

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



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

Audience publique

Public Hearing

Commissaire

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

Commissioner

Tenue à:

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

le mardi 13 septembre 2005

Held at:

Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Tuesday, September 13, 2005

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Mr. Steven Shrybman	Canadian Labour Congress/Council of Canadians and the Polaris Institute
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Mr. Joe Arvay	The British Columbia Civil Liberties Association

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1 Ottawa, Ontario / Ottawa (Ontario)
2 --- Upon commencing on Tuesday, September 13, 2005
3 at 10:00 a.m. / L'audience reprend le
4 mardi 13 septembre 2005 à 10 h

5 THE REGISTRAR: Please be seated.
6 Veuillez vous asseoir.

7 THE COMMISSIONER: Ms McIsaac?

8 MS McISAAC: Thank you, sir.

9 SUBMISSIONS

10 MS McISAAC: As I indicated to you
11 yesterday, my submissions today will focus on the
12 period of time, again, that Mr. Arar was in New
13 York, and particularly with respect to the
14 perspective of CSIS and the Department of Foreign
15 Affairs, and then the actions of Canadian
16 officials during the period of time that Mr. Arar
17 was incarcerated in Syria.

18 Firstly, with respect to CSIS, I
19 think it's probably easier if I deal with New York
20 from a CSIS perspective and then from a Foreign
21 Affairs perspective.

22 A couple of background things are
23 very important for all of us to keep in mind, and
24 the first one is that CSIS does not investigate
25 crimes.

1 A couple of times during the
2 course of the hearing, there have been questions
3 posited to witnesses by various parties which seem
4 to misapprehend that the security intelligence
5 service has some kind of enforcement powers. It
6 does not.

7 It has the power to investigate
8 individuals, to collect intelligence, it has the
9 power to obtain warrants for wiretaps and other
10 kinds of searches from the Federal Court, but it
11 doesn't collect evidence and it has no enforcement
12 powers. It collects intelligence.

13 However, when it, during the
14 course of the investigation, a threat to the
15 security of Canada, concludes that there is
16 criminal activity, or activity that has reached
17 the stage where they believe it is appropriate and
18 necessary to pass the matter on to the RCMP for a
19 criminal investigation, then, of course, they must
20 do so.

21 Clearly, individuals who engage in
22 terrorist activity or with the passage of our
23 anti-terrorism legislation, a broader range of
24 activities that would be more generally considered
25 support of terrorism have also become clearly

1 criminal activity. And it's in that context that
2 CSIS will and must pass information to the RCMP.

3 I want to underline a point,
4 though, that Mr. Fothergill made yesterday. It's
5 not as if they sort of pass over the file and say,
6 "Here it is, it's yours," and wash their hands of
7 it.

8 What CSIS does is it provides
9 information to the RCMP which CSIS believes is
10 sufficient to provide the basis for the
11 commencement of a criminal investigation, and we
12 heard during the contextual evidence last year the
13 mechanisms of advisory letters and disclosure
14 letters for either providing information that's
15 intended to be used in court proceedings, such as
16 the basis for obtaining a warrant, as opposed to
17 information which is merely provided for the
18 purposes of information.

19 I think we have to appreciate that
20 there's always going to be some degree of overlap
21 between the activities of the security service and
22 the activities of the RCMP, and that's simply
23 because the kinds of activities that are a threat
24 to our national security by and large are also
25 crimes.

1 But it's important to recognize,
2 and again, Mr. Fothergill made this point
3 yesterday, that just because CSIS provides
4 information to the RCMP, in the belief that that
5 information forms the basis for a viable criminal
6 investigation which should or could result in a
7 prosecution, does not mean the RCMP has to take
8 it.

9 The RCMP does its own independent
10 evaluation of the information and determines that,
11 from its point of view, yes, indeed, a viable
12 investigation should and could be undertaken here.

13 Throughout the investigation, like
14 any other investigation, the RCMP will continually
15 evaluate the progress of the investigation,
16 determine where it's at, and make a decision as to
17 whether that investigation continues to be viable.

18 Now, one of the important things
19 we have to keep in mind here, to the extent that
20 the RCMP may have been -- because of the nature of
21 what happened on September the 11th, 2001 --
22 unprepared for the vast influx of tips and
23 activity of a criminal nature that had to be
24 investigated, requests from the American partners
25 and others with respect to information, with this

1 fear that there was a second wave of attacks
2 possible, there seems to have been a suggestion
3 occasionally that somehow the RCMP weren't quite
4 ready for the investigation.

5 I'm not quite sure what to make of
6 that because I can't imagine them saying, "Oh,
7 sorry, we're not quite ready for this
8 investigation. Could you wait six, eight months
9 while we train some people, pull a team together,
10 and then we'll start investigating?" That's not a
11 viable solution.

12 The viable solution is the
13 solution that the RCMP undertook, and that
14 solution was to pull together a group of seasoned,
15 major crime investigators with the kinds of
16 expertise required to investigate the possible
17 criminal activity that had been identified to them
18 by CSIS.

19 Now, with respect to CSIS
20 involvement, the evidence shows, I think it was
21 Mr. Hooper's evidence, that Mr. Arar's name was
22 known to CSIS prior to his incarceration in New
23 York, but essentially CSIS played no role and had
24 no prior knowledge of the fact that Mr. Arar was
25 returning to Canada or would be arrested upon his

1 arrival in New York.

2 We have reviewed the CSIS evidence
3 as well as a discussion of the CSIS involvement in
4 Chapter 2 of our submissions, which reviews the
5 evidence, and Chapter 3, which is our discussion
6 of the issues from the CSIS point of view; and in
7 my submission, that evidence shows the following:

8 Firstly, it is clear that CSIS was
9 unaware that Mr. Arar would be arrested when he
10 transitted through New York.

11 Secondly, in my submission, the
12 evidence is clear that CSIS did not play any role
13 in the decisions of the U.S. authorities with
14 respect to Mr. Arar. CSIS only learned of
15 Mr. Arar's detention through its contacts at
16 Foreign Affairs and became aware of the detention
17 at the time that Foreign Affairs was already in
18 the process of tracking Mr. Arar down and
19 attempting to obtain consular access.

20 What CSIS did do, because they
21 couldn't understand what was going on, they
22 undertook inquiries in an attempt to find out why
23 it was that Mr. Arar had been arrested in New
24 York, and the evidence shows that they did not
25 receive any information about his situation prior

1 to his actual deportation from New York.

2 The evidence of CSIS was that they
3 were surprised to learn that Mr. Arar had been
4 deported to Syria because they, like everyone
5 else, had fully expected that he would be deported
6 to Canada, if not returned to Zurich, or, more
7 likely, even retained in U.S. custody while an
8 investigation was completed, and then possibly
9 charges laid or some type of deportation
10 proceeding taken place at that time.

11 And those findings are
12 essentially -- or those submissions, excuse me,
13 are essentially the same as the findings of the
14 Security Intelligence Review Committee which, as
15 you know, has undertaken an investigation of
16 CSIS's involvement in Mr. Arar's detention and
17 subsequent -- pardon me, detention in New York and
18 subsequent deportation as well as his
19 incarceration in Syria.

20 I think it's important to go back
21 to, again, to this question of why would people
22 think that Mr. Arar would be deported in the way
23 he was to Syria; and Mr. Fothergill mentioned this
24 yesterday, but I would take you back to the
25 evidence of Mr. Yale-Loehr, one of the

1 Commission's experts, and in particular his report
2 with respect to U.S. immigration law, which is to
3 be found in Exhibit P-120 at tab 4, and his
4 evidence at page 5,560 of the transcript, where he
5 reaches the conclusion, based on the material
6 that's available to him, that Mr. Arar was likely
7 deported pursuant to a provision of the
8 Immigration and Naturalization Act, section
9 235(c), which is a provision allowing for an
10 expedited removal for a variety of
11 security-related offenses.

12 And Mr. Yale-Loehr, an expert in
13 U.S. immigration law, testified that Mr. Arar's
14 case was the first section 235(c) procedure and
15 removal order that he had seen.

16 So this was a very unusual
17 process, and there is no reason, in my submission,
18 why CSIS ought to have had any reason to believe
19 that this process would be used with respect to
20 Mr. Arar.

21 Now, with respect to Foreign
22 Affairs and the period of time that Foreign
23 Affairs was involved with Mr. Arar in New York, my
24 understanding of the allegation is essentially:
25 He should have known that he was going to go to

1 Syria.

2 And for the reasons I have just
3 stated, that we discussed yesterday with respect
4 to the RCMP, in my submission it is unreasonable
5 to say that Foreign Affairs officials should have
6 known that Mr. Arar would be sent to Syria. They
7 couldn't be aware of this process which had never
8 occurred before.

9 The alternative, as I understand
10 it, allegation is, well, if you didn't actually
11 know it was going to happen, you should have
12 known, and you turned a blind eye or you were
13 incompetent. You didn't read the signals
14 properly.

15 And in my submission, again,
16 that's an unfair characterization of what happened
17 and it really attributes to Foreign Affairs
18 officials, both in New York and in Ottawa,
19 clairvoyance to understand what was going to
20 happen.

21 We have set out for you, sir, in
22 our discussion of the issues, what I hope is a
23 helpful review of the events in New York. It's at
24 Chapter 7 and it is to be found at page 4 of the
25 discussion of the issues.

1 Now, it's important to understand
2 that, yes, a threat to send Mr. Arar to Syria
3 appears to have been made, but the evidence, as I
4 understand it, with respect to that threat, is as
5 follows:

6 The threat was made by an
7 immigration official to Mr. Arar while he was
8 still at the airport. The evidence, as I
9 understand it, is that that threat was then
10 reported in Ottawa, and Mr. Arar himself
11 subsequently raised it with Ms Girvan when she had
12 her meeting with him at the Metropolitan Detention
13 Center.

14 But what's important to understand
15 is that Ms Girvan's assessment of that threat was,
16 he had started out at the airport, where an
17 expedited immigration procedure might be expected.
18 That's where the threat was made. He had
19 subsequently been moved to the Metropolitan
20 Detention Center. He was then, I think as Ms
21 Girvan put it, in the system, and it was
22 reasonable, in my submission, for her to expect
23 that Mr. Arar would continue to be "in the system"
24 and that he would be treated to some sort of
25 immigration hearing, he may be detained, there may

1 be an investigation, but that he was not going
2 anywhere in any great hurry.

3 And let's look at the sequence of
4 events.

5 Firstly, Foreign Affairs first
6 became aware that Mr. Arar was missing on Sunday,
7 September the 29th. Now, at that point, they're
8 not certain who he is or why he might be missing.
9 But on Monday morning, they undertake inquiries to
10 figure out where he might be. That's September
11 the 30th. They begin looking for him. And
12 despite a lack of cooperation from the U.S.
13 authorities, they continue in their efforts and
14 they manage to locate him on Wednesday, and I note
15 there's a typographical error. Wednesday would be
16 October 2nd, not October 1st.

17 Now, yes, during the course of
18 these inquiries, somebody in Immigration, I
19 believe, remarks that this is big, and suggests
20 that perhaps the Ambassador or somebody should
21 contact the Department of Justice. But remember,
22 this is when they're still trying to find him.

23 They then find him. He's at the
24 Metropolitan Detention Center, and Ms Girvan
25 actually manages to have a consular visit with

1 Mr. Arar.

2 In the meantime, Ms Collins and
3 Mr. Pardy, back in Ottawa, were considering the
4 question of whether a diplomatic note of some kind
5 would be necessary, and presumably would have
6 carried on with that if Mr. Arar had not been
7 found. But he's now been found, and we've got our
8 consular access, and the evidence of Ms Girvan,
9 supported by Mr. Pardy, was essentially that once
10 they had that consular access, the priority was to
11 carry on with ensuring that Mr. Arar had contact
12 with a lawyer and was able to deal with his
13 present situation.

14 The priority was not starting to
15 complain to the American authorities because they
16 had not immediately provided Mr. Arar with the
17 consular access that he was entitled to.

18 So they find him on Wednesday,
19 October 2nd. On Thursday, October 3rd, Ms Girvan
20 has a consular visit with Mr. Arar, and this is
21 where she learns what the alleged charges are
22 against him. He shows her the document that he's
23 been provided.

24 She immediately contacts --
25 ensures that the family is aware of where he is,

1 that she's been to see him, and the allegations
2 that have been made against him, and efforts are
3 immediately put in place to ensure that Ms Oummih
4 is retained as his lawyer, the lawyer identified
5 by the family -- I think actually through a family
6 friend, and Ms Girvan sends a fax to the
7 Metropolitan Detention Center requesting that
8 Ms Oummih be allowed to visit Mr. Arar, and, in
9 fact, two days later, on Saturday, October
10 the 5th, Ms Oummih does manage to have a visit
11 with Mr. Arar.

12 So as of Saturday, October
13 the 5th, Mr. Arar has had a consular are visit and
14 he's met with his lawyer. The American
15 authorities know that he's a Canadian, know that
16 the Canadian consular services are on the case, if
17 I can put it that way, and they know that he has
18 retained a lawyer to assist him with his
19 immigration proceedings, whatever they might be.

20 Now, at this point, everything
21 seems to go off track, and unfortunately, we've
22 not yet heard from Mr. Arar, and I presume we're
23 not going to hear from Ms Oummih, so we don't
24 really know what happened. But as best we can
25 tell from the evidence that is on the record,

1 Ms Oummih had some kind of contact with
2 immigration officials, either over the weekend or
3 on the Monday morning, that would be October
4 the 7th, and she advised Ms Girvan that she had
5 met with Mr. Arar and that there was to be some
6 kind of interview with the District Director of
7 the Immigration and Naturalization Service at
8 7 p.m. that evening. So, so far, everything seems
9 to be in hand, and the case is in the hands of Ms
10 Oummih.

11 In the meantime, of course,
12 Ms Girvan is actually following up in her attempts
13 to try to arrange for Mr. Arar to have a telephone
14 call with his wife, and she is dealing both with
15 the Metropolitan Detention Center and with Ottawa
16 headquarters.

17 Now, we don't really know what
18 happened next, but it would appear that either the
19 interview never took place, it was changed, or
20 something happened. Ms Oummih was misled. We
21 don't know what happened.

22 THE COMMISSIONER: There was a
23 call later on from the CRC, was it, that group
24 that suggested that the meeting had actually taken
25 place on the Sunday?

1 MS McISAAC: That's correct. It
2 would appear possible that Ms Oummih thought it
3 was to be Monday night and, in fact, it was Sunday
4 night.

5 THE COMMISSIONER: She had been
6 left a phone mail message on the Sunday and may
7 have picked it up Monday and assumed somebody
8 might have said there was a meeting tonight. She
9 assumed it was Monday? I don't know.

10 MS McISAAC: It's all very
11 confusing as to what exactly happened.

12 THE COMMISSIONER: It did appear
13 that there was some sort of meeting on the Sunday
14 night. Is that an overstatement?

15 MS McISAAC: I don't think we know
16 that for sure, sir. I mean, we have suggestions
17 that there was some kind of meeting on the Sunday
18 night, but I don't think there's clear evidence on
19 that point.

20 THE COMMISSIONER: Right. Okay.

21 MS McISAAC: And so it's not clear
22 to me whether it didn't occur or whether it
23 occurred early and they didn't give her an
24 opportunity to be at it.

25 In any event, this is the Monday,

1 and sometime that night, actually early the next
2 morning, between 3 a.m. and 4 p.m. in the morning
3 of Tuesday, October 8th, without Girvan being
4 aware of it, without Mr. Arar's lawyer being aware
5 of it, without presumably anybody being aware of
6 it, Mr. Arar is put on a jet airplane, privately
7 chartered, we understand, a fairly luxurious
8 aircraft, from what he says, and flown out of the
9 country.

10 Now, Mr. Pardy, sir, described
11 that action as duplicitous, and I think, quite
12 frankly, we would all have to agree. To hold a
13 hearing on a Sunday night without one's lawyer
14 present, knowing that a lawyer has been retained,
15 to fly somebody out of the country between 3 a.m.
16 and 4 a.m. in the morning, secretly, is, at the
17 very least, duplicitous.

18 But how, why, would Foreign
19 Affairs officials, Mr. Pardy, Ms Collins,
20 Ms Girvan -- indeed anyone -- expect that to
21 happen? How could anyone have had the foresight
22 to expect that to happen?

23 In my submission, the behaviour in
24 these circumstances is so strange and so
25 unprecedented that it would be unfair in the

1 extreme, using the hindsight we now have today, to
2 suggest that Ms Girvan, Ms Collins, Mr. Pardy, or
3 indeed anyone else, could have expected this to
4 happen.

5 So in my submission, there was not
6 only not any collaboration or concurrence in what
7 happened to Mr. Arar, there was no wilful
8 blindness, there was no negligence, there was no
9 failure to read the signals.

10 They did everything in their
11 power. They did everything reasonable to ensure
12 that Mr. Arar received the consular services that
13 he was entitled to, and they genuinely thought
14 that he had in hand a lawyer, an appropriate
15 representation, to deal with whatever the
16 immigration proceeding was, and indeed, had the
17 immigration proceeding taken place, as it ought to
18 have, in a sensible, fair manner, Ms Oummih
19 presumably could have attended, and things might
20 have been quite different than they turned out.

21 It's also important just to make
22 the point as well that no Canadian official,
23 whether it be Ms Girvan, Ms Collins, or Mr. Pardy,
24 actually received a direct communication from any
25 American official suggesting that Mr. Arar would

1 be sent to Syria.

2 My understanding of the evidence
3 is that the information or the threat that
4 Mr. Arar could be sent to Syria was provided at
5 the airport to him, and that the threat was then a
6 secondhand one to the officials at Foreign
7 Affairs.

8 Now, we reach the period of time
9 when Mr. Arar is in Damascus, Syria, and of course
10 you've heard evidence as to the period of time
11 when nobody was quite sure where Mr. Arar was.
12 There was a belief he might be in Syria. The
13 Syrians did not admit to having him. There was a
14 belief he might be in Jordan. And Foreign Affairs
15 immediately, through our embassies in both Amman,
16 Jordan, and Damascus, Syria, undertook inquiries
17 as soon as they realized that he was not in New
18 York to see if they could track him down.

19 Now, let's not forget the
20 background to what is happening here.

21 We're in a situation where two
22 other individuals, we now know, had been
23 incarcerated in Syria.

24 Mr. El Maati had been in Syria.
25 The Syrians never acknowledged -- in fact, I don't

1 think anybody realized he had been there until he
2 had left, and he told the consular officials in
3 Egypt that he had been in Syria.

4 We are pretty sure Mr. Almalki was
5 in Syria, but the Syrians wouldn't even
6 acknowledge that they had Mr. Almalki.

7 So, obviously, as Mr. Pardy
8 indicated in his evidence, if Mr. Arar was in
9 Syria, they were quite concerned, because their
10 fear was that he too would remain in some limbo
11 for some considerable period of time and that no
12 consular access would be granted.

13 But once they realized that he was
14 actually in Syria, as a result of the Syrians, for
15 the first time, acknowledging his presence to
16 Ambassador Pillarella, they made immediate efforts
17 to obtain a consular visit.

18 Now, can you fault the Ambassador,
19 Mr. Pardy, Mr. Martel for approaching that
20 consular visit very carefully and being very
21 cautious?

22 THE COMMISSIONER: Just before we
23 get to the first visit. What does the Government
24 suggest I should find about where Mr. Arar -- what
25 his whereabouts were during the period from

1 October the 9th until the Syrians acknowledge that
2 he was in Syria?

3 MS McISAAC: Well, I mean, once
4 again, it's a bit difficult, but there's no reason
5 to disbelieve, I would have thought, Mr. Arar's
6 assertion, that he was in Syria all of that time.
7 But I think the point is that up until the first
8 visit, nobody was sure where he was. Okay?

9 THE COMMISSIONER: But I'm just,
10 for purposes of my report, because it seems to me,
11 if I conclude that, and it's not just Mr. Arar,
12 there's other circumstances that would support
13 that conclusion.

14 MS McISAAC: Yes.

15 THE COMMISSIONER: That then
16 triggers a concern, because of the Syrians' record
17 about holding people incommunicado, about what's
18 the next step in my conclusions that I make?

19 Should that have been a red flag,
20 that the reason that they didn't acknowledge it
21 was because they were following their normal
22 pattern of interrogating with abusive treatment?

23 MS McISAAC: You have to be
24 careful there, sir, quite frankly. Now, looking
25 back on it, with all that we know today, I believe

1 that there's no reason to doubt that Mr. Arar was
2 in Syria for that entire period of time; and I
3 acknowledge that at the first visit, Mr. Arar
4 indicated that he had been in Syria the entire
5 period of time.

6 Now, the difficulty is that there
7 was also information suggesting that he had, in
8 fact, been in Jordan longer than that. The
9 Syrians denied having him. And I think it was
10 fair for the Department of Foreign Affairs not to
11 leap to any conclusions as to where Mr. Arar had
12 been during that period of time. I think it was
13 open to them and appropriate for them to continue
14 to be concerned.

15 But I think that there's also no
16 question that they operated on the basis that
17 there was a possibility, indeed probably more than
18 a possibility, that he had been in Syria, and
19 Mr. Pardy's evidence, as I recall, is that it was
20 his working assumption that Mr. Arar had been in
21 Syria the entire time, and it was his working
22 assumption that Mr. Arar might well have been
23 subject to ill treatment, indeed torture, during
24 that period of time that he was in Syria. So they
25 approached it, in my submission --

1 THE COMMISSIONER: Certainly
2 Mr. Pardy did.

3 MS McISAAC: Yes -- on the
4 assumption that that was a possibility, and quite
5 frankly, in my submission, that was Ambassador
6 Pillarella's evidence too. The possibility that
7 Mr. Arar had been incarcerated in Syria and
8 subjected to torture while the Syrians were not
9 acknowledging his presence was something, I think
10 if you look at the evidence, Ambassador Pillarella
11 acknowledged as well.

12 The question was, once they got in
13 to see him, what did they see and what did they
14 do? What could they do is perhaps even more
15 important.

16 And I want to stop for just a
17 moment to remind us -- I know that we've been over
18 this ad nauseam, but sometimes I'm not sure that
19 people are willing to put the emphasis on the fact
20 that Mr. Arar was a dual citizen, that is
21 required, the emphasis on that, that is necessary.

22 You heard a lot of evidence from
23 experts, particularly Professor Forcese and his
24 colleague, about the nature of dual citizenship,
25 about the fact there is no mechanism which

1 requires a country such as Syria to recognize a
2 second citizenship. They look at somebody like
3 Mr. Arar as a Syrian citizen, and they're going to
4 treat him as a Syrian citizen, and quite frankly,
5 even if Mr. Arar were not a Syrian citizen, he
6 were a citizen of some other country, as well as
7 being a Canadian citizen, there's no reason to
8 believe that countries that have dictatorial
9 regimes are necessarily going to fall all over
10 themselves to engage in their consular
11 obligations, or to allow Canada necessarily to
12 undertake its consular visits.

13 But the consular authorities,
14 Mr. Pardy, Mr. Pillarella as the Ambassador,
15 Mr. Martel, were conscious of this difficulty and
16 were surprised and relieved, I dare say, that they
17 were going to have an opportunity to have their
18 first consular visit with Mr. Arar.

19 Mr. Livermore -- once they had the
20 first consular visit -- no, before I go to that, I
21 want to make another point, too, is that the
22 assumption, that because Syria tortures people,
23 Mr. Arar must have been tortured, and, please, I'm
24 putting myself -- I'm not talking about today.
25 I'm not talking about Mr. Arar today. We've heard

1 Mr. Arar's story. I'm talking about, what were
2 people thinking at the time that Mr. Arar was in
3 Syria back in October and November of 2002? What
4 were they thinking? What were they entitled to
5 think? Were they thinking things that were
6 reasonable in the circumstances that they found
7 themselves at the time?

8 There were a number of factors, in
9 my submission, that went into their assessment of
10 the situation.

11 Mr. Livermore acknowledged the
12 general reputation of Syria. But he testified
13 that each case should be treated as unique and had
14 to be dealt with on its own merits. And he said
15 you can't necessarily jump from the general
16 reputation to specific conclusions of ill
17 treatment.

18 He actually gave examples of when
19 he was the consular officer in Chile at a time
20 when Chile had a very poor international
21 reputation, was no doubt engaged in torture and
22 abuse of individuals who are incarcerated, and he
23 was aware of situations where that simply wasn't
24 the case. So it's not always the case that
25 somebody is going to be tortured.

1 But as I understood the evidence,
2 they all approached the incarceration of Mr. Arar
3 and the first consular visit on the assumption
4 that he might well have been mistreated in some
5 manner, and that's their working assumption. And
6 I think again that was Mr. Pardy's term, the
7 working assumption was that Mr. Arar might well
8 have been mistreated.

9 They all had it in the front of
10 their minds, that possibility. And, in fact, for
11 the Ambassador -- quite frankly, I think the
12 Ambassador has got, I am going to put it in the
13 vernacular, a "bum rap" from the media.

14 The Ambassador's evidence was --
15 and the reference to his evidence is to be found
16 at page 6 in our submissions, Chapter 6 of our
17 submission. He said, of course it went through
18 his mind that Mr. Arar might be handled roughly or
19 that his detention conditions were bad, and he
20 said that's precisely why he fought so hard for
21 access to Mr. Arar as quickly as possible in order
22 to verify that Mr. Arar was safe.

23 Mr. Pardy, exactly the same thing,
24 but he cautioned against jumping to conclusions,
25 particularly public conclusions. He said, "You

1 knew that conditions in prison were quite
2 difficult. I mean, that was the assumption you
3 made. And that's what lent urgency to your work.
4 Making public accusations about these conditions
5 was what concerned me more because those were
6 issues that could delay our consular access."

7 The approach of all of them, in my
8 submission, was: "We've got to get in to see
9 Mr. Arar. Let's take advantage of this unique and
10 unprecedented opportunity. The Syrians have
11 acknowledged they have him, and they're willing to
12 allow us to get in to see him."

13 Now, the first consular visit --
14 but before we go to the first consular visit, I
15 would commend to you the evidence of Mr. Burns,
16 another expert who testified, and particularly his
17 evidence at page 5955 through 5957. There is a --
18 I guess it's a difference in approach.

19 He was of the view, in that
20 evidence, that notwithstanding what a standard for
21 a consular visit ought to be, i.e., unfettered
22 access, private access, an opportunity to have a
23 discussion with the individual who is
24 incarcerated -- in many cases that is not
25 realistic. It's ideal. It would be what we would

1 want to have. But we're always at the mercy of
2 the country that is holding the detainee.

3 And it's one thing to be dealing
4 with the Brits, I think he suggested. It's one
5 thing to be trying to get consular access to
6 somebody incarcerated in Liverpool. It's quite a
7 different matter when you're trying to get access
8 to somebody who is incarcerated in a country like
9 Syria.

10 In any event, as soon as contact
11 was made and the Syrians were willing to
12 acknowledge that they had Mr. Arar in their -- I
13 don't want to use "possession" -- they had
14 incarcerated him, they did allow for a consular
15 visit.

16 And it's interesting, if we go
17 back to Mr. Martel's evidence about this consular
18 visit. It's clear that this was something quite
19 new for the Syrians officials, the Syrian Military
20 Intelligence officials.

21 There was this elaborate process.
22 You didn't just walk up to the prison, knock on
23 the door, show his credentials, and go into a
24 room.

25 There was a rather unusual and

1 elaborate protocol. This protocol involved him
2 transferring between vehicles. He went to a place
3 where he was met. He was moved to another
4 vehicle. He was driven to the facility where he
5 was going to meet Mr. Arar. He had to meet with
6 the Syrian officials for a while. Then Mr. Arar
7 is brought in.

8 The whole thing is very elaborate,
9 almost sinister, if you will, and very strange.

10 Nevertheless, in my submission,
11 that indicates both the seriousness with which the
12 Syrians were taking this consular visit and the
13 uniqueness of this access. It wasn't something
14 they were used to. And Mr. Martel, I think,
15 actually testified to the fact that he felt the
16 Syrian officials were uneasy and awkward with the
17 whole situation.

18 But he was able to meet with
19 Mr. Arar. He was able to speak with him. They
20 met for approximately 30 minutes.

21 There were clearly some
22 significant restraints. Obviously everybody was
23 feeling their way, including Mr. Martel. And as I
24 understood his evidence, it was that he didn't
25 want to do anything to jeopardize that visit or

1 future visits.

2 He was able to shake Mr. Arar's
3 hand, get close enough to him to shake his hand.
4 He was able to observe his physical condition,
5 albeit to some extent from a distance after they
6 had finished shaking hands. But the room wasn't
7 all that big. It was about 5 metres by 5 metres,
8 which would be slightly over -- I think about 15
9 feet by 15 feet. A little bit more.

10 So relatively speaking, it's not
11 as if they were miles and miles away.

12 So Mr. Martel did have an
13 opportunity to observe. He noted that Mr. Arar
14 seemed resigned and submissive. Well, that's to
15 be expected under any circumstances, I would have
16 thought. The poor man has been spirited away from
17 the United States in the middle of the night, you
18 know, flown to Syria, then to Jordan, then back to
19 Syria in a car, as I understand his story, and
20 held presumably without any contact other than
21 with his gaolers for the period of time, which I
22 gather by now is about 10 or more days.

23 Nevertheless, Martel notices that
24 Mr. Arar seems to be physically okay. He doesn't
25 show any obvious signs of physical abuse. He's

1 aware of the constraints, the fact that Mr. Arar
2 is obviously not free to speak freely, that
3 Mr. Martel's constrained in the questions that he
4 can ask Mr. Arar; and the evidence is that, upon
5 reviewing the consular report of what Mr. Martel
6 was able to view and observe during that visit,
7 the immediate response of consular affairs in
8 Ottawa, as well as Mr. Martel and the Ambassador,
9 was to push for a second consular visit.

10 And Mr. Pardy, with all his
11 experience in consular affairs, reported -- or
12 testified to you that Mr. Martel's first visit
13 with Mr. Arar couldn't be characterized as
14 anything other than good news.

15 They had seen Mr. Arar. They had
16 seen a man who was not obviously suffering from
17 physical abuse. And they were in a situation
18 where they believed they were going to get more
19 consular visits. This was a real breakthrough,
20 because they had never gotten in to see anyone
21 before. In fact, the Ministry of Foreign Affairs
22 had never even acknowledged having Mr. Almalki in
23 their custody.

24 And as Mr. Pardy testified, this
25 gave Foreign Affairs a benchmark against which to

1 measure Mr. Arar's well-being, and they could
2 refer back to it in subsequent visits.

3 They got a follow-up visit. But
4 before we get to that, Mr. Martel's evidence was
5 that when he spoke to Mr. Arar during that first
6 visit, there was nothing that led him to believe
7 that Mr. Arar had been subject to torture.

8 Now, I'm not commenting on whether
9 Mr. Arar was subject to torture or not. He has
10 now come back to Canada and he has given us a
11 credible story that he was tortured, and
12 Mr. Martel has said that he has no reason to
13 believe -- disbelieve Mr. Arar.

14 What I'm talking to you about is
15 the very issue we discussed yesterday, and that is
16 judging the actions of Canadian officials based on
17 what they knew at the time, what they reasonably
18 assumed at the time, and what they were reasonably
19 able to achieve at the time.

20 And in my submission, at the end
21 of the first visit, Canadian officials were of the
22 view that Mr. Arar was, at least at that point,
23 reasonably okay.

24 And I say that very advisedly,
25 because "reasonably okay," having been

1 incarcerated for a period of from ten days to two
2 weeks in a Syrian prison is a very relative term,
3 but they were in to see him, they had a promise of
4 future access, and he seemed to be "relatively
5 okay."

6 So their emphasis from there on in
7 was to continue the consular visits, to continue
8 to obtain as much information as they could, and
9 to continue to monitor, as best they could in the
10 constrained circumstances, Mr. Arar's well-being.

11 Now, here's where the judgment
12 comes in, sir: Mr. Martel's assessment, and I
13 believe that assessment was concurred in certainly
14 by the Ambassador and by Mr. Pardy as well, is to
15 have asked at that point, to have pushed for an
16 independent meeting, was just too risky.

17 We can look back now, and I
18 suppose we can do this: We can say, well, he
19 should have tried. He should have asked. Right?

20 And if they had asked and the
21 Syrians had said, "Oh, we don't want to be
22 involved in this. Thank you very much. You've
23 had your consular visit. That's it." That would
24 have been a mistake.

25 THE COMMISSIONER: They never

1 asked throughout the whole time.

2 MS McISAAC: They didn't, sir.
3 They made the judgment --

4 THE COMMISSIONER: Even at any
5 point of this, despite the Ambassador's good
6 relationship with General Khalil, they couldn't
7 even ask, that that would be fatal.

8 MS McISAAC: That was their
9 judgement. They had asked -- and I was going to
10 come to this -- they had asked for an opportunity
11 for, at the very least, a phone call with
12 Ms Mazigh, they had asked for a second consular
13 officer, but at each stage they were denied.

14 The ability to have a second
15 consular officer attend. They were denied the
16 ability to arrange for a picture, and I was going
17 to deal with my friend's comments regarding a
18 picture. They were denied the ability to arrange
19 for any telephone calls or anything of that
20 nature.

21 Now, we can sit here today and we
22 can say they were too cautious. But at the time,
23 in my submission, we had experienced individuals,
24 we had Mr. Pardy, an experienced consular
25 official -- in fact, somebody who has had more

1 experience than any of us will ever have, more
2 knowledge, more intuition about these things, and
3 Mr. Pardy concurred in the assessment that it was
4 better to take what they could get, at least for
5 that first period of time, and to not push the
6 envelope too far lest they absolutely lose any
7 ability to see Mr. Arar.

8 And in my submission, that is --
9 we can say, "I would have made a different
10 choice," you might have made a different choice,
11 but is that the wrong choice, was that the wrong
12 choice, or was that, based on their experience and
13 expertise, the reasonable choice at the time?

14 THE COMMISSIONER: Ms Edwardh said
15 to me -- she said, well, when they finally got
16 frozen out, actually starting to push, publicity
17 and so on, broke the logjam.

18 MS McISAAC: Eventually.

19 THE COMMISSIONER: Yeah. And I
20 take your point, that one should be careful about
21 hindsight, but I guess the issue comes, when you
22 come to dealing with a regime like the Syrians, do
23 you tip-toe around them, or do you say what you
24 think, or somewhere in between?

25 MS McISAAC: And part of the

1 problem here, sir, is exactly what I was
2 discussing yesterday. We don't really know why
3 Syrian decisions were made.

4 We don't know why they decided to
5 allow the original consular access when they had
6 never done it before. We don't know exactly why
7 they cut it off essentially in early February of
8 2003. We don't know exactly why they decided it
9 was okay to have Ms Catterall and Mr. Assadourian
10 visit. We don't know why they then continued to
11 refuse to even respond to the diplomatic notes
12 that were sent throughout the next period, and we
13 don't know why it is that with the announcement
14 from the Syrian Human Rights Commission and the
15 allegations with respect to torture, they suddenly
16 decided to allow access to Mr. Arar again.

17 We really don't know what the
18 decision-making was on the part of the Syrians,
19 and that's why -- I mean, I don't know that you
20 can conclude -- you can speculate -- but I don't
21 know that you can conclude whether it was the
22 publicity or whether it was something else.

23 THE COMMISSIONER: Did we learn
24 anything from all of this?

25 MS McISAAC: Pardon?

1 THE COMMISSIONER: Did we learn
2 anything from all of this? I mean, what I find
3 about what you're saying is, it would suggest,
4 well, we don't know anything; therefore, I guess
5 we have no lessons to take forward when we're
6 confronted with a situation like this, and that
7 would sort of be a depressing thought.

8 MS McISAAC: Well, I'm not sure --
9 I mean, it's a depressing thought, but I'm not
10 sure it's a surprising thought, sir.

11 For instance, we have a case -- I
12 mean, we had the case of Mr. Sampson. That case
13 was different from Mr. Arar's. Mr. Almalki was
14 slightly different from Mr. Arar. They are all
15 different.

16 And that's why we have individuals
17 like Mr. Pardy at the time, Mr. Sigurdson now,
18 whose job, in conjunction with other officials at
19 Foreign Affairs, the Ambassador, the consular
20 officers on the ground, have to make these
21 difficult choices.

22 They have to decide, what is the
23 best way to go here? Do we make a big fuss? Is
24 that going to work? Or is that going to have
25 exactly the opposite effect?

1 And what I'm saying to you, sir,
2 is that it's very difficult for these people to
3 make these judgments, and we will all come at it
4 from a different perspective when we're assessing
5 the judgments that they've made. And what I urge
6 on you, sir, is to make that assessment on the
7 basis that these people may have made mistakes,
8 but they were acting in good faith and they were
9 making decisions on the basis of what they thought
10 was best for Mr. Arar.

11 THE COMMISSIONER: And, really,
12 that was what I was suggesting in my question,
13 Ms McIsaac, was it seems to me there are two
14 exercises that we go through here. I will go
15 through both of them.

16 One will be to evaluate what
17 happened and so on. The second will be, having
18 done that, whatever it is, is what lessons, if
19 any -- I mean, it may be that some situations,
20 there's nothing to be learned from what happened.
21 We simply don't know enough. Now, that's what I
22 would have thought would be a concerning thought,
23 I think.

24 MS McISAAC: Well, I'm not so sure
25 though, sir, even if we knew exactly what had

1 happened.

2 Let's say you could conclude, and
3 I don't think you can, but let's say you could
4 conclude that a whole bunch of publicity was
5 exactly the right thing to have done and that's
6 what finally got Mr. Arar out of jail. All right.
7 So next year, we have somebody else who's
8 incarcerated in China, or Iran, or anywhere
9 else -- name your country -- does that mean that a
10 whole bunch of publicity is going to work in that
11 case, too? It doesn't.

12 THE COMMISSIONER: Probably -- I
13 think one would make a mistake if you jumped to
14 arbitrary approaches.

15 MS McISAAC: Right. Similarly,
16 let's assume we have somebody incarcerated in
17 Syria, dual Canadian national. Can we assume that
18 a whole bunch of publicity is going to work there
19 just because it may have worked the time before?
20 I think the answer is: No, sir, we don't know.
21 And these people -- Mr. Pardy, Ms Pastyr-Lupul,
22 Ambassador Pillarella, Mr. Martel -- all, in my
23 submission, made their decisions in good faith
24 based on what they thought was the best they could
25 do for Mr. Arar.

1 I really was quite disturbed by
2 any suggestion that these individuals would act
3 with any kind of malice towards Mr. Arar. Why
4 would they do that? Why would they do anything
5 but what they thought was the best thing there was
6 to do for Mr. Arar? Why would they want him to
7 stay in prison? Why would they not want him to be
8 freed and able to come back to Canada? There's no
9 reason. Absolutely no reason why these people
10 would want that.

11 So why would they do anything but
12 act in good faith on the basis of what they felt
13 at the time was the best thing to do for Mr. Arar?
14 And I leave you with that, sir, because a
15 suggestion other than that, in my submission, is
16 really quite unfair.

17 I don't know if it's worthwhile
18 going through the consular visits. I think what's
19 important to note is that the consular visits did
20 get a little easier. Everybody was a little more
21 relaxed. And Mr. Martel has noted at each
22 occasion that as he met with Mr. Arar, he seemed
23 to be still relatively okay, and there were never,
24 as I understood the reports, any obvious signs of
25 mistreatment.

1 He was allowed to provide him with
2 reading material, I believe money was provided, he
3 was able to show him pictures, Mr. Arar was
4 writing back to his family and messages were being
5 exchanged. This isn't ideal. This isn't perfect.
6 This is far, far from ideal or from perfect. But
7 I think the evidence of Mr. Martel was that the
8 Syrians -- these were their rules of the game.
9 And Mr. Martel I think even testified that early
10 on he felt that Mr. Arar had also made a decision
11 that consular access, as limited as it was, was
12 better than nothing. So neither of them was
13 really going to do much to rock the boat, as long
14 as they could maintain that consular access.

15 Now, of course it got cut off, and
16 I think the evidence of Mr. Pardy, and
17 particularly Mr. Martel and Mr. Pillarella, was
18 that they were devastated when they were told, in
19 I believe it was in February, to start dealing
20 with the Ministry of Foreign Affairs because they
21 had never had any success dealing with the
22 Ministry of Foreign Affairs before, and I think
23 they rightly predicted that at the point where
24 they were going to be obliged to deal with the
25 Ministry of Foreign Affairs, that was a signal

1 that their access was going to be very, very
2 difficult, if not impossible, and indeed it turned
3 out that it was.

4 They had one more visit, which was
5 arranged by the Department of Foreign Affairs,
6 with the hope that a visit from Ms Catterall and
7 Mr. Assadourian, representing Canada, representing
8 Canadian Parliamentarians, and representing
9 Canadian people, again bringing a letter from
10 Mr. Graham, would have some ability to either get
11 Mr. Arar out or, at the very least, allow the
12 consular access to be reinstated.

13 Unfortunately, that didn't work.
14 But, once again, it did give the delegation an
15 opportunity to assess Mr. Arar, and as I recall Ms
16 Catterall's evidence, her evidence was that,
17 again, Mr. Arar appeared to be in reasonably good
18 health. I keep saying I use that term very
19 advisedly because everything, of course, is
20 relative.

21 But at no stage did they have
22 evidence that would have allowed them to protest
23 to the Syrians about the way Mr. Arar was being
24 physically treated.

25 They did protest again and again,

1 by way of diplomatic notes, to the fact that they
2 were not being allowed consular access, and of
3 course I don't need to go through all the
4 evidence, but we have -- the Ambassador is called
5 in, Mr. Graham phones the Foreign Minister, a
6 letter is sent when Ms Catterall and
7 Mr. Assadourian go over, and every opportunity,
8 Mr. Pillarella testified, that he could, he raised
9 the Arar case with his Syrian contacts and made
10 the point that we want Mr. Arar back. Let him go,
11 send him home to Canada. That was
12 Mr. Pillarella's evidence.

13 I'm going to come back to the
14 second letter, the letter that eventually came
15 from the Prime Minister, and I'm going to deal
16 with that as a separate topic.

17 THE COMMISSIONER: Are you going
18 to deal with the consular reports being shared
19 with others?

20 MS McISAAC: Yes, I will, sir.

21 --- Pause

22 Sorry. I just sort of lost my
23 train of thought.

24 THE COMMISSIONER: That's okay.
25 Take your time.

1 MS McISAAC: Yes, the next topic I
2 was going to deal with is information-sharing, and
3 in our submission, as I understand the issues that
4 are of concern to the Commission,
5 information-sharing really breaks down into what
6 I'll call three categories.

7 There is, firstly, the information
8 received from Syria, and that's not really
9 information-sharing, but sharing by Syria with
10 Canada; that's the decision to have Ambassador
11 Pillarella obtain from the Syrians information
12 that they had received from Mr. Arar during his
13 questioning by them and as part of their
14 investigation. The CSIS visit to Syria.

15 Second topic is RCMP discussions
16 about the possibility of sharing investigative
17 information with the Syrian authorities.

18 And finally, the third aspect of
19 that is Mr. Pardy's decision to share some of the
20 consular reports and consular information with the
21 RCMP and CSIS.

22 THE COMMISSIONER: Does he share
23 that -- just on that, to sort of take you out of
24 it -- with both the RCMP and CSIS?

25 MS McISAAC: I believe there were

1 two documents, if I'm not mistaken, that were
2 shared with CSIS.

3 Is that correct?

4 THE COMMISSIONER: But Mr. Pardy,
5 I think, what the suggestion is --

6 MR. CAVALLUZZO: CSIS received two
7 documents, one January the 7th of 2003, and the
8 other April 22nd of 2003.

9 As to whether Mr. Pardy approved
10 the transfer of those documents to CSIS is -- I
11 don't believe there is evidence to that effect.
12 However, I could be corrected.

13 MS McISAAC: I think in all cases
14 the vehicle for the transfer of the information
15 was ISI, though. That would be my understanding.

16 THE COMMISSIONER: Okay. Thank
17 you.

18 MS McISAAC: First of all, I'd
19 like to deal with the decision that was made to
20 obtain from the Syrians information that they had
21 gathered as a result of their investigation, and
22 in particular what we could call Mr. Arar's, well,
23 in quotes, "confession," as they called it. The
24 information they obtained from him during their
25 questioning or interrogation of him. And I want

1 to look at the genesis of how that came about, and
2 that is discussed at page 10 of our review of the
3 evidence in Chapter 6.

4 But essentially what happened is
5 that, upon reading the first consular report, and
6 of course at that point being aware of the fact
7 that there had been an A-OCANADA investigation
8 during which Mr. Arar's name had come up, that the
9 Americans had apparently sent Mr. Arar to Syria
10 because of their belief that he had ties with
11 al-Qaeda in some manner, it was Mr. Pardy who
12 directed the Ambassador to follow up with his
13 contacts, particularly General Khalil, in order to
14 see if he could get more information on the state
15 of their investigation and any conclusions they,
16 being the Syrians, might have reached with respect
17 to Mr. Arar.

18 Because at this time we're still
19 trying to figure out, what's going on here.

20 We've got this individual, as
21 Mr. Fothergill pointed out yesterday, where the
22 A-OCANADA/RCMP investigation has told the
23 Americans: "We don't make any links to al-Qaeda.
24 Yes, there have been some contacts. We're still
25 trying to figure out what's going on."

1 The Americans would appear to have
2 decided that this person is of such importance and
3 interest that they've engaged in this elaborate
4 activity to get him out of the country to Syria.

5 What's going on here? What is it
6 that the Syrians know? What is happening? And
7 the Syrian of course at that point had indicated
8 to -- General Khalil I believe had indicated to
9 Mr. Pillarella that they were investigating
10 Mr. Arar for possible links to terrorism.

11 So they wanted to find out what
12 was going on, and it was Pardy who expressly
13 suggested to Mr. Pillarella that he go back to his
14 contacts at SMI and ask them for any additional
15 information they might have.

16 Pardy's reason for doing that was
17 to help Foreign Affairs understand what it was the
18 Syrians believed Mr. Arar had done. Why are they
19 holding this man? Why are they investigating him?
20 What is going on?

21 And Mr. Pardy's evidence is that
22 that information would, in turn, allow Foreign
23 Affairs officials to work more effectively for
24 consular access, if they knew what they were up
25 against.

1 So, again, this isn't Ambassador
2 Pillarella running around getting information from
3 General Khalil. What it is, it's a collective
4 decision on the part of Foreign Affairs consular
5 officials that more information to assist them in
6 understanding what the Syrian position was
7 regarding Mr. Arar would be useful and necessary
8 to allow them to understand what was happening,
9 and to allow them to effectively deal with the
10 very unusual situation that they were faced with.

11 And Mr. Pardy actually testified
12 that this idea of obtaining more information about
13 what was going on, what the charges were, et
14 cetera, these are standard instructions. They go
15 out to ambassadors all the time in these complex
16 cases, where there is no clear situation where an
17 individual is incarcerated and a charge is laid
18 and it's obvious what the situation is. They need
19 to have this information in order to provide
20 effective consular services.

21 So Ambassador Pillarella, in
22 accordance with --

23 THE COMMISSIONER: Was that the
24 purpose, you say, of the visit then to get
25 information from the Syrians to assist with their

1 consular --

2 MS McISAAC: That was Mr. Pardy's
3 evidence. Yes, it was. I think if you look
4 carefully at --

5 THE COMMISSIONER: I want to be
6 careful here. But is there other evidence that
7 suggests there was another interest? Just getting
8 some other intelligence?

9 MS McISAAC: Well, I think as a
10 broader view, yes, there was, sir. I think we
11 also have to keep this in mind. I mean, let's be
12 realistic here.

13 The Americans -- Mr. Arar is not
14 an unknown person. He's at least known to the
15 A-OCANADA investigation. His name was known to
16 CSIS. We don't have information that links him to
17 al-Qaeda. We tell the Americans we don't have
18 information that links him to al-Qaeda.

19 However, the Americans appear to
20 have something -- something that caused them to
21 send him to Syria.

22 The Syrians, when Mr. Pillarella
23 has his first visit with General Khalil, indicate
24 that they appear to have information that ties
25 Mr. Arar to terrorism or to al-Qaeda.

1 So, yes, we need to know what
2 that's all about in order to deliver effective
3 consular services, but, yes, we need to know that,
4 because it might -- it might -- we don't know; we
5 haven't seen it yet -- it might be very important
6 to our either policing, or security services, or
7 both with respect to the safety of Canadians. We
8 don't know.

9 So, yes, there is a national
10 security reason for wanting to find out what the
11 Syrians know as well.

12 Again, these circumstances under
13 which Mr. Pillarella actually gets the information
14 from General Khalil I think have been
15 miscategorized in some of the media reporting as
16 well, and I think it's important to clarify, in my
17 submission, what I think the evidence really said.

18 The evidence basically is that
19 Mr. Pillarella was on his way back to Canada
20 anyway. And as we know, he was, in fact, back in
21 Canada by at least the 6th of November.

22 So he spoke with General Khalil,
23 and General Khalil indicated to him that they had
24 information. He gave him a general idea of what
25 the information was.

1 And Mr. Pillarella said, "Well,
2 can you put it in writing for me so I can take it
3 back to Canada with me?" Now, that's an eminently
4 sensible request.

5 Now, Mr. Pillarella was happy to
6 receive that information as quickly as he did.
7 But why was he happy?

8 Well, he was happy because he was
9 getting on an airplane that night and he wanted to
10 take it with him.

11 So if the Syrians had delayed for
12 two or three days in getting it to him, he
13 wouldn't have been able to bring it back with him.
14 And his ability to discuss that information back
15 in Ottawa with the appropriate officials would
16 have obviously been delayed.

17 So of course he was pleased that
18 he received it quickly.

19 Mr. Pardy, I think the evidence
20 is, was not actually in Ottawa at that time. I
21 believe he was in Beirut, if I'm not mistaken, and
22 Ambassador Pillarella, before leaving Damascus,
23 called Mr. Pardy and gave him a full briefing
24 about his discussions with General Khalil and the
25 fact that he would be bringing the information

1 back to Canada and that there would be discussions
2 in Canada with respect to that information.

3 In my submission, all of those
4 actions are (a) collectively taken by individuals
5 at Foreign Affairs who are thinking about two
6 things.

7 They are thinking about, "What do
8 we need to know to understand Mr. Arar's situation
9 so that we can assist him?" But they're also
10 thinking, quite properly, "What is going on here?
11 What information do they have? Do we need this
12 information?" And of course, "We must find out
13 what's going on just in case this information
14 could be of great importance to the security of
15 Canada."

16 And that's, in my submission, the
17 thinking, the appropriate thinking, of those
18 individuals.

19 Now, it turns out, and I don't
20 want to stray into information that's not on the
21 public record, because I know Ms Edwardh had some
22 problems with the summary of that being made
23 public, but the information comes back, and it
24 includes two things.

25 It concludes what the Syrians have

1 so far, or are willing to at least what they are
2 willing to share with us, of their questioning of
3 Mr. Arar, and it also indicates that the Syrians
4 are willing to continue their cooperation by
5 having further discussions with Canadian security
6 officials. They don't want to talk to the police,
7 apparently, but they would be prepared to talk to
8 Canadian security officials.

9 Well, again, there are a couple of
10 opportunities here.

11 One is to obtain more information
12 about what is it that Syrians think is going on
13 with Mr. Arar.

14 But secondly, you will remember my
15 remarks yesterday, and certainly I didn't take you
16 through it, but Mr. Hirsch's book, and the general
17 understanding at the time that the Syrians
18 actually were providing some fairly useful
19 intelligence at least to the Americans with
20 respect to global terrorist threats.

21 So this also provided an
22 opportunity for the CSIS delegation to obtain
23 general information that the Syrians might have
24 with respect to global terrorism and terrorist
25 threats.

1 The instructions to the CSIS
2 delegation were clear. They were going to receive
3 whatever information the Syrians might be willing
4 to provide to them, and, yes, that included
5 information about Mr. Arar, if they were willing.
6 They were not going to, and in my submission the
7 evidence is clear, although I appreciate some of
8 it is in camera, they did not give any information
9 to the Syrians. They received it only.

10 And in my submission, both the
11 attempts by Canada, through the Ambassador --
12 again, I emphasize, the Ambassador's evidence has
13 been portrayed from time to time as if he was off
14 on some kind of frolic of his own. He was not.
15 He was following instructions based on a
16 collective decision that it would be appropriate
17 to receive this information from the Syrians, and
18 the collective decision of the Department of
19 Foreign Affairs and CSIS was that it would be
20 appropriate for CSIS to take this trip to obtain
21 more information, if possible, on all sorts of
22 things, including general global threat.

23 The other thing that we mustn't
24 forget, and I think I mentioned yesterday that the
25 United States had been on one of their high alerts

1 throughout this period. I believe -- I may have
2 the date wrong -- but I think it's October 12th
3 the Bali bombing occurred.

4 So this is the milieu in which
5 people were operating. They were concerned. And
6 Canada had been named as a possible target.

7 So this is what people were
8 thinking. This is what people were worrying
9 about. And this is what they were trying to deal
10 with at the time.

11 THE COMMISSIONER: Was there
12 concern about the possibility that cancelling the
13 Minister's call that preceded this, which was to
14 deal with having Mr. Arar's release so that a trip
15 from the Canadian intelligence agency to collect
16 information potentially about Mr. Arar might send
17 a signal to the Syrian --

18 MS McISAAC: Well, my
19 understanding of the evidence, sir, and of course
20 you'll have to come to your own conclusions, but I
21 urge you to go back to it, because my
22 understanding of the evidence was that the
23 cancellation of the call was not tied to the CSIS
24 visit.

25 The cancellation of the call was

1 that they were unable to make arrangements for
2 Minister Graham to speak to his counterpart in
3 Syria, and a decision was taken -- this is sort of
4 a parallel track decision, in my submission, the
5 parallel track decision being that they would call
6 in the Ambassador in Canada first. Then that
7 would leave them the opening for Mr. Graham to
8 place a call to the Foreign Minister later on.

9 THE COMMISSIONER: I must say my
10 recollection is a bit different, but the evidence
11 will speak for itself.

12 MS McISAAC: I suppose what I can
13 urge on you, sir, is to go back to that evidence,
14 to just be careful that you read it again. And
15 obviously if your conclusion is different than
16 mine, it will be different than mine.

17 But my recollection, and my
18 submission to you, is that the reading of the
19 evidence will indicate that it was not -- the call
20 was not delayed because of the CSIS visit. There
21 were other reasons why the call --

22 THE COMMISSIONER: There was
23 difficulty arranging the call in December, which
24 essentially led to it being put over to January.
25 But I thought --

1 MS McISAAC: In the meantime
2 recall the Ambassador was called in instead. They
3 called the Syrian Ambassador here in Canada in to
4 protest to him Mr. Arar's continued incarceration.

5 THE COMMISSIONER: Right. No, but
6 I'm going back to -- the call was initially
7 scheduled for November 18th, wasn't it?

8 MS McISAAC: I believe that --
9 possibly.

10 THE COMMISSIONER: Yes. And then
11 the visit took place on the 21st to the 24th. I
12 thought -- well, I have a recollection of the
13 linkage, but I'll look at the record.

14 MS McISAAC: Please, sir, because
15 I don't think it's that clear. There were
16 parallel things happening at the time.

17 I just also want to make the other
18 point that while there was some discussion about
19 perhaps delaying the visit, I think all witnesses
20 have been clear that the delay was only a question
21 of timing and related more to the fact of the
22 intense publicity that Mr. Arar's case had at that
23 time rather than the efficacy of a visit per se.
24 It was a timing issue more than anything else.

25 THE COMMISSIONER: I guess we

1 begin to encounter, though, when we have a
2 Canadian in detention in a place like Syria, with
3 the concerns about abuse and so on, it begins to
4 raise concern about whether or not we're
5 sending -- if our primary goal is to have him
6 released. Let's assume as a country, everybody in
7 Canada says, "Yes, our number one objective is,"
8 then all arms of the Canadian government do
9 everything that is consistent with that and in no
10 way do anything that could even be interpreted as
11 inconsistent with that.

12 MS McISAAC: Well --

13 THE COMMISSIONER: What I'm
14 suggesting now, if it is the primary goal, then we
15 begin to -- one has to look at and say, "What did
16 different arms of the Canadian government do? Did
17 they do anything that might be interpreted
18 differently?"

19 MS McISAAC: Yes, but it is not
20 that simple.

21 THE COMMISSIONER: Is that a fair
22 question?

23 MS McISAAC: It is a fair
24 question. And I'll put it back to you, sir, with
25 respect, it's not that simple, is it? We now know

1 that nothing was going on. But at the time what
2 if -- I want to be careful. I don't want anybody
3 to take my what ifs as being anything that really
4 happened.

5 What if Mr. Arar was, in fact, a
6 prime player in some event that was going to
7 occur? What if the Syrians knew something as a
8 result of their questioning of Mr. Arar? What if?

9 They didn't know. And I guess --
10 that's the problem. And this is the problem that
11 officials are faced with.

12 Yes, we want Mr. Arar back. We
13 want to work at getting Mr. Arar back, because
14 whether he is involved in some activity that he
15 shouldn't be involved in or not, he is not to be
16 banged up in a Syrian prison without any of the
17 rights that we would normally consider to be
18 appropriate for an individual who is either guilty
19 of or suspected of some kind of offence.

20 On the other hand, we have our
21 obligations to Canada and to Canadians, and we
22 have to figure out a way to put those together.

23 And my submission to you would be
24 at the time the collective view of Canadian
25 officials was that they could take the consular

1 route: obtain information, try to continue their
2 access with Mr. Arar, find out what was going on,
3 and at the same time use the opportunity of the
4 offer from the Syrian military to meet with Canada
5 in order to attempt to find out more about what
6 the Syrians might know about global terrorism
7 issues and indeed, if they knew anything more
8 about what they might know about Mr. Arar or
9 anyone he might be involved with --

10 THE COMMISSIONER: Do you suggest,
11 though, that in advancing your what-if objective,
12 that in some circumstances it would then be okay,
13 in furtherance of protecting national security, to
14 obtain information from a country like Syria, that
15 we had reasonable grounds to believe was obtained
16 by torture?

17 MS McISAAC: That's the moral
18 debate I think that Mr. Elcock was engaged in with
19 Commission counsel, and it's a horribly difficult
20 question, isn't it?

21 Let us say -- let me give you an
22 example. Let us say that I know, or the security
23 service knows, that an individual is going to go
24 into, well, let's use Damascus, we've been talking
25 about Damascus, is going to blow up the British

1 Embassy, the Canadian Embassy, in some sort of
2 concerted effort to blow up a bunch of Embassies,
3 and a lot of people are going to be killed.

4 THE COMMISSIONER: This is the
5 Bloor subway station.

6 MS McISAAC: Well, it's the
7 opposite of the subway station. We give
8 information to the Syrians --

9 THE COMMISSIONER: Oh, okay.

10 MS McISAAC: And we know darn well
11 that the individuals are going to be, if they're
12 picked up, are going to be tortured, ill-treated,
13 badly treated. Do we not do that, sir?

14 THE COMMISSIONER: What you raise
15 is --

16 MS McISAAC: And then you turn it
17 around and we have the bombing in Canada. We know
18 the information has come as a result of torture --

19 THE COMMISSIONER: In both cases
20 you're talking about a very real, imminent
21 catastrophic effect.

22 MS McISAAC: Well, again, it's --

23 THE COMMISSIONER: It's the thing
24 that Mr. -- let me just finish my question. It's
25 the thing that Mr. Dershowitz has written about,

1 that he would say justifies the use of torture.
2 Okay.

3 I think we can all safely agree
4 that we didn't, in Mr. Arar's case, approach the
5 Bloor subway station or the British Embassy.

6 MS McISAAC: Well -- but let's put
7 ourselves back in the situation that the Canadian
8 government was in, in the fall of 2002. We didn't
9 actually know what the Americans -- the full
10 extent of what it is the Americans thought they
11 knew. Now it turns out that --

12 THE COMMISSIONER: Could it be
13 reasonably expected that if the Americans had
14 knowledge that the Bloor subway station was going
15 to be blown up, that they would have told us?

16 MS McISAAC: I don't know. I
17 guess it was reasonable to assume, but a lot of
18 things didn't happen the way one would reasonably
19 have thought they would happen --

20 THE COMMISSIONER: I would have
21 thought --

22 MS McISAAC: Well --

23 THE COMMISSIONER: Just let me
24 finish. Whatever one has to say about the United
25 States' decision in this case, I don't think

1 anybody would suggest that if they knew of an
2 imminent threat to the safety of Canadians, that
3 the Americans would not have notified us and fully
4 assisted in dealing with the threat. I mean, that
5 would seem to me to be going -- I'm not sure
6 you're suggesting that --

7 MS McISAAC: And I'm not. I
8 certainly wasn't suggesting that.

9 THE COMMISSIONER: I certainly
10 wouldn't need an awful lot of convincing to be
11 persuaded of that.

12 MS McISAAC: No, I wasn't
13 suggesting that, sir.

14 What I'm trying to say to you,
15 sir, is there are situations where Canadian
16 officials -- these Canadian officials were
17 involved in making some difficult choices.

18 And in my submission, they did not
19 see at the time that there was an incompatibility
20 between continuing to push for consular access and
21 attempts to get Mr. Arar out, trying to find out
22 what it was the Syrians knew or thought they knew
23 about Mr. Arar, and using the opportunity to see
24 if we could obtain more information, particularly
25 general information regarding global terrorism, by

1 having the CSIS delegation visit Syria.

2 Those decisions, again, were made
3 by good-faith individuals with heavy
4 responsibilities, based on the information they
5 had at the time, bringing to bear, in my
6 submission, their best judgment.

7 They were not made with any animus
8 towards Mr. Arar. Not by anybody. They were made
9 in good faith, very difficult decisions, very
10 important decisions, and these people have to make
11 those decisions and they made them.

12 THE COMMISSIONER: Good.

13 MS McISAAC: All right.

14 I was about to move on to the
15 second two parts of the information-sharing topic
16 in general, and if appropriate, maybe we could
17 have a break?

18 THE COMMISSIONER: Okay. We'll
19 take a 15-minute break.

20 THE REGISTRAR: Please stand.

21 --- Upon recessing at 11:15 a.m. /

22 Suspension à 11 h 15

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

24 Reprise à 11 h 36

25 THE REGISTRAR: Please be seated.

1 MS McISAAC: Thank you, sir.

2 THE COMMISSIONER: Ms McIsaac?

3 MS McISAAC: With your permission
4 then, sir, I'm going to move on to the second
5 subtopic, if you will, on the issue of
6 information-sharing, and that was the discussions
7 that the RCMP had, particularly that Cabana had
8 with Gould when Gould phoned in October to advise
9 the RCMP that the Syrians had, in fact,
10 acknowledged that Mr. Arar was in their custody.

11 The totality of that evidence is
12 that this is early in the situation, we still
13 don't know quite what's going on. Mr. Arar has
14 been missing since he was removed from New York.
15 The Americans would appear to know more than the
16 Canadians know. The Syrians maybe know more than
17 the Canadians know. And the totality of the
18 evidence, quite frankly, is a vague knee-jerk
19 reaction, if I can put it that way, on the part of
20 Inspector Cabana when he first hears from
21 Mr. Gould.

22 In my submission the offer to
23 share was not an offer. It was a blue-sky
24 discussion more than anything else.

25 And you will recall that Deputy

1 Commissioner Loepky testified that decisions to
2 go forward with the provision of questions or
3 provision of information to another police force,
4 or even the decision to invite Syrian authorities
5 to attend in Canada to discuss the A-OCANADA
6 investigation, would go through a process, and at
7 that point there would be the involvement of CID,
8 there would be the involvement of Foreign Affairs,
9 and there would be a broad-based discussion about
10 it.

11 So, really, what is there is a
12 discussion, and I say to you, is it appropriate to
13 criticize someone for that kind of discussion in
14 an abstract way, as it was at that point?

15 The third aspect is Mr. Pardy's
16 decision to share certain consular information
17 with other authorities.

18 Now, I think we have to start with
19 the proposition that everyone agrees that some
20 degree of sharing is appropriate.

21 For instance, as I understood the
22 position of Mr. Arar's counsel, and indeed perhaps
23 Commission counsel's view through some of the
24 questioning, it would have been, they believed,
25 appropriate for Foreign Affairs to share

1 information about the alleged threats to send
2 Mr. Arar to Syria with the RCMP. Maybe the RCMP
3 could have done something about it had that threat
4 been seen as Foreign Affairs as serious.

5 We've heard evidence during the
6 cross-examination, really, of Mr. Pardy with
7 respect to the sharing of consular information
8 with police authorities in other situations where
9 the police were, in fact, able to assist by
10 providing information that would demonstrate -- I
11 think in that case it was the innocence of the
12 individuals involved.

13 So the sharing of information on
14 the basis of consular information received with
15 other Canadian police or security authorities, in
16 my submission, can be appropriate in certain
17 circumstances.

18 Mr. Pardy was clear in his
19 evidence that he saw the information-sharing as a
20 way to engage a broader coalition of Canadian
21 agencies and departments, and it was part of his
22 effort to seek Mr. Arar's release.

23 I think we would also agree that
24 there must be circumstances in which it's
25 permissible to engage in the exchange of

1 information if that information is appropriately
2 shared for the purposes of genuine police
3 interests, the security of Canadians.

4 The difficulty I think we face is
5 that there has to be a clear delineation, or a
6 clear set of guidelines, in which it is
7 appropriate to share information.

8 Again, my submission to you would
9 be that the information in this case was shared by
10 Mr. Pardy, for the most part with his authority,
11 for the purpose of assisting in providing consular
12 services to Mr. Arar.

13 I think he was particularly
14 interested in whether Canadian police or security
15 officials might have information, as he had been
16 able to do in other cases, that would tend to
17 rebut the allegations that were being made by the
18 Syrians.

19 As I say, I think some of the
20 other information was shared with the agreement
21 and concurrence of ISI on the basis that it would
22 be necessary for our police and security agencies
23 to be aware of what was happening in Syria.

24 The information that came directly
25 from the Syrians, in my submission, is not

1 consular information. That is information that is
2 provided outside of the provision of consular
3 services.

4 I think what we're talking about,
5 in terms of the sharing, is the information
6 obtained during the course of consular visits or
7 consular discussions with Mr. Martel.

8 On that point, or on that issue, I
9 would make the following points:

10 The first one is that the sharing
11 of the information again was made in difficult
12 circumstances -- the decision to share was made in
13 difficult circumstances, in good faith, in the
14 belief and understanding that the sharing was
15 necessary and appropriate both to assist Mr. Arar
16 and to keep our security and policing agencies
17 abreast of what the situation was in Syria.

18 The second point, though, is that
19 I will concede that the brochure that is given to
20 individuals, as I've put it in my -- I think I've
21 called it the "bon vloyage", one of the typos that
22 didn't get caught late at night, the bon voyage
23 booklet is perhaps overly broad and could be
24 misleading with respect to the situation of the
25 confidentiality of consular exchanges.

1 And I can tell you that this is a
2 difficult area. It's a small area. I think it's
3 very seldom, not very often, that we're going to
4 have security issues of the nature that arose in
5 this case, high-profile consular case, where the
6 difficult choices about sharing information need
7 to be made. The vast majority of consular cases,
8 this issue will not arise. But it does arise --

9 THE COMMISSIONER: Do I understand
10 you to say that it would be all right to share
11 information obtained during a consular visit for
12 national security investigation purposes? Was
13 that --

14 MS McISAAC: I believe there may
15 be circumstances in which it would, yes.

16 THE COMMISSIONER: Are we talking
17 the imminent threat? I mean --

18 MS McISAAC: Certainly that would
19 be an example for certain where it would be
20 appropriate. But what I think --

21 THE COMMISSIONER: But there would
22 be nothing in this case, when we look at these
23 consular reports, that would fit into that
24 category?

25 MS McISAAC: I think it was more a

1 point of keeping the security officials and
2 authorities aware of what the situation was and
3 what was happening in Syria so that Mr. Pardy --
4 at least that's as I understood his evidence --
5 could tap into their knowledge as appropriate --

6 THE COMMISSIONER: To assist
7 Mr. Arar.

8 MS McISAAC: -- to assist
9 Mr. Arar.

10 THE COMMISSIONER: Okay, but where
11 I'm drawing the line is, it's one thing, it seems
12 to me, to share the consular reports in order to
13 assist the person. It's another to share it for a
14 national security investigation purpose.

15 MS McISAAC: A different set of
16 criteria to go by.

17 THE COMMISSIONER: Okay. What I'm
18 asking you is, for the second category, leaving
19 aside the very imminent threat, the Bloor Street
20 subway and so on.

21 MS McISAAC: Yes.

22 THE COMMISSIONER: Or even looking
23 at these consular reports, would there be any
24 justification for sharing these reports solely for
25 the purpose of furthering a national security

1 investigation?

2 Is that the Government's position,
3 that that would have been okay for that purpose?

4 MS McISAAC: No, actually, what
5 the Government's position is, sir, is I'm going to
6 turn that back to you. And I'm going to say, as I
7 did before, this is a very difficult area. It's
8 one that we all have to grapple with.

9 There are choices that need to be
10 made, and I think that there is a recognition that
11 criteria need to be developed in order to guide
12 the decision-makers as to when it's appropriate to
13 share information and when it's not, and I am, in
14 fact, inviting you, if you feel that you have
15 observations in your report that would assist in
16 developing the appropriate criteria with respect
17 to the sharing of consular information, both in
18 circumstances where there's a view that it might
19 assist the individual and in circumstances where
20 it might be considered that the sharing of
21 information would be useful for national security
22 purposes.

23 I would agree with you, and I
24 believe the Government would agree with you, that
25 it's a difficult area and that there needs to be a

1 set of criteria developed in order to deal with
2 the decision -- to at least guide the
3 decision-makers in what factors are to be taken
4 into account when reaching these decisions.

5 But I urge again. Of course, it's
6 a very, very small number of consular cases where
7 that sort of issue will even arise.

8 --- Pause

9 Our submissions in full are, of
10 course, contained in Chapter 7 of our submissions,
11 and they are beginning at paragraph 33, and there
12 is reference back to Mr. Parady's thinking on that
13 point as well.

14 I would then like to deal with, if
15 I may, the issue of the letter, and this of course
16 is the letter that was contemplated in May and
17 June to be signed by Minister Graham and
18 ultimately, of course, was signed by the Prime
19 Minister and delivered by Senator De Bané.

20 The idea of a letter in some ways
21 goes back to Mr. Edelson's request early in the
22 process when he had approached A-OCANADA and was
23 looking for some kind of letter from the RCMP with
24 respect to Mr. Arar that could be delivered to the
25 Syrians, and that issue is dealt with in our

1 submissions, under the RCMP submissions,
2 Chapter 5, beginning at paragraph 59.

3 But in essence, the difficulty for
4 the RCMP with respect to Mr. Edelson's letter was
5 his request that there be a letter saying that
6 Mr. Arar was not suspected of any terrorist
7 activity.

8 Foreign Affairs, of course, was
9 aware that Mr. Arar was least a person of
10 interest, as somebody who had come to the
11 attention of the A-OCANADA investigators.

12 There was the statement that had
13 allegedly been obtained from Mr. Arar that had
14 come back from the Syrians.

15 And it was the RCMP position -- I
16 think quite a reasonable position -- that if
17 Foreign Affairs was the one that felt some kind of
18 correspondence to the Syrians was appropriate,
19 that that request should come from Foreign
20 Affairs. It shouldn't be funnelled through
21 Mr. Edelson, it should be Foreign Affairs that
22 would deal with it.

23 They also took the position that
24 this kind of letter would be the most unusual
25 thing. Standard practice of the RCMP is not to

1 disclose information about subjects who are
2 identified in the course of an investigation.

3 It's partly to protect the
4 integrity of the investigation, and it's partly to
5 ensure that information isn't provided that might
6 come back in a subsequent proceeding and be used
7 in the defence if it's not accurate -- and turns
8 out not to be accurate.

9 So the RCMP position, in my
10 submission, was quite reasonable, and that was
11 that we'll provide a letter, we'll certainly
12 confirm that Mr. Arar is not wanted for any
13 offence in Canada. He wasn't. But to go so far
14 as to say -- I think the wording that was
15 requested, if I can just go back for a minute, "a
16 confirmation that he was not suspected of any
17 terrorist activities," and, again, this is early
18 days, and we still have a large number of
19 questions have arisen as to what Mr. Arar's actual
20 role is and what is happening.

21 THE COMMISSIONER: But at this
22 point -- I'm not quarrelling whether they were
23 asking whether they should send a letter or not.

24 I mean, the fact of his status at
25 this point is he wasn't suspected, he wasn't a

1 suspect, he was a person of interest.

2 MS McISAAC: He was a person of
3 interest in the A-OCANADA investigation. But
4 remember, sir, we're still back in the fall of
5 2002, okay? The Americans have decided he's
6 something more.

7 THE COMMISSIONER: Right.

8 MS McISAAC: Whether they have any
9 basis for that or not is really beside the point
10 at that stage.

11 The Syrians have sent some
12 information back suggesting some kind of
13 involvement in something.

14 THE COMMISSIONER: Right.

15 MS McISAAC: The A-OCANADA
16 investigators, in my submission, are not certain
17 what's going on here, and it's not --

18 THE COMMISSIONER: Does that ever
19 change, until Mr. Arar comes home?

20 MS McISAAC: Well, I think it
21 does, sir. I think it does change. I think
22 we've -- I don't want to refer to the in-camera
23 evidence, but I think as the in-camera evidence
24 develops -- quite frankly, at the end of the day,
25 I mean, I'm not a police investigator and I don't

1 evaluate evidence, but I don't think there was
2 much there that took us any further they were at
3 the very beginning as a whole bunch of questions.

4 THE COMMISSIONER: Yes.

5 MS McISAAC: But this is early on,
6 and we have got to put ourselves back to the
7 situation that they were all faced with at the
8 time. And as I say, our submission is developed
9 in our materials.

10 What continued then is, Mr. Arar
11 was getting consular access, and he was getting
12 consular access on a reasonably regular basis up
13 until the beginning of February, I believe it was.
14 Certainly from just before Christmas, I believe
15 the December 16th visit or so, there were some
16 significant concerns about whether they were going
17 to continue to get the access or not. But there
18 was access.

19 Ms Catterall and Mr. Assadourian
20 visited, I believe, in April. They were trying to
21 get them in earlier, but they did go in April, and
22 they took a letter from Minister Graham with them,
23 asking for Mr. Arar's release.

24 In the meantime, you will recall,
25 the Syrian Ambassador had been called in in the

1 fall by Canadian authorities here. That's the
2 Syrian Ambassador to Canada. Mr. Graham had
3 phoned his counterpart at the Syrian Foreign
4 Ministry to make a plea for Mr. Arar's return.
5 And then, of course, we have the MPs' visit, and
6 they deliver a letter.

7 But by this time consular access
8 is being denied. The officials in Damascus are
9 told: "Go to the Ministry of Foreign Affairs.
10 That's how we're going to arrange your consular
11 access." Ministry of Foreign Affairs wouldn't
12 respond to requests and diplomatic notes were
13 being unanswered.

14 So Mr. Pardy was looking for
15 another way to try to do something to at least
16 reopen the dialogue with the Syrians, and
17 Mr. Pardy then suggested, I think it started with
18 a joint letter between the Solicitor General and
19 the Minister of Foreign Affairs.

20 Now, the evidence of the
21 witnesses -- first of all, there are two issues
22 that really arise with the letter. The first one
23 is who should sign it? Should it be a joint
24 letter signed by both the Minister of Foreign
25 Affairs and the Solicitor General? And the second

1 issue, which I'll come to, is what should it say?

2 In my submission, the consensus of
3 the evidence, evidence of CSIS officials, evidence
4 of Foreign Affairs officials, basically is that
5 the right person to sign this letter really is the
6 Minister of Foreign Affairs.

7 This is a consular matter, and the
8 spokesperson for Canada on consular issues is the
9 Minister of Foreign Affairs, and after all, I
10 assume that everybody had proceeded on the
11 assumption that this letter would be sent from the
12 Canadian Department of Foreign Affairs to the
13 Syrian Department of Foreign Affairs.

14 So the recommendation to the
15 Solicitor General, and the recommendation
16 generally, was that this letter should be signed
17 solely by the Minister of Foreign Affairs.

18 The second question is: What
19 should the letter say?

20 Now, quite frankly, I was
21 reviewing the evidence, because it starts with a
22 number of meetings in May. There are meetings
23 involving CSIS, the RCMP, the Department of the
24 Solicitor General, Foreign Affairs, and I believe
25 PCO was involved, in order to reach some consensus

1 as to how this letter could be framed for Minister
2 Graham to sign.

3 And we don't actually have an
4 awful lot of evidence of what was discussed at
5 those meetings. We know they took place. We have
6 Mr. Pardy's evidence on some of the issues, but I
7 was actually rather surprised as I went back to
8 see that there wasn't a great deal of detailed
9 evidence as to what the nature of the discussions
10 and the concerns were at those meetings.

11 But nevertheless, a consensus was
12 reached and a letter was drafted, a letter that
13 Mr. Pardy sent up with his briefing note to the
14 Minister of, I believe it was June 5th, and the
15 consensus was that the wording that would be used
16 for the Minister's letter was, there's no
17 impediment to Mr. Arar's return to Canada.

18 What then happened is the
19 Minister's office, or officials in the Minister's
20 office, decided that they would like to add the
21 additional wording, that there was no evidence
22 that Mr. Arar was involved in terrorist activity,
23 and I'm not sure I've got that, but the "no
24 evidence" phrase was what was put forth.

25 And that went back down through

1 the consultation process to the Ministry of the
2 Solicitor General to get the views of CSIS and the
3 RCMP.

4 Now, I think there are a couple of
5 important points here.

6 First of all, CSIS and the RCMP
7 don't tell the Minister of Foreign Affairs what to
8 do. So when they gave their view -- and I think
9 if you go back to Deputy Commissioner Loepky's
10 letter it will be, "We recommend."

11 So they don't say you can't sign
12 this letter, don't sign this letter. They say,
13 "We recommend against signing that letter."

14 That's the appropriate
15 consultation process because, after all, Minister
16 Graham is going to be speaking on behalf of the
17 entire government.

18 Both CSIS and the RCMP advise
19 through the Solicitor General's department that
20 their recommendation was against the addition of
21 the new words that there is no evidence.

22 It's not because they didn't want
23 Mr. Arar back. Quite frankly, I don't think there
24 is any evidence that anybody didn't want Mr. Arar
25 back. It makes a nice story, but I don't think

1 that evidence is there, sir. It isn't.

2 But the information in the letter
3 that the Solicitor General was to sign wasn't
4 quite accurate. There wasn't evidence that
5 Mr. Arar is a terrorist, but there was some
6 evidence of links that he had with individuals who
7 were the subject of the A-OCANADA investigation,
8 and the concern of the officials, an appropriate
9 concern on their part, was to bring to the
10 Minister's attention their concern that he not
11 sign a letter of that nature when the information
12 in it might not be -- well, at least on the face
13 of it, wasn't quite accurate and might not be
14 accurate at all.

15 That's what officials do. They
16 advise Ministers about the steps that Ministers
17 are going to take based on the information they
18 have.

19 And even though it is still not
20 clear what those links are, whether they mean
21 anything at all, in my submission, it was
22 appropriate and it was prudent for the RCMP and
23 CSIS to make the recommendations, certainly after
24 this fulsome discussion which had already taken
25 place, that the letter that Minister Graham sent

1 and which was ultimately sent by the Prime
2 Minister, stick with the wording, "There is no
3 impediment to Mr. Arar's return to Canada."

4 The next topic --

5 THE COMMISSIONER: Just before we
6 leave that. What do I read into it? You say
7 there's no evidence that they didn't want him
8 back. I mean, I guess one -- I will make of the
9 record what I will when I see the enthusiasm or
10 lack thereof that was in briefing notes and so on.

11 But when they suggest wording for
12 a letter, they actually suggest that -- they say
13 he is the subject of a national security
14 investigation -- I mean, what strikes me, or let
15 me ask you, I mean, it seems to me in everything
16 I've heard, that was wrong.

17 It's ratcheted up, the level of
18 interest, significantly, at a point in time when
19 one would hope they would be striving, doing their
20 very best, to get him back, rather than throwing
21 roadblocks --

22 MS McISAAC: Well, I urge you
23 again to go back to the evidence, because what we
24 have -- and, quite frankly, I don't know the
25 answer. What we have is an e-mail, I believe,

1 from Mr. Heatherington, in which he says, "Here is
2 the wording that the RCMP and CSIS have agreed
3 on."

4 That wording is similar, if not
5 identical, to what is found in Deputy Commissioner
6 Loepky's letter, but Deputy Commissioner
7 Loepky's letter is after Mr. Heatherington's
8 e-mail.

9 So I don't actually think that
10 there is a great deal of evidence on the record as
11 to the actual discussions among the players. We
12 have the letter, but we don't have the actual
13 discussion among the players with respect to what
14 led up to Mr. Heatherington's e-mail. So I
15 actually am not sure what the background says.

16 THE COMMISSIONER: Well, we have
17 the letter, but the letter tends to speak for
18 itself.

19 MS McISAAC: But Deputy
20 Commissioner Loepky's letter doesn't recommend
21 that wording, if you go back to it. He isn't
22 recommending wording.

23 He's recommending against
24 including the no-evidence statement because
25 Mr. Arar is, and he says, the subject --

1 THE COMMISSIONER: Of a national
2 security investigation --

3 MS McISAAC: But he doesn't
4 recommend that wording.

5 THE COMMISSIONER: No, but he was
6 not that.

7 MS McISAAC: It depends again. We
8 have this difficulty with the RCMP and the various
9 officers will use terminology differently when it
10 comes to describing an individual.

11 He was of interest, certainly. I
12 think on the basis of most of the information we
13 have. "Subject" was probably not the most
14 appropriate choice of words there.

15 But it's not a recommendation as
16 to what should go in the letter. I want you to go
17 back, please, sir --

18 THE COMMISSIONER: I certainly
19 will. And I'm aware of what it says.

20 But it does -- I guess it could
21 raise a concern in somebody's mind that he's being
22 described as a subject of a national security
23 investigation, which -- I mean, to whomever is
24 going to read that letter, which is at a fairly
25 critical time, at least one could argue,

1 overstates the level of interest. I mean, other
2 people keep saying, "We're interested in
3 interviewing him as a witness."

4 However you want to characterize
5 what's going on, I know they don't have the CSIS
6 system, but the difference between being the
7 subject of a national security investigation and a
8 potential witness, I think in anybody's book, is a
9 real difference.

10 MS McISAAC: Right. But can you
11 take that, sir, and turn it into a conclusion that
12 Canadian officials didn't want Mr. Arar back?

13 THE COMMISSIONER: Certainly one
14 would want to, in evaluating all the evidence --
15 that would be a factor that one might look at.

16 MS McISAAC: I don't disagree with
17 that, sir.

18 The next topic I wanted to deal
19 with, unless I can assist you there, is what has
20 been called mixed messages.

21 And I believe that it's a number
22 of things, but primarily it falls into two
23 categories.

24 It's the idea of having CSIS visit
25 and the idea of Ambassador Pillarella or CSIS

1 bringing information back from the Syrians, and I
2 think I already dealt with that before the break.

3 THE COMMISSIONER: Yes.

4 MS McISAAC: The second part is
5 the assertion that comes from the Syrians that
6 there were not just mixed messages inadvertently
7 given but that CSIS or somebody actually said, "We
8 don't want him back."

9 And I believe the evidence is,
10 Ambassador Pillarella's C-4 message back to
11 Canada, I believe of January 16th, if I'm not
12 mistaken, indicates that it was CSIS. I believe
13 Mr. Martel's evidence was that he heard at one
14 point more generally Canada doesn't want him back.

15 A couple of points.

16 The first one, let's look at that
17 message. Ambassador Pillarella receives
18 information from his Syrian contacts, receives two
19 pieces of information. The first one is, Mr. Arar
20 doesn't want to come home, and the second is that
21 CSIS doesn't want him back.

22 I find it, in passing, interesting
23 watching the proceedings here. We don't believe
24 anything the Syrians tell us, do we?

25 We don't believe Mr. Arar really

1 wasn't in Syria. We don't believe that he doesn't
2 want to come home. We don't believe that he's
3 being treated specially. We don't believe this,
4 we don't believe that.

5 But, by golly, the minute they say
6 CSIS doesn't want him back, we're supposed to
7 believe that?

8 Now, Mr. Commissioner, it's
9 reasonable to assume that it would be in the
10 Syrians' best interests to say CSIS doesn't want
11 him back. It's a way of not having to say no.

12 It's just like -- I think you can
13 also conclude that when the Syrians decided that
14 access to Mr. Arar would be through the Ministry
15 of Foreign Affairs rather than through the Syrian
16 Military Intelligence, that was a way of saying
17 "No more access," because then the Syrian Military
18 Intelligence people didn't have to say no.

19 What they could say is, "Well, I'm
20 sorry, you'll have to ask the folks over at
21 Foreign Affairs." And of course the folks over at
22 Foreign Affairs are not going to answer.

23 But it's a way of not having to
24 say no.

25 That's equally plausible,

1 particularly when you have the evidence of
2 Mr. Hooper that upon being advised that the
3 Syrians were suggesting CSIS didn't want Mr. Arar
4 back, he asked the individuals who had been there,
5 he spoke with them, and they told him that they
6 didn't say anything that would leave the
7 impression that CSIS didn't want Mr. Arar back.

8 On top of that, Mr. Graham,
9 immediately thereafter, telephones the Syrian
10 Foreign Minister and tells him that if there's any
11 doubt, yes, Canada wants Mr. Arar back.

12 Senior Foreign Affairs officials
13 convey the same message to Mr. Arnous, the
14 Ambassador here in Canada.

15 Ambassador Pillarella testified
16 that at every opportunity he had to raise the
17 matter with Syrians officials, he told them Canada
18 wants Mr. Arar back.

19 And, finally, Ms Catterall and
20 Mr. Assadourian, when they travelled to Syria, one
21 of the messages they carried with them is, Canada
22 wants Mr. Arar back.

23 That was the consistent message.

24 And in my submission, if you look
25 carefully at the evidence, the question about

1 whether Syria is confused or mixed up or anything
2 really only arises one more time, and that's later
3 on. That's Exhibit, I believe, P-99, and that's
4 when Ms Catterall has met with Ambassador
5 Assadourian here in Canada and Ms Pastyr-Lupul is
6 recording her conversation with Ms Catterall, so
7 it's several removed. And my recollection of that
8 evidence is that it says, "initially the Syrians."

9 So, again, the discussion is in
10 the context of at some point the Syrians may have
11 had some confusion, either genuine confusion or
12 confusion that they just found it convenient to
13 put forward.

14 So at the end of the day, sir, I
15 think it's very difficult to conclude that anybody
16 from CSIS said anything to the Syrians, that we
17 didn't want Mr. Arar back.

18 Similarly -- I won't spend a lot
19 of time on the Hooper-McCallion telephone call --
20 but, again, you heard what Mr. Hooper said he
21 said, you heard what Ms McCallion said about the
22 conversation.

23 The evidence about what that
24 conversation involved comes from the two
25 individuals who were engaged in that conversation,

1 and I would urge you to disregard the evidence of
2 Mr. Gould and Mr. Dyet -- not disregard it in the
3 sense that they were lying or not telling the
4 truth, but they quite candidly said, "We were
5 recording what we thought the conversation was
6 about." And you have before you the evidence of
7 the only two individuals who were on the
8 conversation and what they had to say about it.

9 I would like to say one more point
10 about that conversation, though, because that
11 conversation, as Mr. Hooper indicated and as Ms
12 McCallion indicated, was an attempt on their part
13 to come to grips with what is obviously a very
14 difficult issue, and that is, Canada's approach to
15 consular cases that have a -- well, I suppose
16 there's three elements: there is a consular
17 element; there is a high-profile element; and
18 there is a security-related element.

19 And indeed the Department of
20 Foreign Affairs has undertaken a number of
21 initiatives, which really started with what we
22 have called the deck that Mr. Pardy prepared and
23 the briefing note that he sent up to the Minister.

24 There has since been the review of
25 consular activities. And I know that the

1 Department of Foreign Affairs and the government
2 generally would welcome any observations you have
3 as a result of this inquiry which would assist in
4 developing, again, some guidelines, some criteria,
5 some benchmarks that can be usefully applied by
6 consular officials and others when deciding how
7 best to deal with these cases, and they are very
8 difficult cases.

9 There aren't a lot of them, but
10 they probably consume far more energy than any
11 other case.

12 THE COMMISSIONER: They do. I
13 noted very helpfully you set out in your written
14 submissions, I just don't have my finger on it,
15 the various actions that the Government has taken
16 since this matter arose, and I take it that is a
17 complete list --

18 MS McISAAC: It's those that are
19 at a point where that are worth talking about.
20 Some of them actually would have preceded this.

21 I mean, there are other issues
22 that actually may have been commenced before the
23 Arar case and don't arise directly because of
24 Mr. Arar's circumstances.

25 THE COMMISSIONER: Right.

1 MS McISAAC: But do address some
2 of the issues that arise. And that's in the
3 overview document.

4 THE COMMISSIONER: Okay. Thank
5 you.

6 MS McISAAC: Two more points. I
7 don't know how I'm doing for time.

8 THE COMMISSIONER: You're fine.

9 MS McISAAC: Okay. I think maybe
10 I won't use all my time then, sir.

11 Firstly, the telephone -- pardon
12 me, not the telephone, the meeting that Mr. Martel
13 had with Mr. Arar in August, August the 14th, and
14 I would agree with my friend that you have not
15 heard what Mr. Arar had to say about that meeting,
16 and it would be not only unwise, but, I think you
17 would agree with me, improper, to draw any
18 particular conclusions about who said what, when,
19 why, during the course of that meeting without
20 hearing all of the evidence with respect to it.

21 THE COMMISSIONER: Would it not be
22 appropriate, though, for me to comment, accepting
23 what Mr. Martel has said in his examination in
24 total, recognizing that there may be other things
25 that Mr. Arar will say about it, but if I had any

1 observations that I thought were worth making,
2 that I could -- I could take the record as I have
3 it before me rather than simply ignoring it.

4 MS McISAAC: No, I'm not
5 suggesting you ignore it.

6 For instance, I think Mr. Martel,
7 for instance, quite candidly conceded that if he
8 had that report to write again, he would have put
9 something in about the size of the cell.

10 So there are elements of his
11 discussions with Mr. Arar in his reporting that I
12 would think you could probably comment on, but
13 there are other aspects of it where, to the extent
14 there seems to be disagreement with what we
15 understand Mr. Arar will say, both about that
16 meeting and their flight home, then I agree with
17 my friend, that you really don't have all the
18 evidence necessary --

19 THE COMMISSIONER: And I agree
20 with that. And what I wouldn't do is, I wouldn't
21 deal with it in a way that, of course, to set out
22 Mr. Arar's version. I would make it clear.

23 But if I do -- I'm repeating --
24 but if I do have observations on the basis of the
25 evidence before me, or if I can anticipate or can

1 glean that what I've heard coincides with what
2 Mr. Arar's description would be, then I would be
3 in a position to deal with it.

4 MS McISAAC: Oh, I think that's
5 correct, sir, yes.

6 THE COMMISSIONER: Yes. So that I
7 think, as I took Ms Edwardh's point, it was simply
8 if I'm alerted, and I think I will know the
9 evidence well enough, that there's an area where
10 Mr. Arar may disagree with what somebody said,
11 then I should be careful not to dismiss that
12 disagreement.

13 MS McISAAC: And I hope I wasn't
14 saying anything more than that.

15 THE COMMISSIONER: And I don't
16 think you were.

17 MS McISAAC: All right.

18 THE COMMISSIONER: It's important
19 from my standpoint, as I sit down to write this,
20 that I know that.

21 On that phone conversation -- or
22 on that consular meeting, can you comment on the
23 rebut torture issue? I mean, it strikes me that
24 that's not -- I think you know what I mean --

25 MS McISAAC: Yes.

1 THE COMMISSIONER: That's not
2 something about which Mr. Arar himself would have
3 any knowledge.

4 MS McISAAC: No, and I think you
5 have got Mr. Pillarella's evidence with respect to
6 that point. I think I would say three things:

7 One is, first of all, it was fired
8 off, I think, in a fair hurry, by Ambassador
9 Pillarella back to Ottawa.

10 The Ambassador has agreed that
11 "rebut" was not the most felicitous choice of
12 words on his part, and I don't know how much to
13 make of this, but certainly Mr. Pillarella is
14 certainly a multilingual individual, and I don't
15 believe English is his first language, although
16 his English is obviously quite good.

17 So the choice of a poor word is
18 what I would categorize that as, and that
19 essentially was his evidence, as I understood it.

20 I think also though, sir, what
21 might have influenced that, and as I understand
22 what Mr. Arar has said, that the original --
23 certainly the original allegations of the Syrian
24 Human Rights Committee suggested that Mr. Arar was
25 continuing and at that very time undergoing

1 physical torture, and so there may have been --
2 that may have played a role in terms of trying to
3 determine, based on what they were aware of and
4 what Mr. Pardy believed at that time, whether
5 there was torture actually occurring at that
6 moment in time.

7 THE COMMISSIONER: They didn't
8 know. They hadn't seen him for three or four
9 months.

10 MS McISAAC: That's correct. And
11 you have the Ambassador's evidence, which is the
12 best evidence you will have, as to why he used
13 that word and his agreement that it probably
14 wasn't the best word to use.

15 --- Pause

16 MS McISAAC: I'm going to jump
17 back, just for a moment, because there were two
18 concerns that I mentioned earlier that actually
19 have to do with the consular visits.

20 And it has to do with the question
21 of whether a photo of Mr. Arar might be taken to
22 be sent back to his family and the issue of -- I
23 believe it was Mr. Arar's relatives -- his brother
24 and sister-in-law? Sister and brother-in-law, who
25 wished to visit him.

1 I'm not going to go through it in
2 great detail, but the issue of asking if a
3 photograph could be taken of Mr. Arar to send back
4 to Canada first arises on December the 9th,
5 in 2002, and it's dealt with in the document that
6 you'll find at tab 246 of the Foreign Affairs
7 collection of documents.

8 If you follow through the sequence
9 of events, document 249 and so on, you will see
10 that there is a concern still being expressed
11 about being discrete in what they asked for.

12 On December the 10th, Mr. Arar --
13 or, pardon me, Mr. Martel reports, this is
14 document 249: "We really have to be extremely
15 discrete, not even willing to consider another
16 consular staff member to visit Mr. Arar.
17 Questions will have to be raised with very senior
18 people, and I'll speak to the Head of Mission."

19 I think the two points here that
20 are important is, first of all, that these kinds
21 of requests -- the people who are actually at the
22 meetings with Mr. Martel don't seem to be in a
23 position to make decisions. So anyone who is
24 going to make a decision presumably has to be at a
25 higher level, maybe even as high as General

1 Khalil.

2 In December, the Head of Mission
3 reported back that apparently General Khalil had
4 been quite ill. So the whole possibility of
5 further meetings with the General is foreclosed by
6 his illness, whether real or not, we don't know.

7 But on December 16th, the consular
8 people indicate back to Ottawa -- pardon me, 15th,
9 that they've noted the request for the photograph
10 and they'll raise the issue of a photograph. As
11 well at this time they're talking about a possible
12 visit by Ms Mazigh.

13 But as you'll recall,
14 December 16th is the point at which they start to
15 get a little nervous about their consular visits
16 because people are busy, the General is ill, and,
17 in fact, they only, I believe, have two more
18 consular visits, if I'm not mistaken, after that.
19 One in January and one in February.

20 So it's not that they refused to
21 go ahead and try to obtain a photograph. It's
22 just that they were nervous, as they were with
23 other things, in terms of whether they'd be able
24 to get the photograph.

25 And, in fact, on the 22nd of

1 December and on the 26th of December, they're
2 still reporting back that their visit cannot be
3 accommodated.

4 So they're not even able to get
5 back in during that period of time to make
6 arrangements for a further visit with Mr. Arar.

7 And then the focus seems to change
8 early in January. Rather than a photograph, the
9 suggestion from Ottawa is perhaps they could
10 arrange a telephone call.

11 But, again, the Ambassador reports
12 back, and this is document 274, that he's had no
13 luck meeting with his usual contact. He's trying
14 other ways to obtain consular access again, but
15 he's being thwarted at every turn.

16 Finally, January 7th they report
17 back that the authorities are not prepared to let
18 Mr. Arar place or receive phone calls. No
19 outsiders, and I expect, except our current
20 consular access, are authorized to speak to him.

21 So this sort of deals with this
22 whole attempt to try to get a photograph, to try
23 to arrange for a phone call with Ms Mazigh. And
24 the Syrians just aren't being cooperative.

25 There are attempts. And to

1 suggest that there were no attempts I think is
2 unfair to the evidence and to the individuals.

3 The second one has to do with the
4 visit by Mr. Arar's relatives, and you'll recall
5 that the issue for the family to get access arises
6 actually in June, towards the end of June. They
7 have not had consular access for quite a long
8 period of time.

9 So it's June. The family is
10 trying to get access. And the Syrian authorities'
11 position --

12 First of all, consular
13 officials -- the Embassy have been writing to the
14 Ministry of Foreign Affairs, as they were
15 directed, sending diplomatic notes; getting no
16 response. So they're being ignored.

17 Mr. Arar's family wants them to
18 assist in gaining access, yet the Syrian
19 authorities, if you go to the evidence, are saying
20 to the consular authorities, "This is to be
21 arranged through you. It's got to be arranged
22 through some other department." And the
23 cooperation level was zero at that point.

24 So, again, to suggest that there
25 was any animus or unwillingness to assist the

1 family in arranging for some kind of visit simply
2 is not a fair characterization of the evidence.
3 There wasn't anything that they could usefully do
4 in order to arrange that visit because the Syrians
5 had essentially cut everything off.

6 Again, sir, if I can come back to
7 something I said earlier, and I can advise you,
8 unless there is something I can assist you with, I
9 essentially am at the end of -- I am at the end of
10 my submissions.

11 The totality of the evidence, in
12 my submission, for the period of time that
13 Mr. Arar was in Syria, should be summed up as
14 follows:

15 Canadian officials, particularly
16 the officials at Consular Affairs Bureau in
17 Ottawa, Ambassador Pillarella, Mr. Martel and the
18 staff at the Embassy in Damascus, did their very
19 best, under trying circumstances, to provide
20 Mr. Arar with the consular services to which he
21 was entitled under Canadian standards.

22 They were thwarted by Mr. Arar's
23 dual nationality. They were thwarted by the
24 attitude that developed in Syria. They were no
25 doubt thwarted, or at least affected, by external

1 events: the war in Iraq; perhaps the listing of
2 Hezbollah as a terrorist group.

3 But at the end of the day, they
4 acted in good faith. They made judgment calls
5 based on the best of their ability and
6 understanding of the situation, and they made
7 those judgment calls with Mr. Arar's best
8 interests in mind.

9 And I urge you, in reviewing the
10 evidence, sir, to keep those comments in mind.

11 THE COMMISSIONER: Okay.

12 MS McISAAC: Thank you.

13 THE COMMISSIONER: Thank you very
14 much, Ms McIsaac. It's been very helpful.

15 What time is it here?

16 Mr. Cavalluzzo, suggestions?

17 MR. CAVALLUZZO: Yes.

18 Commissioner, there are some administrative
19 matters that we have to attend to, and that is,
20 introducing certain exhibits pursuant to your
21 ruling of September 7th.

22 And then after that is completed,
23 what I recommend is, that we break for lunch and
24 reconvene at 1:45 or 2:00, at which time we will
25 hear from the amicus and then from the intervenors

1 as well as the Ottawa Police Service. The OPP
2 will not be making oral submissions.

3 THE COMMISSIONER: Okay. So we
4 can complete all that this afternoon?

5 MR. CAVALLUZZO: Yes, we can.

6 THE COMMISSIONER: Okay. Would
7 you like to then introduce the exhibits?

8 MR. CAVALLUZZO: In your ruling of
9 September 7th, based on an application of counsel
10 for Messrs. El Maati, Almalki, and Nureddin, you
11 ruled that their chronologies be filed as the next
12 public exhibits in these proceedings, and that's
13 what I would intend to do at this time, initially
14 starting with Mr. Almalki's biography.

15 THE COMMISSIONER: Exhibit 254?

16 EXHIBIT NO. P-254:

17 Mr. Almalki's biography

18 MR. CAVALLUZZO: The next will be
19 Mr. El Maati's biography and chronology.

20 THE COMMISSIONER: 255.

21 EXHIBIT NO. P-255: Mr. El
22 Maati's biography and
23 chronology

24 MR. CAVALLUZZO: The next will be
25 Mr. Nureddin's chronology.

1 THE COMMISSIONER: 256.

2 EXHIBIT NO. P-256:

3 Mr. Nureddin's chronology

4 MR. CAVALLUZZO: Now, there are a
5 couple of final exhibits.

6 The next one relates to
7 documentation which counsel for Mr. El Maati gave
8 to Commission counsel, some of it coming from
9 DFAIT, but should be filed as a separate exhibit
10 but as an addendum to his chronology, as it is
11 quite helpful as far as his chronology is
12 concerned, and I want to briefly take you through
13 that so counsel is aware of the relevant portions.

14 THE COMMISSIONER: 257.

15 EXHIBIT NO. P-257: Case

16 notes for Mr. El Maati

17 (addendum to his chronology)

18 MR. CAVALLUZZO: Just let me
19 explain to you and counsel what these documents
20 are.

21 The first is a case note dated
22 July 17th of 2002, and what it contains is a
23 diplomatic note from Foreign Affairs to Egypt, in
24 effect looking for Mr. El Maati at that point in
25 time, and, as we know, we did receive.

1 You'll see the diplomatic note is
2 set out in the bottom paragraph on the first page.
3 You'll see there's reference to an RCMP visit,
4 presumably in the future, and in effect DFAIT is
5 asking for his whereabouts in Egypt, if he is in
6 Egypt, and obviously, the next month, as we know,
7 we received a consular visit on August the 12th
8 of 2002.

9 The next document, the third page
10 in, is dated November 19th, 2002, and it
11 represents a diplomatic note on November the 19th,
12 and you'll see the diplomatic note on the second
13 page.

14 This is an e-mail from Ms Myra
15 Pastyr-Lupul to the El Maati family, and on the
16 second page, you'll see the diplomatic note
17 relates to questions put forward by DFAIT on
18 behalf of Mr. El Maati as to why he is being
19 detained and whether there are any charges
20 outstanding in respect of his detention.

21 The next page you will see is a
22 response from the Egyptian authorities, which is
23 dated April 29, 2003, and they set out the
24 reasons, from their perspective, as to why Mr. El
25 Maati is being detained in Egypt at that time.

1 And then if you go three pages,
2 three or four pages from there, you will see that
3 there is a very helpful chronology of events
4 relating to Mr. El Maati, and this is a DFAIT
5 chronology, and it's quite helpful because it
6 gives Mr. El Maati's whereabouts and the efforts
7 on behalf of Mr. -- of DFAIT looking for Mr. El
8 Maati, right from November 16th of 2001, when his
9 family first notified DFAIT that he was missing.

10 The relevant dates that you might
11 highlight in counsel's copy as well as yours is,
12 on the second page, you will see April 4th of
13 2002. You will see that that appears to be the
14 date that the Syrians finally notified DFAIT that
15 Mr. El Maati was no longer in Syria.

16 July 2nd of 2002, you will see
17 that -- and we've got a copy of that -- that the
18 Syrian Ministry of Foreign Affairs sent a
19 diplomatic note to Canada saying that Mr. El Maati
20 had voluntarily left Syria for Egypt.

21 July 15th of 2002 is another
22 diplomatic note to the Egyptians, and we have
23 referred to that as where DFAIT is looking for his
24 whereabouts.

25 August 7th, 2002, appears to be

1 the time at which DFAIT discovered his whereabouts
2 in Egypt, and consular access is requested; and as
3 you will see, August the 12th, 2002, is the first
4 consular visit. As you know, we have a copy of
5 that report.

6 And I leave the remainder for the
7 reader.

8 If you go -- there are a few other
9 documents that are relevant. If you go about five
10 or six pages from there, at page 17 in the top
11 right-hand corner of this packet, you will see
12 that DFAIT is asking Syria for the date upon which
13 Mr. El Maati left that country.

14 And then, three pages in, you will
15 see a response from the Syrians dated July 2nd,
16 2002, which I referred to earlier, and that is
17 where Syria responds that he left Syria for Egypt.
18 They don't know when or how he left.

19 The last three documents no doubt
20 we're all aware of, and that is, the very last
21 page of the packet is the map that has been
22 referred to, the map of the government complex
23 with numbers on it indicating different buildings,
24 and the two prior pages are letters from Mr. El
25 Maati's employer, indicating, first of all, in the

1 first one, which is dated August 27th, it relates
2 to Mr. El Maati being stopped at the Canadian
3 border at Buffalo, and this is when the map became
4 an issue in respect of the U.S. Customs.

5 She indicates what his employment
6 history is, and in particular, in relation to that
7 particular truck that he was driving at that time
8 and that the map was discovered in the cab of the
9 truck and what it was doing there.

10 And then the final document, the
11 third page in, that's page 20, is the letter dated
12 October 15th, 2001, from the employer, once again
13 indicating that in respect of that truck, it had
14 other drivers prior to Mr. El Maati, one of whom
15 lived in Ottawa and who, on occasion, delivered to
16 buildings or whatever, customers in the Ottawa
17 region.

18 And the final exhibit that we
19 would file are the Flewelling telephone records.
20 You may recall, in the examination of
21 Mr. Flewelling, that we did refer to his cellular
22 telephone records. There were privacy concerns.

23 THE COMMISSIONER: 258.

24 EXHIBIT NO. P-258: Mr. Rick
25 Flewelling's cellular

1 telephone records

2 MR. CAVALLUZZO: Since then we
3 have taken those concerns into account and
4 redacted certain numbers.

5 So that would complete the filing
6 of the public exhibits, Mr. Commissioner.

7 THE COMMISSIONER: Okay. That's
8 the housekeeping.

9 MR. CAVALLUZZO: That completes
10 the housekeeping.

11 It is now 12:35, so I would
12 recommend that we rise until 2:00.

13 THE COMMISSIONER: Two o'clock
14 okay? Two o'clock.

15 THE REGISTRAR: Please stand.

16 --- Upon recessing at 12:34 p.m. /

17 Suspension à 12 h 34

18 --- Upon resuming at 2:01 p.m. /

19 Reprise à 14 h 01

20 THE REGISTRAR: Please be seated.

21 THE COMMISSIONER: Mr. Atkey?

22 MR. ATKEY: Thank you,

23 Commissioner.

24 THE COMMISSIONER: Good afternoon.

25 MR. ATKEY: Good afternoon.

1 SUBMISSIONS

2 MR. ATKEY: Today I want to cover
3 three general areas in the half hour I have
4 available.

5 The first relates to ministerial
6 responsibility and the rule of law.

7 The second will be discussion on
8 testing government claims to National Security
9 Confidentiality.

10 And the third is outlining a list
11 of key issues that I believe you must decide in
12 this inquiry from the perspective of the role I
13 have played as an interested observer of virtually
14 all of the evidence adduced both in public and, of
15 course, having reviewed transcripts of evidence
16 adduced in camera.

17 Dealing with my first submission.
18 This Commission has an important role in
19 redefining accountability and transparency within
20 DFAIT, the RCMP, and CSIS, and other agencies such
21 as Project A-OCANADA and the Canadian Border
22 Security Agency.

23 It is very much -- the task facing
24 you reminds me very much of my first year as
25 chairman of SIRC 20 years ago.

1 It was a new review body
2 overseeing CSIS, a new organization which had been
3 recommended by the Macdonald Commission. And both
4 CSIS and SIRC had growing pains at the time,
5 because they were new.

6 But as each organization
7 approached crises which arose, they worked out a
8 way of accommodating each other in which
9 transparency and accountability became the rule
10 rather than the exception.

11 And for the most part, surprises
12 were avoided and each entity grew to be more
13 comfortable and confident and efficient in its
14 work as time progressed, and Ministers were
15 generally kept in the loop.

16 Now, with the intervention of the
17 horrors of 9/11, and the unfortunate circumstances
18 like those visited on Mr. Arar, it is now time for
19 a new chapter to be written post-Macdonald, so
20 that Canadian officials will become more
21 transparent and accountable in performing their
22 public duties in the security intelligence field.

23 Whether it's DFAIT, the RCMP, or
24 CSIS, it's important for you, Commissioner, to lay
25 out the benchmarks for performance evaluation of

1 Canadian officials tasked with protecting the
2 security of Canadians, that which was mentioned by
3 Ms McIsaac yesterday, and at the same time
4 respecting the individual rights of Canadians and
5 others unfairly caught up in the vigorous
6 application of investigative and protective
7 operations. And we must, as a nation, never let
8 the individual rights of our citizens be
9 sacrificed on the altar of investigative
10 efficiency and expediency.

11 Protecting the security of
12 Canadians does not mean that the police, the
13 security intelligence officers, or the Foreign
14 Affairs officers can operate as a law unto
15 themselves without keeping their superiors fully
16 informed and making sure that Ministers ultimately
17 responsible for these actions in Parliament know
18 what is going on and take responsibility for these
19 actions as elected representatives of the people.

20 This, combined with an independent
21 judiciary, is what the rule of law is all about,
22 and we measure our success as a nation in many
23 respects on how well we follow the rule of law.

24 Commissioner, you have a unique
25 opportunity to write the next chapter in your

1 report, both on this factual inquiry and on your
2 policy review.

3 A professional colleague far
4 removed from Ottawa remarked to me the other day,
5 commenting on this Commission, that it's nice to
6 live in a country where we have a commission of
7 inquiry into the actions of Canadian officials in
8 relation to an aggrieved citizen. In other
9 countries, this might well have been swept under
10 the rug.

11 But the opportunity is yours,
12 Commissioner, to address contemporary issues
13 head-on and to establish benchmarks for the next
14 20 years so that all Canadians will see and
15 understand what went on and what should have gone
16 on.

17 Now let me move to the second part
18 of my submission, and that's regarding the issue
19 of testing NSC claims.

20 I addressed this issue before you
21 in a very summary way on May 3rd, and my written
22 brief outlines the legal basis for challenges to
23 NSC claims both in practice and in the
24 jurisprudence.

25 And from the outset, I have taken

1 the position that, in testing NSC claims, there
2 are two primary considerations here.

3 First, the public's right to know,
4 which is inextricably linked to the freedom of
5 expression guaranteed by section 2(b) of the
6 Canadian Charter of Rights and Freedoms, and
7 second, fairness to Mr. Arar, the very person
8 whose situation caused this public inquiry.

9 Now, as stated and as noted by Ms
10 McIsaac yesterday, there is not disagreement that
11 NSC involves information, the disclosure of which
12 would cause were injury to international
13 relations, national defence, or national security.

14 We all agree that the Commissioner
15 has the right under the terms of reference and the
16 Canada Evidence Act to engage in the balancing
17 test, to balance the public interest in disclosure
18 against the injury to international relations,
19 national defence, and national security resulting
20 from disclosure.

21 And as noted in my brief, CSIS
22 appears to have set the standard within the
23 Government of Canada for making NSC
24 determinations.

25 And as I point out in paragraph 13

1 of my brief, these categories are contained in a
2 legend outlined "CSIS National Security Claims."
3 They're well-known to all of us who are working as
4 insiders but perhaps not well-known to the public,
5 and it's in this context that I think they're
6 worth repeating for the record.

7 First, privilege is claimed on
8 information which identifies or tends to identify
9 service interest in individuals, groups, or
10 issues, including the existence or absence of past
11 or present files of investigation or
12 investigation, the intents of the investigations,
13 or the degree or lack of success of
14 investigations.

15 Two, information which tends to
16 identify -- or tends to identify human sources of
17 information for the Service, or content of
18 information provided by human source.

19 Third, information which
20 identifies, or tends to identify, investigative
21 techniques and methods of operation utilized by
22 the Service.

23 Fourth, information that
24 identifies, or tends to identify, Service
25 employees or internal procedures and

1 administrative methodologies of the Service, such
2 as names and file numbers.

3 Fifth, information which
4 identifies, or tends to identify, relationships
5 that the Service maintains with other police,
6 security, and intelligence agencies in Canada and
7 elsewhere, and would disclose information received
8 in confidence from such sources.

9 Sixth, information that reveals or
10 tends to reveal information about the
11 telecommunications system utilized by the Service.

12 And seventh, information which may
13 jeopardize, or tend to jeopardize, essential
14 international relations.

15 And I add on that, of course, that
16 privilege is claimed quite properly for personal
17 information on grounds of privacy and information
18 subject to a sealing order of a judge.

19 And I think that we all agree,
20 those of us who have worked with this Commission
21 in various capacities, that there's nothing wrong
22 with these classifications.

23 I don't purport to argue that
24 they're illegal or wrong or misplaced. I think,
25 as Ms McIsaac said yesterday, it's really the

1 interpretation and application of these
2 classifications by government agencies, such as
3 CSIS, the RCMP or DFAIT, where there has been
4 disagreement.

5 Now, the Government's aggressive
6 approach to NSC claims that was pursued during
7 in-camera hearings all last winter, starting in
8 September and going right through to the end of
9 April, and in the context of draft summaries that
10 were prepared by you last fall for consideration,
11 this aggressive approach appears to have abated
12 somewhat at the beginning of June 2005, as
13 documents previously redacted were unredacted in
14 whole or in part during the testimony of
15 Government witnesses at public hearings in June
16 and July and August of this year.

17 And I note, Commissioner, with
18 congratulations, that you have encouraged
19 Government agencies, through counsel for the
20 Attorney General, to unredact as much information
21 as possible to facilitate the public portion of
22 the hearings process, yet preserving the
23 Government's essential NSC claims which are truly
24 justifiable, that is, would, in fact, be injurious
25 to international relations, national defence, or

1 national security.

2 It's my understanding that any
3 remaining disagreements between you and counsel
4 for the Attorney General as to specific NSC claims
5 that may relate to your interim report to the
6 Government will be the subject of NSC hearings to
7 be held in camera later this year. Perhaps not
8 too long from now.

9 It's anticipated that I will
10 participate in these in-camera proceedings, and at
11 this stage, therefore, I think it's important to
12 set forth the reason and the legal basis upon
13 which I will be making submissions to you during
14 the in-camera proceedings, but at least for the
15 public to know the basis upon which I make my
16 submissions.

17 Now, first, let me outline
18 submissions of law in relation to testing
19 Government claims to NSC.

20 First, the public's right to know.
21 And I refer to paragraph 17 in my written brief.

22 Freedom of expression and the
23 value of openness in matters of justice and human
24 rights are reflected in the very existence of this
25 Commission, as a public commission of inquiry.

1 A public commission of inquiry at
2 its very essence exists to uncover and disclose
3 the truth of a particular matter, where that truth
4 is not known or available to the public.

5 The accountability of government
6 officials, including law enforcement and security
7 agencies, is self evidently a matter that pertains
8 directly to the public interest.

9 And I can't help but refer to the
10 quote, which I note is in the Government's written
11 brief, quite properly so, of the late Sam Grange,
12 when he headed the inquiry following the infant
13 deaths at the Toronto Hospital for Sick Children,
14 and I quote Mr. Justice Grange. He says:

15 "I remember once thinking
16 egotistically that all the
17 evidence, all the antics, had
18 only one aim, to convince the
19 commissioner, who after all
20 eventually wrote the report,
21 but I soon discovered my
22 error. They are not just
23 inquiries, they are public
24 inquiries, and I realize that
25 there was another purpose to

1 the inquiry, just as
2 important as one man's
3 solution to the mystery, and
4 that was to inform the
5 public. Merely presenting
6 the evidence in public,
7 evidence which had hitherto
8 been given only in private,
9 served that purpose. The
10 public has a special
11 interest, a right to know,
12 and a right to form its
13 opinions as it goes along."
14 (As read)

15 And that was quoted with approval
16 by Justice Cory in the Westray decision, Supreme
17 Court of Canada, 1995, a Justice who has made a
18 significant contribution to the concept of open
19 courts in his utterances.

20 There has been a line of cases in
21 the Supreme Court and the Federal Court which
22 support the open court principles as one of the
23 cornerstones of the Canadian judicial system.

24 The common law presumption of
25 openness is recognized as a constitutional value,

1 and it's protected, in my submission, by section
2 2(b) of the Canadian Charter of Rights and
3 Freedoms.

4 And I submit that this is a
5 presumption that extends beyond court systems to
6 pretrial stages of litigation and to commissions
7 of inquiry, which have a quasijudicial
8 investigative mandate to uncover the truth
9 surrounding an issue of public concern.

10 And I can't help but quote -- or
11 re-quote that which was put before you on May 3rd,
12 and that's from the Vancouver Sun case, the
13 utterances of Justices Iacobucci and Arbour in the
14 Vancouver Sun case, which is 2004, and I quote:

15 "The open court principle has
16 long been recognized as a
17 cornerstone of the common
18 law. The right of public
19 access to the courts is one
20 of principle, turning not on
21 convenience but on necessity.
22 Justice is not a cloistered
23 virtue, publicity is the very
24 sole of justice, it is the
25 keenest spur to exertion and

1 the surest of all guards
2 against improbity. The open
3 court principle --" (As
4 read)

5 And the quote continues.

6 "-- is inextricably linked to
7 the freedom of expression
8 protected by section 2(b) of
9 the Charter and advances the
10 core value therein. The
11 freedom of the press to
12 report on judicial
13 proceedings is a core value.
14 Equally, the right of the
15 public to receive information
16 is also protected by the
17 constitutional guarantee of
18 freedom of expression. The
19 press plays a vital role in
20 being the conduit through
21 which the public receives
22 that information regarding
23 the operations of public
24 institutions. Consequently,
25 the open court principle, to

1 put it mildly, is not to be
2 lightly interfered with."

3 (As read)

4 And that was just a year ago in
5 the Vancouver Sun's decision in the Supreme Court
6 of Canada.

7 Now, I'm not going to go through
8 in detail the Dagenais and Menta cases. They are
9 discussed in my brief at paragraphs 29 through 37.
10 Clearly it's established the jurisprudence that
11 parties seeking to uphold secrecy must provide
12 clear and convincing evidence to justify injury.

13 It can't be potential injury, it
14 can't be probable injury, or can't be speculative
15 injury, it must be actual injury that would occur.

16 National security claims, if they
17 are to stick, must be well-grounded in the
18 evidence. That is the challenge that will face
19 the Attorney General in NSC hearings that may be
20 held later.

21 And I conclude, in paragraph 44,
22 Chairman, with this view of the open court
23 principle.

24 As it pertains to public
25 commissions of inquiry, it has two elements:

1 The first is that Canadians have a
2 right to the greatest possible disclosure of
3 information about the actions of Canadian public
4 officials as they pertain to a matter that bears
5 on the public interest.

6 The second is that the public
7 interest is best advanced through an informed
8 public, that is, informing Canadians about the
9 actions of their public officials.

10 Now I turn to the next part of my
11 legal submissions, that is, the question of
12 fairness to Mr. Arar.

13 Fairness is a flexible concept and
14 its content varies depending upon the nature of
15 the inquiry and the consequences for the
16 individual involved.

17 Now, my brief takes you through
18 the discussion in Baker v. Canada, the Supreme
19 Court of Canada, most recent decision, in 1999,
20 where they apply five factors to be considered.

21 And I go through in my written
22 brief to discuss these five factors, being: the
23 nature of the decision; the statutory scheme; the
24 importance of the decision to the individual
25 affected; the legitimate expectations of the

1 affected person; and the procedures of the
2 commission.

3 And I conclude, and would submit
4 to you, Commissioner, that Mr. Arar is owed a
5 robust approach towards procedural fairness, and I
6 outline this in paragraphs 47 to 55 of my brief.

7 I strongly support the decision
8 you made on May 12th, where you were dealing with
9 issues relating to RCMP testimony, and you said
10 this:

11 "It's worth remembering that
12 Mr. Arar was granted standing
13 for a reason. Clearly he has
14 an interest in this inquiry.
15 He has been excluded from all
16 of the in-camera evidence,
17 although Mr. Arar's counsel
18 have had an opportunity to
19 suggest questions to
20 Commission counsel to be
21 asked in camera. The value
22 of this opportunity is
23 somewhat diluted because
24 Mr. Arar's counsel have not
25 heard any evidence before

1 proposing questions. In my
2 view, the opportunity to hear
3 evidence, as I envision it,
4 and to pose questions
5 directly, adds significant
6 value to Mr. Arar's
7 participation as a party to
8 this inquiry. Maximizing the
9 participation of parties is a
10 legitimate objective when
11 considering what evidence
12 should be called at public
13 hearings. Indeed, given the
14 opportunity of Mr. Arar and
15 other parties to question the
16 RCMP witnesses directly from
17 these parties' unique
18 perspectives maximizes the
19 chance of a fuller picture
20 emerging from the inquiry."

21 (As read)

22 And, Commissioner, I agree
23 wholeheartedly with the ruling that you've made in
24 that context.

25 Now, Commissioner in my brief, I

1 also discuss the application of section 7 of the
2 Charter of Rights and Freedoms, guaranteeing the
3 right to principles of fundamental justice,
4 paragraphs 64 through 69.

5 The case law is complicated here,
6 but I've tried to outline the basis for
7 distinguishing the cases of Ruby, Chiarelli and
8 Ribick to give Mr. Arar a basis for arguing that
9 his Charter rights under section 7 could be
10 violated if there is insufficient disclosure of
11 NSC materials pertaining to him.

12 In conclusion, procedural fairness
13 to a person directly affected by a commission of
14 inquiry is an important element of maintaining the
15 integrity and credibility of this Commission,
16 particularly when reputational interests like
17 Mr. Arar's are at stake.

18 Yes, the reputation of CSIS, the
19 RCMP, DFAIT, and other agencies of government are
20 at stake in this inquiry, but they or their legal
21 representatives have full access to NSC materials.
22 Mr. Arar and his counsel do not.

23 Accordingly, I would argue for a
24 robust approach towards disclosure in applying the
25 public interest balancing test as you proceed.

1 The public interest inherent in
2 the balancing test when challenging NSC claims is
3 not simply satisfying the public sense of
4 curiosity about the actions of Canadian officials
5 as they pertain to Mr. Arar.

6 It's the public interest in the
7 sense of the phrase, "the best interests of the
8 Canadian public," in according procedural fairness
9 to parties affected to maintain the integrity and
10 credibility of this Commission. Procedural
11 fairness is best achieved through a robust
12 approach to disclosure.

13 Now, Chairman, I propose to
14 outline for you some questions which I have come
15 up with, which are by no means exhaustive, of
16 those which you will have to address in fulfilling
17 your mandate under Part 1 of this inquiry.

18 Nevertheless, from the perspective
19 of amicus curiae, they represent the primary
20 questions which, in the mind of the public, should
21 be addressed, given their focus on actions of
22 Canadian officials.

23 There will be additional questions
24 involving NSC evidence which I may file later this
25 week in camera, and they can be dealt with at this

1 time, but they are few in number.

2 The first question relates to one
3 that you raised yourself, Commissioner, following
4 your August 17th ruling this summer on motions to
5 quash that were filed by certain parties.

6 Should these rulings be made
7 public, with appropriate NSC redactions, it is my
8 submission that they should be made public since
9 they constitute an important and precedent-setting
10 decision related to section 13 of the Inquiries
11 Act, and they would be useful jurisprudence to
12 have for public consumption.

13 The next question I ask, when one
14 steps back and looks overall, prior to
15 October 2002, when Mr. Arar was deported to Syria,
16 was there any agreement or understanding between
17 senior Canadian and U.S. officials or Ministers
18 that there would be prior consultation prior to
19 deportation of citizens of their respective
20 countries to the other country or to a third
21 country?

22 Then I ask a question that has
23 been the subject of much debate over the last two
24 days. At what stage should Canadian officials
25 have known, or ought to have known, that the

1 prospect of deportation to Syria was real?

2 In this regard, I think you should
3 consider carefully the evidence of Flewelling,
4 Girvan, Collins, Pardy, and Pastyr-Lupul.

5 If Canadian officials knew, or
6 ought to have known, of this prospect, what steps
7 might have been taken to forestall deportation to
8 Syria, such as representations to appropriate U.S.
9 agencies, a report to the Minister of Foreign
10 Affairs, or the Solicitor General, suggesting
11 intervention with U.S. counterparts; perhaps a
12 more aggressive approach by consular officials in
13 facilitating the hiring and directing of a U.S.
14 lawyer; or I would even suggest media exposure
15 might have been helpful.

16 Next question: Was there
17 unrestricted information-sharing by the RCMP and
18 CSIS with U.S. counterparts regarding Mr. Arar,
19 and was this done without the usual caveats?

20 If a caveats-down approach was
21 followed by the RCMP or CSIS, was this done by
22 individual officers without official direction or
23 approval from the top of respective organizations,
24 directly or by inference?

25 Next question: Was the

1 information and intelligence on Mr. Arar passed to
2 foreign agencies accurate and reliable, and was it
3 information obtained strictly in accordance with
4 policies, procedures, and protocols to be followed
5 by investigators in the investigation of Mr. Arar?

6 And I refer specifically to the
7 evidence of Cabana, Loepky, Flewelling, and
8 Hooper.

9 Next question: Was there adequate
10 supervision and control over the managers and
11 investigators of Project A-OCANADA in regards to
12 their disclosure and exchange of information on
13 Mr. Arar with U.S. authorities? And was there an
14 inappropriate relationship between investigators
15 of Project A-OCANADA and the CIA?

16 Next question: Were the managers
17 and investigators of Project A-OCANADA adequately
18 trained and knowledgeable of the customs, mores,
19 and values of the Islamic community, to which
20 Mr. Arar is a member? And as a result was some of
21 the information shared in relation to Mr. Arar
22 reliably assessed and analysed?

23 Next question, discussed today and
24 yesterday: Was there information-sharing and
25 preparation of questions carried on with the

1 Syrian officials by the RCMP or by CSIS without
2 appropriate safeguards? Did this prejudice
3 Mr. Arar's situation unfairly?

4 Next question: Did the
5 relationship between Project A-OCANADA
6 investigators and foreign intelligence agencies
7 contravene the letter and spirit of the Memorandum
8 of Understanding between the RCMP and CSIS, and
9 the understanding between the RCMP and the CIA
10 that was apparently reached in 1989?

11 And then the question of the trip
12 to Syria by CSIS, November 2002: How did this
13 actually affect Mr. Arar in terms of how he was
14 treated and how long he was detained? Was the
15 information exchanged by CSIS concerning Mr. Arar
16 prior to, during, or after this visit? Was it
17 information reliably assessed and analysed? And
18 was it appropriate to be sharing information with
19 Syrian officials given that country's human rights
20 reputation?

21 Was Mr. Arar, as a Canadian,
22 well-served by Canadian consular officials from
23 DFAIT in the U.S. and in Europe, and that is in
24 Syria, excuse me, while he was in custody? Were
25 his privacy rights respected, or was there any

1 inappropriate sharing of his personal information
2 with other Canadian and foreign officials?

3 Next question: Did the Canadian
4 Ambassador, Mr. Pillarella, from October 2002
5 through to May 2003, act appropriately in
6 balancing Mr. Arar's situation of detention in
7 Syria against his close relationship with General
8 Khalil, and particularly when it appears he
9 transmitted the fruits of the Syrian investigation
10 of Arar back to Canada without indications as to
11 how the confessions might have been obtained and
12 references to the track record of Syrian military
13 officials in engaging in abusive treatment to
14 extract confessions?

15 Next question: Was there an
16 inappropriate turf war between DFAIT on the one
17 hand and CSIS and the RCMP on the other hand in
18 coming up with suitable and timely language for
19 the Canadian government communications to the
20 Syrian government that Canada wanted Arar back?

21 Was this resolved through the
22 overriding intervention of the Prime Minister by
23 his letter delivered by Senator De Bané, which
24 seems to have been instrumental in securing
25 Mr. Arar's release, or was the release of Mr. Arar

1 less related to the letter and perhaps more to
2 geopolitical issues -- Syria's deteriorating
3 relationship with the U.S.?

4 Next question: Was it reasonable
5 for participants in the process, that is the
6 Syrians, the RCMP, DFAIT, and the PCO, to infer
7 that CSIS, by its actions and non-actions did not
8 want Mr. Arar back in Canada in the period
9 November 2002 to August 2003, or should CSIS have
10 been more forthright in stating that it wanted
11 Mr. Arar back in Canada?

12 And should the privy council
13 office have taken a more active coordinating role
14 in getting DFAIT, CSIS and the RCMP to work
15 together in espousing Canada's interest in having
16 Mr. Arar back in Canada in the period October to
17 August?

18 And a more difficult question for
19 you, Commissioner, is: How is torture to be
20 defined for purposes of this inquiry? According
21 to this definition, or any definition you adopt,
22 was Mr. Arar tortured by the Americans? By the
23 Syrians? Was his alleged confession of certain
24 events coerced under conditions of torture?

25 Next question: Were any or all of

1 DFAIT, the RCMP, CSIS, or Ambassador Pillarella
2 aware of the reputation and practices of Syrian
3 Military Intelligence officials in engaging in the
4 use of torture as an investigative technique prior
5 to October 8th, 2002, when Mr. Arar was deported
6 to Syria. Prior knowledge I think becomes
7 relevant in the total context of things.

8 And then more recent issues, of
9 course: Did Mr. Arar's relationship with Almalki
10 or El Maati and Nureddin alone constitute grounds
11 for CSIS and RCMP regarding him as a person of
12 interest?

13 Were the submission of questions
14 and information on Mr. Almalki by the RCMP to the
15 Syrian military officials, which was noted in the
16 Almalki chronology, which was filed as an exhibit
17 today, were these appropriate when there was a
18 known credible risk of torture that would be used
19 by Syrian Military Intelligence authorities in
20 asking the questions?

21 Next question: Did the Canadian
22 consular officials in Syria appropriately report
23 back to officials in Canada that Mr. Arar had been
24 physically beaten at the beginning of his
25 detention, and that he had been detained in a

1 3-foot by 6-foot by 7-foot cell and forced to
2 sleep on the ground?

3 And finally I ask the general
4 question, Commissioner, which I think you may have
5 to address in the context of this Commission:
6 Should the RCMP be engaged in security
7 intelligence activities at all, or should they
8 stick to law enforcement, which they do well,
9 leaving security intelligence to CSIS, which was
10 recommended by Macdonald in the '70s?

11 Did RCMP officers and/or members
12 of Project A-OCANADA have adequate training,
13 policy guidance, and direction for security
14 intelligence work of the sort involved in
15 Mr. Arar's situation?

16 So, Chairman, I end in conclusion
17 where I began, with a reference to the general
18 rather than the specific.

19 As amicus, I am pleased to have
20 had an opportunity to contribute in a small way to
21 your proceedings, and would encourage you to be
22 bold in the findings that you may make and the
23 public disclosure which will underpin your
24 findings that you make.

25 And I may say in closing that I am

1 awestruck by the massive contribution made by
2 counsel for Mr. Arar, counsel for the Government
3 in respecting the very tight time lines that have
4 been set for preparation of written submissions,
5 which are very detailed, and the presentation of a
6 very useful oral argument. It has been a pleasure
7 to participate in this proceeding.

8 I also want to state for the
9 record that while I remain fiercely independent
10 from the Commission and from Commission counsel
11 and staff, I have had the utmost cooperation in
12 obtaining access to all relevant materials, all
13 relevant situations, and I have very much
14 appreciated that.

15 Thank you, Chairman.

16 THE COMMISSIONER: Thank you very
17 much, Mr. Atkey.

18 Let me just take a moment to thank
19 you for your presentation, and while your
20 participation in the inquiry doesn't finish today,
21 it may be the end of the public participation, and
22 as I reflect on what you've done, I think that
23 you've set a new standard or set of standards,
24 certainly, for the role that an amicus can play in
25 a proceeding like this, and I think that will be a

1 legacy I hope from this inquiry. And it's a
2 compliment to you and to Mr. Cameron, who assisted
3 you, that you've been able to fulfil that role and
4 set that standard. So I am deeply appreciative of
5 the cooperation, the assistance from both of you.

6 MR. ATKEY: Thank you,
7 Commissioner.

8 THE COMMISSIONER: Thank you very
9 much.

10 Okay. Next is Mr. Neve?

11 Mr. Registrar, do you have my
12 second book, second volume of submissions? It may
13 be out there.

14 Yes. Would you please -- or does
15 someone have a copy of this for me?

16 I don't want to take yours, Ms
17 Edwardh. I will get one from Commission counsel.

18 You can get the other one.

19 Thank you very much.

20 Good afternoon, Mr. Neve.

21 SUBMISSIONS

22 MR. NEVE: Good afternoon,
23 Mr. Commissioner. It's a pleasure to have this
24 opportunity to make submissions to you.

25 I'm going to give my submissions

1 in two sections.

2 I'm going to begin with some
3 opening remarks that I'm making on behalf of all
4 18 organizations that have been granted intervenor
5 status at the inquiry.

6 I'm then going to cede the
7 microphone to my colleague, David Crossin, who is
8 representing the coalition of international
9 organisations, who has a flight to catch. So
10 he'll go next.

11 And then I will resume with some
12 specific submissions on behalf of Amnesty
13 International.

14 So for the intervenors, I'd like
15 to draw your attention to three particular issues.

16 THE COMMISSIONER: Yes. Go ahead.

17 MR. NEVE: Three particular issues
18 that we'd like to bring to your attention, and
19 these, as I would stress again, are issues which
20 all 18 organizations endorse and have a common
21 position.

22 They're all outlined in the brief
23 that we've provided in common to you, and these
24 are, firstly, concerns about pattern; secondly,
25 our recommendations regarding exoneration and

1 redress for Maher Arar; and thirdly, reinforcing
2 public engagement with the inquiry.

3 I will begin with pattern.

4 Commissioner, you have obviously
5 heard from Amnesty International and from other
6 intervenors about this concern previously.

7 When the public phase of the
8 inquiry opened in May, we urged you to mandate the
9 fact finder to look into the possibility that a
10 pattern, policy, or practice wider than Maher
11 Arar's case lay behind what had happened to him.

12 Just two weeks ago we urged you to
13 accept as exhibits the documents -- which we note
14 and welcome the fact they have been filed today --
15 but the documents that had been prepared by
16 Mr. Almalki and Mr. El Maati outlining their cases
17 in considerable detail, and we did that because we
18 felt that the information in those documents bore
19 directly on the question of pattern.

20 So it will certainly come as no
21 surprise to you now to hear me submit on behalf of
22 all 18 organizations that we consider it to be of
23 the utmost importance that this issue figure
24 prominently in your deliberations and your final
25 report.

1 So what do we mean by "pattern"
2 and why is it so important and how do we propose
3 you address it?

4 We aren't able to specify and
5 define with precision what the pattern might be.
6 In our joint brief, we have highlighted aspects of
7 the evidence that we believe raises concerns about
8 the possibility of a pattern.

9 What we do know is that over the
10 course of two years, four Canadian citizens, Ahmed
11 El Maati, Abdullah Almalki, Maher Arar, and then
12 finally Muayyed Nureddin, all dual nationals, all
13 Muslim men, ended up imprisoned in Syria.

14 One, Mr. Arar, after being
15 subjected to extraordinary rendition from the
16 United States. Two, Mr. Almalki and Mr. El Maati
17 upon arrival at the airport in Damascus. And the
18 last, Muayyed Nureddin as he crossed the border
19 from Iraq into Syria to catch a flight home to
20 Canada.

21 All four had been of interest in
22 the course of national security investigations in
23 Canada and Canadian law enforcement or security
24 officers had questioned or sought to question them
25 in the course of those investigations.

1 All four ended up spending all or
2 much of their time in detention in Syria being
3 held in abysmal conditions in basement cells at
4 the far Palestine Branch of Syrian Military
5 Intelligence.

6 All have made detailed, we would
7 submit credible, allegations of torture. In some
8 instances, severe torture over extended time. You
9 will obviously be hearing more about that when you
10 receive the report from your fact-finder,
11 Mr. Steven Toop(ph).

12 All allege being interrogated in
13 ways, or about issues, or even about documents
14 that could only have originated with Canadian law
15 enforcement or security sources and further allege
16 that it was their belief that there was
17 possibility a flow of information back and forth
18 between Canada and Syria, both coming out of and
19 going into those interrogation sessions.

20 Finally, we note with interest the
21 quote in Juliet O'Neill's infamous article from
22 the Ottawa Citizen, and we highlight this at
23 page 9 of our brief, suggesting a perception on
24 the part of an unnamed security source -- we don't
25 know who it is -- as to the possibility that there

1 is some commonality or linkage amongst these
2 cases.

3 She reports that an inquiry would
4 be especially troubling for these "security
5 sources" because it would "present a dilemma over
6 what to do about suspects who have wound up in
7 prison in their native countries, including
8 Mr. Almalki. If Mr. Arar has caused such an
9 uproar, others may do likewise."

10 Well, is this just a series of
11 remarkable tragic coincidences? Perhaps. But in
12 our view, highly unlikely.

13 If not coincidence, what? A
14 policy, practice, procedure? Official,
15 unofficial? Authorized, unauthorized? Widely
16 known or secret?

17 We need to know the answers to
18 these questions. Canadians want and need to know
19 the answers to these questions.

20 And those answers are important
21 for two reasons:

22 First, because they are directly
23 relevant to knowing and understanding what
24 happened to Mr. Arar. Was his case exceptional
25 and isolated, or was it part of a pattern?

1 Secondly, the answers are
2 important as well because of the fundamental
3 values and principles at stake.

4 Ever since the tragedy and horror
5 of the September the 11th terrorist attacks, the
6 world has faced a critical debate about the
7 relationship between security and human rights.

8 Some governments, commentators,
9 some sectors of society believe and assert that
10 the two cannot co-exist and that security trumps,
11 that to be truly secure we have to give up a
12 little bit on human rights, allow a little
13 torture, accept some imprisonment without charge
14 or trial, turn a blind eye to discrimination here
15 and there.

16 Commissioner, the intervening
17 organizations -- and I believe the majority of
18 Canadians -- reject that assertion. We stress, in
19 keeping with international law, that human rights
20 violations lead only to greater insecurity, and
21 that true, durable, sustainable security will only
22 be achieved by embracing human rights like never
23 before.

24 And we emphasize, cannot
25 overemphasize, how important it is that Canada's

1 words and Canada's deeds firmly, unequivocally
2 convey that message to the world: Security
3 through human rights.

4 That is why the issue of pattern
5 is so crucial. There is much at stake here, and
6 we are counting on you in your report to shed as
7 much light on this as you possibly can.

8 We know you have heard in-camera
9 evidence, and some public, on all four of these
10 men. You have received the chronologies, which,
11 yes, unproven as to their truth, nonetheless offer
12 a disturbing catalogue of what is at play here.

13 Yesterday the government invited
14 you to reach findings on the issue of pattern on
15 the basis of in-camera evidence you have heard.

16 We would caution you that it would
17 be clearly unfair and likely inappropriate to make
18 findings that there is no pattern on the basis of
19 in-camera evidence which none of these men have
20 had a chance to respond to, especially with the
21 broader contextual information they have provided
22 in their chronologies which has not yet been
23 tested and explored and hasn't been used to test
24 and explore the in-camera evidence.

25 We think the information that

1 exists, which we've outlined in greater detail in
2 our written submission, at the very least gives
3 prima facie reason to believe there may be a
4 pattern, and we urge you to reach that same
5 conclusion and to recommend a suitable further
6 independent process to examine that concern.

7 That could be a second phase of
8 this inquiry. It could be the appointment of an
9 individual expert with a broad mandate, or some
10 other independent, impartial, expert process.
11 Whatever it may be, we urge you to include this
12 recommendation in your final report.

13 Your view on this will, we
14 believe, be determinative and decisive and without
15 you calling for further review of this nature, we
16 are concerned there may never be answers and
17 accountability for these other men.

18 Let me move to the issue of
19 exoneration and redress for Mr. Arar.

20 Commissioner, the intervening
21 organizations have followed public testimony and
22 evidence as closely as possible in this inquiry,
23 and we all unanimously endorse the following
24 points:

25 First, we believe in the

1 presumption of innocence.

2 Second, we note that after a year
3 of this inquiry, which has, of course, taken place
4 against the backdrop of ongoing in-depth attention
5 from a number of investigative journalists, all we
6 have seen in the public domain is indication that
7 Mr. Arar was perhaps of interest to Canadian
8 authorities as a witness or because of people he
9 knew.

10 We have seen no evidence linking
11 Mr. Arar to criminal offenses, including in any
12 way offenses related to supporting terrorism. If
13 any other evidence does exist, it has been kept
14 from Mr. Arar, providing him with no chance to
15 respond and refute.

16 We understand, of course, the
17 considerable responsibility that other governments
18 also bear for what happened to Mr. Arar. The
19 U.S., Syrian, and even Jordanian governments.

20 We also believe, however, that the
21 evidence has revealed numerous ways in which
22 Canadian action or inaction may have contributed
23 to human rights violations he experienced.

24 Given all of those concerns, we
25 submit that your report should:

1 First, urge that the Government
2 publicly state it has no evidence linking Mr. Arar
3 to criminal offenses, including terrorism-related
4 offenses;

5 Second, call on the Government to
6 publicly apologize to Mr. Arar;

7 Third, recommend that the
8 Government award suitable compensation to Mr. Arar
9 and his family; and

10 Fourth, recommend that anyone who
11 has acted improperly be held accountable through
12 relevant disciplinary or criminal proceedings.

13 Finally, Mr. Commissioner, on
14 behalf of the intervenors again let me underscore
15 the importance of public engagement with this
16 inquiry and with your final report.

17 The Canadian public has been
18 deeply concerned about this case, and it's not
19 just because they have been titillated by shady
20 allegations of terrorism.

21 They have been concerned because
22 of the fundamental principles at stake: human
23 rights protection, the rule of law, our security
24 relationship with the United States, equality and
25 tolerance for Canadian Muslims and Arabs.

1 There is deep public interest and
2 concern, but it has been very difficult for the
3 public to follow and understand the inquiry.
4 Difficult because many of the issues are very
5 complex; difficult as well, of course, because of
6 the extensive amount that has taken place in
7 camera, away from public scrutiny.

8 Commissioner, we know and are
9 confident that you will be thinking about the
10 Canadian public and their right to know as you
11 prepare your final report.

12 We cannot stress how important
13 that is. Our organizations hear from the public
14 all the time. We know their concerns and
15 questions, which, we would note, have only
16 deepened now that Mr. Almalki and Mr. El Maati
17 have gone public with their stories.

18 The public wants, needs, their
19 questions answered in this report.

20 I'm now going to turn things over
21 to Mr. Crossin, and then I will be back afterwards
22 with some further submissions on behalf of Amnesty
23 International.

24 THE COMMISSIONER: Thank you very
25 much.

1 Good afternoon, Mr. Crossin.

2 SUBMISSIONS

3 MR. CROSSIN: Good afternoon.

4 Mr. Commissioner, thank you very
5 much for allowing me the opportunity to appear on
6 behalf of my clients to take a few minutes this
7 afternoon to highlight the written material that
8 you have received.

9 It is an odd experience for
10 counsel to parachute in at the end of a case
11 without having participated in the proceedings or
12 heard any of the witnesses, live at least. But it
13 is a privilege to appear for this purpose, and I
14 can certainly report to you that my clients are
15 very grateful for the opportunity to have
16 participated in the context of their intervenor
17 status in this inquiry, and I should tell you, and
18 I would be remiss if I did not say to you, that
19 the written material that you have is due in large
20 part to the tremendous effort of the women and men
21 associated with those organizations that have
22 gathered together the references and propositions
23 that are contained in the written brief, and I am
24 privileged to appear on their behalf simply to
25 highlight some of those matters for you.

1 They have asked me to highlight
2 four or five main points in the brief and ask you
3 to consider them.

4 I do represent three
5 organizations: The Redress Trust, The Association
6 for the Prevention of Torture, and The World
7 Organization Against Torture.

8 As you know, these are
9 international, non-governmental organizations that
10 work throughout the world, attempting to identify
11 and eradicate torture and the risk of torture, and
12 other forms of cruel and inhumane and degrading
13 treatment and punishment. In addition, these are
14 organizations that will attempt to seek redress on
15 behalf of victims of torture throughout the world.

16 We have filed a written brief
17 addressing aspects of international law and
18 convention, specifically relating to the issue of
19 torture in the world and its prohibition, and we
20 hope you find it helpful in the context of this
21 inquiry.

22 It is necessarily, that is the
23 written brief, a detailed analysis of the area.
24 It is a complex, sometimes, compilation of
25 international documents, conventions, and

1 jurisprudence, but -- although the document is
2 detailed in that analysis, it is, of necessity,
3 general in its application.

4 Its import, in part, will be
5 determined by your findings. It may assist your
6 findings. It may inform your findings.

7 But that is for you to assess,
8 having regard to all of the information before
9 you.

10 Having said that, it is our
11 submission to you, however, that in the context of
12 this inquiry, where there appears to be cogent
13 evidence that a Canadian citizen was taken against
14 his will to another country and then tortured or
15 abused at the hands of that State, you may find
16 that the nature and extent of the international
17 obligations of the Government of Canada and its
18 officials to protect its citizens against the risk
19 of torture, you might well find it critical in
20 assessing the relevant circumstances for the
21 purposes of the framework of your mandate.

22 Very briefly, I have been asked to
23 highlight the following points by way of summary
24 of the analysis that is contained in the written
25 brief that is there for your ultimate

1 consideration.

2 Firstly, from the point of view of
3 Canada and its international obligations, it is
4 our respectful submission that there is no grey
5 area of the law concerning the torture, or risk of
6 torture, of any Canadian citizen.

7 Not only is torture prohibited by
8 specific treaties and covenants to which the
9 Canadian government is a party, its prohibition
10 has achieved such international status as to be
11 sacrosanct.

12 And I might pause to say that the
13 reference to those treaties and the detail of the
14 development of those treaties and the ratification
15 of those treaties are listed in detail in the
16 brief and developed -- and if you would kindly
17 make a note, if you would, generally between
18 pages 4 and 14 of the written material.

19 It is what is known as a
20 peremptory norm in the context of international
21 law. No derogation is permissible by way of
22 domestic law or treaty.

23 In 2005 that may be a self-evident
24 proclamation, but it has taken the international
25 community some decades to reach that.

1 That is the kind of legal and
2 moral commitment that the international community,
3 including Canada, has made, in relation to the
4 rejection of torture.

5 It is sacrosanct to the point, in
6 our submission, with perhaps particular regard to
7 the facts before you, that there is no room in the
8 international context for any notion of balancing
9 national security interests against a citizen's
10 right to be free from torture.

11 And I pause to note that the
12 Pinochet case in the House of Lords is a very
13 helpful case in that regard. It is referenced
14 from time to time in the written brief, but at the
15 back of the brief, there is an index, and at
16 page 10 is the cite for the Pinochet case. That
17 is page 10 of the index at the back of the brief.

18 We develop in our brief, and
19 invite the Commission to consider, the extent of
20 those obligations, that is, the extent and
21 application of those obligations from an
22 international point of view and the ramifications
23 of those obligations in the context of the
24 evidence before you and the findings you may make.

25 This includes, in our submission,

1 the fact, and it is our submission that there is
2 no question, in our view, that from an
3 international point of view, the fact that the
4 Canadian government not only has legal obligations
5 to refrain from carrying out acts of torture but
6 international law has imposed on Canada -- and
7 Canada has accepted -- a positive obligation to
8 prevent, as well as punish and redress, acts of
9 torture, and that primarily arises from the
10 Convention Against Torture, the U.N. Treaty, and
11 if you would kindly make a note, at page 14 of the
12 brief is where we develop that.

13 How these obligations might be
14 relevant and helpful to you will depend upon your
15 findings, they may assist your findings, and the
16 nature of those obligations and how Canada's
17 international obligations may inform and assist
18 this Commission are generally developed -- if I
19 could ask you again to make a note -- between
20 pages 21 and 29 of our brief.

21 By way of example, and I
22 appreciate that the factual foundation is a live
23 issue at this inquiry. I don't know that, but I
24 assume that. If you were to conclude, as an
25 example, Canadian officials in any way endorsed,

1 or acquiesced in, or substantially contributed to
2 the decision of the United States to send Mr. Arar
3 to Syria, where there was a real and substantial
4 risk of torture, such conduct, in our submission,
5 would constitute a breach and violation of
6 Canada's obligations to prevent torture.

7 If, for example, you find Canadian
8 officials sent information to Syria for use in an
9 interrogation by Syrian officials, either pursuant
10 to an intelligence-gathering protocol or
11 otherwise, again, in circumstances where you found
12 there was a real and substantial risk of torture,
13 Canada may be in violation of its international
14 obligations.

15 In other words, in our submission,
16 there is an issue of knowledge and constructive
17 knowledge at play. To put it in a very pedestrian
18 way, if the government or its officials knew or
19 ought to have known the circumstances of Mr. Arar,
20 to send information to the Syrian government for
21 such use in those circumstances, one can see not
22 only legally, but logically, completely
23 undermines, indeed contradicts, Canada's
24 obligations to protect Mr. Arar from torture or
25 the risk of torture.

1 By way of example, we submit that
2 there ought not to be any justification for the
3 Government of Canada or its officials to receive
4 and use information gained as a result of torture
5 and/or abuse.

6 THE COMMISSIONER: Let me just ask
7 you the question: You would submit then that
8 Canada's obligations under these treaties would be
9 such, first of all, if they knew that some
10 information was obtained by torture, they
11 shouldn't receive or use it.

12 What if they just knew information
13 may have been or there was a risk that it was, it
14 came from a regime with a questionable record?

15 MR. CROSSIN: The submission we
16 make to you is that there must be issues of
17 constructive knowledge at play, and depending on
18 the circumstances -- you have used the word
19 "risk", and you have used the word "might", but if
20 in all the circumstances, absent actual knowledge,
21 they ought to have known in the circumstances, on
22 any reasonable view of those facts, that this
23 information was coming from a source that has
24 utilized torture, or the risk of torture, to a
25 detainee in Mr. Arar's circumstances, then, in my

1 respectful submission, it would be a reasonable
2 conclusion that they would be in violation of
3 their international obligations.

4 THE COMMISSIONER: And the way
5 they would avoid being in violation of those
6 obligations would be not to accept, not to receive
7 the information, or not to make use of it, or ...

8 MR. CROSSIN: Well, the first step
9 would be to appreciate the circumstances when the
10 offer is made and make a decision in accordance
11 with their obligations.

12 THE COMMISSIONER: And if they had
13 the constructive knowledge you refer to -- and I'm
14 speaking hypothetical --

15 MR. CROSSIN: They would reject
16 it.

17 THE COMMISSIONER: They would
18 reject the information.

19 MR. CROSSIN: They must.

20 THE COMMISSIONER: They must
21 reject the information. And you would say that
22 flows from international law and our commitments
23 under treaties?

24 MR. CROSSIN: Absolutely. And the
25 starting point is Article 15 of the Convention

1 Against Torture, which is a prohibition against
2 the use of any information obtained by torture as
3 evidence in any proceeding. Now, that's almost a
4 mundane proposition to state, but the submission
5 is that the effect of the obligations of Canada in
6 terms of being party to any number of conventions
7 and treaties, as they have evolved, would be that
8 it would be their obligation not to take that
9 information at all.

10 In the international context, in
11 terms of the evolution of treaty obligations,
12 countries like Canada have been suspicious of the
13 notion of creating a shield of national interest
14 in relation to torture, and the fundamental
15 proposition is that the recognition of the
16 repugnance of torture includes resisting its
17 fruits, regardless of motive.

18 My clients are, as well, keenly
19 interested in some of the evidence that has come
20 out concerning what might be interpreted as a lack
21 of training or expertise in Canadian officials
22 concerning detection and assessment of the fact or
23 prospect of torture, and they do want me to
24 highlight for Your Lordship, it's at page 28 of
25 our brief, beginning at paragraph 83, and in

1 particular, paragraph 85.

2 "One of the most important
3 duties of consular officials
4 is to visit persons who are
5 deprived of liberty,
6 particularly by arrest,
7 detention, or imprisonment in
8 a foreign State. Education
9 and information about the
10 detection and assessment of
11 the treatment of detainees
12 through visits to places of
13 detention is required by
14 Article 10 of the Convention
15 Against Torture. For a
16 broader group of public
17 officials, including those
18 involved in law enforcement,
19 such as the RCMP and other
20 relevant public officials,
21 such as CSIS, the State
22 should at least provide
23 education and information
24 about the nature and scope of
25 the prohibition of torture

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1 and all other forms of cruel,
2 inhumane, or degrading
3 treatment or punishment."

4 And we make recommendations in
5 that regard and cite what we believe would be some
6 relevant evidence for your consideration in terms
7 of making any recommendations you feel are
8 appropriate. As an example, if I could take you
9 to paragraph 87, at page 30:

10 "It would appear that Canada
11 did not provide adequate
12 education or training on
13 torture and other
14 ill-treatment to its consular
15 officials, RCMP, and CSIS
16 staff and other government
17 officials. Officials
18 apparently did not bring
19 adequate special knowledge or
20 technical capacity to bear on
21 either the law concerning
22 torture and other forms of
23 ill-treatment, the ability to
24 assess an individual's
25 treatment while in custody,

1 or appropriate interviewing
2 and visiting techniques for
3 persons deprived of liberty.
4 Mr. Martel testified that he
5 had received no training
6 whatever in recognizing
7 torture, abusive treatment,
8 or inhumane prison
9 conditions."

10 So we set out some
11 recommendations, and we hope they are of
12 assistance to you.

13 The final area that we would like
14 to highlight begins at page 33, and it is our
15 views, and analysis, and recommendations of the
16 oversight body. It begins, and I'll just read the
17 opening paragraph:

18 "A range of international
19 standards binding on Canada
20 should be taken into
21 consideration in determining
22 an appropriate model for an
23 independent arm's length
24 review body. Independent
25 review mechanisms are not

1 only national responses to
2 the perceived inefficiencies
3 of internal control
4 mechanisms and a means to
5 ensure democratic
6 accountability and to
7 safeguard constitutional
8 rights, they also constitute
9 one type of mechanism through
10 which states can fulfil their
11 obligations under
12 international human rights
13 law."

14 And that goes through to page 47,
15 and we leave you with those submissions and
16 suggestions. The detail is there, and they stand
17 on their own. In our submission, they are
18 balanced and fair-minded recommendations that you
19 may very well find helpful.

20 Those are my submissions.

21 THE COMMISSIONER: Well, thank you
22 very much. Let me just express my appreciation
23 for the work that obviously went into the written
24 presentation, followed up by the oral
25 presentation.

1 MR. CROSSIN: Thank you.

2 THE COMMISSIONER: Just reading
3 that material makes it clear that there was a good
4 deal of thought and effort and expertise, and I
5 appreciate that very much, and thank you for
6 coming from Vancouver. Safe trip home.

7 MR. CROSSIN: Thank you.

8 THE COMMISSIONER: Mr. Neve?

9 MR. NEVE: Yes. I'm back.

10 THE COMMISSIONER: You're back.

11 SUBMISSIONS

12 MR. NEVE: I will now, as I said
13 earlier, be presenting some additional points
14 which are specifically on behalf of Amnesty
15 International, and these are in four areas: The
16 global context to this inquiry, National Security
17 Confidentiality issues, torture, and publicity.

18 Beginning with global context. I
19 already earlier spoke about the global debate
20 about security and human rights in discussing our
21 concerns about pattern.

22 Commissioner, I'd just like to
23 underscore that that global context is a
24 profoundly important backdrop to your work, and
25 that your work can, in our view, make a powerful

1 contribution to reminding the international
2 community that there is and can be no trade-off
3 between security and human rights, and as such, we
4 recommend that you firmly anchor your analysis of
5 this case in an international human rights
6 framework, and that you stress that at all times
7 and in all ways Canada's counter-terrorism laws,
8 policies, and practices must be consistent with
9 this nation's international human rights
10 obligations.

11 Secondly, a word about National
12 Security Confidentiality. Amnesty made detailed
13 submissions to you at the outset of the inquiry
14 outlining the applicable standards under
15 international human rights law that we believe
16 should govern your assessment of national security
17 claims, and we've repeated some of that in our
18 closing written brief to you.

19 I'd like to just quickly stress
20 three main points here.

21 The first is that we have been
22 concerned, as have a number of intervening
23 organizations, I believe, through some of the
24 brief glimpses we have had of what lies behind
25 redaction, that some of the claims appear to be

1 overly broad and inappropriate. One alarming
2 example which we've cited in our brief was the
3 redaction in one memo of words describing the fact
4 that during his first consular visit, Mr. Arar's
5 "answers were dictated in Arabic by the Syrians."

6 With respect, Mr. Commissioner, no
7 Canadian would remotely agree that those words
8 give rise to national security concerns, and this
9 leaves us lacking confidence as to what else lies
10 behind some of the redactions.

11 It leads to our second point here,
12 which is the term "international relations."
13 International relations is, we believe, used often
14 to justify confidentiality, that likely -- we
15 don't know for sure -- that likely is the argument
16 that perhaps was made about the example I have
17 just provided, for instance, that that would
18 somehow be embarrassing to the Syrians and
19 therefore damaging of our international relations
20 with the Syrians.

21 But, Commissioner, I would like to
22 stress that international human rights law does
23 not recognize international relations in itself as
24 grounds for closing judicial processes to the
25 public. We urge you, therefore, to interpret the

1 term "international relations" narrowly, and only
2 to allow it to stand as grounds for national
3 security confidentiality when it relates to other
4 relevant grounds, such as a threat of use of force
5 against another nation.

6 And then thirdly, on National
7 Security Confidentiality more broadly, let me
8 conclude by urging that your rulings in this area
9 be narrowly confined to instances where there are
10 obvious concerns which clearly bear on national
11 security and that you maximize public disclosure
12 as fully as you can.

13 The next area I would like to
14 cover, Commissioner, is the issue of torture.

15 There have obviously been many,
16 many human rights issues that have arisen in this
17 case, but none perhaps as centrally and
18 dramatically, though, as the issue of torture.
19 We're not in a position of being able to reach
20 firm, factual conclusions as to many of the issues
21 that arise here. Much of the evidence is simply
22 not available to us. However, what we have seen
23 leads us to make a number of recommendations which
24 we believe are necessary, firstly, to guard
25 against instances where actions or omissions on

1 the part of Canadian officials, either
2 intentionally with wilful blindness, or
3 negligently, expose a Canadian citizen or, we
4 would add, a non-citizen -- this is a universal
5 right obviously -- to a risk of torture; and
6 secondly recommendations necessary to strengthen
7 the capacity of Canadian officials to protect
8 Canadians detained abroad from the risk of
9 torture.

10 The starting point here,
11 obviously, must be the overarching principle that
12 we have to reject the notion that there is any
13 sort of moral debate, any possibility of a
14 trade-off about torture. As you have just heard,
15 international law here is absolutely
16 crystal-clear, the prohibition on torture is
17 absolute, without exception, unequivocal, and for
18 very good reasons.

19 We've outlined a number of
20 recommendations, beginning at page 15 of our
21 brief, which we believe would go some way to
22 addressing the two points I just raised: Guarding
23 against instances where action or inaction may
24 contribute to torture and strengthening the
25 capacity of Canadian officials to protect. I'm

1 not going to read them, but I'd just like to
2 briefly highlight them.

3 The first, we believe that human
4 rights protocols should be developed and should be
5 integrated into the information sharing agreements
6 and arrangements that Canada has with other
7 governments.

8 Secondly, we think that the
9 Criminal Code should be amended to prohibit any
10 action or omission by any person, including
11 government officials, that exposes any person to a
12 risk of torture. We believe that's already clear
13 in the prohibition that exists on torture in the
14 Criminal Code, but the experience around this case
15 and some of the concerns that have come to light
16 suggest that there may be room for specificity in
17 Canadian law that makes it clear how broadly that
18 obligation to oppose torture extends.

19 Next, we think there's also a need
20 for law reform which clarifies that any
21 information likely obtained under torture,
22 domestically or abroad, will not in any way be
23 used in the course of investigations or judicial
24 proceedings.

25 As you've just heard, we would

1 agree with the submission that international law
2 is already very clear on this point, and Canadian
3 law should be amended to make it clear that
4 practice, law, and procedure here will be in
5 keeping with that international standard.

6 Next, we think that the Government
7 needs to establish clearer political authority and
8 central coordination for cases of Canadians
9 imprisoned abroad. We've suggested the role of
10 the parliamentary secretary for Canadians abroad
11 as one option. But in instances where there is
12 concern about serious human rights violations, I
13 think this case demonstrates the fact that there
14 can be discordance, disagreements, and that there
15 needs to be greater mechanisms put in place to
16 guard against that. And that when disputes arise
17 around strategies and action in cases involving
18 Canadians abroad with serious human rights
19 concerns, those disputes need to go quickly and
20 urgently to the Prime Minister for resolution and
21 cannot be allowed to linger within government for
22 days, weeks, or even months, while the safety of a
23 Canadian citizen stands in the balance.

24 We think that there is a need to
25 review the training and continuing education in

1 the area of human rights provided to all
2 diplomatic staff, including ambassadors. We think
3 there's also a need for expert training on
4 interviewing to detect torture, especially
5 interviewing in difficult instances abroad where
6 private visits are perhaps not easily obtainable,
7 and that an expert team should be set up for
8 advice and urgent deployment, as necessary.

9 Next, we think that there should
10 be a Canadian policy whereby consular officers
11 press for the full range of rights of Canadian
12 detainees, legal access, medical attention,
13 private consular visits -- be they dual nationals
14 or not -- be pressed with detaining authorities.
15 How actively, aggressively, publicly or privately
16 will differ from circumstance to circumstance
17 depending upon strategic considerations, but we
18 think it's absolutely vital that Canadian
19 officials always go on the record with detaining
20 authorities with the expectation as to the range
21 of rights that they expect and demand be
22 protected.

23 Next, in carrying out visits,
24 consular visits, we had some concern that it
25 seemed that perhaps sometimes the standard that is

1 used in assessing the treatment of Canadian
2 detainees is whether they are being treated any
3 worse than other detainees, and as long as there
4 is equal treatment, that there may not be room for
5 concern. We think it's critical that it be made
6 absolutely clear to consular officials that regard
7 for international human rights obligations has to
8 be the applicable standard.

9 We think a policy and practice
10 needs to be developed within government in dealing
11 with cases of Canadian citizens that have been
12 subjected to torture abroad, and let's hope that
13 the cases are not frequent, but that upon their
14 release there be an immediate referral of that
15 individual for medical and psychological
16 treatment.

17 And then lastly, two
18 recommendations which are perhaps a bit broader.
19 The first is, we think there's a long overdue need
20 to amend Canada's State Immunity Act which
21 currently stands in the way of individuals such as
22 Mr. Arar, Mr. Almalki, Mr. El Maati, Mr. Nureddin
23 being able to use the Canadian court system to sue
24 their foreign torturers and captors for redress and
25 compensation. We think there's a long overdue

1 need for that Act to be amended to make it clear
2 that when instances like torture, crimes against
3 humanity, and war crimes are on the table there's
4 no place for State immunity in Canada's courts.

5 And lastly, there's an
6 international instrument which Canada needs to
7 ratify. This is the optional protocol to the U.N.
8 Convention Against Torture, a powerful and new
9 international treaty which aims to establish a
10 global inspection team that would carry out
11 ongoing, unannounced investigations of places of
12 detention abroad, with an eye to identifying the
13 signs of torture and doing everything possible to
14 prevent and avoid torture. Something which
15 ultimately could be of great benefit to
16 individuals detained in countries like Syria, and
17 Canadian ratification of that instrument I think
18 would be an important nod to what has happened to
19 Mr. Arar and others, and an indication that
20 Canada's prepared to be part of an international
21 effort to strengthen mechanisms to avoid that
22 happening in the future.

23 The last area I would like to
24 canvass is the issue of publicity and its role in
25 Mr. Arar's release.

1 The question has often come up
2 throughout -- even before this inquiry began but
3 throughout the inquiry as well: Did publicity
4 help secure his release? What is the role of
5 publicity?

6 Certainly throughout Mr. Arar's
7 detention, Ms Mazigh was faced with this challenge
8 and was often urged by government, and even by
9 others, not to seek publicity, warned that that
10 might undermine efforts to free her husband, and
11 that's something that we know that other
12 relatives, detained in Syria and elsewhere, hear
13 frequently from government and others: Stay
14 quiet. Publicity will hurt.

15 Well, Amnesty International is an
16 organization with over 40 years of experience
17 campaigning to free unjustly imprisoned
18 individuals around the world, including in Syria.
19 Sometimes we do that very publicly. Sometimes
20 wholly behind the scenes. Sometimes it is a
21 mixture. And that, I believe, is the key point
22 here. One strategy, one approach, does not fit
23 all situations. Public or private, that
24 assessment differs from country to country, within
25 a country, it differs from case to case. With

1 respect to a particular case, it differs from time
2 to time. Sometimes there will be a need to be
3 very public. Sometimes there will be a need to be
4 very private. Sometimes very aggressive,
5 sometimes very conciliatory. But we firmly reject
6 any assertion that there should be an absolute
7 position that publicity hurts and is never the
8 best strategy. That's a view that throughout work
9 on any case needs to be continuously assessed and
10 revised.

11 And I must stress here that
12 regardless of whether the considerable media and
13 other public attention Mr. Arar's case received
14 influenced Syrians directly or not to free him,
15 there is very little doubt that growing public
16 profile of this case here in Canada pushed it to
17 higher and higher levels within the Canadian
18 government. It's doubtful that it would have
19 received the attention it did: Minister Graham's
20 involvement, MP visits, a letter from the Prime
21 Minister, Senator De Bané's mission, if there had
22 not been that degree of publicity and pressure,
23 and all of that almost certainly ultimately did
24 make some contribution to Mr. Arar's release.

25 And let's not forget as well that

1 other Canadian detainees in Syria have had a very
2 different experience. Very little publicity of
3 their cases. Much less high-level Canadian
4 political attention. Longer in jail.

5 I think the point here is that
6 publicity plays out in very different ways, and we
7 certainly urge you, Mr. Commissioner, to reject
8 any assertion that publicity can never help.

9 Those are the end of my
10 submissions. I guess I'd just like to end by
11 saying two quick things.

12 The first, that it is -- that
13 there are crucial human rights issues that are at
14 stake in this case and your recommendations will
15 have important significance, both nationally and
16 internationally.

17 And the second is to acknowledge
18 that we know that this inquiry has been complex,
19 the territory largely uncharted. Certainly the
20 procedures that have had to be devised and been
21 difficult and sometimes cumbersome, but Amnesty
22 International would like to highlight that we have
23 very much appreciated your thoughtful and
24 principled approach to dealing with this case and
25 we certainly wish you very well in your

1 deliberations.

2 THE COMMISSIONER: Thank you very
3 much, Mr. Neve. Let me here express my thanks to
4 Amnesty, and to yourself and those that have
5 worked with you. I know that you've followed the
6 inquiry closely. You've assisted the process
7 whenever you've been asked to do so and given the
8 opportunity, and I genuinely appreciate the
9 substance of your help and the cooperation with
10 the inquiry. Thank you very much.

11 MR. NEVE: Thank you.

12 THE COMMISSIONER: Mr. Cavalluzzo,
13 should we carry on? You know the schedule.

14 MR. CAVALLUZZO: Yes. We're
15 running a wee bit late, but this may be an
16 appropriate time to break and I'll speak with the
17 remainder --

18 THE COMMISSIONER: All right.
19 We'll take a 10-minute break.

20 THE REGISTRAR: Please stand.

21 --- Upon recessing at 3:26 p.m. /

22 Suspension à 15 h 26

23 --- Upon resuming at 3:39 p.m. /

24 Reprise à 15 h 39

25 THE COMMISSIONER: Good afternoon,

1 Mr. Saloojee.

2 SUBMISSIONS

3 MR. SALOOJEE: Good afternoon,
4 Mr. Commissioner.

5 I will be representing CAIR-CAN
6 and CAIR-CAF before you today in my oral
7 submissions.

8 The primary concern for both of
9 our organisations as intervenors in this inquiry
10 has been the extent to which the ordeal suffered
11 by Mr. Arar occurred as a result of his dual
12 identity as both a Muslim and also as an Arab, and
13 in addition to this, Mr. Arar's case seemed to us
14 to typify five broad concerns that have confronted
15 Canadian Arabs and Muslims post 9/11.

16 The first concern is the
17 stigmatization of Canadian Muslims and Arabs as
18 terrorists, or as having terrorist links;
19 secondly, the operational methods of RCMP and CSIS
20 and the existence of racial profiling; third, the
21 lack of education and cultural sensitivity on the
22 part of security agencies; fourth, the procedure
23 and accountability of security investigations; and
24 lastly, the erosion of fundamental rights during
25 these investigations.

1 There has also been a sixth
2 concern arising from the recent allegations by
3 Mr. Abdullah Almalki, Mr. Mohammed El Maati, and
4 Mr. Muayyed Nureddin. Taken together, we are
5 concerned that the cases raise the alarming
6 possibility that Canadian security agencies may
7 have been complicit in working closely with
8 foreign agencies to detain and interrogate these
9 individuals.

10 In my arguments today, I will
11 briefly explore these six themes, and I will make
12 reference to the evidence very generally. The
13 specifics of that are included in our written
14 submission to you.

15 Regarding the first issue, which
16 is the stigmatization of individuals as
17 terrorists.

18 Since 9/11, there has been a
19 litany of cases of Canadian Muslims and Arabs that
20 have been stigmatized and then subsequently
21 vindicated, and in all of those cases there have
22 been a great, often irreparable, loss to the
23 individual concerned, his life, his family, and
24 his livelihood. All of these cases are a matter
25 of public record. Liban Hussein, Ahmed Shahab,

1 Mohammed Attiya, and the 22 Pakistanis caught in
2 "Operation Thread", only to name a few.

3 Sometimes individuals obtained
4 legal redress, but in most cases, they didn't.

5 Mr. Arar's case is significant
6 because most Canadian Muslims and Arabs live in
7 his shadow. They fear that what happened to
8 Mr. Arar may happen to them, and indeed the mere
9 suggestion that an individual is a terrorist or
10 has terrorist ties is akin in stigma to naming
11 someone a pedophile or a serial killer. Post
12 facto vindication can never fully restore a lost
13 life.

14 The cases I mentioned earlier
15 raise concerns regarding the standards by which
16 people are investigated, either as suspects or
17 persons of interest. Now, because of national
18 security, these standards are never fully
19 revealed, but in this case, I would submit that
20 you have the unique ability to scrutinize these
21 standards.

22 In Mr. Arar's case, the facts
23 disclosed that he came to the attention of the
24 RCMP only after meeting Mr. Almalki, that he was
25 never the primary target of the investigation, and

1 that he was merely a person of interest or a
2 potential witness.

3 Notwithstanding all of these
4 protestations that Mr. Arar was only peripheral,
5 the interest in him by security agencies
6 throughout his ordeal seems to belie that
7 conclusion. Mr. Arar's case is a case of what
8 appears to be cognitive dissonance. He was not
9 central to the investigation, nor is there any
10 evidence of any terrorist affiliations, but
11 security agencies spared no effort in
12 investigating him and pursuing him for
13 information.

14 We would ask you, in our
15 recommendation, that the Government issue a clear
16 public statement indicating that there is no
17 evidence to link Mr. Arar to terrorist offences
18 and that he is, given the evidence presented so
19 far, innocent of any such charges.

20 We would also invite you, from
21 your bully pulpit, to speak more generally to the
22 issue of a government responsibility in issuing
23 such statements when others are stigmatized as
24 terrorists or as having terrorist links. In all
25 of the cases that I know there were no such

1 pronouncements, or no such clarifications, though
2 they were in many cases requested from the
3 Government.

4 We would further ask you to
5 scrutinize whether Mr. Arar was indeed a person of
6 interest, as our security agencies have claimed.
7 In many of the other cases as well, our agencies
8 claim that the individual is only a witness or
9 only a potential person -- a person of interest,
10 so we'd like you to scrutinize that claim, and if
11 there is enough evidence for this assertion, to
12 prove whether there was enough evidence to justify
13 treating him as a person of interest and to
14 justify their continued interest in him.

15 Turning now to the second issue,
16 which is operational methods and racial profiling.
17 We presented a survey to you and to the Commission
18 entitled "Presumption of Guilt," in which we
19 scrutinized the operational methods of the RCMP
20 and CSIS. We found that 8 percent of those
21 individuals who were surveyed, and it was a
22 national survey, were visited by Canadian security
23 agencies, and within that sample, we notice a
24 number of very troubling and discernible trends.

25 Individuals were frequently and

1 actively dissuaded from having a lawyer present,
2 they were regularly visited at their places of
3 work, there were numerous cases where they were
4 given incorrect and improper documentation, there
5 were instances of irrelevant and intrusive
6 questioning, scare tactics, and individuals who
7 were asked to become informants, sometimes through
8 intimidation.

9 Clearly we don't have access to
10 the full evidentiary record in the case of
11 Mr. Arar and the operational tactics used, but
12 there is reason for concern. The RCMP obtained
13 Mr. Arar's lease without a warrant, passed
14 information to the U.S. in contravention of its
15 protocols, and sent questions to the U.S. while
16 Mr. Arar was in detention and had no access to a
17 lawyer.

18 Is there any reason to believe
19 that racial profiling was at play? Superintendent
20 Cabana testified that, "Whether a criminal offence
21 was committed by somebody from the Muslim
22 community, Chinese community, or a Canadian
23 community, it really didn't make a difference."

24 Was Superintendent Cabana's
25 differentiation of Muslims and Chinese from

1 Canadians in general an oversight, or was it
2 something else? We would ask you to determine
3 whether the investigation of Mr. Arar was driven
4 by, or was the result of, in whole or in part,
5 Mr. Arar's faith or his ethnicity.

6 I would like to turn now to the
7 issue of lack of training and awareness.

8 Since 9/11, there's been a
9 heightened scrutiny of Arabs and Muslims.
10 Typically the scrutiny in the media took the form
11 of a number of mythologies. Foremost among them
12 was the idea that Muslims and Arabs were a marshal
13 people, inherently violent or militaristic, that
14 their values were anathema to our values, and that
15 they could never be true Canadians or demonstrate
16 the requisite patriotism. And many Canadian
17 Muslims and Arabs found themselves portrayed as a
18 fifth column.

19 The implications for these myths
20 are critical for those sworn to protect the safety
21 and security of Canada. Our agents and our
22 officers do not operate in a social vacuum. There
23 is a dynamic relationship between the perception
24 of threat and the investigation of that threat,
25 and the perception of threat is itself conditioned

1 by biases, lack of information, and/or cultural
2 illiteracy.

3 The interaction between the
4 community and between security agencies has been
5 very deficient. Outreach efforts have been few
6 and far between. Training has been piecemeal.
7 And education has been sporadic, at best.

8 Security threats are best
9 investigated with intelligent detective work that
10 presumes and even demands solid community
11 networks. Communities who perceive themselves at
12 the investigative end as being persons of interest
13 cannot be effective partners in the legitimate
14 quest to make Canada safer and more secure. The
15 public hearings have disclosed that since 9/11,
16 our security agencies were jolted with a sense of
17 urgency. Borders came down, it was testified, and
18 all officials were told to pull out all the stops.
19 The RCMP was ill-prepared, said the Garvie report,
20 to carry out security investigations, training was
21 lacking in general, and in specific, training
22 about the Arab-Muslim community was absent or
23 inadequate. We would ask you to recommend that
24 security agencies develop, in partnership with the
25 Canadian Muslim and Arab communities, a coherent

1 training plan for security agents and
2 investigators.

3 Such an initiative would see the
4 use of existing community resources and personnel,
5 would see regular meetings between the community
6 and senior officials, and would see policies that
7 are instituted to diversify the agencies by
8 including Muslims and Arabs among investigators
9 and policy personnel.

10 I would now like to turn to the
11 fourth point, which is the procedure and
12 accountability of security investigations.

13 As all of us know, investigations
14 are secretive and typically operate behind closed
15 doors. We are privy only to the broad contours of
16 investigation policy, but we don't have access to
17 the details. It's our expectation that such
18 investigations be conducted following the rule of
19 law and other fundamental principles, and that
20 checks and balances are adhered to in the best
21 interests of all concerned.

22 One of our greatest concerns as
23 Arabs and Muslims revolve around the transfer of
24 information. Many of the communities -- or many
25 of the countries that my community hails from do

1 not respect basic human rights, especially after
2 9/11. Dirty information passed about individuals
3 to foreign governments often has dire consequences
4 for both individuals and their families. In
5 Mr. Arar's case, the RCMP shared its entire
6 database of information with U.S. officials
7 without caveats, and in violation of its own
8 policy. Questions were shared with impunity.
9 Information sharing was contemplated with
10 torturers, and information was shuffled back to
11 Canada without, it appears, any regard for its
12 credibility or truth.

13 We would ask you to recommend a
14 strict evaluation of current protocols regarding
15 information-sharing with foreign agencies.
16 Information must not be passed where such
17 information would foreseeably contribute to the
18 torture or ill-treatment of individuals, and
19 additionally we would ask you to recommend that
20 the law be amended to ensure that those who engage
21 in this practice face strict penalties.

22 Turning now to the fifth theme,
23 which is the erosion of fundamental rights.

24 One of the most pressing
25 contemporary debates that you have heard about is

1 the trade-off between civil liberties for greater
2 security.

3 Canadian Muslims and Arabs know
4 full well that trading off civil liberties means,
5 more pointedly, their civil liberties. All
6 members of society do not appear to bear the
7 burden of security with equality. Canada's
8 security regime has been not blind, in the best
9 interests of justice, but, rather, colourblind.
10 Those stigmatized as terrorists, those languishing
11 under security certificates, those affected are
12 almost exclusively Muslims and Arabs.

13 Legislation and policies that
14 betray the rule of law create a sense of civic
15 cynicism and second-class citizenship. In the
16 current climate, it seems as the Charter of Rights
17 and Freedoms' guarantee of life, liberty and
18 security is becoming increasingly threatened. Did
19 Canadian officials protect the life, liberty, and
20 security of Mr. Arar? The evidence suggests to
21 you that Canadian officials failed in this duty
22 through numerous errors of omission and
23 commission. They failed to intervene during
24 Mr. Arar's detention in the U.S., despite U.S.
25 recommendations for intervention. They were

1 unaware of the most basic human rights abuses in
2 Syria, and they failed to request vigorously
3 Mr. Arar's basic consular rights.

4 On the contrary, officials asked
5 for interrogation reports, asked for Canadian
6 officials to interrogate Mr. Arar in Syria, and
7 gathered information to rebut the possibility of
8 torture. Our security agencies consistently
9 refused to exonerate Mr. Arar, raised political
10 objections to Canadian efforts in having him
11 returned, and travelled to Syria and had
12 high-level meetings with Syrian military
13 personnel.

14 We would ask you,
15 Mr. Commissioner, to assess the actions and
16 inaction of Canadian officials in Mr. Arar's case
17 and to determine whether they bear any
18 responsibility for having caused or contributed to
19 any of the human rights violations that he
20 experienced.

21 We would further ask you to
22 recommend that the Government establish clear
23 guidelines for consular officials, delineating
24 their responsibilities in assisting Canadians
25 abroad, indicating their role as

1 intelligence-gathering experts, and also speaking
2 to their duties to meaningfully inquire into and
3 assess torture, as well as their duty to report
4 any such concerns.

5 Lastly, Mr. Commissioner, I would
6 speak to the issue of the pattern.

7 The cases of Mr. Arar,
8 Mr. Almalki, Mr. El Maati, and Mr. Nureddin are
9 frightening due to the similarities existing
10 between them. Taken together, we think they raise
11 the possibility that Canada may have its own form
12 of rendition to torture. You've heard from my
13 colleague, Mr. Neve, about the commonalities
14 between these cases, and I won't delve into them.
15 If the allegations made by these individuals are
16 true, Canadian officials have much to account for.
17 Mr. Almalki, for example, has alleged that a
18 Canadian report was sent to Syrians after he was
19 released, that the Canadian Embassy ejected him
20 when he needed them the most, and that the
21 government flatly ignored him when he came to
22 Canada even though Mr. Arar had spoken previously
23 and publicly about Mr. Almalki's torture.

24 We would ask you to go as far as
25 the evidence allows with respect to determining

1 whether what happened to Mr. Arar can be linked to
2 a Canadian policy of rendition, of having Canadian
3 citizens detained and interrogated abroad, and we
4 would also ask you to call for a further process
5 of an independent, impartial, and expert review of
6 the cases of Mr. Almalki, Mr. El Maati, and
7 Mr. Nureddin through either the second phase of
8 this public inquiry or through any other effective
9 independent process that you consider to be
10 sufficient to ensure full and complete public
11 accountability.

12 In closing, I would like to say
13 that this is the only public inquiry that I know
14 that is examining the impact of national security
15 investigations on the life of an individual. It's
16 the only one I think in the world. Mr. Arar once
17 recounted to me a dream that he had in prison
18 where he was seen to be giving gifts of savories
19 to other prisoners. In my faith there is such a
20 thing such as true dreams. I don't have them.
21 Only the select are blessed to have them.

22 I think that the metaphor of the
23 dream was that Mr. Arar would be helping others
24 who are similarly detained.

25 There are many individuals who

1 languish forgotten in too many parts of the world,
2 and Mr. Arar is only a single case, but I have
3 every belief that Mr. Arar's justice will be the
4 justice denied of so many. This inquiry will be
5 significant, and I want to thank you as sincerely
6 as I can for having the courage to lead it.

7 Thank you so much.

8 THE COMMISSIONER: Thank you very
9 much, Mr. Saloojee. This will probably be the
10 last time you'll be before the Commission. Let me
11 express my thanks to you and to your organizations
12 for your participation and involvement throughout.
13 You've been here since the start, and I know
14 you've followed it closely and bringing your
15 perspective to the inquiry has been of great
16 assistance to me. So thank you.

17 MR. SALOOJEE: Thank you very
18 much, Mr. Commissioner.

19 MS PILLAY: Commissioner O'Connor,
20 it's very nice to see you again.

21 THE COMMISSIONER: Nice to see
22 you, Professor Pillay.

23 SUBMISSIONS

24 MS PILLAY: Thank you on behalf of
25 InCAT for allowing us to appear. As you know I'm

1 appearing on behalf of the intervenor, the
2 International Coalition Against Torture.

3 We ask you, Commissioner O'Connor,
4 to make three recommendations.

5 The first one is to recommend that
6 the Government of Canada petition the U.N., the
7 United Nations Committee against Torture, that the
8 United States has violated its obligations under
9 the U.N. Convention Against Torture.

10 As Your Lordship is aware, the
11 Convention Against Torture, in article 21,
12 provides:

13 "A State party to this
14 convention may at any time
15 declare, under this article,
16 that it recognizes the
17 competence of the committee
18 to receive and consider
19 communications to the effect
20 that a State party claims
21 that another State party is
22 not fulfilling its
23 obligations under this
24 convention."

25 Article 21 further provides that

1 such inter-State complaints are permissible so
2 long as each State party has made a declaration
3 recognizing the competence of the U.N. Committee
4 Against Torture.

5 Commissioner O'Connor, both Canada
6 and the United States have declared that they
7 recognize the competence of the U.N. Committee
8 Against Torture to receive and consider
9 communications that another State party is not
10 fulfilling its obligations under the Convention
11 Against Torture.

12 Accordingly, the U.N. Committee
13 Against Torture has the competence to hear and
14 consider a petition by Canada to determine whether
15 or not the United States did or did not fulfil its
16 obligations pursuant to the Convention Against
17 Torture with respect to the obligations the U.S.
18 itself owed to Mr. Arar.

19 There is substantial evidence
20 before this Commission that indeed the United
21 States did not fulfil its obligations under the
22 Convention Against Torture owed to Mr. Arar.
23 Mr. Arar has stated that on September 26th, 2002,
24 he arrived at JFK airport in New York, returning
25 from a family trip to Tunisia. He has stated that

1 when he arrived, U.S. Immigration and
2 Naturalization Services, the INS, took Mr. Arar
3 into custody, although he was only at JFK in
4 transit, en route returning to Canada.

5 According to Mr. Arar, with no
6 lawyers present, the INS then proceeded to
7 question him for nine hours about his alleged
8 links to al-Qaeda. Mr. Arar states that he was
9 then removed to the Metropolitan Detention Center
10 in New York where he spent 13 days, and from that
11 site, Mr. Arar was deported by the United States,
12 via Jordan, to Syria.

13 This deportation occurred without
14 a hearing, without any knowledge, apparently, of
15 the Canadian consulate, Mr. Arar's lawyer, or
16 Mr. Arar's family.

17 Ms Maureen Girvan, Canadian consul
18 in New York at the time the Americans detained
19 Mr. Arar in New York and deported him, told this
20 Commission on May 11th, 2005, that when she tried
21 to procure information about Mr. Arar's status,
22 that she was stonewalled by American officials,
23 and she has also given evidence that she was not
24 given any advance notice that Mr. Arar would be
25 deported.

1 Most significantly, this
2 deportation occurred despite Mr. Arar's repeated
3 and continuous protests and statements to U.S.
4 officials in the United States and to U.S.
5 officials in Jordan, that if returned to Syria, he
6 would be tortured.

7 He was eventually handed over to
8 Syrian authorities on October 21st, 2002. The
9 United States did not apparently insist upon or
10 implement any monitoring system to report on
11 Mr. Arar's treatment while in Syrian custody.
12 This despite a 2001 U.S. Department of State
13 report that condemned the widespread practice of
14 torture in Syria.

15 Mr. Arar has told us, or has
16 reported, that once in Syria he was taken
17 immediately into the custody of the Syrian
18 Military Intelligence branch, Far' Falastin, which
19 is allegedly known for torturing political
20 prisoners. Mr. Arar reports that he was
21 immediately, and for the next six days of
22 interrogation, subjected to torture using an
23 electric cable and beatings. During this
24 interrogation, Mr. Arar claims that because of the
25 torture, he signed a false confession that he had

1 visited Afghanistan.

2 InCAT wishes to point out at this
3 point that the U.N. Convention Against Torture, in
4 its very definition of torture found in Article 1,
5 defines torture as:

6 "Any act by which severe pain
7 or suffering, whether
8 physical or mental, is
9 intentionally inflicted on a
10 person for such purposes as
11 obtaining from him or a third
12 person information or a
13 confession."

14 The definition does continue.

15 Mr. Arar also reports that for the
16 next ten months he was kept in cruel and inhumane
17 conditions in Syria before his eventual release to
18 the Canadian consulate in Damascus on October 5th,
19 2003.

20 Your Lordship, we would also like
21 to reiterate here that the Convention Against
22 Torture prohibits State parties from expelling or
23 returning a person to another State, i.e. the
24 principle of non refoulement rather, "where there
25 are substantial grounds for believing that he

1 would be in danger of being subjected to torture."

2 There is substantial credible
3 evidence that the United States violated this
4 prohibition by removing Mr. Arar to Syria through
5 Jordan. Indeed, the Committee Against Torture has
6 heard individual complaints, and in one well-known
7 case from 1997, it considered the complaint of
8 Tapia Paez against Sweden, and the committee held
9 there that wherever substantial grounds exist for
10 believing an individual would be in danger of
11 being subjected to torture upon expulsion to
12 another State, the State party is under obligation
13 not to return that person concerned to that State.

14 Furthermore, the committee also
15 stated that the nature of the person's activities,
16 the question of what activities a person may or
17 may not have engaged in, cannot be a material
18 consideration when making a determination under
19 Article 3 of the Convention.

20 The U.N. Special Rapporteur on
21 torture has also stated that this principle of non
22 refoulement contained in Article 3 is an inherent
23 part of the overall, absolute, and imperative
24 nature of the prohibition of torture and other
25 forms of ill treatment.

1 We do not request or expect this
2 Commission to come to any conclusion on the
3 evidence of U.S. complicity in the torture of
4 Mr. Arar. We do also accept the submissions of
5 the other intervenors with respect to the pattern
6 of extraordinary renditions. We also recognize
7 that the United States is not a party nor an
8 intervenor at this Commission, and it would be
9 unfair to the U.S. to come to a conclusion on
10 their responsibility without hearing from them.

11 Nevertheless, the issues of
12 accountability, responsibility, and the need to
13 end impunity with respect to torture is an issue
14 of vital importance to Mr. Arar, to Canadians, and
15 to all members of the human family.

16 In this regard, American
17 responsibility and accountability must not be
18 overlooked but addressed, and given that there are
19 serious grounds to question whether there was
20 direct American complicity in the torture of
21 Mr. Arar, we believe that the U.N. Committee
22 Against Torture and its interstate complaint
23 mechanism is the credible mechanism to come to a
24 conclusion on that evidence.

25 InCAT also submits that

1 determining American responsibility in this regard
2 is an essential component to determining Canadian
3 responsibility with respect to what has happened
4 to Mr. Arar. In order to make a complete
5 determination of the responsibility of Canadian
6 officials it would be necessary to make a
7 determination of American responsibility.

8 Again, we request then that this
9 Commission should recommend to the Government of
10 Canada to invoke Article 21 of the Convention
11 Against Torture.

12 Our second submission is that we
13 respectfully ask this Commission to recommend that
14 the Canadian State Immunity Act be amended to
15 allow civil suits against foreign States for
16 torture. The Convention Against Torture, in
17 Article 14, provides:

18 "Each State party shall
19 ensure in its legal system
20 that the victim of an act of
21 torture obtains redress and
22 has an enforceable right to
23 fair and adequate
24 compensation."

25 This has not been the case in

1 Canada, and I would just like to point out a few
2 instances as they relate to Mr. Arar's case as
3 well.

4 Mr. Houshang Bouzari, one of the
5 founders of InCAT, sued Iran for the torture the
6 Iranian government inflicted upon him. He was
7 tortured in Iran in 1993. He became a permanent
8 resident of Canada in July 1998, and a citizen of
9 Canada in 2001. Prior to receiving his Canadian
10 citizenship, he sued Iran in Canadian courts in
11 2000, seeking compensation for his torture, but
12 without success. He lost in the Ontario Superior
13 Court in May 2002, in the Ontario Court of Appeal
14 in June 2004, and in 2005, the Supreme Court of
15 Canada denied his request to appeal the lower
16 court decision. David Matas, the co-author of
17 this submission, was one of the counsel at these
18 court proceedings.

19 The lower Ontario courts held that
20 The State Immunity Act was a bar to Mr. Bouzari's
21 lawsuit. Mr. Arar sued Jordan and Syria for the
22 torture inflicted on him. Syria did not defend
23 and was noted in default. Jordan moved to dismiss
24 the action on the basis of the State Immunity Act.
25 Mr. Arar's counsel attempted to distinguish the

1 decision of the Ontario Court of Appeal in the
2 Bouzari case on the basis that at the time of the
3 torture Mr. Arar was a Canadian citizen, but
4 Mr. Bouzari was not. The Honourable Eklin J. of
5 the Ontario Superior Court of Justice, in February
6 2005, rejected this distinction and accepted the
7 Jordanian motion, i.e., that the State Immunity
8 Act was a bar.

9 As we know, Canada is a signatory
10 to the U.N. Convention Against Torture, and it
11 provided its periodic reports on implementation of
12 that Convention to the U.N. Committee Against
13 Torture this past May 2005. Canada submitted its
14 fourth and fifth periodic reports.

15 The Committee considered Canada's
16 implementation of the Convention, and the
17 Committee released its conclusions on Canada's
18 report this past May 20th. The Committee
19 expressed its concern that in Canada there is:

20 "an absence of effective
21 measures to provide civil
22 compensation of victims of
23 torture in all cases."

24 The Committee in its
25 recommendations also included one recommendation

1 that Canada should review its position under
2 Article 14 of the Convention to ensure the
3 provision of compensation through its civil
4 jurisdiction to all victims of torture.

5 This is particularly important as
6 well, given that Mr. David Matas and Mr. Hussein
7 Bouzari met with the U.N. Committee Against
8 Torture prior to the report coming out and
9 discussed the Bouzari case, and they had just --
10 and as a result the reference to "all cases" and
11 to "all victims of torture" we suggest implies
12 that the right to compensation should not be
13 restricted to cases of torture only occurring
14 within Canada's jurisdiction.

15 Our third submission, Your
16 Lordship, is that this Commission recommend that
17 the Attorney General of Canada allow private
18 prosecutions by Canadian citizens for torture
19 inflicted abroad. Indeed, Canadian law currently
20 does allow for such private prosecution. However,
21 in a recent case in which Mr. Kunlun Zhang, a
22 Canadian citizen, a Falun Gong practitioner, and a
23 Chinese torture victim, attempted to bring a case
24 against China in a Canadian court. The Attorney
25 General of Canada refused to grant consent for

1 such a private prosecution. Mr. David Matas
2 represented Kum lin Zhang in this action, and
3 although it is unclear whether the Attorney
4 General's consent is actually required, out of an
5 abundance of caution, he did request such consent,
6 and as stated, it was denied.

7 InCAT's submission here is that
8 the Attorneys General have used the policy on
9 public prosecutions in making a determination of
10 whether a private prosecution should be allowed,
11 and we respectfully submit that that was an error,
12 and indeed, when it comes to citizens bringing
13 actions against a foreign State for torture
14 committed abroad, consent to prosecute should be
15 allowed by the Attorney General, given the gravity
16 of the crime which, as we've heard this afternoon,
17 is a crime that has jus cogens dimensions.

18 So these are our submissions, and
19 thank you, Commissioner.

20 THE COMMISSIONER: Thank you very
21 much, Professor Pillay. Let me express my
22 appreciation to you and to InCAT for preparation
23 of your submissions and your participation in the
24 inquiry. I appreciate it. Thank you.

25 --- Pause

1 MR. BARRETTE: Mr. O'Connor, I
2 will make my submission in French.

3 THE COMMISSIONER: Okay. I'll
4 need --

5 M. BARETTE : Je vais obliger tout
6 le monde à prendre -- ou presque.

7 THE COMMISSIONER: No, no. That's
8 fine. I just have to wait for my earphones.

9 Merci beaucoup.

10 --- Pause

11 THE COMMISSIONER: Okay. Go
12 ahead.

13 SOUMISSIONS

14 M. BARETTE : OK. So I'm Denis
15 Barette. De la Coalition pour la surveillance
16 internationale des libertés civiles.

17 Ma présentation va être un peu
18 décousue puisqu'il y a beaucoup de thèmes qui ont
19 été abordés par d'autres intervenants qui m'ont
20 précédé.

21 Je dois toutefois vous dire que
22 nous avons été créés -- la coalition, le CSILC, le
23 ICMLMG en anglais -- nous avons été créés après
24 le 11 septembre, suite aux événements que l'on
25 connaît et suite aussi à nos craintes que les

1 mesures de sécurité portent gravement atteinte aux
2 droits humains.

3 Malheureusement, beaucoup de
4 facteurs ont confirmé notre crainte.

5 On peut penser aux équipes
6 intégrées d'agences d'enquête entre les États-Unis
7 et le Canada, au partage effréné d'information
8 entre agences et entre États, au certificat de
9 sécurité qui permet de garder des gens détenus
10 pendant plusieurs années sans procès, au discours
11 du gouvernement du Canada qui permet de justifier
12 le renvoi vers la torture dans des circonstances
13 exceptionnelles, et évidemment aux cas de
14 messieurs Arar, Almalki et El Maati.

15 Le secrétaire général des Nations
16 Unies Kofi Annan et l'ancienne juge Louise Arbour,
17 qui est maintenant haute commissaire aux Droits de
18 l'homme, se sont levés dans la dernière année pour
19 dénoncer les dérives des mesures sécuritaires et
20 pour réaffirmer l'importance de mettre de l'avant
21 les droits de l'homme.

22 Tous les intervenants vont aussi
23 dans ce sens là, j'en suis certain.

24 Monsieur David Crossin a bien
25 expliqué l'importance du droit international dans

1 cette enquête.

2 On voudrait souligner deux-trois
3 aspects à ce sujet là, notamment : le pacte
4 relatif au droit international et relatif au
5 droits civils et politiques, à l'article 4,
6 interdit -- même dans un cas où le danger immédiat
7 de menace d'existence à la nation, il est interdit
8 de pratiquer la torture ou d'infliger des
9 traitements cruels ou inhumains. Clairement
10 interdit par le pacte des droits civils et
11 politiques.

12 Le Canada a signé ces pactes là.
13 Le Canada a signé aussi la Convention contre la
14 torture.

15 Malgré ces signatures, malgré ces
16 engagements, malgré sa réputation de pays où on
17 respecte les droits humains, le Canada maintient
18 toujours le discours -- le gouvernement canadien
19 maintient le discours qu'il y a toujours des
20 circonstances exceptionnelles.

21 Même ce matin, on entendait
22 l'avocat, une avocate du Canada, du gouvernement
23 canadien, que dans certains cas, il y a certains
24 cas, certains cas de menace, ou certains cas où on
25 pourrait justifier ou pondérer les droits de la

1 personne, certains droits de la personne et la
2 sécurité des Canadiens.

3 Je vous rappelle, Monsieur le
4 Juge, comme bien d'autres, qu'il n'y a aucune
5 pondération, aucun équilibre possible entre
6 torture, mauvais traitement et sécurité nationale.

7 Ce discours là est maintenu
8 constamment par le gouvernement canadien et par
9 certains témoins de l'enquête.

10 Vous avez monsieur Ward Elcock,
11 qui était à l'époque directeur du SCRC, qui est
12 venu vous dire qu'il faisait un « balancing », un
13 équilibre, entre besoin de sécurité et besoin de
14 renseignements et droits de la personne.

15 Il rajoute que, dans certains cas,
16 il va recommander des ententes de partage de
17 sécurité avec des pays qui sont soupçonnés de
18 pratiquer la torture.

19 Ce genre de pondération là,
20 Monsieur le Juge, n'est rien d'autre pour nous
21 qu'une justification de la torture. Cela ne mène à
22 rien d'autre.

23 Nous irions plus loin. À la
24 limite, cela nous mène à une participation, à une
25 complicité à des pays où on pratique la torture.

1 La réputation du Canada au niveau
2 international est grande, et nous en sommes fiers.
3 On dit qu'au Canada on est réputé avoir un respect
4 des droits humains, sauf que cette réputation là
5 ne va pas sans obligation.

6 On peut imaginer l'impact sur la
7 communauté internationale si le Canada se met à ne
8 pas respecter les conventions internationales des
9 droits de l'homme.

10 La sous-traitance de la torture.
11 Je n'aborderai pas le sujet plus qu'il ne le faut.
12 Nous sommes d'accord avec ce qu'Alex Neve vous a
13 dit à ce sujet là.

14 On a signé les représentations des
15 intervenants à ce sujet là. On croit aussi qu'il
16 est légitime, que le public peut légitimement
17 savoir ce qui est advenu et s'il y un modèle de
18 sous-traitance de torture au Canada sur les
19 détenus des Canadiens ou des détenus à l'extérieur
20 du pays qui pourrait peut-être nous donner de
21 l'information.

22 Je vais aborder la question du
23 partage d'informations.

24 Monsieur Arar, on sait que le 29
25 novembre 2001, on a une note sur un document qui a

1 été déposé, dont je n'ai pas la pièce ici, comme
2 quoi monsieur Arar serait un « terrorist », en
3 anglais.

4 Donc, monsieur Arar se retrouve
5 sur une « watch list », je vais l'appeler comme
6 ça, où on trouve l'indication « terrorist ». Cela
7 est le 29 novembre 2001.

8 Tous les témoins du gouvernement
9 sont venus vous dire qu'on ne considérait pas
10 monsieur Arar comme terroriste, mais comme témoin
11 potentiel. Il n'était même pas suspect.

12 Alors, on se pose la question :
13 Pourquoi cette mention là se retrouve à l'aéroport
14 Trudeau à Montréal lors de son arrivée à Montréal
15 ? Terroriste. D'où vient cette mention là ?

16 Plusieurs hypothèses.

17 La première : elle provient de
18 responsables canadiens qui ont décidé qu'on devait
19 imposer cette mention là à monsieur Arar.

20 Autre hypothèse : elle provient de
21 responsables des États-Unis qui l'incluent sur
22 leur base de données et ensuite l'information est
23 transmise aux bases de données des aéroports
24 canadiens.

25 Cette hypothèse là nous fait

1 demander : quelle est l'autonomie véritable du
2 Canada sur les bases de données utilisées dans les
3 aéroports, quel contrôle véritable a-t-on de nos
4 bases de données d'enquête et qui décide de ce qui
5 est inscrit, des inscriptions, sur les bases de
6 données d'enquête, qu'elles soient dans les
7 aéroports ou ailleurs ?

8 Et cela nous amène à l'intégration
9 des équipes d'enquête.

10 Ce que j'ai compris des
11 témoignages de monsieur Cabana, c'est que le FBI,
12 et probablement la CIA, ne sont pas seulement des
13 observateurs dans l'équipe A-OCANADA. Ils sont des
14 participants dans l'équipe A-OCANADA.

15 J'ai compris que les réunions se
16 font plus d'une fois par semaine. J'ai compris que
17 l'information circule. Et j'ai compris aussi, des
18 plaidoiries de mes collègues du gouvernement, que
19 la pression était énorme de la part des États-Unis
20 pour faire des enquêtes sur le terrorisme.

21 Et je me pose la question
22 légitimement : Est-ce que, dans les équipes
23 intégrées, le Canada peut conserver sa
24 souveraineté dans les enquêtes soit criminelles ou
25 les enquêtes de sécurité ou criminelles de

1 sécurité, en fait ? Puisque monsieur Cabana
2 diffère les deux. Une enquête criminelle de
3 sécurité. Et encore là, qui décide vraiment de ce
4 qui se passe ?

5 Monsieur Cabana nous dit que dans
6 l'équipe intégrée on travaille sur le modèle du
7 « open book investigation ». Et, je vous
8 sou mets -- dans nos recommandations, Monsieur le
9 Juge, on vous soumet plusieurs recommandations
10 pour une révision des équipes intégrées, et même
11 un moratoire des équipes intégrées, une
12 révision -- vous avez les recommandations.

13 Il y en a plusieurs. Je vous vois
14 les regarder. Ça commence à la recommandation
15 numéro quatre jusqu'à la recommandation numéro 13.

16 Il y a plusieurs différentes
17 recommandations sur soit le partage de données, le
18 partage d'information, soit les équipes intégrées
19 et soit la question de la souveraineté canadienne
20 à l'intérieur du partage d'information des équipes
21 intégrées.

22 Une chose est sûre, Monsieur le
23 Juge -- Monsieur le Commissaire, pardon. Une
24 chose est sûre, Monsieur le Commissaire, c'est
25 que, qu'il s'agisse des droits de l'homme, des

1 droits de la personne, ou qu'il s'agisse de
2 partage d'information, de donner une formation aux
3 fonctionnaires ou de changer les règles de
4 procédures ne changera rien si la culture ne
5 change pas.

6 Cela ne changera rien si les
7 orientations politiques à haut niveau ne sont pas
8 modifiées.

9 Et cela ne change rien sur ce qui
10 s'est passé à monsieur Arar.

11 Pour ce qui est de la
12 responsabilité des personnes en cause dans cette
13 enquête, je dois vous dire que notre coalition
14 trouve invraisemblables les explications de
15 plusieurs responsables qui sont venus témoigner
16 ici.

17 Nous avons lu ou écouté des
18 personnes de haut niveau, de haut rang -- monsieur
19 Pillarella, monsieur Cabana, monsieur Elcock --
20 venir nous dire que --

21 Par exemple, monsieur Elcock,
22 avocat qui a travaillé, je crois, au bureau du
23 Conseil privé à une certaine époque comme avocat,
24 directeur du SCRS, ne connaît pas de définition de
25 la torture. Monsieur Elcock n'est pas certain

1 qu'il y ait de la torture infligée en Syrie.

2 Monsieur Pillarella. Monsieur
3 Pillarella, ancien directeur de la division des
4 droits humains au ministère des Affaires
5 étrangères. Monsieur Pillarella ne connaît pas --
6 ne sait pas ce qu'est la « Palestine Branch », le
7 lieu où sont détenus Maher Arar et les autres, ne
8 sait pas que la « Palestine Branch » est un lieu
9 qui est contrôlé par les services de
10 renseignements syriens. Pourtant, il connaît bien
11 monsieur Khalil.

12 Monsieur Pillarella ne sait pas
13 non plus si on torture en Syrie, ne connaît pas la
14 situation en Syrie.

15 Écoutez, on trouve cela incroyable
16 parce qu'une personne de si haut niveau, si haut
17 placée, est présumée connaître -- d'abord, est
18 présumée être compétente, présumée connaître la
19 situation en Syrie, présumée être responsable et
20 compétente et savoir quoi faire dans des
21 situations semblables que celles qu'à vécues
22 monsieur Arar.

23 C'est invraisemblable, Monsieur le
24 Juge, surtout si l'on sait que monsieur Pillarella
25 était très -- travaillait très fort à organiser

1 des rencontres entre les agences de renseignements
2 et les Syriens ou à servir de courroie de
3 transmission entre soit les agences de
4 renseignements et la GRC et les Syriens.

5 Il est important que la commission
6 fasse la lumière, dans son rapport, sur les
7 obligations et sur les manquements des
8 fonctionnaires de haut niveau dans le cas de
9 monsieur Arar.

10 Je ne veux pas m'éterniser. Je ne
11 relirai pas tout le mémoire évidemment, mais je
12 vous dirais qu'on est d'accord aussi avec ce que
13 monsieur Neve vous a dit quant au huis-clos.

14 Il est important que le public --
15 le public s'attend à avoir des réponses à toutes
16 les questions qui ont été posées.

17 C'est une question de légitimité.
18 C'est une question de légitimité, pas de la
19 commission, mais de légitimité des agences
20 d'application de la loi.

21 Et on vous encourage à maintenir
22 la position -- maintenir que l'enquête soit le
23 plus public possible. Et on espère que le
24 gouvernement va lever les obstacles au caractère
25 public, à la tenue du caractère public des

1 conclusions de votre enquête. Et on vous encourage
2 à ce que le rapport soit le plus public possible.

3 Finalement, Monsieur le
4 Commissaire, on voudrait vous faire part qu'on a
5 beaucoup apprécié votre écoute et votre
6 sensibilité envers les intervenants, et on a aussi
7 beaucoup apprécié que vous nous ayez permis
8 d'avoir quelqu'un pour faire la coordination entre
9 les intervenants, qui est madame Kerry Pither, qui
10 a fait un très bon travail. Même, c'est peu dire,
11 un travail extraordinaire. Et on fait confiance à
12 votre rapport, qui, espérons, va arriver le plus
13 tôt possible.

14 Merci.

15 LE COMMISSAIRE : Merci beaucoup,
16 Monsieur Barette.

17 Let me thank you, as well as
18 Mr. Allmand and your group, for your involvement
19 and participation. From the very beginning, you
20 have been involved, and I'm keenly aware of it,
21 and certainly also Mr. Allmand in the round table
22 and the policy review. I appreciated that. So
23 thank you very much for coming today and your
24 presentation.

25 SUBMISSIONS

1 MR. SHRYBMAN: Good afternoon,
2 Mr. Commissioner.

3 THE COMMISSIONER: Good afternoon.

4 MR. SHRYBMAN: I appreciate the
5 opportunity to make these final submissions on
6 behalf of the Council of Canadians and the Polaris
7 Institute.

8 I should begin by acknowledging
9 that we've only been able to play a very limited
10 role in this inquiry. At the outset of the
11 inquiry, we made reasonably detailed
12 submissions --

13 THE COMMISSIONER: I recall.

14 MR. SHRYBMAN: -- about the issues
15 that we believed that it was crucial for you to
16 consider and address, and our understanding of the
17 evidence only reinforces our notion that these are
18 key issues, and certainly we encourage you to do
19 your best to tackle them.

20 But our ability to participate,
21 you know, with the Commission and its staff in
22 order to ensure that these issues were fully
23 pursued, was seriously frustrated by a lack of
24 resources to follow the proceedings and to wade
25 through the very voluminous evidence and

1 documentation that continued to arrive at my
2 office.

3 But I don't want you to take from
4 that a lack of interest by my clients in the
5 proceedings or the very serious issues that are
6 before you. So I'm here again to make
7 submissions, though they are limited in scope. I
8 should note that as well.

9 So we have joined with other
10 groups and have endorsed the submissions with
11 respect to a pattern. You will find both the
12 Council of Canadians and the Polaris Institute as
13 signatories to those submissions; and on these
14 issues, we encourage you to determine and make a
15 finding as to whether or not what happened to
16 Mr. Arar and others is linked to policies,
17 practices, and procedures that led to the
18 detention and interrogation by Syrian and Egyptian
19 intelligence agencies of Canadian Muslim men.

20 We are also aware and strongly
21 support the positions adopted by several other
22 intervening groups, particularly those that are
23 concerned with international human rights and
24 Canadian civil liberties, and in particular,
25 Amnesty International and the International Civil

1 Liberties Monitoring Group, of which the Council
2 of Canadians is a member, and we are very grateful
3 for the work those organizations have done and
4 their attentive and active participation in these
5 proceedings.

6 However, the lens that my clients
7 view the events surrounding Mr. Arar is a little
8 different than the ones brought to those events by
9 these other groups.

10 The groups that I represent spend
11 a great deal of time and energy and attention
12 focussed on the issues of Canada-U.S. relations,
13 whether those are issues of trade, Canadian
14 sovereignty with respect to water or missile
15 defence or defence policy generally. Those are
16 the preoccupations or key preoccupations for both
17 the Council of Canadians and the Polaris
18 Institute. So while these groups share the
19 concerns that have been raised by other
20 intervenors, their perspective on the events
21 surrounding Mr. Arar is also informed by an
22 understanding of the nature of Canadian-U.S.
23 relations, particularly in the post-9/11
24 environment.

25 Mr. Neve has suggested that you

1 tackle the process of writing your report and
2 preparing recommendations within the context of
3 international law relating to human rights and
4 that larger framework of law and policy that
5 relates to human rights and civil liberties. We
6 encourage you as well to consider another context
7 while you go about your work, and that is the
8 context of Canada-U.S. relations and the policies
9 and practices and institutional framework that was
10 established and enhanced particularly in the wake
11 of the events of September 11th.

12 When I appeared before you at the
13 outset of this inquiry, I expressed some concern
14 about the Commission's mandate being too hastily
15 and narrowly focussed on the activities of
16 Canadian police, security, and intelligence
17 services, and pointed to the fact that the policy
18 review was going to be limited in scope to
19 recommending additional oversight or perhaps
20 institutional controls for the RCMP.

21 The apprehension that this raised
22 for us was that in fashioning your mandate in that
23 manner, the Canadian government had adopted a
24 policy that was intended to distract your
25 attention to the symptoms rather than the causes

1 of the events that gave rise to the abuses that
2 Mr. Arar has suffered.

3 It is essential, we submit, for
4 this Commission to resist any temptation to
5 examine the conduct of Canadians officials,
6 whether employed by the RCMP, CSIS, the Department
7 of Foreign Affairs and International Trade or
8 elsewhere, including those elected to office, in
9 isolation from the government's policies,
10 programs, and institutions that provided direction
11 and established the context within which these
12 officials operate.

13 The Canadian officials referred to
14 in the Commission's mandate must be taken, in our
15 view, to include those responsible for fashioning
16 Canadian security agenda, not just those charged
17 with carrying it out.

18 Accordingly, we believe that it is
19 vital for the Commission to identify that policy
20 and institutional framework within which Canadian
21 officials involved in the Arar case operated. A
22 thorough examination of this context is essential
23 if the actions of Canadian officials are going to
24 be properly understood and assessed and if the,
25 you know, egregious mistreatment that Mr. Arar

1 suffered at the hands of several governments is to
2 not recur.

3 I won't take you through our
4 written submissions, but there are two issues that
5 are fundamental, from our perspective, for you to
6 explore in this regard. One of them is the role
7 of Privy Council Office, not just in terms of
8 whether or not it properly acted to arbitrate
9 competing agendas as they might have played out as
10 between the RCMP and CSIS and officials at the
11 Department of Foreign Affairs and International
12 Trade but also as the architect of the policy and
13 institutional framework that we regard as
14 providing an important explanation for what
15 happened to Mr. Arar and why the officials that
16 were engaged directly in his case and that worked
17 on the file behaved in the manner they did.

18 And you will find the origins of
19 those policies -- so they preexisted the events of
20 9/11. They were given a much higher status within
21 the government, and indeed Privy Council Office
22 established a team to organize and coordinate and
23 orchestrate a whole broad institutional and policy
24 agenda to address the concerns that arose in the
25 wake of those terrorist attacks.

1 It's very clear that Canada's
2 motivation wasn't just to secure the security of
3 Canadians, their physical security, but also was
4 very much determined by a desire to keep the
5 border open with the United States and attend to
6 the economic security of Canadians, and it's an
7 important explanation of why the government
8 responded in the way it did and why we believe so
9 little attention was paid to constitutional
10 constraints on the capacity of Canadian officials
11 to act, including those set out in the Charter of
12 Rights and Freedoms, and so little attention paid
13 as well to Canada's obligations under
14 international law as they concern human rights and
15 civil liberties.

16 The other issue that we invited
17 you to explore in our opening submissions that
18 also speak to the interrelationship or confluence
19 of competing foreign policy objectives, some
20 relating to security, some relating to foreign
21 investment, some relating to international trade,
22 some just broadly framed in terms of accommodating
23 U.S. interests and ambitions, was to point out
24 that, during that very period of time that Canada
25 was ostensibly trying to secure Mr. Arar's release

1 from Syria, Canada was negotiating two important
2 investment agreements with the Government of Syria
3 having to do with oil and gas exploration and
4 development, including one by Petro-Canada in
5 which it then had a significant equity interest.

6 I don't know to what degree
7 Canada's consul in Syria was engaged in
8 facilitating that foreign investment endeavour,
9 but it seems to me that the two objectives were
10 clearly playing out at precisely the same time,
11 and one can imagine that one might have well
12 influenced the other and the degree to which
13 Canada's consul might want to accommodate the
14 interests or requests for advice or assistance
15 that might have been received from Syrians
16 officials.

17 I don't know, to close, how far
18 along with the inquiry into these issues the
19 Commission has been able to go. I've had a chance
20 to review some of the evidence, in particular the
21 evidence of Mr. Dickenson, and while it's probing
22 with respect to his role in relation to the
23 actions of Canadian officials in and around
24 Mr. Arar, it doesn't go very far in terms of
25 exposing these broader issues that we think it's

1 important for you to contend with. There may be
2 more that has come to light in the in-camera
3 evidence that's not apparent from the summaries
4 that have been made available to us. You may have
5 the evidence you need in order to tackle these
6 issues; you may not. I'm thinking of Mr. Neve's
7 suggestion that you may decide, with respect to
8 the submissions from our groups and others about
9 the pattern that may exist in this context, that
10 further inquiry is necessary if indeed you do have
11 that view or develop it.

12 The issues that we've asked you to
13 canvass, if not fully canvassed, might also be
14 suitable subjects for that type of further
15 inquiry.

16 So those are my submissions.

17 THE COMMISSIONER: Well, thank
18 you, Mr. Shrybman. I can assure you I'll consider
19 the issues that you raise. You know, I'll reflect
20 on it. I think you fairly touch on the point that
21 they're not issues that, in any large sense, as
22 you noted, that we've explored, but I'll certainly
23 give careful consideration to what you raise.

24 Let me thank you and your groups,
25 the two you represent, for participation and

1 coming, and I join in your comments that the
2 coordination of the intervenor groups through Ms
3 Pither has been most helpful, so I share in those
4 comments, and I think that was a very positive
5 step for the intervenors and for the inquiry as
6 well.

7 Thank you.

8 Mr. Westwick?

9 SUBMISSIONS

10 THE COMMISSIONER: Good afternoon,
11 Mr. Westwick.

12 MR. WESTWICK: Good afternoon,
13 Commissioner. I now know what it is like to be
14 the clean-up hitter in the batting order.

15 THE COMMISSIONER: You're batting
16 No. 9, I'd say, not the clean-up. You mean we're
17 only at the fourth spot?

18 --- Laughter / Rires

19 MR. WESTWICK: Mr. Commissioner,
20 since the submissions of the Ottawa Police Service
21 are on record and are available to the interested
22 parties, I wish to use the time today not to read
23 them into the record but rather to highlight some
24 of the issues that are of importance to us.

25 I wish to point out that the

1 written submissions have been shared earlier today
2 with the Muslim and Arab community in Ottawa and
3 will be available on our web site later this
4 afternoon.

5 While the outcome of this inquiry
6 is of grave importance to all of those that are
7 represented here today and to the Canadian public,
8 it is also of special importance to the Ottawa
9 Police Service. It is of importance to the Ottawa
10 Police Service because its officers, as you well
11 know, were involved in Project A-OCANADA.

12 In addition, it's important to the
13 Ottawa Police Service because there is an
14 expectation, a public expectation, within the
15 Ottawa community, that the police service will use
16 its resources, working with its police partners,
17 to solve crime, prevent terrorism, and keep the
18 community safe.

19 In our submission, your report
20 will serve two important purposes: The first,
21 obviously, will be to address the mandate that the
22 Government has given to this Commission. It will
23 comment on the action of Canadian officials, make
24 conclusions based on the evidence, the evidence
25 that the Commission has heard over the last

1 several months. This has been the focus of
2 extensive submissions today and yesterday and is
3 obviously a paramount purpose.

4 This, however, is not the only
5 purpose to which your report will be used. With
6 time, the report will be increasingly looked upon
7 for its future application. As is the case with
8 previous Commissions of Inquiry, the report of the
9 fact-finding component of the Arar Commission,
10 together with the recommendations on Part 2, will
11 make a significant and serious contribution to the
12 body of knowledge about how public authorities
13 conduct major multi-jurisdictional investigations
14 in Canada.

15 Like other commissions and
16 judicial inquiries, for example the Campbell
17 Commission, the Macdonald Commission, and judicial
18 inquiries into the wrongfully convicted, this
19 report will be studied by police, courts, and
20 oversight bodies, thereby informing
21 administrative, operational, and legal decisions
22 in respect of major investigations, including
23 those dealing with national security.

24 So, Mr. Commissioner, since
25 national security investigations are of such

1 importance to the citizens of Ottawa, and since,
2 when the dust settles, the Ottawa Police will
3 continue to be involved in these kinds of major
4 investigations, we have a strong interest in
5 addressing both of those purposes of your report.

6 If I may deal with the first
7 purpose of the report, the conduct of Canadian
8 officials, insofar as it applies to the Ottawa
9 Police Service and its members who were involved
10 in Project A-OCANADA, I can put our position very
11 succinctly: It is our submission that there is no
12 evidence to suggest any wrongdoing, malice,
13 inappropriate action or inaction on the part of
14 the Ottawa Police Service or its officers, and
15 further it is our submission that the --
16 submission of the Ottawa Police Service that the
17 report of the Commission of Inquiry should confirm
18 that.

19 The Ottawa Police stands by its
20 role in Project A-OCANADA, supports its officers
21 for their professionalism, commitment, and
22 endorses the continued involvement of the police
23 service in national security investigations in the
24 National Capital Region.

25 Being respectful of the in-camera

1 proceedings, I must err on the part of not
2 commenting further except to say that the Ottawa
3 Police Service and its officers have received
4 standing and participated in both public hearings
5 and in-camera hearings at the Commission of
6 Inquiry. We do so, sir, out of respect for the
7 important work that you are doing and to assist,
8 if we may. We also note that the police service
9 and the officers have cooperated fully and
10 completely with your Commission.

11 Having said that, I would like to
12 devote the remainder of my time to the second
13 purpose of the report: Its future application.
14 And rather than review the evidence and invite you
15 to consider our interpretation, I would like to
16 focus, perhaps proactively and prospectively, on
17 the report and its impact on future national
18 security investigations, more specifically I would
19 like to address information-sharing, case
20 management, and integrated policing.

21 It is the submission of the Ottawa
22 Police Service that the practice of
23 information-sharing among police is critical to
24 the success of any major police investigation,
25 including a national security investigation; and

1 further, that the principles and underlying value
2 of information-sharing applies equally to Canadian
3 law enforcement agencies sharing information with
4 law enforcement in the United States. This is not
5 new.

6 Investigation is the collection,
7 analysis, and management of information.
8 Investigations are often solved as a result of
9 linkages from minor and often previously unrelated
10 pieces of information. Information-sharing in an
11 investigative context is fundamental and
12 necessary.

13 Information-sharing in a
14 multi-jurisdictional context is critical.

15 In moving forward, let us not
16 forget where we have been. The Bernardo
17 investigation review, the report of Mr. Justice
18 Archie Campbell, 1996, looked into the allegations
19 that Ontario Police Services did not properly
20 share or manage information obtained in separate
21 investigations in different jurisdictions and a
22 suggestion that harm occurred as a result.

23 Much of the current thinking in
24 police operations was formed by the wise words of
25 Justice Campbell. Following an intensive and rare

1 look into the mechanics of a major
2 multi-jurisdictional investigation, Justice
3 Campbell tells police not to work in silos, to set
4 aside the turf wars and the protectionism. He
5 implores police to work together and to share
6 information. He says the problem with major
7 investigations is even greater when there are
8 separate investigations with no capacity to share
9 and pool information about suspects and
10 investigative leads.

11 Justice Campbell's thinking is not
12 unique. It is often repeated in the reports of
13 judicial inquiries into the cases of wrongfully
14 convicted because information both inculcates and
15 exculpates. In order to provide protection and
16 prevention to their communities, law enforcement
17 agencies must communicate, cooperate, and
18 coordinate, including the exchange and sharing of
19 information.

20 Today's society operates in a
21 global context, characterized by instantaneous
22 communication, an international economy, world
23 wide technology, and multinational citizenship.
24 It is well-settled that organized crime and
25 terrorism are not limited to one jurisdiction but,

1 rather, thrive in a global environment, with
2 law-breaking activities freely and frequently
3 moving across local, national, and international
4 boundaries.

5 In our submission, Justice
6 Campbell's words are as applicable today as they
7 were in 1996: Canadian police must be able to
8 respond, cooperate, and share in order to defeat
9 the efforts of organized criminals and terrorists
10 who try to exploit investigative weaknesses caused
11 by jurisdictional boundaries.

12 Justice Campbell goes further than
13 telling police to just share information. He also
14 recommends a systematic approach to information
15 management that structures the investigation so
16 that information is properly managed and shared.
17 Justice Campbell says:

18 "A case management system is
19 needed that is based on
20 cooperation rather than
21 rivalry among law enforcement
22 agencies. A case management
23 system is needed that depends
24 on specialized training,
25 early recognition of linked

1 offences, coordination of
2 interdisciplinary and
3 forensic resources, and some
4 simple mechanisms to ensure
5 accountability and
6 coordination."

7 While he is speaking about serial
8 sexual predators, from an investigative technique
9 standpoint and process standpoint, all major
10 multi-jurisdictional investigations share common
11 features. Case management is now statutorily
12 mandated in Ontario for police.

13 The last topic where the report
14 can inform future investigations, in our
15 submission, is integrated policing. It will come
16 as no surprise to you, Mr. Commissioner, that the
17 Ottawa Police wish to make a strong representation
18 on integrated policing. Integrated policing is
19 the effective coordination and collaboration of
20 operational effort by agencies operating in
21 multiple jurisdiction with overlapping mandates.

22 Our submissions quote RCMP Deputy
23 Commissioner Loeppky on several points related to
24 integrated policing. Since I am limited to the
25 public evidence, and lest anybody think that this

1 is not an important concept to Canadian police, I
2 also point to the recent annual conference of the
3 Canadian Association of Chiefs of Police, which
4 took place a few weeks ago here in Ottawa, where
5 virtually every police leader endorsed the concept
6 of integrated policing. While integrated police
7 operations take place throughout Canada, its
8 principles are likely more employed in Ottawa than
9 elsewhere, and there are several reasons for this.

10 In addition to the proximity of
11 the provinces of Quebec and Ontario, as the seat
12 of the Government of Canada is located in Ottawa,
13 there are unique overlapping jurisdictions within
14 the city itself. Both the RCMP and the Ottawa
15 Police have long recognized this and are working
16 together, meeting these new policing challenges.
17 Mr. Loeppky pointed to examples of integrated
18 operations between the Ottawa Police and the RCMP
19 with promises of more to come.

20 Some of these operations are
21 visible to the public. For example, where
22 officers are performing duties undertaken by
23 others in different uniforms. For example, RCMP
24 officers driving marked vehicles, Ottawa
25 Police-marked vehicles, and responding to general

1 duty calls.

2 Some activities, like A-OCANADA,
3 are not so visible.

4 In either case, the concept of
5 integrated policing is simple: Work together,
6 maximize resources, and provide a professional,
7 integrated service within the City of Ottawa.

8 As you will soon see, sir, in part
9 2, integrated police operations create intriguing
10 legal and practical issues, including
11 constitutional concerns.

12 Mr. Commissioner, as the first
13 inquiry to look at an integrated police operation
14 in the way that you have, the Ottawa Police
15 Service invites you to comment in a positive way
16 on the concept.

17 More generally, while we welcome
18 your insights into the investigative process, we
19 caution against comments that may be interpreted
20 as a retreat from the Campbell report. We worry
21 that restrictions and limitations on
22 information-sharing, case management, even in an
23 international concept, may create a spillover
24 chilling effect on their application to domestic
25 multi-jurisdictional investigations, returning

1 policing to a time before Campbell.

2 In conclusion, I'd like to make
3 four comments: No one knows its community like
4 the police of local jurisdiction. The Ottawa
5 Police Service works within the community
6 cooperatively and actively in problem-solving and
7 crime prevention. This day-to-day working
8 relationship builds the mutual trust and
9 confidence drawn upon both the police and the
10 community in difficult times and circumstances,
11 such as a national security investigation.

12 My second point. The report of
13 the Commission of Inquiry will have to be crafted
14 so as to ensure a vigorous and effective response
15 to the current reality of terrorism.
16 Mr. Commissioner, you will need to be
17 statesmanlike in order to harmonize community
18 expectations for safety and prevention while, at
19 the same time, reinforcing the respect for human
20 rights and the important application of the
21 Canadian Charter of Rights and Freedoms.

22 In striking this vital balance, we
23 hope that you will be mindful of our concerns
24 about integrated policing, case management, and
25 information-sharing, not just as the police say

1 they are but, rather, as described by Mr. Justice
2 Campbell.

3 The work of the Commission has
4 received significant public attention within the
5 community and also within policing circles. It is
6 important that in the result Canadian police have
7 a clear mandate to conduct comprehensive
8 investigations into crime and national security
9 matters and that the public have a clear
10 understanding of the special challenges associated
11 with national security investigations.

12 My last comment, sir, while we
13 understand that you have had very important issues
14 to resolve arising from your mandate with very
15 tight time frames, you have, nonetheless, always
16 treated our issues with respect and professional
17 courtesy, as has your counsel team, and we thank
18 you sincerely for that.

19 Thank you.

20 THE COMMISSIONER: Thank you very
21 much, Mr. Westwick. Again, let me express my
22 appreciation to you and to the police service for
23 your participation. I think throughout it's been
24 very appropriate, it's been very useful, and I
25 appreciate the spirit of cooperation that you've

1 brought to the inquiry, so thank you very much.

2 MR. WESTWICK: Thank you very
3 much, sir.

4 THE COMMISSIONER: Mr. Cavalluzzo?

5 MR. CAVALLUZZO: Mr. Commissioner,
6 that would complete the public submissions. As
7 the schedule indicates, there will be in-camera
8 submissions tomorrow, which will commence at 9:30.

9 THE COMMISSIONER: At 9:30
10 tomorrow.

11 MR. CAVALLUZZO: At 9:30 tomorrow,
12 rather than ten o'clock, just to ensure that
13 everyone is there on time.

14 THE COMMISSIONER: It had been
15 10:00.

16 MR. CAVALLUZZO: Right.

17 THE COMMISSIONER: Okay.

18 MR. CAVALLUZZO: Now, in respect
19 of where we go from here, there will be future
20 public hearings in respect of Part 1. We will be
21 dealing with certain evidence relating to consular
22 services.

23 We are hoping to have the first
24 day of that evidence on October the 24th, at which
25 time we will set up a schedule as to the witness;

1 and then in the next week and the first week of
2 November, I hope to have a couple of days relating
3 to expert evidence in respect of consular
4 services.

5 The remaining days of hearing will
6 be in December, and they will relate to the
7 national security concerns that we have heard
8 about today. We do not have firm dates in
9 December, but we hope to have those days in the
10 last month of this year.

11 THE COMMISSIONER: That was the
12 hearing that Mr. Atkey referred to, where we hope
13 to, with the Government, look at the significant
14 issues, if there are some --

15 MR. CAVALLUZZO: That's correct.

16 THE COMMISSIONER: -- about what
17 can be released and not released --

18 MR. CAVALLUZZO: That's correct.

19 THE COMMISSIONER: -- in the
20 report so that -- okay.

21 MR. CAVALLUZZO: Okay.

22 THE COMMISSIONER: And so that
23 that would be then, at least as currently
24 envisioned, the last of the hearings of this
25 Commission of Inquiry.

1 MR. CAVALLUZZO: That will be the
2 last of the Part 1 hearings, correct.

3 THE COMMISSIONER: I might just
4 say for purposes of the public we have as well in
5 October four days scheduled for submissions with
6 respect to the policy review.

7 Some of the intervenors have, in
8 their submissions today, included submissions that
9 deal with the policy review. I'm aware of that.

10 Certainly a schedule will be set
11 up for those submissions, and so that if groups
12 are very interested in participating, even though
13 they've made submissions here today, they're
14 certainly invited and welcome to participate
15 during those four days in October.

16 Let me just, in expressing
17 thanks -- I didn't, Ms McIsaac, intentionally
18 leave out the Government publicly to express my
19 thanks for the appreciation for your submissions.

20 I thought that the written
21 information submissions that you and
22 Mr. Fothergill put together and your oral
23 submissions were very helpful indeed and very
24 appropriate as well. I appreciate that.

25 Now, you will be back at the next

1 go-around. We hope this doesn't become the
2 inquiry that never ends. I think not. I think we
3 are getting through it.

4 Let me -- I have thanked all the
5 intervenors, but I do want to make one further
6 general comment, without going overboard, but the
7 participation of the public in a public inquiry is
8 obviously very important. People have alluded to
9 that.

10 In this inquiry, it's been more of
11 a challenge than would normally be the case, and I
12 can understand from the intervenors' standpoint
13 that have a great interest in these issues and in
14 the particular work of this inquiry why they might
15 justifiably feel frustrated, have felt frustrated
16 from time to time.

17 Nonetheless, I think that the
18 submissions that I've received, both in writing
19 and the oral presentations here today, speak to
20 the value of that contribution.

21 I think this is encouraging, as a
22 Canadian, to sit here and listen and to see that
23 there are people that are truly engaged in the
24 process, take the time, effort -- I think I do
25 appreciate what's involved to come forward and to

1 participate in this fashion.

2 So, again, I say thank you to all
3 of you for your support throughout the inquiry.

4 Okay. The public hearings then,
5 we will rise until October 24th, and we'll have
6 our in-camera hearing tomorrow.

7 THE REGISTRAR: Please stand.

8 --- Whereupon the hearing adjourned at 5:04 p.m.,
9 to resume on Monday, October 24, 2005,
10 at 10:00 a.m. \ L'audience est ajournée
11 à 17 h 04, pour reprendre
12 le lundi 24 octobre 2005 à 10 h

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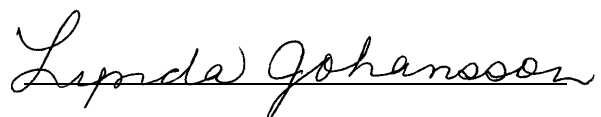
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Lynda Johansson,

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