

**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**

**Table ronde d'experts  
canadiens sur les modèles  
d'examen et de surveillance**

**Roundtable of Canadian  
Experts on Review and  
Oversight**

**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 vendredi 10 juin 2005

**Held at:**

Algonquin Room  
Old City Hall  
111 Sussex Drive  
Ottawa, Ontario

Friday, June 10, 2005

1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Friday, June 10, 2005

3 at 9:00 a.m. / L'audience débute le vendredi

4 10 juin 2005 à 9 h 00

5 THE COMMISSIONER: Good morning.

6 We will get under way.

7 Let me welcome everybody to this  
8 second roundtable for the Arar Inquiry. We had  
9 one, as you may know, back on May 20th with a  
10 panel of international experts and found that to  
11 be very illuminating.

12 I think everyone will agree when  
13 they read the list of people we have participating  
14 in the panel today that this is truly a  
15 distinguished panel of experts, all from Canada.  
16 They bring with them a broad range of experience,  
17 operational, some in academic, some with review  
18 agencies, and they will bring different  
19 perspectives to the issues. We have set out the  
20 questions, and I think it will truly be an  
21 informative session for me and for people working  
22 on the Commission.

23 I would like to express in advance  
24 my appreciation to each of the participants for  
25 the time and effort that they have devoted to

1 coming here to help out the Commission. I  
2 certainly think it is an important piece of work  
3 that we are engaged upon. I think they do, too,  
4 and as Canadians we should be appreciative that  
5 people of this distinction are devoting their time  
6 to assist with this project. Thank you to you  
7 all.

8 The biographical sketches of the  
9 participants can be found at tab 2 of the  
10 material.

11 For those in the audience, there  
12 are materials at the front door if you didn't get  
13 it on the way in, but there is a background for  
14 each of them set out there. I won't go through it  
15 fully because I can leave it to you to read it,  
16 but let me just highlight some of the more  
17 significant parts of the backgrounds of each.

18 First we have Mr. Warren Allmand,  
19 who, as I am sure everybody knows, was a Member of  
20 Parliament for 33 years from Montreal. He is now  
21 an international human rights consultant. He is a  
22 lawyer by training. He served in several cabinet  
23 posts in the federal government, including  
24 importantly, for our purposes, he was the  
25 Solicitor General of Canada. He has received many

1 honours over the years, including the Order of  
2 Canada in the year 2000.

3 Next is Professor Reem Bahdi, who  
4 is an assistant professor of law at the University  
5 of Windsor Law School, a graduate with an LLB and  
6 LLM from the University of Toronto. She has  
7 published many articles that are relevant to the  
8 issues that we will be discussing, on a wide  
9 variety of topics, including racial profiling in  
10 the conflict with terrorism. She participated on  
11 a panel we had yesterday in the inquiry dealing  
12 with issues, post-9/11 issues, for the Arab-Muslim  
13 community in Canada and made a very valuable  
14 contribution to that panel.

15 Next is Commissioner Gwen  
16 Boniface, who has been a member of the Ontario  
17 Provincial Police since 1977 and has been the  
18 Commissioner of the OPP since 1998. Commissioner  
19 Boniface is a lawyer. She was called to the bar  
20 of Ontario in 1990. She has worked with the Law  
21 Commission of Canada, and she has received many  
22 honours: an Order of Ontario in 2001, for work  
23 with First Nations communities. And I think when  
24 you look at her biographical sketch, you will see  
25 that she has a very distinguished career in making

1 contributions to the First Nations community.

2 Next is Mr. Alan Borovoy. And  
3 where do you start with Mr. Borovoy? He is the  
4 father of Canadian civil liberties, maybe more  
5 aptly the grandfather or the great-grandfather.

6 MR. BOROVOY: Oh, thank you.

7 --- Laughter / Rires

8 THE COMMISSIONER: He received the  
9 Order of Canada back in 1982. He has simply been  
10 the face and voice of civil liberties in Canada  
11 for over 35 years. When I was practising law, it  
12 was always a great honour to be retained by  
13 Mr. Borovoy and the Canadian Civil Liberties  
14 Association. I had waited many years for the  
15 phone to ring, and finally it rang. He asked me  
16 to do a case for them, and we got along, I  
17 thought, exceedingly well, very friendly and so  
18 on, until one serious thing went wrong: I lost  
19 the case.

20 I waited for many more years. The  
21 phone didn't ring again. He is a tough man.

22 MR. BOROVOY: We will acknowledge  
23 though that we paid the lawyer's fees.

24 THE COMMISSIONER: I will  
25 acknowledge that. The only thing I will say to

1           you, Alan, is it was a hopeless case.

2                           MR. BOROVOY: In that perspective  
3           it wasn't different from a lot of our others.

4                           THE COMMISSIONER: You said that.

5                           Professor Stuart Farson is a  
6           part-time professor at Simon Fraser University in  
7           Political Science, is a consultant on public  
8           policy issues, particularly national security  
9           issues. He has two experiences that he has  
10          participated in that I think are particularly  
11          helpful to what brings us here today. He  
12          participated in a full-scale assessment of  
13          municipal police governance, and he was also the  
14          Director of Research for the House of Commons  
15          study in 1989 and 1990 when they did review of the  
16          CSIS Act. He has written extensively in the area  
17          and will no doubt bring an interesting  
18          perspective.

19                          Mr. Norman Inkster, who is sitting  
20          next to Professor Farson, is a partner at Gowling  
21          Consultants Investigative and Consulting Services.  
22          Mr. Inkster joined the RCMP in 1957, was  
23          Commissioner from 1987 to 1994 and was  
24          responsible, I think, for bringing in many  
25          initiatives in policing and the composition of the

1 RCMP that, by anybody's assessment, were at the  
2 time forward-looking and very progressive. I  
3 think his legacy as the Commissioner of the RCMP  
4 is something that all Canadians should be very  
5 proud of. He has had extensive involvement in  
6 police associations, domestically and  
7 internationally, and he received the Order of  
8 Canada in 1995.

9 Commissioner Dirk Ryneveld is the  
10 Commissioner of the British Columbia Office of  
11 Police Complaint Commission. He was a lawyer at  
12 one time in private practice, a Crown attorney, a  
13 regional Crown attorney, a director of major crime  
14 prosecutions on Vancouver Island, and very  
15 interestingly he was the senior prosecuting trial  
16 attorney with the International Criminal Tribunal  
17 for the Former Yugoslavia. He has had extensive  
18 involvement with police forces and, as one will  
19 appreciate, with the oversight of them.

20 Finally on my right is Professor  
21 Wesley Wark, who is a Professor at the University  
22 of Toronto Munk Centre for International Studies.  
23 He teaches graduate and under-graduate courses in  
24 intelligence, terrorism and security. He has  
25 written and lectured extensively in the area. He

1 is about to publish a book on the official history  
2 of Canadian intelligence community during the Cold  
3 War and has undertaken a new book dealing with  
4 Canadian intelligence activities involved in the  
5 war on terror. I think I can fairly say that  
6 Professor Wark is recognized broadly as one of the  
7 very leading academics and writers dealing with  
8 these security intelligence issues in Canada.

9 There you have a panel. I can't  
10 think of a more distinguished, qualified panel to  
11 discuss these issues.

12 The format for today is found at  
13 tab 1 of the material, and I am not sure if  
14 everybody has them by tabs. We have divided the  
15 program into six questions to try to bring a focus  
16 to the discussions. The first three questions  
17 will be dealt with in the morning and the second  
18 three after the lunch break.

19 The format for each question is  
20 the question will be posed, and we have asked  
21 three speakers to speak to the question initially  
22 for approximately five minutes to give their  
23 perspective and their view. After that has taken  
24 place, I will then ask other members of the  
25 roundtable panel to respond, if they choose to do



1 so, and would encourage exchanges of views,  
2 agreements, disagreements, and so on.

3 I will during the course of the  
4 discussion of each question pose questions to the  
5 panel, to set out those issues which I think are  
6 particularly important to the mandate.

7 I would encourage members of the  
8 panel to speak freely to ensure that all of the  
9 matters that they think are important to my  
10 mandate are raised in one way or another.

11 Certainly the questions that we  
12 have designed are designed really to draw out and  
13 to elicit the views of the panel members on these  
14 subjects.

15 I will keep track of the time so  
16 that we complete the three morning questions by  
17 twelve o'clock noon. There will be a morning  
18 break at 10:30 for 15 minutes.

19 From 12:00 to 12:30 we will open  
20 the floor on the first three questions, and people  
21 who are here in the audience will have an  
22 opportunity to direct questions on those first  
23 three questions to the members of the panel.

24 We will break at 12:30 to 1:30 for  
25 lunch, and in the afternoon we will repeat that

1 format for the three afternoon questions, and we  
2 will wind up, at the latest, with questions from  
3 the floor by 4:45. If we don't need all that  
4 time, we could finish earlier.

5 So with that introduction, let me  
6 then turn to the first question.

7 The first question is obviously a  
8 fundamental one: The mandate calls upon me to  
9 make recommendations for a review mechanism for  
10 the RCMP's national security activities. It  
11 strikes me that the first question -- and that is  
12 why it is posed as the first question -- is: Need  
13 there be any change or is the status quo  
14 sufficient for those activities?

15 There already are a number of  
16 accountability and review structures in place.  
17 Internally, there is the governing statute, the  
18 RCMP Act, Code of Conduct, internal policies,  
19 ministerial directives, a supervisory hierarchy.  
20 Externally there is the CPC, the complaints body,  
21 and they also must comply with statutes: the  
22 Privacy Act, the Access to Information Act, Human  
23 Rights Act, the Charter of Rights, law generally.

24 Finally, if cases are taken to  
25 prosecution, they are subject to scrutiny of the

1           judiciary.

2                               So there is that body of  
3           accountability, if you will, present.

4                               The question that arises here --  
5           and I will stop talking in about two sentences.  
6           But the question that arises here, that is really  
7           at the heart of this inquiry, is this: Are the  
8           national security activities of the RCMP such, and  
9           are they different in a material way from the  
10          other activities of the RCMP, that they warrant a  
11          further type of review?

12                              Police oversight most often takes  
13          the form, is focused on complaints-based. Is that  
14          sufficient for the review of national security  
15          activities? Or, as some would posit, do we need  
16          more of a review mechanism, an inspection, an  
17          audit mechanism, however one wants to put it,  
18          similar to what we have for SIRC, an intelligence  
19          agency?

20                              I think that is the signal for me  
21          to stop talking.

22          --- Laughter / Rires

23                              THE COMMISSIONER: Who wants to be  
24          the first to speak in the dark?

25                              So I think that fundamentally sets

1 out the issue. I won't say any more, and I will  
2 call on Mr. Norman Inkster to lead off the  
3 discussion.

4 Mr. Inkster?

5 MR. INKSTER: Thank you very much,  
6 Mr. Commissioner. It is a pleasure to be here.  
7 Thank you very much for the invitation.

8 As you know, we were asked as  
9 panellists to select questions that we would like  
10 to speak to, and I found this one of course to be  
11 one that was most intriguing so I thought I would  
12 offer up my opinion.

13 As we all know and would expect, a  
14 lot has changed since I left the role of public  
15 policing in 1994, and I must admit while it is  
16 difficult to keep abreast of all of the changes in  
17 policing in Canada, as an interested bystander I  
18 have certainly done my best, I hope, to follow  
19 along with the changes that have occurred.

20 I was intrigued by the question,  
21 number one, and its reference to the national  
22 security activities of the RCMP. As we all know,  
23 in the business of policing and the business of  
24 review panels and commissions, it is important  
25 that we look at the words carefully and that those

1 words don't portray something which is not  
2 intended.

3 The reference portrayed for me the  
4 suggestion that the RCMP had somehow been given  
5 some additional mandate that went beyond that  
6 which is contained in the RCMP Act, and I am of  
7 course referring to their responsibilities in  
8 respect of the national security activities.

9 My own research and the  
10 documentation that was kindly provided by the  
11 Commission staff led me, of course, to the  
12 Security Offences Act to see whether or not there  
13 was something there that pertains, and to my  
14 surprise it became evident to me that the Security  
15 Offences Act does not help with the determination  
16 of what comprises the national security activities  
17 of the RCMP.

18 So for me as an informed observer,  
19 the reference to national security activities of  
20 the RCMP is not different in concept than a  
21 reference to the RCMP's crime prevention  
22 activities or drug enforcement activities, as all  
23 are captured by what is defined as the RCMP's  
24 mandate, which of course is the enforcement of the  
25 laws of Canada as set out in the RCMP Act.

1                   The role of the RCMP is the  
2 prevention, detection and investigation of  
3 criminal activity and, where warranted by the  
4 evidence obtained, the laying of criminal charges  
5 for prosecution. That includes offences  
6 incorporated by definition of section 6(2) of the  
7 Security Offences Act, which gives the RCMP  
8 jurisdiction to investigate offences which relate  
9 to a threat to the security of Canada, which is a  
10 lift from section 2 of the CSIS Act, and the  
11 Security Offences Act also includes offences  
12 against internationally protected persons.

13                   Now all of this preamble is simply  
14 to say that the RCMP's primary responsibility was,  
15 and remains as I see it, the enforcement of the  
16 laws of Canada and the investigation of those who  
17 it is alleged have broken those laws, to determine  
18 whether or not there is a reasonable and probable  
19 grounds to believe that an offence has occurred  
20 and that charges are warranted.

21                   The question to the national  
22 security activities of the RCMP does not imply a  
23 new or expanded role for the Force but, rather,  
24 the investigation of crime of all sorts, including  
25 those which are often characterized as acts of

1 terrorism.

2                   During the last several years that  
3 I spent in the RCMP at a fairly senior level, I  
4 witnessed my predecessor, Commissioner Bob  
5 Simmons, lead the Force through seven Royal  
6 Commissions. Commissioner Simmons was in many  
7 respects my mentor, and I watched with great  
8 admiration as he managed this onerous workload.

9                   Thus Royal Commissions, as is  
10 referenced in the documentation made available to  
11 us to read, is not a new experience for the RCMP.  
12 But make no mistake, the work of the Commission  
13 has always been seriously taken by all members of  
14 the Force in the firm belief that assuming errors  
15 and oversight are situations that caused the  
16 government to establish a Royal Commission in the  
17 first place, the end result would be a better,  
18 more responsive and more publicly accountable  
19 organization.

20                   I, as one individual, spent a lot  
21 of time, almost 40 years in policing now, both  
22 private and public. I firmly believe, and hold  
23 the belief, that one of the most important pillars  
24 that supports democracy is a professional,  
25 well-trained publicly accountable law enforcement

1           body. Without it, anarchy results and of course  
2           all attempts at democracy would fail.

3                         There is no need to repeat here,  
4           as you have mentioned already, the many  
5           accountability systems to which the RCMP is held,  
6           and to ensure that -- it is important, I think, to  
7           understand as well the fundamental differences  
8           between the roles and the responsibilities of  
9           police agencies and those of security services, in  
10          that in my opinion -- and it is a somewhat narrow  
11          comment. But in my opinion, if police do their  
12          work well, then their work product is of course  
13          subject to all of the protections of the court and  
14          all of the review bodies that you have mentioned.

15                        In other words, if law enforcement  
16          does its work well, then virtually everything it  
17          does becomes public and it is available for public  
18          scrutiny.

19                        On the contrary, however, in a  
20          security service -- although I never served in a  
21          security service -- if they do their work well,  
22          nothing becomes public and we don't hear of it.  
23          It is the fundamental differences between their  
24          roles.

25                        I understand, of course, and to be



1       sure that not all investigations by the police  
2       lead to criminal charges.  If the evidence in the  
3       investigation does not meet the burden of proof of  
4       beyond a reasonable doubt, charges will not be  
5       laid.  In some Canadian jurisdictions even where  
6       law enforcement believes that the beyond a  
7       reasonable doubt test has been met, Crown counsel  
8       will not authorize the laying of a charge if the  
9       Crown believes that there is not a strong  
10      likelihood of conviction.  So there are additional  
11      checks and balances.

12                   Which brings me around to the  
13      fundamental point, I suspect, and that is:  Does  
14      the RCMP require a new form of review for their  
15      security activities?

16                   When I brought my mind to this  
17      question, I really had to ask myself:  Well, if we  
18      were to put in place some new form of review,  
19      would it help to deter or prevent the events which  
20      caused this public inquiry to be created?

21                   My understanding of the events  
22      that led to the establishment of this commission  
23      are as follows:  that during the height of the  
24      post-9/11 activity -- and I think that is a  
25      context that we must not overlook.  But in the

1 context of the 9/11 activity, information in the  
2 hands of the RCMP was shared with authorities in  
3 the U.S.A.; that at least some of that information  
4 pertained to Mr. Arar. And of course I have not  
5 had access to any information that has not been in  
6 the public domain.

7 Members of the RCMP in possession  
8 of this information ignored an RCMP directive as  
9 it pertained to the sharing of information with  
10 authorities outside the RCMP and the caveats that  
11 applied thereto.

12 Authorities in the U.S.A. detained  
13 Mr. Arar, presumably based in part, although this  
14 has not been made clear to me in any public way,  
15 on the information provided to the RCMP -- by the  
16 members of the RCMP who chose to ignore/overlook  
17 the controls that were in place.

18 Then the U.S.A. authorities chose  
19 to deport Mr. Arar, a Canadian, to Syria rather  
20 than back to Canada, assuming that deportation  
21 anywhere was warranted.

22 And nothing that I have been able  
23 to see indicates that the RCMP were consulted in  
24 the merits of Mr. Arar's deportation, which is of  
25 questionable -- whether it had any value at all.

1                   If this fact scenario, albeit much  
2 abridged, is a reasonable portrayal of what  
3 occurred, then I am left with the question: How  
4 would the creation of any additional oversight  
5 mechanism prevent the occurrence of a similar  
6 event in the future?

7                   If people within an organization  
8 choose to ignore rules, or indeed, as always will  
9 be the case, if people within the organization  
10 simply make mistakes, I can't see that any amount  
11 of oversight or review will be effective. One  
12 cannot conceive of an oversight or review  
13 mechanism that can function in real-time fashion  
14 to avoid the errors that occurred while not  
15 interfering with the independence of the police.

16                  I clearly admit, Mr. Commissioner,  
17 that I have not had at my disposal all of the  
18 facts, nor have I heard all of the testimony  
19 presented to this Inquiry, but if additional  
20 oversight will avoid the errors of the past and  
21 prevent anyone from suffering the indignities  
22 experienced by Mr. Arar, then I am one Canadian  
23 who will offer full support. But oversight for  
24 the sake of oversight will serve no one well.

25                  There will always be a need to

1 hold the police accountable for their actions and  
2 my sense is that in the context of the facts  
3 around this Commission, the existing mechanisms  
4 are more than adequate for that purpose.

5 Thank you for your time.

6 THE COMMISSIONER: Thank you,  
7 Mr. Inkster.

8 Professor Farson next?

9 MR. FARSON: Thank you,  
10 Commissioner, for the opportunity to present my  
11 thoughts today.

12 I am very much in favour of a new  
13 form of scrutiny. I would argue that in the  
14 aftermath of 9/11, we have seen the addition of  
15 greater powers, a broader mandate, a restructuring  
16 in the way policing is done in this country. When  
17 you have that, I would argue that we need a more  
18 balanced form and a greater form of scrutiny.

19 When we come to decide what form  
20 that greater scrutiny should -- how it should be  
21 shaped, I think there are a number of points that  
22 can be made that might give us some guidance.

23 It would be my argument, one of my  
24 working hypotheses now would be where you have  
25 coercive and intrusive institutions that happen to

1 be ineffective or inefficient at what they do,  
2 they constitute, or tend to constitute, a threat  
3 to civil liberties and human rights. Also when  
4 you have a greater perceived failure or a greater  
5 amount of political pressure, you get greater  
6 abuse.

7 And I think the issue of or the  
8 policy of rendition and the use of torture falls  
9 as a consequence from that.

10 So there is, I would argue, in any  
11 type of review system -- and we need, I would  
12 argue, a broad review system for national security  
13 purposes. We need to attend to both issues of  
14 propriety and efficacy. I think that is a crucial  
15 ingredient.

16 When we come to look at how  
17 scrutiny is actually done, I think we have to  
18 admit that it can serve several different  
19 purposes. There is the master of propriety, of  
20 efficacy and constitutionality and there are  
21 dimensions of that that we also have to look at.

22 Under propriety, we are looking at  
23 compliance. We are looking also at the adequacy  
24 of law, whether the rules that we have in place  
25 are adequate. We don't often always do that in

1           our review mechanisms.

2                                 With efficacy we are looking at  
3           the issue of whether there is capacity, whether  
4           institutions have the resources, the powers, the  
5           right sort of mandates, whether they have and will  
6           have the performance necessary to do their duties,  
7           and whether they operate with due economy.

8                                 Finally, there are these  
9           constitutional issues of answerability and  
10          accountability.

11                                One of the conclusions I have  
12          drawn from my own research is that scrutiny  
13          institutions are not necessarily good at doing all  
14          of these various different types of scrutiny. So  
15          we need horses for courses, if you will.

16                                Two examples I think I could give  
17          which would make the point.

18                                Police complaints, I would argue,  
19          generally have been very good at making policy  
20          changes but rather poor at getting rid of bad  
21          apples from forces.

22                                Second, I think if we look at  
23          legislative bodies and their oversight  
24          mechanisms -- and I am taking my guidance here  
25          from work that has been done in the United

1 States -- legislative bodies tend to be very good  
2 at dealing with what McGovern and Schwartz have  
3 called fire alarms, and not very good at the  
4 mundane everyday sort of research to see whether  
5 institutions are adequate for the job.

6 So it is very important, when we  
7 look at scrutiny organizations, to understand the  
8 organizational cultures that are likely to be  
9 present.

10 One of the other points that I  
11 would make is that with security and intelligence  
12 matters, the activities involved do not form part  
13 of what we might call discrete vertical silos in  
14 government; rather, they are horizontal functions  
15 that spread themselves across the full range of  
16 government institutions. So we can't look at the  
17 problem of scrutiny simply in terms of single  
18 institutions and the problems that single  
19 institutions have. Rather, we have to look at the  
20 activities of the entire framework of government,  
21 and particularly how functions run across  
22 institutional lines.

23 Thus, institutions doing scrutiny  
24 need to be able to talk to one another freely and  
25 to look across government.

1                   There are three final points I  
2 would make with regard to scrutiny.

3                   If you want to have effective  
4 scrutiny, it depends, I think, on clearly defined  
5 mandates and powers: informational connectivity  
6 between scrutinizing institutions and very much so  
7 on adequate resources.

8                   And I would argue that most  
9 scrutiny bodies are under-resourced. I think we  
10 could look at the way, for example, that Bill C-36  
11 is currently being reviewed and the Library of  
12 Parliament resources that are being provided to  
13 those committees.

14                  We could also look at what has  
15 happened to the security and intelligence  
16 committee in the United Kingdom and how the chief  
17 investigator got fired for perhaps making  
18 statements against the government.

19                  My sixth point would be that  
20 history does have a habit of repeating itself, and  
21 we might, for example, want to put 9/11, Pan-Am  
22 and Air India in one sort of continuity. But I  
23 would counsel the Commission on one point: that  
24 the next crisis may have very little to do with  
25 the current one. So when we are thinking about



1        putting new forms of review, oversight, and what  
2        have you in place, whilst we may want to solve the  
3        current crisis, and it may have nice political  
4        optics, we may not be dealing with the best  
5        solution in terms of the public interest.

6                    So we need to look forward as well  
7        as back when we are dealing with recommendations.

8                    Also I would point out in this  
9        regard that our definition of national security is  
10       changing, has changed rapidly since 9/11. In a  
11       structural sense, at least, we have moved in this  
12       country, and particularly at the provincial level,  
13       to an all-hazards approach, not simply the  
14       traditional notions of national security.

15                   Finally, I would like to make the  
16       point that Juvenal's question about "who will  
17       watch the watchers" is a really relevant one for  
18       this Commission, I would argue. We know that  
19       scrutinizing bodies clearly sometimes fail in what  
20       they do.

21                   I would point to the fact that  
22       when Parliament came to review the CSIS Act in  
23       1989-90, we found SIRC's methodology on a number  
24       of their reviews wanting. I notice also that  
25       review bodies can get co-opted. Ron Atkey

1 recently admitted with regard to Air India that  
2 the committee held back on their review.

3 So I think that there are a number  
4 of broader requirements to look at when we are  
5 looking for some form of new mechanisms for the  
6 RCMP and, more broadly, for the community at  
7 large.

8 I would make one final point,  
9 which to me and from my experience is an obvious  
10 point: we are not, and we haven't yet, I don't  
11 think, in the Commission's papers looked at the  
12 involvement of Parliament in this process, and it  
13 is crucial.

14 Thank you.

15 THE COMMISSIONER: Thank you,  
16 Professor.

17 Mr. Allmand?

18 MR. ALLMAND: Mr. Commissioner, in  
19 answer to the question "do we require a new form  
20 of review or oversight", I would say absolutely,  
21 yes. And is the status quo sufficient?  
22 Absolutely, it is not sufficient.

23 It hasn't been mentioned so far  
24 that the Commission for Police Complaint for the  
25 RCMP has no power of subpoena, either for verbal

1 or written evidence, unlike SIRC. It is mainly  
2 complaints-driven. It doesn't have an overall  
3 audit capacity or power, although it can formulate  
4 complaints. It doesn't have a general audit  
5 power.

6 Third, in any complaint sent to  
7 the CPC, it must first refer that complaint to the  
8 RCMP, who do an initial investigation, which we  
9 have seen in certain cases takes considerable  
10 time. And the old maxim goes that justice delayed  
11 is justice denied.

12 So there are many flaws in the CPC  
13 system, the present oversight system, compared to  
14 SIRC, let's say, which is I think a much better  
15 system which only applies to CSIS.

16 Now, my old friend, you didn't  
17 mention in his curriculum vitae that Norm Inkster  
18 was an outstanding hockey player.

19 THE COMMISSIONER: He is a good  
20 golfer, too. I know that from personal  
21 experience.

22 MR. ALLMAND: At one time when he  
23 was captain of the RCMP team, he asked me to play  
24 when I was Solicitor General. But I couldn't keep  
25 up with him.

1 MR. INKSTER: I thought he was  
2 doing some fancy skating here.  
3 --- Laughter / Rires

4 MR. ALLMAND: In any case, I have  
5 to disagree to a certain extent with my old  
6 captain, because the RCMP since 9/11 with C-36 and  
7 C-17 have taken on a lot more security and  
8 intelligence activities, especially in their -- we  
9 have seen a review of their intelligence-led  
10 policing activities, their joint operations, and  
11 the INSETs with provincial and municipal police  
12 forces, their operations, joint operations, many  
13 types of joint operations, in the gathering and  
14 collection of intelligence and security  
15 information.

16 Any final dossier on security and  
17 intelligence, the information we now see comes  
18 from many sources, including the RCMP. The final  
19 dossier on an individual, on an organization, on a  
20 set of activities, is contributed to by the RCMP  
21 in their work, the other police forces in Canada,  
22 CSIS, perhaps the Communications Security  
23 Establishment, a wide range of organizations, and  
24 the present oversight body, which is the CPC, is  
25 just not capable.

1                   I am not alone in saying that, but  
2 Shirley Heafy, who is the chair of that Public  
3 Complaints Commission, has been very critical of  
4 it; said that she has not been able to do her  
5 work, especially on security intelligence matters.  
6 On pure policing and law enforcement is another  
7 thing.

8                   But on the growing area of  
9 security intelligence, which the RCMP is required  
10 to do as a result of all the post-9/11 legislation  
11 and policies, she has not been able to do that,  
12 and we are at a bit of a stalemate. That is why  
13 we have this commission, as a matter of fact.

14                  So I would say that, yes, we  
15 absolutely need a new system. You get into the  
16 kind of new system in Question 2, and I will wait  
17 until you put that question to us to deal with it.

18                  I just want to point out that  
19 while these dossiers that I referred to, that are  
20 put together, are built up from many sources,  
21 including the RCMP, they can of course be used to  
22 break up anti-terrorist activities, to thwart -- I  
23 should say terrorist activities. But when  
24 mistakes are made, they can severely hurt people,  
25 as they have in the case of Mr. Arar.

1                   And we know mistakes are made.  
2                   And the most outrageous mistake, I guess in recent  
3                   times, on poor intelligence is the greatest power  
4                   in the world, the United States, through their  
5                   intelligence and security operations, coming to  
6                   believe and trying to tell the world that Iraq had  
7                   weapons of mass destruction. That was a serious  
8                   error in security intelligence.

9                   But there are many, many others.  
10                  We need oversight bodies that are effective, that  
11                  have the powers essential to get to the bottom of  
12                  things and protect people against what might go  
13                  wrong.

14                  I will be ready, in Question 2, to  
15                  comment on what kind it should be.

16                  THE COMMISSIONER: Thank you,  
17                  Mr. Allmand.

18                  Let me then turn this question  
19                  open to the panel, people who wish to deal with  
20                  the question: status quo or new form?

21                  Professor Wark?

22                  MR. WARK: Thank you,  
23                  Mr. Commissioner.

24                  Very quickly, the answer, I think,  
25                  to Question 1 is a very unacademic answer, but it

1 is "of course".

2 I want to just set this in a  
3 little bit of a context, and I will have my own  
4 opportunity later to enlarge on some of these  
5 ideas, but I want to come back to Mr. Inkster's  
6 remarks about what good are review mechanisms in  
7 any case.

8 Let me just very quickly say in  
9 support of the notion of "of course" being the  
10 answer, let's think about what has changed in the  
11 world and this country since 9/11 with regard to  
12 national security activities. It is an impressive  
13 short list.

14 The laws have changed. The  
15 security and intelligence community in Canada has  
16 been fundamentally transformed. The nature, or at  
17 least the perception, of the threat to national  
18 security has been fundamentally transformed as a  
19 result of the emergence of the global  
20 transnational terrorism threat. Public awareness  
21 of these activities has changed fundamentally.  
22 And political attention, something often in the  
23 past lacking in this field, has also been  
24 fundamentally transformed.

25 In all of these regards, it seems

1 to me, a broad-based review mechanism for national  
2 security activities, if that is what we are going  
3 to call them, has a fundamental role to play. The  
4 mechanisms that we have in place, which we  
5 inherited from a pre-September 11th world, are  
6 simply insufficient across the board in every  
7 respect to deal with these problems.

8 So "of course" is my answer.

9 Let me raise an objection to, or a  
10 response to Mr. Inkster's note about -- it is an  
11 interesting question: What good would a different  
12 kind of RCMP review mechanism have made in the  
13 context of the Arar Commission?

14 It has to be said -- and again I  
15 will use the words "of course" -- that review  
16 mechanisms don't foolproof security and  
17 intelligence communities, and all the scholarship,  
18 decades upon decades of scholarship tells us that  
19 intelligence failures are in many respects, alas,  
20 inevitable. Review mechanisms don't exist in  
21 order to prevent intelligence and national  
22 security failures.

23 Nor are they necessarily meant, as  
24 Mr. Inkster perhaps has suggested, to try and fix  
25 a problem while that problem is kind of



1           operationally under way. Rather, review  
2           mechanisms have different capacities. They are  
3           designed to enforce and improve competency, and  
4           propriety and respect for the law within national  
5           security communities, and I think all the evidence  
6           suggests that those review mechanisms that exist  
7           around the world have had some considerable impact  
8           in that regard.

9                                So they are meant in effect to  
10          improve not with regard to any particular  
11          incident, but overall improve the performance of  
12          security intelligence communities; and if they do  
13          their job well, they can have that impact.

14                              But perhaps the biggest role they  
15          play is a role in the field of public education,  
16          public knowledge, and public reassurance. It  
17          seems to me one of the great damages -- and I  
18          think we saw some flavour of this in yesterday's  
19          expert witness testimony. One of the great  
20          damages that can occur in national security  
21          practice in a country is when society at large, or  
22          important components of that society, feel a  
23          growing distrust, scepticism and unease about the  
24          national security mechanisms of that country.  
25          That in itself becomes, in fact, a national

1 security threat.

2 In an ideal world, review agencies  
3 have a role to play in public education, public  
4 knowledge, public reassurance, which very few  
5 other mechanisms in the political structure can  
6 play.

7 So I would fundamentally disagree  
8 with Mr. Inkster's approach to the question of  
9 what review agencies are meant to do, or the  
10 nature of how we measure their performance. They  
11 do other things and they can do other things well.  
12 I don't think that we are currently set up to do  
13 the kinds of things that need to be done well in  
14 this country, but I will have another occasion to  
15 remark in greater detail about that.

16 Thank you.

17 MR. INKSTER: It is been a long  
18 time since I have been scolded by a professor, so  
19 I don't want to let it go by.

20 As we engage in this debate, which  
21 is a very, very important debate -- one, he  
22 clearly misunderstood me. Of course we need  
23 review mechanisms. We have them in place. I have  
24 worked with them for years, and they are very  
25 effective and very helpful, as I said in my

1           remarks, which he apparently chose to ignore.

2                           But I think as we deal with this  
3           issue, we bandy words about and we have to be  
4           very, very careful. I mean, Warren's reference to  
5           intelligence-led policing. This is not new. This  
6           has been going on since 1873. Of course you  
7           gather information, which becomes intelligence;  
8           intelligence becomes evidence; evidence gets  
9           presented in a court of law. And that is how it  
10          works. This is not a new thing. Policing has  
11          always been based on gathering information about  
12          crime, which is often referred to as intelligence.

13                           There seems to be, as well, a  
14          fundamental misunderstanding as between security  
15          intelligence and criminal intelligence. Both  
16          agencies use intelligence appropriately, and it is  
17          necessary, but they are not one and the same thing  
18          and they are often used for different outcomes.  
19          But intelligence gathered in the RCMP becomes  
20          evidence, evidence leads to charges and charges  
21          are laid.

22                           But furthermore, in the constant  
23          reference to the national security activities of  
24          the RCMP, we need to bear in mind as a group that  
25          these apply to all police departments in Canada.

1           So if they are going to have some additional  
2           oversight in the RCMP around national security  
3           issues, then it probably needs to embrace law  
4           enforcement agencies across this country --

5                         THE COMMISSIONER:  Certainly one  
6           of the issues -- my mandate, as you are aware,  
7           specifically refers to the national security  
8           activities of the RCMP.

9                         MR. INKSTER:  Exactly.

10                        THE COMMISSIONER:  But in a world  
11           of integrated policing in the national security  
12           area, one can't ignore the fact that all the other  
13           policing agencies are similarly involved.

14                        MR. INKSTER:  I don't have the  
15           numbers at my fingertips, but my suspicion is  
16           there are about 60,000 police officers in this  
17           country, and something less than 20,000 are in the  
18           RCMP.  So if we are going to look at the role of a  
19           police department around these activities, we have  
20           to embrace it across the country; otherwise, a  
21           review of national security activities in the  
22           interests of Canadians won't work.

23                        THE COMMISSIONER:  I will come to  
24           that as one of the later questions:  that they  
25           work in an integrated fashion.  If one only had

1 the review mechanism for the RCMP, it is not going  
2 to be effective if those they are working with  
3 aren't under similar. But we will come to that.

4 Thank you.

5 Mr. Borovoy.

6 MR. BOROVOY: In some ways you may  
7 have got us off on the wrong track by, in a way,  
8 asking the wrong question at the outset when you  
9 ask what is different today that might require  
10 some new mechanism.

11 I would respond, in part, even if  
12 nothing were different, all this would show us is  
13 that something has been missing all these years.  
14 I would say that two key factors argue for  
15 something new.

16 One, anyone who has lived in the  
17 real world for longer than an hour knows that  
18 people who run into conflict with the police are  
19 often very intimidated about filing complaints.  
20 You have heard evidence about that from the Muslim  
21 community. The Canadian Civil Liberties  
22 Association has conducted surveys over the years  
23 showing the same thing. Our own day-to-day  
24 experience tells us that.

25 The second factor is that so much

1 in the national security area is, and is supposed  
2 to be, done in secret, and so those who are being  
3 abused -- even if this sounds like an internal  
4 contradiction -- often don't know it. So if their  
5 privacy is being invaded, they don't know it. If  
6 their activities are being disrupted -- and  
7 incidentally, I make a special mention of that  
8 because in an era of preventive law enforcement,  
9 we are told that the policy of the federal  
10 government now is to prevent acts of terrorism, so  
11 this suggests very strongly that a lot of the  
12 activity we have to be concerned about is not in  
13 the laying of charges and in prosecutions openly  
14 reviewed but in secret disruptive activity that  
15 isn't thereby reviewed.

16 So what this means is that people  
17 who are being invaded improperly don't know enough  
18 to file complaints. They don't know what has  
19 happened. All Canadians, therefore, need some  
20 assurance that somebody outside of the agency  
21 itself, and the politicians who are so often  
22 reluctant to engage in this kind of conflict with  
23 the police, that somebody else is looking at it.

24 I don't think we have to choose  
25 between perfection and nothing. A little

1 improvement would go a long way.

2 THE COMMISSIONER: Anyone else?

3 MR. ALLMAND: I want to make a  
4 further comment on security-led policing.

5 It is true, as Norman Inkster  
6 said, that the RCMP has been doing  
7 intelligence-led policing for a long time, but  
8 they were doing it mainly with respect to criminal  
9 activities.

10 Now, when they split off the  
11 security service from the RCMP in 1981, more or  
12 less, they were supposed to put security and  
13 intelligence with CSIS and keep law enforcement  
14 with the RCMP. But what has happened -- and  
15 Mr. Wark referred to this -- since 9/11 and with  
16 Bill C-17 and Bill C-36, with the new crimes of  
17 terrorism, the area between security and  
18 intelligence and law enforcement is blurred.

19 Since 9/11, the RCMP is doing a  
20 lot of security intelligence-led policing related  
21 to security matters in addition to policing, and  
22 we are more concerned here with its  
23 intelligence-led policing on security matters  
24 because that information, as I say, with CSIS  
25 information, with other information, is going into

1 the dossiers that maybe are putting Mr. Arar into  
2 Syria and other sorts of abuses that we heard  
3 yesterday from the Arab-Muslim panel, where their  
4 civil liberties are being harmed.

5           Whereas the intelligence that was  
6 gathered that in criminal activities or law  
7 enforcement finally went before the courts and the  
8 courts had the opportunity, the judges, to test  
9 that evidence, they don't with the type of  
10 evidence that the RCMP is gathering on security,  
11 which is, as I say, going into dossiers, which  
12 could prevent people from getting jobs, which  
13 could end up in security certificates. And we can  
14 see people are now in prison for several years on  
15 security certificates without ever being charged,  
16 et cetera.

17           That is why I believe very  
18 strongly that we need a new form of review to  
19 cover not only the law enforcement activities, but  
20 the security and intelligence activities of the  
21 RCMP.

22           THE COMMISSIONER: Anybody else  
23 who hasn't spoken that wishes to on this? There  
24 will be obviously opportunities on other  
25 questions.



1                   Let me ask this question that I  
2 see as a subset of this question.

3                   We know that we have and we  
4 respect a principle of the independence of the  
5 police, and typically the oversight of police  
6 departments in Canada, as I mentioned earlier, is  
7 focused on a complaints-based system. It is based  
8 on the notion that people know and then can bring  
9 a complaint forward, and so on. But what we don't  
10 do, typically with police departments in Canada at  
11 least -- they do elsewhere -- is we don't have a  
12 review system, SIRC-like review system, where the  
13 review body can go -- and I don't mean this in a  
14 negative way -- and muck around in what the agency  
15 is doing and conduct its own review and its own  
16 investigations.

17                   If we look as one of the changes  
18 to the status quo -- I pose this question to those  
19 who advocate change, and often they say that  
20 because this is more like security intelligence,  
21 then we should be looking at SIRC, at least, as a  
22 model, as a starting point.

23                   Can you reconcile that type of  
24 review activity, the new self-initiated mucking  
25 around in the national security activities of the

1 police, with the notion of police independence?

2 Is there a problem there or is there not?

3 Just a last comment. I would  
4 indicate that there are countries -- and we have  
5 referred to it in the material, I won't go into it  
6 in detail -- overseas in Europe who do have that  
7 type of review for police agencies and I guess  
8 seem to view the notion of police independence  
9 differently than we do.

10 Yes, Commissioner?

11 MR. RYNEVELD: Thank you,  
12 Commissioner.

13 I can only tell you the experience  
14 I have as British Columbia's Police Complaint  
15 Commissioner, in that we are somehow unique from  
16 some of the other various models across Canada in  
17 that my office is an independent officer of the  
18 legislature, and we do not report to any level of  
19 government other than to the Speaker of the House.  
20 In that sense my office has independence.

21 The other issue about our  
22 office -- the legislation which, by the way, is  
23 far from perfect, and I have recently drafted a  
24 white paper to which I will make reference later,  
25 with draft statute for change, because our

1           legislation requires change.

2                           But one of the key features that  
3           British Columbia's legislation has is that it is  
4           not solely complaint-driven.  Someone who has a  
5           complaint against the municipal police forces in  
6           British Columbia can make a complaint either to  
7           the police detachment or office involved, or  
8           complain to our office.  That is one way.

9                           However, there is also the  
10          opportunity that if something comes to my  
11          attention from any other source that, in my view,  
12          requires in the public interest that the matter be  
13          investigated, I can order an investigation, be  
14          that internally or externally.

15                          So I can ask one of the municipal  
16          forces to investigate a matter that perhaps I  
17          might read in the press or has come to me on a  
18          confidential basis.  If it comes to me  
19          confidentially, I cannot launch what is known as a  
20          public trust -- I cannot launch a public trust  
21          investigation, but I can order an external  
22          investigation for me to determine whether or not I  
23          should order a respondent to be named, et cetera.

24                          Although my jurisdiction is  
25          limited to municipal police forces, the

1           legislation permits me to go to the Commissioner  
2           or Deputy Commissioner of the RCMP to act as my  
3           investigative body, in other words. And I have on  
4           occasion requested the good services of the RCMP  
5           to investigate complaints about municipal  
6           departments, especially where you have a large  
7           force and you have small other municipal  
8           departments who simply do not have the resources  
9           to do an extensive investigation.

10                        So not all systems need  
11           necessarily be complaint-driven. I think that if  
12           you were to give that kind of jurisdiction to  
13           whatever body should perform this review task, you  
14           may wish to consider expanding it beyond mere  
15           complaint-driven.

16                        Thank you.

17                        THE COMMISSIONER: Anybody else on  
18           the first question?

19                        MR. ALLMAND: On your question?

20                        THE COMMISSIONER: Yes, go ahead.

21                        MR. ALLMAND: You asked,  
22           Commissioner, whether any oversight body should  
23           have the right to muck around, I think you used  
24           the term.

25                        THE COMMISSIONER: Maybe I

1           shouldn't have used that term. You know what I  
2           mean.

3                           MR. ALLMAND: Yes, I know what you  
4           mean.

5                           In other words, how does that meet  
6           that whole issue of police independence?

7                           THE COMMISSIONER: Yes, that is  
8           it.

9                           MR. ALLMAND: Of course, the RCMP  
10          have to be independent in the governance of their  
11          day-to-day operations, but they operate within a  
12          policy framework, in a framework of laws, in a  
13          framework of directives, of policy -- well, a  
14          policy framework. And it is not, I don't believe,  
15          mucking around to see -- not to direct the police  
16          to what they should do on day-to-day operations  
17          but to check to see if they are living up to the  
18          Charter, to the laws of the land, and to their own  
19          directives and so on. And that has to be  
20          independently done.

21                           SIRC does that now vis-à-vis CSIS.  
22          They don't try and tell CSIS how to carry on their  
23          day-to-day operations, but if they are violating  
24          any sort of directive, or law, or the Charter, any  
25          sort of norm that should be applied to them -- by

1 the way, not only are very violating any norms but  
2 sometimes the oversight body might see where there  
3 are gaps in the policy framework, and I could give  
4 examples of that where you only find out after a  
5 complaint or by an audit that a very serious  
6 matter has never really been touched by policy and  
7 it should be. And that is where the audit body,  
8 or the oversight body, can also intervene. But I  
9 don't call that mucking around.

10 They should certainly, as I say,  
11 not interfere with the independence of day-to-day  
12 operations.

13 THE COMMISSIONER: Anyone else?

14 Yes, Commissioner.

15 MS BONIFACE: If I could follow up  
16 on Mr. Allmand's point, I think one of the things  
17 that, as you work through this exercise -- and  
18 this is also a layered process in my mind in terms  
19 of consideration -- is that to the breadth of the  
20 bodies who have an opportunity to raise questions,  
21 and while I am not totally familiar with the  
22 federal context, I will give you the provincial  
23 context.

24 Police in Ontario may be subject  
25 to questions from the Human Rights Commission,

1 from the Ombudsman's Office, from the Ontario  
2 Commission on Police Services. So my point merely  
3 is, as you work through the exercise, look to the  
4 breadth of what those responses required on  
5 policing, both for individual officers and for the  
6 organization, and then work back in terms of  
7 trying to satisfy some of the issues that have  
8 been raised in terms of where does it fit and how  
9 does it connect into those types, so that the  
10 foundation, if you choose to build a foundation  
11 that talks about what a new body would look, do  
12 the breadth of those expectations.

13 THE COMMISSIONER: Don't duplicate  
14 what's there now, don't over-review and build on  
15 that. Right.

16 Anybody else on the first  
17 question? Okay.

18 MR. WARK: I am coming to your  
19 question.

20 THE COMMISSIONER: Please do then.

21 MR. WARK: I think the question of  
22 whether review interferes with the traditional  
23 doctrine of police independence is an extremely  
24 important and complex one, but it may also be  
25 slightly misleading as well in two different

1 contexts.

2 One is that I think some of the  
3 comments around the table are absolutely right:  
4 that there is a difference we have to recognise  
5 between intelligence gathering activities and law  
6 enforcement activities. And what we are really  
7 focusing on here is the question of intelligence  
8 activities in the context of RCMP and other  
9 security intelligence community activities.

10 These intelligence activities are  
11 different, and they can, I think, be distinguished  
12 and separated from the law enforcement part of the  
13 RCMP's mandate. What the implications of that for  
14 review are is another question.

15 One of the reasons why it might be  
16 necessary for a review agency to be involved in  
17 this process is simply that -- there are two  
18 arguments here.

19 One is the that, in the  
20 post-September 11th world in particular, getting  
21 intelligence right is a fundamental requirement of  
22 national security in ways that may not have been  
23 for Canada as a country at any time in its prior  
24 history.

25 The RCMP, of course, is part of



1 the security intelligence community. It is part  
2 of that community that doesn't really have very  
3 rigorous oversight of what it does in the national  
4 security field, and I think that has to change.

5 I would say that within the  
6 structure of the RCMP, the work that it does in  
7 the national security field, on the intelligence  
8 side, is bureaucratically distinct, and that  
9 should assist the process of review.

10 And I think also we have to raise  
11 the question of to what extent is the traditional  
12 doctrine of police independence slightly  
13 mythologized and perhaps slightly out of date in  
14 this national security field?

15 I think the truth of the matter  
16 is -- and we see this in part in some provisions  
17 of Bill C-36 -- there is going to be greater  
18 political direction and greater political  
19 involvement in national security policy  
20 decision-making that will have an impact on  
21 intelligence collection, intelligence assessments  
22 and the use of intelligence. And it behooves us  
23 to have the capacity to review the implications of  
24 that political involvement and direction, but also  
25 to have some form of accountability over that new

1 political attention and interest in this field.

2 So in all of these regards, again,  
3 I guess I come back to a kind of "of course we  
4 have to deal with this problem".

5 We cannot give the RCMP, under a  
6 perhaps slightly outmoded doctrine of police  
7 independence, a kind of free ride in this field.

8 THE COMMISSIONER: Last comment on  
9 Question 1, and then we will move to Question 2.

10 Perhaps, Mr. Borovoy, you can make  
11 it, and save other comments. I am sure you can  
12 work them into one of the other questions.

13 Mr. Borovoy.

14 MR. BOROVOY: The -- go ahead.

15 --- Laughter / Rires

16 THE COMMISSIONER: All right. I  
17 am sure there will be ample opportunity during the  
18 day -- I mean, there is an overlap within the  
19 questions -- to discuss ideas.

20 Just before moving to Question 2,  
21 I didn't introduce some people I should have at  
22 the outset.

23 Sitting immediately to my left is  
24 Ms Andrea Wright, who is one of the legal counsel  
25 working for the Commission, doing a spectacular

1 job. She works with two lawyers in the front row,  
2 Freya Kristjanson and Ron Foerster, who have been  
3 responsible for doing a lot of the background  
4 papers. I think anybody who has read them agrees  
5 that they've done a terrific job.

6 There are also three members of my  
7 advisory panel here today, three out of five:  
8 Madame Monique Begin needs no introduction, in the  
9 front row. Former Assistant Commissioner,  
10 Alphonse Breau, from the RCMP, who is behind Ron  
11 Foerster, and Professor Kent Roach from the  
12 University of Toronto Law School. They are three  
13 of the five people who are on the advisory panel  
14 helping me with this.

15 If I can turn to the second  
16 question, and the questions from here on are  
17 premised on the notion that there will be some  
18 change to the review mechanism. And let me hasten  
19 to add, the first question is a legitimate  
20 question and is obviously something I am going to  
21 consider. But one wants to, in a session like  
22 this, consider all of the issues.

23 The first question -- or Question  
24 No. 2 is: If so, assuming there is going to be  
25 some alteration, should the review of national

1 security activities be conducted by -- and then  
2 there are really four options that are set out  
3 here. Let me just briefly explain each one.

4 The first would be an expanded CPC  
5 with review-like powers, similar to SIRC. So we  
6 would take the existing institution and we would  
7 say that for the national security activities,  
8 presumably -- it could be for everything -- but  
9 for the national security activities, we would  
10 expand the powers of the CPC to have SIRC-like  
11 powers.

12 The second would be just a new  
13 body with jurisdiction over the RCMP national  
14 security activities with review powers, and we  
15 will come later to what we mean by review powers.  
16 I realize it is vague at this point, but we are  
17 dealing with the fundamental approach at this  
18 point.

19 The third approach is an expanded  
20 SIRC, which would have jurisdiction not only over  
21 CSIS but also over the RCMP national security  
22 activities.

23 The fourth is again an expanded  
24 SIRC, but it would sweep in jurisdiction over all  
25 or some of the federal agencies, some of the other

1 federal agencies, that carry out national security  
2 activities.

3 What we are looking at at the  
4 beginning is: Would one select a model for a  
5 review body that is institutionally directed, one  
6 that is focused only on the RCMP? Or would one  
7 look at a review body that is functionally  
8 directed, that would look at the function of  
9 national security activities, wherever they may be  
10 carried out, and then provide review on a  
11 functional basis?

12 So it seems to me that that is at  
13 the core of deciding between these two different  
14 options.

15 But an important question that  
16 arises here -- and I will throw it out now: Is it  
17 going to be possible to separate the RCMP's  
18 national security activities from its other law  
19 enforcement activities? How does one go about  
20 that?

21 The mandate seems to presuppose  
22 that if I am to make a recommendation, that we can  
23 do it, because it says review mechanism for  
24 national security activities. Implicit in that  
25 is, not for other activities. Draw a line. How

1 do you do it?

2 One thing I have heard, and I  
3 think persuasively I have heard, is there is a  
4 good deal of overlap. Investigations can start  
5 out as traditional criminal investigations, move  
6 into national -- start out as, you know, proceeds  
7 of crime, money laundering, have national security  
8 aspects, move into national security, and then  
9 fall back out. So there is back and forth.

10 It seems to me that if there is to  
11 be any change, given the mandate, somehow, if I am  
12 going to do that, I am going to have to make a  
13 recommendation that draws a line. How does one do  
14 that in a way that doesn't create more problems  
15 than it solves?

16 In any event, that is the  
17 introduction for Question No. 2.

18 Commissioner Ryneveld, will you  
19 start?

20 MR. RYNEVELD: Thank you,  
21 Mr. Commissioner.

22 At the outset, I am pleased to  
23 have been asked to participate in the roundtable  
24 discussion on oversight models for the RCMP's  
25 national security activities.

1                   I should preface any remarks I  
2                   make, however, with the caveat that I am not, nor  
3                   do I purport to be, an expert on national or  
4                   international security issues. There are other  
5                   panellists around this table who have that type of  
6                   expertise. I do not. That is despite the fact  
7                   that I have worked in an international setting  
8                   involving state departments and other governments  
9                   and had to deal with high-security issues. I am  
10                  not at the same level with respect to that as  
11                  other panellists.

12                 However, in my present capacity as  
13                 British Columbia's Police Complaint Commissioner,  
14                 and my role as President of CACOLE, the Canadian  
15                 Association of Civilian Oversight of Law  
16                 Enforcement, I have gained some experience with  
17                 respect to civilian oversight of police, and it is  
18                 in that capacity that I would like to share my  
19                 views on some aspects of the -- basically of your  
20                 consideration.

21                 Of those options that you outline  
22                 in Question 2 for us, rather than attempt to pick  
23                 from one of those options, I believe that my  
24                 contribution to this discussion may be most  
25                 helpful if I focus less on the question as to who

1           should do the reviewing, and instead address the  
2           question as to the key characteristics that this  
3           agency must possess if it is to function  
4           effectively.

5                                 In this regard I believe it is  
6           useful for me to refer to the white paper that I  
7           referred to earlier that I prepared for proposed  
8           amendments to British Columbia's Police Act, where  
9           I outline the four foundational principles on  
10          which an effective oversight structure ought to  
11          operate: namely, civilian oversight; solid  
12          legislative foundation -- and I will actually  
13          expand on that in a moment; structural  
14          independence from government; and a recognition  
15          that the process is regulatory.

16                                Now, time doesn't permit me to  
17          quote extensively from my white paper on amendment  
18          to the B.C. legislation, but it may be helpful to  
19          quote from a small portion dealing with the issue  
20          of need for a solid legislative foundation in  
21          order for there to be effective civilian  
22          oversight.

23                                I am quoting:

24   "The second precept that  
25   underlines this white paper



1 is that an effective process  
2 for handling public  
3 complaints requires a sound  
4 legislative foundation that  
5 enables the civilian  
6 overseer, in this province  
7 the Police Complaint  
8 Commissioner, to effectively  
9 carry out his functions.  
10 Sound legislation goes hand  
11 in glove with the fair  
12 mindedness, impartiality and  
13 good judgment by those  
14 responsible for administering  
15 legislation.  
16 As pointed out in a  
17 background paper on statutory  
18 powers and procedures  
19 prepared for the  
20 administrative justice  
21 project in 2002, even the  
22 best administration cannot  
23 transcend the problems  
24 arising from inadequate  
25 legislation.

1 Administrative tribunals  
2 should, as public service  
3 agencies, be spending as  
4 little time as possible  
5 resolving questions as to  
6 their substantive and  
7 procedural authority. Where  
8 such powers are inadequately  
9 or incompletely expressed,  
10 tribunals sometimes choose  
11 not to exercise those powers  
12 at all. On other occasions  
13 they may resolve ambiguity by  
14 opting for more court-like  
15 solutions to problems on the  
16 basis that they should play  
17 it safe. On other occasions  
18 they may spend significant  
19 time at hearings, in court,  
20 addressing jurisdictional  
21 arguments. They may in the  
22 end spend time and money  
23 seeking to resolve issues  
24 that might have been avoided  
25 had the legislator

1                   anticipated the issues and  
2                   provided appropriate  
3                   guidance."

4                   In my previous annual report I  
5                   said that:

6                   "One of the main obstacles to  
7                   the effective performance of  
8                   our duties lies with the  
9                   inadequacies of the  
10                  legislation governing our  
11                  office. In my respectful  
12                  view, many of the problems  
13                  encountered in the past five  
14                  years can be avoided by  
15                  amendments to Part 9 of the  
16                  police Act, which will  
17                  clarify jurisdictional  
18                  issues. Too much time,  
19                  energy, and scant financial  
20                  resources have been spent  
21                  arguing about the wording,  
22                  intent, and authorities  
23                  provided for under the  
24                  statute. One of my main  
25                  objectives for 2004 would be

1 to make strong  
2 recommendations to the  
3 legislature."

4 And I have recently done that.

5 Then I quoted some other specific  
6 interests and cases that prove the point.

7 Mr. Commissioner, if these topics  
8 that I noted earlier are not properly addressed in  
9 the enabling legislation of the body in question,  
10 whatever you ultimately recommend would be the  
11 appropriate one, it may matter little which body  
12 and acronym are selected as the reviewing body.

13 I therefore urge you to be quite  
14 specific in your ultimate recommendations in the  
15 matter of civilian oversight, legislative clarity  
16 and structural independence from government -- and  
17 I refer to my own experience about the necessity  
18 for structural independence from government.

19 I believe that my experience, and  
20 hence my remarks, reflect similar views expressed  
21 by others who are involved in civilian oversight  
22 capacities, both in Canada and abroad. Of course,  
23 I refer in part to the submission by my  
24 counterpart in Northern Ireland, Ms Nuala O'Loan,  
25 that you heard on May 20th of this year.

1                   As I understand her submission to  
2                   you, she made the point with the increased  
3                   complexity of crimes and activities by terrorist  
4                   groups, it may be difficult to distinguish between  
5                   police conduct and national security issues.

6                   For example, the police may stop a  
7                   motorist for a minor traffic offence and  
8                   subsequently find a bomb in the trunk. The matter  
9                   might escalate rather rapidly into matters of both  
10                  criminal and national security issues. In that  
11                  sense I agree with Ms O'Loan that any review  
12                  agency established in this country, whatever that  
13                  should be, should operate over both the security  
14                  function and the crime function.

15                  In my view, if these necessary  
16                  foundational concerns are addressed, other  
17                  legitimate questions can then be properly  
18                  addressed, including the question whether, as  
19                  raised in the discussion paper, the reviewing body  
20                  should be specific to the agency or whether it  
21                  should be focused less on the particular agency  
22                  than on the national security function at issue.

23                  I suppose that if pressed to make  
24                  a decision, I would have a mild preference, in  
25                  principle, to an agency who has functional

1 expertise, particularly given the increasing  
2 integration between law enforcement agencies in  
3 respect of national security issues. But I wish  
4 to be clear that this is simply at this point a  
5 prima facie preference. I will listen with  
6 interest to the views of others who have greater  
7 depth of familiarity with civilian review in the  
8 area of national security.

9 I also agree in principle with the  
10 position that when members of provincial and  
11 municipal police forces are working in integrated  
12 national security teams, they too should be under  
13 the jurisdiction of the national civilian  
14 oversight agency. This was discussed on pages 3  
15 and 4 of the discussion paper.

16 As to whether or not an office  
17 such as mine, the Office of the Police Complaint  
18 Commissioner, might be a proper statutory gateway  
19 for information-sharing, before I would be in a  
20 position to comment intelligently, I would,  
21 frankly, have to know more about the proposed  
22 agency, its structure, the purpose of the  
23 information-sharing, the grounds on which it might  
24 occur and safeguards to protect confidential  
25 information.

1                   This is an issue I would be happy  
2                   to discuss as the Commission's proposals take on a  
3                   more concrete form.

4                   I pause here simply to say that it  
5                   has already been pointed out this morning under  
6                   Question 1 that of the 60,000-some-odd police  
7                   officers, only 20,000 or so are probably RCMP, and  
8                   therefore the different other municipal forces  
9                   across this country would have to somehow be  
10                  integrated and there would have to be  
11                  information-sharing, and there would have to be a  
12                  gateway from one review agency to another.

13                  So it is a very complex issue, and  
14                  I don't envy your task.

15                  I will be just one more minute.

16                  As I understand the thrust of  
17                  submissions by most of the international experts,  
18                  it is clear that there are present deficiencies in  
19                  oversight mechanisms, and I believe Question 1,  
20                  there seems to be some consensus that we do have  
21                  some problems that need to be addressed.

22                  One option, of course, is to beef  
23                  up the mandate of SIRC. Another would be to  
24                  expand the role and authority of the CPC. Perhaps  
25                  one solution would be to have concurrent bodies

1 with the right of first refusal by SIRC if there  
2 is a national security component to the issue.

3           Regardless of which model is  
4 chosen, I would make the observation that the  
5 agency responsible for oversight should have  
6 adequate resources and adequate authority to both  
7 investigate and make decisions. If not, the  
8 agency would be somewhat toothless.

9           The difficulty, as I see it,  
10 relating to separate agencies would be the  
11 possibility that it may result in two competing,  
12 under-resourced, toothless bodies that may be  
13 zealous of guarding their particular jurisdiction.

14           We have all heard of examples of  
15 various agencies who the public supposes are  
16 sharing information but are in fact are doing the  
17 exact opposite. We have all heard of the  
18 anecdotal but mind-boggling stories of serious  
19 matters falling between the cracks because  
20 agencies with the relevant information do not  
21 share with others who have a need to know.

22           In any event, Mr. Commissioner, if  
23 you are persuaded to ultimately conclude that  
24 there ought be an integrating of policing and  
25 security issues, then I would strongly recommend



1           that the greater the integration of police and  
2           security, the greater the need for integration of  
3           oversight.

4                       Such an oversight body must be  
5           given a broad mandate but also have concomitant  
6           powers. The structure must be kept simple and not  
7           complicated by excessive layers of bureaucracy.  
8           Such an agency should, in my view, also be  
9           authorized to conduct different types of oversight  
10          review, both police conduct or misconduct, issues  
11          amounting to service and policy, value for money  
12          and perhaps political oversight.

13                      Mr. Commissioner, those are my  
14          preliminary remarks that I hope will be helpful to  
15          you in your considerations.

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

18                      Next is Mr. Allmand.

19                      MR. ALLMAND: Mr. Commissioner, I  
20          think before we decide, or try to decide, what  
21          type of review agency we should have -- and you  
22          have listed four options in your question -- I  
23          think we have to look at the types of activities  
24          that need to be overseen or reviewed.

25                      What we see is that we have, first

1 of all, the collection and gathering of  
2 information. And we know now from what the  
3 evidence is before you so far that that is done  
4 through joint operations, sometimes with the RCMP,  
5 with INSETs, with provincial and municipal police  
6 forces, sometimes with CSIS, and sometimes  
7 receiving information from overseas, from outside  
8 the country.

9 So the final dossier, as I said  
10 previously, is made up with investigative and  
11 information techniques done in a joint way by  
12 several agencies.

13 Second, then we have the analysis  
14 and interpretation of that information, also done  
15 not just by the RCMP but also done, once that  
16 information is fed in and it is in a file, it is  
17 interpreted in different places in different ways.

18 Then we have the sharing of that  
19 information -- I talked about receiving it, but  
20 also sharing it with other countries, as may have  
21 been done in the Arar case. So it goes beyond,  
22 again, just the RCMP.

23 We have issues of storage of  
24 information and, finally, the use of it by many  
25 agencies of government.

1                   As I said, the use could be, if  
2                   the information is solid and it has been gathered  
3                   properly, it can be used to thwart a terrorist  
4                   organization or terrorist activities. But on the  
5                   other hand, if it is incorrect information, if it  
6                   is unreliable, it can be used to hurt and harm  
7                   people and interfere with the civil liberties and  
8                   the human rights of individuals.

9                   Also, I refer to the most  
10                  horrendous example, wrong intelligence information  
11                  can lead to a war where people have been killed,  
12                  and the biggest example is Iraq. I mean, terrible  
13                  mistakes on information, and they keep repeating  
14                  showing Secretary Powell giving this information  
15                  to the U.N., which was later totally wrong.

16                  So when you look at all these  
17                  types of activities and you say which one of these  
18                  four options should be used, I come down on No. 4,  
19                  which is an expanded SIRC which would have  
20                  jurisdiction over -- I wouldn't say some, but I  
21                  would say over all other federal agencies with a  
22                  national security function. Otherwise, things  
23                  will fall between the cracks.

24                  Also, as other experts on the  
25                  panel have said, there is no clear line between

1           what is now law enforcement and security matters.  
2           It was already pointed out in Northern Ireland the  
3           IRA are involved in criminal activities, but also  
4           they are a terrorist organization. Same with ETA  
5           in Spain, and in other areas of the world.

6                         So you need, I think, an oversight  
7           agency which would be able to look at all the  
8           security intelligence matters, both  
9           complaint-driven and having a proactive auditing  
10          role, as several people have said: wide powers to  
11          subpoena, to audit and to get the information  
12          necessary to protect the human rights and civil  
13          liberties of Canadians, but also to assure  
14          confidence in the security system.

15                        Yesterday we heard where many  
16          Muslim Canadians, many Arab Canadians have lost  
17          faith in the system and are not using it. So to  
18          restore faith you have to have something that will  
19          be transparent and bring about confidence in the  
20          system; also, as I say, not be just  
21          complaints-driven but have a proactive auditing  
22          capacity.

23                        THE COMMISSIONER: So you would  
24          opt then for the functional, as opposed to the  
25          institutionally directed?

1 MR. ALLMAND: Absolutely.  
2 Otherwise too many things fall in between the  
3 cracks.

4 THE COMMISSIONER: Professor Wark?

5 MR. WARK: Thank you,  
6 Commissioner. I also wanted to express my  
7 gratitude for being asked to attend this session.

8 I would say, in addition, to  
9 commend the Commission, in case this isn't on the  
10 record -- I am sure everybody is thinking along  
11 these lines -- but to commend the Commission for  
12 the great tool that the Commission's website is  
13 for all of us interested in this question, and  
14 also for the very high quality of the background  
15 papers that have been done. I can say that I have  
16 had nothing to do with these background papers but  
17 I have greatly benefited from reading them and I  
18 want to quote from one of them in my brief  
19 remarks.

20 I think what I have to say follows  
21 on seamlessly from Mr. Allmand's comments. I too  
22 feel the that the only way ahead, the only  
23 sensible way ahead for a review function of  
24 national security in Canada -- it is a difficult  
25 option because it is an ambitious option, and it

1 doesn't much represent the status quo at the  
2 moment, but the only way ahead is for a new review  
3 body that has a very broad-ranging security  
4 intelligence community mandate to review all  
5 aspects, if you like, functionally, of what is  
6 being done in the security intelligence field.

7           Let me begin by saying -- and many  
8 people in this room don't need any reminder about  
9 this. But we have in Canada a very large,  
10 complex, diffuse, decentralized security and  
11 intelligence community. Parts of that community  
12 have a very long history that go back, in fact, to  
13 the closing days of the Second World War. In some  
14 other respects the security and intelligence  
15 community has been transformed by the new demands  
16 of the post-September 11th environment.

17           In any case, history plus  
18 contemporary reality means that there are many  
19 agencies of the federal government that have a  
20 central function in security and intelligence  
21 matters at the moment.

22           As it currently stands, the review  
23 systems that are in place are only empowered to  
24 review a small fragment of that security and  
25 intelligence community's activities, and those

1 review mechanisms are fundamentally focused on the  
2 operational agencies, as they've been  
3 traditionally defined, above all Canadian Security  
4 Intelligence Service, which has not one review  
5 mechanism but in fact two, if we add in both SIRC  
6 and the IG's office, and a great deal, I think, of  
7 duplication in practice between those two  
8 functions.

9 CSIS is therefore under current  
10 review and has been since the CSIS Act and then  
11 the addition of the IG's functions.

12 And then we have a form of review  
13 of the Communications Security Establishment that  
14 came later in the form of the CSE Commissioner's  
15 function. But many other parts of the security  
16 and intelligence community, very important parts  
17 of it in the policy-making field and indeed in the  
18 operational field, have no review system in place.  
19 And I would simply name bodies like the Privy  
20 Council Office, Foreign Affairs Canada as it is  
21 now called -- and I am sure they will change their  
22 name again soon -- the Department of National  
23 Defence, Transport Canada, other functions that  
24 now reside within the Public Safety Department.

25 The security and intelligence

1 community may be diffuse but it is real, and it  
2 functions according to a common but new definition  
3 of national security, which my colleague Stuart  
4 Farson mentioned, a kind of all hazards approach.  
5 That new definition of national security was  
6 enshrined in the creation of the Public Safety  
7 Department in December 2003, a fundamental  
8 restructuring of the Canadian government in this  
9 field, and also complemented by the national  
10 security strategy document that was released by  
11 the government in April 2004, which for the first  
12 time in Canada's history sets out a national  
13 security kind of framework of defining threats to  
14 the security of this country.

15 We need to take these realities,  
16 it seems to me, into consideration when we  
17 redesign our review capacity.

18 What I am really, I think,  
19 advocating is in fact Option 5 because I think  
20 we -- this is not to say that we might not end up  
21 with something that would look like the Security  
22 Intelligence Review Committee, but with a greatly  
23 expanded mandate and operating differently.

24 I am a little fearful that we may  
25 rest too content with a SIRC-like expanded



1 activity when I think we have to also recognize  
2 that there are some problems in the way that SIRC  
3 itself operates.

4 The first point I want to make --  
5 and just to come back to it -- is that national  
6 security review in Canada requires, it seems to  
7 me, in a post-September 11th world, and it  
8 probably required it for a long time, a capacity  
9 to review all functions that occur within the  
10 defined security and intelligence community in the  
11 federal government.

12 The second point I want to make  
13 briefly -- and here I am going to quote just very  
14 quickly from one of the background papers -- is  
15 that the Canadian tradition has been very much to  
16 emphasize one particular aspect of the review  
17 function, which is to focus on issues of  
18 propriety.

19 We have focused on issues of  
20 propriety, I think, for some good reasons and for  
21 some slightly mythologized reasons. In the  
22 mythologized sense we owe an enormous debt to  
23 George Orwell and 1984 for instilling in us an  
24 inescapable fear of a national security state and  
25 the powers of the surveillance state, which have

1           been both an exaggerated and useful cautionary  
2           lesson. And I think there is something to be said  
3           for that general kind of community concern about  
4           the powers of intelligence agencies and national  
5           security agencies that propel these kinds of  
6           activities.

7                                Much of this focus on propriety is  
8           of course just a product of the Canadian  
9           experience, with the Macdonald Commission and  
10          other things, where we were led to believe and  
11          came to the conclusion that the greatest danger  
12          that national security agencies pose to Canada and  
13          Canadian society was its abuse of the law.

14                            It is of course very important for  
15          any review agency and for the societal good at  
16          large to be able to assure ourselves that national  
17          security agencies in the federal government are  
18          pursuing their mandates in accordance with the law  
19          and in accordance with ministerial direction.

20                            But my very strong view is that a  
21          review function that stops at that point is of  
22          very little overall value. The greatest threat  
23          that is posed to Canadian national security and  
24          indeed Canadian civil liberties is the potential  
25          incapacity or incompetence of our security and

1 intelligence community. It is an efficacy  
2 question.

3 I want to quote just very briefly  
4 from the background paper on these points, because  
5 I think that there is a way in which we are  
6 missing the definition and the import of these  
7 terms.

8 The background paper that I refer  
9 to is the background paper on accountability and  
10 transparency, and it has a section on pages 10 and  
11 11, very briefly, that I will just read quickly,  
12 under the heading "Accountability For What?"

13 And I quote:

14 "Accountability may be used  
15 in reference to propriety or  
16 to efficacy. In practice it  
17 is invariably in reference to  
18 both."

19 In fact, in the Canadian system  
20 that is not true. There is no efficacy review  
21 involved in the CSE Commissioner's Office  
22 function.

23 But the two sentences I am quoting  
24 again now should be distinguished conceptually  
25 since they each entail somewhat different

1 mechanisms of accountability.

2 "Propriety refers to  
3 compliance with law and with  
4 ethical norms both in  
5 relation to ends and to  
6 means."

7 I would pause there and say that  
8 propriety often doesn't refer very extensively to  
9 ethical norms. It is really about compliance with  
10 the law and ministerial direction. Ethical norms  
11 is another issue it seems to me altogether that is  
12 rarely raised in reviews that are based on  
13 proprietorial questions.

14 I go on with the quote:

15 "Are the goals of a security  
16 service appropriately framed  
17 in relation to the values of  
18 society?"

19 This is very much a background  
20 issue for proprietary based reviews, it seems to  
21 me, and so there is a slightly misleading element  
22 to that definition.

23 Again I quote:

24 "Are the methods used  
25 ethically acceptable in light

1                                   of the goals and of  
2                                   democratic values?"

3                                   That is the end of the section on  
4                                   proprietary as a definition.

5                                   "Efficacy..."

6                                   The document goes on to say:

7                                   "... tends to focus on the  
8                                   relation of means to given  
9                                   ends. Are they efficient in  
10                                  giving value for money?"

11                                  That, it seems to me,  
12                                  Commissioner, is not a good definition of what  
13                                  efficacy means in this context.

14                                  In intelligence and security  
15                                  communities efficacy is not about value for money.  
16                                  No intelligence community in the world that I know  
17                                  of pays any attention to value for money. That is  
18                                  not to say that they are wasting taxpayers' money,  
19                                  but a concern about value for money when it comes  
20                                  to intelligence collection frankly makes no sense.  
21                                  It is not measurable and it is not the way to  
22                                  proceed.

23                                  Efficiency is not the issue  
24                                  either. The issue in efficacy-based reviews is  
25                                  competence and capacity. It is essentially about

1           knowledge. That is the thing that we require from  
2           security and intelligence communities. It is a  
3           thorough-going deep, available knowledge of  
4           threats to the security of Canada.

5                        It is very hard to know what the  
6           reality is. And in some ways it has to be hard to  
7           know what the reality is because there is a real  
8           need for secrecy in this field.

9                        But that need for secrecy has to  
10          be balanced against what I think of as a  
11          fundamental transformation in public attitudes and  
12          approaches to intelligence and security matters in  
13          this country, and worldwide, that have been  
14          stimulated by the events of September 11th and the  
15          events that Mr. Allmand refers to, which is the  
16          terrible intelligence failure of the Iraq war and  
17          the ways in which many publics feel that they  
18          were, as the common phrase goes, neo-conned into a  
19          war.

20                       We are in a new era, which I call  
21          an era of public intelligence, in which there will  
22          be simply a strong expectation that publics have a  
23          right and a need to know as much as possible about  
24          the activities and the competencies of the  
25          intelligence and security community that serves

1           them.

2                           We have in this country, it seems  
3           to me -- and I will just end my remarks on this  
4           second point about the balance between reviewing  
5           propriety and reviewing efficacy.

6                           I think traditionally we have the  
7           balance entirely wrong, and that is why I, in a  
8           way, am kind of pressing for Option 5 because I  
9           would like to see that balance changed. Of  
10          course, we have to continue to expend all the  
11          energies we need to do to ensure propriety, to  
12          ensure compliance with the law, ensure compliance  
13          with ministerial direction.

14                          But for the most part my  
15          understanding of the Canadian security  
16          intelligence community suggests to me that we are  
17          not wrestling with what the American Congress in  
18          the mid 1970s thought they were wrestling with: a  
19          rogue elephant. These communities are not rogue  
20          elephants. I think they are doing their best in  
21          very difficult circumstances and the possibility  
22          for abuse of power and law is always present and  
23          always has to be checked.

24                          But the key thing is efficacy.  
25          The question is: How good are they at their job?

1                   This is a very difficult thing to  
2                   account for. And it is not overly intrusive to  
3                   suggest that a review agency should play a role in  
4                   trying to find an answer to that question: How  
5                   good are they at their job? There are other  
6                   layers of review, both inside the government and  
7                   outside, and in the public in general that will  
8                   assist in that question. But review agencies have  
9                   to have a strong efficacy mandate.

10                   And that relates to the third and  
11                   final point, Mr. Commissioner -- and I am sorry if  
12                   I go on at length and passionately about this, but  
13                   it is something that goes deeply to the heart of  
14                   my own interests and my own research and my own  
15                   work in the public domain in this field.

16                   And that is that the existing  
17                   status quo system for review in this country is  
18                   internally directed, I would call it. The  
19                   Security Intelligence Review Committee does, on  
20                   occasion, often admirable work but it works for,  
21                   it has to be said, the Minister and Parliament,  
22                   and it works under a heavy blanket of secrecy.  
23                   The result is that SIRC's annual reports, in my  
24                   view, are more or less worthless as a form of  
25                   public information, and I don't think that it has



1 to be that way.

2 That is not to say that what  
3 underpins the SIRC annual reports are worthless;  
4 it is to say when it comes to presenting a public  
5 report that is eventually released by the Minister  
6 in Parliament, the amount of information in those  
7 reports is so bland and so compressed because of  
8 national security considerations that it is of  
9 little use to the public.

10 SIRC doesn't report to the public,  
11 and I would say frankly that the same problem  
12 exists with the CSE Commissioner's office.

13 Now I have gone and offended not  
14 only Mr. Inkster but friends from the SIRC and CSE  
15 Commissioner's office in the audience. I will try  
16 and stop making enemies sometime in the course of  
17 today.

18 --- Laughter / Rires

19 MR. WARK: My final point is that  
20 we have to find a way in this country -- and I  
21 don't think it is impossible. We have to find a  
22 way to not only change the balance between  
23 propriety and efficacy in the way we do review,  
24 but change the balance in terms of who review is  
25 for.

1                   My argument is that in a 21st  
2                   Century world, in a world that I call the world of  
3                   public intelligence, in which much more  
4                   information about intelligence is going to be in  
5                   the public domain in which politicians, as we have  
6                   seen in the 9/11 war, are going to use  
7                   intelligence publicly in unprecedented ways to  
8                   justify crucial national security decisions, in  
9                   that kind of context review has to be for,  
10                  primarily, the public.

11                  The second consumer of review --  
12                  and this is also I think to understand a change in  
13                  the purpose of these things. The second consumer  
14                  for review are the security and intelligence  
15                  agencies themselves, who have no capacity  
16                  internally in Canada, and many other countries, to  
17                  assess on an ongoing basis, in an independent and  
18                  objective way, their own performance. They are  
19                  simply incapable of learning lessons from their  
20                  own mistakes, I am afraid to say. They don't have  
21                  the time, they don't have the resources, they  
22                  don't have the structure, and they don't even have  
23                  the interest in doing that.

24                  It has to be done through review  
25                  mechanisms of various kinds, and it has to be done

1 in such a way that there is a public  
2 accountability mechanism that adds the necessary  
3 degree of grit, friction, and pressure to the  
4 process.

5 It is important -- and I will end  
6 on this point -- that we get this right because  
7 the failure to get intelligence right could have  
8 catastrophic consequences for Canada in terms of  
9 domestic security and in terms of our  
10 international relations. It is one of the crucial  
11 questions for us in the future.

12 It may not be at the same level as  
13 the future of our public health system as of  
14 yesterday, but I promise you this will be an  
15 ongoing problem for us as a power with global  
16 interests and domestic security concerns for the  
17 remainder of the century.

18 Thanks very much.

19 THE COMMISSIONER: Thank you,  
20 Professor Wark.

21 The next stage of this will be to  
22 have people respond to the three opening comments  
23 on this question. We are going to have a break,  
24 but before we have the break, I wondered if I  
25 could pose a question to Mr. Inkster and to

1 Commissioner Boniface, and it is this.

2 The mandate is, as I have repeated  
3 several times, to look at reviewing mechanisms for  
4 the national security activities of the RCMP. As  
5 a practical matter, if one were to set about to  
6 give a body jurisdiction over those, what would  
7 you suggest should be the criteria in defining  
8 what activities fall within the "national security  
9 activities" and what should be excluded?

10 What I am thinking there is the  
11 mandate does not direct me to recommend a review  
12 body for all of the RCMP activities. They don't  
13 want me to have a review body, as I read my  
14 mandate, for impaired driving investigations in  
15 Whitehorse.

16 The mandate itself almost  
17 implicitly suggests -- does implicitly suggest  
18 there is something that is unique and different  
19 about national security activities. So accepting  
20 that, if one accepts that and said, okay, now we  
21 have to come to grips with it, does one look at  
22 the nature of what the officer does? Does one  
23 look at the bureaucratic setup within the RCMP?  
24 Does one look at the legislation which they are  
25 seeking to investigate and enforce?

1                   It seems to me there is a whole  
2 potential of options, and even at that there is  
3 going to be a good deal of overlap and wandering  
4 back and forth between, if I can call it,  
5 traditional law enforcement and national security  
6 activities.

7                   I don't know even if you wanted to  
8 think about that over the break, but it is a  
9 question that at some point -- I am welcome to  
10 hear from everybody on it, but you two in  
11 particular at some point, I would be obliged to  
12 have your views.

13                   We are going to have a morning  
14 break and we are going to carry on with this  
15 Question 2, and the points that Professor Wark and  
16 Mr. Allmand, and so on, have raised. I think it  
17 is in many ways the most difficult question of  
18 them all.

19                   We will take a 15-minute break.  
20 We will hold it to 15 minutes so we will come back  
21 at 10:50, is what I am saying, and we can respond  
22 to this question then.

23                   Okay, recess.

24 --- Upon recessing at 10:37 a.m. /

25                   Suspension à 10 h 37

1 --- Upon resuming at 10:54 a.m. /

2 Reprise à 10 h 54

3 THE COMMISSIONER: We will get  
4 back under way.

5 What we will do now is I have  
6 asked Mr. Inkster and Commissioner Boniface to  
7 answer my question, and then I would like to hear  
8 from the other members of the panel who haven't  
9 spoken on Question 2, and we will have the  
10 discussion go from there.

11 Mr. Inkster?

12 MR. INKSTER: Thank you,  
13 Commissioner.

14 Just by way of some preliminary  
15 comment, I have a fear, as I have listened to the  
16 discussion around this question -- and I  
17 understand and endorse the importance of the  
18 academic approach and the academic review and the  
19 academic writings on all of these things. It is  
20 extraordinarily important, clearly.

21 But I think as we go through this  
22 exercise, I would like to ask the panel and anyone  
23 listening -- and of course you, Commissioner, I  
24 know you have had the experience -- to put your  
25 heart and your mind in the body of a young police

1 officer as he or she is out there doing their job,  
2 and having to make the decision Mr. Allmand  
3 referred to.

4                   They made a routine traffic stop,  
5 look in the trunk of the car, and there is a bomb.  
6 And you are looking at a young person, four, five  
7 years of service, having to make that decision,  
8 deal with that issue, and it is important  
9 therefore that as the Commission does its work and  
10 it reports, that we not do anything that has a  
11 chilling effect on the ability of that young  
12 person to act appropriately and justifiably under  
13 the circumstances as they are presented to him or  
14 to her.

15                   Just by way of anecdote, during my  
16 experience as the Commissioner of the RCMP, the  
17 RCMP and me personally were roundly criticized for  
18 high-speed chases in the Province of Alberta, and  
19 we had several visits with the attorneys general  
20 from those provinces who sought to find some other  
21 means to deal with the high-speed chases, because  
22 unnecessary deaths occurred and so on. And I  
23 tried to say the young police officer has got to  
24 make a decision at that point to do the right  
25 thing, whatever he or she thinks and has been

1           trained to deal with it.

2                           By way of illustration I asked the  
3           attorneys general to participate in a test. The  
4           RCMP had a training unit called FATS, which  
5           referred to the Financial Arms Training System.  
6           It was a live video and the live video depicted a  
7           man in a darkened garage opening the trunk of a  
8           car and reaching in the trunk of the car for  
9           something. On one version of the video he would  
10          extract the tire iron, and he is going to change  
11          the tire of his car. On another version of that  
12          same video he would extract a weapon, and the  
13          young officer was to shoot. I can assure you  
14          every attorney general that took that test shot  
15          the wrong guy.

16                           I am just simply saying that we  
17          have to remember that these decisions are made in  
18          a split-second way, and we mustn't do anything  
19          that puts a chilling effect on that and to  
20          second-guess themselves to the point of putting  
21          their lives in danger or those of others.

22                           The other word that I have heard,  
23          and I would just comment on by way of preliminary  
24          comment is the use of balance. It is very, very  
25          important that in however we structure any



1           subsequent or new review body, that we achieve the  
2           right balance as between allowing the law  
3           enforcement officer to get on with his or her  
4           duties as they see it and are instructed to  
5           enforce it, and of course the rights of Canadians,  
6           the rights of accused, the rights of the public to  
7           know.

8                                 Getting now to your question. I  
9           mean, in the RCMP -- and I assume at some point,  
10          if you have not already, you will hear from  
11          Commissioner Zaccardelli who is in a far better  
12          position to describe in detail the structure of  
13          the RCMP currently.

14                                But it is my understanding that  
15          currently the RCMP has separated out, in a  
16          functional way, those responsible for conducting  
17          national security offence investigations. And in  
18          terms of dealing with the issue that has been  
19          discussed prior to the break around looking at it  
20          from a functional point of view, then presumably,  
21          perhaps with some other further reorganization,  
22          one could circumscribe those people within the  
23          RCMP who are responsible for conducting those  
24          investigations and they could report that activity  
25          or it could be subject to the kind of review that

1           seems to be favoured.

2                           Inevitably, though, that leads us  
3 down the trail of other organizations in an  
4 integrated policing concept. INSETs, for example,  
5 they are combined, you will have three members of  
6 the RCMP, perhaps three members of the Ontario  
7 Provincial Police sitting together. Are you just  
8 going to review of the work of the RCMP and not  
9 the work of the others?

10                           If, for example, information was  
11 to be shared, it is going to be shared, I assure  
12 you, in that setting.

13                           The other concern is that there  
14 have been a number of court decisions that have  
15 had a direct impact on the sharing of information,  
16 and I am referring to the sharing of information  
17 from offshore, in specifically the Stinchcombe  
18 decision. I am not here to second-guess the  
19 wisdom of the Supreme Court, but I do know that  
20 there have been agencies during my time in  
21 policing, foreign agencies who have said, "We  
22 won't give you this information because we know  
23 you have to a make it all public, you have to  
24 disclose everything, and the risk to our national  
25 security is such that we can't do that."

1                   I am not saying that is right on  
2                   their part, and I am certainly not saying the  
3                   decision of the Supreme Court is wrong, not at  
4                   all. How do you do all of that while remaining an  
5                   effective enforcement body in the interests of  
6                   Canada and the interests of Canadians in  
7                   protecting our national security?

8                   So it is a tough one.

9                   But I think, to your precise  
10                  question, one could circumscribe to a large degree  
11                  those responsible for those investigations in the  
12                  RCMP and have that work reviewed as some have  
13                  described.

14                  Thank you.

15                  THE COMMISSIONER: Commissioner?

16                  MS BONIFACE: I will add firstly,  
17                  I guess, that I agree with Mr. Inkster in terms of  
18                  how you funnel in and figure out exactly what the  
19                  work is. But using the example that was given  
20                  about the traffic stop and the bomb in the trunk  
21                  it is really: Where do you decide the activity  
22                  starts in the process? So as information feeds  
23                  in, how far-reaching does it get? And then of  
24                  course you reach then into mandates of other  
25                  oversight bodies.

1                   And as organizations change and  
2                   use new definitions, because bureaucracies just  
3                   love to change titles, I think it would be  
4                   important for the Commission to think about it in  
5                   terms of what the activities are, and the  
6                   specialization by the definition of the work they  
7                   do as opposed to what they call themselves. I  
8                   think that will be an important piece.

9                   As you work through the thought  
10                  process on that, it is really figuring out the  
11                  definition of activities, and others have said  
12                  this as well. You really need to define what the  
13                  activities means and how far-reaching that is.

14                 Where you see that beginning will  
15                 really determine, in part, some of the answer to  
16                 your question.

17                 THE COMMISSIONER: Let me then  
18                 open the floor to the panel to dealing with  
19                 Question No. 2, the four options, the model  
20                 generally.

21                 Mr. Borovoy?

22                 MR. BOROVOY: I think that, first  
23                 of all, I would just like to dispense with some  
24                 notion that seems to hover over this discussion  
25                 from time to time, and that is that somehow

1 ordinary law enforcement ought not to be amenable  
2 to an audit type of review. In my view, there is  
3 no reason in principle why it can't be, and there  
4 is every reason in principle why it should be.

5 Having said that, also  
6 appreciating the fact that you understandably feel  
7 bound by a mandate, and if we were to talk about  
8 how to define the mandate, if I can just put it in  
9 broadly generic terms without attempting a  
10 statutory definition -- I know better than to try  
11 to do that on one foot -- I would talk generally  
12 about serious violence that attempts to destroy or  
13 undermine the ability of government to function as  
14 essentially the kind of national security  
15 activities we ought to be concerned about.

16 When I say that, I join those who  
17 would advocate having a new body or an extended  
18 SIRC perform this after-the-fact audit review of  
19 all national security activities, no matter by  
20 whom it may be done, and that would include not  
21 only the RCMP, but also even those provincial and  
22 municipal police engaged in national security,  
23 because that of course can validly attract the  
24 constitutional power of the federal government.

25 Then I would go one step

1 further -- and here I may part company with some  
2 of those on the panel with whom I am otherwise  
3 associated or allied. I would like to make a  
4 distinction between the operational activities of  
5 a review body and the audit activities.

6 In my view, there is a good  
7 argument for having an audit function performed by  
8 an audit body that does nothing else but perform  
9 audits on national security activities and report  
10 on it.

11 As I say that, then that implies  
12 that the complaints bodies, those that normally  
13 enforce complaints, would not be involved in this,  
14 and indeed an audit body could even audit how  
15 effectively the complaints body is operating; in  
16 other words, oversee the whole thing and report on  
17 it.

18 I can go into this later when you  
19 want to address this, but such audit body should  
20 have no decision-making functions at all, no  
21 remedial power. It should be there to disclose,  
22 expose, and propose, but not decide. I think we  
23 would have a more sensible arrangement.

24 As I say this, I confess to some  
25 uneasiness, because at the moment I have a great

1 deal of respect for the current complaints  
2 commission for the RCMP and the kind of job that  
3 is being done. But I have been at this for a long  
4 time, and I know that people come and go, even if  
5 I haven't.

6 --- Laughter / Rires

7 MR. BOROVOY: That being the case,  
8 it is important to look at this in structural  
9 rather than in personal terms.

10 THE COMMISSIONER: But as I  
11 understand what you are saying, Mr. Borovoy, you  
12 would for the "national security activities of the  
13 RCMP" continue to have the complaints function  
14 carried out by the CPC, but then the new review  
15 body with audit functions -- we will come to  
16 powers later -- would have that type of power with  
17 respect to those activities.

18 MR. BOROVOY: That is right.

19 THE COMMISSIONER: Do you have a  
20 concern -- some people make the point that when it  
21 comes to complaints about national security  
22 activities -- somebody earlier mentioned it --  
23 they say, "Well, it is not a very strong tool  
24 because the nature of national security  
25 investigations is they are confidential, they are

1 not transparent." And I think the statistics  
2 indicate that something over 95 per cent of them  
3 never end up going to court, so there is not the  
4 judicial scrutiny at the end.

5 So the potential complainant  
6 doesn't know the complainant.

7 MR. BOROVOY: Exactly the point I  
8 made earlier. That is why the audit function is  
9 so important, but that is no reason to divest the  
10 complaints commission of its ongoing role, that is  
11 all. To whatever extent anything does bubble up  
12 to the surface, they can handle it; otherwise, we  
13 have an audit function being performed that can  
14 root these things out and expose it but not have  
15 that executive power.

16 THE COMMISSIONER: That would be  
17 different than SIRC because, as you know, SIRC has  
18 both the review function and the complaints  
19 function for CSIS.

20 MR. BOROVOY: And if I had my  
21 druthers, I would have someone else doing the  
22 complaints function and leave SIRC or whatever  
23 other -- in other words, I would like to separate  
24 these two functions.

25 THE COMMISSIONER: I understand.



1 MR. BOROVOY: So you are having an  
2 after-the-fact audit with respect to all the  
3 national security related activity that you  
4 possibly can.

5 THE COMMISSIONER: Sorry to get  
6 hung up on this, but just let me ask this  
7 question: Is there any validity to the point that  
8 by having the complaints function, the knowledge  
9 of the complaints that come forward will show  
10 trends and so on and inform the review function,  
11 will actually support and help it?

12 MR. BOROVOY: Sure, it very well  
13 could.

14 THE COMMISSIONER: But you don't  
15 think it needs to be in the same body, is your  
16 point?

17 MR. BOROVOY: That is right.

18 THE COMMISSIONER: We will go down  
19 to Professor Farson first.

20 MR. FARSON: I said earlier on  
21 that history has a habit of repeating itself. I  
22 guess I am along with my colleague Wesley Wark in  
23 recommending Option 5, which in many ways looks  
24 rather like the Macdonald Commission's  
25 recommendations.

1                   I would want to continue the CPC  
2                   as a complaints entity, but I would want this  
3                   Commission to take a very careful look at the  
4                   powers that Shirley Heafy has asked for and to see  
5                   whether, in your view, those are necessary.

6                   There is the issue of whether a  
7                   complaint becomes a national security issue and  
8                   there would, I think from that basis, have to be  
9                   some form of connectivity to what I would see,  
10                  like Wesley would argue, some form of body that  
11                  looks functionally at national security issues,  
12                  not on institutional bases, something that looks  
13                  at both efficacy and propriety.

14                  So I am in favour of a super-SIRC,  
15                  if you like. I see this as having merit over  
16                  individual agencies that look at -- review bodies  
17                  that look at individual agencies on a number of  
18                  counts.

19                  I would think that, for example,  
20                  it would have the benefit of not adding a whole  
21                  lot of review layers to the process, and I want to  
22                  be very cautious about this because I think that  
23                  one of the problems that security and intelligence  
24                  agencies have is dealing with all the various  
25                  review and oversight bodies. It takes up an

1 enormous amount of resources, so we have to be  
2 careful, I think, to not overburden the agencies  
3 that are being scrutinized.

4 My second reason for going the  
5 route of the super-SIRC, if you like, would be  
6 that it would force this Commission to look very  
7 carefully, in my view, at the mandates and powers  
8 of the existing bodies and the rationales under  
9 which they currently operate, and also the  
10 resources of those bodies.

11 It would also I think force you to  
12 look at the overlaps that exist between the  
13 bodies, whether there needs to be greater overlap  
14 and even if there is too much redundancy on the  
15 other hand.

16 Lastly, I think it would force you  
17 to look carefully at whether one needs statutory  
18 gateways to the provinces.

19 The other dimension of the  
20 system -- and I go back to a point that I  
21 mentioned before -- is the need for some direct  
22 relationship to a standing committee of the House  
23 of Commons, or some joint committee of Parliament,  
24 the place where real accountability has to happen.

25 And I would ask you to go back and

1 look at the difficulties that Parliament had in  
2 trying to review the CSIS Act and to get  
3 information from SIRC, for example, from the  
4 Inspector General, getting a look at their  
5 reports, their certificates, getting a look at the  
6 directives that Ministers had provided to the  
7 agency, getting a look at annual reports that the  
8 director of CSIS had provided.

9 In short, in 1989-90, though  
10 Parliament had a statutory obligation to do a  
11 comprehensive review of the operations and  
12 provisions of the Act, it was really unable to do  
13 that. So real accountability, substantive  
14 accountability, was quite impossible.

15 Ministers could not be held to  
16 account, officials could not be made to answer  
17 appropriate questions. I talked about scrutiny  
18 for the purpose of constitutionality, and that is  
19 what I meant.

20 I want to disagree a little bit  
21 with Alan Borovoy on the efficacy side of things  
22 because, in my view -- and I think Wesley was  
23 intimating this -- part of the efficacy issue  
24 deals with whether you have the capacity to do the  
25 job, and you need to know whether you have the

1 capacity before you actually go and do it.

2 I recall one of the arguments that  
3 the Director of Central Intelligence Agency,  
4 former Director, came to make when he was asked  
5 about the value of review and oversight, and he  
6 said, "When we are short of resources, we have  
7 people on the Hill to go to make our claim that  
8 will listen and understand our problem."

9 I think that is a very real issue  
10 on the efficacy side.

11 If I can just spend a couple of  
12 minutes on one of the points that you are asking,  
13 where are these limits in the policing role and  
14 the national security role, I think this is a very  
15 difficult one, particularly when you reflect on  
16 the fact that organized crime has now come under  
17 the national security remit and also financial  
18 crime has come under the national security remit.

19 And we do have other organizations  
20 that are involved in that. FINTRAC, for example,  
21 has a dual mandate, so I would make that comment.

22 One other thing that I think is  
23 missing is what happens to somebody who is a  
24 whistleblower? And this isn't a complaint that is  
25 being made; it is a problem with the system, the

1 way something is being handled. I am not sure I  
2 have an answer but I think it is something you may  
3 wish to reflect upon.

4 THE COMMISSIONER: Commissioner  
5 Ryneveld?

6 MR. RYNEVELD: Thank you,  
7 Mr. Commissioner.

8 I just wanted to comment, if I  
9 might, on something raised by Former Commissioner  
10 Inkster about the fact that he mentioned about the  
11 distrust of international agencies to share  
12 information with us because of our duties of full  
13 disclosure under Stinchcombe and matters of that  
14 nature. And in order to do so, I have to refer  
15 briefly, if I may, to my four-year experience  
16 practising international criminal law, and most  
17 recently a specific example from the Kosovo  
18 component of the Slobodan Milosevic trial.

19 As the person in charge of that  
20 particular prosecution, we needed to have a lot of  
21 information from various countries, and needless  
22 to say various countries are very loath to share  
23 national security information with a prosecution  
24 team that seemed to want this information in order  
25 to put it before a court which was televised and

1 would therefore become highly public.

2 We needed information in order to  
3 focus our investigation.

4 So you might want to consider what  
5 they seem to have worked out there, and that is  
6 something that I believe was called Rule 88, and  
7 that was where, in a sort of old St. Lawrence Rule  
8 type of pre-Charter situation -- the Charter  
9 didn't apply there, of course -- information was  
10 given to us by various countries under the  
11 complete cloak of secrecy and our undertaking not  
12 to use it per se, but that we could get, as it  
13 were, derivative evidence, in other words fruit of  
14 the poison tree in a way, I suppose, that we  
15 would -- for example, if I had a satellite image  
16 that was provided to me by some international  
17 agency about the location of some particular armed  
18 forces doing something in a particular area, but  
19 they didn't want to acknowledge that they had done  
20 that, we would then at least know where to start  
21 looking. We would not enter that evidence, we  
22 would not use that evidence --

23 MR. BOROVOY: A Deep Throat  
24 operation.

25 MR. RYNEVELD: But the point was

1           it was a basis from which to commence your  
2           investigation.

3                           Any derivative evidence that we  
4           obtained from that Rule 88 material, of course,  
5           was subject to disclosure. But the reason why we  
6           focused our attention there was not the subject of  
7           disclosure. The Court recognized that. And the  
8           only one who could review whether or not that  
9           material should or should not be disclosed would  
10          be the Court. If the Court said "you need to  
11          disclose this", then we would withdraw that count  
12          in the indictment so that we wouldn't violate the  
13          undertaking we gave to the government.

14                           In other words, the risk was you  
15          didn't get to use all this good stuff.

16                           In any event, there might be some  
17          way in which we can adopt something like what they  
18          are using in the international criminal courts in  
19          order to accomplish this and get the trust of  
20          other agencies to share vital security information  
21          with us.

22                           THE COMMISSIONER: It is an  
23          interesting point and I think certainly worth  
24          looking at it.

25                           It strikes me that one principle



1           that might underlie any review agency would be  
2           that the review agency in its processes itself  
3           should not in any way injure national security.  
4           So you are starting out reviewing national  
5           security activities, and what you should be saying  
6           is that in reviewing it -- and it would typically,  
7           if you were going to injure, it would be by  
8           disclosure.

9                           Let me throw it out, if anybody in  
10           discussion throughout the morning wants to comment  
11           on it.

12                           But it would seem to me there  
13           could be a principle that underlies that whatever  
14           you are doing and reviewing, it would be  
15           important, holding accountable and so on, but you  
16           not do it in such a manner that you then endanger  
17           national security itself. It would seem to be  
18           almost counterproductive and so on.

19                           Yes, Professor Wark?

20                           MR. WARK: Just to comment on that  
21           point, I think that there would probably be broad  
22           agreement that it would be important in the  
23           mandate of a review agency to protect, not  
24           necessarily national security something -- the way  
25           you have just defined it, Commissioner, I am

1       sorry -- but rather something a little more  
2       precisely defined, sources and methods, which is  
3       the language that intelligence communities usually  
4       use.

5                   I think there is very strong  
6       reason to protect sources and methods and that  
7       also puts a bit of a limit around what you, in  
8       fact, are trying to protect and what you are also  
9       trying to disclose.

10                   Can I just make a couple of  
11       comments on points that have been raised so far,  
12       and I also want to offer my own answer to your  
13       initial question about how you distinguish  
14       national security operations and the RCMP for  
15       review purposes.

16                   First just to talk for a minute  
17       about Alan's comment, his strong emphasis on the  
18       importance of focusing on an audit body, and I  
19       absolutely agree with that.

20                   The suggestion, though, that maybe  
21       in order to provide that focus you would have to  
22       separate out a complaints process, for example, so  
23       that you might in a new Option 5 environment strip  
24       a super-SIRC of its complaints procedure, I am not  
25       sure would be a good idea or necessary.

1                   I think what would be useful by  
2 way of a suggestion would be in fact to ask SIRC  
3 and the CSE Commissioner's Office about their  
4 experience of complaints in a practical sense: to  
5 what extent dealing with complaints over the  
6 course of their history has had a kind of  
7 inhibiting effect on the resources and capacity to  
8 do the primary job of the audit function.

9                   I don't know what the answer to  
10 that might be, to what extent they feel they have  
11 to devote resources to complaints, some of which  
12 at the end of the day prove frivolous or  
13 fictitious and others which prove, on occasion,  
14 serious.

15                   I think it is a prima facie matter  
16 to continue to have a complaints function built  
17 into an audit body. Unless there is some  
18 compelling case that waters down the audit  
19 capacity, that is the right way to go.

20                   Stuart raised the question of the  
21 relationship between any recommendation on a  
22 review body and a future parliamentary committee,  
23 and that seems to be a good point but very complex  
24 because we have no idea what the parliamentary  
25 committee might look like.

1                   But it seems to me,  
2           Mr. Commissioner, that at least a rationale would  
3           have to be provided for an external review agency  
4           on the assumption that Parliament will have a  
5           fairly strong review capacity, in either a single  
6           or joint parliamentary committee of some kind.  
7           And I think the argument that has to be made is  
8           that there is a need for a different layer of  
9           review, a different kind of review in an external  
10          and independent body as opposed to what Parliament  
11          might do, how you sort out those different  
12          missions.

13                   THE COMMISSIONER:   Indeed, the  
14          mandate seems to contemplate an independent arm's  
15          length review mechanism.   But I agree.   Part of  
16          the task in this hierarchy of review, if there is  
17          a parliamentary committee carrying out review, is  
18          what is the relationship?

19                   One thing I am keenly concerned  
20          about is not duplicating it, over-reviewing, and  
21          so that the relationship between that and a new  
22          body would be critical.

23                   MR. WARK:   Could I just make one  
24          last point and then turn the floor over?

25                   It is just not a question of in

1 practical terms how difficult will it be to define  
2 a mandate for a new review body that will look  
3 specifically at the RCMP's national security  
4 mechanisms and perhaps separate that out from the  
5 broader RCMP remit. I think it is important to  
6 make that distinction.

7 I don't have to write this so I  
8 can easily say this, but I don't think the  
9 distinction is going to be that difficult on  
10 functional grounds.

11 The RCMP does functionally  
12 separate its intelligence and national security  
13 activities within the agency and within the  
14 Criminal Intelligence Directorate and within  
15 specifically the NISS function, and I think that  
16 is the area that needs, in particular, to be  
17 reviewed.

18 But I also think what we are  
19 really looking at is the role of the RCMP within  
20 the security and intelligence community and the  
21 interrelationship between the RCMP's activities  
22 there and the way in which the security  
23 intelligence community is structured, in which  
24 policy is made and decisions are driven.

25 I think, therefore, a second part

1 of the answer to this question is if you focus  
2 functionally on the specific remit of particular  
3 parts of the RCMP in the national security field,  
4 which I think is easily identifiable, and secondly  
5 be able to have the capacity to follow the  
6 connections between the RCMP and the security  
7 intelligence community in terms of the role of the  
8 Public Safety Department and the central  
9 committees that function out of the Privy Council  
10 Office, all of those things, it seems to me, have  
11 to be brought in to the remit of this review.

12 But what the RCMP does in the  
13 national security field I think is institutionally  
14 quite distinct and so capable of being reviewed in  
15 that sense.

16 Thank you.

17 THE COMMISSIONER: Mr. Inkster?

18 MR. INKSTER: Thank you,  
19 Mr. Commissioner.

20 I wanted to say that I am  
21 delighted that this is on the record because it  
22 will be the second time in my life that I have  
23 agreed with Mr. Borovoy.

24 THE COMMISSIONER: Can I ask about  
25 the first?

1 MR. INKSTER: On the first  
2 occasion --

3 MR. BOROVOY: I might change my  
4 mind.

5 MR. INKSTER: On the first  
6 occasion I suggested that he was good-looking and  
7 he agreed.

8 --- Laughter / Rires

9 MR. INKSTER: I am attracted to  
10 Mr. Borovoy's suggestion, and the merit I see in  
11 it is that in an ongoing way, as the work  
12 unfolds -- and it would be subject to the audit  
13 that he described -- properly structured, properly  
14 staffed, it could seen by those who are subject to  
15 that audit as being helpful and constructive in an  
16 ongoing way.

17 I mean, there is no reluctance on  
18 the part of any police officer to improve the way  
19 they go about their work. They all want to  
20 improve and be better. And that helpful, ongoing  
21 advice that I presume would be part of that audit  
22 function for those engaged in the work in my view  
23 would be very helpful and constructive.

24 THE COMMISSIONER: Professor  
25 Bahdi?

1 MS BAHDI: My comments don't  
2 follow directly on that point, so if yours do,  
3 please go ahead.

4 MR. ALLMAND: Go ahead.

5 MS BAHDI: Thank you.

6 Yesterday we heard about  
7 reluctance on the part of members of various  
8 communities to come forward and complain, so my  
9 comments really want to draw on some of the themes  
10 that were made yesterday and to just look at the  
11 whole question of institutional design from a  
12 complainant's perspective.

13 Thinking about institutionally  
14 directed oversight, it occurs to me that from a  
15 complainant perspective, this might deter  
16 complaints because of the simple fact that if you  
17 have to go to individual bodies to file a  
18 complaint, if that is what we are looking at,  
19 confusing, costly, the possibility of  
20 contradictory decisions would deter.

21 The reality is if we look at a  
22 number of different incidents, let's call them --  
23 like Operation Thread, for example, that we heard  
24 about yesterday. If I am correct about this, it  
25 involved CSIS, the RCMP, border authorities, as



1 well as Immigration.

2 On the other hand, a functional  
3 approach, you risk losing the expertise, and the  
4 relationship I would imagine that would be very  
5 important between the oversight body and the  
6 security agencies, the relationship of knowing the  
7 policies, the practices, the programs, the  
8 cultures, indeed the people who were involved at  
9 the various levels.

10 And that in itself, if it is  
11 working properly, would produce some efficiencies  
12 that would be important from a complainant  
13 perspective because at the very least it would  
14 reduce delay, presumably.

15 So I have to say I can't say I  
16 have decided between these two. Somebody  
17 suggested a concurrent approach, and I thought,  
18 "Oh, well that is interesting. That solves the  
19 problem." I don't know how you would exactly  
20 design that, though.

21 THE COMMISSIONER: That would be  
22 the Canadian way.

23 MS BAHDI: Exactly.

24 THE COMMISSIONER: I will just  
25 fudge it up here.

1 MS BAHDI: Exactly. But I wanted  
2 to put out those considerations from a  
3 complainant's perspective.

4 THE COMMISSIONER: Thank you.

5 Mr. Allmand, I will have you  
6 speak, but you might want to build into this a  
7 question I have about the super-agency approach.

8 MR. ALLMAND: That is what I was  
9 going to speak on.

10 THE COMMISSIONER: Let me ask my  
11 question and you can build it into your answer.

12 How would we determine what  
13 agencies, federal departments and agencies, would  
14 be swept into this new super-agency, first of all?

15 Second, it is then going to  
16 involve us going to these different agencies, the  
17 Canadian Border Service, the Department of  
18 Defence, Privy Council Office and so on, and  
19 drawing a line in each of them that says let's  
20 take out your national security activities,  
21 because we are going to collect these national  
22 security activities from these 10 or 12 agencies,  
23 put them into one big pot under this review body.

24 So we now are drawing the line,  
25 that I spoke to Mr. Inkster about. It would have

1 to be drawn in each of these agencies.

2 Is it a legitimate concern? I  
3 understand in theory it sounds attractive. But is  
4 it a legitimate concern that this is just going to  
5 be a recipe for judicial review lawyers? It will  
6 be a bonanza for them ever after looking at this  
7 and putting it together.

8 I must say when I think of that  
9 idea, then I step to the practicality of it.

10 In any event, if you are going to  
11 speak to that, I would certainly be obliged to  
12 hear your comments.

13 MR. ALLMAND: Yes. Having  
14 reviewed the evidence that was public so far  
15 before your Commission, it is pretty obvious that  
16 there is a lot of joint operations,  
17 interconnectedness. The security community is  
18 working together at many levels, not just with the  
19 collection of information, but the interpretation  
20 in different places, the sharing, the storage, the  
21 use of, whether it is in Immigration or in  
22 Transport and so on. It is a growing community.

23 This new CBSA, the Canadian Border  
24 Security Agency now, which has joint participation  
25 as well. Also this National Risk Assessment

1 Centre, which I am not totally -- you probably  
2 know more about it than we do because you heard  
3 the in-camera evidence.

4 THE COMMISSIONER: Right.

5 MR. ALLMAND: So there is a  
6 growing number of agencies that are dealing with  
7 security issues. I am convinced that the only way  
8 you can have effective oversight, review and so  
9 on, is by having one body that deals with all  
10 matters that relate to security intelligence,  
11 whether it is the RCMP, whether it is CSE, INSETs  
12 operations, border security, et cetera.

13 If you don't have that, the  
14 consequences can be so damaging. The Arar case is  
15 just one example, but we heard other cases  
16 yesterday: the Thread operations, and there are  
17 others.

18 And by the way, I would disagree  
19 with my friend, Borovoy. I think what you might  
20 have is in the one agency a complaints chamber and  
21 an audit chamber, if I can put it that way, but I  
22 think the coordination has to be there so you can  
23 move quickly and that there is some overall  
24 administration or coordination. If the complaint  
25 gives rise to the need for an audit, you can do it

1 right away and there is no great delay.

2 I don't like to see the  
3 proliferation of too many agencies, one dealing  
4 with auditing, the other dealing with complaints.  
5 I am talking about complaints with respect to  
6 security and intelligence.

7 Also, I would like to disagree  
8 with Ms Bahdi on that point. I think you can also  
9 have the expertise within one agency by bringing  
10 in the experts; having experts with respect to the  
11 RCMP in the agency, experts with respect to CSIS.  
12 You don't need different agencies that are  
13 separated and have their own bureaucracy and turfs  
14 and so on.

15 I think, because it is so  
16 important, you need one agency to deal with all  
17 security intelligence operations, with the powers  
18 of subpoena, of auditing, any power necessary to  
19 get to the bottom of matters.

20 By the way, somebody was talking  
21 about -- I guess it was Mr. Wark -- the need for  
22 public education. In other words -- we will get  
23 to that maybe this afternoon -- what kind of  
24 reports you have and how you report so that you  
25 can also stimulate public discussion and public

1 education. I think that is also necessary.

2 THE COMMISSIONER: We will move  
3 away from Question 2. But just before we do, let  
4 me ask this: Assuming there is to be a new review  
5 body, is there anyone who suggests that it should  
6 be confined solely to the RCMP?

7 Let's say a new body with a  
8 review-type function that we have been talking  
9 about, SIRC-like. Is there anyone who thinks that  
10 it should be institutionally directed at the  
11 RCMP's national security activities only?

12 So in that model there would be  
13 two choices: it would just be a new body that is  
14 going to review national security activities  
15 solely for the RCMP. That is its sole function.  
16 It takes that slice of the RCMP. It has  
17 jurisdiction over that, end of story. It could  
18 have, as we now say, statutory gateways,  
19 interactions with other review bodies, sharing  
20 back and forth, joint hearings, and so on, but its  
21 jurisdiction would be that.

22 Or it could be the CPC. We could  
23 just graft onto its current jurisdiction this new  
24 review function over the RCMP's national security  
25 activities.

1                   Is there anybody who thinks, if we  
2                   are going that route, that is a good idea? Or  
3                   certainly the preponderance of thought seems to be  
4                   if you are going to a review body, whether it is a  
5                   super agency, there should be a sharing of  
6                   jurisdiction, looking at other intelligence  
7                   agencies.

8                   I simply ask that question  
9                   generally.

10                  Yes, Commissioner?

11                  MS BONIFACE: The only point I  
12                  would make on it is I think you have to in some  
13                  ways look at what the scope is. So when I hear  
14                  "super-agencies", I worry about bureaucracies that  
15                  become bigger than the agencies they are  
16                  overseeing. I think there is a risk there in  
17                  terms of the depth and breadth you look at.

18                  Second, I am not sure we have  
19                  explored in the discussion -- and it doesn't have  
20                  to be at this table. But I think the gateway  
21                  notion is worth taking a look at, however that is  
22                  done.

23                  On the complaints commission  
24                  extension of authority into these issues, I worry  
25                  about being able to take the depth of expertise

1       you require on these issues and put them into one  
2       great big context and then decide that everybody  
3       can do everything because it is just sort of one  
4       degree of separation as we go.

5                   I think in some ways it is a  
6       matter of determining what the activities are that  
7       you look at, where they fall in whatever  
8       institutions, what those institutions currently  
9       have for oversight and then, in turn, how those  
10      oversight mechanisms operate today and how they  
11      best interplay with each other or, as Mr. Allmand  
12      said, whether or not it is a super one.

13                   But I see that as getting to the  
14      end of the discussion, not the front of the  
15      discussion, as you determine it.

16                   And I think the one piece -- and I  
17      apologize, because I had to step out. But the one  
18      piece we ought not to forget in the process is  
19      that in these organizations there are management  
20      responsibilities that fall within frameworks, and  
21      I worry about oversight mechanisms deciding that  
22      they are eventually the managers, and so it is  
23      drawing the criteria and lines around that  
24      process.

25                   Certainly the way it is managed,



1           you know, there is an oversight role. But I think  
2           those distinctions need to be clarified.

3                           THE COMMISSIONER: Just on that  
4           point, if I can, we talk about review and  
5           oversight, we tend to, interchangeably.

6                           Review is a looking back, and I  
7           think Mr. Borovoy made that point. Oversight  
8           brings with it the possibility of involvement in  
9           the ongoing operations and indeed raises the  
10          difficulty that the body itself, if there is a  
11          problem, becomes part of the problem, because they  
12          were there conducting oversight of management as  
13          the problem developed.

14                          I must say, we -- and I am  
15          probably guilty of this too -- have used the words  
16          interchangeably.

17                          I tend to use the word "review".  
18          The word "review" is used in the mandate, and I  
19          must say that when I am asking questions I am  
20          thinking of review rather than ongoing oversight.

21                          If people wish to address that as  
22          we go ahead, there will be opportunity.

23                          I think we have a natural segue  
24          into Question No. 3, and that is: How should the  
25          Commission's recommendations address issues of

1 integration and information-sharing among the RCMP  
2 and other federal agencies, provincial/municipal  
3 police forces and foreign governments and  
4 agencies? So there are three situations there.

5                   We have touched on this to some  
6 extent, and this question really triggers -- I  
7 guess follows up on the discussion we have been  
8 having: a joint agency. Or with some agencies it  
9 may not be possible to have a joint agency because  
10 of constitutional concerns and/or with foreign  
11 agencies.

12                   So the question of "statutory  
13 gateways", what type of interaction could there be  
14 between review bodies in order to ensure things  
15 don't fall between the cracks so that they are  
16 reviewing a transaction, one. They share their  
17 work; they don't come to inconsistent results.  
18 All of those sorts of things.

19                   Why don't we turn to the three  
20 people that are to speak?

21                   I think, Commissioner Boniface,  
22 you were first on this.

23                   MS BONIFACE: Thank you.

24                   Certainly as we move into the  
25 questions, we are dipping into questions ahead

1           anyway. So let me keep my comments.

2                           A couple of things that I think  
3           are really important on the premise of certainly  
4           joint force operations.

5                           The process for integrated  
6           policing is a step forward in Canada, I believe,  
7           and consequently anything the Commission does I  
8           think they need to fully appreciate the direction  
9           that it is gone and the importance of the  
10          direction it is gone, particularly given the size  
11          of our country and the number of police officers  
12          you have and of course the jurisdictional  
13          differences between federal, provincial and  
14          municipal, but the fact that we are all there  
15          together.

16                          I think the 9/11 Report spoke  
17          quite clearly about the need for people to work  
18          together in these agencies.

19                          I think the second thing -- and I  
20          will speak to it in the general sense of your  
21          comments -- is that we all have codes of conduct  
22          and legislation that we operate under depending  
23          where we are in that context.

24                          Third, there is a really important  
25          issue surrounding the information-sharing for the

1 protection of the national security-related  
2 matters. So although there are individual rights,  
3 public rights, and other matters for review policy  
4 and procedures, it is really important that we  
5 ensure the safety and security of all citizens for  
6 the collective interest. And quite clearly that  
7 balance needs to be struck and how that  
8 information is shared in that regard.

9 I think that whatever new review  
10 mechanism is anticipated or thought through, it  
11 must be respectful to all agencies in terms of how  
12 it would interact and how those steps could be  
13 taken.

14 Tip-toeing around the  
15 jurisdictional issues, but really, as Mr. Inkster  
16 said in one of his comments, people who work in  
17 these fields need to understand what mechanism  
18 kicks in for their work. And I think one of the  
19 challenges you have before you is subject to how  
20 many oversight or review mechanisms am I, if I am  
21 a particular person working in this field, whether  
22 I am a municipal officer, a provincial officer or  
23 an RCMP officer -- and I think for many of us in  
24 those agencies there is a lot to consider in terms  
25 of what that would mean.

1                   Nonetheless, it is really  
2                   important that the work be carried out seamlessly,  
3                   and I think a good reminder that certainly in  
4                   joint forces operations of this type, they are led  
5                   by the RCMP. So there are still mechanisms within  
6                   management to deal with those issues.

7                   Any recommendations that you do  
8                   around this aspect of it, I think it is very  
9                   important to appreciate the progressive nature of  
10                  Canadian law enforcement around integrated  
11                  policing. I can't say that enough times because  
12                  it is what is going to make, I think, the future  
13                  secure for all of us.

14                 I think on the RCMP and other  
15                 federal agencies question on your Question 1, I  
16                 think you have covered that one fairly closely.

17                 On the RCMP and provincial and  
18                 municipal forces, you made reference to the  
19                 jurisdictional question, and I will only highlight  
20                 for you some of the challenge this is just  
21                 province to province. Just the constitutional  
22                 question that we have to continually sort through  
23                 in order to give officers authority to work  
24                 between provincial agencies is a challenge.

25                 I have area, for instance, in the

1 province of Ontario, where my officers have to  
2 drive through another province to get to the other  
3 side of their own jurisdiction, and we have had to  
4 work across provinces to try to sort that issue  
5 out.

6 So if it is an issue province to  
7 province, you will appreciate what it is federal  
8 to provincial.

9 I will speak only briefly on the  
10 foreign governments' agencies, and that is really  
11 whatever mechanism is considered, it must be  
12 understood, as we work through it, what that  
13 impact or that the relationship with those other  
14 governments will be. I think some of the  
15 international work that has been done, and it has  
16 been referred to here, government to government,  
17 we take a position clearly on what we want within  
18 this country, but it also has to reflect what the  
19 implications are to be sharing with foreign  
20 governments, as Mr. Inkster referred to earlier.

21 For instance, what type of  
22 information would be subject of a review: Who is  
23 privy to that information, and whether or not  
24 other agencies have concerns about that  
25 information be shared outside the law enforcement

1 or security field.

2 So how do you build a model that  
3 would put those into place and make it helpful?

4 I think at the end of the day part  
5 of the evolution will be there is going to be  
6 challenges to the perfect model, as we heard. The  
7 statutory gateways, and the reading I did on  
8 Belgium interested me in terms of how we could  
9 make that work in ten provinces, federal  
10 government agencies, and how that would work. But  
11 it is a question that I think we should not take  
12 lightly in terms of the use of the statutory  
13 gateways and how that may work in a constitutional  
14 framework in which Canada is.

15 THE COMMISSIONER: In England they  
16 have some, too. I mean, they have experience with  
17 it successfully in some contexts.

18 Thank you very much, Commissioner.  
19 Professor Farson?

20 MR. FARSON: I will try not to  
21 overlap my comments with Commissioner Boniface.

22 Information-sharing in one of the  
23 documents is limited to criminal investigations  
24 and national security. I think there is an  
25 important additional dimension in which the RCMP

1 is critically involved, and that concerns the  
2 transfer of information with regard to the  
3 security of critical infrastructure.

4 As you are probably aware, 90 per  
5 cent of critical infrastructure isn't in the hands  
6 of the federal government; it is in the hands of  
7 provinces, municipalities, and above all the  
8 private sector.

9 So we have here a whole new set of  
10 problematics about the transfer of information.

11 One of the reasons that the RCMP  
12 of course is involved is it is the big link-pin  
13 between the federal, the provincial and the  
14 municipal systems of government, so it plays a  
15 crucial role here.

16 I would suggest that you perhaps  
17 should want, therefore, to look at this transfer  
18 process and what's being transferred and the  
19 problems that potentially arise. There are  
20 privacy concerns. There are concerns about the  
21 exchange of proprietary information regarding the  
22 competitive positions of corporations, and even  
23 the adequacy of the information that is being  
24 transferred from the ITAC process to the  
25 provincial, municipal and private sectors.



1                   When I was doing research in this  
2                   area, there were no feedback loops really  
3                   operating to give some indication of the adequacy  
4                   of this information flow. It is not,  
5                   incidentally, something that the RCMP has control  
6                   over, but it does play this really important  
7                   linkage.

8                   Just a comment on the transfer of  
9                   information to other bodies.

10                  I think one of the things that  
11                  needs to be integral in the review process,  
12                  particularly where foreign agencies are concerned,  
13                  is that memoranda of understandings and their  
14                  updates need to go instantly to the review bodies.

15                  One, I think, was a little  
16                  suspicious of what CSIS was doing in Syria from  
17                  the evidence given the other day. Apparently  
18                  there was an indication that this had to do with  
19                  setting up a sharing arrangement. Well, this  
20                  would presumably have been something that SIRC  
21                  could have immediately identified whether it was  
22                  true or false, and I think that may have been an  
23                  important issue to cover.

24                  Another point that I would  
25                  raise -- two more points.

1                   There are both formal and informal  
2                   transfers of information. Here we are talking  
3                   about an efficacy issue. Quite often it is  
4                   necessary to have an informal transfer rather than  
5                   a formal transfer purely on the basis of speed, of  
6                   getting the job done quickly, the timeliness of  
7                   the transfer, in other words.

8                   Even when there are caveats on  
9                   these informal transfers, with interviews that I  
10                  did not so long ago, within the last two to three  
11                  years, people doing the transferring of the  
12                  information routinely referred to having been  
13                  burnt in the transfer process.

14                  One of the consequences: to  
15                  formalize the process and therefore to slow down  
16                  the process, so there is a problem area there.

17                  I would just point you to airports  
18                  as a place where this happens. Airports, as one  
19                  of my respondents suggested, is just like a  
20                  village. All sorts of government agencies and  
21                  also all sorts of foreign agencies operating,  
22                  particularly American ones, as I am sure you are  
23                  aware.

24                  And my last point has to do with  
25                  technology. The technology with which we transfer

1           the information, and the compatibility of that  
2           transfer has been a possible area of problems.  
3           Once again, in terms of -- I mean, the Oppal  
4           Inquiry, for example, going back a few years,  
5           talked about the transfer of information between  
6           police forces. But we are not dealing now with  
7           just between police forces; we are talking about  
8           transfers between a variety of agencies,  
9           et cetera, and there may be technological issues  
10          that come with that.

11                           I think I will leave it with that.

12                           THE COMMISSIONER: Mr. Inkster?

13                           MR. INKSTER: Thank you,  
14           Commissioner.

15                           I thought that I would begin my  
16           remarks talking for a minute or two to remind  
17           folks of the importance of information in law  
18           enforcement, and the very important role that the  
19           community at large plays in that way.

20                           If you go back to Sir Robert Peel  
21           and the creation of professional law enforcement,  
22           he made the statement that went along the lines  
23           that the community is the police, and the police  
24           is the community. Really the law enforcement  
25           people just do it on a fulltime basis, but it is

1 everybody's responsibility.

2 I must admit, commenting on some  
3 testimony I heard yesterday, I was quite appalled  
4 to learn that in the Arab and Muslim community  
5 they put out a directive that people shall not  
6 speak to police, or it was recommended that they  
7 do not speak to the police without a lawyer being  
8 present. In terms of looking for them joining in  
9 the community and becoming part of the community  
10 and helping to solve crimes, I didn't think that  
11 that sort of advice would be helpful.

12 Naturally in the references to the  
13 role of the RCMP in the execution of its mandate,  
14 much has been said about how we would organize  
15 ourselves for the sharing of information with all  
16 of these other agencies, and we have to find a  
17 way. I think that is the bottom line. We have to  
18 find a way to do that.

19 We bear in mind again, and perhaps  
20 it bears repeating, that there are 60,000 police  
21 officers and only a small number, a relatively  
22 small number, one third, are in the RCMP. So I  
23 don't know how we can talk about any  
24 recommendations in respect of information-sharing  
25 and not contemplate the role of other agencies in

1 all of that.

2 Information is really what makes  
3 policing effective. There is no magic in  
4 policing. There is no magic. There are certainly  
5 capable software tools and hardware tools and so  
6 on, but there is no magic. It is about people  
7 talking to you and telling you what's going on and  
8 you making sure that that information gets into  
9 the hands of someone who can act on it quickly and  
10 in an appropriate way.

11 One of the issues that we looked  
12 at when I was working with the Government of  
13 Ontario around national security issues post-9/11  
14 was really the question of how quickly can we get  
15 the information from a complainant, or someone who  
16 has a suspicion and reports something to the  
17 police officer, how quickly can you get it into  
18 the intelligence unit that is looking at it, how  
19 quickly can they analyze it and then get it into  
20 the hands of the individual who has to make an  
21 arrest, make an investigation, or whatever?

22 So it is a challenge in speed, and  
23 speed is oftentimes everything.

24 I think as we go about looking for  
25 ways to share information and ask ourselves where

1           that information ought to be shared, there has to  
2           be a question of relevancy. Do they need to know?

3                       I mean, I as a Canadian living in  
4           one of the best democracies of the world thinks  
5           the public has a right to know, but having been a  
6           policeman I recognize too they may not need to  
7           know right now. But they do need to know. It  
8           needs to come out and be reviewed. But there is  
9           always the issue of timing.

10                      One of the models that I suspect  
11           you have already looked at in contemplating some  
12           of these questions is Interpol. Interpol is an  
13           organization of 185 or 187 countries, many of  
14           whom, outside of policing, are at odds around  
15           other issues, such as religion and ideologies,  
16           even at war, and yet you will see in the Interpol  
17           organisation people sitting shoulder to shoulder  
18           in a room like this and sharing information.

19                      But Interpol has developed  
20           protocols whereby they decide -- someone  
21           intervenes at the personal level and decides who  
22           ought to get that information. In other words,  
23           there is not an open sharing of information that  
24           is submitted to Interpol by all of the countries.  
25           There are tests that are applied as to whether it

1 is shared in specific circumstances.

2 When sharing information with  
3 foreign governments, it is very important that the  
4 exercise be circumscribed. I know that in law  
5 enforcement agencies, if they are sharing  
6 information with a country, or they feel there is  
7 a concern about the need for sharing information  
8 with a country where their human rights record has  
9 been less-than-spectacular, it is a very, very  
10 tough decision for them to make.

11 I mean, the sorts of questions  
12 that goes through their mind, "If I share that  
13 information, will it be abused, and will someone  
14 suffer some indignity?" -- as did Mr. Arar, in a  
15 highly inappropriate way. Or, "If I don't share  
16 it, does that mean that a bomb is going to go off  
17 and hundreds of people are going to be killed?"

18 That is often the dilemma that  
19 face people who are in the possession of  
20 information.

21 To comment on what Commissioner  
22 Boniface has said, we must not overlook the  
23 lessons from the 9/11 Commission where there was  
24 clearly inappropriate sharing -- or information  
25 wasn't shared appropriately; and secondly not in a

1           timely way.

2                           Information is power, and people  
3           are inclined to keep it unto themselves and that  
4           resulted in clearly some inefficiencies in the  
5           ability of the United States authorities to deal  
6           with what turned out to be a very real threat  
7           which we are all aware of.

8                           I think in a smaller, but no less  
9           important context, the review in terms of the  
10          Bernardo trial, again, a murder trial where, on  
11          review, everyone involved was highly criticized  
12          for not sharing information.

13                          So I can only say that the  
14          importance of finding the right way to do it  
15          cannot be overstated and nothing we do here should  
16          impede that.

17                          What would really be helpful, I  
18          think, would be any advice that the Commission and  
19          its advisors could offer to law enforcement  
20          agencies:  What are the appropriate tests to be  
21          applied?  What are the appropriate questions to be  
22          asked as information is shared?  It is not a  
23          question of not sharing, it is how and when and  
24          what.

25                          And I certainly agree with



1 Professor Farson, with the ability of people to do  
2 real harm to us remotely and the ability to pass  
3 information around the world in split-seconds, the  
4 recommendations also need to contemplate that  
5 world out there to which we all have some  
6 vulnerability and to which we need to contribute  
7 in some way.

8 It just boggles my mind, in the  
9 work that I now do, how quickly monies can flow  
10 around the world. If you looked at the issue of  
11 terrorist financing, for example, the ability of  
12 the police to follow terrorist financing  
13 activities is mind boggling because of the ability  
14 of the efficiencies of banks, the different rules  
15 and laws, the different sovereign approaches to  
16 these issues. It is one that really is crying out  
17 for some advice and counsel as to how we deal with  
18 that world out there. We are clearly not an  
19 island, as we all know.

20 Thank you.

21 THE COMMISSIONER: Thank you,  
22 Mr. Inkster.

23 We have five minutes before we  
24 open it up to the floor. Do any of the other  
25 panel members wish to comment on this question?

1 Mr. Borovoy.

2 MR. BOROVOY: Perhaps just to say  
3 this, without addressing the substantive issues  
4 about disclosure and sharing something about the  
5 process. There is a good case for a  
6 requirement -- indeed I suspect they do it  
7 anyway -- of recording what it is they are  
8 sharing, with whom and why, so that this could be  
9 amenable to a subsequent audit, and those  
10 subsequent audits can help to refine the criteria  
11 and the procedures as we go along.

12 THE COMMISSIONER: Professor Wark.

13 MR. WARK: Just two things  
14 quickly.

15 One, to agree with Alan. It would  
16 be the irony of ironies if we set up a  
17 super-review agency that had nothing to review  
18 because no one was keeping records about  
19 intelligence matters.

20 And I don't raise this issue  
21 frivolously, but I think it is recognized as a  
22 growing problem, especially in the fast-flowing  
23 field of intelligence collection and analysis in  
24 the international environment. There is a genuine  
25 problem about record retention and record

1 management that needs to be spoken to. Unless we  
2 have those records, there is not going to be  
3 anything to review, and this is a very complex  
4 issue and speaks to various parts of federal  
5 legislation, including problems with the Access  
6 Act. But I just flag it as an issue.

7 Another thing just very quickly to  
8 say on the third point, I think the three  
9 questions you raise under the heading of Question  
10 3, the first one is solved, if we are doing a  
11 super-agency broad-based functional review.

12 The second one I think can quickly  
13 easily be resolved simply by addressing federally  
14 directed activities, and as Commissioner Boniface  
15 said, many of these activities in the national  
16 security field are led by the RCMP.

17 The third one is, however, a  
18 tricky one, and this is international  
19 intelligence-sharing. Canada is critically  
20 dependent on its capacity to share and gain access  
21 to international intelligence. There is no firm  
22 figure for this, but let's say 90 per cent of  
23 Canadian intelligence is offshore in various  
24 forms, a huge percentage. This has to be  
25 maintained for our own security purposes.

1                   I would just very quickly say that  
2                   a review agency has to have the capacity to be  
3                   able to monitor all memorandums of understanding  
4                   with foreign governments about information-sharing  
5                   and to be able to have access to all the kinds of  
6                   assessments about the complexities of  
7                   information-sharing with those governments.

8                   This would I think be one of those  
9                   areas that would legitimately fall under  
10                  protection of sources and methods, not to give an  
11                  excuse to the security and intelligence community  
12                  to share that information at all with the review  
13                  agency, but clearly it is a matter that the review  
14                  agency is not going to be able to share very  
15                  broadly with the public.

16                  THE COMMISSIONER: Thank you.

17                  Yes, Mr. Allmand?

18                  MR. ALLMAND: Commissioner, if I  
19                  remember correctly, at the Commission a year ago,  
20                  Assistant Commissioner Loepky said that with  
21                  respect to the sharing of information, that there  
22                  were written protocols. But I think he also said  
23                  that they very often made agreements on sharing  
24                  verbally.

25                  THE COMMISSIONER: He did with

1           respect to law enforcement matters, yes, as I  
2           recall the evidence.

3                         MR. ALLMAND: Well, I just want to  
4           support Mr. Wark and Mr. Borovoy. I think any  
5           sort of agreements and what is shared, there  
6           should be a written record, whether it is in code  
7           or whatever.

8                         But how can you review or hold  
9           people accountable if there was a proliferation of  
10          verbal sharing and agreements without any way to  
11          check on it?

12                        THE COMMISSIONER: I don't think  
13          Deputy Commissioner Loeppky said that there would  
14          be no record of the sharing. I think he said it  
15          might be done through an informal or an unwritten  
16          understanding, a relationship between the  
17          agencies. But I don't think he suggested that  
18          there would be information shared, just handed  
19          over, and no record that that took place.

20                        MR. ALLMAND: Good.

21                        THE COMMISSIONER: I am going to  
22          take the point about the need for records.

23                        We will open it up to the floor  
24          and I would ask that each speaker go to the  
25          microphone, identify themselves, and ask their

1 question.

2 The first one is Madame Begin.

3 MME BEGIN: Maybe I have been  
4 burned or felt a victim of federal-provincial  
5 relations a lot, and I am quite sensitive to that  
6 dimension, so I hear how police forces are  
7 "integrated" or working together more and more in  
8 Canada across jurisdictions. And that was done  
9 without any federal-provincial crisis that I  
10 recall.

11 Now we speak of the possibility of  
12 an agency or whatever body that might encompass  
13 different jurisdictions. And although you  
14 mentioned where we should be careful in all of  
15 that, nobody seems to think it is a big problem.

16 Are the cultures of the various  
17 police forces -- I am speaking as a layperson, so  
18 bear with me -- such that it could take place  
19 easily? Do I make any sense?

20 Could a review or proactive  
21 mechanism of any kind be all-encompassing  
22 relatively easily in Canada?

23 MS BONIFACE: The comparator I  
24 gave was the province-to-province, trying to get  
25 sort of cross-jurisdictional, and we have not been

1           able to accomplish that. So I was looking at  
2           it -- I am not a constitutional lawyer, so there  
3           will be, I am sure, constitutional lawyers who  
4           would be able to comment better than I can.

5                           But I know that in the Police  
6           Complaint Commissioner's report, if I recall  
7           correctly, she said this had some constitutional  
8           implications which are more problematic.

9                           So I am not as convinced on the  
10          front of how it would impact. My question really  
11          comes to: Can anything that is done or passed  
12          federally, would it be accepted by the provinces  
13          from the administration of justice perspective and  
14          how would it operate?

15                           I don't know if you could flow it  
16          through through agreements. I just don't know  
17          from a constitutional basis how you would make it  
18          work.

19                           MME BEGIN: The institutional  
20          cultures of the various forces, would they receive  
21          that positively?

22                           MS BONIFACE: I wouldn't speak for  
23          all of them, but the dilemma I think we would have  
24          is the clarity in the interaction. So if I am  
25          sitting as an officer doing this type of work in,

1 I will pick Ontario, then I am subject to the  
2 Police Services Act in Ontario; I am subject to  
3 another mechanism. How do those two mechanisms  
4 interact and what are my obligations to each of  
5 them?

6 I think that is the complexity  
7 that would have to be worked out.

8 THE COMMISSIONER: Mr. Allmand and  
9 then Commissioner Ryneveld.

10 MR. ALLMAND: Well, it is my view  
11 that national security is a federal  
12 responsibility, and if you get into formal things  
13 like INSETs, where provincial or municipal police  
14 are formally working with the RCMP -- I think even  
15 maybe Mr. Inkster or Mr. Ryneveld mentioned  
16 that -- how could you have this agency review the  
17 work on the INSET, let's say, of the people in the  
18 RCMP, and not the provincial or municipal?

19 Once they agree to participate in  
20 something that is federal, I think they have  
21 agreed to an oversight on the security and  
22 intelligence operations that they are doing  
23 jointly with the federal police force.

24 Now, there may be grey areas.

25 THE COMMISSIONER: One more



1 comment in answer to this question, Commissioner.

2 MR. RYNEVELD: Yes, if I could  
3 just address two issues.

4 First of all, the cultural  
5 community, as it were, that you have specifically  
6 asked about, I think it depends from area to area.

7 If I can just give my example,  
8 Southern Vancouver Island, where I live, has about  
9 seven different police forces, municipal police  
10 forces, with a population base of less than half a  
11 million, with jurisdiction from street to street  
12 almost. There are those who call out for  
13 integration of police services because of the  
14 different levels of bureaucracy and everything,  
15 but you will find that the cultural institutional  
16 kind of approach is, "No, no, no, we are not going  
17 to change anything."

18 So you have resistance to an  
19 integrated kind of more efficient service.

20 It seems to me, as an observer,  
21 you would have all kinds of benefits from  
22 integration because of levels of bureaucracy,  
23 information-sharing, and those kinds of things.

24 So you will find that sometimes it  
25 is self-interest, sometimes it is small "p"

1 political, municipal governments who want to keep  
2 their own force for whatever reason.

3 I think if you take that sort of  
4 resistance and apply it to a broader perspective,  
5 you are going to find that there is going to be  
6 cultural resistance of people wanting to zealously  
7 guard their own jurisdiction.

8 But in the integrated forces that  
9 I have seen, where the RCMP are working with major  
10 task forces, I think the cooperation has been  
11 excellent. It depends at what level we are  
12 talking about. I think all police officers want  
13 to do the most effective job they can, and they  
14 will not let petty bickering between who is in  
15 charge affect them doing a very good job.

16 Canadians are very well-policed,  
17 in my view, and we are very, very fortunate. I  
18 think that where there is a political will and  
19 leadership between those who integrate these  
20 particular components, specific particular  
21 components, they are very well-managed and they  
22 are very effective at what they do.

23 THE COMMISSIONER: Next question?

24 MR. HYPPIA: Remi Hyppia.

25 Mr. Commissioner, you preempted my

1 question about oversight versus review. I want to  
2 come back to it.

3 Listening to the debates also, I  
4 am trying to figure out if this new review body or  
5 oversight body could do the two things; in some  
6 cases do oversight and in other cases do review.

7 When I was working at SIRC at the  
8 time, we had great esoteric debates, because as a  
9 Francophone also, if you look the name up SIRC, in  
10 French it is Comité de surveillance, which implies  
11 more oversight than d'examine.

12 In some cases, when we were  
13 discussing with our colleagues of CSIS, they were  
14 bending more for the review side than the  
15 surveillance side. There is confusion in the  
16 terms.

17 So I think one of the first roles  
18 that you will have to do and the experts will have  
19 to do is to clarify the terms.

20 The second question is in the case  
21 of information-sharing, I think that will be very  
22 important, what type of information is shared  
23 either with police or security intelligence  
24 organizations, especially on Canadian individuals.

25 I think one of the roles of the

1 Government of Canada is to defend its citizens,  
2 right or wrong in some cases, but I think there  
3 should be something built in, in the case that if  
4 you share personal information, how this other  
5 government may use it. Will it go against the  
6 rights of Canadian citizens?

7 So I think there could be a  
8 mechanism, an oversight be built in, so that we  
9 are sure that the rights of Canadians are  
10 protected, you know, in this case.

11 The other issue is on the  
12 complaint. I would disagree with Mr. Borovoy on  
13 separating complaints and review, because I think  
14 one of the best efficient case would be that if a  
15 review body oversight discovers something, that it  
16 could initiate itself a complaint against the  
17 agency if there is a real wrongdoing.

18 In some cases, it is only them  
19 having the access that could be able to do that.

20 So that is a thing maybe that  
21 might be considered also, if the review board  
22 could have the power to initiate its own  
23 complaint.

24 Thank you.

25 THE COMMISSIONER: I think that

1 last question will come up this afternoon.

2 On the review or oversight, I  
3 would be obliged to hear comments on that, and if  
4 anybody has any comments on whether the efficacy  
5 jurisdiction, if I can call it that, is part of a  
6 review or oversight mechanism; so review being  
7 after the fact, oversight being ongoing.

8 Anybody? Yes, Professor Farson.

9 MR. FARSON: I was very careful in  
10 my opening comments not to use either "oversight"  
11 or, I think, "review". I used the term  
12 "scrutiny" -- and for good reason. I think the  
13 terms have been abused and misused.

14 I think we have to go back to the  
15 other issue I raised, which is: What is the  
16 object of the exercise in each instance?

17 If we are looking at efficacy, we  
18 are not simply looking at after-the-fact matters.  
19 We have to look ahead. We have to see whether the  
20 resources are in place, whether the capacity is  
21 there, whether in some instances with regard to  
22 performance, we are looking backwards and we are  
23 looking possibly forward.

24 So review, if I now can use that  
25 word, has to happen before and after.

1                   Oversight -- once again, a loaded  
2                   term. A lot of people argue that this is a nasty  
3                   Americanism. Twenty years ago, it wasn't used in  
4                   our language, in the parliamentary sense, that is.  
5                   But I think the academic literature has moved way  
6                   ahead now and it is widely used and it is used in  
7                   a different sense than it was.

8                   So we shouldn't get caught up with  
9                   these words. We should be careful, though, to  
10                  understand what it is exactly that we are after  
11                  and what is our intention.

12                 MR. BOROVOY: Perhaps a helpful  
13                 way of making the distinction is to say that those  
14                 who are doing the scrutiny, if you like, should  
15                 not be involved in the decision-making about which  
16                 the scrutiny is occurring. So whether it is  
17                 before or afterwards isn't the critical factor; it  
18                 is the fact that they are reviewing what somebody  
19                 else has done, not what they have done.

20                 THE COMMISSIONER: Professor Wark?

21                 MR. WARK: Just to speak to this  
22                 issue, there are various terms that we can end up  
23                 with but I think what we are talking about is  
24                 review and I think this is also what Alan means,  
25                 rather than kind of focus on or any involvement in

1 ongoing and current operations.

2 So I take Stuart's point, that one  
3 of the purposes of review is to learn lessons and  
4 to apply those lessons by way of recommendations  
5 and advice to future operations and future  
6 resources and the structure of government and all  
7 the rest of it.

8 I think there is really no place  
9 for oversight if it is narrowly defined as an  
10 ability of an agency to scrutinize and be involved  
11 in ongoing operations of the security and  
12 intelligence community. I think that just has no  
13 purpose whatsoever.

14 The review function, on the other  
15 hand, I think is a very important one, and it is  
16 not one that is in any sense simply meant to be  
17 historic. We look back at things that have  
18 already happened and redress things after the  
19 fact.

20 The idea behind review, the whole  
21 purpose of review is to engage in an ongoing  
22 process of improving the competency of security  
23 intelligence communities, improving their  
24 relations with the public in Canada, improving our  
25 sense in the public at large about how this

1 function operates and how it could function better  
2 in the future.

3 So I think review is the key to  
4 it, whatever we end up calling it in the end.

5 THE COMMISSIONER: Anyone else?  
6 Next question?

7 Yes, Mr. Joseph?

8 MR. JOSEPH: For the benefit of  
9 the panel, my name is Faisal Joseph, and I am  
10 national legal counsel for the Canadian Islamic  
11 Congress and the Association of London Muslims and  
12 a former provincial and federal Crown attorney.

13 Two points that I want to make.  
14 One is with respect to the public complaints  
15 process, and I think it is really important for  
16 those members around this table and that it is on  
17 the record with respect to the queries that have  
18 come up in the last two days about the process and  
19 I want to deal with a point that Mr. Inkster made.

20 I want to give you a factual  
21 situation with respect to the public complaints  
22 process.

23 I have heard the name Shirley  
24 Heafy thrown around, and I have a great deal of  
25 respect for Ms Heafy and what she does. When she



1 had indicated in the press that she was  
2 "concerned" about the potential abuses with  
3 respect to racial profiling, with respect to  
4 anti-terrorism legislation and investigations, I  
5 had personally contacted her and asked her to come  
6 to London, Ontario, which has the highest per  
7 capita of Muslims in the country, to talk to  
8 Muslims, to talk to that community, about what  
9 role they play in education that I have heard  
10 about, so that people that didn't know, what it is  
11 all about and how to do it.

12 And I want to tell you what  
13 happened, which was absolutely frightening from my  
14 perspective.

15 She came to speak to what she  
16 thought was a group of 50 to 100 people, and she  
17 spoke to a group, on a Friday after Juma prayer,  
18 of over a thousand at one Islamic institution.  
19 She came with her staff and she told them about  
20 the process and how she encouraged them to come  
21 forward if they felt they had been wrongly dealt  
22 with and had two people on staff, a senior member,  
23 to take complaints that day.

24 Then she made the mistake of  
25 saying, "Is there anybody in this room that feels

1           that they have a legitimate grievance or a  
2           complaint about how they have been dealt with by  
3           the RCMP?"

4                           And to my shock, dozens of hands  
5           went up, in one institution in London, Ontario.

6                           Now, this was a surprise to me as  
7           a leader in the community, not just as a lawyer.  
8           And immediately we started, as leaders in the  
9           community, to convene and talk about what needed  
10          to be done with respect to this.

11                           Her department arranged -- she  
12          said, "Well, what do you want to do with this?"  
13          We had spoken to at least two dozen people who  
14          were in that room. We took names of people that  
15          had raised their hands and spoke to them.

16                           One out of 24 people was prepared  
17          to lay a complaint.

18                           I am telling this committee, this  
19          Commission, that they were afraid for their  
20          family. And I don't care whether they needed to  
21          be afraid or not. The perception was more  
22          important than whatever reality there was, and  
23          many of them had reason to be fearful in how they  
24          had been dealt with in the past and how they were  
25          approached with respect to giving information.

1                   So the way that we dealt with it  
2 was that Ms Heafy arranged for us to have a  
3 meeting with the commander of "O" Division,  
4 Freeman Sheppard, and we sat down and without  
5 giving specific names -- although on a couple we  
6 did -- we went through what the complaints were.

7                   I really think it is important to  
8 keep it in this context.

9                   Mr. Inkster, you know, I am going  
10 to tie this in to what he said, and I think the  
11 word he used was "disturbed" that a national  
12 organization, CAIR-CAN, had said that Muslims  
13 should not talk to police without the benefit of  
14 their counsel. He said he was disturbed or  
15 alarmed by that -- I think that was the word he  
16 used, "alarmed".

17                   He should be alarmed at why that  
18 advisory was given out, the reasons that advisory  
19 was given out. In fact, you will know,  
20 Commissioner, that with Justice LeSage, he has  
21 done a very thorough review on the public  
22 complaints situation in Ontario, of which we have  
23 made representations.

24                   That process for many people --  
25 and this has nothing to do with Muslims; that has

1 to do with throughout Ontario -- has been seen as  
2 a joke with respect to the current public  
3 complaints system. People do not have access to  
4 statements, do not have access to the files when  
5 they put a complaint against a police officer.  
6 They are not given any of that information. They  
7 are interviewed by a member of that police force  
8 to take the complaint -- totally unsatisfactory.

9 And after I have seen the results  
10 of what Justice LeSage said, many of those  
11 recommendations, and recommendations for  
12 significant changes, can apply to the federal side  
13 as well.

14 So I encourage you to take a look  
15 at that, because it is a real phenomenon and it is  
16 going to benefit Ontario greatly.

17 But I think it is very, very  
18 important that we understand with respect to that  
19 complaint process and what we are talking about  
20 here today -- and I am taking into account  
21 Mr. Inkster, who I personally like, but strongly  
22 disagree with his comments -- that he should be  
23 more alarmed as to why those advisories are being  
24 brought out and should remember an old adage of my  
25 father which was that trust is not something that

1 is to be earned freely but is to be earned  
2 properly.

3 And that trust is not there with  
4 respect to the Muslim and Arab community of which  
5 I am speaking of today.

6 Thank you.

7 THE COMMISSIONER: Thank you,  
8 Mr. Joseph.

9 Does anybody wish to respond?

10 Mr. Inkster?

11 MR. INKSTER: The only comment I  
12 would make is of course Faisal is absolutely  
13 right. The problem is why are Arabs and Muslims  
14 not comfortable coming forward?

15 I just don't feel it is helpful to  
16 prohibit that open and free communication that one  
17 might want to see. And the question is: How do  
18 the police then and the other authorities work  
19 with the community so that they will be  
20 comfortable coming forward with helpful  
21 information?

22 Not if they are under  
23 investigation; that is an entirely different  
24 point, of course. But if they have information  
25 that would be helpful to law enforcement, how can

1 we work with the community so that they are  
2 comfortable coming forward and making that  
3 contribution to law enforcement through  
4 information-sharing?

5 THE COMMISSIONER: Thank you.  
6 Professor Wark?

7 MR. WARK: Can I just say briefly  
8 on this, and it may not sound right. But I think  
9 the truth of the matter in part is that there will  
10 always be a problem of a complaints-driven process  
11 in national security matters, for the very reasons  
12 that that problem exists now.

13 The solution to that, I think, is  
14 twofold.

15 One is that a review agency has to  
16 have a capacity to do the complainant's work for  
17 them. It has to be able to anticipate the nature  
18 of the kind of popular feeling and concern and  
19 distrust that exists out there in the country.

20 One of the problems we have  
21 currently with this, if you like, ear to the  
22 ground capacity is that I think virtually all the  
23 staffing of the review agencies comprises former  
24 members of the security and intelligence  
25 community, who are not people necessarily to have

1           their ear to the ground or any broader expertise  
2           in the area of security and intelligence. They  
3           have a functional experience in this field, and  
4           there are good reasons for using some of those  
5           people, but they should not have a monopoly on  
6           staffing of review agencies. And perhaps we will  
7           get to that.

8                                 There has to be, it seems to me,  
9           built into the review process some informal  
10          capacity to have an ear to the ground and some way  
11          in which that is reflected in the staffing of  
12          these agencies in order to make them effective.

13                                Thank you.

14                                THE COMMISSIONER: Thank you.

15                                Yes, Commissioner.

16                                MR. RYNEVELD: Mr. Joseph's  
17          comments I think give further credence to my  
18          suggestion earlier that a process should not be  
19          solely complaint-driven. In other words, if you  
20          had a situation whereby you don't have a  
21          complainant coming forward naming a particular  
22          respondent for fear of retribution, even though  
23          that may be statutorily prohibited, that  
24          nevertheless that if something is brought to the  
25          attention of an agency such as the Police

1 Complaint Commission Office, and they have the  
2 right to make their own order for investigation  
3 by, say, an external force -- which in British  
4 Columbia I have that authority to do where I  
5 believe it is in the public interest.

6 And if in a situation such as  
7 Mr. Joseph has outlined the commissioner would be  
8 of the view that this matter requires to be looked  
9 into, in British Columbia our legislation would  
10 permit that to occur.

11 So you may want to consider  
12 whether or not any agency should have those  
13 expanded powers if they are not just entirely or  
14 solely specific complaint-driven by a named  
15 complainant and a named respondent.

16 THE COMMISSIONER: Thank you.

17 We will go to the next question  
18 then, Mr. Neve.

19 MR. NEVE: Thank you very much,  
20 Mr. Commissioner. My name is Alex Neve and I am  
21 the Secretary General of Amnesty International  
22 Canada.

23 I wanted to ask a question about  
24 information-sharing, information-sharing in  
25 particular with foreign governments, which clearly



1 can and often does have a very critical human  
2 rights dimension to it.

3 We absolutely agree that we need  
4 information-sharing, we need good  
5 information-sharing, we need it to be quick, we  
6 need it to be reliable. It plays a critical role  
7 on the human rights front. Information-sharing  
8 can help head off serious human rights abuses,  
9 including acts of terrorism, but other serious  
10 violations as well, crimes against humanity. Good  
11 information-sharing is also a critical means of  
12 identifying and possibly punishing individuals who  
13 have committed serious human rights abuses, which  
14 is a critical component in overcoming the kind of  
15 impunity that lies behind human rights abuses.

16 The flipside, of course, is that  
17 bad or reckless information-sharing can very much  
18 expose individuals, or even entire communities, to  
19 the risk of serious human rights abuses.

20 In our view, it is critical that a  
21 review body -- and we certainly do come down on  
22 the side of a review body which would have a broad  
23 overarching functional approach and not an  
24 agency-specific approach -- have a very strong  
25 human rights mandate, including with respect to

1       this question of information-sharing; that we  
2       would want to make sure that the review body was  
3       ensuring that security and police agencies in  
4       Canada are going about their business, and very  
5       much including the information-sharing side of  
6       things, in ways which are going to maximize the  
7       potential for that to be helping on the human  
8       rights front and avoiding or at the very least  
9       minimizing the possibility that  
10      information-sharing will cause human rights  
11      abuses.

12                   Of course, that latter concern is  
13      not theoretical. It is obviously one of the  
14      pieces. It is not the entire piece of the Maher  
15      Arar puzzle, but it is one of the pieces very much  
16      at the centre of this inquiry and we will all look  
17      forward to your findings on that front.

18                   It is not only about Maher Arar,  
19      though. There is a growing number of cases in  
20      Canada with troubling, deeply troubling, and  
21      unresolved questions as to the possibility of  
22      information-sharing on the part of law enforcement  
23      and/or security agencies here may have directly or  
24      indirectly -- lots of unknowns here -- put people  
25      at risk of very serious human rights violations,

1 including torture.

2 So the review body, in our mind,  
3 would have to have that be a central part of what  
4 it is on the lookout for.

5 Our concern is that it feels to us  
6 that there is not enough clarity in Canadian law  
7 and policy as to what are the human rights  
8 obligations that guide the process of  
9 information-sharing with foreign governments. We  
10 don't know what kinds of reference there is to  
11 this in memorandums of understanding that Canada  
12 has with foreign agencies. There certainly  
13 doesn't seem to be a lot that is clear about it in  
14 Canadian law.

15 I guess my question is: Do people  
16 agree that this review body should play a central  
17 role on the human rights front in ensuring that,  
18 especially when it comes to issues outside the  
19 country, that our agencies are acting in ways  
20 which are going to both maximize human rights  
21 protection and minimize human rights harm?

22 But do we at this point in time  
23 have enough clarity in Canadian law and policy as  
24 to what those obligations and standards are, such  
25 that there would be principles against which to

1 carry out that review, or do we need some Canadian  
2 law reform as well, a parallel process of very  
3 clearly enumerating the human rights obligations  
4 of law enforcement and security agencies, which  
5 would then be subject to review?

6 THE COMMISSIONER: Thank you,  
7 Mr. Neve.

8 Who would like to start with that?  
9 This will be our last question before lunch.

10 Professor Bahdi.

11 MS BAHDI: I would like to quote  
12 Wesley Wark and say "yes, of course" in response  
13 to the human rights dimension.

14 And then I do agree with you also  
15 that there needs to be some clarification about  
16 what the standards are and what the measures are.  
17 How we actually get there, I don't know, but I  
18 thank you for that observation.

19 THE COMMISSIONER: All right.  
20 Anybody else? Mr. Allmand and  
21 Professor Wark?

22 MR. ALLMAND: I am also going to  
23 quote Wesley, and say "of course" as well. You  
24 can't separate human rights on the issues that we  
25 are dealing with here. They are necessarily

1 connected to it.

2 But when I look at the information  
3 that led to these five security certificates --  
4 all, by the way, Arabs who have been in prison for  
5 over a year, many of them, without ever knowing  
6 what they are charged with -- much of that  
7 information is the result of, from what I  
8 understand, sharing and sources, et cetera.

9 I am convinced in these cases  
10 there is a massive abuse of human rights, of  
11 people being held, not being charged, never  
12 knowing -- they claim they are innocent, that they  
13 have no connections, but they have no chance to  
14 prove it, and they continue to be held. And the  
15 alternative is to send them to countries where  
16 they could be tortured or even executed. Serious  
17 matters.

18 THE COMMISSIONER: Professor Wark,  
19 last comment before lunch.

20 MR. WARK: Of course. Two things,  
21 but very quickly.

22 One is that you can be taken by  
23 surprise in terms of the human rights dimension of  
24 intelligence-sharing.

25 Canadian intelligence-sharing

1 functions in a series of concentric circles. At  
2 the very heart of it is an old intelligence  
3 alliance -- do I get to enter this acronym for the  
4 first time in the record -- called UKUSA, which  
5 dates back to the Second World War and links us  
6 with the United States, Great Britain, Australia  
7 and New Zealand. That is the heart of our  
8 intelligence-sharing arrangement.

9 We are so familiar with that  
10 arrangement that we don't concern ourselves too  
11 much about human rights abuses in the massive  
12 informational exchanges that go on there. That  
13 may have been a contributing factor in the Arar  
14 affair.

15 There is the other issue, which is  
16 that beyond that inner circle there are the many  
17 concentric circles out from there in which we have  
18 built various kinds of arrangements with foreign  
19 governments to share intelligence on various  
20 matters.

21 I think that there is a  
22 recognition that those relationships have to be  
23 exercised with caution. It comes down to a  
24 problem, however, of knowledge.

25 The Canadian government's

1 knowledge in the intelligence field of the  
2 internal security practices and the intelligence  
3 structures of a whole range of foreign governments  
4 is, frankly, limited. Why is it limited? Because  
5 prior to September 11th we didn't pay too much  
6 attention to this, and prior to September 11th we  
7 didn't have much of a foreign intelligence  
8 capacity.

9 I think one of the things we have  
10 to do is pay much more attention to our capacity  
11 to understand the internal security arrangements  
12 of countries that we have entered into  
13 arrangements with, and I would frankly advocate --  
14 this could be a role for the review committee --  
15 that it help to create something similar to the  
16 State Department's annual review of global  
17 terrorism and security. I mean, we need a kind of  
18 formal public assessment of the global situation  
19 in this regard as a form of test against which  
20 these intelligence-sharing arrangements operate.

21 Thank you.

22 THE COMMISSIONER: Thank you.

23 Mr. Farson.

24 MR. FARSON: Just a short point.

25 If I could just take up on one of the things that

1 Wesley said earlier on, that has to do with what  
2 has been in the reports of review bodies to date.

3 I don't recall this issue ever  
4 coming up in any significant way by SIRC, for  
5 example. I would have thought that this is  
6 something that over the years we should have had  
7 some more forthcoming information and should have  
8 had some detailed scrutiny on these matters and  
9 seen the connectivity.

10 THE COMMISSIONER: Thank you very  
11 much. That will complete our morning session.

12 We will take a break for an hour  
13 and resume at 1:30.

14 The three questions this afternoon  
15 I think get down more to the nitty-gritty of some  
16 of the specific powers, how review proceedings  
17 would be initiated and how the review body might  
18 be constituted, how it would relate to other  
19 bodies, including the legislative committees. So  
20 I think it will be a good session.

21 We will see you back here at 1:30.

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

23 Suspension à 12 h 34

24 --- Upon resuming at 1:30 p.m. /

25 reprise à 13 h 30



1 THE COMMISSIONER: We will get  
2 under way again, then, and turn to the fourth  
3 question, which is: How should the review body be  
4 able to initiate a review?

5 Then there are a number of  
6 choices: Complaint; own motion investigations;  
7 inspections; referral from the Executive,  
8 Legislature or other review body.

9 As I said earlier, typically the  
10 review of police in Canada at least is triggered  
11 by a complain by outsiders, or indeed I guess we  
12 have heard in some circumstances by the Agency  
13 itself.

14 The question is: Is a complaint-  
15 based system sufficient for national security?

16 I guess what that says, to put it  
17 another way, is: Should there need to be a  
18 specific incident or series of incidents in order  
19 to trigger the review, the inspection, the audit,  
20 whatever we want to call it, or should the body  
21 itself just have a broader jurisdiction to  
22 instigate a review and investigation, et cetera,  
23 absent something that could give rise to a  
24 complaint?

25 So there is the point that you can

1 say: Well, okay, a complainant may not be willing  
2 to prosecute or bring forth a complaint, the  
3 review body acting on that incident could do it  
4 itself. But I think this question goes beyond  
5 that and it says: Do you even need a specific  
6 complaint of any sort or should there be a broader  
7 review power?

8 We will start with Professor  
9 Bahdi.

10 MS BAHDI: Thank you.

11 I will start by first of all  
12 addressing whether there should be an individual  
13 or a group-based external complaint mechanism. I  
14 think my answer to that is yes.

15 Here I envision, just as  
16 Commissioner O'Connor said, an individual or a  
17 group coming forward and saying something happened  
18 that was wrong and we would like the body to  
19 scrutinize it.

20 But I think my "yes" is  
21 conditioned on the question of what sort of  
22 remedial powers would this review body have.  
23 Would it have the power to give remedies for the  
24 individuals such as an apology, compensation, or  
25 some sort of vindication for the individual.

1                   Otherwise, I'm not sure that there  
2 would be sufficient incentives for individuals to  
3 come forward, given that they would be putting  
4 their lives really under public scrutiny, and  
5 given the kinds of energy -- here I am thinking of  
6 what Maher Arar has told us about the kind of  
7 energy that it has taken him to come forward, but  
8 also on a less dramatic level, the kind of energy  
9 of those who go through the human rights complaint  
10 system talk about need to expend in order to go  
11 through the system.

12                   But I think an individual  
13 complaint process is important for the system, in  
14 part because sometimes that is the only way that  
15 information might be revealed about certain  
16 practices. It is the only way that certain  
17 practices might come to light.

18                   It is also important for the  
19 individual as a matter of access to justice. It  
20 might be the only place for them to go to get a  
21 remedy.

22                   The benefit also, I think, of  
23 having a complainant come forward, or creating  
24 avenues for complainants to come forward, is just  
25 very simply that if they come forward you can be

1 relatively assured that they will cooperate with  
2 the investigation and that the information that  
3 they have will be made available to the  
4 investigators.

5 But I think we heard yesterday,  
6 and Mr. Joseph before lunch, with his usual  
7 eloquence, reminded us of why a complaint-based  
8 system would be inappropriate and inadequate on  
9 its own in this context, and that is that there is  
10 fear and uncertainty in the communities, the urban  
11 Muslim communities who feel themselves most  
12 affected by anti-terrorism measures.

13 We discussed this example  
14 yesterday so I apologize for those who have  
15 already heard it, but perhaps for the benefit of  
16 those who weren't here yesterday, let me just give  
17 an example of how the fear might play itself out.

18 Let's assume that an individual is  
19 being investigated by the RCMP, or even just  
20 contacted by the RCMP for information and  
21 something happens that is inappropriate in the  
22 course of this contact. The individual who has  
23 been contacted may nonetheless be reluctant to  
24 complain. One of the reasons for that is because  
25 they very simply don't want others to know that

1       this contact has been made by the RCMP. They  
2       don't want their neighbours or their friends to  
3       know that they have been approached, because they  
4       don't want to be ostracized by their neighbours or  
5       by their friends or terminated by their employers.

6                   One of the things that we talked  
7       about yesterday was that the fear that they will  
8       be ostracized is a perfectly rational one. In  
9       fact, the anti-terrorism legislation itself sets  
10      out association as a reason to consider whether  
11      someone is engaged in terrorist activity.

12                   So individuals, neighbours,  
13      friends, employers might not want to associate  
14      with somebody who is under investigation, because  
15      they themselves fear that they will then come  
16      under investigation.

17                   So a complaints-driven system, I  
18      think on its own, is inadequate and inappropriate  
19      and it has to be augmented by the power to launch  
20      an investigation. In other words, the review body  
21      has to have the power to launch its own  
22      investigation.

23                   Here I am conscious of my  
24      terminology and I wish I had the time to rewrite  
25      this. Any time I say "review" or "investigation"

1 I would like to really imply scrutiny.

2 But the investigation might be  
3 focused on what has happened in a particular case  
4 or group of cases.

5 One vexing problem here -- and  
6 this is an issue that comes up in different  
7 contexts. I would be very interested to hear,  
8 Commissioner, how you deal with this issue -- is:  
9 What do you do if you don't have the consent of  
10 the individuals?

11 But I think the value of allowing  
12 the review body to launch its own investigation is  
13 then it can look at systemic concerns. These  
14 again are some of the issues that came to light  
15 yesterday and that we discussed yesterday. Let me  
16 just give some brief examples of what some  
17 systemic concerns might be.

18 One, a report that comes to light  
19 about decision-making with the RCMP or security  
20 services that suggests that the decision-making  
21 might be tainted by stereotypes.

22 Two, very closely linked, but some  
23 evidence is brought forward of some widespread  
24 misunderstanding of cultural norms or newcomer  
25 practices.

1                   Yesterday an example was given  
2                   that it is actually very common within newcomer  
3                   communities, and the Arab culture and Muslim  
4                   culture, to do things like co-signing a lease on  
5                   behalf of someone who you might not know because  
6                   it is just a part of the process of assisting  
7                   newcomers to settle. So if there is some  
8                   misunderstanding of how to interpret those kinds  
9                   of acts, and evidence that there is some  
10                  misunderstanding of that, it would be useful to  
11                  have a systemic investigation.

12                  The objective of launching a  
13                  systemic investigation would be to recommend  
14                  systemic change rather than to necessarily give an  
15                  individual remedy. Of course here the value is  
16                  that it doesn't require individuals to come  
17                  forward.

18                  So I haven't fully thought through  
19                  the issue that we were talking about earlier as to  
20                  whether these two things should be done by the  
21                  same body or whether they need to be divided and  
22                  undertaken by different bodies, but I think my  
23                  initial inclination is to say that they should be  
24                  undertaken by the same body because that way an  
25                  analysis of individual complaints can be more

1 readily examined and might lead to an  
2 understanding of the kinds of systemic complaints  
3 that might be -- sorry, systemic investigations  
4 that might be undertaken.

5 But at this point I have to maybe  
6 stop and confess that I have some uncertainty  
7 about my recommendation, or at least a question  
8 about my recommendation that there should be an  
9 individual complaints mechanism, and that  
10 uncertainty relates to the question of: How would  
11 such a complaints mechanism relate to the current  
12 legislative schemes? In particular, who would  
13 have the right to launch a complaint?

14 Would somebody whose case is  
15 before the courts for example in some capacity  
16 have the right to launch a complaint?

17 Here what I am thinking about is  
18 somebody who has had a security certificate, for  
19 example, issued against them, would they have the  
20 right to launch a complaint or to ask that the  
21 manner in which they were treated by the RCMP, or  
22 some other body, be looked at or scrutinized.

23 On some level I think the  
24 immediate reaction might be to say no, because a  
25 Federal Court judge has already reviewed the case



1 under the Immigration and Refugee Protection Act.  
2 But the judge's decision under that piece of  
3 legislation is limited to the question of whether  
4 the security certificate is reasonable, and it  
5 doesn't necessarily require an assessment of the  
6 manner in which that investigation was conducted,  
7 but only a determination of reasonableness, as I  
8 have said. Often these will amount to the same  
9 thing, but not always.

10 So on the one hand, on the other  
11 hand, is what I would like to close off with.

12 If we do allow individuals who are  
13 currently before the courts to file complaints  
14 with the review body, we have to worry that the  
15 whole courtroom process would be undermined.  
16 There are other concerns, too, that we have  
17 already raised about taxing security agencies and  
18 requiring them to respond to a number of different  
19 oversight mechanisms.

20 But of course if we don't allow a  
21 concurrent type of review, then those who might  
22 need the review the most might be the ones who are  
23 deprived of it. That in the end, if we are  
24 concerned about access to justice for individuals,  
25 I think is a concern for the way we go about

1 thinking about the kinds of powers that this body  
2 would have.

3 I will leave it there.

4 THE COMMISSIONER: Thank you.

5 Commissioner Boniface...?

6 MS BONIFACE: Let me just deal  
7 with some general aspects first and then I will  
8 zero in, not necessarily following the question or  
9 the steps as you have them.

10 I think, first, that the complaint  
11 system that is driven on individuals, from what we  
12 are hearing around the table, that is currently in  
13 place, is argued that it is not meeting the needs  
14 of this.

15 I had some conversation at lunch  
16 and I was somewhat confused by whether it is the  
17 capacity of the unit or the legislative framework  
18 for the Commission. So from the Commission's  
19 perspective on a complaint base it would be worth  
20 having that knowledge in terms of is it a  
21 legislative limitation, is it a resource  
22 limitation or what is it that makes that more or  
23 less effective on these sorts of issues. The  
24 paper didn't give me that clarity.

25 On the second point, I think in

1 looking at various agencies involved in this, one  
2 of the things you may wish to think about is the  
3 notion of a single gateway for all complaints. So  
4 if I just deal with it in the complaint structure.

5 I am responding really to earlier  
6 comments that my colleague made around the number  
7 of bodies and how do people figure out where they  
8 go. If you compound that by municipal, provincial  
9 and federal, then it is complicated all over  
10 again.

11 So perhaps there is a mechanism of  
12 a single gateway that then deflects it to the  
13 appropriate place.

14 Using it from a complaint  
15 perspective, it would concern me -- and I put some  
16 thought to it -- the capacity of an individual  
17 agency to deal with everything from national  
18 security complaints to an officer who was rude to  
19 me on the side of the road in the Yukon, how do  
20 you create a capacity to deal with the breadth and  
21 depth of those sort of issues. So I think one  
22 needs to really think about that when you decide  
23 what would be the mandate if indeed this is the  
24 process you take.

25 On the own motion investigation or

1 any investigative capacity, competence is a  
2 significant issue. I raise this with the  
3 experience and with tremendous respect to where  
4 the Special Investigations Unit in Ontario has  
5 come to, but in the early days, in some of the  
6 structural, both in structure and funding and I  
7 suspect in the legislative framework of the day,  
8 struggled significantly to find its way.

9 That raised significant concerns  
10 for people who were subjected to their  
11 investigations, particularly police officers.

12 I think by their own sense where  
13 they are today, and that is from the police  
14 community perspective, is very different than they  
15 were when they started out and I think that  
16 credibility, whatever, would need to be there.

17 I tend to really see my colleague  
18 Mr. Borovoy's comments around audit and audit  
19 capacity as something that would be worth looking  
20 at, but I would ask you to look at it from this  
21 perspective.

22 If you have some capacity to do  
23 audit, the opportunity to marry it with whatever  
24 management systems are in place within agencies  
25 that are subject to their own internal audit

1 processes, external audit, these things all need  
2 to be married together because one of the great  
3 benefits of audits that are done, or organizations  
4 that are subject to audit, however painful they  
5 may be, is that they are a learning process for  
6 moving ahead.

7                   So if that is one of the roles or  
8 the role -- which I favour -- of some sort of  
9 review, I think that is the benefit, but with  
10 recognition that there are mechanisms in place, in  
11 the RCMP I suspect and other agencies, today that  
12 one could help develop the policy and procedure  
13 through those recommendations of an audit process.

14                   On the executive and parliamentary  
15 involvement, while I will confess not to have  
16 great knowledge of this, I would only say that one  
17 must ensure that you not confuse the notion of  
18 police independence with these issues in terms of  
19 direct and such like. So I don't know how  
20 invasive -- or how directive that may be, but  
21 there is, in my view, as you work your way through  
22 this, a great deal of the Canadianism of police  
23 independence is a very important piece for our  
24 society.

25                   On the accountability framework

1 and how it may work, the one question I asked  
2 myself -- and I heard it earlier today -- who  
3 oversees the overseers? I think this is always a  
4 question that whether you sit in the academic  
5 world or you sit subject to the overseer I think  
6 it is a question that you may want to turn your  
7 mind to as you work through those issues as well.

8 There are so many mechanisms of  
9 other aspects, the courts, obviously the other  
10 aspects that all police agencies are subjected to,  
11 the RCMP are subjected to as well, that I am just  
12 asking both for clarity and the thinking on how it  
13 affects individual officers going back to  
14 Mr. Inkster's comments, is they have to know with  
15 clarity who they respond to and when and how that  
16 works and how it interacts with everything else.

17 You have a complex issue before  
18 you, Commissioner.

19 THE COMMISSIONER: Thank you,  
20 Commissioner.

21 Mr. Borovoy...?

22 MR. BOROVOY: Well, I will start  
23 with this: It is critical, it is crucial that the  
24 body, that I am talking about anyway, have a power  
25 of self-generated audit and inspection, not one

1 bit dependent upon the filing of any complaints.

2 There have been many allusions to  
3 how intimidated people are about filing  
4 complaints. There have been some allusions to the  
5 surreptitious nature of a lot of current activity  
6 in the national security field such that those  
7 being victimized by it don't know about it and  
8 aren't in a position to file complaints.

9 There is another one that  
10 continues to haunt me, in any event, that is, it  
11 is the preventive mandate that the Canadian  
12 government has given to the RCMP on the issue of  
13 national security.

14 Anne McLellan a number of years  
15 ago was quoted as saying: It is too late if the  
16 terrorists are even allowed to get on that plane.  
17 You have to stop them; you have to disable them.

18 So there have to be, or at least  
19 there are bound to be pressures to engage in some  
20 kind of countering tactics. I am using the  
21 language that I grew up on a number of years ago.  
22 They have to be able to counter them.

23 The nice question is: What are  
24 they doing to do that? I don't anticipate anybody  
25 coming and giving a public lecture on the tactics

1           they are using, but one problem does rather bother  
2           me, and that is how much are they resorting to  
3           tactics outside of criminal investigation for  
4           these purposes?

5                           I brought something with me. I  
6           picked this up in one of the background papers.  
7           One of them is the brief of the Commission. It is  
8           the RCMP itself. They say:

9                           "The fact is that all  
10                          national security related  
11                          investigations are  
12                          undertaking with the  
13                          objective of criminal  
14                          prosecution." (As read)

15                          And they talk about the other  
16           instances as rare.

17                          Then I read the comments of Deputy  
18           Commissioner Loepky, I think his name is:

19                          "I think that our primary  
20                          role in society is to  
21                          preserve the peace and to  
22                          prevent crime before it  
23                          begins. It is only as a last  
24                          resort that we end up doing  
25                          criminal investigations



1                   leading ultimately to  
2                   prosecution." (As read)

3                   I am impelled to be cute and say,  
4                   "Would the real RCMP please stand up".

5                   It is hard to know. Maybe there  
6                   is some ultra sophisticated way of reconciling  
7                   those two notions, I don't know.

8                   What I do remember -- and of  
9                   course one can only look at history to help it  
10                  guide us -- is that when the RCMP was under this  
11                  kind of pressure a long time ago in the wake of  
12                  the FLQ crisis, they resorted to countering  
13                  tactics that were highly dubious -- which is all  
14                  now part of the public record -- both dubious  
15                  tactics from the standpoint of the disruptions  
16                  they visited on some of these groups, and dubious  
17                  in the selection of targets.

18                  I always think of two of them, one  
19                  where you had the Waffle faction of the New  
20                  Democratic Party, a democratic organization; you  
21                  had the Trotskyists, not a democratic  
22                  organization, but I was always impelled to lecture  
23                  the RCMP on grasping the distinction between a  
24                  threat to the State and a pain in the ass. That  
25                  was one that seemed to evade them in those days.

1 --- Laughter

2 MR. BOROVOY: All of which of  
3 course one hopes that those bad days are behind  
4 us. But we know that they are under pressure in  
5 this respect and people under pressure often take  
6 shortcuts that they shouldn't be taking. We are  
7 talking about, in the main, secret, surreptitious  
8 activity, all of which shores up the need for the  
9 power of self-generated audit and inspection. I  
10 will deal with the powers and the restraints on  
11 those powers in the next segment.

12 THE COMMISSIONER: The next  
13 question. Okay.

14 Just as I open it up for comments  
15 by the other panellists on this question, let me  
16 also include a comment on what Professor Bahdi  
17 said about the matter of timing.

18 So that whether it is initiated, a  
19 review, an investigation, whatever we call it,  
20 initiated by a specific complaint or it is a self-  
21 generated review by the review body itself, how  
22 should that interact with the investigations that  
23 constitute the subject matter of the complaint or  
24 the review? If it is a complaint or review  
25 process that is going to go on at the same time as

1 the investigation continues, do we encounter  
2 problems with the notion of police independence  
3 and are there problems should that matter proceed  
4 to prosecution?

5 Unlike a security intelligence  
6 investigation, this could result in a prosecution.  
7 If the review agency is, at the same time as the  
8 investigation carries forward, conducting a  
9 review, are we going to run into difficulties when  
10 the matter goes to trial with disclosure of what  
11 the review agency discovered, and so on?

12 My question sort of presents the  
13 difficulties with it.

14 I should tell you, for those who  
15 didn't see it, Mrs. Nuala O'Loan, who is the  
16 Police Ombudsman for Northern Ireland, spoke at  
17 length about this and they carry out concurrent  
18 investigations. The Ombudsman, she has actually  
19 police powers, in some circumstances can arrest,  
20 and search and seizure, and so on. She thought  
21 that it was entirely viable but one had to be  
22 cautious.

23 So my question on this is: Is  
24 there an issue with respect to timing and, if so,  
25 if there are problems how would one address them?

1 I open it to the floor.

2 Commissioner...?

3 MR. RYNEVELD: Mr. Commissioner, I  
4 think my views about whether it should be a  
5 complaint only process or something else has  
6 already been stated so I won't waste time on that.

7 But I would like, if I may, to  
8 respond to a couple of questions that I understood  
9 came from Professor Bahdi about what do you do if  
10 there is no consent of an individual. If I might  
11 just address that?

12 I think that an oversight body has  
13 to perform a balancing act. On the one hand,  
14 there has to be confidence by the public in the  
15 complaint process, but by the same token in order  
16 for this to work effectively, you have to earn the  
17 trust of the police being overseen that they are  
18 going to be treated fairly in the process.

19 I think that pretty much all  
20 bodies who review complaints recognize that there  
21 are some who are going to have frivolous or  
22 vexatious complaints. There has to be a  
23 recognition that some complaints are not always  
24 properly motivated by best interests. So you have  
25 to provide that balance.

1                   So you have to be careful. You  
2                   have to try to attempt to determine, ab initio as  
3                   it were, whether or not the complaint is something  
4                   that needs to be followed up on even if the  
5                   complainant is not prepared to identify  
6                   themselves.

7                   I think you have to make a  
8                   distinction as well between whether this is an  
9                   anonymous complaint, i.e. you don't know who is  
10                  making the complaint, or it is a confidential  
11                  complaint. A confidential complaint I think there  
12                  can be steps taken, and we have done that, provide  
13                  off-site locations to interview the person so as  
14                  to guard against friends and family finding out  
15                  that they are providing this information.

16                  You can protect privacy or third  
17                  party interests in any reporting, and I believe  
18                  there are some practical steps that can be taken  
19                  in order to encourage people with legitimate  
20                  complaints to come forward and have them acted  
21                  upon without necessarily exposing them to the  
22                  risks of either retaliation by the police that  
23                  they are worried about or ostracization by their  
24                  friends and family.

25                  The second thing that I might

1           just quickly mention is that again a review body  
2           has to guard against what might a complaint with  
3           respect to an attempted plea bargain situation. I  
4           think you raised it in the context of accused  
5           persons who -- or somebody raised the issue about  
6           accused persons who might be coming forward with  
7           complaints.

8                            You have to guard against the  
9           complaint arising as a result of being charged  
10          with a criminal offence and then saying: Well, I  
11          will drop my charge against the police officer if  
12          you will drop the charge against me. You have to  
13          guard against those kinds of things and I think  
14          they are often in the hands of Crown counsel who  
15          might be the one who receives the bargain, as it  
16          were, put forward by counsel for the accused.

17                           We do permit withdrawal of  
18          complaints, but we always look behind why they are  
19          being withdrawn. In other words, if there is  
20          duress or if there is a trade-off, we do look  
21          behind the withdrawal rather than just "I don't  
22          want to go ahead with this complaint." That would  
23          be the easy thing to do, but we check behind to  
24          see why the complaint is being withdrawn and if it  
25          is legitimate.

1                   So those are just two things that  
2                   I think I will point out to you, that there can be  
3                   practical steps taken to safeguard, to promote the  
4                   appropriate investigation of legitimate  
5                   complaints.

6                   Thank you.

7                   THE COMMISSIONER: Thank you.  
8                   Other comments? Yes, Mr. Allmand.

9                   MR. ALLMAND: Well, I think it is  
10                  very important that this review body or this SIRC-  
11                  plus has the ability to do the systemic review  
12                  based on perhaps a number of complaints of a  
13                  similar nature.

14                 On another day before this  
15                 Commission we were arguing that the Commission  
16                 should look into the possibility that there may be  
17                 a pattern, that Arar is not a single case where a  
18                 mistake was made, maybe that there was a  
19                 possibility that a pattern was being developed  
20                 with a plan, some place in the Canadian government  
21                 or elsewhere, and that that should be looked into.

22                 I note, Commissioner, that you  
23                 have appointed a Special Investigator, Stephen  
24                 Toope, and we had recommended something like that,  
25                 but I can see this happening here. Person A makes

1 an individual complaint on a subject. Two months  
2 later "B" comes along and makes somewhat a similar  
3 type of thing, then "C". Then it would seem to me  
4 that if this review agency is operating properly  
5 those responsible might say, "Well, maybe there is  
6 a systemic problem here that needs to -- we have  
7 to look at in a broader picture."

8 That is why I would like, even  
9 though you might have two chambers or whatever,  
10 one to deal with complaints and one with overall  
11 audits, I think there has to be a coordination  
12 there because there could be -- I think in  
13 questions of employment equity and so on in the  
14 Canadian Human Rights Commission, after so many  
15 they look for systemic issues there too.

16 Anyway, I really believe that the  
17 one might flow from the other and there has to be  
18 a capacity to do both.

19 THE COMMISSIONER: Thank you.  
20 Professor Farson...?

21 MR. FARSON: I just would like to  
22 say a couple of things about the distinction  
23 between "able" and "required to" review something.  
24 I think the body should be able to initiate its  
25 investigations, but it also should be required to



1 do certain things.

2 Mr. Allmand this morning described  
3 a number of reviews that the body might do. We  
4 might also add coordination of intelligence to  
5 that requirement from time to time.

6 So I think there is a distinction  
7 between the ability to investigate and the  
8 requirement to investigate.

9 The requirement might, in some  
10 instances, also take into consideration the need  
11 to do certain types of investigation in  
12 conjunction with other bodies, for example the  
13 Auditor General of Canada.

14 My last point, I have raised the  
15 issue of whistleblowers before and it seems to me  
16 that people who are constrained by the Security of  
17 Information Act don't have anywhere really to go  
18 in the public interest. It seems to me that this  
19 would be a useful place to have some capacity to  
20 do exactly that.

21 THE COMMISSIONER: Okay. Anybody  
22 on the timing issue? Should reviews await the  
23 completion of matters under investigation or can  
24 they be started during the course of it?

25 Mr. Inkster...?

1                   MR. INKSTER: On the one hand,  
2                   one can recognize the merits of them going along  
3                   coincidentally. My suspicion is, though, and I  
4                   have had the experience, where investigations were  
5                   being done against an individual who may have  
6                   misbehaved within a law enforcement agency and a  
7                   criminal investigation going on about the thing he  
8                   or she was investigating that the court said,  
9                   "You will stop your review until the court case  
10                  is done."

11                  So the question may be moot, the  
12                  court would say you just cannot proceed  
13                  coincidentally and that is that.

14                  THE COMMISSIONER: One of the  
15                  things people say in national security is the  
16                  investigations tend to be, I guess, like organized  
17                  crime, some of them tend to be years and years and  
18                  so that there is a concern about waiting.

19                  Yes, Commissioner...?

20                  MR. RYNEVELD: I'm sorry, I don't  
21                  wish to monopolize this topic but now I want to  
22                  respond specifically to the question you have  
23                  raised about timing. I can give you an example  
24                  out of our own jurisdiction.

25                  As many of the people here might

1           be aware even though it is a British Columbia  
2           matter, the Picton trial of the missing 21 or some  
3           odd bodies that were found on a pig farm in  
4           British Columbia, there is also a concurrent  
5           complaint against members of the Vancouver police  
6           and the RCMP for either neglect of duty or not  
7           acting quickly enough on information. So that has  
8           come to my office.

9                           The bottom line about that is, I  
10           had to make a decision about whether or not to  
11           start that investigation in the complaint. I have  
12           decided to defer it. So this is a specific answer  
13           to your question about timing.

14                           I think that criminal matters have  
15           to take paramountcy, and my concern was that if we  
16           start to do an investigation, interviewing  
17           individuals, finding police statements, victim  
18           statements, et cetera, et cetera, we could raise  
19           all kinds of problems in terms of disclosure. We  
20           might be getting information that the Crown  
21           doesn't have, or if the Crown doesn't have it they  
22           can't disclose to the defence. There could be all  
23           kinds of problems that might adversely impact on  
24           the trial itself.

25                           I have made the call, rightly

1 or wrongly but I take responsibility for it, that  
2 the timing of the matter will have to wait until  
3 after verdict.

4 THE COMMISSIONER: Let me just ask  
5 you in response to that, given that national  
6 security investigations often don't mature into  
7 prosecution -- I mean one hears a lot of numbers  
8 but a lot of them don't, for good reason, it is  
9 intended, the primary goal is prevention and  
10 disruption it is said in many cases.

11 Is it a feasible regime where a  
12 review, as a result of a complaint or otherwise,  
13 could relate to an investigation, but if a  
14 prosecution was commenced then at that point a  
15 decision like the one you have made could be  
16 considered, or would the harm be done already?

17 MR. RYNEVELD: That depends. If  
18 it doesn't go to prosecution you don't have the  
19 problem.

20 THE COMMISSIONER: There is no  
21 problem.

22 MR. RYNEVELD: Absolutely. But  
23 you don't know when you launch an investigation  
24 where it is going.

25 THE COMMISSIONER: That's right.

1                   MR. RYNEVELD:  Once you have  
2                   collected information, which if it is a national  
3                   security issue cannot then be disclosed, for  
4                   whatever national security interest there may be,  
5                   you might find yourself in the same position that  
6                   I referred to earlier where we got the  
7                   confidential information from a referring body,  
8                   which was information and not evidence, but we  
9                   have it and without it you can't prove your case,  
10                  you might have to withdraw that count in the  
11                  indictment or the indictment all together.

12                  So I think there are some  
13                  problems, yet there are certain aspects of an  
14                  investigation which may not impact on a potential  
15                  prosecution.  In other words, it could be things  
16                  that you can concurrently investigate if your best  
17                  guess is that it will not impact on the  
18                  prosecution.

19                  But in this particular case,  
20                  they are so intertwined that I don't want to run  
21                  the risk because I think the criminal prosecution  
22                  has to be paramount.  That is my view, rightly  
23                  or wrongly.

24                  THE COMMISSIONER:  I can  
25                  understand that.

1                   Mr. Allmand, Professor Wark and  
2                   then Professor Farson.

3                   MR. ALLMAND: But there are other  
4                   types of cases that may take place. There could  
5                   be cases before the Federal Court on deportations  
6                   under the Immigration Act. I go back to the  
7                   securities certificates. We have had people now  
8                   held without charges where there is an attempt to  
9                   deport to countries where they claim they will be  
10                  tortured or killed even, executed. It would seem  
11                  to me that these people should have the right,  
12                  under what we are proposing, to have the super  
13                  SIRC, or whatever, look at whether the information  
14                  in the security certificate is reliable  
15                  information or hearsay or faulty or whatever, even  
16                  though that case is pending, but it is not a  
17                  criminal type of case.

18                  THE COMMISSIONER: Thank you  
19                  very much.

20                  Professor Wark...?

21                  MR. WARK: I'm not sure I'm  
22                  qualified really to talk about this issue, but it  
23                  seems to me that perhaps we are drifting away  
24                  slightly from what is bound to be the main onus of  
25                  the work of a review committee, that is that its

1 main job, and most of its resources and time, will  
2 be devoted to a systemic retrospective review on  
3 an annual basis of the performance of the security  
4 and intelligence community.

5 It seems to me that at the same  
6 time this review body has to have the capacity to  
7 launch investigations as a result of complaints,  
8 launch own motion investigations, respond to  
9 breaking developments that seem to be critical for  
10 national security issues and to have generated  
11 public interest.

12 Perhaps it is too commonsensical,  
13 but it seems to me that the matter would have to  
14 be left to the discretion of the leadership of the  
15 review agency as to whether it was a good and  
16 prudential idea to launch a concurrent  
17 investigation into something that may be an  
18 ongoing operational matter or may be an ongoing  
19 prosecutorial matter.

20 The specific case that comes to  
21 mind is Air India in this field where the Security  
22 Intelligence Review Committee eventually, after a  
23 number of years, put together, I would say a very  
24 commendable sophisticated report on some of the  
25 problems surrounding intelligence gathering and

1 cooperation between the security and law  
2 enforcement agencies that I think was a very  
3 important piece of work to do.

4 There was a long delay there. The  
5 question might be: Why such a long delay? When  
6 it eventually was completed and made public, it  
7 doesn't seem to have had any adversarial impact on  
8 the criminal prosecution process itself.

9 So I would have said that as a  
10 commonsense matter discretion would be the order  
11 of the day, but the possibility of launching such  
12 things would always have to be part of the remit  
13 of the review body.

14 THE COMMISSIONER: Professor  
15 Farson...?

16 MR. FARSON: I would like to draw  
17 a distinction between related investigations and  
18 parallel investigations. I don't think anybody  
19 wants to impede a criminal prosecution, but there  
20 may be instances where you want to have some form  
21 of policy investigation. I'm thinking of the  
22 Lockerby bombing and what the Americans did was to  
23 have a Commission of Inquiry into airline safety  
24 and there was at the same time a criminal  
25 investigation ongoing for several years. If my



1 memory is correct, I don't believe that in that  
2 instance there was anything that came out of the  
3 American President's Commission. I don't think  
4 that impeded the criminal prosecution.

5 So we have to be careful, I think,  
6 between a parallel investigation and an  
7 investigation that is related. I think in some  
8 instances Wesley is quite correct in talking about  
9 Air India in this. We might have successfully had  
10 policy investigations a long time ago and perhaps  
11 advanced airport and airline security way before  
12 9/11 on the international scale.

13 THE COMMISSIONER: Let me just ask  
14 a last question under this topic 4.

15 "SIRC can be tasked by the  
16 Minister to provide special  
17 reports concerning any matter  
18 that relates to the  
19 performance or the duties or  
20 functions of CSIS."

21 So the Minister can be a  
22 triggering thing.

23 "The CSE Commissioner can be  
24 authorized by the Governor in  
25 Council to carry out

1                    assignments and activities  
2                    related to its mandate.

3                    The question then arises: Should  
4                    a review body, the one that is being discussed  
5                    here, should it be triggered into action by  
6                    Minister or by the Governor in Council, the  
7                    Executive, and so on?

8                    The difficulty -- Commissioner  
9                    Boniface you will think of this -- is that we are  
10                    talking about now triggering a review of a law  
11                    enforcement agency so that it immediately engages  
12                    the notion of police independence. I guess one of  
13                    the prospects would be you would have the RCMP  
14                    carrying out an investigation and all of a sudden  
15                    it has the chilling effect of its review body  
16                    being directed by the Executive or the Minister  
17                    to review.

18                    But that is the question: Is  
19                    there --

20                    MR. BOROVOY: I think there is a  
21                    tendency to pay excessive homage to the notion  
22                    that the police must be almost a law unto  
23                    themselves. When you talk about independence,  
24                    that is what you start to mean when you look at  
25                    its application in various circumstances.

1                   I for one don't think it is a sin  
2                   to have the government say, "I want some of this  
3                   law enforcement activity looked at and we have an  
4                   agency to look at it and let them report on it."

5                   In fact, I would think that is a  
6                   way of promoting police accountability. I think  
7                   there is far too much of a taboo around the idea  
8                   of being able to say something and do something  
9                   about police investigative discretion.

10                   THE COMMISSIONER: Okay. Anybody  
11                   else on that subject?

12                   Yes, okay.

13                   MR. WARK: Just to respond not  
14                   with regard to Alan's comments but just with  
15                   regard to your question.

16                   I think the ideal circumstance  
17                   would be to leave options open. I would be  
18                   slightly reluctant to see a broader review agency  
19                   in a circumstance in which it would be compelled  
20                   necessarily to meet Cabinet Ministers requests for  
21                   investigations. I think that it should retain the  
22                   right to choose to either accept such a task or  
23                   refuse it.

24                   But I think we have to face  
25                   practical considerations, that is if a Cabinet

1 Minister or the government or Cabinet in general  
2 comes along and says, "We need an inquiry into  
3 'X'", then it is either going to be done by the  
4 review body or it is going to be done by an  
5 outside agency. That would be another context for  
6 the review agency itself deciding what would be  
7 best, it seems to me.

8 But I wouldn't like to see it  
9 tasked by a Minister in the sense that SIRC can be  
10 tasked by a Minister but for that option to be  
11 available.

12 THE COMMISSIONER: Okay. Yes,  
13 Mr. Inkster.

14 MR. INKSTER: Thank you. Just in  
15 summary around this question, I think that I am  
16 not in a position to speak for all law enforcement  
17 professionals, and I don't presume to do so, but I  
18 can't help but think, knowing the leadership of  
19 law enforcement in Canada, that a process whereby  
20 problems, whether they be systemic, one-off  
21 complaints about the behaviour of one particular  
22 individual, complaints related to a particular  
23 incident, get reviewed where there is  
24 justification for that review. I can't think of  
25 any law enforcement professional in Canada who

1 would disagree with that proposition.

2 THE COMMISSIONER: Right.

3 MR. INKSTER: Second, I think the  
4 issue around that, however, is that there must be  
5 some applied judgment that the review is  
6 justified, that it is not frivolous, that police  
7 officers are not being reviewed or investigated  
8 inappropriately or in some frivolous way. So  
9 there needs to be a compelling test within the  
10 body to ensure that in fact that is the case.

11 THE COMMISSIONER: Yes.

12 MR. INKSTER: In terms of the  
13 parallel investigations, my suspicion is at the  
14 end of the day one will need to have the option of  
15 doing that. One of the pieces of judgment that  
16 needs to go into exercising that option is: If I  
17 am investigating Norman Inkster, who was the key  
18 investigator on that criminal investigation, and  
19 we are now investigating his behaviour, don't  
20 think for a minute it isn't going to change my  
21 attitudes about who I'm going to protect under  
22 those circumstances.

23 So the question needs to be asked  
24 of the -- I think you could leave the option open,  
25 but the question needs to be asked: Will it

1 enhance or interfere with the outcome of this very  
2 important criminal investigation? As the  
3 Commissioner referred to, you leave that judgment  
4 to the person who is responsible for it and go  
5 forward, but having the option available I don't  
6 think is troublesome.

7 THE COMMISSIONER: Right.

8 MR. BOROVOY: I have to tell you  
9 that Inkster is getting better all the time.

10 THE COMMISSIONER: That's right.  
11 Is this the third time in your long history  
12 together?

13 --- Laughter

14 MR. BOROVOY: I gotta call them  
15 like I see them.

16 THE COMMISSIONER: Mr. Allmand...?

17 MR. ALLMAND: I agree with Alan  
18 Borovoy that you can push this independence of the  
19 police too far.

20 I have here before me an article  
21 which is a report on the problems that the Clinton  
22 administration had with the FBI in the invasion of  
23 the Waco, Texas where 81 people were killed. It  
24 seems that -- I am just quoting here a bit.

25 It says:

1 "The Clinton team believes  
2 that the FBI's position that  
3 it is above politics is a  
4 guise that allows it to avoid  
5 accountability."

6 In other words, you can go too far  
7 in allowing police forces -- I mean, I agree with  
8 Mr. Inkster that you have to draw the line where  
9 you can and where you can't, but I don't think we  
10 can be so open in allowing police forces to almost  
11 do anything on the basis of being above politics  
12 or being independent. Sometimes there has been,  
13 in some cases, a tendency to do that.

14 THE COMMISSIONER: A last comment  
15 on this question?

16 Professor Farson...?

17 MR. FARSON: If I remember my CSIS  
18 Act properly, I think the wording with regard to  
19 the Minister's tasking, or possible tasking of  
20 SIRC is "may request". So there is discretion, I  
21 would suggest to you, if I am correct, on SIRC's  
22 part to decline to do that work. That maybe is  
23 the solution.

24 THE COMMISSIONER: That is  
25 certainly consistent with the thought we hear that

1 ultimately there should be a discretion in the  
2 independent body itself.

3 MR. ALLMAND: Just one final word?

4 THE COMMISSIONER: Sure.

5 MR. ALLMAND: There is a new  
6 committee that has been announced by the  
7 government that they are going to set up a  
8 National Security Committee in Parliament with  
9 swearing the people in as privy councillors,  
10 all party.

11 It would seem to me that that  
12 committee, which is a new departure really for a  
13 parliamentary committee to have that capability, I  
14 think they should also have the right to refer,  
15 because they wouldn't have the tools otherwise to  
16 do the investigation.

17 THE COMMISSIONER: Right. No.

18 MR. ALLMAND: And since they would  
19 meet in camera and be sworn in as privy  
20 councillors, that information would be kept  
21 secret, just as it is with SIRC. I think they  
22 would be sworn in just like SIRC members.

23 THE COMMISSIONER: Just as an  
24 aside on that point, should the recommendation  
25 here be for a new type of review body, certainly



1 its relationship and links to that committee will  
2 be something that would need to be addressed.

3 MR. ALLMAND: Right.

4 THE COMMISSIONER: Let's turn  
5 to -- I'm sorry?

6 MR. FARSON: Could I just respond  
7 to Mr. Allmand's point here, because unless  
8 something has happened in the last 24 hours I  
9 don't think that committee has been appointed yet.

10 MR. ALLMAND: No. It has been  
11 announced, but not appointed.

12 THE COMMISSIONER: Yes.

13 MR. FARSON: In the last 24 hours?

14 MR. ALLMAND: No, no, not  
15 appointed.

16 MR. FARSON: No. Well, what I'm  
17 saying is there is a great deal of distinction to  
18 be drawn between a Standing Committee of the House  
19 of Commons and a committee of parliamentarians.

20 One has all the powers that  
21 Parliament has under Standing Order, in the House  
22 of Commons, of section 108, to call for people,  
23 papers and records.

24 The other one has the powers that  
25 may be allotted by the Prime Minister.

1                   So once again we need to be very  
2                   careful about what we are actually talking about  
3                   and we have yet to wait and see what the  
4                   settlement is going to be on this, because there  
5                   is a conflict between the Interim Committee on  
6                   what their views of the way the committee should  
7                   be and the government's view.

8                   If you will recall, on  
9                   December 13th when Mr. Martin became Prime Minister  
10                  he talked about a Standing Committee. By, I think  
11                  it was the 14th of February, over the Christmas  
12                  recess, the Deputy Prime Minister was talking  
13                  about a committee of parliamentarians. So some of  
14                  us have noted Sir Humphrey Appleby had clearly  
15                  been involved in the process.

16                  THE COMMISSIONER: Thank you,  
17                  Professor Farson.

18                  MR. BOROVOY: I wonder if I can  
19                  just add something.

20                  I have been bothered for a while  
21                  about the implications of this whole business of  
22                  the relationship between the government and the  
23                  police. It leads to insoluble conundrum: How in  
24                  the world is the government supposed to be  
25                  accountable if they can't say, "Look, you stop

1       doing that". So you say, "Oh yes, they can tell  
2       you as a matter of policy, but not with respect to  
3       a specific operation."

4                   A lot of the harm is caused in  
5       specific operations.

6                   And yes, I recognize the risks of  
7       politicizing the police, but I suggest that a way  
8       of dealing with this so that we can have greater  
9       accountability by the government for the police, a  
10      way of dealing with it is to subject it to  
11      independent auditing that relationship was well,  
12      indeed especially.

13                  I could also imagine a requirement  
14      that when the government does give instructions to  
15      the police it be in writing.

16                  I can just see it now, I can see  
17      the Minister saying something to the Commissioner  
18      of the RCMP and the Commissioner says, "Put it in  
19      writing, Minister". That would be very salutary  
20      as far as any impropriety is concerned, but at the  
21      same time it would give us a way of trying to  
22      reconcile accountability on the one hand with some  
23      kind of integrity on the other hand.

24                  THE COMMISSIONER: Mr. Inkster...?

25                  MR. INKSTER: It is an exciting

1           proposal.

2           --- Laughter

3                           THE COMMISSIONER: I thought it  
4           was going to be number four.

5                           MR. INKSTER: It is an  
6           exciting proposal, but what a slippery slope that  
7           describes.

8                           I will tell you, I met on one  
9           occasion with the equivalent of the Solicitor  
10          General of Canada from one of the States in  
11          Australia and after one or two glasses of wine he  
12          described for me how he had instructed the police  
13          to behave in a certain way and how they were to  
14          handle solving a kidnap. Well, it actually  
15          resulted in the kidnappee being killed.

16                          So I understand the importance of  
17          accountability, political accountability, but once  
18          politicians -- non-police professionals start to  
19          delve in the actual operations, it is a very  
20          slippery slope because at the end of the day in  
21          terms of accountability the Minister, who gave a  
22          certain amount of direction about a particular  
23          operation, is he or she going to be held  
24          accountable to the review body and will that  
25          review body have remedies that it can inflict upon

1           that politician.

2                           The second point, in just a very,  
3           very general sense -- and I am one who is  
4           subjected to political accountability so I  
5           understand it and its importance. I understand  
6           that it is important for a Minister to be able to  
7           speak in confidence about the role of the RCMP and  
8           what they do.

9                           But if in the review proposals  
10          that we have been talking about there is a  
11          political oversight of some form, my own  
12          experience in terms of appearing before  
13          parliamentary committees, and I have appeared  
14          before many, notably over the question of budget,  
15          and over the course of seven years I had never one  
16          question on budget.

17          --- Laughter

18                           MR. INKSTER: It was about what  
19          did you do here and what did you do there, and it  
20          was about the opposition trying to score points on  
21          the back of the Commissioner to embarrass the  
22          government of the day.

23                           A bit cynical perhaps I am, but  
24          at the end of that I often wondered: Did it make  
25          anything better? Because it was politics being

1           played in a room where we should have been  
2           trying to talk about making the RCMP more  
3           accountable about their budget. We just never  
4           talked about that.

5                                So I think it is a case of getting  
6           the right balance and recognizing who is going to  
7           have what interests -- what interests are going to  
8           be at play in that forum.

9                                MR. ALLMAND: On the same  
10          subject --

11                               THE COMMISSIONER: Go ahead.

12                               MR. ALLMAND: I can recall  
13          instances where Ministers did say to the RCMP on a  
14          policy matter, not on an -- that this shouldn't be  
15          done. I recall in the late 1960s, before I was  
16          Solicitor General, some way or other John  
17          Diefenbaker got word that the RCMP was using  
18          minors as undercover agents. At that time I think  
19          there was no rule on it and the government then  
20          instructed the RCMP, and they agreed, to draw up a  
21          set of guidelines on when minors, I think with the  
22          consent of their parents, might or might not be  
23          undercover.

24                                But that was not how to do it in  
25          an individual case, it was the policy framework on

1           who can and who cannot be used as an undercover  
2           man or woman.

3                                 That kind of thing is legitimate.  
4           I think the Minister has to, if he sees a  
5           violation of the law, of policies or human rights  
6           standards, et cetera, bring it to the  
7           Commissioner's attend and say this has to stop.  
8           But I wouldn't want him to say, "Stop  
9           investigating Borovoy and start investigating  
10          Mr. Inkster".

11                                MR. BOROVOY: But, Warren, if  
12          prior to promulgating this rule about using minors  
13          the Minister learned that they were using a minor,  
14          are you saying the Minister can't do anything  
15          about it? He can't just phone them up and say  
16          "Stop it"?

17                                MR. ALLMAND: No, no. They did.  
18          In fact, the way it happened, it was raised in the  
19          House -- he did.

20                                MR. BOROVOY: Then that is getting  
21          involved in a specific operation.

22                                MR. ALLMAND: No, no. He said,  
23          "As a general rule no minor should be used", and  
24          the Force agreed. They did stop in that  
25          particular case.

1                   But I think the way the rule --  
2                   and maybe the Commissioner or the former  
3                   Commissioner would remember -- I think they still  
4                   could be used with the consent of the parent. I'm  
5                   not sure how the rule developed.

6                   But they did stop in that case.  
7                   They said "Stop it" and they developed a  
8                   guidelines. But I guess the matter hadn't come up  
9                   before that particular time so there was no  
10                  policy.

11                  MR. BOROVOY: Suppose they said,  
12                  "Stop wiretapping, let's say, the Partie  
13                  Quebécois. Stop doing it to them now. I'm not  
14                  promulgating any general rule, I'm saying don't  
15                  you dare do that to these people".

16                  MR. ALLMAND: Of course -- yes.

17                  MR. BOROVOY: Can't the Minister  
18                  do that?

19                  MR. ALLMAND: Yes, he can, because  
20                  you are not supposed to -- the guidelines for  
21                  wiretapping are in Criminal Code and in the law  
22                  and you are not supposed to wiretap organizations  
23                  that are not spelled out. There are criteria.

24                  MR. BOROVOY: Okay. "Stop  
25                  infiltrating them. Stop your process of



1 infiltration." That is not unlawful.

2 MR. ALLMAND: As a matter of fact,  
3 Mr. Trudeau, when he was Prime Minister, found out  
4 there had been confusion in some cases by police  
5 forces in targeting members of the Rassemblement  
6 pour l'Indépendance Nationale, which was before  
7 the PQ, and confusing them with FLQ. He tried to  
8 make the point that people who were FLQ types,  
9 yes, they deserved to be targeted, but not people  
10 who were advocating independence in a democratic  
11 way because that was not subject to --

12 MR. BOROVOY: Despite his best own  
13 best admonitions about keeping the Minister out of  
14 day-to-day operations, he had to get involved in  
15 some day-to-day operations. It is just an  
16 artificial distinction.

17 MR. ALLMAND: I don't think so.  
18 --- Laughter

19 THE COMMISSIONER: A very  
20 interesting obviously and important issue. And  
21 important issue for us, too. I think it is  
22 something we are going to have to grapple with.

23 In furtherance of time, let's move  
24 to question No. 5 which has to do with powers of a  
25 review body.

1                   What powers would a review body  
2                   for national security activities need and what  
3                   restrictions should apply?

4                   The first one would be access to  
5                   information and documents.

6                   The choices would be that:

7                   The review body would have access  
8                   to information and documents from the agency being  
9                   reviewed.

10                  Another choice would be: also  
11                  from all other federal agencies.

12                  Another choice, an even broader  
13                  choice, would be that the review body would have  
14                  access and power to compel production of documents  
15                  and witnesses from the private sector. So there  
16                  would be a broad reach in terms of the compulsory  
17                  powers to obtain information, start at the most  
18                  narrow being the agency itself.

19                  The first speaker on this is  
20                  Commissioner Ryneveld.

21                  MR. RYNEVELD: Thank you,  
22                  Mr. Commissioner. In the interest of time I will  
23                  be briefer than I was in question 2.

24                  In my view, a meaningful civilian  
25                  review body must have at least two core powers in

1 order to operate effectively in respect of police  
2 agencies operating in the national security area.

3 First, the body must have  
4 unfettered access, whether by operation of law or  
5 administrative order, to all information in the  
6 care, control and knowledge of the law enforcement  
7 agency that is necessary to enable a meaningful  
8 review to take place.

9 Now, there must be complete file  
10 access to the agency being reviewed and the powers  
11 to compel necessary information from other  
12 government agencies in possession of relevant  
13 documents. So that would be, as Mr. Allmand has  
14 said earlier, the powers of subpoena, et cetera,  
15 et cetera, but powers to compel.

16 Second, the second point is, the  
17 body must have the authority to initiate audits,  
18 inspections and reviews of its own motion rather  
19 than being solely complaint-driven. I have  
20 already said something on that earlier.

21 From having read CPC Commissioner  
22 Heafy's submission to you dated February 21, 2005,  
23 I note that she made the distinction between  
24 "mandate-granted" and "powers bestowed" on  
25 oversight agencies.

1                   She correctly makes the point, in  
2 my view, that in essence you must give an agency  
3 the necessary authority to carry out its  
4 responsibilities in order for it to be effective.

5                   I also agree with her that it is  
6 essential that the oversight body must have  
7 unfettered access to all relevant information.

8                   Now, I would add that it must be  
9 clearly spelled out as to who the final arbiter  
10 would be as to what information was relevant. It  
11 is one thing to say "all relevant information" and  
12 then have the ensuing argument about, "Well,  
13 what's relevant?" I think that has to be clearly  
14 spelled out.

15                   And that the final arbiter should  
16 be, in my view, the investigating agency. They  
17 know what they are looking for.

18                   Now, it has been said that  
19 ambiguity is the refuge of those who have  
20 something to hide. So unless the legislation  
21 creating the oversight agency is absolutely clear,  
22 I predict that problems of interpretation will  
23 prevent effective oversight by creating delays and  
24 unnecessary confrontation.

25                   Ms Heafy's examples, which she

1           quotes at page 34 of her submission concerning the  
2           APEC Inquiry are, in my view, good examples of  
3           what might transpire if you transpose it to  
4           another situation.

5                           The question whether the review  
6           body ought to be allowed to exercise its power  
7           only retrospectively as opposed to while a file  
8           remains current is less clear. We have talked  
9           about that somewhat.

10                           The concerns about oversight not  
11           interfering with existing national security  
12           investigations should not be lightly dismissed, in  
13           my view.

14                           However, it is my view in  
15           principle that civilian oversight is less  
16           effective where it operates only retrospectively.  
17           A concurrent investigation power which requires  
18           the civilian overseer to suspend his or her  
19           activities when he or she is persuaded that the  
20           necessities of an ongoing investigation ought to  
21           be paramount would appear to satisfactorily  
22           reconcile competing goals, particularly given what  
23           the discussion paper suggests is the experience in  
24           both the United Kingdom and the United States.

25                           So the final question under this

1 heading is whether the review body should have the  
2 authority to issue binding orders. I do not  
3 believe that this question can properly be  
4 answered without taking account of the subject  
5 matter in respect of which an order might  
6 potentially be issued, in other words, depends.

7                   Clearly, civilian oversight  
8 agencies should not have the authority to issue  
9 orders respecting national security policy. This  
10 is an area in which agencies should propose and  
11 make recommendations and the legislators and  
12 police agencies should finally decide.

13                   Outside this area, however, there  
14 does exist significant scope to make orders that  
15 do not infringe on the role of police or  
16 legislators.

17                   One such area of course relates to  
18 the power to make procedural orders to facilitate  
19 the means of civilian oversight that I discussed  
20 under question two.

21                   Another may relate to issues of  
22 discipline against individual officers who commit  
23 discipline defaults. Members of the committee may  
24 be interested to know that in British Columbia all  
25 discipline decisions proposed by a respondent

1 officer's commander are subject to hearing by a  
2 retired judge or justice sitting as an  
3 adjudicator. The adjudicator operates at arms'  
4 length from the police, from government and from  
5 the Commissioner.

6 This new hearing before the  
7 adjudicator can arise either at the instance of  
8 the officer, as of right in some cases, or by the  
9 Police Complaint Commissioner. The adjudicator's  
10 decision regarding whether a default has been  
11 committed and about the appropriate discipline is  
12 final, subject only to an appeal on a question of  
13 law to the Court of Appeal.

14 This model has proved in principle  
15 to be very credible to stakeholders, also to the  
16 public, and has not resulted in a diminution of  
17 the role of the commanding officer, who still has  
18 a primary role to play in the discipline process.

19 While some adaptation of the  
20 details of that process would be necessary in  
21 order to reflect the realities of discipline cases  
22 arising in the national security context, in  
23 particular adaptations relating to publicity, the  
24 role of complainants and access to information,  
25 such adaptation would appear to be feasible.

1                   This having been said, I have, in  
2                   our white paper, recently proposed several changes  
3                   that would improve the basis on which B.C.'s  
4                   public hearings operate.

5                   I will promote this shamelessly  
6                   and say that I comment this white paper to the  
7                   committee for its review and any assistance it  
8                   might provide --

9                   THE COMMISSIONER: I just tapped  
10                  Ms Wright on the shoulder.

11                 --- Laughter

12                  MR. RYNEVELD: -- in formulating  
13                  recommendations respecting the matters in issue  
14                  here.

15                  On that note, that is all I  
16                  propose to say, Mr. Commissioner, and I hope it  
17                  will very helpful.

18                  THE COMMISSIONER: Mr. Borovoy,  
19                  you are the other speaker on this topic.

20                  MR. BOROVOY: Further to this  
21                  ability of the agency to function, yes, they  
22                  should have the power to -- well, they should have  
23                  a power of ongoing access to the records,  
24                  facilities and personnel of any agencies that they  
25                  are mandated to monitor.



1                   In addition, they should be able  
2                   to compel the production of documents and  
3                   testimony from witnesses who have it, much the  
4                   same as a public inquiry, very similar powers to a  
5                   public inquiry.

6                   At this point it may be a bit  
7                   extravagant to recommend a power of arrest. I  
8                   will leave that to those with more courage in this  
9                   respect than I do.

10                  --- Laughter

11                   MR. BOROVOY: As far as restraints  
12                   are concerned, restraints on their power, here I  
13                   would like to make this point, that my remarks  
14                   here are assuming that we finally make the  
15                   division between an audit review function and a  
16                   complaint processing function. I think that they  
17                   ought not to be processing complaints.

18                   Just one argument in this respect,  
19                   and there are others.

20                   Our experience has been that we  
21                   have not infrequently found complaint agencies not  
22                   functioning all that well either. Partly  
23                   sometimes the behaviour was quite abysmal; other  
24                   things just habits that were difficult to  
25                   overcome, whatever, and some ability to audit the

1 complaint behaviour could be very helpful to  
2 making the whole national security picture  
3 function in a more acceptable fashion to the  
4 public.

5 Of course we come back to the idea  
6 that if they are going to audit the complaint  
7 function, they shouldn't be administering it, they  
8 shouldn't be exercising it.

9 So I would argue for a separation  
10 of functions, and then I would make the point that  
11 the review agency should not have remedial power,  
12 that insofar as the greatest number of decisions  
13 are concerned in the area of national security,  
14 these are properly government decisions.

15 We elect governments to govern and  
16 I want them to do exactly that. I am prepared to  
17 pressure them and I want to build in pressures on  
18 it, but a government is accountable, they were  
19 elected to govern, they should be accountable,  
20 they should be able, in the final analysis, to  
21 make these kinds of decisions, largely policy and  
22 structural ones around national security. This is  
23 not for an outside agency. But of course they  
24 should be able to disclose, expose, propose, and  
25 all that.

1                   So as much as possible -- so then  
2                   hive off these functions and leave this primarily  
3                   as an audit function.

4                   Then I come to the question of  
5                   what to do about national security information  
6                   that could show up in their report. Of course  
7                   there would have to be some restrictions here.

8                   One of them is that the audit  
9                   agency itself should not disclose information  
10                  publicly that in its view would damage national  
11                  security interests.

12                  But even there I know how  
13                  important it is to the people in this area -- a  
14                  friend of mine once said it is analogous to -- it  
15                  isn't enough to put on a belt and then suspenders,  
16                  you have to walk around holding your pants up, and  
17                  there is an analogy here to that.

18                  I think there is an argument to be  
19                  made for requiring that before the report is made  
20                  public it be vetted by the agency that they are  
21                  auditing and by the government. If there is a  
22                  disagreement as to what is ultimately  
23                  releasable -- you might be asking for this  
24                  yourself at one time.

25                  --- Laughter

1                   MR. BOROVOY:  If there is a  
2                   disagreement as to what is releasable, the audit  
3                   agency should have a right to take it to court and  
4                   the court should have the power to release it if  
5                   it finds no reasonable basis for withholding it.

6                   Again, I would not have the court  
7                   substitute its views for that of the government,  
8                   but I would say that the court can require the  
9                   government to operate within what I like to call  
10                  the ballpark of reasonable judgment and if it goes  
11                  outside then they can act.

12                  To whatever extent, however, the  
13                  review agency at the end of the day differs with  
14                  the government decision about what is releasable,  
15                  the review agency, at the very least, should be  
16                  able to announce publicly that it had a  
17                  disagreement with the government about this.  Even  
18                  if it can't disclose the reasons, the facts or  
19                  anything like that, at least subject the  
20                  government to the ongoing pressure.

21                  I don't want to take away the  
22                  government's power to make decisions, but I want  
23                  to subject it to an awful lot of pressure.

24                  THE COMMISSIONER:  We will have a  
25                  follow-up discussion with others on these issues,

1 but we will take the afternoon break now for  
2 15 minutes and resume at 3 o'clock.

3 --- Upon recessing at 2:45 p.m. /  
4 suspension à 14 h 45

5 --- Upon resuming at 3:02 p.m. /  
6 Reprise à 15 h 02

7 THE COMMISSIONER: Let's resume.

8 I open the floor to the panel to  
9 respond to Question 5: the powers, access to  
10 information, remedial powers or compulsory powers  
11 question.

12 Mr. Inkster.

13 MR. INKSTER: Thank you,  
14 Mr. Commissioner.

15 It is not a question so much as a  
16 point of clarification.

17 I was going to ask Commissioner  
18 Ryneveld, who suggested that any complaints  
19 commission should have access to all information,  
20 understand the merits of that: Would that include  
21 or could that include any information that is  
22 under seal by court order?

23 MR. RYNEVELD: Far be it for me to  
24 suggest that a sealed document should be anything  
25 other than unsealed. I do defer to the

1           paramountcy of the courts.

2                           So the answer to that is my  
3           personal view would be no.

4                           MR. INKSTER:   No.

5                           MR. RYNEVELD:   I'm an officer of  
6           the court first.

7                           THE COMMISSIONER:   Professor  
8           Farson and then Mr. Allmand.

9                           MR. FARSON:   Just a couple of  
10          powers I think such a body should have:   the  
11          capacity to share information, documents and  
12          records and to brief fully any standing committee  
13          of the House of Commons or Senate that might be so  
14          appointed to deal specifically with national  
15          security matters that would have the necessary  
16          security procedures in place on appointment and on  
17          staff and environment.

18                           I would ask also that legislative  
19          clarity is needed here on this point to make it  
20          absolutely explicit so we don't have another  
21          situation that we had in 1989-90.

22                           The other related matter is that  
23          the review body I think should have total autonomy  
24          over its own hiring of staff, subject of course to  
25          the appropriate clearances.   I wouldn't want to

1 see the same thing happen to this body that  
2 happened to the British committee.

3 THE COMMISSIONER: Mr. Allmand?

4 MR. ALLMAND: Yes. With respect  
5 to reporting, I would think that there could be  
6 two versions of the report, and I would agree with  
7 the guidelines that were suggested by Mr. Borovoy.  
8 One version would go to the Cabinet, which would  
9 have confidential information or national security  
10 information, but also that report would go to, if  
11 it is ever established, this proposed committee of  
12 Parliament where they are sworn in as privy  
13 councillors and so on.

14 The reason that I would like to  
15 see it go to that committee is that I would look  
16 on one role of that committee to follow up from  
17 year to year as to whether or not the agencies are  
18 in fact following the recommendations of the  
19 review committee.

20 I am in agreement that the review  
21 committee should not have the authority to make  
22 binding orders, which seems to be a consensus  
23 around the table.

24 I would like to mention the type  
25 of recommendations that I can see it making.

1                   I can see it making  
2           recommendations to correct documents, records and  
3           decisions; to give compensation; to change  
4           directives, practices and protocols; to release  
5           from custody -- and I am thinking here in cases of  
6           security certificates; to reinstate personnel that  
7           may have been fired unfairly; to discipline police  
8           and security agents, and I think in any other  
9           matter that justice and the Charter might require.

10                   I realize that that is a limited  
11           list, but I could see the committee making  
12           recommendations of that kind because I have seen  
13           abuses in all of those areas.

14                   THE COMMISSIONER: Professor Wark?

15                   MR. WARK: Just a few things on  
16           these points.

17                   First of all, I think I agree with  
18           comments around the table: that what we are  
19           looking for is a review agency that does have  
20           unfettered access and the power to compel records  
21           as necessary.

22                   Add to that something that may  
23           complicate the matter, which is Cabinet  
24           confidences.

25                   In my experience in this area



1       doing research, a lot of material can get parked  
2       in Cabinet confidences. I fear that if the review  
3       committee doesn't have access to relevant Cabinet  
4       confidences in this area, it may simply not be  
5       able to do its work appropriately.

6                       I at least encourage you,  
7       Mr. Commissioner, to look at that issue. It is a  
8       difficult one, I appreciate.

9                       The third thing I would say is  
10       that in the actual legislation for such a review  
11       agency if it is set up, I think it would be  
12       important to stipulate, but stipulate carefully,  
13       the onus on the committee to the review body to  
14       provide for the protection of intelligence,  
15       sources and methods.

16                      I would much prefer that kind of  
17       language rather than national security interests.  
18       National security interests can be defined very,  
19       very broadly, including matters of simply  
20       political embarrassment, which should not be  
21       things to be necessarily protected and preserved  
22       in a review setting.

23                      Alan mentioned the idea of a  
24       vetting process, which I think strikes me with  
25       horror on a couple of grounds: partly the time

1           that might be involved in putting a review  
2           committee's findings through such a mechanism. It  
3           could be years in fact, particularly if the  
4           vetting process required some outsourcing to  
5           foreign government agencies, as often happens with  
6           Access to Information Act requests, for example.

7                        I would say there is absolutely no  
8           need for a vetting process. A review agency will  
9           be operating under the stipulations of the  
10          Security of Information Act and whatever oath  
11          Privy Councillors, if they come to serve on this  
12          committee, will be serving under.

13                      I think we would simply have to  
14          leave it to the powers of the law with regard to  
15          the protection of information and to the  
16          discretion of those who served in this function as  
17          the ways to protect the information.

18                      And vetting, I would absolutely  
19          not want to see happen. I think that would be a  
20          recipe for immense consumption of time and  
21          frustration and simply could produce an workable  
22          review process.

23                      Alan also mentioned, also I think  
24          strongly advocated the idea of separating out the  
25          complaints function from what he is calling the

1       audit function. I am of two minds on that, and it  
2       is obviously an issue that needs to be looked at  
3       closely.

4                   I think the truth of the matter is  
5       that the experience in this particular field, in  
6       national security reviewing that has been done by  
7       the Security Intelligence Review Committee and the  
8       CSE Commissioner's Office over the years suggests  
9       that the kinds of complaints, for whatever reasons  
10      that come forward, don't present an onerous  
11      workload for that committee.

12                   The thing that I am most concerned  
13      about is that the audit function, that systematic  
14      review function, has to take priority.

15                   But unless there is some strong  
16      reason to suggest that that audit function will  
17      not take priority if a complaints mechanism is  
18      also built into the review agency, then I think I  
19      would be in favour of keeping the complaints part  
20      of that review agency's mandate, not least because  
21      I think it would be of value in terms of the  
22      public legitimacy of such a review agency and it  
23      might well be of value in terms of triggering  
24      investigations and a general understanding of the  
25      kinds of public attitudes that are out there in

1 the country about national security issues.

2 Finally, I would just say that I  
3 don't see any place for binding orders of any kind  
4 in a review agency function. These are very  
5 complex policy issues very often involved in the  
6 national security field. The review agency's job  
7 would be to call attention to what it sees as  
8 problems and areas where it sees it needs  
9 correction. It would be the government's job  
10 under the usual Westminster system of  
11 accountability to respond to those things.

12 But I can't see binding orders  
13 functioning in this field.

14 Thank you.

15 THE COMMISSIONER: Thank you.

16 Yes, Commissioner.

17 MS BONIFACE: Very quickly, if I  
18 could just add since it has not been spoken to, I  
19 think in a complaints-type review, if that is  
20 indeed included in this discussion, due process  
21 for everybody, including the individual officer to  
22 be affected needs to also be considered.

23 THE COMMISSIONER: Very much so.

24 One other question on powers. The  
25 suggestion is that the mandate should include an

1 educational power and to perform some outreach to  
2 certain communities; not simply doing review but  
3 going beyond that.

4 In the United States, the  
5 Inspector General of the Department of Justice and  
6 the Civil Liberties Officer for Homeland Security  
7 have to publicize their civil liberties mandates  
8 through many media and do so in many languages.

9 The question arises: Should there  
10 be a component of the powers of this review agency  
11 where they do that and, as someone suggests, seek  
12 to reach out to deal with certain communities who  
13 may be or are perceived to be adversely affected  
14 by the activities of the RCMP?

15 The question is this is a lightly  
16 different power than we have been talking about, a  
17 different role really. I think it is a different  
18 role than we have in any other review bodies -- I  
19 am not certain of this, but I think so -- in  
20 Canada.

21 It is sort of a proactive role and  
22 so on.

23 Do we see that as being part of  
24 this body's function or should somebody else in  
25 the system be handling that type of mandate?

1 Yes, Mr. Inkster.

2 MR. INKSTER: By way of a general  
3 comment, I can't see anything but good in that:  
4 educating new Canadians about the processes and  
5 how it works, so long as it is not assumed that  
6 that removes the same responsibility of law  
7 enforcement agencies to reach out to those same  
8 communities to help them understand how law  
9 enforcement operates in this country.

10 THE COMMISSIONER: Right.

11 Professor Wark?

12 MR. WARK: I think the public  
13 education mandate might be very important and it  
14 certainly would not be duplicating anything that  
15 is currently done.

16 I think an outreach mandate, in  
17 part, both to specific communities in Canada and  
18 the public in general, would be very important to  
19 educate people about what the review agency does  
20 and it might, as well, reinforce what I hope will  
21 be the message, that ultimately this review agency  
22 is trying to hold itself accountable to the people  
23 of Canada, not to individual ministers in the  
24 government or even to Parliament.

25 THE COMMISSIONER: Yes,

1 Mr. Allmand.

2 MR. ALLMAND: I really think that  
3 they should have that capacity, and I would like  
4 to refer to yesterday's testimony where it was  
5 pointed out how stereotypes develop in the  
6 Canadian public, let's say, with respect to Arabs  
7 and Muslims, which are negative. And it was  
8 stated by the three witnesses yesterday how  
9 important it is for leadership, when we find  
10 something wrong, to state loudly that that is not  
11 the case.

12 I can see, for example, in cases  
13 like this where certain Arabs or Muslims or  
14 Aboriginal people, whatever they may be, who have  
15 been unfairly targeted because of racial profiling  
16 or something, that there is public education  
17 saying we have looked into this. It's false.

18 I know that other Ombudsmen under  
19 the federal government, the Commissioner for  
20 Official Languages, the report is published each  
21 year. It does a sort of public education role.

22 I think the Commission for Human  
23 Rights used to. I can remember several high  
24 profile -- the chief commissioner making very  
25 important remarks with respect to Aboriginal

1 people, and so on, and human rights abuses in  
2 Canada, following complaints and the publication  
3 of the annual report. So it is not unprecedented.

4 THE COMMISSIONER: Yes,  
5 Commissioner.

6 MR. RYNEVELD: Again speaking from  
7 experience we have, we do have some identifiable  
8 communities. There is a large Asian community in  
9 British Columbia, an Aboriginal community, but we  
10 also have the marginalized individuals of the  
11 downtown east side who are an identifiable group  
12 but not by race.

13 When we do try the outreach and  
14 education, we have been accused of trolling for  
15 business. So that is the balance that one has to  
16 keep in mind; that when you try to inform the  
17 public, those think that we are looking for more  
18 complaints. Not the case.

19 THE COMMISSIONER: You don't have  
20 enough to do. Is that it?

21 Yes, Professor Bahdi.

22 MS BAHDI: Not that this committee  
23 doesn't have enough work to do, this committee as  
24 well as the committee under discussion.

25 I want to clarify or just remind



1           that yesterday when we were talking about outreach  
2           and education, the idea was that the public should  
3           be educated about what security agencies do but  
4           also that security agencies need to be educated  
5           about the public or certain aspects of the public.

6                        I am wondering if there is a way  
7           of thinking about the education function as a  
8           two-way street and not simply as outreach meaning  
9           you go there and educate the people who are  
10          sitting in the room. But there is also a way of  
11          listening to what is being said.

12                       I wonder if that would address  
13          some of the concerns that you have experienced,  
14          Commissioner, if there is an understanding that it  
15          is a two-way street.

16                       MR. RYNEVELD: Yes. I completely  
17          agree with you.

18                       One of the other things that we  
19          have tried to invoke because we have such a  
20          limited budget, there are a lot of people who  
21          can't speak English very well and most of the MPs  
22          and MLAs in these particular ridings do have  
23          translation facilities or interpreters available.  
24          So we have tried to leave Form 1 complaint forms  
25          in these offices, because my office simply can't

1 bear that economic burden.

2 So there is a way to use other  
3 resources in order to get the message across and  
4 facilitate the educational program.

5 THE COMMISSIONER: Let's move to  
6 Question 6. There are actually five sub-questions  
7 under Question 6, and it seems to me they fall  
8 into two general categories.

9 The first has to deal with the  
10 appointment and composition of a review body. The  
11 second has to do generally with the question of  
12 reporting.

13 Let me start first with the first  
14 part.

15 The question is: What should the  
16 qualifications be for people who would serve on  
17 such a review body? And as part of that, how  
18 would they be chosen and who would do the  
19 choosing?

20 Currently -- I am sure you know  
21 this -- by way of background, the three models we  
22 have, the Commissioner for the CSE is a single  
23 officer, a retired judge. Former Chief Justice  
24 Lamer now serves that position.

25 For SIRC, we have five members of

1 the Committee. They are all Privy Councillors as  
2 a requirement. They are appointed -- correct me  
3 if I am wrong on this, Andrea, but I believe they  
4 are appointed by the Governor in Council but after  
5 consultation with the leaders of the federal  
6 parties.

7 Then the Police Complaints Body  
8 has, by legislation, potentially 31 members. That  
9 would be unworkable, no doubt. There are two  
10 fulltime members at the present time, and I think  
11 they are appointed by Order in Council.

12 Let me frame the question as I see  
13 it -- and I think the two are tied.

14 Probably an "of course" statement  
15 would be that we want to appoint a body that would  
16 engender public confidence and trust to the  
17 maximum amount. So both the qualifications and  
18 the method of appointment will have an impact on  
19 the level of trust.

20 In terms of the qualifications, it  
21 strikes me there are two extremes and the answer  
22 may be somewhere in the middle.

23 Assuming there is going to be more  
24 than one, we could appoint people who seem to be  
25 independent of any interest and independent of

1 political considerations, if you will. Some  
2 people might quarrel with it, but generally  
3 speaking it would be the judicial model.

4 You wouldn't be appointing  
5 somebody to represent any particular interest  
6 group: the law enforcement agency, one political  
7 party, another political party, or other groups.  
8 You would be appointing people who, if they sat  
9 alone, would be viewed as being independent.

10 The other model at the other end  
11 of the extreme would be no, you would appoint  
12 people to capture the interests or from different  
13 groups so that people would feel that they had  
14 representation on the body.

15 Or you may well appoint a  
16 combination of both. I don't know that it has to  
17 be either one or the other.

18 It strikes me that those would be  
19 the two extreme models.

20 The issue of the method of  
21 appointment -- and I think on both of these  
22 questions I would certainly value your views.  
23 Obviously the issue of transparency and the  
24 independence in the choice, so that it is seen to  
25 be independent, will be important.

1                   We have two speakers on this. The  
2 first one is Professor Wark.

3                   MR. WARK: Thank you,  
4 Mr. Commissioner.

5                   My preferred construction for this  
6 review body would be that it would be composed of  
7 what, for lack of a better word, we would call  
8 eminent persons. What qualities make eminent  
9 persons exactly would have to be left to people's  
10 discretion.

11                   I liked Alex Neve's submission --  
12 I just saw a copy of it recently -- in which he  
13 talks about expertise and diversity being part of  
14 sort of the essential make-up of an eminent  
15 person's body.

16                   I think what we are essentially  
17 talking about are recognized experts in the field  
18 with some public profile, who have had political  
19 experience, experience in the security and  
20 intelligence world, who have had expertise in the  
21 sort of general study of the area perhaps.

22                   What is really crucial, of course,  
23 is that the business of reviewing national  
24 security practices is not easy. It requires an  
25 ability at the end of the day to ask the right

1           questions. You cannot wait for departments in a  
2           security intelligence community to come forward to  
3           tell a review agency what it needs to ask and  
4           where the documents are. That knowledge has to be  
5           built into the review agency's capacities and  
6           capabilities.

7                                So an eminent person appropriately  
8           constructed I think is the way to go, with a  
9           finite term of service but a locked-in terms of  
10          service on the basis of good behaviour, with the  
11          capacity to appoint independently a research staff  
12          within a budgetary envelope.

13                              And I think really in many  
14          respects what might be key to the detailed working  
15          of the review agency will be the expertise of the  
16          staff itself. One of the areas in which I think  
17          we have typically fallen down in the Canadian  
18          practice and tradition is that staffs have been  
19          under-resourced and staffs have been monolithic in  
20          terms of their expertise in this area. I think  
21          that has to change.

22                              I think it could change if we  
23          adopt a kind of independent appointment model  
24          driven by an eminent person's panel and if we are  
25          a bit more innovative about the kinds of people

1       who might serve as experts and staffers on such  
2       review committees and look at things like  
3       temporary secondments and all kinds of ways to  
4       make sure that information and expertise flows in  
5       and out of such bodies as happens, and has  
6       happened for years -- and I think it would be a  
7       good model to be familiar with, at least -- with  
8       regard to the U.S. Congressional Committees on  
9       Intelligence Oversight in the House of  
10      Representatives and the Senate.

11                   Those staffs have a very diverse  
12      composition and they do, by all accounts,  
13      excellent work because of that diversity of  
14      expertise and backgrounds and prior exposure.

15                   I would begin with those remarks.  
16      I think it is very important, as the Commissioner  
17      has suggested, that this body have a profile and  
18      legitimacy; that its operations be as transparent  
19      as possible; and that it be understood and it  
20      understand its own mandate as to be essentially to  
21      provide for public accountability and public  
22      education in this field.

23                   I think frankly the last thing we  
24      need is another form of ministerial accountability  
25      built into a layered system that already exists

1           and that is always, by nature, imperfect.

2                           This again speaks to the issue of  
3           needing to swing the balance to issues of efficacy  
4           as opposed to propriety in terms of the work that  
5           this kind of review body should do.

6                           National security confidentiality,  
7           how to address this, I think it is addressed, as I  
8           have said before, by a stipulation in the mandate  
9           to put an onus on the review body to respect  
10          intelligence sources and methods and otherwise  
11          will be dealt with basically by the provisions of  
12          the Security of Information Act.

13                          I would leave it at that.

14                          The fourth question that was  
15          raised in the sub-set of issues under this  
16          question: To what entities should the review body  
17          report? I would say it reports to the public, not  
18          to Parliament, not to the government. It reports  
19          to the public and is independent formally in that  
20          sense.

21                          And fifth and finally: What forms  
22          should the reporting take?

23                          I think it should be an annual  
24          report supplemented, as required, by individual  
25          special reports, depending on the circumstances of



1 the year and whatever events transpire.

2 I think that if we constructed a  
3 review body of this kind, it could have over the  
4 long term a tremendous beneficial impact in a wide  
5 variety of fields: in improving, in fact, the  
6 performance of the security and intelligence  
7 community; in addressing the question of public  
8 ignorance, public mythology, public scepticism,  
9 the circulation of conspiracy theories, the kind  
10 of distrust that can be poisonous in a democratic  
11 society where we have to have these agencies and  
12 their practice is that they have to be trusted.

13 It could in fact raise the profile  
14 of Canada as a partner in various kinds of liaison  
15 arrangements and international alliance  
16 agreements.

17 I think in fact, rather than  
18 impede it, as perhaps some people in the security  
19 intelligence community would argue, it could have  
20 tremendous benefits. It would take time, I think,  
21 to get going properly. It would be a challenge to  
22 construct it and provide for its work, but it is a  
23 doable proposition.

24 And we are starting with some  
25 considerable and useful expertise in terms of the

1 work that has been done in the past by the  
2 Security Intelligence Review Committee, the CSE  
3 Commissioner's Office, the CPC. All of that I  
4 would like to see folded into this new agency and,  
5 as a start, lessons learned distinctly from those  
6 experiences on the part of SIRC and the CSE  
7 Commissioner's Office.

8 So those bodies would end but we  
9 would try to learn lessons from them before we  
10 started out properly with a new super-agency.

11 Thank you.

12 THE COMMISSIONER: Thank you.

13 Professor Bahdi?

14 MS BAHDI: Thank you.

15 On the general question of what  
16 qualifications should be necessary, I will start  
17 off by saying that I appreciate the value of  
18 having insider knowledge and expertise.  
19 Nonetheless, I think it is important that  
20 individuals who are appointed to the review body  
21 not be perceived as coming from within the  
22 security agencies themselves.

23 I say that with some hesitation  
24 because, as I have acknowledged, I think there is  
25 tremendous value to having insider knowledge and

1 expertise.

2                   Nonetheless, again it goes to the  
3 point that I made yesterday about when we think  
4 about access to justice and what we want out of a  
5 system, part of what we want is not only that  
6 justice be done but that it be seen to be done.

7                   So I think the credibility of the  
8 review body would be enhanced if the perception is  
9 that the body is totally impartial because it is  
10 totally separate from the security agency, both as  
11 an institutional fact and as an historical fact.

12                   I think it would also be very  
13 important to have what I will call different  
14 perspectives rather than different interests on  
15 the review body. Again, I harken back to the  
16 discussion that we had yesterday, where it was  
17 pointed out that for members of various  
18 communities, and Arab and Muslim communities in  
19 particular -- and this is Professor Wark's  
20 point -- that it is important to have diversity on  
21 the committee.

22                   Again, the idea here is to bring  
23 different perspectives to bear. I think  
24 ultimately what this does is that it supports the  
25 impartiality of the committee itself.

1                   That is the second criteria:  
2           different perspectives.

3                   Here I have a quick point.

4                   Obviously the question of who  
5           represents is a very, very difficult question and  
6           here I think there has to be some input from  
7           community organizations who have had experience  
8           with security issues in order, again, for the  
9           person or individuals, depending on the size of  
10          the committee, who are appointed to have some  
11          credibility with those communities.

12                   The third point -- and I will just  
13          highlight it because it has already been  
14          discussed -- is the point that was raised by  
15          Mr. Neve from Amnesty International earlier, and  
16          that is the absolute necessity of having  
17          individuals with a human rights background.

18                   As Mr. Allmand pointed out, in  
19          part that is because there are profound human  
20          rights implications to these decisions and they  
21          have to be at the centre of what is being  
22          examined; and also because there is the importance  
23          of understanding that, for example, when  
24          information is shared, it could be politicized  
25          information if it is coming from foreign

1 government sources, and that needs to be assessed  
2 and understood through a human rights lens, I  
3 think.

4 Maybe I will just stop there on  
5 the first part.

6 On the question of how should  
7 national security and confidentiality needs be  
8 addressed, of course this is the crux of the  
9 problem. In order to have effective oversight and  
10 resolution of complaints, you need access to the  
11 information. But the very nature of national  
12 security investigations requires protecting that  
13 information.

14 Here I just point out that the  
15 Immigration and Refugee Protection Act has come up  
16 with a balance that looks good on paper, at least,  
17 and the balance is this. There is the possibility  
18 of introducing secret evidence, and basically what  
19 happens is that the judge on the request of the  
20 Minister or the Solicitor General of Canada -- and  
21 this request can come at any time in the  
22 proceedings -- can hear all or part of the  
23 information in the absence of the individual who  
24 is the subject of a security certificate and in  
25 the absence of their lawyer. But the judge has to

1           make the determination if the disclosure would be  
2           injurious to national security.

3                           I say it sounds good on paper  
4           because it seems to balance the need for justice  
5           with the need for secrecy, but judges themselves  
6           have expressed significant discomfort with this  
7           kind of secret evidence.

8                           I will just quote one federal  
9           court judge who says he feels like he has been  
10          turned into a fig leaf.

11                          He says:

12                                "This is not a happy posture  
13                                for a judge. We do not like  
14                                the process of having to sit  
15                                alone hearing only one party  
16                                and looking at the materials  
17                                produced by only one party  
18                                and having to try to figure  
19                                out for ourselves what is  
20                                wrong with the case that is  
21                                being presented before us.  
22                                We greatly miss, in short,  
23                                our security blanket, which  
24                                is the adversary system, the  
25                                real warranty that the

1                   outcome of what we do is  
2                   going to be fair and just."

3                   Lawyers who were involved in the  
4 process of course also have complaints, and their  
5 complaint is very simply that if they are trying  
6 to represent a client, they can't do that if they  
7 don't know the case that they are being asked to  
8 meet, even though they are given summaries of the  
9 information.

10                   I call it information, not  
11 evidence, because it hasn't been tested by the  
12 other side.

13                   Again this is, I am sure, a  
14 solution that sounds very simple on paper, so I  
15 look forward to the discussion around this. But  
16 what I propose is very simply that the review body  
17 have staff and lawyers who do have access to all  
18 of the information and that they are the entity  
19 that determines what information is actually made  
20 available to them.

21                   I just want to say that I don't  
22 question in all contexts the need to keep  
23 information from a complainant for matters of  
24 national security, but the integrity of both the  
25 security agencies and the legal system itself is

1           undermined when observers of the system -- and  
2           here I am not just talking about the complainant,  
3           of course, but the public.

4                       As Professor Wark has noted on a  
5           number of occasions, when they become sceptical  
6           about why information is not being released and  
7           they become concerned about a process that is  
8           really hiding abusive power -- Professor Wark, I  
9           am quoting you a number of times today; please  
10          forgive me for borrowing all of your material.

11                      But as he pointed out earlier in  
12          the day, all this can ultimately do is undermine  
13          national security.

14                      I will end there.

15                      THE COMMISSIONER: Thank you very  
16          much.

17                      I will throw it open to the  
18          members of the panel to comment.

19                      Yes, Commissioner.

20                      MR. RYNEVELD: Very briefly on the  
21          one point that Professor Bahdi has raised about  
22          the proposed solution to this national security  
23          confidentiality.

24                      Again I am going to draw on my  
25          experience overseas. As I understand your



1 solution, it is like an ex-parte voire dire. That  
2 is really what we are talking about. It is a  
3 voire dire about whether or not the evidence  
4 should become admissible, but it is ex parte  
5 before the judge.

6                   It is somewhat similar to that  
7 Rule 88 material that I am talking about, where  
8 the court can decide whether or not it is  
9 appropriate. If you have an unrepresented  
10 accused, like we had with Mr. Milosevic, the  
11 court's response to that is to appoint an amicus  
12 curiae. So although you don't have the accused  
13 there or his lawyer, you do have another advocate  
14 who is sworn to secrecy, as it were, who is given  
15 the responsibility of advocating the other side.

16                   It is at least a compromise  
17 position about giving the court the benefit of a  
18 debate without betraying to the accused and/or his  
19 counsel the nature of the evidence.

20                   I am not saying it is perfect, but  
21 if we are looking for practical solutions, I throw  
22 that up as a possibility.

23                   THE COMMISSIONER: Professor  
24 Farson?

25                   MR. FARSON: In the interests of

1           brevity, I will just try and hit a few points  
2           here.

3                           On the issue of the process of  
4           selection, maybe I could just talk about some of  
5           the existing practices and what to avoid.

6                           I think the SIRC process, where  
7           the Prime Minister appoints after consultation  
8           with the leaders of the opposition parties having  
9           more than 12 members in the House, has not been  
10          proven to be a very good method.

11                          I think we have had some in the  
12          past what I can only describe as awful candidates  
13          coming forward. So I would like to avoid that. I  
14          think they haven't proven to be what we need,  
15          which is persons of proven integrity and high  
16          probity. I would also hope that we would have  
17          people of quite diverse ethnicity and diverse  
18          experience.

19                          I am assuming, of course, a  
20          super-SIRC model here.

21                          On the way the Commissioner for  
22          the CSE is appointed, right now it is either a  
23          former judge or a supernumary judge. I have some  
24          problems with that, and that comes out of the  
25          experience of Parliament in talking to judges.

1                   Parliament does not like, and has  
2                   great difficulty in having judges come before it  
3                   and/or going to judges. So it is a two-way "don't  
4                   like" street.

5                   Some time ago I recommended  
6                   against supernumary judges, and I was pleased to  
7                   see that the previous commissioner actually took  
8                   up that recommendations in one of his annual  
9                   reports.

10                   I think that is something that  
11                   could well be changed.

12                   The last point I would like to  
13                   make is on reporting and on the immediate  
14                   availability of reports to the appropriate  
15                   parliamentary committee.

16                   The current circumstance is that  
17                   the annual reports cover material that in some  
18                   instances is 12-to-18 months after the fact.  
19                   Parliamentarians are certainly not interested in  
20                   old news. It has to be a current practice on the  
21                   reporting procedure.

22                   I will leave it there. Thank you.

23                   THE COMMISSIONER: Mr. Allmand?

24                   MR. ALLMAND: For Mr. Farson, I  
25                   thought that the process of appointing people for

1 SIRC where they had to consult with the opposition  
2 parties, those that had sufficient standing, was a  
3 protection that it wouldn't be overloaded with the  
4 government of the day's appointees.

5 I agree with you that they should  
6 be persons of proven integrity and experience, and  
7 so on, but how does it hurt to have them consult  
8 and more or less get the approval of the  
9 opposition?

10 Isn't it a tradition with SIRC  
11 that they have attempted -- and I don't think it  
12 is in the law -- to make sure that representatives  
13 have come from known political parties? I think  
14 they had the former Attorney General of Manitoba,  
15 who was NDP; Ron Atkey. They have had Liberals.

16 THE COMMISSIONER: Bob Rae was on  
17 it.

18 MR. ALLMAND: Who?

19 THE COMMISSIONER: Bob Rae.

20 MR. ALLMAND: Yes, that's right.  
21 I think there is a bit of tradition, except for  
22 the Reform Party or the Alliance. But they have  
23 had the Conservative. They have been pretty  
24 consistent in trying to have somebody from the  
25 Conservatives, Liberals, NDP.

1                   Anyway, I don't understand.

2                   MR. FARSON: I certainly don't  
3 want to discuss individuals.

4                   Once again, I am relying on  
5 information which is now a little old.

6                   During the 1989-90 review, my  
7 staff went out and tried to understand, by going  
8 and interviewing the relevant people, what  
9 actually the consultation wording actually meant.  
10 We found that in point of fact there was very  
11 little consultation.

12                   The consultation might have been  
13 simply a phone call came in, these are my  
14 recommendations. Okay, end of story, phone goes  
15 down. That is not really, we thought, true  
16 consultation.

17                   MR. ALLMAND: Wouldn't the answer  
18 be full consultation?

19                   I know when I was appointed  
20 President for the International Center for Human  
21 Rights, it is written in the statute for the  
22 International Center for Human Rights -- and it is  
23 one of the few that has it written in the  
24 statute -- that the government has to consult with  
25 the opposition.

1                   I knew the results because people  
2                   in the NDP, Conservatives and the Bloc Québécois  
3                   all told me that they approved of my appointment.  
4                   At the time, the Reform Party said they had no  
5                   comment. They didn't object or they didn't  
6                   approve.

7                   But I thought that was a  
8                   protection for myself. I was quite pleased that  
9                   they had to consult, because if they really  
10                  objected they could have raised it in Parliament  
11                  saying why are you appointing this hack to be  
12                  president of this organization?

13                  I was pleased with that process.

14                  MR. FARSON: My own  
15                  recommendation --

16                  MME BEGIN: It is a three-minute  
17                  phone conversation.

18                  MR. FARSON: My own recommendation  
19                  in point of fact would be to go broader than the  
20                  process of consultation that is currently  
21                  practised. I think there are a number of other  
22                  opportunities.

23                  For example, there is now an  
24                  ethnic council or an ethnic roundtable -- I forget  
25                  the exact title of it. There is shortly, I

1 understand, to be a National Security Advisory  
2 Committee.

3 So maybe the three entities of  
4 having some form of political consultation, some  
5 consultation with the ethic groups that are  
6 represented in Canada, and also a national  
7 security advisory council of experts to bring into  
8 the committee, or whatever it happens to be, the  
9 right sort of diversity and to avoid -- I don't  
10 want to mislead people or to think I think all of  
11 the appointments have been bad.

12 I am just saying there have been  
13 some that I thought were very unfortunate.

14 THE COMMISSIONER: Yes,  
15 Mr. Inkster.

16 MR. INKSTER: Listening carefully  
17 to everything that is said, I can see the  
18 difficulty in the construction of this review body  
19 going from one to a hundred people on it, to make  
20 sure that all of the interests are represented.  
21 So I think a lot of thought will have to go into  
22 the construction of that.

23 Of course, everyone around the  
24 table recognizes that.

25 I can only refer to my own

1           experience in the RCMP where we needed to  
2           understand better the issues confronting the  
3           visible minorities community and the Aboriginal  
4           community. We created advisory groups who met  
5           with the commissioner on a regular basis to raise  
6           the kinds of issues that have been raised here.  
7           These are the problems. People are not coming  
8           forward with complaints.

9                         As a model, it seemed to work in  
10           that context, whether or not it will here. But it  
11           would help to keep the numbers relatively small.

12                        Second, one needs to think of them  
13           being efficient and effective and moving through  
14           the issues promptly. If you get beyond three  
15           people or so who are on that committee, it really  
16           is going to bog down, unfortunately.

17                        I think it should be more than  
18           one, but whether three is the right number, I  
19           don't know. It certainly should be more than one  
20           but not a huge group.

21                        In looking for the right balance  
22           in representation, I would encourage the  
23           construction to be one which takes into  
24           contemplation the people who also understand from  
25           a real time point of view the pressures that are



1 on law enforcement.

2 In other words, our colleague  
3 Justice LeSage in his recommendations precluded --  
4 he recommended that former police officers or  
5 people with practical experience be excluded from  
6 participating in any review function.

7 I think that is unfortunate,  
8 because it presumes that former police officers  
9 don't understand and can't be objective and fair,  
10 which we all know is not the case.

11 I just wouldn't want to make any  
12 such exclusion.

13 In fact, I would suggest that one  
14 of those eminent persons ought to be someone who  
15 understands the business because he or she has  
16 been there and done it and have demonstrated other  
17 abilities to understand the pressures on the  
18 visible minorities community and the sorts of  
19 things that have caused this Commission to be  
20 created.

21 Thank you.

22 THE COMMISSIONER: Mr. Wark?

23 MR. WARK: I just want to seize  
24 this opportunity to agree with Mr. Inkster on  
25 something during the course of the day.

1                   I think what we are looking at is  
2                   a small committee of eminent persons. To the  
3                   extent that it is possible, it should be a  
4                   combination of diversity and expertise.

5                   To follow on from Stuart's  
6                   comments, I know exactly what he is talking about.  
7                   I think the unfortunate dimension of what emerged  
8                   with regard to SIRC was that the consultation  
9                   process itself wasn't really a significant one.  
10                  It wasn't followed through in practice. That  
11                  could be reinforced, I think, in the language of  
12                  whatever is used to construct this committee.

13                  I think what should not be done,  
14                  which was I think the intention behind the  
15                  consultation process in the first place for SIRC,  
16                  is I see no need for this review agency in terms  
17                  of its composition of Privy Councillors to in any  
18                  sense reflect the Parliament of Canada in terms of  
19                  the different distribution of political parties in  
20                  the Parliament.

21                  I think that might well water down  
22                  the whole emphasis on eminent persons and  
23                  expertise. It gives rise to the always  
24                  unfortunate possibility of patronage appointments.

25                  So I would like to avoid that.

1 But I can still see the possibility for genuine  
2 consultations as a beneficial process.

3 Thank you.

4 THE COMMISSIONER: If there is  
5 nothing more on that, we will go to the last  
6 segment of today's program, which is to open the  
7 floor to questions.

8 Madame Begin.

9 MME BEGIN: Have I well understood  
10 Professor Wark earlier this afternoon that access  
11 to Cabinet documents is a must? Could you say  
12 what you mean by Cabinet documents and tell us  
13 why, because you will never get it.

14 --- Laughter / Rires

15 MR. WARK: It is the business of  
16 academics to tilt at windmills, Madame Begin.

17 My concern here is that in truth  
18 of fact, although Cabinet confidences would seem  
19 in commonsense to define something very specific,  
20 which I would take to be the record of Cabinet  
21 discussions around the Cabinet table, in fact they  
22 are used when it comes to classified documents in  
23 the federal government, very much more broadly  
24 than that, as I am sure you know.

25 Advice to Ministers. It becomes a

1           slippery slope, advice to Ministers. Well, where  
2           does advice start? It might start well down in a  
3           middle-level committee of the Privy Council  
4           Office, for example.

5                        If you don't have some capacity to  
6           have access to Cabinet confidences, as they are  
7           now broadly defined, then I fear that you will not  
8           have the proper capacity to review national  
9           security practices and policies.

10                      I appreciate the difficulty that  
11           you are referring to, and I am sure there will be  
12           a great deal of reluctance to open this up. But I  
13           would suggest to the Commissioner that there has  
14           to be built in some suggestion that the review  
15           agency would have to have access to the  
16           appropriate kinds of documents that might be  
17           classified as Cabinet confidences, not necessarily  
18           a blanket ability to see everything.

19                      I think there has to be  
20           recognition that there is important material in  
21           Cabinet confidences, as they are broadly defined,  
22           that are important to the remit of the committee.

23                      How to go beyond that, I don't  
24           know. And I appreciate the reservations that are  
25           bound to be there. But it seems to me a major

1           problem.

2                           That is really all I can  
3           contribute on that.

4                           MME BEGIN: The word of the  
5           Minister in charge of this or that would not be  
6           enough, or his or her officials?

7                           MR. WARK: The word of the  
8           Minister that this is a Cabinet confidence would  
9           not be enough? Sorry.

10                          MME BEGIN: No, regarding the  
11           information that you think you will get from  
12           Cabinet documents. If the same information is  
13           transmitted by the Minister or the Deputy Minister  
14           of the relevant department, you wouldn't find that  
15           enough. You think there is more in Cabinet  
16           documents?

17                          MR. WARK: I don't know. I have  
18           never seen them, which is the problem.

19                          MME BEGIN: You will be in for a  
20           surprise.

21                          MR. WARK: I would just say on  
22           this that all I am trying to draw attention to, I  
23           think -- and I have no remedy to this -- is that a  
24           great deal of information can fall within what I  
25           think were originally meant to be the very narrow

1 confines of Cabinet confidences.

2 I fear for the hindering effect  
3 that the current way of classifying records in the  
4 federal government operates.

5 THE COMMISSIONER: Professor  
6 Farson?

7 MR. FARSON: My sense is that if  
8 you had been applying for draft memoranda to  
9 Cabinet a decade or so ago, you would have  
10 probably got draft memoranda to Cabinet with all  
11 the notations on and all of that good stuff. But  
12 since we have gone to a much more computerized  
13 world, and I think a greater caution about what  
14 people write on the sides of paper, there has been  
15 a great pruning of these so-called drafts so that  
16 you only end up with final documents.

17 So being able to understand the  
18 process, for an academic, has gone.

19 THE COMMISSIONER: Thank you.  
20 The next question?

21 MR. HYPPIA: Remi Hyppia once  
22 again. I have a question pertaining to Question 4  
23 that was discussed.

24 If we take the hypothesis that the  
25 review body would have a complaint function, my

1 question is: What would be the criteria to  
2 trigger an investigation or what would be the  
3 reasonable grounds -- a term that I know a lot of  
4 people are strong in the intelligence community.

5 What would be the reasonable  
6 grounds to trigger an investigation or not and  
7 should those reasonable grounds, criteria, be  
8 ingrained in legislation or left as they are, of  
9 the procedural code of the review body?

10 That is my first question.

11 The other question is --

12 THE COMMISSIONER: Do you want us  
13 to deal with the first question first?

14 MR. HYPPIA: You are the  
15 Commissioner.

16 THE COMMISSIONER: It would  
17 probably be easier.

18 Does anybody have comment on that?  
19 What would be the triggering threshold for an  
20 investigation when there is a complaint?

21 MR. HYPPIA: If I may add, because  
22 people mentioned that in some cases complaints may  
23 be considered frivolous or what. So what would be  
24 the criteria to say we have reasonable grounds and  
25 yes, it is serious or no, it is not serious?

1                   MR. INKSTER: I suspect that the  
2 solution might lie in not what ought to trigger a  
3 complaint. I think people should be free to  
4 complain about anything where they feel they have  
5 been offended.

6                   The important part would then be  
7 for the body to review that complaint to see  
8 whether or not it has merit. If it has merit,  
9 then it moves on through the process.

10                  THE COMMISSIONER: You would say  
11 the test for moving ahead would be merit, there is  
12 reasonable basis for --

13                  MR. INKSTER: Yes, the review  
14 process by the group would determine whether it is  
15 frivolous, vexatious or indeed substantive.

16                  THE COMMISSIONER: Right.  
17 Commissioner?

18                  MR. RYNEVELD: I think that would  
19 be a good criteria to determine whether something  
20 warrants an investigation. But once you get to  
21 that, you may also want to consider the  
22 seriousness of the complaint, the seriousness of  
23 the harm, the likelihood of an investigation  
24 really discovering additional evidence, the time  
25 limits. There are a number of criteria that I



1 think would have to be taken into account.

2 I think you would have to leave it  
3 to the decision-maker to assess whether or not it  
4 is in the public interest basically to go much  
5 further. I'm afraid someone has to be entrusted  
6 with that function, and I think that would go to  
7 if it is a panel or a commission to do that.

8 But I think there would have to be  
9 some clear criteria outlined before you can do it  
10 ex mero motu, as it were, on your own motion, or  
11 basically act on a complaint that would trigger an  
12 extensive or invasive investigation.

13 THE COMMISSIONER: But ultimately  
14 you think it would be a public interest test, a  
15 decision with criteria underlying it?

16 MR. RYNEVELD: That is my  
17 inclination, Mr. Commissioner.

18 I haven't had a lot of time to  
19 think about it, but to me a lot of what we are  
20 about has to do with public interest. And when  
21 you factor into public interest, of course, human  
22 rights, the rights of the police, the rights of  
23 the public, the rights of national security, it is  
24 a balancing test.

25 Someone has to be the arbiter,

1 perhaps at an initial stage. There are those who  
2 suggest that that may also be subject to review.

3 THE COMMISSIONER: Mr. Allmand.

4 MR. ALLMAND: I presume that in  
5 the legislation setting up this body, the criteria  
6 would be spelled out, such things as were just  
7 mentioned: violation of the Charter, the Canadian  
8 Human Rights Act, certain standards or failure to  
9 comply with norms of behaviour and protocols,  
10 et cetera.

11 The complaints would have to be  
12 based on some of the criteria that were in the  
13 legislation.

14 THE COMMISSIONER: Anybody else?

15 Next question.

16 MR. HYPPIA: The other question  
17 is: Depending on the avenue we take -- for  
18 example, SIRC as a power recommendation. Let's  
19 say you get your security clearance taken out.  
20 You go to SIRC. They say effectively it was  
21 wrongful. We recommend you to get your security  
22 back. It's to the DM or the administrator general  
23 of the department to decide if you get it or not,  
24 and he is not necessarily compelled.

25 I think there is maybe an appeal

1 mechanism, but nevertheless you are not compelled.

2 If in one case you take the route  
3 that you choose that let's say there would be --  
4 how would the decision be implemented?

5 If you decide, for example, it is  
6 compelling. Could you force, let's say, I don't  
7 know, the police organization to apologize, to pay  
8 fees, or what? How would it be structured and how  
9 could it be respected?

10 In the second case, if you give  
11 that, what would be the appeal mechanism? We  
12 speak in French of justice naturelle and due  
13 diligence in English: if you get condemned for  
14 something, you have the right of appeal.

15 Have you been thinking or will you  
16 be thinking of that because it has all kinds of  
17 implications legally and so on. So I would like  
18 to hear maybe the panel or maybe you,  
19 Commissioner, on this.

20 I have a last question and after I  
21 will leave the floor.

22 THE COMMISSIONER: I will let the  
23 panel comment.

24 Yes, Mr. Allmand.

25 MR. ALLMAND: Well, the report

1 deals with recommendations. You are asking how do  
2 you make sure the recommendations are complied  
3 with?

4 The Auditor General, when she  
5 makes recommendations and they are not adhered to,  
6 she brings it up the next year at a public meeting  
7 and flays the government and does it over and over  
8 again.

9 I know that the treaty bodies in  
10 the Human Rights Commission, the Committee on  
11 Human Rights, the Economic-Social Committee  
12 Against Torture, and so on, they do the same thing  
13 in the country reviews.

14 MR. HYPPIA: It is political  
15 pressure.

16 MR. ALLMAND: Yes, that is what it  
17 does. If you repeat it, if the Auditor General  
18 repeats it in her report and says last year or the  
19 year before I recommended that such be done and it  
20 hasn't been done, it is taken up by the press. It  
21 is taken up by political opposition, and so on,  
22 and it puts pressure on the government. But it is  
23 nothing that you can go to court on, or it is not  
24 binding.

25 But that is the same with all

1           ombudsmen around the world. Ombudsmen generally  
2           give their reports with recommendations, and they  
3           rely on public opinion and the political system.

4                       MR. HYPPIA: This I understand.  
5           But some people say for the weakness of SIRC, for  
6           example, is that it is a recommendation body. So  
7           the politician of the day may decide okay, we will  
8           follow it or we will bury it. If it is too  
9           embarrassing, we will act.

10                      I am asking, for example, if there  
11           was a new body, would this body have the power to  
12           implement and what would be their instrument?  
13           Would they have a legal instrument? If they have  
14           a legal instrument, would people be able to appeal  
15           and could it end up like in Supreme Court, for  
16           example?

17                      That is what I am trying to see  
18           what would be the preferred approach. A  
19           recommendation approach, which might be for maybe  
20           people in the organization a more lenient way than  
21           a real -- almost an administrative tribunal or law  
22           saying yes, you falter on this and you have to pay  
23           reparations or at least make, in French, amendes  
24           honorables, do a declaration or something like  
25           this, which is more compelling on the

1 organization, on the bureaucracies there.

2 MR. ALLMAND: I understood the  
3 consensus around the table was that none of us  
4 were recommending binding rulings by the body, and  
5 for good reason.

6 I point out that none of our  
7 ombudspersons in Canada or abroad do that. They  
8 leave it to the political system and public  
9 opinion because they are not in a position. Some  
10 people made very good arguments around the table  
11 here against doing that.

12 MR. HYPPIA: The last question is:  
13 To appoint people let's say for this body, I think  
14 they should be appointed by the GIC, however,  
15 based on a merit list.

16 I am thinking the example now of  
17 the reform, maybe you have heard, of the  
18 Immigration Refugee Board Commissioner, which I  
19 think I haven't seen yet the first batch of them  
20 named on the merit principle. But it seems there  
21 has been a reform last year because, you know, the  
22 scandal. And at the time one of the criteria may  
23 be -- it you were a good friend of the party in  
24 power, it was almost better.

25 So I think that should be an

1           avenue to be examined; that it should be maybe a  
2           list of people based on criteria board, an  
3           independent board that should present a list to  
4           the GIC, i.e. the Prime Minister, which could not  
5           change the list, a little bit like the formal  
6           appointment of a judge. And maybe it should be  
7           approved by Parliament and after they should  
8           report to Parliament.

9                               However, I would like to ask the  
10           professor the question: When you say they should  
11           report to the public, excuse me, but in our  
12           Canadian system reporting to the public means  
13           reporting to nobody in a sense because who is the  
14           one who can -- it's Parliament.

15                              I just want to know maybe if you  
16           could clarify what you mean by the public because  
17           in our system, if you want something to get done,  
18           it is either through Parliament or through the  
19           executive.

20                              THE COMMISSIONER: Do you want to  
21           answer that?

22                              MR. WARK: Sure, very quickly.

23                              If you report to the public, does  
24           nothing get done? I'm not sure I quite agree with  
25           that.

1                   In suggesting that ultimately the  
2                   idea is to report to the public, I have no  
3                   objection to the report being made through  
4                   Parliament, but it is the intention of the  
5                   audience, I think, that matters here.

6                   What I am specifically trying to  
7                   avoid is the process that SIRC is currently  
8                   involved in, which is that you report to the  
9                   Minister and the Minister ultimately reports to  
10                  Parliament. And in that process there is a great  
11                  deal of vetting and classification of the contents  
12                  of the report itself.

13                  THE COMMISSIONER: Thank you.

14                  Mr. Joseph.

15                  MR. JOSEPH: Mr. Commissioner, two  
16                  very short points, one with respect to the  
17                  discussion by Monique earlier with respect to  
18                  Cabinet documents.

19                  There is nothing I would love more  
20                  than for people to be accountable by having access  
21                  to those documents, particularly in a case such as  
22                  this where we have different views on what was  
23                  said by Mr. Easter, Mr. Graham and Ms McLellan.  
24                  But I think the chances of that occurring are not  
25                  going to happen.



1                   I think it would have a chilling  
2 effect with respect to a frank and full discussion  
3 in Cabinet. So I don't think that is going to go  
4 anywhere, although I want to be on record that I  
5 would love to be able to, because people in power  
6 might be a little more careful about what they say  
7 if there is documentation to that effect.

8                   The second point I want to make --  
9 and I don't want this to go to the heads of the  
10 panellists here today. I think it is going to be  
11 critical, in light of the expertise that is around  
12 this table and the full and frank discussion that  
13 we have had, that the policy review, in my humble  
14 opinion, has to continue after you make your  
15 findings with respect to the factual inquiry.

16                   The reason I say that is that it  
17 may not be anticipated, but I think it is of  
18 critical importance because there is no way,  
19 particularly after everything we have heard and  
20 the different views and the hypotheticals -- I  
21 think it would be very constructive that once you  
22 have made your findings in the factual inquiry,  
23 that the policy review continue because then we  
24 can direct our minds specifically to the findings  
25 that you have made.

1 I just wanted to put that on  
2 record and thank you all for your expertise.

3 THE COMMISSIONER: Well, I think  
4 that completes today.

5 Let me make a couple of comments.

6 First of all, I think it is worth  
7 noting that the proceedings today have been  
8 recorded and they will be posted, either tonight  
9 or tomorrow, on the website. So they are  
10 available there.

11 It is certainly, from our  
12 standpoint, going to be very useful to have them  
13 recorded in that way.

14 For those that are interested, I  
15 think the proceedings will also -- I don't know if  
16 they are being televised live on CPAC today, but  
17 they will be televised on CPAC at some time.

18 Our son, who just had his first  
19 child, our first grandchild, told me the other  
20 night that our proceedings are televised on CPAC.  
21 He was up with the baby from 1:00 to 3:00, and he  
22 said it was absolutely terrific for putting the  
23 baby to sleep.

24 --- Laughter / Rires

25 THE COMMISSIONER: The other thing

1           that struck me is that today was so  
2           extraordinarily valuable. I genuinely mean this.  
3           It is almost like a comfort blanket. I don't want  
4           to let you people go.

5                         If there are any observations or  
6           thoughts that you have about the questions and the  
7           issues we have been discussing, by all means, I  
8           say to the panel members, feel free to communicate  
9           them to us. I think it would be very helpful to  
10          me, indeed.

11                        Let me close by expressing my  
12          appreciation and I am sure the appreciation of  
13          everybody here to all of you. All of you come  
14          from very busy lives, busy backgrounds. You have  
15          contributed your time to this exercise. I think  
16          we are all committed that it is important, but it  
17          enriched the whole exercise enormously, from my  
18          standpoint. The ideas that came forward today are  
19          going to be so useful in trying to work out these  
20          recommendations.

21                        I really am very genuinely  
22          appreciative of all the help you have given.

23                        On behalf of us all, thank you  
24          very much.

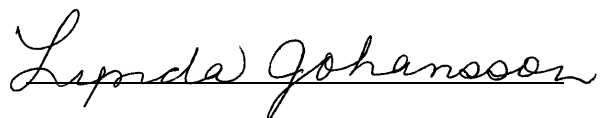
25                        We will adjourn now.

1                   Let me just announce that the  
2 public hearings will commence again on Monday at  
3 10 o'clock. For anybody who is listening, there  
4 was some suggestion that it might be at 9:30, but  
5 it will be 10 o'clock Monday morning.

6                   MME BEGIN: Could I just add that  
7 in terms of documents in my time, which was before  
8 the First World War, there was no names of  
9 Ministers mentioned, not even the title. So do  
10 not even think of that.

11                   THE COMMISSIONER: Thank you.  
12 --- Whereupon the roundtable adjourned at  
13 4:07 p.m. / La table ronde est ajournée  
14 à 16 h 07

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Lynda Johansson,

C.S.R., R.P.R.

A				
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