

# Military Police Complaints Commission

AFGHANISTAN PUBLIC INTEREST HEARINGS  
held pursuant to section 250.38(1) of the *National Defence Act*,  
in the matter of file 2008-042

LES AUDIENCES D=INTÉRÊT PUBLIC SUR L=AFGHANISTAN  
tenues en vertu du paragraphe 250-38(1) de la *Loi sur la  
défense nationale* pour le dossier 2008-042

## TRANSCRIPT OF PROCEEDINGS

241 boulevard de la Cité-des-Jeunes  
Gatineau, Québec  
on Wednesday, October 14, 2009

## VOLUME 2

### BEFORE:

Mr. P. Tinsley

The Chair

Mr. R. Berlinquette

Commission Member

Ms. F. Kristjanson  
Mr. N. Marshman

for the Commission

Mr. A. Préfontaine  
Ms. E. Richards  
Mr. V. Wirth

for Maj Bernie Hudson;  
Maj Michel Zybala; Maj Ron Gribble;  
LCol (ret=d) William H. Garrick; CWO Barry Watson;  
MWO Jean-Yves Girard; Maj John Kirschner

Mr. P. Champ  
Mr. K. Elgazzar  
Mr. S. Jodoin

for Amnesty International and  
BC Civil Liberties Association

Mr. M. Wallace

for Capt(N) (ret=d) Moore, CFPM

Ms. R. Cléroux

Registrar

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1 Gatineau, Quebec  
2 --- Upon resuming on Wednesday, October 14, 2009  
3 at 10:00 a.m.

4 THE CHAIR: Good morning. Thank  
5 you, please be seated.

6 THE REGISTRAR: Ladies and  
7 gentlemen, the Afghanistan Public Interest Hearings  
8 held pursuant to section 250.38(1) of the National  
9 Defence Act in the matters of the Military Police  
10 Complaints Commission file 2008-42 are now in  
11 session, the chair, Mr. Peter Tinsley, and the  
12 Commissioner, Mr. Roy Berlinguette, presiding.

13 Mesdames et messieurs, les  
14 audiences d'intérêt public sur l'Afghanistan tenues  
15 conformément au paragraphe 250.38(1) de la Loi sur  
16 la défense nationale pour le dossier de la  
17 Commission d'examen des plaintes concernant la  
18 police militaire 2008-42 sont maintenant ouvertes,  
19 le président, monsieur Peter Tinsley, et le  
20 commissaire, monsieur Roy Berlinguette, président  
21 les audiences. Merci.

22 THE CHAIR: Thank you, Madam  
23 Registrar. Ms. Kristjanson, you've advised me that  
24 you have matters to deal with before we deal with  
25 the matters of the motions.

1 MS. KRISTJANSON: That's correct.

2 I have a very brief procedural overview and have  
3 three matters to bring to your attention.

4 First, counsel for Mr. Colvin has  
5 written to Commission counsel and to the parties  
6 and has raised concerns about the accuracy of some  
7 of the submissions presented before you last week.

8 In particular, she asserts in her letter of  
9 October 13 that some statements made by counsel may  
10 have had the effect of misleading the Commissioner.

11 I was proposing this morning to file Ms.  
12 Bokenfohr's letter because it does raise issues  
13 that may be relevant to the disposition of the  
14 motions before you last week.

15 However, I have been advised today  
16 by government counsel that he is asserting a claim  
17 of solicitor-client privilege over portions of Ms.  
18 Bokenfohr's letter. As a result, and I will --  
19 perhaps Mr. Préfontaine might address that. My  
20 understanding is he objects to the filing with the  
21 Commission at this time of this letter.

22 MR. PRÉFONTAINE: We can deal with  
23 it now, or if you prefer to raise your two other  
24 points, I can deal with the three points if there's  
25 a need to one after the other.

1 THE CHAIR: I think I would prefer  
2 that we deal with the matter of the letter, this  
3 first one first.

4 MR. PRÉFONTAINE: Well, the letter  
5 is entirely irrelevant to your proceeding. That's  
6 the first ground upon which I object to the letter.  
7 The second -- the letter being introduced into  
8 evidence.

9 The second basis is obviously that  
10 the letter is subject to solicitor-client  
11 privilege. The letter was addressed to 29  
12 witnesses, which the Commission wished to conduct  
13 prehearing interviews of. It was issued on July  
14 28, 2009, immediately after I received on July 16,  
15 2009, a letter from Commission counsel serving new  
16 summonses and renewing the request for prehearing  
17 interviews, and most of those who were the  
18 addressees of my letter were people who had already  
19 formally retained me. The others were all  
20 Government of Canada employees.

21 As Mme. Kristjanson knows full  
22 well, the Treasury Board policy on legal  
23 indemnification of the provision of legal services  
24 provides that Government of Canada employees are  
25 entitled to legal representation in the course of

1 an investigation, such as the public hearing  
2 conducted by the Commission, and have the right to  
3 legal representation at government expense.

4           The policy also makes clear that  
5 it's the Department of Justice who provides that  
6 legal representation unless there is a conflict of  
7 interest, and on July 28, 2009, there had been no  
8 decision as to whether Mr. Colvin in particular was  
9 in a conflict of interest.

10           I must say that the government has  
11 always taken the view, quite rightly in my view,  
12 that a difference of opinion between two public  
13 servants over matters of public policy doesn't  
14 arise to the level of conflict simply because the  
15 government expects its public servants to engage in  
16 healthy debate of public policy issues, and it is  
17 through those exchanges of views, sometimes  
18 contradictory one to the other, that government  
19 policy is established and is set.

20           So the fact that Mr. Colvin might  
21 have a different view of certain issues from other  
22 -- and the Department of Foreign Affairs is  
23 something which is normal, expected and is not in  
24 and of itself a conflict of interest. So on July  
25 28, Mr. Colvin was not separately represented. As

1 I had committed to Commission counsel it was my  
2 duty to inform these potential -- these witnesses,  
3 I'm sorry, of the Commission's request that they  
4 meet in prehearing interview.

5 Mme. Kristjanson in her own  
6 covering letter, which I forwarded to the  
7 witnesses, had set out her opinion as to why it was  
8 in the interest of the Commission and the witnesses  
9 to meet at this prehearing interview, and since I  
10 take the view that the letter is subject to  
11 solicitor-client privilege, I can't discuss what's  
12 in it in any detail. But I think it shouldn't be  
13 surprised that a normally competent lawyer provides  
14 to his clients, or those who are about to retain  
15 him, and that would be the class of former  
16 employees and present employees of the Government  
17 of Canada, the pros and cons of a decision they are  
18 about to make. The decision was whether to accept  
19 the offer, and so it is not surprising that my  
20 letter would canvass all of those for them to  
21 consider and, at the end of the day, provide me  
22 with instructions on it.

23 So the letter is privileged  
24 because obviously it was a communication between a  
25 lawyer, myself, and the persons who were either at

1 that time already my clients because they had  
2 formally retained me or were about to be because  
3 they are entitled to legal representation at public  
4 expense and usually through the Department of  
5 Justice. In this particular case, it would have  
6 been through me or members of the team that I have  
7 the honour of leading, so that's fairly  
8 unequivocal.

9                   So turning to the law then, the  
10 National Defence Act provides specifically that the  
11 Commission doesn't have the power to receive  
12 evidence which is inadmissible by a court of law by  
13 reason of any privilege, and I direct you to  
14 section 250.41(2)(a) of the National Defence Act.

15                   When there is a dispute as to  
16 whether a document is rightfully the object of a  
17 privilege, the Supreme Court has clarified last  
18 summer in the case of Blood Tribe that because of  
19 the constitutional underpinnings to the  
20 solicitor-client privilege, unless the act  
21 specifically provided an inferior tribunal to the  
22 capacity to review the information and decide, that  
23 was a jurisdiction to be -- that is reserved to  
24 superior courts.

25                   Seeing the plain wording of

1 section 250.41(2)(a) which deprives the Commission  
2 from the capacity to hear information that would be  
3 inadmissible in a court of law by reason of any  
4 privilege, that is not a clear expression by  
5 Parliament that this Commission has the power to  
6 rule upon the existence of the provision. Quite  
7 the contrary. It is a clear affirmation that the  
8 issue of whether there is a solicitor-client  
9 privilege is something that is reserved for a  
10 superior court to decide.

11                               So it would be improper to lead  
12 evidence that would tend to disclose  
13 solicitor-client information. Mme. Bokenfohr in  
14 her own letter has elected to cite passages of my  
15 letter, obviously those that she believed were the  
16 passages that she thought served best her interest.

17 I think it is fair to say, having written the  
18 letter myself, that the extracts that she selected  
19 do not provide the reader with a fair depiction of  
20 what was contained in my letter. I can't say what  
21 was contained in my letter, though, and I am  
22 certainly not proposing to follow the same path  
23 that Mme. Bokenfohr has elected, and therefore,  
24 this is something that should not be tendered,  
25 either my letter or in this particular case Ms.

1 Bokenfohr's letter because it contains -- at least  
2 the first two pages contain extracts of my letter,  
3 including direct quotes, at least that's what she  
4 alleges, so that disclosing or tendering that  
5 Bokenfohr letter to you would be tantamount to  
6 disclosing the communication and that is something  
7 that is not permitted by section 250.41(2)(a) of  
8 the National Defence Act. You can't do indirectly  
9 what you don't have the power to do directly.

10                   And I would suggest that, given  
11 the importance of the privilege and the place it  
12 occupies in your system of administration of  
13 justice, you should be loathe to become the  
14 accessory to the violation of that privilege.

15                   THE CHAIR: In your last few  
16 submissions I think you did assist us in ensuring  
17 that we understand the factual basis for what's  
18 being discussed here, but I just want to be  
19 absolutely sure.

20                   My understanding was that the  
21 Commission counsel started out talking about a  
22 letter from Lori Bokenfohr. Your initial  
23 submissions were in respect of another letter, I  
24 take it?

25                   MR. PRÉFONTAINE: Correct. In my

1 July 28, 2009, letter, and I spoke about that  
2 because Ms. Bokenfohr's letter is in response to  
3 and cites portions, she alleges, of my July 28  
4 letter. So obviously tabling her letter with her  
5 cites of my letter would be tantamount to  
6 disclosing the communication itself. And I will  
7 say that the only reason her client became privy to  
8 that was at the time that the letter was sent to  
9 him, although he hadn't formally retained me and  
10 eventually decided to retain Mme. Bokenfohr  
11 instead, he was in the class of putative clients.

12 THE CHAIR: I must say I've never  
13 heard the term "putative clients" before.

14 Again, Ms. Kristjanson, the letter  
15 you were seeking to file was the Bokenfohr letter,  
16 not Mr. Préfontaine's letter. Are we clear on  
17 that?

18 MS. KRISTJANSON: Mr.  
19 Commissioner, that is correct, but I do have here,  
20 and I think I should hand around now, and email  
21 string amongst counsel yesterday, because I wrote  
22 specifically to request from Ms. Bokenfohr a copy  
23 of the July 28 letter, not believing at that time,  
24 of course, that it was privileged. So I did write  
25 her to ask. Mr. Préfontaine wrote back immediately

1 to indicate that, in his view, it was privileged  
2 and to assert that claim.

3 Ms. Bokenfohr replied, and this is  
4 the relevant portion, in an email at 5:59 p.m.  
5 yesterday stating that:

6 "When you delivered -- Mr.  
7 Préfontaine delivered -- the  
8 July 28, 2009, letter to my  
9 client Richard Colvin, he had  
10 retained the DOJ as legal  
11 counsel. On the contrary, he  
12 advised your colleagues in  
13 April 2009 that he was then  
14 obtaining advice from legal  
15 counsel outside of government  
16 on a pro bono basis." (As  
17 read)

18 So she is there asserting as a  
19 factual matter something that he was not a client  
20 at the time. So I believe I should tender these,  
21 and I wrote back in response to that, that in light  
22 of the fact that a position is being taken as to  
23 the July 28 letter of privilege that Mr.  
24 Préfontaine, in his capacity as counsel for the  
25 government, should have the opportunity to make

1 representations and pursue legal avenues that he  
2 deems appropriate to assert the claim of privilege.

3 So I propose to --

4 THE CHAIR: Please do. Madam  
5 Registrar, please assign an exhibit.

6 THE REGISTRAR: I will do, Mr.  
7 Chair. This will be entered as Exhibit P-18.

8 EXHIBIT NO. P-18: Email  
9 chain between counsel dated  
10 October 13, 2009.

11 THE CHAIR: I will ask another  
12 question. Again, the certainty of the  
13 understanding with respect to the facts of this  
14 situation, Ms. Bokenfohr, who the Commission has  
15 never met but has seen installments from according  
16 to represent Mr. Colvin, there is no reason the  
17 Commission would ask to question her status as Mr.  
18 Colvin's counsel.

19 MS. KRISTJANSON: She has  
20 confirmed directly to me that she is Mr. Colvin's  
21 counsel, and Mr. Colvin, indeed, has confirmed her  
22 status as his lawyer.

23 MR. PRÉFONTAINE: I have always  
24 made it my practice to accept my friends at the  
25 bar's word that they represent somebody. If Ms.

1 Bokenfohr tells me she represents Mr. Colvin, then  
2 she does.

3 THE CHAIR: The interest of this  
4 Commission is in safeguarding the integrity of its  
5 process. There has been a serious issue raised by  
6 Ms. Kristjanson. Before we go any further, I will  
7 ask counsel for other parties whether they have  
8 anything to say to this matter. Mr. Wallace?

9 MR. WALLACE: I have nothing to  
10 add, sir. Thank you.

11 THE CHAIR: Mr. Champ?

12 MR. CHAMP: Thank you, Mr. Chair.

13 Our primary concern has to do with  
14 the proper functioning of the Commission. It would  
15 seem to us that Ms. Bokenfohr's letters and the  
16 issues she raises therein go directly to the  
17 functioning of the Commission. Our primary concern  
18 is in relation to the fact that almost no witnesses  
19 or potential witnesses have spoken to the  
20 Commission. Of the 29 witnesses that received  
21 summonses, as we understand it, 28 of 29 have not  
22 spoken to the Commission counsel. We have heard my  
23 friend Mr. Préfontaine indicate, "Well, that's  
24 their right," but I think the concern raised in Ms.  
25 Bokenfohr's letter is perhaps there were other

1 reasons why these individuals, rather than their  
2 own voluntary rights, cooperated with the  
3 Commission. I think that's one of the issues. I  
4 think that's the sort of relevance of it.

5                   The other aspect in terms of the  
6 proper functioning of the Commission, Mr. Chair, in  
7 our view, is an issue that we've raised before in  
8 passing, and I think both Commission and Commission  
9 counsel have also expressed some concern and  
10 confusion over the matter is properly delineating  
11 or identifying who is the solicitor and who is the  
12 client. My friend Mr. Préfontaine, throughout,  
13 even prior to the hearings, has written saying he  
14 represents all emanations of government  
15 departments. At other times he's indicating he  
16 represents all the subjects, except now Captain  
17 Moore is represented by Mr. Wallace, and also  
18 representing all of the witnesses. I think that --  
19 putting aside the potential conflicts of interest  
20 issues which can be raised at other times and in  
21 other forums, I think the issue here has to be that  
22 when counsel is speaking, it should be clear about  
23 who is a party to this proceeding and who he  
24 represents. If the Commission counsel is dealing  
25 with the Department of Justice or the Government of

1 Canada on, for example, section 38 production  
2 issues, in our view it is not appropriate or at the  
3 very least it's not conducive to the proper  
4 functioning of this Commission to have the point of  
5 contact or the lawyer representing the Attorney  
6 General be the same counsel who is representing all  
7 of the subjects, or almost all the subjects, and  
8 all of the witnesses or potential witnesses.

9                   So that is our concern, and we  
10 would -- that's the other issue that we believe is  
11 raised by the letter. I think that we have gotten  
12 into a quagmire on a few issues that may well be  
13 because of this sort of confusion about who's  
14 acting for whom.

15                   And then the other issue about the  
16 solicitor-client privilege aspect, my friend raises  
17 the potential or the issue that perhaps this  
18 Commission doesn't have the jurisdiction to rule on  
19 privilege. I'm unfamiliar with the authority he  
20 raises and I think, in fairness to my friend, it  
21 probably should be further sort of comments or  
22 submissions on that. In my practice, when I have  
23 appeared before other tribunals or boards, it's  
24 been the same practice as before the superior  
25 court, that the decision-maker has the power to

1 look at the document and make the ruling on  
2 privilege, but out of respect for my friend in  
3 raising that issue, I think that the jurisdiction  
4 of that should probably be explored further.

5                   At a bare minimum, I think an  
6 issue that can be addressed and perhaps -- I would  
7 hope addressed today is who is counsel acting for.

8 I think that's an issue that we've all encountered  
9 right from the beginning, and I would suggest that  
10 counsel should make an election about who they're  
11 representing. This letter of July 28, 2009, that  
12 went out, as I understand it, it went out to 29  
13 individuals who were subject to summonses, some of  
14 whom were the subjects.

15                   I think it's all -- I think the  
16 independent representation of Mr. Colvin and  
17 Captain Moore I think has brought a bit of clarity  
18 to the proceedings, and if the interests of these  
19 other people are at least represented by other  
20 lawyers, I think it would assist in the proper  
21 functioning of the Commission. So those are our  
22 comments on where we are at today, Mr. Chair.

23                   In terms of the actual  
24 introduction of the letter, I think that should be  
25 deferred whether it's necessary, but I think the

1 issues that arise from the letter, I think we can  
2 all clearly see, or at least we see clearly from  
3 our perspective, that could perhaps even be  
4 addressed without the introduction of the letter,  
5 potentially.

6 THE CHAIR: The Commission is  
7 familiar with the restrictions provided in the  
8 National Defence Act, section 250.41 in respect of  
9 its receipt of evidence. We are also cognizant of  
10 the guidance provided by the Supreme Court of  
11 Canada in the Blood Tribe case.

12 Without crossing any lines of that  
13 guidance or the restrictions provided in the  
14 National Defence Act, I am still having trouble  
15 with understanding the basis for the assertion of  
16 privilege. I don't think I would transgress on  
17 either the National Defence Act or Blood Tribe by  
18 ensuring that this Commission understands what the  
19 assertion is.

20 Mr. Préfontaine, perhaps you could  
21 assist me further. I'm having some difficulty in  
22 terms of the establishment of solicitor-client  
23 relationship between you and Mr. Colvin given all  
24 that I've heard, and even if there was such a  
25 relationship established which could give rise to

1 privileged communication, with Ms. Bokenfohr now  
2 acting for Mr. Colvin, are you taking a position  
3 that by addressing the letter openly to what I  
4 understand to be you and the other counsel that  
5 there has not been a waiver of any such privilege?

6 MR. PRÉFONTAINE: There's none  
7 because she's not in a position to waive. Let's go  
8 back, if you wish. I addressed firstly --

9 THE CHAIR: No, please address  
10 that further. How is she not, as his legal counsel  
11 today representing him, which I understood was  
12 totally accepted, in a position to waive on his  
13 behalf?

14 MR. PRÉFONTAINE: That's because  
15 you're confusing a number of issues, Mr. Chairman.

16 The first is obviously that at the  
17 time that her client, Mr. Colvin, received the  
18 letter, she was not representing him. He was  
19 seeking legal representation in accordance with the  
20 Treasury Board policy. It would have been open to  
21 Mr. Colvin on July 28, or earlier, to say, "We  
22 don't want to be represented by the Department of  
23 Justice and I am prepared to get my own lawyer at  
24 my own expense." He didn't do that. He wanted to  
25 have the benefit of the Treasury Board policy which

1 would allow him, if his department considered that  
2 there was a conflict of interest, to legal  
3 representation at public expense through a private  
4 practitioner.

5                   But on July 28 we hadn't crossed  
6 that bridge, so he was part of the class of persons  
7 who were entitled to legal representation. In  
8 accordance with the Treasury Board policy, legal  
9 representation is normally provided by the  
10 Department of Justice, and therefore, at that  
11 point, he was a putative client. Putative means  
12 that, until he confirmed it, we were in a  
13 client-solicitor-like relation because, if he was  
14 to get legal advice at public expense, it would  
15 have been through the team that I have the  
16 privilege of leading. So that is the first portion  
17 of the equation.

18                   The second step of the equation is  
19 that the addressees were more than one, and that  
20 others, the 28 others addressees of that letter,  
21 also have a solicitor-client relationship. While  
22 some of them at that particular point in time had  
23 not retained my services, they have since.

24                   Consequently, the disclosure of  
25 the communication by one party to this

1 communication in effect scubbards the privilege  
2 that the 28 others have in ensuring the sanctity of  
3 their communications with me to receive legal  
4 advice and to provide instructions. So you can't  
5 do indirectly what you can't directly.

6 THE CHAIR: Thank you for  
7 attempting to correct what you have identified as  
8 my confusion, but I'm still having some difficulty,  
9 Mr. Préfontaine. In respect of your first point,  
10 are you taking a position that subsequent counsel  
11 cannot waive a privilege with respect to  
12 communications with prior counsel and the client?

13 MR. PRÉFONTAINE: Yes. It's  
14 settled law that counsel never has the authority to  
15 waive the privilege. It is only the client, but  
16 then the client's ability --

17 THE CHAIR: Yes, Mr. Préfontaine,  
18 I am absolutely familiar with that. It seems to me  
19 that in your case you are the solicitor advancing  
20 the privilege. I am also hearing that Mr. Colvin  
21 is represented by another counsel at this point who  
22 would appear to have waived the privilege. Are you  
23 saying that's not possible?

24 MR. PRÉFONTAINE: That's exactly  
25 what I'm saying. What I'm saying is that, because

1 there's a common interest, solicitor-client  
2 privilege, that is to say, the letter was addressed  
3 to 21 persons. Mr. Colvin is only one --

4 THE CHAIR: Mr. Préfontaine, you  
5 are moving to the second point. I am looking for  
6 an answer. Are you telling me that there is law on  
7 the point that a subsequent, properly retained  
8 solicitor cannot waive in respect of communications  
9 with a prior solicitor?

10 MR. PRÉFONTAINE: If it is within  
11 that client's ability to waive, that would be true,  
12 but this is not the case. And it is not the case  
13 because Mr. Colvin is only one of 29 persons.

14 THE CHAIR: So that's my second  
15 question. With respect to multiple putative  
16 clients, are you suggesting that there must be  
17 unanimous consent in order for any one of them to  
18 waive? And if so, is there law on that point?

19 MR. PRÉFONTAINE: It is called the  
20 common interest of privilege, and do I have it at  
21 my fingertips? No. I would welcome the  
22 opportunity to discuss this at a later point in  
23 time when I have had the occasion to do the  
24 research that will allow me to provide you with the  
25 authorities that you are seeking this morning.

1                   THE CHAIR: Of course, the dilemma  
2 that faces the Commission this morning is that we  
3 have heard, unsupported, but these submissions from  
4 Commission counsel that Ms. Bokenfohr has raised  
5 the allegation that the Commission may have been  
6 misled last week in the hearing motions. The  
7 Commission has returned here this morning to  
8 provide its response to those motions.

9                   As I said earlier, the integrity  
10 of the process of this Commission is the primary  
11 interest at this point of the Commission. How are  
12 we to be assured, in the face of this point being  
13 raised, this suggestion, unsubstantiated suggestion  
14 nonetheless, that we can proceed to issue the  
15 decisions that we've taken based on submissions  
16 received last week?

17                   MR. PRÉFONTAINE: Simply because  
18 the entire matter is irrelevant to both of the  
19 proceedings and the integrity of your process.

20                   The integrity of your process is  
21 addressed by the National Defence Act. Pursuant to  
22 section 250.38, you have decided to cause a public  
23 hearing to be conducted in this investigation that  
24 endows the Commission with the power to compel  
25 attendance of witnesses through the issuance of

1 summonses. There is no issue that the witnesses  
2 who have been duly summonsed will appear and will  
3 answer the questions within the parameters set by  
4 law. And therefore, the integrity of the  
5 Commission's investigation is not in issue.

6                   What is in issue is something that  
7 the law doesn't provide for, and actually Mme.  
8 Kristjanson last week referred to the fact that she  
9 recognizes that prehearing interviews are voluntary  
10 and are conducted usually for the convenience of  
11 counsel. So the integrity of the Commission's  
12 process is not an issue.

13                   I would add, furthermore, that the  
14 representation that the Commission hasn't  
15 interviewed those witnesses it wants to call is  
16 factually inaccurate. The Commission has  
17 interviewed a great number of witnesses. I can  
18 mention one right off the bat. The Commission has  
19 interviewed Lieutenant-General Gauthier on previous  
20 occasions. The Commission has interviewed --

21                   THE CHAIR: Mr. Préfontaine, are  
22 you now sharing with me the contents of the letter?

23                   MR. PRÉFONTAINE: No, I'm not.

24                   THE CHAIR: Well then you're not  
25 answering my question or the issue, the dilemma

1 that the Commission faces in looking for  
2 reassurance that we can proceed with integrity in  
3 the face of what we've already heard this  
4 suggestion being raised.

5 I will ask other counsel. On that  
6 point alone can you help the Commission? Mr.  
7 Wallace? I take it -- my understanding is in  
8 asking that question that all counsel have seen  
9 this correspondence.

10 MS. KRISTJANSON: That is correct.

11 MR. WALLACE: That's correct.

12 THE CHAIR: Mr. Wallace?

13 MR. WALLACE: I think that your  
14 interests in ensuring that the decision that you  
15 are being made is free from the cloud that this  
16 letter seems to imply. I haven't seen, obviously,  
17 the predecessor letter in this particular case, so  
18 I'm not -- probably in this forum shouldn't be  
19 making any submissions. In any event, I couldn't.  
20 I think this is an important issue. I  
21 unfortunately don't have a magic bullet here to  
22 assist you as to the course of action, but I do  
23 think it's something that has to be looked at prior  
24 to your decision.

25 THE CHAIR: Mr. Champ?

1 MR. CHAMP: Mr. Chair, in hearing  
2 my friend Mr. Préfontaine's submissions, I think it  
3 brings me back to my first point. Who is he  
4 speaking on behalf of right now? When he's now  
5 asserting the privilege and he's making his  
6 submissions, who is his client or who are his  
7 clients? Are they the subjects?

8 MR. PRÉFONTAINE: If I could --

9 THE CHAIR: Please.

10 MR. CHAMP: Are they the subjects?  
11 Are they the witnesses? Is it the Government of  
12 Canada in its various emanations as my friend  
13 describes it? I think that is the threat -- that  
14 is the first concern we have, and perhaps in even  
15 addressing or resolving these issues we have to  
16 know who is he representing. If he is still  
17 purporting to represent all of those different  
18 clients, in our submission, that is not  
19 appropriate, and perhaps the resolution of this  
20 issue may well be better served after we, in my  
21 suggestion, our submission, get different counsel  
22 representing these different clients.

23 THE CHAIR: Thank you, Mr. Champ,  
24 but again, the issue immediate before us this  
25 morning is proceeding with integrity in the face of

1 what the Commission has already heard about  
2 possibly misled.

3                                   You have seen the correspondence.

4 Can you assist the Commission in that regard?

5                                   MR. CHAMP: It's tied to just what  
6 I said, Mr. Commissioner. It's just simply that I  
7 think I shared my concerns with previous counsel,  
8 Mr. Wallace, that, in light of that kind of a  
9 cloud, rendering a decision is problematic. The  
10 question is how do we dissipate that cloud, and  
11 that's where I get to my original points. I think  
12 there's concern here, a problem here trying to  
13 dissipate the cloud given that we still have one  
14 counsel or one team of counsel representing all of  
15 these very multi-faceted interests.

16                                   We already know, Mr. Chair, is  
17 that it would appear that Treasury Board in  
18 respective departments have determined that at  
19 least one of these witnesses have sufficient  
20 conflict of interest that independent counsel is  
21 being paid for. Similarly, one of the subjects, it  
22 would appear, with Mr. Wallace here, also  
23 sufficiently has a conflict of interest with the  
24 Government of Canada that they are allowed to have  
25 independent counsel.

1                   So these are -- I don't want to  
2 delve into solicitor-client sort of issues, Mr.  
3 Chair, but when we have counsel appearing here  
4 suggesting that they represent all of these  
5 manyfold interests, I think that does come to bear  
6 on the integrity of the Commission and its proper  
7 function.

8                   THE CHAIR: Commission counsel?

9                   MS. KRISTJANSON: There are two  
10 issues raised in the Colvin letter. The first,  
11 generally, has to do with the relevance would be  
12 the degree to which government or government  
13 counsel have been cooperative in facilitating  
14 prehearing interviews. Those are the remarks that  
15 Ms. Colvin addressed at length in her letter.

16                   What was argued on the motions,  
17 however, generally related to production of  
18 documents and a fairness to subjects due to the  
19 lack of an evidentiary record. That is my  
20 understanding of what was argued.

21                   So in the Commission's long-term  
22 interests, and in terms of proceeding on a  
23 going-forward basis, I would submit that this  
24 letter is critical and should be addressed, but I'd  
25 also submit that today is not the day that that can



1                   She asserts that "to restrict  
2 communications between my client and his DFAIT  
3 colleagues is an improper exertion of litigation  
4 strategy by the Department of Justice and an  
5 inappropriate interference in internal DFAIT  
6 operations."

7                   That's a serious issue on a  
8 going-forward basis with respect to the treatment  
9 of potential witnesses, and I submit that that also  
10 must be addressed in this context, but Ms.  
11 Bokenfohr should have the opportunity, on behalf of  
12 Mr. Colvin, to make submissions in whatever forum  
13 that privilege issue arises.

14                   THE CHAIR: I hear you with  
15 respect to dealing with this matter today, but I'm  
16 still looking for your guidance and assurance in  
17 respect of the propriety of the Commission going  
18 forward and issuing decisions based upon  
19 submissions received last week. Is there anything  
20 raised in that letter that would cast doubt on the  
21 propriety of issuing those decisions today?

22                   MS. KRISTJANSON: In my view,  
23 there is nothing relevant to the issue of  
24 production of documents and the fairness of  
25 proceeding or adjourning because of the document

1 production failures. My understanding is that is  
2 the primary basis of those motions.

3                   This is a separate issue which has  
4 to do with cooperation by government counsel in  
5 facilitating prehearing interviews, and I do not  
6 believe that the motions address that issue.

7                   THE CHAIR: I apologize. We  
8 weren't expecting to be faced with this very  
9 serious matter the first thing this morning. The  
10 Commission needs to take ten minutes to consider  
11 its position. Thank you.

12 --- Upon recessing at 10:36 a.m.

13 --- Upon resuming at 10:43 a.m.

14                   THE CHAIR: As I have already  
15 indicated, this matter presented in surprise to the  
16 Commission this morning raises matters of  
17 significant concern, and within those matters of  
18 concern I do not limit myself to referring to the  
19 treatment of, for instance, witnesses who will at  
20 some point be called to testify before this  
21 Commission.

22                   We have also been presented with  
23 the serious issue of solicitor-client privilege.  
24 Again, with reference to the National Defence Act,  
25 sections 250.41 and, as I said earlier, the

1 guidance provided by the Supreme Court of Canada in  
2 Blood Tribe, the Commission is conscious of its  
3 limitations in respect of determining  
4 solicitor-client privilege.

5                   However, we do not believe that we  
6 have to accept or should accept any simple  
7 assertion of solicitor-client privilege. There  
8 must be some basis for legitimate assertion of  
9 solicitor-client privilege. In that respect, we  
10 are not convinced that we have heard one this  
11 morning.

12                   That said, Mr. Préfontaine, in  
13 response, to my questions has indicated a desire to  
14 advance further and more substantial submissions or  
15 argument in that regard, and I propose to give him  
16 that opportunity: seven days or, shall we say,  
17 next Wednesday, the 21st, I believe that would be.

18                   Once those submissions are  
19 received, I would propose that counsel for other  
20 parties and Ms. Bokenfohr, as representative of Mr.  
21 Colvin, be given a chance to respond.

22                   The Commission will then determine  
23 the issue of whether we believe that there is a  
24 sufficient basis for the assertion of  
25 solicitor-client privilege that must be determined

1 in a superior court in the final analysis.

2                   However, again, the concern of the  
3 Commission is the issues that have at least been  
4 raised. As I say, I include amongst those the  
5 treatment of witnesses to be called before the  
6 Commission. We can't deal with those matters  
7 unless we are able to see the assertions that have  
8 been made.

9                   All that said, I will rely on the  
10 assurances of counsel that the Commission need not  
11 adjourn, that the contents of the letters do not  
12 affect the submissions received last week in  
13 respect of the motions to the effect that there is  
14 risk occasioned to the integrity of our process, as  
15 I have put it, or the rendering of those motion  
16 decisions this morning, at least in respect of the  
17 first three motions that we heard.

18                   I am prepared to go ahead with  
19 that now, but I understand, Ms. Kristjanson, that  
20 you have some other issues to deal with?

21                   MS. KRISTJANSON: Yes, just very  
22 briefly, the Richard Colvin affidavit. I can  
23 advise the panel that the affidavit of Richard  
24 Colvin is now unsealed. That affidavit, as you  
25 will recall, was filed in a sealed format last

1 Wednesday, October 7. On October 8, a lawyer from  
2 the National Security Group, Attorney General of  
3 Canada, attended at the Commission to obtain the  
4 affidavit for the purpose of scrutinizing for  
5 sensitive national security information as defined  
6 in section 38 of the Canada Evidence Act.

7                   The National Security Group lawyer  
8 signed an undertaking that he would not disclose  
9 the contents of the affidavit to Department of  
10 Justice counsel who here represent seven subjects.

11                   Yesterday, the National Security  
12 Group confirmed that the affidavit of Mr. Colvin  
13 contains no sensitive information and may be  
14 disclosed in the course of the Commission's  
15 proceedings. Subsequently, I directed the  
16 registrar that that affidavit may be unsealed and I  
17 now inform you that we have filed an unsealed  
18 affidavit in response to the motion to quash  
19 summons which has been brought before this  
20 Commission by the Vice Chief of Defence Staff and  
21 by seven subjects represented by Department of  
22 Justice counsel.

23                   Finally, I must --

24                   THE CHAIR: Just to confirm with  
25 the registrar, you have now unsealed the document?

1 THE REGISTRAR: Yes, it has, Mr.  
2 Chair.

3 THE CHAIR: And bearing the same  
4 exhibit number as was placed on the sealed envelope  
5 previously?

6 THE REGISTRAR: That is right, Mr.  
7 Chair.

8 THE CHAIR: Thank you.

9 MS. KRISTJANSON: I can advice I  
10 have provided copies to all the parties.

11 Finally, the October 7 transcript  
12 incorrectly records that Mr. Préfontaine and Ms.  
13 Richards appeared as counsel for the Attorney  
14 General of Canada. In fact, on October 7, together  
15 with Mr. Wirth, they were here representing seven  
16 subjects, Lieutenant-Colonel Garrick, retired;  
17 Chief Ward Officer Watson; Master Warrant Officer  
18 Girard; Major Kirschner; Major Hudson; Major Zybala  
19 and Major Gribble.

20 I have asked the register to so  
21 inform the court reporter and she has done so.

22 I also note that Mr. Elgazzar  
23 attended last Wednesday as counsel for both Amnesty  
24 International Canada and the B.C. Civil Liberties  
25 Association. I note that Mr. Elgazzar is here in

1 that same capacity today.

2 Those are my -- that is my  
3 procedural overview.

4 THE CHAIR: Thank you, Ms.  
5 Kristjanson. In respect of the matter of  
6 representation, thank you for making the  
7 correction, which I understand the specificity of  
8 the correction in respect to the representational  
9 status of Mr. Préfontaine and Ms. Richards and Mr.  
10 Wirth. However, the Commission clearly heard  
11 submissions from at least Mr. Préfontaine and Ms.  
12 Richards which it understood to be beyond the scope  
13 of representations on behalf of the specific seven  
14 subjects and provided those submissions to the  
15 Commission on behalf of the government.

16 I make this statement because, as  
17 will be reflected in the reasons for the decisions  
18 on the adjournment applications or adjournment  
19 motions, there is, in part, reference to what the  
20 Commission clearly understood to be government  
21 representations. Do you have any difficulty with  
22 that, Mr. Préfontaine?

23 MR. PRÉFONTAINE: No. I think I  
24 made it clear on the record that in this room the  
25 parties that we represent are the seven subjects,

1 but we are also conscious of the fact that, as  
2 Department of Justice lawyers, we are representing  
3 the federal government in its various institutions,  
4 but they are not in this room as parties.

5 THE CHAIR: Anything else, Ms.  
6 Kristjanson?

7 MS. KRISTJANSON: No, I have  
8 completed the procedural update.

9 THE CHAIR: That being the case,  
10 the Commission is prepared to render its decision  
11 in respect of the motions to adjourn. This will  
12 take me probably 40 to 45 minutes to deliver these  
13 reasons and the decision. I thank you for your  
14 patience.

15 At the recommencement of the  
16 hearing on October 7, 2009, the Commission heard  
17 three motions for adjournment presented by the  
18 subjects of the complaint.

19 Motion 1, the first motion was  
20 presented by Mr. Wallace, counsel for Captain  
21 (Navy) (Ret'd) Moore and was based on his inability  
22 to use and disclose certain documents in his  
23 possession, as well as to obtain further documents.

24 Motion 2 was a related motion for  
25 adjournment or a stay, as the case may be. It was

1 argued on behalf of the other seven subjects by Ms.  
2 Richards from the Department of Justice and was  
3 similarly based on the lack of access to documents  
4 which was said to prevent the subjects from making  
5 "full answer and defence."

6 Finally, the third motion was a  
7 request for adjournment presented again by Ms.  
8 Richards supported by Mr. Wallace, this time asking  
9 for an adjournment pending determination of an  
10 application for leave to appeal the decision of the  
11 Federal Court having quashed the Commission's  
12 jurisdiction in respect of what is known as the  
13 custody complaints, the two custody complaints.

14 All of these motions demand  
15 serious concern and attention. While in the result  
16 they may impede the advancement of this inquiry,  
17 they all go more or less to matters of fairness to  
18 the parties, who would seemingly bare no  
19 responsibility for the circumstances in question.  
20 I propose to deal first with the third motion  
21 concerning the matter of an appeal and then jointly  
22 with the other two motions concerning what I  
23 consider to be the much weightier matter of  
24 documents.

25 Motion 3: Turning first to the

1 issue of the impact on these hearings of a possible  
2 appeal of the September 16, 2009, Federal Court  
3 decision of Mr. Justice Harrington, as Ms. Richards  
4 notes, the Commission has indicated its firm  
5 intention to at least seek the leave of the Federal  
6 Court of Appeal to appeal from the orders issued by  
7 Justice Harrington in respect of the two custody or  
8 transfer complaints. In fact, that application for  
9 leave to appeal will be filed this week.

10 In her submissions in support of  
11 an adjournment of this public interest hearing in  
12 respect of the remaining failure to investigate  
13 complaint, Ms. Richards points to the significant  
14 overlap in factual and legal issues between this  
15 complaint and the two custody complaints whose  
16 future status would then become a matter of  
17 uncertainty if the Commission obtains leave to  
18 appeal the relevant orders of Justice Harrington  
19 pending the resolution of that appeal. She notes  
20 in particular that three of the subjects whom she  
21 represents, along with the former Canadian Forces  
22 Provost Marshal, Captain Moore, represented by Mr.  
23 Wallace, are subjects in all three complaints.  
24 This overlap among the three complainants is  
25 indeed, as Ms. Richards observes, part of the

1 reason why they have proceeded together thus far  
2 before the Commission.

3 Ms. Richards submits that it would  
4 be both unfair to her clients and an unwise  
5 expenditure of public funds to have a bifurcated  
6 process wherein the Commission proceeds now on the  
7 hearing in respect of the failure to investigate  
8 complaint but with the possibility of further  
9 hearings in the future in respect of the custody  
10 complaints if the Commission were to be successful  
11 in the appeal which it has already indicated its  
12 intention to seek.

13 She argues procedural fairness  
14 demands that her clients have full knowledge of the  
15 case they must meet before the Commission. Ms.  
16 Richards submits that the force of these  
17 considerations is particularly strong if the  
18 Commission were to initiate an appeal of the  
19 Federal Court's decision defining the scope of the  
20 failure to investigate complaint. However, we  
21 understand her submissions to be applicable to some  
22 extent even in respect of an appeal solely of the  
23 orders related to the custody complaint.

24 Moreover, it is at least implicit  
25 in Ms. Richards' submissions in favour of an

1 adjournment on the basis of the Commission's  
2 intended appeal of the custody complaints that she  
3 does not believe that any unfairness incurred by  
4 her clients in having to appear and participate  
5 generally in a bifurcated process could be  
6 adequately remedied by a certain latitude on the  
7 recall of witness or filing of other evidence at  
8 other hearings. Ms. Richards also made the point  
9 that any uncertainty on the scope of the  
10 Commission's hearings directly ties into questions  
11 about the scope of the potential production and  
12 disclosure of documentary evidence which, in turn,  
13 also has an impact on what witnesses might be  
14 called or be permitted to say in giving oral  
15 evidence and, in particular, how the subjects  
16 conduct their case in the hearings.

17                   For his part, while Mr. Champ, for  
18 the complainants, made submissions indicating there  
19 were other means of addressing the subjects'  
20 concerns, at least in respect of any unfairness  
21 which might result from a successful appeal by the  
22 Commission, Mr. Champ argues, first of all, that we  
23 are essentially in the same situation as in  
24 February 2009 when this Commission heard and  
25 dismissed a motion to stay its hearings in the face

1 of the government's pending application for  
2 judicial review.

3                   A similar application to the  
4 Federal Court was also dismissed by Madam Justice  
5 Mactavish in April 2009. In Mr. Champ's view,  
6 there is nothing to prevent the Commission from  
7 splitting up the two sets of complaints -- custody  
8 and failure to investigate -- and proceeding  
9 separately and initially on the failure to  
10 investigate alone.

11                   Mr. Champ indicated that he views  
12 the failure to investigate as the more serious  
13 complaint in any event. He further submits in the  
14 event of a successful Commission appeal restoring  
15 the two custody complaint proceedings, the scope,  
16 and therefore also the costs and inconvenience, and  
17 perhaps even the necessity of the later hearings  
18 could be -- that the latter hearings could be  
19 reduced by the evidentiary record from the hearings  
20 in respect of the failure to investigate complaint.

21                   Mr. Champ also points out that,  
22 while he is sympathetic to the procedural fairness  
23 rights of the subjects of the complaint, the  
24 Commission must also be mindful of other interests  
25 at stake, including the rights of Afghan detainees

1 not to be transferred in circumstances where they  
2 face a substantial risk of torture.

3 As is acknowledged by both Ms.  
4 Richards and Mr. Champ, there would be considerable  
5 overlap of both factual and legal issues in  
6 proceeding in respect of the custody complaints and  
7 the investigation complaint and, indeed, for this  
8 reason, as already indicated, the Commission has  
9 thus far dealt with them jointly.

10 However, Mr. Champ is correct.  
11 There is nothing to prevent the Commission from  
12 splitting them up and dealing with them separately  
13 in the event of a successful Commission appeal of  
14 the orders quashing the custody complaints.

15 Ms. Richards has concerns that  
16 such a bifurcated process would not be fair to her  
17 clients who are entitled to know the full extent of  
18 the case they must meet when they appear and  
19 otherwise participate in these hearings. However,  
20 as Ms. Richards acknowledges, there is considerable  
21 overlap of factual and legal issues as between the  
22 custody and investigation complaints.

23 The facts relevant to a military  
24 police member's duty to investigate possible  
25 criminal or service liability in respect of the

1 transfer of detainees to a risk of torture would be  
2 very similar, if not identical, to those relevant  
3 to such a member's duty to refrain from, question  
4 or raise concerns about, compliance with a  
5 direction to effect such transfers. In the event,  
6 therefore, that the Commission were successful in  
7 having the custody complaints reinstated on appeal,  
8 it is highly unlikely that those subjects common to  
9 both proceedings would have -- it is highly likely  
10 that those subjects common to both proceedings  
11 would have very similar cases to meet in both  
12 proceedings.

13                   It should be noted that the  
14 legislative provisions governing the Commission's  
15 public interest hearings provide broad prohibitions  
16 against the admission or consideration at such a  
17 hearing of testimony given in a hearing in respect  
18 of a separate complaint. Indeed, read broadly, the  
19 combined effects of paragraphs 250.41(2)(c) and (d)  
20 of the National Defence Act would potentially  
21 preclude the Commission from receiving or  
22 considering all testimony from hearings into the  
23 investigation complaint at any possible future  
24 hearings into the custody complaints.

25                   Arguably, however, the subject's

1 previous testimony at the investigation complaint  
2 hearings could be used against them in  
3 cross-examination when they appeared at a possible  
4 future hearing on the custody complaints.

5                   While this might well be  
6 considered a tactical disadvantage to the subjects  
7 concerned flowing from the bifurcation of the  
8 hearings resulting from the splitting up of the  
9 proceedings in respect of the complaints, it is  
10 difficult to see how this would amount to  
11 procedural unfairness.

12                   On the other hand, these  
13 evidentiary restrictions in the National Defence  
14 Act would potentially deprive the Commission and  
15 the parties of the potential ability to reduce  
16 duplication of evidence and effort as between the  
17 two sets of hearings, a possibility which Mr. Champ  
18 held out in his submissions.

19                   While the Commission has  
20 considerable discretion in the adjournment of its  
21 proceedings, inasmuch as this motion to adjourn  
22 relies upon the possibility of a successful appeal  
23 of at least part of the September 16 Federal Court  
24 ruling on the government's application for judicial  
25 review, it is appropriate that we consider the





1 cross-examine them in a manner contrary to their  
2 interests.

3                   While we are not persuaded that  
4 the pursuit of separate hearings in respect of the  
5 custody complaints would necessarily and inevitably  
6 result in actual procedural unfairness to any  
7 party, it might well at least be perceived to do  
8 so. Moreover, it seems evident that it would be  
9 more convenient and advantageous to the parties,  
10 and certainly more convenient and efficient for the  
11 Commission, and would better serve the public  
12 interest to address these matters in the context of  
13 one set of hearings. Therefore, we are inclined,  
14 out of an abundance of caution, to grant this  
15 motion for a stay and adjourn this hearing pending  
16 resolution of the matters related to an appeal of  
17 Justice Harrington's decision.

18                   Clearly affecting and reinforcing  
19 our decision to adjourn this hearing pending  
20 seeking leave to appeal of Justice Harrington's  
21 decision in respect of jurisdiction over the  
22 custody complaint has been a potential effect of  
23 the Federal Court's declaration in respect of the  
24 permissible scope of the Commission's  
25 investigation, notwithstanding the court's

1 confirmation of the jurisdiction in respect of the  
2 failure to investigate complaint. Through some of  
3 the motions filed with the Commission, albeit not  
4 yet argued, it is apparent that there is  
5 disagreement amongst the parties before the  
6 Commission about the scope of the limitations  
7 placed by the Federal Court's decision on the  
8 nature of the evidence that can and should be heard  
9 and on the areas of inquiries that can be made from  
10 the witnesses to be called.

11                   Counsel for seven of the subjects  
12 have presented a motion to have this Commission  
13 determine the standard of conduct to be applied in  
14 light of the Federal Court's decision, that this  
15 Commission's inquiries should be limited to what  
16 the military police subjects knew or "had the means  
17 of knowing." In the written notice of motion  
18 presented, counsel for the subjects point to an  
19 interpretation of the Federal Court ruling advanced  
20 by counsel for the applicants in correspondence  
21 sent to the Commission and advocate against the  
22 interpretation which they contend would give the  
23 expression "had the means of knowing" a very wide  
24 meaning. Counsel for the subjects also raise  
25 concerns about the views that Commission counsel

1 might have about the meaning of the Federal Court  
2 ruling.

3                   In a separate motion, counsel for  
4 seven of the subjects have raised issues about the  
5 type of the matters the Commission should be  
6 permitted to inquire into, again in light of the  
7 Federal Court's decision. In particular, it is  
8 argued that matters pertaining to training and  
9 administration have been excluded from the  
10 Commission's purview by the Federal Court ruling.

11                   Issue is also taken by counsel for  
12 seven of the subjects with views that they allege  
13 this Commission has taken in the past which would  
14 indicate that the Commission's mandate includes  
15 systemic issues. For greater certainty, I would  
16 like to make it clear that whatever the objects of  
17 the complainants might be, I make no comment one  
18 way or the other. It is not and never has been the  
19 intention of this Commission to critique the  
20 performance of the Canadian Forces as a whole, let  
21 alone other departments, or to question the  
22 policies of the Government of Canada generally in  
23 respect of the Afghan detainee transfers. This  
24 Commission has, from the outset, attempted to  
25 discharge its mandate and provide a context in

1 which to measure the performance of the military  
2 police members who are the subject of this  
3 complaint.

4                   According to well-established  
5 investigative practices, both in the world of law  
6 enforcement and in the realm of administrative  
7 proceedings, obtaining as much information as  
8 possible about the conduct and/or knowledge of  
9 suspects or subjects of complaints from independent  
10 and objective sources first is often preferable.  
11 As has been said many times, information is the  
12 lifeblood of an investigation. The subjects or --  
13 suspects or subjects of complaint are generally  
14 then interviewed or called to testify last in order  
15 to provide any explanation or qualifications to the  
16 information already obtained. However, a  
17 restricted interpretation of the scope of the  
18 investigation this Commission can conduct into the  
19 failure to investigate complaint would lead to a  
20 situation where the subjects of the complaint would  
21 be questioned in a vacuum, without an opportunity  
22 to obtain sufficient information from other  
23 sources. This, naturally, is of great concern to  
24 the Commission.

25                   In light of the need to obtain a

1 judicial pronouncement on the scope of the  
2 restrictions that can be imposed on these  
3 administrative proceedings, and in light of the  
4 uncertainty surrounding the meaning of the Federal  
5 Court's decision for the parties, it has become  
6 apparent that more judicial guidance is required  
7 before these matters can be properly dealt with by  
8 the Commission. The Commission has determined that  
9 the most efficient and effective way to obtain the  
10 required clarification of the Federal Court's  
11 decision is to seek leave to appeal the declaration  
12 contained in Mr. Justice Harrington's decision of  
13 September 16 to the Federal Court of Appeal.

14                   The prospect of an appeal by the  
15 Commission of both parts of Mr. Justice  
16 Harrington's ruling clearly reinforces the case for  
17 a stay of the present hearings. The challenges  
18 which would confront the parties by proceeding  
19 separately on the investigation and custody  
20 complaints would be greatly compounded by a  
21 possible expansion in the scope of the present  
22 hearings on the investigation complaint. Parties  
23 would potentially be faced with having to consider  
24 and address significant amounts of new and  
25 different evidence and sources of evidence in the

1 course of the same proceedings after already having  
2 testified, cross-examined witnesses and generally  
3 planned and at least partially conducted their case  
4 before the Commission. This, in the Commission's  
5 view, would result in additional unfairness to the  
6 subject parties to this hearing.

7                   Now turning to Motions 1 and 2,  
8 the Commission considers that in any event there  
9 were more substantial grounds related to the  
10 government's response to the Commission's attempts  
11 to obtain information and documents and the  
12 consequent effect on the fairness to the parties,  
13 which require consideration of an adjournment.

14                   I turn first to the situation  
15 faced by the former Canadian Forces Provost Marshal  
16 and his counsel which were set out in great detail  
17 in Mr. Wallace's submissions. Mr. Wallace, of  
18 course, is the counsel to Retired Navy Captain  
19 Steven Moore, a subject of the failure to  
20 investigate complaint. He brought his motion to  
21 adjourn these proceedings on the basis of what he  
22 submits is a serious infringement of his client's  
23 right to procedural fairness. This infringement,  
24 he submitted, is caused, in large part, procedural  
25 barriers put in place by the Government of Canada

1 to the release of certain documents.

2                   Furthermore, Captain Moore is in  
3 possession of documents that he considers relevant  
4 to this complaint and that he wishes to disclose to  
5 the Commission pursuant to what he correctly  
6 identifies as his obligation to do so under the  
7 Commission's hearing rules.

8                   First I note that Mr. Wallace  
9 appears to have had trouble having his security  
10 clearance granted to him by the RCMP, in place  
11 since 2005 and not yet expired, recognized by  
12 Department of National Defence officials. This was  
13 only settled apparently recently on September 16,  
14 2009. Mr. Wallace has indicated to the Commission  
15 that were it not for this need to double-check his  
16 security clearance he would have been in receipt of  
17 certain of the documents in question as early as  
18 June 2009. Instead he did not receive documents  
19 from the Department of National Defence until  
20 September 15, 2009, only three weeks before the  
21 hearing of this motion. This unexplained failure  
22 of one department of government to recognize a  
23 clearance issued by another is but one factor  
24 contributing to Mr. Wallace's difficulties in  
25 accessing and releasing documents.

1                   Mr. Wallace was then required to  
2 sign an undertaking to receive documents. An email  
3 from the Department of National Defence counsel,  
4 Mr. Huyer, describes these documents as "Government  
5 documents which Mr. Wallace and his client had  
6 identified as relevant to the MPCC public interest  
7 hearings." Thus, it appears to this Commission  
8 that as early as June 3, 2009, the department and  
9 Captain Moore felt they were dealing with documents  
10 relevant to these proceedings.

11                   Mr. Wallace, his staff, and it  
12 seems his client, were required to sign this  
13 undertaking, not to enable them to receive  
14 unredacted documents at his office, as one might  
15 have supposed, but to enable them to receive  
16 documents fully redacted for the purposes of the  
17 Canada Evidence Act. However, the undertaking  
18 signed by Mr. Wallace prohibited him from  
19 disclosing the documents he received to this  
20 Commission, despite the fact that the documents  
21 were fully redacted and had been specifically  
22 identified in correspondence between DND and Mr.  
23 Wallace as relevant to these hearings.

24                   Mr. Wallace was also permitted to  
25 view unredacted, except for solicitor-client

1 privilege and cabinet confidence, documents at DND  
2 offices on Queen Street. I note, by contrast, that  
3 the Commission itself has not been allowed to view  
4 new, unredacted documents since the decision to  
5 proceed to these public interest hearings.

6                   In any event, Mr. Wallace and his  
7 client attended at DND to view the unredacted  
8 versions of the materials he already had at his  
9 office. This review caused Mr. Wallace to make  
10 further disclosure requests of DND. Likewise, Mr.  
11 Wallace attended a meeting of counsel at the  
12 Commission offices on September 25, 2009, and  
13 learned information that caused him to make another  
14 disclosure request of the government. He informs  
15 the Commission that, in respect of these  
16 supplementary disclosure requests, he has not heard  
17 back from the government and can give no indication  
18 when he will be in a position to review the  
19 materials, let alone disclose what is relevant to  
20 this Commission.

21                   On September 30, 2009, the  
22 Commission has heard that Mr. Wallace wrote to DND  
23 counsel, in this case Mr. Chaplan, asking to be  
24 released from his undertaking in order to disclose  
25 the documents he did have to the Commission in

1 accordance with his disclosure obligations. These  
2 were fully redacted documents, and Mr. Wallace  
3 stated to this Commission that he did not expect a  
4 problem with being released from his undertaking.  
5 However, on October 5, Ms. Richards, presumably in  
6 her capacity as government counsel, not counsel to  
7 the subjects she also represents, indicated that  
8 Mr. Wallace would not be relieved from his  
9 undertaking. She wrote that, instead, appropriate  
10 steps would be taken to ensure the information was  
11 formally reviewed for sensitive information, and  
12 only then could it be provided to the Commission.

13                   Counsel for the seven subjects,  
14 apparently again in their other capacity as counsel  
15 to the government, have indicated to the Commission  
16 that some, at least, of Mr. Wallace's redacted  
17 documents were subject to a section 38 notice, that  
18 is, they were documents requested by the Commission  
19 in subpoena form. There can be no doubt that the  
20 Commission wished to have those documents on an  
21 expedited basis and has so wished for a long time.

22                   More importantly, Mr. Wallace's  
23 client now faces a situation where he will not be  
24 able to reference in public materials he has  
25 identified as relevant and that he has indicated

1 would be used in cross-examination of witnesses,  
2 including of his own testimony. This is inherently  
3 unfair to Retired Captain Moore, and yet it is  
4 unfairness created on the basis of a technical  
5 argument that the redaction process must be "just  
6 right" before documents can be released to the  
7 Commission. I note that the Commission is already  
8 in possession of hundreds of pages of matters  
9 over-redacted through the informal process with no  
10 objection from the Government of Canada.

11 In fairness, Mr. Wallace has also  
12 indicated that he has been told that the transition  
13 from informal to formal redaction may be completed  
14 fairly quickly. It should be noted, however, that  
15 Captain Moore's fairness concerns extend also to  
16 his inability to make reference to the other  
17 materials he has identified in his subsequent  
18 disclosure requests. These, too, are materials  
19 that he will not be able to reference in public,  
20 portions of which he has identified as relevant,  
21 and that he has indicated would be used in  
22 cross-examination of witnesses, including in his  
23 own testimony.

24 In terms of the general  
25 unavailability of documents subject to outstanding

1 subpoenas or requests but not yet provided, Mr.  
2 Wallace's procedural fairness concerns were echoed  
3 by the counsel for the other seven subjects. All  
4 subjects seek an adjournment on the basis that  
5 documents requested by the Commission are not  
6 available. The Commission recognizes the inherent  
7 irony of the fact that it is the same Department of  
8 Justice counsel making these submissions who are  
9 also representing the government's reasons why the  
10 documents in question have not been released.  
11 However, it is, of course, the interests of the  
12 parties that must be considered herein.

13 I note that the summonses issued  
14 are recent, but requests for those very same  
15 documents date back much further. Some of those  
16 documents, not yet provided to the Commission, were  
17 requested in November 2008 or February 2009.  
18 Moreover, the Commission understands that some of  
19 these documents have also been put through an  
20 informal redaction process which was abruptly  
21 abandoned this summer.

22 Frustrating as it all is, the  
23 Commission does not have this material. Thus, not  
24 only can Commission counsel not make use of it, but  
25 importantly from the subjects' perspective, some of

1 it has recently been definitively identified as  
2 relevant by the subjects and cannot be used by them  
3 to cross-examine witnesses and supplement or  
4 support their own testimony.

5                   This is not a criminal process,  
6 nor does the Commission have the right to make  
7 findings of civil liability. However, the subjects  
8 of this complaint, as the Commission has noted all  
9 along, have a very real personal interest at stake,  
10 including their professional and reputational  
11 interests. The subject matter of this complaint is  
12 very serious, and until the Commission is satisfied  
13 that it has the documentary basis that it requires  
14 to afford all parties the ability to make and  
15 defend their case, it would be unfair to proceed.

16                   It should be noted that the  
17 Commission may have been able to at least begin  
18 holding its hearings, though there were some  
19 document requests outstanding. Commission counsel  
20 has indicated that she has reviewed the documents  
21 that were returned in redacted form by the  
22 government and was satisfied with most of the  
23 redactions. She has stated her views that the  
24 hearings could proceed in public on the basis of  
25 the unredacted portions of these documents, and

1 that specific, narrower requests have been made for  
2 documents that appear particularly relevant, such  
3 as those demonstrating some investigations would  
4 have taken place. However, in light of the issues  
5 raised by the subjects, it has become impossible,  
6 in fairness to them, to proceed at all.

7                   Indeed, the subjects have  
8 indicated they require access to the documents they  
9 do not have or cannot use in order to cross-examine  
10 the witnesses to be heard. In Captain Moore's  
11 case, this is more than hypothetical since there  
12 are documents of which the Commission learned only  
13 recently that his counsel has reviewed and  
14 specifically identified as relevant and necessary  
15 for Captain Moore to proceed with the hearings.  
16 Other documents have been identified by Captain  
17 Moore's counsel as specifically relevant and have  
18 not yet been received. Under the circumstances,  
19 beginning the hearings is simply no longer an  
20 option.

21                   I note that Commission counsel  
22 supported the motion brought on behalf of the  
23 subjects, citing grave procedural fairness  
24 concerns. Similarly and appropriately, in my view,  
25 counsel for Amnesty International and the B.C.

1 Civil Liberties Association, Mr. Champ, also agrees  
2 that the procedural fairness rights of Captain  
3 Moore may well have been infringed by the manner of  
4 the government's use of section 38, and although he  
5 takes no formal position on this motion, he  
6 recognizes that through no fault of their own the  
7 procedural fairness rights of all of these subjects  
8 are at risk at this stage.

9                   In light of the great unfairness  
10 that had been caused to the subjects of the  
11 complaint by the lack of documents and in some  
12 cases the inability to use these documents at the  
13 hearings and the dramatic and continuing effect on  
14 the progress of this inquiry, it is important to  
15 note how this situation came about, involving  
16 matters beyond the control of either the Commission  
17 or the parties.

18                   What must be understood is that  
19 the lack of documents and the unfairness caused to  
20 the subjects is not related to the need to protect  
21 national security. This case is not about national  
22 security concerns versus concerns for fairness and  
23 access to documents. None of the subjects before  
24 us have argued that they are precluded from  
25 presenting their position because they wish to rely

1 on information that has been redacted or censored  
2 to protect national security. What has happened is  
3 that the subjects and the Commission have been  
4 precluded from accessing materials, a large portion  
5 of which will no doubt ultimately be determined to  
6 be unclassified.

7                   The reason invoked by the  
8 government to refuse access to the documents and  
9 information is solely based on the fact that the  
10 cumbersome review processes they are engaged in to  
11 determine which parts of the documents need to be  
12 censored have not yet been completed. Worse, in  
13 some cases, we have been told that the documents  
14 will not be produced because too much information  
15 has been edited out.

16                   Only one set of documents, the  
17 ones that had been provided to the Commission  
18 before any decision to call public hearings was  
19 made, have been returned in redacted form by the  
20 government. The last set of these redacted  
21 documents was received in May 2009. It should be  
22 made clear that these were not new documents. What  
23 was new was that the government now advised the  
24 Commission of the portions of the documents already  
25 provided before the decision to call public

1 hearings that would be blacked out or redacted.

2                   Having reviewed the documents,  
3 Commission counsel indicated in her submissions  
4 that she was satisfied with many of the redactions,  
5 although some of the other redactions appeared  
6 unnecessary or excessive and, hence, have been  
7 challenged by the Commission in a separate process  
8 before the Federal Court.

9                   Commission counsel indicated  
10 clearly that, in any event, she is prepared to  
11 proceed with the documents as redacted. The  
12 documents have been requested since, and that are  
13 now said to be in the process of being reviewed,  
14 relate to the same or similar subject matters. In  
15 all logic, once the process of review is completed,  
16 and we will continue to hope that some day it will  
17 be, large portions of these documents should remain  
18 unredacted, as was the case for the initial set of  
19 documents. Yet, at present, the Commission and the  
20 subjects are precluded from accessing even those  
21 unclassified portions of the documents. They are  
22 prevented from receiving groups of documents that  
23 have already been reviewed on the ground of the  
24 entire set of potentially relevant documents must  
25 be reviewed first.



1 interpreted in a manner that takes into account the  
2 legitimate need to protect national security  
3 confidentiality. This question does not arise  
4 before us today as it is not access to redacted  
5 parts of documents that is sought by the subject  
6 but access to documents, period.

7                   The Commission has always been and  
8 will continue to be respectful of the government's  
9 legitimate interest in protecting national security  
10 information. It will not take any action that  
11 would put at risk the security or safety of members  
12 of the Canadian Forces serving in Afghanistan. It  
13 will continue to ensure that all material is  
14 treated and protected in accordance with its  
15 security classification.

16                   The question that is raised here  
17 does not relate to any risk that the Commission  
18 will leak or fail to protect national security  
19 information. Mr. Préfontaine indicated during last  
20 week's hearings that his concern was not about the  
21 Commission somehow being "a sieve of information"  
22 or indeed providing information to those with a  
23 view to harming Canada's interests. He noted that  
24 the government's concern rather stemmed from the  
25 fact that the Commission had elected to hold public



1                   General stated that it takes  
2                   'disciplined Commission  
3                   counsel, Members of the  
4                   Commission and people on edge  
5                   to ensure objections in  
6                   time', in order to ensure  
7                   that potentially injurious  
8                   information is not disclosed.  
9                   While I do not agree with  
10                  counsel's observation, I see  
11                  no reason why this will not  
12                  occur in this case." (As  
13                  read)

14                  Accordingly, the real question  
15                  that arises is why, after so much time, do we still  
16                  not have access to the required documents. The  
17                  explanation for this situation was largely provided  
18                  in Commission counsel's submissions respecting the  
19                  history of the Commission's attempts to obtain  
20                  documents and in the submissions received from the  
21                  parties in response. The new facts revealed by  
22                  counsel for one of the subjects, Mr. Wallace, about  
23                  his own attempts to obtain documents from the  
24                  government were also instructive in this respect.

25                  What was made clear from the

1 submissions was that since this Commission has  
2 announced its decision to hold public interest  
3 hearings well over a year ago, not one single  
4 document has been provided -- new document has been  
5 provided by the government despite continued public  
6 statements that cooperation is being rendered to  
7 the Commission.

8                   The government counsel who have  
9 been responding to the Commission's requests for  
10 documents, Mr. Préfontaine and Ms. Richards  
11 principally, also happen to represent seven of the  
12 subjects before this Commission as already noted.

13                   Though the government is not a  
14 party to these proceedings, these counsel have  
15 presented some of their submissions on behalf of  
16 the government, not the subjects, particularly on  
17 the issue of the production of documents. The  
18 thrust of the submissions was to deny that the  
19 government was to blame for the delay in providing  
20 the documents, yet government counsel have not  
21 denied Commission counsel's statements that no new  
22 documents have been received since public interest  
23 hearings have been announced.

24                   Government counsel have taken the  
25 position that section 38 of the Canada Evidence Act

1 precludes them from providing classified materials  
2 to the Commission. The Commission's position has  
3 been that, contrary to what was the case previously  
4 when the Department of National Defence provided  
5 unredacted documents to this Commission early on in  
6 the investigation of the custody complaints, the  
7 decision to call public interest hearings has  
8 triggered the application of section 38.  
9 Government counsel's position is that there is not  
10 a matter of choice on their part -- this is not a  
11 matter of choice on their part but a requirement of  
12 the law that they must obey.

13                   According to government counsel,  
14 the fact that the Commission is not a designated  
15 entity pursuant to section 38 explains why no  
16 classified materials can be provided to it, despite  
17 the security clearance of its personnel and counsel  
18 and despite the security of its facilities. They  
19 claim this is because the Commission is not on the  
20 list of entities included in the section 38  
21 schedule which are allowed to receive information  
22 covered by section 38. The government maintains  
23 that this constitutes a significant roadblock to  
24 providing potentially sensitive information to the  
25 Commission, despite the fact that it remains within

1 the government's own control to include the  
2 Commission on the list in the schedule as it has  
3 been requested to do twice.

4           Even assuming, for argument's  
5 sake, that the government's position that  
6 classified materials cannot be provided to the  
7 Commission is correct, all that this should mean is  
8 that, prior to being provided, the materials must  
9 be reviewed and redacted. One would have thought  
10 that, almost one full year after the full document  
11 requests specifically addressing this complaint was  
12 made in November 2008, the government would have  
13 had time to redact and provide at least some  
14 documents.

15           Yet, we reconvened these hearings  
16 on October 7, 2009, only to be told that not one  
17 new document had been produced in the past year by  
18 the government. This is particularly surprising,  
19 to say the least, in light of the government's own  
20 assurances of cooperation as reiterated before this  
21 Commission last week. As early as February 2008,  
22 and subsequently on numerous occasions, including  
23 in March 2009, the government indicated it would  
24 provide the Commission with all the documents that  
25 the government would be compelled to provide if a

1 summons were issued. Last May 2009, government  
2 counsel assured Commission counsel that the review  
3 process then underway would soon yield results, as  
4 documents collected in response to at least some of  
5 the requests were being redacted and would be  
6 produced.

7 Government counsel was present  
8 when Commission counsel consequently announced in  
9 the May hearings that new documents would be  
10 received and disclosed to the parties over the  
11 summer, and they did not indicate in any way that  
12 this information was incorrect.

13 In these hearings last week,  
14 government counsel reiterated that it would  
15 "continue to cooperate" with the Commission. This  
16 leaves intact the mystery of how it is possible  
17 that in months and months of discussions and  
18 reviews not one single document was provided.

19 What can be understood about the  
20 government's explanation for this lack of documents  
21 is twofold. First, government counsel has blamed  
22 the number of documents requested -- the document  
23 requests issued by the Commission in its request  
24 and then in its summonses covering those same  
25 requests. Government counsel has argued that the

1 documentary disclosure process is entirely within  
2 the control of Commission counsel and has insisted  
3 on the fact that, though asked, Commission counsel  
4 has not provided an order of priority in which she  
5 wished to receive the documents. Mr. Préfontaine  
6 indicated:

7 "The problem that we face --  
8 and this is the Government of  
9 Canada speaking, the provider  
10 of the information -- is  
11 that, for example, Ms.  
12 Kristjanson has focused on  
13 reports of investigations  
14 related to Afghan detainees  
15 and has wondered why they  
16 were not produced. Well, if  
17 you were to look at the  
18 complete list that she drew  
19 your attention to, you'll see  
20 that it's a list that makes  
21 18 pages that request the  
22 Government of Canada to  
23 produce all of those  
24 documents and that doesn't  
25 set any order into which the

1 Commission wishes to receive  
2 them." (As read)

3 If I understand correctly, the  
4 position that is being advanced here is, because  
5 there were too many requests and no indication of  
6 what was most important, nothing could be provided  
7 in response. While this may have explained why  
8 every request could not be answered, it remains  
9 difficult to understand why at least some documents  
10 were not provided, especially when there existed  
11 particular categories of documents that had been  
12 identified and that were clearly relevant.

13 As part of its explanation for  
14 this, government counsel referred to the need to  
15 review the materials pursuant to section 38 to  
16 protect sensitive information. Mr. Préfontaine  
17 concluded that it was not surprising that with "all  
18 those demands, informal and formal, and faced with  
19 the obligation to review everything to ensure that  
20 sensitive information is not inadvertently  
21 disclosed, the process would be long and arduous."

22 Though not directly raised by  
23 government counsel in these hearings, the  
24 government has in the past taken the position that,  
25 until all of the documents collected in response to

1 the Commission's requests have been reviewed and  
2 redacted, no document at all can be produced. On  
3 October 5, 2009, Ms. Richards wrote on behalf of  
4 the Attorney General that:

5 "We also advised you that, in  
6 our experience, documents  
7 subject to a section 38  
8 notice are not reviewed and  
9 produced on a piecemeal  
10 basis, as you have suggested,  
11 because the risk of  
12 inadvertent disclosure of  
13 sensitive information would  
14 be heightened."

15 Commission counsel has reported in  
16 her submissions that the government adopted this  
17 position to refuse to produce a specified group of  
18 documents until all other documents were reviewed  
19 and to argue that in light of the number of  
20 outstanding requests the could take months, if not  
21 more.

22 Commission counsel stated:

23 "Essentially, Commission  
24 counsel is put in a position  
25 where we have been told that

1                   unless we abandon a large  
2                   portion of our document  
3                   requests, no documents will  
4                   be received because the  
5                   totality of all documents  
6                   collected in response to the  
7                   request cannot be released  
8                   until the whole has been  
9                   reviewed."

10                   To argue that nothing at all could  
11                   be provided because too much is available defies  
12                   logic. Presumably, the government has been in the  
13                   process of collecting and reviewing documents for  
14                   section 38 purposes over the past year and, in that  
15                   process, must have completed the review of at least  
16                   some documents. If these documents are provided  
17                   with injurious information redacted pursuant to the  
18                   Attorney General's decision under section 38 and  
19                   other documents are later provided, again with  
20                   redactions and obviously taking into account the  
21                   documents previously released, I fail to see how  
22                   this could be argued to result in a heightened risk  
23                   of inadvertent disclosure of sensitive information.  
24                   In fact, this type of reasoning, taken to its  
25                   logical conclusion, could lead to the absurd result

1 that no documents would ever be produced as long as  
2 a specific matter was pending before a tribunal  
3 since other related documents could always be  
4 requested later.

5                   While conducting a review only  
6 once for an entire finite group of documents would  
7 no doubt be more convenient for government  
8 officials, this is not a legal requirement for the  
9 protection of national security. Where relevant  
10 groups of documents have been identified, there is  
11 no reason why the government cannot review and  
12 produce these specific documents even while  
13 continuing to endeavour to provide responses to  
14 other potentially broader requests. In this case,  
15 these comments are not purely hypothetical. There  
16 were clearly relevant documents that have already  
17 been collected and identified but not yet have been  
18 produced.

19                   In particular, documents  
20 indicating whether any investigations were  
21 requested or conducted by the military police about  
22 the authorization of transfer of detainees despite  
23 an alleged risk of torture abuse were specifically  
24 requested by government counsel in November 2008.

25                   As pointed out by counsel for the

1 complainants, Mr. Champ, this particular request  
2 related to an issue that has always been recognized  
3 by government and by the subjects of the complaint  
4 as being within the jurisdiction of the Commission:  
5 the duty to investigate.

6 In May 2009, government counsel  
7 advised that documents had been identified in  
8 response to this request and were being reviewed  
9 and redacted in order to be provided to the  
10 Commission.

11 Commission counsel, surprised to  
12 learn that there could indeed have been  
13 investigations into the matters at the very heart  
14 of the failure to investigate complaint, though  
15 review of the materials provided and witness  
16 interviews conducted before public hearings were  
17 called indicated no such investigations,  
18 immediately wrote to clarify the request,  
19 specifically asking whether there were documents  
20 about -- these were documents about the  
21 investigations into the authorization of transfers  
22 to an alleged risk of torture during the time  
23 period targeted by the failure to investigate  
24 complaint. The government has never provided any  
25 response to this request. No documents have been



1 government of the fact that investigations into the  
2 very matter, as I said, at the heart of this  
3 complaint were in fact conducted. He submitted  
4 that late disclosure was discourteous and showed  
5 disrespect to the proceedings and the Commission as  
6 a whole. He stated that his clients took on this  
7 matter as complainants in good faith and based on  
8 their view that a very serious issue was raised.  
9 He noted that they had been working very hard on  
10 this process for a year and a half under the  
11 premise or understanding that there were no  
12 investigations by the military police and that they  
13 were disconcerted to learn about the possible  
14 investigations after extensive proceedings in the  
15 Federal Court and before this Commission had  
16 already been undertaken.

17                   Considering the importance of  
18 these documents and the fact that they were part of  
19 a group of documents that were already identified  
20 in May 2009, a group that should have been reduced  
21 following Commission counsel's clarified request, I  
22 can only express disbelief that the government  
23 still maintains that the documents cannot be  
24 produced until all other potentially relevant  
25 documents have been reviewed and redacted. The

1 existence of this group of highly relevant  
2 documents requested early on in the process makes  
3 it clear that it would have been possible for the  
4 government to produce at least some documents in  
5 redacted form prior to the reconvening of these  
6 hearings, yet the government chose not to do so.

7                   Another set of obviously relevant  
8 documents that had been identified early on but  
9 were not provided to the Commission despite  
10 outstanding requests were the documents assembled  
11 for Mr. Wallace. As we have learned last week,  
12 those documents were assembled as a result of a  
13 list of relevant documents that Captain Moore  
14 himself, then the Canadian Forces Provost Marshal,  
15 identified as relevant to this complaint. Captain  
16 Moore was obviously in a unique position to  
17 identify relevant documents.

18                   Since Commission counsel had also  
19 been requesting documents relevant to the  
20 complaints in sufficiently broad terms to capture  
21 all potentially relevant documents, and government  
22 counsel has complained about that breadth of the  
23 requests in no uncertain terms, the documents  
24 assembled at the direction of Captain Moore would  
25 also have been responsive to the Commission's

1 requests. Indeed, as pointed out by Commission  
2 counsel, the fact that government counsel confirmed  
3 that at least part of the Moore documents were  
4 targeted by section 38 notice indicates that they  
5 were also considered responsive to the Commission's  
6 requests or summonses as such notices were being  
7 issued over the documents collected in response.  
8 In fact, Captain Moore's counsel, having reviewed  
9 the documents, identified them as relevant to the  
10 present complaint and as subject to an obligation  
11 on his part to disclose them to the Commission.

12                   This package of documents had  
13 already been assembled by DND as of June 9, 2009,  
14 and possibly earlier. The government was even able  
15 to redact the documents informally for the purposes  
16 of providing them to Mr. Wallace so that he could  
17 bring them to his non-secure office. Yet, the  
18 government did not see fit to provide this set of  
19 easily identifiable and apparently easily  
20 reviewable and redactable documents to the  
21 Commission despite outstanding requests.

22                   The other explanation provided by  
23 the government for its complete inability to  
24 provide any documents in the past months is even  
25 more baffling. It relates, as I understand it, to

1 the distinction that is being drawn between what  
2 has been termed a formal and an informal review  
3 process.

4                   Mr. Préfontaine has explained in  
5 submissions before the Commission that there exist  
6 two different processes for redacting documents.  
7 One that he has described as the formal process  
8 entails a determination of what information is  
9 potentially injurious to national security, an  
10 evaluation of whether the information is relevant  
11 to the matter it is being requested for and a  
12 weighing of the competing interests to arrive at a  
13 final decision on what information needs to be  
14 redacted.

15                   This process, which was described  
16 as "fairly long," is complete with an internal  
17 challenge function, in Mr. Préfontaine's words, to  
18 ensure that what is authorized to be disclosed will  
19 not cause injury or, conversely, that what is  
20 protected is not overly broad.

21                   However, there also exists an  
22 informal process which Mr. Préfontaine explained  
23 can be used to speed things up and which he said  
24 was in fact used to redact the documents provided  
25 to Mr. Wallace and the documents that had been

1 initially provided to the Commission before the  
2 decision to hold public hearings was made.

3                   This informal process entails only  
4 an identification of sensitive or potentially  
5 injurious information. As a result, it will often  
6 produce over-redacted documents, that is, documents  
7 with more information censored than what would  
8 ultimately be done following the formal process.

9                   The documents provided to Mr.  
10 Wallace were in this category of potentially  
11 over-redacted documents. As such, by definition,  
12 the information left unredacted was not sensitive  
13 or potentially injurious and could have been  
14 disclosed to this Commission with no risk at all to  
15 national security. Yet, the government refuses to  
16 produce the documents until we have been fully put  
17 through the formal redaction process, of course  
18 along with all other documents ever requested by  
19 the Commission, and have come out with potentially  
20 less redactions. In the meantime, the subject  
21 Captain Moore is told that he simply cannot use the  
22 documents in cross-examining witnesses or in  
23 fulfilling his disclosure obligations to the  
24 Commission. This, it must be understood, is what  
25 the government now alleges constitutes the

1 so-called legal limitations to its ability to  
2 produce documents to the Commission in response to  
3 the outstanding requests and summonses.

4 Contrary to what was argued by  
5 government counsel, the reason why no new documents  
6 have been produced in the past year is not because  
7 the law prohibited such production and required  
8 waiting further before anything could be produced.

9 The reason, instead, relates to what Mr.  
10 Préfontaine described as a "policy reason," that  
11 is, the government's desire to avoid publicly  
12 disclosing documents that might be overly redacted  
13 and that might subsequently require engaging in  
14 what he described as "that seesaw process of one  
15 day protecting and the next day lifting." Surely  
16 it cannot be contrary to law to disclose documents  
17 when all of the sensitive or potentially injurious  
18 information they contain has been edited out.

19 While I can understand the  
20 embarrassment or inconvenience that can result from  
21 the government when it has to revise its positions  
22 publicly about what information needs to be  
23 protected on national security grounds, this cannot  
24 be a sufficient reason to deprive subjects of the  
25 complaint of the ability to use documents that

1 otherwise pose no risk to national security. This  
2 should also not have been a sufficient reason to  
3 delay the present proceedings by creating a  
4 situation where not only some documents are  
5 unavailable, but all documents requested since the  
6 filing of the failure to investigate complaint are  
7 unavailable.

8                   The logic behind the government's  
9 argument that no documents could be produced  
10 because of the need to submit all documents to a  
11 lengthy formal review process has not impacted only  
12 on the smaller group of documents provided to Mr.  
13 Wallace. In fact, as indicated by Mr. Préfontaine,  
14 the quicker informal redaction process was  
15 initially being used to review the documents  
16 requested by the Commission, including the  
17 documents about the investigations that were  
18 allegedly conducted into this matter.

19                   However, when the Commission began  
20 to challenge some of the redactions applied through  
21 the informal process and retained outside counsel  
22 to challenge these specific redactions, engaging a  
23 section 38 process over the information they  
24 censored, government counsel wrote to the  
25 Commission counsel to advise that, as a result, the

1 informal process would no longer be used. Any  
2 documents requested in the future which contained  
3 sensitive or potentially injurious information  
4 would be the object of a section 38 notice,  
5 Commission counsel was told last July, and would  
6 then have to be reviewed through the lengthier  
7 "formal section 38 CEA process." And indeed, as  
8 related by Commission counsel, section 38 notices  
9 were then issued over many of the documents  
10 collected in response to the summonses issued by  
11 the Commission.

12 Government counsel then took the  
13 position that, since the notices had now been  
14 issued, abiding by the provisions of the Canada  
15 Evidence Act was now mandatory for all counsel  
16 involved. Government counsel, in effect, indicated  
17 that the government itself now had no choice but to  
18 engage in the lengthy formal section 38 review  
19 process before anything was produced, even for the  
20 documents that were already midway through the  
21 informal process before, such as the documents  
22 allegedly demonstrating that investigations took  
23 place.

24 In correspondence dated October 5,  
25 2009, government counsel specified: "We do not

1 control the process of documents once a notice has  
2 been given under section 38 of the CEA." In other  
3 words, according to the government, it has now  
4 become impossible to speed things up in any way,  
5 despite the fact that we know that a more informal  
6 and quick redaction process does exist, was under  
7 way and was abruptly abandoned. All counsel have  
8 now become hostage, so to speak, to the formal  
9 review process, and no one can even advise how long  
10 the review will take.

11                   It is clear that the complete  
12 absence of documents before us in fact results from  
13 policy and administrative concerns on the part of  
14 the government rather than from the strict  
15 operation of the law. This is how we find  
16 ourselves where we are today, forced to adjourn the  
17 proceedings out of fairness to the subjects since  
18 obviously they should not be the ones to suffer  
19 because of the government's conduct.

20                   It does deserve note that many of  
21 the objectives of the Commission have been  
22 frustrated so far not by any party before the  
23 Commission, nor by any of the national security  
24 concerns that could arise in this file once reviews  
25 are fully completed, but by a legalistic and

1 technical approach on the part of the government.

2 In the Arar Inquiry, Commission  
3 O'Connor explained that he was at times faced with  
4 overbroad national security confidentiality, or  
5 NSC, claims presented on behalf of the government.

6 Justice O'Connor commented:

7 "In legal and administrative  
8 proceedings, where the  
9 Government makes NSC claims  
10 over such information, the  
11 single most important factor  
12 in trying to ensure public  
13 accountability and fairness  
14 is for the Government to  
15 limit, from the outset, the  
16 breadth of those claims to  
17 what is truly necessary."

18 (As read)

19 In the present case, the  
20 government's failure to heed this warning and the  
21 government's failure to attempt to limit rather  
22 than broaden needlessly the documents it refused to  
23 produce have significant consequences. Not only  
24 does this type of behaviour promote "public  
25 suspicion and cynicism about legitimate claims by

1 the government of national security  
2 confidentiality," as stated by Commissioner  
3 O'Connor, but in this case it has created  
4 unfairness for the subjects of the complaint.

5 I also note that other impediments  
6 to the holding of these hearings have been  
7 discussed before us. For example, the section 38  
8 notice has been issued over the knowledge possessed  
9 by Richard Colvin, presently the Deputy Head of the  
10 Intelligence Liaison Office at the Canadian Embassy  
11 in Washington. Government counsel have advised  
12 that the impact of this notice is to preclude Mr.  
13 Colvin entirely from providing any information to  
14 the Commission, either in a public interest hearing  
15 or a prehearing interview. As a result, Commission  
16 counsel has advised that she has been unable to  
17 conduct a prehearing interview with Mr. Colvin.  
18 Further, it is unknown whether Mr. Colvin will be  
19 able to testify before this Commission, even if the  
20 Commission were to rule that the summons issued to  
21 him is valid and that he likely possesses relevant  
22 information, as we are told he himself alleges in  
23 the affidavit he has provided and that is now in  
24 force.

25 We are also told a section 38

1 notice has been issued with respect to one other  
2 witness, CSC employee Linda Garwood-Filbert, and  
3 that similar notices could be issued with respect  
4 to most, if not all, of the other witnesses. The  
5 impact this could have on the hearings is uncertain  
6 at this time, and the solutions proposed by  
7 government counsel involve either private  
8 interviews conducted by government counsel alone or  
9 private hearings where any section 38 objections  
10 would then be referred to the Federal Court.

11                   However, Mr. Préfontaine appears  
12 to have backtracked on this somewhat indicating  
13 last week that holding the hearings in public was  
14 also an option that was available, although he  
15 qualified it was not the safest choice. It is  
16 nevertheless unclear what position the government  
17 would take for witnesses subject to 38 notices, in  
18 light of the fact that government counsel has  
19 stated in the past that such a notice would  
20 preclude Mr. Colvin from providing information in  
21 testimony until the matter was resolved by the  
22 Attorney General or the Federal Court.

23                   Further, it should be noted that  
24 one of the options that could have averted some of  
25 those concerns, the holding of prehearing

1 interviews, with a possibility for government  
2 counsel to vet statements of anticipated evidence  
3 for each witness and flag section 38 concerns, is  
4 not available in this case. This is because  
5 government counsel has advised that each and every  
6 witness he represents has refused to meet with the  
7 Commission counsel for such an interview. We refer  
8 here of course to witnesses only who are not  
9 subjects of the complaint. Government counsel has  
10 also taken the position, which this Commission  
11 finds to be quite incredible, that the government  
12 cannot require such witnesses, its own employees or  
13 members of the Canadian Forces, as part of their  
14 work-related duties, to attend for interview.

15                   As a result, the Commission  
16 remains in the hands of the government as to what  
17 testimony will take place in light of the existing  
18 and potential section 38 notices and cannot take  
19 positive steps to mitigate the concerns through  
20 prehearing interviews in light of the government's  
21 insistence on the witnesses' individual rights to  
22 refuse to be interviewed.

23                   Hence, in addition to the clear  
24 unfairness the government created for the subjects  
25 by not making any documents available, there are

1 also other impediments that can be expected to  
2 result from some of the government's positions and  
3 that could hinder the proceedings. It can only be  
4 hoped that all of these issues will be resolved  
5 during the adjournment.

6                   For all these reasons I conclude  
7 that the Commission cannot proceed at the present  
8 time. Accordingly, I will grant the subjects'  
9 motion and adjourn these proceedings by the  
10 following order.

11                   The Commission hereby orders  
12 pursuant to section 38 of the Rules of Procedure  
13 For Hearings Before the Military Police Complaints  
14 Commission, that this hearing is adjourned to a  
15 date to be determined pending resolve of the  
16 matters of appeal and, more particularly, the  
17 provision of documents by the government sufficient  
18 to allow the inquiry to proceed in a manner which  
19 ensures fairness to the parties.

20                   I will conclude by saying that  
21 these matters have attracted much public attention  
22 and expectation re: answers. The Commission very  
23 much regrets having to incur further delay and to  
24 leave the public record as it is at this time. As  
25 I have said before, the concerns raised by the

1 complainants are serious in the interests of what  
2 have been referred to as the victims or potential  
3 victims. They are also potentially -- they also  
4 potentially call into question the honour and  
5 professionalism of Canada's military police in  
6 discharging their solemn duty to uphold the Rule of  
7 Law within the Canadian Forces, even in the midst  
8 of Canada's most substantial military engagement in  
9 a half century.

10                   When I speak of the public record,  
11 I am not, to be sure, speaking of the Commission's  
12 evidentiary record in respect of this hearing. As  
13 of this moment, despairingly little evidence is  
14 before us in the context of the formal proceedings  
15 of this public interest hearing. Nonetheless, over  
16 the past two and a half years of the preceding  
17 public interest investigation and other inquiries  
18 preliminary to these hearings, certain information  
19 has come to the attention of the Commission that,  
20 in fact, moved the Commission to convene this  
21 hearing and underscored the importance of the  
22 inquiry. Some of that information is indeed  
23 already in the public domain. A case in point is  
24 that of Richard Colvin and his affidavit, as  
25 discussed earlier here this morning.

1                   The danger and difficulty in all  
2 of this is that what I refer to -- what I will  
3 refer to as "information" is incomplete and/or  
4 untested before this Commission. It cannot  
5 properly be referred to as a complete evidentiary  
6 basis of fact. Accordingly, we, the Commission, do  
7 not and cannot draw any conclusions or implications  
8 from such information and caution the public to  
9 adopt similar restraint.

10                   The Commission is fully aware of  
11 the sensitivity of the detainee issue. We  
12 appreciate the reality that, by inquiring into the  
13 conduct of military police in respect of these  
14 allegations, facts might well come to light which  
15 reflect on the actions and decisions of those  
16 outside of the military police. But as said  
17 earlier, that was never the purpose of this  
18 inquiry.

19                   Indeed, it is the government  
20 itself that bears significant responsibility for  
21 risking enhanced public attention to these  
22 sensitive matters.

23                   For over a year, the Commission  
24 sought to address this complaint through an  
25 investigation without hearings, but the government

1 failed to fully assist the Commission's access to  
2 relevant information, and so we were compelled to  
3 the more formal and public route of a hearing which  
4 was the only available means to compel information,  
5 or so the Commission thought.

6                   Agencies for the independent  
7 oversight of the police are intended to serve the  
8 people or the community on behalf of the government  
9 that created them, that is, in maintaining  
10 confidence in the police, unquestionably a priority  
11 for any democratic government today. The norms of  
12 independent oversight of the police across Canada,  
13 and indeed such international standards as do  
14 exist, dictate that such oversight agencies be  
15 created in statute form with the purpose of  
16 providing independence, both real and perceived,  
17 from the government of the day, of which the police  
18 are an agent.

19                   This Commission was so created in  
20 order to ensure its credibility and effectiveness  
21 in fostering public confidence in military  
22 policing, which effectively means the carrying and  
23 enforcement of the laws and standards that  
24 Canadians expect within their military, including  
25 from the chain of command, at home and abroad.

1                   Unfortunately, the fallibility of  
2 this arrangement has been baldly exposed herein  
3 when, quite out of step with the normal situation  
4 wherein the principal challenge to oversight is  
5 what has often been referred to as the "blue wall,"  
6 the government becomes the antagonist in the  
7 oversight piece as opposed to the police  
8 themselves.

9                   In such circumstances,  
10 notwithstanding establishment and empowerment by  
11 Parliament, experience to date in this matter has  
12 demonstrated that when the government decides not  
13 to cooperate there is no equality of arms. Indeed,  
14 herein the essential cooperation of the government  
15 has become a much-distorted concept as discussed  
16 earlier in this decision, seemingly Kafkaesque.

17                   It would seem that some of the key  
18 lessons of the Somalia experience from which this  
19 Commission arose wherein accusations, whether well  
20 founded or not, were fuelled by a total lack of  
21 transparency, have not been learned. Oversight of  
22 military policing, like military policing itself,  
23 presents a number of unique challenges. The  
24 Commission's goal throughout this process has been  
25 focused on one overarching objective, to ensure

1 public confidence in the integrity and  
2 professionalism of the military police and the Rule  
3 of Law.

4                   The Commission, as a mechanism for  
5 maintaining such confidence, has, for the time  
6 being, been frustrated in this case. We very much  
7 regret the additional delay occasioned by this  
8 adjournment in rendering this service to the  
9 Canadian people and indeed to the military police  
10 personnel involved who continue to live a  
11 government-enforced dark cloud of unproven  
12 suspicion. However, it is hoped that all concerned  
13 will understand the necessity and source of this  
14 further delay. The Commission continues to be  
15 committed to resolve these matters as soon as may  
16 be possible and in the public interest. To that  
17 end, we will rely on the government's undertaking,  
18 made through counsel during submissions last week,  
19 to provide documentation to the Commission during  
20 the course of this regrettable adjournment.

21                   Thank you.

22                   MS. KRISTJANSON: Excuse me, Mr.  
23 Chair. Because it's an oral decision, could the  
24 Vice Chair indicate whether he agrees with the  
25 decision?

1                                   MPCC MEMBER BERLINQUETTE: I agree  
2 with it.

3                                   THE CHAIR: Thank you.

4 --- Whereupon the hearing adjourned at 12:02 p.m.

I HEREBY CERTIFY THAT I have, to the best  
of my skill and ability, accurately recorded  
by Realtime and transcribed therefrom,  
the foregoing proceeding.

Michelle Anderson, RPR, CCR, CCP, CSR(A)

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