

The following contains extracts from the October 14th 2009 Afghanistan Public Interest Hearing transcript so as to only include the panel's decision. All relevant pages have kept their respective pagination from the original transcript.

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 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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