

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



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

Audience publique

Public Hearing

Commissaire

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

Commissioner

Tenue à:

Salon Algonquin
Ancien hôtel de ville
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Ottawa (Ontario)

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Algonquin Room
Old City Hall
111 Sussex Drive
Ottawa, Ontario

Wednesday, June 8, 2005

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Mr. Emelio Binavince	Minority Advocacy and Rights Council
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1 Ottawa, Ontario / Ottawa (Ontario)

2 --- Upon commencing on Wednesday, June 8, 2005

3 at 9:33 a.m. / L'audience débute le mercredi

4 8 juin 2005 à 9 h 33

5 THE REGISTRAR: Please be seated.

6 Veuillez vous asseoir.

7 THE COMMISSIONER: Good morning.

8 Mr. Gover?

9 MR. GOVER: Good morning,

10 Commissioner. Our first witness today is

11 Professor Peter Burns, and we have prepared a book

12 of reference materials in relation to Professor

13 Burns' testimony.

14 I would ask that that be marked

15 now as the next exhibit, please.

16 THE COMMISSIONER: Is that 123?

17 126? I must have been sleeping for the last ones.

18 --- Laughter / Rires

19 EXHIBIT NO. P-126: Book of

20 Documents entitled "Reference

21 Materials Compiled in

22 Relation to the Evidence of

23 Professor Peter Burns"

24 THE COMMISSIONER: Do you wish to

25 be sworn or affirmed?

1 MR. BURNS: Either. Swearing is
2 fine.

3 THE COMMISSIONER: Would you stand
4 and take the Bible in your right hand, please?

5 SWORN: PETER THOMAS BURNS

6 THE COMMISSIONER: Your full name?

7 MR. BURNS: Peter Thomas Burns.

8 THE COMMISSIONER: Thank you.

9 MR. GOVER: Commissioner, I will
10 be asking at the end of my preliminary questions
11 that you qualify Professor Burns as an expert in
12 the fields of international criminal law and
13 international human rights law, and especially the
14 prohibition against torture.

15 EXAMINATION

16 MR. GOVER: Professor Burns, your
17 curriculum vitae appears at tab 1 of what has just
18 been marked as Exhibit P-126, and I understand,
19 sir, that you graduated from law school at Otago
20 University in New Zealand in 1963.

21 Is that correct, sir?

22 MR. BURNS: That is correct.

23 MR. GOVER: You also acquired a
24 Master of Laws degree from Otago University in New
25 Zealand.

1 Is that correct, sir?

2 MR. BURNS: That is correct.

3 MR. GOVER: You began your career
4 as a law teacher in that year, 1963?

5 MR. BURNS: Yes.

6 MR. GOVER: You subsequently moved
7 to the province of British Columbia and you first
8 took up teaching duties at the University of
9 British Columbia faculty of law in 1968?

10 MR. BURNS: Yes.

11 MR. GOVER: And you then rose
12 through the ranks of assistant professor and
13 associate professor, and you became a full
14 professor in July 1971?

15 MR. BURNS: Yes.

16 MR. GOVER: You served as Dean of
17 Law at the University of British Columbia from
18 1982 through 1991?

19 MR. BURNS: Yes.

20 MR. GOVER: And in all, I
21 understand you taught law at the University of
22 British Columbia for some 37 years.

23 MR. BURNS: Yes.

24 MR. GOVER: Your areas of special
25 interest include criminal law, international

1 criminal law and international human rights.

2 Is that correct, sir?

3 MR. BURNS: That is correct.

4 MR. GOVER: Your professional
5 activities have included service in the
6 international society for the reform of criminal
7 law?

8 MR. BURNS: Yes.

9 MR. GOVER: And in addition, you
10 became involved in the work of United Nations as
11 it relates to the prohibition against torture.

12 Is that correct, sir?

13 MR. BURNS: That is correct.

14 MR. GOVER: Can you tell us what
15 that worked entailed.

16 MR. BURNS: The seven so-called
17 universal human rights treaties that are sponsored
18 by the United Nations have committees which are
19 elected by State parties that are responsible for
20 ensuring their enforcement, and these are
21 sometimes referred to as monitoring bodies or
22 treaty reporting bodies.

23 In 1987, I was the Canadian
24 nominee to the Committee Against Torture, which
25 was the formal body administering the Convention

1 Against Torture, of which Canada was a party.

2 We received reports, State
3 reports, from countries as they ratified the
4 Convention. We investigated allegations of
5 systematic torture on the ground, assuming that a
6 State has not reserved on that particular part of
7 the Convention, and we received individual
8 complaints, assuming that they came from countries
9 that had opted into the individual complaints part
10 of the Convention.

11 All in all, our task was to ensure
12 that the terms of the Convention were observed by
13 the State parties.

14 MR. GOVER: I understand that you
15 were first elected in 1987 to the Committee
16 Against Torture and that you were subsequently
17 reelected in 1991, 1995 and 1999.

18 Is that correct, sir?

19 MR. BURNS: Yes, that is correct.

20 MR. GOVER: And in fact you
21 chaired the committee from 1998 through the end of
22 your term in 2003.

23 MR. BURNS: Yes.

24 MR. GOVER: In your role as a
25 member of the Committee Against Torture, in

1 addition to what you have already described, you
2 also took part in the drafting of what is known as
3 General Comment No. 01, I understand.

4 MR. BURNS: Yes.

5 MR. GOVER: We will deal with that
6 in the course of your testimony, but it is found
7 at tab 5 of Exhibit P-126.

8 Is that correct?

9 MR. BURNS: Yes.

10 MR. GOVER: In addition to the
11 work that you carried out as a member of the
12 Committee Against Torture, you also served as a
13 country rapporteur.

14 Is that right?

15 MR. BURNS: A country rapporteur
16 for many of the State reports, yes.

17 MR. GOVER: Can you tell us, sir,
18 what the role of a country rapporteur is?

19 MR. BURNS: Yes. A country
20 rapporteur is responsible for ensuring that the
21 State report is analyzed fully, that relevant
22 issues are teased out from it, and that a whole
23 series of questions that are regarded as relevant
24 to the ultimate question "is the country actually
25 implementing the terms of the Convention?" are

1 made available to the committee at the time of the
2 actual hearing with the State delegation.

3 As well as that, the country
4 rapporteurs tended to be those that met with and
5 analyzed information from non-governmental
6 organizations as well.

7 MR. GOVER: I understand, sir,
8 that you have taken the time to write various
9 articles about the Convention Against Torture.

10 Is that right?

11 MR. BURNS: Yes.

12 MR. GOVER: If we turn to your
13 curriculum vitae, at page 8 of the publications
14 record which is appended to your curriculum vitae,
15 just to refer to a few of the many publications
16 that appear there, on page 8 the third-last entry
17 I see there is entitled, "The Convention Against
18 Torture and Other Cruel, Inhuman or Degrading
19 Treatment or Punishment", (with Joseph Voyame) in
20 The Manual on Human Rights Reporting for the
21 U.N.O. Centre for Human Rights.

22 Is that correct, sir?

23 MR. BURNS: That is right.

24 MR. GOVER: In addition, at the
25 bottom of that page appears the publication "The

1 United Nations Convention Against Torture and
2 Other Cruel, Inhuman or Degrading Treatment or How
3 it is Still Better to Light a Candle than Curse
4 the Darkness". And that was an article written
5 with Obiora Okafor.

6 Is that correct?

7 MR. BURNS: That is correct.

8 MR. GOVER: That article in fact
9 appears at tab 17 of Exhibit P-126.

10 Is that correct?

11 MR. BURNS: Yes.

12 MR. GOVER: And on the next page,
13 page 9, I note that you have written about "Crimes
14 Against Humanity: International Protection and
15 International Developments" in papers that were
16 presented in the year 2000.

17 Is that correct, sir?

18 MR. BURNS: Yes.

19 MR. GOVER: You have also written
20 a paper entitled "The United Nations Committee
21 Against Torture and its Role in Refugee
22 Protection". That was a paper presented to the
23 International Association of Refugee Law Judges,
24 which was reprinted in the Georgetown Immigration
25 Law Journal.

1 Is that correct, sir?

2 MR. BURNS: Yes.

3 MR. GOVER: And that paper is
4 reproduced at tab 16 of Exhibit P-126. Am I
5 correct?

6 MR. BURNS: Yes.

7 MR. GOVER: Further, you wrote the
8 paper which appears as the next entry with Sean
9 McBurney, "Impunity and the United Nations
10 Convention Against Torture: A Shadow Play Without
11 an Ending?". That was a chapter in a book
12 entitled "Torture as Tort".

13 Is that correct, sir?

14 MR. BURNS: That is correct.

15 MR. GOVER: That chapter appears
16 at tab 14 of Exhibit P-126.

17 MR. BURNS: Yes.

18 MR. GOVER: And the next entry is
19 "The Convention Against Torture and Diminishing
20 Impunity". This was a paper that you presented at
21 a conference entitled The Changing Face of
22 International Criminal Law, and it appears at tab
23 15.

24 Is that correct, sir?

25 MR. BURNS: Yes.

1 MR. GOVER: And at the bottom of
2 the page, I note three further papers that you
3 have written in relation to "The Convention
4 Against Torture"; two in 2002 and one in 2003, the
5 last of which was a lecture given to the Vancouver
6 Institute at the University of British Columbia
7 entitled "The Convention Against Torture: From
8 Pinochet to a World Without Borders".

9 That lecture, or those notes,
10 appear at tab 18 of Exhibit P-126.

11 Is that correct, sir?

12 MR. BURNS: That is correct.

13 MR. GOVER: Those are my
14 questions, Mr. Commissioner, during the
15 qualification stage. I don't know if my friends
16 have any questions or submissions.

17 THE COMMISSIONER: Any questions
18 or submissions from other parties?

19 MR. WALDMAN: Just that we
20 absolutely support his qualifications as an
21 expert.

22 THE COMMISSIONER: All right.

23 MR. FOTHERGILL: No questions.

24 Thank you.

25 THE COMMISSIONER: I am satisfied

1 that Professor Burns should be qualified as an
2 expert to express opinions with respect to
3 international criminal law, international human
4 rights and prohibitions against torture.

5 MR. GOVER: Thank you very much,
6 Commissioner.

7 Professor Burns, if you could turn
8 now to tab 2 of Exhibit P-126, please, here we
9 have the Convention Against Torture and other
10 Cruel, Inhuman or Degrading Treatment or
11 Punishment.

12 What I would ask you to do at this
13 point is to provide us with an overview of the
14 history of the Convention Against Torture.

15 MR. BURNS: Well, it depends on
16 who you speak to as to your view of the history of
17 the Convention.

18 I place much of the impetus on the
19 Swiss Committee Against Torture because of the
20 eminence of a couple of very, very significant
21 Swiss intellectuals who happened to also be rather
22 well-to-do at the time and managed to carry this
23 agenda, and also the activity occurring out of
24 London by Amnesty International.

25 This started occurring in the '60s

1 and picked up speed in the '70s, and ultimately
2 there was a resolution before the General Assembly
3 and that spun off into the Convention Against
4 Torture.

5 The Convention came into existence
6 in 1987 with the 27th ratification, and from that
7 point to the present day where there are now 139
8 ratifications, the Convention tended to be, until
9 the most recent Convention on Migratory Workers,
10 tended to be the least ratified of all the
11 international human rights conventions.

12 One can understand that, because
13 the obligations that the Convention imposes on
14 States parties are very general, quite deep in
15 terms of impact on the domestic legal system, the
16 criminal justice system in particular, and in many
17 instances imposed relatively onerous economic
18 burdens, particularly on smaller countries and
19 micro-States.

20 They had to change their
21 legislation. They had to organize their police
22 forces, reorganize their military in terms of the
23 way in which military dealt with prisoners,
24 et cetera. They then had to ensure there was
25 somebody in the Department of Foreign Affairs who

1 had the capacity to pull all the information
2 together that the Convention requires to be
3 presented to the committee and then, actually
4 having done all that, come to Geneva for at least
5 five days, which for small countries is a major
6 economic burden.

7 So 139 States doesn't sound that
8 large at the moment, but I think in fact it is a
9 sign of real progress.

10 The Convention itself is broken
11 into four parts.

12 The first part of the
13 Convention -- and it all relates to the
14 jurisdiction of the committee.

15 The first part of the
16 Convention -- and I am not talking at it in terms
17 of Article 1 through 33.

18 The first part of the Convention
19 deals with what the committee regards as its most
20 significant function, and that is the reporting
21 function of States and the committee's receipt of
22 the State reports.

23 The theory is, as I understand it,
24 that if States are under an obligation to report
25 how they have actually observed the Conventional

1 obligations, and do so in public and are subjected
2 not merely to the scrutiny of the committee but
3 the committee's conclusions and recommendations --
4 and these are all then presented to the General
5 Assembly at the next meeting of a particular
6 committee -- then the public outing of countries
7 that aren't doing what they ought to do will have
8 an impact domestically.

9 It will then be up to domestic
10 NGOs and domestic bodies to put pressure on the
11 government to modify its behaviour and ensure that
12 it comports with the Convention. This sometimes
13 works and sometimes doesn't work, but that is the
14 theory that underlies the Article 19 reporting
15 obligation. It certainly takes up the bulk of the
16 time of the committee.

17 Then you have Article 20. Article
18 20 gives the committee the authority to engage in
19 an investigation where there is well-founded
20 evidence of systematic torture, assuming one
21 thing: that the State party has not, at the time
22 of the ratification, excluded the committee's
23 jurisdiction in that respect.

24 Many countries have excluded it;
25 other countries have not, and to their surprise

1 they have found that they are subjected to
2 investigations of this sort.

3 I think today every country knows
4 that unless it actually makes known its rejection,
5 then the committee has jurisdiction.

6 The committee regards this as a
7 very extensive interference with domestic
8 sovereignty, and it has not engaged in that many
9 of these investigations. It has received
10 information. It has acted on at least seven. It
11 has rejected some, and I am sure it has received
12 information since I was a member of the committee.
13 So we will be looking at that.

14 It is a very intrusive function of
15 the committees and it is a very expensive function
16 of the committees, so it is not undertaken
17 lightly.

18 The third jurisdiction is also a
19 crucial one, and this is the individual
20 communication jurisdiction.

21 Where a country has opted into the
22 individual communication system, the committee can
23 receive complaints from individuals that the State
24 party concerned is in breach of the Convention and
25 has in some way affected the interests of the

1 individual. Now, that is becoming an increasing
2 part of the committee's functions. As lawyers
3 become aware of it, it tends to become, if you
4 like, a final further review mechanism from those
5 countries that allow such individual complaints to
6 occur.

7 MR. GOVER: By way of example, I
8 would take you to Exhibit P-120, which I believe
9 is also before you, and to tab 21.

10 MR. BURNS: That is Sweden and
11 Egypt, is it?

12 MR. GOVER: It is the Agiza and
13 Sweden matter which is described as a decision,
14 but Communication No. 233/2003.

15 MR. BURNS: Yes, that is an
16 illustration of it.

17 MR. GOVER: So you have described
18 the three purposes so far of the Committee Against
19 Torture.

20 MR. BURNS: There was a fourth
21 that I don't think we need to spend any time on,
22 and that is that States, and virtually every
23 State, can opt into a system whereby one State
24 party can complain about another State party
25 breaching the Convention and the committee can act

1 as an arbiter.

2 To my knowledge it has never
3 happened. Every one of the human rights treaties
4 has the same provision. To my knowledge it has
5 never happened in any one of those, and one can
6 understand why.

7 MR. GOVER: How is the agenda set
8 for the country reports received by the committee?

9 MR. BURNS: It is set by the
10 secretariat initially. The secretariat does it
11 chronologically. As they are received, it then
12 chronologically just becomes part of the stack of
13 State reports to be dealt with in either the
14 coming session or the session after that.

15 Then it goes before the committee.
16 The committee looks at the chronological order,
17 and it may make some adjustments. And the
18 adjustments could be made on, from memory, one of
19 two bases:

20 If a country has been a State
21 party for many years but has not reported, but has
22 finally produced a report -- and this tends to be
23 indicative of some of the smaller countries that
24 just didn't have the resources to pull the thing
25 together and get it to the committee -- then the

1 committee is likely to take it out of order and
2 deal with that.

3 If it is a country where there
4 appears to be some sort of crisis, according to
5 information the committee has before it, it may
6 very well pull it out of the chronological order
7 and deal with that at the next session.

8 Bear in mind that we are only
9 talking about, historically, two sessions a year.
10 I am not quite sure if there are not three
11 sessions a year now. But historically it was two
12 sessions a year.

13 MR. GOVER: How long are the
14 sessions?

15 MR. BURNS: Two weeks and three
16 weeks.

17 And you can only get through six
18 in two weeks and nine or ten in three weeks. The
19 only reason that the committee has not been
20 swamped and unable to cope is the tardiness in the
21 States in their reporting. If they actually
22 reported according to the obligations contained in
23 the Convention, the committee would be completely
24 unable to deal with it.

25 MR. GOVER: How many times has

1 Canada reported to the committee?

2 MR. BURNS: Oh, at least three,
3 maybe four. At least three occasions.

4 I think you have a copy of their
5 last report here in the material.

6 MR. GOVER: Yes. Also in Exhibit
7 P-120 we have the consideration of the --

8 MR. BURNS: It will tell you at
9 the top.

10 MR. GOVER: -- fourth and fifth
11 periodic reports of Canada.

12 MR. BURNS: Canada was late with
13 the fourth, and it combined the fourth and fifth.

14 MR. GOVER: Now I would like to
15 discuss the signatories of the Convention. You
16 told us that it became effective upon the 27th
17 State party signing.

18 MR. BURNS: Yes.

19 MR. GOVER: In particular, can you
20 tell us when Canada signed the Convention? And I
21 understand, sir --

22 MR. BURNS: From memory, I cannot.

23 MR. GOVER: I understand that was
24 in August of 1985, and that Canada ratified in
25 June 1987.

1 MR. BURNS: I am sure you are
2 right. I just don't recall that.

3 MR. GOVER: The United States
4 signed in April 1988 and ratified in October 1994.

5 Is that correct?

6 MR. BURNS: Yes, that is correct.
7 That I remember.

8 MR. GOVER: Now, Syria, has it
9 become bound by the Convention Against Torture?

10 MR. BURNS: Yes. Syria ratified
11 it last year, and at the time of ratification it
12 excluded the committee's Article 20 jurisdiction.

13 At the same time, it did not opt
14 into the Article 22 jurisdiction. So it basically
15 has the reporting jurisdiction applying to it.

16 MR. GOVER: Now, Egypt, has it
17 become a party to the Convention?

18 MR. BURNS: It certainly has. It
19 has been a party for a very long time, one of the
20 earlier parties.

21 MR. GOVER: And Morocco?

22 MR. BURNS: Morocco has also, yes.

23 MR. GOVER: And finally, what can
24 you tell us, if anything, about Jordan?

25 MR. BURNS: Virtually nothing. I

1 know nothing about Jordan. I do not recall. I am
2 sure Jordan reported during the time that I was a
3 member of the committee, but I don't recall the
4 Jordanian report.

5 MR. GOVER: Now I would like to
6 turn to the substantive provisions of the
7 Convention, and in particular, if I could take you
8 back to tab 2 of Exhibit P-126, which is the
9 Convention itself and the definition of torture
10 which appears in Article 1.

11 MR. BURNS: Yes.

12 MR. GOVER: Can you take us
13 through, Professor Burns, the essential elements
14 of that definition?

15 MR. BURNS: Okay. This definition
16 has been criticized by commentators because it is
17 a purposive definition.

18 One must remember that the
19 Convention Against Torture was virtually the last
20 of those Conventions that was hammered out and
21 entered into by the world community before 1991,
22 prior to the collapse of the old Soviet empire.
23 So cooperation between the Eastern Bloc and the
24 Western Bloc was not that high, and suspicions
25 were the order of the day. As a consequence, many

1 of the concepts that were entered into these
2 Conventions tended to be compromised concepts.

3 I think that is evident when you
4 look at the definition of torture here because it
5 is pretty limited.

6 "For the purposes of this
7 Convention, the term
8 'torture' means any act by
9 which severe pain or
10 suffering ..."

11 Not pain and suffering or
12 suffering, but severe pain. And that created
13 enormous difficulty for the committee in its
14 dealings, particularly with the State of Israel,
15 over a period of about 12 or 15 years. Israel
16 used to interrogate terrorist suspects quite
17 rigorously, and the methodologies were, although
18 not admitted to by Israel, there was very strong
19 independent evidence of what these methodologies
20 were.

21 And the committee, as is the
22 committee's wont, tended to approach things with a
23 State party initially relatively softly and then,
24 if it didn't get cooperation from the State party,
25 increased both the contact and the tenor of the

1 so-called constructive dialogue.

2 And that is the way they talk
3 about it in the United Nations; that the
4 engagement with the committee and the State party
5 is a constructive dialogue. It is not one of us
6 holding a hammer to the other, and it is not
7 supposed to be a discourteous or even the sort of
8 discussion that you have when there is a lis. It
9 is not a common law plaintiff-defendant
10 relationship; it is a genuine dialogue.

11 Well, ultimately, we concluded
12 that Israel was guilty of a breach of the Article
13 1 definition of torture, and I am very pleased to
14 say that the Supreme Court of Israel, quite
15 independently of the committee, has prohibited
16 Israel from engaging in virtually all the types of
17 interrogation methods that the committee was
18 concerned with.

19 But what Israel did was to hide
20 behind the concept of "severe". Whenever you get
21 an adverb or adjective like "severe" attached to a
22 concept, then that gives the person who wants to
23 the opportunity of saying, "Hey, it is open
24 textured, and what I am doing doesn't fall within
25 it." And that was Israel's position: what they

1 were doing was causing a little bit of pain and
2 suffering, but not severe.

3 MR. GOVER: Understood. Are there
4 any other aspects of the definition of torture in
5 Article 1 that cause you to say that this is the
6 product of compromise?

7 MR. BURNS: I think the purposive
8 aspect of it is also a product of compromise. If
9 you have a look at the European Convention on
10 Human Rights there is no reference to purpose. I
11 was quite surprised that when they had the
12 opportunity of giving meaning to the definition,
13 they adopted the same position as is contained in
14 Article 1 of the U.N. convention, and they decided
15 to import purposes into it.

16 If you have a look at the
17 definition of crime against humanity in the Rome
18 Statute relating to the International Criminal
19 Court, there is absolutely no reference to
20 purpose, none whatsoever. There are some other
21 requirements, but certainly purpose is not part of
22 it.

23 MR. GOVER: So here, for example,
24 you are referring to the words:

25 "... for such purposes as

1 obtaining from him or a third
2 person information or a
3 confession, punishing him for
4 an act he or a third person
5 has committed or is suspected
6 of having committed, or
7 intimidating or coercing him
8 or a third person, or for any
9 reason based on
10 discrimination of any
11 kind..."

12 MR. BURNS: That is right.

13 MR. GOVER: Then it continues
14 about the capacity of the person who has
15 instigated, or inflicted, or consented to or
16 acquiesced in the infliction of the --

17 MR. BURNS: Right. That of course
18 is open-textured too. To a common lawyer, it
19 immediately smacks of vicarious liability. But,
20 in fact, the committee has given it a very, very
21 broad interpretation. The interpretation was
22 designed to ensure that a State party did not hide
23 behind a very technical attribution of that
24 concept which would have led to a person being
25 refouled to a place which was a failed State where

1 the chances of him either being executed or
2 tortured were, in the committee's eyes, very high
3 indeed.

4 So this open texturedness of
5 language can work in different directions.

6 We have never had a problem
7 applying it, I might add. I mean, we criticize
8 the purposive reference, but virtually every case
9 that we have had in front of us fell within one of
10 the purposes.

11 MR. GOVER: Right. And then, of
12 course, the definition also refers to the role of
13 a public official or other person acting in an
14 official capacity in inflicting, instigating,
15 consenting to or acquiescing in the treatment.

16 Is that right?

17 MR. BURNS: Yes. We take the view
18 that that extends to such things as paramilitaries
19 or any proxy for the government whatsoever. And
20 in the case that I was referring to a moment ago,
21 we extended it to a failed State where there is no
22 government but where certain tribal groups were
23 exercising quasi-governmental capacity within
24 small geographic areas. So we extended it that
25 far.

1 MR. GOVER: So then am I correct
2 in summarizing -- and I am a little fearful in
3 doing this with a law professor. But am I correct
4 in summarizing the three elements as these:

5 (1) severe pain or suffering;
6 (2) that is inflicted for one of
7 the specific purposes outlined; and
8 (3) by or at the instigation,
9 et cetera, of some sort of State agency or proxy
10 for a State agency?

11 MR. BURNS: Yes. The one other
12 thing that I don't think you want to waste time on
13 this is it doesn't include pain or suffering
14 arising only from inherent and incidental to
15 lawful sanctions. That is the conflict between
16 the western European and the United States' view
17 of capital punishment.

18 It is also a conflict that arose
19 when we met with Saudi Arabia, which applies
20 fundamental sharia law, and their argument was
21 that according to their domestic legal system,
22 sharia law, with its various forms of sanction,
23 applies because that is their domestic law and it
24 is excluded. All those sanctions are lawful
25 according to their domestic law.

1 They reacted very strongly when I
2 asked them to consider the question that lawful
3 sanctions means lawful according to domestic and
4 international law, because many of the sanctions
5 probably fell outside those that were lawful at
6 international law. So we had a very long, loud,
7 constructive dialogue.

8 MR. GOVER: Right. Now, earlier
9 this week we heard about differing practices of
10 various countries in ratifying treaties, and in
11 particular we heard about how the ratification
12 process in the United States involves obtaining
13 the advice and consent of the Senate. We have
14 heard some evidence as well about reservations and
15 understandings made by the Senate, or publicized
16 by the Senate, at the time of ratifying the
17 Convention Against Torture.

18 You have the U.S. reservations,
19 declarations and understandings in relation to the
20 Convention Against Torture and Other Cruel,
21 Inhuman or Degrading Treatment or Punishment at
22 tab 4 of Exhibit P-126.

23 MR. BURNS: Yes.

24 MR. GOVER: In particular, can I
25 ask you to comment on the Senate's advice and

1 consent as it relates initially to Article 1, and
2 then other aspects of the Convention.

3 First of all, do you think that
4 the --

5 MR. BURNS: If you are asking me
6 to comment on whether or not, in my view, the
7 constitutional provisions in the United States are
8 roughly similar to the Article 16 provisions -- is
9 that what it is?

10 MR. GOVER: Well, to begin with,
11 for example, at page 2 of 3, the United States
12 sets out its understanding -- well, first of all,
13 on page 1.

14 "... Article 1 is intended to
15 apply only to acts directed
16 against persons in the
17 offender's custody or
18 physical control."

19 And further above that, the United
20 States sets out its understanding that:

21 "... in order to constitute
22 torture, an act must be
23 specifically intended to
24 inflict severe physical or
25 mental pain or suffering and

1 that mental pain or suffering
2 refers to prolonged mental
3 harm caused by or resulting
4 from: (1) the intentional
5 infliction or threatened
6 infliction of severe physical
7 pain or suffering; (2) the
8 administration or
9 application, or threatened
10 administration or
11 application..."

12 MR. BURNS: Okay.

13 MR. GOVER: Can you comment on
14 that?

15 MR. BURNS: Yes, I am willing to
16 comment on both those points.

17 I will take the latter one first.

18 The United States is bound by the
19 Vienna Convention on the interpretation of
20 treaties, as all States are that ratified it, and
21 it cannot interpret the treaty in a way which is
22 inconsistent with the terms or purpose of the
23 treaty.

24 The notion of prolongation, as
25 distinct from transitory, which seems to flow out

1 of the U.S. understanding, is one that I find --
2 and if I were sitting on the committee and looking
3 at that that I would probably disagree with and
4 require the United States to justify in terms of
5 the purposes of the Convention.

6 In my view, torture can occur
7 where the pain or suffering is transitory.

8 I would take the view, for
9 example, that where electrodes are attached to
10 genitalia and only one severe jolt is received,
11 that that could, and in my view would, fall within
12 the definition of torture within Article 1, even
13 if you could introduce medical evidence that the
14 pain was transitory and medical evidence that this
15 individual did not suffer more than that and
16 mentally was not shocked by it particularly.

17 I think, also, you have to take
18 into account the circumstances in which the
19 application of force or threatened force is
20 occurring. If it is occurring in degrading
21 circumstances, that seems to me to reinforce the
22 view that what is happening is torture, even
23 although it might be a single instance, even
24 though the pain may not last very long. One shot
25 is very often enough to get what you want from

1 someone that you are interrogating. They don't
2 want any more of it.

3 So I have difficulty with their
4 understanding.

5 I have -- sorry, what was the
6 first one again?

7 MR. GOVER: Well, I would like to
8 take you back to this concept of vicarious
9 liability that you mentioned earlier --

10 MR. BURNS: Oh, yes, yes.

11 MR. GOVER: At page 2, the United
12 States set out its understanding that the term
13 acquiescence required that:

14 "... the public official,
15 prior to the activity
16 constituting torture, have
17 awareness of such activity
18 and thereafter breach his
19 legal responsibility to
20 intervene to prevent such
21 activity."

22 MR. BURNS: Right. The reference
23 you made in your original reading was with
24 reference to "within their custody or physical
25 control".

1 MR. GOVER: Right.

2 MR. BURNS: And I think that is
3 just too narrow an interpretation and inconsistent
4 with certainly the few instances that the
5 committee has construed Article 1 as extending to.
6 It is not difficult to at least conceive of a
7 situation where, in a situation of international
8 disorder, one State utilizes another State to act
9 as proxy. It is not within their physical
10 control, it is not within the territory, not under
11 arrest, not under their custody, but the State is
12 aware full well of what the circumstances of
13 handing the person over to another State will be.

14 I have absolutely no doubt -- or I
15 would suggest, with respect, that the committee
16 would construe that as a requisite construction of
17 that concept of acting in an official capacity in
18 Article 1.

19 MR. GOVER: Right. And then as
20 for this vicarious liability concept at the top of
21 page 2, the term acquiescence is understood in a
22 particular way.

23 What is your view in relation to
24 the U.S. understanding in that respect?

25 MR. BURNS: The way it is

1 expressed is relatively narrow, and probably is
2 narrower than the common law's domestic concept of
3 constructive knowledge or wilful blindness. I
4 doubt, with respect, that it is consistent with
5 the purpose of the Convention: that the State,
6 the public official or officials concerned must
7 know of the specific circumstances.

8 I suspect that the committee is
9 likely to take the view it is sufficient if the
10 public officials should have been aware -- it goes
11 beyond just negligence -- but are aware of crucial
12 facts that place them on notice but they choose
13 not to take them into account or just ignore them,
14 for whatever reason, which is effectively the way
15 in which the same concept of wilful blindness has
16 emerged in domestic criminal law in Canada, the
17 U.K., Australia and New Zealand. I can't speak
18 for the United States; I have never looked at it.

19 So it is very narrow, and I
20 suspect if it were applied literally the way in
21 which it is referred to there, it may very well
22 frustrate a rather important function of the
23 Convention.

24 MR. GOVER: If I could take you
25 back to the Convention itself and Article 1, I

1 note that within Article 1, clause 2 provides
2 that:

3 "This article is without
4 prejudice to any
5 international instrument or
6 national legislation which
7 does or may contain
8 provisions of wider
9 application."

10 MR. BURNS: Right.

11 MR. GOVER: Do you have any
12 comment about that?

13 MR. BURNS: I knew you were going
14 to ask that question, and I should have done a
15 little work on it.

16 In fact, the European Convention
17 doesn't have anything on that. As far as I am
18 aware, it doesn't bear on it.

19 I should have looked at the
20 Organization of American States Convention. But,
21 no, I really can't comment. I am not aware of
22 what the international instruments are that might
23 be wider than the Convention Against Torture.

24 MR. GOVER: Fair enough. I would
25 like to ask you now for some general comment in

1 relation to Article 2, please.

2 Article 2 provides in the first
3 clause:

4 "Each State Party shall take
5 effective legislative,
6 administrative, judicial or
7 other measures to prevent
8 acts of torture in any
9 territory under its
10 jurisdiction."

11 MR. BURNS: Okay. That one is
12 probably the first question that the committee
13 asks of States, particularly when they are
14 introducing their first report.

15 What the committee is looking for
16 is initially a criminalization of the crime of
17 torture, together with aiding, abetting,
18 conspiring and being a party -- or being, after
19 the fact, a party to the commission of torture.

20 What the committee is also looking
21 for is a definition of torture domestically that
22 is in terms identical to that contained in Article
23 1.

24 Regrettably, very few countries
25 have done that. Canada has done that. The U.K.

1 has now done it. France has now done it. A
2 number of countries have -- Australia, New
3 Zealand -- incorporated that definition.

4 And there are two reasons, I
5 think, why it is important to have that definition
6 incorporated.

7 The first is if you think about
8 the way in which information is collected to be
9 brought to the committee, it is initially
10 collected by the foot soldiers, the police
11 officers in the streets. They are the guys who
12 write the reports. Those reports are then
13 analyzed, then they are aggregated and they go up,
14 and then ultimately the guys in justice pull this
15 stuff together and try to fit it within whatever
16 the international treaty is that they are having
17 to deal with.

18 How on earth can you persuade a
19 committee in Geneva about the rate of torture in a
20 domestic situation if you don't have (a) a
21 domestic crime of torture and (b) the same crime
22 of torture that we are talking about in the
23 Convention? How can you do it?

24 Well, all you can do is say we
25 have murder, we have manslaughter, we have

1 assault, we have aggravated assault, and we have
2 gone through this stuff and we have disaggregated
3 the ones we think might be torture.

4 Well, that really is a very, very
5 amorphous and unscientific way of trying to
6 persuade anybody of anything.

7 However, I have to tell you that
8 the vast bulk of the States have not incorporated
9 a crime of torture domestically, taking the view
10 that their manslaughter, murder and assault
11 provisions are sufficient, and some of which have
12 not adopted specifically the definition, such as
13 the U.S.

14 The other reason is a very simple
15 one, and that is we think it has precatory
16 persuasive value if it is incorporated.

17 MR. GOVER: Just by overview, I
18 understand as well that Article 2 expressly
19 excludes the defence of superior orders.

20 MR. BURNS: Yes.

21 MR. GOVER: And expressly excludes
22 the concept that exceptional circumstances, such
23 as a state of war, or political instability, or
24 other public emergency may be used as a
25 justification for torture.

1 MR. BURNS: Right. It is not the
2 only convention that does that. The International
3 Covenant on Political and Legal Rights also has a
4 very specific provision, and virtually every
5 country has ratified that.

6 MR. GOVER: Let's turn then to
7 Article 3, which is sometimes referred to as the
8 nonrefoulement obligation.

9 MR. BURNS: Yes.

10 MR. GOVER: It provides in the
11 first part:

12 "No State Party shall expel,
13 return ('refouler') or
14 extradite a person to another
15 State where there are
16 substantial grounds for
17 believing that he would be in
18 danger of being subjected to
19 torture."

20 And in the second part:

21 "For the purpose of
22 determining whether there are
23 such grounds, the competent
24 authorities shall take into
25 account all relevant

1 considerations including,
2 where applicable, the in the
3 State concerned of a
4 consistent pattern of gross,
5 flagrant or mass violations
6 of human rights."

7 MR. BURNS: Yes.

8 MR. GOVER: How has the committee
9 interpreted this obligation?

10 MR. BURNS: The committee regards
11 this as an absolutely crucial part of the
12 Convention.

13 The first point to make is the
14 committee has specifically, on every occasion it
15 has examined it, taken the position it is
16 non-derogatable. There can be no derogation. And
17 that may have some relevance to another question
18 you want to ask a little later.

19 But so far as the international
20 obligations are concerned, the committee is clear:
21 no State can justify derogation of Article 3.

22 MR. GOVER: If I can take you back
23 to tab 4, and that the is United States
24 reservations and understandings at the time of
25 ratifying the Convention, and especially to page 2

1 of 3, at the top of the page beside (2):

2 "That the United States
3 understands the phrase,
4 'where there are substantial
5 grounds for believing that he
6 may be in danger of being
7 subjected to torture,' as
8 used in Article 3 of the
9 Convention, to mean 'if it is
10 more likely than not that he
11 would be tortured.'"

12 Do you have any comment in
13 relation to that, Professor Burns?

14 MR. BURNS: Well, I think it is
15 fairly obvious, in the light of the general
16 comment of the committee, that the committee's
17 view is that to require the civil standard of more
18 probable than not in every case is not compliance
19 with Article 3.

20 MR. GOVER: May I interrupt you
21 just to point out that General Comment No. 01 of
22 the committee appears at tab 5 of Exhibit P-126,
23 and I believe you are referring to point 6 at page
24 2.

25 MR. BURNS: Yes.

1 MR. GOVER: You have just
2 testified that, in your view, the concept of
3 meeting what we in Canada call the civil burden of
4 proof as part of the standard which is contained
5 in Article 3 of the Convention Against Torture is
6 not consistent with the Convention itself in
7 Article 3 or the purpose of it.

8 Is that right?

9 MR. BURNS: It is the purpose of
10 it because the Convention doesn't say anything
11 about it, and the committee has construed it, in
12 terms of its purpose, to say this is what is
13 expected of States parties.

14 Basically, the committee's view is
15 that to always impose a probability of torture is
16 in many instances too high. It would preclude --
17 I should say it would preclude a State from
18 feeling obliged not to send a person back to a
19 particular country in circumstances where the
20 committee feels the State should refrain.

21 If you look at it, as I did, very
22 much in the same way as the House of Lords did in
23 Baldman Stern when it was analysing the concept of
24 risk and what sorts of risks require a reasonable
25 person to respond and modify behaviour, in that

1 case Lord Reeves said a reasonable person is
2 actuated by material, or subsequently it was
3 called real risks in number two.

4 Material risks are those risks
5 that would legitimately influence one's behaviour.

6 There are many circumstances
7 involving the risk of torture where there is a
8 risk that goes beyond mere theory and mere
9 suspicion, but it may not, depending on what is
10 ultimately decided, amount to a probability.

11 But given the nature of the risk,
12 if you look at the history of the State concerned,
13 the sort of interrogation methods that they adopt,
14 the status of the individual -- it may be a person
15 who belongs to a group that is particularly
16 vulnerable in this country.

17 Kurds, for example, historically,
18 have been very vulnerable in a number of
19 countries, and the mere fact of being a Kurd puts
20 you into a different risk category than being
21 anybody else in those countries.

22 So taking these all into account,
23 although we might if we were a legal tribunal
24 sitting there looking objectively saying, "You
25 know, you just haven't shown me it is more

1 probable than not," we have taken the view that
2 given the purposes of the Convention, in those
3 circumstances where there is a real or material
4 risk, even though it may not be a probability, a
5 State is under an obligation to exercise its
6 choice in favour of the individual not running
7 those risks.

8 MR. GOVER: How do you factor into
9 that analysis the pattern within the State -- and
10 I am referring now to the second part of Article
11 3 -- of a consistent pattern of gross, flagrant or
12 mass violations of human rights?

13 MR. BURNS: It is a really
14 important factor and historically human rights
15 bodies have regarded that as a crucial factor.
16 But there have been a large number of cases that
17 we have dealt with where there was a State where
18 there were gross patterns of violations of human
19 rights where the individual just didn't fit
20 because of status into the category that was going
21 to be exposed to it.

22 For example -- again, I have to be
23 careful here. In old Congo -- which is now broken
24 up into different Congos. But I believe it was
25 the old Republic of Congo. If you happened to be

1 a former military person who was being refouled,
2 the evidence was clear: the moment you landed and
3 you were in the hands of the people at the
4 airport, you were pretty badly treated. They just
5 had this practice of dealing with people who had
6 displayed such disaffection to the State very
7 rigorously.

8 But that didn't necessarily apply
9 to other people who fell into different types of
10 categories. We have in fact agreed that States
11 can send others back where it was considered that
12 the risk was very low, it was not a real risk,
13 despite the fact that that was a country where you
14 could argue that it fitted into the Article 3,
15 paragraph 2, type of fact pattern.

16 MR. GOVER: Right. And could you
17 take us through what the General Comment No. 01
18 says then about standard of proof?

19 MR. BURNS: Okay. That is tab...?

20 MR. GOVER: That will be tab 5.

21 This is General Comment No. 01,
22 dated November 21, 1997. This was at a time when
23 you were on the committee.

24 Is that correct, Professor Burns?

25 MR. BURNS: Yes.

1 MR. GOVER: Were you chair of the
2 committee then?

3 MR. BURNS: I am just trying to
4 remember. What date was that?

5 MR. GOVER: November 21st, 1997.

6 MR. BURNS: 1997.

7 MR. GOVER: Actually, you became
8 chair in 1998.

9 MR. BURNS: Yes. So I was not the
10 chair.

11 MR. GOVER: Regardless of that,
12 were you involved in the drafting of this?

13 MR. BURNS: Oh yes, yes. There
14 were two of us that drafted this. The other
15 member is now a judge of the Human Rights Court in
16 Europe.

17 What we basically did was to set
18 out what we understood the States were in need of,
19 and that is direction concerning their obligations
20 under Article 3. It became clear to us that they
21 needed to know, because many States were viewing
22 it differently and their practices were different.
23 We basically formulated a set of practices which
24 indicated that a State would be in breach of
25 Article 3 if it returned a person to a State where

1 there is "a real or material risk of torture".

2 We stated that the test does not
3 have to go to the point of being highly probable,
4 and that, in a sense, is a tip of the cap to the
5 Americans. We didn't want to confront that
6 directly at that point, as I recall, because I am
7 not sure that everybody on the committee would
8 have agreed or disagreed with it.

9 But in any event, everybody agreed
10 it doesn't go to the standard of high probability;
11 it goes beyond mere theory or suspicion. And
12 basically as long as there is a risk, in my view,
13 that could be characterized as material risk, that
14 would be sufficient for the State to be under an
15 obligation not to return or extradite a person to
16 that country of risk.

17 MR. GOVER: Would the fact that a
18 State has a notoriously poor record for violating
19 human rights, would that in itself be sufficient
20 to meet the standard?

21 MR. BURNS: Well, as a lawyer, I
22 have to say no, that is not in and of itself,
23 because it has to be the individual that is at
24 risk, which means you have to demonstrate this
25 individual, in these circumstances, is at risk and

1 that the risk goes to a point where you feel you
2 are under an obligation not to send back.

3 You would take into account the
4 conditions. You would take into account the known
5 disposition of the State to people of the sort.
6 You are under an obligation to do that. Those are
7 the ordinary sorts of facts that you would take
8 into account. But at the end of the day, as any
9 adjudicator must, you have to ask yourself whether
10 on the totality of the facts and these individual
11 facts, including the record of this country, was
12 this person at risk in the sense in which it is
13 referred to in the general comment of being
14 tortured?

15 And if the answer is yes, in my
16 view, you are under an obligation under the
17 Convention not to return or extradite that person
18 or deport that person.

19 MR. GOVER: Can you comment on the
20 role of diplomatic assurances, and in particular
21 where there may be a risk which is beyond mere
22 theory or suspicion, approximating even something
23 that you don't have to meet here, the risk of
24 highly probable, let's say? Does the mere fact of
25 a diplomatic assurance then permit a State to

1 return someone to another country where there is a
2 risk of torture?

3 MR. BURNS: Again, that would
4 depend on the circumstances. You are dealing with
5 the diplomatic world, and you are dealing with
6 States that exercise their own internal
7 jurisdiction, and jurisdiction with other States,
8 on the basis of comity and reciprocity.

9 If a State gives an assurance and
10 breaches the assurance, that is the end of it.
11 That would be the end of it vis-à-vis the State
12 that sent the person back but it would also be the
13 end of it insofar as all future attempts at
14 assurances from other States would be concerned.

15 And certainly the committee, I am
16 sure, would take the view that to rely on the
17 assurances of a State that had breached an
18 undertaking would be really, really bad behaviour
19 on the part of the State concerned.

20 It is most unusual for a State to
21 breach a diplomatic assurance. But you do get
22 States sometimes trying to weasel and sort of
23 taking the position it wasn't a real diplomatic
24 assurance, and it was really the State sending the
25 person back that was looking for a ground to send

1 them back and they misinterpreted the range of the
2 assurance, et cetera.

3 MR. GOVER: Right. Moving on then
4 to Article 10 of the Convention, taking us back to
5 tab 2, I note that Article 10 creates an
6 obligation on State parties to educate officials,
7 including law enforcement officers, who may be
8 involved in the treatment of individuals who are
9 arrested, detained or imprisoned.

10 Can you tell us what the
11 committee's experience is in relation to this
12 provision?

13 MR. BURNS: I am not sure that
14 this article is very satisfactorily applied in the
15 dealings between States parties and the committee,
16 because in virtually every case there will be a
17 few paragraphs by the State party in their report
18 saying that in the police colleges, in the
19 military, educational programs, the personnel are
20 advised they are not to torture people. It may
21 well be that this is a one-day or half-a-day or
22 two-hour portion of a 10-week or a 12-month
23 program. It is not at all clear very often.

24 But virtually every country claims
25 it does train its personnel not to torture.

1 Now, we know that some do, but
2 these are countries where torture is not endemic
3 anyway. Denmark has a big program for its police
4 officers and medical personnel, but torture is not
5 a problem in Denmark.

6 It is a tricky one, once again,
7 because it involves resources. The committee
8 would like to see more schools and military
9 training establishments, police colleges that have
10 big blocks of training dedicated to this. But
11 this is only one small part of these people's
12 training generally.

13 Every State says they do it. To
14 what extent one can take that with a grain of salt
15 or otherwise, is not entirely clear. Some
16 countries in fact do do it, and those countries
17 give us lots of paper on it.

18 MR. GOVER: Right. We have
19 discussed rather extensively the definition of
20 torture in Article 1.

21 Article 16 addresses cruel,
22 inhuman, or degrading treatment or punishment.

23 MR. BURNS: Yes.

24 MR. GOVER: Do you have any
25 comment regarding Article 16, and in particular I

1 note that we see the words again:

2 "... at the instigation of or
3 with the consent or
4 acquiescence of a public
5 official or other person
6 acting in an official
7 capacity ..."

8 In relation to the infliction of
9 cruel, inhuman or degrading treatment or
10 punishment not amounting to torture.

11 Is that correct?

12 MR. BURNS: Yes, that is correct.

13 Article 16 does not receive, in my
14 opinion, the focus it should receive in the State
15 reports and by the committee as a consequence.
16 The focus tends to be on torture, and one can
17 understand that. But in reality, if you look at
18 the whole range of what is happening in States,
19 Article 16 probably is more problematic than
20 Article 1.

21 But it is the Convention Against
22 Torture, and that is how people focus.

23 I have no doubt we would interpret
24 acquiescence of a public official in the same way
25 they did in Article 1, give it a very broad

1 construction, and it would extend to circumstances
2 where in a failed State you do have a group acting
3 as though they were a government agency, or if you
4 have a situation where some group is acting as
5 proxy, even though they are not paramilitaries in
6 the traditional sense. It would certainly extend
7 to paramilitaries.

8 I have no doubt it would extend,
9 for example, in the U.K. and in the United States
10 to private incarceration modalities, using
11 academic jargon, private prisons.

12 MR. GOVER: Is there a
13 nonrefoulment obligation in relation to cruel,
14 inhuman or degrading treatment?

15 MR. BURNS: No, there is not, not
16 under this convention.

17 MR. GOVER: Is there elsewhere in
18 international law?

19 MR. BURNS: I am not familiar with
20 the conventional obligation, and I am not familiar
21 with a customary international law obligation,
22 although if I looked at that, it may very well be
23 that there is one emerging in the light of
24 developments over the last five or six years.

25 MR. GOVER: Also, in Exhibit

1 P-120, we have -- that is the thicker volume to
2 which I referred you earlier --

3 THE COMMISSIONER: The Registrar
4 will get it.

5 MR. GOVER: We have at tab 23 the
6 "Conclusions and Recommendations of the Committee
7 Against Torture" at the conclusion of the 34th
8 session, and these conclusions and recommendations
9 related to Canada. This was the subject of some
10 comment by the witnesses yesterday.

11 Subjects of concern and
12 recommendations are set out at pages 2 through 4
13 of the conclusions and recommendations of the
14 committee.

15 You have taken the time before
16 testifying to review these, and in particular,
17 before we get to that, can you tell me how the
18 committee goes about formulating its conclusions
19 and recommendations?

20 And you are smiling, I note,
21 Professor Burns.

22 MR. BURNS: Well the first thing
23 you must recognise is that the committee is not a
24 court. The committee isn't even an administrative
25 review body. The committee is a monitoring body.

1 So it does have rules of procedure, and it does
2 observe the rules of procedure, but the members of
3 the committee are not necessarily legally trained.

4 I think there is at least one
5 third at the moment who are not legally trained.

6 And the way in which the
7 committee -- and this is true of all committees,
8 not just the committee against torture -- is that
9 a couple of members of the committee take the lead
10 role. They make sure that everything is read, all
11 the arguments are teased out, and they are the
12 ones who tend to draft the recommendations and
13 conclusions and subjects of concern which are
14 either adopted or not adopted by the bulk of
15 committee.

16 As well as that, in recent years,
17 the non-governmental organizations have become
18 rather more sophisticated and many of them have
19 representation prior to the meetings and they meet
20 with members of the committee and they press
21 points of view upon the members of the committee.

22 Now, these are usually the same
23 points of view that are on paper that the
24 committee has already received, but of course it
25 has more of an impact if you are dealing with

1 people who claim to have firsthand knowledge.

2 Again, bear in mind that the
3 committee is not like a court. It is not dealing
4 with primary evidence. It is dealing with
5 everything on the record, some of which may be
6 true and much of it may be untrue. Even States
7 parties may be gilding the lily when they are
8 presenting this stuff to the committee.

9 So the committee has all this
10 information, has met with people, has listened to
11 the States party. The States party has had a lot
12 of questions put to it. It goes away and comes
13 back with the answers, and then the conclusions
14 and recommendations and matters of concern are
15 formulated. They are formulated in private and
16 they are just laid on the States party when the
17 conclusions have been reached, et cetera.

18 MR. GOVER: Right. And then these
19 particular subjects of concern in relation to
20 Canada at pages 2 and 3 --

21 MR. BURNS: Yes?

22 MR. GOVER: Referring to, for
23 example, the Supreme Court of Canada's decision in
24 Suresh v. Minister of Citizenship and Immigration;
25 referring to the alleged roles of State party

1 authorities in the expulsion of Mr. Arar from the
2 United States to Syria, where torture was
3 reported; and then referring as well to the
4 provisions in the Immigration and Refugee
5 Protection Act 2002, among other subjects of
6 concern.

7 Do you have anything to say about
8 the subjects of concern that the Convention
9 Against Torture has identified here?

10 MR. BURNS: (a), (b) and (c). I
11 really don't have any comment on (b).

12 MR. GOVER: Which is the Arar case
13 in our particular --

14 MR. BURNS: That is this case,
15 yes. I believe that is what this Commission is
16 designed for.

17 (c), again, I really haven't
18 considered that very strongly.

19 (a) is one that gives me
20 considerable concern.

21 MR. GOVER: That is in relation to
22 the Suresh case.

23 MR. BURNS: Yes.

24 MR. GOVER: Why so?

25 MR. BURNS: Well, it appears on

1 one interpretation, although many people would say
2 the only interpretation, of the Suresh case that
3 there is still an avenue of opportunity for the
4 State to, that is to say Canada, to refoule
5 someone in circumstances where there is "a real
6 risk of torture".

7 My opinion is that Article 3 of
8 the Convention precludes that. Canada has
9 ratified the Convention, and that is a legal
10 obligation imposed upon the Canadian government,
11 and whatever the domestic law may be,
12 internationally the Canadian government is in
13 breach in those circumstances if it were to
14 refoule someone.

15 Personally, I cannot conceive of
16 the Canadian government refouling anybody where
17 there is a real risk of torture. I would be
18 absolutely shocked and dismayed if that happened.

19 I have lectured to immigration
20 people. I have talked to the people in Foreign
21 Affairs. They all understand, to my knowledge,
22 the ones I have spoken to, the obligation under
23 Article 3.

24 MR. GOVER: By the way, I should
25 have asked you: In consideration of country

1 reports, and in particular country reports from
2 Canada, as a member of the committee from Canada,
3 were you permitted to participate?

4 MR. BURNS: No, no. I recuse
5 myself from anything having to do with Canada.

6 MR. GOVER: If I could take your
7 attention now to the Recommendations, starting at
8 page 3 and carrying over to page 4, the first
9 recommendation relates to respecting the absolute
10 nature of Article 3 -- that is the nonrefoulement
11 obligation -- in all circumstances, and fully to
12 incorporate the provision of Article 3 into the
13 State party's domestic law.

14 Is that correct?

15 MR. BURNS: Yes.

16 MR. GOVER: Do you have any
17 comments in relation to that recommendation made
18 by the committee?

19 MR. BURNS: Well, I guess in the
20 light of Suresh, it would be desirable that the
21 government do something along those lines,
22 although I would have thought that it is using a
23 sledgehammer to crack a nut because in my opinion
24 they are under that obligation anyway.

25 MR. GOVER: Right. The only other

1 two recommendations that I would like to take your
2 attention to are, first, (d):

3 "(d) the State party should
4 insist on unrestricted
5 consular access to its
6 nationals who are in
7 detention abroad, with the
8 facility for unmonitored
9 meetings and, if required,
10 appropriate medical
11 expertise."

12 Do you have any comment in
13 relation to that recommendation, Professor Burns?

14 MR. BURNS: No, that is standard.
15 Most countries do in fact insist on unrestricted
16 access to nationals who are in custody abroad.
17 The big problem is 98 per cent of the time they
18 don't know their nationals are in custody abroad,
19 and in the bulk of those cases their nationals
20 don't want Canada to know they are in custody.

21 MR. GOVER: Right. And then the
22 subject of diplomatic assurances bears comment in
23 the next recommendation which reads as follows:

24 "(c) given the absolute
25 nature of the prohibition

1 against refoulement contained
2 in article 3 of the
3 Convention, the State party
4 should provide the Committee
5 with details on how many
6 cases of extradition or
7 removal subject to the
8 receipt of 'diplomatic
9 assurances' or guarantees
10 have occurred since 11
11 September 2001, what the
12 State party's minimum
13 contents are for such
14 assurances or guarantees,
15 what measures or subsequent
16 monitoring it has undertaken
17 in such cases and the legal
18 enforceability of the
19 assurances or guarantees."

20 Do you have any comment in
21 relation to that?

22 MR. BURNS: This is almost a "have
23 you stop beating your sister" type of conclusion.

24 Much of it I agree with. I think
25 a country like Canada ought to be able to, and

1 should be prepared to, reveal what its practices
2 are relating to diplomatic assurances. To that
3 extent it ought to be prepared to reveal which
4 countries it has dealt with upon this basis, and
5 also what follow-up it has initiated to see
6 whether or not the assurances were met; and if the
7 assurances weren't met, what sort of diplomatic
8 protests occurred.

9 That gets us back to the last
10 question, and that is what sort of sanctions has
11 Canada got? Canada has no sanctions except
12 diplomatic protest. No country has, apart from
13 protesting a breach if a breach occurs.

14 Of course if it ever happened,
15 Canada would never enter into an arrangement with
16 that country again of that sort. I guess that is
17 a form of sanction.

18 No, I don't see anything wrong
19 with requesting Canada to come up with that
20 information. I am not sure that Canada may not
21 try and hide behind questions of confidentiality,
22 but I can't see why, quite frankly.

23 MR. GOVER: Thank you, Professor
24 Burns. Those are my questions.

25 THE COMMISSIONER: How long are

1 you going to be, Mr. Waldman?

2 MR. WALDMAN: An hour.

3 THE COMMISSIONER: You will be
4 that long?

5 And how long would you expect to
6 be, Mr. Fothergill?

7 MR. FOTHERGILL: Rather like
8 yesterday, I would say, 15 minutes before I hear
9 this estimate.

10 That may lengthen depending on the
11 questions that Mr. Waldman has.

12 THE COMMISSIONER: Why don't we
13 take a ten-minute break?

14 I will say this to you: You can
15 obviously take as long as you wish. We have a
16 full day and we have to finish with the three
17 witnesses today, whatever time it is.

18 The second comment is I do get it
19 the first time when Mr. Gover leads. So I urge
20 you to go to areas that he hasn't covered.

21 MR. WALDMAN: I promise I won't
22 repeat anything that is already covered.

23 THE COMMISSIONER: We will take a
24 ten-minute break and then resume.

25 THE REGISTRAR: Please stand.

1 --- Upon recessing at 10:52 a.m. /

2 Suspension à 10 h 52

3 --- Upon resuming at 11:05 a.m. /

4 Reprise à 11 h 05

5 THE REGISTRAR: Please be seated.

6 Veuillez-vous asseoir.

7 THE COMMISSIONER: Mr. Waldman?

8 EXAMINATION

9 MR. WALDMAN: I would like to pick
10 up just where we left off on the report with
11 respect to Canada.

12 You say you would be shocked if --

13 MR. BURNS: Excuse me. What tab
14 is that?

15 MR. WALDMAN: That is tab 23. The
16 one you were looking at Of Exhibit P-120.

17 MR. BURNS: Thank you.

18 MR. WALDMAN: You told us you
19 would be shocked if Canada ever attempted to
20 deport someone to torture. I gather that means
21 you are not aware that the Federal Court has
22 already ruled, in the case called Sogi and other
23 cases, that Suresh allows for deportation to
24 torture?

25 MR. BURNS: I'm aware of Suresh

1 and that window of opportunity. Ultimately it is
2 an executive decision.

3 I will be shocked if it
4 actually happens.

5 MR. WALDMAN: I will leave it
6 at that.

7 MR. BURNS: Your comment would be
8 that I shock easily.

9 --- Laughter / Rires

10 MR. WALDMAN: No, my comment would
11 be that Canada has already attempted to remove
12 someone and it was only as a result of a stay that
13 he was not removed. So that the executive
14 decision to remove in Sogi back to torture has
15 already been made.

16 How do you respond to that?

17 MR. BURNS: I'm shocked.

18 --- Laughter / Rires

19 MR. WALDMAN: Thank you.

20 More importantly, with respect to
21 page 4, I wanted to tie this in to Article 14 of
22 the Convention.

23 Page 1 of the recommendations
24 is that Canada:

25 "...should review its

1 position under article 14 of
2 the Convention to ensure the
3 provision of compensation
4 through its civil
5 jurisdiction to all victims
6 of torture;"

7 So perhaps we could go back and
8 look at Article 14 in the Convention, because we
9 didn't really cover this.

10 If I could ask you first about the
11 obligation to ensure redress for compensation and
12 why this recommendation might have been put in.

13 So perhaps you could tell us a bit
14 about the obligation for redress?

15 MR. BURNS: The obligation is
16 fairly clear. If an agency of the State has
17 injured someone through torture, then the agency
18 of the State is under a legal obligation, not only
19 domestically but qua this Convention, to provide
20 reasonable methods for redress, and redress
21 includes compensation and rehabilitation. So we
22 sort of start from that point.

23 That is relatively obvious, except
24 in many countries there is no domestic law which
25 imposes that obligation on States. That has

1 created all sorts of difficulty for victims who
2 have to rely on international groups, charitable
3 groups, to provide rehabilitation.

4 Can I just take this up?
5 Because I did take the trouble to read the report
6 of the debate in the Committee Against Torture
7 relating to this.

8 MR. WALDMAN: Okay.

9 MR. BURNS: To be quite frank with
10 you, I was taken aback. Because if I understand
11 the way in which it arose as a question to the
12 Canadian delegation, it was essentially: Why do
13 you, Canada, not provide a system of compensation
14 made available to victims of torture who are
15 tortured somewhere else? That is, I understand,
16 basically what the issue was.

17 The person raising the question
18 based it very largely on the literal language of
19 the Convention. This is the first time in all
20 these years I have ever seen anybody raise this
21 question.

22 When you have a look at the
23 travaux préparatoire you will see it was never
24 considered in the travaux. But the person raising
25 the question drew an analogue with the U.S. Alien

1 Torts Claim Act.

2 The U.S. Alien Torts Claim Act
3 is almost sui generis. You won't find anything
4 in other countries that remotely resembles that.
5 It was designed in the 18th Century. It was
6 effectively, I think, the second piece of
7 legislation that was enacted by the
8 Continental Congress.

9 It was designed to deal with
10 piracy. Pirates would attack vessels, seize their
11 goods, and very often they would land on the
12 Eastern Seaboard of the United States and make hay
13 with all the stuff that they have stolen from
14 people on the high seas.

15 What the Alien Torts Claim Act was
16 then concerned to do was to give aliens, not
17 Americans, an action in the United States against
18 foreigners whose events occurred and caused damage
19 to them outside the United States, namely the
20 pirates in this case.

21 I'm delighted to let you know that
22 it was used very successfully in the 20th Century
23 to extend it to torture committed in Central
24 America by one foreigner against another foreigner
25 where they both ended up in the United States. So

1 it was extended to that.

2 But, quite frankly, I don't think
3 it is -- I don't think it is a legitimate
4 interpretation of Article 14 if you are arguing
5 that Canada is under an obligation to provide
6 access to Canadian courts to provide a civil
7 remedy for torture that has occurred outside
8 Canada. If that is the question? I mean, I don't
9 want to formulate your question, but I thought
10 that is what you were driving at.

11 MR. WALDMAN: It was a little bit
12 more sophisticated than that, it was to provide
13 access to a civil remedy to people who have been
14 tortured outside of Canada when they could not
15 have access to -- if they are Canadian citizens,
16 and if they could not get access to the remedy in
17 the country where the torture occurred?

18 MR. BURNS: My response to that
19 is twofold.

20 One, I do not think that is a
21 legitimate interpretation of the Article 14
22 purposes.

23 Second, I would be delighted if
24 Canada was willing to introduce legislation of
25 that sort. How effective it would be, I suspect,

1 is another matter entirely.

2 But, again, the educative effect
3 of that, and the moral effect of that, might be
4 quite profound. But I don't believe it to be an
5 obligation under Article 14.

6 MR. WALDMAN: Okay. If I could
7 ask you to turn back to tab 4 of your book at 126?

8 I'm not going to repeat all the
9 concerns that you expressed about the reservations
10 of the Americans and your view that many of them
11 are not in compliance with CAT.

12 Would it be fair to say that in
13 light of all these reservations which, in your
14 view, do not express U.S. compliance with CAT,
15 that there are legitimate concerns about the
16 extent to which the United States is complying
17 with the Convention Against Torture, given these
18 reservations that you have stated fall outside the
19 interpretation of the committee?

20 MR. BURNS: If you want me to
21 answer yes or no, I'm not sure I can.

22 I would say for the most part the
23 United States is complying. Their reports
24 indicate that for the most part they are
25 complying, but there are some crucial classes of

1 case where there is a clear division of view
2 between the CAT and the Convention and the United
3 States and the Convention, and they are the ones
4 you have just referred to.

5 MR. WALDMAN: The ones that I
6 referred to?

7 MR. BURNS: Yes.

8 MR. WALDMAN: But those are pretty
9 significant differences?

10 MR. BURNS: Very significant.

11 MR. WALDMAN: So in terms of
12 non-return to torture, there is a very significant
13 difference between your view and the American view
14 on the threshold beyond which persons should not
15 be sent back to torture?

16 MR. BURNS: Yes. The only
17 qualification I would make is in the vast
18 bulk of cases the real risk will also be a
19 probability. It is those key cases where the real
20 risk is less than a probability where that real
21 distinction lies.

22 MR. WALDMAN: Right. In those key
23 cases the Americans might be sending people back
24 to torture because they are applying a higher
25 threshold than the ones that you are --

1 MR. BURNS: If they are, it would
2 be my personal view that that is in contravention
3 of Article 1.

4 MR. WALDMAN: I won't take you to
5 the other examples that you gave us on that.

6 I wanted to deal briefly with
7 the definition of torture, because my friend took
8 you to the mental -- o the physical aspects, but
9 he didn't ask you to deal with the mental aspect
10 of torture.

11 MR. BURNS: Yes.

12 MR. WALDMAN: Is it not correct
13 that torture can occur even if it is doesn't
14 involve physical abuse?

15 MR. BURNS: Yes.

16 MR. WALDMAN: In other words, in
17 Mr. Arar's case it is on the public record that he
18 said that during the first days of detention he
19 was beaten repeatedly with an electrical cord
20 during the course of interrogations that sometimes
21 lasted as long as 18 hours.

22 In your view, would that
23 constitute torture?

24 MR. BURNS: If that was
25 established, in my view that would certainly

1 be torture.

2 MR. WALDMAN: Let's move on to
3 other things that he alleged occurred to him.

4 He also alleged -- I mean he
5 stated, we are asserting it as a fact, that during
6 the period of time that he was detained he was
7 detained incommunicado without access to anyone in
8 a 3 by 6 by 9 cell that didn't have proper toilet
9 facilities and that this caused him to become
10 severely mentally disoriented. He was in darkness
11 for most of the time, there was a grate that
12 allowed rats and cats to urinate on him, and this
13 created severe mental anguish for him.

14 Would that treatment in and of
15 itself, in your view, constitute torture?

16 MR. BURNS: How long was he
17 constrained?

18 MR. WALDMAN: Ten months?

19 MR. BURNS: Ten months. In
20 this cell?

21 MR. WALDMAN: In this 3 by 6 by
22 9 cell that was --

23 MR. BURNS: Incommunicado the
24 whole time?

25 MR. WALDMAN: The only time he was

1 taken out was for interrogations and for nine
2 consular visits that lasted a half an hour.

3 MR. BURNS: So no social
4 interaction?

5 MR. WALDMAN: Absolutely no
6 social --

7 MR. BURNS: Assuming that that
8 was established, and assuming the medical evidence
9 supported it, I would regard it to be torture,
10 again subject to the purposive aspect of the
11 definition.

12 MR. WALDMAN: Well, we know that
13 he was held in detention for the purposes of
14 interrogation by the Syrian Military Intelligence
15 during that time as a result of him being deported
16 by the United States to Syria. So would that not
17 meet the purposive aspect?

18 MR. BURNS: Not simpliciter. It
19 has to be for certain specific purposes. I'm sure
20 you could fit it within any one of them.

21 MR. WALDMAN: Well, for the
22 purpose of interrogating him to extract evidence
23 about his alleged involvement in --

24 MR. BURNS: Confessions?

25 MR. WALDMAN: Confessions, yes.

1 MR. BURNS: That certainly fits
2 within it.

3 MR. WALDMAN: I wanted to ask you
4 about obligations of States who signed the
5 Convention to Prevent Torture. Is that something
6 that arises under international law from the
7 Convention Against Torture or any of the other
8 international conventions?

9 Do States have an obligation to
10 take steps to prevent one of their citizens, or
11 any citizen, from being tortured, aside from the
12 non-refoulement issue

13 MR. BURNS: Are you talking about
14 within their territory or a territory under their
15 control or through the agency of their people, or
16 do you mean does Canada have an obligation to stop
17 some people torturing some other people in the
18 polar regions of the south?

19 MR. WALDMAN: Let's take a
20 specific example related to the facts of this
21 case: the consular officials in New York.

22 If we assume a set of facts that
23 were that they were warned that there was a
24 serious risk that Mr. Arar might be sent to Syria,
25 that given the human rights record in Syria and

1 the reasons why he was being sent there, there was
2 a risk that he might -- a serious risk that he
3 might be tortured there.

4 If we make these two assumptions,
5 would the Canadian consular officials and the
6 Canadian government officials be under an
7 obligation to attempt to prevent his deportation
8 to Syria, to prevent the torture?

9 MR. BURNS: Under customary law,
10 one of the functions of the consul is to represent
11 the interests of the citizen abroad, and upon
12 being notified that one of the citizens is being
13 held in circumstances where there was a real risk
14 of torture, I would take the view that it would be
15 a real breach of the consular function not to at
16 least make inquiries.

17 MR. WALDMAN: If they made
18 inquiries and, based upon the information that was
19 provided, -- if, for example, a consular official
20 after they had been advised that there was a risk
21 of deportation to Syria, spoke to a senior U.S.
22 official and was told, "This is an extremely
23 serious case. Your ambassador should take it up
24 with the Department of Justice in Washington at
25 the highest levels," would there be an obligation

1 to proceed further and take this up at the highest
2 levels to prevent the deportation?

3 MR. BURNS: I am not sure whether
4 public international law imposes that positive
5 obligation, quite frankly, to go that far.

6 But where he would run a real risk
7 I think is in domestic law. The government
8 probably would find itself at the wrong end of a
9 negligence suit under the ordinary rules of
10 negligence if an official, having that knowledge,
11 failed unreasonably of course, being under a civil
12 law duty in Canada to take steps to protect and
13 failed to do so.

14 That is where I would probably
15 look rather than at customary international law,
16 because the rules -- the Vienna Convention on
17 consular rights, et cetera, is big on rights and
18 low on duty, and what international practice is I
19 have never examined very thoroughly on that
20 particular point, but I suspect it is pretty light
21 as well.

22 So I would say, according to the
23 rule of reason, yes, he should certainly, given
24 that information, investigate as part of the
25 consular function; and a failure to do so may

1 render the government responsible in some way
2 according to the domestic law of Canada, the law
3 of torts -- may. I don't assert that as a
4 positive.

5 MR. WALDMAN: I was intrigued
6 about one of the possibilities that you mentioned,
7 and I just wanted to raise it with you. There is
8 this possibility of State-to-State complaints --

9 MR. BURNS: Yes.

10 MR. WALDMAN: -- under the
11 Convention Against Torture?

12 MR. BURNS: Yes.

13 MR. WALDMAN: So let me ask you
14 this: If the Canadian government has protested to
15 the American government about Mr. Arar's
16 torture -- deportation to Syria, would it be
17 possible for the Canadian government to make a
18 State-to-State complaint to the Committee Against
19 Torture and ask the Committee Against Torture to
20 investigate --

21 MR. BURNS: To adjudicate.

22 MR. WALDMAN: -- to adjudicate
23 whether the U.S. violated the Convention?

24 MR. BURNS: This takes us over to
25 Article 33 whereby a State, when it ratifies, has

1 to opt in to the State-to-State complaint
2 mechanism.

3 MR. WALDMAN: I think you told us
4 the Americans opted into that.

5 MR. BURNS: I don't believe I did.
6 I mean, I would have to go and have a look at the
7 Convention and the time they ratified the
8 Convention.

9 Canada certainly has.

10 MR. WALDMAN: Assuming --

11 MR. BURNS: Assuming they both
12 have, then yes, the short answer would be Canada
13 could complain to the Committee Against Torture
14 and the Committee Against Torture could then
15 adjudicate the complaint, assuming the United
16 States has also opted in.

17 MR. WALDMAN: So would it be fair
18 to say that if Canada were concerned about the
19 conduct of the U.S. officials in deporting
20 Mr. Arar to Syria, one possible mechanism --
21 because we know that, for example, the American
22 authorities have not been willing to appear before
23 this Commission. So assuming that the Americans
24 ratified Article 33, would there not be another
25 mechanism for Canada to force the Americans to

1 account for their deportation of Mr. Arar through
2 the Convention --

3 MR. BURNS: That would be a
4 mechanism. But as I indicated, that mechanism is
5 in every treaty, every one of the international
6 human rights treaties, the universal ones. Not
7 one State has ever exercised it, and the reason is
8 quite clear. Once one State does it, all bets are
9 off. You know? They can't rely on comity. They
10 can't rely on the good offices of each State. Now
11 they have to cover their back against the other
12 States party to the Convention.

13 MR. WALDMAN: Wouldn't you agree
14 with me that if Canada were really concerned about
15 what happened to Mr. Arar and the illegality of
16 his deportation to Syria, that the Article 33
17 complaint might be an appropriate way for them to
18 get to the bottom --

19 MR. BURNS: It might.

20 MR. WALDMAN: Given the reluctance
21 or the refusal of the Americans to come here?

22 MR. BURNS: It might. I have
23 never seen a case of it so I don't know how it is
24 going to work.

25 But I would have thought that the

1 more obvious one would be diplomatic notes to find
2 out just what is going on.

3 MR. WALDMAN: I think diplomatic
4 notes have already been sent and haven't helped.
5 So if the diplomatic note route were unsuccessful,
6 aside from the Article 33 route, is there any
7 other route -- the International Court, can Canada
8 do that as a mechanism for forcing the Americans
9 to explain their actions in Mr. Arar's case?

10 MR. BURNS: I know of no other
11 route.

12 MR. WALDMAN: There is no other
13 route.

14 MR. BURNS: Not that I am aware
15 of, except -- to require the Americans to justify
16 sending him back to Syria? Is this the bottom
17 line?

18 MR. WALDMAN: Or to provide
19 information in some kind of public forum as to why
20 they did it, what were the bases for it, and to
21 justify it, yes.

22 MR. BURNS: No, I don't know of
23 any alternative.

24 MR. WALDMAN: So the only way that
25 we could force the Americans to show their hand

1 would be through this Article 33 complaint?

2 MR. BURNS: As far as I am aware,
3 and then it would turn on just how the Committee
4 Against Torture interpreted its adjudicative
5 jurisdiction. You may not find it very
6 satisfactory.

7 MR. WALDMAN: Thank you.

8 I would like to deal with an issue
9 of information sharing. We know that Mr. Arar was
10 brought to the attention of the American
11 authorities as a result of information sharing
12 that was part of a national security
13 investigation. We know that other Canadians have
14 made allegations that they were detained and
15 tortured as a result of information sharing that
16 was given by Canadians to regimes that do not
17 respect human rights.

18 Given our international
19 obligations under the Conventions Against Torture,
20 and other conventions, do you have concerns about
21 sharing of information with regimes that do not
22 respect human rights when it results in Canadian
23 citizens being tortured?

24 Is that in compliance with our
25 international obligations?

1 MR. BURNS: I am just trying to
2 think -- I guess it is a reductio ad absurdum
3 argument you are raising. If Canada shares
4 information with the United States that leads to
5 someone being sent to another country where there
6 is a real risk of torture --

7 MR. WALDMAN: Right.

8 MR. BURNS: -- what mechanism is
9 there internationally to prevent that from
10 happening?

11 Well, if the Canadian officials
12 were wilfully blind, then you might be able to
13 argue they are complicit. You could argue that
14 they are complicit, if they know that this is what
15 is going to happen.

16 MR. WALDMAN: So this is an
17 offence both under -- so that would be an offence
18 under domestic --

19 MR. BURNS: It would be a breach
20 of CAT.

21 MR. WALDMAN: A breach of CAT?

22 MR. BURNS: Yes.

23 MR. WALDMAN: It would also be --
24 could it also be an offence under our domestic
25 law?

1 MR. BURNS: Oh, I think it could.
2 It could be a crime under our domestic law. We
3 have a crime of torture in this country, and we
4 have -- the common law has developed, you know,
5 the rules relating to aiding and abetting, and
6 conspiring, and also rules relating to
7 constructive knowledge and wilful blindness. I
8 mean, this could all be realized.

9 MR. WALDMAN: So if we take the
10 examples of Canadian citizens who have alleged in
11 public statements that they were detained in Syria
12 and tortured as a result of information that was
13 provided by Canadian authorities, would that also
14 fall into the category of complicity in torture?

15 MR. BURNS: Well, it would depend.
16 The Canadian government could pass along perfectly
17 legitimate information to another State relating
18 to security, and the other State will then utilize
19 it in a particular way.

20 If the Canadian government knew if
21 "X" then refoulement to a State that tortures,
22 then they would be in breach of the Convention.
23 Whether or not it would constitute something that
24 is suable civilly in Canada I think is a little
25 more oblique.

1 MR. WALDMAN: What you have just
2 said to me then suggests that if an official
3 shares information and has a reasonable
4 expectation that the sharing of that information
5 might lead to a person being detained in regimes
6 where there are human rights violations, that that
7 would be an obligation both --

8 MR. BURNS: I think that would
9 clearly be in breach of the CAT. You would be a
10 party to a breach of the CAT, even although you
11 are not the one that refouled them.

12 MR. WALDMAN: The justification
13 that we have seen throughout the documentation is
14 that information-sharing is necessary to protect
15 our national security. Would that be a proper
16 justification --

17 MR. BURNS: Article 2 of the CAT
18 says that necessity is not a defence, so it would
19 still be a breach of your international legal
20 obligation.

21 How that would resound to the
22 advantage of the individual domestically is
23 another matter. I mean, what do you do with it?
24 Do you just have a breach of the international
25 obligation out there in the stratosphere? You, as

1 a lawyer, are looking for remedies.

2 MR. WALDMAN: Right now I am also
3 concerned about this whole process of information
4 sharing, and the extent to which it is being
5 justified by the war on terrorism despite the fact
6 that we see that there are serious consequences to
7 Mr. Arar and other Canadian citizens about the
8 torture. I am asking you on that particular
9 level.

10 MR. BURNS: Okay.

11 MR. WALDMAN: If we establish that
12 a person is arrested, detained and tortured as a
13 result of the information sharing, that is a
14 breach of CAT?

15 MR. BURNS: As long as the person
16 rendering the information knew, or should have
17 known, or was wilfully blind to the fact that it
18 would be utilized for that purpose.

19 MR. WALDMAN: I would like to ask
20 you about using the fruits of torture.

21 Generally speaking, is it
22 acceptable for an official of any government --
23 let's be more specific, the Canadian government,
24 to receive statements that he knew or ought to
25 have known were extracted under torture and used

1 them by sending them to police officials?

2 MR. BURNS: The Convention Against
3 Torture does not prohibit that. What it prohibits
4 is the use of torture-obtained admissions in legal
5 proceedings except against the torturer.

6 MR. WALDMAN: Does legal
7 proceedings encompass national security
8 investigations?

9 MR. BURNS: The CAT has always
10 construed that to mean courtroom proceedings.

11 MR. WALDMAN: Only courtroom
12 proceedings.

13 MR. BURNS: But to my knowledge,
14 no one has raised the issue directly before with
15 CAT.

16 MR. WALDMAN: So is it not fair to
17 say that CAT could be -- one possible
18 interpretation of that -- that is Article --

19 MR. BURNS: Article 14 or
20 something -- no, Article 15.

21 MR. WALDMAN: Article 15. Perhaps
22 we could look at that for a second.

23 "Each State Party shall
24 ensure that any statement
25 made which is established to

1 have been made as a result of
2 torture shall not be invoked
3 as evidence in any
4 proceeding..."

5 So is it not fair to say that
6 that, at least on its wording, proceeding is broad
7 enough to cover not only legal proceedings but
8 other types of investigations?

9 MR. BURNS: Pre-trial
10 investigation?

11 MR. WALDMAN: Right.

12 MR. BURNS: You could make that
13 argument. I am not sure I would buy into it. But
14 if it was a civilian system, then you might very
15 well do it because they have a sort of
16 quasi-legal-investigative proceeding before the
17 actual hearing in court.

18 MR. WALDMAN: Are there any other
19 domestic or legal obligations that -- domestic or
20 international rules that would preclude officials
21 from receiving the fruits of torture that you are
22 aware of?

23 MR. BURNS: There may have been
24 some ruling of the Human Rights Committee under
25 the international covenant, but I am not aware of

1 it, if there has been. I have never looked at
2 that particular issue with respect to the European
3 Convention or the Organization of American States,
4 so I really can't answer that.

5 MR. WALDMAN: So if the Canadian
6 ambassador obtained the statements that Mr. Arar
7 had made when he was subject to torture and
8 brought them back to Canada and gave them to the
9 RCMP and CSIS for their use in his investigation,
10 that wouldn't be a violation of any international
11 rule that you are aware of?

12 MR. BURNS: Prima facie I would
13 not regard that as a breach of Article 15, but I
14 would want to listen to your arguments before I
15 finally made my mind up on that.

16 MR. CAVALLUZZO: Commissioner,
17 just to correct the record, the evidence is not
18 that the Canadian ambassador brought the statement
19 back and shared it with CSIS and the RCMP. The
20 evidence is that Mr. Pillarella brought the
21 statement back and gave it to the other
22 individuals at headquarters in DFAIT who shared
23 the information. I just wanted to ensure that
24 Mr. Pillarella...

25 MR. WALDMAN: Okay.

1 Perhaps I could take you to just
2 one briefing note and ask you to comment on this.

3 I am a bit lost. I don't know the
4 number. It is one of the Wayne Easter books, book
5 1 of Wayne Easter. My exhibit list doesn't go up
6 to that and we didn't put the number down.

7 It is Volume 1 of Wayne Easter.

8 THE COMMISSIONER: It is a memory
9 task.

10 MR. FOTHERGILL: I believe it is
11 P-117.

12 MR. WALDMAN: Exhibit P-117,
13 Volume 1, tab 49.

14 THE COMMISSIONER: Forty-nine?

15 MR. WALDMAN: Yes. I just want to
16 illustrate to you how the information was used.

17 Could you look to where it says
18 "Current Status"?

19 MR. BURNS: Yes.

20 MR. WALDMAN: This is a briefing
21 note that was sent by the Assistant Commissioner
22 of the RCMP in charge of the Criminal Intelligence
23 Directorate, Richard Proulx, on April 30th, 2003,
24 to the Commissioner of the RCMP, and under
25 "Current Status" it says -- and remember the

1 evidence before the Commission is that Mr. Arar
2 was tortured and under torture he made statements
3 to the Syrians.

4 It says:

5 "Arar remains in Syrian
6 custody. He was interviewed
7 by the Syrians and
8 volunteered he had received
9 training at the ... camp in
10 Afghanistan."

11 Are those statements, as a
12 distortion of what really happened in terms of the
13 fact -- sort of negating and denying the torture,
14 does that cause you any concern?

15 MR. FOTHERGILL: Mr. Commissioner,
16 I really do need to intervene at this point.

17 First of all, I am not sure that
18 we really do have direct evidence of the treatment
19 Mr. Arar received. That is a matter that I think
20 you are exploring through your appointment of the
21 special fact-finder.

22 And quite apart from that, this is
23 not a question that calls for this witness'
24 expertise to answer. This is a rather thinly
25 disguised form of argument where Mr. Waldman is

1 trying to recruit the witness to agree with him on
2 what is really a question of logical
3 interpretation of the facts rather than a question
4 that calls for expertise in international law.

5 THE COMMISSIONER: Mr. Waldman,
6 response?

7 MR. WALDMAN: Well, the first
8 thing is I thought the evidence before the
9 Commission is that Mr. Pardy had assumed that from
10 the very beginning Mr. Arar was subject to torture
11 during the periods of interrogation. That is the
12 basis of the facts, the assertion of fact I am
13 making.

14 Second of all, the question I am
15 asking is whether this raises any -- this
16 statement, because this is an example of how the
17 confessions were used by the RCMP, and I want to
18 know if this raises any concerns about violations
19 of international law.

20 THE COMMISSIONER: I wouldn't
21 object to the rule that out of order for you to
22 ask the question on the assumption there was
23 torture, because I think there is going to be
24 evidence, and whether or not I eventually conclude
25 there was --

1 MR. WALDMAN: Well, if we
2 assume --

3 THE COMMISSIONER: Let me just
4 finish the ruling.

5 Whether I conclude there was or
6 not will be something at the end. But I wouldn't
7 rule the question out of order on that basis.

8 On the other hand, I do think the
9 question that you have asked this witness goes
10 beyond the expertise that he -- with great respect
11 to you, Professor Burns -- that he brings to
12 assist this inquiry, and I think it is something
13 that is well within my expertise to eventually
14 rule on in my report.

15 MR. WALDMAN: Okay.

16 What would be your view, if we
17 assume for a second that officials were aware that
18 Mr. Arar had been tortured or had a reasonable
19 belief that he was being tortured while he was
20 being interrogated and instructions were sent to
21 the ambassador to seek further information from
22 the authorities who were subjecting Mr. Arar to
23 torture, what would be your view of that conduct,
24 if they were asking for the proceeds of the
25 interrogations that might have been conducted

1 under torture?

2 THE COMMISSIONER: You are asking
3 his opinion with respect to --

4 MR. WALDMAN: International law.

5 THE COMMISSIONER: International
6 law or CAT?

7 MR. WALDMAN: Right.

8 MR. BURNS: I really don't have an
9 opinion. It's just a personal view. I mean, I
10 don't think it falls within CAT specifically, not
11 the literal language of the Convention, if that is
12 the question you are asking.

13 MR. WALDMAN: Would you not see it
14 as aiding and abetting or encouraging torture to
15 ask someone to get further information from
16 someone who had been subjected to torture before?

17 MR. BURNS: It would depend on the
18 circumstances. I mean, if they are doing it to
19 find out the state of mind or how this person is
20 being held or what his condition is, et cetera,
21 et cetera, that is perfectly legitimate.

22 If they are doing -- and I think
23 this might be what you are suggesting -- I mean, I
24 don't know what the purpose of the government
25 official was or is alleged to have been in

1 requesting the additional information. If they
2 know he is being tortured and they request
3 information of the torturers, then it does seem to
4 me that the official would be running into
5 difficulty with the CAT.

6 MR. WALDMAN: Right. So let's
7 just be clear. If the official requested from
8 military intelligence, who are the people who are
9 detaining and torturing Mr. Arar, further fruits
10 of their interrogations, that would be problematic
11 as far as CAT?

12 MR. BURNS: In my opinion, that
13 would be problematic, because they would be
14 presumably encouraging them to continue torturing
15 to get the additional information.

16 It would turn on the facts,
17 though. You would have to have really, really
18 powerful facts in those cases.

19 MR. WALDMAN: We have -- well, we
20 will let the Commissioner decide.

21 MR. GOVER: You are trying to
22 shock me, aren't you?

23 MR. WALDMAN: I promised, sir,
24 that I would shock you a few times and I think I'm
25 trying to do that.

1 I wanted to deal with one last
2 area, which is the question of assurances.

3 You are going to have to forgive
4 me because I only have Suresh on my computer and
5 it was too long to print during the break, so I'm
6 going to have to read you one paragraph of Suresh.

7 The issue of assurances arose in
8 Burns and Raffay in the context of the death
9 penalty and the Supreme Court of Canada ruled that
10 because there was -- I'm sure you are aware, that
11 because there was sufficient capacity to monitor
12 and there was diplomatic processes, that
13 assurances in the context of the death penalty
14 were sufficient. This also arose in the context
15 of Suresh.

16 Do you recall Suresh?

17 MR. BURNS: I know Suresh.

18 MR. WALDMAN: Are you familiar
19 with what the Supreme Court of Canada said on
20 assurances?

21 Should I read you the paragraph
22 just to remind you?

23 MR. BURNS: Read it again, just so
24 that I -- Shock again.

25 MR. WALDMAN:

1 "It might be useful to
2 comment further on
3 assurances. A distinction
4 may be drawn between
5 assurances given by a State
6 that it will not apply the
7 death penalty through a legal
8 process and assurances by a
9 State that it will not resort
10 to torture, an illegal
11 process. We would signal the
12 difficulty in relying heavily
13 on assurances by a State that
14 it will refrain from torture
15 in the future where it has
16 engaged in illegal torture or
17 allowed others to do so on
18 its territory in the past.
19 The difficulty becomes acute
20 in cases where torture is
21 inflicted not only with the
22 collusion but through the
23 impetus of the State in
24 controlling the behaviour.
25 Hence the need to distinguish

1 between assurances regarding
2 the death penalty and
3 assurances regarding
4 torture." (As read)

5 Do you agree with that statement?

6 MR. BURNS: Sure, it is difficult.

7 MR. WALDMAN: In the case of
8 Syria, you testified that Syria signed the CAT
9 last year. So when Mr. Arar was deported in 2002,
10 Syria had not signed the CAT.

11 Would you be concerned about
12 receiving assurances from a State that had not yet
13 signed CAT with respect to not inflicting torture?

14 MR. BURNS: Right. Actually Syria
15 acceded to the CAT which goes beyond signing.

16 MR. WALDMAN: Okay, acceded. But
17 it was last year. When Mr. Arar was deported they
18 hadn't yet acceded.

19 MR. BURNS: It would depend on the
20 State, quite frankly. There are some States that
21 haven't yet ratified or acceded -- and there are
22 reasons they haven't done it, legitimate reasons,
23 usually reasons of economic necessity -- and one
24 really would not be that concerned about
25 refoulement to those States.

1 Then there are other States, and
2 those States are States that we make specific
3 reference to in many of our decisions, especially
4 Article 22 decisions, and it is always a negative
5 reference, where they haven't not only not
6 ratified or acceded to the CAT, they haven't
7 acceded to Article 22, which gives individuals the
8 power to go to the Committee Against Torture.

9 So the short answer is, depending
10 on the State, yes.

11 MR. WALDMAN: I'm not sure, are
12 you familiar with the specific human rights record
13 of Syria?

14 MR. BURNS: Much of it, yes.

15 MR. WALDMAN: Okay. Would you
16 feel comfortable, given your knowledge -- or would
17 you have felt comfortable in 2002 -- given your
18 knowledge of the serious human rights violations
19 that had were occurring in Syria and the fact that
20 Syria hadn't acceded to the CAT, and given what
21 the Supreme Court said in Suresh -- accepting
22 assurances from Syria in that context?

23 MR. BURNS: If I am Foreign
24 Affairs I would have to qualify my answer, and I
25 qualify it now. I would look at the record of

1 assurances and whether they have been upheld by
2 Syria. I mean, you have to look at past practice
3 in order to gauge how they are likely to behave in
4 the future.

5 You would look at the human rights
6 record, and you would look at what international
7 instruments they had acceded to that would give
8 protection to a person in these circumstances.

9 If at the end of the day you had a
10 bad human rights record, no accession to
11 international instruments, and no record upon
12 which you could base the assurance, then I would
13 be very, very careful. I would regard that as a
14 dubious one.

15 MR. WALDMAN: Those are my
16 questions. Thank you very much.

17 THE COMMISSIONER: Thank you,
18 Mr. Waldman.

19 Mr. Fothergill?

20 EXAMINATION

21 MR. FOTHERGILL: Professor Burns,
22 by way of introduction, my name is Simon
23 Fothergill and I am appearing for the Government
24 of Canada.

25 I'm wondering if I could enlist

1 your help in identifying some burdens of proof for
2 us in the Convention Against Torture.

3 MR. BURNS: Yes.

4 MR. FOTHERGILL: If I could ask
5 you first to address your mind to Article 1.

6 The Convention is found at
7 tab 2 of the materials that have been prepared for
8 your testimony.

9 In Article 1 we see there is a
10 prohibition, not just on inflicting torture, but
11 also on consenting or acquiescing to the
12 infliction of torture.

13 I'm wondering if you could help us
14 in providing further clarity about what sort of
15 standard is applied by the Committee Against
16 Torture to the concepts of consent or
17 acquiescence?

18 MR. BURNS: So far all we have
19 said is that the burden of proof is on the person
20 complaining. We haven't really referred to the
21 standard of proof that the person would have to
22 meet with reference to that.

23 My own view is that it would be
24 the civil standard of proof.

25 MR. FOTHERGILL: So you would

1 equate it with something in the nature of the
2 common law test of wilful blindness.

3 Is that correct?

4 MR. BURNS: Yes.

5 MR. FOTHERGILL: All right. As a
6 practical matter, can you comment on the practice
7 of States?

8 Do States generally adopt this
9 common law test or is it a lesser or even a
10 greater test?

11 MR. BURNS: I really am not in
12 a position to answer that question. I just
13 don't know.

14 This issue does not arise that
15 often in front of the committee, so we have never
16 really analyzed it in any great detail.

17 MR. FOTHERGILL: All right. If we
18 turn then to Article 3, substantial grounds for
19 believing that an individual would be in danger of
20 being subjected to torture, you were already taken
21 to the United States' understanding as distinct
22 from a reservation of what that means, and that is
23 the U.S.' standard of more likely than not. I
24 think you agreed with Mr. Waldman's suggestion
25 that that is, in the view of the Committee, a

1 serious difference of views, if I can put it that
2 way, between the Committee and the United States
3 of America.

4 Is that true?

5 MR. BURNS: Yes, and I am pleased
6 to hear you call it a difference of views because
7 at this stage that is all it is.

8 MR. FOTHERGILL: All right. Are
9 you aware that at least in some cases Canada also
10 applies the standard of more likely than not when
11 determining whether somebody faces substantial
12 risk of torture?

13 MR. BURNS: As a matter
14 of practice?

15 MR. FOTHERGILL: Yes.

16 MR. BURNS: No.

17 MR. FOTHERGILL: We referred
18 briefly yesterday, and we can do so again if
19 necessary, to a recent decision of our Federal
20 Court of Appeal in a case called Li that was
21 issued in January.

22 Are you familiar with that case?

23 MR. BURNS: I actually read an
24 electronic version of it about two weeks ago.
25 So I wouldn't say I'm familiar with it. I know

1 of it.

2 MR. FOTHERGILL: You know of it.

3 MR. BURNS: Yes.

4 MR. FOTHERGILL: You said
5 something quite interesting earlier, and I'm
6 wondering if I'm interpreting it correctly.

7 Is the difference of views with
8 the United States based upon the fact the United
9 States has formally registered an understanding
10 of how that provision operates in all cases as
11 opposed to leaving open the possibility that a
12 different standard might be applied in
13 different cases?

14 MR. BURNS: If you are asking for
15 a yes or no answer, I would probably say yes with
16 qualifications.

17 MR. FOTHERGILL: All right.

18 MR. BURNS: I would put it
19 slightly differently.

20 We take the view that there must
21 be a real risk, which may be a probability but in
22 certain circumstances may be less because of the
23 circumstances.

24 MR. FOTHERGILL: Yes.

25 MR. BURNS: So we agree that

1 in, abstractly, 98 per cent of all cases the
2 American probability test probably meets our
3 threshold anyway, but it is the other little group
4 of cases where they are still didactically
5 applying that test where we would not, with
6 respect, we would not, that the disagreement
7 rests. A very small margin.

8 MR. FOTHERGILL: I was going to
9 say, this is an articulation of the idea that a
10 low risk of a very serious outcome --

11 MR. BURNS: Precisely.

12 MR. FOTHERGILL: -- perhaps can
13 be comparable to a high risk of a less serious
14 outcome and the two must be viewed --

15 MR. BURNS: Yes. Lord Reid
16 exactly in Bolton and --

17 MR. FOTHERGILL: Yes. So you will
18 agree with me, and I don't think we need to refer
19 to it, that Canada is not being criticized for its
20 application of the more likely than not test in
21 certain cases?

22 MR. BURNS: That is probably an
23 oversight.

24 --- Laughter / Rires

25 MR. FOTHERGILL: Very well. I

1 take your point.

2 --- Laughter / Rires

3 MR. FOTHERGILL: I was going to
4 suggest that one possible explanation for that,
5 however, is that Canada has not bound itself to
6 always applying the standard, and it could be that
7 in the cases where that standard has been applied
8 it was, in fact, appropriate, given the risks
9 involved?

10 MR. BURNS: I would not disagree
11 with that. I just don't know.

12 MR. FOTHERGILL: But certainly
13 the Committee would have had the opportunity to
14 address it in its most recent report, had it
15 wished to?

16 MR. BURNS: If the Committee had
17 turned its mind to that question, and if the NGOs
18 had specifically raised it. Because I'm not sure
19 that the Canadian government did, did it?

20 MR. FOTHERGILL: I'm not in a
21 position to advise, I'm sorry.

22 All right. Let's carry on.
23 Another very short question I think. Article 10,
24 the obligation of the State party to educate and
25 inform its officials.

1 I take it Canada has never
2 been criticized for any failing in respect to
3 compliance with Article 10 to your knowledge?

4 MR. BURNS: Not that I am
5 aware of.

6 MR. FOTHERGILL: The final area
7 I want to discuss with you is one of the
8 recommendations that was made in the recent
9 Committee's report on Canada. This is the one
10 about:

11 "A State Party should insist
12 on unrestricted consular
13 access to its nationals who
14 are in detention abroad with
15 a facility for unmonitored
16 meetings and, if required,
17 appropriate medical
18 expertise."

19 First of all, can you give us any
20 comment on the genesis of this recommendation or
21 any sort of elaboration?

22 MR. BURNS: I suspect it was the
23 Iraqis. I assumed when I read that somebody who
24 was involved in Arar had drawn it to the attention
25 of the Committee, and this is the result of that.

1 But I may be wrong. I have just never seen it
2 before in any of the reports of the Committee.

3 MR. FOTHERGILL: Do you recognize
4 that there may be some very real and practical
5 limitations on the ability of a country such as
6 Canada to insist on this kind of consular access?

7 MR. BURNS: Oh, yes, there are
8 obvious limitations. One, you have got to be
9 aware of it first.

10 As I say, in the sort of standard
11 case where somebody is just picked up in a foreign
12 country for selling drugs, Canada may never know
13 about it, and the individual may not want Canada
14 to know about it. So that is one.

15 The other one is, there is not a
16 heck of a lot a consul can do. It is quite
17 different if you are the consul in Liverpool and
18 you are dealing with the British government in
19 getting access, and you are the consul in a very
20 small remote country which is not very sympathetic
21 to western ideals and values and believes that
22 this individual is a threat to it.

23 What can a consul do? A consul
24 can demand access and very often get access. But
25 access in private? I think that is a little

1 dubious in many cases. Getting access may take a
2 long time because of the way in which the domestic
3 agencies react to the request. There are all
4 sorts of reasons why it is going to be very
5 difficult.

6 MR. FOTHERGILL: All right.
7 Thank you. Those are my questions.

8 THE COMMISSIONER: Re-examination,
9 Mr. Gover?
10 EXAMINATION

11 MR. GOVER: Thank you,
12 Commissioner.

13 I have one question, which is a
14 slight variation on a question that was asked by
15 Mr. Waldman, and it is a hypothetical question
16 that goes along these lines, Professor Burns.

17 Would sharing information about a
18 Canadian with a regime in which that Canadian was
19 being detained and at risk of torture constitute a
20 violation of the Convention Against Torture, in
21 your opinion?

22 MR. BURNS: Sharing information
23 simpliciter may not, but sharing information with
24 the knowledge that it would lead to torture I
25 think in all probability would.

1 MR. GOVER: Thank you very much.

2 THE COMMISSIONER: Well, let me
3 thank you, Professor Burns. That completes your
4 evidence.

5 MR. BURNS: Thank you.

6 THE COMMISSIONER: I thought you
7 demonstrated your expertise and I appreciate very
8 much your sharing that with us.

9 MR. BURNS: And the limits of it.

10 --- Laughter / Rires

11 THE COMMISSIONER: The other
12 observation, just before you leave, your teaching
13 background was evident.

14 --- Laughter / Rires

15 This material was not only very
16 informative, but was presented in a very
17 interesting way and I appreciate it very much.

18 MR. BURNS: Thank you very much.

19 THE COMMISSIONER: You can
20 step down and we will just figure out where we go
21 from here.

22 Mr. Cavalluzzo, what is next?

23 MR. CAVALLUZZO: Commissioner, we
24 have our next witness, Professor Ofshe, who can
25 start right now if you want, or we can break a few

1 minutes.

2 THE COMMISSIONER: I'm content to
3 start, unless there is any request for an
4 adjournment or a recess.

5 MR. CAVALLUZZO: That's fine.
6 Professor Ofshe.

7 --- Pause

8 MR. CAVALLUZZO: Can we commence?
9 Is it all right? Fine.

10 Commissioner, our next witness
11 is Professor Richard Ofshe and I would introduce
12 you to him.

13 Professor, would you prefer to be
14 sworn or affirmed?

15 MR. OFSHE: Affirmed.

16 THE COMMISSIONER: Could you stand
17 then, please, Professor?

18 AFFIRMED: RICHARD J. OFSHE

19 THE COMMISSIONER: Your full name?

20 MR. BURNS: Richard Ofshe.

21 THE COMMISSIONER: Thank you.

22 MR. CAVALLUZZO: Mr. Commissioner,
23 at the outset I would like to establish Professor
24 Ofshe as an expert in interrogation methods with a
25 special focus or interest in the theory and

1 classification of true and false confessions.

2 I would like to introduce as the
3 next exhibit the reference materials, or Book of
4 Documents which have been prepared for Professor
5 Ofshe's evidence.

6 THE COMMISSIONER: Exhibit
7 No. P-127.

8 EXHIBIT NO. P-127: Book of
9 Documents entitled "Reference
10 Materials Compiled in
11 Relation to the evidence of
12 Professor Richard J. Ofshe"

13 EXAMINATION

14 MR. CAVALLUZZO: Professor Ofshe,
15 you are currently Professor Emeritus in the
16 Department of Sociology at the University of
17 California at Berkeley?

18 MR. OFSHE: Correct.

19 MR. CAVALLUZZO: In respect of
20 your education, you received a Ph.D. in Sociology
21 in 1968 at Stanford.

22 MR. OFSHE: Correct.

23 MR. CAVALLUZZO: And you have
24 taught at Berkeley since 1967.

25 MR. OFSHE: That is also correct.

1 MR. CAVALLUZZO: That was a
2 very interesting time to be at Berkeley. I wish I
3 was there.

4 MR. OFSHE: The best of times.
5 --- Laughter / Rires

6 MR. CAVALLUZZO: In any event you
7 have taught consistently at Berkeley since 1967 in
8 the Department of Sociology.

9 MR. OFSHE: That's right.

10 MR. CAVALLUZZO: During that
11 period, in 1971 you were a Visiting Professor in
12 the Department of Sociology at Stanford.

13 MR. OFSHE: Yes.

14 MR. CAVALLUZZO: Apart from your
15 current teaching position, I understand that you
16 are also a Fellow at the Center on Wrongful
17 Convictions at Northwestern University School of
18 Law in Chicago.

19 MR. OFSHE: Yes.

20 MR. CAVALLUZZO: In regard to a
21 number of awards, you have, I guess, been the
22 partial recipient of Pulitzer Prize for Public
23 Service in 1979.

24 MR. OFSHE: The Prize is actually
25 awarded to the Point Reyes Light newspaper. The

1 Gold Medal is the only one that goes to the
2 institution. I did the work jointly with other
3 people that won the Pulitzer Prize for the Point
4 Reyes Light, a tiny newspaper in western West
5 Marin County, California.

6 MR. CAVALLUZZO: The same
7 newspaper was also awarded the California
8 Newspaper Association Award in 1980.

9 Is that correct.

10 MR. OFSHE: That is correct.

11 MR. CAVALLUZZO: You were also the
12 recipient of the Roy Dorcus Award for the Best
13 Paper on Clinical Hypnosis of 1984.

14 MR. OFSHE: 1994.

15 MR. CAVALLUZZO: 1994, excuse me.
16 You have a number of professional
17 memberships, including the American Sociological
18 Association, the American Psychological
19 Association, and so on and so forth as is set out
20 on page 2 of your CV.

21 MR. OFSHE: That is correct.

22 MR. CAVALLUZZO: Your professional
23 activities are set out at page 2, at the bottom of
24 page 2, and I need not refer to them other than
25 having counsel read them.

1 You are the consultant and have
2 been the consultant to a number of police and
3 prosecutorial agencies that are set out in page 3.

4 Is that correct.

5 MR. OFSHE: That is correct.

6 MR. CAVALLUZZO: Indeed, I
7 understand from you this morning that you have
8 been an expert witness in judicial proceedings on
9 over 230 occasions.

10 MR. OFSHE: That is correct.

11 MR. CAVALLUZZO: In regard to your
12 publications, they are many and I will only refer
13 to a few of them. Perhaps if we can go to your
14 CV, starting at page 7, it would appear in about
15 1989 you published a paper entitled "Coerced
16 Confessions: The Logic of Seemingly Irrational
17 Action"?

18 MR. OFSHE: Right. That is the
19 first in the series on interrogation.

20 MR. CAVALLUZZO: That is what
21 I noted.

22 In 1992 you wrote another
23 paper entitled "Coercive Persuasion and
24 Attitude Change."

25 Is that correct.

1 MR. OFSHE: Yes.

2 MR. CAVALLUZZO: Then if we go to
3 page 8 we see a series of published articles
4 relating to the issue upon which you will be
5 testifying today.

6 In 1995 you wrote an article
7 entitled "I'm Guilty If You Say So"?

8 MR. OFSHE: Yes.

9 MR. CAVALLUZZO: In 1997 you
10 co-author a paper with Richard Leo entitled "The
11 Social Psychology of Police Interrogation: The
12 Theory and Classification of True and False
13 Confessions"?

14 MR. OFSHE: Correct.

15 MR. CAVALLUZZO: That can be
16 found, Mr. Commissioner, behind tab 2 of the Book
17 of Documents.

18 As well, in 1997 you coauthored
19 another paper with Richard Leo entitled "The
20 Decision to Confess Falsely: Rational Choice and
21 Irrational Action".

22 Is that correct?

23 MR. OFSHE: Correct.

24 MR. CAVALLUZZO: That,
25 Mr. Commissioner, can be found behind tab 3 of the

1 Book of Documents.

2 There are several other papers
3 relating to coerced confession; for example, at
4 page 10, if you go to four articles up, in 1988,
5 "Coerced Confessions: Case Studies in The Tactics
6 and Persuasion".

7 In 1988, the next paper, "Thought
8 Reforming Interrogations in America".

9 On the next page as well -- your
10 CV is filled with these kinds of articles and I
11 would like to move on from your published articles
12 to presentations that you have made at judicial
13 conferences, starting at page 13 of your
14 curriculum vitae.

15 It started back in 1994 and it
16 would appear to have culminated in 2004 on a
17 conference at the Annual General Meeting of the
18 Ontario Court of Justice in this city, Ottawa.
19 The title of your presentation was "Interrogation
20 and Coerced and False Confession"?

21 MR. OFSHE: There is actually one
22 more past that, a conference at Brooklyn Law
23 School also in 2004.

24 MR. CAVALLUZZO: Okay. As well, I
25 see that you are also involved in training of

1 attorneys and investigators, the very last page of
2 your curriculum vitae, page 21. In 2004 you were
3 involved in these kinds of trainings.

4 Is that correct.

5 MR. OFSHE: Correct.

6 MR. CAVALLUZZO: The final point,
7 apart from the fact that you have made
8 presentations to judicial conferences, have
9 testified numerous times in court proceedings on
10 this particular issue, I understand as well that
11 your published works on police interrogation and
12 production of true and false confessions have been
13 cited quite often in judicial authorities, both
14 Canadian and American.

15 Is that correct.

16 MR. OFSHE: They have certainly
17 been cited. I don't know how often, but they have
18 been cited.

19 MR. CAVALLUZZO: Mr. Commissioner,
20 on that basis I would ask that Professor Ofshe be
21 found to be an expert witness in the areas I have
22 submitted.

23 THE COMMISSIONER: Ms Edwardh, any
24 questions or submissions?

25 MS EDWARDH: No, other than to

1 acknowledge that the witness is well qualified to
2 give opinion evidence in this area.

3 THE COMMISSIONER: Mr. Fothergill?

4 MR. FOTHERGILL: No questions,
5 thank you.

6 THE COMMISSIONER: Or submissions?

7 MR. FOTHERGILL: No.

8 THE COMMISSIONER: I am satisfied
9 that the witness is well qualified to give expert
10 evidence and express opinions in the areas
11 indicated by Mr. Cavalluzzo.

12 Please proceed.

13 MR. CAVALLUZZO: Thank you, sir.

14 Commissioner, really if I could
15 summarize the areas in which Professor Ofshe will
16 be testifying to: Initially we are going to
17 discuss the general principles through which
18 interrogation leads to confession, and while
19 though torture fits into this analysis, it plays a
20 unique role.

21 Second, we are going to
22 be reviewing Mr. Arar's account of his
23 interrogation and discussing the principles,
24 the general principles, with Professor Ofshe in
25 respect of an application of those principles to

1 the process.

2 Then, finally, we will be
3 discussing the conclusion that the type of
4 interrogation program to which Mr. Arar was
5 exposed is likely to drastically raise the rate at
6 which false confessions are likely to be obtained
7 from both actual terrorists and persons who are
8 completely uninvolved in terrorism.

9 Just at the outset, Professor
10 Ofshe, if we could just talk briefly about the
11 tactics used during interrogation in respect of
12 the three objectives that these tactics are
13 intended to achieve.

14 MR. OFSHE: Interrogation is a
15 process of influence. It can't be looked at
16 simply as a laundry list of factors that are
17 thrown into a pot and cooked into a stew. It is a
18 process that is time-ordered. Certain things have
19 to occur before other things are likely to happen
20 and interrogation is built to influence a person
21 to come to see the world in a certain way and then
22 to make decisions based on their perception of the
23 world as they find themselves in it. So it is an
24 ongoing, moving-through-time process.

25 For convenience sake, I think it

1 is possible to talk about three factors that tend
2 to occur during interrogation. One of them has to
3 do with setting a stage, and then there are two
4 factors that are dynamic that over the course of
5 time change people's perceptions and impact their
6 decision-making as their perceptions change.

7 These three factors I simply label
8 as factors relating to a sense of powerlessness,
9 factors relating to a sense of hopelessness, and
10 factors intended to motivate a person to comply
11 with what the interrogator wants.

12 It works best, or at least
13 interrogation is built on the assumption that it
14 works best, to first create a sense of
15 powerlessness. That has to do generally, in a
16 standard interrogation done by police agents, in
17 certainly Western society, and I think the model
18 applies to torture-driven interrogations as well.

19 After all, torture-driven
20 interrogations are actually a step backward.
21 Modern police interrogation derives from
22 torture-driven interrogations. What we see
23 historically is a process of repudiating
24 various kinds of torture, minimizing the torture
25 that appears in interrogation, and ultimately

1 shifting from torture as a legitimate or as an
2 accepted motivator in interrogation to other
3 motivators having essentially the same role that
4 torture once played.

5 So for me, looking at torture and
6 interrogation is actually taking a step backward,
7 looking at a less sophisticated rather than a more
8 sophisticated system. I have certainly seen some
9 examples of torture-driven interrogations in the
10 United States in the recent past. So it is not
11 entirely outside of my experience, but thankfully
12 it is rare in my experience.

13 The setting factors are those of
14 where the interrogation takes place, the demeanour
15 that the interrogator effects, the apparent
16 certainty that the interrogator attempts to exude.
17 All of this is designed to make the target of the
18 interrogation feels as if he or she is utterly
19 hopeless, that they have -- I'm sorry, utterly
20 powerless, that they have no ability to control
21 what is happening to them.

22 Hence, in a modern interrogation
23 the session tends to take place at a police
24 station as opposed to someone's home. Obviously
25 they will feel less comfortable and be made more

1 aware of the power of the State to interfere with
2 their lives if they are taken into a secure area,
3 a place where they have a sense that they have to
4 be passed in and out at the pleasure of the
5 interrogator, they are surrounded by agents of the
6 State, and they are well aware of the fact that
7 these agents of the State have the ability to
8 interrupt the normal flow of their lives.

9 The interrogator will always
10 effect an attitude of absolute certainty in what
11 he or she is saying. The interrogator will appear
12 never to credit what the suspect says about an
13 alibi, even if the interrogator has personal
14 doubts about the information they are using and
15 may suspect that the suspect is telling the truth
16 when the suspect says, "I was with my girlfriend
17 two Thursdays ago." The interrogator dares not
18 reveal that because that will destroy the
19 interrogator's sense -- or his appearance of being
20 all-powerful and being all-knowing.

21 These variables designed to
22 create powerlessness merely set the stage for
23 an interrogation. As we will see if we look at
24 Mr. Arar's interrogation, the powerlessness
25 factors are extraordinarily strong, far stronger

1 than one sees in a modern interrogation in a
2 western society.

3 In that setting, the setting
4 defined by where and how the interrogator acts,
5 the first thing that needs to be accomplished is
6 for the interrogator to convince the person who
7 initially believes, "I will be able to survive,
8 get through this situation in relatively good
9 shape, or without any major damage, merely by
10 denying what I'm accused to have done."

11 The object is to change their
12 perception of their situation from one in which
13 they are all right and the future holds no great
14 problem for them by simply saying that they did
15 nothing wrong, to one in which they become
16 convinced that their situation is utterly
17 hopeless, that like it or not, innocent or not,
18 confessing or not, their future is known.

19 The interrogator will try to
20 convince the person that, "I have so much evidence
21 against you or my position is so strong that I
22 don't need your confession in order to make my
23 case. What it is that I want to accomplish, I
24 have already accomplished. I'm talking to you for
25 reasons that, all things considered, probably

1 benefit you more than they benefit me". In other
2 words, to take a line from the Treasurer of the
3 Sierra Madre, "I don't need your stinking
4 confession. I have everything that I need,
5 overwhelming evidence to link you to the crime."

6 The object is to take someone who
7 feels confident, especially if they are innocent,
8 that they did not commit the crime and make them
9 realize it makes no difference what you think.
10 Your situation is hopeless. When this session is
11 over, you will move on to the next step of the
12 process, whatever that is. In the ordinary police
13 interrogation that would be arrest, indictment,
14 prosecution, trial, conviction and punishment.
15 All of these things are determined because I have
16 so much evidence against you.

17 Again, comparing that to
18 Mr. Arar's situation, one in which he certainly
19 didn't know what the system held in store for him
20 in the future and was certainly fearful of it, at
21 some point he must have come to a feeling of
22 extraordinary hopelessness, probably far more
23 hopeless than an ordinary person accused of a
24 crime in any western society that I have any
25 experience with.

1 MR. CAVALLUZZO: Just stopping you
2 there. In respect of the information that the
3 interrogator leads the target to believe he or she
4 has, are there any legal strictures as to whether
5 it must be credible information, reliable
6 information, truthful information, or are there no
7 limits at all.

8 MR. OFSHE: It depends on what
9 country you are in. In England, for example, it
10 is prohibited for police to lie to suspects about
11 the strength of the evidence that they have. An
12 interrogation will be thrown out, or the result of
13 it will be thrown out, if police overstate the
14 strength of the evidence.

15 In the U.S. it is completely the
16 opposite, and I gather in Canada it is also
17 permissible for police to overstate the evidence.
18 It is a difference in cultural attitude.

19 I have no doubt that the freedom
20 to overstate evidence makes for a much more
21 powerful interrogation. I also don't believe that
22 merely that ability will necessarily produce false
23 confessions.

24 It is a social judgment as to how
25 a society wants police to act that controls what

1 the society produces. Tactically, there is no
2 question in my mind that overstating the evidence
3 is a very powerful tactic and potentially a very
4 dangerous tactic because the ability to overstate
5 the evidence can lead to a sense of hopelessness
6 in the mind of someone who knows they did not
7 commit the crime. While that alone ought not to
8 produce a false confession, it can open the door
9 to a false confession if other things occur.

10 It varies from culture to culture,
11 but it is very powerful. Certainly, if the person
12 is convinced that the interrogating agent has
13 enormous amounts of information, details about
14 their lives for example, can almost substitute for
15 specific information about their involvement in
16 the crime, anything that contributes to creating
17 the impression that the interrogator has vast
18 amounts of information is going to empower the
19 interrogator.

20 MR. CAVALLUZZO: Okay. Thank you.

21 In terms of the third principle or
22 the third tactic, that of motivation, I wonder if
23 you might expand on that, because you talk about
24 different degrees of motivation which are crucial
25 for interrogation methods.

1 MR. OFSHE: Even if a person has
2 been convinced that the interrogator believes they
3 have overwhelming evidence linking them to the
4 crime, even if they come to the point where they
5 recognize that continued resistance is effectively
6 futile, they are never going to convince the
7 interrogator, who really stands for the State in
8 his role in relation to the suspect. It is the
9 accusing agent, the accusing authority is
10 immovable. That is not necessarily going to lead
11 someone to decide, "Well, gee, I should confess."
12 They still need to be motivated.

13 In modern interrogations, there
14 are a series of motivators that can be introduced,
15 running from relatively low end, in terms of their
16 power, to extraordinarily high end, with torture
17 generally going beyond what one sees in most
18 interrogations in western society.

19 Low-end motivators, as they
20 function in typical police interrogation, have to
21 do largely with if an interrogator has established
22 some rapport with the suspect, if the interrogator
23 has been successful in convincing the person that
24 they are caught, and if in fact they know that
25 they are caught, then appeals to play the game,

1 "do the right thing", "be a man, at least in my
2 eyes", "do what someone who at least has the
3 integrity to admit to having done something that
4 you have been caught doing", "why continue to
5 lie", "do something that presents yourself to me
6 and to the rest of the world in a somewhat better
7 light", can be a sufficient motivator to get
8 someone who knows they have committed the crime to
9 say "okay, you've got me", because they know that
10 they are caught.

11 I have never seen an innocent
12 person electing to give a false confession merely
13 because the interrogator said "do the right
14 thing". Usually the innocent person says, "I have
15 been telling you the truth for the last five hours
16 and you refuse to believe me."

17 They are at loggerheads over this
18 issue of whether the person committed the crime or
19 not.

20 The innocent person is not about
21 to move off that. The person is not about to
22 admit to something that they didn't do, or
23 certainly, if we analogize this to Mr. Arar's
24 situation, not about to admit that he is involved
25 in international terrorism merely to please the

1 interrogator when he knows he wasn't.

2 The mid-range interrogators, as
3 they appear in most interrogations that I see,
4 have to do with trying to get the person to begin
5 to think about the future, think about what the
6 criminal justice system holds for them, and to
7 give them very subtle suggestions that, "In the
8 future, given the future that is in store for you,
9 you will fare better if you elect to confess now,
10 if you elect to show remorse now."

11 Statements which apparently have
12 some history in Canadian law about "it would be
13 better if" are suggestions that "it will be better
14 for you if you confess", without linking up
15 explicitly the consequence, without promising
16 anything explicitly, but merely suggesting, and
17 sometimes quite powerfully suggesting, that the
18 system will treat you better if you confess.

19 That is clearly an inducement
20 beyond just "look better in my eyes".

21 Beyond that, there is the
22 introduction of obvious psychological coercion,
23 and that is accomplished in one of two ways,
24 typically: either through blatant linking up of a
25 contingency between confession and a consequence

1 of minimal punishment or denial and a consequence
2 of maximum punishment by simply asserting: This
3 will follow if you do that, and something else
4 will follow if you do something else. On the one
5 hand, you could get the death penalty; on the
6 other hand, I will talk to the judge, who is a
7 friend of mine, or the prosecutor. I will some
8 way intervene for you.

9 And that kind of explicit promise
10 can get made.

11 But the idea that there will be a
12 strong link between confession or denial and a
13 subsequent result can be gotten across, can be
14 successfully communicated, through suggestions.
15 And there is research that demonstrates that this
16 is the case.

17 And certainly in America these
18 days police are trained to communicate threats of
19 harm and offers of leniency through sub-blatant
20 suggestions. I have seen that hundreds -- well,
21 that is an exaggeration -- dozens and dozens and
22 dozens, perhaps as many as a hundred times, in
23 interrogations in the U.S. where a series of
24 statements are made by the interrogator.

25 If one pulls those statements and

1 looks at them, it is very clear that a theme is
2 being introduced and that theme is: contingent
3 upon confession, "you will get lenient treatment";
4 contingent upon continued denial, "you are likely
5 to be charged with the worst version of the crime
6 that is likely to have the much stronger
7 punishment". In effect, the message is
8 communicated quite well and is understood.

9 That puts the person in a position
10 in which there is a benefit and a strong benefit,
11 powerful benefit, for confessing, and a punishment
12 for continuing to deny. That can produce a
13 decision to give a false confession.

14 Someone who has been made to
15 believe that their situation is hopeless, has
16 accepted the idea that because they think the
17 police would never lie to them all this evidence
18 that the detective tells them is arrayed against
19 him the detective genuinely believes exists --
20 even though the person knows that it is in error,
21 the detective believes it. The detective is a
22 reasonably smart person with a lot of skills --
23 with a lot of history and experience at the job.
24 "The detective thinks I committed the crime. The
25 detective tells me there is evidence that links me

1 to the crime. Other people will see it the same
2 way," which is, of course, what the detective says
3 about the prosecutor, the jury, the judge, and so
4 on. "My fate is determined."

5 An innocent person feeling that,
6 believing that, now given an option of confessing
7 to the crime, especially if it is put out in a
8 scenario form that transforms the severity of the
9 crime from high to low, such as premeditated
10 murder versus accidental killing versus
11 self-defence, arrays a series of different crimes
12 that carry different levels of punishment and the
13 person is given the opportunity, very often in the
14 form of some scenario for the crime articulated by
15 the interrogator, that goes, "This looks like a
16 premeditated murder, but what I think happened,"
17 and then talks about how, "Harry was a bad guy.
18 That is why you were carrying a gun. When you two
19 met up, he became aggressive. He made a move like
20 he was going for his gun, and then, in the best
21 Texas style, you beat him to the draw, you shot
22 him. It was just self-defence."

23 The interrogator signals he is
24 willing to accept that. The person is now
25 confronted with an opportunity to minimize their

1 loss.

2 There are scenarios that police
3 use for homicides, for sexual abuse crimes, that
4 are tailored to get that message across.

5 A desperate, confused, anxious,
6 innocent person might at that moment elect to give
7 a false confession, believing it is the only way
8 to minimize their punishment, perhaps save their
9 lives. That is typically where false confessions
10 come about.

11 For someone who knows they have
12 committed the crime, when confronted with that
13 sort of coercion, it looks like the best deal that
14 they can ever get, and that can also lead to
15 coerced but nevertheless reliable statements. But
16 it will produce false confessions.

17 And then we go beyond that to
18 something that is rarely seen, and that is the
19 introduction of torture.

20 Torture, physical coercion of any
21 sort, is simply a much more immediate and much
22 more powerful motivator than suggesting things
23 about what your punishment will be in the future
24 or whether you will get to go home at the end of
25 the day. Depending on the strength of the

1 torture, it as a motivator gets increasingly
2 powerful.

3 I think everyone who either knows
4 anything about the history of interrogation,
5 studies it, thinks about it in terms of what you
6 have to do to motivate someone to comply to
7 anything, will clearly recognize that torture is
8 an enormously powerful motivator, but it fits in
9 the same system.

10 If the individual has already been
11 convinced that the interrogator is immovable, then
12 it makes no sense to resist the torture. The only
13 thing in front of them is to minimize the amount
14 of torture. That is the only choice they've got.
15 And they can do that by complying. And the more
16 severe the torture, the stronger the motivator to
17 do that, to cut it off.

18 And if you can succeed in cutting
19 it off by giving a false confession, that can
20 start to look like a very attractive alternative,
21 and perhaps you don't want to think about what is
22 in store for you in the long run if you do that
23 because you are concerned about minimizing the
24 punishment at the moment.

25 So I think, as I see it, torture

1 is an extension of what we see going on in modern
2 interrogation. It simplifies things. It can
3 provide, depending on how strong the torture is,
4 such a powerful motivator that primitive
5 interrogation systems don't necessarily have to
6 work very hard to convince someone that their
7 situation is hopeless. It becomes immediately
8 obvious that the situation is hopeless as the pain
9 of the torture becomes excruciating, and the fact
10 that the person anticipates that the torture will
11 go on because they see no cavalry coming over the
12 hill to rescue them. So therefore, they see
13 nothing; a future filled with nothing but more of
14 the same and perhaps worse torture.

15 Torture becomes just a very
16 powerful motivator and is very likely to produce
17 compliance, perhaps more likely to produce false
18 confession than true confession, simply because if
19 someone has something to genuinely confess,
20 especially if we are thinking about ideologically
21 or politically motivated individuals, they may be
22 willing to hold out longer than someone who is in
23 fact completely uninvolved, has nothing to protect
24 in the sense of no commitment to the organization
25 that they are accused of being a representative

1 of, and that person is freer to think about how to
2 deal with their current situation. And the
3 current situation has been designed to lead them
4 to reach the decision to comply; hence, they want
5 to confess, they want to confess falsely if that
6 will end their torture. And there is nothing to
7 restrain them other than perhaps the realization
8 that in the long run it is not going to work.

9 Certainly anyone who operates a
10 system that depends on this has got to be aware of
11 its potential to produce either intentional
12 deception on the part of people who have an
13 involvement in an outlaw group that they are
14 trying to protect or people who simply want to end
15 the torture by telling them what they need to
16 hear.

17 And so these systems would have to
18 involve checks on the stories that are told to
19 separate out the true from the false because they
20 must be accustomed to getting false statements
21 from people subject to this sort of torture.

22 MR. CAVALLUZZO: I wonder if we
23 might turn then to some particulars of Mr. Arar's
24 detention.

25 I wonder if the clerk might give

1 you Volume 8?

2 Professor Ofshe, if you would
3 refer to tab 693, and if you go to page 3 of 6, I
4 just want to highlight certain facts before
5 Mr. Arar arrives in Syria.

6 If you go to the bottom of the
7 page, you will see that on October the 8th
8 Mr. Arar is still in New York City in the United
9 States and -- about 15 lines up -- he is woken up
10 by a guard. He is then chained and shackled and
11 he is brought before a person, a director of the
12 INS, and he is told a decision has been made and
13 he is also told he will be deported to Syria.

14 The facts are, prior to this time,
15 he had been threatened with that deportation and
16 said, "Don't send me to Syria. I will be
17 tortured."

18 In any event, it goes on. He was
19 driven to an airport and you will see he was put
20 in a plane. He was chained and shackled in the
21 plane. He was along with others. They flew to
22 Washington, D.C. and then eventually they ended up
23 in Jordan, and he is with some four or five people
24 in the airplane. He is taken to Jordan. He is
25 met in Jordan by a number of people. Six or seven

1 Jordanian men were waiting for him. They
2 blindfolded him, chained him, and put him in a
3 van. They made him bend his head down in the back
4 seat and then this man "started beating me. Every
5 time I tried to talk, they beat me", et cetera.

6 He is in Jordan for a particular
7 period of time.

8 If you go on to page 4 of 6, he
9 continued to be blindfolded. They asked him
10 certain routine questions. And then he is there
11 for -- I am going to move on now.

12 He is there for a period of time,
13 of hours, and then finally, if you go eight lines
14 down, it says:

15 "Over an hour later, we
16 arrived at what I think was
17 the border with Syria."

18 So he arrives in Syria finally.

19 He is put in another car, is
20 driven for about three hours, taken into a
21 building where there were guards who went through
22 his bags and took some chocolates that he had
23 bought in Zurich.

24 I assume that the taking of those
25 chocolates is going to enhance his powerlessness,

1 presumably, in terms of the principles you are
2 talking about.

3 MR. OFSHE: In terms of the
4 principles I am talking about, everything that you
5 have read is so obviously going to impact someone,
6 to give them a sense that they are utterly
7 powerless, from being picked up at Kennedy
8 Airport, which you did not read, but then held,
9 transported from western society, obviously with
10 great care and at great expense, to the Middle
11 East, has got to be an experience that proves to
12 you that you are utterly powerless to resist this
13 fate.

14 It is worse than my trying to
15 change planes at O'Hare Airport yesterday.

16 --- Laughter / Rires

17 MR. CAVALLUZZO: If we can move on
18 from O'Hare.

19 MR. OFSHE: Thankfully.

20 MR. CAVALLUZZO: The good
21 professor was delayed three hours last night at
22 O'Hare airport for those who do not know.

23 In any event, it goes on.

24 Picking up three lines later.

25 "Three men came and took me

1 into a room. I was very,
2 very scared. I was crying
3 all of the time. They put me
4 on a chair and one of the men
5 started asking me questions.
6 I later learned this man was
7 a ... Colonel. He asked me
8 about my brothers and why we
9 had left Syria. I answered
10 all the questions. If I did
11 not answer quickly enough, he
12 would point to a metal chair
13 in the corner and ask, do you
14 want me to use this?"

15 I guess another signal to the
16 target that your situation is hopeless.

17 MR. OFSHE: Training of obedience
18 as well. Having read some of Mr. Arar's account
19 of his experience, I know that he did not know
20 what that chair was. But obviously the
21 interrogator is pointing out something to him
22 which he will eventually learn what its function
23 is.

24 It is obviously pointed out to him
25 as a threat of what the future holds for you. All

1 of this is setting the target, Mr. Arar, up to
2 recognize that he had better comply.

3 MR. CAVALLUZZO: Okay. Now, it
4 goes on. Apart from these threats, he said,
5 picking up:

6 "There was no violence. Only
7 threats. At about 1:00 in
8 the morning the guards came
9 to take me from my cell
10 downstairs. We went into the
11 basement and they opened a
12 door and I looked in. I just
13 could not believe what I saw.
14 I asked how long I would be
15 kept in this place. He did
16 not answer. But put me in
17 and closed the door. It was
18 like a grave, exactly like a
19 grave. It had no light. It
20 was three feet wide. It was
21 six feet deep. It was seven
22 feet high. It had a metal
23 door with a small opening in
24 the door which did not let in
25 the light because there was a

1 piece of metal on the outside
2 for sliding things into the
3 cell. There was a small
4 opening in the ceiling..."

5 We have heard earlier there were
6 cats and rats that were urinating, and so on and
7 so forth.

8 Just your comment in terms of that
9 kind of detention condition in which Mr. Arar
10 found himself from October to about late August of
11 the next year.

12 MR. OFSHE: I suppose it would be
13 reasonable to say that this is the equivalent in
14 terms of the setting to what I have described as
15 commonplace in interrogation in western society,
16 done at the police station rather than at
17 someone's home, in order to communicate a
18 particular message.

19 Here the message is coming through
20 loud and clear in everything and up to the
21 abominable conditions under which he recognizes he
22 is going to be kept, not knowing how long; all of
23 it purposive, designed to communicate a certain
24 message to him, and it is a message that I call
25 powerlessness.

1 MR. CAVALLUZZO: Okay. Now, it
2 picks up from there and you will see that physical
3 beatings started that day. I am just picking up
4 here, halfway down:

5 "The beatings started that
6 day and was very intense for
7 a week. And then less
8 intense for another week.
9 That second and the third
10 days were the worst. I could
11 hear other prisoners being
12 tortured and screaming and
13 screaming. Interrogations
14 are carried out in different
15 rooms. One tactic they use
16 is to question prisoners for
17 two hours and then put them
18 in a waiting room so they can
19 hear the others screaming and
20 then bring them back to
21 continue the interrogation."

22 And I guess that kind of periodic
23 beatings, along with waiting time listening to
24 others scream, must have some impact as well.

25 MR. OFSHE: He is learning that

1 his situation is not unique. The others are
2 screaming. I don't know how intense his beating
3 was at that point, whether he was screaming. But
4 if he wasn't and others were, that must have
5 gotten across to him the idea that it is possible
6 that worse things can happen.

7 To assault someone for a period of
8 time and let them sit while they hear the sounds
9 of torture going on around them has got to
10 communicate the message: this is just a temporary
11 break. It is going to focus all of their
12 attention on this experience, the fact that it
13 appears to be the business of what goes on here,
14 that it is continuous, and that how long it will
15 go on and what breaks there will be are entirely
16 up to those who control it, making him very aware
17 of now his powerlessness and his hopelessness.

18 MR. CAVALLUZZO: Okay. The
19 statement goes on to describe being beaten with a
20 black electric cable, which is a shredded cable
21 about 2 inches thick.

22 "They hit me with it
23 everywhere over my body.
24 They mostly aim for my palms
25 but sometimes missed and hit

1 my wrists."

2 And then it goes on:

3 "They also struck me on my
4 hips and my lower back.

5 Interrogators constantly
6 threatened me with a metal
7 chair, tire, and electric
8 shocks."

9 Part of the same pattern.

10 And then it goes on:

11 "Then on the third day, the
12 interrogation lasted about 18
13 hours. They beat me from
14 time to time and made me wait
15 in the waiting room for one
16 to two hours before resuming
17 the interrogation. While in
18 the waiting room, I heard a
19 lot of people screaming. I
20 remember that was one of the
21 worst parts of my
22 imprisonment, is just to hear
23 all those people screaming."

24 And then it goes on.

25 And then, finally, in regard to

1 any statements, if you pick it up about four lines
2 down, it says:

3 "I repeat, they had not asked
4 me about this in the United
5 States. They kept beating
6 me. So I confessed and told
7 them that I went to
8 Afghanistan. I was ready to
9 confess to anything if it
10 would stop the torture. They
11 wanted me to say I went to a
12 training camp. I was so
13 scared that day. I remember
14 I urinated on myself twice.
15 The beating was less severe
16 each of the following days.
17 At the end of each day, they
18 would always say 'tomorrow
19 will be harder for you' so
20 each night I could not
21 sleep."

22 And then, finally, it goes on:

23 "Around October 17th the
24 beatings subsided. Their
25 next tactic was to take me in

1 a room, blindfold will, and
2 people would talk about me.
3 I could hear them saying "he
4 knows lots of people who are
5 terrorists. We will get
6 their numbers. He is a liar.
7 He has been out of the
8 country for long.' Then they
9 would say let's be frank,
10 let's be friends, tell us the
11 truth and come around the
12 desk and slap me on the face.
13 They played lots of mind
14 games. The interrogation and
15 beating ended three days
16 before I had my first
17 consular visit which was on
18 October 23rd."

19 It is obviously a rhetorical
20 question as to whether, first of all, the
21 conditions of detention as described by him, as
22 well as the physical beatings, the threats, the
23 screaming, and so on and so forth, whether these
24 would be at the upper end of your model in terms
25 of physical coercion inducing any kind of

1 confession.

2 MR. OFSHE: They are certainly
3 worse than almost anything that I have seen in the
4 U.S. On the other hand, there are examples of
5 interrogations that have gone on in the U.S. in
6 the recent past involving electrical currents
7 passed through the genitals of prisoners in Cook
8 County. There are perhaps as many as a hundred
9 cases on appeal in the Illinois Appellate Court
10 system over the issue of torture leading to
11 confessions. I have seen other cases in which
12 particular prisoners or suspects have been beaten.

13 This is clearly at least at that
14 level, if not worse, partly because of the
15 conditions of detention. But based on what
16 Mr. Arar reports about what he learned later, when
17 he was transferred to another prison, about the
18 extent of torture that other people got, it is not
19 as severe as it potentially might have been,
20 apparently.

21 The chair, for example. They,
22 while threatened him with it, he doesn't report
23 that it was used on him, and he does report that
24 other people told him that it was used on them.

25 Something is going on here that

1 may not be known to Mr. Arar. They are setting
2 him up clearly, in my judgment, to focus on
3 getting names of other people. Perhaps they
4 actually believe at this point that he knows names
5 of people involved in al-Qaeda, but they are
6 certainly going through the motions of demanding
7 names; and probably, had they pressed him on that,
8 there is a good chance they would have gotten
9 names. And if he is in no way involved in any
10 terrorist organization, he probably would have
11 given them the names of people that he knew who
12 themselves were not involved.

13 But if this process continued,
14 they probably would have been able to squeeze
15 everything that they wanted out of him, and it may
16 all have been worthless.

17 To me, it seems that is what they
18 are setting him up for: letting him overhear "he
19 is a liar", letting him overhear "he knows about
20 other people". They are communicating to him what
21 he has to do to control the level of torture. But
22 it does not seem to continue.

23 After he first breaks, he reports
24 that the level of torture seemed to go down after
25 that. That is teaching him: comply and the

1 torture will diminish.

2 At the same time, according to his
3 account, they are also communicating what they
4 want to know next and allowing him to realize,
5 perhaps, that he needs to give them that;
6 otherwise, the torture will start going up.

7 One of the things that I note in
8 this that strikes me as intriguing or
9 thought-provoking, he says his torture stopped
10 three days before he had his first consular
11 meeting. Probably the people who were torturing
12 him knew at least three days in advance that he
13 was going to be meeting with a consul. That may
14 have been an inhibiting factor.

15 His experience in this system may
16 have been impacted by what the Canadian government
17 was doing to try to protect him and may have in
18 fact protected him from the kind of treatment that
19 he learned other people got merely because of
20 their presence.

21 If I look at what he describes, I
22 see the system as going in a particular direction,
23 but then I see things not happening that appear to
24 be destined to happen. Changes occurring on cue.
25 When he complies, torture is reduced. But all of

1 a sudden torture stops, and three days later a
2 Canadian consul shows up. Perhaps it is
3 happenstance or perhaps there is some causal
4 connection between them.

5 But the system that he is
6 describing is somehow reacting to something
7 external to it, it seems to me.

8 MR. CAVALLUZZO: Now, we have
9 heard a great deal of evidence on that, and
10 obviously at the end of the day the Commissioner
11 will be making certain findings in respect of
12 whether there is any causal connection.

13 But just a few final questions.

14 Obviously from what you have
15 described in terms of your opinion, any product,
16 any report, confession, statement that was the
17 product of this process could be false, and the
18 question that I have related to that is the
19 reliability of that kind of statement.

20 In your experience, if we have a
21 report or statement that is the product of
22 torture, that we know is the product of torture,
23 is it of any use to police or security
24 intelligence agencies?

25 MR. OFSHE: As a general

1 principle, the purpose of an interrogation,
2 whether lawfully conducted or driven by torture,
3 is to obtain information about the matter that is
4 at issue, whether it is the crime or the witness
5 statement that the interrogator wants. It is not
6 merely to get someone to say, "I did it"; it is to
7 get a confession.

8 And I would define confession as a
9 detailed account of the persons involved in the
10 crime step by step by step, or a detailed
11 statement of what the person witnessed, if that is
12 the target, if that is what the interrogator
13 wants.

14 Police are trained always to seek
15 corroboration. Merely getting an "I did it" is
16 not the name of the game. It is getting the
17 person to volunteer information which can be
18 objectively evaluated, which can be compared with
19 the objectively knowable facts of the crime, or,
20 if one is seeking intelligence, compare it with
21 what is reliably known about the training camp in
22 Afghanistan or the organization of an al-Qaeda
23 cell or whatever it might be.

24 So whether the person is
25 confessing, first, to something that is within

1 their experience can be evaluated to screen out
2 either false statements that are made by people
3 who are ignorant of the matter at issue, or false
4 statements made by people who are quite
5 knowledgeable but are choosing to withhold that
6 information. The only standard for doing that is
7 getting details that can be evaluated, can be
8 corroborated. That is true in confession of every
9 sort. That is how one distinguishes between true
10 and false confessions in modern societies that are
11 not torture-driven; and certainly in
12 torture-driven interrogation, the same principle
13 would hold.

14 So if torture increases the
15 motivation to stop the process, it is going to
16 increase the likelihood that someone would elect
17 to falsely confess. And if one is dealing with a
18 population, some of whom are perhaps innocent,
19 others are ideologically committed, the factor of
20 ideological commitment is also likely to produce
21 some false confessions in order to (1) stop the
22 torture, and (2) protect the group.

23 So for a whole host of reasons I
24 would think that interrogators or
25 intelligence-gathering systems that depend on

1 torture have to be even more sensitive to the
2 possibility of false confession and more aware of
3 the need to get verifiable information than
4 ordinary police agents, at least not terribly
5 well-trained police agents.

6 So I think there is a great danger
7 for the system to produce an unreliable statement.

8 MR. CAVALLUZZO: Just in closing,
9 I guess there could be one exception to what you
10 have just said, and that is we discussed earlier a
11 statement that is really a political statement;
12 and that is, you are not concerned about the
13 information that you received, you just want a
14 political statement for whatever the purpose is.

15 MR. OFSHE: Sure. I don't think I
16 mentioned that before, but certainly sometimes
17 there are purely political purposes for getting
18 someone to say "I did it", and that is all that
19 the authority wants out of it. They simply want a
20 confession.

21 This was typical of foreign
22 missionaries who were held in China after the
23 revolution. They needed to be gotten to confess
24 because of the political value, not for any
25 intelligence that they were going to contribute.

1 I mean, I can't say what people believed about
2 whether or not they really were spies, but it
3 would be hard for me to imagine that they were
4 actually thought to be spies. These were
5 missionaries who happened to be in China, but they
6 were made to confess.

7 A lot of the show trials in the
8 Soviet Union after the revolution were about
9 getting confessions, not about actually wrapping
10 up spy rings. They had a political purpose.

11 I am sure that it certainly could
12 come about that, under a particular set of
13 circumstances, the goal might be or might become
14 getting someone to make an admission that so
15 damages their reputation that perhaps no one cares
16 about what happened to them.

17 So it may have political purposes
18 alone, especially, I would imagine, if it is
19 recognized that a mistake has been made and that
20 someone who never should have been taken against
21 their will and subjected to this kind of torture
22 was indeed taken and tortured; and as a political
23 move, it is necessary to develop a cover story,
24 and a confession would probably be helpful.

25 MR. CAVALLUZZO: Okay, Professor

1 Ofshe. That would complete your direct
2 examination.

3 Mr. Commissioner, it is one
4 o'clock. I don't know. Maybe we should assess
5 what the cross-examination --

6 THE COMMISSIONER: Let's see what
7 the likelihood of timing is.

8 MS EDWARDH: I don't expect to be
9 more than 15 to 20 minutes.

10 THE COMMISSIONER: Okay.

11 Mr. Fothergill?

12 MR. FOTHERGILL: My estimate is
13 roughly the same.

14 THE COMMISSIONER: Would you say
15 2:00 or 2:15?

16 What is the last witness, the
17 third witness, likely to be, Mr. Gover?

18 MR. GOVER: I would estimate a
19 similar length to Professor Ofshe. So I might
20 suggest two o'clock?

21 THE COMMISSIONER: All right.

22 We will rise and resume at two
23 o'clock.

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

25 Suspension à 12 h 57

1 --- Upon resuming at 2:00 p.m. /

2 Reprise à 14 h 00

3 THE COMMISSIONER: Yes,
4 Ms Edwardh.

5 EXAMINATION

6 MS EDWARDH: Good afternoon,
7 Professor Ofshe. My name is Marlys Edwardh, and I
8 represent Maher Arar.

9 MR. OFSHE: Good afternoon.

10 MS EDWARDH: I thank you for your
11 evidence this morning because I will be very
12 brief. I wanted to just canvass a couple of
13 issues with you.

14 There is no doubt that there has
15 been a significant moderation in interrogation
16 tactics in ordinary domestic policing in both the
17 United States and, I think probably I can say, in
18 Canada as well since the 1930s.

19 MR. OFSHE: Without doubt.

20 MS EDWARDH: That did not,
21 however, prevent interrogation practices that were
22 designed to manipulate psychological variables to
23 induce a confession.

24 MR. OFSHE: Correct.

25 MS EDWARDH: So that if one were

1 to look at interrogation teaching today in an
2 ordinary policing environment, the process you
3 have described is indeed one that is taught in
4 order to produce a sense of those variables in
5 order to obtain a confession.

6 MR. OFSHE: Let me clarify a
7 little bit.

8 MS EDWARDH: Sure.

9 MR. OFSHE: My experience, and
10 everything I have learned in studying
11 interrogation, is such that except for an
12 extraordinarily unusual set of circumstances, I
13 would not anticipate that an otherwise legally
14 acceptable interrogation would produce a false
15 confession from someone who is not extraordinarily
16 vulnerable; that is to say, intellectually
17 impaired, a child, mentally ill. You know, those
18 are special categories.

19 Deception, the pressure, the
20 distress of being involved in any interrogation
21 where you are being accused ought not to produce
22 false confession.

23 What police are taught to do, that
24 conforms to the law, I don't see as problematic.
25 The problem is police are sometimes also taught

1 how to get around the law, by communicating
2 threats and offers of leniency through suggestion,
3 in order to deceive both the suspect and the
4 courts as to what happened. It is possible to
5 communicate the message. That is the dangerous
6 point.

7 Now, there are training
8 organizations that deliberately train police to do
9 that, tell them it is legal to do that, which is
10 not, tell them that it won't produce false
11 confessions, which it will, and that is because
12 they are being misinformed as to what they are
13 being taught. The problem there is that police
14 are being misinformed as to what they are taught
15 to do.

16 That is assuming that the police
17 want to conform to the law, which is not
18 invariably true, but in the main I think it
19 probably is.

20 MS EDWARDH: I found it
21 interesting if you actually go back to Mr. Arar's
22 experience -- you have, I think, in front of you
23 at Volume 8 and tab 693, his description of
24 events. But it is noteworthy that when he was
25 first arrested, and I believe that is around two

1 o'clock on September 26, 2002 -- you see that at
2 page 2 of 6, halfway down that long paragraph:

3 "He is pulled aside and then
4 there begins a process of
5 interrogation by a number of
6 officers ..."

7 According to this statement.

8 "...that lasts well until
9 midnight."

10 Let me let you take a moment. It
11 starts halfway down, the paragraph beginning with
12 the words:

13 "My flight arrived in New
14 York at 2 p.m."

15 I am not going to suggest very
16 much, so I don't know if you have to read it in
17 detail, Professor Ofshe, but it is obviously a
18 serious interrogation and, without trying to pick
19 it apart, is not conforming to proper police
20 practices. Certainly techniques were used to
21 convey certain impressions to Mr. Arar.

22 But in addition to this
23 interrogation, which lasted quite a long time, he
24 was again interrogated just before he was removed
25 through a "hearing/interview process" for a number

1 of hours.

2 But it is interesting that despite
3 what was done and despite being held in very harsh
4 conditions at MDC in New York on the 9th floor for
5 a period of days, if -- I will just note, if you
6 turn to P-20, which is the decision of the INS
7 when they remove Mr. Arar throughout whatever
8 interrogation he went through -- if you could just
9 provide that to the witness.

10 Are you getting the typed version
11 or the --

12 Okay. I am, in this very bad
13 copy, sir, on page 6 at the top right-hand corner,
14 page 4 at the bottom.

15 It is interesting to observe that,
16 despite the interrogation that he experienced in
17 the United States, it notes:

18 "Mr. Arar denied having any
19 affiliation or link to a
20 terrorist organization."

21 So that really conforms to what
22 you have just said. In a normal, healthy person
23 with -- I don't want to call them appropriate, but
24 at least standard police interrogation procedures,
25 you would expect them to be able to take a

1 position and hold it and answer what they wanted
2 to say without being overwhelmed by the
3 circumstances.

4 MR. OFSHE: Of course.

5 MS EDWARDH: Now, I want to then
6 go on to another area, if I could, and ask you to
7 reflect on Mr. Arar's situation beyond that
8 initial period that Mr. Cavalluzzo described to
9 you.

10 We know that after two weeks or
11 so, just before his first consular visit, the
12 extremely aggressive interrogation coupled with
13 physical brutality stopped, but he continues to
14 reside, without having any knowledge of if or when
15 he would be released, and continues on in the same
16 prison conditions as he was in the first two
17 weeks, and there are a couple of other incidents
18 later on in his detention. And just before he
19 leaves he is asked to sign a statement and he
20 complies.

21 Now, I would just like to ask you
22 whether or not the conditions of confinement that
23 exist for a long period of time would continue to
24 operate on him in such a way as to ensure
25 compliance throughout his period of confinement?

1 MR. OFSHE: I would think so.
2 There is no guarantee someone can -- you know, if
3 they are in a period of relative stability, as
4 long as they remain fearful that intense torture
5 could return, that ought to generate compliance.

6 On the same count, if they are
7 able to recover and regain some strength, their
8 resistance might build up a little bit as well. I
9 think either one is possible.

10 But certainly he is well aware of
11 the dynamics of the system that he is in, and
12 unless he wants to go through the process of being
13 broken again, he would be wise to comply.

14 MS EDWARDH: And indeed that is
15 one of the things that is taught throughout that
16 whole process. He is trained to comply?

17 MR. OFSHE: Clearly, that starts
18 from the very beginning.

19 MS EDWARDH: One of the things we
20 have learned, Professor Ofshe, is that since 9/11
21 there has been a merging of the world of
22 intelligence-gathering with the world of criminal
23 investigation and that the barriers have fallen
24 between those two worlds, both -- I think we have
25 heard it in Canada, and as well we understand it

1 is occurred in the United States.

2 I just want to ask you, sir, to
3 reflect a little, if you would, on the difference
4 between the two worlds, and I am going to suggest
5 a couple of important differences.

6 If one is measuring the
7 reliability of a statement given in interrogation
8 in a criminal process where there has already been
9 a crime, you would agree with me, sir, that one of
10 the advantages of having a real crime scene is
11 there is a basis to measure the narrative that you
12 should get from a person to determine if it is
13 consistent with the crime scene, and whether it is
14 logically consistent in the entirety of the
15 statement, et cetera.

16 You get a base measure of what the
17 truth is.

18 MR. OFSHE: Well, you know what
19 the crime facts are, and that becomes the basis
20 for evaluating the fit of the confession to the
21 crime facts, and then that becomes a basis for
22 weighing how much significance to give to the
23 person's statement, "I did it".

24 MS EDWARDH: And if the person can
25 recount those facts without being told them, that

1 adds to the ability to give some sense of
2 reliability to the person's utterances.

3 MR. OFSHE: Well, it doesn't add
4 to it. It is the basis.

5 MS EDWARDH: Fair enough.

6 MR. OFSHE: If they are
7 contaminated, it is worthless, whether
8 contaminated through the press, contaminated
9 through the interrogator. If someone says it
10 first and all the person is doing is agreeing to
11 it, they've just lost the value of that particular
12 fact.

13 MS EDWARDH: Now, that is the way
14 it is done when you are doing basic criminal law.
15 I want to move into the kind of different world of
16 intelligence-gathering and I want to talk about,
17 for example, an interrogation that was premised on
18 membership: "Are you a member of such an such an
19 organization?" that doesn't really have a factual
20 basis to make judgments about.

21 I mean, it is difficult, it is not
22 like you have a crime scene.

23 I wonder if you can comment, sir,
24 about whether or not the kind of information one
25 gets, that you are a member, is more inherently

1 more unreliable because there is nothing to
2 measure it against?

3 MR. OFSHE: I don't know that it
4 is fair to say there is nothing to measure it
5 against. What one would seek to measure it
6 against is different than the already known or the
7 crime facts that one could be led to. So often
8 police don't know where the missing murder weapon
9 is, and if the suspect can tell them where to find
10 it, that is a biggie -- not because it is the
11 murder weapon but because it is something the
12 police didn't know.

13 If the person said "Go to this
14 place and that is where you'll find it," the
15 probability of guessing that is infinitely small,
16 and bingo they come up with the right answer.

17 The evaluation problem is
18 different. Let's say one is accused of being a
19 member of a particular group. "Okay, I am a
20 member of that group." "Tell me, now, where do
21 they meet? Who are the other members? What's the
22 secret handshake? What's the this? What's the
23 that?" Gather that information.

24 Some of it, the intelligence
25 agency may already have and they are discovering

1 that the person is telling them things that they
2 have reason to believe are accurate; others, they
3 might be information that they can act on and
4 discover that it turns out to be reliable and
5 therefore they can gain confidence in that way.

6 There still has to be an
7 evaluation. You are evaluating it in a different
8 way, but it is still the same evaluation process.

9 MS EDWARDH: So one evaluates it,
10 though, by reference to factual matters that can
11 be confirmed?

12 MR. OFSHE: It has to be.

13 MS EDWARDH: Now, I want to just
14 talk about another aspect of the
15 intelligence-gathering that we have at least
16 adverted to.

17 If in fact the confirmation comes
18 from another interrogation by the same torturers,
19 which is then confirmed --

20 MR. OFSHE: Forgive me for
21 laughing.

22 MS EDWARDH: Well, I appreciate
23 why you are laughing, because it is ludicrous to
24 think that is confirmation.

25 MR. OFSHE: It is called the

1 Central Park jogger case interrogations.

2 MS EDWARDH: Why don't you explain
3 a little of that?

4 MR. OFSHE: Five teenage kids,
5 grabbed by police the night that the Central Park
6 jogger was raped back in 1989, I think it was.
7 All of them interrogated, all of them gotten to
8 give what we now know to be absolutely false
9 confessions. And they simply impose the same
10 story, insofar as they could -- and the stories
11 turned out to be wildly different, because every
12 time something that had not been determined by the
13 police was asked about, the kids gave different
14 answers, because they were just guessing and there
15 was no reason to think that they would guess the
16 same.

17 But that is an example of
18 contamination; the contaminating of the suspect to
19 get them to agree to the police version of the
20 story. I have seen lots of examples of that.
21 There is nothing unusual about it. Whether it is
22 done to one person or two people to try to get
23 similar stories, it is still a product of the
24 technology of influence.

25 MS EDWARDH: And I suppose one can

1 only observe from your earlier remarks when the
2 influence involves the use of torture, then the
3 whole process, including the likelihood of a false
4 confession, gets magnified many times.

5 MR. OFSHE: It is a much more
6 powerful tool if I am correct that the likelihood
7 of getting compliance goes up with the power of
8 the motivator. Then it follows that false
9 confessions ought to be more of a problem when
10 torture is used than when torture is not used.

11 MS EDWARDH: Thank you very much
12 for joining us here, Professor Ofshe. We wish you
13 safe travels back to California.

14 MR. OFSHE: Thank you.

15 THE COMMISSIONER: Mr. Fothergill?

16 EXAMINATION

17 MR. FOTHERGILL: Professor Ofshe,
18 my name is Simon Fothergill, and I am representing
19 the Government of Canada in these proceedings.

20 I think you told us that cases of
21 torture are relatively rare in North America now.

22 Is that right?

23 MR. OFSHE: As far as I know.

24 MR. FOTHERGILL: So to the extent
25 you have the opportunity to analyze the phenomenon

1 of coerced confessions, the sample of torture
2 cases is relatively small?

3 MR. OFSHE: Yes, that I am aware
4 of.

5 MR. FOTHERGILL: Yes. I am only
6 asking you to draw on your own experience.

7 Would you agree with me that, by
8 its very nature, it is very difficult to study the
9 effect of torture on people's tendency to give
10 true or false confessions.

11 MR. OFSHE: It would be a very
12 complicated problem. It would be much easier to
13 study the dynamics, or the organization of a
14 system of torture, than to evaluate the ground
15 truth and any particular result of it.

16 MR. FOTHERGILL: And I take it as
17 well as there being practical difficulties,
18 presumably there are some ethical difficulties in
19 terms of trying to ascertain the impact of torture
20 on people's truthfulness.

21 MR. OFSHE: Well, I don't know if
22 there are any ethical difficulties in asking
23 people about their experience. It probably would
24 be not a good thing to be present while it was
25 going on. That might create an ethical problem.

1 But asking about it I think is fine.

2 MR. FOTHERGILL: After the fact.
3 I take your point.

4 You have described torture as an
5 extreme motivator.

6 MR. OFSHE: In the system I
7 use, yes.

8 MR. FOTHERGILL: You have offered
9 the view that it perhaps is more likely to elicit
10 false confessions than true ones, but I take it
11 that that is as far as you can go?

12 MR. OFSHE: That is why I went
13 that far.

14 MR. FOTHERGILL: All right.

15 I take it that if we accept that
16 it is conceivable, however unlikely, that people
17 subjected to torture may nonetheless tell the
18 truth, this underlines the importance of
19 corroboration which you told us about?

20 MR. OFSHE: I guess I have a
21 problem with the beginning of your question. I
22 don't see necessarily why torture would only
23 produce false confessions.

24 It starts with whether or not
25 the person has something to confess. So not being

1 able to get blood from a stone, you are only going
2 to get false confessions from people who are
3 ignorant of the subject matter that you are
4 interested in.

5 Those who are knowledgeable of it
6 may attempt to deceive you in the beginning, but
7 you may eventually be able to get to a reliable
8 statement from them if you are sophisticated in
9 the way in which you manage the process.

10 So I don't see that there is a --
11 torture can produce compliance and can certainly,
12 I think, produce reliable information as well.

13 MR. FOTHERGILL: It is the
14 uncertainty that makes corroboration so important?

15 MR. OFSHE: Corroboration is
16 important for any statement, whether volunteered,
17 produced responsive to interrogation, or produced
18 responsive to torture.

19 MR. FOTHERGILL: To the extent
20 that you can corroborate information, even if it
21 was given under duress, that would tend to make
22 the information more reliable?

23 MR. OFSHE: Corroboration is
24 the standard for evaluating the reliability of
25 information.

1 MR. FOTHERGILL: Now, I wonder
2 if you could tell us whether it is possible to
3 assess the reliability of a statement merely
4 from its content?

5 Let me make it clear what I
6 mean by that. If you were given a summary of
7 what somebody has said, but you are not privy to
8 the manner in which it was obtained, is it
9 possible to assess whether or not it was the
10 product of coercion?

11 MR. OFSHE: No. I wouldn't
12 think so.

13 MR. FOTHERGILL: So, for example,
14 if you are given an account of somebody's
15 so-called confession, does it make a difference
16 whether the confession clearly incriminates the
17 individual or leaves it somewhat unclear whether
18 the individual is actually engaged in criminal
19 behaviour or not?

20 MR. OFSHE: I just don't think
21 there is any way to get from the output statement
22 back to the circumstances under which it was
23 collected without independent information about
24 the circumstances of the interrogation.

25 Once the person has gotten to the

1 point of compliance, a different set of issues
2 arise and I don't know that you can go backwards.

3 MR. FOTHERGILL: But I think you
4 told us that typically if somebody is being
5 coerced into confessing, the objective is to get a
6 detailed account, a step-by-step account, that
7 clearly implicates them in involvement in criminal
8 behaviour.

9 MR. OFSHE: If someone can be
10 gotten to the point where they are willing to say
11 "I did it," I would refer to that as the point of
12 admission, whether they indicate that they are
13 giving up resisting, whether they use the words "I
14 did it" or however they do it, that is the point
15 at resistance stops.

16 Typically in interrogation, at
17 that point the interrogator now seeks to get a
18 confession. The confession by definition, at
19 least my definition, is a detailed account of the
20 person's involvement in the event, the crime,
21 whatever it is. It is getting that detailed
22 account that creates the possibility of using that
23 information in order to corroborate.

24 If you don't have a detailed
25 account, there is nothing to corroborate. You

1 can't independently corroborate the "I did it"
2 statement, but what you can do is evaluate whether
3 or not the person's account of what happened, or
4 their statement about the mysterious group that
5 you are trying to learn about, leads to
6 information which is reliable, and that is how you
7 evaluate the "I did it" statement, or the "I am a
8 member" statement.

9 MR. FOTHERGILL: So following
10 from Ms Edwardh's example, membership in the
11 group, I think you indicated that for a statement
12 to really be probative of anything you need a lot
13 of detail: Where the group meets, what the secret
14 handshake is.

15 MR. OFSHE: Those would be
16 examples of things that might be subject to
17 evaluation, depending on what information the
18 controlling organization had to start with, or
19 what things they might learn in the future, or the
20 leads they might get out of it that could then
21 develop additional information.

22 MR. FOTHERGILL: To the extent
23 that a statement is missing that kind of detail,
24 does that tell you anything about whether or not
25 it is likely the product of coercion?

1 MR. OFSHE: Not the product of
2 coercion. It tells me something about the skill
3 of interrogators. It might suggest something
4 about what the interrogators were trying to
5 accomplish, but it wouldn't necessarily tell you
6 anything about coercion itself.

7 MR. FOTHERGILL: When you
8 conducted your own analysis of Mr. Arar's
9 statement and his experiences, how important was
10 it to you to have the benefit of the statement
11 that he gave on November 4th of 2003, that
12 Mr. Cavalluzzo referred you to?

13 MR. OFSHE: I didn't conduct
14 very much of my own evaluation of Mr. Arar's
15 account because I have never been able to meet
16 with him. I took the information that was
17 available that gave me some idea of the outline of
18 what he experienced and, limited by that, it
19 seemed nevertheless to fit into the analysis that
20 I am accustomed to doing when it comes to
21 evaluating interrogation. Certain things he said
22 made sense to me. Had I been given the
23 opportunity to interview Mr. Arar, I might have
24 learned a great deal more.

25 But my job, as I understood it,

1 was to come here and entertain or bore, or
2 whatever it is, about the subject of
3 interrogation, rather than try to help and develop
4 the fullest account of the specifics of what
5 Mr. Arar experienced.

6 MR. FOTHERGILL: So you found his
7 statement useful but limited and it would have
8 been preferable to speak with him?

9 MR. OFSHE: If I were to undertake
10 the task of trying to develop the fullest
11 understanding of his experience, then I would want
12 as much information as I could get. The
13 information that I got gave me some idea of what
14 happened to him and the idea that I got from it
15 was not terribly surprising to me.

16 MR. FOTHERGILL: If I can
17 broaden the discussion just a little bit, when you
18 are called upon to analyze whether or not a
19 statement has been given under duress and may or
20 may not be true, I take it that the best scenario
21 is for you to have some sort of videotape or
22 visual recording of the manner in which the
23 interrogation was conducted.

24 Correct?

25 MR. OFSHE: Videotape recording

1 and transcript.

2 MR. FOTHERGILL: And transcript.
3 Presumably if you can't have the video, a
4 transcript would be your next choice?

5 MR. OFSHE: Correct.

6 MR. FOTHERGILL: Then after that
7 it would be somebody's after-the-fact account of
8 precisely what happened to them in as much detail
9 as possible?

10 MR. OFSHE: Correct.

11 MR. FOTHERGILL: What if you have
12 none of those things?

13 MR. OFSHE: Then I don't say
14 anything.

15 MR. FOTHERGILL: Would you agree
16 with me, then, that without having this kind of
17 detailed information about the manner in which an
18 interrogation was conducted, it is quite simply
19 impossible to determine whether or not the
20 resulting information is reliable or not?

21 MR. OFSHE: Whether it is
22 reliable? I don't know any of the details that
23 Mr. Arar gave. I don't know what details he was
24 asked for. All I know is, he reports that he was
25 tortured in this way and that way and exposed to

1 this horrendous set of circumstances, and he
2 reports that he gave a false statement that he had
3 been to an al-Qaeda training camp.

4 I don't know what details he gave
5 about that al-Qaeda training camp, if any. I
6 don't know how thorough his interrogators were in
7 trying to elicit information. All I know is what
8 is contained in this report, and that is simply
9 because it was available, and I asked for
10 information about what happened to him.

11 MR. FOTHERGILL: So if we
12 return, then, to the issue that I think most
13 concerns us in this inquiry, which is the conduct
14 of Canadian officials. If you are a Canadian
15 official trying to make sense of a statement that
16 you have received from Syria through the auspices
17 of the Department of Foreign Affairs, and Mr. Arar
18 has not yet come home to Canada to give his
19 account of what happened to him, how possible is
20 it for that Canadian official to evaluate the
21 statement and determine whether or not it is the
22 product of coercion?

23 MR. OFSHE: Does the Canadian
24 official in your hypothetical know that Mr. Arar
25 was grabbed by the FBI, was transported out of

1 the United States, was dumped into Syria, a place
2 where he was fearful to go because he expected
3 to be tortured, a place where there is a
4 reputation for torturing people, someone who
5 maintains that he has nothing to do with al-Qaeda,
6 whose wife is maintaining that he had nothing to
7 do with al-Qaeda, that he is maintaining he was
8 tortured there?

9 MR. FOTHERGILL: I think the
10 last one --

11 MR. OFSHE: Perhaps he wasn't.

12 MR. FOTHERGILL: I'm just saying,
13 up until you said that I would have said yes, you
14 can assume those.

15 MR. OFSHE: Right.

16 MR. FOTHERGILL: I think the
17 evidence is that it would have been very difficult
18 for Mr. Arar to communicate in the circumstances
19 that he was held, whether he was being mistreated
20 or not, but the rest of your assumptions I think
21 are reasonable ones.

22 MR. OFSHE: Well, let me ask this:
23 If that Canadian official that you have in your
24 hypothetical had a child who was picked up by the
25 FBI, transported to Syria, held in Syria for a

1 long period of time, without having access to
2 the Canadian consulate for private meetings, do
3 you think that Canadian official would be worried
4 that perhaps his or her child was being mistreated
5 in Syria?

6 MR. FOTHERGILL: Well, I think if
7 perhaps you could try to answer my questions
8 rather than vice versa.

9 MR. OFSHE: I would actually
10 rather answer my questions.

11 --- Laughter / Rires

12 MR. FOTHERGILL: I may be able to
13 sit down sooner, and you may be able to get back
14 to California sooner.

15 I think you know where I'm heading
16 with this line of questioning and I think that the
17 qualifications that you want to place before you
18 give your answer are perfectly reasonable ones.

19 Let me just cut straight to the
20 point. I am suggesting to you that a Canadian
21 official trying to make sense of the statement
22 obtained from a country with admittedly a poor
23 human rights record, where we cannot account for
24 the conditions of incarceration, we may even have
25 doubts about them, but I am suggesting to you that

1 it is a difficult process to properly evaluate the
2 statement that is obtained from a foreign country
3 without the benefit even of the account that you
4 had, which you described as limited.

5 Would you agree with me
6 about that.

7 MR. OFSHE: All I can agree with
8 you is, if it was my government and there was not
9 a great deal of concern I would be outraged. So I
10 am not an expert on government practices and I
11 don't represent myself to be.

12 I assume that Canadian government
13 officials are well-informed and are intelligent
14 people, and if they don't use their information
15 and their intelligence in a way to benefit
16 Canadian citizens then I don't think they are
17 doing their job. If it was an American government
18 official and I were in that situation, I would be
19 outraged at any failure to try to help me on the
20 possibility that I might be having the worst
21 experience of my life.

22 Beyond that, I really can't
23 say anything.

24 MR. FOTHERGILL: Yet the one thing
25 that you haven't addressed in your answer is the

1 question that I asked you, which is --

2 MR. OFSHE: I told you, I prefer
3 my questions.

4 --- Laughter / Rires

5 MR. FOTHERGILL: But I'm asking
6 you, sir, to give us an answer based on your
7 expertise, which I believe is evaluation of
8 confessions and whether they are reliable or not.

9 I am simply asking you to
10 acknowledge that there are particular challenges
11 faced by a Canadian official who receives
12 information from a foreign country where we do
13 not know the full circumstances under which it
14 was obtained.

15 Will you agree with me that that
16 poses real difficulty.

17 MR. OFSHE: It poses a problem
18 that needs to be solved, and needs to be solved
19 expeditiously, because some Canadian citizen may
20 be being subjected to torture while the Canadian
21 official is twiddling his thumbs.

22 MR. FOTHERGILL: I think that is
23 probably about as clear an answer as I'm going to
24 get. Thank you very much.

25 MR. OFSHE: Yes. You are welcome.

1 THE COMMISSIONER: Mr. Cavalluzzo,
2 re-examination?

3 MR. CAVALLUZZO: I have no
4 re-examination, Commissioner.

5 THE COMMISSIONER: Well, that
6 completes your evidence, Professor. Let me just
7 take a minute to thank you for your evidence. We
8 appreciate somebody with your experience and
9 stature coming to the Commission. It has been
10 most informative. It has been very interesting.
11 We all wish you a happier experience at O'Hare
12 International.

13 MR. OFSHE: Thank you.

14 Your Honour, if you have a
15 question I will actually answer it.

16 THE COMMISSIONER: I would be
17 scared that you might ask me one. Just kidding.
18 --- Laughter/ Rires

19 THE COMMISSIONER: Thank you
20 very much.

21 Should we break, Mr. Gover, or
22 just carry on?

23 MR. GOVER: I see Dr. Payne
24 is in the room, however, I know that we need to
25 set up.

1 THE COMMISSIONER: We will take
2 10 minutes.

3 MR. GOVER: If we may. Thank you.

4 MS EDWARDH: Thank you very
5 much, sir.

6 --- Upon recessing at 2:38 p.m. /

7 Suspension à 14 h 38

8 --- Upon resuming at 2:43 p.m. /

9 Reprise à 14 h 43

10 THE REGISTRAR: Please be seated.
11 Veuillez vous asseoir.

12 THE COMMISSIONER: Good afternoon.

13 DR. PAYNE: Good afternoon.

14 MR. GOVER: Mr. Commissioner, our
15 next witness is Dr. Donald Payne, and I will be
16 asking you to qualify Dr. Payne as an expert in
17 relation to the circumstances of torture, the
18 physical and psychological effects of torture on
19 its victims, and the reliability of information
20 obtained under torture.

21 Broadly put, there will be six
22 areas --

23 THE COMMISSIONER: I will just
24 swear him first.

25 MR. GOVER: Yes. I was getting

1 ahead of myself.

2 --- Laughter / Rires

3 THE COMMISSIONER: Would you like
4 to be sworn or affirmed?

5 DR. PAYNE: Affirmed.

6 AFFIRMED: DONALD ERNEST PAYNE

7 THE COMMISSIONER: And your full
8 name?

9 DR. PAYNE: Donald Ernest Payne.

10 THE COMMISSIONER: Thank you,
11 Doctor.

12 MR. GOVER: Broadly put,
13 Mr. Commissioner, there will be six areas that
14 Dr. Payne's evidence will address: first, the
15 circumstances of torture; second, torture as
16 described by Dr. Payne by over 1,450 torture
17 claimants whom he has assessed; third, Dr. Payne's
18 evidence in relation to the treatment and
19 conditions of detention that Mr. Arar says he
20 endured while in Syria; fourth, psychological
21 symptoms experienced by torture victims and the
22 psychiatric disorder of which they are
23 characteristic; fifth, the course of treatment for
24 torture victims; and finally, the reliability of
25 information obtained under torture.

1 Now Dr. Payne's reference
2 materials are contained within a volume that is
3 being distributed to counsel, and I would ask that
4 the reference materials compiled in relation to
5 the evidence of Dr. Donald Payne be marked as
6 Exhibit P-128, please.

7 THE COMMISSIONER: All right.

8 EXHIBIT NO. P-128: Book of
9 Documents entitled "Reference
10 Materials Compiled in
11 Relation to the Evidence of
12 Dr. Donald Payne"

13 EXAMINATION

14 MR. GOVER: Doctor to address the
15 preliminary questions I have of you in relation to
16 your qualifications, you received your Doctor of
17 Medicine degree from the University of Toronto in
18 May of 1963.

19 Is that correct?

20 DR. PAYNE: That is correct.

21 MR. GOVER: Subsequently, you were
22 licensed to practise medicine in Newfoundland.

23 Is that right?

24 DR. PAYNE: That is correct.

25 MR. GOVER: And in 1967 you were

1 granted the licence to practise medicine in
2 Ontario.

3 Is that right?

4 DR. PAYNE: That is correct.

5 MR. GOVER: Subsequently then,
6 between 1967 and 1971, you undertook postgraduate
7 training in psychiatry?

8 DR. PAYNE: That is correct.

9 MR. GOVER: Dr. Payne, I
10 understand that you did that at the University of
11 Toronto.

12 Is that correct?

13 DR. PAYNE: Correct.

14 MR. GOVER: You were, further, a
15 resident in psychiatry at the Clarke Institute of
16 Psychiatry, the Queen Street Mental Health Center,
17 the Wellesley Hospital, St. Michael's Hospital and
18 the C.M. Hincks Treatment Center.

19 Is that correct?

20 DR. PAYNE: That is correct.

21 MR. GOVER: You were certified as
22 a specialist in psychiatry in 1971?

23 DR. PAYNE: That is correct.

24 MR. GOVER: Between 1971 and 1974
25 you were a staff psychiatrist at the Queen Street

1 Mental Health Center?

2 DR. PAYNE: That is correct.

3 MR. CAVALLUZZO: Since 1972 you
4 have been in the private practice of psychiatry in
5 Toronto?

6 DR. PAYNE: That is correct.

7 MR. GOVER: Dr. Payne I understand
8 an area of special interest to you has been the
9 psychiatric assessment and treatment of
10 individuals who have claimed to have been
11 tortured.

12 Is that correct?

13 DR. PAYNE: That is correct.

14 MR. GOVER: And in particular I
15 understand that you saw your first torture patient
16 in 1979?

17 DR. PAYNE: That is correct.

18 MR. GOVER: And in fact, since
19 1978 to the present day you have been a member of
20 the Medical Network of Amnesty International?

21 DR. PAYNE: That is correct.

22 MR. GOVER: And you in fact have
23 served as the National Coordinator of the Medical
24 Network of Amnesty International Canadian Section,
25 English-speaking, since 1982?

1 DR. PAYNE: That is correct.

2 MR. GOVER: Further, you have been
3 a member of the Canadian Center for Victims of
4 Torture since 1983?

5 DR. PAYNE: That is correct.

6 MR. GOVER: That membership
7 continues to the present day?

8 DR. PAYNE: That is correct.

9 MR. GOVER: Since 2003 you have
10 been one of two elected North American council
11 members for the Council of the International
12 Rehabilitation Council for Torture Victims, which
13 is known as the IRCT.

14 Is that correct, sir?

15 DR. PAYNE: That is correct.

16 MR. GOVER: You have written about
17 torture and about the psychiatric effects of
18 torture over the past 21 years.

19 Is that correct?

20 DR. PAYNE: That is correct.

21 MR. GOVER: And if we look at page
22 3 of your curriculum vitae, at tab 1 of Exhibit
23 P-128, we see that you wrote to the editor of the
24 Canadian Medical Association Journal in August
25 1984 on the subject of "Torture and Human Rights

1 in Chile"?

2 DR. PAYNE: That is correct.

3 MR. GOVER: Further, about halfway
4 down the page, you have written reports on Somali
5 torture victims reported in the National Academy
6 of Science's report "Scientists and Human Rights
7 in Somalia", in 1988.

8 Is that correct, sir?

9 DR. PAYNE: That is correct.

10 MR. GOVER: You have written a
11 paper, which appears at tab 3 of the reference
12 materials in Exhibit P-128, "Psychological
13 Problems of Refugee Claimants in Interviews and
14 Hearings". You wrote that in 1989 and revised it
15 in 1992?

16 DR. PAYNE: That is correct.

17 MR. GOVER: Further, on page 3,
18 reference is made to your paper which was
19 presented at the International Congress of Law and
20 Mental Health in Toronto in June of 1990, "The
21 Psychiatric Sequelae of Torture: Diagnosis and
22 Treatment".

23 Is that correct, sir?

24 DR. PAYNE: That is correct.

25 MR. GOVER: Turning to page 4 of

1 your curriculum vitae, you have written the paper
2 that appears at tab 2 of Exhibit P-128, "Refugees
3 and the Experience of Violence: Coping with the
4 Effects of War and Torture", presented at the
5 Shared Citizenship Public Lecture Series at the
6 University of Toronto in April 2004.

7 Is that correct, sir?

8 DR. PAYNE: That is correct.

9 MR. GOVER: And you have further
10 made a presentation entitled, "Working with
11 Refugees and Survivors of Torture and War:
12 Experiences and Observations of the Canadian
13 Centre for Victims of Torture". That is a paper
14 that you co-authored and presented in October of
15 last year.

16 Is that right, sir?

17 DR. PAYNE: That is correct.

18 MR. GOVER: Finally in respect of
19 your publications, you have served since 1983 to
20 the present day as editor of "Health Care and
21 Human Rights", the Bulletin of Amnesty
22 International's Medical Network in Canada.

23 Is that right, sir?

24 DR. PAYNE: That is correct.

25 MR. GOVER: You have, I

1 understand, performed psychiatric assessments of
2 more than 1,450 victims of torture and other
3 severe persecution.

4 Is that right, sir?

5 DR. PAYNE: That is correct.

6 MR. GOVER: And I understand that
7 those individuals came to Canada from in excess of
8 90 countries?

9 DR. PAYNE: That is correct.

10 MR. GOVER: Those countries
11 include Afghanistan?

12 DR. PAYNE: Correct.

13 MR. GOVER: And I understand that
14 you have assessed 31 individuals from Afghanistan?

15 DR. PAYNE: Yes.

16 MR. GOVER: Bangladesh?

17 DR. PAYNE: Yes.

18 MR. GOVER: And you have assessed
19 32 individuals from there?

20 DR. PAYNE: Correct.

21 MR. GOVER: You have assessed 200
22 from Bosnia?

23 DR. PAYNE: That is correct.

24 MR. GOVER: You have assessed 29
25 from Bulgaria?

1 DR. PAYNE: That is correct.
2 MR. GOVER: You have assessed 21
3 from Chile?
4 DR. PAYNE: That is correct.
5 MR. GOVER: You have assessed 16
6 from China?
7 DR. PAYNE: That is correct.
8 MR. GOVER: Seventeen from El
9 Salvador?
10 DR. PAYNE: That is correct.
11 MR. GOVER: Forty-eight from
12 Ethiopia?
13 DR. PAYNE: That is correct.
14 MR. GOVER: Sixty-one from Ghana?
15 DR. PAYNE: That is correct.
16 MR. GOVER: Forty-one from India?
17 DR. PAYNE: That is correct.
18 MR. GOVER: Three hundred from
19 Iran?
20 DR. PAYNE: That is correct.
21 MR. GOVER: Eighteen from Iraq?
22 DR. PAYNE: Correct.
23 MR. GOVER: Fifteen from Kenya?
24 DR. PAYNE: That is correct.
25 MR. GOVER: Twenty-nine from

1 Nigeria?

2 DR. PAYNE: That is correct.

3 MR. GOVER: Twenty from Pakistan?

4 DR. PAYNE: That is correct.

5 MR. GOVER: One hundred and

6 forty-six from Somalia?

7 DR. PAYNE: That is correct.

8 MR. GOVER: One hundred and

9 twenty-seven from Sri Lanka?

10 DR. PAYNE: That is correct.

11 MR. GOVER: Twenty-three from

12 Sudan?

13 DR. PAYNE: That is correct.

14 MR. GOVER: And 44 from Turkey?

15 DR. PAYNE: That is correct.

16 MR. GOVER: I understand that in

17 addition to that list you have assessed torture

18 claimants from Syria?

19 DR. PAYNE: That is correct. I

20 have seen four from Syria.

21 MR. GOVER: When we speak of

22 torture claimants who you have seen in the course

23 of your work, can you tell me whether there was

24 any sort of referral process by which torture

25 claimants were screened in any way before you saw

1 them?

2 DR. PAYNE: Usually refugee
3 claimants would be seen by their lawyer and then
4 sent to the Canadian Center for Victims of Torture
5 and be assessed there, and then would be referred
6 on to me or one of the other psychiatrists or
7 physicians for examinations.

8 Since there is a limited number of
9 people doing this work, people have to be
10 relatively disturbed before they got sent on.
11 They weren't sent on for frivolous reasons.

12 There were some occasions I would
13 see people from the board, when they went for
14 their refugee determination hearing and they were
15 obviously very disturbed at the hearing. I got
16 requests sent on from the board saying, "You
17 should have a psychiatric assessment," before they
18 returned for the continuation of their hearing.

19 MR. GOVER: My final question in
20 relation to your qualifications is this: I
21 understand that on approximately 18 occasions you
22 have been accepted as an expert witness
23 previously.

24 Is that right?

25 DR. PAYNE: Yes, for refugee

1 determination hearings.

2 MR. GOVER: Those are my questions
3 at this stage, Commissioner.

4 THE COMMISSIONER: Mr. Waldman,
5 questions or submissions?

6 MR. WALDMAN: No questions. We
7 are satisfied as to his qualifications.

8 THE COMMISSIONER: Mr. Fothergill?

9 MR. FOTHERGILL: I certainly have
10 no quarrel with the witness' qualifications. He
11 is obviously eminently well qualified.

12 One area of concern I do have
13 relates to the purpose of the testimony. I will
14 certainly concede that to the extent the witness
15 is going to speak about the visible signs of
16 torture, the sort of things that Canadian
17 officials might have been able to observe when
18 they visited Mr. Arar in captivity, that strikes
19 me as useful to you in your evaluation of the
20 conduct of Canadian officials.

21 If we are going to broaden that to
22 examine the long-term effects of torture, then
23 that strikes me as something which perhaps is more
24 appropriate in the context of a civil damages
25 claim rather than the mandate that has been given

1 to you.

2 THE COMMISSIONER: Mr. Gover, do
3 you have anything to say with respect to that?

4 MR. GOVER: What I submit in
5 relation to that is that, as with other evidence
6 that you have heard in the course of this week,
7 this is context evidence.

8 And in addition, I would submit
9 that the evidence that you hear about the impacts
10 of torture, the lasting effects, the course of
11 treatment -- all of that may assist you in
12 assessing what it is the fact-finder reports to
13 you, which would be the basis for your findings
14 regarding Mr. Arar's account of what happened to
15 him.

16 So in that respect, I submit that
17 it would be of assistance to you in assessing that
18 evidence. As well, it would be of assistance to
19 you overall in providing context.

20 THE COMMISSIONER: Do you wish to
21 respond to that?

22 MR. FOTHERGILL: I might suggest
23 that we proceed, and if I feel that there is some
24 sort of unfairness being worked to people I
25 represent, I will let you know.

1 But with that explanation, I think
2 that does help me to understand the purpose of the
3 evidence.

4 THE COMMISSIONER: Yes. I think
5 the comment could be made about, if I might just
6 observe, some of the other evidence we have heard
7 this week.

8 I have found as background,
9 actually, a lot of it to be quite informative,
10 although some of it certainly wouldn't be directly
11 applicable to the facts. But I think some of it
12 clearly is and is very important.

13 I think also with this witness'
14 evidence -- I don't know what it is going to be --
15 potentially it would be helpful in terms of the
16 symptoms, or how Mr. Arar presented, both during
17 his detention and on his return.

18 I expect that there will be public
19 evidence, to some extent, with respect to that,
20 and I think it will provide certainly a background
21 and be helpful to me.

22 So I am satisfied that Dr. Payne
23 is qualified to express opinions in the areas that
24 you have indicated, Mr. Gover, and I am also
25 satisfied that I should receive the evidence.

1 MR. GOVER: Thank you,
2 Commissioner.

3 Dr. Payne, I ask you initially,
4 with your background of performing assessments of
5 individuals who have suffered torture and other
6 severe persecution, can you provide us with some
7 background or context for the circumstances of
8 torture?

9 DR. PAYNE: I can respond
10 historically in terms of how we became involved in
11 Canada in seeing torture victims which occurred in
12 the mid to late 1970s when torture victims from
13 Chile started arriving in Canada and in Denmark.
14 Torture victims from Chile and the military rule
15 in Greece arrived and medical doctors then became
16 involved in doing psychiatric assessments, medical
17 assessments, to help support their claims for
18 refugee status.

19 The literature of the first
20 article was published in 1973 by Amnesty
21 International, their medical group, calling
22 attention to the problem, and especially calling
23 attention to the participation of doctors in
24 torture and with their concern about that.

25 In Canada, the first article was

1 published in 1979 by two doctors at St. Michael's
2 Hospital in Toronto, Dr. Cathcart and Dr. Berger
3 on 17 Chilean applicants that they had seen up
4 until that point.

5 The article that is in your
6 material from JAMA, the Journal of American
7 Medical Association from 1988, an article that is
8 an overview article of studies done in Canada,
9 Denmark, and Holland on 319 reported survivors of
10 torture that outlines the physical and
11 psychological sequelae of that and how medical
12 evidence could be used to back up or substantiate
13 or correlate their stories of torture.

14 Following that, it has been
15 accepted, yes, these are the psychological,
16 physical sequelae. Many other people have written
17 about their experiences, but in terms of advancing
18 the field people are trying to go on to other
19 areas now.

20 MR. GOVER: Doctor, if I could
21 take you to tab 5 of Exhibit P-128, this is the
22 article by Goldfeld et al, "The Physical and
23 Psychological Sequelae of Torture".

24 Can you comment on the
25 significance of this article in the psychiatric

1 assessment of torture victims?

2 DR. PAYNE: It outlines the
3 psychological sequelae that have been observed in
4 many different countries, and are the same in the
5 three different countries, and established that
6 these are real symptoms that occur and can be
7 expected to occur as a result of torture.

8 MR. GOVER: Your paper, "Refugees
9 and the Experience of Violence: Coping with the
10 Effects of War and Torture" appears at tab 2 of
11 the exhibit.

12 In this paper you trace, as you
13 have mentioned a moment ago, the history of the
14 assessment and treatment of torture claimants in
15 Canada, and particularly the appearance in Canada
16 of Chilean refugees following the September 1973
17 overthrow of the Chilean government. You comment
18 about halfway down the page:

19 "Although torture is often
20 seen as the infliction of
21 pain, the overall aim of
22 torture is to dehumanize and
23 degrade the victim."

24 You say:

25 "Individuals typically report

1 that the physical effects of
2 their torture were very
3 intense at the moment of the
4 torture, but the
5 psychological aspects of
6 their torture were much more
7 difficult for them to deal
8 with overall."

9 Can I ask you to elaborate on that
10 statement, please, Dr. Payne?

11 DR. PAYNE: That is correct.
12 Again, torture has usually been, in the general
13 public's eye, viewed as pain and suffering that is
14 inflicted on somebody and people respond to reduce
15 the pain, whereas seeing many individuals you come
16 to recognize it is really destroying the will,
17 humanity, spirit of the individual so that they
18 lose control of themselves and are willing to give
19 up control of themselves to their torturers.

20 It is done in the context where
21 the individual being tortured is dehumanized by
22 the process, regarded as a thing by the way they
23 are treated, the circumstances, the torture
24 itself, and once they are things, then the normal
25 restraints in dealing with other human beings are

1 released. They are seen like, you know, the
2 enemy, the vermin that you can, you know, just get
3 rid of and not have to treat them as human, with
4 the respect as a human being.

5 MR. GOVER: Now, in the course of
6 this treatment, and based on what those whom you
7 have assessed have told you, have you been able to
8 discern -- in addition through the literature by
9 the way -- the purposes for infliction of pain?

10 DR. PAYNE: The purposes of the
11 torture are generally three: One, to obtain
12 information; second, as a punishment, either
13 punishment of the individual directly or as a
14 representative of the enemy, the opposition.
15 Along with that is also their sort of the release
16 of frustration of the torturers, where they can
17 treat people badly as a way of getting out their
18 frustration at the enemy; and, third, as a method
19 of intimidating the population as a whole.

20 MR. GOVER: Are those three
21 purposes mutually exclusive?

22 DR. PAYNE: The three tend to go
23 together. Certainly torture for information
24 usually involves a strong punitive element to it,
25 the way people are beaten, abused verbally. As a

1 punishment and for information there is also an
2 effect of intimidating the population as a whole
3 so they know this is going to happen to them if
4 they start rebelling.

5 MR. GOVER: I would like to focus
6 on the concept of use of torture as a means of
7 extracting information.

8 First of all, is that common
9 or uncommon among torture claimants whom you
10 have assessed?

11 DR. PAYNE: It is fairly
12 common, more so after coups, more so after
13 uprisings or larger uprisings within the
14 population it is there.

15 One of the things that is done
16 with people in general that are rounded up at
17 demonstrations, they will be interrogated about:
18 Who did you find out about it? If you are
19 distributing pamphlets they will ask who did you
20 get them from? Who has the printing press?

21 There is always the problem of the
22 authorities not knowing what information they do
23 have and how much information they have. So
24 opponents and suspected opponents tend to be
25 grouped together as one group and treated the

1 same. It is almost that you are guilty until you
2 can prove yourself innocent and there is no way of
3 proving yourself innocent.

4 MR. GOVER: I would like to turn
5 to the second area, which is the description of
6 torture which has been given to you by the over
7 1,450 claimants whom you have assessed.

8 Have the individuals whom you
9 have assessed described the tortures that they
10 have endured?

11 DR. PAYNE: Yes, they have.

12 MR. GOVER: Have those tortures
13 had both physical and psychological dimensions?

14 DR. PAYNE: Yes, they have.

15 MR. GOVER: What have those
16 individuals whom you have assessed told you about
17 the physical tortures that they have endured?

18 DR. PAYNE: Regarding the physical
19 tortures from the countries that I have seen, the
20 torture is usually very harsh and brutal and
21 doesn't require high technology at all.

22 Beatings are almost universal,
23 either by one individual or, more often, by groups
24 of individuals with fists or gun butts, batons,
25 cables, being beaten on the soles of the feet,

1 being suspended upside down and being beaten while
2 suspended, often being placed in painful
3 positions, being given electrical shocks,
4 especially to sensitive parts of their body, being
5 burnt with cigarettes or hot pokers, being
6 submerged in dirty water, being suffocated with a
7 plastic bag over their head. Those are some.

8 MR. GOVER: Let me turn then
9 to the psychological aspects of the tortures
10 that those whom you have assessed have told you
11 they have endured.

12 Can you tell us what they have
13 described in that respect?

14 DR. PAYNE: Regarding
15 psychological tortures, they talk again almost
16 universally about being assaulted, verbally
17 abused, both individually and for their ideas,
18 being sexually abused or degraded, being
19 threatened with worse torture or death, receiving
20 threats against family members, having to hear or
21 observe the torture of others. Many of those
22 describe that as much worse than the torture of
23 themselves because it reinforces their impotence.
24 They are not able to do anything to come to the
25 rescue of the person, especially women; and mock

1 executions, where someone is told they are going
2 to be executed, they are prepared for it, told to
3 write out their last words and are taken off to be
4 often shot and gunshots will ring out and they are
5 still alive. Sometimes other people who are taken
6 out with them are dead, or they are told, "Okay,
7 we have decided not to do it today. Come back
8 tomorrow. We will do it tomorrow."

9 MR. GOVER: Have the individuals
10 whom you have assessed described torture with
11 simultaneous physical and psychological aspects?

12 DR. PAYNE: Usually both.
13 Physical and psychological torture are done at the
14 same time, or combined. People will be beaten,
15 and while they are being beaten they are
16 threatened that it is going to be worse if they
17 don't provide information.

18 Certainly the sexual abuse has
19 both physical aspects of being abused and
20 psychological aspects, especially in Muslim
21 cultures where rape is considered equivalent to
22 adultery, where it gives grounds for one's husband
23 separating from one, or in strict Muslim sense it
24 is even authority to be stoned to death.

25 MR. GOVER: Have you seen evidence

1 of physical -- I know that you are there to
2 perform a psychiatric assessment, but have you
3 seen evidence of physical torture in those whom
4 you have assessed?

5 DR. PAYNE: Yes. Usually when
6 people come in for their physical assessment they
7 will show me their physical scars as well even
8 though I may not do a report on them. Usually
9 they show scars from the cuts they received, scars
10 from lashes, from burns, some evidence of broken
11 bones. Some had blows to the head that resulted
12 in hearing loss and neurological damage.

13 MR. GOVER: Have you observed any
14 variation in the incidence of physical evidence of
15 torture based on the place where those whom you
16 have assessed came from?

17 DR. PAYNE: Very early in the work
18 individuals from Chile and Somalia tended to show
19 a lot of physical evidence of torture in terms of
20 scars. Over the years there seems to be much less
21 scarring shown, that countries tend to use methods
22 of torture that leave less evidence of scars.
23 They also tend to allow individuals to recuperate
24 for some time after before they are released.
25 That gives some time for healing to occur.

1 MR. GOVER: I understand, Doctor,
2 that you have not assessed Mr. Arar.

3 DR. PAYNE: That is correct.

4 MR. GOVER: However, though,
5 Dr. Payne, I would like to take you to Volume 8 of
6 the Foreign Affairs Canada hearing documents,
7 tab 693. I understand you have that before you.

8 DR. PAYNE: Yes.

9 MR. GOVER: At tab 693,
10 page 3 of 6, this is toward the bottom of the
11 page, approximately 10 lines from the bottom of
12 the page -- let me give you the context.

13 Mr. Arar had earlier said that
14 he had been asked to volunteer to go to Syria. He
15 said no way. He had expressed fear of being
16 deported to Syria because he felt he could be
17 tortured there.

18 Just picking up his account, and
19 then I will ask you for your opinion in relation
20 to it, Mr. Arar says:

21 "We flew first to Washington.
22 A new team of people got on
23 the plane and the others
24 left. I overheard them
25 talking on the phone, saying

1 that Syria was refusing to
2 take me directly. But Jordan
3 would take me. Then we flew
4 to Portland, to Rome, and
5 then to Amman, Jordan. All
6 the time I was on the plane,
7 I was thinking how to avoid
8 being tortured. I was very,
9 very scared. That's all I
10 thought about when I was on
11 the plane, how can I avoid
12 torture? We landed in Amman
13 at 3:00 in the morning local
14 time on October 9th. They
15 took me out of a plane -- of
16 the plane and there were six
17 or seven Jordanian men
18 waiting for us. They blind
19 folded and chained me and put
20 me in a van. They made me
21 bend my head down in the back
22 seat. Then this man started
23 beating me. Every time I
24 tried to talk, they beat me.
25 Every time I tried to move, I

1 tried to talk, I tried to say
2 anything, they just beat me
3 very severely. And they did
4 this for the first few
5 minutes. It was very, very
6 intense. About 30 minutes
7 later, we arrived at a
8 building where they took off
9 my blindfold and asked me
10 routine questions. Before
11 taking me to a cell. It was
12 around 4:30 in the morning on
13 October 9th. Later that day,
14 they took my fingerprints and
15 blindfolded me..."

16 And so on.

17 The continues several lines down:

18 "Over an hour later, we
19 arrived at what I think was
20 the border with Syria. I was
21 put in another car and we
22 drove for another three
23 hours. I was taken into a
24 building where some guards
25 went through my bags and took

1 some chocolates I bought in
2 Zurich. I asked one of the
3 people where I was, and he
4 told me I was in the
5 Palestine branch of the
6 Syrian military intelligence.
7 It was about 9:00 in the
8 evening on October 9th. It
9 was about 6:00 in the evening
10 on October 9th. Three men
11 came and took me into a room.
12 I was very, very scared. I
13 was crying all the time.
14 They put me on a chair and
15 one of the men started asking
16 me questions. I later
17 learned this man was a ...
18 Colonel. He asked me about
19 my brothers and why we had
20 left Syria. I answered all
21 the questions. If I did not
22 answer quickly enough, he
23 would point to a metal chair
24 in the corner and ask, do you
25 want me to use this? And he

1 said it many times, do you
2 want me to use this? I did
3 not know then what that chair
4 was for. I learned later it
5 was used to torture people.
6 I asked him what he wanted to
7 hear. I was very terrified
8 and I did not want to be
9 tortured. I would say
10 anything to avoid torture.
11 This lasted for four hours.
12 There was no violence. Only
13 threats. At about 1:00 in
14 the morning, the guards came
15 to take me to my cell
16 downstairs. We went into the
17 basement and they opened a
18 door and I looked in. I just
19 could not believe what I saw.
20 I asked how long I would be
21 kept in this place. He did
22 not answer. But put me in
23 and closed the door. It was
24 like a grave, exactly like a
25 grave. It had no light. It

1 was three feet wide. It was
2 six feet deep. It was seven
3 feet high. It had a metal
4 door with a small opening in
5 the door which did not let in
6 light because there was a
7 piece of metal on the outside
8 for sliding things into the
9 cell. There was a small
10 opening in the ceiling, about
11 one foot by two feet, with
12 iron bars. Over that was
13 another ceiling so only a
14 little light came through
15 this. There were cats and
16 rats up there, and from time
17 to time, the cats peed
18 through the opening into the
19 cell. There were two
20 blankets, two dishes, two
21 bottles. One bottle was for
22 water and the other one was
23 used for urinating during the
24 night. Nothing else. No
25 light. I spent ten months

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1 and ten days inside that
2 grave. Again, I repeat, I
3 spent ten months and ten days
4 in that -- inside that grave.
5 The next day, I was taken
6 upstairs again. The beatings
7 started that day and was very
8 intense for a week. And then
9 less intense for another
10 week. That second and third
11 days were the worst. I could
12 hear other prisoners being
13 tortured and screaming and
14 screaming. Interrogations
15 are carried out in different
16 rooms. One tactic they use
17 is to question prisoners for
18 two hours and then put them
19 in a waiting room so they
20 can't hear the others
21 screaming, and then bring
22 them back to continue the
23 interrogation. The cable is
24 a black electrical cable,
25 it's a shredded cable, about

1 two inches thick. They hit
2 me with it everywhere on my
3 body. They mostly aim for my
4 palms but sometimes missed
5 and hit my wrists. They were
6 sore and red for three weeks.
7 They also struck me on my
8 hips and lower back.
9 Interrogators constantly
10 threatened me with a metal
11 chair, tire, and electric
12 shocks. The tire is used to
13 restrain prisoners while they
14 torture them with beating on
15 the sole of their feet. I
16 guess I was lucky because
17 they put me in the tire but
18 only as a threat. I was not
19 beaten while in the tire.
20 They used the cable on the
21 second and third day, and
22 after that, mostly beat me
23 with their hands, hitting me
24 in the stomach and on the
25 back of my neck and slapping

1 me on the face. Where they
2 hit me with the cables, my
3 skin turned blue for two or
4 three weeks, but there was no
5 bleeding. At the end of the
6 day, they told me, tomorrow
7 would be worse. So I could
8 not sleep. Then on the third
9 day, the interrogation lasted
10 about 18 hours. They beat me
11 from time to time and made me
12 wait in the waiting room for
13 one to two hours before
14 resuming the interrogation.
15 While in the waiting room, I
16 heard a lot of people
17 screaming. I remember that
18 was one of the worst part of
19 my imprisonment, is just to
20 hear all those people
21 screaming. I remember my
22 heart on many times I heard
23 this was just going to go out
24 of my chest. they had not
25 asked me about this in the

1 united states. I repeat,
2 they had not asked me about
3 this in the united states.
4 They kept beating me. So I
5 confessed and told them that
6 I went to Afghanistan. I was
7 ready to confess to anything
8 if it would stop the torture.
9 They wanted me to say I went
10 to a training camp. I was so
11 scared that day. I remember
12 I urinated on myself twice.
13 The beating was less severe
14 each of the following days.
15 At the end of each day, they
16 would always say 'tomorrow
17 will be harder for you' so
18 each night I could not sleep.
19 I did not sleep for the first
20 four days. And I slept no
21 more than two hours a day for
22 about two months. Most of
23 the time I was not taken back
24 to my cell but put in a
25 waiting room where I could

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1 hear all the prisoners being
2 tortured and screaming. One
3 time I heard them banging a
4 man's head repeatedly on a
5 desk really hard. Around
6 October 17th the beatings
7 subsided. Their next tactic
8 was to take me in a room,
9 blindfold will, and people
10 would talk about me. I could
11 hear them saying "he knows
12 lots of people who are
13 terrorists. We will get
14 their numbers. He is a liar.
15 He has been out of the
16 country for long.' Then they
17 would say let's be frank,
18 let's be friends, tell us the
19 truth and come around the
20 desk and slap me on the face.
21 They played lots of mind
22 games. The interrogation and
23 beating ended three days
24 before I had my first
25 consular visit which was on

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1 beaten, and usually more severely in the early
2 stages of detention; very common to be threatened
3 with worse torture. And especially the four
4 individuals that I have seen from Syria, it was
5 very common for them to be threatened with worse
6 torture.

7 The one man I saw who wasn't
8 tortured very badly but was always threatened with
9 being sent to the entertainment room, as he
10 interpreted it to me, and he was hearing the
11 screams and yells of other people being tortured
12 at the time.

13 I had one individual who was given
14 electrical shocks to his abdomen and threatened
15 with being given electrical shocks to his genitals
16 if he didn't provide information, and he was taken
17 out and shown a group of men who were very weak
18 and sick and thin and pale, and was told that they
19 had had electrical shocks to their genitals, and
20 that he was going to end up like these men if he
21 didn't provide information.

22 MR. GOVER: Now, in addition, did
23 any one of the four whom you assessed that came
24 from Syria describe to you being held in a small,
25 underground cell?

1 DR. PAYNE: Yes, three of them
2 specifically reported being held in small
3 underground cells. One cell was 1 metre by
4 1 metre, even smaller than Mr. Arar's.

5 MR. GOVER: In addition, did
6 any of the claimants from Syria describe to you
7 hearing other people screaming in the course of
8 their detention?

9 DR. PAYNE: Yes. They all heard
10 other people screaming and had other similar
11 threats used against them.

12 MR. GOVER: Can you comment on the
13 conditions in which torture victims whom you have
14 assessed were detained and the impact of the
15 conditions of detention on the detainees?

16 DR. PAYNE: They were all held
17 in rather sort of hopeless, demoralizing,
18 depressing situation, in these small, dark cells
19 without access to other people, in conditions
20 where they had no control over their future at all
21 of what was going to happen to them. Sort of a
22 hopeless, helpless feeling that was most
23 distressing, not knowing when they were going to
24 be released, having no one they could appeal to
25 for help or justice, and often being told that

1 they could be killed at any time and nobody would
2 know the difference.

3 MR. GOVER: In the course of
4 referring to Volume 8 at tab 693 I also described
5 to you the conditions of detention that Mr. Arar
6 has described as the conditions that prevailed for
7 10 months and 10 days of his detention in Syria.

8 Given what Mr. Arar has said about
9 the conditions of his confinement, can you comment
10 on whether the conditions of his detention, as he
11 has described them to you, are consistent or
12 otherwise with the conditions that you have
13 described as having been provided to you by way of
14 description by those whom you have assessed?

15 DR. PAYNE: Yes, they are
16 consistent with the other individuals I have
17 assessed, especially those from Syria. He was
18 detained for quite a long time, more than most
19 other people were detained, which was more in the
20 range of several months.

21 MR. GOVER: You described a moment
22 ago the impact of conditions of detention on
23 others who have claimed to have been tortured,
24 specifically those whom you have assessed, these
25 1,450 or more, including four from Syria.

1 Can you comment on the
2 likely impact of those conditions of detention
3 on Mr. Arar in particular, if one accepts what is
4 reported here at tab 693 of Volume 8?

5 DR. PAYNE: They are relatively
6 consistent with individuals that I have examined
7 in general who report that during the first few
8 weeks of the detention their torture is usually
9 worse, especially when they are held
10 incommunicado, without anybody knowing where they
11 are and the government officials denying that they
12 are even in detention.

13 Often once their family knows
14 where they are and they are allowed access to
15 their family or lawyers, conditions improve
16 somewhat, and once they come to court and are
17 subject to the judicial system things usually
18 improve considerably. The torture can still go
19 on, but it is much, much less.

20 MR. GOVER: So that I'm clear on
21 this, is it correct to say then that based on what
22 those whom you have assessed have told you, that
23 the severity of torture tended to vary depending
24 on the stage of detention?

25 DR. PAYNE: It often did. As in

1 Mr. Arar's case, it would be most severe early on,
2 and being still present but much less intense as
3 time went on.

4 MR. GOVER: You have mentioned
5 earlier that one of the purposes of the torture as
6 reported to you by those who have endured it was
7 extraction of information from them.

8 If you look at the three purposes
9 that you described earlier as underlying torture,
10 that is to obtain information as punishment of the
11 person, either directly or as a proxy for the
12 enemy, or as a method of intimidating a population
13 as a whole, based on what they have told you once
14 again, can you comment on the severity of torture
15 and whether it is variable having regard to the
16 apparent purpose?

17 DR. PAYNE: It is severe in terms
18 of getting information, but that is also combined
19 very much with punishment and getting out
20 frustration of the guards as well.

21 In many cases it seems much more
22 punitive than actually, you know, to get
23 information, and in many cases it is known that
24 the individuals have very little information to
25 provide. But they are there, they are part of the

1 opposition, the enemy, so we have got them.
2 Somebody has to be punished, so they get punished
3 because they are there.

4 MR. GOVER: Earlier in your
5 evidence and in your paper you described the
6 objective of dehumanizing the victim of torture.

7 How long does that dehumanization
8 last and how long does the corresponding feeling
9 of loss of control last?

10 DR. PAYNE: The psychological
11 effects last for a long time. Certainly during
12 detention, certainly after they are released and
13 they are still in the country, because there is
14 always a fear of being detained again and having
15 to face more torture that could happen at any
16 time. So it is not able to be relaxed, always
17 being on the alert, you know, watching out for the
18 authorities.

19 Even after they come to Canada,
20 the ones that do here, and out of their country,
21 there is still an ongoing fear that persists in
22 them, some because they may not pass their
23 hearings and may get sent back on that tends to
24 perpetuate it, but even after they have passed
25 their hearings and are able to stay, it takes a

1 long time for this fear and sense of themselves to
2 come back again. You know, to feel whole as a
3 person takes a long time.

4 MR. GOVER: That really takes us
5 to the fourth area that I would like to address
6 with you, and that is the psychological symptoms
7 experienced by torture victims and the psychiatric
8 disorder of which they are characteristic.

9 Let me ask first, what are the
10 psychological symptoms experienced by torture
11 victims whom you have assessed?

12 DR. PAYNE: Psychological systems
13 are related to, again, almost universal
14 re-experiencing of their torture. That can occur
15 through bad dreams at night, nightmares, intrusive
16 memories of the torture repeatedly coming into the
17 mind during the day. Sometimes they are able to
18 distract themselves on to other things and
19 sometimes they can't. And flashbacks, where they
20 feel they are really back in the experience again,
21 they are back in the country they came from and
22 undergoing the torture rather than just
23 remembering it.

24 MR. GOVER: So those are all
25 manifestations of this symptom of persistently

1 re-experiencing the torture?

2 DR. PAYNE: Yes. More upset if
3 they get any reminders, directly or indirectly,
4 about the experiences they have been through,
5 certainly such as seeing police in Canada, hearing
6 sirens.

7 Very unfortunately, people have
8 scars on their body from their torture. Every
9 time they shave in the morning they see their scar
10 and that reminds them, or scars on other parts of
11 their body that are there, the permanent reminder
12 of what they have gone through.

13 MR. GOVER: Other symptoms?

14 DR. PAYNE: Other symptoms. They
15 usually avoid anything that will remind them of
16 their torture. Many will stay away from people of
17 their own country because that is a reminder.

18 They will stay away from
19 television programs or movies associated with
20 violence, because that again is a reminder of the
21 violence that they went through.

22 They are much more revved up with
23 anxiety, and many of them have a lot of
24 psychosomatic physical symptoms of torture,
25 headaches, muscle pains, stomach upset. They feel

1 depressed, in sort of that sort of hopeless type
2 of depression rather than a loss-type of
3 depression.

4 They tend to be withdrawn and
5 avoid other people. They tend to feel a sense of
6 shame, especially those that have had sexual
7 abuse. Women will tend to isolate themselves out
8 of their sense of shame, and for men too because
9 they no longer feel the strong person that they
10 were before. There are even some men I have seen
11 who have been coping relatively well and then
12 their families arrive in Canada and they do much
13 worse when their families are here, because they
14 are no longer able to be the strong man in the
15 family that they had been prior to their torture.
16 They need their wife to look after them and to
17 help them and that is a big disgrace to them.

18 They often are more physically
19 revved up in arousal, they just are agitated and
20 can't calm down. They have an increased startle
21 response. They hear a bang, they will jump very
22 quickly and have difficulty tolerating noise.

23 Their memory and concentration
24 tend to be poor, which again makes it more
25 difficult for them to learn English and learn

1 other things that they need in Canada.

2 They have a conditioned fear
3 in Canada of situations from back in the country
4 they came from. Especially seeing police, where
5 they will regard the police here as sort of
6 similar to the police back in the country they
7 came from with the same danger. Even though
8 logically they know it is not true, their
9 emotional reaction is a fear reaction.

10 Especially for torture victims,
11 they have difficulty trusting other people in
12 general, especially government authorities they
13 will have difficulty trusting. I have the
14 advantage of being white skinned which makes it
15 much easier for them to trust me. One of my
16 colleagues who is a physician who has a beard and
17 is a bit dark-skinned has great difficulty dealing
18 with some individuals, especially from Iran, as he
19 reminds them of people back in Iran.

20 MR. GOVER: Doctor, is there a
21 psychiatric disorder that is consistent with the
22 history and this grouping of symptoms?

23 DR. PAYNE: These symptoms
24 fit under the diagnostic criteria of posttraumatic
25 stress disorder in the American Psychiatric

1 Association's Diagnostic and Statistical Manual of
2 Mental Disorders, which is now in its fourth
3 edition.

4 MR. GOVER: We haven't,
5 Commissioner, reproduced the entire DSM-IV but we
6 have an excerpt from it at tab 4 of Exhibit P-128.

7 Perhaps I could draw your
8 attention, Dr. Payne, to page 424, and
9 specifically if you could summarize for us the
10 diagnostic features for posttraumatic stress
11 disorder, please?

12 DR. PAYNE: The diagnostic
13 features.

14 First, one has to have the
15 traumatic event which is outside the range of
16 usual human experience. It is not something that
17 is commonly experienced, and usually experienced
18 in a helpless, hopeless situation.

19 Then one has symptoms of
20 re-experiencing of the traumatic events in various
21 ways that I have mentioned, in dreams and
22 intrusive memories. General avoidance, under (c)
23 avoidance of stimuli in situations that remind the
24 individual of these. They mention emotional
25 numbing, but we don't see that much in torture

1 victims. They are more aroused up than being
2 emotionally numbed.

3 Also things like difficulty
4 concentrating, more irritability, getting upset
5 easily. With a duration of 3 months -- acute they
6 say is more than 3 months. Chronic, certainly the
7 ones we get to see are all chronic, they have had
8 symptoms lasting for many months, and in many
9 cases years.

10 MR. GOVER: I note that the
11 diagnostic features state that the person's
12 response to the event must involve intense fear,
13 helplessness, or horror.

14 DR. PAYNE: Yes. This is not
15 just the ordinary upsets of life, it is something
16 much more severe and intense than the ordinary
17 upsets one might go through like divorce or minor
18 accidents.

19 MR. GOVER: Now, can you
20 provide us with a definition of the term
21 "neurophysiology"?

22 DR. PAYNE: Neurophysiology is one
23 of the areas of interest in posttraumatic stress
24 disorder now. It relates to the neurological
25 structures in the brain and the brain chemistry

1 that regulate our basic body functioning and
2 underlie our conscious awareness of our feelings
3 and our thinking.

4 MR. GOVER: I understand that
5 the neurophysiology of individuals with
6 posttraumatic stress disorder has been studied and
7 a report appears at tab 6 of Exhibit P-128.

8 Is that correct.

9 DR. PAYNE: That is correct.

10 MR. GOVER: If you could put in a
11 concise statement in layman's terms what it is
12 this article says, I would be grateful.

13 DR. PAYNE: This is one of several
14 articles. Usually doing brain imaging techniques,
15 MRI scans, PET scans of individuals that shows the
16 areas of the brain that are being activated while
17 people are talking about their torture
18 experiences, and certainly it is shown that
19 various brain structures are overly stimulated,
20 hyperactive during this time.

21 It gives an indication that
22 posttraumatic stress disorder is not just
23 something in the mind, in this mind-body
24 dichotomy, but it something that affects the
25 structure of and functioning of the brain itself.

1 I guess in computer terms, it
2 is not just a software problem but it is a
3 hardware problem as well as software.

4 It is likely these changes in
5 brain functioning result in disturbances in
6 processing information, especially memories, and
7 account for the long-lasting nature of many
8 psychological symptoms.

9 Just to mention a few. There is
10 an area of the brain called the amygdala, which is
11 a sorting device for all information coming into
12 the brain and where it gets sent off in the brain
13 and, as well as that, it puts an emotional content
14 to it. People with posttraumatic stress disorder,
15 it gives a fear emotion put into many stimuli that
16 come in, so even before it hits the thinking part
17 of the brain it has this fear response that gets
18 activated.

19 It is also shown that from people
20 that went through traumatic experiences some
21 developed posttraumatic stress disorder and some
22 didn't. For the ones who developed posttraumatic
23 stress disorder, they had more activation on the
24 right side of their brain, which is a pre-verbal
25 area of the brain, so that their thinking was --

1 their experience of their torture or other
2 traumatic event, while they were talking about it
3 it was very sort of raw emotion, whereas those who
4 hadn't experienced posttraumatic stress disorder
5 it was more on the left side of the brain was
6 activated, which is more a logical, rational,
7 where they can put their emotions into words.

8 Again, it helps explain why people
9 with posttraumatic stress disorder tend to have a
10 lot of strong feeling associated with what is
11 going on that is sort of non-verbalized yet. Once
12 it gets verbalized, then you can manipulate it a
13 lot more and deal with it in a rational fashion,
14 but before it is verbalized it is more sort of raw
15 emotion and comes out in a lot of visual images,
16 in the re-experiencing and the flashbacks, rather
17 than processed into verbal, intellectual terms
18 that can then be manipulated later on.

19 MR. GOVER: Can you give us a
20 brief description of the course of the ongoing
21 psychological symptoms you described earlier and
22 the phases of treatment?

23 DR. PAYNE: Yes. certainly a
24 course for people varies considerably. It can
25 relate to the length and severity of the torture,

1 certainly for torture victims' detention. There
2 is a big difference between people who may be
3 detained for a couple of hours or a couple of days
4 and tortured and then they are released and get on
5 with their lives. With individuals that are
6 detained for months, certainly more than 6 to
7 8 months, it has a much, much, much more severe
8 long-term effect on people and they are more
9 disturbed.

10 It depends on how resilient people
11 are. Some people are just naturally more
12 resilient than others and will bounce back and
13 have some inner resources to get themselves
14 together pretty well, and some people don't have
15 that. Some people have more supportive
16 environment that are helpful to them and some
17 people are left to flounder on their own and tend
18 to do less well.

19 Certainly individuals who are seen
20 at the Canadian Centre For Victims of Torture that
21 come to us, it is usually probably two to four
22 years that people have contact with the Centre
23 before they feel they can manage without it.

24 With posttraumatic stress disorder
25 the symptoms can carry on for many years or

1 decades. I have one man that I'm seeing now
2 unrelated to this reasons who was in the Second
3 World War as an underage soldier in Belgium, and
4 every night, or almost every night, he is still
5 back in the war, experiencing the war that he was
6 in 55-60 years ago now.

7 Flashbacks can occur very often
8 too. I have one person who I have seen previously
9 who I encountered and told me she was studying for
10 her Ph.D. exams and was giving a lecture and the
11 projector wasn't focused quite right and she went
12 to focus it and the light came in her eye and she
13 immediately had a flashback to the torture she had
14 had 15 years previously in one of the Latin
15 American countries when a bright light was shone
16 into her eyes while she was being interrogated.

17 People get on with their lives and
18 cope, but things are still there and can be
19 certainly reactivated.

20 In terms of general treatment,
21 the first thing is just getting the person out of
22 the situation. Like an allergic reaction, you
23 want to get the person away from the thing that is
24 stimulating the problem into a safe situation.

25 Then we want to deal with things

1 that are perpetuating their problems. Like
2 difficulty sleeping can keep the person more
3 aroused, they can't cope with things very well.
4 Excessive anxiety. If you can, again, keep the
5 cycle of tension going up, excessive depression,
6 withdrawal, can again just deepen the depression.

7 If we deal with those immediate
8 things that are just tending to keep the situation
9 going and make it worse, then there is a real
10 issue of integrating the person back into society
11 again, and integrating his personal experience
12 into his life experience.

13 I think part of this is getting
14 it from this raw emotion in the right brain into
15 this more logical, thought-out, able to be
16 manipulated and dealt with and incorporated into
17 one's life overall.

18 Certainly we can use a lot of
19 things to help with that. Medication helps.
20 Therapy, both individual and group therapy.
21 Certainly in Toronto we found art therapy helps
22 get people's non-verbal images out, and then
23 talking about it and helping put it into sort of
24 verbal things, then it can be dealt with much
25 easier. A lot of just general support.

1 One of the most important things
2 is developing a trusting relationship with people,
3 helping them develop trusting relationships with a
4 few people that hopefully then can expand as time
5 goes on and then they get better.

6 MR. GOVER: Doctor, I would like
7 to return to one of the purposes of torture, as
8 you understand those purposes from what you have
9 been told by those whom you have assessed, and I
10 would like now to turn to the last area, and that
11 is the reliability of information obtained under
12 torture.

13 Given your expertise, having
14 assessed over 1,450 patients who claim to have
15 been tortured, given your training, given your
16 familiarity with the literature, are you able to
17 comment on the reliability of information obtained
18 under torture?

19 DR. PAYNE: I think reliability
20 is one of the difficult things to assess, because
21 people may say a lot of different things under
22 torture but again it is very difficult for the
23 person receiving the information to determine
24 whether it is reliable or not.

25 In terms of the likelihood of

1 people providing information, useful information
2 under torture, it tends to be associated with the
3 personality of the individual and how important
4 his or her attachment is to the organization or
5 the individual that they are involved with.

6 Certainly there are people that
7 are not very psychologically strong, have
8 difficulty tolerating distress, are excessively
9 narcissistic or self-centred, and they are ones
10 that would likely quickly provide information
11 under torture, under the threat of torture. They
12 just don't want to tolerate stress at all.

13 These characteristics can be found
14 in the population as a whole, probably in
15 conscripted soldiers, but are probably not found
16 in individuals who voluntarily strive for
17 political change in difficult situations.

18 Individuals who are attracted to
19 this political activity are usually
20 psychologically strong, are aware of the risks
21 that are involved in it, put their cause ahead of
22 personal pleasure, and are able to tolerate
23 distress for their cause.

24 An individual with a strong
25 attachment to an identity with their cause, and

1 people associated with it, are much less likely to
2 provide information than people who have very
3 little attachment or less attachment to it.
4 Someone who is very strongly committed to their
5 political activity and the people associated with
6 it are much less likely to give information.

7 I think we know probably from our
8 own personal experience, if we were detained and
9 tortured by somebody who wanted to know the
10 location of our child or grandchild because they
11 wanted to abuse them, how much torture would it
12 take before we revealed that information? We
13 could say, okay, yes, there are just some things I
14 am not going to reveal because I could suffer as
15 much as I want, but nothing is going to make me
16 reveal things like that.

17 It shows that there is no direct
18 correlation between the amount of torture given
19 and people's ability or willingness to provide
20 information. There are other psychological
21 factors of importance of information, importance
22 of a person and the cause that will limit
23 information being given under any circumstances.

24 MR. GOVER: The answer to
25 this should be self-apparent, but are you aware

1 of any medical studies on information obtained
2 under torture?

3 DR. PAYNE: Again, I'm not aware
4 of any medical studies. Again, these studies
5 wouldn't and couldn't be produced. Couldn't
6 because technically it is impossible to get into
7 these situations, technically impossible to know
8 who has information and who doesn't have
9 information, and certainly it would be against
10 medical ethics.

11 MR. GOVER: Have torture
12 victims whom you have assessed told you about
13 information that they have provided while being
14 subjected to torture?

15 DR. PAYNE: They have talked to me
16 about the way they dealt with the situation of
17 dealing with it.

18 None of the individuals I have
19 seen have admitted confessing, in the sense of
20 spilling the beans, about what has happened to the
21 people that have interrogated them.

22 They will speak much more about
23 resisting that, speaking of the demoralizing and
24 degrading effects of torture, and one way of
25 maintaining their morale or their sense of

1 themselves was not giving information. If they
2 could resist giving information, then they could
3 feel they won, they succeeded over their captors,
4 and there is a lot of positive self-esteem that
5 went along with that, even though they are in this
6 very degrading situation.

7 Many took pride in telling me,
8 "Well, they didn't break me. I went through all
9 of this, but they didn't break me."

10 MR. GOVER: Did torture victims
11 whom you have assessed tell you about confessions
12 in particular that they made under torture?

13 DR. PAYNE: In this context
14 "confession" has to be used in quotation marks.

15 For many individuals who were
16 tortured, if the torture carried on long enough
17 they would do something to stop it when they
18 couldn't tolerate it. Giving "confessions," again
19 in quotation marks, would be one of the ways that
20 they would stop the torture, at least temporarily.

21 Probably confessions in the
22 sense that Mr. Arar has reported, where they have
23 something written out that is produced before
24 them and you sign it or you put your thumbprint on
25 it, or for others you just sign a blank piece of

1 paper and they will fill it in and that is the
2 confession, which again is not giving any
3 information.

4 It seemed to me in many cases a
5 face-saving way for the interrogators and
6 torturers to deal with it. "If we don't get
7 information from you, at least we have got you to
8 sign something so we have got something, you know,
9 to hold over you in the end, even though we don't
10 get information and even though you are going to
11 be released."

12 MR. GOVER: Do you have any other
13 comments about information provided under torture
14 and its reliability?

15 DR. PAYNE: Some people have told
16 me they will consciously edit the information they
17 provide. They will provide some information for
18 somebody they may know of already in long-term
19 detention, somebody who has left the country, the
20 information they can provide that is not going to
21 be helpful and it is not going to harm any of
22 their colleagues or friends.

23 Some people would just, say,
24 provide any information, usually unreliable, just
25 to stop the torture for a short period of time,

1 until they get it checked out and they may come
2 back and the torture will continue again, but it
3 gives a little bit of a reprieve.

4 MR. GOVER: Finally, have torture
5 victims whom you have assessed told you about
6 undergoing torture after attempts to obtain
7 information have ended or failed?

8 DR. PAYNE: Yes, but the torture
9 carries on for almost everybody in detention for
10 political reasons. It is to start out being
11 tortured. It may become less intense but people
12 seem to sort of get caught up in the system and
13 once you are in the system you are in a system of
14 torture and it continues, it continues on, often
15 as a punitive thing to people keep in line, as a
16 general deterrent from the population, that this
17 will happen to you too if you start rebelling and
18 speaking up.

19 MR. GOVER: Thank you, Doctor.
20 Those are my questions.

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

23 EXAMINATION

24 MR. WALDMAN: With respect
25 to Mr. Arar's statements and confessions,

1 according to his statement he had nothing to do
2 with anything, so he had nothing to hide or no
3 one to protect.

4 Have you dealt with people in that
5 kind of situation in your experience? Have you
6 dealt with people who weren't involved and were
7 just picked up and had nothing to hide?

8 DR. PAYNE: Oh, yes, I have dealt
9 with many people who have been picked up, have
10 nothing to hide. Because usually the suspicion
11 that goes along with opposition groups is that
12 somebody will be detained and then their brothers
13 will be detained because they are part of the same
14 family and under suspicion, or people will be at
15 the house of somebody who gets arrested and then
16 everybody in the house will be detained.

17 MR. WALDMAN: So in the context of
18 those individuals who had no one to protect, how
19 do they usually deal with the torture in terms of
20 being asked to confess?

21 DR. PAYNE: They will usually
22 maintain that they are not involved, they are not
23 involved at all, but usually when the torture
24 continues on for a long, long, long time, then
25 they will eventually, as Mr. Arar says, be willing

1 to say anything, to sign anything just to stop it.
2 They will confess, again usually in terms of
3 signing something that has been prepared already
4 for them.

5 MR. WALDMAN: Right. So in the
6 context of someone like Mr. Arar, the normal
7 course would be for the torturer to create the
8 statement that the person would sign?

9 DR. PAYNE: Create, yes. In
10 terms of Mr. Arar stating he had gone to
11 Afghanistan, he knew this is what they wanted to
12 hear, very clearly.

13 MR. WALDMAN: We won't take
14 you through it, but the statement goes on for a
15 while and a period of time goes by where he is in
16 the very small cell in appalling conditions for a
17 long time.

18 That, even though there is no
19 physical torture, would being kept in the same
20 place, in the very same difficult conditions,
21 would that continue the traumatizing effect of the
22 original torture?

23 DR. PAYNE: Yes, it very much
24 continues the traumatizing effect of the original
25 torture itself. There is no specific direct harm,

1 but the sensory isolation that goes along with
2 being a prolonged time in a dark space where there
3 is no outside stimulus, or very little outside
4 stimulus coming in is an aspect of torture in
5 itself. You have a lot of time to brood, to think
6 about things, and usually it is the negative,
7 depressing things.

8 There is always the sense of being
9 on the outlook for something happening. Usually
10 people held in these cells are very sensitive to
11 noises, the sounds of individuals walking in the
12 hallway, guards, or the door opening, any
13 indication they might be, you know, taken out
14 again. Because usually the only clue they have of
15 what is happening in the world around them is
16 people walking back and forth, the noises they
17 make, what they are talking about, and they are
18 always on the alert and revved up, hyped up, for
19 these, rather than being able to relax.

20 MR. WALDMAN: Mr. Arar, according
21 to his statement, was taken to another prison
22 where he was put into slightly better conditions
23 for a period of about 6 weeks. But then he was
24 taken back to the same prison, to the same
25 conditions.

1 Being taken back to the first
2 prison where he was tortured, would that have a
3 retraumatizing effect on him?

4 DR. PAYNE: That would make him
5 feel more hopeless again. Certainly he was in
6 better conditions in the other prison he was taken
7 to, he was around other people and had
8 socialization, people to talk to.

9 When I read it, it said he was in
10 a room 20 by 12 feet by 20 feet --

11 MR. WALDMAN: Right, with --

12 DR. PAYNE: -- with 50 people,
13 which is less than 5 square feet per person. So
14 it was an improvement, but if those figures are
15 correct it was a pretty jam-packed area that he
16 was in, rather than an area where he could relax.

17 MR. WALDMAN: He said he was,
18 according to his statement, only beaten on one
19 occasion. But then at the end of September,
20 according to his statement, he was taken back to
21 the original place and it was during that period
22 of time he was brought up and was asked to sign
23 another confession.

24 All the experiences that he
25 experienced at the beginning when he was severely

1 treated, would they be present at the time he was
2 asked to sign the second confession?

3 DR. PAYNE: Yes. I think it is
4 always worse to go back again to a worse
5 situation. It would bring back more the hopeless
6 feeling, the expectation the torture was going to
7 continue, that the situation had become worse and
8 he was in a much more dangerous situation now.

9 MR. WALDMAN: You talked a bit
10 about the retraumatization that occurs, and I
11 would like to deal with that in respect of
12 Mr. Arar, especially with respect to the event and
13 conduct of Canadian officials after he came back
14 to Canada and whether their conduct would have
15 been likely to retraumatize.

16 When he came back to Canada, or
17 since he has come back, the government has refused
18 to acknowledge publicly that he was wronged.
19 Would that have -- what is the -- oh.

20 Am I being corrected?

21 MR. FOTHERGILL: I don't know that
22 that is entirely a correct statement. The
23 government has conceded that he was a victim. The
24 extent to which Canadian officials contributed or
25 caused his misfortune is, of course, what we are

1 here investigating.

2 THE COMMISSIONER: I think that is
3 a fair statement.

4 MR. WALDMAN: Okay. Well,
5 they have conceded that he is a victim, but
6 they haven't acknowledged their role in
7 his mistreatment. Perhaps I will ask you a
8 question.

9 One of the things that we have
10 seen -- and I want you to advise if this is
11 something that is common or present -- is it is
12 quite clear from Mr. Arar's public statements that
13 for him a sense of having justice and an
14 acknowledgment that he was wronged is extremely
15 important.

16 Is that something that you see in
17 other torture victims?

18 DR. PAYNE: Yes, I think this is
19 extremely important for torture victims, a sense
20 of justice. I think that is part of the basis of
21 the fight against impunity for individuals who
22 have been torturers. Pinochet and other
23 individuals who have been tortured, that there is
24 a sense of injustice that they are allowed to go
25 free and their own situation isn't recognized.

1 MR. WALDMAN: So would it be
2 important in terms of Mr. Arar's long-term
3 recovery to have an acknowledgment as to the
4 extent and nature of involvement of the different
5 persons who were involved in his situation?

6 DR. PAYNE: I think if he felt he
7 was getting justice. If this is one of the
8 methods of getting justice for himself I think it
9 would be a relief and would be helpful to put --
10 helping him to put some closure on this aspect of
11 his life and move on from it.

12 MR. WALDMAN: After Mr. Arar has
13 returned there was, for example at the end of
14 October before he made a public statement, a very
15 public leak to CTV News which alleged that he had
16 provided information about other persons who were
17 detained in Canada under immigration security
18 certificates and other places, alleging that he
19 had fingered them as being members of al-Qaeda.

20 He reacted very strongly publicly
21 to this, but my question is: How would that
22 affect him psychologically, an allegation that he
23 had fingered other people?

24 DR. PAYNE: I think it would be
25 difficult for anyone to be pointed out as a

1 betrayed of people, to be falsely pointed out as a
2 betrayed of people, especially people who they
3 had, you know, strong, positive feelings for.

4 MR. WALDMAN: Subsequent to
5 that, there was a major leak of his file,
6 which was published in the Ottawa Citizen and
7 other newspapers, suggesting that he had been
8 to Afghanistan and was connected to a
9 terrorist organization.

10 Would that kind of public leak
11 of information have had an effect of
12 retraumatizing Mr. Arar?

13 DR. PAYNE: I would anticipate
14 that it would have brought the whole situation up
15 again and his sense of not being understood and
16 not being given justice.

17 MR. WALDMAN: One of the
18 other pieces of information that we have learned
19 during the course of the hearing that affected
20 Mr. Arar -- and I wanted to ask you if this is
21 consistent with your understanding -- was when
22 he learned that the information that he had
23 provided during the consular visits to the
24 consul who he had seen while he was being
25 detained was subsequently passed on by officials

1 to the RCMP and CSIS and became part of his
2 investigative file.

3 Would that have retraumatized him?

4 DR. PAYNE: I think he would have
5 seen that as a big betrayal and that would have
6 traumatized him and stirred up his ambivalence
7 around Canadian officials, whether they are
8 trustworthy or not, which I think would have
9 reactivated his real frustration from his time in
10 detention when he had the consular visits there,
11 from which it is reported he seemed to really
12 appreciate them for the contact with people but
13 was very frustrated that they couldn't be helpful
14 to him. They couldn't be helpful because he
15 couldn't tell them what was happening to him and
16 they didn't get it together in their heads to be
17 able to understand what was going on.

18 I think that was a very
19 distressing time for him and he tells in his
20 report of how distressing that was, and screaming
21 and banging his head against the wall with the
22 tension and frustration that was there. I think
23 that it would, again, sort of stir up this sort of
24 tension/conflict within: How much can he trust?
25 How much can they be helpful to him now? When

1 in some ways he knows they can, but then it is
2 not happening and there are more problems. This
3 would certainly create more of a dilemma in his
4 head for himself.

5 MR. WALDMAN: What about the
6 suggestion that he might still be under
7 investigation? Would that be traumatic for him
8 as well, to suggest that -- would that
9 retraumatize him?

10 DR. PAYNE: I understand that he
11 has a sense that his name is not cleared yet,
12 whether it is with the authorities or with the
13 community as a whole, and I think that has a
14 negative psychological effect on him.

15 MR. WALDMAN: Thank you.

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

18 Mr. Fothergill?

19 MR. FOTHERGILL: I think I can be
20 very brief.

21 EXAMINATION

22 MR. FOTHERGILL: Dr. Payne, my
23 name is Simon Fothergill and I appear for the
24 Government of Canada.

25 My questions really just arise

1 from the last exchange you had with Mr. Waldman.

2 I think you told us that you have
3 never examined Maher Arar, is that right?

4 DR. PAYNE: No, I have never
5 examined him.

6 MR. FOTHERGILL: Would you agree
7 with me that there are some quite profound
8 limitations to the extent to which you can comment
9 on the impact of different events on his psyche
10 without actually having examined him?

11 DR. PAYNE: Yes. I can only
12 comment on what I would expect to happen in
13 general in situations like his, yes.

14 MR. FOTHERGILL: So in respect to
15 the answer that you just gave to Mr. Waldman, what
16 you are telling us is that it is possible that
17 Mr. Arar could have reacted in the way that
18 Mr. Waldman suggested, but equally, without
19 examining him, you cannot tell us for sure?

20 DR. PAYNE: It is probable, but I
21 couldn't say for sure.

22 MR. FOTHERGILL: All right.
23 Thank you.

24 DR. PAYNE: Probably more than
25 50-50, but certainly I can't say for sure.

1 THE COMMISSIONER: Thank you.
2 Mr. Gover?

3 MR. GOVER: Mr. Commissioner, I
4 have no re-examination of the witness.

5 Thank you, Dr. Payne.

6 THE COMMISSIONER: Let me express
7 my thanks to you, Dr. Payne. I appreciate the
8 time and effort you put in to preparing to give
9 evidence and coming here today. It has been
10 helpful and I am very appreciative of your help.

11 DR. PAYNE: Thank you very much.

12 THE COMMISSIONER: Thank you.

13 We are going to begin
14 tomorrow at...?

15 MR. GOVER: At 9:30,
16 Mr. Commissioner.

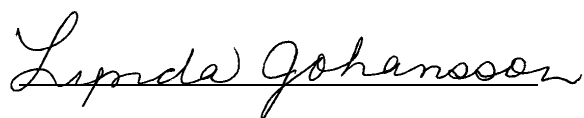
17 THE COMMISSIONER: 9:30 for
18 everybody? Okay.

19 We will rise until then.

20 THE REGISTRAR: Please stand.

21 --- Whereupon the hearing adjourned at 4:09 p.m.,
22 to resume on Thursday, June 9, 2005,
23 at 9:30 a.m. / L'audience est ajournée à
24 16 h 09, pour reprendre le jeudi 9 juin 2005
25 à 9 h 30

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Lynda Johansson,

C.S.R., R.P.R.

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