Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions

Enquête publique sur l'ingérence étrangère dans les processus électoraux et les institutions démocratiques fédéraux

Public Hearing

Audience publique

Commissioner / Commissaire
The Honourable / L'honorable
Marie-Josée Hogue

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Appearances / Comparutions

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Appearances / Comparutions

Ukrainian Canadian Congress	Donald Bayne Jon Doody
Government of Canada	Gregory Tzemenakis Barney Brucker
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Human Rights Coalition	Hannah Taylor Sarah Teich
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Michael Chong	Gib van Ert Fraser Harland
Jenny Kwan	Sujit Choudhry Mani Kakkar
Media Coalition	Christian Leblanc Patricia Hénault
Centre for Free Expression	John Mather Michael Robson

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Appearances / Comparutions

Churchill Society	Malliha Wilson
The Pillar Society	Daniel Stanton
Democracy Watch	Wade Poziomka Nick Papageorge
Canada's NDP	No one appearing
Conservative Party of Canada	Michael Wilson Nando de Luca
Chinese Canadian Concern Group on The Chinese Communist Party's Human Rights Violations	Neil Chantler
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Ottawa, Ontario

--- Upon commencing Tuesday, January 30, 2024 at 10:00 a.m.

THE REGISTRAR: Order, please.

This sitting of the Foreign Interference Commission is now in session. Commissioner Hogue is presiding.

C**OMMISSIONER HOGUE:** Good morning, everyone. It's a bit of a change this morning. The table is in a different position.

We are lucky enough to have three guests this morning as announced yesterday. So, Jean-Philippe MacKay with Commission Counsel will address you, and the panel right after.

--- INTRODUCTION TO EXPERT PANEL BY / INTRODUCTION AU PANEL DE SPÉCIALISTES PAR Me JEAN-PHILIPPE MacKAY:

MR. JEAN-PHILIPPE MacKAY: This panel discussion will begin with presentations from each panelist and will be followed after the lunch break with the question and answer session led by Commission Counsel.

The Commission has invited the participants to submit questions in advance so that the panel can explore the challenges and limitations and potential adverse impacts associated with the disclosure of classified national security information and intelligence and participants are invited to continue to send questions as the presentations unfold this morning.

The first ... of the Faculty of Law of the University of Montreal. He specializes in media and

information technology law and is particularly interested in fundamental information rights and the protection of privacy. He has written and co-authored several books on these issues. He's a regular columnist of "Le Devoir" newspaper.

Mr. Turdel is a Fellow of the Royal Society of Canada.

Mr. Trudel, over to you for your presentation.

--- PRESENTATION BY / PRÉSENTATION PAR Prof. PIERRE TRUDEL:

Prof. PIERRE TRUDEL: Thank you. Thank you, Commissioner, Mr. MacKay.

I was asked to provide to the Commission the public's right to know with respect to information as well as the limits of the law and the principles in that context, namely, taking into account all of the principles of fundamental law. The big challenge is to apply these acts together and in a balanced way.

What I'd like to do this morning is explore the existence of the public's right to know as part of the democratic process in Canada and how is it that this right was considered as being significant but was never considered to be absolute.

And thirdly, I want to speak about the limits, the limits to access to information by the public. These limits need to be justified. And here, we're talking about the duty to explain and justify why a certain information may not be accessible under certain circumstances or, again, there could be certain situations that would

justify that.

Finally, I want to speak about the right to access information. Here, I'm talking about a confirmation, an independent confirmation of the status of a specific document or piece of information, so when the documents are not being published, there need to be good reasons for which that information will not be provided to the public.

The first part of my presentation will deal with the public's right to know as part of the Canadian democratic process. This is a link that we often make between the idea of democracy and freedom of expression, and this idea stems from the assumption that the ability to criticize government action is the very essence of a democracy. That guarantee of freedom of expression protects in a certain way the ability to criticize the decision -- decisions, rather, of the authorities and ensures the possibility of questioning the functioning of public institutions, this principle that has long been recognized in Canada. Of course, the challenge is to ensure that there -- we're able to reconcile the inherent rights of transparency which are key to the public's right to know and other values such as the national security or protecting people.

In the Reference regarding the Alberta statutes, a decision that was made in 1938, it was identified that there's a link between parliamentary democracy that existed in Canada, and the Court spoke about the preamble of the constitutional law of 1867 that indicates that we wanted to have a parliamentary system that we -- similar to the

United Kingdom's in the context of the Westminster system.

And therefore, parliamentary institutions that were inspired by the Westminster system and responsible government must be -- we must take into account public opinion. And taking into account the preamble of the 1867 Act, the Court speaks about the parliamentary system of government and the public's right to know as a right.

The Supreme Court indicated that elected officials' decisions is a fundamental part of a democratic process and this open discussion is only possible if the information is made available to the public. There can't be any reasonable discussion or debate if there isn't information associated with the issues that are the subject of such debate.

In 1982, the inclusion of freedom of expression into the Act was such that in 1994, with respect to the Indigenous Women of Canada, the Supreme Court of Canada also recognized that freedom of expression could include a clause that would lead to the public's right to information. The Judge at the time wrote that, in line with that approach, there could be a situation whereby it wouldn't be acceptable to adopt an attitude of reserve. In such case, a positive government measure would be necessary.

This, for example, could include a legislative intervention that would prevent certain conditions that would muzzle expression or prevent the public from having access to certain types of information.

MR. JEAN-PHILIPPE MacKAY: Due to

interpretation, I would ask you to line -- to slow down a bit. Thank you.

Prof. PIERRE TRUDEL: In the appropriate context, Sopinka -- the Judge Sopinka said these considerations could be relevant and could bring a Court to conclude that there is a need for a positive government intervention in order to ensure that there is a concrete existence of the public's right to such information.

As a result, the public's right to know is a principle, a significant principle of Canadian law. But as all such laws and fundamental laws, it is not absolute. And this is the second part of my presentation.

So I want to speak here about the non-absolute character of the public's right to know.

Even though the interpretation of freedom of expression has to be respectful of the public's right to know and have access to information, there is no general right of the public to have access to all government information and, as a result, this is not part of constitutional Act. The right to information could be limited to the legitimate non-imperatives of a democratic society and such imperatives have to be alleged even if it's not necessarily always possible to act in doing so by exposing the information.

As all laws related to information issues, the public's right to have access to information is not absolute. It can be balanced based on reasonable reasons and justifiable reasons in a democratic society.

In 2010, the Supreme Court of Canada in the

case of *Criminal Lawyers Association* examined these issues once again and the Court brought to the attention that the section 2(b) of the *Canadian Charter of Rights and Freedoms* could -- the government could indicate that certain information would not be made public if they were able to determine that criticism of -- the criticism related to not releasing such information could be a matter of public debate.

Justice Abella, who was responsible for that decision at the Supreme Court, also referred to a Judge in the United States, and this was part of an article that became quite well known from 2013. And the article was titled "What Publicity Can Do".

And in this article, Mr. Brandeis, Judge Brandeis, indicated this sentence that has become well known, "Sunlight is the best disinfectant".

For government to work transparently, all citizens, said Justice Abella -- that all citizens must have access to government documents when necessary for meaningful public debate on the conduct of government and government institutions.

Once it's been demonstrated that, at first look, the documents should be disclosed, the applicant that is calling for the disclosure must then show that the protection is not outweighed by countervailing considerations incompatible with disclosure. And here I'm still referring to Justice Abella that is speaking to the issue of *Criminal Lawyers*.

At paragraph 38, Justice Abella also indicates that:

> "It is conceded that certain privileges properly fall outside the scope of the protection afforded by paragraph 2(b) of the *Charter*." (As read)

Thus, there are rules that limit the right to information, and Justice Abella, in this very important case of *Criminal Lawyers* spoke about what are these main rules that are susceptible to create a balance with respect to disclosure.

She explained that the privileges that are recognized by common law such as solicitor-client privilege generally correspond to situations where public interest in keeping information confidential outweighs the interest that would be served by disclosure.

The same is true of common law privileges in tried in legislation as a privilege of the Queen's Privy Council for Canada. Since both common law and statutes must be consistent with the *Charter*, Justice Abella explained that the creation of specific categories of privileges could be challenged based on the constitutional rules such as freedom of expression. But Justice Abella explained that in practice, these privileges will probably be incredibly circumscribed and, as such, will offer predictability and certainty as to what may disclosed -- must be disclosed and what remains protected.

The *Criminal Lawyers* decision also recognizes

that a particular government function may also be incompatible with access to certain documents. Justice Abella gives the example of the open court principle according to which hearings must be open to the public and decisions must be made public so that they are both subject to public scrutiny and comment.

On the other hand, memos prepared in the course of drafting a decision do not have to be made public, as their disclosure would be detrimental to the proper functioning of the Court. Judges would thus be prevented from deliberating and discussing fully and frankly before rendering their decisions.

Justice Abella also referred as another example to the principle of confidentiality of Cabinet deliberations on internal government discussions.

In 2005, in the decision of *City of Montreal v. 2952133 Quebec*, the Supreme Court of Canada came back to re-examine these decisions and spoke about the different government functions and activities that could require a certain reduction of freedom of expression. So she spoke a bit about this and she spoke about the functions of a specific institution. And that can help to determine which types of documents can be withheld from disclosure.

So I'm still speaking about this same decision. The Court decided that certain situations required a certain isolation and the Court helps to determine which types of documents can be withheld from disclosure because this could be detrimental to the proper functioning or the

institutions that are concerned.

And at paragraph 76, the Court indicates as follows, that:

> "The real function of the place is also important. For example, is it a private area even if it is within the government confines or is it public? What are the functions? What are taking place within that particular area? Are they compatible with freedom of expression or is it, on the other hand, an activity that requires a certain isolation and limited access?" (As read)

In summary, a number of functions, according to the Courts -- a number of functions of public administration, for example Cabinet meetings, require a certain isolation and to extend the freedom of expression in such situations could compromise democracy and the efficiency by which the government governs.

In 2007, in the decision of *Charkaoui*, the Supreme Court was interested in national security. The Court came back on the fact that a number of decisions -- a number of decisions from the Supreme Court of Canada recognized that there were considerations relating to national security can limit the extent of disclosure of information even if there's a person who's particularly interested in that particular legal procedure.

For example, in the case of *Chiarelli*, the

Court recognized the fact that non-communication and details of the investigation and the sources used by the police, and this was part of a procedure... discussions regarding the various number of Acts, including the Acts related to immigration.

The Auditor General -- the Solicitor General of Canada also mentioned that the disclosure of personal information could require the fact that an *in camera* meeting should take place with respect to issues relating to national security or confidential information coming from foreign states.

The Court then indicated these social concerns are part of the context that is relevant that we must consider to determine the scope of the principles that are applicable when it comes to fundamental justice that are also guaranteed by our Constitution.

Finally, we are recognizing the fact that there are imperatives that have to do with national security or other public interests could justify keeping confidential documents or information. The Supreme Court determines that it's necessary for Courts to take measures to make sure that limits to the right of the public to know are justified and circumscribed.

And this now takes us to the third part of this presentation, the limits to the right of access to information must be justified.

It is important to ensure that the reasons for restricting the public's right to know are known and

discussed, for there is no escaping the need to agree that certain types of information and documents are excluded from public access by their very nature or by the likely consequences of their disclosure.

For example, in the case of documents or information relating to national security, the challenge is to have guarantees that ensure that these documents could undermine national security or that of an individual, but when national security reasons are evoked, the public and the media find themselves in a position where they are asked to take the word of those who talk about the confidentiality. Hence, it is important and necessary to have a process to give the public real guarantees when it comes to the existence and truth of the reasons mentioned to ensure transparency.

In the *Charkaoui* case in 2007, the Supreme Court, Chief Justice of Canada, explains that one of the responsibilities of a government, one of the fundamental values is to ensure the security of its citizens. And to do so, sometimes they have to act on the basis of information that cannot be disclosed when it has to do with people that constitute a threat to national security.

On the contrary, the Chief Justice explains that in a constitutional democracy, the government must act in a responsible manner while respecting the Constitution and the rights of freedom of expression that are guaranteed, so this shows that there's an inherent tension in the modern democratic system.

For the Chief Justice, this tension can only be resolved while respecting imperatives that have to do with security and constitutional governance that is responsible.

We could add that one of the major challenges of this right in a democratic society is finding the balance that ensure that, as far as possible, all rights are protected.

The fourth and almost last part of my remarks, Madam Commissioner, has to do with the need for independent confirmation of the status of information or documents because to ensure that the reasons given to take away documents from the public spotlight are justified, we need an independent process that is intended to verify the facts that justify confidentiality and attest to the existence of conditions that must be met for information or a document to be kept confidential.

Such a process is necessary to compensate for the fact that the public and the media that are sometimes the guarantors of the public are faced with a black box when the reason is invoked for sealing information or documents, so this need for a mechanism to ensure that withdrawing a piece of information, a document is justified. In other words, everything takes place as if the principle of transparency's offset by a mechanism whereby an independent third party verifies the facts and satisfies that they do, indeed, give rise to confidentiality. It's a mechanism that is likely to provide guarantees that confidentiality is justified.

In a democratic ecosystem, a system where

there is an independent judicial system that is impartial, it is one way to deal with the confidentiality of information or documents. This would help address the need for reconciling the imperatives of security or other imperatives that justify confidentiality and the imperative of transparency.

This perspective, this practice is a characteristic of democratic countries or a real guarantee of judicial independence which I believe is the case of Canada. This balance between national security and the right to information may go through the intervention of a Judge, who then acts as a trusted, independent observer that has the capacity to verify and satisfying the regularity of the measures taken to seal or restrict information so a Commission of Inquiry with such guarantees could also provide this balance and the guarantees that are sought after.

For example, provisions of section 38 on the *Privacy Act* in Canada -- on evidence, rather, shows special reasons that could limit information. Paragraph 38.06, first paragraph, clearly compels Judges to consider the reasons of public interest that could justify disclosure and conditions or reasons that are more likely to limit any danger that could be posed on national security, defence and so on.

The Supreme Court of Canada in the *Hamad* case explains that when it makes its decision, the Judge could announce partial disclosure or lift some conditions or provide a summary or mention that some facts could be taken for truth for the purposes of the trial.

This now takes me to my conclusion.

The right of the public to know as a fundamental value of a democratic society, as is the case in Canada, requires that we ensure a balance between the imperatives of national security and other imperatives that could justify maintaining secrecy and the transparency that is inherent in our system. The right of the public to know could take various routes to make public certain facts without undermining national security or other interests that could justify sealing of information, so some facts could be made public because they may be explaining to the public why national security and other imperatives are concerned by the documents or information concerned.

Thank you, Madam Commissioner.

COMMISSIONER HOGUE: Thank you, Professor Trudel.

MR. JEAN-PHILIPPE MacKAY: I have two questions for you, questions of clarification.

This afternoon there will be questions put to you and to your co-panelists. You talked about the use of black boxes. This is something that we've seen in legal documents. Jurists are aware of this. But for the public, what do you mean by this concept of "black box"?

Prof. PIERRE TRUDEL: Actually, the public and the media when exceptions to the principle of transparency are invoked, so the different types of exceptions, they find themselves in a situation where they know nothing about what it's all about, what the subject matter is, the reasons for which information cannot be

disclosed. Therefore, it gives the impression that we need to believe people, so there's some kind of mystery so you can't access or know the information because you cannot have access to the information. So it's not very satisfactory as an answer.

This is the type of black box effect that could undermine public trust in institutions and in different processes, including legal processes, where we could find such situations. In other words, the black box effect is an effect where the public finds itself in ignorance. So to offset this black box effect, we should be able to provide the public with clarifications on the reasons why we cannot disclose everything contained in the black box.

We need to find a mechanism and practice such a mechanism through which the public could have access to information that, while protecting the interests that need to be protected, allow at least certifying that we are, indeed, in a situation where the exception to the principle of transparency applies.

So when there's the black box effect, the public could be tempted to think that the exception is being used or invoked without true conviction that the exception should apply. For example, the reason may be to hide information or to withdraw information that may be embarrassing without undermining the life or security of an individual or of the state. So there could be temptation or the public could feel that a public decisionmaker could be highly tempted to invoke the exception, particularly if the

exception is very absolute, to hide situations of facts that should not be part of that exception, for example, with the intention to hide any misbehaviour by a decisionmaker or an organization.

MR. JEAN-PHILIPPE MacKAY: If I understand you, when we find ourselves in a scenario where disclosure is not possible, the communication act that should be completed is to complete the reasons why the black box exists and why the public cannot have access to that.

Prof. PIERRE TRUDEL: Absolutely. In other words, when we find ourselves with the black box situation, we need a mechanism that explains to the public why the information should remain in the black box, what the reasons are. And in cases where we can't go further with disclosure without compromising the very protection of individuals and security, then we need to rely on an independent third party that is impartial who can come and tell the public, "I have looked into what is contained in the black box and I have realized that, indeed, the exceptions provided for by law and which allow that some information not be disclosed should remain in the black box and those reasons are justified".

Of course, you may say that all this is based on the fact that, in a democratic society, the judicial system enjoys the trust -- some trust and confidentiality. I know that we are going through a period where some countries do not have this vision of a judicial system, but I still believe that in Canada, the judicial system ensures that we have Judges that are independent, impartial and have the

necessary stringency to reassure the public when it comes to the existence and reality of reasons for which we must not disclose some information to the public.

MR. JEAN-PHILIPPE MacKAY: Professor West had a question.

DR. LEAH WEST: I just wanted to add, I totally agree that in a democracy, the "just trust us" response is not sufficient, ever. It's not a reasonable justification for a limit on the public's right to know. However, I would say that there are very rare and particular instances, I'm thinking here of even the existence of a human source, where saying the justification for not revealing this information is because it comes from a human source could potentially reveal the identity of a human source in certain circumstances. And in that case, that's where you need that independent third party, who they, themselves, may not even be able to explain the justifiable limit, but to verify that limit for the public.

MR. JEAN-PHILIPPE MACKAY: Thank you. I will leave the podium to my colleague given that.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AUX PANÉLISTES PAR COMMISSIONER HOGUE:

COMMISSIONER HOGUE: Before that, I have a question for Professor Trudel.

Of course, since I've been a Judge myself for almost 10 years, this matter of the public trust is one that I consider very important. In the context of a Commission of Inquiry like this one, there are two issues that I would like

you to consider, a Commission of Inquiry that is independent presided over by an acting Judge and which will have access to information that may be otherwise protected for national security reasons. You have referred to mechanisms that should be used to engender public trust.

Could you please tell us more about what you consider to be mechanisms that could be used by such a Commission of Inquiry to reassure the public and to instill the necessary trust?

Prof. PIERRE TRUDEL: Fundamentally, I think we are talking about mechanisms that could be used by the Judge to explain to the public why, in certain situations with certain information, some information cannot be made public. I don't believe that there is no -- I don't believe that there's a standard mechanism as such.

We find ourselves in a situation -- well, first of all, let's make sure that we minimize as much as possible situations where information will be sealed and, when it's not possible, it should -- the reasons should be explained, reasons explaining why it's not possible.

The mechanisms that come to mind are usual mechanisms you use in judicial decisions, for example, the Judge explains the reasons why they have decided why a document should remain confidential or why certain documents should be redacted or the reasons justifying such a decision. That seems to be the most useful mechanism.

Of course, mechanisms could take different forms. In the context of the Commission of Inquiry, the

Commissioner, I believe, has the capacity to exercise this decision-making authority.

Thank you very much.

COMMISSIONER HOGUE: Thank you.

MS. ERIN DANN: Building then on Professor Trudel's very helpful comments, we turn now to Michael Nesbitt, who will speak to us on -- continue to speak to us on balancing secrecy and confidentiality within democratic -- or with democratic transparency. Professor Nesbitt is an associate professor of law at the University of Calgary, Faculty of Law, where he teaches, researches, and practises in the areas of national security and anti-terrorism law, criminal law, and the laws of evidence. Professor Nesbitt worked as a lawyer and diplomat for Global Affairs Canada and as a lawyer for Canada's Department of Justice. Professor Nesbitt's SJD dissertation, helpfully for us today, concern Commissions of Inquiry and their methods, procedures, and receipt of evidence. He is a senior research affiliate with the Canadian Network for Research on Terrorism, Security and Society. Professor Nesbitt?

--- PRESENTATION BY/PRÉSENTATION PAR DR. MICHAEL NESBITT:

DR. MICHAEL NESBITT: Thank you so much. It's a pleasure to be here and an honour to be here.

To reiterate, the task, as I understood it anyways, that I've been given, is to offer some high-level contextual background on the importance of balancing secrecy and confidentiality with democratic transparency, and what factors are at play, and perhaps end a little bit with how we

might think about going about that task.

I will, however, start with a caveat, and that caveat is that the Commission is not alone in its broad task, nor is it alone in the task of searching for the right balance between national security confidentiality and democratic transparency. Indeed, there are many beyond this inquiry that reside within and outside government who perform oversight review and accountability roles in the national security context, all of whom have to balance the need for secrecy and confidentiality with democratic transparency, to greater or lesser degrees, all of whom will push to release information to the public, while also recognizing the importance of keeping other information secret, and all of whom can provide lessons for the Commission and for the public on how this task is accomplished.

Just quickly review the main such bodies so they're on the table and known to everyone. We have NSIRA, the National Security Intelligence Review Agency. We have NSICOP, the National Security Intelligence Committee of Parliamentarians. We have an Intelligence Commissioner in government. We have their other officers, like the PBO and the Ethics Commissioner. And I'm going to mention a couple others that I think are really important. The first is well known to the Commissioner and Commission counsel, and that's the courts, and the other one is the media, including through how they choose to handle Access to Information requests, whistleblower information and so on.

So with that said, how is this balancing

navigating -- navigated between what I will call democratic accountability and transparency on the one hand and state secrecy and confidentiality on the other. The answer, and perhaps it's too professorial to say, but it's complicated. And so I think what we need to do is start with the big picture principles, as we often do in law and national security, and then dig down into how those can be applied on a case-by-case basis.

Firstly, it is then important to remember, as Professor West just mentioned, the very good reasons why governments maintain secrecy and confidentiality in a number of cases, including to protect lives, or, contrary to what some may think, even to protect the rule of law, for example, by ensuring privacy, privacy law supply, or the safety of individuals within Canada is maintained. As the Arar Inquiry said, Commission of Inquiry reviews concerned the most intrusive state powers of the state, including electronic surveillance, information collection and exchange with domestic and foreign security, intelligence and law enforcement agencies, and so on.

Let me add to that so on. Secrecy is needed for reasons primarily related to the protection of source's lives and wellbeing, and that includes both human sources and those working undercover for security agencies. It's needed to protect techniques, methods of information collection, especially from those looking to overcome those methods of information collection. It's needed to protect employee identities in some case, particularly, as I said, those

working undercover, as well as some internal procedures. It's needed to protect information received from foreign partners, and in so doing, protect these foreign relationships. For Canada, this shouldn't be diminished. We have a Five Eyes partnership, which many will have heard on -- heard of, and Canada is, this is well known, a net importer of intelligence, meaning these relationships are extraordinarily important to us and the flow of information and the ability for Canada to maintain its secrecy and relationship is extraordinarily important to us.

And we also, I would add, must protect the intensity of investigations in some cases that are ongoing, or how, when, and why investigations in the past may have failed, all good information for those looking to overcome the investigations informed by Canadian security agencies.

I'll add that outside of the national security classification claims, there's one thing I did want to bring up, which is just that we may also see cabinet confidences and references to solicitor/client privilege claims that append to -- these are not national security claims, of course, but they can append to national security information and documents, and thus perform the same function in many ways. They may hinder the Commission's Access to Information or the public Access to Information; that is, the ability for the Commission to make such information public. In that regard, we must also note that these are two areas of confidentiality that I understand the Commission may see -- may never see. The Commission's Terms of Reference allow for

the release only of those cabinet confidences that were provided to the Independent Special Rapporteur on Foreign Interference in relation to the preparation of the report, and while there is a process for negotiating solicitor/client privilege documents, those will not, as I understand it, be afforded as a right. These are, of course, important possible limitations to the information both that might one supposes be made available to the Commission but also to the public.

There are also legal requirements related to all of the above protections, and I will leave my discussion at that and allow Professor West to provide those details with which we in Canada have entrenched the protections of sources, methods and information acquired from foreign partners that I've just discussed.

So bearing in mind what I believe to be these very good reasons to protect national security information and maintain secrecy, we must simultaneously remember that the purpose of national security in Canada, at a broad level, is to keep all of us safe and help protect our lives, our livelihood, our way of life, and our democracy. In short, in a democratic nation like Canada, the task of national security operators is, at the broadest level, to work for all of us. This means, as a necessary corollary, that national security powers and actions must be valid expressions of the will of us, the people.

As a result, as Professor Kent Roach said in reviewing the Arar Inquiry, there is a real need for

reviewers to make public as much information as is consistent with genuine national security concerns about protecting sources, methods and relations with foreign governments.

This, I think, brings to the fore the essence of the reciprocal and admittedly caveated relationship between protecting he security of a democratic nation on the one hand and promoting through transparency the sort of democratic accountability and values that ensures power is maintained in the hands of the people on the other. Transparency begets democratic national security, and democratic national security includes as a *sine qua non* transparency and accountability, all allowing as a matter of responsibility what Professor Craig Forcese has called "principled secrecy".

To put it in more concrete terms, there is the imperative on the one hand to keep people safe and, likewise, to keep information secret that keeps people safe. And there is, on the other hand, an imperative to push to share as much information as is possible to ensure transparency and, through it, democratic accountability.

In practice, I truly believe that Canadian agencies and their employees well recognize this reciprocal relationship, this tension, including the imperative for transparency and accountability. Indeed, it's frankly my submission, suspicion, that they are more acutely aware of the issue than most. But looking at past inquiries and their reports to some of our review bodies as well as Court cases in the national security arena, it must also be said that

there's a tendency as a matter of practice for the balance between secrecy and transparency to skew, at least in the first instances, when the disputes first arise, towards secrecy.

Let us look at national security at a fundamental level to see why, and by this I mean a simple day-to-day practice level.

Most laws and institutional mores in national security agencies will rightfully tell security operatives their jobs are important. It's a job of manager. And their jobs are, in part, to keep state secrets. Indeed, these employees will be made well aware that these laws exist, including, in our *Security of Information Act*, that these laws will criminalize the unlawful release of state secrets by those bound to secrecy.

At the same time, rarely, if ever, is there punishment, at least at an individual level, for failing to be fully transparent.

In short, we need a balance of transparency and secrecy, yet most laws and day-to-day practices, the understandable cultures in national security, operate to pressure the prioritization of secrecy.

The same is bluntly true even when it comes to national security redactions that happen every day within government, that being those reviews that look to section 38 of the *Canada Evidence Act*, which Professor West will discuss more later, to determine if information, if released, would be injurious to national defence, national security or

international relations. In the context of something that I think is more broadly understood than some of what we might discuss today is access to information requests or inquiry requests, should it come to that, the following dynamic might often hold. Release too much information as an employee, you will receive a reprimand on the job at best or a criminal charge at worst. Release too little information, and the requesting party will fight the government over it for what might be, frankly, years to the point that the original reviewer and classifier of the information may have long since moved on.

I'm sure that there -- if there's any media in the room, and I know there is, they will be well aware of this dynamic.

In fact, once a review is complete and the redactions I suggested, it tends to be the case that someone else will review the first reviewer's work. The incentive in each case will be to classify more information, not challenge the classification of colleagues, though that surely happens.

The more a document is reviewed before a release, in short, the more important it is, the more redactions one might expect to see. The result, almost inevitably, and to my mind through no real fault of any individual, is a system that will necessarily over-classify. And this is a problem we have seen mentioned in numerous Court cases and governments' reports, but perhaps most forcefully for our purposes by the Arar Inquiry.

Indeed, don't take my word for it. Take the

word of eminent Justice O'Connor, Commissioner of the 2004 to 2006 Arar Inquiry. He said, and I think it bears repeating:

> "It is perhaps understandable that initially, officials chose to err on the side of caution in making national security claims. However, in time, the implications of that over-claiming for the Inquiry became clear. I raise this issue to highlight the fact that overclaiming exacerbates the transparency of and procedural fairness problems that inevitably accompany any proceeding that can not be fully open because of [I put my own words here, legitimate] national security concerns. It also promotes public suspicion and cynicism [as Professor Trudell discussed] about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming."

Justice O'Connor then went on to say:

> "I am raising the issue of the Government's overly broad [national

> security] claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes [national security] claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit, from the outset, the breadth of those claims to what is truly necessary. Litigating questionable national security claims is in nobody's interest. Although government agencies may be tempted to make [such] claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted."

For this reason, I'm going to end with a less theoretical justification for the need for the transparency and, instead, offer some very practical ones.

At a most basic level, national security review can take place with a view to propriety, that is, did the actors do the right thing, did they obey the law, and

with respect to efficacy and efficiency, that is, are the laws and practices in place for the studied actors to do their jobs effectively and efficiently. In terms of propriety review, transparency and accountability measures can identify and correct wrongdoing, whether intentional or accidental, which includes the hiding of mistakes. Such wrongdoing might even be what we call "a noble cause", which is exactly what the MacDonald Commission found in looking into RCMP activities in the aftermath of the 1970 October crisis.

Do keep in mind that propriety review is not to be dismissed in the context of Canadian inquiries. Bluntly put, Canada has a history of wrongdoing, including and perhaps especially that which has come to light as the result of past Commissions of Inquiry.

In terms of the efficacy and efficiency review, it's the other side of it, and the benefits fed by transparency, again keep in mind here that Canada also has a history, both efficient and inefficient, effective and ineffective, efforts in the national security arena, some of which have come to light and from which important solutions have been diagnosed as the result of Commissions of Inquiry.

Think here of the Air India Inquiry looking at the sharing of information between the RCMP and CSIS or, in the U.S. context, the 911 Commission Report that led to a host of changes to how national security agencies in the U.S. cooperate and share intelligence.

Having said all of this, in the context of

government or any large organization, I think a quote from one of my favourite legal philosophers, if you'll bear with me, Lon Fuller, perhaps best tells the story of why transparency is so valued in the national security context for efficiency reasons. And that quote goes as follows:

> "Most injustices are inflicted not with the fists, but with the elbows. When we use our fists we use them for a definite purpose and we are answerable to others and to ourselves for that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbor may be painfully aware that he is being systematically pushed from his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows..."

In the national security context, I interpret this to mean that we must first identify the source of the elbows, and then the damage, in order to ensure accountability, and improve on clumsy efforts, and make them deliberate and effective.

And that is the role of transparency in this process, to ensure that democratic accountability. To compel the rulers to answer for both their fists and the damage of

their elbows. To answer for what was done wrong by accident, or intentionally, to answer for mistakes along the way, and ultimately, to improve matters going forward. Which of course is one of the goals of this inquiry.

The value of transparency, then, is, in part, to instill within democratic institutions, I think this is very important, the trust and legitimacy necessary to justify the powers with which today's security agencies are endowed.

Returning to Fuller. At a minimum, a person:

"...will answer more responsibly..."

This is a quote:

"...if he is compelled to articulate the principles on which he acts...."

But it is only through transparency that the ruler is truly so compelled. Transparency requires reason-giving, and reason-giving impels an articulation and a justification of the principles on which agencies act in support of our national security, and more fundamentally, our democracy.

So that's a high-level overview of the interests, as I see them, legitimate interests in keeping information secret on the one hand and the value of transparency, particularly in the national security context.

The question, of course, then becomes the much more difficult one, which is how is this all done? And again, perhaps this time instead of the professorial answer I'll give the lawyerly answer, which is it is done by keeping mind and applying these broad principles on the role of

secrecy and transparency and their values, but in practice that understanding will then inform a nuanced case-by-case analysis of the issues at hand.

In this regard, at least on the topic of commissions of inquiry and secrecy versus transparency, let me end with some brief lessons from the past in my study of inquiries:

First, commissions of inquiry have a long history of managing and collecting such information in intelligence environments, where confidentiality obtains. In varying degrees, we have done this effectively, and our past inquiries provide many lessons for the present, far beyond what I have time to go into now, but it is possible.

Let me offer, nevertheless, a few more concrete lessons:

First, it is absolutely clear from these inquiries that they must protect sources and methods where there are legitimate risks. They must respect the efforts of state agencies to do so, particularly where the law so compels.

At the same time, when such information was received, and it influenced commission decisions but cannot be made public, one can include in the final report the extent to which findings were relied on, or were modified by, or substantially modified by non-public information, and why -- and even why it was, why the information -- why the information was deemed credible or not. And if possible, a summary of sorts might be offered in the public report of the

type of information, or the justifications for why reports were relied on, whether there were multiple of reports providing the same type of information which might increase their credibility and so on.

For example, the expert fact-finding report by Stephen Toope in the Arar Inquiry stated that his findings were, in his case, simply not modified by the secret information that he received. It helped the public, to my mind, to greatly understand the basis for his conclusions. Similarly, whether heard in public or private, to the extent possible, and particularly where it influences proceedings, assessments of credibility of all witnesses is key. That includes government witnesses, and witnesses *in-camera*, and witnesses providing information through documents, as well, if necessary.

Similarly, the reliability of those reports relied upon by the Commission must be considered and, again, explained where possible. This includes an understanding of intelligence languages standards, clarifications in reports, the extent to which they are supported by other sources, and so on. This was all done in the Arar Inquiry, but also most international and domestic commissions of inquiry that have been successful.

Of course, judges tend to be extremely good at this, but I think it bears mentioning because we must not lose sight of it outside of the courtroom as well.

At the end of the day, believability and the coherence of the story must be explained, even if all the

details are not.

In the end, commissions of inquiry are set only on important issues, and are often, as in cases like this, one of the few sources of transparency, and thus accountability, so they must be willing to push on behalf of all us: push to get the full picture; push to share as much of it as possible with the public; push to explain to the public where they legitimately cannot provide further details; push to improve efficacy; push to improve propriety; push to get the best picture of the factual landscape from which to judge existing laws and policies, but also, where necessary, to recommend new laws and policies.

To return, then, to the earlier quote from Professor Roach, inquiries must push to allow the public to see as much, quote:

> "...information as is consistent with genuine national security concerns about protecting sources, methods, and relations with foreign governments." (As read)

I might end with a final lesson for the inquiry itself because I think it's an important one. That is, in my study of commissions of inquiry, domestic and international, it's clear to me that commissions must, at the end of the day, take responsibility for lack of information, either that they were not provided or to which they had access but cannot discuss. They can push for more transparency, of course; they can blame parties for non or

incomplete compliance, for over classification, should it come to that, or for anything else besides, but at the end of the day, an inquiry that does not have access to relevant facts must treat that as a limitation of the inquiry itself.

Put simply, bad facts made bad law and policy, and bad or no facts make equally bad commission inquiry findings and recommendations. In some, there will be some limitations at least on the inquiries in terms of the facts available that they can provide publicly, and that must be treated both with respect and as a possible limitation of the process. Like it or not, the alternative is to undermine the credibility of the exercise. Thank you.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AUX PANÉLISTES PAR MS. ERIN DANN:

MS. ERIN DANN: Thank you, Professor Nesbitt.

If I can follow up on one of the points you made earlier in your presentation. You told us about how generally laws and institutional mores and cultures tend to prioritise secrecy over transparency. And you spoke of how that tendency manifested itself in the Arar Inquiry.

Do you have any suggestions or ideas for a commission operating within this -- within this reality?

DR. MICHAEL NESBITT: I do have a few. One of them is to do as much, and obviously there are timing issues at play in virtually every inquiry, and particularly in this one, but to do as much legwork as possible in advance. And so the Arar Inquiry was very clear about that. It said as much as can be done to negotiate the release of

information, or to understand why it's not going to be able to be released in advanced, the better.

Litigation in Federal Court, for example, which Professor West will discuss, if it happens, it happens; if it's necessary, it necessary. It really benefits no one in the process. And so the usual -- the pre-trial conference, as it were, that can do some of the work and the information gathering before a negotiation beforehand, is extremely effective.

I will add, because we have a -- an excellent article by an individual who prosecuted a number of the terrorism cases in Canada, and he said exactly the same thing with respect to courtrooms and how to prepare for national security cases, and that is that he spent about -- I won't get the exact time right, but six months to a year in advance preparing for the release of information such that they had pre-screened as much as possible. Again, there are limitations to how much that can be done, but at the bare minimum, an explanation as to why it's important and a reminder to -- as to why it's important to the government, and, of course, a process like this to understand what is not going to be made public I think are two important factors that might be undertaken to help the process.

MS. ERIN DANN: I saw, Professor West, that you may have an answer to this as well, but I wonder, given the time, if we should take our morning break and return with Professor West's presentation following the break.

COMMISSIONER HOGUE: Thank you.

THE REGISTRAR: Order, please.

The hearing is in recess for 15 minutes.

--- Upon recessing at 11:08 a.m.

--- L'audience est suspendue à 11h08

--- Upon resuming at 11:33 a.m.

--- L'audience est reprise à 11h33

THE REGISTRAR: Order, please.

This sitting of the Foreign Interference Commission is back in session.

MS. ERIN DANN: Thank you. Good morning again.

We'll now turn to the presentation of Professor Leah West. Leah West is an associate professor at the Normand Patterson School of International Affairs where she teaches graduate courses on national security law, international law, counterterrorism, and ethic. So is co-author along with Craig Forcese of *National Security Law*, and a co-editor of *Stress Tested: The COVID-19 Pandemic and Canadian National Security*.

In addition, Professor West is a practising lawyer working in the areas of criminal, quasi-criminal, and administrative law. She previously served as counsel with the Department of Justice National Security Litigation and Advisory branch. I should note that Professor West will be referring to a PowerPoint this morning. The PowerPoint is available currently on the Commission website in both French and in English.

Thank you, Professor West.

--- PRESENTATION BY/PRÉSENTATION PAR DR. LEAH WEST:

DR. LEAH WEST: Thanks.

And I'll just say, I apologize for the density of these slides. I'm not going to really speak to the slide, but I prepared them with the hopes that they could be taken and used by the parties and public. So I will be speaking, but they're more for when you're not listening to me and you want to refer back to any of these concepts.

So really what I'm going to start to talk about today is how Parliament, with the help of the Courts, have attempted to implement these broader principles that were articulated both by Professor Trudel and Nesbitt earlier this morning into Statute and common law.

So I'm going to start with the concept of injury to national security, and this is something that Professor Nesbitt already talked about a bit, so I won't go into significant detail, but I want to begin describing what I call the core secrecy preoccupations. Some might call them obsessions of the government in the area of national security. And in so doing I draw on statements made regularly in government Affidavits, justifying non-disclosure in Court proceedings.

And I suspect that this is something you will hear a lot about in the coming days from other witnesses. So when making national security claims, security services focussed most often on the importance of secrecy and protecting sources and methods. This is a term you heard from Professor Nesbitt. And so, for example, the Canadian

Security Intelligence Service, or CSIS, will strongly oppose disclosure of information that may identify or tend to identify employees, or procedures, or methodology, or that identify or tend to identify investigative techniques and methods of operation, or identify individuals and groups, and issues of interest to the service.

Among the most sensitive security service secrets are those of the identities of human sources, as well as the information and content they've provided. As a security intelligence, every action taken by CSIS, regardless of the threat under investigation, is governed to my mind by three key considerations, or like I say before, preoccupations.

First unlike typical policing, security intelligence has national and international dimensions. The threat actors, the influences, the consequences, and the theaters of operation demand liaison and information sharing with foreign and domestic partners of all types, often under a demand for secrecy. And as a net importer of intelligence, a term you've already heard, and I'm sure you will hear again, maintaining strong relationships of trust with Canada's partners is vital to our national security interests.

Second, the constant fear of penetration by a foreign agency or a threat actor demands unrelenting vigilance and creates an obsessive need to safeguard employees, sources, and investigative techniques.

And third, the ultimate aim of security

intelligence organizations is not public recognition for their successes, or to even make citizens aware of the threats that they have faced, or that they have been -- threats that have been thwarted. The aim is the collection of information about people and organizations who seek to obscure their true intent, necessitating the careful use of deceit, manipulation, and intrusive technology, all without violating the rights and freedoms the agency has been established to protect.

So I'll just reiterate that they're not in the job of publicizing their wins, nor is it their job necessarily to speak about threats to Canadians. First and foremost, their job is to collect intelligence to help government, decision, and policy makers do their jobs and make informed policy decisions. Their advice, therefore, is not written or shared with disclosure to the public in mind, except for in very specific cases.

Now, I mentioned the concept of being a net importer of intelligence and it is implying this -- a third-party rule, or also a rule known as originator control that we see concerns arising from this reality at work. The third-party rule means that a state agency who provides the information to a Canadian Agency like CSIS, retains control over its use and its distribution, even after sharing it with that partner. This rule can and has been formalized between Canada and its allies in formal information sharing agreements, but can also be done on a case by case basis.

The purpose of the third-party rule is to

protect and promote the exchange of sensitive information between Canada and foreign states or agencies. The interest is to protect both the source and the content of the information exchanged in order to achieve that end. Information sharing agencies exercise originator control through the use of caveats. And caveats as described by the Arar Inquiry are written restrictions on the use and further dissemination of shared information.

Now of course, there is no guarantee that a recipient of information to which a caveat is attached will honour that caveat. The system is based on trust and caveats are not typically legally enforceable. However, the ability and willingness of Canadian agency to respect caveats and seek consent before using information will affect the willingness of others to provide that information to Canada in the future. Thus, these caveats are taken very seriously.

The courts are generally sensitive to this concern, but there have been occasions where at the very least, courts have expected Canadian security agencies to seek foreign service authorization to simply ask the question, may we disclose this in these proceedings, or to relax caveats permitting disclosure.

Canada has sometimes been reluctant even to do that for fear that asking for the relaxation of caveats signals unreliability to a foreign partner. There have been instances, most notably in the immigration security certificate context, where the government has withdrawn a case when faced with a court order that it disclose

information subject to a third-party rule.

Another important concept is that of the mosaic effect. Now, the mosaic effect is not an information sharing rule, rather it's a concept that must be understood when applying or upholding redactions to information subject to public disclosure. The mosaic effect posits that the release of even innocuous information could jeopardize national security, if that information can be pieced together with other public information by a knowledgeable analyst. Considering advances in data analytics, this concept is truly not hypothetical, but one security and intelligence agencies seek to capitalize on a routine basis, even our own. So we must expect the same from adversary nations.

As such, assessing the damage caused by the disclosure of information cannot be done in the abstract or in isolation. It must be assumed that information will reach persons with a knowledge of service targets and this informed -- and that this informed reader can piece together unrelated or seemingly unrelated information.

Thus, while a word, phrase, date, et cetera, which may not itself be particularly sensitive, could potentially be used to develop a more comprehensive picture, aka a mosaic, when compared to information already known by an informed viewer or available from other sources. And the mosaic effect has, again, long been recognized by Canadian courts. However, the courts have sometimes expressed scepticism about its uncritical use. After all, the mosaic effect could conceivably be used to deny access to any and

all information if taken to its logical extreme, and so the Federal Court now requires more than simply the invocation of the mosaic effect or reference to it, but rather, also sufficient reasons to support its application to a particular piece of information.

So now I'll turn to something that you'll all hear a lot about of, I'm sure, in the next week, which is section 38 of the *Canada Evidence Act*, so -- and the actual workings of this scheme.

As noted, section 38 of the *Canada Evidence Act* creates a special privilege permitting the government to deny parties access to potentially injurious information and sensitive information and proceedings. And these are all defined terms.

Section 38 is not the only privilege relevant to national security practice. As we heard, some information may not be disclosed because it is subject to Cabinet confidences or solicitor-client privilege.

There are also two distinct privilege schemes that support the non-disclosure of information that could reveal the identity of people or organizations who have provided ---

MS. ERIN DANN: Excuse me. I'm sorry, Professor West, to interrupt.

Because we have -- yes, exactly. If you could just take your time.

DR. LEAH WEST: Sure.

MS. ERIN DANN: Thank you.

DR. LEAH WEST: There are also two distinct privileges that support the non-disclosure of information that could reveal the identity of people or organizations that have provided assistance to CSIS or CSE in exchange for a promise of confidentiality, and I'll cover those later.

And of course, there are distinct common law and legislative privileges that apply to criminal proceedings that could potentially apply here such as common law informer privilege, that are less likely to be apparent.

All that being said, the scheme that is most relevant to this Commission is section 38, and key to this legislative scheme is the concepts of potentially injurious information and sensitive information, both defined using what are, frankly, sweeping terms.

"Potentially injurious information" means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security, whereas "sensitive information" means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from, inside or outside Canada and is of a type the Government of Canada is taking measures to safeguard.

Where such information might be disclosed in a proceeding, meaning before a court, a person or a body with jurisdiction to compel the production of information, like the Commission, the *Canada Evidence Act* sets out a series of steps that must be followed to affirm and protect the

information which is alleged to be privileged.

In general, the first step in the section 38 analysis is one of notice, meaning any person who has connection with a proceeding is required to disclose or expects to disclose or cause the disclosure of information must notify the Attorney General where that information is sensitive or potentially injurious information. There is an exception to that rule that applies in this case, and that is when potentially injurious or sensitive information will be disclosed to an entity for a defined, pre-determined purpose ---

MS. ERIN DANN: I'm sorry, Professor West, to interrupt again. If we ---

DR. LEAH WEST: I'm sorry. It's so boring.

Okay.

MS. ERIN DANN: Not to us.

DR. LEAH WEST: Okay.

MS. ERIN DANN: Because you're so familiar, but for all of us, we're taking careful notes, so.

Thank you.

DR. LEAH WEST: There is an exception to that rule that applies in this case, and that is when potentially injurious or sensitive information will be disclosed to an entity for a defined or pre-determined purpose and listed in the Schedule of the *Canada Evidence Act*. In this case, the Governor in Council issued an Order in Council amending the *CEA* Schedule last year, authorizing the disclosure of sensitive or potentially injurious information to the

Commissioner so that she may exercise her duties.

Importantly, however, this does not mean that the Commissioner is now at liberty to disclose such information publicly. Should she wish to disclose information publicly, information over which the government maintains national security claims, notice would have to be given, presumably to PCO, who would then inform the Attorney General, who would then initiate the section 38 process.

Once notice is given, say, in the concept(sic) of the Commission of Inquiry, the Commissioner may not disclose the information subject to the notice, the fact that the notice has been given or that an application to the Federal Court to affirm the non-disclosure has been made. Alternatively, if the Attorney General and the party seeking to disclose the information, in this case the Commission, enter into some form of agreement about disclosure under the law that, too, may not be revealed publicly without the Attorney General's consent.

Of course, the Attorney General can always agree to allow the disclosure of the information in question or that notice has been given or the fact that there is an agreement. And this does happen from time to time.

However, should the Attorney General not agree to release the information or there's no agreement reached with the parties seeking disclosure, they must bring application -- so this is the Attorney General -- must bring an application to the Federal Court to affirm the non-disclosure. These applications may be heard entirely *in*

camera and *ex parte* by a designated Judge of the Federal Court, meaning a Judge who's experienced and specifically assigned to hear national security matters.

That said, it is often the case that there would also be public hearings where the parties seeking disclosure can present their arguments and the government will often present some public argument in support of non-disclosure, and that's typical of the case where the parties don't have security cleared lawyers that can argue in closed or where the parties themselves haven't seen the information that they're seeking to be disclosed.

It might work a little bit differently in this case where you have security cleared counsel that have already seen and had access to the information that they're seeking to disclose publicly, so presumably rather than having a public hearing where counsel for Commission would make arguments, all of that could be done in closed, potentially.

Often the case is that the designated Judge will assign a top secret cleared what we call *amicus curiae*, which essentially means friend of the Court, to assist the Court by making arguments in the closed portion of the applicant and allowing to be more adversarial. The *amicus* will be privy to the parties' public arguments and also have access to the classified information.

Again, if the Commission were to go seek disclosure that the AG brought a claim for in section 38, that process might be a little bit different because, again,

we have security cleared counsel, counsel who could advance the counsel's own arguments in the top-secret proceedings.

Essentially, what typically happens is that the *amicus* or, in this case, potentially counsel for the Commission, and government lawyers try to negotiate what information is contentious and needs to be deliberated in front of the Judge. But again, that process is usually when the outside parties are asking for information, a swath of information over which they have not seen. So again, in this case, we can expect that deliberations would probably have already happened before you're getting to the point of going before a Federal Court Judge, but this could still potentially happen even after notice and an application begins.

So for where disagreement remains, the *amicus* or potentially counsel for the Commission will make arguments against a government's claims for non-disclosure. And importantly, when hearing arguments for or against non-disclosure, the judge is not bound to typical rules of evidence. Rather, the designated judge may receive into evidence anything that in their opinion is reliable and appropriate and may base their decisions on that evidence. Typically, evidence includes affidavits or testimony from government witnesses, articulating what injury would arise if the information in question was disclosed, and often, an amicus will cross-examine the witnesses on their evidence.

This evidence and argument is aimed at helping the judge decide what can and cannot be disclosed in

the particular circumstances. To make that determination, the Federal Court of Appeal enunciated a tripartite test for adjudicating section 38 claims in a case called *Ribic*. So you'll often hear this term, the Ribic test, and it's a three-part test as all law tests are required to be.

This first step in the test is to assess the relevance of the information in question to the underlying proceeding. That burden rests with the parties seeking disclosure. This is, again, typically a pretty low bar, and I imagine in this context where the Commission is seeking disclosure of additional information, where they know what that information is and why they want it, that would be a very low bar. In some cases, the Commissioner could be seeking the disclosure of her very own words or findings. So relevance would probably be an easy one to meet in this context.

Second -- the second test or step in the test is the question of injury. The designated judge must determine whether the information issue would, not could, be injurious to international relations, national defence or national security if disclosed. This demands demonstrating probability of injury, not merely the possibility, and the burden on this rests with the Attorney General of Canada.

Importantly, this is not a question of the information in the aggregate. The judge will typically go line-by-line, sometimes word-by-word, to make this assessment. On this point, they will hear counterarguments from the amicus, or in this case Commission counsel,

rebutting the government's claims, and ultimately, the court will tend to give more weight to the government's claims as the expert on this issue. Still, those claims must have a factual basis established by the evidence.

The third element of the Ribic test, and the most challenging typically, is assessing whether the public interest and disclosure outweighs the public interest favouring non-disclosure. So and here, the public interest and disclosure would be the mandate of the Commission and the public interest and non-disclosure would be the interest -- the injury to national security. And here, the burden would rest with Commission counsel. When arriving at this conclusion, the Federal Court judge will often consider if there are ways to minimize the threat and maximize the public interest by issuing summaries or partial redactions of information. Again, this is not done in the aggregate. The designated judge will go line-by-line, potentially word-by-word, making their decision about where the balance lies.

Once the judge has engaged in this thorough balancing exercise, they will either make an order authorizing the release of the information, authorizing the disclosure of all or parts of the information subject to conditions or in summary form, for example, or confirming the non-disclosure of the information. Importantly, an order of the judge that authorized disclosure does not take effect until the time provided to grant an appeal -- or to seek an appeal has expired.

This means, of course, that the Federal Court

order is not necessarily the end of the matter. First, a party can appeal a decision to the Federal Court of Appeal within 10 days of the order, and all the way up to the Supreme Court of Canada if they are so inclined. The process and the test would be the same except done before three judges of the Court of Appeal, or nine judges -- up to nine judges of the Supreme Court. If it is the government appealing the decision or the disclosure order, the judge conducting the appeal can make an order to protect the confidentiality of the information that the Federal Court ordered to be released. Alternatively, the Attorney General of Canada may personally issue a certificate that just outright prohibits the disclosure of the information in connection with the proceeding for the purpose of protecting national defence, national security, or international relations. That certificate may only be issued after an order or a decision that results in the disclosure of the information has been made.

So, essentially, the process will look like this. The AG lost on some of its claims for section 38 privilege is to be maintained and the court ordered that in the public interest, certain amounts of the information that government sought to protect had to be disclosed. The government could appeal, or the Attorney General could issue a certificate prohibiting the future disclosure of that information, and that is essentially the end of the matter. There is an element of being able to test the appropriateness of that certificate, but, essentially, it's a bit of a fiat.

In short, the AGC is holding a trump card, and if played, then notwithstanding the Federal Court's order or their finding, the information must be withheld in accordance with the certificate. So far as we know, this card has only been played once before in a criminal trial involving allegations of espionage.

Why has that trump card only been played once? Well, I would argue it's because section 38, as cumbersome and potentially complex as it seems, is actually a rather flexible process, mostly thanks to the actions of the Federal Court to ensure it is so over the past decade and a half. That process creates, and I'd argue, incentivises collaboration between the parties to find compromises at three points before an application is made to the Federal Court, before the court hears arguments on the Ribic test and when the judge is crafting their order.

As we will see, this is not the case for information subject to human source privilege claims. Nevertheless, the downside of this process, like a lot of good bureaucratic processes, is the length of time it takes to complete.

Thus, avoiding the full adjudication of national security privilege claims is certainly something that all parties should seek to avoid. It may be flexible, but this process is very rarely quick. This was exemplified in the Arar Commission, as Professor Nesbitt alluded to earlier, when Justice O'Connor sought to disclose information over which the Attorney General maintained national security

claims in his factual report. That Commission of Inquiry had a similar mandate to this one when it came to national security claims and disclosure. Like as the Commissioner, if Justice O'Connor was of the opinion that the release of part or of a summary of classified information presented in-camera would provide insufficient disclosure to the public, Justice O'Connor said he would advise the Attorney General of Canada, which would in turn satisfy the notice requirement set out in section 38 of the *Canada Evidence Act*. Justice O'Connor set out a whole process for hearing evidence in-camera. He determined that he would apply the Ribic test when making determinations about national security claims. He also heard evidence regarding the need for non-disclosure of certain information, including from an independent advisor, who was a former CSIS director, and he appointed two experienced amicus, one of who's in the room, to challenge the national security claims in the in-camera proceedings.

So, essentially, the Commissioner himself applied the same tests as a Federal Court judge would when hearing information from government witnesses in determining whether that information could be included in summaries of those hearings, or in his final report or broader work.

After the main evidentiary hearing's concluded, both public and in closed, government council and the Commissioner held a series of discussions about what could be included in his final factual report and how, and they were able to resolve the vast majority of disputes. Matters that were still unresolved, it got bumped up to

senior government officials, including Deputy Ministers who were consulted, resulting in the government ultimately authorizing the disclosure of certain passages of the Commissioner's report, notwithstanding the potential injury. Ministers were then briefed on what remained, and Ministers decided not to authorize certain disclosure, regardless of the fact that the Commissioner was of the opinion that their disclosure was in the public interest and was necessary to recite the facts surrounding the Arar affair fairly.

With that understanding, on September -- in September 2006, 2 final reports were submitted by the Commissioner to PCO, 1 classified, the other public. Redactions were applied to the public report, and it was released to the Canadian public.

In December of 2006, the Attorney General filed a section 38 application to withhold approximately 1500 words from the public report, which is less than .05 per cent of the total report. The designated judge appointed in the Federal Court -- by the Federal Court heard testimony, 2 days of public hearings, 4 days of open hearings, and, ultimately, issued his decision in July of 2007. The designated judge was Justice Noël, and he agreed in part with the Attorney General and in part with the Commission. And consistent with his order, the final report was released in September 2007 with fewer redactions. In total, the adjudication of 1500 words took over a year.

Notably, in his decision, Justice Noël set out the factors he considered when balancing the public

interest in the context of a Commission of Inquiry. Several of them apply in all contexts, but the one that he added for the purpose of the Commission of Inquiry was whether the redacted information relates to the recommendations of a Commission, and if so, whether the information is important for the comprehensive understanding of said recommendations.

In his final report, Justice O'Connor reflected on the national security claims made by the government and on their impact of the work of the Commission, and we heard some of that from Professor Nesbitt.

As far as process, he was satisfied that his modified approach, not his initial approach, which one might have called the ideal approach, worked as best it could in the circumstances. However, he made clear that the public hearing part of the inquiry could have been made more comprehensive than it turned out to be if the government had not for over a year asserted NSE claims over a good deal of information that eventually was made public.

He noted that throughout the in-camera hearings and during the first month of the public hearings, the government continued to make national security claims over information that it had since recognized may be disclosed publicly. This overclaiming occurred despite the government's assurances at the outset of the inquiry that its initial claims would be reflected of its considered position and would be directed at maximizing public disclosure. The government's initial national security claims, said Justice O'Connor, were not supposed to be an opening bargaining

position. In effect, overclaiming by the government exacerbated the transparency and procedural fairness problems built into a Commission addressing matters of national security and promoted public suspicion and cynicism. He warned that it is very important that at the outset of the proceedings of this kind, every possible effort be made to overclaiming.

Now, I obviously agree with all of that, but I do want to make one point. It is impossible for those who are making redactions at the outset of a Commission to know what the Commissioner's findings and conclusions are going to be. And some of the information that is redacted may prove to be very important to ultimate findings or making sense of those things. But the person making the redactions does not know that. So there will inevitably be an element of back and forth. There will be no case where it's simply obvious to someone tasked with redacting a document to know the ultimate weight a Commission of Inquiry will put on that piece of information. So I think, obviously, we need to take the findings of Justice O'Connor to heart, and the government should not start with an opening position, but I think that we need to remember that some of this information will prove to be more important to your findings, and as a result, may result in a change of government position on redactions.

Okay. I'll turn now to the two regimes that cover human source privilege. The first is a scheme set out in section 18.1 of the *CSIS Act*. CSIS relies on human sources for information, and indeed, what sets CSIS apart

from other law enforcement agencies is its focus on the development and recruitment of human sources. These sources are not, however, informers in the legal meaning of the term. The Supreme Court of Canada held in 2015 that the class privilege of police informants did not extend to CSIS human sources. So Parliament responded to that finding by amending the *CSIS Act* and to create a new statutory privilege for human sources.

The *CSIS Act* defines a human source as an individual who, after having received a promise of confidentiality has provided, provides or is likely to provide information to the service. So there's two parts to this definition. There is the promise of confidentiality made and the promise of information. So it doesn't even have to be that the information was provided, but a promise that information would be made in exchange for that promise of confidentiality.

Section 18.1 of the *CSIS Act* now prohibits the disclosure of the identity of a CSIS human source or any information from which the identity of a human source could be inferred in a proceeding before a court or a person or body with jurisdiction to compel the production of information like the Commission. While the privilege only came into existence in 2015, it does protect those who fulfilled the definition of a human source before the passage of the legislation. And human source privilege can only be waived with the consent of both the source and the CSIS director.

Moreover, the application of the privilege can only be challenged on essentially three grounds. One, that the individual is not a human source, so they don't meet that definition; second, that the identity of this human source could not be inferred from the information in issue; or third, and this really only applies in criminal context, that the identity of the information protected by the privilege is essential to establish an innocence accused in a criminal trial, so not applicable here. So you're dealing with two situations. The person is not a source, or the information could not reveal their identity. Other than that, there is no grounds to challenge the disclosure of human source information. There is no balancing here. Any hearing respecting the privilege is to be held in-camera and *ex parte*.

The other form of source privilege -- I haven't found a good shorthand for this, is set out for the -- in the *Communication Security Establishment Act*. In section 55 of that Act, Parliament has prohibited the disclosure of the identity of a person or entity that has assisted in or is assisting the CSE on a confidential basis, or any information from which that identity could be inferred in a proceeding.

Section 2 of the *CSE Act* defines an entity as a person, group, trust, partnership, or fund, or unincorporated association or organization, and includes a state or political subdivision or agency of a state. Again, waiving this privilege requires the consent of both the

assisting person or entity and the CSE Chief. And I'm not aware of this type of privilege being raised in at least a public legal proceeding, so we don't have any case law on it. Importantly, however, unlike 18.1 of the *CSIS Act*, the claim of privilege under the *CSE Act* -- sorry, *CSIS Act*, claim of privilege under the *CSE Act* triggers the section 38 process but it short-circuits the Ribic test, or that's how I read it. Instead of applying the three-step Ribic test, a judge may only order disclosure where, again, the person or identity -- entity is not actually assisting CSE on a confidential basis to -- their identity could not be inferred from the disclosure of the information, or again, it's necessary to establish an innocence -- the innocence of the accused in a criminal proceeding, which is inapplicable in the context of this Commission.

Section 18.1 of the *CSIC Act* and section 55 of the *CSE Act* are far more akin to common law and former privilege and much more restrictive than national security public interest privilege created by section 38. The parties and the judge do not have the same capacity to find compromise on the release of information about human sources. There is no balancing. If the information could reveal the identity of a human source, neither the Attorney General nor the judge have the authority to disclose it.

The reason for this being that we are talking about the need to safeguard human sources from threats to their lives or the lives of their loved ones, ensure that others will continue to take the risks of providing critical

information and assistance to our national security agencies.

With all of that said, though, look forward to your questions.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AUX PANÉLISTES PAR MS. ERIN DANN:

MS. ERIN DANN: Thank you very much, Professor West.

Perhaps I can begin by just clarifying the types of *in-camera* or closed proceedings that might be involved, either in this Commission or following the work of this Commission.

So you mentioned at least two types of closed proceedings, one where -- that I understand would be led by the Commissioner, and one that would take place in Federal Court. Can you help us understand the difference between those proceedings and where they might be or why they might be employed?

DR. LEAH WEST: So I'll start in order. So it's very likely, even looking at the Rules of Procedure for this Commission, that there will be testimony heard in closed proceedings, so *in-camera*. Meaning that it'll be not only closed to the public, but presumably closed to many of the parties. And it'll be where I imagine predominantly Government of Canada witnesses would provide information relevant to the Commissioner's mandate that they deem privileged, subject to confidentiality claims. And this would be a forum without the public where the Commissioner and Commission counsel could question government witnesses

about their evidence, meaning it would be presented by a government counsel, but you could also cross-examine and question them on their evidence. And presumably, again, I don't know your process, but you will have a sense of the types of questions that parties would want asked as well, and you could pose them to government witnesses without the parties being presented so that the Commissioner would have the benefit of those answers.

In the Arar Commission, what happened as well was that during that process government witnesses would make argument about why the information they were providing at the time needed to be maintained under national security confidentiality, and a *amicus* appointed in that case could question the witnesses about that specific element of their testimony.

I don't suspect that that will happen in this case, I don't know what your process is going to be, but you have security cleared counsel that are experienced *amicus*, who could test that kind of evidence as need be throughout the process.

But the reason why that was done in Arar was because Justice O'Connor wanted to be able to produce summaries of the evidence that was heard *in-camera* publicly for the benefit of the parties. He eventually abandoned that practice because just the sheer process of hearing the evidence about what needed to be claimed, having that be tested by a *amicus*, making a decision about a summary, then working with government lawyers to try to create some sort of

agreement on what the summary would be, they are -- actually never reached an agreement. The Attorney General refused to allow some of that information, and it led to section 38 proceedings.

And that process, again, is long and drawn out, and the -- Justice O'Connor, in that case, said, "I'm not doing this anymore." And he actually changed his Rules of Proceeding to say, "I'll do summaries, maybe, may issue summaries", but he decided that, really, it -- with the time that he had and the length of process that that took, he wasn't going to do it anymore.

So future *in-camera* evidence was not subject to that process. He just heard the evidence. I believe the *amicus* did still push on evidence or claims of national security, but they didn't enter in this process of producing summaries anymore.

Then what happened in Arar, and this answers your second part of the question, it was -- it got to the point where the Commissioner was ready to release his factual findings, and like in this Commission, he was instructed to have both a public and a confidential version of his findings on the factual element of his mandate.

And he wrote up both, and he wrote one with the intent of it being public, and one with the intent of it remaining classified. And the government disagreed, and there was again negotiations back and forth, but ultimately disagreed with some of the information he wanted released in that public report. It wasn't that Justice O'Connor

necessarily disagreed with the injury, but said it was too important for the public to not have that information.

And then they went through the section 38 process at the Federal Court, and that's when a court was appointed, sorry, a Federal Court judge was appointed, and went through the whole legislative proceeding, and that process took an extra year.

So you saw the *Ribic* and the balancing test in Arar already take place in both instances, but eventually it was abandoned by the Commissioner because it was too cumbersome and it was left really for the Federal Court to adjudicate that last little bit of information that the Commissioner and the Attorney General couldn't agree on how to be made public.

MS. ERIN DANN: And I think you've anticipated, perhaps, my next question, or what I was going to ask you. But in this, the process, you spoke of the compromise and negotiation that happens before, or is encouraged to happen before a section 38 application occurs, do the legal principles that you identified that were identified in *Ribic*, can those inform or to play any role in the negotiations that happen in respect of national security confidentiality claims outside of a formal section 38 application?

DR. LEAH WEST: Oh, absolutely, and I think what you end up getting is one side, the party seeking disclosure, arguing vehemently in the public interest why it's important to release that information, potentially

notwithstanding the injury, and the other side arguing that the injury is too grave or potentially trying to minimise the importance of the public interest. And that -- you know, really at the end of the day, you're getting -- you're trying to get the difference, the delta down, so that you can get a compromise on how that information is released.

And often it could simply be a rephrasing of a statement or the removing of certain factual elements of a conclusion, and that negotiation takes place based on that kind of balancing, constant balancing between the public interest and how important that information is in the public interest of the Commission's mandate versus the potential injury.

And so I think that's -- throughout the negotiations which will take place, I think before, or after, or during the writing of any report coming out of this Commission, that's always kind of the balance. And it will be up to the Commission counsel to recognise and really balance that themselves when seeking to push for public information, and I hope that it's also the government's position to also recognise the public interest and the mandate of the Commission when making injury claims so that they can come to some sort of compromise.

MS. ERIN DANN: Thank you. You mentioned that in the Arar Inquiry, a *amicus curiae*, or a friend of the court, was appointed to make submissions to challenge national security confidentiality claims in the Commission's *in-camera* proceedings. Can you explain how or whether the

role of *amicus* in that type of proceeding would differ from a Commission counsel?

DR. LEAH WEST: So it's my understanding in the Arar Inquiry the counsel appointed had very little, and even Justice O'Connor, had very little experience with national security matters. And so part of the justification for having *amicus* was someone who was experienced in listening and questioning government plans of national security, who's familiar with the concepts and confident in testing those assertions, which was not something that they had built into the counsel team initially.

That's very different in this case where you have several people who are top secret cleared counsel and who do serve that purpose in other hearings, and so I would argue that it's potentially not necessary here because you have counsel who have that ability and have that confidence to challenge and accept, where necessary, claims of national security privilege.

MS. DANN: Thank you.

We are approaching the lunch break. This afternoon, we will have an opportunity for the participants who have been sending us, I hope, and I will encourage participants over the lunch hour to continue to send questions that we can put to our panelists. We will have the full afternoon to answer and address those questions.

In listening to your presentations and perhaps just to get people thinking about other questions, I wanted to pose one myself.

We heard yesterday in a presentation from Commission counsel and I anticipate we will hear from witnesses later this week that the classified information relevant to the Commission's work in this case is particularly sensitive, very, very secret, as it was described yesterday, and that disclosure would be highly injurious to the national interest.

At the same time, we are -- and as we are reminded by a number of the participants, the public interest in being fully informed about the integrity of our elections is difficult to overstate the importance of the public interest in that type of information given its central role to our democracy and public confidence in our government. And so I'd ask the panelists to reflect on and share your thoughts on how the Commission or how we should -- these relative public interest in the disclosure of information on the one hand and transparency and the protection of national security be weighed in this context, admittedly a challenging context.

So I believe we'll break, and returning at 2:00 p.m. from lunch.

THE REGISTRAR: Order please.

This sitting of the Foreign Interference Commission is now in break until 2:00 p.m.

--- Upon recessing at 12:25 p.m./

--- L'audience est suspendue à 12h25

--- Upon resuming at 2:02 p.m./

--- L'audience est reprise à 14h02

THE REGISTRAR: Order please.

This sitting of the Foreign Interference Commission is back in session.

COMMISSIONER HOGUE: Good afternoon.

MS. ERIN DANN: Thank you to everyone for your questions received during -- over the course of the lunch hour. We will do our best to make our way through the questions in the time we have this afternoon.

Let's begin with turning to the question that I posed before the break, perhaps a difficult question or perhaps you'll tell us how easy it is.

How, in the context of this Commission where both the national security -- the public interest in maintaining secrecy and the public interest in transparency both weigh quite heavily. How do we begin to balance those values?

And I'll perhaps start with Professor West, as I'm looking in your direction.

DR. LEAH WEST: That's noted.

So to me, I think there's a difference in terms of what the mandate of the Commission is. And the mandate of the Commission is to understand not only the threat, but how the government responds to the threat of foreign interference or did respond to the threat of foreign interference in the past two elections. At least that's the first part.

And to me, coming here, there have been allegations of wrongdoing or failure on the part of the

government to fulfil its responsibilities to inform Parliament and potentially even to undertake its mandates under the law. And I think that is different than understanding how our intelligence agencies detect the threat, how they surveil (sic) the threat, how they potentially intercede in the threat.

And it's helpful to understand that probably to understand how information that was passed to government decision-makers or policy makers was made, but I don't really think it's the crux of the issue or the crux of the issue about keeping our trust in our democratic institutions. And if I was to, you know, take this back to an ethical or -- like there's shallow secrets and deep secrets. And the shallow secrets here are the ones about what the government did with the information, and the deep secrets is how it got the information upon which it did or did not make decisions.

And to me, I think how the government got the information that it did or did not make decisions upon are the -- is the information that is the most sensitive and could be potentially most injurious to national security and maybe doesn't need to be made public to answer that bigger -- that other question.

Obviously, if in the Commission's work you come across wrongdoing on the part of the people who are collecting the information, or something about the techniques used that were harmful to Canadian interests, that's -- that changes the equation. But I think keeping in mind that a major mandate of the Commission, what questions you're -- the

big questions you're asked, and whether or not the information below that, those deep secrets, is really necessary to reveal in order to allude to those other findings and make recommendations, I think would be helpful for the Commissioner and the Commission counsel moving forward.

MS. ERIN DANN: Professor Nesbitt, your pen stopped writing first, so I'll turn next to you.

DR. MICHAEL NESBITT: It ran out of ink, actually.

No. So maybe I'll refer back to both what I said this morning, and to some extent what Professor Trudel said this morning too. I think you have to start with those high level values of the values and transparency, and the principles that we sort of discussed. You know, why do we have secrecy, and understanding of the need for secrecy in many cases, and understanding of the need that some of the secrecy is protecting Canadians. Right? That sometimes when we don't disclose certain information, that's to protect individuals and methods of collection that protect all of us.

And at the same time, understand those values with respect to access to information, transparency to the public that Professor Trudel discussed, but also that that transparency is fundamental to the role of accountability, as I discussed or tried to discuss this morning. That without having access to testing and forcing -- testing information and forcing those who hold it to articulate the reasons for confidentiality, we are not able to hold them accountable,

right, for, as I said, their fists or for their elbows.

And so there's real value -- there's real value to secrecy, and there's real value to transparency. And -- but we have to understand why that is; right? Not the simplistic notion, but the broader notions of the values that we're upholding here, why this matters, why it matters in the context of inquiries. And I say that not to skirt the issue, but because that's got to inform, then, a case-by-case analysis of the materials at issue.

So the next step is then to test it, to test the claims. You know, if you look at what's happened in court cases in this area, if you look at what happened at the Arar Inquiry, it's -- you're challenging, you're not challenging because you don't trust, it's, as Professor Forcese, like, just said, you trust but verify. So you're challenging ---

DR. LEAH WEST: (Off mic)

DR. MICHAEL NESBITT: Yeah, yeah, yeah, perhaps so.

So test. Are the values that we say we're upholding, are they really applicable; right? Does the protection of lives actually apply here, or does it apply in theory to types of information which maybe is less relevant here. How much do you need the information? Right?

So we're almost getting into at this stage, necessarily, judges will be used to it, proportionality analysis of sorts. Right? Why do I need this information? Why does the public need it? How much will it inform what we

have to do? How much does the public have to know about it? And that's being balanced against the legitimacy of the claims of secrecy on the other side of it.

Unfortunately, that leaves you with not a definitive answer in this case, but rather a, I guess in this case, a bit of a plea to do a case-by-case analysis, to keep in mind those broad values, as I said, but also to take seriously the context in which you're engaged in which claims are being made.

MS. ERIN DANN: Thank you.

Professor Trudel. Any points to add to what your colleagues have mentioned?

Prof. PIERRE TRUDEL: I agree with my colleague on that, that we're to see and to organise the thinking about that and the reasoning that we must rationalise to get a decision. So I'm in agreement.

MS. ERIN DANN: Thank you very much.

Let me ask -- let me turn to some short, perhaps, slightly easier questions that we received over the course of the break.

For Professor Nesbitt, you mentioned the Five Eyes. Can you explain what are the Five Eyes and just expand a bit on this concept?

DR. MICHAEL NESBITT: Of course. So Canada has a fairly well known information-sharing arrangement with what are called the Five Eyes, which we are part of. And so the Five Eyes are Canada, the U.S., England, Australia, and New Zealand. Sorry. I don't want to get that one wrong at

this point.

So what that is, is essentially an agreement, amongst those countries in particular, to be forthcoming in the sharing of our intelligence that affects democracies, western democracies, in particular, that affects those nations to maintain, you know, at a very broad level, good working relationships.

And so what that means for Canada as a net importer of intelligence is we get more, it's well known, from the Five Eyes than we give out to the Five Eyes, which is probably to be expected. First of all, it's four other nations and we're one; and secondly, several of those nations are quite a bit bigger. But the implication, then, is that we are, to some extent, dependent on information received from other countries, and particularly, those members of the Five Eyes.

I did want to say something in that regard because that in turn has sort of two implications. The first implication is that we're dependent to some extent on multilateral engagement on this sort of stuff, and on the receipt of that information, and on continuing to be trusted. And so that justifies, or can justify, us protecting information from the Five Eyes.

The flip side of that, and I hope this isn't taken too far, but if you are dependent on the importation of intelligence because you're doing less than the other countries, it strikes me that it's -- it would be odd, then, to say, "Then we can't provide the public with information

because we didn't bother to collect it ourselves."

So put another way, there is real reason to say it's important within the Five Eyes context to be sympathetic to claims that we need to maintain our credibility and reliability with our partners. On the other hand, we can't use it -- I think it's important to ensure that it's not used as sort of a crutch.

MS. ERIN DANN: Professor Nesbitt, someone also asked about the article that you referred to in your remarks. And because I happen to have time, I looked it up, and I believe it's an article by Croft Michaelson?

DR. MICHAEL NESBITT: That's correct.

MS. ERIN DANN: All right. So that's for those interested, it's Navigating National Security: The Prosecution of the Toronto 18. And that's in the Manitoba Law Journal. We can provide -- it's a 2021 article.

Professor West, one specific question for you. You mentioned the section 38.13 certificate, which when that is issued, I forget the term that you used, "the trump card" or the sort of the certificate is invoked, will that decision to invoke that, or issue that certificate, will that always be made public?

DR. LEAH WEST: I would have to go back and read the statute because it's not something I've ever considered. I -- it's my understanding that it would, but I can't -- I would have to go back and read the statute to know. It would state in the statute whether or not it could be revealed publicly. There are certain things in the

statute that say cannot be, as I mentioned earlier, and it would be clearly articulated within the statute. I'm sorry, I don't have the -- in front of me to answer.

MS. ERIN DANN: All right, thank you very much.

I think we'll turn now to start -- we have tried to organise some of the questions by theme. So I'll just pass the microphone over to my colleague to ask some questions about in-camera proceedings and related topics.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AUX PANÉLISTES PAR MR. JEAN-PHILIPPE MacKAY :

MR. JEAN-PHILIPPE MacKAY: Good afternoon. Maybe a follow-up question concerning the question about the Five Eyes. There's a -- we have received a question concerning the multilateral arrangements, and is there anything in those arrangements concerning disclosure of information in the context of public pressure for disclosure, or orders for disclosure?

DR. LEAH WEST: There are in some -- I know, for example, even a NATO information-sharing agreement, for example, is the example we use in our textbook because it's a public arrangement, does make clear that the originator maintains control over disclosure. There is no leeway in these agreements that if the public really, really would like to know, please, whether or not that, you know, trumps the originator control premise over the information, essentially, usually in the agreements it's if you want to use this for any purpose other than the purposes you've -- we have agreed

to in this exchange, you need to come back and ask us. And so there may be limited allowances for information sharing beyond the agency to agency in the agreement, but it'll typically say beyond that, you need to come back and ask us. And then it is up to that country to determine whether or not the justification for you asking the question is sufficient for them to say, okay, go ahead and use the information as requested. And they may say no, regardless of the justification asked for the request. They could still very well say no. Again, it's not a legally binding contract. A court could still order that that information go out and has in some cases, in a security certificate case, for example, and then it's up to the agency to decide how they want to, you know, proceed, either deal with the reputational impact or the relationship impact of that, of compliance, or find some other means of, in the security certificate case, just choosing not to proceed.

So, yeah, it's -- the information remains in the control of the agency who gave it, and the premise is that you will not use it unless we've agreed to the way in which you use it, regardless of the reasoning why.

MR. JEAN-PHILIPPE MacKAY: And you call that the control of -- is there a specific ---

DR. LEAH WEST: So either the third-party rule or the originator control ---

MR. JEAN-PHILIPPE MacKAY: Okay.

DR. LEAH WEST: --- rule ---

MR. JEAN-PHILIPPE MacKAY: Okay.

DR. LEAH WEST: --- concept.

MR. JEAN-PHILIPPE MacKAY: Thank you.

When we look at it from the public viewpoint, public perspective, what can be the concerns raised by the holding of some hearings *in camera* when there's a Commission of Inquiry like this one and there's *in camera* hearings? Are there particular considerations in the public's eyes that can exist?

Prof. PIERRE TRUDEL: Indeed. When the public is being told that part of hearings are being held *in camera*, there's a sort of spontaneous reaction, what are you trying to hide. Why don't you just do it openly?

The public is ready to accept that *in camera* might be necessary in some cases. For example, daily the Courts sit *in camera* when we're talking about child welfare and other situations involving minors. So essentially, I would say that what can become unhealthy and a problem is when the public gains the impression of there being -- that something is being hidden from them.

One way of remediating that is to be as transparent as possible on the reasons for which the *in camera* session is necessary, what is being protected or -- national security, for example, if it's -- or the security of certain persons.

Is it a question of the integrity of the agreements between allied countries, another example. And then, in that case, I think that the concerns of the public are a lot easier to manage or alleviate when the public is

informed correctly and loyally, so to speak, of the reasons for which things have to be held *in camera*.

It prevents the impression that the public might have or some elements of the public might have that something is being hidden from them.

MR. JEAN-PHILIPPE MacKAY: Turning now to Professor West or Professor Nesbitt concerning the Arar Inquiry. It was mentioned this morning during Professor West's presentation that the summaries were abandoned as part of the process of the O'Connor Inquiry. Could you provide a bit more context as to why the summaries were abandoned in this fashion?

DR. LEAH WEST: Sure, and for anybody who really cares to know, that Justice O'Connor actually spelled out in it, he has a ruling on summaries that was four pages long that explains this process but essentially, it was the process of negotiating the information that could be released in the summary that proved to be quite lengthy. So not only did he have to go through the process of hearing evidence about why information could and could not be revealed in the in-camera proceedings itself, which would have added to the proceedings, he then made rulings on those issues, and then created a summary based on those findings, and then entered into negotiations with government lawyers about the content of the summaries, and they could never reach full agreement on the summary, ultimately, leading to a section 38 application by the Attorney General.

So in the process of getting to a point where

there was a summary that both sides could agree to just took too long in the context of a Commission of Inquiry. I mean, in an ideal world, for every hearing that you have in-camera, there would be a summary of evidence that would be put forward to the public, upon which they could understand what went on. That is something that is often done, for example, in complaints made against CSIS or CSE, for example, parties cannot be a party to them.

But those processes are not under the same time constraints as a Commission of Inquiry, so, ultimately, it came down to the ideal process of getting to a point where there is a summary, which was the process Justice O'Connor went into thinking that he would do, because it is probably the best process for managing this balance of the need to know in the context of Commission, especially for the parties. It just wasn't workable in the timeframe that they had, so they chose to abandon the process of creating summaries.

MR. JEAN-PHILIPPE MacKAY: And do you know if there are other strategies or techniques that could be used to ensure transparency, as much transparency as possible where those summaries or the ideal scenario that you just mentioned, where this is not possible?

DR. LEAH WEST: So summaries are already a compromise; right? So we've gone from having the parties be full participants in a hearing to getting summaries of the evidence to, essentially, in the case of -- or not getting summaries and only getting the final factual report. And I

think Justice O'Connor, based on reading his -- I wasn't there, but based on reading it is he decided to put the time and effort to argue and find compromise in that final factual report, rather than throughout every step along the way. And to ensure that the -- because there may be information in the summary that really doesn't need to even go into a final finding of fact; right? Like, he decided to put his weight, his time, the effort of the Commission into really arguing and really into focussing on transparency around the core issues that they felt were necessary to meet the public in that final factual inquiry. And so rather than run out the clock on stuff that may not be all that important in the grand scheme of things to really focussing their efforts on that which was really necessary for the Commissioner to make his findings.

But it's a compromise on a compromise.

DR. MICHAEL NESBITT: If can jump in on that. I guess just to elaborate, the one thing they did in *Arar* and I think it's just a good process, is if you can't provide a summary, at least explain the evidence you're using and why you're using it.

And so by that I mean, you don't have to in the final report say, I'm using this from a source in X country, but you might be able to provide something like, I'm relying on information from *in camera* hearings because there were multiple sources that were independent that I find to be reliable, maybe even provide a reason, that corroborated this finding. Or as Professor Toope did well, lot's great

information but I'm not relying on it here. It's not influencing my decision.

And so you're not getting a summary per say, but you're getting an understanding out there in the public in terms of what type of information might have been available in terms of what I would have been looking for, for credibility in the witnesses, or the reliability in the reporting, whether it was corroborated, whether I'm relying on it or not. And then again, as Dr. West says, focussing on that on the report, and then see if maybe you can get some of the information out as well, if there's going to be a fight about that.

But even if you don't, there's other ways to provide less detailed summaries to at least justify and explain your choices.

MR. JEAN-PHILIPPE MacKAY: My colleague might return on the topic of an *in camera* hearing, so before moving to another topic, I'll let her take the podium.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AU PANÉLISTES PAR MS. ERIN DANN:

MS. ERIN DANN: I think just following up on the discussion about summaries, one of the other -- or this morning, one of you mentioned the idea in terms of increasing transparency about *in camera* hearings, that questioning of a witness in an *in camera* proceeding might include questions suggested by participants or parties who are excluded form the hearing.

In your view, should the Commission provide

all the parties a complete list of all witnesses who will be called? Is that necessary? Is there a requirement of a minimum amount of notice about the topics or the witnesses who will be testifying in *in camera* proceedings? Perhaps you can speak to those types of strategies that might enhance transparency in an *in camera*? Those are other type of strategies that could enhance transparency in *in camera* proceedings?

DR. LEAH WEST: So the -- again, the ideal, which I don't think under the constraints of the Commission you have. The ideal would be to have a special advocate, or special advocates who are security cleared who could work alongside parties -- counsel for the parties and ask those questions themselves. So we see this in a variety of administrative matters, most notably security certificate cases. Where lawyers were designated to represent the interests of the parties inside *in camera* proceedings.

Based on my understanding of the Commission and the type of work already having been done by Commission counsel, that's not feasible in this case. There would be no way for a special advocate to become fully cognisant of the underlying evidence or documentation to be able to do that job, to catch up and do that job in the hearings that are scheduled. That would be the ideal, I'm not certain it could happen here.

MS. ERIN DANN: So just before we move on from that, so for people who haven't heard these ---

DR. LEAH WEST: Yes.

MS. ERIN DANN: --- terms before, there's Commission counsel, we heard something about amicus earlier, you've used the term special advocate. Special advocate, how would that -- how would a role like that be different than that of a Commission counsel for example, who is cleared and able to participate in *in camera* proceedings?

DR. LEAH WEST: So Commission counsel are lawyers for the Commission and the Commissioner, and your raison d'être is the mandate of the Commission. That may not be true, and it is unlikely to be true for a number of the parties. They all have different interests, and might want to advance different issues based on those interests. And so, the difference in an *in camera* proceeding is if you were to have a special advocate, they would essentially be representing those interests, the interest of the party in the *in camera* proceeding, whereas Commission counsel will continue to represent the interest of the Commission.

Now, I'll say, the interests of the Commission do include the interest of the public, the public, the broader public interest. So there would be some overlap, but it would be a more defined role for a special advocate. That's different from an amicus typically. An amicus is often, as I use the term, a friend of the Court. They can be given very broad mandates to take very adversarial roles, but typically they are there to provide assistance to the Commissioner, to act as the Commission's counsel of sorts inside a hearing. The Commissioner already has counsel in this case, that's why they're different.

MS. ERIN DANN: And I took you off. You were going to talk about if a special advocate for either -- for reasons of practicality or other reasons, isn't available, what other ---

DR. LEAH WEST: Yeah.

MS. ERIN DANN: --- what other strategies or approaches in this example, providing a list of witnesses for example, a notice of the topics to be covered?

DR. LEAH WEST: I think both of those would be critical. You may not be able to give the person's name for example, but at least their position or role within an agency. And the Commission may have, you know, a summary of anticipated evidence for example, that the government could produce a public and private version of that summary, and that could be used to inform the parties and the intervenors about the types of things that witness would speak to.

And then with a sufficient notice for the parties to consider, based on what they've read, what kind of questions they would like to see pursued. That doesn't necessarily mean Commission counsel would pursue all avenues suggested by the parties. But those that are most pressant to the Commission's mandate could possibly be taken up.

I don't think I have any other recommendations. No, that's where I would stop.

MS. ERIN DANN: Thank you. Did anyone else want to add to that, on that topic? All right. Before we leave this question of summaries and other strategies, I wanted to ask about the human source privilege you noted in

section 18.1.

Are summaries a -- summaries an available technique for providing some information about human sources as defined in section 18.1?

DR. LEAH WEST: So this question was answered in the negative by the Federal Court of Appeal. There is no summaries available for human source information.

MS. ERIN DANN: Professor West, perhaps just going back and I'll ask this of all of our panelists, in answering one of my earlier questions, you talked about the Commission identifying particular areas of interest likely to be of most interest to the public.

Professor Trudel, Professor Nesbitt, do you have any comments you wish to add on how the Commission might best identify the areas, or topics, or categories of information that will be of most interest to the participants and the public? What values or principles do you say should guide the Commission in determining -- assuming we have to engage in some kind of prioritizing of what information is made public to the participants and to the public, how should we go about -- or what should we think about? What are those big picture values we should think about in identifying the areas for -- that are of highest priority for the public?

DR. LEAH WEST: She didn't ask me.

DR. MICHAEL NESBITT: I guess the easy answer is go back to your Terms of Reference and start there. Whatever the Terms of Reference say is the priority of the Inquiry would be guiding what sort of information you look

for and prioritize.

DR. LEAH WEST: I would only add that taking lessons from Arar, it's seemingly the issues that he was prepared to argue over was information that was most relevant to the recommendations being made, so not necessarily the -- you know, all findings of fact, but those ones that were crucial to understanding or which were foundational to recommendations being made are the ones -- the type of information that the Commission might really push to have made public.

MS. ERIN DANN: Thank you.

I want to turn, then, to some questions on -- that we've received on assessing harm or the potential injury to the national interest. One of the arguments we have heard or expect to hear from government, and that was mentioned in some of your presentations this morning, is that a single piece of information may, on its own, appear innocuous -- I think addressing Professor West, you're talking about the mosaic effect -- but its disclosure will still be harmful when pieced together with other information.

How do you suggest the Commission consider this type of claim where the harm may not be immediately apparent based on the information itself? How can the government provide some comfort that this is a legitimate concern and not a sort of broad hypothetical that could be used to overclaim national security confidentiality?

DR. LEAH WEST: So this is something that the Federal Court itself has dealt with, and the Federal Court

now does say, you know, you need to not come with just this hypothetical theory and tell me, but you need to provide some evidence as a foundation for this assertion.

And so I think some of that evidence might be knowledge of how the relevant intelligence agency or foreign state might collect or analyze information or their capacities and their priorities and how that piece of information could trigger the use of their tools, you know. A more sophisticated intelligence service from a foreign adversarial state might have tools known to our intelligence agencies that are capable of doing large-scale data analytics, for example, versus, you know, a different state who may not have similar capabilities, so coming to the Commissioner and saying, "Look, in this context this information would be very relevant to this state, they would care greatly about this piece of information because it might tend to reveal X, Y, Z and we know them to have the capabilities to do that kind of analysis".

So again, you don't know for sure that that piece of information would trigger something, but evidence to support the idea that the mosaic effect could be -- could be implicated if that information was released?

Prof. PIERRE TRUDEL: May I add something?

MS. ERIN DANN: Yes. Of course.

Prof. PIERRE TRUDEL: I think that when you're talking about an exhibit or about some information which could be combined to others, in the equation you have to include the possibilities that are available through

artificial intelligence. Once an information is disclosed to the public, you can no longer consider in a linear way the risk that it might be combined with others now. And we can assume that the people who are in charge of collecting and analyzing the information, sometimes for good reasons, sometimes for reasons which may not be as good -- we can assume that they now have access to technologies which enable them to infer and literally to generate information and knowledge.

And so we probably have to introduce in the equation a risk analysis that some elements of information can be processed in an AI environment in the global sense of the term without going into science fiction or hysteria. But we have to take into account the fact that there are technologies that exist and that can make it so that we can't just take it for granted that a piece of information will always or cannot be analyzed in conjunction with information that is circulating in the public domain to produce, deduce or infer other information.

MS. ERIN DANN: Thank you.

It is -- we have not previewed these questions with our panel, but you have -- Professor Trudel, you have hit on one of the other questions that was asked by the participants on how advances in technology will impact the analysis and the weighing that is ongoing.

On the issue of evaluating or assessing claims of harm, one of the participants asked or notes that some of the classified information that is within the

Commission's mandate, there have been leaks to the media and certain information or at least allegations of certain classified information have been -- are in the public in the form of media stories.

Could the panel address how leaked information affects the balancing that the Commissioner or a Federal Court Judge, if it came to a section 38 application, would undertake?

So in particular, in some circumstances would this affect the assessment of the potential injury to national security and the release of documents or part of documents?

DR. LEAH WEST: So if I was still working in government, my answer would be validating leaked information as true or asserting that the claims made are true is, in itself, harmful because it then tends to reveal what Canada's national security agencies knew and when, and potentially how. So generally, you will not see national security agencies in Canada and elsewhere validate claims made on the -- on leaked information because that, itself, lends credibility.

And the other thing I'll say is that the problem with leaked information, especially if it's a leaked document or an assessment, those are potentially assessments made at a moment in time and they don't necessarily reflect new information learned and that could change an assessment, for example, of a threat. And so that also have to be taken into account as leaked information, just because it's leaked

information, doesn't mean it's true information. It may have been believed to be true at one time and is no longer the case. So that needs to be factored in.

That said, there have been many a case in the Canadian Federal Court where well-known information, for example, that enhanced interrogation methods were used on certain prisoners in Guantanamo, right, was well known, but the United States refused to allow certain information relating to that to be disclosed in the Canadian Court because it would be validating things that had not been validated by U.S. government officials.

So it's -- it has to be done, again, on a case-by-case basis, and that's how it has always been done in the Federal Court.

So again, I'll just use the example of information derived from the use of enhanced measures were used in certain cases in Guantanamo. You know, that was public, but the balance was, okay, is this ridiculous to withhold from the public as, you know, relevant in this case when it is so well known; right? It was no longer a question of whether it was true or false. It was very well known and went to the credibility and reliability of certain evidence being put forward. And in that case, the judge said, you know, no, I can't possibly allow this. And so, you know, I don't think, to my mind, any of the leaked information in this case has risen to that level of public truth.

MS. ERIN DANN: All right. Thank you. If there's no further comments that any of the panelists want to

make on that point, I will turn the podium to my colleague to ask some questions about process.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AUX PANÉLISTES PAR MR JEAN-PHILIPPE MacKAY :

MR. JEAN-PHILIPPE MacKAY: The first question requires a preamble.

We know that, in administrative decisions, there are some fundamental rights but also values that need to be taken into consideration by decisionmakers in public administration. In the context where some views that are guaranteed by the *Charter* need to be taken into account by decisionmakers in the context of disclosure or the decisions to disclose protected elements for national security reasons, how can the *Charter* or how should it intervene in the process of disclosing information? So in the context of this Commission specifically.

Prof. PIERRE TRUDEL: We probably need to look at the issue or the issues surrounding the information for which these questions are being asked. Once these issues are identified, it will be possible to better see the values that are at play.

For instance, if we are protecting the identity of a person because their life can be in danger if this information was revealed, well, obviously, the right that is being invoked here is the right to safety of the person. So by identifying the issue at stake, we can be in a better position to identify the values that are impacted by this issue raised by the information that we are questioning

whether they should be revealed to the public or not or to what extent they should be disclosed.

So this is how it will become possible to introduce and what we can call the reasoning of the decision-making process of the decisionmaker, the Judge. This will make it possible to introduce some kind of grid where we can say, "Well, this is the value at stake and, given this value, what needs to be done and what precautions must we take to ensure that we are aligned with these values and respecting these values".

For instance, values related to the freedom of expression, I think it's the same rationale, what kind of harm could be caused to the freedom of expression and the public trust if we unduly restrict the circulation of information.

So this is a way to ask the question regarding values on the operational level so that a decision can be made because, obviously, values that are in the *Charter*, the fundamental rights, are very abstract and we have to make them a lot more tangible. And one way to do this, in my opinion, is to properly identify the issues that are impacted with these questions related to information so we have to see whether they should be made public or not.

MR. JEAN-PHILIPPE MacKAY: In the context of this Commission when we look at the mandate, the Terms of Reference, there are some specific considerations. The Commission needs to look at special vulnerabilities of some diaspora groups in Canada.

In the context to follow up on the -- on your response, Professor Trudel, in the context where there's some specific vulnerability that need to be studied and analyzed by the Commission, in this context is the right to equality or how can the right to equality be one of these issues related to these questions on the vulnerability of some of these diaspora groups?

Prof. PIERRE TRUDEL: Absolutely. I think taking into account these vulnerabilities to respect the right to equality is to apply the measure of vulnerability. In other words, to truly respect the right to equality and the values, we have to examine the specific vulnerability that can be experienced by some members of some groups, vulnerable groups or groups that have some specific characteristics with which we can identify, vulnerabilities that are more present in these groups compared to other segments of the population.

So I think this is, once again, to operationalize this, this right to equality, because respecting this right means that we have to take into account that not everybody, not all -- everybody is vulnerable in the same situation in the same way to the same events. So this needs to be taken into account if we really want to go beyond the formal right to equality and respect the true value of equality. And I think this is what we need to consider in the -- with the concept of fundamental rights in Canada.

Also on the same topic, we're talking about different levels since this morning, the issues of

confidentiality in relation to national security, for instance, in negotiations between the government and the Commission and also in judiciary terms. If there is, for instance -- so there's some fundamental values.

MR. JEAN-PHILIPPE MacKAY: This element of analysis, does it apply only to judiciary, quasi-judiciary decisionmakers or does it -- is there an element that needs to guide them in the negotiations between the government and the Commission when it comes time to discuss the scope of a privilege or a disclosure related to national security?

Prof. PIERRE TRUDEL: I would say that the need to take into account and respect values is imposed on everyone, including the judiciary branch and also the executive. So I think these values should be taken into consideration by everyone, values that -- that underpin our *Charter*, as they impact all parties.

These are values that concern the rights of all citizens, so everybody who is involved in the decision-making process and also the negotiation process to -- they have to take these values into account. It's not just a private sort of the Judge or the Commissioner or the Commission. This really concerns all the decisionmakers and all persons who exercise authority.

MR. JEAN-PHILIPPE MacKAY: We have received another question which reads as follows, do you agree that it would be helpful if this Commission disclosed to the participants and the public the guidelines that the Commission will use to determine how it will balance the

public's interest in disclosure in national security concerns in its work.

DR. LEAH WEST: So ---

MR. JEAN-PHILIPPE MacKAY: Well, maybe if I can ask you ---

DR. LEAH WEST: Yeah.

MR. JEAN-PHILIPPE MacKAY: --- a follow-up question. Do you think such a framework can exist in a vacuum, or it has to be tied to a specific, in French, "*enjeu*" ---

DR. LEAH WEST: Yeah.

MR. JEAN-PHILIPPE MacKAY: --- so a specific concern or on the case-by-case basis?

DR. LEAH WEST: So to my mind, this might be something that is articulated in the Commissioner's findings, not necessarily in advance. I don't know that it's something that the Commissioner could articulate in advance of making these kinds of decisions. Ultimately, the Commissioner is going to decide based on her mandate what she believes needs to be made public, and she may ultimately decide injury be damned. And in that case, I suspect that she would articulate the reasons why for that. And presumably, the first time that that's released, whatever it is will be redacted because there'll be now a battle over that piece of information in the courts.

And so I think, generally, once a decision has been made about how you're going to write your findings of fact after you've reviewed all the information, how you

then weight it, your actual process of weighing that, which I think you will only know once you engage in that exercise, should be articulated to the public in your findings about how you chose what to make public and what not. But I think it would probably lead to -- I don't know that you could fully articulate your process, unless you were to say I generally plan to apply the Ribic test and move forward, I don't know how much more granular you could be at the outset.

DR. MICHAEL NESBITT: I mean, I'll caveat this by saying it's not studied opinion because I've been thinking about it for ---

DR. LEAH WEST: Yeah.

DR. MICHAEL NESBITT: --- two minutes while Professor West is talking here, but I'll try to do the best I can, and the best I can would be to essentially agree. I think absolutely you have to explain that this sort of detail I see no reason why that wouldn't make the most sense that you would do it in the final report on a case-by-case basis.

I guess to add to what Professor West was saying, and, again, I'd have to think about it more, but I'd have as much worry that you would undermine the credibility of the inquiry by coming up with something that was so general so as to apply to any sort of situation or piece of evidence in the final report that it was easily criticized in the abstract before we ever get to the case-by-case analysis, which is invariably where this is going to play out anyways. So perhaps that's a middle-ground answer to your question, which is, yes, we should provide some guidelines as to how

you weight evidence, just like you would -- I don't want to make this a court, but just as you would in a court decision; right? I put more weight here. I thought this was corroborated. I thought this was credible. I find this backed this. Here's why. Here's the values that I considered in this case. In this case, it mattered to hear from intervenors because they were a particularly affected community and had something, you know, that needed to be said and to respect their quality. I had to hear from them. In this other case, there was no such person. But again, I think that would be done most obviously in a final report as one explains the findings.

MR. JEAN-PHILIPPE MacKAY: According to our schedule, we have a 20-minute break at 3:00 p.m.

COMMISSIONER HOGUE: So we will take a 20-minute break. We will be back in 20 minutes.

THE REGISTRAR: Order, please. The hearing is in recess until 3:20.

--- Upon recessing at 2:59 p.m.

--- L'audience est suspendue à 14h59

--- Upon resuming at 3:24 p.m.

--- L'audience est reprise à 15h24

THE REGISTRAR: Order, please.

The sitting for the Foreign Interference Commission is back in session.

MR. JEAN-PHILIPPE MacKAY: Welcome back. A specific question for Professor Nesbitt.

In your review of past inquiries, we spoke a

lot about Arar since the beginning of the day, but we are -- the question is about other inquiries including -- also the Arar Inquiry. What types of cooperation has the government provided? Did they take steps to assist the Commission balance the tension between national security confidentiality and the right to information, and what were those steps?

DR. LEAH WEST: Sure.

MR. JEAN-PHILIPPE MacKAY: Professor West can jump in if ---

DR. MICHAEL NESBITT: So, I mean, I'm a little limited in my answer to what is provided in the report, so the fundamentals of the report in the Arar Inquiry talked about the need to sort of -- that they did some of the pre-work that we've already discussed, but the need to do more of it and for future inquiries to do more of it. The modern Canadian inquiries have, for the most part, discussed an issue with overclaiming, so I think it has to be on the table that it's a possible concern. It has been something that's been noted in past inquiries.

What steps did they take? I think we've covered most of them, which is you try to do as much of the legwork upfront as you can. You obviously try to discuss with those involved and help them to understand the importance of providing the information that is necessary, while yourself learning to understand what information just won't be released. And then, and I know that perhaps this is a bit of a theme of today, but it often has looked, at least from the outside in reading the reports, like a contextual

analysis. Right? How you deal with that depends on what the claim is, whether it's an overclaim, whether it's a legitimate claim that's being balanced with a real imperative of the inquiry to make certain information public, understanding that there are also reasons not to make it public.

There are, of course, just to be thorough, I mean, there are other options here. You can take it just to Federal Court and have a section 38 *Canada Evidence Act* dispute. That's, as Professor West has already discussed, it's neither efficient nor effective, particularly given the timelines of this. It also could happen. Maybe it will happen, I -- no idea, and don't want to speculate on that. But the timelines on that generally don't allow for the completion of reports in three months from now or even 10 or 11 months from now. So that would certainly be, as the Arar Inquiry said, it's an option that's on the table. It should be the last option.

And to reiterate, I think a more important point is that serves no one well. None of the parties, no one involved, the government, nor the parties, nor the Commission are served well by that approach. So a collaborative approach that works ahead of time to negotiate a solution is usually the best one.

DR. LEAH WEST: I'm going to just take examples from other types of bodies that are in this game. So mentioned *NSIRA* and *NSICOP*. Both have taken steps to articulate where they felt that government agencies were not

being forthcoming or overclaiming in their reporting, and they also praise those who are -- those agencies who do a good job in responding to requests for information. So that's something else.

Institution or reputation is important for these agencies because an institution's trust is crucial to their work. So if the Commission finds that certain agencies are being deliberately obtrusive, it -- you know, even if you can't get to a point where you get that compromise, making that clear in the report is something other agencies have done, and you know, might be something that would make them reconsider their position, just like praising those agencies who do a good job in that regard would help bolster confidence in those institutions.

MR. JEAN-PHILIPPE MACKAY: So since the beginning of the panel today, we have discussed the importance of cooperation, as Professor Nesbitt has just mentioned. But what is your opinion of the importance of a adversarial debate on national security confidentiality issues in the context of a public inquiry? So at all levels of the negotiation, then also -- well, we'll speak to that. So the -- in the negotiation context, the role of an adversary to the government in the context of an inquiry, what is your opinion between this relationship between parties?

DR. MICHAEL NESBITT: Can I clarify what -- well, maybe you don't know. What is meant by the question of an adversarial relationship?

MR. JEAN-PHILIPPE MACKAY: Well, this is not my question, so I wouldn't know. But in the context of the question that we had this morning, so the role of Commission counsel in negotiating those claims with the government. We also mentioned earlier the notion of a special advocate in certain national security settings. So this element of having an adversary in front of the government, so do you think that this is a necessity in the context of an inquiry or this specific inquiry?

DR. LEAH WEST: Yes. And that's why it had to be added on in the Arar case through special advocate that were designed specifically to take that role. Their job wasn't really to bring out the facts, their job was to challenge claims of national security confidentiality.

And so, you know, I'm heartened to see that there are several counsel in the Commission that are well placed, and I can't think of people more experienced than to do that job here, and I'm sure were appointed for that very reason because they have history, credibility, experience taking it to the government on their claims of national security confidentiality. Because it is absolutely crucial that you have people who are capable and competent to engage in that process.

MR. JEAN-PHILIPPE MACKAY: And I don't want to interrupt you, Professor. I think you misspoke about the Arar, and you mentioned special advocate.

DR. LEAH WEST: Sorry. Yeah, I meant to say *amicus curiae*.

MR. JEAN-PHILIPPE MACKAY: Okay.

DR. LEAH WEST: Thank you.

DR. MICHAEL NESBITT: Yeah, it's a more general answer, but maybe it speaks to both this and your previous question. And that is in certain circumstances it's been clear that the approach has to be somewhat adversarial in a general sense, which is to say, the word I used repeatedly in the talk this morning was you have to "push" or "challenge".

That is quoted multiple times, or some version of that is said multiple times in the Arar report, obviously as an indication to future inquiries that sometimes it will have to be adversarial in the sense of challenging to release more information, challenging the justifications, perhaps, that may be to release the information, that may be just challenging them to ensure the Commissioner is satisfied that the information should be protected.

But again, it's not -- we're not just referring to the Arar Inquiry there. That was -- sorry, I believe I quoted Professor Kent Roach. Kent Roach, of course, was part of the Air India Inquiry, and is drawing lessons from that as well.

I spoke this morning of a published article, a public published article by a prosecutor with a long history of dealing with national security litigation in the criminal context, and again, he said the same thing. Sometimes he put it as you have to be adversarial, but he sort of said, "but you start the process early and you start

that negotiation." And to some extent, I read into that, and sometimes that meets that sort of process of pushing.

So I think there absolutely, as Professor West was saying, absolutely has to be adversarial sometimes, and that's the nature of it, it's by way of Commission counsel to some degree. But it's also, I think -- I think just based on past practice, you know, my previous answer was well, it's got to be contextual. How do you convince someone of something? Well, depends on who the person is and what the context is and what you want to convince them of. But what is clear is however you take that adversarial approach, you know, whether that's with a carrot or a stick, sometimes that has to happen in the context. And the history has suggested it may, if history is an indication, happen here as well.

MR. JEAN-PHILIPPE MACKAY: Thank you.

MS. ERIN DANN: At the risk of misreading the question that we were submitted, I think it may have to do -- the use of adversarial may be in comparison to inquisitorial. It has to do with sort of the role of Commission counsel. And you may not be the panel to ask, or you may well be, given your experience in, Professor Nesbitt, in studying commissions of inquiry. But the commission counsel role it is that one that is purely inquisitorial or it can, Commission counsel, take on, for example, by engaging not just in examination in-Chief but asking cross-examination type questions.

Is that a method that has been used in or --

in prior inquiries? Is it available? Is there -- does the -- does the role of Commission counsel permit a kind of a taking challenging posture or a position in a Commission of inquiry?

DR. LEAH WEST: That's for you.

DR. MICHAEL NESBITT: I -- unless someone disagrees with me, I see no reason why not, but -- and as I said, I expect it might have to happen. I mean, the Commission is -- the Commission's report is going to depend on the extent to which it is impartial and independent as was discussed yesterday. It is an impartial and independent body. That means the Commission counsel might have to play the role of being a little less inquisitorial and a little more vigilant in trying to get the information that's in the interests of the Commission to receive.

DR. LEAH WEST: And that would be especially true in *in camera* proceedings where you do not have party counsel who can ask -- or cross-examine witnesses.

--- QUESTIONS TO THE PANEL BY/QUESTIONS AU PANÉLISTES PAR MS. ERIN DANN:

MS. ERIN DANN: Thank you.

Following up on the discussion we had before the break about *Charter* values, a question was posed, would you agree that giving targeted individuals and communities the ability to take precautionary measures in the face of imminent threats of foreign interference or transnational repression is an aspect of the public interest in disclosure or something that weighs in favour of disclosure?

How do you feel this should be factored into the balance to be struck as the Commission conducts its work?

And I'll -- I pose the question to any of the three of you that wish to respond.

DR. LEAH WEST: So I -- especially in the second half of the Commission's mandate, you know, I do think that there is a role not just for national security agencies, but the Commission in making sure the public understands broadly how foreign states seek to influence the public or a subset of the Canadian population in order to build resilience. I think that's part of the job our security agencies are taking more and more of, but also, you know, the public education aspect of it, of this is the type of threats Canadians and Canadian communities are facing from foreign actors and this is the impact it can have on our democratic institutions, I think, are appropriate findings for the Commission to be making and definitely part of that public interest.

And so -- but again, I think you can make findings of that sort without revealing how our security agencies have come to know the details of that. And I think it'll be very important to hear from those communities in a way that they feel safe so that they can explain that to the Commission and the Commission can, on behalf of those communities, explain it to the Canadian public.

MS. ERIN DANN: Thank you.

This question begins, we understand the need for confidentiality or classification to protect national

security interests. The question for the panel is whether you would acknowledge or can you speak to whether there are national security interests that are served by the disclosure of information, even sensitive information, in the sense that the questioner suggests that could promote awareness or serve to isolate -- insulate, I should say, the public from the impact of foreign interference.

Professor West, I see you nodding your head, so I'll ---

DR. LEAH WEST: Well, I think that goes to the point I just made, but also, I mean, we're seeing that very clearly be articulated by the Canadian security intelligence service right now. They're in the midst of doing public consultation saying we want the ability to share more information that we've collected in our investigations with provincial governments, universities, et cetera in order to help them build their own resilience.

I think the same thing would apply to diaspora communities as well.

And so we see that kind of work being done routinely when it comes to cyber threats and cyber security threats. We have a whole agency now basically dedicated to that in the cyber -- Canada Cyber Centre that's designed to articulate to the public what these threats are and they've done that in the case of democratic interference. And so I do think that there is an important role of informing the public and potentially declassifying information to build resilience.

And we've actually seen that not just in the case of foreign interference, but with other threats. We've seen other intelligence agencies, including the Department of National Defence, release or declassify information to counter disinformation coming from other states to help Canadians become more resilient and understand, to actually get into the fight of the -- not leave a vacuum of information, but actually to help fill the void and enter into the debate of public ideas by declassifying certain information.

So I think there absolutely is a need and I think a growing recognition of the need to share information that intelligence agencies know in order to build public resilience, not just with foreign interference, but a variety of national security threats.

Prof. PIERRE TRUDEL: There is an advantage, there is even a need for better knowledge on behalf of the whole public regarding possible strategies or activities of interference. For example, in electoral processes, interference can come from all sorts of sources. And if we take the example of false information or misinformation which can go viral which it can be targeted, so regular citizens are targeted and they are likely to be the first targets of such interferences.

So improving the general knowledge of the public of the risks specific to the fact that information is circulated very rapidly and can land very quickly in our cell phones or in all the tools that we use in our daily lives,

that's certainly an issue which requires much more transparency, so I totally agree with the person who was asking this question. I think that there is a requirement for sharing all situations where foreign interference can be determined, particularly when using the various technologies which are used on a daily basis today.

DR. LEAH WEST: I just want to add, the National Security Transparency Advisory Group, which is an independent advisory body that provides advice to the Minister of Public Safety on implementing Canada's transparency goals, has written about this quite extensively and they have published three reports. And one of those reports dramatically highlights, you know, all of the positives that come to national security from transparency, so it might be a reference for the Commissioner.

DR. MICHAEL NESBITT: I was actually going to sort of point to the same thing. And in part, I -- no, that's great.

And I was going to point to it because I was going to tie it to a quote I had earlier from the Arar Inquiry, which is that overclaiming, and I quote, "also promotes public suspicion and cynicism about legitimate claims by the government of national security confidentiality".

And so the flip side of what was just said is that if you have a situation of overclaiming, if you're not sharing the information, if the public isn't understanding what's happening, you have a lack of trust. And a lack of

trust in our institutions eventually will lead to the failure of the institutions.

And so at a very fundamental level, some form of transparency which allows for, as I was discussing this morning, accountability is fundamental to upholding our national security apparatus as a whole, and so absolutely there are benefits, right. The corollary of that is if a lack of trust undermines the potential, the activities, the likely powers in the long run of our national security agencies, then public trust in those institutions will garner more support for them and will allow them to act in our interest better.

DR. LEAH WEST: Okay. I just want to add one last point on that, in that lack of trust in our institutions is probably at its greatest in a number of diaspora communities and ethnic minority groups across Canada because of lack of accountability when there's been wrongs to those communities or over-surveillance, et cetera. And so given the nature of the question at hand, I think it's additionally important in this context.

MS. ERIN DANN: Thank you. I would -- just a few more questions, specifically about some of the intricacies of section 38.

DR. LEAH WEST: Oh, boy.

MS. ERIN DANN: Professor West, one of the questions we received submits that the procedural safeguards contained within the *Canada Evidence Act* were an important consideration in favour of constitutionality when different

provisions of that Act have been assessed by the courts, and specifically, the regime provided by section 38.

Are these safeguards, these sort of constitutionally saving safeguards, are they applicable in the context of a Commission of inquiry? And the questioner asks, for example, or poses, for example, whether risks of the infringement of certain *Charter* values or protections that were discussed earlier in our presentations, can these be -- are remedies such as a stay of a proceedings or a stay of indictment or limiting the amount of information provided in relation to an indictment, those don't seem to have a specific sort of applicability in this context.

Can you provide any insight on....

DR. LEAH WEST: So there is two things: One, a large part of that is in the context of criminal proceedings where an accused has a right under section 7 to all of the relevant information before them at trial.

Those constitutional premise or the procedural safeguards do matter to an extent in civil cases or judicial review, but not quite to the same extent. So some of those safeguards, like a stay of proceedings, for example, or the ability to deny the admission of certain evidence, are more applicable in that context and I don't really think transfer well to this context.

But the other thing I'll say is no, because at the end of the day, in this case, the government still gets to decide what is disclosed or not. Right? That was made very clear in their institutional report. And you know,

at the end of the day, the government has control over what information that is privileged and under -- by national security claims, can or cannot be released, not the Commissioner.

The Commissioner will argue and -- or through her counsel argue for what you want to be disclosed, but at the end of the day, the decision rests with the government, and ultimately the Attorney General. And if there can't be agreement on that, then you go to the court, and that's when those safeguards kick in.

MS. ERIN DANN: And turning, then, to follow that. Where section 38 is engaged, would you agree that it is important for the public to be aware that the Commission does not agree with certain national security claims by the government? And in that context, in your view, would it be important for the Attorney General to authorise disclosure of the very fact that a notice under section 38.02 of the *Canada Evidence Act* has been given by the Commission?

DR. LEAH WEST: Absolutely.

MS. ERIN DANN: That looks like agreement across the board, no differing opinions on that point. Thank you.

I'll just take a moment and consult with my colleague on our remaining questions for you. Just one moment.

One further question. And my trouble in reading this question is not with the question that was posed, but with my advanced -- my increasingly problematic

eyesight.

"Before the lunch break, Commission counsel", I suppose that's me, "asked the panel about the balance between national security confidentiality and the public interest in fair and free elections and democratic processes. What are the thoughts of the panel on the balance between the interest of parliamentarians in being aware of infringements of their parliamentary privileges, which protect their ability to fulfill their duties free from obstruction, intimidation, or interference, and national security confidentiality?"

Anyone able to address that question?

DR. LEAH WEST: So I'll start because I assigned this as a case study to my ethics class last week, essentially.

And really, you know, parliamentarians who have a job to maintain accountability over the government, and who have privileges in order to do that, how much do they need to know? I would say in this case we know that there is allegations that they need to know specifically because threats have to do with them, versus the interest in national security and not disclosing certain information potentially about those threats. And to me, that's really a question for the national security agencies who have the full picture and understand the level of threat.

In an ideal world, I think anyone who faces a personal threat or a threat to their ability to uphold their duties in a democratic institution, should have as much

information as possible. But it's a -- it would be very case dependent, and I don't think anybody could make that decision other than the agencies holding all of that -- all of those cards. But I think that the agencies with that information would need to take into account a parliamentarian's role, very important role, in democracy when weighing those -- the potential injury of revealing more information to them.

My students really should have been watching that.

(LAUGHTER/RIRES)

MS. ERIN DANN: It'll be on the exam. I'll just take one more moment.

Commissioner, those are all of the questions that we had for our panel this afternoon.

COMMISSIONER HOGUE: Thank you. Thank you to all of you.

THE REGISTRAR: Order, please.

COMMISSIONER HOGUE: We'll resume tomorrow at 10:00 a.m. Thank you.

THE REGISTRAR: This sitting of the Foreign Interference Commission has adjourned until 10:00 a.m. tomorrow.

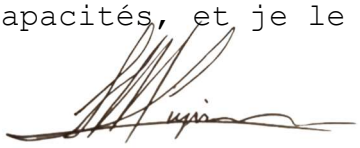
--- Upon adjourning at 3:54 p.m./

--- L'audience est ajournée à 15h54

C E R T I F I C A T I O N

I, Sandrine Marineau-Lupien, a certified court reporter, hereby certify the foregoing pages to be an accurate transcription of my notes/records to the best of my skill and ability, and I so swear.

Je, Sandrine Marineau-Lupien, une sténographe officiel, certifie que les pages ci-hautes sont une transcription conforme de mes notes/enregistrements au meilleur de mes capacités, et je le jure.



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Sandrine Marineau-Lupien