
Memorandum of the Attorney General of Canada

OVERVIEW

1. Canada is assisting the Islamic Republic of Afghanistan to restore peace and the rule of law. The bilateral arrangement that governs Canada's military presence permits the Canadian Forces (the "CF") to assist Afghanistan by capturing detainees¹, in certain cases. The arrangement directs the CF to transfer detainees to Afghan authorities to be processed in accordance with Afghan law.

2. Within the CF, the capture, detention and transfer of prisoners of war and of detainees has always been part of military operations under the control of the military chain of command, particularly the Commander of the theatre of operations. All soldiers are trained to perform this task, however the commander often entrusts its coordination to the senior representative of the Military Police on his staff. Notwithstanding the participation of members of the military police in the handling of detainees, it remains part of military operations, not of "*policing duties and functions*".

3. Members of the military police have a dual capacity: they are always soldiers but are policemen only some of the time. Parliament was acutely aware of this dual capacity when it created a civilian body to oversee the investigation of complaints about the conduct of members of the Military Police in the performance of their "*policing duties and functions*".² Parliament choose to exclude from the mandate of the Military Police Complaints Commission (the "Commission") oversight of any duty "*that relates to administration, training, or military operations*".³ In a 2002 report, the Commission recognized that guarding

¹ Detainee means any person, other than a Canadian national, whose initial detention and capture, for whatever reason, occurred at the hands of the CF.

² *National Defence Act*, R.S.C. 1985, c. N-5, s. 250.18(1) ("*NDA*") (**Applicant's Book of Authorities** ("**BoA**"), tab 2).

³ *Complaints about the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065, s. 2(2) (the "*Regulations*") (**BoA**, tab 3).

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and supervising detainees was not an activity of the military police that was subject to the Commission's oversight.

4. Amnesty International Canada ("Amnesty") and the British Columbia Civil Liberties Association ("BCCLA") allege that Afghan authorities mistreat their detainees. They want Canada to refuse to transfer detainees captured during CF operations to Afghan authorities '*until appropriate conditions could be achieved in Afghan institutions*'.⁴ To achieve this objective, Amnesty and BCCLA have filed two conduct complaints with the Commission.

5. When it decided to hold a public hearing into the first conduct complaint that the military police transferred detainees to the Afghan authorities despite a risk of torture, the Commission clearly exceeded its mandate. It has compounded this error by deciding to investigate and hold a hearing into the second complaint, which does not concern the conduct of particular members of the military police, but amounts to a 'systemic' review of the policy of transferring detainees.

6. Neither of the complaints currently before the Commission are concerned with the conduct of members of the military police in the performance of their '*policing duties and functions*'. Instead, the Commission is purporting to review matters relating to military operations and to government policy. The Commission has no jurisdiction to investigate either of them.

PART I - FACTS

7. The applicant is challenging two decisions issued by the Commission. The two applications are consolidated.⁵ He seeks a declaration that the complaints are not complaints about the conduct of a member of the military

⁴ Affidavit of A. Neve, sworn April 1, 2009, para. 15.

⁵ **Applicant's Record (AR)**, vol. 5, tab 13, p. 1209-1210 (*Consolidation Order*).

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police in the performance of any of the 'policing duties or functions', as that expression is defined by subsection 250.18(1) of the *National Defence Act* and section 2 of the *Complaints About the Conduct of Members of the Military Police Regulations* and consequential relief.

A. Detainee handling is part of military operations in Afghanistan

8. Canada's military presence in Afghanistan occurs in the context of an ongoing armed conflict.⁶ Canada is assisting the Islamic Republic of Afghanistan to restore peace and the rule of law. The legal authority for Canada's military presence there rests on individual and collective self-defence, relevant resolutions from the Security Council of the United Nations and the consent of Afghanistan.⁷

9. The Islamic Republic of Afghanistan has expressed its consent to the CF presence and activities in its territory in a number of ways, including through bilateral arrangements. They authorize the CF to use force to ensure the accomplishment of operational objectives. Whenever detainees are captured by the CF, the arrangements direct that the CF will transfer them to Afghan authorities to be handled in accordance with Afghan law. The arrangements specifically provide that:

'Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.'⁸

10. These arrangements require the Government of Afghanistan to investigate

⁶ AR, vol. 1, tab 4(1), p. 228, par. 4 (*Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan* ("Technical Arrangements"); AR, vol. 1, tab 4(2), p. 237, para. 10-11 (*Task Force Afghanistan Theatre Standing Order* ("TSO") 321A).

⁷ *Amnesty International Canada v. Canada (Attorney General)*, 2008 FC 336 at para. 21, 27-29 and 41-42 (BoA, tab 11); aff'd by 2008 FCA 401 at para. 36 (BoA, tab 12); leave to appeal refused, SCC no. 33029, 21 May 2009 (BoA, tab 13).

⁸ AR, vol. 1, tab 4(1), p. 230-231, para. 12 (*Technical Arrangements*).

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allegations that a detainee transferred by the CF may have been mistreated and to prosecute offenders in accordance with internationally applicable standards.⁹

11. Canada's highest-ranking soldier in Afghanistan is the Commander of Joint Task Force Afghanistan ('JTFA'). He has issued a standing order, Theatre Standing Order 321A ("TSO 321A")¹⁰, which provides members of JTFA with detailed instructions on how to implement the principles contained in the bilateral arrangements with Afghanistan.

12. The arrangements do not contemplate that Canada will operate a detention facility in Afghanistan for captured detainees. TSO 321A thus directs that '*individuals apprehended in the course of the on-going conflict*' are going to be either released or transferred to Afghan authorities.¹¹

13. CF soldiers who capture insurgents must assess whether these individuals present a threat. If it is determined that an individual is not a threat, he or she is released immediately without further processing. If he or she is determined to be a threat, the capturing unit hands over the detainees to those tasked with evacuating detainees, as quickly as operationally feasible.¹² The detainees are then evacuated back to Kandahar Airfield where they are held at the transfer facility prior to release or transfer.

14. As contemplated by military doctrine,¹³ TSO 321A recognizes that handling of detainees is a command function for which the Commander JFTA has overall responsibility. Only the Commander has the authority to order that

⁹ *Amnesty International Canada v. Canada (Attorney General)*, 2008 FC 336 at para. 74 (BoA, tab 11).

¹⁰ AR, vol. 1, tab 4(2), p. 235, para. 2 (TSO 321A).

¹¹ AR, vol. 1, tab 4(2), p. 235, para. 2 (TSO 321A).

¹² AR, vol. 1, tab 4(2), p. 235, para. 2 (TSO 321A).

¹³ AR, vol 1, tab 2, p.16, para. 35 (Affidavit of LCol Lander); AR, vol. 1, tab 2(6), p. 149, para. 203 (Prisoners of War, Detainees and Interrogation & Tactical Questioning in International Operations).

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detainees shall continue to be detained, be released or be transferred to Afghan authorities.¹⁴

15. Pending a decision by the Commander, the detainee is held at the Kandahar Airfield Transfer Point. The Commander has tasked his senior military police advisor, the Task Force Provost Marshal, with operating the Kandahar Airfield Transfer Point and with arranging for transfers to Afghan authorities, when directed to do so by the Commander.¹⁵

16. To accomplish this task, the Task Force Provost Marshal employs soldiers, some of whom are military police members with peace officer status, reserve military police members who are not credentialed peace officers and non-military police soldiers.¹⁶ All soldiers are trained to handle detainees and prisoners of war;¹⁷ non-military police soldiers and reserve military police members work at the Kandahar Airfield Transfer Point.¹⁸

17. Major Harvey was the Task Force Provost Marshal and Commanding Officer of the Military Police & Force Protection Company for JTFA from August 2006 to February 2007. His unchallenged account of the process followed to transfer detainees to Afghan authorities confirms that the entire process is under the direct control of the Commander JTFA, not of the Military Police.

If the Commander decided to transfer a detainee to Afghan authorities, I would receive instructions to that effect. I would then arrange for a medical examination of the detainee, as close

¹⁴ AR, vol. 1, tab 4(2), p. 235-236, para. 3 and p. 259, para. 8 (*Annex I to TSO 321A*).

¹⁵ AR, vol. 1, tab 4, p. 223-227, para. 6-7, 9, 11-15, 20, 23 (*Affidavit of Maj. Harvey*); AR, vol. 5, tab 14, p. 1246-1247, 11 to 25, l. 1-23 (*Transcript of cross-examination of Maj. Harvey*).

¹⁶ AR, vol. 1, tab 4, p. 225-226, para. 13-18 and 20 (*Affidavit of Maj. Harvey*).

¹⁷ AR, vol. 5, tab 14, p. 1233, l. 18 to p. 1235, l. 14 (*Transcript of cross-examination of Maj. Harvey*).

¹⁸ AR, vol. 1, tab 4, p. 226, para. 20-21 (*Affidavit of Maj. Harvey*); AR, vol. 1, tab 2, p. 16, para. 36 (*Affidavit of LCol Lander*).

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as feasible to his transfer to Afghan authorities, to document his medical condition as he left Canadian custody.¹⁹

B. Dual roles and responsibilities of the Military Police

18. Members of the military police do more than policing. In the CF, members of the Military Police are soldiers first. Military Police perform military operational functions common to all members of the CF in addition to their policing role. As LCol Lander expresses it, "...we're soldiers and we're policemen. We are policemen only some of the time."²⁰ This distinction between the different roles performed by the Military Police is grounded in military custom and practice and is understood by all those who serve in the CF.²¹

19. Military police are an integral part of the CF and must participate in all types of operations throughout the spectrum of conflict and in each phase of conflict. Military doctrine recognizes the CF policy that a member of the military police is first and foremost a soldier.²²

20. The role of the Military Police is to help the Commander achieve his mission by conducting policing service operations, providing mobility support, security, and detention.²³ Of those four sectors of activities, only the first (policing service operations) is comparable to the duties of civilian police. The remaining three are military operational duties.

21. Detainee handling is one of the military operational duties customarily assigned to the Military Police. In this role, the Military Police Branch supports

¹⁹ AR, vol. 1, tab 4, p. 226-227, para. 23 (Affidavit of Maj. Harvey).

²⁰ AR, vol. 5, tab 15, p. 1298, l. 19-21 (Transcript of cross-examination of LCol Lander).

²¹ AR, vol. 1, tab 2, p. 10, para. 5, 7 (Affidavit of LCol Lander); AR, vol. 3, tab 10 (Affidavit of Col Cooper).

²² AR, vol. 1, tab 2(1), p. 28 (Provost Duties); AR, vol. 1, tab 2(3), p. 59, para. 5 (Military Police).

²³ AR, vol. 1, tab 2, p. 12 para. 15 and 18 (Affidavit of LCol Lander); AR, vol 3, tab 10 (Affidavit of Col Cooper).

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operations by ensuring the orderly removal and custody of prisoners of war and detainees from the battlefield.²⁴

22. Six witnesses have attested to the fact that the handling of detainees and prisoners of war has formed part of military operations under the control of the commander of the theatre of operations since at least the Boer War. Three of those witnesses are experienced members of the military police,²⁵ while two are seasoned commanders²⁶ and the last is an historian specializing in the history of the CF.²⁷ All agree that there is no known exception to this custom or practice.²⁸

23. Military doctrine dating back to at least the mid-twentieth century classifies prisoner of war and detainee handling separately from policing duties.²⁹ This is reflected in the current technical guidance provided to members of the military police.³⁰

24. There are sound military reasons justifying the doctrine and the custom it represents; both are grounded in the ultimate accountability of the Commander for military decisions.

25. The efficient conduct of military operations requires prisoners of war and detainees to be removed from the battlefield in accordance with a country's

²⁴ AR, vol. 1, tab 2, p. 15 para. 31 (*Affidavit of LCol Lander*).

²⁵ Col Cooper, the former Canadian Forces Provost Marshal - the most senior member of the military police; LCol Lander, the current Army Provost Marshal; and Maj. Harvey, who was the Task Force Provost Marshal and Commanding Officer of the Military Police & Force Protection Company for the Joint Task Force Afghanistan from August 2006 to February 2007.

²⁶ Brigadier-General Fraser, the former Commander of the Task Force Afghanistan (from February 2006 to November 2006); and Lieutenant-Colonel Putt, the former Deputy Commander of the Task Force Afghanistan (from February 2006 to August 2006). LCol Putt was second-in-command to BGen Fraser.

²⁷ AR, vol. 2, tab 7, p. 475-476, par. 2 (*Affidavit of Y. Tremblay*).

²⁸ AR, vol. 2, tab 7, p. 476, par. 4 and p. 498-500, para. 78-83 (*Affidavit of Y. Tremblay*).

²⁹ AR, vol. 1, tab 2, p. 11, para. 10-12 (*Affidavit of LCol Lander*); AR, vol. 1, tab 2(2), p. 36-37, para. 108 (*The Canadian Provost Corps in War*).

³⁰ AR, vol. 1, tab 2(3), p. 83-88, at paras. 32-36 (*Military Police*). Prisoner of war tasks are listed in the section entitled "Warfighting".

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international humanitarian law obligations and processed as efficiently as possible.³¹ Prisoners of war and detainees are not "arrested or detained" in a domestic criminal law context. They are detained by military troops to remove a threat to the success of the military mission.³²

26. One of the main purposes of an army is to engage in armed conflict. From the perspective of military operations, prisoners of war and detainees divert much-needed resources from that primary purpose: they must be guarded, protected, fed and cared for. The proper control of prisoners of war and other detainees remains a command issue because it directly affects how the Commander controls his battlefield responsibilities.³³

27. From an operations perspective, detainee handling is not a task requiring the specialized skills of a peace officer. It may be performed by any member of the CF; all members of the CF are trained to handle detainees and prisoners of war.³⁴ This stands to reason, since detainees are first captured by combat troops and, depending on the availability of logistical support, may continue to be guarded or escorted by combat troops.³⁵ In fact, the personnel assigned to handle detainees in Afghanistan are not required to be peace officers and while some have this status, others do not.³⁶

28. Second, Military Police members are limited in number and they must

³¹ AR, vol. 1, tab 2, p. 15, para. 32-33 (*Affidavit of LCol Lander*); AR, vol. 1, tab 2(3), p. 81, para. 25 (*Military Police*); AR, vol. 1, tab 4(2), p. 248, Annex B, at para 2 (*TSO 321A*); AR, vol. 3, tab 8, p. 527-528 para 11-16 (*Affidavit of BGen Fraser*); AR, vol. 3, tab 9, p. 534, par. 11-12 (*Affidavit of LCol Putt*).

³² AR, vol 3, tab 10, p. 540, para 15 (*Affidavit of Col. Cooper*); AR, vol. 5, Tab 14, p 1268, l10-17 (*Transcripts of Cross-examination of Maj. Harvey*).

³³ AR, vol. 1, tab 2, p. 15, para. 33 (*Affidavit of LCol Lander*); AR, vol. 3, tab 8, p. 527, para 12-13 (*Affidavit of BGen Fraser*); AR, vol. 3, tab 9, p. 534, par. 11-12 (*Affidavit of LCol Putt*).

³⁴ AR, vol. 5, tab 14, p. 1233, l. 18 to p. 1235, l. 14 (*Transcript of cross-examination of Maj. Harvey*).

³⁵ AR, vol. 1, tab 4, p. 224, para. 9 (*Affidavit of Maj. Harvey*).

³⁶ AR, vol. 1, tab 4, p. 225-226, para. 13-18 and 20 (*Affidavit of Maj. Harvey*).

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be allocated in a way that is most likely to ensure the success of CF missions. The Force Commander is best placed to weigh the advantages, disadvantages and risks associated with making this allocation of resources.³⁷

29. Lastly, safety may be jeopardized if Military Police act independently in respect of military operational functions. Again, only the Task Force Commander has the necessary information and perspective to fully assess the risks.³⁸

30. When performing functions and duties related to the handling of detainees, the Military Police are engaged in military operations and act under the authority of the commander and pursuant to her or his orders. According to military custom and practice, the Military Police are not performing 'policing duties and functions' when they are performing the duties in support of military operations which could be assigned to any soldier.

C. The mischief: lack of independence in investigatory functions

31. The scandal surrounding the beating death of Shidane Arone while detained and guarded by members of the now disbanded Canadian Airborne Regiment in Somalia raised serious issues concerning the structure of the military justice system and of the military police. In 1997, the Government decided to implement the recommendations made on this subject by two different inquiries.³⁹

32. The Right Honourable Brian Dickson chaired the Special Advisory Group on Military Justice and Military Police Investigation Services (Dickson

³⁷ AR, vol. 3, tab 8, p. 528, para. 15 (*Affidavit of BGen Fraser*); AR, vol. 1, tab 2, p. 67-68, para. 26 (*Military Police*).

³⁸ AR, vol. 3, tab 8, p. 528, para. 16 (*Affidavit of BGen Fraser*).

³⁹ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5149-5150 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) and 7936-7940 (10 June 1998; J. Richardson, Parliamentary Secretary to the Minister of National Defence, on 3rd reading) (**BoA**, tab 32); AR, vol. 1, tab 2, p. 17, para. 42 (*Affidavit of LCol Lander*); AR, vol. 1, tab 2(8), p. 171 (*Report to the Prime Minister on the Leadership and Management of the Canadian Forces, Minister of National Defence*).

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report) while the Commission of Inquiry into the Deployment of CF to Somalia was chaired by the Honourable Gilles Létourneau (Somalia report).

33. The reports recognized the dual role of the military police. On the one hand, Military Police members who perform combat functions form an integral part of the field formation and must function under the operational chain of command. Like all other soldiers, Military Police members must be fully responsive to, and immediately obey the lawful commands of the operational chain of command.⁴⁰

34. As the two reports also recognized, however, this arrangement can create difficulties when it is applied to the policing duties and functions of the Military Police. In their policing role members of the Military Police must have investigative independence, which includes the ability to exercise discretion in the conduct of their investigations and the laying of charges. Without this independence, non-Military Police officers could thwart, improperly influence or terminate investigations and they could cover-up, or be perceived to be covering up, incidents like those that occurred in Somalia.

35. For these reasons, the Somalia report and Dickson report concluded that special arrangements needed to be made for Military Police in their policing role not in their combat and other non-policing roles. Accordingly, both reports recommended the institution of special arrangements that would apply only to policing duties.

36. Consistent with the focused structure they recommended, the two reports found that the military operational functions of military police include custody of prisoners of war or detainees. Both concluded that the military police

⁴⁰ AR, vol. 1, tab 2(7), p. 159-160 (*Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*); AR, vol. 1, tab 2(9), p. 183 (*Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*).

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must remain within the control of the chain of command when involved in the custody of prisoners of war or detainees.⁴¹

D. The solution: a focused civilian oversight

37. Following the Somalia report and Dickson report, a number of steps were taken to ensure that the Military Police would enjoy independence in their policing role, while their operational role stayed within the chain of command. None of these changes affected the performance of long-established military operational functions under the control of the chain of command, of which detainee handling is one. Rather, these reforms reinforced the distinction between the policing functions and operational functions of the Military Police.⁴²

38. Some of the recommended steps involved administrative or regulatory changes, while others involved amending the *National Defence Act* (the "Act"). All were aimed at modernizing the military justice system.⁴³

39. On the administrative front, an important change was instituting the position of Canadian Forces Provost Marshall ("CFPM") as the senior member in the Military Police Branch. While the Chief of Defence Staff retains ultimate control of the Military Police,⁴⁴ as of September 1, 1999, the CFPM exercises technical control of the military police- but only in respect of policing duties.⁴⁵

⁴¹ AR, vol. 1, tab 2(7), p. 163-165 (*Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*); AR, vol. 1, tab 2(9), p. 187, recommendation 40.9 (*Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*).

⁴² AR, vol. 1, tab 2, p. 19-20, para. 51 (*Affidavit of LCol Lander*).

⁴³ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5149 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) and 7936 (10 June 1998; J. Richardson, Parliamentary Secretary to the Minister of National Defence, on 3rd reading) (BoA, tab 32); AR, vol. 1, tab 2, p. 17, para. 42 (*Affidavit of LCol Lander*); AR, vol. 1, tab 2(8), p. 171 (*Report to the Prime Minister on the Leadership and Management of the Canadian Forces, Minister of National Defence*).

⁴⁴ *Queen's Regulations and Orders for the Canadian Forces* (Q.R.&O.), art. 22.03 (BoA, tab 4).

⁴⁵ AR, vol. 1, tab 2(3), p. 90, figure 2-3 (*Military Police*).

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40. The CFPM is responsible for developing policies to guide the management of the Military Police. The CFPM also establishes the professional standards members must satisfy to receive the Military Police credentials which allow them to acquire peace officers status.⁴⁶ In cases involving the breach of the *Military Police Professional Code of Conduct*,⁴⁷ the CFPM can revoke those credentials.⁴⁸

41. Another important step was the establishment the Canadian Forces National Investigation Service ("CFNIS") as a Military Police independent major crimes investigation unit.⁴⁹ To shield the CFNIS from any perception of command influence, it is placed under the command of the CFPM.

42. The *Act* was amended in a number of respects. It now sets standards for the institutional independence of investigative, prosecutorial, defence and judicial functions in its Part III, the *Code of Service Discipline*.⁵⁰ The *Act* was further amended to create new oversight and review mechanisms to enhance accountability and transparency within the military justice system.⁵¹

⁴⁶ Section 156 of the *NDA* (**BoA**, tab 2) allows for the appointment of MPs. Chapter 22 of the *Q.R.&O's* (**BoA**, tab 4), adopted pursuant to section 156, require members to obtain and hold valid Military Police credentials: art. 22.02(2). Not all persons belonging to the Military Police branch are credentialed peace officers pursuant to s. 156. Most reserve Military Police members are not peace officers. See AR, vol. 5, tab 15, p. 1298, l. 6-22 (*Transcripts of cross examination of LCol Lander*).

⁴⁷ SOR/2000-14, (2000) 134 *Can. Gaz.* II 92 (**BoA**, tab 5). This Code has adopted for the specific purpose of responding to the recommendations of the Somalia Commission, as appears from the *Regulatory Impact Analysis Statement* published with this regulation: (2000) 134 *Can. Gaz.* II 92 at 94.

⁴⁸ *Q.R.&O's*, art. 22.04(11) (**BoA**, tab 4).

⁴⁹ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5150 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) (**BoA**, tab 32).

⁵⁰ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5150 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) and 7937 (10 June 1998; J. Richardson, Parliamentary Secretary to the Minister of National Defence, on 3rd reading) (**BoA**, tab 32).

⁵¹ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5150 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) and 7939 (10 June 1998; J. Richardson, Parliamentary Secretary to the Minister of National Defence, on 3rd reading) (**BoA**, tab 32).

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43. One of the new oversight mechanisms was the Commission. It oversees the performance, by members of the Military Police, of their policing duties and functions. The responsible Minister explained to the House that this oversight would '*ensure that day to day decisions are monitored effectively and are capable of being assessed*'.⁵²

44. In the newly added Part IV, subsection 250.18(1) provides that conduct complaints are complaints about the conduct of a member of the military police *in the performance of policing duties or functions*, as prescribed by the Governor in Council.

250.18 (1) Any person, including any officer or non-commissioned member, may make a complaint under this Division about the conduct of a member of the military police in the performance of any of the policing duties or functions that are prescribed for the purposes of this section in regulations made by the Governor in Council.

250.18 (1) Quiconque — y compris un officier ou militaire du rang — peut, dans le cadre de la présente section, déposer une plainte portant sur la conduite d'un policier militaire dans l'exercice des fonctions de nature policière qui sont déterminées par règlement du gouverneur en conseil pour l'application du présent article.

45. The Governor in Council has exercised this power by adopting the *Complaints about the Conduct of Members of the Military Police Regulations* (the "*Regulations*").⁵³ While subsection 2(1) enumerates a list of duties subject to oversight, subsection 2(2) specifically excludes military operations:

(2) For greater certainty, a duty or function performed by a member of the military police that relates to administration, training, or **military operations** that result from **established military custom**

(2) Il est entendu que les fonctions exercées par le policier militaire qui se rapportent à l'administration ou à la formation, ou aux **opérations d'ordre militaire** qui découlent de

⁵² *Commons Debates*, 36th Parliament, 1st Session, at pp. 5151 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) (BoA, tab 32).

⁵³ P.C. 1999-2065, 18 Nov. 1999, s. 2(1)(i) (BoA, tab 3).

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or practice, is not a policing duty or function.

coutumes ou pratiques militaires établies ne sont pas comprises parmi les fonctions de nature policière.

[emphasis added]

46. In a 2002 report, the Commission recognized that guarding and supervising detainees was not an activity of the military police that was subject to the Commission's oversight.⁵⁴ It stated:

Finally, in addition to their police duties, Military Police members perform important military duties, since, as part of operations, they are responsible for guarding and supervising detainees or prisoners of war, overseeing detention barracks and conducting route surveys.

47. In a 2006 brief to the Standing Committee on National Defence, the Commission acknowledged that the Act limited *"the complaints process, and the corresponding oversight role of the Commission, to the "policing duties or functions" of military police, to ensure external civilian oversight of military police on their special responsibilities and to avoid extending it to their generic military activities as soldiers"*, a matter for the chain of command.⁵⁵

48. The Right Honourable Antonio Lamer came to the same conclusion in 2003. He acknowledged the role entrusted to the CFPM in the oversight, audit and review of the performance of Military Police functions through the Military Police technical network, which was required because of the *"dual role played by Military Police given that they are soldiers first, peace officers second and subject to the regular chain of command when not performing policing duties or*

⁵⁴ AR, vol. 3, tab 10(A), p. 552 (*Interference with Military Police Investigations: What is it About?*).

⁵⁵ AR, vol. 3, tab 10(B), p. 579 (*Crisis in Building Confidence*).

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functions.”⁵⁶

E. The complaints before the Commission

49. Amnesty and the BCCLA, are pursuing litigation on multiple fronts to challenge the policy of the Government of Canada directing the CF to transfer detainees to Afghan authorities. Initially, Amnesty and the BCCLA challenged the policy under the *Canadian Charter of Rights and Freedoms*. The Court dismissed the application, ruling that the *Charter* did not apply to Canadian soldiers involved in the transfer of detainees to Afghan authorities in Afghanistan.⁵⁷

50. On another front, the respondents filed two conduct complaints with the Commission “in the hopes that the Canadian Forces’ practice of detainee transfers would be properly investigated and suspended until appropriate conditions could be achieved in Afghan institutions”.⁵⁸

1) First complaint: transferring to Afghan authorities

51. The main thrust of the first conduct complaint filed by the respondents is the assertion that arrangements between the governments of Canada and Afghanistan “provide no effective safeguards against torture.”⁵⁹ The respondents’ complaint is with respect to Canada’s operational policy of transferring detainees to Afghan authorities, a “systemic issue”.⁶⁰ The complaint:

- a) is not directed towards identified incidents of members of the Military Police acting improperly in the conduct of their policing duties and functions.

⁵⁶ AR, vol. 1, tab 2(10), p.191 (*The First Independent Review of the Right Honourable Antonio Lamer of the provisions and operation of Bill C-250*).

⁵⁷ *Amnesty International Canada v. Canada (Attorney General)*, 2008 FC 336 (BoA, tab 11); *Amnesty International Canada v. Canada (Attorney General)*, 2008 FCA 401 (BoA, tab 12).

⁵⁸ Affidavit of A. Neve, sworn April 1, 2009, at para. 15.

⁵⁹ AR, vol. 1, tab 3(1), p. 200-201 (*Letter from Respondents to Commission*).

⁶⁰ AR, vol. 1, tab 3, p. 201-202 (*Letter from Respondents to Commission*).

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- b) refers to 18 unidentified persons transferred, as examples of the "past and continuing acts",⁶¹ which "may disclose" wrongful acts;⁶² and,
- c) names the CFPM as a subject of the complaint but not any Military Police participating in detainee handling in Afghanistan.

52. Within three working days of receiving this complaint, the Commission decided to investigate it rather than permit the CFPM to follow the normal procedure and investigate the complaint. The Commission dismissed the reservations expressed by the CF regarding its jurisdiction, without ever considering whether subsection 2(2) of the *Regulations* exclude the complaint from its mandate.⁶³ The Chairperson appears to have had nothing before him when considering whether the role played by the Military Police in the handling of detainees was part of military operations or not.

53. The Commanding Officer of the CFNIS requested the assistance of the Royal Canadian Mounted Police ("RCMP") to investigate whether the complaint against the CFPM had any merit. Within three months, the RCMP review team reported that there was no evidence to support the allegations made in the complaint or that the CFPM had committed a criminal act.⁶⁴

54. This conclusion rested in part on the findings of the RCMP investigators that none of the persons they had interviewed – including two Task

⁶¹ AR, vol. 1, tab 3, p. 198 (*Letter from Respondents to Commission*).

⁶² AR, vol. 1, tab 3, p. 197 (*Letter from Respondents to Commission*).

⁶³ AR, vol. 4, tab 12(A), p. 816-818 (*Letter from P.A. Tinsley to distribution list*); AR, vol. 4, tab 12(B), p. 820 (*Letter from Gen. Hillier to P.A. Tinsley*); AR, vol. 4, tab 12(D), p. 822-823 (*Letter from Col Gleeson to J. Dunbar*); AR, vol. 4, tab 12(E), p. 825-826 (*Letter from J. Dunbar to Col Gleeson*).

⁶⁴ AR, vol. 4, tab 12(H), p. 857 (*Assistance to the Department of National Defence The Canadian Force Provost Marshal – Canadian Forces Detainees in Afghanistan*).

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Force Provost Marshals for JTFA, the CFPM, several of his deputies and other senior military personnel posted to Afghanistan, the Canadian Expeditionary Force Command to which the Commander JTFA reported, and the representative from the Correctional Service of Canada ("CSC") who had had access to prisoners confined in Afghan institutions – were at any time privy to any information suggesting that the Afghan nationals transferred by the CF to Afghan institutions had been subjected to abuse or torture post handover.⁶⁵

55. The Commission received the RCMP report soon after it was completed. It forms part of the record of decision subsequently transmitted by the Commission pursuant to rule 318.⁶⁶

56. Undeterred, the Commission continued its investigation. Despite their jurisdictional reservations, the CF and the Department of National Defence continued to cooperate, voluntarily providing the Commission with more than 1,300 unredacted documents. The Commission also interviewed 38 witnesses.⁶⁷

57. However, this voluminous information did not dissuade the Commission from exploring "*the informational environment in which the MPs were functioning*".⁶⁸ It requested unredacted documents from the Department of Foreign Affairs and International Trade (DFAIT) and also from CSC. The requests were not restricted to documents addressed to or received by a member of the Military Police.⁶⁹

58. The Commission's requests for DFAIT and CSC documents added a new dimension to the government's concerns about the Commission's compliance

⁶⁵ AR, vol. 4, tab 12(H), p. 853 and 855 (*Assistance to the Department of National Defence The Canadian Force Provost Marshal – Canadian Forces Detainees in Afghanistan*).

⁶⁶ AR, vol. 4, tab 12, p. 813, para. 9 (*Affidavit of K. Candline*).

⁶⁷ AR, vol. 4, tab 12(F), p. 829 (*Letter from J. Dunbar to A. Neve*).

⁶⁸ AR, vol. 4, tab 12(F), p. 830 (*Letter from J. Dunbar to A. Neve*).

⁶⁹ AR, vol. 4, tab 12(F), p. 830-832 (*Letter from J. Dunbar to A. Neve*).

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with its mandate. When attempts to resolve these jurisdictional concerns failed, the governmental institutions involved informed the Commission that they would continue to disclose all the records the Commission would be entitled to receive, as if it were conducting a hearing and had issued a subpoena.⁷⁰

59. Unsatisfied with this approach, the Chairperson decided to hold a hearing into the complaint. This, he reasoned, would allow the Commission to compel the production of records from CSC and DFAIT.⁷¹ In his decision, the Chairperson expressed the opinion that the Commission "*has been established by Parliament to provide for greater public accountability by Canadian Forces (CF) military police and the chain of command*" (emphasis added).⁷² He explained:

. . . the complaint, though directed exclusively against members of the military police, indirectly *calls into question directives, orders and standing procedures that have been developed or approved at very senior levels within the CF and the Department of National Defence*. [Emphasis added]⁷³

60. The applicant challenges the jurisdiction of the Commission to hold a hearing into this complaint in Court file T-581-08.⁷⁴

2) Second complaint: failure to investigate

61. On June 12, 2008, Amnesty and BCCLA filed a second complaint, alleging that members of the Military Police failed to investigate the possibility that the orders issued by the Commander JTFA to transfer detainees to Afghan authorities were illegal.⁷⁵

62. The same day, the Commission called for submissions on six issues

⁷⁰ AR, vol. 4, tab 12(G), p. 835 (Letter from A. Préfontaine to J. Dunbar).

⁷¹ AR, vol. 1, tab 3(5), p. 218-219 (Letter from P.A. Tinsley)

⁷² AR, vol. 1, tab 3(5), p. 216 (Letter from P.A. Tinsley)

⁷³ AR, vol. 1, tab 3(5), p. 217 (Letter from P.A. Tinsley). To the same effect, see AR, vol. 1, tab 3(2), p. 206 (Letter from P.A. Tinsley).

⁷⁴ AR, vol. 1, tab 1, p. 1-8 (Notice of application, T-581-08).

⁷⁵ AR, vol. 2, tab 6(B), p. 283-289 (Letter from P. Champ to P.A. Tinsley).

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arising out of this second complaint. On the issue of jurisdiction, the Commission asked for submissions only if they had not been made in the application for judicial review.⁷⁶

63. Meanwhile, on June 27 and 11, 2008 Commission investigators interviewed two officers, Brigadier General Fraser and Lieutenant-Colonel Putt,⁷⁷ in the context of a separate complaint before the Commission.⁷⁸ In the course of that interview the officers were asked to express their opinion on whether the handling of detainees was a policing duty or function.⁷⁹ That issue, however, did not arise in the complaint for which they were being interviewed and they were not advised that the answers they provided would be used by the Commission in these complaints.

64. Both officers later testified that they found the questions on this issue to be confusing. Both confirmed that, had they properly understood the questions, they would have informed the investigator that handling of detainees always remains a command responsibility.⁸⁰ The answers provided by the officers were not provided to the parties prior to the Commission rendering its decision.

65. On September 30, 2008, the Chairperson decided to investigate the second complaint and hold a public hearing into it. He characterized this new

⁷⁶ AR, vol. 2, tab 6(C), p. 292 (*Letter from P.A. Tinsley to Gen. Hillier*).

⁷⁷ BGen Fraser was the Commander of JTFA in 2006 (AR, vol. 3, tab 8, p. 525, para. 2 (*Affidavit BGen Fraser*) and LCol Putt was his Deputy (AR, vol. 3, tab 9, p. 532, para. 3 (*Affidavit LCol Putt*)).

⁷⁸ The complaint filed by Mr. Attaran relates to the allegation that members of the military police would have failed to investigate the potential abuse, by CF personnel, of Detainees while in Canadian custody. The Commission released its final report of that complaint in April 2009: http://www.mpcc-cppm.gc.ca/alt_format/300/3700/2007-003/2007-003-eng.pdf.

⁷⁹ LCol Putt was asked whether "the detainee piece" was "a policing duty versus a non-policing duty": AR, vol. 4, tab 12(J), p. 957, l. 11-16 (*Transcript of interview of LCol Putt*). BGen Fraser was first advised that dealing with people in custody is a policing function and duty and then asked whether he saw MP handling of detainees as a military function: AR, vol. 4, tab 12(K), p. 1153, l. 5 to p. 1154, l. 4 (*Transcript of interview of BGen Fraser*).

⁸⁰ AR, vol. 3, tab 8, p. 526-528, para. 9-16 (*Affidavit of BGen Fraser*); AR, vol. 3, tab 9, p. 533-534, para. 8, 10-12 (*Affidavit of LCol Putt*).

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complaint as dealing with systemic issues “*resulting from a lack of direction and appropriate guidance from the upper command of the CF Provost Marshal’s office*”.⁸¹ The Chairperson also took advantage of the occasion explain in some detail why he believed the Commission had jurisdiction over both complaints.

66. Relying on a dictionary definition of the word “custody”, he expressed the view that detainees were under the custody of the Military Police from the point of handover to the point of release.⁸² He then concluded that subsection 2(2) did not apply. Throughout his analysis, the Chairperson refers exclusively to the English version of the *Act* and of the *Regulations*.

67. To sustain his conclusion that subsection 2(2) of the *Regulations* did not deprive the Commission of jurisdiction, the Chairperson construed the opening words “for greater certainty” to mean that subsection 2(2) merely confirms the list of subsection 2(1).⁸³ He then dismissed the notion that detainee handling is part of military operations. In his view, “*the vague reference to “military operations” would arguably exclude from review everything the military police do*”.⁸⁴ In reaching this point of view, the Chairperson commented unfavourably on the credibility of those who had sworn affidavits in support of these applications for judicial review, preferring instead to rely on the undisclosed and unsworn statements obtained from LCol Putt and BGen Fraser by Commission investigators in the circumstances above.⁸⁵

68. The Attorney General challenges the September 30, 2008 decision in

⁸¹ AR, vol. 2, tab 6(E), p. 376-377, para. 164 and 167 (*Decision*). To the same effect, see AR, vol. 2, tab 6(E), p. 370-371, para. 146 (*Decision*).

⁸² AR, vol. 2, tab 6(E), p. 343, para. 67 (*Decision*).

⁸³ AR, vol. 2, tab 6(E), p. 349-351, para. 87-92 (*Decision*).

⁸⁴ AR, vol. 2, tab 6(E), p. 361, para. 119 (*Decision*). To the same effect, see AR, vol. 2, tab 6(E), p. 362, para. 120 (*Decision*).

⁸⁵ AR, vol. 2, tab 6(E), p. 354-361, para. 102-118 (*Decision*).

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the second of the present judicial review applications.⁸⁶

69. The Commission's approach to its hearings demonstrates that it intends to pursue systemic interests to the exclusion of any meaningful exploration of the conduct of the ten subjects it has identified.⁸⁷ The Commission is primarily interested in finding out how information was exchanged within the government, why certain command decisions were made, and whether the present structure governing the delivery of policing services in the CF should be revised.

PART II - QUESTIONS IN ISSUE

70. The questions raised by these applications for judicial review and the positions of the Attorney General of Canada are as follows:

- a) What is the proper standard of review of the jurisdiction of the Commission?
 - No deference is accorded to jurisdictional questions and the Commission's decision must be correct.
- b) Does the involvement of members of the Military Police in the detention of detainees relate to "the arrest or custody of a person" (paragraph 2(1)(i) of the *Regulations*)?
 - Paragraph 2(1)(i) of the *Regulations* is limited to the investigative functions of the Military Police and to the custody of persons subject to the *Code of Service Discipline*. It does not apply to the handling of detainees in Afghanistan.

⁸⁶ AR, vol. 2, tab 5, p. 267-274 (*Notice of application*, T-1685-08).

⁸⁷ AR, vol. 2, tab 6(H), p. 432-440 (*Memorandum to parties on Draft Issues List*).

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c) Does the involvement of members of the Military Police in the detention of detainees relate to military operations that result from established military custom or practice, pursuant to subsection 2(2) of the *Regulations*?

- Military custom and practice establish that detainee handling is part of military operations, from the initial capture by combat troops to the decision to release or transfer taken by the Commander. The involvement of members of the Military Police in that process is not a policing duty or function.

d) Can the Commission legitimately transform an investigation into a complaint about an alleged failure to investigate a service offence into a systemic review of decisions of the Commander of JTFA to transfer detainees and of the policy of the Government of Canada directing the CF to transfer detainees to Afghan authorities?

- A complaint about a failure to investigate a service offence committed by a person to whom the *Code of Service Discipline* applies could form a legitimate conduct complaint. In the case of the second complaint however, the Commission purports to conduct a systemic review of detainee transfers. The investigation of a complaint about the conduct of a member of the Military Police is not the occasion for the review of the decisions of the Commander of JTFA to transfer detainees to lawful Afghan authorities or the conduct of international affairs by the Government of Canada.

e) Can the Commission acquire jurisdiction by consent?

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- Administrative bodies such as the Commission are entirely creatures of statutes and may only act within the jurisdiction granted by Parliament, not the parties.

71. It follows that the Commission is exceeding its jurisdiction by investigating and holding a public hearing into either complaint.

PART III - SUBMISSIONS**A. The Commission must correctly decide it has jurisdiction**

72. Administrative bodies such as the Commission are entirely creatures of statute and may only act within the scope of their delegated mandate.⁸⁸ As the Supreme Court of Canada held in *Dunsmuir*, judicial review is the means by which courts supervise those who exercise statutory powers to ensure that they do not overstep their legal authority.⁸⁹

A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.⁹⁰

73. The appropriate standard of review of the Commission's decision on jurisdiction is correctness; however, on either a correctness or reasonableness standard of review, the Commission's decisions must be set aside because they are neither correct nor reasonable. This Court must prevent the Commission from acting without legal authority. As noted by the Supreme Court, it is "*courts' constitutional duty to ensure that public authorities do not overreach their lawful powers.*"⁹¹

⁸⁸ *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3 at para. 24 (BoA, tab 7).

⁸⁹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28 (BoA, tab 8).

⁹⁰ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 29 (BoA, tab 8).

⁹¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 29 (BoA, tab 8).

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74. The first step in identifying which standard of review applies is to examine the jurisprudence. If the jurisprudence has already determined how much deference should be accorded to a particular category of question, the inquiry ends there.⁹² The category in this case is jurisdictional questions. Jurisdiction, as the Supreme Court warned in *Dunsmuir*, must be narrowly defined:

“Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

75. This narrow definition of jurisdiction is directly applicable in the present case: does the Commission’s statutory grant of power give the Commission the authority to decide to hold hearings into the respondents’ complaints?

76. Jurisprudence has already determined that no deference is accorded to jurisdictional questions and the decision must be correct.⁹³ Therefore, the applicable standard is correctness and no further analysis is necessary. The Court must substitute its own interpretation for that of the Commission.

77. Even if the jurisprudence had not already determined the matter, a full analysis of the standard of review analysis would confirm that the applicable standard is correctness.⁹⁴ There is no privative clause. The Commission may have special expertise with respect to matters within its jurisdiction, but the jurisdictional question requires a departure from the Commission’s governing provisions – Part IV of the *Act* – to consider the role of the Commission within the scheme of the *Act* as a whole. Such an interpretation is outside the Commission’s expertise. Furthermore, as this is the first occasion on which the courts are called

⁹² *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 62 (BoA, tab 8).

⁹³ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59 (BoA, tab 8).

⁹⁴ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 55 (BoA, tab 8).

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upon to interpret these provisions, the precedential value also points to the correctness standard.⁹⁵

78. The Chairperson broadly interpreted the definition of policing duties and functions in the *Regulations* to justify the exercise of a broad review jurisdiction. But Parliament left it to the Governor in Council to determine the scope of policing duties. A purposive approach to the construction of the *Act* and of the *Regulations*, coupled with the evidence, supports the conclusion that Parliament intended to confine policing function and duties to the investigation and prosecution of offences. Focussing on the nature of the act complained of, as opposed to the subject of the complaint, achieves this objective.

B. Custody as defined in the Regulations does not apply to the handling of detainees

1) Statutory interpretation

79. The modern approach to statutory interpretation requires that "*the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*"⁹⁶ As stated by Iacobucci J., "[t]he modern approach recognizes that statutory interpretation cannot be founded on the wording of the provision alone. Indeed, the words of the particular provision must be considered in light of the legislation as a whole."⁹⁷

⁹⁵ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15 at para. 282 (per Deschamps J. and Rothstein J. dissenting) (BoA, tab 9); *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 36-37 (BoA, tab 10); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23 (BoA, tab 7).

⁹⁶ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 26 (BoA, tab 14), citing, with approval, E.A. DRIEDGER, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87.

⁹⁷ *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 at para. 26 (BoA, tab 15).

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80. When the words of the legislation are read according to their grammatical and ordinary meaning, in the context of the *Act* as a whole, it is clear that the role of the Military Police with respect to the custody of detainees following their detention by other members of the CF during military operations and prior to their release or transfer to Afghanistan authorities, is not a policing duty or function as set out in the legislation.

81. A complaint becomes a "conduct complaint" that is subject to the Commission's oversight only when it satisfies the five cumulative conditions imposed by subsection 250.18(1) of the *Act* and section 2 of the *Regulations*. It must:

- a) Be a complaint;
- b) About the conduct;
- c) Of a member of the military police;
- d) In the performance of a policing duties or functions prescribed by regulation - in this case, the "custody of a person", "conduct of an investigation" or the "enforcement of laws"; and
- e) Not relate to what established military custom or practice considers to be administration, training, or military operations.

82. Subsection 250.18(1) of the *Act* attributes to the Governor in Council, not to the Commission, the power to decide what will be functions or duties performed by members of the Military Police relate to policing. As the legislative history demonstrates, when Parliament entrusted to the Governor in Council the task of delineating the Commission's mandate, it clearly understood that the task of handling of detainees would be excluded from that mandate.

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2) Parliament wanted independence for policing functions but to keep military operations within the chain of command

83. Extrinsic materials, such as reports from commissions or study groups, are admissible to establish external context and purpose.⁹⁸ The amendment adding Part IV to the *Act* implemented the recommendations of the Somalia and Dickson reports.⁹⁹ Both reports recognized the dual role of the military police in performing (1) policing functions and (2) military operational or "combat" functions.¹⁰⁰ Furthermore, the military operational functions of the Military Police, as both reports specifically identified, include custody of prisoners of war or detainees.

84. The mischief Parliament wished to address by adding Part IV of the *Act* was to ensure the independence of the Military Police in the performance of their investigatory functions, not to abolish the duality of their functions. At the time of these reports, Military Police operated exclusively under military (non military-police) commanders with respect to all functions, both military operational and policing. However, this arrangement caused difficulties when applied to the policing functions. In their policing role, Military Police members need investigative independence, which includes the ability to exercise discretion in the conducting of investigations and laying of charges. Without this independence, non military-police officers superior in rank could thwart, improperly influence or

⁹⁸ *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998 1 S.C.R. 27 at para. 35 (BoA, tab 16), in relation to legislative history generally; *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] S.C.J. No. 84, [1983] 2 S.C.R. 493 at 494-495 (BoA, tab 17) on the use of commission reports.

⁹⁹ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5150 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) and 7939 (10 June 1998; J. Richardson, Parliamentary Secretary to the Minister of National Defence, on 3rd reading) (BoA, tab 32); AR, vol. 1, tab 2(8), p. 171 (*Report to the Prime Minister on the Leadership and Management of the Canadian Forces*, Minister of National Defence).

¹⁰⁰ AR, vol. 1, tab 2(7), p. 159-160 (*Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*); AR, vol. 1, tab 2(9), p. 183 (*Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*).

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terminate investigations and they could cover-up or be perceived to be covering up, incidents like those that occurred in Somalia.¹⁰¹

85. Military operational functions, however, as both reports recommended, must remain within the chain of command.¹⁰² In other words, when performing military operational functions the Military Police must, like all other soldiers, be fully responsive to, and immediately obey the lawful commands of their superior operational commanders.¹⁰³

86. Following the Somalia and Dickson reports, a number of steps were taken to ensure that military police would have independence in their investigative role, while their operational role stayed within the chain of command. These included instituting the position of CFPM, establishing the CFNIS as a military police independent major crimes investigation unit, and the creation of the Commission.¹⁰⁴

87. Both the CFPM and the Commission exercise authority *only* in relation to the policing duties and functions of the Military Police. The CFPM as the most senior member in the Military Police Branch is responsible for developing policies to guide the management of the Military Police. He or she exercises technical control of the Military Police, but only in respect of policing duties.¹⁰⁵ The CFPM has no authority over the military operational functions performed by Military Police.¹⁰⁶ The CFPM is responsible, in the first instance, to investigate every

¹⁰¹ AR, vol. 1, tab 2, p. 18, para. 45 (*Affidavit of LCol Lander*).

¹⁰² AR, vol. 1, tab 2(7), p. 164-165, recommendation 9 (*Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*); AR, vol. 1, tab 2(9), p. 186-187, recommendation 40.9 (*Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*).

¹⁰³ NDA, s. 83 (BoA, tab 2); *R. v. Finta*, [1994] 1 S.C.R. 701 (BoA, tab 18).

¹⁰⁴ AR, vol. 1, tab 2 p. 19-20, para. 51 (*Affidavit of LCol Lander*).

¹⁰⁵ AR, vol. 1, tab 2(3), p. 90, figure 2-3 (*Military Police*).

¹⁰⁶ Q.R.&O., art. 22.03 (BoA, tab 4).

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conduct complaint.¹⁰⁷ In conjunction with the institution of the CFPM, the Commission was created to handle complaints about the Military Police in the performance of their policing duties and functions.

88. None of these changes affected the performance of long-established military operational functions under the control of the chain of command, of which detainee handling is one. Rather, these reforms reinforced the distinction between the policing functions and operational functions of the military police.

3) A purposeful construction of the words of the Act

89. Part IV of the *Act* creates an oversight mechanism for the performance of the investigatory functions performed by the Military Police in application of the *Code of Service Discipline* adopted in Part III of the *Act*. This legislative context informs the construction of both paragraph 2(1)(i) and subsection 2(2) of the *Regulations*.

a) *Custody is only of persons subject to the Code of Service Discipline*

90. The *Regulations* provide a list of policing duties and functions. The effect of this context is to ~~narrow the potentially broad scope of "custody" to "custody for the purpose of investigating and prosecuting service offences"~~.

2. (1) For purposes of subsection 250.18(1) of the Act, any of the following, if performed by a member of the military police, are policing duties or functions:

(a) the conduct of an investigation;

(b) the rendering of assistance to the public;

2. (1) Pour l'application du paragraphe 250.18(1) de la Loi, «fonctions de nature policière» s'entend des fonctions ci-après lorsqu'elles sont accomplies par un policier militaire :

a) enquêter;

b) prêter assistance au public;

¹⁰⁷ NDA, s. 250.26(1) (BoA, tab 2).

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- | | |
|---|---|
| (c) the execution of a warrant or another judicial process; | c) exécuter les mandats ou autres actes de procédure judiciaires; |
| (d) the handling of evidence; | d) gérer les éléments de preuve; |
| (e) the laying of a charge; | e) porter des accusations; |
| (f) attendance at a judicial proceeding; | f) participer à l'instance; |
| (g) the enforcement of laws; | g) faire respecter la loi; |
| (h) responding to a complaint; and | h) donner suite aux plaintes; |
| (i) the arrest or custody of a person. | i) arrêter ou détenir des personnes. |

91. Properly understood, the ordinary meaning of “custody” in this context is distinct from the dictionary definition relied on by the Chairperson in his September decision. Ordinary meaning is the meaning a competent reader naturally understands upon reading a word or expression in its immediate context.¹⁰⁸ The meaning of a word or expression in a provision is influenced by the other words and expressions with which it is associated. Under the associated words rule (or *noscitur a sociis*), “the generality of a term can be limited by a series of more specific terms which precede or follow it.”¹⁰⁹ This is particularly instructive when considering the list of functions or duties found in subsection 2(1) of the *Regulations*.

92. When paragraph 2(1)(i) is read with the other paragraphs in the subsection, a particular context emerges, which might be described as follows. As a result of a complaint (h) alleging that someone has contravened the law (g), an investigation is conducted (a) in which evidence of a crime is gathered (d)

¹⁰⁸ R. SULLIVAN, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada, 2008), pp. 25-28 (BoA, tab 27).

¹⁰⁹ *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, para 93 (BoA, tab 20).

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warranting a search and seizure of further evidence (c), the arrest of the accused (i) and the laying of charges (e), followed by a judicial proceeding (f).

93. In his decisions, the Chairperson ignores this immediate context and relies, instead, on the dictionary definition of the word "custody".¹¹⁰ By contrast, "arrest or custody of a person" in paragraph 2(1)(i) of the *Regulations* must be interpreted more narrowly and consistently with both the immediate context in which it appears and the larger context provided by the object and scheme of the *Act*.

94. This larger context establishes that there must be a nexus connecting the person arrested or detained to the exercise of the powers vested in the Military Police by Part III of the *Act* and to the oversight, under Part IV of the *Act*, of how those powers were exercised in a particular case. This may be described as a "service nexus".

95. The *Code of Service Discipline* regulates the conduct of those it applies to through service offences.¹¹¹ It applies to soldiers, alleged spies and persons accompanying a unit or serving with the Forces.¹¹² It does not apply to persons captured by the CF in the course of operations, like detainees in Afghanistan. This reflects a choice, not an omission. This choice gives effect to the objective of the *Code*: "*maintaining discipline and integrity in the Canadian Armed Forces*".¹¹³

96. The *Code* next sets up the institutions charged with the application of the military justice system: the military investigators, prosecutors, defence lawyers

¹¹⁰ AR, vol. 2, tab 3(2), p. 205 (*Letter from P.A. Tinsley*); AR, vol. 2, tab 6(E), p. 343, para. 66-67 (*Decision*).

¹¹¹ Section 2 of the *NDA* (BoA, tab 2) defines "service offence" to mean "an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the *Code of Service Discipline*".

¹¹² *NDA*, s. 60 (BoA, tab 2).

¹¹³ *R. v. Généreux*, [1992] 1 S.C.R. 259 at 281-293 (BoA, tab 19).

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and judges. The investigatory function required to implement it is found in section 156.¹¹⁴ Section 156 closely ties the powers of the Military Police to the enforcement of the *Code of Service Discipline*:

156. Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may

(a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and

(b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

156. Les officiers et militaires du rang nommés policiers militaires aux termes des règlements d'application du présent article peuvent :

a) détenir ou arrêter sans mandat tout justiciable du code de discipline militaire — quel que soit son grade ou statut — qui a commis, est pris en flagrant délit de commettre ou est accusé d'avoir commis une infraction d'ordre militaire, ou encore est soupçonné, pour des motifs raisonnables, d'être sur le point de commettre ou d'avoir commis une telle infraction;

b) exercer, en vue de l'application du code de discipline militaire, les autres pouvoirs fixés par règlement du gouverneur en conseil.

[emphasis added]

97. When the Military Police exercise their powers as peace officers, they have power over any person subject to the *Code of Service Discipline* in relation to the commission of service offences. Chapter 22 of the *Queen's Regulations and Orders for the Canadian Forces* reinforces this service nexus by requiring the officer or non-commissioned member to prepare a report on each person placed under custody in his care¹¹⁵ which must include "*the service number, rank, name*

¹¹⁴ Members specially appointed as military police members pursuant to s. 156 NDA are defined to be "peace officers" by section 2, paragraph (g) of the definition of "peace officer" of the *Criminal Code*, R.S.C. 1985, c. C-46 (BoA, tab 1).

¹¹⁵ Q.R & O., art. 22.06(1) (BoA, tab 4).

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and unit of the person under custody".¹¹⁶ Under Part III of the *Act*, custody is expected to be of a member of the CF.

98. The service nexus required by Part III of the *Act* serves to define the service nexus forming the necessary foundation to oversight under Part IV. Parliament did not intend to equate custody of detainees captured by the CF in the course of military operations with the power to arrest and detain soldiers for service offences imposed by this *Code*. Major Harvey said it best when he explained that, according to military doctrine:

"[d]etention becomes part of policing duties, when you're physically arresting someone as part of that judicial process. In the context that's given here, I suggest that detention it's a given here doctrinally refers more so to detention and prisoner of war handling in operations. Whereas any such custody of our own soldiers falls, it is expected to fall in the policing operations."¹¹⁷

99. This construction of the *Act* best reflects the reality within which it applies. Military police do not "arrest" detainees, combat troops capture them. Military Police do not take "custody" of detainees in the exercise of their powers as peace officers since non-peace officers can and do perform this task.¹¹⁸ The bilateral arrangements do not require peace officer status in Canadian law for those involved in handling detainees.¹¹⁹ Peace officer status has no application to the custody of detainees in Afghanistan.

100. Military police participate in custody of detainees under orders from the Commander JFTA. Therefore while they may have "custody" in a general sense, it is not "arrest or custody of a person" for the purposes of s. 2(1)(i) of the

¹¹⁶ Q.R.&O., art. 22.06(3)(a) (BoA, tab 4).

¹¹⁷ AR, vol. 5, tab 14, p. 1253, l. 21 to p. 1254, l. 3 (*Transcript of cross-examination of Maj. Harvey*).

¹¹⁸ AR, vol. 1, tab 4, p. 226, para. 18 (*Affidavit of Maj. Harvey*); AR, vol. 1, tab 2, p. 16, para. 36 (*Affidavit of LCol Lander*).

¹¹⁹ AR, vol. 1, tab 4(1), p. 228-231 (*Technical Arrangements*).

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Regulations and is not a policing duty or function.

101. This larger context must inform the interpretation of paragraph 2(1)(i) of the *Regulations*. It leads inexorably to the conclusion that the Governor in Council intended to limit the Commission's oversight function over "the arrest or custody of a person" to persons subject to the *Code of Service Discipline*, not to the detention of prisoners of war or detainees. The fact that the respondents' complaint does not involve "custody" under s. 2(1)(i) alone should have been enough for the Chairperson to conclude that it fell outside the Commission's jurisdiction.

**C. In accordance with established military custom and practice
detainee handling is part of military operations.**

102. From the list established by subsection 2(1), subsection 2(2) of the *Regulations* excludes a duty or function that relate to administration, training or military operations. Subsection 2(2) prescribes:

(2) For greater certainty, a duty or function performed by a member of the military police that relates to administration, training, or military operations that result from established military custom or practice, is not a policing duty or function.

(2) Il est entendu que les fonctions exercées par le policier militaire qui se rapportent à l'administration ou à la formation, ou aux opérations d'ordre militaire qui découlent de coutumes ou pratiques militaires établies ne sont pas comprises parmi les fonctions de nature policière.

103. The undisputed record demonstrates that in all overseas operations in which Canada has participated in its history, it has been the invariable military custom or practice to consider the handling of detainees and prisoners of war as a part of military operations.

104. To avoid this result, the Chairperson concluded that the opening words

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of subsection 2(2) “for greater certainty” were merely intended to clarify but not limit the scope of the words in subsection 2(1).¹²⁰ Neither the plain meaning of a “for greater certainty” clause nor the French version of subsection 2(2) support that conclusion.

105. Given its ordinary meaning and its ordinary use in legislation, a “for greater certainty” clause operates in exactly the same way as a “notwithstanding” clause: to the extent there is a conflict between two provisions, the provision introduced by either of these clauses prevails over the others to the extent of the inconsistency.

106. Indeed, the opening “for greater certainty” must be construed in light of what they are intended to qualify, the closing words “is not a policing duty or function”. When read in its immediate context, the purpose of subsection 2(2) is to declare that certain things are excluded from the ambit of subsection 2(1).

107. The French version of the *Regulations*, through the application of the shared meaning rule, dispels any doubt about the only proper construction of subsection 2(2). The dictionary meaning of the locution “*entendu que*” expresses a restriction; it can be replaced by the conjunctions “*cependant, toutefois*”.¹²¹ The locution “*étant entendu que*” is translated in English by “it being understood”.¹²²

108. Further, “[i]l est entendu que” qualifies the closing words “*ne sont pas comprises parmi les fonctions de nature policière*”. The French version confirms that the purpose of subsection 2(2) is to exclude certain things are from the ambit of subsection 2(1). The shared meaning of both equally authoritative versions of

¹²⁰ AR, vol. 2, tab 6(E), p. 349-351, para. 87-92 (*Decision*).

¹²¹ A. REY et J. REY-DEBOVE (éd.), *Le Petit Robert 1*, Les Dictionnaires Le Robert, 1987, p. 654 (bien entendu que); p. 275 (cependant) (BoA, tab 28).

¹²² B.T ATKINS et al (éd.), *Collins Robert French-English English French Dictionary*, 2d ed., 1978, Williams Collins Sons & Co Ltd, p. 252 (BoA, tab 29).

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subsection 2(2) indicates a desire to restrict the meaning of subsection 2(1), not to clarify it.¹²³

109. The suggestion of the Chairperson that the drafters would have used “notwithstanding” if they meant to restrict as opposed to clarify is unpersuasive. The only difference between the terms is that “notwithstanding” is used when there is a clear conflict between provisions while “for greater certainty” is used when there is a potential for conflict. In the latter case, the conflict is realized if the interpreter adopts the incorrect meaning of a provision that lends itself to more than one interpretation.

110. In the *Regulations*, the intention was to limit “custody” to “custody in the context of investigating and prosecuting an offence.” However, recognizing the potential for misinterpretation, the Governor in Council added a “for greater certainty” clause to exclude the broader application favoured by the Chairperson. In so far as the custodial duties or functions of the Military Police relate to “military operations that result from established military custom or practice”, they are clearly and expressly excluded from subsection (1). In this instance, ~~if subsection 2(1) is properly interpreted, the effect of the “for greater certainty” clause is to confirm rather than narrow its intended meaning and scope.~~

111. Since the intent of subsection 2(2) is to restrict, the words “military operations” must be construed in a manner that will permit its objective to be achieved.¹²⁴ The established custom and practice includes the task of handling of detainees and of prisoners of war in “military operations”.

112. The Chairperson attempted to avoid this plain result by focusing on the

¹²³ M. BASTARACHE, *The Law of Bilingual Interpretation* (Butterworths, 2008), p. 15 and 32-33 (BoA, tab 30).

¹²⁴ *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12 (BoA, tab 6).

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status of the subjects rather than the nature of the task. In his view, "*the vague reference to "military operations" would arguably exclude from review everything the military police do*".¹²⁵ This analysis is marred by two fundamental errors.

113. The Chairperson's first error was to focus his analysis on the status of the persons against whom the complaints were made. While a conduct complaint may be made only against a member of the Military Police, subsection 250.18(1) equally requires that the complaint be in relation to the performance of policing duties and functions.

114. The Chairperson's second error was his excessively reductionist approach to what constitutes "military operations". This approach robs subsection 2(2) of any practical meaning by limiting the exclusions to circumstances that are not enumerated in subsection 2(1). Under this interpretation, subsection 2(2) has no purpose or effect. The Chairperson's reasoning is tantamount to asserting that all non-policing operational activity without exception is subject to the jurisdiction of the Commission simply because it may in some way be characterized as relating to an alleged failure to investigate.

115. Indeed, the Chairperson was unable to point to any cogent evidence of the "established military custom or practice" supporting his reductionist approach to what constitutes "military operations", as subsection 2(2) of the *Regulations* requires. He relied on the statements extracted from LCol Putt and BGen Fraser in the circumstances discussed above; however, both explain how they misunderstood the question asked of them.¹²⁶ He also offers his own review of history; however, this review is without any historical basis, as a military historian

¹²⁵ AR, vol. 2, tab 6(E), p. 361-362, par. 119 (*Decision*). To the same effect, see par. 120.

¹²⁶ AR, vol. 3, tab 8, p. 526-528, para. 9-16 (*Affidavit of BGen Fraser*); AR, vol. 3, tab 9, p. 533-534, para. 8, 10-12 (*Affidavit of LCol Putt*).

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explains.¹²⁷

116. The factual underpinnings of his conclusions are affected by palpable and overriding errors. Unfortunately, the Commission did not provide the parties with an opportunity to comment on the reliability of the statements or of the Chairperson's revision of Canada's military history. Those factual underpinnings cannot be relied upon.

117. A literal interpretation must avoid a result that is absurd or unreasonable. The provisions governing the Commission's jurisdiction are restrictive in nature and not inclusive of all military police activity.

D. A systemic review of a government decision is not a conduct complaint

118. Subsection 250.18(1) of the *Act* creates an oversight mechanism for the conduct of a member of the Military Police in the performance of any prescribed policing duties or functions. The objective of this oversight would '*ensure that day to day decisions are monitored effectively and are capable of being assessed*'.¹²⁸ Clearly, Parliament did not contemplate that the Commission could transform conduct complaints into reviews of systems. Yet, that is exactly what the Commission proposes to do with both complaints.

119. The Chairperson justified his decision to hold a hearing into the first complaint to allow the Commission to compel the production of records from CSC and DFAIT. In his decision, the Chairperson expressed the opinion that the Commission "*has been established by Parliament to provide for greater public accountability by Canadian Forces (CF) military police and the chain of command*"

¹²⁷ AR, vol. 2, tab 7, p. 476, par. 4 and p. 498-500, para. 78-83 (*Affidavit of Y. Tremblay*).

¹²⁸ *Commons Debates*, 36th Parliament, 1st Session, at pp. 5151 (19 March 1998; Hon. Eggleton, Minister of National Defence, on 2nd reading) (BoA, tab 32).

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(our emphasis). He explained:

. . . the complaint, though directed exclusively against members of the military police, indirectly *calls into question directives, orders and standing procedures* that have been *developed or approved at very senior levels within the CF and the Department of National Defence*. [Emphasis added]¹²⁹

120. The Chairperson decided to investigate and hold a hearing into the second complaint because it deals with systemic issues "*resulting from a lack of direction and appropriate guidance from the upper command of the CF Provost Marshal's office*".¹³⁰ He further justified this decision by holding that this new complaint dealt with the "conduct of an investigation" pursuant to s. 2(1)(b) of the *Regulations* and the "enforcement of laws" pursuant to s. 2(1)(g) of the *Regulations*.¹³¹

121. The Commission intends to hold a single hearing into the two complaints. This confirms that it intends to pursue systemic issues to the exclusion of any meaningful exploration of the conduct of the ten subjects it has identified. The Commission is primarily interested in finding out how information was exchanged within government, why certain command decisions were made, and whether the present structure governing the delivery of policing services in the CF should be revised.¹³²

122. When the statement above is contrasted with the Commission's hearing plans, it becomes clear that the Chairperson means "administration" when he writes "*lack of direction*"; he likewise means "training" when he speaks of a "*lack of appropriate guidance*". But those systemic issues are excluded from the Commission's mandate by subsection 2(2) of the *Regulations*.

¹²⁹ AR, vol. 1, tab 3(5), p. 216-218 (*Letter from P.A. Tinsley*).

¹³⁰ AR, vol. 2, tab 6(E), p. 367-377, para. 164 and 167 (*Decision*). To the same effect, see para.

146.

¹³¹ AR, vol 1, tab 6(E), p371-371 and 375-376. (*Decision*)

¹³² AR, vol. 2, tab 6(H), p. 432-440 (*Memorandum to parties on Draft Issues List*).

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123. The *Act* does not contemplate this type of systemic review. A conduct complaint is a complaint concerning the conduct of an identifiable member of the Military Police – the subject of the complaint. It concerns the performance of that subject's policing duties or functions, not matters of policy. It puts the reputation of its subject at issue and consequently demands sufficient specificity to allow the subject to defend his or her reputation.

124. The second complaint alleges that ten members of the Military Police failed to investigate the possibility that the orders issued by the Commander might have been illegal. But the exercise of discretion entailed in the decision to investigate or not is not amenable to such a systemic review.

125. A police officer investigating a crime performs a public duty derived from law. The rule of law requires independence from the control of the executive in the performance of that public duty.¹³³ Independence implies the exercise of discretion and the discretion is that of the police officer who exercised it.¹³⁴

126. A complaint about a failure to investigate therefore requires, by definition, a fact specific investigation. For example, the allegation that a member of the Military Police decided not to investigate a homicide that occurred on a military base would provide the required specificity. Thus, the allegation that members of the Military Police failed to investigate a possible offence cannot be, in law, a 'systemic' complaint.

127. In reaching this decision the Commission has clearly expanded the definition of "conduct of an investigation" and "enforcement of laws" beyond that contemplated by the words of the *Regulations*. The clear and obvious meaning of

¹³³ *R. v. Campbell*, [1999] 1 S.C.R. 565, para. 27-34 (BoA, tab 21).

¹³⁴ *Hill v. Hamilton-Wentworth Regional Police*, [2007] 3 S.C.R. 129, 2007 SCC 41, para. 51, 149-150 (BoA, tab 22). See also *R. v. Beaudry*, [2007] 1 S.C.R. 190, 2007 SCC 5 at para. 35-39

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those words could only include an investigation by the Commission of a failure by the Military Police to investigate where a specific and identifiable service offence has been committed and has not been responded to in any manner by the Military Police. That is not the case in the complaints before the Commission.

128. Under colour of investigating conduct complaints, the Commission is in fact attempting to review the policy decisions made by governmental officials in relation to the transfer of detainees by the CF to the Afghan authorities. The review of governmental policy falls outside of the scope of the Commission's mandate. It involves a comprehensive review of the conduct of persons who are not members of the Military Police in the performance of duties that are not policing duties or functions. It also demonstrates the fact that the Commission is not truly engaged in the review of a "failure to investigate" complaint.

129. Further, the high policy nature of the review illustrates how ill-suited the Commission is to the task. Whether there exists a real risk that a particular detainee would be in danger of being subjected to torture or other forms of mistreatment if transferred¹³⁵ is not a function of the recipient state's human rights record, as perceived by the respondents. Rather, this assessment must also take into account all of the circumstances in which a particular transfer will occur and whether those circumstances provide a reasonable basis to believe a particular detainee will not be at risk if transferred.¹³⁶ Thus, even against the backdrop of the respondents' general allegation of illegality, a review of transfers cannot be systemic.

¹³⁵ *Amnesty International Canada v. Canada (AG)*, 2008 FC 336 at 64 (BoA, tab 11).

¹³⁶ *RB (Algeria) (FC) v Secretary of State for the Home Department*, [2009] UKHL 10 at para. 23 and 114 (Lord Phillips of Worth Matravers), 187 and 191-193 (Lord Hoffmann), 236-239 (Lord Hope of Craighead) and 265 (Lord Mance) (BoA, tab 24).

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E. Jurisdiction is not acquired by consent

130. While the Commission may have been entitled to make inquiries to the extent necessary to ascertain whether the first complaint was a matter properly within its jurisdiction, it has already had ample opportunity to determine its lack of jurisdiction. After a year of investigating, the Commission had reviewed over 1300 documents and conducted 38 interviews.¹³⁷ Furthermore the CFPM, the only originally individual named in the complaint, has been cleared of any wrongdoing by an RCMP investigation, a significant development that was brought to the Commission's attention and yet went unmentioned in the Commission's status report.¹³⁸

131. The Commission cannot acquire jurisdiction by consent. Therefore, the fact that the Chairperson's earlier decision to investigate the complaint was not judicially reviewed is irrelevant. *"Where an agency's jurisdiction flows from legislation, unless the legislation contemplates an extension of that jurisdiction by the parties, the parties cannot expand the agency's authority by consent."*¹³⁹

132. Only regulatory or legislative change could grant the Commission the jurisdiction it does not currently possess. That is a matter for the Governor in Council or Parliament, not this Court.

F. Conclusion

133. Members of the military police have a dual capacity: they are always soldiers but "*policemen only some of the time*".¹⁴⁰ Parliament was acutely aware of this dual capacity when it adopted measures to improve the military justice

¹³⁷ AR, vol. 4, tab 12(F), p. 829 (Letter from J. Dunbar).

¹³⁸ AR, vol. 4, tab 12(F), p. 828-833 (Letter from J. Dunbar).

¹³⁹ MACAULAY and SPRAGUE, *Practice and Procedure before Administrative Tribunals*. Carswell loose-leaf (BoA, tab 26) D. MULLAN, *Administrative Law*, (Toronto: Irwin Law, 2001) at 499 (BoA, tab 31); *Brown v. R.*, [1962] S.C.R. 371 at 375-376 (BoA, tab 25).

¹⁴⁰ AR, vol. 5, tab 15, p. 1298, l. 20-21 (Transcript of the cross-examination of LCol Lander).

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system. It bifurcated the accountability mechanisms between the chain of command for anything done in the performance of activities related to military operations, administration or training, while entrusting the oversight of the CFPM and of the Commission to the activities of MPs in the performance of their "*policing duties and functions*", being the application of the *Code of Service Discipline*.

134. The Government of Canada must account to others for its conduct of international relations, the agreements it concludes with other sovereign nations and how it conducts military operations, most notably to Parliament, the electorate and the judiciary on issues of law. It is not for the Commission to assume oversight of those issues under colour of construing the *Regulations* simply because it believes the issue to be important.

PART IV - COSTS

135. There is no reason to depart from the usual rule that costs should follow the event.

PART V - ORDERS SOUGHT

136. That the Court grants these applications;

A. On application T 581-08:

- a) A declaration that the complaint of the respondents is not a complaint about the conduct of a member of the military police in the performance of any of the 'policing duties or functions', as that expression is defined by subsection 250.18(1) of the *Act* and section 2 of the *Complaints About the Conduct of Members of the Military*

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Police Regulations, P.C. 1999-2065;

- b) A declaration that subsection 250.38(1) of the *Act* consequently does not grant to the Military Police Complaints Commission the jurisdiction to either investigate or hold a hearing into the complaint of the respondents;
- c) An order setting aside the March 2008 decision of the Chairperson of the Military Police Complaints Commission to hold hearings into the complaint made by the respondents;
- d) A writ of prohibition, prohibiting the Chairperson and the Military Police Complaints Commission from investigating the complaint brought by the respondents; and
- e) Its costs.

B. On application T-1685-01:

- a) A declaration that the Commission has construed complaint Commission file # 2008-24 beyond the parameter of its jurisdiction in that it is no longer a complaint about the conduct of a member of the military police in the performance of any of the 'policing duties or functions', as that expression is defined by subsection 250.18(1) of the *Act*, R.S.C. 1985, c, N-5 and section 2 of the *Complaints About the Conduct of Members of the Military Police Regulations, P.C. 1999-2065;*
- b) A declaration that subsection 250.38(1) of the *Act*, R.S.C. 1985, c,

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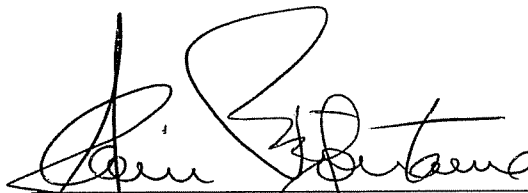
N-5 consequently does not grant to the Commission the jurisdiction to either investigate or hold a hearing into the complaint;

- c) An order setting aside the decision of the Chairperson of the Commission to commence a public interest investigation into the complaint;
- d) An order setting aside the decision of the Chairperson of the Commission to hold a hearing into the complaint;
- e) A writ of prohibition, prohibiting the Chairperson and the Commission from investigating the complaint; and
- f) Its costs.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 10, 2009



John H. Sims, Q.C.

Deputy Attorney General of Canada

Per: Alain Préfontaine

Elizabeth Richards

Zoe Oxaal

Department of Justice
Room 1109, East Tower
Bank of Canada Building
234 Wellington Street
Ottawa, ON K1A 0H8

Tel.: (613) 946-3815

Fax.: (613) 954-1920

email: aprefontaine@justice.gc.ca

Counsel for the Applicant, the
Attorney General of Canada