

FEDERAL COURT

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

-and-

**AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Respondents

RESPONDENTS' MEMORANDUM OF FACT AND LAW

PART I - FACTS

Overview

1. Members of the Canadian Forces Military Police play a primary role in the custody of detainees in Afghanistan, including their transfer into the hands of the Afghanistan National Directorate of Security, an agency notorious for committing torture and other human rights abuses. The Respondents filed a complaint with the Military Police Complaints Commission ("MPCC") in February 2007, alleging that the Military Police were participating in such transfers despite the risk of torture to detainees. Evidence subsequently came to light that demonstrated individual detainees were in fact being subjected to brutal forms of torture. The Respondents filed another complaint with the MPCC in June 2008 asserting that Military Police officers failed in their duty to investigate whether CF commanders were legally responsible for individuals being tortured in these circumstances.

2. The Chairperson of the MPCC decided that these complaints raised issues

that were inherently serious, and he therefore exercised his power under section 250.38(1) of the *National Defence Act* ("NDA" or the Act) to hold public interest hearings. The Applicant initiated applications for judicial review to quash these hearings and the corresponding complaints in their entirety, claiming that the MPCC has no jurisdiction to inquire into these matters.

3. The Applicant has acknowledged that "custody of a person" and "conduct of an investigation" are expressly enumerated grounds of MPCC jurisdiction. However, it is argued by the Attorney General that "custody" should be narrowly interpreted in a manner that precludes MPCC oversight. Similarly, the Applicant contends that MPCC should be prohibited from inquiring into any underlying or systemic factors that may have contributed to wrongful conduct by Military Police members.

4. The Respondents submit that the MPCC has jurisdiction to look into these complaints, and it should be afforded the opportunity to complete its hearings and render findings. Canadian Forces ("CF") Military Police have specialized training to be tasked with the custody of detainees and prisoners of war, and have historically performed that function. Moreover, the Military Police are specially positioned and trained to evaluate the lawfulness of such transfers against the standards of international law. The issues raised clearly fall within the jurisdiction of the MPCC.

5. It should also be kept in mind that the torture of Afghan detainees is the first significant controversial issue to come before the MPCC, a body that was established in the wake of the Somalia scandal. The CF, the Military Police and the MPCC should not fail this test. Transparency and restoring public confidence can only be served by allowing the MPCC to complete its work.

Background of First Complaint - MPCC 2007-006

6. Canadian Forces operating in Afghanistan frequently capture individuals and bring them to CF detention facilities at Kandahar Airfield. According to CF operating

policies, the CF possess a wide discretion to detain Afghan civilians, including those having no role in hostilities. The CF Theatre Standing Order regarding "Detention of Afghan Nationals and Other Persons" (TSO 321A) states that the CF may detain any person on a "reasonable belief" (defined as "neither mere speculation nor absolute certainty") that he or she is adverse in interest. This includes "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF / Coalition Forces".

7. The CF Military Police take custody of detainees at Kandahar Airfield. In the CF detention facility, the Military Police interrogate the detainees, search their belongings, and take fingerprints and photographs. The CF Commander then makes a decision on whether to release the individual, continue detention, or transfer the custody of the individual to Afghan authorities.

8. The CF Task Force Provost Marshall ("TFPM") is the senior Military Police officer in Kandahar. The TFPM provides advice to the CF Commander on detainee transfer decisions. Once the Commander makes that decision, the TFPM is responsible for carrying out the direction. The TFPM liaises with the relevant Afghan authority and arranges for the transfer. The CF Military Police assigned to the detention facility are responsible for the physical transfer of custody to Afghan authorities.

9. On February 21, 2007, the Respondents filed a joint conduct complaint with the MPCC under section 250.18 of the *National Defence Act*. The complaint (MPCC 2007-006, hereinafter "the Detainee Complaint") alleged in part:

The Provost Marshall and unidentified members of the Military Police have transferred and/or allowed to be transferred detainees to the Afghan National Police (ANP) and National Directorate of Security (NDS), notwithstanding knowledge that the transfer system is lacking effective safeguards against torture, and notwithstanding abundant evidence from publicly available credible reports that the ANP and NDS

routinely torture detainees.¹

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10. MPCC Chair Peter Tinsley considered the complaint and, on February 26, 2007, rendered a decision finding that the Respondents' allegations concerned "the conduct of members of the military police with respect to the custody of persons", and therefore fell under the MPCC's statutory mandate. Mr Tinsley determined that, given the inherent seriousness of the issues raised, the MPCC should immediately commence a public interest investigation.²

11. General Rick J. Hillier, Chief of the Defence Staff, wrote to Mr. Tinsley and indicated that he would need "to seek clarification regarding the jurisdiction and scope of the announced investigation."³ The Respondents expressed concern about any delays that may arise from a jurisdictional challenge by General Hillier, and asked the MPCC to request written submissions on the issue.⁴

12. In a letter dated March 13, 2007, the Judge Advocate General, Col. Patrick Gleeson, wrote to the MPCC and stated that it was the position of the CF and the Department of National Defence ("DND") that the complaint was not within the MPCC's jurisdiction under the *Act*. Col. Gleeson wrote, "We are therefore considering whether to instruct the Attorney General of Canada to commence an application for judicial review of Mr. Tinsley's decision with respect to this specific

¹ Letter from Alex Neve, Secretary General of Amnesty International Canada, and Jason Gratl, President of the B.C. Civil Liberties Association, to Peter A. Tinsley, Chair, MPCC, dated February 21, 2007, p. 1 [Applicant's Application Record ("AAR"), Vol. 1, p. 196]

² Notice of Decision, MPCC Chair Peter A. Tinsley, dated February 26, 2007, pp. 1-2 [AAR, Vol. 1, p. 205]

³ Letter from General R. Hillier, CF, to P. Tinsley, MPCC, dated March 2, 2007 [AAR, Vol. 4, p. 820]

⁴ Letter from J. Dunbar, MPCC, to P. Champ, dated March 9, 2007 [AAR, Vol. 4, p. 821]

complaint."⁵

13. Col. Gleeson did not adduce any evidence or refer to any other information that supported DND's position. Nevertheless, Col. Gleeson asked the MPCC for further clarification or information "that may affect our decision to proceed" in the Federal Court, and noted that the CF and DND were "faced with a deadline for the filing of an application for judicial review".⁶

14. The MPCC provided the clarification requested by Col. Gleeson in a letter dated March 15, 2007. The MPCC counsel advised that the *Complaints About the Conduct of Members of the Military Police Regulations* specified that the MPCC could look into enumerated policing duties and functions, including "the arrest or custody of a person."⁷ The custody of detainees by military police fell within that category. Col. Gleeson did not respond to this letter and the Attorney General did not commence an application for judicial review on or before March 28, 2007.

15. The MPCC carried out its public interest investigation in respect of the complaint throughout the rest of 2007 and early 2008. DND and the CF co-operated with the investigation and corresponded regularly on the matter with the MPCC. Members of the CF, including subjects of the complaint, also participated in interviews with MPCC investigators. The MPCC received approximately 1,300 documents and interviewed 38 people.

16. On March 12, 2008, Mr. Tinsley, Chair of the MPCC, rendered a decision finding that it was necessary to commence a public hearing into the complaint

⁵ Letter from Col. P. Gleeson, Judge Advocate General, to J. Dunbar, Senior Legal Counsel, MPCC, dated March 8, 2007, pp. 1-2 [AAR, Vol. 4, p. 822-824]

⁶ Letter from Col. P. Gleeson, Judge Advocate General, to J. Dunbar, Senior Legal Counsel, MPCC, dated March 8, 2007, pp. 1-2 [AAR, Vol. 4, p. 822-824]

⁷ Letter from J. Dunbar, MPCC Acting General Counsel, to Col. P. Gleeson, Judge Advocate General, dated March 15, 2007, p. 2 [AAR, Vol. 4, p. 825-827]; and *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065, section 2

under s. 250.38(1) of the *National Defence Act* due to lack of cooperation from other federal government departments.⁸

17. The Attorney General challenged this decision by commencing an application for judicial review on April 11, 2008, being Court File number T-581-08. Although section 2(1) of the Regulations explicitly enumerates "custody of a person" as a policing function, the Notice of Application states that the expression "policing duties and functions" under the Act and Regulations cannot include any duty that relates to military operations, and therefore the MPCC was without jurisdiction to investigate the complaint.⁹ The Notice of Application provides the following explanation for the delay in pursuing judicial review:

In a spirit of cooperation, the government did not challenge the jurisdiction of the MPCC to investigate the...complaint. This should have given the Commission the opportunity to satisfy itself that the second complaint should be dismissed either because it lacked merit or because the Commission had no jurisdiction to investigate it.

18. The Attorney General subsequently filed supporting affidavits by Lt.-Colonel Lander, Major Harvey, and Karen Candline. The evidence and views expressed in these affidavits were not put before the MPCC by the Applicant.

Evidence of Torture and Outcome of Charter Application

19. There is overwhelming evidence that torture in Afghan custody is widespread and systemic. The United Nations Secretary-General, the U.N. High Commissioner for Human Rights, the United States' State Department and the Afghan Independent Human Rights Commission have all maintained that individuals are routinely tortured and otherwise abused in Afghan custody. The Afghan National Directorate of Security (the Secret Police or the NDS), the sole authority to whom

⁸ Notice of Decision, MPCC Chair P. Tinsley, dated March 12, 2008 [AAR, Vol. 1, p. 216-220]

⁹ Notice of Application for Judicial Review, dated April 11, 2008 [AAR, Vol. 1, p. 4]

the CF presently transfer detainees, is singled out as an agency of particular concern for perpetrating torture.¹⁰

20. Canada's Department of Foreign Affairs and International Trade (DFAIT) prepares annual reports regarding the human rights situation in Afghanistan. In the report released in January 2007, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are all too common."¹¹

21. The Respondents in this case brought their own application for judicial review in the Federal Court, seeking a declaration that the *Canadian Charter of Rights and Freedoms* applied to individuals held in CF custody in Afghanistan. In the context of that application, DND and DFAIT were ordered to disclose the monitoring reports of Canadian officials who were visiting former CF detainees in Afghan prisons. The monitoring reports revealed graphic, first-hand accounts of torture told to Canadian officials between May 3, 2007 and November 5, 2007. Justice Mactavish of the Federal Court described this disturbing evidence:

These complaints included allegations that detainees were kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads.

Moreover, in some cases, prisoners bore physical signs that were consistent with their allegations of abuse. In addition, Canadian personnel conducting site visits personally observed detainees manifesting signs of mental illness, and in at least two cases, reports of the monitoring visits described detainees as appearing "traumatized".¹²

¹⁰ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 162, at paras. 102-107

¹¹ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 162 at para. 105

¹² *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 162 at paras. 85 and 87. Copies of the original DFAIT Monitoring Reports can be found at RR, Vol.

22. Notwithstanding these first-hand reports of torture, General Laroche, the CF commander of Task Force Afghanistan, continued to transfer detainees into the hands of Afghan authorities throughout the spring, summer and fall of 2007. The CF Military Police did not investigate whether these further decisions to transfer detainees in any way breached relevant standards of conduct, domestic law or international humanitarian law.

23. Transfers of detainees to Afghan authorities were finally suspended by the acting commander of Task Force Afghanistan, Colonel Juneau, on or about November 6, 2007. This followed a report by Canadian officials who interviewed a detainee held by the Afghan secret police (NDS) on November 5, 2007. This disturbing report relates in part:

[The detainee] indicated that he could not recall the [***] interrogation in any details as he was allegedly knocked unconscious early on. He alleged that during the [***] interrogation, [*] individuals held him to the ground while the other [***] beating him with electrical wires and rubber hose. He indicated a spot on the ground in the room we were interviewing in as the place where he was held down. He then pointed to a chair and stated the implements he had been struck with were underneath it. Under the chair, we found a large piece of braided electrical wire as well as a rubber hose. He then showed us a bruise (approx. 4 inches long) on his back that could possibly be the result of a blow.¹³

24. On March 12, 2008, Justice Mactavish dismissed the Respondents' application on the basis the *Charter* could not apply to the actions of Canadian soldiers on Afghanistan territory, even if transfers to Afghan authorities exposed detainees to a substantial risk of torture. While Justice Mactavish viewed this jurisdictional conclusion as unavoidable given her interpretation of the law, she found the implications of her judgment "troubling" in light of the serious nature of the

II, pp. 552-577.

¹³ KNDH-0123 DFAIT Periodic Follow-up Visit to NDS [RR, Vol I, p. 570] Asterisks (**) relates to information suppressed by the Attorney General pursuant to the *Canada Evidence Act*.

evidence adduced.¹⁴

25. Justice Mactavish did emphasize that her judgment did not mean detainees were in a legal “no man’s land” with no protections whatsoever. In particular, the Court pointed to the fact that CF personnel could be disciplined or prosecuted for their actions. At para. 344 of the judgment, the Court said:

[M]embers of the Canadian Forces cannot act with impunity with respect to the detainees in their custody. Not only can Canadian military personnel face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they could potentially face sanctions or prosecutions under international law.¹⁵

Background of Second and Third Complaints - MPCC 2008-024 & 2008-042

26. On June 12, 2008, the Respondents filed a new conduct complaint with the MPCC, alleging that the Military Police members had failed in their duty to investigate potential wrongdoing by CF officers who directed the transfer of detainees to Afghanistan authorities, referring in particular to the eight detainees who reported their brutal torture to DFAIT officials. The complaint (hereinafter the Investigation Complaint, MPCC 2008-042) read in part:

[T]he public importance and urgency of this matter cannot be over-emphasized. The Federal Court ruled in *Afghan Detainees II* that individuals held by the Canadian Forces in Afghanistan are not protected by the *Canadian Charter of Rights and Freedoms*. However, the Court stated that Canadian law did offer indirect protection to detainees because CF members could be prosecuted for their actions. This limited protection may be illusory if there is no realistic chance that CF members will be investigated for their knowledge of or role in the torture of detainees by Afghan authorities.

¹⁴ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336 at para. 339

¹⁵ *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FC 336 paras. 343-344

In the present case, there is clear evidence that, for at least eight individuals, the chain of custody which started with the Canadian Forces ended in torture. This is surely a matter that warranted investigation by the Military Police. For the same reasons, the failure of the NIS and TFP to investigate is a matter that demands scrutiny by the MPCC.¹⁶

27. In addition, the Respondents' letter dated June 12, 2008 also requested that the original Detainee Complaint (MPCC 2007-006) be updated and expanded to include detainee transfers up to the date of the letter. They also asked that, "to the extent it is expedient to do so", the two complaints should be heard together.

28. The MPCC Chair subsequently wrote to Captain Steven Moore, the CFPM, as well as General Rick Hillier, Chief of the Defence Staff. He enclosed the Respondents' June 12th complaint and asked for submissions or comments on certain questions. In respect of the original Detainee Complaint, the MPCC Chair asked the following:

Your counsel has provided the MPCC with a copy of the materials filed by the Attorney General of Canada in the Federal Court application regarding the Detainee Complaint, and we have reviewed those materials. Do you have any further comments with respect to the jurisdiction of the MPCC over the Detainee Complaint, and the request to update and expand the scope of the Detainee Complaint?¹⁷

29. The Applicant filed a 21-page submission with the MPCC Chair on the issues raised, including jurisdiction. With respect to the question of whether Military Police custody of detainees fell within the jurisdiction of the MPCC, the Applicant adduced no further materials than what was already included in the Court record for judicial review application file number T-581-08.¹⁸

¹⁶ Letter from P. Champ to MPCC Chair P. Tinsley, dated June 12, 2008 [AAR, Vol. 1, p. 288-289]

¹⁷ Letter from MPCC Chair P. Tinsley to Capt. S. Moore and General R.J. Hillier, dated June 12, 2008 [AAR, Vol. 2, p. 292]

¹⁸ Submissions of the Attorney General of Canada, MPCC File Nos. 2007-006 & 2008-024, dated June 27, 2008, at para. 20. [AAR, Vol. 2, p. 300]

30. Following the submissions of the parties, the Chair of the MPCC rendered a decision on September 30, 2008, dealing procedurally with the new allegations raised by the Respondents. The MPCC Chair allowed the Respondents' request to update the Detainee Complaint, though he decided to characterize it as a new complaint (hereinafter the Second Detainee Complaint, MPCC 2008-024).¹⁹

31. In the same decision, the MPCC Chair determined that the Investigation Complaint raised systemic issues relating to lack of direction and guidance and therefore should be limited to subjects "in positions with command responsibility". The Chair identified the subjects of the complaint by their positions, although he did not publish their names.²⁰

32. The Chair also observed that the level of media and community interest in the allegations "remains acute", and there existed a real threat to public confidence in the military police. For these and other reasons, he decided that the Investigation Complaint should proceed immediately to a public interest hearing.²¹ He also directed that all three complaints should be heard together, though he noted the following:

I should stress, however, that I am not consolidating the Investigation and Detainee Complaints. Rather, I am directing that they remain three separate complaints, heard together for the sake of convenience...It is in the public interest, in my view, that the three complaints be heard together for so long as it is practicable and desirable to do so. This will help avoid duplication, increase efficiency and expeditiousness, and reduce costs.²²

¹⁹ Notice of MPCC Decision, dated September 30, 2008, paras. 49, 145-146 and 241 [AAR, Vol. 2, pp. 337, 370, and 398]

²⁰ Notice of MPCC Decision, dated September 30, 2008, paras. 167-168 [AAR, Vol. 2, p. 377]

²¹ Notice of MPCC Decision, dated September 30, 2008, paras. 170-172 [AAR, Vol. 2, p. 378]

²² Notice of MPCC Decision, dated September 30, 2008, para. 240 [AAR, Vol. 2, p. 397]

33. The Attorney General commenced judicial review proceedings challenging the Chairperson's decision dated September 30, 2008. None of the named subjects to the complaints sought judicial review of the decision. This second Notice of Application for Judicial Review (Court file T-1685-08) indicates that the Attorney General is attacking the Second Detainee Complaint on essentially the same jurisdictional grounds as the first application for judicial review. The Notice also contends that the MPCC Chair's decision to describe the Investigation Complaint as "systemic" was an error in fact and law.²³

34. The MPCC issued a Notice of Procedural Overview dated November 4, 2008, for hearings to commence on December 4, 2008.²⁴ In the course of his opening remarks on December 4th, the Chair noted that the judicial review proceedings were ongoing, and said the following:

It is important to realize that the Federal Court judicial review applications are on a different track, so to speak, than the Afghanistan Public Interest Hearings. At the present time, no application has been made to me to stay the Afghanistan Public Interest Hearings, and no stay of proceedings has, to my knowledge, been issued by the Federal Court. As a result, having determined that this Commission has jurisdiction over the complaints, it is my intent to proceed with the public interest hearings. It is, in my view, essential to do so.

The deployment in Afghanistan is scheduled to continue until 2011. Accordingly, a timely examination of these issues is critical to the practice of our military police, and the confidence of Canadians in the process. These are the issues of great public interest, and this Commission has a mandate to respond to complaints made about the conduct of the military police.²⁵

35. From December 2008 to March 2009, the Applicant filed several affidavits in

²³ Notice of Application for Judicial Review, dated October 30, 2008 [AAR, Vol. 2, pp. 267-274]

²⁴ MPCC Notice of Procedural Overview, dated November 4, 2008 [AAR, Vol. 2, pp. 401-405]

²⁵ Transcripts of Afghanistan Public Interest Hearings, December 4, 2008, at pp. 12-13, 13 for quote [AAR, Vol. 2, pp. 441-456]

support of the second judicial review application (Court file T-1685-08). Among these were the affidavits of Dr. Yves Tremblay and Colonel Dorothy Cooper. These affidavits offered as evidence the deponents' views on whether custody of detainees was a "policing duty or function" within the meaning of the Act and the Regulations. There was no explanation indicating why these affidavits could not have been filed in May 2008 in support of Court file T-581-08, or otherwise submitted to the MPCC Chair in the course of his deliberations for the decision rendered September 30, 2008.

36. The MPCC has commenced its hearings into these complaints.

PART II - ISSUES

37. The Respondents submit that these two applications for judicial review raise the following issues:

- (a) Are the affidavits of Dr. Tremblay and Col. Cooper admissible?
- (b) What is the appropriate standard of review?
- © Do the Detainee Complaints fall within the jurisdiction of the MPCC?
- (d) Does the Investigation Complaint raise a jurisdictional issue justifying the intervention of this Court?

PART III - ARGUMENTS

A. Preliminary Issue - Are Certain Affidavits Admissible?

38. The applicant in an application for judicial review files a supporting affidavit or affidavits pursuant to Rule 306 of the *Federal Courts Rules*. As a general rule, applications for judicial review are normally conducted solely on the basis of the material before the decision-maker.

39. There is of course an exception to this general rule. Courts may allow extrinsic evidence on issues of jurisdiction, such as procedural fairness.²⁶ But this exception is not absolute, and Courts may disallow the evidence if there was an opportunity to present it to the administrative tribunal under review.²⁷ In such circumstances, the jurisprudence teaches that the burden is on the applicant to demonstrate why the introduction of the extrinsic evidence is necessary to get at the lack of jurisdiction. In *Gitksan Treaty Society*, Rothstein J., as he then was, said:

[T]his is not a case in which the want of jurisdiction of the Board could only be made apparent on new evidence. The opportunity to introduce new evidence before the reviewing Court is not open simply on the grounds that the applicant chose not to introduce sufficient evidence before the Tribunal or did not comply with required procedure so as to enable the attorneys general to have the opportunity to do so.

[...]

The essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court. The latter is what the applicant is inappropriately proposing for this judicial

²⁶ *Gitksan Treaty Society v. Hospital Employees' Union*, [1999] F.C.J. No. 1192 (F.C.A.), para. 13

²⁷ See, e.g., discussion in *AOV Adults Only Video Ltd. v. Manitoba (Labour Board)*, 2003 MBCA 81 at paras. 28-34.

review. This is not the necessity to which Lord Sumner was referring in *Nat Bell Liquors*, *supra*. The Court will not entertain new evidence in these circumstances.²⁸

40. The affidavits of Dr. Tremblay and Col. Cooper offer evidence about the proper interpretation of “policing duties and functions”. Dr. Tremblay, a military historian employed by the Department of National Defence, provides his understanding of the historical role of CF Military Police in the handling of prisoners of war.²⁹ Col. Cooper testifies that she has read the decision of the MPCC Chair dated September 30, 2008, and offers her “opinion” that it is wrong because, in her view, custody of persons in an armed conflict cannot be regarded as a policing function. She also indicates that she has read the Applicant’s affidavits filed in Court file T-581-08, and testifies that she agrees with the opinions stated therein.³⁰

41. There were several junctures at which the Applicant could have submitted these affidavits to the MPCC for the Chair’s deliberations on the issue of jurisdiction. The CF and DND first raised the issue of whether the transfer of detainees fell within the jurisdiction of the MPCC in March 2007. No evidence or affidavits were put forward at that time to justify the CF’s position. Later, the Applicant filed several affidavits of extrinsic evidence and opinions in the context of Court file T-581-08. Yet the affidavits of Dr. Tremblay and Col. Cooper were inexplicably not included in those materials. Finally, the MPCC explicitly asked the Attorney General on June 12, 2008, whether he had anything further to submit on this jurisdictional question.³¹ Although the Attorney General filed a 21-page submission in response,

²⁸ *Gitxsan Treaty Society*, *supra*, paras. 13 and 15 [emphasis added]

²⁹ Affidavit of Dr. Y. Tremblay [AAR, Vol. 2, p. 475]

³⁰ Affidavit of Colonel Cooper, paras. 10-15 [AAR, Vol. 3, pp. 539-540]

³¹ Letter from MPCC Chair P. Tinsley to Capt. S. Moore and General R.J. Hillier, dated June 12, 2008 [AAR, Vol. 2, p. 292]

he chose not to introduce any additional material to the MPCC.³²

42. The Attorney General should not be permitted to essentially withhold from the MPCC evidence that he deems relevant, only to file it later with the Court in seeking to impugn the MPCC's decision. These were clearly not circumstances in which a party was unable to put the material before the decision-maker, which is the primary justification for the exception to the general rule. Such practice runs afoul of the basic principles of administrative law, and the Court should not condone it. The affidavits should be struck.

B. Standard of Review

43. The Respondent accepts the submissions of the Applicant with the respect to the law on standard of review. In that regard, correctness is the appropriate standard of review where an administrative body renders decisions on questions of jurisdiction, and the Court must remain deferential on other issues that are not jurisdictional in nature.³³

44. The Applicant's analysis is flawed, however, because he fails to distinguish between the different issues raised in the within applications for judicial review. In the present case, the Respondents agree that the correctness standard should apply to the interpretation of "policing duties and functions", an issue raised in the Detainee Complaints. However, the more deferential standard of reasonableness should apply to the Applicant's challenge to the Investigation Complaint as it does not raise a jurisdictional issue.

45. Significantly, the Applicant has acknowledged that, "properly framed", the

³² Submissions of the Attorney General of Canada, MPCC File Nos. 2007-006 & 2008-024, dated June 27, 2008, at para. 20. [AAR, Vol. 2, p. 300]

³³ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59

Investigation Complaint falls within the MPCC's jurisdiction.³⁴ Yet he challenges the MPCC's approach to this complaint, contending that any inquiry into broader systemic issues underlying potential misconduct is not permissible. The Respondents submit that this kind of objection does not raise a jurisdictional issue as it is understood in administrative law. The Supreme Court of Canada emphasized in *Dunsmuir* that jurisdiction 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...We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.³⁵

46. To conclude, the Applicant agrees that the MPCC Chair must be correct in his interpretation of "policing duties or functions", as this relates to the MPCC's threshold jurisdiction to inquire into the Detainee Complaints. However, the MPCC clearly has jurisdiction over the Investigation Complaint, and therefore the issue raised in that matter should be afforded the more deferential reasonableness standard of review.

³⁴ Submissions of the Attorney General to the MPCC, dated June 27, 2008 [AAR, Vol. 2, p. 304]

³⁵ *Dunsmuir*, *supra*, at para. 59

C. The Detainee Complaints (MPCC 2007-006 & 2008-024)
Policing Duties or Functions

47. According to CF doctrine, the CF Military Police are responsible for the custody of persons, including prisoners of war and detainees. In a foreign theatre, the Military Police are also doctrinally tasked with duties related to the transfer of detainees to foreign authorities. In Afghanistan, CF Military Police are responsible for the physical custody of detainees from the time they are handed over by the capturing troops until the moment they are transferred to Afghan officials. Senior Military Police officers play a central and integral role in detainee issues, including and in particular issues related to detainee transfers.

48. Torture in Afghanistan is endemic. Officials from the Afghan Secret Police - the NDS - are particularly notorious for practising torture. The Respondents' were concerned that members of the Military Police were not properly discharging their primary role in ensuring the safe custody of detainees because they were transferring them into the hands of authorities such as the NDS. As the original Detainee Complaint (MPCC 2007-006) states,

The Provost Marshall and unidentified members of the Military Police have transferred and/or allowed to be transferred detainees to the Afghan National Police (ANP) and National Directorate of Security (NDS), notwithstanding knowledge that the transfer system is lacking effective safeguards against torture, and notwithstanding abundant evidence from publicly available credible reports that ANP and NDS routinely torture detainees.³⁶

49. By the time the Respondents filed their second Detainee Complaint (MPCC 2008-024) - which was actually a request to update the first Detainee Complaint -

³⁶ Letter from A. Neve and J. Gratl to MPP Chair P. Tinsley, dated February 21, 2007 [AAR, Vol. 1, p. 196]

they had obtained incontrovertible evidence that CF-transferred detainees were in fact being tortured. Monitoring visits by Canadian Foreign Affairs officials reported that several detainees showed signs of torture and in some cases were confiding the horrible nature of their abuse. Moreover, it appears that this torture was committed after the first Detainee Complaint was filed. In their complaint dated June 12, 2008, the Respondents submitted the following:

[T]he new evidence suffices to establish: (I) that detainee operations continued after the instances in 2006 which were the subject matter of the original complaint; and (ii) that the risk of torture faced by detainees upon transfer was regrettably confirmed by first-hand accounts and physical evidence. The (Complainants) accordingly request the Chair to update and expand the scope of their original complaint, to cover detainee transfers to the present date.³⁷

(I) Custody of a Person

50. For the Respondents, the statutory authority for filing these complaints is found in section 250.18(1) of the *NDA*, which reads:

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.

51. The Regulations referred to in the above provision are the *Complaints About the Conduct of Members of the Military Police Regulations*. Section 2 of the *Conduct Regulations* prescribes the meaning of "policing duties or functions":

2.(1) For the purpose 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;

³⁷ Letter from P. Champ to MPCC Chair P. Tinsley, dated June 12, 2008 [AAR, Vol. 2, p. 285]

- (b) the rendering of assistance to the public;
- (c) the execution of a warrant or another judicial process;
- (d) the handling of evidence;
- (e) the laying of a charge;
- (f) attendance at a judicial proceeding;
- (g) the enforcement of laws;
- (h) responding to a complaint; and
- (i) the arrest or custody of a person.

(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.³⁸

52. The Respondents rely substantially on "custody of a person" as the relevant policing duty or function at issue in the Detainee Complaints. The capturing CF troops hand over detainees to CF Military Police as quickly as possible. At that point, the safety of those individuals is entrusted to the Military Police until the moment they are released or physically transferred to Afghan authorities.

53. The Applicant contests the MPCC's jurisdiction to inquire into the Detainee Complaints. The Applicant argues that "custody" in s. 2(1)(i) of the *Conduct Regulations* should be interpreted to mean "custody for the purpose of investigating and prosecuting service offences".³⁹ To support this argument, the Applicant says that Military Police are only engaging in "policing duties or functions" when they are dealing with misconduct by individuals governed by the CF's *Code of Service Discipline*. The Applicant suggests that there must be a "service nexus" connecting the person detained in custody and the exercise of powers by the Military Police.⁴⁰

54. There are certain corollaries to the Applicant's theory about the proper

³⁸ *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065, paras. 2(1)(a), (g) and (i)

³⁹ Applicant's Memorandum of Fact and Law, para. 90 [AAR, Vol. 6, p. 1343]

⁴⁰ Applicant's Memorandum of Fact and Law, paras. 94-99 [AAR, Vol. 6, pp. 1345-1347]

interpretation of "policing duties or functions". First, the Applicant says that only duties which fall under the MP chain of command can be "policing" duties. Second, the Applicant says that MP activities that relate to military operations in any way cannot constitute "policing duties or functions". Third and finally, the Applicant claims that the activity cannot be a policing duty if it can be performed by a CF member who is not a peace officer.⁴¹

55. The Respondents have numerous arguments that address these points, but it is perhaps most helpful to first turn to the MPCC Chair's cogent reasons on these issues. As a starting point, the MPCC Chair considered both the dictionary and legal meaning of "custody", and observed the following:

The allegations in the Detainee Complaints are that detainees were in the custody of the military police, under their control and guardianship from the point of handover in theatre or wherever else, through the time that they are in temporary detention facilities, and up to and including the point of release. This is consistent with the plain meaning of the word "custody", as well as the legal meaning of the word "custody".⁴²

56. The MPCC Chair also reviewed various CF doctrinal guides and documents, all of which related in detail the special responsibility of Military Police members for any person in CF custody.⁴³

57. According to the MPCC Chair, the distinctions that the Applicant sought to draw between "policing" and other MP duties were not logically consistent and would all but emasculate the MPCC. For example, the Chair noted that the vast majority of MPs are under the operational military chain of command at any given

⁴¹ Applicant's Memorandum of Fact and Law, paras. 85, 87-88, 97 and 99 [AAR, Vol. 6, pp. 1342-1343 and 1346-1347]

⁴² Notice of MPCC Decision, dated September 30, 2008, para. 67 [AAR, Vol. 2, p. 343]

⁴³ Notice of MPCC Decision, dated September 30, 2008, para. 79 [AAR, Vol. 2, p. 347]

time. Thus, the narrow interpretation urged by the Applicant would mean that "all but a tiny fraction of MPs would be immunized from review in the course of their policing duties and functions."⁴⁴

58. The MPCC also found that peace officer status is not dispositive of the issue. The Chair noted that anyone in the military was empowered to carry out "hard policing functions" if necessary. The MPCC Chair observed,

[W]ith respect to the other "policing duties and functions" enumerated in section 2(1) of the *Conduct Regulations*, it is also true that any soldier can perform them. Any soldier can render assistance to the public, hold an individual in custody, conduct an investigation, handle evidence and attend a judicial proceeding, for example. What is critical is that under the *Conduct Regulations*, where these functions are performed by members of the military police, then they are policing duties and functions over which the Complaints Commission has jurisdiction.⁴⁵

59. The history of CF detention operations in past wars indicated that custodial operations have always been entrusted to Military Police. In citing these documents, the MPCC Chair observed that "historical military police doctrine supports the notion that detainee/prisoner of war handling has always been police work, meant to be carried out by the military police."⁴⁶

60. The Respondents submit that the MPCC's reasoning was thorough and cogent, and was fully supported by the evidence. In particular, it is noted that the CF Military Police Doctrine Manual specially entrusts the responsibility of detainee handling to members of the Military Police. According to the manual, "Doctrine represents the fundamental teachings of our profession and it establishes the way

⁴⁴ Notice of MPCC Decision, dated September 30, 2008, paras. 102-103 and 107, 103 for quote [AAR, Vol. 2, p. 354-356]

⁴⁵ Notice of MPCC Decision, dated September 30, 2008, para. 127 [AAR, Vol. 2, p. 362]

⁴⁶ Notice of MPCC Decision, dated September 30, 2008, paras. 111-113, 113 for quote [AAR, Vol. 2, p. 357-359]

we practice this profession in the Canadian army...Doctrine also justifies how we structure, organize, equip and operate."⁴⁷

61. Some of the more salient passages in the CF Military Police Doctrine Manual that deal with Military Police responsibility for detainees are as follows:

Transfers of prisoners of war to another party to the *Geneva Conventions* who is capable of applying the Conventions may occur. In those cases, a memorandum of understanding with the nation must be signed. The J1, in consultation with the senior Canadian Provost Marshall and the legal advisor, will negotiate a memorandum of understanding with other nations, approve transfers and then verify that prisoners of war receive the treatment in accordance with the *Conventions*.⁴⁸

Military Police are responsible for the care and custody of the detainees until they can be transferred to a higher formation facility or be returned to host-nation authorities. If credible and lawful civil authorities exist, they should be responsible for the detention of non-combatant civilians. If such authorities do not exist, or they are unwilling or incapable of exercising their responsibilities, the Canadian Forces Military Police Unit will take those persons into custody until they can be released to appropriate authorities.⁴⁹

Military Police ensure effective liaison exists with all authorities concerned with the treatment of prisoners of war. The proper treatment of prisoners of war is important and Canada must meet its obligations. Adequate liaison with civilian authorities, humanitarian groups and any designated Protecting Power must ensure Canada is seen as being respectful of all international agreements.⁵⁰

⁴⁷ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), para. 8 [AAR, Vol. 1, p. 60]

⁴⁸ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), Ch. 5, Section 2, para. 8 [AAR, Vol. 1, p. 101]

⁴⁹ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), Ch. 5, Section 4, para. 42 [AAR, Vol. 1, p. 110-111]

⁵⁰ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), Ch. 5, Section 4, para. 44 [AAR, Vol. 1, p. 111]

62. Other CF operating procedures and documents confirm that detention operations are a primary task of the Military Police. Several note that Military Police are responsible for "coordinating tasks related to persons held in custody (including military detainees and prisoners of war)".⁵¹

63. In the context of Afghanistan, Major Harvey confirmed in cross examination the central role that the Military Police - including himself as the Task Force Provost Marshall - play in detainee operations, including the transfer of detainees to Afghan authorities.

Q118: And then you did provide advice to the Commander on detainee issues, correct?

A: Yes, sir.

Q119: And what type of detainee issues would you provide advice about?

A: From detainee handling to again, it was under a command authority that we transferred detainees, I would offer advice on continuation of detention. A number of occasions where while someone had detained an individual in the field under certain circumstances, as we questioned and got more information which wasn't available on the battle field, we determined that there was no requirement for continued detention.

Advised the commander of who in turn gave me the authority to release, I would also advise on continuation of detention and - - and transfer, sir.

Q121: And it was your role to arrange the transfers, if you were going to be transferring detainees to Afghan authorities?

A: I coordinated it yes sir, on the Commander's behalf.

Q124: And this function of arranging the transfer to the Afghan authorities, that is a doctrinally assigned duty as well, is it not? Isn't that part of MP doctrine, to be part of or responsible for the transfer?

A: A big part of the process is doctrinally, yes, sir.

Q130: And so you were responsible for that entire chain of custody?

⁵¹ CF recruitment website on Military Police [RR, Vol. I, p. 6]; and The Canadian Forces Military Police "Serving You" [RR, Vol. I, p. 12]

A: Yes, sir.⁵²

64. In cross-examination, Lieutenant-Colonel Rodney Lander essentially corroborated the special role of the Military Police in relation to detainees, whether service detainees or otherwise, and indicated that the Military Police were doctrinally assigned these tasks because of their specialized training.

Q14: One of the reasons, I understand, that Military Police are assigned these duties is they have experience and specialized training in custody of persons.

A: Yes, it's related to the fact that normally we have powers of arrest and detention and the custody that follows that. It's just logical to assume that MP's would be better suited and better trained and have a more complete skill set when dealing with any kind of detainee, including prisoners of war.

Q28: And you would agree with me that according to Doctrine, the Military Police have special responsibilities for detention of both service detainees but also civilian detainees or prisoners of war?

A: That is a role the Commander usually assigns to the Military Police, yes.

Q29: Well, it's part of Doctrine, it's part of the fundamental guidance of the Canadian Forces that the Military Police are responsible for those duties.

A: That's right. It's normal.⁵³

65. In addition to the above statements, Lieutenant-Col. Putt, a former TFP, told MPCC investigators that, in his view, detainee operations in Afghanistan were a "policing function". His commanding officer in Afghanistan, Brigadier General Fraser, also told MPCC investigators that detainee handling was "per the policing function."⁵⁴ These two individuals later changed their candid statements only after

⁵² Cross Examination of Major Harvey, conducted May 19, 2009 [AAR, Vol. 5, pp. 1246-1248]

⁵³ Cross Examination of Lieutenant-Colonel Lander, conducted May 20, 2009 [AAR, Vol. 5, pp. 1280 and 1284]

⁵⁴ Notice of MPCC Decision, dated September 30, 2008, paras. 117-118 [AAR, Vol. 2, p. 360-361]

speaking to their employer.

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66. In light of all the foregoing, it is abundantly clear that custody of individuals - whether service detainees, prisoners of war, or civilian detainees - are one of the primary functions of the CF Military Police. The Applicant attempts to limit the MPCC's jurisdiction to simply those functions that can only be performed by peace officers, or those activities which are not under the regular military command and control. But these distinctions are manifestly false ones. One of the Applicant's own witnesses, Major Harvey, gets so confused in his effort to justify these distinctions that he testifies that even custody of service detainees is not a policing duty because the duty can be performed by non-peace officers. Major Harvey's candidly admits that, according to his narrow definition of "policing", only 10% of the duties performed by Military Police members in Afghanistan are actually "policing duties or functions" within the meaning of the Act and Regulations.⁵⁵

67. To conclude, a number of specialized tasks are entrusted to Military Police, including investigation of crimes and detention operations. These are not generic military activities which may on occasion be assigned to CF Military Police, but rather are regarded doctrinally as the primary tasks of the Military Police. Parliament did not give "custody of a person" the narrow definition suggested by the Applicant, though it easily could have done so. In the wake of the Somalia Inquiry, there is properly a sensitivity around the issue of detainees. One should not lightly assume that Parliament intended to exclude from the MPCC accountability mechanism the safe custody of prisoners of war or civilian detainees.

⁵⁵ Cross Examination of Major Harvey, conducted May 19, 2009, Questions 64-72 and 83-85, [AAR, Vol. 5, pp. 1228-1233 and 1237-1238]

(ii) Enforcement of Laws

68. The Detainee Complaints are also grounded in the prescribed duties and functions of section 2 of the *Conduct Regulations* to the extent that Military Police are always responsible for the “enforcement of laws”.⁵⁶ In that regard, Military Police receive specialized training in the requirements of the *Geneva Conventions*, and they are responsible for investigating any breaches of international law. It is the Respondents view that the Military Police officers responsible for detainees’ custody ought to have been aware that the transfer orders were likely in breach of international humanitarian law.

69. A central feature of the Military Police profession is the understanding that a Military Police officer always wears ‘two hats’ - that of a soldier, and a police officer.⁵⁷ The Military Police Doctrine Manual emphasizes this point:

During the course of any duty, Military Police continually conduct law enforcement.⁵⁸

70. One of the Applicant’s witnesses, Lieutenant-Colonel Lander, agreed that Military Police officers are in a special position to conduct law enforcement in relation to the transfer of detainees.

Q47: In terms of some of the investigational responsibilities of the Military Police, it is my understanding that Military Police are responsible for investigating everything from service offences to breaches of the Criminal Code or Canadian Domestic Law, but also international law?

A: Yes.

Q48: And that would include any international law that might apply to

⁵⁶ *Conduct Regulations, supra*, s. 2(1)(i)

⁵⁷ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), Ch. 1, section 1, paras. 4-7 [AAR, Vol. 1, pp. 59-60]

⁵⁸ *Military Police Doctrine Manual* (B-GL-362-001/FP-001), Ch. 6, section 3, para. 28 [AAR, Vol. 1, p. 120]

the transfer of detainees?

A: Yes.

Q49: Would you agree with me that the Military Police are in a special position to assess the lawfulness of transfers of detainees?

A: Yes.⁵⁹

71. There is direct evidence that CF-transferred detainees were in fact tortured by Afghan authorities. In short, the chain of custody that began with the CF - in many cases - ended in torture. There is an arguable point as to whether Military Police officers failed in their duty to enforce international law, including and in particular the prohibition against torture or handing over an individual to a risk of torture. The application should be dismissed and the MPCC allowed to conduct its hearings.

D. Investigation Complaint (MPCC 2008-042)

72. The Applicant has conceded that the MPCC has jurisdiction over the subject matter of the Investigation Complaint, but contends in court file T-1685-08 that the MPCC erred by treating the complaint as "systemic". The Respondents submit that this application should be dismissed, not simply because the Applicant is wrong in law, but also because the challenge is premature.

73. The general rule is that interlocutory decisions of administrative bodies should not be subject to judicial review. Aside from the deferential stance that should be afforded to administrative bodies while they conduct their work, the Federal Court of Appeal has explained other concerns underlying this rule:

[I]t must be recognized that the lack of a right to have the Court

⁵⁹ Cross Examination of Lieutenant-Colonel Lander, conducted May 20, 2009 [AAR, Vol. 5, pp. 1290-1291]

review the position taken by a tribunal as to its jurisdiction or as to some procedural matter, at an early stage in a hearing, may well result, in some cases, in expensive hearings being abortive. On the other hand, a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal.⁶⁰

74. The policy reasons outlined above apply to the present case. The outcome of the MPCC's hearings cannot be known in advance, and the Commission may well find that all of the CF Military Police subjects acted appropriately and did not have any grounds to investigate torture. The application does not raise any jurisdictional issues or issues of bias, and therefore should be dismissed as premature.⁶¹

75. Furthermore, the Attorney General's position on the merits lacks both logic and legal authority. It is hard to understand why the Attorney General would argue that the MPCC should restrict its investigations to incidents of individual misconduct, and ignore any contextual factors or systemic problems that may have contributed to the misconduct. The MPCC's role and purpose under Part IV of the *NDA* as an oversight body is to foster accountability of the military police and improve its practices and procedures. To properly fulfill that mandate, the MPCC should be encouraged to consider other factors or systemic problems that may contribute to the conduct at issue.

76. In short, the Attorney General's narrow view of the MPCC's role is inconsistent with the objects and purposes identified above. Moreover, there is no legal authority that provides any support for this curious view.

77. There are indicators in the statute that Parliament's intention was to invest

⁶⁰ *Schnurer v. Canada (Minister of National Revenue)*, [1997] F.C.J. No. 121 (F.C.A.) at para. 11, quoting earlier judgment, *Re Anti-Dumping Act*, [1974] F.C. 22. Also see *Zundel v. Citron*, [2000] F.C.J. No. 678 (F.C.A.) at paras. 10-13

⁶¹ *Société Radio-Canada v. Bouchard*, [1988] F.C.J. No. 957 (F.C.) at pp. 3-4

the MPCC with a wide power and mandate to fully review individual misconduct, including underlying systemic causes of that misconduct. In that regard, the right to complain under section 250.18 of the *Act* is not restricted to those directly affected by alleged Military Police misconduct. Rather, the right is open-ended - "anyone" can file a complaint. For greater certainty, subsection 250.18(2) underscores this point:

A conduct complaint may be made whether or not the complainant is affected by the subject-matter of the complaint.

79. Furthermore, the MPCC is granted the power to conduct "public interest" hearings under section 250.38(1) of the *NDA*. It is submitted that the public interest is not served by narrow inquiries that do not afford the Commission the mandate to investigate underlying causes or factors and make appropriate findings and recommendations. By granting the MPCC this power, Parliament surely had a more robust role for the Commission in mind.

80. The legal frailty of the Attorney General's position is further illustrated by the final report of the MPCC Chairperson in the only other public hearing to be instituted under section 250.38 of the *NDA*. In that case, the MPCC Chair inquired into the "methods and procedures" utilized by military police members carrying out a sexual assault investigation. The MPCC determined that its mandate included looking into "underlying issues" that caused the improper conduct. The MPCC explained the nature and purpose of this approach:

The analysis of complaints regarding police performance by an oversight agency can be a complex matter. The process can be simplified if the investigative body confines its inquiries within the four corners of the complaint; that is, addressing only those issues specifically raised by the complainant. However attractive the simplicity of this approach might be, it is bound to leave the oversight function incomplete, addressing only the symptoms and not the root cause of any inadequate performance. A complainant's perspective is normally informed solely by the offending contact with frontline police personnel. However, the conduct complained of is seldom attributable to those police members alone, without the contributing effect of systemic factors. Accordingly, the first step in any oversight review is

to analyze and interpret the complaint to ensure that issues arising from the conduct which immediately impacted the complainant are addressed, as are issues associated with any other causative factors.⁶²

81. The Attorney General participated in the above hearing as counsel for the Canadian Forces Provost Marshall. Neither the Attorney General nor the CFPM took issue at any time with the systemic approach adopted by the MPCC. Not only were no judicial review proceedings initiated, the MPCC Chairperson delivered a preliminary report to the Minister of National Defence, the Chief of the Defence Staff, and the CFPM, as represented by the Attorney General of Canada, evidently with no objections.⁶³

82. The MPCC Chair subsequently submitted his 2007 annual report to the Minister of National Defence, a copy of which was tabled in Parliament.⁶⁴ The MPCC Chair expanded on the virtues of this approach to the oversight function:

[T]he best practice for independent civilian oversight of the police is to concentrate principally on substantive systemic issues that are very often the root cause of individual instances of below standard performance. By way of example in that regard, the report of the Commission's first public hearing, held in respect of the investigation of a youth for sexual assault, contained significant recommendations concerning operational procedures, training standards and supervisory practices that far outweighed those findings related to the specific conduct of the directly involved military police personnel. It is believed that this approach to oversight will have the most positive and effective benefit to the system as a whole...⁶⁵

83. Given that the Attorney General, the DND and the CF did not take issue with the MPCC Chair's approach to MPCC 2005-024, or his remarks in the 2007 Annual

⁶² Final Report of the MPCC Following a Public Interest Hearing, MPCC 2005-024, dated December 17, 2007, para. 31. [RMR, Vol. I, Tab 1, p. 18]

⁶³ NDA, section 250.48

⁶⁴ NDA, section 250.17

⁶⁵ Military Police Complaints Commission, 2007 Annual Report, Introductory Message from the Chair [RMR, Vol. I, Tab 1, p. 5]

Report, it is submitted that, at a bare minimum, the Attorney General is unable to establish in Court file T-1685-08 that special circumstances exist justifying judicial review of the Chair's interlocutory decision in the present case. This is particularly so given that the Attorney General has not raised any jurisdictional issue, which again is generally the only ground on which judicial review of an interlocutory decision may be successful.⁶⁶

84. For all the foregoing reasons, the Respondents submit that the application for judicial review commenced under Court File T-1685-08 should be dismissed.

E. Conclusion

85. There is a presumptive public interest in allowing an administrative body carry out its functions. This is particularly so when it concerns a civilian oversight body vested with the responsibility of investigating misconduct of government actors. Harm caused by delay to the proceeding must always be considered in a stay motion.

86. The Court must also take into account the inherent seriousness of the allegations. The Canadian Forces military police have evidence of eight victims of torture. These were individuals in the custody of the CF and who were transferred to the authorities that committed the torture. While the Attorney General raises some theoretical quibbles with the manner in which the MPCC proposes to approach the issue, the public interest in having the oversight body vested with this responsibility look into this matter cannot be overstated.

87. The evidence that torture remains a systemic problem in Afghanistan legal institutions is overwhelming. The CF will presumably continue transfers until the deployment is over in 2011. As the MPCC Chair observed, "a timely examination of

⁶⁶ *CHC Global Operations v. Global Helicopters Assn.*, [2008] F.C.J. No. 1579 (F.C.A.) at para. 2. Also see *Société Radio-Canada v. Bouchard*, [1988] F.C.J. No. 957 (F.C.) at pp. 3-4

these issues is critical to the practice of our military police, and the confidence of Canadians in the process.”⁶⁷ Moreover, as the law currently stands, the only legal protection that detainees have in CF custody is the potential that CF members will face disciplinary or criminal sanctions for their conduct. This limited protection may be illusory if there is no realistic chance that CF members will be investigated for their knowledge of or role in the torture of detainees by Afghan authorities.⁶⁸

88. The Court, and the Attorney General, should permit a thorough review of the grave allegations raised. As the MPCC Chair observed, “To do otherwise would, in my view, be a disservice to the complainants, the Canadian public, not to mention the men and women of the military police.”⁶⁹

⁶⁷ Transcripts of Afghanistan Public Interest Hearings, December 4, 2008, at pp. 12-13, 13 for quote [AMR, Vol. II, pp. 314-315, 315 for quote]

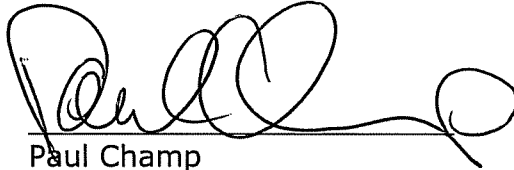
⁶⁸ *Afghan Detainees II*, paras. 343-344

⁶⁹ Notice of MPCC Decision, dated September 30, 2008, para. 197 [AMR, Vol. I, p. 209h]

PART IV - ORDER REQUESTED

89. The Respondents submit that the applications for judicial review should be dismissed with costs.

Dated at Ottawa, this 30th day of June, 2009.

A handwritten signature in black ink, appearing to read 'Paul Champ', written over a horizontal line.

Paul Champ

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PART V - AUTHORITIES

AOV Adults Only Video Ltd. v. Manitoba (Labour Board), 2003 MBCA 81

Amnesty International Canada v. Canada (Canadian Forces), 2008 FC 162

CHC Global Operations v. Global Helicopters Pilots Assn., [2008] F.C.J. No. 1579 (F.C.A.)

Canada (Attorney General) v. Canada (Information Commissioner), [2002] F.C.J. No. 225 (F.C.A.)

Dunsmuir v. New Brunswick, 2008 SCC 9

Gitxsan Treaty Society v. Hospital Employees' Union, [1999] F.C.J. No. 1192 (F.C.A.)

Schnurer v. Canada (Minister of National Revenue), [1997] F.C.J. No. 121 (F.C.A.)

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Zundel v. Citron, [2000] F.C.J. No. 678 (F.C.A.)

Other Authorities

Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (1997), Volume 5, Chapters 39-40