



January 28, 2008

The Honourable Peter MacKay, P.C., M.P.
Minister of National Defence
National Defence Headquarters
Major-General George R. Pearkes Building
101 Colonel By Drive
Ottawa, ON
K1A 0K2

Re: MPCC file 2007-006 PI (Amnesty International Canada and BC Civil Liberties Association)

Dear Minister:

Further to our meeting of October 29th, the purpose of this letter is to advise you of my continuing concerns regarding the level of cooperation the Commission has been receiving with its public interest investigation pursuant to section 250.38 of the *National Defence Act* in respect of the captionally-noted complaint. You will recall that the allegations contained in the complaint are to the effect that CF military police members have transferred detainees in Afghanistan to security forces of that country despite awareness of a serious risk in so doing of subsequent unlawful mistreatment, including torture.

Cooperation from DND

The cooperation the Commission has received from the Department of National Defence and the Canadian Forces (DND/CF) has so far mainly suffered due to resource limitations in terms of the time it has taken to track down relevant documents and information. DND/CF usefully created a special Detainee Information Support Team (DIST) to handle document and information requests of the CF Board of Inquiry, the National Investigation Service criminal investigation, as well as this Commission's investigation. However, this team has also been given responsibility for assisting with the numerous access to information requests from the public on this topic as well as with the review of documents proposed to be disclosed in the ongoing Federal Court proceedings with Amnesty International Canada et al. Moreover, the DIST only coordinates the disclosure of requested materials to the various ongoing investigations; its creation has not to my knowledge translated into additional resources for the various entities within the Department or the Canadian Forces which hold relevant documents and who must locate and retrieve them. Given the necessary operational focus of those entities which are the

principal holders of relevant documents (most notably CEFCOM and JTF Afghanistan), some significant delays have been encountered and there remain a number of outstanding requests as a result. A list of the outstanding requests is attached. The Commission is still awaiting a reply to its request for an indication of timelines for the production of these materials.

Many relevant documents in DND's possession originated from other departments and DND has insisted that we approach the originating department to obtain these documents. To date, my primary concern in terms of cooperation with the MPCC investigation is with those other departments or agencies who hold potentially relevant documents and information, specifically, the Department of Foreign Affairs and International Trade (DFAIT) and the Correctional Service of Canada (CSC).

Cooperation from Other Departments

Given the acknowledged role of CF military police members in the transfer of Afghan detainees to Afghan security forces, this complaint clearly puts in issue the level of awareness by those members as to the likely post-transfer treatment of such detainees. Just as the Commission could not credibly limit its investigation to military police witnesses and military police-generated documents alone, it would be similarly problematic for the Commission to ignore relevant documents in the possession of DND, simply because they originated outside the Department.

Both DFAIT and CSC have been on the ground in Afghanistan and have been involved in monitoring the treatment of detainees by Afghan authorities. DFAIT moreover has a particular responsibility for gathering information on conditions in foreign countries and disseminating it to other engaged departments, such as DND, in the case of Afghanistan.

Therefore, the Commission has since May made a number of requests to DFAIT for documents and information. To date, however, DFAIT has declined to provide the Commission with access to any information beyond that which has been publicly released in the course of the Federal Court proceedings. DFAIT has effectively treated the Commission as if it were a party to the Federal Court case, rather than as an agency of the Government of Canada pursuing a statutory mandate and fully subject to the Government Security Policy.

While a significant number of potentially relevant documents have become available to the Commission through the public release of the various government documents filed with the Federal Court, these documents have been the subject of redactions under sections 38 through 38.15 (sensitive information/information potentially injurious to international relations or national defence or security) – and to a lesser extent, section 37 (specified public interest) – of the *Canada Evidence Act* (CEA). Moreover, the scope of these redactions is such that the Commission's ability to fully and credibly probe matters central to this investigation would be significantly impaired if we were required to rely upon the present public versions of these documents. CSC has demonstrated somewhat greater flexibility by sharing with the Commission material which has been redacted

under CEA section 37 in the public versions of its documents which have been filed in court, however this affects only a minute amount of additional text.

Misapplication of Canada Evidence Act

To be sure, the concern expressed here is not with the merits of the CEA redactions, but rather their application to information disclosed to the Commission for the purposes of this investigation. In the Commission's view, which is supported by an independent legal opinion which was recently obtained on this question (a copy of which I enclose herewith), CEA sections 37 and 38 through 38.15 do not apply to the Commission's present investigation.

Nor is the Commission's investigation in any way analogous to the Federal Court proceedings. The Commission's investigation is a behind-closed-doors process and is inquisitorial, rather than adversarial, in nature. As a result, the Commission's investigation is not subject to the same judicial requirements of transparency vis-à-vis the public, or even to the parties to the complaint. The Commission is therefore capable of entering into an arrangement with departments which will accommodate both the Commission's need for access to relevant information and the need to safeguard sensitive information (the approach adopted in respect of the recent public inquiry by Mr. Justice O'Connor into the Maher Arar affair offers a useful precedent here). That is to say, this Commission is as much bound to prevent the public disclosure of sensitive or injurious information as any other government department or agency.

In any event, I can see no logical reason why the statutory mandate being exercised by this Commission should not attract the same level of support from DFAIT and CSC as it has received from DND and the CF, which have been providing unredacted documents to the Commission throughout the course of this investigation.

Commission's Efforts to Obtain Cooperation

Therefore, on November 6th, after a continuous lack of responsiveness from DFAIT's Justice Legal Services Unit with whom Commission staff were directed to deal on these matters, I wrote to the Deputy Minister of Foreign Affairs seeking his assistance in achieving an acceptable level of cooperation with our investigation (a copy of this letter is enclosed for your information). Over seven weeks later, on December 21st, I received a reply from the DFAIT Legal Advisor, Mr. Alan Kessel, who simply noted that the requests for information raise "complicated matters" and deferred any substantive response to mid-January. However, nothing further has been heard despite the continued efforts of my staff to follow up.

On December 21st, the Commission wrote to counsel for CSC indicating that, as CEA section 38 did not apply to this investigation, the Commission reiterated its request for access to unredacted documents relative to the treatment of CF-transferred detainees in the custody of Afghan authorities. No reply has been forthcoming.

Most recently, however, Commission counsel have been advised that DFAIT and CSC have designated a Department of Justice litigation counsel as the new point of contact for the Commission in respect of both client departments. While this counsel has expressed the intention of seeking a resolution to the issues outstanding between the Commission and his clients, the Commission has been given no indication that there will be any newfound flexibility in the position of the relevant departmental officials or, indeed, the National Security Group, which I am given to understand is directing the matter, with respect to cooperation with this investigation.

In respect of the security concerns being relied upon for the lack of voluntary cooperation, it is worthy of note that it has been confirmed repeatedly that the Commission is willing and able to safeguard any sensitive information received from DFAIT and CSC, as it has done with information and documents received from DND. As evidence of the Commission's position in this regard, I have enclosed for your information a copy of the information-sharing protocol entered into between the Commission and the CFNIS in connection with a related complaint investigation (MPCC 2007-003 (Attaran)) and the ongoing criminal/service offence investigation which arose therefrom, as well as a copy of the Commission's letter formally requesting copies of certain NATO records (which request is still pending). Offers of similar arrangements have been made by Commission staff to both DFAIT and CSC officials, but to no effect. (Severed text)

At this point, I believe that all that is possible has been done at the officials level in trying to obtain DFAIT's and CSC's voluntary cooperation with the MPCC investigation. Accordingly, I must now seek, through you, the Government's position in respect of full and voluntary cooperation with this Commission, as has been provided by the DND/CF to date.

While there still exists the option of calling a public interest hearing to compel production of relevant information, I continue to believe that, given the additional time and other resources which such a hearing process entails, this mechanism should only be used very exceptionally and to meet particular requirements, of which cooperation is only one.

However, the issue of cooperation is becoming all the more crucial because, as you are aware, the statute requires that after six months, and every month thereafter, the Commission report why it has not been able to complete its investigation. Next month, the Commission will have been seized of this complaint for one year. As a result, the Commission must publish a status report outlining the Commission's progress to date and the prospects for completion of the investigation within a reasonable timeframe, consistent with statutory requirements.

Solicitor-Client Privileged Material

Finally, as we had in our meeting touched on the issue of solicitor-client privilege vis-à-vis investigations by the Commission, I wish to advise that I have since had occasion to submit a request to the DIST for certain legal opinions relative to this file (I enclose a

copy of our request letter for your convenience); that privilege, of course, belongs to you. As you may appreciate, such opinions, particularly the factual assumptions on which they are based, would be highly relevant to the allegations under investigation. Indeed, it is expected that there will be further requests for this type of information as the investigation progresses.

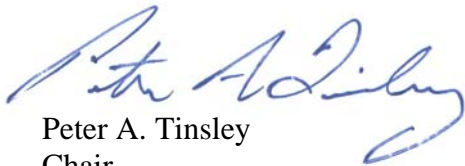
I understand that the Office of the Judge Advocate General (JAG) is presently studying this request. However, I am aware that JAG is traditionally reluctant to share such information with the Commission. The main obstacle, in this case, seems to be the concern that in sharing such information with the Commission, solicitor-client privilege would be deemed to be waived vis-à-vis other parties. However, Commission counsel have recently met with counsel for DND and referred them to case law which indicates that the effect of the voluntary sharing of privileged information with a third party is dependent on the privilege-holder's intention, such that privileged materials could be disclosed to the Commission for a specified purpose without diminishing the privilege vis-à-vis others. As already indicated with respect to information deemed sensitive for security reasons, the Commission is similarly prepared to respect special caveats on the use of such privileged information. (Severed text)

In Closing

The allegations which the Commission is charged with investigating are both serious and a matter of considerable public attention. As I am sure you will agree, it is, therefore, all the more important that the Commission be allowed to complete a thorough and credible investigation. I look forward to hearing from you in respect of the matters of cooperation raised herein, and I trust that you will appreciate the urgency of this matter as explained above.

Please do not hesitate to contact me if you require any further information regarding this matter.

Sincerely,



Peter A. Tinsley
Chair

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