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**Our File: MPCC-2007-006 (Public Interest Investigation)
Amnesty International Canada &
B.C. Civil Liberties Association – Status Report**

Gentlemen:

As you are aware, it is now almost exactly one year since the captionally-noted military police (MP) conduct complaint was filed with this Commission pursuant to section 250.18 of *National Defence Act* (NDA). That complaint alleged that unnamed MP personnel at all levels up to and including the Canadian Forces (CF) Provost Marshal have been responsible for transferring CF detainees in Afghanistan to the custody of Afghan security forces while being aware or wilfully blind to the likelihood that such detainees would be subject to a significant risk of torture or other unlawful mistreatment.

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You will recall that, given the nature and significance of the allegations, the Chair deemed it appropriate to exercise the jurisdiction conferred by NDA section 250.38 to initiate an immediate investigation by the Commission in the public interest, rather than refer the matter to the CF Provost Marshal for investigation and disposition in the first instance in accordance with the usual procedure for conduct complaints.

As required by statute, this office has been providing monthly reports advising of the status of the ongoing public interest investigation in respect of this complaint. These letters have briefly indicated the ongoing investigative steps which are in progress. At this stage, however, the Commission is obliged by the legislation to further explain why its investigation has not been completed. Therefore, subject to the need to protect the integrity of our ongoing investigation, the Commission will in this report provide a more detailed account of our activities to date and of our prospects for completion of our investigation within a reasonable further period of time.

The first step in the investigation was to request copies of all documents and records in the possession of the Department of National Defence (DND) related to the transfer of Afghan detainees by Canadian Forces (CF) military police members (MPs) to Afghan authorities. Initially, a broadly worded request was submitted, which has since been refined into more discrete categories, and even specific documents in some cases, as the investigation progressed.

DND responded by creating a special team within the Strategic Joint Staff called the Detainee Information Support Team (DIST) whose mandate it has been to respond to our information and document requests. While there was initially some questioning of the Commission's jurisdiction to investigate this complaint by senior military officials, this issue was quickly resolved in the Commission's favour by the Minister of the day who directed a posture of cooperation with the Commission.

Since that time, the Commission's investigative team has enjoyed a cooperative relationship with DIST officials, which has enabled the Commission to make some progress in its investigation of this complaint. To date, the Commission has obtained and reviewed over 1300 documents and has conducted some 38 interviews, primarily with CF personnel and DND officials at various levels, in Ottawa and at other locations in Canada.

However, progress has been slowed by the fact that DIST resources are limited and it has not been able to focus uniquely on the information requirements of the Commission.

The creation of DIST to coordinate the handling of the Commission's document requests has not translated into additional resources for those entities which are the main holders of relevant documents – such as Joint Task Force Afghanistan and Canadian Expeditionary Force Command – to conduct the necessary searches and to retrieve the requested materials. As these organizations are intensely focussed on ongoing military operations, the actioning of document requests to assist our investigation has, unsurprisingly, not been their only priority.

Moreover, in addition to dealing with the information needs of the Commission, the DIST has also been tasked with coordinating the disclosure of documents to the ongoing investigations of the CF National Investigation Service and an internal CF Board of Inquiry with respect to detainee-handling by CF personnel in Afghanistan, and in response to the numerous requests for documents on this subject by members of the public under the *Access to Information Act*. On top of that, the DIST has been involved in advising on the application of section 38 of the *Canada Evidence Act* (information potentially injurious to national defence or security) in respect of documentary evidence subject to disclosure in the Federal Court proceedings commenced by the complainants with respect to detainee transfers.

However, to date, the Commission's concerns regarding DND's responsiveness to requests for documents and information have been limited to the issue of timeliness. The Commission has been confronted with a more substantial obstacle to its investigation with the level of cooperation forthcoming from other government departments and agencies whose assistance we have requested.

The involvement of MPs in Afghanistan with the transfer of detainees to Afghan security forces is a known fact. What the Commission has been seeking to determine in this investigation is whether MPs were either actually aware of information which indicated that detainees so transferred faced a substantial risk of physical abuse at the hands of Afghan security forces, or else deliberately ignored or avoided such information. To do this, the Commission must understand the informational environment in which the MPs were functioning.

Some information of this nature originated with sources outside of DND. As is now well known, the Department of Foreign Affairs and International Trade (DFAIT) and the Correctional Service of Canada (CSC) in particular have been significantly engaged on the detainee issue throughout the period of interest to the Commission. However, when relevant documents of extra-departmental origin in CF or DND possession were requested, the DIST on behalf of DND advised that the Commission would have to request such material directly from the originating department or agency. As a result, the Commission has, since the spring and

summer of last year, been requesting relevant documents and information directly from DFAIT and CSC, respectively.

After considerable delay, these organizations indicated that they would only provide information that was to be released publicly in the course of the Federal Court proceedings initiated by Amnesty International and B.C. Civil Liberties Association. In other words, the Commission would receive access only to documents vetted under sections 37 (public interest privilege) and 38 (information potentially injurious to international relations or national defence or security) of the *Canada Evidence Act* (CEA). For the most part, these documents only became available at the time of their public release starting in late November of last year. Contrary to the predictions of counsel for DFAIT and CSC, the CEA redactions have affected a significant amount of material in these documents. It should be noted that CSC did provide the Commission with access to certain material redacted under CEA section 37, however, this enabled Commission access to only a minute amount of additional text.

As the Commission is not a party to the Federal Court proceedings, it is not for the Commission to take a position on the manner in which redactions pursuant to CEA sections 37 and 38 have been made to the relevant documents. However, the Commission does take issue with the application of these legislative provisions to information disclosed to the Commission. Quite simply, as the Commission's public interest investigation is not a "proceeding" as defined in CEA sections 37 and 38, these provisions have no application to it.

Furthermore, the Commission, as a government agency, is fully subject to the Treasury Board's Government Security Policy and, as such, is under the same obligations as DFAIT and CSC to protect sensitive information from unauthorized disclosure. Moreover, the Commission is ready, willing and able to abide by any reasonable conditions on our access to sensitive information. The Commission's capacity to appropriately treat with sensitive information should, in any event, be apparent from the fact that the Commission has been receiving and handling unredacted DND documents through DIST since the very early days of this investigation. All these points have been made repeatedly to representatives of DFAIT and CSC, but to no avail.

Furthermore, even apart from the request for access to the unredacted versions of documents disclosed in the Federal Court proceedings, a number of other Commission requests to DFAIT for relevant information, made as early as last summer, have yet to elicit any response.

Having exhausted all efforts with departmental officials to gain broader government cooperation, the Chair has recently sought assistance from the ministerial level. While it had been hoped that the Chair would have received an

answer to his request for assistance before this status report was issued, this has not occurred and this request remains outstanding at this time.

On the contrary, a government lawyer has been designated as the Commission's single point of contact in respect of all federal departments and agencies for the purposes of this file. However, this official has so far been unable to advise the Commission as to the government's intended level of cooperation, nor is he able to indicate when he expects to be in a position to do so.

In the meantime, the Commission is not limiting its sources of information to the aforementioned federal departments and agencies. The Commission has engaged other organizations and individuals, both within and outside of the Government of Canada, for assistance in respect of this investigation, and will continue to do so. However, given the nature of their respective roles in Canada's mission in Afghanistan, DFAIT and CSC remain critical sources of information relevant to this investigation.

Ultimately, the success of this public interest investigation process is dependent on the voluntary cooperation of government authorities. If the cooperation sought from such as DFAIT and CSC is not forthcoming, the Commission is very concerned that this will frustrate the completion of this investigation and that the Commission will, therefore, not be able to issue a report which fully addresses the serious allegations raised in this complaint.

While it is true that the Chair retains the legal option of calling public hearings under NDA section 250.38 and thereby gaining a power of subpoena, it must also be recognized that such a process would trigger the application of CEA sections 37 and 38 to all evidence in the proceedings, including to information provided by DND. There is, moreover, every reason to believe that CEA section 38 in particular would quickly become a core issue in the process, likely resulting in significant delay and the exhaustion of limited financial resources, and, at the end of the day, might well prevent the successful completion of this inquiry. The Chair, nonetheless, continues to reserve on this option.

Naturally, the Commission had hoped to be in a position to report greater progress at this point in time and regrets its inability to do so. The Commission will keep you apprised of further developments related to these matters regarding the status of this complaint. The Commission will also continue to pursue all fruitful avenues available in order to advance the investigation and resolution of this complaint.

Sincerely,



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