



March 12, 2008

Distribution List

Re: MPCC File # 2007-006 (Amnesty International Canada & BC Civil Liberties Association) – Notice pursuant to paragraph 250.4(1)(b) of the *National Defence Act* re Decision to cause a hearing

The Military Police Complaints Commission (the Commission) is a quasi-judicial body which has been established by Parliament to provide for greater public accountability by the Canadian Forces (CF) military police and the chain of command. While the Commission reports to Parliament through the Minister of National Defence, the Commission is independent of both the Department of National Defence (DND) and the CF. The Commission's mandate and authorities are established in Part IV of the *National Defence Act* (NDA).

Perhaps the most significant authority provided to the Commission under the legislation is the authority conferred by NDA subsection 250.38(1) to, "at any time the Chairperson considers it advisable in the public interest," initiate an investigation into a complaint and, "if warranted, to hold a hearing..." In the context of such a hearing, the Act gives the Commission powers similar to those of a public inquiry to compel the attendance and testimony of witnesses and to require the production of documents and other evidence.

Though encapsulated in a single legislative provision, these authorities – the authority to launch an investigation of a complaint in the public interest, and the authority to initiate a hearing process in relation to such an investigation – are in fact two distinct powers which are by law entirely within the discretion of the Chair of this Commission. Of course, such discretion must be exercised on a reasoned basis.

The first power under NDA subsection 250.38(1), to initiate a public interest complaint investigation was exercised by me shortly after this complaint was received just over a year ago. For the reasons that follow, I have now determined that it is necessary to exercise the second power under this provision and commence a hearing process in furtherance of this investigation.

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On February 21, 2007, the Commission received a written military police conduct complaint from Amnesty International Canada (AIC) and the British Columbia Civil Liberties Association (BCCLA) pursuant to section 250.18 of the *National Defence Act* (NDA). The complaint outlined allegations to the effect that the Canadian Forces Provost Marshal (CFPM) and other unidentified Canadian Forces (CF) military police members (MPs) had transferred, or allowed to be transferred, detainees in CF MP custody to various Afghan security forces (notably, the Afghan National Police (ANP) and the Afghan National Directorate of Security (NDS)), “notwithstanding abundant evidence from publicly available credible reports that the ANP and NDS routinely torture detainees.”¹ The complainants alleged knowledge or wilful blindness on the part of the implicated military police personnel with respect to information about the subsequent treatment, including torture of detainees by certain Afghan authorities.

On February 26, 2007, I issued notice of my decision pursuant to NDA section 250.38 to initiate an investigation by the Commission in the public interest.² In that decision notice, I stated my determination that, as the complainants’ allegations related to the conduct of MPs in the performance of a “policing duty or function” (namely, the “custody of persons”), the complainants’ letter constituted a valid conduct complaint under NDA section 250.18 and regulations made thereunder.³ I further noted a number of factors which contributed to my determination that it was in the public interest that the Commission immediately commence an investigation:

- the inherent seriousness of the allegations;
- media/community interest in the issues,
- the potential threat to public confidence in the military police;
- the fact that the head of the MP Branch of the CF, the CFPM, is specifically named as a subject of the complaint;
- the fact that the complaint indirectly called into question directives, orders and procedures developed or approved at very senior levels within the CF and the Department of National Defence (DND).

These factors also support the holding of a hearing in respect of this complaint. However, at the time this public interest investigation was commenced, I reserved my decision on the holding of a hearing in support of the investigation, but noted that this issue would be revisited as the investigation progressed. The Commission had been hopeful that the more efficient and economical vehicle of a public interest investigation, without a hearing, would allow the Commission to adequately probe the very serious allegations raised in this complaint.

¹ Letter of complaint of February 21, 2007 signed by Mr. Alex Neve, Secretary General AIC and Mr. Jason Gratl, President BCCLA, page 1.

² The usual process for the handling of conduct complaints in NDA Part IV calls for the disposition of the complaint by the CFPM in the first instance, but subject to a review by the Commission at the request of the complainant.

³ *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065, section 2.

In my opinion, this approach of reserving the option of a hearing process until it was clearly warranted was consistent with the Federal Court of Appeal's admonition that for bodies which are authorized to hold hearings on a discretionary basis (as is the Commission), this authority should only be used exceptionally, and that investigations, without hearings, should be the norm.⁴ It was also in keeping with the Commission's own legislation which requires that it "deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit."⁵

It was explicitly acknowledged in my earlier decision that in proceeding with a public interest investigation, without a hearing, the Commission was relying on the cooperation of relevant government authorities. The decision clearly stated that the mechanism of a hearing, with the concomitant power to compel evidence, would be utilized, *inter alia*, if required to obtain the necessary cooperation with the investigation. Unfortunately, that point has been reached and the Commission must now seek to compel relevant information from the Government which the latter has declined to provide voluntarily. Therefore, in light of the need to compel further cooperation with the Commission's investigation, as well as the factors noted above with respect to the nature of the complaint itself, I have determined that a hearing process in support of this investigation is warranted.

The developments which have led to this decision are outlined in the one-year status report on this complaint which was issued on February 20, 2008.⁶ The principal difficulty which has given rise to this decision has been the Government's refusal to provide the Commission with full access to relevant documents and information under the control of such as the Department of Foreign Affairs and International Trade (DFAIT) and the Correctional Service of Canada (CSC). Despite the Commission's repeated commitments to take appropriate steps to protect sensitive information, DFAIT and CSC have only offered access to documents and information which have been subject to significant redactions under the *Canada Evidence Act* in respect of proceedings in the Federal Court between the Government and the complainants.

Most recently, the Government has confirmed to the Commission the positions taken by DFAIT and CSC in refusing the Commission access to uncensored documents and information, and has given notice that this will extend to all other government sources.

As the Commission's recent status report on this complaint shows, this decision to call a hearing has not been taken lightly. As anyone with exposure to such processes can attest, a hearing will add significantly to the cost and duration of this investigation. However, given the relevance of documents and information under the control of DFAIT and CSC and the scope of the redactions applied to that material by the Government, the Commission must pursue this further effort to obtain full cooperation in order to permit a

⁴ *RCMP Public Complaints Commission v. Attorney General of Canada*, 2005 FCA 213, at paragraph 62.

⁵ NDA section 250.14.

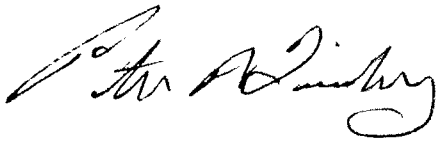
⁶ This report is available on the MPCC's website at: http://www.mpcc-cppm.gc.ca/300/Afghanistan/2008.02.21.2_e.pdf.

thorough investigation of the grave allegations raised in this complaint. 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.

While, as noted above, the addition of a hearing process to this investigation will inevitably increase substantially the funds and time needed to resolve this matter, the Commission will endeavour to minimize such expenditures and delay to the extent possible. Moreover, the Commission considers that the applicable legislation (NDA Part IV) is such that there is sufficient flexibility to allow the Commission, even in a hearing process, to protect legitimate security and other national interests.

Further notice to the affected parties as to the commencement of the hearing, and any matters preliminary thereto, will follow at the appropriate time.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Tinsley". The signature is fluid and cursive, with a large initial "P" and "T".

Peter A. Tinsley
Chair

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