



February 3, 2009

SENT BY MAIL AND EMAIL

Mr. Alain Préfontaine
Senior Counsel
Civil Litigation Section
Department of Justice
Bank of Canada Building
East Tower, Room 1109
234 Wellington Street
Ottawa, Ontario
K1A 0H8

**Re: Amnesty International Canada and British Columbia Civil Liberties Association
MPCC File #'s 2007-006, 2008-024 & 2008-042
Question re Stay of Proceedings**

Dear Mr. Préfontaine :

We acknowledge receipt of your letter received on January 29, 2009. In your letter you state that the Government of Canada is requesting a stay of the Commission's public interest hearings in MPCC 2007-006, 2008-024 and 2008-042 (the "Afghanistan Public Interest Hearings.") You further state that you will seek the stay from the Federal Court, rather than the Commission, because of what you state are "numerous indications you have received that the Chairperson of the Commission is not inclined to grant a stay."

It is unfortunate that you take this position, as the Chairperson of the Commission is fully prepared to receive and consider, with a fair, impartial and open mind, all submissions that you might wish to make regarding a stay of the Afghanistan Public Interest Hearings.

In his comments at the December 4, 2008 Procedural Overview, the Chairperson stated as follows:

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“I want to assure you that all participants in the process will be treated fairly, and with respect. These hearings are public interest hearings, addressing issues of public concern. But fairness will remain an overriding concern throughout the hearings.”¹

One of the fundamental requirements of procedural fairness at a hearing is the requirement for an impartial decision-maker. As the Chair has indicated, fairness will remain an overriding concern throughout the hearings. The Chair will carefully consider any submissions you wish to make with respect to whether or not a stay should be granted pending the Federal Court’s decision on your outstanding judicial review applications.

Indeed, at the Procedural Overview on December 4, the Chair specifically noted that: “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.”² As a result, having determined that the Commission had jurisdiction, and having received no stay application, he indicated his intent to proceed with the public interest hearings. At no time between December 4 and January 29 did you apply for a stay of proceedings to either Federal Court or to this Commission.

It is in light of this background that we respond to your January 29, 2009 letter.

In your letter you state that:

“The Commission has elected not to exercise its power to stay its own proceedings pending resolution by the Federal Court of the important question of jurisdiction raised in the applications for judicial review.”

You cite the Afghanistan Public Interest Hearings, Rules 8 and 38 as support for this statement, although it appears that you have misconstrued Rule 8.

In fact, Rule 8 provides that:

“At any time during a proceeding, the Complaints Commission may, in accordance with the *Federal Court Act*, refer any question of law, of jurisdiction or of practice and procedure to the Federal Court – Trial

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¹ Opening Remarks of the Chair, Peter Tinsley, Afghanistan Public Interest Hearings, Procedural Overview, held on Thursday, December 4, 2008 at p. 3, lines 14-20.

² Opening Remarks of the Chair, Peter Tinsley, Afghanistan Public Interest Hearings, Procedural Overview, held on Thursday, December 4, 2008 at p. 13, lines 7-11.

Division. The Complaints Commission may stay the proceeding in whole or in part until after the question is determined.”

Rule 8 is thus a power to make a reference to the Federal Court. We note that the issue of jurisdiction is already before the Federal Court, as the Attorney General of Canada has commenced two judicial review proceedings, in Court File Nos. T-581-08 and T-1685-08, raising this very issue before the Federal Court. As a result, any reference on the question of jurisdiction under Rule 8 would be duplicative of proceedings already commenced by the Attorney General of Canada.

However, we note that Rule 7 provides that:

“At any time during a proceeding, the Complaints Commission may determine any question with respect to jurisdiction or practice and procedure. The Complaints Commission may stay the proceeding in whole or in part until after the question is determined.”

In light of your letter, the Commission will determine the following question:

“Should the Afghanistan Public Interest Hearings be stayed by this Commission pending disposition by the Federal Court of the issues raised by the Government of Canada in the two judicial review applications brought by the Attorney General of Canada in Federal Court File Nos. T-581-08 and T-1685-08?”

The Commission invites you, as counsel for the Government of Canada or as counsel for the subjects whom you represent, or both, to make any further representations, submissions or provide any evidence on this question no later than February 10, 2009. In your letter of January 29, 2009 we note that your draft materials with the Federal Court are returnable February 10, 2009. If you cannot complete your representations and evidence by February 10, 2009 please contact me as soon as possible.

Submissions from the subjects and the complainants are to be provided by February 19, 2009. This will include any representations, submissions or evidence the subjects and the complainants may wish to file on the question.

The Government of Canada will be treated as if it were a moving party for the purposes of this question, and will thus be afforded the opportunity to reply by February 24.

In order to assist your consideration of the question, Commission counsel has identified a number of issues which you may wish to address:

1. What is the legal test to be applied to the decision by the Commission whether it should stay its proceedings pending the hearing and disposition of the judicial review applications?
2. In particular, is the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 the test to be applied to a decision to stay the Afghanistan Public Interest Hearings?
3. If so,
 - (a) Is there a serious question to be tried?
 - (b) Will there be irreparable harm if the stay is not granted, and if so, what is the nature of the harm? Is there evidence of actual harm that will occur if the stay is not granted?³ If so, what is this evidence? and,
 - (c) Does the balance of convenience weigh in favour of the granting of a stay of proceedings? What factors should be considered in the balance of convenience in this case?
4. If you do not accept that the test in *RJR-MacDonald Inc. v. Canada (Attorney-General)* applies to the determination to be made, then what alternative legal test do you propose and why?
5. The Commission is not a party to the Federal Court proceedings. The Commission has been provided with the Notice of Application in Federal Court File No. T-581-08 issued April 11, 2008 (“first Judicial Review Application”), the Affidavit of Lieutenant-Colonel Lander sworn May 9, 2008, and the Affidavit of Major Harvey sworn May 16, 2008.

The Commission has also been provided with the Notice of Application in Court File No. T-1685-08 issued on October 30, 2008 (“second Judicial Review Application”), and the Affidavits of Brenda Price, Dr. Yves Tremblay and Guylaine Fortin, all sworn December 15, 2008. All of these affidavits were filed by counsel for the Attorney General of Canada. There are a number of questions that the parties or the Government of Canada may wish to address, including:

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³ See on this point the decision of Chief Justice Richard, *In Re the Attorney General of Canada, Application Under Section 18.3(2) of the Federal Courts Act*, 2008 FCA 3 (CanLii), at paras. 22 and 25; see also *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 at para. 12.

- (a) What steps have the parties taken in the judicial review applications?
- (b) Has a schedule been set?
- (c) Are there motions which have been argued or scheduled?
- (d) Are there any decisions of a Federal Court Judge or Prothonotary relevant to the hearing of the applications?
- (e) When will the applications be argued?
- (f) Will they be argued together or separately?
- (g) What is the relevance, if any, of these issues to the stay of proceedings question?

If there are documents from the judicial review applications that are relevant to the stay question, please provide those documents to the Commission, the parties, and counsel to the Government of Canada.

6. The process for filing of the Commission's Rule 317 records in both judicial review applications has taken some time. We note the following:
 - (a) Amnesty International Canada and British Columbia Civil Liberties Association requested the Commission's Rule 317 Record for the first Judicial Review Application on June 27, 2008;
 - (b) By letter dated September 11, 2008, Commission counsel provided the Commission's Rule 317 Record in the first Judicial Review Application to the Attorney General of Canada for CEA section 38 scrutiny;
 - (c) Commission counsel received the Attorney General of Canada's response on September 26, 2008 and October 3, 2008, and subsequently provided the Rule 317 Record in the first Judicial Review Application to the National Security Group, Attorney General of Canada, for section 38 review on October 6, 2008;
 - (d) In response to Mr. Préfontaine's request made by letter dated October 23, 2008, the Commission made certain additions to the Rule 317 Record in the first Judicial Review Application and provided these additional materials to the National Security Group, Attorney General of Canada, for section 38 review on October 30, 2008;

- (e) Commission counsel wrote to the Federal Court on October 10, 2008 requesting permission to file public portions of the Rule 317 Record in the first Judicial Review Application and explaining the CEA section 38 issues in the record. Prothonotary Aronovitch of the Federal Court approved the filing by order dated October 27, 2008 and the public portions of the Rule 317 Record in the first Judicial Review Application were filed by the Commission with the Federal Court on October 30, 2008;
- (f) The National Security Group provided the Attorney General of Canada's section 38.03 decision in response to Commission counsel's two section 38.01 notices concerning the Rule 317 Record in the first Judicial Review Application on January 23, 2009;
- (g) On February 2, 2009 Commission counsel wrote to the parties to the first Federal Court Judicial Review Application requesting their consent to obtaining an extension of the time within which to file the redacted portions of the Rule 317 Record in the first Judicial Review Application without having to file a motion to that effect. Both Amnesty International/BCCLA and the Attorney General consented to this request by February 3, 2009;
- (h) The Attorney General requested the Commission's Rule 317 Record for the second Judicial Review Application on October 30, 2008;
- (i) Commission counsel provided the Commission's Rule 317 Record to the Attorney General of Canada for review of CEA section 38 and other public interest immunities and privileges in the second Judicial Review Application on November 20, 2008;
- (j) Counsel for the Attorney General of Canada has not yet provided a response on CEA section 38 and other public interest immunities and privileges with respect to the Rule 317 Record on the second Judicial Review Application;
- (k) The Commission's Rule 317 Record in the second Judicial Review cannot be filed until the Attorney General completes its review for CEA section 38 and other public interest immunities and privileges;

- (l) It is possible that after the initial response by the Attorney General on CEA section 38 and other public interest immunities and privileges, there may also be some time required for review by the National Security Group and potentially a decision by the Attorney General of Canada pursuant to CEA section 38.03 before the redacted Rule 317 Record can be filed in the second Judicial Review Application. This was the case with the Rule 317 Record in the first Judicial Review Application.

Issue: What is the effect, if any, of:

- (a) the delays in completing the Rule 317 Records process, and
 - (b) the potential redactions in the Rule 317 Record(s) on the basis of CEA section 38 or other public interest immunities or privileges,
- on the decision whether or not to grant a stay of proceedings of the Afghanistan Public Interest Hearings pending the Federal Court's disposition of the two judicial review applications?

Pursuant to Rule 38, the Chairperson has ordered that the Afghanistan Public Interest Hearings, scheduled to proceed on February 17, 2009, will be adjourned pending the disposition of the stay question. A copy of the Adjournment Order is attached hereto.

Please do not hesitate to contact me if you have any further questions or comments.

Yours truly,



Freya Kristjanson
Lead Counsel – Afghanistan Public Interest Hearings

Encl.: Adjournment Order

c.c.: Paul Champ, counsel to Amnesty International/B.C. Civil Liberties Association

William Carroll, counsel to Capt. (N) Moore

Vance Wirth, counsel to LCol William Garrick, MWO Barry Watson, MWO Jean-Yves Girard and Capt John Kirschner

Alain Préfontaine, counsel to Maj Jim Fraser, Maj Jeff Harvey, Maj Bernie Hudson, Maj Michael Zybala, and Maj Ron Gribble



ORDER FOR ADJOURNMENT

Afghanistan Public Interest Hearings pursuant to
Section 250.38(1) of the *National Defence Act*

MPCC 2007-006, MPCC 2008-024 & MPCC 2008-042

IN THE MATTER of conduct complaints under section 250.18 of the *National Defence Act* by Amnesty International Canada and the British Columbia Civil Liberties Association the Military Police Complaints Commission (the "Commission") issued a Notice of Hearing, pursuant to section 250.43(1) of the *National Defence Act*, on January 16, 2009 stating that a panel of the Commission would conduct Public Interest Hearings in accordance with the decisions of the Chair of the Commission dated March 12, 2008 and September 30, 2008 commencing on Tuesday the seventeenth day of February, 2009.

WHEREAS the Commission has received correspondence from counsel on behalf of the Government of Canada dated January 29, 2009 stating the intention to seek a stay of the Commission's Public Interest Hearings from the Federal Court pending determination of the Government's applications for judicial review to the Court challenging the Commission's jurisdiction in these matters, unless the Commission stays the hearings on its own initiative;

AND WHEREAS the Commission intends to consider this submission by the Government of Canada pursuant to Rule 7 of the *Rules of Procedure for Hearings before the Military Police Complaints Commission*, SOR/2002-241, and the *Afghanistan Public Interest Hearings Rules*, and, in so doing, to receive and consider the submissions of the parties;

IT IS HEREBY ORDERED THAT the February 17, 2009 commencement date for the Public Interest Hearings will be adjourned to a date to be determined pending a decision by the Commission on the question of whether to stay the Afghanistan Public Interest Hearings pending determination of the Attorney General of Canada's applications for judicial review by the Federal Court in Federal Court File Nos. T-581-08 and T-1685-08.

DATED at Ottawa, Ontario this 3rd day of February, 2009.

A handwritten signature in blue ink, appearing to read "Peter A. Tinsley".

Peter A. Tinsley
Chairperson



ORDONNANCE D'AJOURNEMENT

Audiences d'intérêt public sur l'Afghanistan tenues en vertu
du paragraphe 250.38(1) de la *Loi sur la défense nationale*

CPPM 2007-006, CPPM 2008-024 et CPPM 2008-042

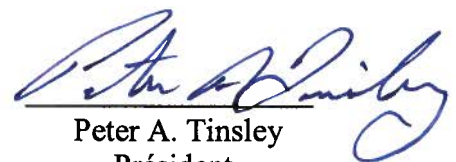
DANS L'AFFAIRE des plaintes pour inconduite déposées en vertu de l'article 250.18 de la *Loi sur la défense nationale* par Amnistie internationale Canada et l'Association des libertés civiles de la Colombie-Britannique, la Commission d'examen des plaintes concernant la police militaire (la Commission) a délivré, le 16 janvier 2009, un avis d'audience en application du paragraphe 250.43(1) de la *Loi sur la défense nationale* afin de préciser qu'un panel de la Commission tiendrait, à compter du mardi 17 février 2009, des audiences d'intérêt public conformément aux décisions du président de la Commission datées du 12 mars 2008 et du 30 septembre 2008.

ATTENDU QUE la Commission a reçu une correspondance en date du 29 janvier 2009 dans laquelle l'avocat représentant le gouvernement du Canada a annoncé son intention de solliciter une suspension des audiences d'intérêt public de la Commission auprès de la Cour fédérale jusqu'à ce que soient tranchées les demandes de contrôle judiciaire que le gouvernement a déposées auprès de la Cour afin de contester la compétence de la Commission sur ces questions, à moins que la Commission ne suspende les audiences de son propre chef ;

ATTENDU QUE la Commission a l'intention d'examiner cette demande du gouvernement du Canada conformément à l'article 7 des *Règles de procédure des audiences de la Commission d'examen des plaintes concernant la police militaire*, DORS/2002-241 et des *Règles de procédure des audiences d'intérêt public sur l'Afghanistan*, et, à cette fin, de recevoir et d'examiner les observations des parties ;

LA COMMISSION ORDONNE QUE la date fixée pour le début des audiences d'intérêt public, soit le 17 février 2009, soit reportée à une date qui sera déterminée après que la Commission aura décidé s'il y a lieu de suspendre les audiences d'intérêt public sur l'Afghanistan jusqu'à ce que la Cour fédérale tranche les demandes de contrôle judiciaire déposées par le procureur général du Canada dans les dossiers numéros T-581-08 et T-1685-08.

FAIT à Ottawa (Ontario), le 3 février 2009.



Peter A. Tinsley
Président