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Canada

Ministère de la Justice
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Our File Number: 2-368256-1

BY FAX/E-MAIL

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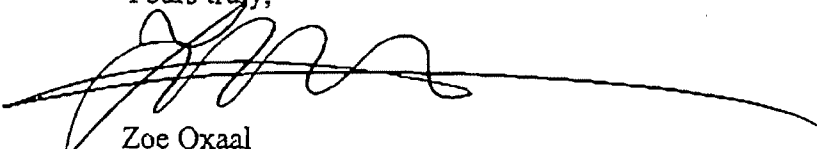
Freya Kristjanson
Military Police Complaints Commission
270 Albert Street, 10th Floor
Ottawa, ON K1P 5J8

Dear Counsel:

**Re: MPCC - Afghan detainees - application for judicial review [T-1685-08]
& [T-581-08]**

I enclose for your information a copy of the Applicant's Notice of Motion for a stay which was served on the Respondents on March 27, 2009 for your information.

Yours truly,



Zoe Oxaal
Counsel, Civil Litigation Section

ZO/kc
Enclosure

Canada

Court files T-581-08 and T-1685-08

FEDERAL COURT

BETWEEN:

Attorney General of Canada

Applicant

- and -

Amnesty International Canada, British Columbia Civil Liberties Association

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT Applicants will make a motion to the Court on April 2nd, 2009, at 9h30 or as soon thereafter as counsel may be heard, at 90 Sparks Street, Ottawa, Ontario.

THE MOTION IS FOR:

- (a) An order staying the hearings of the Military Police Complaints Commission (the 'Commission') into complaints MPCC 2007-006, MPCC 2008-024 and MPCC 2008-042 until the final determination of the applications for judicial review commenced by the Attorney General of Canada in Federal Court file numbers T-581-08 and T-1685-08.
- (b) Such other relief as counsel may advise and this Honourable Court may permit;
- (c) Without cost, unless opposed by the respondents.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Attorney General of Canada appears on behalf of the Government of Canada and eight of the ten subjects of the conducts complaints which give rise to the two applications for judicial review commenced by the Attorney General of Canada in Court files T-581-08 and T-1685-08.
- (b) The applications for judicial review raise a serious issue related to the nature and scope of the Military Police Complaints Commission's mandate.
- (c) If the Commission's public hearings go ahead in advance of the Court determining the jurisdictional question, the ten subjects of the conduct complaints and the Government of Canada will suffer irreparable harm.
- i) The hearings will put the reputation of the subjects of the complaints at risk, both professionally and within the community. By definition, a subject is a member of the military police against whom a conduct complaint has been laid. Should the Commission, not complete the hearings before the Court rules that it had no jurisdiction to undertake them, the reputation of those subjects will be jeopardized by unresolved allegations of wrongdoing. If the Commission concludes its hearings and renders its report, the judicial review will be rendered largely moot.
 - ii) Calling hearings to lead evidence in public without first establishing that the Commission truly has jurisdiction to hold the hearings creates an unacceptable risk of inadvertent disclosure of sensitive and potentially injurious information protected by s. 38 of the *Canada Evidence Act* ('national security information'). The Government cooperated with the Commission by disclosing, during a prior phase

of the investigation, vast amounts of information, including national security information. The hearings create an unacceptable potential for inadvertent or uninformed disclosure of national security information, either by the members of the Commission, Commission counsel or by the witnesses.

iii) If the Commission proceeds with its public hearings in advance of the Court's determination of the jurisdictional question, irreparable harm will further be suffered by the Government of Canada as a result of the unnecessary expenditure, without any hope of compensation, of time, effort and resources for purposes that the Court may conclude are not authorized by Parliament. Further, the conduct of the hearings before the Commission will require military personnel to devote their time and energy to the hearings rather than to the performance of their primary functions.

(d) The balance of convenience favours an interim stay of the Commission's proceedings until the Court determines the fundamental issue of the Commission's jurisdiction.

i) The Commission cannot accomplish much through its hearings until the Court resolves the fundamental issue of jurisdiction. As the Commission recognizes, the hearings will necessarily raise national security information. Pursuant to section 38 of the *Canada Evidence Act*, only the Attorney General of Canada and the Federal Court have the power to authorize its disclosure. The relevance of the information sought to the issues informs two of the three steps of the test applied by both of those authorities in deciding whether to

authorize the disclosure of such information. Information cannot be relevant unless it relates to a lawful exercise of the Commission's mandate. It follows therefore that little can be accomplished by the Commission in public hearings until the fundamental issue of jurisdiction and the scope of the Commission's mandate has been resolved by the Federal Court.

- ii) A stay will also prevent the imposition of an unnecessary burden on this Court. Given the Commission's stated objective in holding the public hearings to compel disclosure of national security information, the Court will doubtless be seized with a number of applications pursuant to section 38 of the *Canada Evidence Act*. Before it can rule on those applications, the Court will need to determine whether the information in issue is relevant to the properly framed public hearings of the Commission and if so, to what extent. A ruling by the Court on the jurisdiction of the Commission will ensure the efficient use of judicial resources and reduce the likelihood of multiple s. 38 proceedings.
- iii) Even if decided in favour of the Commission, a decision by the Federal Court on the nature and scope of the Commission's jurisdiction in the context of these complaints will provide useful direction in establishing which information is relevant to the determination of the complaints. Staying the hearings in the interim will prevent a duplication of effort and will contribute to the efficient conduct of the proceedings in the event that they are held to be within the Commission's jurisdiction.

iv) A stay will not prejudice the complainants. Their complaints can legitimately relate only to the conduct of the ten members of the military police the Commission has designated as subjects to those complaints. By definition, those conduct complaints do not permit a collateral attack on the legality of the transfer of detainees to Afghan authorities. Further, the arrangements that were in place between the Government of Canada and Islamic Republic of Afghanistan with respect to the transfer of detainees have been supplemented since the time that the complainants' first complaint was filed. The supplementary arrangement enhances the December 2005 arrangement to make explicit Canada's expectations and Afghanistan's responsibilities to protect against the risk of mistreatment of detainees that are transferred by the Canadian Forces to the Afghan authorities. The situation on the ground may continue to change. None of these changes affect the complainants' ability to pursue their complaints once the Commission's jurisdiction has been clarified.

(e) *The Federal Courts Act*, R.S.C. 1985, c. F-6, s. 18.2

(f) *The National Defence Act*, R.S.C. 1985, c. N-5, s. 250.14, 250.18(1), 250.38(1), 250.39, 250.44, 250.48, 250.49(2), 250.51, and 250.53(2).

(g) *The Complaints about the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065.

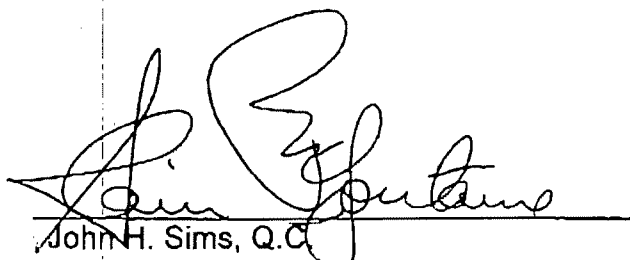
(h) *The Rules of Procedure for Hearings before the Military Police Complaints Commission*, SOR/2002-241, rules 7, 24, 29, 38 and 39.

(i) The *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38 to s. 38.16.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The file of the Court in matters T-581-08 and T 1685-08;
2. The affidavits of Major Jeffrey Harvey sworn May 16, 2008 and March 27, 2009;
3. The affidavit of Guylaine Fortin sworn December 15, 2008;
4. The affidavit of Brenda Price affirmed December 15, 2008;
5. The affidavit of Brigadier-General David Fraser sworn January 31, 2009;
6. The affidavit of Karen Candline sworn March 27, 2009;
7. Such other material as counsel may advise and this Honourable Court may permit.

Ottawa, 27th day of March 2009.



John H. Sims, Q.C.

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