

FEDERAL COURT OF CANADA

B E T W E E N:

ATTORNEY GENERAL OF CANADA

Applicant

– and –

**AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Respondents

NOTICE OF MOTION

(Motion for Leave to Intervene by the Military Police Complaints Commission)

TAKE NOTICE THAT the Military Police Complaints Commission (the “Commission”) will make a motion to the Court under Rules 109 and 359 of the *Federal Courts Rules*. The motion will be heard on April 9, 2009, at 90 Sparks Street, Ottawa, Ontario.

THE MOTION IS FOR:

1. An Order pursuant to Rule 109 of the *Federal Courts Rules* granting leave to the Commission to intervene in the Attorney General of Canada’s motion for a stay of the Commission’s Afghanistan Public Interest Hearings on the following terms:
 - (a) that the Commission may make oral submissions at the hearing on the question of whether the Court should exercise its discretion to dismiss the Attorney General’s

stay motion on the basis of the interrelated doctrines of issue estoppel, collateral attack and abuse of process,

- (b) that the Commission may file one set of materials for use in both Court File Numbers T-581-08 and T-1685-08, and
- (c) that the Commission neither seek nor be liable for costs.

2. Such further or other order that this Court may deem appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. The legislative mandate of the Military Police Complaints Commission is found in Part IV of the *National Defence Act*. The Commission was established as a quasi-judicial, independent civilian agency to examine complaints arising from either the conduct of military police members in the exercise of policing duties or functions, or from interference in or obstruction of their police investigations.
2. In its motion, the Attorney General seeks an order staying the Commission's hearings into complaints filed by the Respondents. The hearings are scheduled to proceed on May 25, 2009.
3. The Commission has already ruled on the issue of whether the Commission's hearings should be stayed pending disposition of the Attorney General's judicial review applications, in a decision dated March 26, 2009. The stay decision was made following the request of the Attorney General that the Commission stay its proceedings. The Commission posed a legal question on whether the Commission should stay its proceedings, gave notice to the parties, and sought submissions from the parties, including the Attorney General. The Attorney General did not make submissions on the stay question, instead taking the position that the Commission lacked jurisdiction to decide whether to stay its own proceedings. The Attorney General has not sought to judicially review the March 26, 2009 decision of the Chairperson of the Commission in

which the Chairperson declined to stay the Commission's hearings pending determination of the judicial review applications.

4. The Commission takes no position on the merits of this stay motion. The Commission's proposed submissions address the Court's exercise of discretion to dismiss this motion on the basis of the interrelated doctrines of issue estoppel, collateral attack and abuse of process. Notwithstanding the fact that the Commission has already ruled on the stay issue, the Attorney General seeks to relitigate this issue before this Court. If the Attorney General wishes to challenge the Commission's stay decision, the appropriate recourse would be to bring an application for judicial review of the Commission's decision.
5. The Commission has a direct and significant interest in the outcome of the Attorney General's stay motion. The Commission has an overriding interest in preserving the integrity of its processes. If the Attorney General's stay motion is allowed to proceed, it would permit parties to disregard an administrative tribunal's processes and to circumvent established administrative law recourses by seeking to relitigate matters before the courts. It creates duplication, wastes both tribunal and Court resources, undermines the principle of finality, and the authority of tribunal processes.
6. The Commission's proposed submissions will be distinct, would not otherwise be put before the Court, and will be of assistance to the Court in determining the issues before it. None of the parties has the same institutional interest as the MPCC in maintaining the integrity of its processes.
7. The timing of the Commission's intervention will not cause prejudice to the parties. The Commission's intervention is focussed solely on one issue, which is of importance to the administration of justice. In addition, the Commission is prepared to proceed with oral submissions on the hearing date originally scheduled by the Attorney General. Furthermore, the hearing date for the Attorney General's stay motion has now been moved to April 21, 2009, leaving ample time to both sides to adjust to the Commission's proposed intervention.

8. The interests of justice would be served by the Commission's intervention as the issue that the Commission proposes to raise strikes at the heart of the rule of law and the administration of justice.
9. There is a lengthy background to the matters in issue. The Respondents to this motion filed complaints with the Commission, (1) that members of the Canadian Forces military police transferred detainees to Afghan authorities notwithstanding alleged evidence that there was a likelihood that the detainees would be tortured, and (2) that members of the military police failed to investigate alleged crimes in connection with the transfers. The Commission determined that it would proceed to public interest hearings into the complaints.
10. The Attorney General of Canada has commenced two judicial review applications in Court File Numbers T-581-08 and T-1685-08, seeking to prohibit the Commission from proceeding with the hearings on the grounds that the Commission lacks jurisdiction over the complaints. No date has yet been set for argument on the two judicial review applications.
11. On January 16, 2009 the Commission issued a Notice of Hearing indicating that hearings into the two complaints would commence on February 17, 2009.
12. By letter dated January 29, 2009, the Attorney General of Canada wrote to the Commission stating that it would seek a stay of proceedings in Federal Court unless the Commission stayed its public hearings pending the final disposition of the Attorney General's judicial review applications in respect of this matter.
13. The Commission issued an order adjourning the hearings, for the purpose of considering whether the Commission's hearings should be stayed pending the disposition of the judicial review applications

14. The Commission stated a legal question pursuant to Rule 7 of the Commission's *Rules of Procedure for Hearings Before the Military Police Complaints Commission*, SOR/2002-241, as follows:

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?

15. On February 3, 2009, the Commission sought submissions from the parties on the question of whether the Commission should stay the Afghanistan Public Interest Hearings pending disposition of the Attorney General's judicial review applications. The Commission's counsel invited the parties to make representations and to provide any evidence on this question.
16. The Attorney General of Canada took the position that the Commission lacked jurisdiction to consider the stay question. Instead, the Attorney General submitted that the Commission should adjourn its proceedings pending the disposition of the judicial review applications. The Attorney General did not submit any evidence in support of its submissions. The Attorney General of Canada made submissions on its own behalf and on behalf of eight subjects of the complaints. Counsel for the other two subjects made no submissions on the stay of proceedings question posed by the Commission, although counsel for one subject adopted the adjournment submissions of the Attorney General.
17. The respondents to this motion, Amnesty International and the British Columbia Civil Liberties Association, made no submissions on the stay question, and submitted that the Commission should decline to adjourn its scheduled hearings.
18. By letter dated March 3, 2009 the Commission's Lead Counsel sought submissions from the parties on the relevance, if any, of a number of cases to the Rule 7 stay question and adjournment request.

19. After considering the parties' submissions, by decision dated March 26, 2009, the Chairperson of the Commission declined to stay or to adjourn the hearings pending the disposition of the Attorney General's judicial review applications.
20. The Attorney General of Canada did not seek judicial review of the Commission's decision.
21. By Notice of Motion dated March 27, 2009, the Attorney General provided notice that it will make a motion directly to the Federal Court to stay the Commission's Afghanistan Public Interest Hearings.
22. Rules 109 and 359 of the *Federal Courts Rules*; and
23. Such further and other grounds as Counsel may submit and this Honourable Court permit.

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

1. The Affidavit of Raymonde Cleroux sworn April 7, 2009; and
2. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Dated: April 7, 2009

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Commission

FEDERAL COURT

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ATTORNEY GENERAL OF CANADA

(Applicant)

- and -

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