Federal Court  Cour fédérale

Date: 20110929

Docket: T-846-10

Citation: 2011 FC 1099

Ottawa, Ontario, September 29, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LIEUTENANT COLONEL (RET'D) W.H. GARRICK, MAJOR J.P.P. KIRSCHNER, MAJOR B. HUDSON, MAJOR J.T.M. ZYBALA, MAJOR R.R. GRIBBLE, CHIEF WARRANT OFFICER B. WATSON, MASTER WARRANT OFFICER (RET'D) J.Y. GIRARD, BRIGADIER-GENERAL J.A.V.R. BLANCHETTE AND THE ATTORNEY GENERAL OF CANADA

Applicants

and

AMNESTY INTERNATIONAL CANADA AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Respondents

and

THE MILITARY POLICE COMPLAINTS COMMISSION

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants have filed three applications for judicial review that were consolidated into this proceeding, challenging interlocutory decisions of the Military Police Complaints Commission (the "Commission" or "MPCC") made in the course of a public interest hearing held under Part IV of the *National Defence Act*, RSC 1985, c N-5 (the "Act"); partially reproduced in the Appendix to these Reasons. The hearing is to examine a complaint made by the Respondents on June 12, 2008, alleging that Military Police members had failed in their duty to investigate potential wrongdoing by Canadian Forces officers who directed the transfer of detainees to Afghan authorities.

[2] The application in file number T-846-10 challenges the summons issued *proprio motu* by the MPCC to Major Gagnon, subsequently replaced by Brigadier-General Blanchette, directing them to produce a number of documents. The second judicial review application, filed under Court file number T-1126-10, alleges a refusal by the Commission to hear a motion made by the Applicants at the early stage of the hearings seeking a ruling on the standard against which their professional conduct will be assessed. The third application, filed under Court file number T-2110-10, contests the ruling eventually made by the Commission on that standard.

[3] These applications raise important issues with respect to the jurisdiction of the MPCC and the role of this Court in overseeing investigative bodies, and commissions of inquiries in particular. For the reasons that follow, I find that these applications are premature and, for that reason, ought to be dismissed.

1. Background

[4] The MPCC is an investigative body established pursuant to Part IV of the Act to provide oversight and greater accountability on the part of the Canadian Forces' Military Police. Parliament vested it with the power and responsibility to examine complaints about the conduct of Military Police members in the exercise of their policing duties and functions (s 250.18(1) of the Act). To carry out this mandate, the Chair of the Commission has the power to investigate complaints, convene public hearings, render findings and make recommendations based on those findings. The MPCC reports to Parliament through the Minister of National Defence, but in the discharge of its functions, the MPCC is independent from both the Department of National Defence ("DND") and the Canadian Forces.

[5] There is no need to expand on Canada's role in Afghanistan, or on the role of the Military Police both as custodian of Afghan prisoners and as an investigative unit. This has been covered extensively by Justices Mactavish and Harrington in previous Federal Court decisions, to which I shall refer below.

[6] Amnesty International and the British Columbia Civil Liberties Association (to whom I shall refer collectively as "Amnesty") have, through various proceedings beginning in 2007, challenged matters affecting the issue of the transfer of detainees by Canada to Afghan authorities. Amnesty first called into question the legality of the policy of the Government of Canada to transfer to Afghan authorities, the detainees captured by the Canadian Forces operating in Afghanistan. Amnesty pursued this unsuccessful challenge all the way to the Supreme Court of Canada: see *Amnesty International Canada v Canada (National Defence)*, 2007 FC 1147, [2007] FCJ no 1460

(QL) (FC); *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FC 162, [2008] FCJ no 198 (QL) (FC) [*Amnesty – Canadian Forces*]; *Amnesty International Canada v Canada (Attorney General)*, 2008 FC 336, [2008] FCJ no 356 (QL) (FC), aff'd by 2008 FCA 401, [2008] FCJ no 1700 (QL) (FCA), leave to appeal refused, SCC no. 22029, 21 May 2009 [*Canada – Amnesty International*]. It is now settled law that the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "Charter"), does not apply to the detention of non-Canadians by the Canadian Forces or to their transfer to the Afghan authorities.

[7] Amnesty also disputed the legality of the implementation of this policy by filing two conduct complaints with the Commission. The first complaint ("the detainee complaint") related to the involvement of the Military Police in the actual transfer of detainees to Afghan authorities and was filed on February 21, 2007. On February 26, 2007, the Commission decided to initiate an investigation of that complaint in the public interest, and on March 12, 2008, the Commission announced its intention to hold a public interest hearing into that complaint.

[8] On June 12, 2008, the Respondents filed a second conduct complaint ("the failure to investigate complaint"), seeking an extension of the timeframe of its first complaint and, as a distinct issue, alleging that Military Police members had failed in their duty to investigate potential wrongdoing by Canadian Forces officers who directed the transfer of detainees to Afghan authorities. The complaint was based on information obtained in the previous Court application to halt the transfers on *Charter* grounds, to which Madam Justice Mactavish refers in her decision to

dismiss an application for an interlocutory injunction filed by Amnesty: see *Amnesty – Canadian Forces*, above, at paras 85-87. The substance of this complaint reads as follows:

> Amnesty International Canada and the B.C. Civil Liberties Association hereby file a new, discrete conduct complaint pursuant to section 250.18 of the *National Defence Act*, concerning the failure of certain members of the Military Police to investigate crimes or potential crimes committed by senior officers in command of Task Force Afghanistan, from May 3, 2007 to the present [which is when Canada signed a new detainee agreement with Afghanistan that permitted Canadian officials to visit and inspect detainees in Afghan custody].
>
> Specifically, members of the National Investigation Service (NIS) in Kandahar and the Task Force Provost Marshall (TFPM) have been aware that former Canadian Forces (CF) detainees were likely tortured by Afghan authorities, yet they failed to investigate whether any members of the CF should be charged for their role in facilitating these crimes. In particular, senior officers occupying the position of Commander of Task Force Afghanistan ordered the transfer of detainees to the custody of the Afghan secret police during the relevant period, despite compelling first-hand reports that previous CF detainees were tortured by those authorities.
>
> In our submission, when officers in the chain of command order a detainee to be transferred to the custody of Afghan authorities, in full knowledge that the Afghan authorities are predisposed to torture these persons, a number of possible criminal offences warrant investigation…
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> June 12, 2008 Complaint, Respondents' Record, vol. II, pp. 245-251.

[9] It is worth noting that on or about November 6, 2007 the acting Commander of Task Force Afghanistan issued a temporary moratorium on detainee transfers. This followed a report by a Canadian official who interviewed a detainee held by the Afghan secret police on November 5, 2007, in which the detainee alleged that he was knocked unconscious during a first interrogation and was then beaten with electrical wires and rubber hose during a second one.

[10] Given the seriousness of the subject matter, the complexity of the legal and factual issues involved, and the public interest in the issues, the MPCC decided on September 30, 2008 to conduct a public interest hearing into the failure to investigate complaints under Part IV of the Act.

[11] Lieutenant Colonel (ret'd) W.H. Garrick, Major J.P.P. Kirschner, Major B. Hudson, Major J.T.M. Zybala, Major R.R. Gribble, Chief Warrant Officer B. Watson and Master Warrant Officer (ret'd) J.Y. Girard are seven of the eight subjects later named by the Commission for the failure to investigate complaint. Brigadier-General Blanchette is a witness summonsed by the Commission, *ex proprio motu*, to produce documents in the control of DND and the Canadian Forces.

[12] The Attorney General challenged the MPCC's jurisdiction to inquire into the Respondents' 2007 and 2008 complaints. The applications for judicial review were heard together and, on September 16, 2009, the Court issued a judgment quashing the Respondents' first complaint: see *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 918, [2010] 4 FCR 182. According to Justice Harrington, the handling of detainees was not a policing function *per se*, and therefore the MPCC could not examine the duties of the Military Police in that regard. However, he upheld the jurisdiction of the MPCC to inquire into the failure to investigate complaint. The gist of his decision is captured in the following two paragraphs:

> [12] Although the Attorney General's position may be somewhat overstated, and although the detention of insurgents in Afghanistan and their subsequent release to the Afghan authorities may possibly be described as policing duties or functions which were performed by members of the Military Police in Afghanistan as pertaining to the arrest or custody of persons, those duties or functions, policing or not, relate to military operations that resulted from established military custom or practice and, therefore, are beyond the jurisdiction of the Commission.

> [13] With respect to the second complaint, the failure to investigate complaint, I am satisfied that this is a policing duty or function in that the conduct of an investigation within the meaning of the Regulations includes a failure to investigate. However, as the *National Defence Act* makes clear, the Commission is limited to considering the conduct of members of the Military Police in the performance of their policing duties or functions. It has no jurisdiction to inquire into the conduct of the military at large, much less the conduct of persons who are not members of the military. Thus, while the Commission may legitimately inquire as to what any member of the Military Police knew, or had the means of knowing, it would be an excess of jurisdiction to investigate government policy and to inquire as to the state of knowledge of the Government of Canada at large, and more particularly the Department of Foreign Affairs and International Trade (DFAIT), and to the extent, if any, it had relevant information to question why that information was not shared with the Military Police.

[13] While acknowledging the jurisdiction of the Commission with respect to the second complaint, the Court cautioned that it could not use this complaint as a "springboard" into investigating government policies or practices:

> [62] On this second complaint, I reemphasize that the jurisdiction of the Commission is to investigate complaints about members of the Military Police in carrying out their policing functions. The Commission does not have jurisdiction to investigate complaints about government officials whether or not they are carrying out policing functions. If one were to take the Commission's approach to the extreme, there would be no question of Military Police misconduct in Afghanistan if Canadian Forces were not there. The whys and wherefores of that policy decision are beyond the reach of the Commission and of this Court…

[14] As a result, the Court quashed the decisions of the MPCC to investigate the detainee transfer complaint. With respect to the failure to investigate complaint, the Court declared that "…the Military Police Complaints Commission may only investigate what the Military Police subjects of the complaint knew, or had the means of knowing". It is in the context of the hearing of this failure to investigate complaint that the impugned decisions were made by the MPCC.

2. The impugned decisions

a) The summons (Application T-846-10)

[15] Throughout the public interest hearings before the MPCC, it is fair to say that many issues and concerns have arisen in connection with the scope, pace and completeness of document production by the government in response to Commission summons, and in response to requests for documents identified by witnesses during their testimony. These issues of document production have caused significant delays to the MPCC hearing of the complaint, and have raised concerns as to how documents were being vetted and selected by the government for disclosure to the Commission.

[16] As previously mentioned, the Commission began to conduct a public interest investigation into the initial complaint in February 2007, and until March 2008, DND apparently provided documents without censoring or redacting them for national security purposes. However, the production of documents stopped when the Commission announced that it would hold a public interest hearing in March 2008. When the hearings commenced on the two complaints in the spring of 2009, an adjournment had to be called after two weeks because the Commission had yet to receive any disclosure from the subjects or the Attorney General. The government took the position that the Commission was not allowed to receive un-redacted documents once it decided to convene public hearings, by virtue of section 38 of the *Canada Evidence Act*, RSC 1985, c C-5. It explained the delay in providing documents on the grounds that those documents needed to be reviewed and redacted in accordance with that legislative provision. It appears that the government took the

position that no disclosure would be made until all documents requested by the Commission had been reviewed and redacted.

[17] Concerned that the requested documents would not be produced voluntarily, the MPCC sought to compel production through the issuance of summons in July 2009 to senior officials in the Canadian Forces (Brigadier-General Blanchette) and the Department of Foreign Affairs and International Trade Canada ("DFAIT") (Deputy Minister Edwards). Despite government counsel's written assurances that outstanding document requests would be provided shortly, no further documents had been produced when the Commission reconvened shortly after the issuance of the judgment of Justice Harrington in October 2009. Counsel for the Commission also explained that some government officials were prevented from producing documents by the Attorney General. Captain Moore, the former Canadian Forces Provost Marshal, was provided with documents to assist him in preparing for his case. He was however required to sign an undertaking that specifically prohibited him from providing them to the Commission. Similarly, Mr. Colvin, a DFAIT official, indicated that he would attend a pre-hearing interview and would provide the Commission with documents pursuant to the summons served on him. However, he was prevented from doing so because he was issued a notice under section 38 of the *Canada Evidence Act* over the entirety of the information that he may have to provide: see MPCC transcripts, October 7, 2009, in Respondents' Record, vol. II, at pp 263-264 and 266-268.

[18] A five-month adjournment ensued to give the government more time to produce documents. To push the process along, the MPCC issued new summons on October 26, 2009 to Deputy Minister Edwards and on October 21, 2009 to Brigadier-General Blanchette (Applicants' Record,

vol. I, pp 38 and 46). In keeping with the guidance of Justice Harrington, the summons often referred to categories of documents either directly communicated to Military Police members "or that were otherwise available to the military police chain of command and/or technical chain". The MPCC also issued a direction on December 10, 2009 that required parties to produce all other relevant and necessary documents by February 19, 2010 (Respondents' Record, vol. II, p. 402).

[19] When the hearings resumed on March 22, 2010 many documents had been disclosed but many more remained outstanding. The hearings proceeded on the basis that the Attorney General would produce documents as quickly as possible. On April 1, 2010 the Respondents obtained documents through a request under the *Access to Information Act*, RSC. 1985, c A-1 consisting largely of communications between Canadian Forces officers in Kandahar and civilian officials in Ottawa concerning the decision to suspend transfers on November 6, 2007.

[20] The Commission counsel reviewed the documents and wrote to counsel for the Attorney General on April 8, 2010. Commission counsel was of the view that the documents collected in response to the Access to Information request would also be relevant to the subject matter of the Commission's inquiries, and found it "inconceivable" that these documents, many of which were addressed or copied to individuals who are summonsed as witnesses, could have been considered irrelevant to the matters under inquiry.

[21] The Department of Justice and the MPCC exchanged further letters on this issue. In a letter dated April 9, 2010, counsel for the Attorney General indicated that the documents were not produced "because they were not communicated to any military police members, including the

subjects of the complaint and there is no evidence that they were otherwise available to them" (Applicants' Record, vol. I, p. 73). In other words, the Attorney General takes the position that it is the government's prerogative to determine whether the documents were shared with Military Police members or were "within their means of knowing". In response, MPCC counsel strongly disagreed with that position and wrote: "We believe it is the Commission's mandate to determine whether or not there is evidence that documents were communicated to, or available to, Military Police members. This cannot be determined by government officials looking at the face of the documents and deciding not to produce them" (Applicants' Record, vol. I, p. 82). This is clearly the nub of the dispute between the Attorney General and the Commission.

[22] There were further tense exchanges of oral and written communication between counsel on this issue. Deputy Minister Edwards and Brigadier-General Blanchette were then ordered to appear before the Commission to explain how they were determining which documents should or should not be produced to the Commission (MPCC Transcripts, April 21, 2010, Respondents' Record, vol. II, pp. 788-790).

[23] Brigadier-General Blanchette appeared before the MPCC with Major Denis Gagnon on April 27, 2010. The military officers testified jointly about the Canadian Forces' work in gathering and disclosing documents. They were questioned at length about the following issues:

a) The means by which the government made determinations regarding the responsiveness of documents to the Commission's summons;

b) Whether written or oral guidelines had been provided to the departments as to a document's responsiveness to a summons;

c) Staffing issues;

d) The structure of the teams dealing with matters related to detainee hearings and information;

e) The preparation of witnesses for testimony before the Commission;

f) The procedure for producing documents subject to a notice under section 38 of the *Canada Evidence Act*;

g) Whether instructions had been given to witnesses to deliberately slow the production of documents to the Commission;

h) The storage of documents in Afghanistan and their repatriation;

i) Whether DFAIT site visit reports would have been publicly released if not summonsed by the Commission; and

j) Whether the subject of the reappointment of the former Chair of the Commission had been discussed at the Deputy Ministerial meetings on Afghanistan.

[24] Brigadier-General Blanchette and Major Gagnon testified that documents were first screened out when they were deemed not to be responsive to the summons. This was determined by examining who it was addressed to, the content of the document, and whether the MPs knew or should have known about the content of those documents (MPCC Transcripts, April 27, 2010, pp. 46-47 and 52; Applicants' Record, vol. I, pp. 244-245 and 250). Once a document has been deemed relevant and responsive to the summons, it is then reviewed for any potential section 38 claims.

[25] On April 29, 2010, the MPCC served a new summons upon Major Gagnon, requiring him to produce several new categories of documents. On August 25, 2010, the Commission released

Major Gagnon from his summons and issued an identical summons to Brigadier-General Blanchette. These summons were not requested by the Respondents. Rather, they were issued by the MPCC *ex proprio motu*, pursuant to the granting of authority under section 250.41(1)(a) of the Act, apparently because it considered it necessary for its full investigation and consideration of the matters before it.

[26] These summons required the production of 16 categories of documents, which can be grouped into five different classes:

a) Documents related to the response of DND and of the Canadian Forces to a previous summons (items 1 to 6 and 8);

b) Documents not produced to the Commission as being non-responsive to the summons (items 7 and 9);

c) Documents recording the factors considered by the Commander of the Joint Task Force Afghanistan ("JTFA") in deciding to transfer a detainee to Afghan authorities (items 10-12);

d) A list of any witness met by DND officials in connection with the hearing (item 13); and

e) Three uncontroversial items, since produced.

[27] The Attorney General of Canada challenged these summons by way of judicial review. On May 28, 2010, the application bearing file number T-846-10 was issued. The Applicants seek to have the summons set aside and other declaratory relief on the basis that the Commission has exceeded its jurisdiction.

b) The "means of knowing" (Application T-1126-10)

[28] Shortly after the Federal Court's ruling on September 16, 2009, the Applicants brought two motions to the Commission for a determination on how the Commission would interpret the Court's expression, "means of knowing". Relying on the right to make full answer and defence to the allegations of misconduct brought against them, as guaranteed by section 250.44(a) of the Act, they essentially argued that they were entitled to know the standard by which their actions would be assessed, in advance of evidence being called. Delaying this determination to a later point, they submitted, effectively brings to naught the right of the subjects to understand the case that they have to meet of any meaning or substance, to decide what evidence they need to lead, to determine which testimony they should challenge by cross-examination, and why.

[29] The MPCC adjourned the motion, along with other procedural issues, until the hearing reconvened. The Applicants filed written submissions with the Commission on March 22, 2010, and the "means of knowing" motion was argued on March 24, 2010. It is interesting to note that in his written submissions, counsel for the Applicants took the position (relying on Justice Harrington's decision on the legal environment of investigations and on previous judicial consideration of "means of knowing") that this concept is "…limited to that information which might have been gleaned by any inquiries made by a reasonable Military Police officer in like circumstances, without recourse to the investigative and enforcement powers bestowed by law on peace officers": Respondents' Record, vol. II, p. 404 at para 2.

[30] In oral submissions, the Applicants' counsel expanded on this interpretation and further clarified his clients' understanding about the "means of knowing" concept in the following terms:

> The only thing that is relevant to the review of the conduct of the subjects is what these other actors shared with them by way of information, or the information that they would have shared if they had been asked. I think that's a fair construction of the word "means of knowing".
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> Respondents' Record, vol. II, p. 492-493.

[31] The Respondents largely agreed with the Applicants' definition of the "means of knowing", although they would have expanded it to encompass information in the public domain, information available to the subjects by virtue of their station and rank, and information that the subjects should have known by virtue of their duties. Instead they took the position that it was premature for the Commission to rule on that matter. They suggested that the Commission may, at times, hear evidence that did not necessarily fall within the strict definition of "means of knowing", as this may sometimes be necessary to understand the context of the interactions between certain actors. Finally, the Respondents submitted that there are other means at the disposal of the Commission to provide procedural fairness to the subjects as the case goes on; for example issuing updated notices of adverse findings as the hearings progress.

[32] The Commission issued two separate decisions on the Applicants' motion on April 1, 2010. The Commission concluded in its "means of knowing" decision that it was not advisable to issue a ruling at that early stage, stating that such determinations would be "inherently factual and contextual, and must not be ruled on in a factual vacuum" (Applicants' Record, vol. I, p. 61 at para 12), particularly in light of submissions that factors such as security clearances and need to know principles might affect what Military Police had the means of knowing (*Ibid* at para 15). The

Commission similarly found in its "standard of conduct" ruling that it would be inadvisable to try to set out a conclusive standard by which the subject Military Police members' conduct will ultimately be judged (Respondents' Record, vol. I, pp. 123-130). The MPCC did reiterate the significance of the "reasonable police officer" standard, as found in *Hill v Hamilton-Wentworth Regional Police*, 2007 SCC 41, [2007] 3 SCR 129, and affirmed that it would be relevant to whether the Military Police had the means of knowing certain information (Applicants' Record, vol. I, p. 61 at para 14).

[33] The Applicants did not seek judicial review of either of the MPCC's April 1, 2010 decisions, and the MPCC thereafter proceeded to receive the testimony of 20 non-subject witnesses. During the course of their examination, the Commission explored wide ranging issues to which counsel for the Applicants objected, on the basis that they relate to government policy and the state of knowledge of the government at large. To provide some context relevant to the case at bar, counsel for the Applicants drew the attention of the Court to some of the lines of examination permitted by the Commission (Memorandum of Argument, Applicants' Record, vol. IV at paras 17-18; all references to the transcript are found in these paragraphs):

- An employee of the Department of Foreign Affairs and International Trade (DFAIT) who conducted prison visits and interviewed detainees transferred by the Canadian Forces to ascertain their post-transfer treatment, was asked about the following: the training he received on detecting signs of torture; the procedure followed on prison visits; the purpose and distribution of site visit reports; and specific allegations of mistreatment which were included in the site visit reports which evidence indicates were not provided to members of the Military Police;

- Another employee of DFAIT, acting as the Political Advisor to the Commander of the JTFA, was questioned on the following: the reporting structure within DFAIT; the procedure for distributing site visit reports within JTFA and the determination of who should receive them; whether medically unfit detainees had ever been transferred; allegations by a former translator regarding threats made by a senior official of the National Directorate of Security; legal obligations on public servants to make and keep records of their actions, his knowledge of allegations made to UK forces; and whether his advice to the Commander was informed by allegations of mistreatment contained in newspaper articles;

- The Commander himself of the JTFA was asked about specific human rights reports he might have read or which individuals were tasked with briefing him on their contents, whether information regarding detainees was shared with or received from Canada's allies in Afghanistan, the factors he took into account when deciding whether to authorize the transfer of detainees to Afghan authorities, whether DFAIT or DND was the cause of difficulties in conducting prison visits, and his personal view on the possibility of having a full-time Canadian presence in Afghan prisons.

[34] On June 7, 2010, counsel for the Applicants brought a second motion to the Commission seeking a ruling on the "means of knowing" standard. At this time, the MPCC was well into hearing the testimony of the non-subject witnesses, but a number of non-subject witnesses remained to be heard. In its Notice of Motion, counsel for the Applicants stated that since the Commission had declined to rule on the Applicants' first "means of knowing" motion, it sought production of

information relating to the risk of mistreatment of a detainee transferred to Afghan authorities might face, regardless of whether the information was known to the subjects or whether they reasonably had the means of knowing it. Counsel also reproached Commission counsel to have explored not only the recollection of witnesses concerning information which Military Police knew or had the means of knowing, but also the witnesses' recollection about the risk of mistreatment a detainee transferred to Afghan authorities might face – thus addressing matters that are beyond the Commission's jurisdiction.

[35] By letter dated June 10, 2010, Commission counsel advised the parties that the Commission would schedule the Applicants' second "means of knowing" motion after the remaining non-subject witnesses had testified, consistent with its Ruling on April 1, 2010 in the original "means of knowing" motion. The Panel was then asked by counsel for the Applicants to confirm this orally during the hearings on June 15, 2010, which they did. This led to the second judicial review application filed by the Applicants under Court file number T-1126-10, alleging a refusal by the Commission to hear their motion.

[36] The hearings continued and several more witnesses were heard. As the Commission had indicated, it set down the Applicants' second "means of knowing" motion after all the non-subject witnesses were heard, but before any evidence was heard from the subjects. The last non-subject witness testified on October 13, 2010, and the next day, the Commission heard the motion.

[37] In their written submissions filed on September 29, 2010, counsel for the Applicants repeated that the Applicants were entitled to know the case they had to meet, and ought to know

how the Commission would interpret the concept of "means of knowing". In the Applicants' view, the "means of knowing" is a legal standard that can be established by a declarative ruling in advance, without reference to facts or context, and is part and parcel of the standard of conduct. As for the proper interpretation of "means of knowing", counsel apparently departed from the representations he had made on the first motion and adopted a more restrictive definition of that concept, which is captured in the overview of his submissions at paragraph 2:

> The subjects' conduct can only legitimately be assessed on the basis of what they knew, or information over which they had effective control. In the absence of actual knowledge by the Military Police subjects, the "means of knowing" is not whether queries were made or could have been made but rather whether Military Police exercised effective control of information sufficient to warrant a police investigation or other appropriate action.
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> Respondents' Record, vol. I, p. 14.

[38] Fearing that the Commission intended to impute the subjects with knowledge of all information available to the Government of Canada or publicly available, and also with the knowledge of all information which might have been shared with Military Police if they had requested it, regardless of whether the subjects would have had any reason or duty to seek out that information, counsel further elaborated as to what he saw as the proper mandate of the Commission, in the following terms:

> The subjects' conduct must not be assessed as if the subjects knew or had the means of knowing the vast array of documents and testimony the Commission has heard. Rather the assessment must be much more precise. In the absence of actual knowledge on the part of the Military Police subjects, the "means of knowing" test is defined by an examination of whether the subjects exercised effective control over the requisite information. Effective control means the physical custody or possession of the information whether or not that information was actively accessed within their control. It would be sufficient to establish effective control if it is demonstrated that

> access to the requisite information was the exclusive province of the subjects.
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> Respondents' Record, vol. I, p. 20 at para 20.

[39] In response, counsel for the Respondents reiterated much of the position he had taken in the context of the first "means of knowing" motion. He emphasized once again that the conduct of Military Police subjects should be assessed "based on what they could have learned through making simple inquiries", and repeated that whether the subjects should have made those inquiries are matters better left for final submissions on a full evidentiary record. The following paragraphs capture the essence of the parties' disagreement as to the proper standard to be applied:

> The Complainants allow and agree that the Military Police subjects cannot be imputed with all the knowledge of different actors across the Government of Canada. But they should be held responsible for information they could have reasonably obtained through simple inquiries. Practically all witnesses who have testified before the Commission have had direct contact with one or more of the Military Police subjects. Many of those witnesses – including and most recently Lt. General Gauthier – gave evidence that they would have shared information about detainee transfers with the Military Police had they been asked.
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> Respondents' Record, vol. I, p. 30-31 at para 11.

[40] The Commission rendered its ruling on the second "means of knowing" motion on November 3, 2010, prior to any of the subjects appearing as witnesses. The Commission rejected the notion that the subjects should only be responsible for information over which they had "effective control". The Commission agreed that the standard "captures information which a reasonable Military Police officer would have obtained by making reasonable enquiries". This, in the Commission's view, entails a subjective element based on what the Military Police officer

knew, and an objective element as to what a reasonable Military Police officer would have done in the circumstances to seek out more information "to fill the gaps".

[41] The Commission considered that it would be inadvisable to make pronouncements as to whether a duty to investigate was triggered in this case, or whether and to what extent the subjects were under some duty to seek out information that would be relevant to any decision to initiate a formal investigation. As the Commission stated:

> Whether viewed as part of the consideration of the duty to investigate, or as a distinct analytical step preliminary to considering the duty to investigate, the scope of what the subjects had a duty to know may only be fairly established on a full evidentiary record.
>
> Applicants' Record, vol. III, p. 1371.

[42] Responding to the argument that it was straying beyond the confines of their jurisdiction by enquiring into government policy and the state of knowledge of the Government of Canada at large, the Commission emphasized that the "means of knowing" test does not exist in a factual vacuum and that to determine whether a person had the means of knowing something, one has to know whether that something existed to be known. That being said, the Commission conceded that some information that is relevant to the subject matter of the complaint might ultimately be found to fall outside of this perimeter. It went on:

> The mere fact that information relating to the subject matter of the complaint has been adduced at these proceedings does not mean that the Commission is going to impute knowledge of all this information to any or all of the subjects. The breadth of the inquiry to date has been a function of the need to gather evidence that is considered pertinent to the grounds set out in the complaint. It does not reflect an assumption or a pre-determination by the Commission that the individual subjects knew, or could have or should have accessed such information.

Applicants' Record, vol. III, p. 1372.

[43] Contending that they were no further ahead in knowing the case they have to meet as a result of that decision, the Applicants brought a third judicial review application under Court file number T-2110-10. Eventually, the three applications for judicial review were consolidated by Orders of Prothonotary Aronovitch dated August 31, 2010 and December 22, 2010, and were heard together by this Court on March 28 and 29, 2011.

3. Issues

[44] The parties have raised a number of issues in the course of their written and oral arguments. These issues, as I see them, may be stated as follows:

a) Should the Court exercise its discretion to consider these applications, or should they all be dismissed as premature?

b) To the extent the Court were to intervene, can it be said that the Commission erred in law by failing to articulate the standard by which it will assess the Applicants' conduct before calling witnesses?

4. Analysis

a) Should the Court rule on interlocutory decisions?

[45] The first question to be determined in the context of these three applications for judicial review is whether the Court should intervene and rule on what are essentially interlocutory decisions made by the MPCC in the course of its investigation. Counsel for the Respondents and for the Intervener have strenuously argued that it would be improper and at variance with the prevailing case law, for the Court to entertain the challenges brought by the Attorney General.

Conversely, counsel for the Applicants acknowledged that, as a general rule, interlocutory decisions made during the course of a tribunal proceeding do not usually warrant the intervention of courts, but submitted that the decisions now being disputed fall under the exception to the rule, as they would clearly bring the MPCC outside of its jurisdiction.

i) General principles

[46] It is trite law that interlocutory decisions of administrative bodies are not subject to judicial review until a final decision is issued. For a variety of reasons, this rule has been upheld both by this Court and the Federal Court of Appeal on numerous occasions. Firstly, the application may well be rendered moot and unnecessary by the ultimate outcome of the case, and the tribunal may change its original position once it reaches its final decision. Similarly, an application may be overtaken by events. The second application for judicial review in the current proceedings is a case in point.

[47] It will be recalled that counsel for the Applicants delivered a Notice of Motion on June 7, 2010, requesting a hearing for a motion before the MPCC dealing with the "means of knowing" standard. At this time, the MPCC was well into hearing the testimony of the non-subject witnesses, but a number of non-subject witnesses remained to be heard. Consistent with its ruling of April 1, 2010, the Commission advised the parties that it would schedule the Applicants' motion after the remaining non-subject witnesses had testified. As it happens, the motion was ultimately heard by the Commission on October 14, 2010 and decided on November 3, 2010, after all the witnesses were heard but before any of the subjects-Applicants were scheduled to testify. This application for judicial review, therefore, is clearly moot, as the motion of the Applicants was ultimately heard and

decided before the application for judicial review could be determined. As a result, I shall say no more of this application.

[48] Moreover, the judicial review of interlocutory decisions creates the risk of fragmenting the process, with the attendant consequences in terms of costs and delays. Finally, a court is obviously at a disadvantage when ruling on an objection brought at an early stage of the proceedings, as it lacks a full record and the relevant background to assess how the disputed ruling may actually play out in the actual determination of the case.

[49] These considerations have been aptly summarized in *Zundel v Citron*, [2000] 4 F.C. 255, 97 ACWS (3d) 977 (FC), where the Court of Appeal stated:

> 10. Are the applications for judicial review premature? As a general rule, absent jurisdictional issues, rulings made during the course of a tribunal's proceeding should not be challenged until the tribunal's proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute. For example, in the proceedings at issue in this appeal, the Tribunal made some 53 rulings. If each and every one of the rulings was challenged by way of judicial review, the hearing would be delayed for an unconscionably long period. As this court held in *Re Anti-Dumping Act,(In re) and in re Danmor Shoe Co. Ltd..*,[7] "a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal".
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> See also: *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, at paras 30-32, [2010] FCJ no 274 [*Canada (Border Services Agency)]; Szczecka v Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 934, at para. 4 (F.C.A.), 116 DLR (4th) 333; *Schnurer v Canada (Minister of National Revenue)*,

> [1997] 2 FC 545 at para 11-12 (FCA), 69 ACWS (3d) 86; *Sherman v Canada (Customs and Revenue Agency)*, 2006 FC 715 at paras 39-41, 295 FTR 116; *CHC Global Operations v Global Helicopter Pilots Assn.*, 2008 FCA 345, 173 ACWS (3d) 4.

[50] As a result, courts will not interfere with ongoing administrative processes until they have run their course, absent exceptional circumstances. As previously mentioned, counsel for the Applicants does not dispute this principle, but argued that the interlocutory decisions now being challenged do raise exceptional circumstances. According to counsel, the decisions underlying the three applications for judicial review do not merely arguably, but clearly, bring the MPCC outside of its jurisdiction. They would effectively allow the Commission to investigate beyond the conduct of members of the Military Police and into both government policy and the military at large. This would be in direct contradiction to the previous decision of this Court, which cautioned the Commission that it could not use the conduct complaint as a "springboard" into investigating government policies or practices.

[51] I have not been persuaded by this line of reasoning, for a number of reasons. A review of the case law shows that the "exceptional circumstances" allowing the courts to intervene and to review interlocutory decisions have been quite narrowly defined. While exceptional circumstances may not be exhaustively defined, courts have held that such will exist when the impugned decision is dispositive of a substantive right of a party *(Canada v Schnurer Estate*, [1997] 2 FC 545 (FCA), 208 NR 339 (FCA)), raises a constitutional issue *(AG of Quebec and Keable v AG of Canada et al*, [1979] 1 SCR 218 [*Keable*]), or goes to the legality of the tribunal itself (*Cannon v Canada*, [1998] 2 FC 104 (FCTD), [1997] FCJ no 1552 (QL) (FC)). More recently, the Federal Court of Appeal

has gone so far as to say that even those circumstances may not qualify as "exceptional", if there is an internal administrative remedy available:

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin, supra; Okwuobi, supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
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> *Canada (Border Services Agency)*, above, at para 33.

[52] An allegation that a commission or tribunal has somehow exceeded its jurisdiction in the course of rendering an interlocutory decision will not be sufficient. The whole approach of attempting to intervene in interlocutory decisions of commissions by labelling them as "jurisdictional", has been discarded by the Courts.

[53] The Federal Court of Appeal has not accepted the position that the assertion of a jurisdictional issue is, by itself, an exceptional circumstance allowing a party to launch judicial

review before the administrative process has been completed. The Court has repeatedly eschewed interference with intermediate or interlocutory administrative rulings and has forbidden interlocutory forays to the Court, even where the impugned "decision" is alleged to address a jurisdictional issue:

> [39] When "jurisdictional" grounds are present or where "jurisdictional" determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a "jurisdictional" issue, by itself, an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed?
>
> [40] In my view, the answer to these questions are negative. An affirmative answer would resurrect an approach discarded long ago.
>
> [41] Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as "preliminary questions" that went to "jurisdiction": see, *e.g., Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. By labelling tribunal rulings as "jurisdictional," courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.
>
> [42] Over thirty years ago, that approach was discarded: *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), "The courts, in my view, should not be alert to brand as jurisdic-tional, and therefore subject to broader curial review, that which may be doubtfully so." Recently, the Supreme Court again commented on the old discarded approach, disparaging it as "a highly formalistic, artificial 'jurisdiction' test that could easily be manipulated": *Dunsmuir, supra*, at paragraph 43. Quite simply, the use of the label "jurisdiction" to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.
>
> …
>
> [45] It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory

> forays to court, even where the decision appears to be a so-called "jurisdictional" issue: see *e.g., Matsqui Indian Band, supra; Greater Moncton International Airport Authority, supra* at paragraph 1; *Lorenz v. Air Canada*, [2000] 1 F.C. 452 (T.D.) at paragraphs 12 and 13; *Delmas, supra; Myers v. Law Society of Newfoundland* (1998), 163 D.L.R. (4th) 62 (Nfld. C.A.); *Canadian National Railway Co. v. Winnipeg City Assessor* (1998), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 210 N.B.R. (2d) 386, 536 A.P.R. 386 (C.A.).
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> *Canada (Border Services Agency), supra*, at paras 39-45. See also: *Greater Moncton Airport Authority v PSAC. et al*, 2008 FCA 68 at para 1, [2008] FCJ no 312 (QL) (FCA).

[54] The Court of Appeal has also held that a tribunal's interlocutory decisions on a question of law dealing with the admissibility or compellability of evidence does not constitute a jurisdictional question justifying immediate judicial review when the tribunal is vested with the authority to hear and determine all questions of law and fact, including questions of jurisdiction that arise in the course of proceedings: *Bell Canada v Canadian Telephone Employees Association*, 2001 FCA 139 at para 5, 105 ACWS (3d) 483 (FCA); *Canada (Minister of Citizenship and Immigration) v Varela*, 2003 FCA 42 at para 3, 238 FTR 200 (FCA).

[55] Counsel for the Applicants submitted that the impugned decisions of the MPCC fit within the exception and clearly raise a serious issue of jurisdiction. In other words, it is argued that the Commission purports to overstep the boundaries of its mandate by a) inquiring into the conduct of the Military Police on the basis of what they knew or ought to have known; and b) seeking production of documents emanating from government departments without first establishing that copies of those documents were provided to the Military Police or that the Military Police had the ability to obtain them. In so doing, the Applicants claim that the Commission not only strays beyond the confines of its legislation, but also disregards the previous ruling of this Court. It signals

its intention to use as the applicable standard of conduct for the Military Police, the duty to be curious, which is at odds and conflicts with a proper understanding of Justice Harrington's "means of knowing" standard. I shall deal first with the argument pertaining to the "means of knowing" standard, and the discussion relating to the production of documents will follow.

ii) The "means of knowing" standard

[56] Contrary to the Applicants' argument, I do not think this is a case where the alleged lack of jurisdiction has been demonstrated beyond any reasonable doubt. Counsel for the Applicants relied heavily on the decision of the Supreme Court of Canada in *Keable*, above, as a precedent for the relief sought in the present application. The situation in that case was quite different from the one at issue in the case at bar, however. In that case, it will be remembered, one of the questions was whether a commissioner appointed under provincial legislation for the purpose of inquiring into the circumstances surrounding the commission of allegedly criminal or reprehensible acts, could inquire into the rules, policies and procedures of a federal institution itself (the RCMP). What was at stake was a challenge, on a constitutional basis, of the very jurisdiction of the commissioner with respect to a vital part of his inquiry. It is also worth noting that all eight judges sitting on that case came to the conclusion that a province could not confer on a body of its own creation the jurisdiction to inquire into the administration of a federal police force.

[57] In the case at bar, the situation is quite different in a number of respects. Firstly, the argument put forward by the Applicants as regards to the standard of conduct to be expected from a Military Police officer is not based on any constitutional principle. Indeed, constitutional principles do not figure prominently in the abundant case law revolving around that issue in the context of

civilian police officers, and are absent in the Applicants' discussion in their written and oral arguments. The right to a fair trial and to make full answer and defence are invoked by counsel for the Applicants as the rationale to require the MPCC to articulate fully the standard of conduct against which the conduct of the Applicants will be assessed. This is a separate issue which will be dealt with later in these reasons.

[58] Secondly, the Act itself does not delineate with precision, the jurisdiction of the MPCC with respect to a conduct complaint, and certainly does not provide a clear answer as to the circumstances that should prompt a Military Police officer to investigate. It is therefore much more difficult to demonstrate with reasonable certainty that the Commission not only erred in crafting such a standard, but exceeded its jurisdiction.

[59] Nor can it be said that the Commission clearly contravened the decision reached by this Court in *Canada -- Amnesty International,* above. It is not at all obvious that Justice Harrington was intent on setting a legal standard of conduct when he stated at para 13, without more, that "the Commission may legitimately inquire as to what any member of the Military Police knew, or had the means of knowing…". The thrust of his decision was meant to address the jurisdiction of the Commission with respect to the first complaint (the "detainee complaint"). There was not much to say about the second complaint (the "failure to investigate complaint"), as the Attorney General acknowledged that it related to a policing duty or a function normally carried out by the Military Police. Accordingly, Justice Harrington went no further than stressing that the Commission could not use its limited jurisdiction as a "springboard" to investigate government policy at large. There

is, however, no obvious link between this caveat and the standard to which the Military Police should be held in conducting its investigations.

[60] Moreover, it cannot be said that the "means of knowing" standard, as it has become known, carries a well-defined meaning and refers to a shared understanding of its parameters, at least in the context of Canadian criminal or military law. Indeed, it is quite telling that counsel for the Applicants was unable to point the Court to any judicial precedents where this concept has been used, except in the context of claims of negligence as a means of imputing knowledge where the tortfeasor's lack of knowledge is due to wilful blindness: see *Jamieson v Edmonton (City)* (1916), 54 SCR 443 at para 9. The Commission also pointed out in its second decision on "means of knowing" dated November 3, 2010, at para 26, that none of the parties were able to provide it with precedents where an oversight agency had considered this standard in the context of a failure to investigate complaint, against the police.

[61] To be fair, counsel for the Applicants put forward quite an elaborate and interesting argument as to why the "means of knowing" standard should be defined by an examination of whether a Military Police officer exercised effective control over the requisite information, sufficient to trigger a duty to investigate. Counsel relied both on the military status of the Military Police officer and on the nature of a peace officer at common law to delineate that standard.

[62] First of all, argue the Applicants, the expected standard of conduct found in the Act itself (in particular, section 124 creating the service offence of negligent performance of a military duty), in the *Queen's Regulations and Orders for the Canadian Forces*, P.C. 1999-1305, vol. II –

Disciplinary (in particular section 106.02(1), prescribing that an investigation shall be conducted "where a complaint is made or where there are other reasons to believe that a service offence may have been committed"), and in the *Military Police Professional Code of Conduct*, SOR/2000-14, should inform the standard of conduct applicable to Military Police officers. A close reading of these provisions, however, reveals that they do not specifically address when Military Police officers are expected to commence an investigation.

[63] Secondly, counsel for the Applicants relied on the common law, and particularly on *R. v Mack*, [1988] 2 SCR 903, [1988] SCJ no 91 (QL) (SCC) for the proposition that peace officers are required to investigate only when they form a reasonable suspicion of criminal activity. Absent a reasonable suspicion of criminal activity, there can be no duty to investigate. Counsel accepts that what gives rise to a reasonable suspicion necessarily depends on all of the circumstances facing the police officer and will vary from case to case. That being said, the reasonableness of a police officer's conduct must be measured against an objective standard. At a bare minimum, the decision of a police officer to investigate or not, will be judged against his or her actual knowledge of the circumstances. The Applicants contend that in the absence of actual knowledge, a police officer may be imputed with the knowledge of circumstances only when he or she is wilfully blind to relevant information under his or her effective control. Such a deliberate ignorance would be the safest way to articulate the "means of knowing" standard. To quote from the Applicants' factum, "[E]xtending imputed knowledge beyond the confines of wilful blindness leads to a circuitous standard by imposing a non-existent duty to inquire to see whether there is a reason to investigate" (at para 56).

[64] Counsel finds support for that thesis in the *Privacy Act*, RSC 1985, c P-21, and goes as far as saying that it is the only interpretation of the "means of knowing" standard that is consistent with the obligations imposed on the Canadian Forces and the Canadian Forces Military Police by that Act. Section 8(1) of the *Privacy Act* proscribes the disclosure of personal information except as permitted in section 8(2). Two of the permitted exceptions to the proscription to disclosure of personal information are particularly relevant to police work:

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
Where personal information may be disclosed	Cas d'autorisation
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
…	…
(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;	c) communication exigée par subpoena, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;
…	…

(e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;	e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés;

[65] Both of these exceptions require an ongoing investigation before personal information can be disclosed, thereby negating the possibility that the same information forms part of the information imputed to a Military Police officer. In the context of paragraph 8(2)(c), a Military Police officer can obtain a search warrant only on establishing that he has reasonable and probable grounds to believe that a criminal act occurred. This standard being more demanding than the standard of reasonable suspicion, it would not tolerate disclosure to an MP to see if an investigation could be launched. As for paragraph 8(2)(e), an investigation must exist before a Military Police officer could request DND or DFAIT to disclose personal information; therefore, the knowledge of that information cannot be imputed to an MP when reviewing if he or she should have launched an investigation, based on what he or she knew or had the means of knowing.

[66] While these arguments are both interesting and not without merit, they have never been tested in court. I note, in particular, that the *Privacy Act* argument was not even submitted to the MPCC, and was raised for the first time before this Court. As for the notion that the "means of knowing" test can be reduced to an examination of whether a Military Police officer exercised effective control over the requisite information, it is fraught with difficulties and is not devoid of

ambiguity. Counsel for the Respondents credibly submitted that, if accepted, the "effective control" test could encourage police officers to remain wilfully blind about certain matters and insist that documents or information not be left in their purview, lest they be held accountable. Since law enforcement includes not only criminal investigation but crime prevention as well, they argue that the "means of knowing" standard, to the extent that it can be discerned, simply means whether an individual could have learned about the information through proper inquiries.

[67] The "effective control" test does not lend itself to an easy definition. In his factum, at para 62, counsel for the Applicants did not expand much on this concept and offered little guidance as to what it means in practice, beyond stating that it denotes "…the physical custody or possession of the information whether or not that information was actively accessed within their control". This is far from satisfactory as an explanation of the standard that is supposed to govern the conduct of Military Police officers, in the conduct of their investigations.

[68] At the hearing, counsel for the Applicants accepted that the "effective control" test can sometimes go beyond wilful blindness, for example in those situations where an MP may not have been aware of an information (and could thus not have actively suppressed it) but could still have had the means of knowing it because it was within the realm of information that was received by his unit. When pressed, however, counsel admitted that it is a concept difficult to define and confessed that it is easier to say what it does not encompass (i.e. a duty to be curious).

[69] In light of the foregoing, I think it is quite obvious that the "means of knowing" standard has no clear and well-defined meaning, either in the legal provisions governing the Military Police or in

the case law. I cannot refrain from recalling that counsel for the Applicants themselves equivocated on the meaning of that standard, first espousing the view shared by the Respondents that it includes only the information other governmental actors would have shared with the Applicants had they sought access to that information, only to draw back later to its current position. In those circumstances, it cannot seriously be contended that the MPCC has exceeded its jurisdiction by overstepping its mandate and flouting its enabling statute or a previous decision of this Court, thereby raising a serious issue of jurisdiction. There is, quite simply stated, no agreed upon definition or clear understanding of the "means of knowing" standard, to the extent that it can be qualified as such.

[70] But there is more. The Commission was very careful not to bind itself to any particular understanding of the "means of knowing" standard. While it rejected the "effective control" test on the basis that it is without support in the case law, the Commission went no further than accepting what both parties had previously agreed upon, that is, that the "means of knowing" standard captures "information which a reasonable Military Police officer would have obtained by making reasonable inquiries" (Applicants' Record, vol. III , p. 1370). The Commission hastened to add that a determination as to whether a Military Police officer acted reasonably, is obviously an issue that cannot be decided in the abstract, because it heavily depends on the evidence. This is a far cry from what counsel for the Applicants characterized as a duty to make an investigation to find out whether one has a reasonable suspicion to investigate.

[71] Indeed, the Commission was very conscious of the need not to prejudge the outcome of its enquiry. The following paragraph attests to that cautiousness and restraint:

> 31. The central issue to be decided in these proceedings is whether the subjects' duty to investigate alleged wrongdoing on the part of those responsible for the transfer of Afghan detainees was triggered – and, if triggered, whether it was reasonably discharged in the circumstances. Given that this is the ultimate issue to be determined in these proceedings, the Commission considers it inadvisable to go further in making predeterminations or pronouncements as to whether a duty to investigate was triggered in this case. In the Commission's view, the same injunction applies to the question of whether and to what extent the subjects were under some duty to seek out information that would be relevant to any decision to initiate a formal investigation. Whether viewed as part of the consideration of the duty to investigate, or as a distinct analytical step preliminary to considering the duty to investigate, the scope of what the subjects had a duty to know may only be fairly established on a full evidentiary record.
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> Applicants' Record, vol. III, pp. 1370-1371.

[72] In my opinion, it cannot seriously be argued that the Commission overstepped its mandate and went beyond its jurisdiction in addressing the complaint of the Applicants with respect to the "means of knowing" standard. While it did rule out the extremely narrow interpretation proposed by the Applicants in their latest submission on the basis that it was not supported in law, it refrained from boxing itself into a position that would pre-empt a careful consideration of the evidence. It should also be noted that the Commission's analysis is consistent with the stand taken by counsel for Capt (ret'd) Moore, and concurred in by counsel for the other Applicants, according to which the determination of what information the subjects had the means of knowing is independent of the determination that they had a duty to investigate, the first logically preceding the second.

[73] Not only has this Court not been convinced of a clear and substantial jurisdictional error, but there are many other steps to be completed before a final report is released. Final arguments have not yet been heard, as a result of the applications for judicial review brought before this Court by the

Applicants. Once the oral submissions will have been made, the Commission will prepare and submit an initial report to the Minister of National Defence, the Chief of the Defence Staff or the Deputy Minister (as the case my be), the Judge Advocate General and the Provost Marshal, setting out the MPCC's findings and recommendations from the hearing, pursuant to section 250.48 of the Act.

[74] The MPCC's report is not public or final at this interim stage. It is submitted for review by the prescribed senior government and military officials so that they may review the Commission's findings and intended recommendations. In this particular case, the Chief of Defence Staff (who by virtue of section 250.49(2) of the Act, is responsible for dealing with conduct complaints about the Provost Marshal) is then required to notify the Minister and the MPCC Chairperson of the actions, if any, that have been taken or will be taken, with respect to the complaint that was the subject of the MPCC hearing and report.

[75] The officials to whom an interim MPCC report is submitted are not legally bound to accept or act on the Commission's recommendations, although historically, for the most part, the MPCC's recommendations appear to have been accepted. Under section 250.51(2) of the Act, where a person in receipt of the Commission's interim report decides not to act on the MPCC's findings or recommendations, the reasons for not acting are to be included in the notice of action described in section 250.51.

[76] After receiving and considering the notice of action, the MPCC Chairperson must prepare a final report setting out the findings and recommendations in respect of the complaint. The final

report shall be sent to the Minister, the Deputy Minister, the Chief of the Defence Staff, the Judge Advocate General, the Provost Marshal, the complainant(s), the subject(s) of the complaint, and any other persons who have satisfied the MPCC that they have a direct and substantial interest in the complaint.

[77] Some of the grounds set out in the notices of application speculate what the Commission might say in its final report. However, the parties will not know what the Commission's final report contains until all of the steps outlined above have been carried out. It may well conclude that the subjects had no means of knowing certain information or, alternatively, had no reasonable grounds to seek it out. This is why the applications are premature and a waste of judicial resources. If the subjects are still dissatisfied with the final report after it has been reviewed and issued pursuant to the procedures set out in the Act, they will at that stage have the ability to seek judicial review.

[78] For all of the foregoing reasons, I am of the view that it would be premature for this Court to articulate the standard of conduct applicable to the complaint of failure to investigate. In its amended Notice of Application in file number T-1126-10, counsel for the Applicants prayed for the following relief:

> 1. An order setting aside the decision of the Commission on the ground that it deprives the applicants of the right to know the case they must meet to answer the complaint about their conduct (MPCC complaint 2008-042, the "conduct complaint");
>
> 2. A declaration that the expression "means of knowing" in the Order issued by this Honourable Court on September 16, 2009 in Court File T-1685-08 permits the Commission to assess the conduct of members of the Military Police based only on what a member of the Military Police could reasonably be expected to have known in the circumstances;

3. A declaration that the expression "means of knowing" in the Order issued by this Honourable Court on September 16, 2009 in Court File T-1685-08 does not permit the Commission to inquire into and make findings about what persons who are not proper subjects of complaint knew or could reasonably be expected to have known regarding the risk of mistreatment potentially faced by detainees transferred to Afghan authorities;

4. A declaration that the Commission cannot, under the guise of investigating what members of the Military Police had the means of knowing, investigate or seek disclosure of information with respect to what persons who are not proper subjects of complaint knew or could reasonably be expected to have known about the risk of mistreatment potentially faced by detainees transferred to Afghan authorities;

5. An order prohibiting the Commission from reporting on, or making findings about, whether Military Police subjects failed to investigate based on information that was not known to them or that they did not reasonably have the means of knowing.

[79] Not only would it be premature for the Court to intervene at this stage, but it would also be unwise and ill-advised. The Court does not have the benefit of the Commission's knowledge of the complaint, of the proceedings or evidence. Making a ruling in a factual vacuum, and looking over the shoulders of an administrative tribunal carrying out its mandate, would be at odds with fundamental principles of administrative law. This Court will be in a much better position to intervene, if need be, once the Commission has made its own findings, on the basis of all the evidence. In the absence of a compelling demonstration that the Commission has exceeded its jurisdiction, it must be allowed to complete its final report before an application for judicial review can be entertained.

[80] Counsel for the Applicants conceded that there is no precedent for the declaratory relief sought, but argued that the Court should be proactive and pre-emptively set the standard against

which the Applicants' conduct will be assessed, to avoid the adverse effects a negative report could have on their professional reputation. While acknowledging that the final report or parts of it could be quashed on judicial review, counsel strenuously emphasized that such an outcome would not be sufficient to remove the negative shadow and the damning consequences that would be visited upon the Applicants, by the Commission's report.

[81] The answer to this argument is quite straightforward. A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. There are no legal consequences attached to the findings of a commissioner. They are not enforceable and do not bind courts called upon to consider the same matters. Moreover, every witness enjoys the protection of the *Canada Evidence Act* and of the *Charter*, which ensures that the evidence given cannot be used in other proceedings against the witness.

[82] This is not to say that reputations cannot be tarnished. It cannot be disputed that a commissioner's findings are sometimes seen as determinations of responsibility by members of the public. This is an inevitable consequence of commissions of inquiry, and it is precisely for that reason that a high degree of fairness is required. At the same time, it is a trade off that Canadians have come to accept in recognition of the fact that such commissions play a useful role in investigating, informing and educating the public, and preventing through their recommendations, the re-occurrence of events that have lead to their investigation. As Décary J.A. pointed out in *Canadian Red Cross Society v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 2 FC 36 at para 35, [1997] FCJ no 17 (QL) (FC)

> . . a public inquiry into a tragedy would be quite pointless if it did not lead to identification of the causes and players for fear of

> harming reputations and because of the danger that certain findings of fact might be invoked in civil or criminal proceedings. It is almost inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning the responsibility borne by certain individuals. I doubt that it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with the reputations of the individuals involved.
>
> See also Canada *(Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 SCR 440, at para 39, [1997] SCJ no 83 (QL) (SCC) where Cory J., for a unanimous Court, endorsed these comments.

[83] It is true that when a commission investigates a particular crime, as was the case in *Re Nelles and Grange* (1984), 46 OR (2d) 210, 9 DLR (4th) 79 (ONCA) and in *Starr v. Houlden*, [1990] 1 SCR 1366, [1990] SCJ no 30 (QL) (SCC), particular caution must be exercised. In those cases, it was held that commissions should refrain from making findings that would appear in the eyes of the public to be a determination of liability. These cases must be distinguished from the case at bar on numerous grounds. First, these cases rest in part on the particular wording of the enabling statutes under which the commissions were investigating. Second, the purpose of these inquiries was tantamount to a preliminary inquiry into specific crimes. In *Nelles*, above, the purpose of the inquiry was to discover who had committed the specific crime of killing several babies at the Hospital for Sick Children in Toronto. By the time the case reached the Court of Appeal, one criminal prosecution for the deaths had failed and an extensive police investigation into the deaths was still continuing. When it established the commission, the government described it as an inquiry into deaths thought to have been the result of deliberate criminal acts. Furthermore, the Attorney General had stated that if more evidence became available which would warrant the laying of additional charges, they would be laid and the parties vigorously prosecuted. Similarly, in *Starr*,

above, the public inquiry arose out of widely publicized allegations of conflict of interest and possible criminal activity by Patricia Starr and Tridel Corporation. The Order-in-Council establishing the inquiry, named both Starr and Tridel and, without providing any requirement for making recommendations, mandated an investigation into their conduct, in language virtually indistinguishable from the pertinent *Criminal Code* provisions. There is nothing remotely equivalent in the present case. Finally, there is no evidence that the MPCC will make findings that will appear in the eyes of the public to be determinations of liability. As a result, the strict test developed in these two cases is inapplicable in the present case.

iii) The examination of witnesses and the production of documents

[84] Counsel for the Applicants, it will be recalled, also argued that the Commission attempted to investigate beyond the conduct of Military Police officers and into government policy, as evidenced in its treatment of witnesses and in the nature of the documents sought. I shall now turn to an examination of these submissions.

[85] It was submitted that the Commission had gone too far in its examination of some of the witnesses, permitting lines of questioning relating to government policy and the state of knowledge of the Government of Canada at large. Objection was raised at least once but was overruled by the Commission. In its November 3rd, 2010 ruling, the Commission explained that it must understand what information was available, to determine if the Applicants had the means of knowing about that information. Here is the gist of the Commission's reasoning in this respect:

> 32. There is also a distinction to be made between the objectives of an investigation and the methodology of an investigation. If the content of what MPs 'knew or had the means of knowing" is an ultimate issue in this proceeding, which we consider it to be, then the

> Commission's investigative process leading to a determination of this question must be able to receive and examine the scope of information that existed to be potentially obtained. In the Commission's view, the "means of knowing" test does not exist in a factual vacuum. It only has meaning if it can be shown that there was information in existence to be obtained by inquiry. Whether a person had the means of knowing something cannot be determined without also determining that something existed to be known. To put the matter another way, it cannot be shown that a person had the means of knowing information if there is no evidence that the information which is sought to be imputed to him even existed.
>
> Applicants' Record, vol. III, p. 1371.

[86] The Commission recognized that, at the end of the day, some information relevant to the subject matter of the complaint may well be found to fall outside the perimeter of what Military Police officers knew, or had the means of knowing. As illustrated by the Commission:

> For instance, information known to non-MP actors, but not specifically shared with MPs, could relate to matters of "common knowledge" regarding relevant conditions in Afghanistan. Such information could potentially be relevant in assessing the credibility of potential MP denials of awareness of such matters. Alternatively, information might be relevant to the Commission's inquiry precisely because there could be specific evidence from non-MP sources that such information was not shared with MPs.
>
> Applicants' Record, vol. III, p. 1371

[87] It is true that some of the witnesses heard by the Commission were civil servants and not members of the Canadian Forces. None of these witnesses are considered subjects of the hearings, and none of them have been given notice that they are considered subjects pursuant to section 250.38(3) of the Act. There is no basis to speculate, as counsel for the Applicants would have it, that the Commission is going to ignore its mandate and start making findings against people it has no authority to make findings against. Yet, to the extent that these witnesses could provide relevant

context on the collection, reporting and communication of information on potential detainee abuse, the Commission was justified in hearing from them. The Act does not limit the Commission to summonsing only members of the Canadian Forces or employees of DND to appear as witnesses. Other persons, including other government employees, can also be summonsed to give evidence that the Commission considers necessary.

[88] I fail to see how it can be argued that the hearing of government employees and their questioning on the procedure followed on prison visits, the purpose and distribution of site visit reports, and the reporting structure within DFAIT, for example, would clearly and undoubtedly bring the Commission in conflict with the previous ruling of this Court. As the Commission observed, Justice Harrington did not say that questions put to the subjects were to be restricted to what they knew or had the means of knowing. The Commission, as an external oversight body, must be left with the discretion to determine for itself, as a result of its investigation, what the Military Police officers that are the subject of its inquiry knew or had the means of knowing. To fulfill its mandate, the Commission ought to be left with some room to manoeuvre, and be given the latitude to determine for itself what is relevant and what is not. If specific questions are thought to be beyond the pale, counsel can always raise objections, ask that additional witnesses of their choosing be called, and make oral and written submissions on any aspect of the evidence heard by the Commission. Otherwise, the Commission's inquiry must follow its course.

[89] For the reasons noted above, it would be premature for this Court to declare the standard according to which a determination must be made as to what the Applicants had the means of knowing. This is true both in the context of the questions that can be put to the subjects and the

witnesses, and with respect to the production of documents which can be ordered by way of summons. These are really the flip sides of the same coin. The Commission must be given some leeway in determining the documents that are relevant for the purposes of its inquiry. As Professor Ratushny stated in his book *The Conduct of Public Inquiries: Law, Policy and Practice* (Toronto: Irwin Law, 2009) "…the first step is simply to gather and review every document that is potentially relevant" (p. 243).

[90] Inferior bodies, such as the Commission, have no common law power to compel the production of evidence, either testimonial or documentary. Their jurisdiction to do so depends on statutory authority. That being said, it is self-evident that document disclosure is fundamental to the ability of the Commission to discharge its mandate and conduct a full, independent investigation into the complaint. This is precisely why section 250.41(1)(a) of the Act grants the Commission the power to require the production of documents that it considers necessary to a full investigation. This is a decision that the Commission is authorized by statute to make, based on the Commission's assessment of the needs of its investigative effort.

[91] As already mentioned, and as stated by the Commission itself in its ruling of November 3, 2010 on the second "means of knowing" motion, it does not mean that all the documents obtained by the Commission, once produced and examined, will necessarily become exhibits or be imputed as knowledge of the subjects. Moreover, any documents that were entered as exhibits either by Commission counsel or by one of the parties can be commented on by all the parties during their closing submissions as to the weight or the significance, (or lack thereof), that any documentary evidence should be given by the Commission.

[92] I also note that the Applicants have never brought a motion before the Commission challenging the Gagnon/Blanchette summons. They had the ability to do so under Rule 7 of the *Afghanistan Public Interest Hearings Rules*. Under Rule 7, the Commission has jurisdiction to "…determine any question with respect to jurisdiction or practice and procedure…" at any time during a proceeding. This was the proper administrative remedy to deal with any contention that a document was inadmissible or irrelevant.

[93] Counsel for the Applicants submitted that three of the five classes of documents listed by the summons to Brigadier-General Blanchette issued on August 25, 2010, called for the production of documents that are subject to solicitor-client and litigation privilege, as they target the process whereby DND and the Canadian Forces identify the documents to be produced to the Commission in response to the summons. According to counsel, this is clearly in excess of the Commission's jurisdiction, as it cannot inquire as to how the government has responded and what measures have been taken to respond to the summons. It is argued that neither the response of two governmental institutions to the summons, the non-responsive documents collected by those institutions nor a list of any witness met by DND officials in connection to the hearing, present the nexus required by s 250.41(1)(a).

[94] I cannot agree with such a narrow view of the Commission's mandate and jurisdiction. As the independent oversight body tasked by Parliament with carrying out a public inquiry into the complaint, it is the MPCC's responsibility to make its own, independent decision as to what documents it considers necessary for a full investigation of the complaint. It should not have to rely

on selected documents provided on the basis on an opaque screening process conducted in-house by government officials.

[95] The MPCC learned during the public hearings that documents were being subjected to some manner of screening process by government officials, based on internal screening parameters or guidelines these officials had been provided with, before being turned over to the Commission. It thus became evident that what the MPCC was being given was a subset of an unknown larger collection of documents, and documents were being screened in or out by government officials, based on guidelines they had been given. To make matters worse, the Respondent obtained documents by way of an Access to Information request that were not originally produced before the Commission.

[96] Section 250.41 of the Act must be broad enough to allow the Commission to inquire into the screening process and the guidelines used by the government, in response to its summons for documents, when it appears that one of the impediments to a full investigation is the lack of production of information. If the Commission does not have full access to relevant documents, which are the lifeblood of an inquiry, there cannot be a full and independent investigation.

[97] There may well be practical difficulties for the government in responding to the summons, arising from the sheer number of documents that could potentially be relevant. This is precisely why the Commission offered to work collaboratively with government officials in identifying the documents that could be considered responsive to the summons. Unfortunately, this offer was turned down. It is obviously not for this Court to determine how best the government should

respond to the summons. But at the end of the day, one principle must stand: it is for the Commission, not for the government, to determine ultimately what documents are relevant to its inquiry. If it were otherwise, the Commission would be at the mercy of the body it is supposed to investigate. This was clearly not the intent of Parliament.

[98] I am therefore of the view that the Commission did not clearly exceed its jurisdiction when it issued a summons for the production of documents relating to the screening process, and the guidelines applied by government departments in response to its previous summons. Of course, the Commission does not have the power to find the persons to whom the summons were directed guilty of an offence, either pursuant to s 118(2)(c) (for persons subject to the *Code of Service Discipline*) or to section 302(b)(ii) and 302(e) (for anyone). This power is reserved to courts. The Commission was authorized to request documents enabling it to understand the government methodology and approach to document disclosure, and to draw its own conclusion from the response given by the government to that request. This is a power necessarily incidental to the power of conducting a full investigation.

[99] Finally, counsel for the Applicants contends that a fourth class of documents listed by the summons, recording the factors considered by the Commander of JTFA in deciding to transfer a detainee to Afghan authorities, should also be struck. These inquiries, according to counsel, have no connection to the complaint at issue but have everything to do with investigating the legality of the orders made by the Commander of JTFA, to transfer detainees to Afghan authorities.

[100] I agree with counsel for the Applicants that the breadth of an investigation into the legality of the order made by the Commander of JTFA to transfer detainees to Afghan authorities, would far exceed the issues properly raised by the complaint of the Respondents. It would entail the determination of whether a particular detainee was in danger of being subjected to torture or other forms of mistreatment, based on what the Commander knew when he ordered his transfer. This is clearly not the gist of the conduct complaint brought forward by the Respondents, and the Commission would be well advised from making recommendations in that respect, as it would clearly exceed its jurisdiction.

[101] That being said, it cannot be contended that the knowledge of the factors which the Commander took into consideration before transferring a detainee to the Afghan forces, is completely immaterial to the subject of the investigation. It is arguably part of the background information that the Commission may find relevant for the purposes of its inquiry into the complaint laid by the Respondents. In light of the wide latitude that a commission of inquiry should be afforded in requesting documentary evidence and of the dynamic nature of such inquiry, I believe it would be premature for the Court to intervene and pre-emptively declare that the Commission ought not consider that information.

[102] Finally, counsel for the Applicants stated in his written submissions that the Commission seeks to explain its inquiry into the factors considered by the Commander, by altering the nature of the complaint it purports to investigate and by transforming the complaint from a complaint of failure to investigate, to a complaint of negligent investigation. I must confess that I do not quite understand the link that counsel tries to draw between the alleged transformation of the complaint

and the documents sought by the Commission. In any event, I do not think this is a very helpful line of analysis. A failure to investigate can certainly encompass an investigation that has been botched or negligently conducted, for example, if certain lines of enquiry have not been pursued or overlooked.

[103] For all of the foregoing reasons, the relief sought by the Applicants in relation to the summons must similarly be dismissed as being premature. More specifically, the Applicants asked the Court to grant the following remedies (Applicants' Record, vol. IV, at para 103):

> i. a declaration that subsections 250.38(1) and 250.41(1) of the *National Defence Act* do not authorize the Commission to compel disclosure of information that was not known to Military Police subjects of complaint or in their effective control;
>
> ii. a declaration that Military Police subjects of complaint did not know or have in their effective control the documents listed items 1 to 13 in the summons issued by the Chairperson of the Commission to BGen Blanchette;
>
> iii. an order setting aside the summons issued by the Chairperson of the Commission to BGen Blanchette on the ground that it was issued in excess of the Commission's jurisdiction.

[104] None of these can be appropriately granted by this Court. They are all closely intertwined with the notion that the Commission undoubtedly exceeded its jurisdiction in its treatment of the "means of knowing" standard and that this Court is therefore called upon to intervene. Having rejected these submissions, it would be premature to grant the above-mentioned remedies just as it would be untimely to grant the other remedies sought by the Applicants.

b) Did the Commission err in law by failing to articulate the "means of knowing" standard?

[105] Having concluded as I have with respect to the prematurity of the applications brought forward by the Applicants, there would be no need to answer this second question. I will, nevertheless, venture the following brief remarks.

[106] Counsel for the Applicants has submitted that the Commission is required to clearly articulate, in advance of calling evidence, the standard against which the Commission will ultimately assess the evidence it gathers about the professional conduct of the seven subjects. He relies for that proposition on section 250.44(a) of the Act, which states that the subjects of a conduct complaint shall be afforded a "full and ample opportunity…to present evidence and to cross-examine witnesses".

[107] The Applicants argue that by deciding not to completely articulate the standard of conduct against which it will assess their professional conduct, the Military Police Complaints Commission has denied them the essence of the right to make full answer and defence guaranteed by s 250.44(a) of the Act. Without the knowledge of the case they had to meet, the Applicants contend that they could not meaningfully exercise their right to challenge the evidence led against them or to lead their own evidence. This premise, with all due respect, is flawed.

[108] It is undoubtedly true that in the context of a criminal procedure, the right to a fair trial entails the right to know precisely the case to be met and the precise standards against which one will be judged. As previously mentioned, however, a commission of inquiry is not a criminal court, and the task of the MPCC is not to determine guilt or innocence, but to make a report setting out its

findings and recommendations with respect to the complaint. Moreover, it is not an adversarial process and there is no accused or prosecuting party. In such a context, the criminal law requirements must obviously be relaxed.

[109] Moreover, there is a limit how far down the road a commission should go in completely articulating the legal standards, according to which it will make its findings. In the case at bar, the commission did provide some insights as to how it purported to apply the "means of knowing" standard of conduct. How more precise should it have been? There will always be the risk that, in an attempt to fully flesh out the legal parameters of its inquiry, the Commission will open itself to the charge that it has somehow pre-determined the issue it is called upon to investigate. Besides, the more you try to articulate a concept and refine it, the more susceptible you are to generate new lines of inquiries and never-ending debates as to what precisely the new "clarifications" really mean.

[110] In the case at bar, the crux of the investigation prompted by the conduct complaint is whether the subjects' duty to investigate alleged wrongdoing by those responsible for the transfer of Afghan detainees was triggered, and if so, whether it was reasonably discharged in the circumstances. What the subjects knew or had the means of knowing can only be a portion of the investigation, and may only be established on the basis of a full evidentiary record. At the end of the day, the real issue will boil down to whether the conduct of the Applicants was reasonable in the circumstances.

[111] Finally, I am of the view that the Military Police officers who are the subject of this inquiry know enough about the particulars of the complaint and the substance of the allegations, as well as

the applicable legal principles to be applied, to make their case and to respond fully. They have been afforded all the rights provided for by s 250.44 of the Act. If ever they are dissatisfied with the result of the inquiry and with the final report, due to their belief that either the Commission has overlooked or misinterpreted some relevant facts, or has erred in law, they will then be entitled to challenge that final report by way of judicial review.

5. Conclusion

[112] These applications for judicial review shall therefore be dismissed with costs for the Respondents under the middle tier of Column IV of *Tariff B*. This elevated allocation for costs is justified by the importance and the complexity of the issues, and not by the conduct of any of the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications for judicial review be dismissed, with costs for the Respondents under the middle tier of Column IV of *Tariff B*.

"Yves de Montigny"

Judge

APPENDIX

PART IV COMPLAINTS ABOUT OR BY MILITARY POLICE	PARTIE IV PLAINTES CONCERNANT LA POLICE MILITAIRE
…	…
Division 2	Section 2
Complaints	Plaintes
Subdivision 1	Sous-section 1
Right to Complain	*Droit de déposer une plainte*
Conduct Complaints	Plainte pour inconduite
Complaints about military police	Plainte contre un policier militaire
250.18 (1) Any person, including any officer or non-commissioned member, may make a complaint under this Division about the conduct of a member of the military police in the performance of any of the policing duties or functions that are prescribed for the purposes of this section in regulations made by the Governor in Council.	250.18 (1) Quiconque — y compris un officier ou militaire du rang — peut, dans le cadre de la présente section, déposer une plainte portant sur la conduite d'un policier militaire dans l'exercice des fonctions de nature policière qui sont déterminées par règlement du gouverneur en conseil pour l'application du présent article.
Complainant need not be affected	Absence de préjudice
(2) A conduct complaint may be made whether or not the complainant is affected by the subject-matter of the complaint.	(2) Elle peut déposer une plainte qu'elle en ait ou non subi un préjudice.
…	…
Time Limit	Prescription
Time limit	Prescription
250.2 No complaint may be made more than one year after the event giving rise to the complaint unless the Chairperson, at the request of the complainant, decides that it is reasonable in the circumstances to extend the time.	250.2 Les plaintes se prescrivent, sauf dispense accordée par le président à la requête du plaignant, par un an à compter de la survenance du fait qui en est à l'origine.

To Whom Complaint May be Made

To whom complaint may be made

250.21 (1) A conduct complaint or an interference complaint may be made, either orally or in writing, to the Chairperson, the Judge Advocate General or the Provost Marshal. A conduct complaint may also be made to any member of the military police.

Acknowledgement and notice of complaint

(2) The person who receives a complaint shall

(a) if the complaint is not in writing, put it in writing;

(b) ensure that an acknowledgement of its receipt is sent as soon as practicable to the complainant; and

(c) ensure that notice of the complaint is sent as soon as practicable

(i) in the case of a conduct complaint, to the Chairperson and the Provost Marshal,

(ii) in the case of an interference complaint concerning an officer or a non-commissioned member, to the Chairperson, the Chief of the Defence Staff, the Judge Advocate General and the Provost Marshal, and

(iii) in the case of an interference complaint concerning a senior official of the Department, to the Chairperson, the Deputy Minister, the Judge Advocate General and the Provost Marshal.

Notice to subject of conduct complaint

250.22 As soon as practicable after receiving or being notified of a conduct complaint, the Provost Marshal shall send a written notice of the substance of the complaint to the person

Réception des plaintes

Destinataires possibles

250.21 (1) Les plaintes sont adressées, par écrit ou oralement, au président, au juge-avocat général ou au prévôt. Elles peuvent aussi, quand elles visent une inconduite, être adressées à un policier militaire.

Accusé de réception et avis

(2) Sur réception de la plainte, le destinataire :

a) la consigne par écrit, si elle lui est faite oralement;

b) veille à ce qu'il en soit accusé réception par écrit dans les meilleurs délais;

c) veille à ce qu'en soient avisés, dans les meilleurs délais :

(i) le président et le prévôt dans le cas d'une plainte pour inconduite,

(ii) le président, le chef d'état-major de la défense, le juge-avocat général et le prévôt dans le cas d'une plainte pour ingérence mettant en cause un officier ou un militaire du rang,

(iii) le président, le sous-ministre, le juge-avocat général et le prévôt dans le cas d'une plainte pour ingérence mettant en cause un cadre supérieur du ministère.

Avis — plainte pour inconduite

250.22 Dans les meilleurs délais suivant la réception ou la notification d'une plainte pour inconduite, le prévôt avise par écrit la personne mise en cause de la teneur de celle-ci, pour

whose conduct is the subject of the complaint unless, in the Provost Marshal's opinion, to do so might adversely affect or hinder any investigation under this Act.

…

Subdivision 2

Disposal of Conduct Complaints

Provost Marshal responsible

250.26 (1) The Provost Marshal is responsible for dealing with conduct complaints.

Complaint about Provost Marshal

(2) If a conduct complaint is about the conduct of the Provost Marshal, the Chief of the Defence Staff is responsible for dealing with the complaint and has all the powers and duties of the Provost Marshal under this Division.

Informal resolution

250.27 (1) On receiving or being notified of a conduct complaint, the Provost Marshal shall consider whether it can be disposed of informally and, with the consent of the complainant and the person who is the subject of the complaint, the Provost Marshal may attempt to resolve it informally.

Restriction

(2) Subsection (1) does not apply if the complaint is of a type prescribed in regulations made by the Governor in Council.

Statements not admissible

(3) No answer given or statement made by the complainant or the person who is the subject of the complaint in the course of attempting to resolve a complaint informally may be used in

autant que cela, à son avis, ne risque pas de nuire à la tenue d'une enquête sous le régime de la présente loi.

…

Sous-section 2

Plaintes pour inconduite

Responsabilité du prévôt

250.26 (1) Le prévôt est responsable du traitement des plaintes pour inconduite.

Plainte visant le prévôt

(2) Dans le cas où la plainte met en cause le prévôt, son traitement incombe au chef d'état-major de la défense, qui, à cet effet, exerce les pouvoirs et fonctions qu'attribue la présente section à celui-ci.

Règlement amiable

250.27 (1) Dès réception ou notification d'une plainte pour inconduite, le prévôt détermine si elle peut être réglée à l'amiable; avec le consentement du plaignant et de la personne mise en cause, il peut alors tenter de la régler.

Exceptions

(2) Ne peuvent toutefois être réglées à l'amiable les plaintes relevant des catégories précisées par règlement du gouverneur en conseil.

Déclarations inadmissibles

(3) Les réponses ou déclarations faites, dans le cadre d'une tentative de règlement à l'amiable, par le plaignant ou par la personne mise en cause ne peuvent être utilisées dans une

any disciplinary, criminal, civil or administrative proceedings, other than a hearing or proceeding in respect of an allegation that, with intent to mislead, the complainant or the person who is the subject of the complaint gave an answer or made a statement knowing it to be false.

juridiction disciplinaire, criminelle, administrative ou civile, sauf si leur auteur les a faites, tout en les sachant fausses, dans l'intention de tromper.

Right to refuse or end informal resolution

(4) The Provost Marshal may direct that no attempt at informal resolution be started or that an attempt be ended if, in the opinion of the Provost Marshal,

(a) the complaint is frivolous, vexatious or made in bad faith; or

(b) the complaint is one that could more appropriately be dealt with according to a procedure provided under another Part of this Act or under any other Act of Parliament.

Refus de résoudre à l'amiable

(4) Le prévôt peut refuser de tenter de résoudre à l'amiable une plainte ou mettre fin à toute tentative en ce sens si, à son avis :

a) soit la plainte est futile ou vexatoire ou a été portée de mauvaise foi;

b) soit il est préférable de recourir à une procédure prévue par une autre loi fédérale ou une autre partie de la présente loi.

Notice

(5) If a direction is made under subsection (4), the Provost Marshal shall send to the complainant and the person who is the subject of the complaint a notice in writing setting out

(a) the direction and the reasons why it was made; and

(b) the right of the complainant to refer the complaint to the Complaints Commission for review if the complainant is not satisfied with the direction.

Avis

(5) Le cas échéant, il avise par écrit le plaignant et la personne mise en cause de sa décision en faisant état des motifs de celle-ci ainsi que du droit du plaignant de renvoyer sa plainte devant la Commission pour examen, en cas de désaccord.

Record of informal resolution

(6) If a conduct complaint is resolved informally,

(a) the details of its resolution must be set out in writing;

Consignation du règlement amiable

(6) Tout règlement amiable doit être consigné en détail, approuvé par écrit par le plaignant et la personne mise en cause et notifié par le prévôt au président.

(b) the complainant and the person who is the subject of the complaint must give their written agreement to the resolution of the complaint; and

(c) the Provost Marshal must notify the Chairperson of the resolution of the complaint.

Duty to investigate

250.28 (1) Subject to any attempts at informal resolution, the Provost Marshal shall investigate a conduct complaint as soon as practicable.

Right to refuse or end investigation

(2) The Provost Marshal may direct that no investigation of a conduct complaint be started or that an investigation be ended if, in the opinion of the Provost Marshal,

(a) the complaint is frivolous, vexatious or made in bad faith;

(b) the complaint is one that could more appropriately be dealt with according to a procedure provided under another Part of this Act or under any other Act of Parliament; or

(c) having regard to all the circumstances, investigation or further investigation is not necessary or reasonably practicable.

Notice

(3) If a direction is made under subsection (2), the Provost Marshal shall send to the complainant and, if the person who is the subject of the complaint was notified of the complaint under section 250.22, to that person, a notice in writing setting out

(a) the direction and the reasons why it was made; and

(b) the right of the complainant to refer the

Enquête

250.28 (1) Sauf tentative de règlement amiable, le prévôt fait enquête dans les meilleurs délais sur la plainte pour inconduite dont il est saisi.

Droit de refuser une enquête

(2) Il peut toutefois à tout moment refuser d'ouvrir l'enquête ou ordonner d'y mettre fin si, à son avis :

a) la plainte est futile ou vexatoire ou a été portée de mauvaise foi;

b) il est préférable de recourir à une procédure prévue par une autre loi fédérale ou une autre partie de la présente loi;

c) compte tenu des circonstances, il est inutile ou exagérément difficile de procéder à l'enquête ou de la poursuivre.

Avis

(3) Le cas échéant, il avise par écrit de sa décision le plaignant, ainsi que, si elle a déjà reçu notification de la plainte en application de l'article 250.22, la personne mise en cause, en faisant état des motifs de sa décision et du droit du plaignant de renvoyer sa plainte devant la Commission pour examen, en cas de désaccord.

complaint to the Complaints Commission for review if the complainant is not satisfied with the direction.

Report on investigation

250.29 On the completion of an investigation into a conduct complaint, the Provost Marshal shall send to the complainant, the person who is the subject of the complaint and the Chairperson a report setting out

(a) a summary of the complaint;

(b) the findings of the investigation;

(c) a summary of any action that has been or will be taken with respect to disposition of the complaint; and

(d) the right of the complainant to refer the complaint to the Complaints Commission for review if the complainant is not satisfied with the disposition of the complaint.

Status reports

250.3 (1) Within sixty days after receiving or being notified of a conduct complaint, the Provost Marshal shall, if the complaint has not been resolved or disposed of before that time, and then each thirty days afterwards until the complaint is dealt with, send to the following persons a report on the status of the complaint:

(a) the complainant;

(b) the person who is the subject of the complaint; and

(c) the Chairperson.

Six-month report

(2) If a conduct complaint has not been resolved or disposed of within six months, the Provost

Rapport d'enquête

250.29 Au terme de l'enquête, le prévôt transmet au plaignant, à la personne mise en cause et au président un rapport comportant les éléments suivants :

a) un résumé de la plainte;

b) les conclusions de l'enquête;

c) un résumé des mesures prises ou projetées pour régler la plainte;

d) la mention du droit du plaignant de renvoyer sa plainte devant la Commission pour examen, en cas de désaccord.

Rapports provisoires

250.3 (1) Au plus tard soixante jours après la réception ou la notification de la plainte et, par la suite, tous les trente jours, le prévôt transmet au plaignant, à la personne mise en cause et au président un rapport écrit sur l'état d'avancement de l'affaire.

Respect des délais

(2) Au bout de six mois, il doit justifier toute prolongation de l'affaire dans tout rapport qu'il

Marshal shall in each report sent after that period explain why not.

transmet après cette période.

Exception

(3) No report shall be sent to the person who is the subject of a conduct complaint if, in the opinion of the Provost Marshal, sending the report might adversely affect or hinder any investigation under this Act.

Exception

(3) Il est relevé de l'obligation de faire rapport à la personne mise en cause lorsqu'il est d'avis qu'une telle mesure risque de nuire à la conduite d'une enquête dans le cadre de la présente loi.

Review by Complaints Commission

Renvoi devant la Commission

Reference to Complaints Commission

250.31 (1) A complainant who is dissatisfied with a direction under subsection 250.27(4) or 250.28(2) in respect of a conduct complaint or the disposition of a conduct complaint as set out in a report under section 250.29 may refer the complaint in writing to the Complaints Commission for review.

Renvoi devant la Commission

250.31 (1) Le plaignant insatisfait de la décision prise aux termes des paragraphes 250.27(4) ou 250.28(2) ou des conclusions du rapport visé à l'article 250.29 peut, par écrit, renvoyer la plainte devant la Commission pour examen.

Information to be provided

(2) If a complainant refers a complaint to the Complaints Commission under subsection (1),

(a) the Chairperson shall send to the Provost Marshal a copy of the complaint; and

(b) the Provost Marshal shall provide the Chairperson with a copy of the notice sent under subsection 250.27(5) or 250.28(3), or of the report sent under section 250.29, in respect of the complaint and all information and materials relevant to the complaint.

Documents à transmettre

(2) Le cas échéant, le président transmet une copie de la plainte au prévôt, lequel, en retour, lui communique une copie de l'avis donné au titre des paragraphes 250.27(5) ou 250.28(3) ou du rapport transmis au titre du paragraphe 250.29 ainsi que tout renseignement ou document pertinent.

Review by Chairperson

250.32 (1) The Chairperson shall review the complaint to which a request for review relates as soon as practicable after receiving the request.

Examen par le président

250.32 (1) Dans les meilleurs délais suivant sa réception, le président examine la plainte renvoyée devant la Commission.

Chairperson may investigate

(2) In conducting a review of a complaint, the Chairperson may investigate any matter relating to the complaint.

Report

(3) At the completion of the review, the Chairperson shall send a report to the Minister, the Chief of the Defence Staff and the Provost Marshal setting out the Chairperson's findings and recommendations with respect to the complaint.

Status reports

250.33 (1) Within sixty days after a complaint is referred to the Commission for a review, the Chairperson shall, if the review has not been completed, and then each thirty days afterwards until it is completed, send a report on the status of the complaint to the complainant and the person who is the subject of the complaint.

Six-month report

(2) If the review has not been completed within six months, the Chairperson shall in each report sent after that period explain why not.

Exception

(3) No report shall be sent to the person who is the subject of a conduct complaint if, in the Chairperson's opinion, sending the report might adversely affect or hinder any investigation under this Act.

…

Division 3

Investigations and Hearings by Complaints Commission

Enquête du président

(2) Il peut, en cours d'examen, enquêter sur toute question concernant la plainte.

Rapport

(3) Au terme de son examen, il établit et transmet au ministre, au chef d'état-major de la défense et au prévôt un rapport écrit énonçant ses conclusions et recommandations.

Rapports provisoires

250.33 (1) Tant qu'il n'a pas terminé son examen, le président transmet, au plus tard soixante jours après le renvoi de la plainte devant la Commission et, par la suite, tous les trente jours, un rapport écrit au plaignant et à la personne mise en cause sur l'état d'avancement de l'affaire.

Respect des délais

(2) Au bout de six mois, il doit justifier toute prolongation de l'examen dans tout rapport qu'il transmet après cette période.

Exception

(3) Il est relevé de l'obligation de faire rapport à la personne mise en cause par la plainte lorsqu'il est d'avis qu'une telle mesure risque de nuire à la conduite d'une enquête dans le cadre de la présente loi.

…

Section 3

Enquête et audience publique de la Commission

Public interest

250.38 (1) If at any time the Chairperson considers it advisable in the public interest, the Chairperson may cause the Complaints Commission to conduct an investigation and, if warranted, to hold a hearing into a conduct complaint or an interference complaint.

Withdrawn complaint

(2) The Chairperson may cause an investigation to be held in respect of a complaint even if it has been withdrawn.

Notice

(3) If the Chairperson decides to cause an investigation to be held, the Chairperson shall send a notice in writing of the decision and the reasons for the decision to the complainant, the person who is the subject of the complaint, the Minister, the Chief of the Defence Staff or the Deputy Minister, as the case may be, the Judge Advocate General and the Provost Marshal.

Exception

(4) No notice shall be sent to the person who is the subject of the complaint if, in the Chairperson's opinion, sending the notice might adversely affect or hinder any investigation under this Act.

Duties suspended

(5) If the Chairperson acts in respect of a conduct complaint under subsection (1), the Provost Marshal is not required to investigate, report on or otherwise deal with the complaint until the Provost Marshal receives a report under section 250.53 with respect to the complaint.

Intérêt public

250.38 (1) S'il l'estime préférable dans l'intérêt public, le président peut, à tout moment en cours d'examen d'une plainte pour inconduite ou d'une plainte pour ingérence, faire tenir une enquête par la Commission et, si les circonstances le justifient, convoquer une audience pour enquêter sur cette plainte.

Retrait de la plainte

(2) Il peut faire tenir une enquête malgré le retrait de la plainte.

Avis

(3) S'il décide de faire tenir un enquête, il transmet un avis écrit motivé de sa décision au plaignant, à la personne mise en cause, au ministre, au chef d'état-major de la défense ou au sous-ministre, selon le cas, au juge-avocat général et au prévôt.

Exception

(4) Il est relevé de l'obligation de faire rapport à la personne mise en cause lorsqu'il est d'avis qu'une telle mesure risque de nuire à la conduite d'une enquête dans le cadre de la présente loi.

Suspension des obligations

(5) La décision du président de faire tenir une enquête ou de convoquer une audience sur une plainte pour inconduite libère le prévôt de toute obligation d'enquêter ou de produire un rapport sur la même plainte, ou de prendre quelque autre mesure à cet égard, et ce tant qu'il n'a pas reçu le rapport visé à l'article 250.53.

Report on investigation

250.39 On completion of an investigation under subsection 250.38(1), the Chairperson shall prepare and send to the Minister, the Chief of the Defence Staff or the Deputy Minister, as the case may be, the Judge Advocate General and the Provost Marshal a report in writing setting out the Chairperson's findings and recommendations with respect to the complaint, unless the Chairperson has caused, or intends to cause, a hearing to be held to inquire into the complaint.

Rapport

250.39 Au terme de l'enquête prévue au paragraphe 250.38(1), le président établit et transmet au ministre, au chef d'état-major de la défense ou au sous-ministre, selon le cas, au juge-avocat général et au prévôt un rapport écrit énonçant ses conclusions et recommandations, à moins qu'il n'ait déjà convoqué une audience ou se propose de le faire.

Assignment of members to conduct hearing

250.4 (1) If the Chairperson decides to cause a hearing to be held, the Chairperson shall

(a) assign one or more members of the Complaints Commission to conduct the hearing; and

(b) send a notice in writing of the decision and the reasons for the decision to the complainant, the person who is the subject of the complaint, the Minister, the Chief of the Defence Staff or the Deputy Minister, as the case may be, the Judge Advocate General and the Provost Marshal.

Audience

250.4 (1) Le président, s'il décide de convoquer une audience, désigne le ou les membres de la Commission qui la tiendront et transmet un avis écrit motivé de sa décision au plaignant, à la personne mise en cause, au ministre, au chef d'état-major de la défense ou au sous-ministre, selon le cas, au juge-avocat général et au prévôt.

Deeming

(2) For the purposes of this Part, the member or members of the Complaints Commission who conduct a hearing are deemed to be the Complaints Commission.

Assimilation à la Commission

(2) Pour l'application de la présente partie, le ou les membres qui tiennent l'audience sont réputés être la Commission.

Powers

250.41 (1) When conducting a hearing, the Complaints Commission has, in relation to the complaint before it, power

(a) to summon and enforce the attendance of witnesses and compel them to give oral or

Pouvoirs de la Commission

250.41 (1) La Commission dispose, relativement à la plainte dont elle est saisie, des pouvoirs suivants :

a) assigner des témoins, les contraindre à témoigner sous serment, oralement ou par écrit,

written evidence on oath and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it;

et à produire les documents et pièces sous leur responsabilité et qu'elle estime nécessaires à une enquête et étude complètes;

(b) to administer oaths; and

b) faire prêter serment;

(c) to receive and accept any evidence and information that it sees fit, whether admissible in a court of law or not.

c) recevoir et accepter les éléments de preuve et renseignements qu'elle estime indiqués, qu'ils soient ou non recevables devant un tribunal.

Restriction

Restriction

(2) Notwithstanding subsection (1), the Complaints Commission may not receive or accept

(2) Par dérogation au paragraphe (1), la Commission ne peut recevoir ou accepter :

(a) any evidence or other information that would be inadmissible in a court of law by reason of any privilege under the law of evidence;

a) des éléments de preuve ou autres renseignements non recevables devant un tribunal du fait qu'ils sont protégés par le droit de la preuve;

(b) any answer given or statement made before a board of inquiry or summary investigation;

b) les réponses ou déclarations faites devant une commission d'enquête ou dans le cadre d'une enquête sommaire;

(c) any answer or statement that tends to criminate the witness or subject the witness to any proceeding or penalty and that was in response to a question at a hearing under this Division into another complaint;

c) les réponses ou déclarations d'un témoin faites au cours de toute audience tenue en vertu de la présente section pour enquêter sur une autre plainte qui peuvent l'incriminer ou l'exposer à des poursuites ou à une peine;

(d) any answer given or statement made before a court of law or tribunal; or

d) les réponses ou déclarations faites devant un tribunal;

(e) any answer given or statement made while attempting to resolve a conduct complaint informally under subsection 250.27(1).

e) les réponses ou déclarations faites dans le cadre d'une tentative de règlement amiable en vertu du paragraphe 250.27(1).

Hearing in public

Caractère public des audiences

250.42 A hearing is to be held in public, except that the Complaints Commission may order the hearing or any part of the hearing to be held in private if it is of the opinion that during the course of the hearing any of the following

250.42 Les audiences sont publiques; toutefois, la Commission peut ordonner le huis clos pendant tout ou partie d'une audience si elle estime qu'au cours de celle-ci seront probablement révélés des renseignements :

information will likely be disclosed:

(a) information that, if disclosed, could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities;

a) dont la divulgation risquerait vraisemblablement de porter préjudice à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives;

(b) information that, if disclosed, could reasonably be expected to be injurious to the administration of justice, including law enforcement; and

b) qui risquent d'entraver la bonne administration de la justice, notamment l'application des lois;

(c) information affecting a person's privacy or security interest, if that interest outweighs the public's interest in the information.

c) qui concernent les ressources pécuniaires ou la vie privée d'une personne dans le cas où l'intérêt ou la sécurité de cette personne l'emporte sur l'intérêt du public à les connaître.

Notice of hearing

250.43 (1) As soon as practicable before the commencement of a hearing, the Complaints Commission shall serve a notice in writing of the time and place appointed for the hearing on the complainant and the person who is the subject of the complaint.

Avis de l'audience

250.43 (1) Le plus tôt possible avant le début de l'audience, la Commission signifie au plaignant et à la personne mise en cause un avis écrit en précisant la date, l'heure et le lieu.

Convenience to be considered

(2) If a person on whom a notice is served wishes to appear before the Complaints Commission, the Complaints Commission must consider the convenience of that person in fixing the time and the place for the hearing.

Situation de l'intéressé

(2) Lorsque le destinataire de l'avis souhaite comparaître devant elle, la Commission fixe la date, l'heure et le lieu de l'audience en tenant compte de la situation de l'intéressé.

Delay of hearing

(3) If the complaint relates to conduct that is also the subject of disciplinary or criminal proceedings before a court or tribunal of first instance, the hearing may not take place until the disciplinary or criminal proceedings are completed.

Sursis des procédures

(3) Toute procédure disciplinaire ou procédure criminelle devant un tribunal de première instance pour l'objet de la plainte tient, jusqu'à sa conclusion, toute audience publique de la Commission en état.

Rights of persons interested

250.44 The Complaints Commission shall afford a full and ample opportunity, in person or by counsel, to present evidence, to cross-examine witnesses and to make representations at the hearing to

(a) the complainant and the person who is the subject of the complaint, if they wish to appear; and

(b) any other person who satisfies the Complaints Commission that the person has a substantial and direct interest in the hearing.

Droits des intéressés

250.44 Le plaignant et la personne mise en cause ainsi que toute autre personne qui convainc la Commission qu'elle a un intérêt direct et réel dans la plainte dont celle-ci est saisie doivent avoir toute latitude de présenter des éléments de preuve à l'audience, d'y contre-interroger les témoins et d'y faire des observations, en personne ou par l'intermédiaire d'un avocat.

Witness not excused from testifying

250.45 (1) In a hearing, no witness shall be excused from answering any question relating to the complaint before the Complaints Commission when required to do so by the Complaints Commission on the ground that the answer to the question may tend to criminate the witness or subject the witness to any proceeding or penalty.

Obligation des témoins de déposer

250.45 (1) Au cours de l'audience, tout témoin est tenu de répondre aux questions sur la plainte lorsque la Commission l'exige, et ne peut se soustraire à cette obligation au motif que sa réponse peut l'incriminer ou l'exposer à des poursuites ou à une peine.

Answer not receivable

(2) No answer given or statement made by a witness in response to a question described in subsection (1) may be used or receivable against the witness in any disciplinary, criminal, administrative or civil proceeding, other than a hearing or proceeding in respect of an allegation that the witness gave the answer or made the statement knowing it to be false.

Non-recevabilité des réponses

(2) Les déclarations faites en réponse aux questions ne peuvent être utilisées ni ne sont recevables contre le témoin devant une juridiction administrative, civile, criminelle ou disciplinaire, sauf si la poursuite ou la procédure porte sur le fait qu'il les savait fausses.

…

…

Report

250.48 On completion of a hearing, the Complaints Commission shall prepare and send to the Minister, the Chief of the Defence Staff or the Deputy Minister, as the case may be, the

Rapport

250.48 Au terme de l'audience, la Commission établit et transmet au ministre, au chef d'état-major de la défense ou au sous-ministre, selon le cas, au juge-avocat général et au prévôt un

Judge Advocate General and the Provost Marshal a report in writing setting out its findings and recommendations with respect to the complaint.

rapport écrit énonçant ses conclusions et recommandations.

Division 4

Review and Final Report

Section 4

Révision et rapport final

Review — conduct complaint

250.49 (1) On receipt of a report under subsection 250.32(3) or section 250.39 or 250.48 in respect of a conduct complaint, the Provost Marshal shall review the complaint in light of the findings and recommendations set out in the report.

Révision — plainte pour inconduite

250.49 (1) Sur réception du rapport établi sur une plainte pour inconduite aux termes du paragraphe 250.32(3) ou des articles 250.39 ou 250.48, le prévôt révise la plainte à la lumière des conclusions et recommandations qu'il contient.

Exception

(2) If the Provost Marshal is the subject of the complaint, the review shall be conducted by the Chief of the Defence Staff.

Exception

(2) Dans le cas où le prévôt est mis en cause par la plainte, c'est le chef d'état-major de la défense qui est chargé de la révision.

…

…

Notice of action

250.51 (1) The person who reviews a report under section 250.49 or 250.5 shall notify in writing the Minister and the Chairperson of any action that has been or will be taken with respect to the complaint.

Notification

250.51 (1) La personne qui procède à la révision du rapport prévue aux articles 250.49 ou 250.5 notifie au ministre et au président toute mesure prise ou projetée concernant la plainte.

Reasons

(2) If the person decides not to act on any findings or recommendations set out in the report, the reasons for not so acting must be included in the notice.

Motifs

(2) Si elle choisit de s'écarter des conclusions ou recommandations énoncées au rapport, elle motive son choix dans la notification.

Notice of action

250.52 (1) If the Minister reviews a report by reason of subsection 250.5(2), the Minister shall

Notification

250.52 (1) S'il a révisé le rapport aux termes du paragraphe 250.5(2), le ministre notifie au

notify the Chairperson in writing of any action that has been or will be taken with respect to the complaint.

président toute mesure prise ou projetée concernant la plainte.

Reasons

(2) If the Minister decides not to act on any findings or recommendations set out in the report, the reasons for not so acting must be included in the notice.

Motifs

(2) S'il choisit de s'écarter des conclusions ou recommandations énoncées au rapport, il motive son choix dans la notification.

Final report by Chairperson

250.53 (1) After receiving and considering a notice sent under section 250.51 or 250.52, the Chairperson shall prepare a final report in writing setting out the Chairperson's findings and recommendations with respect to the complaint.

Rapport final du président

250.53 (1) Après étude de la notification reçue en application des articles 250.51 et 250.52, le président établit un rapport final énonçant ses conclusions et recommandations.

Recipients of report

(2) A copy of the final report shall be sent to the Minister, the Deputy Minister, the Chief of the Defence Staff, the Judge Advocate General, the Provost Marshal, the complainant, the person who is the subject of the complaint and all persons who have satisfied the Complaints Commission that they have a substantial and direct interest in the complaint.

Destinataires

(2) Il en transmet copie au ministre, au sous-ministre, au chef d'état-major de la défense, au juge-avocat général, au prévôt, au plaignant, à la personne mise en cause ainsi qu'à toute personne qui a convaincu la Commission qu'elle a un intérêt direct et réel dans la plainte.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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