Date: 20090428

Dockets: T-581-08
T-1685-08

Citation: 2009 FC 426

Toronto, Ontario, April 28, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Respondents

REASONS FOR ORDER AND ORDER

[1] The Attorney General of Canada seeks an order staying a "Public Interest Hearing" to be held by the Military Police Complaints Commission until the final determination of two applications for judicial review brought by the Attorney General. The hearing is to examine complaints received by the Commission with respect to the transfer of detainees held by Canadian Forces' personnel in Afghanistan to the custody of Afghan authorities. The Attorney General's

applications for judicial review challenge the jurisdiction of the Commission to investigate the subject matter of the complaints.

[2] For the reasons that follow, I find that the Attorney General of Canada has not demonstrated with clear and convincing evidence that irreparable harm will result if the stay is not granted. As a consequence, the motion will be dismissed.

Background

[3] The actions of the Canadian Forces in Afghanistan with respect to the capture and detention of insurgents have been described in detail in my decisions in *Amnesty International Canada et al. v. Canada (Canadian Forces)*, 2008 FC 162, ("*Amnesty #1)*, and *Amnesty International Canada et al. v. Canada (Canadian Forces)*, 2008 FC 336, ("*Amnesty #2*). It is unnecessary to repeat that description for the purposes of this motion.

[4] Briefly stated, as part of Canada's military operations in Afghanistan, Canadian Forces personnel are from time to time required to capture and detain insurgents, or those assisting the insurgents, who may pose a threat to the safety of either Afghan nationals or members of the Canadian military and allied forces.

[5] Following capture by the Canadian Forces, detainees are initially held in a Canadian Forces temporary detention facility at Kandahar Airfield. The Canadian Forces have discretion to

determine whether a detainee will be kept in Canadian custody, transferred to the Afghan authorities or released.

[6] Concerns have been raised with respect to the treatment accorded to detainees once they are in the hands of Afghan authorities, and reports of their mistreatment have been received by Canadian officials. Because of these concerns, Amnesty International Canada and the British Columbia Civil Liberties Association (BCCLA) have filed three complaints with the Military Police Complaints Commission, one in early 2007, and two in June of 2008.

[7] Two complaints (the "detainee complaints") relate to the transfer of detainees held by the Canadian Forces in Afghanistan to the custody of the Afghan authorities, where, it is alleged, they face a substantial risk of torture. The third complaint (the "failure to investigate complaint") asserts that Military Police officials failed to investigate potential wrongdoing by members of the Canadian Forces who directed the transfer of detainees to Afghan authorities.

[8] On March 12, 2008, the Commission Chairman decided to exercise his discretion to hold a "Public Interest Hearing" into the three complaints, in accordance with sections 250.38(1) and 250.40(1)(b) of the *National Defence Act*, R.S.C. 1985, c. N-5. The hearing was initially scheduled to commence on February 17, 2009.

[9] In the meantime, the Attorney General of Canada brought applications for judicial review with respect to all three complaints. The applications assert that the issues raised by each complaint

are beyond the jurisdiction of the Commission, as they do not involve the conduct of members of the military police in the performance of any “policing duties or functions”.

[10] On January 29, 2009, the Attorney General of Canada wrote to the Commission advising that a stay of proceedings would be sought from the Federal Court, unless the Commission was prepared to adjourn or stay its own proceedings pending the determination of the Attorney General’s applications for judicial review. The Commission then adjourned the hearings, so as to allow the parties to make submissions as to whether the Commission should adjourn or stay its proceedings.

[11] On March 26, 2009, the Commission issued a decision refusing to stay or adjourn the proceedings pending the determination of the Attorney General’s jurisdictional challenges. No application for judicial review has been commenced by the Attorney General with respect to this decision.

[12] The Commission’s hearing in relation to the three complaints is now scheduled to begin on May 25, 2009.

Should the Court Decline to Entertain the Motion?

[13] The Military Police Complaints Commission was granted intervener status to allow it to argue the effect that the Commission’s stay decision should have for the exercise of the Court’s discretion to entertain the motion for a stay.

[14] While acknowledging that section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, authorizes the Court to grant interim relief such as a stay in the context of a pending application for judicial review, the Commission contends that the Court should decline to exercise its jurisdiction in this case. According to the Commission, the Attorney General's motion for a stay essentially amounts to a collateral attack on the Commission's decision refusing to stay its proceedings. If the Attorney General was not happy with that decision, the Commission says that the appropriate course of action was for the Attorney General to seek judicial review of the Commission's decision, rather than bringing a fresh motion for a stay before this Court.

[15] The Commission argues that by declining to exercise its jurisdiction, this Court would best recognize the appropriate role of the Court relative to an administrative tribunal. This would in turn engender respect for the Commission's legal process, having regard to the related public law doctrines of collateral attack, issue estoppel and abuse of process.

[16] The Commission further submits that if the Court were to exercise its jurisdiction to deal with the motion, concerns would arise with respect to forum shopping, inconsistency, the integrity of the administrative process, and multiplicity of proceedings.

[17] As a practical matter, given that the Commission is scheduled to commence its hearing in approximately one month's time, it is unlikely that an application for judicial review of the Commission's decision refusing to stay the matter could be brought, perfected, heard and decided in time to afford the Attorney General of Canada the relief that he now seeks. As the Commission

concedes, this Court clearly has the jurisdiction to deal with the Attorney General's motion, and in light of the time constraints involved in this case, I intend to do so.

The Test for a Stay of Proceedings

[18] The parties agree that in determining whether the Attorney General is entitled to a stay of the Commission's proceedings, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[19] That is, the Attorney General must establish:

> 1) That there is a serious issue to be tried in the underlying applications for judicial review;
> 2) That irreparable harm will result if the injunction is not granted; and
> 3) That the balance of convenience favours the granting of the stay.

[20] Given that the test is conjunctive, the Attorney General has to satisfy all three elements of the test before he will be entitled to relief.

Serious Issue

[21] In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. In this regard, the Supreme Court noted that:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at

> trial. A prolonged examination of the merits is generally neither necessary nor desirable. (at para. 50)

[22] Insofar as the detainee complaints are concerned, the Attorney General contends that these complaints are not about the conduct of a member or members of the military police in the performance of any "policing duties or functions", as that expression is used in subsection 250.18(1) of the *National Defence Act*. Rather, the handling of detainees is a duty or function that relates to "military operations that result from established military customs or practice". As such, the conduct in issue is beyond the purview of the Commission: see subsection 2(2) of the *Complaints about the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065.

[23] Amnesty and the BCCLA concede that a serious issue exists with respect to the two detainee complaints, as it relates to the definition of "policing duties and functions". Indeed, the Commission Chairman himself acknowledged the existence of a serious issue in this regard in his decision refusing to stay the Commission proceedings.

[24] Insofar as the failure to investigate complaint is concerned, the Attorney General acknowledges that a complaint regarding the failure of military police officers to investigate unlawful conduct, properly framed, could form the subject matter of a complaint within the jurisdiction of the Military Police Complaints Commission. However, the Attorney General argues that the Commission has construed the failure to investigate complaint in such a way as to take it outside of the Commission's jurisdiction.

[25] That is, by characterizing the failure to investigate complaint as raising systemic issues "resulting from a lack of direction and appropriate guidance from the upper command of the CF Provost Marshal's office", the complaint is no longer a complaint regarding the conduct of a member or members of the military police in the performance of policing duties or functions.

[26] Amnesty and the BCCLA argue that this issue does not amount to a serious issue. I do not agree. Having regard to the low threshold that has to be met at this stage of the inquiry, I am satisfied that the Attorney General of Canada has demonstrated the existence of a serious issue with respect to all three complaints.

Irreparable Harm

[27] A stay of proceedings should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitcodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, at para. 23.

[28] Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages: *RJR-MacDonald*, at para. 59.

[29] The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*. 2005 FC 815, (2005), at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[30] That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*: see *International Longshore and Warehouse Union, Canada v. Canada (A.G.)*, 2008 FCA 3, at paras. 22-25, per Chief Justice Richard.

[31] In this case, the Attorney General of Canada argues that three different forms of irreparable harm will result if the Commission's proceedings are not stayed. These are firstly, damage to the reputations of the individual Canadian Forces' members who are the subjects of the complaints; secondly, the risk of inadvertent disclosure of confidential information which may damage Canada's international relations, national defence or national security; and thirdly, the waste of public funds that will occur if it is ultimately determined that the Commission is acting outside of its jurisdiction. Each category of alleged irreparable harm will be considered in turn.

i) *Damage to Reputation*

[32] Ten individuals have been named as subjects of the various complaints. The Attorney General represents eight of these individuals before the Commission, and two have retained private counsel. None of these individuals have brought their own applications for judicial review with

respect to the actions of the Commission, nor have any of them been named as parties in either of the Attorney General's applications. Furthermore, none of the subjects of the complaints sought leave to intervene in either proceeding. Thus the first question that arises is whether the Attorney General can rely on alleged harm to these individuals in support of his motion for a stay of proceedings.

[33] In this regard, it is noteworthy that the Supreme Court observed in *RJR-MacDonald* that:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect *the applicants' own interests* that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. (at para. 58) (emphasis added)

[34] The jurisprudence is clear that the question for the Court is not whether third parties may suffer irreparable harm if the relief sought is not granted, but rather whether the individual seeking the injunction or stay will himself suffer such harm: see, for example, *Mainil v. Canada (Canadian Wheat Board),* 2004 FC 1768, at para. 61; *Chinese Business Chamber of Canada v. Canada,* 2005 FC 142, at para. 58; *Dodge v. Caldwell First Nation of Point Pelee*, 2003 FCT 36, at paras. 20-21.

[35] Counsel for the Attorney General was careful in his submissions to distinguish between what he called the "corporate interests" of his client, and the personal interests of the individual subjects of the complaints, acknowledging that allegations of harm to reputation did not relate to the Attorney General's own "corporate interests".

[36] The subjects of the complaints have full standing before the Commission: see section 250.44 of the *National Defence Act*. Counsel for the Attorney General acknowledged that as parties "directly affected" by the conduct of the Commission, each of these individuals could have commenced his or her own applications for judicial review with respect to the decisions of the Commission to deal with the complaints, and that none of them has chosen to do so. Counsel also conceded that "technically" or "procedurally" his client could not rely on harm to third parties in support of the motion for a stay.

[37] However, counsel submits that because he represents the interests of eight of the subjects of the complaints in the proceedings before the Commission, the potential damage to the reputations of these individuals should be taken into account in support of the motion for a stay.

[38] Counsel for the Attorney General cited no authority to support his argument in this regard, and I do not agree with his submission. While recognizing that the Attorney General of Canada is not an ordinary litigant and has public interest responsibilities, I am nevertheless satisfied that the reputational interests of the individual subjects of the complaints are clearly personal to them, and cannot be relied upon by the Attorney General to support the claim of irreparable harm.

[39] Even if I were to consider the harm to the reputations of the individuals in question that would allegedly result if the Commission is allowed to proceed with its hearings, I would not find that it amounts to irreparable harm justifying the granting of a stay.

[40] The only evidence before the Court on this issue is the second affidavit sworn by Major Jeffrey Harvey, who served as the Task Force Provost Marshall in Afghanistan in the period between August of 2006 and February of 2007. Appended to Major Harvey's affidavit is the "Notice of Potential Adverse Findings" served upon him by the Commission.

[41] Major Harvey takes issue with the Commission's "shotgun style" in making what he says are general allegations against him based upon the fact that he once occupied the role of Task Force Provost Marshall. He says that by implying that he committed each of the transgressions identified in the "Notice of Potential Adverse Findings", his reputation will be tainted in the eyes of anyone who is made aware of the allegations through the public hearings.

[42] Major Harvey is concerned that he may never be able to clear his name if the Court decides that the Commission does not have the jurisdiction to inquire into the decision to transfer detainees. He further asserts that even if the Court determines that the Commission has the jurisdiction to examine some of the issues in this case, the Commission's current "systemic" approach "means that I may forever be guilty of professional negligence, even if by simple association".

[43] At the same time, Major Harvey asserts that he is firmly convinced that he met the standards of professional conduct expected of him while serving as Task Force Provost Marshall. As evidence of this, he points to the fact that he was awarded the General Campaign Star for his service in Afghanistan.

[44] There is no evidence before the Court from any of the other nine subjects of the complaints. Counsel for the Attorney General says that it was not necessary to bring forward evidence from these individuals, as they would have simply said the same thing as Major Harvey. I do not think that we can speculate as to what it is that these individuals might have said. While some may share the views of Major Harvey, it is quite possible that others may welcome the opportunity to testify before the Commission, in order to clear their names and restore their reputations.

[45] Assuming that I can take the potential risk to Major Harvey's personal reputation into account in support of the Attorney General's motion, I have not been persuaded that the risk to his reputation that he might face as a result of the Commission proceedings amounts to irreparable harm.

[46] Insofar as the allegations contained in the "Notice of Potential Adverse Findings" are concerned, that Notice was confidential and would not have been made public, but for Major Harvey's own actions in attaching it to the affidavit filed as part of the public record in this case. As such, any damage to his reputation that may result from public awareness of the allegations contained in the "Notice of Potential Adverse Findings" is entirely self-induced: see *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1997] 3 S.C.R. 440, at para. 56.

[47] Moreover, we cannot know at this stage of the proceedings what the result of the Attorney General's applications for judicial review will be. Nor can we know what might transpire before the

Commission in relation to the allegations regarding Major Harvey, or what the ultimate findings of the Commission might be in relation to him. Major Harvey has asserted unequivocally in his affidavit that he has done nothing wrong. It may well be that the Commission hearings will provide him with a public forum in which to tell his side of the story, and that the Commission's final report may vindicate his position.

[48] To find irreparable harm based upon Major Harvey's own fears of what *might* happen in the future would require the Court to embark on an exercise of "speculation and conjecture": see *Addy v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia– Létourneau Commission)*, [1997] 3 F.C. 784, at para. 59; *Beno v. Canada Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)*, [1997] F.C.J. No. 936, at para. 20.

[49] I acknowledge that there are cases where Courts have found the potential damage to the reputations of those facing legal proceedings to amount to irreparable harm justifying the staying of those proceedings. In this regard, the Attorney General relies on *Bennett v. British Columbia (Superintendent of Brokers)*, (1993), 22 B.C.A.C. 300, at paras. 17-20, and *Canada (Royal Canadian Mounted Police) v. Malmo-Levine* (1998), 161 F.T.R. 25, at paras. 2-22 and 25-26.

[50] It is noteworthy, however, that in both *Bennett* and *Malmo-Levine*, there were allegations of bias on the part of the presiding officials. A review of the Courts' reasons in those cases makes it clear that this was a critical factor in the determination that the harm to reputation feared by the

applicants in those cases constituted irreparable harm. No allegation of bias on the part of the Military Police Complaints Commission has been made in this case.

ii) ***Risk of Disclosure of Confidential Information***

[51] The second category of harm that the Attorney General asserts will occur if the Commission's proceedings are not stayed relates to the risk of disclosure of potentially injurious information relating to Canada's international relations, national defence or national security.

[52] As I understand it, the Attorney General's primary concern is that in the heat of cross-examination, a witness before the Commission might blurt out information that would otherwise be subject to the provisions of section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[53] Counsel for the Attorney General also expressed the concern that Commission counsel (who has already been provided with access to a great deal of section 38 information on a confidential basis) could inadvertently let potentially injurious information slip in the course of her questioning of witnesses.

[54] In support of these arguments, the Attorney General relies upon the second affidavit sworn by Major Harvey, who discusses the lack of experience that Canadian Forces' members have with "filtering" confidential information. Major Harvey also discusses his own experiences with the rigors of cross-examination, and his concern that sensitive information may inadvertently be disclosed by a witness while the witness is under cross-examination.

[55] I agree that once confidential information has been disclosed, the resulting harm cannot be undone. As a consequence, such disclosure could amount to irreparable harm: see *O'Connor v. Nova Scotia*, 2001 NSCA 47, at para. 16.

[56] I also accept that any time a witness who possesses potentially injurious information gets into the witness box in any kind of public legal proceeding, there is at least a theoretical risk that confidential information could be inadvertently disclosed. That said, the burden is on the Attorney General to provide clear and convincing evidence that irreparable harm *will* result if the stay is not granted. The suggestion that it is *possible* that a witness *might* disclose confidential information on the witness stand does not meet this threshold.

[57] Moreover, there is much that can be done to reduce the risk of inadvertent disclosure of potentially injurious information by witnesses before the Commission. The subjects of the complaints have already been provided with "Notices of Potential Adverse Findings", and counsel for the Commission is also required by the Commission's rules of procedure to prepare a summary of the anticipated evidence of each witness to be called. As a result, the likely areas of questioning for each witness should be relatively easy to identify. Careful preparation of witnesses by counsel will go a long way towards reducing the risk of inadvertent disclosure. Furthermore, alert counsel at the hearing, properly prepared and ready to make timely objections, can also pre-empt concerns with respect to potential inadvertent disclosure.

[58] It is also clear from a review of the record that the Commission is alive to the necessity of maintaining the confidentiality of potentially injurious information, and that it is well aware of its obligations under section 38 of the *Canada Evidence Act*. Indeed, counsel for the Commission has been working cooperatively with the Department of Justice over the last few months in an effort to resolve section 38 issues in advance of the Commission hearings.

[59] Special rules of procedure have also been developed by the Commission specifically for this hearing, in consultation with the parties, so as to address potential concerns with respect to the disclosure of potentially injurious information. Moreover, these Rules make it explicit that they are subject to the provisions of the *Canada Evidence Act*.

[60] Furthermore, there are procedures that may be followed to reduce the risk of inadvertent disclosure in cases where a witness may have difficulty disengaging potentially injurious information from information that may safely be made public. These procedures include the use of summaries: see *Afghanistan Public Interests Hearing Rules*, section S.10, and the section 38 process itself: see the discussion in *Canada (Attorney General) v. Ribic*, 2003 FCA 246, at paras. 51-52.

[61] I am not prepared to give any weight to counsel's suggestion that the Attorney General will suffer irreparable harm because Commission counsel might herself inadvertently disclose potentially injurious information which is subject to notice under section 38 of the *Canada Evidence Act* through her questioning of witnesses.

[62] It is clear from the record that Commission counsel is well aware of her obligations under section 38 of the Act. Commission counsel is an experienced lawyer, and I am not prepared to make a finding of irreparable harm based upon speculation as to the possibility that counsel might breach her professional and legal obligations in her conduct of the hearings.

[63] Counsel for the Attorney General conceded that witnesses in the possession of potentially injurious information do testify in various types of public hearings, including high-profile proceedings that garner a great deal of media attention. Examples of this include security certificate proceedings in this Court, as well as Commissions of Inquiry such as those involving the Air India bombing and the Maher Arar affair.

[64] Indeed, Brigadier General Joseph Paul André Deschamps testified before this Court in *Amnesty #1*, in the presence of the media, with respect to issues relating to the transfer of detainees by the Canadian Forces in Afghanistan, see paras. 32-36. There is no evidence before me that any potentially injurious information has inadvertently been disclosed by witnesses in any of these proceedings.

[65] Counsel for the Attorney General stated that it takes “disciplined Commission counsel, Members of the Commission and people on edge to ensure objections in time”, in order to ensure that potentially injurious information is not disclosed. While I do not disagree with counsel’s observation, I see no reason why this will not occur in this case.

iii) ***Costs Potentially Thrown Away***

[66] The final area of alleged irreparable harm relied upon by the Attorney General relates to the costs associated with the Public Interest Hearing that may ultimately be wasted, if this Court were to determine that the Commission was without jurisdiction to inquire into any of the complaints.

[67] The estimated cost of the hearings for the Commission will be in the vicinity of $4 million. Counsel for the Attorney General submits that, in addition, his client will incur significant costs of its own, although no evidence has been provided as to what these costs may be. These costs could not be recovered, in the event that the Commission proceedings are ultimately stayed.

[68] While recognizing that costs thrown away are not usually viewed as amounting to irreparable harm justifying the staying of proceedings, counsel submits that the waste of public funds of this order of magnitude, in times of fiscal restraint, simply cannot be justified, and would amount to irreparable harm.

[69] In support of his position, the Attorney General relies on the decision of the Alberta Court of Queen's Bench in *Ermineskin Cree Nation v. Canada*, 2001 ABQB 760, at para.79.

[70] While not disputing that significant costs will be incurred in connection with the Commission's hearings, Amnesty and the BCCLA ask me to consider these costs in the context of the overall cost of Canada's mission in Afghanistan. In this regard, the complainants observe that the cost of the hearings represents approximately 0.0005% of the cost of the mission as a whole.

[71] A review of the *Ermineskin* decision cited by the Attorney General discloses that the sum total of the Court's analysis with respect to the cost of proceedings as irreparable harm justifying a stay is the following statement: "The issue of irreparable harm is related to the harm that would be done where both the Tribunal and this Court are trying and making findings on the constitutional question at the same time. This would be a waste of resources, both the Tribunal's and this Court's". Given the brevity of the Court's analysis on the issue, I am of the view that this decision is of limited assistance.

[72] There are, however, numerous decisions of this Court which have held that the inability of a party to recover the costs associated with a hearing does not amount to irreparable harm: see for example, *Canadian National Railways v. Leger*, [2000] F.C.J. No. 243, at para. 15; *Brocklebank v. Canada (Minister of National Defence*), [1994] F.C.J. No. 1496, at para. 11; *ICN Pharmaceuticals, Inc. v. Canada (Patented Medicine Prices Review Board*), [1995] F.C.J. No. 1644, at para. 3; *Bell Canada v. Communications, Energy and Paperworkers Union*, [1997] F.C.J. No. 207, at paras. 37-41; *Northwest Territories v. Public Service Alliance of Canada*, [2001] F.C.J. No.19 (F.C.A.), at para. 19.

[73] Counsel for the Attorney General has argued that exceptional circumstances exist in this case justifying a finding of irreparable harm. That is, counsel says that the magnitude of the hearing scheduled to take place before the Commission is such that irreparable harm will indeed result if the proceedings are ultimately quashed. I do not agree.

[74] Firstly, I note that counsel was unable to tell me how long the Commission hearings will likely take, other than to say that two weeks have been set for the hearings at this point. Thirteen witnesses are expected to testify. The budget submitted by the Commission in its request for supplementary funding is based upon a projected 30 days of hearings. Given the limited evidence available on this point, there is no reason to believe that the hearings in question will be of an unusual magnitude.

[75] Secondly, the *Bell Canada* decision cited above involved pay equity litigation before the Canadian Human Rights Tribunal. Litigation of this nature is inevitably lengthy, complex and expensive. Nevertheless, Justice Richard, then of this Court, did not find that the costs of litigation that would potentially be lost if it were ultimately determined that the proceedings should be quashed amounted to irreparable harm.

[76] Thus, while recognizing the need for restraint in the expenditure of public funds, I cannot find that the costs potentially thrown away in this case amount to irreparable harm.

Balance of Convenience

[77] The test for a stay of proceedings is conjunctive. Given that the Attorney General has failed to satisfy the irreparable harm element of the test, it is not necessary to address the issue of the balance of convenience.

Costs

[78] While I agree that Amnesty and the BCCLA should have their costs associated with this motion, I see no basis for making those costs payable forthwith, as the organizations have requested. Given that the two organizations were represented by the same counsel, they shall have one set of costs, on the ordinary scale.

[79] Counsel for the Commission does not seek costs of the intervention, and none are awarded.

ORDER

THIS COURT ORDERS AND ADJUDGES that the motion for a stay is dismissed, with costs to the respondents.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-581-08 and T-1685-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. AMNESTY INTERNATIONAL CANADA ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 21, 2009
REASONS FOR ORDER AND ORDER:	Mactavish J.
DATED:	April 28, 2009

APPEARANCES:

Mr. Alain Préfontaine Ms. Zoe Oxaal	FOR THE APPLICANT
Mr. Paul Champ	FOR THE RESPONDENTS
Ms. Freya Kristjanson Mr. Nigel Marshman	FOR THE INTERVENER (The Military Police Complaints Commission)

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
RAVEN CAMERON BALLANTYNE & YAZBECK LLP /s.r.l. Barristers & Solicitors Ottawa, Ontario	FOR THE RESPONDENTS
CAVALLUZZO HAYES SHILTON MCINTYRE & CORNISH LLP Barristers & Solicitors Ottawa, Ontario	FOR THE INTERVENER (The Military Police Complaints Commission)