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Docket: T-1685-08

Citation: 2009 FC 918

Toronto, Ontario, September 16, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

AMNESTY INTERNATIONAL CANADA AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Respondents

REASONS FOR ORDER AND ORDERS

[1] Among the men and women serving in our Canadian Armed Forces is a group known as the Military Police. Unlike civilian police forces, their members are entrusted with both police and military duties. It is this distinction which serves as the backdrop to two judicial reviews launched by the Attorney General against decisions of the Military Police Complaints Commission to consider two complaints filed by Amnesty International Canada and the British Columbia Civil Liberties Association (to whom I shall refer collectively as Amnesty International). The complaints

are about the conduct of the Provost Marshal who is the head of the Military Police, and others in the performance of their policing duties or functions in respect of the treatment of detainees in Afghanistan.

[2] The Military Police Complaints Commission was established in 1999 as one of the corrective measures taken in light of misconduct by some members of the Canadian Forces in Somalia. It is an independent commission which has oversight over the conduct of the Military Police in their policing role. However it does not have jurisdiction to investigate complaints against members of the Military Police that relate to military operations resulting from "established military custom or practice."

[3] In the first complaint ("the detainee complaint"), Amnesty International alleged that the Provost Marshal and others "…transferred and/or allowed to be transferred detainees…" to the authorities in Afghanistan notwithstanding that the transfer system lacked effective safeguards against torture and that there was evidence that the Afghan authorities were routinely torturing detainees.

[4] In its second complaint, Amnesty International sought an extension of the timeframe of its first complaint, and as a distinct issue, alleged that the Military Police failed to investigate officers "…having command responsibility for directing the transfer of detainees to the Afghan authorities, in the face of a known risk of torture." Such officers, it was alleged, may be in breach of the *Code of Service Discipline*, the *Geneva Conventions Act* and other Canadian and international laws.

[5] On receipt of the detainee complaint, the Commission, through its Chair, stated it would conduct a public interest investigation on the grounds that one of the policing duties or functions specifically enumerated in the *Complaints about the Conduct of Members of the Military Police Regulations*, PC 1999-2065, is the "…arrest or custody of a person…" if performed by a member of the Military Police.

[6] With respect to the first component of the second complaint, the expansion of the timeframe of the detainee complaint, the extension was granted. That extension shall be considered as forming part of the overall detainee complaint. The Commission also agreed to consider the second aspect of this complaint, the alleged failure of the Military Police to investigate the conduct of those who made the decisions to transfer detainees to the Afghan authorities (the "investigation complaint"). The Commission also decided to call a public interest hearing with respect to both complaints.

[7] The decision to investigate the initial detainee complaint was made without seeking comments from the Military Police. This led to protracted correspondence between the Commission and the Office of the Judge Attorney General, and the Attorney General, and finally to this application for judicial review. The position of the Attorney General is that the capture, detention and transfer of insurgents, and others, in Afghanistan is not a policing duty or function relating to the arrest or custody of persons, but rather is excluded therefrom as relating to a military operation that results from established military custom or practice. It is common ground that decisions to turn

detainees over to the Afghan authorities are made by the Task Force Commander, and not by any member of the Military Police.

[8] The Attorney General has a more nuanced approach to the second complaint which alleges that the Military Police failed to investigate crimes or potential crimes committed by Senior Officers who may have been aware that detainees released to the Afghan authorities were likely to be tortured. He acknowledges that an investigation as to whether members of the Canadian Forces were in breach of the Code of Service Discipline, and other Canadian law as well as international law, is a policing duty or function normally carried out by the Military Police. However, his position is that the Commission has given every indication that it intends to exceed its jurisdiction by investigating Government policy at large. Government policy falls outside the confines of the Commission's mandate and involves persons who are not members of the Military Police acting within the scope of their policing duties or functions.

[9] The Notices of Application are somewhat broader than that which I have just outlined. However, over time, some of the bases for judicial review have fallen by the wayside. The Attorney General no longer seeks to quash the Commission's decision to expand the temporal framework of the detainee complaint on the ground that there was no reason why it could not have been made within the normal delays. The expanded detainee complaint will stand or fall on the question of jurisdiction. If there is jurisdiction, he no longer takes the point that the Commission improperly exercised its discretion in deciding to hold a public inquiry with respect to both the detention and failure to investigate complaints.

[10] Amnesty International has long been critical of Canadian treatment of Afghan detainees. In its unsuccessful attempt to seek a ruling that the Canadian *Charter of Rights and Freedoms* applied to Afghanis held by Canadian military forces, (*Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546), it was given public interest standing. In this case s. 250.18 of the *National Defence Act* provides that "any person" may complain. The status of the complainants before the Commission is therefore not in issue.

[11] Another non-issue is the timing of the Attorney General's application for judicial review of the Commission's initial decision to investigate the detainee complaint. That decision was made in February 2007. The application for judicial review was only filed in April 2008. Normally, an application for judicial review is to be taken within 30 days. However, for reasons which follow, the Attorney General is not out of time.

DECISION

[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.

ISSUES

[14] The first of three issues is whether the applications for judicial review are premature. They are in respect of interlocutory decisions. Courts are loath to engage in judicial review before a final decision is rendered. The second issue is whether I should take into account evidence pertaining to military practice which is before me, but which was not before the Commission. Judicial review is normally based on the material which was before the underlying federal board, tribunal or commission. An exception lies if the review pertains to jurisdiction. However, that exception is not hard and fast, and is subject to discretion. It is not necessary for me to rule on this point, as I have not taken into account evidence which was not before the Commission.

[15] The third issue is the standard of review. My method of approach is to give the background to Part IV of the National Defence Act and the Regulations thereunder, set out the law itself, followed by a brief summary of Canada's role in Afghanistan, the timetable leading to these judicial reviews, the decisions under review and, finally, an analysis of the issues themselves.

THE LAW

[16] Beginning in 1992, members of the Canadian Forces were deployed to Somalia as part of an international mission to facilitate humanitarian relief efforts in the midst of civil strife and ineffective state authority. Members of the Canadian Airborne Regiment Battle Group were involved in incidents which resulted in the death of Somali civilians. A Commission of Inquiry, headed by Mr. Justice Gilles Létourneau of the Federal Court of Appeal, was established. A number of recommendations were made with respect to military policing, the need for some independence from the military chain of command and independent oversight.

[17] Shortly before that report was issued in 1997, a Special Advisory Group, chaired by the late Right Honourable Brian Dickson, former Chief Justice of Canada, assessed the role and function of the Military Police. It too made recommendations with respect to the independence of Military Police Services, independent oversight mechanisms and a process by which complaints with respect to Military Police actions could be investigated.

[18] Following these reports, the *National Defence Act* was amended in 1998 to establish Part IV thereof, sections 250-250.53. Part IV comprises four divisions. The first establishes the Military

Police Complaints Commission, the second deals with complaints, the third with investigations and hearings by the Commission, and finally the findings, report and recommendation process.

[19] As previously stated, any person may make a complaint about the conduct of a member of the Military Police in the performance of police duties. As well, any member of the Military Police may complain about interference with an investigation he or she is carrying out. These judicial reviews do not deal with an interference complaint.

[20] In the normal course, conduct complaints are dealt with by the Provost Marshal. A dissatisfied claimant may then refer the matter to the Complaints Commission for review. At any time, however, the Chairperson may conduct an investigation and hold a hearing.

[21] Sections 250.18 and 250.38(1) provide:

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. (2) A conduct complaint may be made whether or not the complainant is affected by the subject-matter of the complaint.	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. (2) Elle peut déposer une plainte qu’elle en ait ou non subi un préjudice.

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.	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.

[22] In accordance with s. 250.18 and other sections of the *National Defence Act*, the *Complaints about the Conduct of Members of the Military Police Regulations* were enacted. Section 2(1) provides in part and section 2(2) provides:

2. (1) For the purpose of subsection 250.18(1) of the Act, any of the following, if performed by a member of the military police, are policing duties or functions:	1. Pour l'application du paragraphe 250.18(1) de la Loi, « fonctions de nature policière » s'entend des fonctions ci-après lorsqu'elles sont accomplies par un policier militaire :
a. the conduct of an investigation;	a. enquêter;
[…]	[…]
g. the enforcement of laws;	g. faire respecter la loi;
[…]	[…]
i. the arrest or custody of a person.	i. arrêter ou détenir des personnes.

(2) For greater certainty, a duty or function performed by a member of the military police that relates to administration, training, or military operations that result from established military custom or practice is not a policing duty or function.	(2) Il est entendu que les fonctions exercées par le policier militaire qui se rapportent à l'administration ou à la formation, ou aux opérations d'ordre militaire qui découlent de coutumes ou pratiques militaires établies ne sont pas comprises parmi les fonctions de nature policière.

CANADA'S ROLE IN AFGHANISTAN

[23] Canada's role in Afghanistan was clearly explained by Madam Justice Mactavish in the decision referred to earlier in *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, aff'd, 2008 FCA 401, 305 D.L.R. (4th) 741, leave to appeal to S.C.C. refused, 33029 (21 May 2009), and by Peter Tinsley, the Chair of the Complaints Commission, in his reasons for the decision of 30 September, 2008, which is the fundamental decision under review before me. There is no need to repeat what they have said in any detail.

[24] Suffice it to say that Canada is part of both NATO and United Nations missions, with particular security operations in the Kandahar region. Pursuant to various arrangements between Canada and the Islamic Republic of Afghanistan, it has been acknowledged that Canadian personnel may have need to use deadly force in the capture and detention of insurgents or those assisting them. Detainees are afforded the same treatment as Prisoners of War. If not released, they are to be transferred to Afghan authorities in a manner consistent with international law. Afghanistan has agreed to treat detainees in accordance with the Third Geneva Convention, i.e. humanely and without torture.

[25] Various bodies, including the International Committee of the Red Cross and Canadian government personnel (actually from DFAIT) are provided access to persons who have been transferred from Canadian to Afghan authority.

[26] The standard procedure is that those captured by Canadian Forces are turned over to the Military Police for interrogation and detention. If not released outright, detainees are turned over to the Afghan authorities within days. That policy was, however, interrupted from November 2007 until February 2008, upon receipt of reports of the very real possibility that some of the detainees released into Afghan custody were tortured. It is important to note that the Chief of the Defence Staff commands all operations at the strategic level and that decisions to detain or release prisoners are made by the Task Force Commander, not by the Military Police.

[27] Although there are Military Police in Afghanistan providing advice, and although they are under the military chain of command, there is another chain, the technical chain of command designed to help ensure investigative independence. The only Military Police in Afghanistan who are not under the military chain of command are members of the National Investigation Service. The Task Force Provost Marshal in Afghanistan reports both to the Task Force Commander in Afghanistan and to the Canadian Forces Provost Marshal. The Military Police who form part of the National Investigation Service do not report within the military chain of command.

THE TIMELINE

[28] On 21 February 2007, Amnesty International filed its initial conduct complaint with respect to the detention of Afghani nationals.

[29] On 26 February 2007, the Commission decided to investigate. The Chair said: "These allegations relate to the conduct of members of the military police with respect to the custody of persons, which is expressly enumerated in the relevant regulations as one of the 'policing duties or functions' of the military police which may be the subject of a conduct complaint…" He decided it was in the public interest for the Commission to immediately initiate its own independent investigation pursuant to s. 250.38 of the *National Defence Act*, but reserved his decision on the holding of a public hearing. Although they had not been consulted beforehand, this decision was distributed to the Minister of National Defence, the Chief of the Defence Staff, the Judge Advocate General and the Canadian Forces Provost Marshal.

[30] On 3 March 2007, the Office of the Judge Advocate General, on behalf of the Department of National Defence and the Canadian Forces, took the position that the complaint was not a conduct complaint. More particularly, Colonel Gleason stated, among other things, that the practice of transferring detainees pursuant to an arrangement with the Government of Afghanistan is directed by the operational chain of command and is followed by all Canadian Forces members involved, not just the Military Police. Before instituting an application for judicial review of the decision, he asked for clarification of the legal basis of the Commission's jurisdiction, more particularly the basis

for its conclusion that this is a policing duty or function, and, should it proceed, for an outline of subjects and issues to be investigated in light of the very broad scope of the complaint.

[31] On 15 March 2007, counsel for the Commission simply replied that as earlier stated by the Chair the custody of persons is specifically enumerated as a police duty or function.

[32] No application for judicial review was filed between March 2007 and March 2008. The Attorney General was apparently of the view that cooperation was the course of least resistance, that the Commission would ultimately realize that it was without jurisdiction, and that, in any event, there was no merit to the allegations. The Department of National Defence generally cooperated, and a number of witnesses were interviewed. Other departments were, however, less forthcoming. Many documents were provided in redacted form.

[33] On 12 March 2008, the Chair decided to conduct a public hearing. He stated that the main difficulty, which gave rise to his decision, was the Government's refusal to provide the Commission with full access to relevant documents and information under the control of departments or agencies such as DFAIT and the Correctional Service of Canada.

[34] The first application for judicial review was filed on 11 April 2008 under docket number T-581-08.

[35] On 12 June 2008, Amnesty International filed its second complaint expanding the timeframe of its detainee complaint up to that date, as well as the allegations with respect to the alleged failure to investigate.

[36] That same day the Chair brought the second complaint to the attention of the Chief of the Defence Staff and the Canadian Forces Provost Marshal. Although he stated that he was under no obligation to do so, he invited comment on six issues including the request to update and expand the scope of the detainee complaint and jurisdiction. He confirmed he had copy of the material already filed by the Attorney General in the first, and then only, application for judicial review. This material dealt in detail with established military customs and practices.

[37] The Attorney General responded on 27 June 2008. Mention was made of the fact that following the initial detainee complaint against the Provost Marshal, the National Investigation Service, reluctant to investigate the head of the military police, asked the Royal Canadian Mounted Police to review the allegations. The RCMP had reported that it found no grounds to proceed with either a criminal or service offence investigation. I pause to mention that this report in no way ousts the jurisdiction confided upon the Commission by statute and by regulation. No additional comment was made with respect to the Attorney General's position that the Commission had no jurisdiction in the first place.

[38] On 30 September 2008, the Commission, through its Chair, issued a 78-page decision with respect to the 12 June 2008 complaint. This time, in the context of the expanded detainee complaint,

the Commission did not simply state that it had jurisdiction arising from the arrest or custody of a person, but considered in depth section 2(2) of the Regulations and the principles of statutory interpretation.

[39] On 30 October 2008, the Attorney General filed the second application for judicial review under T-1685-08. Subsequent thereto, the two judicial reviews were consolidated under that number, and, since jurisdiction was in issue, the Commission itself was given leave to intervene.

DISCUSSION

[40] In essence, the timeline provides the answer to the first two issues. It is Parliament which gives federal boards, tribunals and commissions their jurisdiction, not the parties. The Court could have raised the issue of jurisdiction on its own motion (*Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363). In any event, the application for judicial review of the second decision, which also deals with jurisdiction, was taken within time.

[41] With respect to the contention that the applications for judicial review are premature, the argument is clearly set out at paragraph 3:4100 in Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Cansvasback Publishing, 2008) where the authors state: "…courts now generally defer a determination of an allegation that an administrative decision maker… has no jurisdiction over a matter… until the administrative process is complete." (footnotes omitted)

[42] Nevertheless, the decision is still a discretionary one, and I have decided it is more appropriate to rule on jurisdiction now. The parties have said just about all that can be said with respect to jurisdiction. The decision of the Chair was based on statutory interpretation, and not his expertise within a specialized tribunal as compared to the Federal Court which is far more generalist in that it is called upon to review decisions made under more than 100 statutes. Finally, the Commission is about to embark on a very expensive process and would be spending the public purse without legal justification.

[43] As to the new evidence pertaining to jurisdiction, which is being contested, it consists of the affidavits of Dr. Yves Tremblay, a government historian, and Colonel Dorothy Cooper, who essentially supports what other affiants have already said. I agree with Amnesty International that the Attorney General had the opportunity to put this evidence in before the Commission rendered its second decision. However, it is not necessary for me to make a ruling on this point as I have not taken that evidence into account.

[44] This is not a case in which the Court is prematurely cutting short an inquiry by findings of jurisdictional facts, which are more within the expertise of a specialized tribunal. The Commission's decision to accept jurisdiction does not turn on a finding as to the content of "established military custom or practice."

[45] This brings us to the standard of judicial review.

JUDICIAL REVIEW - CORRECTNESS OR DEFERENCE

[46] Following the decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, there are two standards of review: correctness or reasonableness. Findings of fact and mixed findings of fact and law are reviewed on a reasonableness standard, meaning that the decision should not be disturbed unless it falls outside a range of rational, articulate outcomes.

[47] Although questions of pure law are reviewed more often than not on a correctness standard, there are exceptions, primarily based on the expertise of the tribunal which rendered the decision. For instance, in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92,* 2004 SCC 23, [2004] 1 S.C.R. 609, the Court deferred to an arbitrator's interpretation of a collective agreement. A very recent instance of the Court deferring to determinations of law by a tribunal is *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39.

[48] However, it was arguable that Parliament imposed a different standard upon the Federal Court. Section 18.1(4) of the *Federal Courts Act* provides that one ground of review upon which the Federal Court may grant relief is that the federal board, commission or other tribunal "erred in law in making a decision or an order, whether or not the error appears on the face of the record".

[49] That concern has been put to rest by the reasons of the majority in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 which held that s. 18.1(4) only establishes the grounds of review, not the standard of review.

[50] The first step in the process is to determine whether the degree of deference owed to the Military Police Complaints Commission has already been established (*Dunsmuir*, above, at para. 62, and *Nolan*, above, at para. 23-24). As far as I am aware, this is the first case dealing with the Commission. Consequently, a standard of review analysis is required.

[51] In their joint reasons for judgment in *Dunsmuir*, Justices Bastarache and LeBel considered the ways and means in which the appropriate standard of review could be determined, such as whether the tribunal is interpreting its own statute or statutes related thereto, the presence or absence of a privative clause, a discrete and specialist administrative regime in which the decision maker has expertise and the nature of the question of law (paras. 54 and 55). However, at para. 59 they state:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. […]

The reference to C.U.P.E. is to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

[52] In my opinion, the jurisdiction of the Commission to entertain the detainee complaint is a true question of jurisdiction. Either Parliament gave the Commission jurisdiction or it did not. This is not a "jurisdiction/preliminary question" or jurisdictional fact such as that seized upon by the Supreme Court under now discarded principles of administrative law in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. Thus the standard of review is correctness.

[53] However should I be wrong in this characterization, for reasons to follow, I also consider the Commission's decision to be unreasonable.

[54] With respect to the failure to investigate complaint, the Attorney General does not contest the Commission's jurisdiction to inquire into any alleged failure to investigate by the Military Police. While I tend to the view that to go beyond the Military Police and to investigate the conduct of others is an exercise in excess of jurisdiction also to be reviewed on a correctness standard, in the end result the applicable standard does not matter. It is unreasonable for the Commission to use its jurisdiction to investigate complaints against Military Police as a springboard to investigate government policy at large.

[55] A recent decision dealing with the jurisdiction of a federal board or tribunal is that of the Federal Court of Appeal in *Public Service Alliance of Canada v. Canadian Federal Pilots Association*, 2009 FCA 223. In that case, all three members of the panel agreed that the standard of review was reasonableness. Two held the decision was reasonable, while one did not. However, the

contextual factors were quite different. In my opinion this case falls squarely within true questions of jurisdiction as referred to in paragraph 59 of *Dunsmuir*, above.

THE COMMISSION'S DECISIONS

[56] A complete set of reasons with respect to both complaints is set out in the decision of 30 September, 2008.

[57] The decision to accept jurisdiction over the detainee complaint was based on the "modern approach" to statutory interpretation, i.e. that the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. This approach has been repeated time after time by the Supreme Court in cases such as *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. This general approach also applies to the interpretation of regulations (*Glykis v. Hydro-Quebec*, 2004 SCC 60, [2004] 3 S.C.R. 285). In the Chair's opinion, "for greater certainty"…"il est entendu" in s. 2(2) of the Regulations is a clarification that does not detract from the scope of enumerated police duties and functions set out in s. 2(1). He stated at para. 93:

> In other words, the excluded duties or functions described in subsection 2(2) are already (i.e., without the operation of subsection 2(2) inherently distinct from the activities enumerated in subsection 2(1).

[58] The Chair drew inspiration from the *Constitution Act, 1867* as we read in paras. 88 and 89 of the decision:

> 88. The term "for greater certainly" arises frequently in division of powers jurisprudence. Section 91 of the *Constitution Act, 1867* distributes to the federal government the power to:
>
> > "…make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces, and for greater *Certainty*, but not so as to restrict the Generality of the foregoing Terms in this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated… [Emphasis added.]
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> 89. The phrase "for greater certainty" preceding the enumeration of specific powers, in the constitutional context, has been determined not to detract in any way from the federal government's exclusive jurisdiction to make laws in relation to peace, order and good government for all matters not exclusively assigned to the province: "…the paramount consideration is that the specific powers are only "for greater certainty"; the basis[sic] rule is that the general legislative authority in respect of all that is not within the provincial field is federal".

[59] Unlike in his initial decision, the Chair went on to consider the impact of military operations that result from established military custom or practice. Paragraphs 121-123 are telling:

> 121. Finally, I note that while the Dickson Report and the Somalia Inquiry report do refer to custody and control of detainees as combat or operation functions, this was in a context where the focus for both reports was to separate "investigations" from everything else an MP does. For example, the Dickson report did not say that these operational roles were not also policing duties or functions. Moreover, the resulting law – s. 2 of the *Conduct Regulations* – went well beyond a concern for investigations. The Governor in Council saw fit to draw numerous other activities of MPs, including custody or arrest, into the fold of policing duties and functions.

> 122. It seems, therefore, that the Attorney General's assertion that detainee handling falls under the rubric of "military custom" is wrong, and that the opposite is more likely true. Based on all the material before me, and based as well on Complaints Commission expertise in the area of military policing, I conclude that the custom has instead developed that arrest and custody of detainees is a policing function, including when in support of deployed military operations.
>
> 123. First, I note that CF Doctrine, Security Orders, Formation Standard Operating Procedures and Military Police Doctrine all assign custodial services, including detention operations, to the military police, and for good reason. In the operations context, it makes good sense for the military police, given their expertise, to handle detainees. MPs are specifically required to know and apply the law of armed conflict to the treatment of prisoners of war, something the MP Doctrine describes as of "particular interest to military police…". MPs must be well-versed in the standards imposed by the Geneva Conventions and Protocols.

[60] More shall be said about the Dickson Report and the Somalia Inquiry Report, as well as custom or usage. Although mention was made of the Commission's expertise, it was not explained how this expertise aided in the interpretation of the regulation, how this expertise would lead to the conclusion that custom had changed, and, if so, when.

[61] The core jurisdiction of the Commission with respect to the "failure to investigate" complaint is not in issue. The Chair considered that the subjects of the investigation complaint include the Canadian Forces Provost Marshal, the Task Force Provost Marshal, the Commanding Officer of the National Investigation Service and the Officer (or Warrant Officer) in charge of the National Investigation Service Attachment in Afghanistan during the time span in question. Given changes of personnel, 10 persons are involved. However, the Commission, either directly or through counsel, has sought production of documents emanating from other departments without

establishing a footing that copies were provided to the Military Police, or that the Military Police had the ability to obtain them.

[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. To quote Francis Bacon:

> It were infinite for the law to judge the cause of causes, and their impulsions one of another; therefore it contenteth itselfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.

[63] Reverting to the decision to accept jurisdiction on the detainee complaint, the file is replete with details of what is called "military doctrine." Various orders, regulations and directives have been given over the years since the Military Police Force was established in World War One. It is not necessary, however, to go beyond the Dickson Report issued in March 1997 and the Somalia Inquiry Report issued in June 1997.

[64] As noted in the Dickson Report, the investigation of service offences is not the main role of the Military Police. Most Military Police members carry out numerous functions and tasks assigned by the Commanding Officer:

> Military police have very broad responsibilities which can best be described as four core areas, namely, police, security duties, custodial duties and direct support to military operations. The performance of their police functions are similar to those of other police forces and include law enforcement, crime prevention and investigations. The security duties of the military police include those of security or personnel, materiel, information and information technology and those related to military intelligence. The military police is also responsible for the custodial functions associated with service prisons or field detention barracks which may be required in operations.
>
> It is in the field of operations that military police's most important war time duties reside. Thus, the military police has an operational function which includes, *inter alia*, battlefield rear area and site security, route reconnaissance as well as traffic control for tactical movement, control of refugees, custody of prisoners of war and sundry direct defence duties in specific areas such as airfields. In short, the primacy of the operational mission will prevail over other duties when military police are deployed with forces in the field, be it in actual operations or in training. [Emphasis added.]

[65] The Somalia Inquiry Report states:

> In addition to their role in the military justice system, MP perform important combat functions. These include tactical and administrative movement control; route signing and traffic control; reception, custody, and control of prisoners of war or detainees; control of refugees; and all aspects of security. We acknowledge that MP performing these operations functions must form an integral part of the field formation and function under the operational chain of command. However, such an arrangement for Military Police engaged in providing *police* support to the military justice system may not afford adequate protection from command influence and thus may well undermine their effectiveness. [Emphasis added.]

[66] The conclusion of these Reports that custody of prisoners of war or detainees was an operational function was reached notwithstanding that Military Police are "peace officers" within

the meaning of the *Criminal Code* and that the *Queen's Regulations and Orders for the Canadian Forces* both then and now include the arrest or custody of persons as falling within the duties of a peace officer.

[67] There is nothing in Hansard nor in the language of the regulation itself which suggests that the Governor in Council intended to give new meaning to "established military custom or practice", as clearly set out in the Dickson and Somalia Inquiry Reports. In the absence of evidence, it was unreasonable for the Commission to so find. Indeed, in a Special Report issued in December 2002, the previous Chair, Louise Cobetto stated:

> Finally, in addition to their police duties, Military Police members perform important military duties since, as part of operations, they are responsible for guarding, and supervising detainees or prisoners of war, overseeing detention barracks and conducting route surveys.

[68] Although the Chair refers to the Commission's expertise, there is no explanation as to why that expertise aids in modern statutory interpretation or leads to the conclusion that the Governor in Council by regulation intended to change established military custom. The obligation to give reasons is a requirement of procedural fairness. No reasons were given which disclose why the Commission's expertise in the area of military policing was of assistance (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *North v. West Region Child and Family Services Inc.*, 2007 FCA 96, 362 N.R. 83).

[69] As a matter of general statutory interpretation, I owe no deference. Judges interpret statutes and regulations. I cannot agree with the *Constitution Act* analogy that the enumeration of specific

legislative powers falling within the provincial domain does not detract from the Federal Government's jurisdiction to make laws in relation to peace, order and good government. If it were not for the "greater certainty" provision in section 91, some matters which do relate to peace, order and good government would be construed as falling within provincial competence as matters of property and civil rights.

[70] Paradoxically, the Commission's position that sections 2(1) and 2(2) of the Conduct Regulations are mutually exclusive is supported by the Attorney General. It is his position that the capture and detention of insurgents is not and never has been a policing duty or function pertaining to the arrest or custody of a person. Furthermore, he submits that a release from custody is not the same as holding in custody. Those arrested or in custody are limited to members of the military and in certain circumstances to other Canadians within Canada. As this is the first decision dealing with the jurisdiction of the Military Police Complaints Commission, I think it preferable to say as little as possible with respect to submissions which did not influence my decision.

[71] I base myself on the Attorney General's subsidiary submission which was that even if the capture or detention of insurgents in Afghanistan could be considered as a policing function or duty, since that function or duty arises from "established military custom or practice", they are deemed not to be a matter of policing.

[72] I do not consider, to use a well-worn phrase used in the interpretation of the Constitution, that subsections (1) and (2) of section 2 are "watertight compartments". The very reason the words

"for greater certainty…" … "il est entendu"…" (and I find no difference between the two) are inserted is that without them the scope of "policing duties or functions" including "the arrest or custody of a person" would be uncertain. Read out of context and on a stand alone basis, which the Commission has done, the custody of a detainee in Afghanistan could be construed as the custody of a person. In fact, it is the custody of a person, but it is not a policing duty or function. Military Police are assigned this duty in the field because of their special training in processing and interrogating persons and in the application of Canadian and international law, including the *Geneva Conventions*.

[73] To illustrate, sections 91 and 92 of the *Constitution* do not specifically mention insurance. One case which has stood the test of time is the decision of the Privy Council in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96. The issue was whether the regulation of policies of insurance entered into or enforced in a province fell within provincial jurisdiction as a matter of property and civil rights (s. 92(13)) or peace, order and good government, more particularly the "regulation of trade and commerce". Their lordships, speaking through Sir Montague Smith, held that insurance was a matter of property and civil rights and that therefore the statute enacted by the Province of Ontario was constitutional.

[74] According to Sir Montague Smith at pages 108 and 109:

> With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these

> classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

He continued at page 110:

> It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at sect. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18, bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion parliament.

[75] A follow-up to this decision is that of the Supreme Court of Canada in *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283. The issue in that case was whether s. 22(2)(r) of the *Federal Courts Act*, which gives this Court jurisdiction over “any claim arising out of or in connection with a contract of marine insurance” was constitutional.

[76] In speaking for the Court, Mr. Justice Chouinard said at pages 291-292:

> The Attorney General of Canada, intervening in support of respondents, submitted that marine insurance is part of maritime law. Maritime law, including marine insurance, falls within the scope of navigation and shipping. Though marine insurance must be regarded as a matter forming part of property and civil rights, it has nonetheless been assigned to Parliament as part of navigation and shipping, except as regards the part of this power which remains within provincial jurisdiction.
>
> In my opinion, the Attorney General of Canada is correct in regarding marine insurance as a matter falling within property and civil rights, strictly speaking, but one which has nonetheless been assigned to Parliament as a part of navigation and shipping**.** The same is true, for example, of bills of exchange and promissory notes, which form part of property and civil rights, but jurisdiction over which was assigned to Parliament by subs. 18 of s. 91 of the Constitution Act, 1867. [Emphasis added.]

[77] To conclude with respect to the judicial review of the Commission's decision to investigate the detainee complaint, even if the capture, detention and transfer of insurgents in Afghanistan could be construed as a policing duty or function if carried out by the Military Police, s. 2(1) of the Conduct Regulations has to be read down to exclude such duties or functions as they arise from "established military custom or practice."

[78] To deny the Commission jurisdiction is not to give the Military Police or any member of the Canadian Forces free reign to ignore or violate Canadian and international laws pertaining to human rights. As Madam Justice Mactavish stated in her reasons in the earlier *Amnesty International* case, at paragraph 344:

> [M]embers of the Canadian Forces cannot act with impunity with respect to the detainees in their custody. Not only can Canadian military personnel face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they

> could potentially face sanctions or prosecutions under international law.

[79] This decision does not leave the Commission a toothless wonder. The main thrust of the amendments to the *National Defence Act* is to give more independence and transparency to the Military Police in their policing duties. A separate complaint was filed that Military Police failed to investigate alleged abuse of Afghan detainees by Canadian Forces. The Commission's jurisdiction is not in issue.

[80] In terms of remedy, this Court has power by virtue of s. 18.1(3)(b) of the *Federal Courts Act* to:

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[81] As stated in *Solosky v. Canada*, [1980] 1 S.C.R. 821, declaratory relief is a remedy neither constrained by form nor bound by substantive content. There is a real issue here, the parties are opposed and it is appropriate to have a resolution now.

[82] As to the future conduct of the Commission with respect to the “failure to investigate” complaint, there is a real, not a hypothetical, dispute between the complainants and the Commission on the one hand, and the Attorney General on the other. If we were dealing in contract, it could be said that a remedy lies now in virtue of an anticipatory breach. See *Hochster v. de la Tour* (1853), [1843-1860] All E.R. Rep. 12 (Q.B.); *Pompeani v. Bonik Inc.* (1997), 35 O.R. (3d) 417 (C.A.).

[83] Orders and declarations shall be issued accordingly.

[84] Notwithstanding that the Attorney General was successful in both judicial reviews; the jurisdiction of the Military Police Commission had not previously been tested; the points are difficult and given the considerable public interest in our Canadian Forces, in accordance with Rule 400 and following of the *Federal Courts Rules*, I consider it appropriate that each party pay its own costs.

[85] A copy of these reasons and orders is to be filed in docket number T-581-08.

ORDER ON APPLICATION T-581-08

UPON the application for judicial review by the Attorney General of Canada originally filed in Court docket no. T-581-08;

FOR REASONS GIVEN;

THIS COURT ORDERS that:

a. The application is granted.

b. It is declared that the complaint of the respondents is not a complaint about the conduct of a member of the Military Police in the performance of any "policing duties or functions," as that expression is defined by subsection 250.18(1) of the *National Defence Act* and section 2 of the *Complaints About the Conduct of Members of the Military Police Regulations*, P.C. 1999-2065.

c. The decisions of the Military Police Complaints Commission issued 26 February 2007 or 12 March 2007 and 30 September 2008 to investigate complaints that the Provost Marshal and others transferred or allowed to be transferred detainees to the authorities in Afghanistan, notwithstanding the allegations that the transfer system lacked effective safeguards against torture and that there was evidence that the Afghan authorities were routinely torturing detainees, are quashed and set aside as the Commission acted without jurisdiction.

d. The Military Police Complaints Commission and its Chairperson are prohibited and restrained from investigating the said complaint.

ORDER ON APPLICATION T-1685-08

UPON the application for judicial review by the Attorney General of Canada, in Court docket no. T-1685, of the decision of the Military Police Complaints Commission dated 30 September 2008 to investigate and to hold a public hearing with respect to the complaint by the respondents that the Military Police failed to investigate officers having command responsibility for directing the transfer of detainees to the Afghan authorities, in the face of allegedly known risks of torture;

FOR REASONS GIVEN;

THIS COURT ORDERS that:

a. The application is granted.

b. It is hereby 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. Otherwise, the Commission would be acting beyond its jurisdiction.

THIS COURT makes no order as to costs in either application.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1685-08
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. AMNESTY INTERNATIONAL CANADA AND BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	August 25-26, 2009
REASONS FOR ORDER AND ORDERS:	HARRINGTON J.
DATED:	September 16, 2009

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