



February 9th, 2007

Distribution List

Our File: MPCC-2007-003 (Attaran)

In accordance with the provisions of subsection 250.38(3) of the *National Defence Act* (NDA), this letter will serve as notice of my decision in respect of the investigation of the captionally-noted complaint.

On January 29, 2007 the Complaints Commission received a letter and supporting documentation from Professor Amir Attaran (the complainant) which contained allegations about the possible abuse of three individuals apprehended and detained by members of the Canadian Forces (CF) in April 2006 near the village of Dukah in the Kandahar Region of Afghanistan. The individuals were brought to Kandahar Airfield where they were held by CF military police prior to being transferred to the custody of Afghan authorities. The complainant suggests various failings by the military police members involved relative to safeguarding the well-being of the persons in custody, and, more particularly, in respect of their failure to investigate the causes of various injuries which may have been sustained while in CF, as opposed to military police, custody.

As the treatment of persons in their custody is enumerated as one of the "policing duties or functions" of the military police in the regulations made under Part IV of the *National Defence Act*, this complaint constitutes a military police conduct complaint under section 250.18 of the Act. The typical process for such complaints is for the Canadian Forces Provost Marshal, more specifically the Deputy Provost Marshal Professional Standards, to investigate the complaint in the first instance. If, following the CF Provost Marshal's investigation, the complainant is dissatisfied with the disposition of the complaint, then the complainant can request that the Complaints Commission conduct a review. Exceptionally, however, section 250.38 of the Act authorizes the Chair of the Commission to launch an investigation of a complaint at any stage, where the Chair considers it to be in the "public interest" to do so.

In the letter outlining his complaint, the complainant specifically addressed himself to the Commission's "public interest" jurisdiction. He has requested that I invoke this authority of the Commission to launch an immediate investigation, including the holding of a public hearing. The complainant indicated that such a course would best respond to the inherent seriousness of the allegations as well as the need to ensure public confidence in their investigation and disposition.

Given the circumstances of this case, wherein the complainant has made submissions and specifically requested investigation by this Commission in the first instance, on January 30, 2007, the Complaints Commission provided the CF Provost Marshal and the Chief of the Defence Staff with the opportunity to offer their views on the prospective invocation of the Commission's public interest jurisdiction. Though not required by law, the Commission took this step in the interests of procedural fairness and transparency, and in recognition of the roles of these senior officials as key stakeholders with respect to military policing and the interests of the Canadian Forces as a whole.

The CF Provost Marshal and the Chief of the Defence Staff replied to the Commission's solicitation in letters dated February 6, 2007.

In the CF Provost Marshal's response, it was indicated that the CF National Investigation Service (a specialized investigative unit of the military police which reports directly to the CF Provost Marshal rather than to the normal operational chain of command) had been directed to investigate possible criminal or service offences by CF personnel, including military police members, involved in the handling of these detainees. The CF Provost Marshal did not specifically address the use of the Commission's public interest mandate; however, he did recommend that any public interest investigation by the Commission await the completion of the National Investigation Service's (NIS) criminal investigation. Alternatively, the Provost Marshal requested that any public interest investigation initiated prior to the completion of the NIS investigation proceed in such a way that the criminal investigation and any potential prosecution arising therefrom is not prejudiced.

For his part, the Chief of the Defence Staff also refrained from speaking directly to the prospect of a public interest investigation by the Commission. However, he took the opportunity to advise that he would convene a CF Board of Inquiry (BOI) to "investigate detainee handling by CF members and the circumstances surrounding this complaint and, as is necessary, review the policy and procedural safeguards in place to address alleged breaches." The Chief of the Defence Staff goes on to stipulate that the BOI process would be undertaken in such a way as to avoid interfering with, or in any way jeopardizing, the NIS investigation.

As indicated to all parties at the outset, copies of the responses of the CF Provost Marshal and the Chief of the Defence Staff were forwarded to the complainant for a final comment. The complainant's comments were provided in

a letter to the Commission on February 7, 2007. In summary, the complainant reiterated the main point made in his initial letter of complaint: that an independent and public process would send a clearer signal that mistreatment of detainees is unacceptable and would best support continued public confidence in the military and military policing. The complainant indicated that neither the NIS investigation launched by the CF Provost Marshal, nor the BOI initiated by the Chief of the Defence Staff were adequate substitutes for an independent and public investigation by this Commission. The complainant also specifically advised that I not defer to either of these internal CF processes in terms of the timing of any Commission investigation. He notes in this regard that the military authorities have already had time to initiate their own investigations into this incident, but that they were not ultimately moved to act until he submitted his complaint to the Commission. The complainant also states his belief that a public investigation by the Commission can be carefully coordinated with the NIS investigation so as not to prejudice the latter, which the complainant acknowledges to be an important consideration.

The determination of the public interest in terms of initiating an independent investigation of a complaint by the Commission is left, pursuant to the legislation, to the Chair's discretion. As such, there is no mandatory criteria to either guide or constrain me, which I believe to be appropriate in ensuring an adequately robust oversight mechanism. However, I believe that there are a number of factors which are appropriate for me to take into account in my determination in this case.

First, there is the inherent seriousness of the allegations contained in the complaint. The possible abuse of defenceless persons in CF custody, regardless of their actions prior to apprehension, and the possibility that military police members may have knowingly or negligently failed to investigate such abuse and may otherwise have failed to follow proper protocols for the treatment of detainees, are matters of serious concern to the public.

Second, the considerable interest and attention already demonstrated in the media and by others in the community, raise the issue of public confidence. In this connection, while considerable changes have been implemented since 1993, memories of the incidents during the Somalia mission are still fresh in many minds and they cannot but serve to heighten public sensitivity.

Third, as raised by the complainant in his letter of February 7, 2007, there have been some recent statements attributed to senior military authorities which, unfortunately, could suggest to some in the community a predisposition to find no wrongdoing in this matter.

In addition, I share the complainant's concern that the relevant military authorities have already had considerable opportunity to initiate internal processes, but have waited until this public complaint to do so.

Finally, while the CF Provost Marshal and the Chief of the Defence Staff declined to address the application of the Commission's public interest mandate to this complaint, the initiatives of which they have advised in their responses to the Commission are nonetheless clearly relevant to my determination as to whether an investigation of this complaint by the Commission at this time is in the public interest. In my view, the initiation of an NIS investigation into these allegations, albeit perhaps belatedly, is entirely appropriate and necessary. However, I have significant concerns about the advisability of proceeding with a BOI prior to the completion of the NIS investigation, given the risk of interference or jeopardy to the criminal investigation into the same "circumstances surrounding this complaint", which the Chief of the Defence Staff himself effectively acknowledges in his letter to the Commission.

In any event, in my view, the NIS and BOI processes will address interests distinct from that of the Complaints Commission. Unlike the NIS, the Commission's focus will be on military police professionalism and not criminality. Unlike both the NIS and the BOI, the Commission's focus will be on military police conduct.

In light of the foregoing considerations, I have decided that it is in the public interest for the Complaints Commission to initiate its own investigation into this complaint pursuant to section 250.38 of the *National Defence Act*, rather than refer the matter to the CF Provost Marshal for investigation in the first instance.

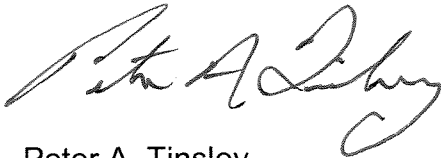
However, I am, at this time, reserving my decision on the holding of a hearing in support of the public interest investigation. While the complainant's points about the potential benefits of a public hearing into such matters are well taken, as the complainant himself recognizes, his allegations are merely "working hypotheses" given the available evidence at this moment. In that regard, I distinguish evidence from facts not fully established and hypotheses in respect thereto. To proceed immediately to a hearing on that basis would be premature and, in my view, not in the public interest. However, as the Commission's investigation unfolds, if sufficient evidence to support the allegations in the complaint is uncovered such that a public hearing would be warranted, then one will be convened.

In choosing the mechanism of a public interest investigation, for the time being without a public hearing, I am relying on the cooperation of all relevant authorities within the CF and the Department of National Defence. However, if it proves necessary to do so, the Commission will proceed with a public hearing in order to avail itself of the additional powers, such as the power of subpoena, concomitant with a hearing under section 250.41 of the Act.

Finally, I wish to indicate that, given my decision to launch a public interest investigation into this complaint at this time, the Commission will take all necessary steps to ensure that its actions do not prejudice the criminal investigation by the NIS. As stated above, the two investigations will be pursuing distinct objectives. Moreover, the Commission will invite the development of a joint protocol with the NIS for the coordination of any overlapping aspects of the respective investigations. In addition, any Commission investigator appointed to this investigation will be well experienced and versed in the conduct of police criminal investigations.

I look forward to your cooperation in this important endeavour and in contributing to the maintenance of public confidence in Canada's military police and, by extension, the Canadian Forces.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Tinsley". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Peter A. Tinsley
Chair

Distribution List (on page 6)

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