# The Flipside of Big Data (When You Are a Tortured Afghan Detainee): No Data, Bad Data, Blocked Data in a Decade of Truth-seeking, 2007-2017

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Panel on "Big Data and Big Brother"

* Other Order Paper Questions related to Afghan detainees submitted by Craig Scott as MP can be supplied upon request, as well as all those submitted by other MPs from 2005 onward.

"Executive Summary" in Omar Sabry, Torture of Afghan Detainees: Canada's Alleged Complicity and the Need for a Public Inquiry (Ottawa: Rideau Institute and Canadian Centre for Policy Alternatives, 2015)

# Executive Summary

> In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
> — *Toronto Star Newspapers Ltd. v. Ontario, Supreme Court of Canada*

THIS REPORT DISCUSSES Canada's shortcomings and violations of international law relating to its transfer of hundreds of Afghan detainees to the National Directorate of Security (NDS), Afghanistan's intelligence service, despite substantial risks that they would be subjected to torture. This occurred during Canada's mission in Afghanistan, and particularly between December 18, 2005, when a Transfer Arrangement was signed between the governments of Canada and Afghanistan, and the end of Canadian Forces (CF) combat operations in that country in late 2011.

Afghanistan's egregious human rights record in detention facilities, especially those under the NDS, is no secret. Various credible reports made public before and throughout Canada's mission described the widespread use of torture in places of detention, particularly in Kandahar, where CF transferred detainees. These reports came from such sources as the United Nations, Human Rights Watch, the Afghanistan Independent Human Rights Commission, the US Department of State, and Canada's own Department of Foreign Affairs and International Trade (DFAIT), among other organizations.

Despite an abundance of such information about torture and other abuse, Canada entered into an arrangement with the Government of Afghanistan that allowed for the transfer of detainees to their custody but did not allow Canada to monitor their conditions post-transfer. When difficulties such as limited capacity for detainee monitoring, delays in notifying the International Committee of the Red Cross of transfers, and reports of conditions and abuse in detention facilities arose, Canada entered into another arrangement that continued to allow for the transfer of detainees but also allowed Canadian personnel to monitor their conditions after transfer. Both arrangements contained diplomatic assurances against torture, which have been shown to be ineffective and unreliable in States with consistent patterns of human rights abuses, such as Afghanistan.

Under the new arrangement, Canada lost track of many detainees transferred in 2006 and 2007, continued to find incidents of torture after the new arrangement was signed, occasionally suspended transfers for various reasons, including allegations of abuse, but then resumed transfers on at least six occasions. The government's conduct in this regard has been haphazard and unprincipled, in addition to being in violation of international law.

In transferring hundreds to the custody of the NDS in Kandahar, Canada failed to prevent the torture of many Afghan detainees. In so doing, it violated international law. In particular, the transfers were in violation of the prohibition of torture, which is a peremptory norm of international law that can never be suspended under any circumstances, including those involving armed conflict. They also violated the Convention Against Torture, which prohibits transfers when there are substantial risks of torture, other international human rights law instruments, and the Geneva Conventions. Canada's military chain of command and other Canadian officials, including Ministers of the Crown, bear potential legal liability for transfers if they knew, or should have been expected to know, about substantial risks of torture.

There have been three major attempts at transparency and accountability on this issue to date. These efforts were either narrow in scope or were stymied by the government. The first was a lawsuit brought forward by Amnesty International and the British Columbia Civil Liberties Association (BCCLA) in 2007 against the Government of Canada before the Federal Court, arguing that Canada's transfer of detainees to the NDS in Kandahar was illegal under international law as well as the *Canadian Charter of Rights of Freedoms*. The second process was an investigation by the Military Police Complaints Commission (MPCC), a quasi-judicial administrative tribunal, into whether Military Police officers failed to investigate transfer orders made

by Task Force Commanders in Kandahar. The third process consisted of a study by the House of Commons Special Committee on the Canadian Mission in Afghanistan of Canada's laws, regulations and procedures for the handling of Afghan detainees.

Whether before the Federal Court of Canada or the Military Police Complaints Commission or the House of Commons Special Committee on the Canadian Mission in Afghanistan, the government refused to release relevant information, invoking national security confidentiality concerns. When the House of Commons issued an Order for the government to release uncensored documents to Members of Parliament, the government refused to comply. The compromise the government conceded was to create an *ad hoc* committee to review documents before they could be released. What ensued, however, was that the government ended the work of this committee before it could finish its review, and the outcome was the release of 362 documents, many of them heavily censored.

For all of the above reasons, the Government of Canada should launch a transparent and impartial judicial Commission of Inquiry into the actions of Canadian officials, including Ministers of the Crown, relating to Afghan detainees. The government should also develop clear policies that would prevent future reliance on diplomatic assurances against torture, including in situations involving armed conflict and extradition, and reaffirm Canada's commitment to the prohibition of torture by immediately signing and ratifying the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

CANADA

# House of Commons Debates

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**OFFICIAL REPORT**
**(HANSARD)**

## Tuesday, December 1, 2009

**Speaker: The Honourable Peter Milliken**

● (1010)

In other words, Bill C-470 would result in an extension of the incidence of a tax by including entities that are not already paying the revocation tax or, potentially, a tax on their income. This means that the bill should have been preceded by the concurrence of the House in a ways and means motion for the bill.

As a result, I submit that the order for second reading of the bill should be discharged and the bill be withdrawn from the order paper.

**Mr. Paul Szabo (Mississauga South, Lib.):** Mr. Speaker, this is the first time in my 16 years here that I have come across this issue. I do not know the details of the argument as well as the hon. member has presented them.

However, one of the protections that members do have is the diligence and review done by the subcommittee of the Standing Committee on Procedure and House Affairs. For all bills that members submit, the members are asked to designate the bill or motion they would like to have on the order of precedence, once the bill is put on the order paper, to decide its disposition and admissibility, whether or not it is constitutional or would require a royal recommendation where additional spending were being recommended.

In this case, we have something in a parallel sense, but it does require a ways and means motion.

I will accept the argument of the parliamentary secretary. However, what the parliamentary secretary is saying is that as a consequence of this situation, this bill should basically be terminated and be taken off the order paper.

This is probably not the only option available to the House. I would argue that if the subcommittee of the Standing Committee on Procedure and House Affairs was not aware and, in fact, has not advised the member, the member would never have picked this bill, simply because there is no process by which a member can actually introduce a ways and means motion to be able to deal with the bill. If the argument is correct, the bill therefore had no chance whatsoever of ever being correct.

I am sure that it would be the intent of the member to seek an amendment to the bill that she wants to put forward for consideration to committee, or would substitute another.

On behalf of the member, I would simply argue that this is not any fault of the member, but rather a circumstance of which she and most of the House were unaware, and that with the guidance of the committee, they may have been able to remediate this.

Thus I am asking for the House to consider whether the member could have the opportunity to seek whatever options might be available, so that she could have an item on the order paper, which is her right given that her bill was put there by the lottery conducted by the House.

**Mr. Derek Lee (Scarborough—Rouge River, Lib.):** Mr. Speaker, I will be very brief about the simple logic being applied by the parliamentary secretary to this issue.

It seems to me that if a ways and means motion were required, the legislative matter might also require a royal recommendation. I do not think that is what is being argued here.

Second, I do not think that the measure being proposed here would create a new tax or a new tax measure. All it would do is to take steps that would make a person or an entity liable to an existing tax measure. If I were to use the same logic the government is using in this matter now, but to legislate in the House a promotion or to create an office whereby a person took that office and thus entered a higher tax bracket by virtue of earning more money, then a ways and means motion would be needed because the legislation, if passed, would ultimately result in that appointed person being subject to additional taxation on his or her income.

My point is that the legislation being proposed here merely sets up a circumstance where the entity would be subject to existing tax measures, not new tax measures.

● (1015)

**The Deputy Speaker:** I appreciate the interventions by the Parliamentary Secretary to the government House leader and the members for Mississauga South and Scarborough—Rouge River. I am sure they will be taken under advisement and a ruling will come back to the House in due course.

# GOVERNMENT ORDERS

[*English*]

## BUSINESS OF SUPPLY

OPPOSITION MOTION—TRANSFER OF AFGHAN DETAINEES

**Mr. Paul Dewar (Ottawa Centre, NDP)** moved:

> That, in the opinion of the House, the government should, in accordance with Part I of the Inquiries Act, call a Public Inquiry into the transfer of detainees in Canadian custody to Afghan authorities from 2001 to 2009.

He said: Mr. Speaker, I want to thank my colleague from St. John's East for seconding this motion.

On April 5, 2006, the following question was posed in this House to the then defence minister. It was posed by my colleague, Dawn Black, who was our defence critic at the time, and I will read it into the record. She said:

> Mr. Speaker, on December 18, the Canadian Chief of Defence Staff signed an agreement with the Government of Afghanistan concerning the transfer of prisoners. My question is for the Minister of National Defence.
>
> Was the previous Liberal government aware of this memorandum of understanding before it was signed? Why does a very similar agreement signed with the Netherlands allow its government to ensure full compliance with all international conventions while ours does not?

The reply by the then defence minister was:

> Mr. Speaker, to my knowledge the previous government knew about the arrangement because it was done under its watch.
>
> With respect to the second question, this is a more mature arrangement than the Netherlands has. Nothing in the agreement prevents the Canadian government from inquiring about prisoners. We are quite satisfied with the agreement. It protects prisoners under the Geneva agreement and all other war agreements.

The supplementary question by my colleague, Ms. Black, was:

*Business of Supply*

*(Division No. 139)*

## YEAS

Members

Allen (Welland)
Andrews
Angus
Ashton
Asselin
Atamanenko
Bachand
Bagnell
Bains
Beaudin
Bélanger
Bellavance
Bennett
Bevilacqua
Bevington
Bigras
Blais
Bonsant
Bouchard
Bourgeois
Brison
Brunelle
Byrne
Cannis
Cardin
Charlton
Chow
Christopherson
Coady
Comartin
Cotler
Crombie
Crowder
Cullen
Cuzner
D'Amours
Davies (Vancouver Kingsway)
Davies (Vancouver East)
DeBellefeuille
Demers
Deschamps
Desnoyers
Dewar
Dhaliwal
Dhalla
Dion
Donnelly
Dorion
Dosanjh
Dryden
Duceppe
Dufour
Duncan (Edmonton—Strathcona)
Easter
Eyking
Faille
Folco
Foote
Freeman
Fry
Gagnon
Gaudet
Godin
Goodale
Gravelle
Guarnieri
Guay
Guimond (Rimouski-Neigette—Témiscouata—Les Basques)
Hall Findlay
Harris (St. John's East)
Holland
Hughes
Hyer
Ignatieff
Jennings
Julian
Kania
Kennedy
Laforest
Laframboise
Lalonde
Lavallée
Layton
LeBlanc
Lee
Lemay
Leslie
Lévesque
MacAulay
Malhi
Malo
Maloway
Marston
Martin (Esquimalt—Juan de Fuca)
Martin (Winnipeg Centre)
Masse
Mathyssen
McCallum
McGuinty
McKay (Scarborough—Guildwood)
McTeague
Ménard
Mendes
Minna
Mourani
Mulcair
Murphy (Moncton—Riverview—Dieppe)
Murphy (Charlottetown)
Murray
Nadeau
Neville
Ouellet
Pacetti
Paillé (Hochelaga)
Paillé (Louis-Hébert)
Paquette
Patry
Pearson
Plamondon
Pomerleau
Proulx
Rae
Rafferty
Ratansi
Regan
Rodriguez
Rota
Roy
Russell
Savoie
Scarpaleggia
Sgro
Siksay
Silva
Simms
Simson
St-Cyr
Szabo
Thi Lac
Thibeault
Tonks
Vincent
Wasylycia-Leis
Wilfert
Zarac– — 145

## NAYS

Members

Abbott
Ablonczy
Aglukkaq
Albrecht
Allen (Tobique—Mactaquac)
Anders
Anderson
Armstrong
Ashfield
Baird
Benoit
Bernier
Bezan
Blaney
Block
Boucher
Boughen
Braid
Breitkreuz
Brown (Leeds—Grenville)
Brown (Newmarket—Aurora)
Brown (Barrie)
Bruinooge
Calandra
Calkins
Cannan (Kelowna—Lake Country)
Carrie
Casson
Clarke
Clement
Cummins
Davidson
Del Mastro
Devolin
Dreeshen
Duncan (Vancouver Island North)
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Finley
Flaherty
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Glover
Goldring
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Grewal
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Harris (Cariboo—Prince George)
Hawn
Hiebert
Hill
Hoback
Hoeppner
Holder
Jean
Kamp (Pitt Meadows—Maple Ridge—Mission)
Keddy (South Shore—St. Margaret's)
Kenney (Calgary Southeast)
Kerr
Komarnicki
Lake
Lauzon
Lebel
Lemieux
Lobb
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Lunney
MacKay (Central Nova)
MacKenzie
Mark
Mayes
McColeman
McLeod
Menzies
Merrifield
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Moore (Port Moody—Westwood—Port Coquitlam)
Moore (Fundy Royal)
Nicholson
Norlock
O'Connor
O'Neill-Gordon
Obhrai
Oda
Paradis
Payne
Petit
Poilievre
Prentice
Preston
Raitt
Rajotte
Rathgeber
Reid
Richards
Richardson
Rickford
Scheer
Schellenberger
Shea
Shipley
Shory
Smith
Sorenson
Stanton
Storseth
Strahl
Sweet
Tilson
Toews
Trost
Tweed
Uppal
Van Kesteren
Van Loan
Vellacott
Verner
Wallace
Warawa
Warkentin
Watson
Weston (Saint John)
Woodworth
Yelich
Young– — 129

## PAIRED

Members

André
Carrier
Guimond (Montmorency—Charlevoix—Haute-Côte-Nord)
Kramp (Prince Edward—Hastings)
Lessard
Saxton
Weston (West Vancouver—Sunshine Coast—Sea to Sky Country)
Wong– — 8

**The Speaker:** I declare the motion carried.

**Finalized version: February 11, 2010**

# Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan: Presentation to the House of Commons Special Committee on the Canadian Mission in Afghanistan

Craig Scott [°]

***Abstract***: The present paper takes the form of presentation made on February 10, 2010, to the prorogued Canadian House of Commons Special Committee on the Canadian Mission in Afghanistan, with Members of Parliament from the Bloc Québécois, Liberal Party, and New Democratic Party in attendance. The subject of the presentation is a report and commentary on an all-day event organized by the Nathanson Centre on Transnational Human Rights, Crime and Security at York University's Osgoode Hall Law School. The event, held in Toronto on February 8, 2010, was called the Special Forum on the Canadian Mission in Afghanistan. The thematic title of the Special Forum was "Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan." In the wake of prorogation of Parliament at the end of December 2009 by Canada's Prime Minister, the Special Forum sought to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces – persons who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities. Because prorogation prevented the Special Committee from continuing in February 2010 the official examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode decided to invite experts on various aspects of the issue of detainee transfer to give presentations – and to respond to questions by a panel – so that ongoing reflection by Canadians on the morality and legality of conduct related to Afghan detainees might be facilitated, and also so as to assist the future work of this Special Committee when it reconvenes after prorogation. Nine experts presented and answered questions over a six-hour period: Alex Neve, William Schabas, Paul Champ, Willem de Lint, David Schneiderman, Michael Mandel, Christopher Waters, Kent Roach, and Michael Byers. A panel of questioners consisted of Craig Scott as Chair (the author), the Honourable Bob Rae (MP for Toronto Centre and a member of this Special Committee), and Retired Colonel Michel Drapeau. The agenda of the Special Forum is attached to the 11-page presentation as Appendix 1. A submission was requested and received by the Special Forum from Retired Commander William Fenrick; entitled "Observations Concerning the Canadian Mission in Afghanistan and the Treatment of Detainees", it is attached as Appendix 2.

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**Professor Craig Scott (Osgoode Hall Law School, York University, Toronto). Presentation to (prorogued) meeting of the House of Commons Special Committee on the Canadian Mission in Afghanistan, February 10, 2010, Parliament of Canada, Ottawa** [*]

Thank you, Mr. Chair, and thank you to the committee for holding sessions, starting last week, notwithstanding the prorogation of Parliament.

I have been asked to report and comment on an all-day event that I organized and chaired in my capacity as Professor of Law at York University's Osgoode Hall Law School and Director of the Nathanson Centre on Transnational Human Rights, Crime and Security. The event, held in Toronto this past Monday, February 8, was called the SPECIAL FORUM ON THE CANADIAN MISSION IN AFGHANISTAN. The thematic title of the Special Forum was "Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan."

By organizing the Special Forum two days ago, we sought to do two things. Firstly, we sought to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces -- persons who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities.

[*] Except for correction of punctuation and capitalization, as well as a clarifying substitution of "Canada's obligation not to transfer" for the earlier "the obligation not to transfer" under point 8, the present document is identical to the written presentation circulated to attending members of the House of Commons Special Committee on the Canadian Mission in Afghanistan at the time of the author's oral presentation – at the invitation of the Special Committee through the initiative of the Bloc Québécois – to the Bloc Québécois, Liberal Party and New Democratic Party MP's who were present at the session convened during the period of prorogation on Wednesday, February 10, 2010, 9:00-11:00 am, in Central Block Room 237C of the Parliament Buildings.

Secondly, because prorogation has prevented the Special Committee from continuing the official examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode decided to invite experts on various aspects of the issue of detainee transfer to give presentations – and to respond to questions by a panel -- so that ongoing reflection by Canadians on the morality and legality of conduct related to Afghan detainees might be facilitated, and also so as to assist the future work of this Special Committee when it reconvenes after prorogation.

Nine experts presented and answered questions over a six-hour period. The list of presenters and the titles of their presentations can be found in the agenda for the event, which has been circulated to you.[1] While I will briefly outline some of the insights arising from the Special Forum, with a view to then answering any questions that you may have, I also encourage you to look at the title of the presentations and to feel free to ask me questions that seem to fall within the themes covered by any given presenter.

Joining me on the panel of questioners were the Honourable Bob Rae (MP for Toronto Centre and a member of this Special Committee) as well as Retired Colonel Michel Drapeau, who appeared as a witness before this committee last week. The Chair of the Special Committee, Mr. Rick Casson (MP for Lethbridge), was also invited to join us on the panel of questioners and, when he graciously declined due to another engagement, all members of the Conservative Party who are also members of this committee were invited to nominate one from their number to stand in for Mr. Casson. Members of civil society with perspectives different from the presenters were also invited to join the panel, including Professors David Bercuson and Tom Flanagan and retired General

[1] Appended to this document as Appendix 1.

Lewis MacKenzie; all responded with genuine and considerable interest but were already committed to travel plans or to other engagements.

Finally, I should mention that the Special Forum also invited the participation of Professor William Fenrick of Dalhousie University. Professor Fenrick was unable to attend, but did send a background note amounting to a sort of informal legal opinion, which he authorized to be circulated and quoted at will. This document has also been copied and provided to you today.[2] I will mention one of his conclusions in my summary.

The overview that follows necessarily is brief and, for the most part, quite general. To a significant extent, the purpose of the summary is to distill lines of inquiry that emerged from the presentations themselves or in the course of questioning and that I feel are important for this Special Committee to pursue -- or continue to pursue, as I am well aware, having read all transcripts, of the crucial information that questioning of witnesses by this Special Committee has already yielded. I have 18 points. None of these points should be understood as précis of the words of any given presenter. For the exact presentations and answers to questions, transcripts and audio-video files should be uploaded to the Nathanson Centre website (nathanson.osgoode.yorku.ca) by early next week.

1. Canadian society, Parliament, and the people of Afghanistan – in future I will simply say “we” – need to understand better why successive Canadian governments did not plan for Canada’s own long-term detention capacity in Afghanistan or, once in Afghanistan, did not respond favourably to proposals that Canada might cooperate with other NATO forces to create a joint detention facility that would be under Afghanistan sovereignty but co-run by NATO forces.

[2] Appended as Appendix 2.

2. We need to know why Canada selected Afghanistan's National Directorate of Security (NDS), a lead intelligence agency in Afghanistan, as the first place in the transfer chain for Afghans detained by Canada and, even more importantly, we need to know why Canada continued to transfer detainees to NDS Kandahar despite a wealth of credible reports from credible actors on the propensity of NDS to torture those in its hands either as a regular habit or a standard operating procedure.

3. We need to know whether, as asserted by Mr Richard Colvin in his December 16, 2009, public letter, proposals were received from Canada's own embassy in Kabul to cut NDS Kandahar out of the transfer chain and whether these proposals were rejected by the military and/or ministers – and, if so, why?

4. We need to know whether NDS Kandahar remains to this day the first port of call for all, most, many or some of the detainees transferred by Canada.

5. More generally, we need to be careful not to limit our concern to the period that has so far received the most scrutiny, namely, 2005-2007. Our practice in 2008, 2009 and now 2010 has also to be subject to appropriate oversight.

6. In this respect, oversight needs to include a more robust House of Commons committee structure than is currently the case. Comparative approaches to parliamentary accountability by our allies – such as the Armed Services Committee in the UK – must be seriously looked at in order to understand whether Canada appears to have lost sight of fundamental principles of democracy by embracing an approach to military

affairs that emphasizes near-total secrecy and that seems to actively disdain civilian oversight. In that respect, we might also consider whether the Judge Advocate General's office is sufficiently independent of the Department of National Defence and to consider the example of countries like Australia who appoint the Judge Advocate General from the ranks of the civilian judiciary.

7. We need to know whether the collection and dissemination of intelligence is, in any significant respect, relevant to the detainee transfer issue. In particular, does Ottawa or do Canadian intelligence agents in the field (whether military intelligence or CSIS or other) receive information from NDS, notably NDS Kandahar, and, if so, is any of this information the product of interrogations of prisoners by NDS? Do we not only receive but analyze and make use of this information? Do we know – or do we ask – how the interrogations were conducted that produced the information?

8. We need to know whether (and, if so, how) various departments, including DND and DFAIT, have generated legal opinions that have resulted in witnesses before the Special Committee correctly stating the "substantial risk of torture" test as the test for Canada's obligation not to transfer detainees but then persistently misapplying that test in the context of the available information in the Afghan detainee context. In this regard, we need to know whether the same interpretation of the "substantial risk of torture" test was presented to Canadian ministers and military officials as the basis on which to decide whether to transfer detainees in Afghanistan to the United States prior to Minister of Defence Graham stopping transfers to US forces.

9. We need Parliamentary as well as more general public access to legal opinions that have been central to the decision-making in relation to the detainees issue, and we need the government to waive solicitor-client privilege so as to provide a level of transparency no less than that provided by the Administration of George W. Bush when that Administration released the legal opinions that structured core dimensions of US government post-9/11 policy.

10. In view of Commander Fenrick's legal analysis in paras. 10 to 12 in the circulated document, "OBSERVATIONS CONCERNING THE CANADIAN MISSION IN AFGHANISTAN AND THE TREATMENT OF DETAINEES", we need to know why Canada's obligations under article 12(3) of Geneva Convention III (on protection of prisoners of war) did not result in the insertion of a monitoring clause in the December 18, 2005 Memorandum of Understanding between Canada and Afghanistan, and why the Department of National Defence so vigorously resisted the insertion of a monitoring clause in the 2005 MOU when, reportedly, requested by Minister Graham that this be done (Stein and Lang, *The Unexpected War*). Also, why does the "corrective action" clause (article 10) that appeared in the otherwise much-improved May 3, 2007, MOU between Canada and Afghanistan not go as far as article 12(3), in at least two respects? Firstly, article 10 of the 2007 MOU focuses on investigation and prosecution by Afghanistan if transferred detainees have been mistreated which is an approach inconsistent with Canada's article 12(3) obligation that Canada must "take effective measures to correct the situation" in cases where a receiving country has mistreated transferred detainees; and secondly, article 10 of the MOU fails to mention Canada's duty to "request the return of the prisoners of war" in the event the situation is not or cannot be corrected.

11. Especially in view of the lessons learned from the Somalia Inquiry about the culture within the Department of National Defence, we need to know whether officials, including military officers, within the DND have inappropriately resisted, manipulated or mislead successive Ministers of Defence since the advent of the war in Afghanistan. For example, how was it that Minister O'Connor was, in reliance on the advice of his officials, he says, under the misimpression for many months that the International Committee of the Red Cross (ICRC) would report to Canada if any detainees transferred to Afghanistan were mistreated, especially given that, to use Commander Fenrick's words (para 8 of his Observations document), "any lawyer involved in giving advice on IHL/LOAC knows (or should know)…the role of the ICRC and how it works…[as] part of IHL 101." For another example, how is it that Minister Graham did not appear to know of the progress of other NATO allies in negotiating MOUs in the 2005 period until he was informed about this in a debate in the House of Commons by the NDP and how is it that he learned that at least one other NATO ally had negotiated a monitoring mechanism only after reading the document once the NDP had drawn his attention to that document (see account in Stein and Lang, *The Unexpected War*)? Further, precisely why and how did the Chief of Defence Staff decide in December 2005 to sign the 2005 MOU with the Defence Minister of Afghanistan in the middle of a federal election campaign, and did the Chief of Defence Staff seek or receive any kind of permission from the then Defence Minister or did the Ambassador of Canada in Kabul seek or receive permission from DFAIT for signature of a treaty by an official with no treaty-signing powers? Finally, in light of conflicting accounts of whether it was DND or DFAIT that controlled the process of drafting and negotiating the 2005 MOU, where lies the truth?

12. Especially to the extent that the Special Committee's scrutiny to date generates *general* reasons for concern about the sort of legal advice and the sort of operational decision-making that has characterized Canada's mission in Afghanistan, we need to know, through heightened access to information and heightened Parliamentary scrutiny, whether there have been or whether there risk being practices or incidents beyond the detainee context that place Canada in danger of contravening IHL and/or IHRL.

13. Despite much progress in the ethical professionalization of the Canadian military since the Somalia inquiry, have there been erosions of the idea of a military accountable to both the rule of law and to civilian government that have manifested themselves during the Afghanistan conflict? For example, have there been any cultural shifts within the Canadian Armed Forces that may possibly be represented by comments from the top of the military about Afghan detainees as being murderers and scumbags and the detainee question as being a distraction and also not something to lose sleep over? Do such comments risk being misinterpreted by those lower down in the hierarchy or, as is hopefully the case, has the training on the laws of armed conflict within the CAF been sufficient for such comments not to have negative implications for conduct in the field?

14. Can we afford to be sanguine about the health of legal and political accountability in Canada not only in relation to the detainee question but more generally, given a range of contexts that must surely give us pause as to the health of our democracy? Contexts such as the following: (a) a context in which the government has successfully achieved a Federal

Court of Appeal judgment that the Charter does not apply to Canada's conduct in Afghanistan; (b) a context in which the Supreme Court of Canada sidestepped any responsibility to clarify the law on extraterritorial application of the Charter and the law on torture by refusing leave to appeal in this same case; (c) a context in which, after this same Supreme Court declined to issue a remedial order to the government in the *Khadr* case of 10 days ago, the government used this as its excuse not to remedy what the Court had also found to have been a violation of the Charter by the government; (d) a context in which the government used aggressive and questionable tactics to hobble efforts by the Military Police Complaints Commission to investigate a complaint filed by Amnesty and BCCLA; (e) a context in which the government seeks to invoke sweeping notions of Crown prerogative related to national security and foreign relations as a way to refuse requests for information from this committee and is aided by legal advice that erroneously invokes an Americanized concept of "separation of powers" between the legislature and executive; (f) a context in which the Prime Minister secures prorogation in the holiday period by phoning the Governor General rather than visiting her in person; and (g) a context in which the Prime Minister gives reasons for prorogation that do not square with the PM's former Chief of Staff's assertion on the CBC that everyone knows that prorogation was done to undermine this Special Committee's scrutiny of the detainee issue?

15. In the context of the vacuum in institutional protections revealed by the above list, we need a serious, fully resourced public inquiry presided over by a respected judge.

16. As part of the mandate of such a public inquiry, the inquiry needs to look at the practices of both documentation and non-documentation that

have characterized decision-making, field operations and reporting related to the detainee question. The state of record-keeping in relation to the detainees is an obvious area for inquiry, but it is not the only aspect of this issue. For example, previous testimony before this committee has presented conflicting notions of the relationship between accountability and various methods of conveying information, such as in relation to the distribution system for emails and in relation to the papering of communications versus oral communications. Concerns have also been raised about the politicization of reporting and documentation practices, including directions from Ottawa to the embassy in Kabul and including an allegation that a note-taker in a meeting in Ottawa stopped taking notes when a member of the meeting raised concerns about torture of detainees. As well, questioning by this committee of a Correctional Services Canada officer whose job it was to interview detainees revealed what appeared to be a standard operating procedure not to ask interviewed detainees questions about when and where their alleged torture had occurred and instead to seek this information by questioning those running the “facilities” in which they were currently detained: What was the questioning protocol employed by this CSC officer and how were decisions made to include or exclude certain questions?

17. We also need either the majority of MPs in this minority Parliament or the government following the next election to stand up for both the rights of Parliament and the values of transparency and democratic accountability by enacting legislation that circumscribes the Crown prerogative asserted by the government relating to information requested by Parliament and that also creates an appropriate mechanism for independent assessments by Parliament of sensitive information.

18. Finally, we need to know whether there is a real possibility that, if certain facts are clarified and are provable in a court of law, one or more Canadian officials could be investigated and possibly charged by the International Criminal Court Prosecutor, under the ICC Rome Statute's article 8 – that is, charged with war crimes stemming from "grave breaches" of the Geneva Conventions' prohibitions on torture, inhuman treatment and willfully causing great suffering or serious injury to body or health. Could the standards for individual criminal responsibility set out in article 25 of the Rome Statute be applicable, possibly article 25(3)(c)'s provision on aiding, abetting or otherwise assisting a war crime committed by another but more likely under article 25(3)(d)'s provision that says a person shall be criminally responsible "if that person…contributes to the commission or attempted commission of [a] [war] crime by a group of persons acting with a common purpose …[where] [s]uch contribution is intentional and…made in the knowledge of the intention of the group to commit the crime"?

If there has been a sort of theme underlying many of my remarks it has been the notion, "We need to know…". Quite obviously, there is still much we don't know but need to know. Here I remind the committee that, in saying "we", I have been referring compendiously to Canadian society, Parliament and the people of Afghanistan. In this quest, my sincere hope is that, especially in the absence of any public inquiry, this Special Committee can continue to be an effective part of the process of both humanizing our approach to Afghan prisoners and democratizing accountability here in Canada.

APPENDIX 1

## SPECIAL FORUM ON THE CANADIAN MISSION IN AFGHANISTAN
## Session Theme: Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan

**Date and Location**: Monday, February 8, 2010, 10am – 4pm, Senate Chambers, 9th Floor Ross Building North, York University (Keele Campus)

**Context and Purpose**: The Prime Minister of Canada requested and was granted prorogation by the Governor-General at the end of December 2009. One of the effects of prorogation is that the House of Commons Special Committee on the Canadian Mission in Afghanistan, made up of Members of Parliament from all parties, cannot officially meet because Parliament's business is totally ended by the act of prorogation. In this context, The Nathanson Centre on Transnational Human Rights, Crime and Security of York University and Osgoode Hall Law School seek to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities by the Canadian military. Were it not for prorogation, the House of Commons Special Committee would be meeting again in February, following a January break for MPs. Because prorogation has prevented the Special Committee from continuing the examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode is inviting experts on various aspects of the issue of detainee transfer to give presentations throughout the day on February 8, 2010, so that reflection by Canadians on the morality and legality of conduct related to the Afghan detainee is facilitated.

Experts will make presentations (at the below-indicated times) on various issues related to the detainee-transfer issue. Questioning will be carried out by a panel consisting of:

•**Professor Craig Scott,** Chairperson of the Special Forum (Professor of Law, Osgoode Hall Law School; Director, Nathanson Centre);
•**The Honourable Bob Rae**, Member of Parliament (Toronto Centre - Lib.);
•**Colonel (Ret'd) Michel W. Drapeau,** Michael Drapeau Law Offices and Professor of Law, University of Ottawa

**10:00 am** **Alex Neve**, Secretary General of Amnesty International (Canada), English branch
***Responsibility of the Canadian State under International Law and in Canadian Law: Charter Review, Public Inquiries, and Civil Liability Lawsuits***

**10:30 am** **(by video-conference) William Schabas**, Dir. Irish Centre for Human Rights, NUI Galway
***Individual Criminal Responsibility under International Law and in Canadian Law: From Field-level to Cabinet-level Conduct***

**11:00 am** **Paul Champ**, Barrister, Champ & Associates, Ottawa
***Proving Facts and Seeking Evidence in the Charter Litigation by Amnesty International against the Minister of Defence: Shadow Boxing with Ottawa***

**11:30 am** **Willem de Lint**, Head of the Dept. of Sociology, Anthropology, & Criminology, U. Windsor
***Situating the Colvin Testimony Within the (Non-) Documentation Practices of the Department of Foreign Affairs and Other Government Agencies***

**12:00 am** **David Schneiderman,** Professor of Law and Political Science, U of T
***The Law , Ethics and Politics of Invoking the Executive Prerogative Power against Parliamentary Efforts to Access Documents on Detainee Policy and Practice***

**1:00 pm** **Michael Mandel,** Professor of Law, Osgoode Hall Law School
***What Right Do We Have to Be in Afghanistan in the First Place? Why the Prisoner Transfer Issue Cannot be Detached from the Legality and Legitimacy of the War Itself***

**1:30 pm** **Christopher Waters,** Associate Dean, Faculty of Law, U. Windsor
***The Erosion of Civilian Oversight Mechanisms: How the Transfer of Afghan Detainees Represents a Betrayal of the Somalia Legacy***

**2:00 pm** **Kent Roach**, Prichard-Wilson Chair of Law and Public Policy at the U of T Faculty of Law
***Linking Government Refusal to Implement the Arar Commission's Recommendations on Review Mechanisms to Judicial Abstention on the Detainee Transfer Issue: How Should the Military and the Government's Conduct be Overseen?***

**2:30 pm** **Frédéric Mégret**, CRC in the Law of Human Rights and Legal Pluralism at McGill (*Professor Mégret was unable to attend due to illness*.)
***Does or Will the International Criminal Court Have Jurisdiction to Investigate and Prosecute Canadian Government Officials?***

**3:15 pm** **Michael Byers**, Canada Research Chair in Global Politics and International Law at the University of British Columbia Faculty of Law
***Canada's Moral Standing in the World: Does Our Detainee Transfer Record Matter?***

**Bob Rae** - The Honourable Robert K. Rae is Member of Parliament for Toronto Centre and a former Premier of Ontario. He is a member of the House of Commons Special Committee on the Canadian Mission in Afghanistan. He has a B.A. and an LL.B. from the University of Toronto and was a Rhodes Scholar in 1969. He obtained a B.Phil. degree from Oxford University in 1971, was named a Queen's Counsel in 1984, and has received numerous honorary degrees and awards from Canadian and foreign universities, colleges, and organizations. Bob was appointed to Her Majesty's Privy Council for Canada in 1998, was appointed an Officer of the Order of Canada in 2000, and was appointed an Officer of the Order of Ontario in 2004. In the period between serving as Premier of Ontario and being elected in 2008 as MP for Toronto Centre, he initiated discussions to form the Forum of Federations, which he served as Chair for seven years, and has advised and worked on federalism and constitutional matters in Sri Lanka, Sudan and Iraq.

**Craig Scott** - Craig Scott is Professor of Law at Osgoode Hall Law School (York University, Toronto) where he is also Director of the Nathanson Centre on Transnational Human Rights, Crime and Security. He is editor of *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford, 2001) and the Convening Editor of the jounal *Transnational Legal Theory*. Prior to joining Osgoode, he was on faculty at the Faculty of Law, University of Toronto, 1989-2000, and a Jean Monnet Fellow at the European University Institute in 2000. He has just been awarded a 2010 Ikerbasque Fellowship for knowledge innovation by the Basque Government. Prior to starting his academic career, Professor Scott served as law clerk to the former Chief Justice of Canada, Brian Dickson.

**Michel William Drapeau** -- Michel Drapeau is a Professor of Law, University of Ottawa where he teaches military law and freedom of information law. He serves on the Board of Governors of the Royal Military College (St Jean) and is a member of the

"After the Speaker's ruling: Open Letter on the House of Commons Process for Examining Documents on Afghan Detainees Produced Pursuant to the House of Commons Order of December 10, 2009", May 2, 2010, *TheCourt.ca* https://www.thecourt.ca/open-letter-on-afghan-detainee-docs/

# AFTER THE SPEAKER'S RULING: Open Letter on the House of Commons Process for Examining Documents on Afghan Detainees Produced Pursuant to the House of Commons Order of December 10, 2010

by Craig Scott · May 2, 2010

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On April 27, 2010, House of Commons Speaker Peter Milliken handed down his ruling on whether the Government had breached Parliamentary privilege by failure to comply with the House of Commons' December 10, 2009, Order that the Government must produce uncensored copies of documents in a list of categories. (See *Ruling on the Questions of Privilege Raised on March 18, 2010, by the Member For Scarborough—Rouge River (Mr. Lee), the Member for St. John's East (Mr. Harris), and the Member for Saint-Jean (Mr. Bachand) Concerning the Order of the House of December 10, 2009, Respecting the Production of Afghan Detainee Documents*.) The House was, and is, seeking documents relevant to Canada's policy and practice of transferring detainees to Afghanistan authorities and to concerns of Canadian involvement in incidents or even a pattern of torture notably by Afghanistan's National Directorate of Security.

Today, May 3, 2010, *Canadian Lawyer Online* is publishing in parallel with the present posting my opinion piece entitled "Parliamentary Privilege After Milliken: What process should emerge from the Speaker's Ruling?" Readers may wish to read that piece first before turning to the below Open Letter sent to Members of Parliament Michael Ignatieff, Bob Rae and Ujjal Dosanjh on May 2.

***

The Honourable Michael Ignatieff, MP,

The Honourable Robert K. Rae, MP

The Honourable Ujjal Dosanjh, MP

May 2, 2010

Dear Mr. Ignatieff, Mr. Rae, Mr. Dosanjh,

I am writing to Mr. Ignatieff in his capacity as Leader of the Official Opposition and to Mr. Rae and Mr. Dosanjh as the members of the Special Committee on the Canadian Mission in Afghanistan who have taken the lead for the Liberal Party. I am writing to you with my unsolicited view on matters involving the House process that is being negotiated with the Government after Speaker Milliken's ruling. I hope

you will indulge me this opinion, given that Mr. Rae and Mr. Dosanjh will know I have been following the work of the Special Committee – and the issues at stake – very closely. This letter is an open letter and may be posted on www.TheCourt.ca on May 3 or on May 4.

I believe the NDP and the Bloc Québécois are correct (a) not to be willing to re-purpose Mr Iacobucci from his current role acting for the Government, and also (b) to insist there can be no filter on production of documents seen by the designated MPs (what information can then be made public is a separate issue/stage). I would like to address these conjoined questions, followed by a note on the nature of the time that will be needed for designated MPs to examine documents produced under the House of Commons Order of December 10, 2009. Finally, I note a separate comment I have written, to be published tomorrow, May 3, 2010, by *Canadian Lawyer* online (www.canadianlawyermag.com) to which I refer you for two other process points, one relating to the Canada Evidence Act and one relating to information flows to relevant police services.

By way of preface, it is relevant to establish – and emphasize – Mr. Iacobucci's present status. You will know that the Government wishes to keep referring to Mr Iacobucci as "Justice Iacobucci." This is an honorific that, by custom, can be used in relation to a retired judge, and I have used it myself in relation to Mr. Iacobucci (who has earned it no less than any other former Supreme Court justice). But the heavy-handed emphasis on this form of address – see Ministers' answers to questions in Question Period of March 15 for a flavour [appended] – has clearly been done to create the impression of stature and third-party neutrality. Indeed, it would not be too much of a stretch to suppose the Government wishes to plant in the mind of the average Canadian that the Government appointed an acting judge, as opposed to having hired a lawyer who once was a judge. As well, even as the Government designates him as "Independent Adviser" (in his Terms of Reference), he is presently acting in some sort of capacity as a confidential adviser that will probably turn out to be a solicitor-client relationship with the Government.

Indeed, we are entitled to assume that Mr. Iacobucci and the Government view him as having been hired to give legal advice. Part of the problem is that, to my knowledge, the Government has not been up-front about whether they consider themselves to have hired a lawyer *qua* lawyer, but, when push comes to shove, that is almost certainly the capacity in which Mr. Iacobucci will turn out to have agreed to act. I am assisted in this supposition by the failure of both Ministers Nicholson and Baird to specify Mr. Iacobucci was not hired *qua* lawyer in answers to questions by both Mr. Rae and Mr. Dosanjh in the House on March 15, 2010. On that occasion, both of you referenced what you assumed was Mr. Iacobucci's role as a lawyer in your questions. Mr. Dosanjh referred to the Government having "hired …yet another lawyer" and expressed concern that Mr. Iacobucci "will not be able to release his report to the public if the government claims solicitor-client privilege." Mr. Rae said in the same session, "There is a difference between starting a public inquiry and simply finding a new lawyer who does not have the power to do the necessary work." That both questioners assumed Mr. Iacobucci was acting as lawyer is clear as day; neither Minister having corrected this impression, I conclude that it must be the case. By the way, it may well be that the Government has since confirmed that Mr. Iacobucci is acting as the Government's lawyer in his capacity as "Independent Adviser" but I have not been able to confirm this from a search of Hansard or the news reports.

In my opinion, the House does not now have time, within the deadline given by Speaker Milliken, to sort out the complexities of what it means, from a practical and/or legal-professional perspective, for Mr. Iacobucci to simply move over from the Government as his "client" (you will recognize that this was

Speaker Milliken's own very pointed choice of word in his ruling) to being some sort of adviser (lawyer?) to the House. For example, there may be things he has been told or heard from Government officials or Government lawyers that could constrain what he can say or do if he moves over from advising the Government – unless the Government waives solicitor-client confidentiality entirely. Just a couple examples may suffice. If the Government considers certain sets of documents (by subject-matter or by type of document) to not fall within the list of document categories of the House's Order of December 10, 2010 – a list that Minister Baird said, on March 15, would be the basis for Mr. Iacobucci receiving all documents he wishes to see – and has told this to Mr. Iacobucci in response to a query from Mr. Iacobucci, is this confidential information from a solicitor-client perspective? Or, if, again despite what was said in the House, the Government actually declined to give a specific document or set of documents to Mr. Iacobucci, or is in some sort of to-and-fro with him over whether a document is relevant, will he be able to tell the House of the document's existence? Or, if Mr. Iacobucci generated a series of queries of the Government in an effort to make sure he was getting all the documents he felt entitled to receive, are those queries – and their results – confidential?

In light of such examples, do the Opposition parties really want to spend time arguing with the Government that they must waive any confidentiality in Mr. Iacobucci's previous relationship with the Government? Have no doubt that such waiver is an absolute must. Also, there are Law Society of Upper Canada Rules of Professional Conduct that indicate that a lawyer cannot switch sides in the same matter without the consent of the former client. Will the Government take the view that their "Independent Adviser", who is also their lawyer, will also be the House's lawyer whatever label the House gives to his advisory role? One must assume this will be their likely interpretation, and so, at minimum, you would need also to get the Government's explicit (not just implicit) consent to allow him to act for the House. Perhaps the Government will act with an uncharacteristic attitude of accommodation and provide both the confidentiality waiver and the new-client consent without a tussle, but the game (of securing Mr. Iacobucci's services) is certainly not worth the candle if the government hems and haws on this.

Quite apart from the foregoing, Mr Duceppe was correct to note that Mr. Iacobucci voluntarily accepted to serve a cloaked process that was clearly, indeed palpably, designed by the Government to sidestep the Order of the House of December 10, 2009, and more generally to keep Parliament and the public out of the picture as much as possible. There are issues related to the appearance of independence in the eyes of the public that Mr. Duceppe may have been getting at, and which need to be taken seriously.

However, in my view, especially if the House process is going to rely on a single adviser or give one adviser a paramount role, I believe the House would benefit much more from the advice of legal professionals – not to mention one or more non-lawyer experts in security matters (e.g. former head of CSIS Reid Morden) – who both have no current connection to the Government and are, as well, knowledgeable about (indeed, 'wise to') the tendency of the Government at large, the military and the intelligence services to employ arguments that cast an exceptionally wide net over information.

Such a tendency is very much a problem with respect to the criterion of "international relations" as one of the three criteria for treating information as sensitive and thus secret. This term, found in Mr. Iacobucci's Terms of Reference and taken from the Canada Evidence Act, is simultaneously extremely broad and undefined, such that one's executive-leaning perspectives could well become important in giving content to that criterion if it is kept as a criterion within the House process. It is enough that "national security" and "national defence" – the two other criteria in both the Canada Evidence Act and

the Iacobucci Terms of Reference – can be argued by the Government to be very broad indeed, and that the Government will be able to call upon a phalanx of seasoned and oft-pugnacious in-house Government lawyers to argue against release of information to the public. In such a context, the House needs to be fully empowered with an advisory team who one really should be looking to be counter-weights to what the Government will throw at MPs.

If, once the House's own advice is taken care of, a third-party actor is needed to mediate or arbitrate on what can be released for public view, note that there are well-situated sitting judges who may well be asked to assist the process. Justice O'Connor of the Ontario Court of Appeal (and of the Arar Commission of Inquiry) comes to mind immediately. The Arar Commission was a very different process from the Internal Inquiry regarding Mr. Almalki (and others) that was run by Mr. Iacobucci. The Arar Commission was one in which the public interest in transparency was central to the role Justice O'Connor had to play – a context much closer to the upcoming House process, I would suggest, than the behind-closed-doors baselines of the Almalki Internal Inquiry presided over by Mr. Iacobucci. I would add that Justice O'Connor gained immense experience tussling with the Government over a wide range of information-related issues versus the much more limited difference of opinion Mr Iacobucci had over several pages of observations in the Almalki Inquiry context.

There is another sitting judge who is highly respected (at least, outside Government and, I suspect, by most Government lawyers as well) for how he handles national security law cases. Judge Richard Mosley of the Federal Court has the reputation of being a truly neutral and even-handed judge. He seems to have an independent cast of mind and, in security-related cases before him, does not accept uncritically what the Government and intelligence services argue. For example, he seems to be demanding when presented by the Government with arguments based on the "mosaic theory." On that 'theory', as you will know, even an innocuous piece of information can be argued (indeed, argued more or less on the basis of 'trust us, we know') to be sensitive information on the basis that, if it is added to other innocuous pieces of information that may also get into the public domain, a mosaic emerges that, in the hands of adversaries, may harm Canada's national security. Whatever the extent of the validity of the mosaic theory, it is easy to imagine the abuse of the theory and the corresponding need for a seasoned response to its invocation.

If there is one theme to the above, it is this: it is important that the decision-making process of MPs – once the documents are seen by designated MPs – leans as much as possible towards transparency rather than replicating the instincts of this Government (and, to be fair to this Government, by times previous Liberal Governments as well) to keep almost everything possible from the public.

I have worn out my welcome by now, I am sure, but please allow me to comment on one further matter. Commentators seem to be repeating, somewhat unreflectively, the notion that, since thousands of pages are potentially at issue, sorting through them could take ages – and this then gets linked to some parties' concerns not to lose MPs to a process of sitting in a room sifting through documents. With respect, this notion seems to be based implicitly on the false assumption that all these documents will need to be gone over with a fine-tooth comb, as if each and every one stands an equal chance of needing to be redacted. However, this would not seem to be the case, because designated MPs' task will naturally be to look for material relevant to the concerns that have been raised for the last many months. This involves concentrated skim-reading, not close reading of everything nor redaction. When potentially relevant documents are noticed, they can be pulled for a closer read and then for discussions

and likely debate on possible redaction. Even then, redaction will only be necessary at the stage at which the question is the release of documents to the public versus, for example, an *in camera* session of the Special Committee.

If, on the other hand, the concern is that MPs on the Special Committee wish to be able to debate and publicly comment on what may turn up in the documents, without fear of inadvertently giving away anything that is truly sensitive information (because they will have seen the non-redacted version prior to the creation of the redacted public version), then there is no choice but for redaction decisions to be made by some House process other than the Special Committee before getting to the Special Committee. But it would be a grave error to think that this pre-Special Committee process would not itself need to have MPs as part of it. MPs must indeed be part of it, and, as outlined above, they need to be familiar enough with the detainee transfer issue to be able to efficiently find the most relevant documents (in the skim-reading process I noted above). Yet, again, even this redaction process should not be anywhere near as time-consuming as many seem to be assuming because this is not a situation of every single document needing to be excised of sensitive information before it gets to the Special Committee. Vast numbers of documents with sensitive information may fall within the broad categories of documents indicated in the December 10 House Order but be of no interest, or of no immediate interest, to the Special Committee, and therefore redaction does not come into the picture for these documents and is therefore not part of the time equation.

Thank you for considering these views. I wish you, your colleagues in the other Opposition parties, and the Government well in the negotiations this week.

Yours sincerely,

Craig Scott, Professor of Law,

Director, Nathanson Centre on Transnational Human Rights, Crime and Security,

Osgoode Hall Law School,

4700 Keele St, Toronto, Ontario, M3J 1P3, Canada

**APPENDIX – Extracts from March 15, 2010, Hansard**

## Afghanistan

**Hon. Bob Rae (Toronto Centre, Lib.):**

Mr. Speaker, last week the Prime Minister of Canada said in the House that Justice Iacobucci would conduct a thorough inquiry into the issue of Afghan detainees. At the end of the week, we learned that Justice Iacobucci does not even have the power to subpoena new documents.

Why did the government not do what the Prime Minister promised last week?

[*English*]

**Hon. John Baird (Minister of Transport, Infrastructure and Communities, CPC):**

Mr. Speaker, here is what the Prime Minister did say in this place last week. He said that he had requested Justice Frank Iacobucci to undertake an independent, comprehensive and proper review of all the redacted documents related to Taliban prisoners. Justice Iacobucci will look at all the relevant documents going back not just with respect to this government but even to the previous government.

He will report on the proposed redactions, how they genuinely relate to information that would be injurious to Canada's national security, national defence or international interests. We should have confidence in a man of this gentleman's esteem.

[*Translation*]

**Hon. Bob Rae (Toronto Centre, Lib.):**

Mr. Speaker, we have the utmost confidence in Justice Iacobucci; that is not the question. It is not him that we have a problem with, it is the government. There is a difference between starting a public inquiry and simply finding a new lawyer who does not have the power to do the necessary work.

I have a very simple question: why not have a public inquiry to finally get to the bottom of things?

[*English*]

**Hon. John Baird (Minister of Transport, Infrastructure and Communities, CPC):**

Let me be very clear, Mr. Speaker. Justice Iacobucci will have access to all relevant documents. He will be able to review them. He will be able to undertake his activities in an independent fashion. He will be able to do it comprehensively. He will have the ability to review all of the documents and report back not just to Canadians but to this House.

We should trust Justice Iacobucci and let him do his work.

**Hon. Bob Rae (Toronto Centre, Lib.):**

Mr. Speaker, we trust Mr. Iacobucci. We do not trust the government. That is the difference, and there is a big difference.

Mr. Iacobucci does not have the power to subpoena the documents. The test of relevance is a test that the government itself will apply. It is not Mr. Iacobucci who determines what relevance is.

Again, I ask the minister, why not have a public inquiry and give Mr. Justice Iacobucci the powers that he so richly deserves to do the job that Canadians want him to do? That is the question.

**Hon. John Baird (Minister of Transport, Infrastructure and Communities, CPC):**

Mr. Speaker, we have said Justice Iacobucci will be able to look at all relevant documents. How does one find relevant documents? Exactly from the motion the Liberal leader put forward. He can also look at all documents related to this issue.

Also, he will not need to subpoena documents because the government has been incredibly clear that we will provide him with all of the relevant documents. Let Justice Iacobucci conduct his review, let him report back to Parliament, let him report back to Canadians who have confidence in a man of this character.

**Hon. Ujjal Dosanjh (Vancouver South, Lib.):**

Mr. Speaker, instead of being asked to conduct a full public inquiry, a respected jurist has been hired as yet another lawyer by the government. He will only see what the government gives him. He will report to the government. He will not be able to release his report to the public if the government claims solicitor-client privilege.

If the government really wanted answers, it would give Mr. Iacobucci the mandate to conduct a full public inquiry, or are there horrible secrets that the government is trying to hide?

**Hon. Rob Nicholson (Minister of Justice and Attorney General of Canada, CPC):**

Mr. Speaker, that is completely untrue. As we have indicated and as was indicated in the terms of reference, Mr. Justice Iacobucci will have access to all relevant documents. He will complete a proper review and he will report those general findings to the public. This should have the support of the hon. member.

**Hon. Ujjal Dosanjh (Vancouver South, Lib.):**

Mr. Speaker, according to the terms of reference, the government will decide what is relevant and give it to Mr. Iacobucci. He will not have the power to subpoena other documents or the authority to release his opinion publicly. He will not be able to reveal the whole story to Canadians and there is no end date for his work to be completed. We are right back where we started.

Why will Mr. Iacobucci not “conduct a thorough inquiry”, as the Prime Minister said last week? What damning secrets is the government trying to hide?

**Hon. Rob Nicholson (Minister of Justice and Attorney General of Canada, CPC):**

Mr. Speaker, we are providing all the documents that are of interest to the members of the House, and we are going beyond that. We are going back to 2001, which was the beginning of our involvement in Afghanistan.

Mr. Justice Iacobucci will have complete authorization to have a look at those. Again, he will report those general findings back to the House.

"**Parliamentary privilege after Milliken: What process should emerge from the Speaker's ruling**", May 3, 2010, *Canadian Lawyer .com*
http://www.canadianlawyermag.com/921/Parliamentary-privilege-after-Milliken.html

# Parliamentary privilege after Milliken

Written by Craig Scott Posted Date: May 3, 2010

House of Commons Speaker Peter Milliken handed down a clear, measured, and compactly reasoned ruling last Tuesday, a ruling which, on occasion, artfully employed both pointed understatement and carefully crafted elisions.

The primary question before the Speaker was of course whether the government had breached parliamentary privilege by failure to comply with the House of Commons' Dec. 10, 2009, order that the government must produce uncensored copies of documents in a list of categories.

The House was, and is, seeking documents relevant to Canada's policy and practice of transferring detainees to Afghanistan authorities and to concerns of Canadian involvement in incidents or even a pattern of torture notably by Afghanistan's National Directorate of Security.

The Speaker structured his ruling to deal first with two witness intimidation allegations, on which he found for the government — albeit without precluding a different view if further information came to light that would situate the impugned conduct in a wider context.

He found in favour of the House of Commons by holding that, on a matter of form, an order to the government was proper (and an address to the Governor General not required).

On the key matter of substance, the government's refusal to abide by the House's order for production of unredacted documents "constitutes *prima facie* a question of privilege." In an earlier portion of the ruling, he outlined why the Speaker's role is to make such a *prima facie* determination, but that, once that is done, it is for the House itself to determine whether there has been a breach of privilege and, if so, also a contempt of Parliament.

The Speaker framed his findings of Parliament's right to compel document production around a combination of long-standing doctrinal opinion and parliamentary practice, and drawing on background values of parliamentary democracy. As to the latter, he noted: "In a system of responsible government, the fundamental right of the House of Commons to hold the government to account for its actions is an indisputable privilege and, in fact, an obligation."

As to the former, he leaned heavily on formulations of the law in texts, most notably Audrey O'Brien and Marc Bosc's *House of Commons Procedure and Practice*, 2nd. ed., from which the following statement of the law is endorsed by the speaker: "No statute or practice diminishes the fullness of the power rooted in the House privileges unless there is an explicit legal provision to that effect, or unless the House adopts a specific resolution limiting the power."

Identifying no such “explicit legal provision” or “specific resolution” hindering the House’s privilege to order the production of uncensored documents, the Speaker ruled the government had to obey the Dec. 10 order to produce the documents.

Milliken then staked out a procedural middle ground to deal with the failure of the House’s order to set out modalities for receiving and protecting sensitive information once in Parliament’s hands. Fashioning something analogous to a creative judicial remedy sometimes seen in the realm of constitutional law, he urged MPs to make best efforts within two weeks to come up with an approach to dealing with sensitive information in the document-production and scrutiny process that would be acceptable both to a majority of the House and to the government.

He framed this process not in terms of any legal obligation on the House but in terms of a wider notion of responsibility framed by values of “accommodation and trust” and also in light of parliamentary history revealing that Parliament does not always insist on such production when cogent reasons are given by the government and accepted by the House, for their non-disclosure.

If, at the end of two weeks, no solution has been achieved, the House’s power to compel production as it sees fit will kick in, with the path open for motions of breach of privilege and contempt.

Attention is now focused, rightly, on what sort of process either could or should be agreed to by MPs before the expiry of the two-week deadline. The simplest — and perhaps most useful — point is to note the relevance of cross-party legislative processes in other democracies — from the United States to Australia.

Without being naive about prospects, the issue is not the availability of workable models that can be adopted and adapted to the Canadian context.

Workable and effective approaches include enlisting the Security Intelligence Review Committee, creating a special process within the special committee on Afghanistan, or creating a hybrid of a subsection of SIRC and designated members of Parliament advised by an experienced sitting Federal Court judge with a strong record for even-handedness in cases involving security information (Justice Richard Mosley, for example, being oft-noted as just such a judge).

The real issues are twofold: one, whether the government will continue to insist on a process whereby Parliament can be prevented even from seeing some unredacted documents; and, two, what use may be made by Parliament of the unredacted information in the broader interests of accountability to Canadians and of justice.

On the first issue, MPs must be careful that they do not structure a process that ends up attracting the application of articles 38 and 39 of the Canada Evidence Act (CEA) — or, at least, attracting government arguments that it has been triggered.

Article 38 generates a web of possibilities for the government to challenge the production of evidence in any "proceeding before a court, person or body with jurisdiction to compel the production of information" where that information relates to "international relations or national defence or national security" that the government "is taking measures to safeguard."

And art. 39(1), dealing with cabinet-related information, does not even require a "proceeding" to trigger the power to exclude evidence. Rather, it states that "[w]here a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body."

One listed example of a confidence is "a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy" (art. 39(2)(d)).

We cannot ignore that central to the entire detainee-transfer debate is the possibility both of the Canadian state's breach of a range of legal obligations (such as the international legal duty not to hand over a person to another country where there are substantial grounds for believing that the person would be in danger of being subjected to torture) and, potentially, of criminal wrongdoing by individuals.

That being part of the context, it takes little imagination to see how such records shielded by article 39 could contain highly probative evidence of high-level policy-making and decision-making relevant to criminal wrongdoing.

MPs should carefully consider how to finesse a negotiated solution so as to specify that the CEA does not apply to any process designated to receive and consider the documents.

If the government will not make that general concession, it might nonetheless specifically agree not to invoke the CEA — or any other right, such as might be argued to be found in common law — to exclude production, in exchange for rules acceptable to the government on how documents could then be made public.

The issue of dissemination beyond Parliament itself leads to a crucial challenge for the process: what are the duties of MPs — or any members of the process — should they come upon evidence of criminal wrongdoing in relation to Canada's detainee-transfer policy and practice?

Among the potentially applicable criminal laws are the provisions of the Criminal Code on torture committed anywhere in the world, provisions of the Crimes Against Humanity and War Crimes Act, and the Geneva Conventions Act.

Situations may arise whereby key pieces of information tending to show criminal wrongdoing are inextricably connected to sensitive information or where information on criminal wrongdoing can be revealed but only by decontextualizing or making it incoherent because neighbouring

sensitive information is redacted.

Any process must ensure that parliamentarians do not end up in an ethical cul-de-sac in such situations wherein they believe they have a duty to keep information confidential for reasons of national security even when that information shows, or tends to show, criminality.

Here, it should be borne in mind that there is nothing in the Criminal Code, and nothing express in the evidence act, that precludes the police from searching and seizing information (from documents to computer data) up to the highest reaches of government, subject to having a judicial warrant on the basis of a sworn reasonable belief that a crime has been or will be committed.

At the very minimum, MPs should at least feel free to report to the RCMP that they have seen documents that tend to show criminal wrongdoing and that the information cannot be disentangled from sensitive information, as well as indicating which documents or computer data the RCMP should specifically secure a warrant to search and seize.

In this manner, no specific conveying of sensitive information outside the parliamentary process will have occurred but sufficient information will have been given for the RCMP to then seek out the documents for purposes of investigation.

*Craig Scott is a professor at Osgoode Hall Law School; director of the Nathanson Centre on Transnational Human Rights, Crime and Security. A more elaborated treatment of some of these issues and arguments appears on* thecourt.ca.

# Gov’t shut down detainee documents panel: judges' letter

The Canadian Press
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OTTAWA - The Conservative government decided to shut down a panel responsible for vetting documents on the handling and treatment of Afghan detainees, a newly released letter indicates.

The June 15 letter from two former Supreme Court judges on the panel says they were advised by the government after the recent election "that it is unlikely" the document review process would be renewed, even though they had examined only an "initial" cache of records.

"We understand that no further work is now expected of the panel," the judges wrote.

The panel of former judges and an ad-hoc committee of MPs from three parties looked at thousands of documents over the last year to try to determine what Canadian officials might have known about the torture of prisoners in Afghan jails.

The New Democrats never had confidence in the document vetting process and declined to take part.

On Wednesday the government released 362 documents -- totalling more than 4,000 pages -- on the transfer of war prisoners in Afghanistan.

The June letter to Justice Minister Rob Nicholson from former Supreme Court justices Frank Iacobucci and Claire L'Heureux-Dube was among the trove of documents disclosed to Parliament. It makes it clear the judges considered the records "an initial set of documents."

In addition, the June 2010 memorandum of understanding governing the panel and committee work says the agreement "survives a dissolution of Parliament" provided that the government and opposition parties opt to renew it.

Iacobucci declined to comment.

Foreign Affairs Minister John Baird said Wednesday upon release of the records that the review was done.

"The process is over," he told reporters.

Andrew MacDougall, a spokesman for the Prime Minister's Office, said Thursday the opposition parties shut down the document review when they defeated the government in late March.

The panel was a creature of the last Parliament, he said.

"For the panel to 'continue,' a new (agreement) would have to be signed. The NDP chose not to participate in the process in the last Parliament and have made it clear they do not support such a process."

In addition, two leaders who signed the agreement in the last Parliament -- Michael Ignatieff of the Liberals and Gilles Duceppe of the Bloc Quebecois -- were defeated.

Liberal MP Stephane Dion, who was a member of the ad-hoc committee, said Thursday the documents disclosed this week are revealing.

"Transfer of notifications to the Red Cross took up to a month. We lost track of hundreds of detainees," he told the House of Commons. "When the Afghan authorities claimed detainees were released, we did not verify. Our own monitoring was erratic and allegations of torture were numerous."

Dion said one detainee sent for interrogation to the Afghan secret services was likely a victim of abuse and death threats.

"What will the government do to ensure that in the future our mechanism to protect detainees is transparent, effective and worthy of Canada?" asked Dion.

Baird rejected Dion's claim that the Canadian-transferred prisoner was likely abused.

But records disclosed Wednesday show Canadian officials in Afghanistan who interviewed detainees transferred by Canadian Forces filed reports in 2007 noting allegations of beatings, sleep deprivation and verbal abuse.

A September 2007 email summary of a detainee interview said the man was "kept awake for 3-4 days and made to keep his hands raised above his head" during interrogation by the National Directorate of Security (NDS).

"He also used the words beat and torture. When asked to expand he said he was beaten badly but doesn't know with what as his eyes were covered. When asked what was used he said a power cable or wire and pointed to his side and his buttocks."

A June 2007 summary of a prison visit noted: "At the time of visit, it was observed that one detainee, (redacted) was being held in solitary confinement (redacted) since his arrival at the NDS. He was also being kept in shackles and was wearing sight deprivation goggles."

In addition, a report on the April 25, 2007 inspection of the NDS detention facility in Kandahar City describes encounters with two inmates who alleged abuse at the hands of their jailers.

NDP defence critic Jack Harris demanded a public inquiry Thursday, accusing the government of "trying to suppress the truth" by shielding the vast majority of some 40,000 federal documents on the prisoner transfers.

"Less than one-tenth of the documents were reviewed by the panel of ex-judges and less than half were even looked at by the backroom committee of MPs," he said during question period.

"And for what? So the government could put this off for a year and now falsely pretend that judgment has been rendered?

"Why did they choose a process that hid the facts from Canadians, and why not hold a public inquiry now?"

Baird said the government has always been committed to handling prisoners in accordance with international rules.

"I think Canadians have got a clear picture that our men and women in uniform fully accepted all of our international obligations and have done a heck of a good job representing this country," he told the Commons.

*National Defence Act* – Part IV

# FINAL REPORT

Following a Public Interest Hearing
Pursuant to Subsection 250.38(1) of the *National Defence Act*
With Respect to a Complaint
Concerning the Conduct of Captain (N) (ret'd) Steven Moore,
Lieutenant-Colonel (ret'd) William H. Garrick, Major John Kirschner,
Major Bernie Hudson, Major Michel Zybala, Major Ron Gribble,
Chief Warrant Officer Barry Watson and Master Warrant Officer (ret'd) Jean-Yves Girard

File: MPCC 2008-042
Ottawa, June 27, 2012

Mr. Glenn M. Stannard, Chairperson
Mr. Roy Berlinquette, Commission Member

## XVII. THE COMMISSION'S FINDINGS AND RECOMMENDATIONS

### 17.1 Commission Commentary on the Hearing Process

The Commission believes it important to state its views on the significant obstacles encountered in obtaining necessary documentary disclosure and witness testimony. As described earlier, these obstacles included:

- the Government refusing to consider options to expedite the s. 38 process, such as negotiating a disclosure agreement with security cleared Commission counsel;
- the Government invoking s. 38 of the *Canada Evidence Act* to block Commission interviews of witnesses and access to their testimony, notably Mr. Colvin;
- the Government's initial refusal to provide any redacted documents to the Commission until all of the documents had been vetted;
- significant delays in documentary disclosure, and in many instances, the outright refusal to act on document requests;
- ongoing disputes over relevance of documents and unilateral determinations by Government officials based on opaque screening criteria;
- the Government's invoking s. 38 to attempt to have questioning of witnesses take place in secret and out of public view; and
- the Government requiring an undertaking from Mr. Wallace not to give documents to the Commission.

Unfortunately, this Commission is not the first tribunal to encounter these types of difficulties. In fact, many parallels were found between this Commission's experiences and those commented on by the Somalia Commission of Inquiry in its 1997 Report, as discussed below.

#### 17.1.1 Commission Comments on the Documentary Disclosure Process

With the Commission's decision to conduct public interest hearings in March 2008, and through to November 2009, the doors were basically slammed shut on document disclosure. The

Commission did not receive a single, new document from the Government throughout that time period despite many requests.

Many excuses were given for this approximately 21 month dry spell in document production and none were very convincing from the Commission's perspective. For example, the Government took the unreasonable position it did not need to produce documents to the Commission if it unilaterally considered them to be outside the Commission's mandate. This stance disregarded the authority of the Commission, under Rule 7 of the *Rules of Procedure for Hearings Before the Military Police Complaints Commission*, SOR/2002-241, to make its own independent determinations as to its jurisdiction. It also disregarded the authority given to the Commission under section 250.41(1) of the *National Defence Act*, which gives the Commission, not the Government, the power to decide what documents and things are considered necessary to the full investigation and consideration of the matters before the Commission. Justice de Montigny of the Federal Court of Canada affirmed this important principle, and validated the scope of the Commision's information/documentation requests, when he said: "[...] it is for the Commission, not for the government, to determine ultimately what documents are relevant to its inquiry. If it were otherwise, the Commission would be at the mercy of the body it is supposed to investigate. This was clearly not the intent of Parliament."[1575] Unfortunately, throughout a significant portion of these proceedings, the Commission believes Parliament's intent was confounded.

While the Commission recognizes there were jurisdictional challenges throughout these proceedings, this still did not explain why documents relating to such clearly relevant matters as NIS investigations into detainee handling were not disclosed or provided to the Commission for a lengthy period of time, despite the fact they clearly related to an unchallenged and central aspect of the Commission's jurisdiction. The first request for such documents was made as far back as November 2008,[1576] yet it was not until a meeting on September 25, 2009, that

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[1575] *LCol (ret'd) Garrick and others v. Amnesty International Canada and others,* 2011 FC 1099, para. 97
[1576] Transcript of Proceedings, October 7, 2009, p. 6

Government counsel advised Commission counsel of the existence of documents relating to MP investigations.[1577]

The Commission regularly offered to cooperate and assist in speeding up document production and redaction, for example by pre-reviewing documents to eliminate those it did not consider necessary and thereby reduce the redaction tasks. Even though the Commission is not an entity on the s. 38 Schedule to which protected information could be disclosed during public interest hearings (despite having requested, without success, to be added to the Schedule), s. 38.031 of the *Canada Evidence Act* still permitted the Attorney General of Canada to enter into a disclosure agreement. Such a compromise was refused and there simply appeared to be no desire to look at alternatives that would have expedited the Commission's work.

Moreover, even though document production eventually occurred, the Commission remained concerned throughout the whole course of the public hearings with the Government's unilateral approach to document production and the screening out of documents, as described *inter alia* in the testimony of Maj Gagnon, and in numerous subsequent interchanges between the Commission and Government counsel. The Commission understands some document screening must take place to avoid having the Commission swamped with masses of irrelevant documents, and the Government devoting time to unnecessarily redacting documents for which the Commission has no need. Precisely for that reason, Commission counsel offered to assist with document review, and the offer was soundly rejected. The Commission believes that the process of document selection and production must be transparent to the Commission if it is to properly discharge its mandate and maintain public confidence in its independence.

Where, as happened here, the Commission increasingly lacks confidence in the document screening and production process; the Government asserts a unilateral right to issue guidelines for production and to make decisions as to the relevance or necessity of documents; and the Government appears to view the Commission as an adversary, there are important implications for the independence of the Commission. It was particularly disturbing for the Commission to

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[1577] Transcript of Proceedings, October 7, 2009, pp.9-10

learn decisions not to produce documents were taken by a committee of the highest ranking civil servants, from various branches of the Government of Canada.

Added to this was the fact that, at times, comments made by Government counsel (who simultaneously acted as counsel for seven of the subjects) towards the Commission's need for documentary disclosure verged on antipathy. At one point, after some pressing from the Commission on how long it would take to produce documents, the Government counsel responded curtly that the Commission would get the documents "...when they are good and ready".[1578] Counsel later apologized for this remark. It is understandable in the heat of the moment remarks might be made spontaneously that are immediately regretted. However, the Commission did consider that this comment, when coupled with the other issues and exchanges around timely document disclosure, reflected an overall attitude of antipathy on the part of the Government towards the Commission and its task, and a general, adversarial approach. In the Commission's opinion, the business of the Government during a public inquiry should be to advance the public interest in having a full and fair process, and to uphold the Rule of Law, not to be unnecessarily adversarial: see, e.g., Adam M. Dodek, *Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law*, 2010 Dal. L.J. 1, at p. 11.

It bears repeating that this Commission is an independent, quasi-judicial body established by Parliament under Part IV of the *National Defence Act* to provide oversight and greater accountability on the part of the Canadian Forces' military police. The Commission reports to Parliament through the Minister of National Defence, but in the discharge of its functions the Commission is independent from both the Department of National Defence and the Canadian Forces. This independence is critical to the proper exercise of the Commission's statutory mandate – a mandate intended to foster public confidence in the military police.

To support the Commission's mandate, the *National Defence Act* grants the Commission significant powers to summon and enforce the attendance of witnesses to give evidence under

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[1578] Transcript of Proceedings, April 20, 2010, p. 25

oath, and to require the production of documents and things under their control the Commission considers necessary for the full investigation and consideration of the matters before it. The Commission's power to issue a summons and require the production of documents considered necessary for its investigation is found in section 250.41 of the *National Defence Act*. These powers are given to the Commission to serve the public interest.

It is self-evident that the ability to obtain timely production of documentation is absolutely fundamental to the Commission being able to conduct the full, independent investigation that the *National Defence Act* requires. Section 250.41(1)(a) of that Act grants the Commission significant powers to require the production of documents that it [i.e., the Commission and not the Government] considers necessary to a full investigation. This is a decision the Commission is authorized by statute to make based on the Commission's own assessment of the needs of its investigative effort.

During a tribunal's investigative stage, the test for relevance should be applied broadly by Commission counsel, as stated by Professor Ed Ratushny in his text, *The Conduct of Public Inquiries: Law, Policy and Practice (2009)*: "In such inquiries, hearings counsel should cast the net of potential relevance very broadly."[1579]

The "failure to investigate" complaint alleged the existence of awareness of likely torture, and of reports pertaining to the alleged torture of detainees after they were ordered transferred. This included awareness on the part of the military police and the senior military officers who ordered the transfers. Put more bluntly, the Complainants alleged crimes were or may have been committed that warranted a police investigation. Allegations of possible criminal conduct based on "awareness" of the likelihood of torture, and "ordering the transfer of detainees" despite "compelling first-hand reports" that previous CF detainees were tortured (to quote the specific wording of this complaint, P2), were thus matters before the Commission. The Commission had a public duty to cast its net broadly enough to get a sense of the overall information environment,

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[1579] Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy and Practice* (Irwin Law 2009)

and the degree to which the MP were branched into that environment. This was necessary to conduct a full and thorough investigation into the serious allegations against the subjects.

It is therefore unfortunate that the document production process carried out by the Government in response to this inquiry was characterized by an attitude of aversion to, or antipathy towards, the public hearing, and that the Government's actions discussed above led to unnecessary costs and significant delays to the Commission and the other parties. The reasonableness of the Commission's position on disclosure is confirmed in the comments of the Federal Court indicating documents are the "lifeblood" of an inquiry, and it is for the Commission, not the Government, to determine what documents are necessary to fulfil its mandate.[1580]

### 17.1.2 Commission Comments on Access to Witnesses

In addition to document issues, the Government's uncooperative stance was also demonstrated in the difficulties experienced by the Commission in accessing witnesses for pre-hearing interviews and even into the hearings themselves.

Government counsel took the position early in the process that any interviews with Government employees must be arranged only through his office since he claimed to be the legal counsel for these Government employees, and in particular the 38 individuals whom the Commission had advised it wished to interview. This position caused difficulties for Commission counsel, as described earlier.

Richard Colvin was one witness who was willing to attend a pre-hearing interview with the Commission and to testify at the hearing. Subsequently the Government issued a section 38 notice over all the information that Mr. Colvin could have provided to the Commission in September 2009. He was thus prevented from providing information to the Commission even though he considered it relevant and necessary to the Commission's investigation. Mr. Colvin could not provide documents to the Commission, be interviewed by Commission counsel, or testify before the Commission due to the s. 38 notice.

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[1580] *Garrick et al v. AIC/BCCLA*, at paras 96-97

Subsequently, Government counsel advised during a meeting on September 25, 2009 that s. 38 notices would likely be issued over all anticipated Government witness testimony, unless a compromise could be reached not involving public airing of their evidence. Indeed, the Government's position would have required most of the questioning of witnesses to take place in private.[1581] Such a process is inimical to the very purpose of a public inquiry.

It is significant to the Commission that, only months later, the s. 38 notice over the entirety of Mr. Colvin's anticipated evidence was retracted, and Mr. Colvin eventually testified, in public. Albeit with some remaining constraints imposed by s. 38 of the *Canada Evidence Act*, on October 13, 2009 the National Security Group confirmed that the affidavit Mr. Colvin had tendered to the Commission contained no sensitive information at all. This clearly put into question the justification for the earlier blanket s. 38 claim over all of Mr. Colvin's evidence.

Justice Mactavish opined in her decision refusing a stay of these proceedings, that the Government's stated security concerns were overblown with respect to witness testimony. She determined any risks of disclosure during witness testimony could be addressed by: (1) careful preparation of witnesses; (2) summaries of anticipated evidence; (3) alert counsel ready to make timely objections; and (4) Commission counsel awareness of s. 38 obligations. She also noted public testimony had been heard numerous times, even where those witnesses were privy to protected information and required to filter what they made public through that lens:

> 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.
>
> 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.[1582]

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[1581] *Transcript of Proceedings*, October 7, 2009, pp. 26-28
[1582] *Canada (Attorney General) v. Amnesty International Canada,* 2009 FC 426 at paras 61-63

The Commission understands there is no obligation on the part of a witness to meet with Commission counsel, but this is a form of cooperation usually extended. Such pre-hearing interviews can assist both sides by eliminating the element of surprise and, in this case, assisting to identify any valid s. 38 concerns ahead of time.

The Commission concludes it did not receive Government cooperation with respect to accessing potential witnesses from the time that public interest hearings were called in March 2008 through to the end of 2009/early 2010. Indeed, the Government's actions during that time appeared more designed to delay or prevent Commission access to witnesses, as exemplified by the case of Mr. Colvin. This impeded the Commission's work during that timeframe.

### 17.1.3 Commission Comments on Government of Canada Use of s. 38 of the *Canada Evidence Act*

In the Commission's view, this case illustrates the real dangers that s. 38 of the *Canada Evidence Act* poses to independent commissions of inquiry being able to access relevant and necessary information, as well as witnesses. Broadly invoked, as it was here, s. 38 has the potential to completely stymie a public inquiry.

Section 38 is intended to protect sensitive and potentially injurious information from public disclosure. The type of information meant to be protected includes information relating to international relations, national defence, or national security. The Commission is bound by law to ensure such sensitive or potentially injurious information is not released publicly, and takes this responsibility seriously. Given the continuing deployment of Canada's troops in Afghanistan, the Commission was keenly aware of the need to ensure sensitive or potentially injurious information would not be compromised as a result of its hearings.

The Commission thus fully understands the importance of protecting the type of information covered by s. 38. The danger lies in the potential for overreaching, that is, invoking s. 38 to prevent disclosure of information belonging, and which can safely be placed in, the public domain.

Both the Arar Inquiry and the Air India Inquiry dealt with s. 38 and national security information, and were still able to address significant issues in public, contributing to the national debate on civil liberties, the obligations of government, the public's right to know, and national security in the 21st century. The list of scheduled entities entitled to receive information under s. 38 includes such entities as boards of inquiry under the *National Defence Act*, the Public Service Relations Board, the Information Commissioner, the Privacy Commissioner, the Security Intelligence Review Committee, the Arar Inquiry, the Air India Inquiry, the Almalki Inquiry and the Public Sector Integrity Commissioner. However, in the course of the AIC/BCCLA complaint, the Commission's two requests to be added to this list of like agencies were turned down.

The Commission has already noted that in advance of announcing public hearings, it did receive non-redacted material during the investigation portion of the first Transfer Complaint. The Commission was thus able to view that material and safeguard it.

Section S18 of the Afghanistan Public Interest Hearings Rules, issued for the public hearings, contemplated that some evidence might need to be kept confidential and not be publicly released. For this reason, the Commission's hearing procedures called for evidence to be classified as either public "P" or confidential "C". This designation of confidentiality extended to the transcripts of evidence heard *in camera*. The Rules also provided documents filed with the Commission in the course of a hearing in private had to be kept separate from the public record. Accordingly, the fact information was disclosed to the Commission in the course of the public hearings did not mean the information would inevitably become public. Sensitive information would be kept confidential in accordance with the Rules governing the hearing.

The issue of the Government invoking s. 38 over documents and witnesses during the public hearing obviously became a major point of contention. The Commission faced significant delays and obstacles related to s. 38 of the *Canada Evidence Act*, and the need for documents to be screened and redacted before receiving them. The process was time-consuming and could have been avoided, or at least shortened, had the Government adopted a more cooperative posture. The opportunities for compromise existed.

On two occasions the Commission wrote to the Minister of National Defence to request the Commission be designated as an entity on the s. 38 schedule of designated entities to the *Canada Evidence Act* pursuant to sections 38.01(6)(d) and 38.01(8) of that Act. The dates of these requests were July 18, 2008 and November 28, 2008. The Chairperson at the time indicated this would clearly allow the Commission to efficiently obtain information relevant to the discharge of its statutory mandate of providing independent oversight of military policing. By letter dated January 16, 2009, the Minister replied stating:

> Having reviewed this matter, I am satisfied that the existing scheme continues to be appropriate for the Commission at this time. As you have pointed out, your request would have both policy and legislative implications which would require further study.
>
> As your letters also touch on matters concerning the application of section 38 of the *Canada Evidence Act*, I am forwarding your letters to the Assistant Deputy Attorney General, Mr. Donald J. Rennie, who exercises delegated authority under the Act.

The Assistant Deputy Attorney General did not respond further to the Commission's request.

However, even without the Commission being scheduled, it was always open to the Attorney General of Canada to negotiate a disclosure arrangement with the Commission pursuant to s. 38.031, something that the Attorney General consistently refused to do.

The Commission has thus been left with the abiding impression that s. 38 became a litigation tool throughout these proceedings, whose purpose became at least as much to delay the work of the Commission as it was to protect truly sensitive information. The former Chairperson summarized the Commission's concerns as follows:

> Again, this case is not about national security. It is about the government invoking its own review processes, which have been in progress for almost 11 months [as of October 2009] now without producing any results, to refuse the production of documents that would assist the subjects and the Commission. It is about the government insisting on distinguishing between formal and informal reviews, refusing to produce over-redacted documents, constantly revising the processes and timelines necessary to review documents, and attempting to explain the delay away on the ground of lack of clarity or overbreadth of the document requests made, even where subsets of clearly relevant materials have been identified and reviewed.[1583]

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[1583] October 14 2009 Transcript of Proceedings, p. 211

All told, the Commission holds the view that the Government's actions with respect to the s. 38 process promoted "[...] public suspicion and cynicism about legitimate claims by the Government of national security confidentiality", the same concern stated by Commissioner O'Connor in the Arar Policy Report.[1584]

The other elephant in the room during the entire hearing process, of course, was the ever-present question as to exactly what information was being removed from the documents in the name of national security. This issue sometimes took on surreal proportions, as was exemplified by the following exchange between Mr. Colvin, Mr. Préfontaine and the Commission, in which Mr. Préfontaine cross-examined Mr. Colvin on information behind a redaction in his reports, information which Mr. Préfontaine had seen, but counsel representing other parties, and the Commission, had not:

> Q: So this is your subtle signal?
>
> A. I would disagree with you there, Mr. Préfontaine. If we had access to the unredacted version, then there would be some crucial information, additional information, which obviously we don't have because of the redactions.
>
> Q. Yes.
>
> A. -- which would --
>
> Q. I have had access to the unredacted document.
>
> A. Yes.
>
> Q. I don't see there anything that is missing or crucial or important, Mr. Colvin.
>
> A. Oh, then I am afraid, then, you would be acknowledging your -- that you are new to this issue, because if you were someone who was involved in this file, involved in Afghanistan involved on this issue, what has been redacted is extremely important, and it is critical to understanding that there is nothing particularly subtle about this message.
>
> I don't agree it is a subtle signal.

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[1584] Transcript of Proceedings, October 14, 2009, pp. 235-236; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006

Q. Okay. And the substance of what you in this message -- not in your head, but in this message -- what you impart to the reader and the substance of what you have to say about treatment of detainees is contained in paragraphs 20 to 23; correct?

A. Correct, and in the summary and conclusions.

Q. And in the summary where you repeat the introduction?

A. The conclusion, yes.

Q. The conclusion, sorry.

A. Yes, that's correct.

Q. Which echoes word for word?

A. Yes. And there is also the follow up that also relates to that issue. That is paragraph 25.

Q. Yes. And the Commission will decide whether it was too subtle for the reader to pick up your meaning.

A. I think the Commissioner is only given the redacted version, so he may have some difficulty fully assessing the subtlety, or lack thereof, of these reports.

Q. And I recognize it is difficult for the Commission to have to contend with -- without ability of independent verification what you say or, for that matter, what I say.

A. Yes. I am fully prepared for the Commission to see the unredacted version and to form his own opinion.

Q. So would I, but it is not my call to make, Mr. Colvin.

THE CHAIR: Can I just ask, did you say that the information contained in the unredacted really isn't critical, or did I misread that?

MR. PRÉFONTAINE: No, you didn't, Mr. Stannard.

THE CHAIR: Just a real silly question, then. Any reason why we don't have it?

MR. PRÉFONTAINE: Because it would be injurious to either national defence, international relations or national security.

THE CHAIR: Even though it is not critical information?

MR. PRÉFONTAINE: It might be the information has nothing to do with what Mr. Colvin makes it out to be.[1585]

This exemplified how s. 38 claims pose problems for tribunals, since in the absence of the redacted information the Commission could not resolve for itself the disagreement that erupted over the significance of the redacted information. It was manifestly unfair to try to impugn Mr. Colvin's testimony by purporting to refer to the substance of redacted information that Mr. Colvin himself was prohibited from disclosing or discussing. It was also inappropriate, in the Commission's opinion, for counsel for seven of the subjects to have seen behind the redactions, while counsel for all other parties, and the Commission, had not. This essentially meant that the subjects represented by Department of Justice counsel had the benefit of privileged access to information that the other parties and the Commission itself did not have. Finally, it should also be noted Mr. Colvin was testifying under oath, whereas the unsworn opinion of counsel as to the content of the redactions did not comprise evidence.

### 17.1.4 Claims of Cabinet Confidentiality Under s. 39 of the *Canada Evidence Act*

In late spring 2009, the Commission challenged in Federal Court certain redactions made to the documents. Through negotiations, counsel for the Commission and counsel for the Government reached compromises to the point where the Commission felt it could proceed with the redacted documents. The Commission recognized that a Court challenge to Government redactions was only likely to add further to the delays the Commission wanted to avoid.

One claim of privilege advanced by the Government was the claim certain redactions were justified under s. 39 of the *Canada Evidence Act*. This section deals with confidences of the Queen's Privy Council for Canada. Under s. 39, a Minister of the Crown or the Clerk of the Privy Council can object to the disclosure of information by certifying in writing the information constitutes a confidence of the Queen's Privy Council of Canada. Disclosure of that information shall then be refused without examining the information or hearing it.

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[1585] *Transcript of Proceedings,* vol 5, April 13, 2010, pp. 217-219

However, although the Government made redactions citing s. 39 grounds, no certificate in writing under s. 39 was provided to the Commission until January 20, 2012. Although the certificate itself appears to have been completed on December 7, 2011, it was not provided to the Commission until January 20, 2012, which was after the Interim Report had already been issued by the Commission.

### 17.1.5 Looking Back on the Somalia Inquiry: The Parallels and a Chance to Move Beyond

This Commission is not the first tribunal to be confronted with difficulties in obtaining access to Government documents and evidence. As former Chairperson Peter Tinsley stated at an early stage of this Commission's proceedings, it seemed that some of the key lessons from the Somalia experience had not been learned. This Commission was indeed struck by a number of similarities between the process issues which it faced, and the experiences reported by the Somalia Inquiry.

The Somalia Inquiry mainly had to do with the actions of the Canadian military in Somalia. The Somalia Inquiry felt compelled in its Report to tell the story of DND's apparent reluctance to cooperate with the Inquiry when it came to transparency and disclosure of documents. The comments made by the Somalia Commission in Chapter 39 of its Report on this issue could, in many respects, be adopted almost word for word to describe the issues this Commission faced in obtaining disclosure of relevant information from the Government during these proceedings.[1586]

At the outset of the Chapter on openness and disclosure, the Somalia Commission stated, "[t]hrough its actions, DND hampered the progress and effectiveness of our Inquiry and left us with no choice but to resort to extraordinary investigative processes to discharge our mandate appropriately."[1587] The progress and effectiveness of this Commission were similarly hampered by the Government's overall approach to document production, which resulted in delays and disagreements, and meant that a great deal of time and effort had to be expended pursuing documentary evidence. It should not have become necessary, in the Commission's view, for witnesses to have to be summonsed from

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[1586] Exhibit P-67, *Dishonoured Legacy : The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia,* Chapter 39 "Openness and Disclosure of Documents"

DND and DFAIT to explain the process of document selection and production to the Commission.

The Somalia Inquiry also had to deal with DND's failure to comply with orders for production of documents and with what it referred to as a "long and disillusioning process" surrounding document production.[1588] This Commission, too, faced a "long and disillusioning process" of document production. Promises of cooperation, while made, were not manifested in practice.

Like this Commission, the Somalia Inquiry was confronted with unilateral decision-making by the Government of Canada on the relevance of document requests to the Commission's mandate,[1589] and repeated requests for clarification from those within DND dealing with document disclosure.[1590] On this subject the Somalia Inquiry Report said, "[...] the Inquiry and SILT [the group created within DND to manage document production during the Somalia Inquiry] had very different views about what was important in terms of documents."[1591] The Somalia Commission further stated, "... it was our role to decide what information was of importance to us, not the Department's [...]"[1592] This Commission was compelled to make precisely the same point on numerous occasions during its dealings with the Government over document production.

The Somalia Inquiry also had to deal with late and last minute disclosure of documents and, in some instances, after all testimony had been heard. This Commission, too, was forced to scramble at the last minute to quickly review and assess the relevance of disclosure provided to the Commission very late in the day.[1593]

One of the most striking parallels between the Somalia Inquiry and this Commission is that both inquiries found it necessary to start their hearings without having obtained complete production of documents. Both subsequently had to call witnesses to explain the delays in document production and related issues. The Somalia Report states:

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[1587] Exhibit P-67, p. 1199
[1588] Exhibit P-67, p. 1204
[1589] Exhibit P-67, p. 1208
[1590] Exhibit P-67, p. 1214
[1591] Exhibit P-67, p. 1223
[1592] Exhibit P-67, p. 1221
[1593] Exhibit P-67, pp. 1203; 1209

> [...] we had no choice but to begin hearings before we had received all the documents. Evidentiary hearings began in October 1995, and as they proceeded through the fall of 1995 and continued through the winter of 1996, we continued to receive, process, and review new documents, including documents of direct relevance to the hearings already under way.
>
> Because of the serious difficulties that we had encountered in obtaining disclosure [...] we were obliged to hold public hearings to determine why we were not receiving documents necessary for us to fulfill our mandate and whether this deficiency was deliberate.[1594]

These words could be applied directly to the Commission's own public interest hearings. After encountering delays in beginning its substantive hearings due to document issues, the Commission had no choice but to begin substantive hearings with the documents that it had in March 2010. Full document production had still not been received at that time; however, the scope and pace of production continued to be an issue during the hearings proper, even as witnesses were being called to testify. As pointed out earlier, a period of 21 months passed during the early stage of the hearings without a single new document being produced by the Government.

The Somalia Inquiry wrote that searches for a key set of documents only became "frantic"[1595] and focused when the Department of National Defence faced the possibility that the Chief of the Defence Staff would be called as a witness. This is similar to the Commission's experience in the fall of 2009, when the extent of the Government's non-cooperation was made publicly evident by Commission counsel and the former Chairperson, when Parliamentary Committee hearings into the detainee question began, and when both the Commission's dilemma and the detainee questions received intense media coverage. For both inquiries, it seems it was only increasing public exposure that caused the Government to become more forthcoming with its disclosure.

Also analogous are the concerns of both the Somalia Commission and this Commission about the Government's litigious and seemingly adversarial approach to document production. The Commission was mindful of the existence of a potential or actual conflict of interest between the Government's duty to produce documents to the Commission on the one hand, and, on the other hand, the self-interest it might have in slowing down or inhibiting disclosure of information deemed harmful to itself. The Somalia Report described the dilemma thus:

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[1594] Exhibit P-67, p. 1217
[1595] Exhibit P-67, p. 1220

> [...] the purpose and design of SILT placed everyone within it in an impossible position, caught between adherence to our order of production and respect for the public inquiry process, and loyalty to their own institution and leadership – a leadership by its own admission disinclined to recognize the public's right to information and willing to resort to legalistic hair-splitting and subterfuge to avoid divulging that information.[1596]

The Commission feels obliged to call on the CFPM, the Chief of the Defence Staff, the Minister of National Defence, and the Government of Canada as a whole to review the process section of this Report in detail to understand the full extent to which the actions described above severely impeded the Commission's ability to carry out the mandate prescribed to it by Parliament. The Complainants, the subjects, the Department of National Defence, and the public would have been much better served by a more transparent and cooperative approach. The Commission holds out the hope that future public interest investigations and hearings will be carried out in the spirit of cooperation and respect that the public has a right to expect.

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[1596] Exhibit P-67, p. 1227

## LSUC Rules of Professional Conduct possibly at stake related to some aspects of MPCC hearings – problematizing Department of Justice lawyer role/s

**The facts set out below are accurate, as far as the writer (Craig Scott) knows, with respect to aspects of the MPCC hearings, but the purpose is to raise issues for general discussion and reflection for attendees at the Law Union conference without focusing on individuals. For this reason, no names are used and the facts are presented in terms of assumed but not proven facts. To give the reflection some edge (that is, to move it away from gut reactions of what is appropriate conduct versus what is formally unethical conduct in the sense of the LSUC Rules) assume, further, that the LSUC does not consider any Rules to have been violated in the below contexts.**

**The assumed facts relate to the LSUC Rules prior to the current 2014 Rules, although many of the provisions are essentially the same. However, for ease of reference, the current Rules are used as the reference points for discussion.**

### (1) Representing both the subjects of the MPCC investigation and the Government of Canada

Potentially relevant CURRENT Rules:

Taking a joint retainer with consent of both clients are set out in the following Rules:

**Rule 3.4-5**

*Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that*

*(a) the lawyer has been asked to act for both or all of them;*

*(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and*

*(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.*

**Rule 3.4-6**

*If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.*

**Rule 3.4-7**

*When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.*

Even if all clients consent to a joint retainer, if problems arise in the course of representation, the following Rules could be relevant:

**Rule 3.4-8**

*Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:*

*(a) The lawyer shall (i) refer the clients to other lawyers for that purpose; or*

*(ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.*

*(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.*

**Rule 3.4-9**

*Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.*

Finally, if a lawyer uses a joint retainer in a way that the presiding officer over proceedings views it as frustrating the proceedings, the following Rule could be engaged:

**Rule 5.1-1**

*When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.*

****

In the MPCC hearings, assume a government lawyer ("the lawyer") claimed to act for seven Military Policepersons whose allegedly improper conduct makes them subjects of the MPCC's investigation (the "seven MPs"), at the same time as he claimed to act for the Government of Canada. The propriety of this joint retainer can be doubted.

Assume that, for example, in the MPCC hearing transcript of 7 October 2009, the Crown lawyer is listed as appearing "for the Attorney General of Canada," but submitted later in argument that "In this hearing, we also represent seven named subjects."

Assume the lawyer explained the joint retainer at one point as follows:

> *I think I made it clear on the record that in this room the parties that we represent are the seven subjects, but we are also conscious of the fact that, as Department of Justice lawyers, we are*

> *representing the federal government in its various institutions, but they are not in this room as parties.*

Assume that, while at times the lawyer prefaced his submissions with phrases such as "this is the Government of Canada speaking," just as often or even more often he gave no preface at all, leaving the tribunal guessing whether a given submission is made on behalf of the seven MPs, the Government of Canada, or both.

Was such a joint retainer a problem under the *Rules of Professional Conduct* from the outset or as proceedings evolved because (a) it prejudiced the seven MPs, and (b) it is contrary to the fair administration of the justice?

Was it the case that, in this process, the MPs being investigated and the Government of Canada do not share a common interest. On the one hand, the interest of the MPs is to be exculpated of all potential adverse findings. On the other hand, the interest of the Government of Canada, which is not a party, is to avoid embarrassment over its detainee transfer policy. These interests can easily clash. For example, the Government of Canada might want certain documents withheld from the MPCC because their disclosure would be unflattering about Government policy. The MPs, however, may want those same documents entered into evidence, to show that Government policy rather than individual action is at fault.

Consider how just such a dilemma actually appears to have arisen.

In October 2009, the lawyer submitted <u>for his Government client</u> various reasons why certain documents that the MPCC had summonsed for its hearing were seriously in arrears and would not be produced and filed with the tribunal. He then submitted <u>for his seven MPs clients</u> that so long as access to those documents was lacking, a fair hearing before the MPCC was impossible and would have to be adjourned so as not to violate those persons' procedural fairness rights. In granting the adjournment motion on 14 October 2009, the MPCC Chairman noted:

> All subjects [of the investigation] seek an adjournment on the basis that documents requested by the Commission are not available. The Commission recognizes the inherent irony of the fact that it is the same Department of Justice counsel making these submissions who are also representing the government's reasons why the documents in question have not been released.
>
> [ … ]
>
> The government counsel who have been responding to the Commission's requests for documents, Mr. Préfontaine and Ms. Richards principally, also happen to represent seven of the subjects before this Commission as already noted. Though the government is not a party to these proceedings, these counsel have presented some of their submissions on behalf of the government, not the subjects, particularly on the issue of the production of documents. The thrust of the submissions was to deny that the government was to blame for the delay in providing the documents…

> [ … ]
>
> One would have thought that, almost one full year after the full document requests specifically addressing this complaint was made in November 2008, the government would have had time to redact and provide at least some documents. Yet, we reconvened these hearings on October 7, 2009, only to be told that not one new document had been produced in the past year by the government.
>
> [ … ]
>
> It is clear that the complete absence of documents before us in fact results from policy and administrative concerns on the part of the government rather than from the strict operation of the law. This is how we find ourselves where we are today, forced to adjourn the proceedings out of fairness to the subjects since obviously they should not be the ones to suffer because of the government's conduct.

The MPCC Chairman concluded that the "the objectives of the Commission have been frustrated."

In sum, the question is whether any of the above represents an improper joint retainer?

Some would take the view that the above scenario is at odds with the ethical obligations of a lawyer in that they would assume a jointly-retained lawyer is not entitled within the same proceeding to carry out one client's instructions (*i.e.* the Government's instructions, to withhold documents), when doing so makes it necessary for the lawyer to take the position that his other clients (*i.e.* the seven MPs, under a cloud of potential adverse findings) are prejudiced and require an adjournment to have fairness restored to them on account of what the lawyer did in the name of the first client. As this view would have it, not only does that seem to breach the duty of fair representation toward the latter clients, but it seems to mock the administration of justice before the tribunal.

Does intentionality (to play one client off the other, forcing an adjournment and frustrating the tribunal as a whole) have to be shown, or is the simple fact of this result enough?

## (2) Treating a federal government employee as both client and an adverse witness without consent of the employee

Potentially relevant CURRENT Rules:

The following Rules require a lawyer to get the consent of a former client before acting against that former client:

**Rule 3.4-10**

*Unless the former client consents, a lawyer shall not act against a former client in*
*(a) the same matter,*

*(b) any related matter, or*

*(c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.*

**Rule 3.4-11**

*When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client provided that:*

*(a) the former client consents to the other lawyer acting; or*

*(b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter.*

****

Assume Person X was (still is) a Government of Canada employee who MPCC requested to give a pre-hearing interview to MPCC. As with all such employees, the default is to be represented by counsel from the Department of Justice, subject of course to one's right to elect outside counsel. (Assume 'X' did later elect outside counsel.)

Assume the lawyer does not dispute that X was his client. On 28 July 2009, the lawyer wrote a letter to 'X', offering legal advice about this request made by the MPCC for a pre-hearing interview. The lawyer marked his letter to 'X': "PROTECTED 'B' - SOLICITOR-CLIENT COMMUNICATION." The lawyer spoke to the *Law Times* of "a letter I sent to my clients, which at that time included X."

On 13 April 2010, 'X' appeared before the MPCC hearings as a witness. X's testimony was led by the MPCC Commission counsel, and as widely reported in the press, it was highly critical of various branches or officials of the Government of Canada on the issue of detainee treatment in Afghanistan.

The lawyer, on the joint retainer as already described, then cross-examined X. At this point, 'X' was formerly his client but 'X' had subsequently hired outside counsel. The lawyer attacked his former client for giving adverse testimony. Such conduct would normally be a conflict of interest unless there was consent of the former client to act against the former client.

If it turns out the lawyer did not seek and received X's consent to act against him, would the lawyer have been in a conflict of interest on the basis that solicitor-client privilege belongs to the client, and comes into being at the first transaction of legal advice (even if a retainer is not perfected). Or is it acceptable not to receive consent or to assume implied consent?

Assume further that (at least) the CBC broadcast a report alleging the lawyer was in a conflict of interest by cross-examining X.

Assume further that the news story quoted the lawyer as saying, "I have the right to cross-examine, and I am not in conflict in doing so." The lawyer also told the news outlet that X had only been his "putative client," not his actual client. If this was the reason he believed he was not in a conflict of interest, the question for reflection may be: is there any legal significance to that distinction and, on the assumed facts (see e.g. the comment to the *Law Times* above), was 'X' actually only a putative client?

## (3) Intimidating a Journalist

Potentially relevant CURRENT Rules:

Consider these Rules:

**Rule 2.1-1**
*A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.*

**Rule 2.1-2**
*A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions*

**Rule 5.6-1**

*A lawyer shall encourage public respect for and try to improve the administration of justice*

****

It appears that the lawyer took the CBC's criticism personally. In a tape-recorded radio interview broadcast on the CBC, the lawyer is heard physically intimidating a CBC journalist, after he posed a string of questions about conflict of interest. The key passage which follows the journalist's questions is as follows.

> ***Journalist:*** *How far away are you from me right now, about what, three inches?*
>
> ***The lawyer:*** *I'm not sure but I can smell your, smell your breath, so maybe you should [be] stepping back.*
>
> ***Journalist:*** *Well, you just stepped into me.*
>
> ***The lawyer:*** *Oh!*
>
> ***Journalist:*** *Is this conduct becoming of a [lawyer] for the Government of Canada?*

> ***The lawyer:*** *Well you have my answer about the conflict of interest issue, and I think we need not discuss this any further.*

Assume that what happened would need to be investigated much further to know whether the lawyer in fact did adopt a threatening stance inches away from the journalist's face and then demanded that the journalist be the one to back off. If that is what happened, assume it is not known if the lawyer apologized to the journalist and the CBC.

Based on this evidence alone, and assuming the facts even as it may not turn out to be as it seems from the transcript, does conduct of this sort rise to the level of a breach of Rules?

**(4) Any other issues arising from the MPCC extract (previous document)**

The MPCC detailed its concerns with the conduct of government lawyers in its report, throughout its report as well as in a dedicated section, which is reproduced in the materials ahead of this document.

Were the same conduct to occur since the adoption of the updated 2014 LSUC Rules, would any issues be raised from anything described by the MPCC,

a) Under the (current) Rules?
b) As general ethical matters without being a problem under the Rules?

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**Q-1117[2]** — Mr. Scott (Toronto—Danforth) — Afghanistan — Notice — December 11, 2012

Made an Order for Return and answer tabled (Sessional Paper No. 8555-411-1117) — March 8, 2013

**Q-1117[2]** — December 11, 2012 — Mr. Scott (Toronto—Danforth) — With regard to the policies and practices concerning treatment of persons under the control of Canadian forces in Afghanistan in any part of the period from September 12, 2001, to present: (*a*) were each of Canada's Defence Intelligence, Canadian Security and Intelligence Service, and the Canadian Security Establishment amongst the intelligence agencies based at Kandahar Air Field (KAF) base; (*b*) what other intelligence agencies, Canadian or non-Canadian, were based at KAF or operated out of KAF without being based there; (*c*) is the government aware of a military facility in Kandahar commonly known as Graceland and, if so, what sort of facility was, or is, it, and what institutional actors operated, or operate, from this facility; (*d*) is the government aware of a military facility in Kandahar commonly known as Gecko and, if so, what sort of facility was, or is, it, and what institutional actors operated, or operate, from this facility; (*e*) how do, or did, the facilities and the institutional actors operating from Gecko and Graceland (i) relate to each other, (ii) interact; (*f*) on what date did Canadian special forces, including JTF2, first arrive in Afghanistan and, if they have left, on what date did they leave Afghanistan; (*g*) if Canadian special forces, including JTF2, are currently in Afghanistan, whether as units or as individual personnel, in what capacity are they in Afghanistan; (*h*) has Canada ever transferred persons under its control to Afghan authorities with the knowledge that some of those persons would or could end up being held in the facilities of National Directorate of Security (NDS) Kabul; (*i*) does the government know of cases of persons under initial Canadian control who ended up being held in the facilities of NDS Kabul, whether under the control of NDS or whether under the control of one or more other Afghan or non-Afghan intelligence agencies and, if so, (i) how many, (ii) which other intelligence agency or agencies; (*j*) did Canada ever seek to trace persons who had been either detained by or otherwise under the control of Canadian special forces, including JTF2, and who Canada knew or suspected had ended up at NDS Kabul facilities and, if so, (i) for what reasons was tracing undertaken, (ii) how many persons did Canada seek to trace, (iii) what were the results of the efforts in terms of the number of persons who were located versus determining that persons were not traceable; (*k*) is the government familiar with the English expression, whether formal or informal, of "amplifying orders" used in the Canadian military context and, if so, what does this mean; (*l*) in the period in question (2001 to present), did General Rick Hillier ever issue "amplifying orders" that related, directly or indirectly, to the policy or practice of handing over persons under Canada's control in Afghanistan to agents of another state, whether Afghan or non-Afghan and, if so, for each set of amplifying orders, (i) what were the dates of the orders, (ii) what previous orders, rules of engagement or other documents were being amplified, (iii) what was the content of the

amplifying orders; (*m*) in relation to the May 25, 2006, capture of "11 suspected Taliban fighters" referenced at page 96 of Ian Hope, Dancing with the Dushman: Command Imperatives for the Counter-Insurgency Fight in Afghanistan (Canadian Defence Agency Press, 2008), could the government set out the manner in which each of these 11 persons controlled by Canadian forces were processed, including what is known about each's subsequent trajectory after passing from the control of Canada until the point at which the government may have lost track of their whereabouts; (*n*) at any period and, if so, which periods, did the Canadian government consider that there were one or more categories of persons who Canada passed on to either Afghan or American authorities but who were not categorized as detainees, and did such categories have a designation, whether formal or informal; (*o*) were there persons under the control of Canadian forces who were transferred to Afghanistan, but who were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer and, if so, on what basis were transfers of such persons not deemed covered by the agreements; (*p*) were there persons under the control of Canadian forces who were transferred to Afghanistan but whose existence and transfer was not made known to the International Committee of the Red Cross and, if so, on what basis was the Red Cross not informed; (*q*) during the 2011 Parliamentary process in which a Panel of Arbiters decided what information could be released to Parliament, were documents withheld from this process by the government if they concerned the transfer of persons that were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer; (*r*) between September 12, 2001, and the entry into effect of the 2005 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities; (*s*) between the entry into effect of the 2005 detainee-transfer Memorandum of Understanding and the entry into effect of the 2007 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities; (*t*) between the entry into effect of the 2007 detainee-transfer Memorandum of Understanding and the present date, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were

transferred to Afghan authorities, (viii) to which Afghan authorities; (*u*) before General Rick Hillier signed the 2005 detainee-transfer Memorandum of Understanding with Afghan Defence Minister Wardak, did General Hillier call or attempt to call the Canadian Defence Minister Graham from Afghanistan, in order to seek Graham's authorization for Hillier to sign; (*v*) at the time of the signing of the 2005 detainee-transfer Memorandum of Understanding between Afghan Defence Minister Wardak and Canadian General Hillier, was the Ambassador of Canada to Afghanistan in the room when the document was signed and thus an eyewitness to each man signing the document; (*w*) have Canadian special forces, whether JTF2 or other, ever participated in operations designed to obtain control over or custody of persons in Afghanistan as a result of information, instructions or orders originating from the Central Intelligence Agency (CIA) or another US intelligence agency and, if so, in what periods and resulting in how many captures; (*x*) if not, have Canadian special forces participated alongside or in coordination with United States special forces for such capture operations in Afghanistan where it is known or reasonably assumed by Canada that the US special forces are acting on information, instructions or orders originating from the CIA or another US intelligence agency; (*y*) have there ever been and are there now Canadian military special forces in Pakistan; (*z*) have Canadian special forces, whether JTF2 or other, ever participated in operations designed to obtain control over or custody of persons in Pakistan as a result of information, instructions or orders originating from the CIA or another US intelligence agency and, if so, in what periods and resulting in how many captures; and (*aa*) if not, have Canadian special forces participated alongside or in coordination with US special forces for such capture operations in Pakistan where it is known or reasonably assumed by Canada that the US special forces are acting on information, instructions or orders originating from the CIA or another US intelligence agency?

8555-411-1117

# ORDER/ADDRESS OF THE HOUSE OF COMMONS
# ORDRE/ADRESSE DE LA CHAMBRE DES COMMUNES

| NO.-N° | BY / DE | DATE |
|---|---|---|
| Q-1117 | Mr. Scott (Toronto – Danforth) | December 11, 2012 / 11 décembre 2012 |

RETURN BY THE LEADER OF THE GOVERNMENT IN THE HOUSE OF COMMONS
DÉPÔT DU LEADER DU GOUVERNEMENT À LA CHAMBRE DES COMMUNES

Signed by Mr. Tom Lukiwski
PRINT NAME OF SIGNATORY
INSCRIRE LE NOM DU SIGNATAIRE

SIGNATURE
MINISTER OR PARLIAMENTARY SECRETARY
MINISTRE OU SECRÉTAIRE PARLEMENTAIRE

MAR 0 8 2013

**(TABLED FORTHWITH / DÉPOSÉ AUSSITÔT)**

# INQUIRY OF MINISTRY
# DEMANDE DE RENSEIGNEMENT AU GOUVERNEMENT

PREPARE IN ENGLISH AND FRENCH MARKING "ORIGINAL TEXT" OR "TRANSLATION"
PRÉPARER EN ANGLAIS ET EN FRANÇAIS EN INDIQUANT "TEXTE ORIGINAL" OU "TRADUCTION"

| QUESTION NO./Nº DE LA QUESTION | BY / DE | DATE |
|---|---|---|
| Q-1117[2] | Mr. Scott (Toronto—Danforth) | December 11, 2012 |

REPLY BY THE MINISTER OF FOREIGN AFFAIRS
RÉPONSE DU MINISTRE DES AFFAIRES ÉTRANGÈRES

John Baird, P.C., M.P.

PRINT NAME OF SIGNATORY
INSCRIRE LE NOM DU SIGNATAIRE

SIGNATURE
MINISTER OR PARLIAMENTARY SECRETARY
MINISTRE OU SECRÉTAIRE PARLEMENTAIRE

QUESTION

With regard to the policies and practices concerning treatment of persons under the control of Canadian forces in Afghanistan in any part of the period from September 12, 2001, to present: (a) were each of Canada's Defence Intelligence, Canadian Security and Intelligence Service, and the Canadian Security Establishment amongst the intelligence agencies based at Kandahar Air Field (KAF) base; (b) what other intelligence agencies, Canadian or non-Canadian, were based at KAF or operated out of KAF without being based there; **See full text of the question attached.**

REPLY / RÉPONSE

ORIGINAL TEXT / TEXTE ORIGINAL [X] TRANSLATION / TRADUCTION [ ]

**(i) does the government know of cases of persons under initial Canadian control who ended up being held in the facilities of NDS Kabul, whether under the control of NDS or whether under the control of one or more other Afghan or non-Afghan intelligence agencies and, if so, (i) how many, (ii) which other intelligence agency or agencies;**

The Department is aware of occasions when Canadian-transferred detainees were re-transferred by the NDS from its Kandahar facility to NDS custody in Kabul. In these rare occurrences involving a small number of detainees, none were subsequently transferred from the NDS Kabul to other Afghan or non-Afghan intelligence bodies. After the *Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan* was signed in May 2007, Canadian officials conducted monitoring of all Canadian-transferred detainees held at NDS Kabul.

.../2

**(j) did Canada ever seek to trace persons who had been either detained by or otherwise under the control of Canadian special forces, including JTF2, and who Canada knew or suspected had ended up at NDS Kabul facilities and, if so, (i) for what reasons was tracing undertaken, (ii) how many persons did Canada seek to trace, (iii) what were the results of the efforts in terms of the number of persons who were located versus determining that persons were not traceable.**

Following the signing of the May 2007 *Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan*, when Canada implemented a post-transfer monitoring program, Canadian officials in Kabul and Kandahar worked with the Afghan authorities to locate all Canadian-transferred detainees held in Afghan facilities, which may have included those who had been captured originally by the Canadian special forces. Four Canadian-transferred detainees, who may have been captured originally by the Canadian special forces, were identified in custody at NDS Kabul.

As noted in a detainee monitoring report that was released publicly in June 2011, these four detainees were interviewed in June 2007. Please see http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/docs/362/poa_269.pdf for details of this monitoring mission.

**p) were there persons under the control of Canadian forces who were transferred to Afghanistan but whose existence and transfer was not made known to the International Committee of the Red Cross and, if so, on what basis was the Red Cross not informed;**

Since June 2006, when the Department of Foreign Affairs agreed to provide notification to the International Committee of the Red Cross (ICRC), the Department has provided the ICRC with the detailed information of Canadian-captured detainees as provided by the Canadian Forces, as well as notifications of their release or transfer into Afghan custody.

**(v) At the time of the signing of the 2005 detainee-transfer Memorandum of Understanding between Afghan Defence Minister Wardak and Canadian General Hillier, was the Ambassador of Canada to Afghanistan in the room when the document was signed and thus an eyewitness to each man signing the document;**

Ambassador David Sproule attended the meeting with General Hillier and Defence Minister Wardak on December 18, 2005 and witnessed the signing of the arrangement.

# INQUIRY OF MINISTRY
# DEMANDE DE RENSEIGNEMENT AU GOUVERNEMENT

PREPARE IN ENGLISH AND FRENCH MARKING "ORIGINAL TEXT" OR "TRANSLATION"
PRÉPARER EN ANGLAIS ET EN FRANÇAIS EN INDIQUANT "TEXTE ORIGINAL" OU "TRADUCTION"

| QUESTION NO./Nº DE LA QUESTION | BY / DE | DATE |
|---|---|---|
| Q-1117 | Mr. Scott (Toronto – Danforth) | December 11, 2012 |

REPLY BY THE MINISTER OF NATIONAL DEFENCE
RÉPONSE DU MINISTRE DE LA DÉFENSE NATIONALE

Hon. Peter MacKay

PRINT NAME OF SIGNATORY
INSCRIRE LE NOM DU SIGNATAIRE

SIGNATURE
MINISTER OR PARLIAMENTARY SECRETARY
MINISTRE OU SECRÉTAIRE PARLEMENTAIRE

QUESTION

With regard to the policies and practices concerning treatment of persons under the control of Canadian forces in Afghanistan in any part of the period from September 12, 2001, to present: (*a*) were each of Canada's Defence Intelligence, Canadian Security and Intelligence Service, and the Canadian Security Establishment amongst the intelligence agencies based at Kandahar Air Field (KAF) base; (*b*) what other intelligence agencies, Canadian or non-Canadian, were based at KAF or operated out of KAF without being based there; - **See full text of the question attached.**

REPLY / RÉPONSE

ORIGINAL TEXT / TEXTE ORIGINAL [X] TRANSLATION / TRADUCTION [ ]

(a) and (b)

Officials from the Chief of Defence Intelligence operated out of Kandahar Airfield at some point during the specified period. Communications Security Establishment Canada was deployed to Kandahar Airfield as part of the broader intelligence support effort to Canadian Armed Forces operations. The Department of National Defence and the Canadian Armed Forces cannot comment on the intelligence activities of other Canadian or non-Canadian agencies.

(c)

The facility once referred to as Graceland was a forward operating base for the Canadian Armed Forces in Kandahar, shared with other allies. The Department of National Defence and the Canadian Armed Forces cannot comment on the operations of other Canadian organizations or allies.

(d)

Gecko was a name used by allies for a forward operating base in Kandahar. The Department of National Defence and the Canadian Armed Forces cannot comment on the operations of allies.

(e)

The Department of National Defence and the Canadian Armed Forces cannot comment on the operations of other Canadian organizations or allies.

(f)

Canadian Special Forces first arrived in Afghanistan on 18 December 2001. A small number of Canadian Special Forces continue to operate in Afghanistan as part of Operation ATTENTION.

(g)

A small number of Canadian Special Forces are currently part of Operation ATTENTION, helping to train Afghan Special Forces in an institutional setting.

(h)

Since Canada and Afghanistan signed the 2005 Detainee Transfer Arrangement, Canada has always recognized that Canadian-captured detainees transferred to Afghan authorities could potentially be moved to the National Directorate of Security detention facility in Kabul. In 2007, Canada and Afghanistan included provisions in the Supplemental Arrangement on Detainee Transfers that specified that the Government of Afghanistan will hold detainees in a limited number of facilities, and provide notifications of such material changes in detainees' statuses. The National Directorate of Security facility in Kabul was among the facilities listed as Afghan facilities approved to hold Canadian-transferred detainees. A list of these facilities is available on the Government of Canada's website at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d.

(j)

All detainees captured by the Canadian Armed Forces, regardless of whether they were captured by Canadian Special Forces or otherwise, are treated in accordance with standard Canadian Armed Forces detainee handling procedures.

Following the implementation of the May 2007 Supplementary Arrangement with the Government of Afghanistan, which included the implementation by Canada of a post-transfer monitoring program, Canadian officials in Kabul and Kandahar worked with the Afghan authorities to locate all Canadian-transferred detainees held in Afghan facilities, including those who may have been captured originally by the Canadian Special Forces. With regard to National Directorate of Security facilities in Kabul, four Canadian-transferred detainees were identified in custody at these facilities. As noted in a detainee monitoring report that was released publicly in June 2011, these four detainees were interviewed in June 2007. For details on this monitoring mission, please see http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/docs/362/poa_269.pdf.

(k)

"Amplifying orders" is not a formal term used by the Canadian Armed Forces, and is not routinely used informally.

(l)

"Amplifying orders" is not a formal term used by the Canadian Armed Forces, and is not routinely used informally. The Department of National Defence and the Canadian Armed Forces do not have records of orders issued as "amplifying orders".

(m)

Canadian Armed Forces detainee statistics can be found at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d. The data includes basic statistical information such as the number of persons detained, released, transferred and deceased. The Department of National Defence and the Canadian Armed Forces do not comment on more detailed detainee-related information, due to factors including, but not limited to, operational security considerations and the safety of the individuals concerned.

(n)

Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control.

(o)

On one occasion, the Canadian Armed Forces took custody of an individual who, on the basis of credible grounds, was suspected of having committed a criminal act when employed at a Canadian Armed Forces facility in Afghanistan. The individual was not an insurgent, and was not arrested for a reason related to the Canadian Armed Forces mission in Afghanistan.

Consistent with standard Canadian Armed Forces procedures for addressing crimes committed or purportedly committed by local nationals at Canadian Armed Forces facilities outside of Canada, the Canadian Armed Forces transferred this individual to the custody of an appropriate Afghan authority for investigation. The individual was visited periodically by Canadian staff while in Afghan custody to confirm that he had not been mistreated.

(p)

Prior to June 2007, the Department of National Defence and the Canadian Armed Forces followed standard procedures which included providing the International Committee of the Red Cross with detailed information on each detainee captured by the Canadian Armed Forces, and notification of their release or transfer to Afghan custody.

On June 26, 2006, the Department of Foreign Affairs and International trade started to also provide similar notifications to the International Committee of the Red Cross, in parallel with the Department of National

Defence and the Canadian Armed Forces. On June 2, 2007, the responsibility for notifying the International Committee of the Red Cross was formally transferred from the Department of National Defence and the Canadian Armed Forces to the Department of Foreign Affairs and International Trade.

(r)

Canadian Armed Forces detainee statistics can be found at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d. The data includes basic statistical information such as the number of persons detained, released, transferred and deceased. Annual detainee statistics do not include information on the number of persons transferred to particular authorities, due to factors including, but not limited to, operational security considerations and the safety of the individuals concerned.

Between September 12, 2001, and the entry into effect of the 2005 detainee-transfer Memorandum of Understanding with the Government of Afghanistan, the Canadian Armed Forces transferred Afghan detainees to the US Forces and, while on joint operations supporting capacity building of the Afghan National Security Forces, to the Afghan National Army, the Afghan National Police or the National Directorate of Security.

Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control.

(s)

Canadian Armed Forces detainee statistics can be found at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d. The data includes basic statistical information such as the number of persons detained, released, transferred and deceased. Annual detainee statistics do not include information on the number of persons transferred to particular authorities, due to factors including, but not limited to, operational security considerations and the safety of the individuals concerned.

Between the entry into effect of the 2005 detainee-transfer Memorandum of Understanding and the entry into effect of the 2007 supplementary detainee-transfer arrangement with the Government of Afghanistan, all Canadian Armed Forces detainees were transferred to the Afghan National Army, the Afghan National Police or the National Directorate of Security.

Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and

in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control.

(t)

Canadian Armed Forces detainee statistics can be found at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d. The data includes basic statistical information such as the number of persons detained, released, transferred and deceased. Annual detainee statistics do not include information on the number of persons transferred to particular authorities, due to factors including, but not limited to, operational security considerations and the safety of the individuals concerned.

Between the entry into effect of the 2007 supplementary detainee-transfer arrangement with the Government of Afghanistan and the end of Canada's combat mission in Afghanistan in July 2011, the Canadian Armed Forces transferred detainees to the Afghan National Directorate of Security. The Canadian Armed Forces have made no transfers of detainees to any Afghan authority since that time. On November 18, 2011, a new arrangement between Canada and the US came into effect to facilitate the transfer of individuals captured by the Canadian Armed Forces in Afghanistan to US Forces' custody at the Detention Facility in Parwan.

Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control.

On one occasion, the Canadian Armed Forces took custody of an individual who, on the basis of credible grounds, was suspected of having committed a criminal act when employed at a Canadian Armed Forces facility in Afghanistan. The individual was not an insurgent, and was not arrested for a reason related to the Canadian Armed Forces mission in Afghanistan. Consistent with standard Canadian Armed Forces procedures for addressing crimes committed or purportedly committed by local nationals at Canadian Armed Forces facilities outside of Canada, the Canadian Armed Forces transferred this individual to the custody of an appropriate Afghan authority for investigation. The individual was visited periodically by Canadian staff while in Afghan custody to confirm that he had not been mistreated.

(u)

No record of such a phone call or attempt to call could be found.

(w)

Due to operational security considerations, the Department of National Defence and the Canadian Armed Forces cannot discuss intelligence sources or collection methods.

(x)

Due to operational security considerations, the Department of National Defence and the Canadian Armed Forces cannot discuss intelligence sources or collection methods.

(y)

Within the context of Canadian Armed Forces operations in Afghanistan, no Canadian Special Forces have operated in Pakistan.

(z)

Due to operational security considerations, the Department of National Defence and the Canadian Armed Forces cannot discuss intelligence sources or collection methods.

(aa)

Due to operational security considerations, the Department of National Defence and the Canadian Armed Forces cannot discuss intelligence sources or collection methods.

# INQUIRY OF MINISTRY
# DEMANDE DE RENSEIGNEMENT AU GOUVERNEMENT

PREPARE IN ENGLISH AND FRENCH MARKING "ORIGINAL TEXT" OR "TRANSLATION"
PRÉPARER EN ANGLAIS ET EN FRANÇAIS EN INDIQUANT "TEXTE ORIGINAL" OU "TRADUCTION"

| QUESTION NO./Nº DE LA QUESTION | BY / DE | DATE |
|---|---|---|
| Q-1117 | Mr. Scott (Toronto—Danforth) | December 11, 2012 |

REPLY BY THE OFFICES OF THE PRIME MINISTER AND THE PRIVY COUNCIL
RÉPONSE DU CABINET DU PREMIER MINISTRE ET DU BUREAU DU CONSEIL PRIVÉ

Honourable Peter Van Loan

PRINT NAME OF SIGNATORY
INSCRIRE LE NOM DU SIGNATAIRE

SIGNATURE
MINISTER OR PARLIAMENTARY SECRETARY
MINISTRE OU SECRÉTAIRE PARLEMENTAIRE

QUESTION

With regard to the policies and practices concerning treatment of persons under the control of Canadian forces in Afghanistan in any part of the period from September 12, 2001, to present: (*a*) were each of Canada's Defence Intelligence, Canadian Security and Intelligence Service, and the Canadian Security Establishment amongst the intelligence agencies based at Kandahar Air Field (KAF) base; (*b*) - **See full text of the question attached.**

REPLY / RÉPONSE

ORIGINAL TEXT / TEXTE ORIGINAL [X] TRANSLATION / TRADUCTION [ ]

The Privy Council Office responds:

With regard to part (q) of the question, the 2011 Parliamentary process in which a Panel of Arbiters decided what information could be released to Parliament contemplated all relevant documents related to the transfer of Afghan detainees from the period 2001 to 2005, as well as subsequent transfers. No relevant documents were withheld from this process, prior to its ending when the Memorandum of Understanding governing the review process was not renewed following the 2011 Federal Election.

# INQUIRY OF MINISTRY
# DEMANDE DE RENSEIGNEMENT AU GOUVERNEMENT

PREPARE IN ENGLISH AND FRENCH MARKING "ORIGINAL TEXT" OR "TRANSLATION"
PRÉPARER EN ANGLAIS ET EN FRANÇAIS EN INDIQUANT "TEXTE ORIGINAL" OU "TRADUCTION"

| QUESTION NO./Nº DE LA QUESTION | BY / DE | DATE |
|---|---|---|
| Q-1117 | Mr. Scott (Toronto—Danforth) | December 11, 2012 |

REPLY BY THE MINISTER OF PUBLIC SAFETY
RÉPONSE DU MINISTRE DE LA SÉCURITÉ PUBLIQUE

Signed by the Honourable Vic Toews

J Toews

PRINT NAME OF SIGNATORY
INSCRIRE LE NOM DU SIGNATAIRE

SIGNATURE
MINISTER OR PARLIAMENTARY SECRETARY
MINISTRE OU SECRÉTAIRE PARLEMENTAIRE

QUESTION

With regard to the policies and practices concerning treatment of persons under the control of Canadian forces in Afghanistan in any part of the period from September 12, 2001, to present: (a) were each of Canada's Defence Intelligence, Canadian Security and Intelligence Service, and the Canadian Security Establishment amongst the intelligence agencies based at Kandahar Air Field (KAF) base; - **See full text of the question attached.**

REPLY / RÉPONSE

ORIGINAL TEXT / TEXTE ORIGINAL [X] TRANSLATION / TRADUCTION [ ]

**Canadian Security Intelligence Service (CSIS)**

For reasons of national security, and to protect operational integrity and employee safety, CSIS can only confirm its general presence in Afghanistan from 2002 to present.

OSGOODE
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

The Honourable Jody Wilson-Raybould,
Minister of Justice,
Department of Justice,
284 Wellington Street,
Ottawa, ON K1A 0H8

April 12, 2017

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Dear Minister,

*Re*: Government response to electronic petition e-608

I am writing in relation to the response you provided on behalf of the government to House of Commons electronic petition e-608, which I attach for your ease of reference as Appendix 1 and your response as Appendix 2.

The rationale for e-608 is outlined in the petition itself. Section 38 of the Canada Evidence Act governs access to documents concerning international relations, national security and/or national defence in legal proceedings, with sub-section 38.01(8) empowering Cabinet to authorize tribunals and other entities to seek and receive documents in uncensored form in a schedule to the *Canada Evidence Act*. This has been done for entities that include the Civilian Review and Complaints Commission for the RCMP under the *RCMP Act*, military boards of inquiry under the *National Defence Act*; and the Security Intelligence Review Committee under the *CSIS Act*.

The Military Police Complaints Commission (MPCC) is not included in this schedule despite MPCC commissioners and lawyers having high-level security clearance no different from personnel of these other entities, and despite the MPCC having powers under the National Defence Act to hear evidence in closed (non-public) proceedings if the information is sensitive to national security and like interests.

Like these other entities, the role of the MPCC is crucial for democratic accountability and the rule of law. Regrettably, these values have been challenged over the past decade, when lawyers of the Department of Justice refused to provide the MPCC with uncensored documents relevant to proceedings on the treatment of Afghan detainees and, then, the government of then Prime Minister Harper declined to exercise its authority under s.38.01(8) to allow the MPCC the same access to information as the bodies that are in the s.38.01(8) schedule.

Partly as a consequence of this past government conduct, e-608 called upon the Government of Canada to reject the approach of the previous government and, accordingly, to exercise its authority under section 38.01(8) of the Canada Evidence Act to designate the Military Police Complaints Commission as one of the bodies permitted unfettered access to documents. I would add now that I also initiated e-608 in part because I have little confidence that Department of National Defence officials and Department of Justice lawyers will necessarily act in a cooperative fashion with the MPCC simply because there is a new government.

My concerns in that respect have been deepened by your government's conduct since taking office. As you will know, the Minister of National Defence has refused to establish an inquiry into the treatment of Afghan detainees despite the Liberal Party pushing for one

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when in the Official Opposition. And, in relation to current proceedings before the MPCC involving a complaint from military police officers that their superiors cooperated with the military to terrorize prisoners in their Kandahar Air Field cells in 2010-2011, the Department of National Defence apparently withheld all documents from the MPCC for a good half-year – coincidentally providing documents only after La Presse newspaper reported the foot-dragging. In this context, I have little confidence we have seen the end of bureaucratic recalcitrance pushing toward limited cooperation with, if not active obstruction of the current and future work of, the MPCC.

In this context, the call in e-608 for MPCC to be put on an equal footing with SIRC, the RCMP Civilian Review and Complaints Commission, and military boards of inquiry remains a pressing matter.

For that reason, I am disappointed that you would sign off on a government response that contains highly dubious reasons for not listing the MPCC on the s.38.01(8) schedule. I reproduce your reasoning below:

> *Section 38 of the Canada Evidence Act is a regime that protects "sensitive information" and "potentially injurious information", as defined in the Act, the disclosure of which could be harmful to Canada's international relations, national defence or national security. Entities that are listed to the Schedule of the Canada Evidence Act are exempt from the general notice provisions, set out in section 38.01 of the Act, where they have the ability to conduct closed proceedings to protect "sensitive information" or "potentially injurious information". The Military Police Complaints Commission (MPCC) does not presently have this capability.*
>
> *While the mandate of the MPCC allows it to conduct in camera (i.e., closed) proceedings if information identified in section 250.42 of the National Defence Act is likely to be disclosed, the scope of section 250.42 does not fully encompass "sensitive information" or "potentially injurious information." As a result, the MPCC does not meet the strict requirements to be listed in the Schedule to the Act.*

Kindly compare the provisions of the RCMP Act's s.45.73(6) with the National Defence Act provision that you reference in your response. Each of them provide for closed proceedings in terms that appear the same in all material respects:

| **National Defence Act**<br>R.S.C., 1985, c. N-5 | **Royal Canadian Mounted Police Act**<br>R.S.C., 1985, c. R-10 |
|---|---|
| **Hearing in public**<br><br>**250.42**<br><br>A hearing is to be held in public, except that the **[Military Police] Complaints Commission** may order the hearing or any part of the hearing to be held in | **Hearings in public**<br><br>**45.73(6)**<br><br>A hearing to inquire into a complaint shall be held in public but the **[RCMP Civilian Review and Complaints] Commission**, on its own initiative or at |

| | |
|---|---|
| private if it is of the opinion that during the course of the hearing any of the following information will likely be disclosed:<br><br>(a) information that, if disclosed, could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities;<br><br>(b) information that, if disclosed, could reasonably be expected to be injurious to the administration of justice, including law enforcement; and<br><br>(c) information affecting a person's privacy or security interest, if that interest outweighs the public's interest in the information. | the request of any party or witness, may order a hearing or any part of a hearing to be held in camera or ex parte if it is of the opinion<br><br>(a) that information that could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities will likely be disclosed during the course of the hearing;<br><br>(b) that information that could reasonably be expected to be injurious to law enforcement will likely be disclosed during the course of the hearing;<br><br>(c) that information respecting a person's financial or personal affairs, if that person's interest or security outweighs the public's interest in the information, will likely be disclosed during the course of the hearing;<br><br>(d) that information that could reasonably be expected to reveal privileged information, as defined in subsection 45.4(1), will likely be disclosed during the course of the hearing; or<br><br>(e) that it is otherwise required by the circumstances of the case. |

The above comparison suggests that the rationale you offer in response to e-608 is on very weak ground.

If you further consider the fact that a body like the Public Service Labour Relations Board has nothing resembling the protective powers to go *in camera* of the MPCC but, yet, is nonetheless listed in the *Canada Evidence Act* schedule, then one must seriously question the real motivation behind your government reserving power to withhold information from the MPCC. It is hard to resist the conclusion that, quite simply, the Trudeau government, as with the Harper government before it, wishes to limit oversight when it comes to getting at the truth about the treatment of Afghan detainees – whether by refusing a commission of inquiry into Canada's role in knowingly sending captives into the hands of torturers from 2006 onward or whether by continuing to reserve the means (withholding information) to try to inhibit the work of the MPCC in the present proceedings concerning allegations of entering captives' cells for purposes of terrorizing them in 2010-2011.

All that said, the real proof of where your government stands should not end with the legalistic and ultimately unconvincing answer written by Department of Justice lawyers on your behalf. I say this because, even if what you say is sincerely believed by you and your advisers, there is nothing to stop your government from taking legislative action to make sure the wording of the MPCC powers are amended in the National Defence Act to precisely replicate those for the RCMP Civilian Review and Complaints Commission.

It bears emphasis that there is nothing to have prevented Parliament from eliminating the gap that the government response now claims exists in the National Defence Act. With respect to the concern that MPCC is not listed in the Schedule to the Canada Evidence Act, successive governments have known since around 2007 (the time of the start of the MPCC proceedings related to our policy of handing Afghan detainees over to likely torture, which preceded the current proceedings related to alleged terrorizing of prisoners in their cells). There is accordingly no obvious excuse for the Act not to have been amended by now to make the MPCC eligible to be on the Schedule no differently from other bodies like the RCMP Civilian Review and Complaints Commission.

Your government might say that the previous Harper government was hardly likely to amend the Act to increase MPCC access to information given its negative attitude to accountability on the matter of detainees. Granted, but that is hardly a reason for the Trudeau government not to now make this a priority. That is, there is no reason unless your government actually wishes to reinforce the message that there is no real difference between a present and the past government on this matter.

Accordingly, even if your government is unlikely – given its handling of this file to date – to introduce its own amendments to the National Defence Act, I am hoping that it will think twice about resisting should proposals to amend the National Defence Act come from another quarter, such as a Private Member's Bill or from a recommendation of a House of Commons committee such as the Standing Committee on National Defence or the FAAE Sub-Committee on International Human Rights.

Allow me, before ending, first to note that the practice of Prime Minister Trudeau appears to be one of ignoring letters specifically written to him on the matter of accountability for Canada's treatment of Afghan detainees. When former Prime Minister Joe Clarke wrote him, Prime Minister Trudeau did not give him, and his co-signatories, the courtesy of a reply. When I wrote the Prime Minister to inform him that there may be information about which he is unaware (e.g. a category of captives who were never formally treated as "detainees" and who may have been transferred by Canada without any triggering of formal procedures to track them) and that he would do well to discuss the matter with his Minister of Foreign Affairs (at the time, the Hon. Stéphane Dion), he also chose not to reply. What he did eventually do, I would note in passing, was dismiss the one minister in Cabinet who was knowledgeable about the Afghan detainee issue and was also in a position to speak against the PM's decision to continue the Harper policy of stonewalling and silence; I speak of course of M. Dion.

In that context, I do not expect a reply to my letter. However, I do hope that you will listen to your colleagues in the Liberal Party caucus should it turn out that apathy and callous disregard for what happened on our watch in Afghanistan have not entirely won the day amongst all Liberal MPs. I cannot say I am optimistic but I do remain hopeful that there are still some of them committed enough to the rule of law and human rights that they

might yet push your government to change course on a strategy that stands in such stark contrast to the "Canada is back" rhetoric our Prime Minister is fond of sprinkling into his speeches in New York.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School of York University; former MP for Toronto-Danforth, 2012-2015

Cc: *The Right Hon. Justin Trudeau*, Prime Minister
*The Hon. Harjit Sajjan*, Minister of National Defence
*The Hon. Chrystia Freeland*, Minister of Foreign Affairs
*Stephen Fuhr*, MP, Chair of House of Commons Standing Committee on National Defence
*Cheryl Gallant*, MP, Vice-Chair of Standing Committee on National Defence
*Randall Garrison*, MP, Vice-Chair of Standing Committee on National Defence
*Michael Levitt*, MP, Chair of FAAE Sub-Committee on International Human Rights
*Cheryl Hardcastle*, MP, Vice-Chair of FAAE Sub-Committee on International Human Rights
*David Sweet*, MP, Vice-Chair of FAAE Sub-Committee on International Human Rights

Such other persons as deemed relevant

**APPENDIX 1**

**e-608 (Access to information)**

42ND PARLIAMENT
*Initiated by Craig Scott from Toronto, Ontario, on October 11, 2016, at 12:31 p.m. (EDT)*

keywords Access to information - Canada Evidence Act - Classified documents - Military Police Complaints Commission - Rights of Parliament

**Government Response Tabled**

**Petition to the Government of Canada**

Whereas:

- Section 38 of the Canada Evidence Act governs access to documents concerning international relations, national security and/or national defence;

- Sub-section 38.01(8) empowers Cabinet to authorize entities to seek and receive documents in uncensored form in a schedule to the Canada Evidence Act;
- Scheduled entities currently include the Privacy, Public Sector Integrity, and Information Commissioners; the Civilian Review and Complaints Commission for the RCMP; military boards of inquiry under the National Defence Act; and the Security Intelligence Review Committee under the CSIS Act – to name only some;
- The Military Police Complaints Commission (MPCC) is not included in this schedule despite MPCC commissioners and lawyers having high-level security clearance no different from personnel of these other entities;
- Like these other entities, the role of the MPCC is crucial for democratic accountability and the rule of law; and
- In previous Parliaments, the government refused to provide the MPCC with some uncensored documents relevant to proceedings on the treatment of Afghan detainees and the Cabinet declined to exercise its authority under s.38.01(8) to allow the MPCC full access to information.

We, the undersigned, **citizens and residents of Canada**, call upon the **Government of Canada** to reject the approach of previous governments and, accordingly, to exercise its authority under section 38.01(8) of the Canada Evidence Act to designate the Military Police Complaints Commission as one of the bodies permitted unfettered access to documents.

Sponsor

Randall Garrison
Esquimalt—Saanich—Sooke, NDP, British Columbia

Petition presented to the House of Commons on February 15, 2017

Government response tabled on April 3, 2017

History

**Open for signature :** October 11, 2016, at 12:31 p.m. (EDT)
**Closed for signature :** February 8, 2017, at 12:31 p.m. (EDT)

***

**APPENDIX 2**

PETITION NO.: **421-01150**
BY: **MR. GARRISON (ESQUIMALT-SAANICH-SOOKE)**
DATE: **FEBRUARY 15, 2017**
PRINT NAME OF SIGNATORY: **THE HONOURABLE JODY WILSON-RAYBOULD**

Response by the Minister of Justice and Attorney General of Canada

SIGNATURE
Minister or Parliamentary Secretary

SUBJECT
**Access to information**

**ORIGINAL TEXT**
**REPLY**

Section 38 of the *Canada Evidence Act* is a regime that protects “sensitive information” and “potentially injurious information”, as defined in the Act, the disclosure of which could be harmful to Canada’s international relations, national defence or national security. Entities that are listed to the Schedule of the *Canada Evidence Act* are exempt from the general notice provisions, set out in section 38.01 of the Act, where they have the ability to conduct closed proceedings to protect “sensitive information” or “potentially injurious information”. The Military Police Complaints Commission (MPCC) does not presently have this capability.

While the mandate of the MPCC allows it to conduct *in camera* (i.e., closed) proceedings if information identified in section 250.42 of the *National Defence Act* is likely to be disclosed, the scope of section 250.42 does not fully encompass “sensitive information” or “potentially injurious information”. As a result, the MPCC does not meet the strict requirements to be listed in the Schedule to the Act. The Government is committed to protecting Canadians by ensuring that Canada’s national defence and national security interests are protected both at home and abroad. That is why tools such as the Schedule to the *Canada Evidence Act* are essential and are updated from time to time where required.

# Canada Evidence Act ss. 38, 38.01-38.06, 39

## R.S.C., 1985, c. C-5

### International Relations and National Defence and National Security

Definitions

**38** The following definitions apply in this section and in sections 38.01 to 38.15.

judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04. (juge)

participant means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (participant)

potentially injurious information means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. (renseignements potentiellement préjudiciables)

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information. (instance)

prosecutor means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the National Defence Act or an individual who acts as a prosecutor in a proceeding. (poursuivant)

sensitive information means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. (renseignements sensibles)

### Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In

such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the National Defence Act, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when

(a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;

(b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

**Schedule**

**(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.**

Disclosure prohibited

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the National Defence Act, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

Application to Federal Court — Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)(a.1), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to section 38.12, take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Procedure

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, with respect to making the application public;

(a.1) shall, if he or she decides that the application should be made public, make an order to that effect;

(a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the National Defence Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

**Disclosure agreement**

**(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,**

**(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and**

**(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.**

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes

the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

When determination takes effect

(3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility

that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.

Notice of order

**Confidences of the Queen's Privy Council for Canada**

Objection relating to a confidence of the Queen's Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), a confidence of the Queen's Privy Council for Canada includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of Council

(3) For the purposes of subsection (2), Council means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

R.S., 1985, c. C-5, s. 39;

1992, c.1, s. 144(F).

**SCHEDULE**

(Paragraph 38.01(6)(d) and subsection 38.01(8))

# Designated Entities

**1** A judge of the Federal Court, for the purposes of section 21 of the *Canadian Security Intelligence Service Act*

**2** A judge of the Federal Court, for the purposes of sections 6 and 7 of the *Charities Registration (Security Information) Act*, except where the hearing is open to the public

**3** A judge of the Federal Court, the Federal Court of Appeal or the Immigration Division or Immigration Appeal Division of the Immigration and Refugee Board, for the purposes of sections 77 to 87.1 of the *Immigration and Refugee Protection Act*

**4** A judge of the Federal Court, for the purposes of section 16 of the *Secure Air Travel Act*

**5. to 8** [Repealed, 2001, c. 41, s. 124]

**9** A board of inquiry convened under section 45 of the *National Defence Act*

**10** A service tribunal or a military judge for the purposes of Part III of the *National Defence Act*

**11** The Public Service Labour Relations and Employment Board that is established by subsection 4(1) of the *Public Service Labour Relations and Employment Board Act*, for the purposes of a grievance process under the *Public Service Labour Relations Act* with respect to an employee of the Canadian Security Intelligence Service, with the exception of any information provided to the Board by the employee

**12** The Information Commissioner, for the purposes of the *Access to Information Act*

**13** The Privacy Commissioner, for the purposes of the *Privacy Act*

**14** The Privacy Commissioner, for the purposes of the *Personal Information Protection and Electronic Documents Act*

**15** A judge of the Federal Court, for the purposes of sections 41 and 42 of the *Access to Information Act*

**16** A judge of the Federal Court, for the purpose of sections 41 to 43 of the *Privacy Act*

**17** A judge of the Federal Court, for the purpose of sections 14 to 17 of the *Personal Information Protection and Electronic Documents Act*

**18** The Security Intelligence Review Committee established by subsection 34(1) of the *Canadian Security Intelligence Service Act*, for the purposes of sections 41 and 42 of that Act, with the exception of any information provided to the committee by the complainant or an individual who has been denied a security clearance

**19** The Public Sector Integrity Commissioner, for the purposes of sections 26 to 35 of the *Public Servants Disclosure Protection Act*

**20** The Commissioner of the Communications Security Establishment, except where the hearing or proceeding is open to the public

**21** A judge of the Federal Court, for the purposes of sections 4 and 6 of the *Prevention of Terrorist Travel Act*

**22** The Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, for the purposes of the *Royal Canadian Mounted Police Act*, but only in relation to information that is under the control, or in the possession, of the Royal Canadian Mounted Police or the Central Authority, as the case may be.

# Appendices

## E-petition e-70 (Afghanistan)

42ND PARLIAMENT
*Initiated by Craig Scott from Toronto, Ontario, on December 17, 2015, at 10:08 a.m. (EDT)*

**Petition to the Government of Canada**

Whereas:

- many Canadians remain ashamed by Canada's approach to Afghan detainees in relation to both treatment in Canadian custody, notably transfer to other states despite the risk of torture, and torture, other inhuman or degrading treatment, disappearance and/or extrajudicial killing to which some of them fell victim after their transfer to other states; and
- many also are disappointed by the poor record of Canadian justice and parliamentary institutions in bringing the relevant facts to light and in securing proper accountability.

We, the undersigned, **citizens of Canada**, request (or call upon) the **Government of Canada** to establish an independent judicial commission of inquiry to:

1. investigate the facts with respect to policies, practices, legal and other opinions, decisions, and conduct of Canadian government actors, including Ministers and senior officials, concerning Afghan detainees throughout Canada's involvements in Afghanistan from 2001;

2. investigate also the success and/or failure of Canada's justice and parliamentary systems in achieving transparency, democratic accountability, and compliance with applicable laws; and

3. issue a thorough, comprehensive and public report on the facts as found and on the commission's assessment of those facts in order: (a) to determine whether state or governmental responsibility arose under international and/or Canadian law; (b) to assess whether any Canadian government officials engaged in misconduct in relation to respect for law, legal process, or parliamentary procedure; and (c) to recommend policy changes as well as law reform and parliamentary reform aimed at preventing violations or misconduct occurring again.

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The Right Honourable Justin Trudeau
Prime Minister of Canada
80 Wellington Street
Ottawa, Ontario
K1A 0A2

June 7, 2016

**RE: Need for Commission of Inquiry on Canada's Transfer of Afghan Detainees to Torture**

Dear Prime Minister:

We write to you today to urge you to launch a Commission of Inquiry into Canada's policies and practices relating to the transfer of hundreds of detainees to Afghan authorities during Canada's military mission in that country.

There is overwhelming evidence that, during this mission, many of the detainees transferred – notwithstanding very clear and credible risks of torture – were indeed tortured. Canadian diplomats documented incidents where detainees were beaten with electric cables, rubber hoses or sticks; given electric shocks; forced to stand for long periods of time with their hands raised above their heads; punched or slapped; and threatened with execution or sexual assault. No one knows exactly how many detainees who were in Canadian custody were tortured, disappeared or died under Afghan custody – partly due to the lack of a rigorous monitoring regime for the conditions of detainees, and partly due to the cloud of secrecy the previous government relentlessly maintained over this matter. By exposing hundreds of Afghans to such high risks of torture, Canada failed utterly to prevent the torture of many of them, thus flouting one of the most basic legal and moral obligations: the prohibition of torture, enshrined in customary international law, international human rights treaties, international humanitarian law and Canada's own *Criminal Code*.

The previous government systematically blocked all efforts to investigate what happened. Citing operational security concerns, it refused to provide uncensored information to the public, Parliament, the Federal Court, and the Military Police Complaints Commission (MPCC). It also thwarted an investigation by the House of Commons Special Committee on Afghanistan, first by refusing to disclose documents and then by shutting down the committee when the Conservatives won a majority in 2011. The House approved a December 1, 2009 motion: "That, in the opinion of the House, the government should, in

accordance with Part I of the *Inquiries Act*, call a Public Inquiry into the transfer of detainees in Canadian custody to Afghan authorities from 2001 to 2009." This motion was ignored.

When some heavily censored documents were finally released, the Honourable Stéphane Dion stated in a press conference: "[w]hen you read these documents, you will have questions to ask to your Prime Minister and your Ministers." On another occasion, Mr. Dion asked in Parliament if the previous government was "opposing an inquiry because it is afraid of having to answer to Canadians." And the Honourable Ralph Goodale lambasted the government for having "stonewalled all inquiries, judicial proceedings, parliamentary committees and requests for documents – as if they had something terrible to hide." Mr. Prime Minister, we agree with Mr. Dion and Mr. Goodale. This is unfinished business of the most serious kind: accountability for alleged serious violations of Canadian and international laws prohibiting perpetration of, and complicity in, the crime of torture.

As a result of the previous government's stonewalling, there were no lessons learned, and no accountability. In a future military deployment, the same practices could reoccur. A public inquiry would serve to authoritatively investigate and report on the actions of all Canadian officials in relation to Afghan detainees, and to review the legal and policy framework that attempted to justify these actions. Based on this review, the Commission would issue recommendations with a view to ensuring that Canadian officials never again engage in practices that violate the universal prohibition of torture.

Thank you in advance for your attention to, and consideration of, this grave matter. We look forward to receiving your response at your earliest convenience.

Yours respectfully,

**Peggy Mason**
President, Rideau Institute
Former Ambassador

**The Right Honourable Joe Clark, P.C.**
Former Prime Minister of Canada

**Ed Broadbent**
Former Leader of Canada's New Democratic Party, and former Member of Parliament

**Honourable Ron G. Atkey**
Former Minister of Employment and Immigration, First
Chair of the Security Intelligence Review Committee (SIRC)

**Paul Champ**
Human rights lawyer
Champ & Associates

**Hélène Laverdière, MP**
NDP Critic for Foreign Affairs
Member of Parliament, Laurier – Sainte-Marie
House of Commons

**Elizabeth May, OC, MP**
**Leader of the Green Party of Canada**
Member of Parliament, Saanich – Gulf Islands
House of Commons

**Alex Neve**
Secretary General
Amnesty International Canada

**Stephen Lewis**
Former Ambassador of Canada to the United Nations

**Eileen Olexiuk**
Retired Diplomat
Deputy Head of Mission, Afghanistan

**Nipa Banerjee**
Senior Fellow at University of Ottawa School of International Development and Global Studies, former Head of Canada's aid program in Afghanistan

**Gar Pardy**
Former Ambassador
Global Affairs Canada

**Daryl Copeland**
Former Ambassador, Global Affairs Canada
Senior Fellow, Canadian Global Affairs Institute
Policy Fellow, Montreal Centre for International Studies (CERIUM)

**Amir Attaran**
Professor, Faculty of Law
University of Ottawa

**Micheal Vonn**
Policy Director
British Columbia Civil Liberties Association

**François Crépeau, FRSC**
Director, McGill Centre for Human Rights and Legal Pluralism
Hans & Tamar Oppenheimer Professor in Public International Law
Faculty of Law, McGill University

**Craig Scott**
Professor of Law
Osgoode Hall Law School

**Sukanya Pillay**
Executive Director & General Counsel
Canadian Civil Liberties Association

**Monia Mazigh**
National Coordinator
International Civil Liberties Monitoring Group

**Samer Muscati**
Director, International Human Rights Program
Faculty of Law, University of Toronto

**John Packer**
Director, Human Rights Research and Education Centre
University of Ottawa

**Jennifer Llewellyn**
Viscount Bennett Professor of Law, Schulich School of Law
Dalhousie University

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# RESPONSE TO PETITION

Prepare in English and French marking 'Original Text' or 'Translation'

PETITION NO.: **421-00217**

BY: **MR. STEWART (BURNABY SOUTH)**

DATE: **MAY 3, 2016**

PRINT NAME OF SIGNATORY: **HONOURABLE HARJIT S. SAJJAN**

Response by the Minister of National Defence

SIGNATURE
Minister or Parliamentary Secretary

SUBJECT

**Afghanistan**

**ORIGINAL TEXT**

**REPLY**

Throughout Canada's military operations in Afghanistan, which began in October 2001 and ended in March 2014, the Government of Canada was committed to ensuring that individuals detained by the Canadian Armed Forces (CAF) were handled and transferred or released in accordance with our obligations under international law. The CAF treated all detainees humanely. The standards of protection afforded by the Third Geneva Convention were applied as a matter of policy. Protections included providing detainees with food, shelter and necessary medical attention. In addition, specific pre-deployment training for Canadian Armed Forces members involving the handling and transfer of detainees was provided.

After more than three decades of civil conflict, the capacity of the Afghan justice and correctional system was seriously eroded. Canada and our allies understood the need to support law and order in Afghanistan by building the capacity of the police, judicial and corrections sectors through targeted capacity-building efforts.

We worked with and trained the Afghan National Defence and Security Forces (ANDSF) to increase the Afghan Government's capacity to handle detainees appropriately. Canada made significant investments to help build capacity in rule of law functions, including police, judicial and correctional services. Canada funded and worked closely with

independent organizations, including the Afghanistan Independent Human Rights Commission (AIHRC), to strengthen their abilities to monitor, investigate, report and act on issues involving the treatment of detainees.

In the early stages of Canada's engagement in Afghanistan, the CAF transferred Afghan detainees to United States (US) authorities, and while on joint operations supporting capacity building of the ANDSF, transferred detainees to Afghan authorities.

In 2005, Canada established the Canada-Afghanistan arrangement for the Transfer of Detainees with the Government of Afghanistan, which outlined roles and responsibilities with regard to the transfer of Canadian-taken detainees to Afghan authorities. In particular, the Afghan government's sovereign responsibility for all issues related to the rule of law and justice in its territory underpinned the 2005 arrangement.

In addition to setting the framework for transfers, this arrangement reinforced the commitments of both parties to treating detainees humanely and in accordance with the standards of the Third Geneva Convention. This arrangement also specifically prohibited the application of the death penalty to any Canadian-transferred detainee.

In 2007, Canada signed a Supplementary Arrangement that clarified Canada's expectations and the Government of Afghanistan's responsibilities. This arrangement provided Canadian officials with unrestricted and private access to Canadian transferred detainees, and committed Afghan authorities to notify Canada when a detainee was transferred, sentenced or released from custody, or had his status changed in any other way. Canada retained the right to refuse follow-on transfers to a third party. In the case of allegations of mistreatment, the Afghan Government committed, through this arrangement, to investigate and, when appropriate, bring to justice suspected offenders in accordance with Afghan law and applicable international legal standards.

In 2008, the Federal Court and Federal Court of Appeal examined Canada's detainee policies and procedures in *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FAC 336, affirmed by 2008 FACA 401, leave to appeal to Supreme Court of Canada denied. In this decision, the Courts set out that International Law, including the Law of Armed Conflict, provided the legal basis upon which the CAF conducts its operations and detainee handling.

In 2010, the Vice Chief of Defence Staff convened a Board of Inquiry (BOI) in order to gain a clear understanding of the specific details of an incident of 14 June 2006, in Afghanistan, during which a person in CAF custody was handed over to Afghan authorities and then taken back by CAF personnel. Although the mandate of the BOI did not include undertaking *a broad examination of Canada's detainee management system,* the BOI did review the CAF Theatre Standing Order (TSO) on detainees and determined that the subsequent amendments and improvements incorporated substantive differences compared to the TSO that was in place in 2006. The appropriate changes were implemented in subsequent rotations.

On November 18, 2011, with Canada's combat mission in Afghanistan coming to a close, Canada signed an arrangement with the US to facilitate the transfer of individuals detained by the CAF in Afghanistan to US Forces custody. The Canada-US arrangement built on and operated in parallel with the 2005 and 2007 arrangements signed between the Government of Canada and the Government of Afghanistan. Together, these arrangements allowed Canadian officials to monitor detention facilities, conduct interviews, and assess detainees' conditions of detention and treatment. Global Affairs Canada officials monitored the treatment of Canadian-transferred detainees in US or Afghan detention facilities up to the point where detainees were sentenced by an Afghan court, or were released from custody. Canada's monitoring responsibilities ended in 2014 after the last Canadian-transferred detainee held in Afghan custody was sentenced by an Afghan court.

When a detainee was taken, any decision to transfer was made by the Canadian Task Force Commander as an operational matter. The Commander took into consideration the facts on the ground and input from a variety of Canadian, international and Afghan sources. The Canadian Task Force Commander made every effort to hold detainees no longer than 96 hours, during which time the CAF reviewed all available information and assessed whether further detention, transfer or release was the appropriate course of action. Any transfers to facilities managed by Afghanistan or other nations were assessed on a case-by-case basis and in accordance with applicable domestic and international law, consistent with the terms set out in our arrangements with those nations.

Operational decisions to hold detainees longer than ISAF guidelines may have occurred for a variety of reasons from medical to administrative to security. These decisions were made by the Commander of Canadian Expeditionary Force Command based on a recommendation from the Commander in Theatre and took into consideration the facts on the ground and input from other government departments, particularly Global Affairs Canada.

In the event of an allegation of abuse, Canada notified Afghan or US authorities, the International Committee of the Red Cross (ICRC) and the AIHRC as appropriate, Canadian officials followed approved protocols, which could include focused interviews with the detainee alleging abuse; follow up with the detaining authority; requests for investigations; an enhanced frequency of follow-up visits; and demarches with relevant authorities. If Canada had any concerns that our partners were not abiding by the arrangements, the CAF Commander in Afghanistan could decide to pause or suspend further transfers.

In 2012, the Military Police Complaints Commission (MPCC) completed a Public Interest Hearing into a complaint that certain Military Police (MP) wrongly failed to investigate CAF Commanders for allegedly ordering the transfer of Afghan detainees to a known risk of torture at the hands of Afghan security forces. The Commission's investigation and hearing process spanned nearly four years. During this time, it heard testimony from 40 witnesses, including the eight subjects of the complaint, and held 47 days of public hearings from 2008 to 2011. The Commission also reviewed thousands of documents throughout its investigation. The Commission found the complaints against the eight individual MPs were unsubstantiated.

In 2015, the Commission Chairperson made a decision to conduct a Public Interest Investigation into an anonymous complaint relating to the investigation of alleged mistreatment of detainees by the Military Police in Afghanistan in 2010-11. The complaint made allegations about the conduct of Military Police members involved in ordering and/or conducting exercises where the mistreatment was alleged to have occurred. The complaint also challenges the failure to lay charges or take any other action following investigations conducted by the Canadian Forces National Investigation Service (CFNIS) and the MP Chain of Command in 2011 and 2012. The MPCC is currently awaiting disclosure of relevant material from the Canadian Forces Provost Marshal (CFPM). Once disclosure is received, the Commission will determine the scope of the investigation, identify the individual subjects of the complaint and notify them. It will then begin to interview witnesses and review materials.

Canada is proud of the honourable work of the men and women in uniform and civilian officials who served in Afghanistan. Canada remains the leading donor supporting the work of the AIHRC to strengthen its capacity to fulfill its constitutional mandate to monitor human rights in Afghanistan. Throughout Canada's military operations in Afghanistan, the Government of Canada ensured individuals detained by the CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law. Therefore the Government of Canada does not believe an independent judicial commission of inquiry is necessary.

# No need for inquiry into Afghan detainee torture, Liberals say

### No need to find out who knew what and when, federal government says in response to e-petition

By Murray Brewster, CBC News Posted: Jun 17, 2016 12:41 PM ET Last Updated: Jun 17, 2016 8:55 PM ET

Federal Liberals who argued for a public inquiry, while in opposition, into the treatment of prisoners during the Afghan war, now say they will not conduct such an investigation.

Prime Minister Justin Trudeau's government was put in a tight corner this spring by an e-petition that demanded a wide-ranging probe into unresolved questions related to the issue, which almost toppled the Harper government in 2009.

Former New Democrat MP Craig Scott, who was defeated in the Oct. 19 election, gathered 750 names for the digital petition, which is a new feature in Parliament, to demand the Liberals live up to their previous stand.

'The government of Canada does not believe an independent judicial commission of inquiry is necessary.' - *Defence Minister Harjit Sajjan, in written response to e-petition*

What the Liberals did deliver Friday, on the cusp of the summer recess, was a three-page written response taking the reader through the long, convoluted history of the incendiary topic. The narrative went all of the way back to 2001, when Canadian special forces arrived in the war-torn country following 9/11.

"Throughout military operations in Afghanistan, the government of Canada ensured individuals detained by the (Canadian Armed Forces) CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law," said the response, penned by Defence Minister Harjit Sajjan. "Therefore the government of Canada does not believe an independent judicial commission of inquiry is necessary."

But the issue at stake was never how Canadian troops treated prisoners.

## What the government knew, and when

The question, which consumed much political oxygen in Ottawa, was whether the Conservative government knew — or had been warned — that prisoners handed over to Afghan authorities by Canadians were tortured or faced the likelihood of abuse.

'This time it's a coverup of what the Conservatives knew, and when they knew it, about torture in Afghanistan. So their solution is not to answer the questions but, rather, to padlock Parliament

and shut down democracy.'
*- Liberal MP Ralph Goodale, Dec.. 30, 2009*

It's an important point of international law.

If the government had been aware, and did nothing to stop it, then it could be considered a war crime.

It was a point of principle the Liberals were prepared to go to an election on in 2009, when the Conservatives stonewalled the release of documents to the Military Police Complaints Commission. The watchdog agency was conducting an investigation into what military cops knew about allegations of abuse in Afghan jails.

The Conservatives faced a Liberal-sponsored motion that could have led to their defeat in the House of Commons, but instead of facing it, former prime minister Stephen Harper prorogued Parliament.

The Liberals howled with outrage at the time.

"This time it's a coverup of what the Conservatives knew, and when they knew it, about torture in Afghanistan," Liberal MP Ralph Goodale, now the public safety minister, told CBC News on Dec. 30, 2009. "So their solution is not to answer the questions but, rather, to padlock Parliament and shut down democracy."

Scott accused the Liberals of hypocrisy on Friday after their response.

The Liberals had staked their reputation on openness and transparency, "but I'm nonetheless disappointed, and a little bit shocked as well, at how much the current government has completely taken on all of the arguments and rhetoric from the last government," he said.

"It's an extremely important issue, because ultimately what is done in our name, what we do around the world, has to reflect our fundamental values. And if we're fighting for those fundamental values, while simultaneously compromising them, we lose all legitimacy to be pushing those values to others."

He also said Sajjan should not have been the one to make the decision because, having served three tours in Afghanistan as a reserve force intelligence liaison officer, he is in a conflict of interest.

"This means he likely has a minimum general knowledge of issues that would have been directly relevant to a commission of inquiry, such that he might need to be a witness. So just with that very basic problem, he should have recused himself."

Previously, Scott had warned that if the new government wasn't prepared to act, he and others in the legal community were willing to petition the International Criminal Court at the Hague to investigate.

He reiterated that pledge Friday.

Paul Champ, the lawyer for Amnesty International and the B.C. Civil Liberties Association, which fought multiple court battles to halt the detainee transfers, said the government missed an opportunity to assert human rights leadership.

"I was hoping they were more principled when they were raising those issues," he said. "I think when the Liberals were in opposition they, perhaps, saw the Afghan detainee issue as nice, partisan, you know, football that they could use to beat up on the Conservative government of the day."

The NDP's Foreign Affairs critic, Hélène Laverdière described the Liberal's decision as hypocritical.

"Justin Trudeau himself called for an inquiry, but now in government, he has flip-flopped on the issue," she said. "Instead of the transparency he promised, we are seeing Liberals use Conservative-style excuses for not holding an inquiry. There are serious allegations here and the reputation of Canada and our military is at stake."

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The Right Hon. Justin Trudeau,
Prime Minister of Canada,
Office of the Prime Minister
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September 19, 2016

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Dear Prime Minister,

RE: Commission of Inquiry on Afghan Detainees

As you are likely aware, Minister of Defence Sajjan, on behalf of the Government of Canada, rejected the request in House of Commons E-Petition E-70 for a commission of inquiry on various aspects of Canada's policy and practice with respect to the treatment of detainees in Afghanistan. For your ease of reference, I attach E-70 and Minister of Sajjan's response (Appendices 1 and 2). I write to ask you to review, and reverse, the decision of your Minister of Defence.

Coincidentally, I write, as the new Parliamentary sitting begins, on the same day that CBC has begun detailed reporting on the complicity of the RCMP, CSIS and the Department of (then) Foreign Affairs in torture overseas of three Canadians during the previous Liberal government's tenure. The documentation revealed by civil litigation has produced incontrovertible evidence of the willingness of officials under the previous government to arrange for the detention and interrogation of Canadians by a government that our officials knew would torture those Canadians.

Today's revelations are directly relevant to the Afghan-detainee question. If officials serving within a Liberal administration are capable of deliberate violation of both Canadian and international criminal law (whether with or without the sanction of 'legal advice' of government lawyers), why would anyone think that the same mindsets and willingness would not exist and be given room to act within the government of Mr. Harper in relation to Afghanistan? Only a commission of inquiry on the Afghan detainees will be able to examine all the relevant paper trails – including the many documents withheld from a 2010-2011 ad hoc parliamentary process on the basis of solicitor-client privilege – to determine exactly why and with what knowledge Canadian decision-makers persisted in sending hundreds and hundreds of people to brutalization at the hands of Afghanistan's National Directorate of Security, Afghan National Army, Afghan National Police, affiliated paramilitaries and quite possibly US actors as well.

To return specifically to Minister Sajjan's negative decision, he opens and closes his response with virtually the same emphatic claim. The penultimate sentence in the response reads: "Throughout Canada's military operations in Afghanistan, the Government of Canada ensured individuals detained by the CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law." No serious legal scholar or close

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observer of this issue believes this to be true, in view of all the facts that are known despite much effort by the previous government. Nor, I imagine, would most Liberal MPs, while in opposition, have dreamed a member of a new Liberal Cabinet would make such a sweeping and inaccurate statement.

I also attach the statement I released immediately following Minister Sajjan's response to E-70 (Appendix 3). In that statement, I make an observation that I believe to be fully accurate which, to the extent it is indeed accurate, may help you realize that this whole file does need a second look by you personally. I reproduce it below:

> *[Minister Sajjan's response to E-70] is full of gaps, elisions, and misdirection. …An analysis of those problems will come later. For the moment, I will limit myself to [the] truly shocking blanket claim that ends the government's response…. These words could have been penned, word for word, by the previous Conservative government. …[T]he fact is they may well have been written by some of the same officials and lawyers who ran the Harper-era messaging strategy. It is deeply disappointing that the Liberal government has chosen to add another link to a chain of complicity that for over a decade has seen non-stop efforts on the part of various Canadian government actors to hide the truth and block any form of accountability. I had expected far more from this government.*

Apart from one major matter addressed below, it continues not to be my purpose to lay bare, at the moment, the considerable number of "gaps, elisions and misdirection" in Minister Sajjan's response. That day will come soon enough if your government does indeed choose to endorse the Harper legacy and continue to reject a commission of inquiry.

As already noted, the reason I am now writing is to urge your direct intervention on this file. I respectfully request that you inform yourself of what information the Government of Canada already has at its disposal that points to the compelling need for a commission of inquiry – and to then ensure that Minister Sajjan's decision is reversed by Cabinet. As part of such an intervention, I respectfully suggest that you specifically consult with your Minister of Foreign Affairs, Stéphane Dion, as to whether or not he has reason to believe a commission would be beneficial for our democracy, the rule of law and Canada's reputation in the world, given information at his disposal and any briefings he or his staff have sought and received since he became Minister of Foreign Affairs.

Not only did Mr. Dion, as Member of Parliament in the then Official Opposition, have some exposure – although by no means full exposure – to some relevant documentation when an ad hoc parliamentary working group was set up in 2010 in response to the Speaker's ruling against Mr. Harper's government, but also he may well now have had the opportunity to acquire further information from any of a number of civil servants in his department with knowledge of what went on under the previous government. The

institutional knowledge of these civil servants may possibly include what may have taken place by way of a cover-up across various departments and the PMO. In this regard, do recall that Minister Dion stated, when a batch of redacted documents were released in 2011 by the Harper government as an outcome of the compromise parliamentary process in which he participated, that "[w]hen you read these documents, you will have questions to ask to your Prime Minister and your Ministers." Keep in mind that Minister Dion would have seen the text behind some of the redactions – alongside generally appreciating what gaps and elisions of the overall documentary record placed before the committee – and formed a view about the kinds of unanswered questions and still-hidden facts that were still outstanding.

I mentioned above that there is one major matter I did want to address arising from Minister Sajjan's response to E-70. As part of your consultation, I would ask that you specifically ask both Minister Dion and Minister Sajjan whether or not either of them or their officials have information about a system used by the last government and the Canadian military to avoid registering persons taken captive by Canadian troops in Afghanistan – and to thereby facilitate Canada's ability to transfer detainees to Afghanistan government agencies (and possibly even to the US) without informing the International Committee of the Red Cross or the then Department of Foreign Affairs, such that neither the ICRC nor DFAIT would know to undertake any monitoring of such persons and such that these off-the-books detainees effectively disappeared.

As the consequence of over three years of making inquiries and investigating while Member of Parliament for Toronto-Danforth (2011-2015) along with considerable further digging since my defeat in the October 19, 2015, election, I have multiple reasons for believing that the Canadian Department of National Defence replicated, at least in part, an American parallel detainee system that treated detainees 'off the books' by labelling some detainees as "Persons Under Control" (or PUCs) with possible terminological variations like "persons under custody" (also producing PUCs as an acronym). One hint of such a system arose from failure of the military to redact part of an (otherwise heavily redacted) CAF Board of Inquiry report that referred briefly and obliquely to "PUCs."

Other evidence exists. At least one Canadian soldier has revealed that, in some contexts, soldiers were told to desist from calling persons in their custody "detainees." Also, there is evidence Canadian Special Forces spoke amongst themselves of "PUC kits" (which I am assuming included things like wrist restraints and so on). And, disturbing conclusions arise from scrutiny of various published contemporary histories and memoirs in which the numbers of prisoners taken by Canadian forces in certain engagements and operations are reported. When these accounts are compared to official records of detainees that came out through the ad hoc parliamentary process, there appears to be evidence of many dozens, possibly into the hundreds, of Afghan prisoners who were detained 'off the books' (as they do not figure in the official detainee numbers), with an unknown number of them transferred on to various Afghan authorities.

There may have been many more PUC'ed than that, because these comparisons are subject to the hit-and-miss coverage of incidents and missions in published accounts. In this respect, whereas we all became used to the detainee issue being one involving transfer to the substantial risk of torture (and actual resulting torture) at the hands of the National Directorate of Security, I am greatly concerned that some, if not many, of these PUC'ed detainees were passed to the Afghan National Police, Afghan National Army, and/or paramilitary units not 'just' to subsequent abuse but also quite probably to extrajudicial execution.

It is apparent that the military has wanted to keep this PUC category secret. One confirmation of this came when I filed an Order Paper Question Q-1117 (41st Parliament) while MP for Toronto Danforth, the fourth or fifth I filed on the detainee issue. A number of the sub-questions in Q-1117 were aimed at getting an answer from the government whether there was a category beyond official "detainees." I reproduce the sub-questions intended to elicit answers related to PUC'ed detainees and related transfers (omitting sub-questions [a] to [l] and [u] onward, which concern other matters):

> ...
>
> *(m) in relation to the May 25, 2006, capture of "11 suspected Taliban fighters" referenced at page 96 of Ian Hope, Dancing with the Dushman: Command Imperatives for the Counter-Insurgency Fight in Afghanistan (Canadian Defence Agency Press, 2008), could the government set out the manner in which each of these 11 persons controlled by Canadian forces were processed, including what is known about each's subsequent trajectory after passing from the control of Canada until the point at which the government may have lost track of their whereabouts;*
>
> *(n) at any period and, if so, which periods, did the Canadian government consider that there were one or more categories of persons who Canada passed on to either Afghan or American authorities but who were not categorized as detainees, and did such categories have a designation, whether formal or informal;*
>
> *(o) were there persons under the control of Canadian forces who were transferred to Afghanistan, but who were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer and, if so, on what basis were transfers of such persons not deemed covered by the agreements;*
>
> *(p) were there persons under the control of Canadian forces who were transferred to Afghanistan but whose existence and transfer was not made known to the International Committee of the Red Cross and, if so, on what basis was the Red Cross not informed;*

*(q) during the 2011 Parliamentary process in which a Panel of Arbiters decided what information could be released to Parliament, were documents withheld from this process by the government if they concerned the transfer of persons that were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer;*

*(r) between September 12, 2001, and the entry into effect of the 2005 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities;*

*(s) between the entry into effect of the 2005 detainee-transfer Memorandum of Understanding and the entry into effect of the 2007 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities;*

*(t) between the entry into effect of the 2007 detainee-transfer Memorandum of Understanding and the present date, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities…*

It is clear that the government understood what I was asking, and that I was giving them the opportunity to reveal the existence of a category called "Persons Under Control" or a like category such as "persons under custody." This the government did not do, although it did acknowledge in general terms something significant, namely that Canada did use other terms for persons "detained" other than "detainees" – while also seeming to indicate persons not formally called

"detainees" could also be transferred no differently than persons formally treated as "detainees." This alone is very significant information. I reproduce a passage that is used as part of the answers to four of the sub-questions (specifically sub-questions [n], [r], [s], and [t]):

> *Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control. [my emphasis]*

The overall impression the government (through Defence Minister Peter MacKay) wants to leave is that categorization did not make any difference because all "persons in Canadian care, custody or control" were treated humanely, legally and according to processes no less legal or humane according to the category used. However, careful reading of the language in these identical passages reveals lawyerly hedging on exactly what the government was indeed saying. Apart from a circumlocution in sentence structure that creates interesting challenges in determining exactly what is being claimed, there are also potentially significant gaps in the list of things Canada is said to do regardless of the label of the person in custody; note that registration/record-keeping of captives is not necessarily included in "handling" and note that there is no specific statement that notification of the International Committee of the Red Cross is one of the always-present practices.

But most significant is that, although Minister MacKay and its drafters uses this exact above-quoted formula as part of answering four sub-questions ("n" and then "r", "s" and "t"), for some reason they decided not to employ this language for "o" and "p" when the formula would appear to be no less relevant. What were "o" and "p" about? Recall that they asked whether some persons in Canadian custody or control were, first of all, deemed not to be covered by the transfer agreements signed with Afghanistan and, secondly, deemed not to require notification to the International Committee of the Red Cross. Why, when this formula proved so relevant for other answers, was it not called in aid for these questions? From my experience with many Order Paper Questions while an MP, the government was never shy to write exactly the same answer for every sub-question they deemed applicable. I believe there is a good chance that their omission of this formula in "o" and "p" could easily be because the answer to each of these crucial questions was "Yes", but the Department of National Defence wanted to avoid saying that at all cost.

Then, when one reads what the answer to sub-question "o" was, one immediately notices that it does not actually answer the question asked. Rather, it gives one solitary example of a transfer not done according to MOU terms, and then conspicuously fails to say anything like "and this is the only instance." So that you can understand the 'style' of the government answer along the above-described lines, the answer to sub-question "o" is reproduced below:

> *On one occasion, the Canadian Armed Forces took custody of an individual who, on the basis of credible grounds, was suspected of having committed a criminal act when employed at a Canadian Armed Forces facility in Afghanistan. The individual was not an insurgent, and was not arrested for a reason related to the Canadian Armed Forces mission in Afghanistan.*
>
> *Consistent with standard Canadian Armed Forces procedures for addressing crimes committed or purportedly committed by local nationals at Canadian Armed Forces facilities outside of Canada, the Canadian Armed Forces transferred this individual to the custody of an appropriate Afghan authority for investigation. The individual was visited periodically by Canadian staff while in Afghan custody to confirm that he had not been mistreated.*

As for the answer to sub-question (p), what is striking is that, here, Minister MacKay's answer reverts to referring only to "detainees" when specifying who the ICRC had been notified about. The answer reads as follows:

> *Prior to June 2007, the Department of National Defence and the Canadian Armed Forces followed standard procedures which included providing the International Committee of the Red Cross with detailed information on <u>each detainee captured</u> by the Canadian Armed Forces, and notification of their release or transfer to Afghan custody. [my emphasis]*
>
> *On June 26, 2006, the Department of Foreign Affairs and International trade started to also provide similar notifications to the. International Committee of the Red Cross, in parallel with the Department of National Defence and the Canadian Armed Forces. On June 2, 2007, the responsibility for notifying the International Committee of the Red Cross was formally transferred from the Department of National Defence and the Canadian Armed Forces to the Department of Foreign Affairs and International Trade.*

If you revert to the formula (reproduced earlier) that the government used in answers to four other sub-questions, you will see the government is careful to structure the passage so that "persons detained" is not the same thing as "detainees", which makes it potentially significant that, here, in the response to sub-question (p), they take care to use only the narrower "detainee." I believe it

is more than possible that the ICRC were only notified of "detainees" and not of "persons detained" (including PUC's) more broadly. And I believe it to be likely that the Department of National Defence crafted its answer to Order Paper Question Q1117 in order to avoid revealing this.

Since being defeated as MP, I have done some further digging and have traced the likely origin of a PUC system to its invention in the winter/spring of 2002 by the American military in Afghanistan. One account (from a former US military interrogator) of the origin of the term suggests that a somewhat benign reason for the new PUC category may have been to allow captured Afghans to be more easily released after interrogation if interrogation led to the conclusion they were not combatants; this account notes that, in this first year after 9/11, the US military found it difficult to secure the release of some prisoners once their names had been formally entered into the record system. Whether this rationale was or was not at the heart of the origin of PUC'ing by the US, what seems highly probable from my research is that the system then morphed ("metastasized" is probably a better term) in Iraq into a full-blown system of off-the-record detention and disappearance carried out by multiple American actors in Iraq after the invasion of that country in 2003.

Whether and how PUC'ing was adopted by Canada alongside an official detention system in Afghanistan would undoubtedly be one of the central tasks of a commission of inquiry to determine. But, if there was such a PUC system, several pathways seem possible (there may be others):

(a) In Iraq from January 2004 to January 2005, Canada had at least one senior officer on the ground. Walter Natynczyk was seconded to play a major role commanding 35,000 US forces in Iraq during Operation Iraqi Freedom. Indeed, he received a prestigious military medal from Canada for commanding combat operations in this war that Canada had deliberately not taken part in qua country. As you will know, Natynczyk was later appointed Vice-Chief of Defence Staff under General Hillier in 2006, and came to play a key role in Afghanistan. Between his role in Iraq and his elevation to Vice-Chief status, he assumed a role that would have given him an extra exposure to detention and transfer issues as head of the Land Force Doctrine and Training system.

(b) It could be that learning about the US PUC system took place at desk level versus in the field -- namely, back in North America. In the relevant period, there would have been regular close exchanges between our military and intelligence agencies and the Pentagon and CIA, whether at the very top (e.g. via General Hillier, when Chief of Defence Staff) or at a more functional level. As for the latter, Lt-General Michel Gauthier headed DND's military intelligence for a couple years, a role which would have involved close collaboration with the US on intelligence-oriented practices and policies in the 'war on terror'. Indeed, Washington, DC, sources of mine suggest that it is also worth asking whether a meeting between Gauthier and Defence Secretary Rumsfeld's most valued advisor, Under-Secretary of Defence for Intelligence Steve Cambone, led to expectations that Canada would closely align its

Kandahar-related policy and practices with US' 'war on terror' imperatives and methods in exchange for Canada being handed Kandahar (in preference to the UK, which wanted it instead of Helmand). Subsequently, for key periods, Lt-Gen. Gauthier was a (if not, the) central decision-maker on when, whether and how Canada would transfer Afghan prisoners to Afghanistan. As his mini-bio also says on The Governance Network's website, Gauthier "[l]ed Canadian Expeditionary Force Command, responsible for all CF operational missions abroad, the Canadian mission in southern Afghanistan."

(c) It could be that Canadian forces were (or, were also) directly schooled in PUC'ing by American forces in Afghanistan itself, either at the time of the handover to Canada in Kandahar in early 2006 or through more longstanding relations arising from the joint operations of US and Canadian special forces.

All three of these could well have played a role in the evolution of a Canadian PUC'ing system in Afghanistan.

I have a good number of other reasons that lead me to believe that a commission of inquiry is as warranted and indispensable now as it was when opposition parties called for it on multiple occasions in the 2007-2011 period. They include troubling questions about the role of government lawyers across a number of ministries. However, I am highlighting the issue of PUC's both because this is information that has remained largely hidden from view. Also, if true, an accountability-avoiding PUC system would take the matter to another plane of wrongdoing and would also demonstrably disprove many of the claims of the Harper government, the Canadian military, and now Minister Sajjan that Canada under the Conservatives took care not to be complicit in torture of persons we transferred from our custody.

If the possible existence of a PUC system and its consequences are news to you, then I trust that you will appreciate how a commission of inquiry is the minimum necessary response. In this regard, please note that I raise this with you directly as Prime Minister as a last resort. Allow me to elaborate.

My work as MP on this issue was intended to lead to a plan of action should the NDP have formed government or been part of a government. When that went by the wayside, I initiated e-petition E-70 shortly after my October 2015 defeat (in December 2015). Well before the response to E-70 was due, I made sure to remind the government that the Q-1117 questions had not come from nowhere, and that my suspicions about a PUC policy/practice had not gone away. I did this by giving an interview that resulted in the possibility Canada had a PUC system being published in an article written by Canadian Press journalist, Murray Brewster.

While my preference would have been for concerns about a PUC system to be raised once a commission of inquiry was in place, I felt I needed to go public in relation to E-70 so that there would be no excuse for various government departments not to start to do the necessary legwork to look into this PUC

matter ahead of making the decision on E-70's request for a commission of inquiry. Despite some of my cynicism that developed after four years of being an MP and watching how government worked under the Harper government, I allowed myself to be hopeful that this new information, aired publicly in the national press, would help spur your government to make good on your expressed desire to lead a government that would be much more attentive to democratic values, the rule of law, human rights and our reputation in the world.

You can thus imagine my disappointment when the response from Minister Sajjan was published.

This letter, accordingly, is my good faith effort to ask one last time that your government, and that you as a Prime Minister of a very different stripe from your predecessor, do the right thing on this file. After consulting your Minister of Foreign Affairs and more widely as needed, I would accordingly ask you to request that your Cabinet exercise its authority under the Inquiries Act to establish a royal commission with a mandate along the lines of what E-70 was requesting

I should say something further. I regret that I feel I have no choice but to appeal directly to you as Prime Minister and make what would ordinarily be a redundant request that the Minister of Foreign Affairs be brought into a file of this sort. However, all indications are that the Department of Global Affairs was cut out of the decision-making chain on e-petition E-70. Just for example, journalists who sought Minister Dion's views on E-70 (and his explanation for why he was not leading the file) were told by Department of Global Affairs officials to contact the Department of National Defence.

This management of the file deliberately sidelined the Minister who should, along with the Prime Minister, have had charge of this file. There are two reasons for this, which are set out in a posting I placed online on June 10, ahead of Minister Sajjan's response (attached as Appendix 4). One is that Minister Sajjan is in a conflict of interest in ruling on this file; not only should he not have assumed what appears to be virtually sole carriage of the file, he should have recused himself from any part in the decision. The second is that this file should involve the entire Cabinet, not just due to the importance of the issues but also given how many different ministries were part of detainee policy and were also part of the previous Government's obstructionist and untruthful responses to revelations about the treatment of detainees transferred by Canada.

From the beginning, it probably should have been you as Prime Minister, supported by the Privy Council office and in consultation with Cabinet, who should have issued the response to E-70 – or, if not, Foreign Minister Dion after consultation with you and Cabinet. As it stands, you do have the opportunity to take a close second look at this because, as far as I know, you have yet to reply to the June 7, 2016, open letter written to you by a number of prominent Canadians including one of Canada's most respected elder statespersons, the Right Hon. Joe Clark, in which you were asked to call a commission of inquiry.

I end by reiterating my request that you review this matter and personally decide whether you support Minister Sajjan's decision or whether, upon reflection and wider consultation, you believe the decision was too hasty and in error. I hope you choose the honourable path, which I trust you will recognize is also the wise path. We need – at minimum – an independent judicial commission of inquiry.

Yours most respectfully,

Craig Scott,
Professor of Law, Osgoode Hall Law School;
former MP for Toronto-Danforth

cc: The Hon. Stéphane Dion, Minister of Foreign Affairs

The Hon. Harjit Sajjan, Minister of National Defence

The Hon. Thomas Mulcair, MP & Leader of the NDP

Hélène Laverdière, MP & NDP Foreign Affairs Critics

Randall Garrison, MP & NDP National Defence Critic

Elizabeth May, MP & Leader of the Green Party

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Mary Dawson, Commissioner,
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November 27, 2016

Dear Commissioner Dawson,

RE: Concerns and Information about a Ministerial Conflict of Interest – The Honourable Harjit Sajjan

I am writing to ask you to examine and rule on whether the Minister of National Defence, the Honourable Harjit Sajjan, has breached section 6(1) of the Conflict of Interest Act by virtue of being the Minister to decide whether to call a commission of inquiry in response to House of Commons E-petition E-70 (transfer of detainees in Afghanistan) despite a conflict of interest, rather than recusing himself as required by section 21 of the Act. I am writing in relation to your power under section 45(1) to examine a matter on your own initiative when you have "reason to believe" the Act has been contravened. This letter is thus a combined letter of information and letter of concern that is intended to provide the "reason to believe" that triggers section 45(1).

Please note that I am writing in my capacity as a private citizen and also in a more specific capacity as a professor of law with a special interest in the rule of law and public accountability in relation to both the operation of our parliamentary democracy and the operation of the executive state in areas that are currently subject to very little oversight or review. I should also declare that I was previously the Member of Parliament for Toronto-Danforth (Match 2012 – October 2015), during which period I spent considerable time on the question of accountability in relation to the Afghan detainee issue; however, this letter is in no way a partisan submission.

By way of initial overview, it is my sincere and considered belief that Minister Sajjan is very likely in possession of information dating back to his time when he was in the Canadian Armed Forces that would almost certainly be of great relevance to any commission of inquiry. This places him in a conflict of interest because of his personal interest ("private interest", per section 4 of the Act -- "intérêt personnel" in the French text) in avoiding being put in the awkward position of being required to testify about his pre-ministerial knowledge in a way that could negatively affect perceptions of the conduct of the ministry he now leads. In addition, it is possible that, given Minister Sajjan's military-intelligence liaison role in Afghanistan prior to being elected to the House of Commons, a commission of inquiry could also touch on his own role as a military-intelligence liaison in ways that he would prefer not be made public; here, I emphasize that I am not talking about any role by the Minister in decisions that lead to torture (for I take the Minister at his word that he was not involved in the decisions to transfer detainees) but about the nature and extent of his overall role that requires him to have close and congenial contact with persons who may turn out to be amongst those responsible for torture in Afghanistan.

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In short, a reasonable observer would, in my view, conclude that it is in the personal interest of the Minister – again, the "private interest" / "intérêt personnel", to use the language of the Conflict of Interest Act – not to have to testify at any commission of inquiry concerning the treatment of detainees during periods when he served in Afghanistan. As such, he is in a conflict of interest by virtue of being the Minister to decide whether there will be a commission of inquiry in the first place.

Before continuing, allow me to emphasize that none of what I have said or will say in this letter, and none of what I have said before or in future on this matter, is meant to cast any aspersions on Minister Sajjan's service in the military. On the contrary, I have every reason to believe he served honourably, bravely and effectively – and this may be an understatement. I also have no reason to believe Minister Sajjan was part of the decision chain surrounding whether or not detainees would be transferred to the risk of torture. However, the foregoing is irrelevant to whether or not Minister Sajjan could reasonably be expected to be called before a commission of inquiry to testify about aspects of his knowledge relevant to what others may have known about the fate that awaited any transferred detainees.
Allow me now to set out the substance of my concerns alongside some basic supporting information. I will do so using numbered paragraphs for ease of future reference:

1. E-petition E-70 called upon / requested the government to establish a commission of inquiry into various aspects surrounding the policy and practices related to Canada's transfer of detained or otherwise captured persons to agencies of the government of Afghanistan. It acquired the requisite number of signatures to trigger an obligation on the government to issue a written response, which it did on June 16, 2016. Both E-70 and a PDF of the government response can be found at the following House of Commons URL: https://petitions.parl.gc.ca/en/Petition/Details?Petition=e-70 I also attach a copy of each.

2. The government response was written and delivered on behalf of the government by the Honourable Harjit Sajjan, the Minister of National Defence.

3. Furthermore, journalists discovered that, whenever they attempted to ask the Minister of Foreign Affairs Stéphane Dion his views on E-70 and a commission of inquiry, journalists were directed by him or his spokespersons to the Minister of National Defence as having sole charge of the file – notwithstanding that the Minister of Foreign Affairs is the senior minister when it comes to state-to-state relations whether in war or peace and notwithstanding that, in multiple respects, the issue of transfer of Afghan detainees involved the whole of government including the (now) Department of Global Affairs and not merely the Department of National Defence.

4. Since Minister Sajjan's decision this past summer, I have made efforts to have the government recognize the problem with having left this file to Minister Sajjan and to revisit the decision, with Minister Sajjan recused from involvement. These efforts include a letter to the Prime Minister of September 19, 2016, which is attached and can also be found online here: http://digitalcommons.osgoode.yorku.ca/public_writing/57/ This letter was copied to Minister Sajjan and his office acknowledged receipt. To my knowledge, neither Minister Sajjan nor the Prime Minister have acted to correct their error.

5. In brief, the reasons for which it was inappropriate for Minister Sajjan to be the Minister to decide whether or not to call a commission of inquiry can be summarized as follows:

    a. Minister Sajjan was a serving officer in the Canadian Armed Forces in Kandahar Province during the key years (2006-2007) when many, if not most, of the problematic transfers took place.

    b. Furthermore, Minister Sajjan was not simply present in theatre. Rather, his role as an intelligence liaison officer placed him in frequent and constant contact with the leadership of the agencies that – there is every reason to believe – practised torture upon persons in their custody, such as the National Directorate of Security (NDS). He also had a liaison role with the Governor of Kandahar who is known to have had a torture chamber in very close proximity to Canadian facilities; while the Governor did not receive detainees from Canada (as far as we know), knowledge of his interrogation practices would have probative value with respect to what Canadian actors should have been aware could also happen at the hands of other actors like the NDS.

    c. In relation to that military-intelligence liaison role, Minister Sajjan was anything but a minor player in Kandahar in the 2006-2007 period. Rather, a former commanding general, General Fraser, credits the intelligence produced by or with the help of Minister Sajjan as having led to hundreds of kills or captures of presumed enemies. "Retired Brig.-Gen. David Fraser has said Sajjan's work as an intelligence officer and his activities in Afghanistan helped lay the foundation for a military operation that led to the death or capture of more than 1,500 insurgents, " reports David Pugliese, "Afghan service puts Defence Minister Sajjan in conflict of interest on detainees, say lawyers," (June 21, 2016) Ottawa Citizen

http://ottawacitizen.com/news/national/defence-watch/afghan-service-puts-defence-minister-sajjan-in-conflict-of-interest-on-detainees-say-lawyers

d. Being on site during that period in that capacity, Minister Sajjan was at least presumptively in a position to hear about and possibly be a direct witness to evidence that is highly relevant to the degree of knowledge various of his colleagues in the commanding ranks of the Canadian Armed Forces had or likely had about the risk of torture when captives in the hands of the CAF were transferred to various Afghan government entities.

e. The "knowledge environment" is a crucial factual question in determining whether and, if so, to what extent Canadian and/or international law was compromised by transferring detainees to Afghanistan – one of the questions a commission of inquiry would be looking into. As such, a commission of inquiry would be interested to learn from any member of the CAF with a role that placed him or her proximate to either transfer decision-makers on the Canadian end or to jailors/interrogators at the Afghanistan end. A person in this role would almost certainly be called as a witness by any commission of inquiry for purposes of testimony on what he knew as to what others knew or should have known about what would or could happen to detainees.

f. Finally, I attach a scanned two pages (pp. 150-151) from a book written by former Globe and Mail journalist Graeme Smith and called *The Dogs Are Eating Them Now: Our War in Afghanistan* (Knopf Canada, 2013). These pages go directly to the question of the kind of knowledge that military liaison officers such as Minister Sajjan had with respect to the practice of torture by the Afghanistan actors with whom they had to liaise. Mr. Smith was the reporter whose Globe and Mail articles in April 2007 shocked the nation when he revealed he had been able to interview some 30 men who alleged they had been brutalized after having been transferred by Canada to Afghan authorities. The indicated passages in his book are evidence of willful blindness on the part of at least some military liaison officers, who told Mr. Smith that they chose not to ask questions about torture because they did not want to hear the answers. A central question when it comes to "knowledge environments" is whether or not key decision-makers deliberately cut themselves off from specific knowledge in ways that still attracts their or their institution's responsibility because they had the means to know and chose to remain – formally – ignorant. I say "formally" because the passages from Mr. Smith's book are palpably clear that some of the military liaison officers had every reason to believe torture was occurring – which is precisely why they did

not make specific inquiries. Again, I emphasize that none of this is intended to link Minister Sajjan to decisions to transfer detainees, but only to show that, as a military liaison, he may well have his own insights into the efforts of members of the Canadian Armed Forces to be willfully blind, including whether or not such efforts as some of his military-liaison colleagues engaged in were paralleled by similar efforts by the officers in the command structure who decided on the policies and practices related to transferring persons to the risk of torture. Such information is especially crucial because one of the lingering and unresolved questions around Canada's transfer policy and practice is whether Canada transferred persons to the risk of torture in part because Canada wanted to receive any military intelligence produced from interrogation of the persons transferred. I attach the entire two pages but also reproduce below key passages (italics are mine):

> The liaison officers who worked near the [Governor's] palace were often smart guys, given the delicate task of managing relationships with the governor and Afghan security forces…..All of them said they did not hear or see any indications of torture by Afghan authorities, but that such tactics would be unsurprising. It was a violent country, they said; it was unreasonable to expect the Afghan forces to maintain high standards of conduct when they faced insurgents who regularly beheaded their captives. …The officers also cultivated close relationships with Afghan security officials, including the local [NDS] intelligence chief. *They needed information to save lives on the battlefield, so they avoided asking questions about how Afghans conducted their interrogations*. In each of these conversations, …I talked about what I learned from the detainees in Sarpoza prison, and the scars on inmates' bodies. Every time, I got something like a shrug from the Canadian soldiers ….[A]ll of them maintained that NATO was only supporting the sovereign government of Afghanistan. They couldn't understand why the media was 'freaking out' over the detainees. *'I made a point of never asking how they got their information,' an officer said. 'if they had told me about torture, it would have impeded my ability to get the intelligence we needed about the Taliban.'* …I came away from these conversations weighed down with sadness. Somebody high up in the ranks…told them to make friend with the Afghan authorities. Those orders came down from a military leadership that should have known ow distasteful such arrangements were, how closely these troops were co-operating with torturers. …[I]ntelligence was passed up the chain of command. My great fear is that somewhere in the buzz of information, there was a terrible calculation, a decision to avoid fighting by the rules.

I trust that the above demonstrates why Minister Sajjan may well prefer not to

have to testify at a commission of inquiry on the detainee question and thus why I believe that, in a general ethical sense, Minister Sajjan was in a conflict of interest when he took carriage of the commission of inquiry file (or accepted the file if the allocation decision came from the Prime Minister's Office or the Privy Council Office). In my view, on any reasonable standard of appropriateness, Minister Sajjan should have recused himself. Institutionally, the decision related to E-70 should either have been a matter for the Minister of Foreign Affairs, for the Prime Minister or for Cabinet as a whole (with the Minister of National Defence not participating).

A question of law here, of course, is whether the Conflict of Interest Act prohibits this kind of conflict of interest or whether you view this statute as so narrow in its application that, on this matter, the Act does not apply. In my view, any reasonable interpretation of the following provisions of the Conflict of Interest Act does indeed capture the conduct of Minister Sajjan:

> 4. For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.
>
> 5. Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.
>
> 6. (1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the ublic office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.
>
> (2) No minister of the Crown, minister of state or parliamentary secretary shall, in his or her capacity as a member of the Senate or the House of Commons, debate or vote on a question that would place him or her in a conflict of interest.
>
> 7. No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.
>
> 21. A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

I believe that the following above-reproduced provisions have been contravened: sections 6(1) and 21. The Minister may also be in breach of section 6(2) by virtue of answers in Question Period, but any such breach flows from the main provision, section 6(1), and is comparatively minor compared to the refusal to recuse himself as required by section 21.

In addition, there could be an issue of non-compliance with section 7 by virtue

of the specific circumstances of this matter: having been a member of the Canadian military (the Minister's *alma mater*, so to speak) and now being civilian head of the same military, there may be an appearance of Minister Sajjan protecting an organization (the Canadian Armed Forces and/or the Department of National Defence) in a way that exceeds the normal role of the Minister in relation to the interests of his organization. As a matter of law, it may be that "organization" cannot include government entities, but I leave that for your determination.

I should also say that, while I note that the Conflict of Interest Act devotes much attention to conflicts of financial interest, at no point does the Act limit the definition of "private interest" to financial matters. As well, a purposive interpretation of the Act would suggest what an impoverished understanding of conflict of interest it would be if the Act were limited to matters concerning money. Indeed, the negative-definition clause of the Act (section 2) is consistent with such a purposive orientation, as it does nothing to suggest "private interest" is limited to financial matters:

> ***private interest*** does not include an interest in a decision or matter
> (a) that is of general application;
> (b) that affects a public office holder as one of a broad class of persons; or
> (c) that concerns the remuneration or benefits received by virtue of being a public office holder

Additionally, I trust that none of these three exceptions are applicable, for obvious reasons I need not go into.

In relation to my own power as a citizen to bring this matter to your attention, I am relying on the following section:

> 45 (1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.

On my understanding of the Conflict of Interest Act enforcement mechanisms, citizens are not provided with the right to demand an investigation by directly filing a complaint. However, section 45(1) is clearly a vehicle for a citizen to provide the Commissioner with information that generates a "reason to believe a public office holder …has contravened this Act", at which time the Commissioner has the power to start an examination on her own initiative. This, thus, is the purpose of this letter. It is not a complaint but simultaneously a letter of information and a letter of concern, which I hope you take most seriously in order to make a decision about an examination under section 45(1). There are no rules in the Conflict of Interest Act dealing with citizens keeping confidential a letter of concern and information of the present sort. This letter accordingly may be made public, which I believe will also fulfill a broader public interest given that the possible conflict of interest of Minister Sajjan is a matter of general interest that is already very much in the public domain. I will only make this letter public once I am satisfied that the letter has been delivered to you and that a copy has also been received by the Minister's office – in each case, with no fewer than 24 hours after receipt of the couriered letter. I will also email this letter and attachments.

Thank you very much for considering my concerns and accompanying information. I would be happy to respond to any questions you have as you consider this matter.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School of York University

*Cc*: The Hon. Harjit Sajjan, Minister of National Defence,
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Commissariat aux conflits d'intérêts et à l'éthique
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**CONFIDENTIAL**

February 27, 2017

Mr. Craig Scott
Professor of Law
Osgoode Hall Law School of York University
4700 Keele Street
Toronto, Ontario M3J 1P3

**Subject: Response to your letter of November 27, 2016**

Dear Mr. Scott:

I am writing in response to your letter dated November 27, 2016 relating to your concerns about the conduct of the Honourable Harjit Sajjan, P.C., M.P., Minister of National Defence. I have now completed my review of the concerns that you raised. My conclusions are not intended in any way to be a comment on the Government of Canada's position concerning the larger question of whether a commission of inquiry is warranted. My concern was only with whether Mr. Sajjan may have contravened his obligations under the *Conflict of Interest Act* (Act).

In your letter, you allege that Mr. Sajjan contravened the Act in exercising his authority to decide whether or not to call a commission of inquiry, in that you suggest that Mr. Sajjan would likely be called as a key witness due to his role as an officer with the Canadian Armed Forces in Afghanistan.

In your letter, you refer to sections 4, 5, 6, 7 and 21 of the Act. You state that in a general ethical sense, Mr. Sajjan was in a conflict of interest when he took on responsibility for the decision relating to a possible commission of inquiry. You request that I include in the definition of "private interests," interests beyond financial matters. In your view, it is in the personal interest of the Minister not to have to testify at any commission of inquiry concerning the treatment of detainees during periods when he served in Afghanistan and for this reason he is in a conflict of interest as defined by the Act.

While the information provided in your letter in support of the allegation that Mr. Sajjan is in a conflict of interest was not sufficient to cause me to initiate an examination under section 45 of the Act, your letter left me with concerns that caused me to follow up with Mr. Sajjan.

I raised directly with Mr. Sajjan your allegation that, as a former intelligence liaison officer, he could reasonably be expected to have knowledge relevant to what others may have known about the fate that awaited any transferred detainees. Mr. Sajjan informed me that he was

deployed as a reservist to Afghanistan where he was responsible for capacity building with local police forces. At no time was he involved in the transfer of Afghan detainees, nor did he have any knowledge relating to that matter.

Mr. Sajjan also told me that, in the context of the inquiries undertaken in 2011 and 2015 by the Military Police Complaints Commission, he, like other Canadian Armed Forces members deployed in Afghanistan, was under orders to come forward with any information related to the Afghan detainee issue. Mr. Sajjan told me that he did not have any information relevant to the inquiries. He said that he was not involved in those inquiries in any way or in matters relating to those inquiries.

Mr. Sajjan also informed me that there were consultations between the Department of National Defence, Global Affairs Canada and the Department of Justice on the content of the government response to the petition that was tabled in the House of Commons. Mr. Sajjan told me that, following these consultations, the Privy Council Office designated the Department of National Defence to issue the response to the petition.

While I understand well the more general ethical concerns you have raised in respect of Mr. Sajjan's decision not to call for a commission of inquiry, I have noted on a number of occasions, such as in *The Cheques Report*, that there was nothing in the Act to suggest that political interests were to be included in the concept of private interest. The Act, which is focused on preventing conflicts of interest, provides for a set of rules focused mainly on a narrow category of largely pecuniary interests, including the value of a person's assets or liabilities, the acquisition of a financial interest, becoming a director or officer in certain types of organizations or the increase in a person's income.

I have also noted that a possible reputational interest will not, on its own, give rise to a conflict of interest within the meaning of the Act. Nor do I believe that a perception of bias alone would fall squarely under the Act.

After having carefully reviewed the matter, I am satisfied that I do not have grounds on which to base an examination under section 45 of the Act. It appears that Mr. Sajjan was simply conveying a governmental decision. Furthermore, I have found no information to suggest that Mr. Sajjan actually had any knowledge related to Afghan detainees, or that he had any involvement in that matter. Therefore, I am of the view that Mr. Sajjan's potential to be a witness at a possible commission of inquiry based on any such knowledge or involvement, remains too remote and too speculative. Therefore, it is not necessary to consider further whether reputational interests and bias would be captured within the meaning of "private interests" under the Act.

I hope this response addresses your concerns.

Sincerely,

Mary Dawson

Mary Dawson
Conflict of Interest and Ethics Commissioner

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April 14, 2017

Dear Commissioner Dawson,

RE: Reply to your letter of February 27, 2017 – in response to my letter of November 27, 2016, concerning the *Conflict of Interest Act* and the Hon. Harjit Sajjan

Thank you for your February 27, 2017, quite detailed response to my letter of November 27, 2016, both of which I attach as appendices to this letter for your ease of reference.

You will recall that, in that November 27 letter, I raised the concern that the Minister of National Defence, the Honourable Harjit Sajjan, had taken a decision not to call a commission of inquiry in relation to the treatment of Afghan detainees despite being, in my view, in a conflict of interest in relation to that decision. As you will recall, I wrote to you for purposes of informing you sufficiently for you to be in a position to decide whether you have grounds under section 45 of the Conflict of Interest Act to initiate an examination. This approach is the only one available to the citizen, as there is no citizen-complaint mechanism in the Act, so I very much appreciate you acted on my letter in the spirit intended. Indeed, I am glad that, in effect, you have recognized an indirect citizen complaint mechanism that we could call a "section 45 citizen expression-of-concern letter." Thank you for interpreting the legislation purposively in this respect.

Ultimately, you concluded that you did not have a basis for your own concern – at least, not a concern sufficient to open an examination on your own accord pursuant to section 45. In one part of your letter, you address the interpretive issue of whether the conflict of interest provisions that I invoke apply to non-pecuniary interests. I recognize that the question of a narrower versus broader interpretation of "private interest" in the Act has been left (somewhat) unresolved in your assessment, although you do all but say (albeit employing caveats) that reputational interests, bias (by this, I assume you mean bias towards one's former institution), and "political interests" do not form part of the Act's conception of "interests." As such, the trend line of your discussion does suggest that you do view the Act as narrow in application (i.e. "mainly" about money and not about other forms of private or personal advantage, such as avoidance of the complications and potential embarrassment of having to be a witness in a commission of inquiry). To the extent this is a fair characterization of your interpretive stance, I do urge you, should you continue on as Commissioner, to give this another look, ideally inviting input from experts and stakeholders before you

act on what I am calling a narrow pecuniary view of the Act's scope. I would be happy to make a submission to you or the relevant House of Commons committee should this matter come up for discussion in future.

All that said, in the result, you did set aside the above issue – at least provisionally – and instead relied on a kind of assumption *arguendo* in order to be able to look – to some degree – at the substance of my concern (i.e. assuming, without deciding, that the non-pecuniary conflict of interest alleged by me in my November 27 letter is covered by the Act). In that respect, it does appear that you conducted a kind of preliminary examination because "[my] letter left [you] with concerns that caused [you] to follow up with Mr. Sajjan." This follow-up entailed visiting Minister Sajjan personally to ask him whether he might have information that could be of interest to a commission of inquiry on Afghan detainee matters. This way of handling the matter constitutes another procedural innovation related to my section 45 letter of concern, and I thank you again for another purposive interpretation of the Act on the procedural front.

However, it is at this point that I must observe that, well intended as your initiative clearly was, you left yourself vulnerable to your acceptance of one piece of evidence – the Minister's statement to you – received in an *ex parte* basis. Although you wrote to inform me that one of your investigators had been assigned to the matter following my November 27 letter, I was not contacted by your investigator to ask about the accuracy of what Minister Sajjan said to you, before you decided to rule that you had no basis under section 45 to start a formal examination. This is unfortunate because what Minister Sajjan is reported by you to have said appears not, according to publicly available information, to be fully accurate.

Allow me to set out what you were told and why it appears not to be the whole truth.

First of all, I note that, in your letter to me, you do characterize the context correctly when you say:

> *I raised directly with Mr. Sajjan your allegation that, as a former intelligence liaison officer, he could reasonably be expected to have knowledge relevant to what others may have known about the fate that waited any transferred detainees.* (my emphasis)

This is precisely the issue and indeed what you were correct to raise with the Minister.

I set out in my November 27 letter the role of Minister Sajjan that included liaising with some of the very actors who we know regularly tortured their prisoners, including those transferred by Canada. I did not assert or even imply Minister Sajjan had any role in the decision-making or physical process of transferring detainees, but only that his testimony at a commission of inquiry would be valuable – indeed, likely crucial – to understand the knowledge environment for those who were engaged in the transfer

process. What did, could, or should they know about the fate that would await detainees once transferred on?

For example, if Minister Sajjan knew or had reason to know or even 'just' strongly suspected that prisoners were abused by the agencies with whom he had regular contact (the Afghan National Police, the National Directorate of Security and the Governor of Kandahar), a commission would be able to draw conclusions as to what level of knowledge could be expected of other Canadian decision-makers when they were deciding on the policy and practice of detainee transfer into the hands of agencies who regularly torture. Or, if Minister Sajjan were to testify that he had no knowledge whatsoever and no reason to make inquiries, this would be equally valuable as evidence because of what it might reveal either about the reasonableness of others in the Canadian military acting similarly or, viewed differently, what it might reveal about a culture and practices of deliberate willful blindness that might have been in play across a range of actors with respect to 'not knowing' about torture. Precisely one of the questions any commission would put to the military and civilian decision-makers who designed and operated Canada's transfer policy and practice would be, for example, "How could you not know that you were sending people to agencies who would very likely torture at least some of them?"

However, and secondly, it appears that Minister Sajjan elided your question. He did this in one way that has the hallmarks of skillful deflection and he did it in another way that is, I regret to say, hard to see as fully truthful.

With respect to what I refer to as deflection, you report:

> *At no time was he involved in the transfer of Afghan detainees, nor did he have any knowledge relating to this matter.*

With respect to the first part of this sentence, this answer by Minister Sajjan ducks your question, because the relevant knowledge is of what could happen to detainees once transferred, not knowledge of, let alone involvement in, the transfer process. (For the moment, I am assuming the second part of the sentence refers to him saying he has no knowledge of the transfer process, "this matter".)

With respect to truthfulness, you report:

> *Mr. Sajjan informed me that he was deployed as a reservist to Afghanistan where he was responsible for capacity building with local police forces.*

This answer seems clearly to be a misrepresentation both by virtue of it being formalistic and by it being a deliberate omission of highly relevant facts about his role. In terms of formalism, I have little doubt that Minister Sajjan would be able to show a job description, appointment order or letter, and the like that will focus only on "capacity building with local police forces."

In terms of the reality, what a soldier is formally in theatre to do may turn out to be only part of what that soldier actually ends up doing, as roles can shift especially when senior commanders decide they will. This appears to be precisely the case with Minister Sajjan who had an intelligence liaison role well beyond his "reservist", police capacity-building role, as a consequence of General David Fraser and other officers in Kandahar seeing Minister Sajjan's utility as going beyond what Minister Sajjan described to you. Indeed, his role went well beyond interacting with the police and included regular contact with the National Directorate of Security, which is the central institution upon which torture concerns focus; even then, I would note that the Afghan National Police (with which Minister Sajjan does expressly say he worked) would also be a focus of any inquiry given that their handling of prisoners is also problematic, including allegations of extrajudicial executions.

My letter to you could hardly set out all relevant information on what Minister Sajjan's role was. Its purpose was to present his military-intelligence liaison role, signal its importance (see General Fraser's accolades), and also point to how other liaison officers turned a blind eye to what their partner institutions were doing in a "don't ask, don't tell" kind of way. I had no idea that any examination by you would run aground on the basis that Minister Sajjan would convince you he had no relevant knowledge because he claimed to have no relevant role.

In that regard, I expect that you will be interested to know of one piece of hard evidence that Minister Sajjan was less than fulsome in what he told you. It comes in the form of a historical account by Sean M. Maloney in his book *Fighting for Afghanistan: A Rogue Historian at War* (Annapolis, MD: Naval Institute Press, 2011). At the time of this book's publication, he was an associate professor of history at Canada's Royal Military College and, as he is described on the book jacket, "historical advisor to the Chief of the Land Staff for the war in Afghanistan." *Fighting for Afghanistan* is the third in a trilogy of histories of Canada's war there written by Maloney, for which purpose he was closely embedded with military forces and, as a consequence, an eye witness to many of the key actors' roles.

Maloney mentions Minister Sajjan on several occasions in the book. Allow me to quote from four of those pages (106, 108, 104-105) in order for you to see a Sajjan role that looks remarkably different from the impression he left you with. The passages speak for themselves, but I will also use underlining to highlight for you the basics of the intelligence role he played with actors that were not limited to the police and that included the National Directorate of Security:

> *(p106) It was this point that I met Major Harjit Sajjan…Harj was a policeman from British Columbia. <u>When [General] Dave Fraser heard</u> about Harj's experiences dealing with organized crime and gang activity, <u>he was brought south from Kabul</u>.*
>
> *<u>Harj explained</u> to me how he worked. '<u>My responsibilities were vague at first</u>. <u>General Fraser had me work with [Governor of Kandahar Province] Asadullah</u>*

*Khalid. But I also worked at the PRT [Provincial Reconstruction Team] to assess emergent Afghan policing issues. The [Kandahar] JCC [Joint Coordination Committee] had already been established by the Americans, but it was only a coordination cell: it has no continuity, no resources, and no focus. I discovered that there was a goldmine of information flowing into the [Governor's] palace.' [Colonel] Ian Hope [commanding officer of Canada's Task Force ORION] decided to put more resources into the JCC and make it a permanent position that included the deputy-battlegroup intelligence office, a signals detachment and an intelligence operator. This took about two week to ramp up. 'Ultimately, about 80 percent of TF ORION's intelligence comes from the JCC, not the ASIC [All-Source Intelligence Center] back at KAF [Kandahar Air Field]," Harj explained.*

*(p108) …I also found out later that the ASIC generally ignored the JCC, in part because some ASIC people refused to accept that a person working on finding ways for improving the ANSF couldn't be viewed an intelligence collector. Harj attended the weekly security meeting and learned that the meeting could become a tool as well. Over time, he developed rapport with all the security 'players' in Kandahar. The NDS [National Directorate of Security] said 'no' at first, but later changed its mind. There were in fact two meetings: the first included everyone, including the international organizations working in Kandahar. The second included just the uniformed Afghan and coalition members. Harj was able to send two pages of solid intelligence to TF ORION per week. The quality of the intelligence was awesome. I found out later that elements in the ASIC didn't like this because they viewed it as 'single source' Afghan information and did not trust it until they could 'wash it' through their processes. To me, ground truth information from Afghans we have developed a rapport with beats stuff coming across a computer hooked up to a bunch of American systems. …*

*…In many cases, Harj and the JCC would predict events based solely on the JCC information – and then these events would happen. …[After a specific incident proving JCC's worth][f]rom then on, Harj sent intelligence directly to AEGIS, to ORION, and to the ASIC with his analysis attached.*

*…(p104-105) [T]he JCC …was in a compound co-located with the Governor's Palace. Captain Darren Hart, the Canadian liaison officer, …explained to me how the JCC worked. 'We synthesize everything here with the Afghans when we plan joint operations. Intelligence flows from both countries come in here.' ….Hart explained that the NDS funneled most of the information into the JCC, so it wasn't all just coming from OEF systems or resources.*

The foregoing is some of the relevant information on how Minister Sajjan was at the very heart of intelligence operations that included intelligence from (and to) the very agencies that he "developed rapport with" – notably the NDS, known to torture as part of its *modus operandi* in generating intelligence. Minister Sajjan was central to this

process, according to historian Maloney, and his "rapport" with NDS officials and others helped make the system effective.

Any commission of inquiry would want to know what those Canadians receiving intelligence from NDS knew about how that intelligence was generated – or could have been generated – and to know whether questions about torture as generative of intelligence were ever asked, or whether, like the liaison officers I quoted in my November 27 letter, it was deemed best not to speak or ask precisely in order to avoid hearing a compromising answer. For these reasons, Minister Sajjan did not need to have anything to do with the design and delivery of our Afghan detainee transfer policy to be in a position to know much that was significant about what environment those detainees faced after being handed over to NDS.

Indeed, I would now go further than I did in my original letter to you. Not only would Minister Sajjan have information of interest on what was generally known (or generally avoided as something to know) about torture being conducted by Afghan partner agencies like NDS, but also he would be a key witness for another reason too. Any inquiry would address a lingering question that remains as to whether or not higher-ups in Ottawa refused to stop transfers in part because intelligence flows back to the Canadian military was one of the outcomes they hoped would arise from handing over detainees to be interrogated. If that is indeed part of a commission's investigation, an inquiry would want to learn how it was that Canadian actors working directly with agencies like NDS either did not know of torture (if that is the claim) or believed protestations from NDS that they were not torturing (if that is the claim). And, of specific relevance to the military liaisons cited by Graeme Smith in his book *The Dogs Are Eating Them Now* (as quoted in my November 27 letter to you), a commission of inquiry would need to study closely whether a range of deniability tactics were used precisely to avoid unwelcome knowledge (i.e. so as to produce willful blindness) or whether, as Minister Sajjan appears to say, it is actually plausible that Canadians working day in and day out with the likes of NDS officials would be oblivious to their interrogation methods.

You concluded your letter to me with a very firm conclusion:

> *After having carefully reviewed the matter, …I have found no information to suggest that Mr. Sajjan actually had any knowledge related to Afghan detainees, or that he had any involvement in the matter. Therefore, I am of the view that Mr. Sajjan's potential to be a witness at a possible commission of inquiry based on any such knowledge or involvement, remains too remote and too speculative.*

Knowing what you now know (from the above-reproduced reporting by historian Maloney), I trust that your opinion on Minister Sajjan's importance as a witness at an inquiry might well be different than when you based it on what Minister Sajjan told you. His value as a witness at a potential commission of inquiry is anything but remote and speculative.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School of York University; former Member of Parliament for Toronto-Danforth

Cc: *The Right Hon. Justin Trudeau*, Prime Minister
*The Hon. Harjit Sajjan*, Minister of National Defence
*The Hon. Chrystia Freeland*, Minister of Foreign Affairs
*Stephen Fuhr*, MP, Chair of House of Commons Standing Committee on National Defence
*Cheryl Gallant*, MP, Vice-Chair of Standing Committee on National Defence
*Randall Garrison*, MP, Vice-Chair of Standing Committee on National Defence
*Michael Levitt*, MP, Chair of FAAE Sub-Committee on International Human Rights
*Cheryl Hardcastle*, MP, Vice-Chair of FAAE Sub-Committee on International Human Rights
*David Sweet*, MP, Vice-Chair of FAAE Sub-Committee on International Human Rights
*Blaine Calkins*, Chair of House of Commons Standing Committee on Access to Information, Privacy and Ethics
*Nathaniel Erskine-Smith*, Vice-Chair of House of Commons Standing Committee on Access to Information, Privacy and Ethics
*Daniel Blaikie*, Vice-Chair of House of Commons Standing Committee on Access to Information, Privacy and Ethics

Such other persons as deemed relevant

PS: One other aspect in your letter warrants comment. The references to Minister Sajjan "simply conveying a governmental decision" flies in the face of ministerial responsibility. Furthermore, this way of viewing responses to House of Commons petitions ignores the magnitude of an issue such as this, about which the Minister had for some time been aware due to questions from reporters and in the House. How can it be satisfactory for a minister to affix his or her signature simply because "the Privy Council Office…designated" him to reply?

Analysis

# Conflicting accounts of Harjit Sajjan's role revive ex-MP's conflict of interest allegations

## A former NDP MP is questioning Sajjan's comments about treatment of prisoners during the Afghan war

By Murray Brewster, CBC News Posted: May 01, 2017 5:00 AM ET Last Updated: May 01, 2017 3:24 PM ET

The unexpected, fiery political argument over Defence Minister Harjit Sajjan's role during the Afghan war could breathe new life into an old complaint before the conflict-of-interest commissioner.

At least that is what former New Democrat MP Craig Scott is hoping.

An emotional debate was touched off last week when Sajjan, in an April 18 speech in India, described himself as the "architect of Operation Medusa," one of the biggest battles fought by Canadian troops during the Afghan war.

Former soldiers with direct knowledge of his role told CBC News Sajjan was a liaison officer with the local Afghan leadership, who provided critical intelligence and insight that helped shape the battle, but he did not plan the September 2006 operation west of Kandahar city.

Sajjan has apologized, and did so repeatedly during the weekend on social media. But that has not been enough to calm critics, including the Conservatives who are expected to use the resumption of Parliament on Monday to press for his firing — or resignation.

The contrast between Sajjan's comments in India and what he told ethics watchdog Mary Dawson a few months ago is what has piqued Scott's attention.

Sajjan stated that he deployed to Afghanistan as a reservist and was "responsible for capacity-building with the local police forces."

Scott says he believes the minister gave the commissioner a benign description in order to get out of the conflict-of-interest complaint.

"While his boast in New Delhi was indeed less than truthful, the much bigger deception is his attempt to make Commissioner Dawson believe he was only a mere reservist working with police on 'capacity-building'," said Scott, a law professor who lost his Toronto-Danforth seat in 2015.

Scott has been leading the charge to convince the Liberal government to hold an inquiry into the treatment of suspected Taliban prisoners, who human rights groups claim were tortured by Afghan officials.

In opposition, the Liberals championed such an inquiry and Scott delivered an e-petition to Parliament last spring demanding one.

Sajjan, responding on behalf of the government, turned down the plea.

At the time, he said the matter had been investigated by the Military Police Complaints Commission and that Canada had obeyed international law.

## 'Led the commissioner down the garden path'

That touched off a complaint to the ethics watchdog, with Scott arguing Sajjan — because of his role in Kandahar — had a vested interest in not seeing an inquiry take place.

Dawson declined to investigate last winter, but in a letter to Scott she said she was left "with concerns."

The commissioner did question Sajjan, but said in the end she was satisfied he simply conveyed the government's decision and didn't know anything of the alleged torture of prisoners.

Scott said Sunday that minister "led the commissioner down the garden path" and the conflict investigation needs to be re-opened.

"Minister Sajjan needs to account for being less than truthful with the Ethics Commissioner," he said.

"It is a very serious matter if it turns out a minister lied or otherwise knowingly misled an Officer of Parliament (and) there remains an underlying conflict of interest in that Sajjan is blocking an Afghan-detainees commission of inquiry for which he would be a crucial witness."

Contacted Sunday, a spokeswoman for Sajjan said the minister has no comment on Scott's renewed bid for an investigation.

Last November, in an interview with CBC News, Sajjan said the ethics complaint was an attempt to make "political hay" where there is none.

"I was not involved in any potential type of conflict here," he said. "Somebody is trying to turn this into a political situation."

# 'Myth and folklore around my position'

Sajjan also said his role in Afghanistan had been exaggerated in the aftermath of his election to Parliament.

"There is a lot of myth and folklore around my position," he said. "I was always a reservist. People talk about the great intelligence work I did, but keep in mind I was never an intelligence officer. I was brought in for my policing experience and my understanding of cultural aspects."

Scott said the question of what the former Conservative government knew of the alleged torture carried out by local Afghan authorities is crucial to Canada's reputation.

Knowingly handing prisoners over to torture is considered a war crime under international law.

The issue was at the centre of a number of political crises between 2007 and 2010.

The minority government of former prime minister Stephen Harper was almost brought down over its refusal to hand over documents related to the issue.

CHEF DU NOUVEAU PARTI DÉMOCRATIQUE DU CANADA

LEADER OF THE NEW DEMOCRATIC PARTY OF CANADA

CHAMBRE DES COMMUNES
HOUSE OF COMMONS
CANADA

THOMAS MULCAIR
DÉPUTÉ, MP, OUTREMONT

May 02, 2017

Dear Commissioner Dawson,

Over the past several days, the credibility of the Minister of National Defence has been widely questioned following revelations that he falsely represented his role during the war in Afghanistan.

In light of the new information that has come to light, I am urgently requesting that you review your decision and open an examination into whether the Minister of National Defence violated the *Conflict of Interest Act* when he refused an inquiry into the Afghan detainee scandal in response to House of Commons petition E-70, which called on the government to establish a public inquiry into Canada's policies and practices with respect to detainees in Afghanistan.

As has been brought to your attention on more than one occasion, the Minister would be a key witness at such an inquiry, given his former intelligence liaison role on the battlefield.



It is now public knowledge that the Minister informed you he was merely a "reservist" who was responsible for capacity building with local police forces. In your letter of response to Professor Craig Scott, dated February 27, 2017, you write: "At no time was he involved in the transfer of Afghan detainees, nor did he have any knowledge relating to the matter."

On April 18, however, he repeated for at least the second time that he was "the architect" of Operation MEDUSA, one of Canada's largest military operations since the Korean War. In addition, Professor Craig Scott provided to you further information in a letter dated April 14, 2017. General David Fraser, who was commander of Canada's Coalition Task Force in Kandahar and the Minister's superior, stated in a letter dated September 16, 2006 the following:

*Maj Sajjan was specially selected for that demanding and challenging task of acting as the Liaison Officer of the Afghan National Police on behalf of the Combined Task Force (CTF) Aegis HQ because of the civilian skillset he has brought to the table as an undercover narcotics officer. His job further changed into being a special intelligence officer working direct to Commander CTF Aegis because of his ability to understand and exploit criminal networks. He consistently provided the most timely and accurate intelligence available, and he personally fused broad sources of information into an extremely coherent picture upon which most of the formations major operations were based.*

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This information casts further doubt on the Minister's truthfulness in the account of his role that he provided to you. It is simply not plausible for a military intelligence liaison officer who had such a role on the battlefield to have had no access whatsoever to information relating to the capture and transfer of Afghan detainees.

These revelations seriously call into question the Minister's honesty and forthrightness with respect to his role, and what information he had access to throughout his time in Afghanistan. The blatant discrepancies in his statements warrant immediate scrutiny from your office. I thereby request that you review your decision and open an examination under *the Conflict of Interest Act*. This is a matter of fundamental human rights, of public accountability, and transparency.

This is a clear conflict between the Minister's responsibilities and his personal interests regarding events before his appointment.

Thank you for your thoughtful consideration of this matter.

Sincerely,

Thomas Mulcair.

http://news.nationalpost.com/full-comment/craig-scott-sajjan-downplayed-his-role-in-afghanistan-where-it-could-hurt-him-but-exaggerated-where-it-helped-him

May 3, 2017

# Sajjan exaggerated his role in Afghanistan where it helped him, and downplayed it where it could hurt

By Craig Scott, Special to National Post

## Even if Sajjan did not know that those partners regularly used torture to interrogate detainees to produce some of the intelligence he subsequently...

Defence Minister Harjit Sajjan is being lambasted in the news for telling an audience in New Delhi that "(o)n my first deployment to Kandahar in 2006, I was the architect of Operation Medusa." Sajjan's boastful claim to be "the" architect of this major battle merits the criticism it's received. However, the media's emphasis on Sajjan's diminished role in the operation may lead the Canadian public to misunderstand the significant role Sajjan did play in Canada's Afghanistan missions.

Tellingly, in another context, Sajjan chose not to play up his role in Afghanistan, but rather to minimize it in a way that pulled the wool over the eyes of an Officer of Parliament. In November 2016, I wrote to Conflict of Interest and Ethics Commissioner Mary Dawson about Sajjan's decision to reject a petition[1] that I initiated to establish a commission of inquiry into Canada's practices relating to the transfer of detainees in Afghanistan.

I alerted the commissioner that Sajjan's pivotal intelligence role in Kandahar made him a potentially valuable commission witness on the crucial issue of what was known about the use of torture by Afghan partner institutions. It was thus, I argued, a conflict of interest for Sajjan to be the one to reject such a commission.

In my view, it was a conflict of interest for Sajjan to be the one to reject a commission of inquiry into Canada's practices relating to the transfer of detainees in Afghanistan.

War historian Sean Maloney writes in his 2011 book, Fighting for Afghanistan, that Sajjan "developed rapport with all the security 'players' in Kandahar." Maloney details how Sajjan was a key conduit for intelligence flows from partner institutions-including the National Directorate of Security (NDS)-due to Sajjan's role within a body called the Joint Coordination Committee. NDS is an Afghan agency widely known to engage in systematic torture of its prisoners. Yet, according to a 2015 Rideau Institute report, Canada systematically transferred detainees to NDS

between 2006 and 2011, after the Canadian and Afghanistan governments signed a transfer agreement in late 2005.

In February 2017, the commissioner wrote to me to say: "I raised directly with Mr. Sajjan your allegation that... he could reasonably be expected to have knowledge relevant to what others may have known about the fate that awaited any transferred detainees." How did Sajjan reply to the commissioner? "Mr. Sajjan informed me," Dawson continues, "that he was deployed as a reservist to Afghanistan where he was responsible for capacity building with local police forces. At no time was he involved in the transfer of Afghan detainees, nor did he have any knowledge relating to the matter." Dawson then concluded: "Mr. Sajjan's potential to be a witness at a possible commission of inquiry ... remains too remote and too speculative."

The problem is that the minister may have led the commissioner down the garden path. According to Maloney, Sajjan was central to the flow and analysis of key intelligence from Afghan partner agencies with which he cultivated a close rapport, including the NDS and Afghan National Police.

Even if Sajjan did not know that those partners regularly used torture to interrogate detainees to produce some of the intelligence he subsequently handled, a commission would presumably want to understand why and how he could not know. This understanding would presumably inform a commission's views on whether others-like former generals Rick Hillier and Michel Gauthier-could plausibly have made detainee transfer decisions without knowing that individuals were being handed over to Afghan authorities when there was a substantial risk those authorities would engage in torture.

But the buck does not stop with Sajjan. Trudeau has also helped stonewall the creation of a commission and shield Sajjan.

Thus, while in India, Sajjan essentially claimed to be Mr. Everything for Operation Medusa, but back in Ottawa he led Dawson to believe he was essentially Mr. Nobody, a mere reservist working with police on "capacity building."

But the buck does not stop with Sajjan. Prime Minister Justin Trudeau has also helped stonewall the creation of a commission and shield Sajjan. After Sajjan rejected my petition, I wrote to Trudeau on Sept. 19, 2016 to explain why, in my view, Sajjan was in a conflict of interest. I asked Trudeau to remove Sajjan from the file and revisit the decision not to establish a commission.

I also explained that there is reason to be concerned that the Canadian Forces (CF) conducted off-the-books transfers of some captives to the Afghans. According to a 2010 Department of National Defence Board of Inquiry report, when a person is designated as a "detainee," various record-keeping and reporting obligations are triggered. But in at least some cases where prisoners were labelled as "Persons Under Control," no record was kept of the transfer and no report made to the International Committee of the Red Cross. My concern is that these instances may have constituted an on-the-ground practice that was encouraged or even created by CF

leadership. I aimed to impress upon Trudeau that this concern, amongst others, made a commission necessary. I have yet to receive a reply from Trudeau or anyone on his behalf.

On June 7, 2016, former prime minister Joe Clark, former New Democratic Party leader Ed Broadbent, former Ontario NDP leader Stephen Lewis, numerous academics, and others sent a letter to Trudeau, which also called for a commission into Canada's practices around detainee transfers in Afghanistan. Trudeau's response? A loud silence: not even the courtesy of an acknowledged receipt of a letter from a former prime minister.

We should not forget that Michael Ignatieff, Trudeau's predecessor, emphasized in December 2009 that it was a matter of Canada's honour to hold a commission of inquiry into these matters. The Liberals under Ignatieff also supported a Dec. 1, 2009 House of Commons motion from the NDP calling for such a commission, which was adopted by a 145–129 majority.

So yes, Sajjan must account for being less than forthcoming about his intelligence roles with the Conflict of Interest and Ethics Commissioner. At the same time, Trudeau owes the public a response to the calls he's received for a commission of inquiry. But he would do even better to actually call a commission. Honour demands it.

*Craig Scott is a law professor at Osgoode Hall Law School, York University, and former Member of Parliament for Toronto-Danforth and New Democratic Party Official Opposition Critic for Parliamentary and Democratic Reform.*

## References


1. https://petitions.parl.gc.ca/en/petition/details?petition=e-70