



MPCC File Nos: 2007-006, 2008-024 and 2008-042

MILITARY POLICE COMPLAINTS COMMISSION

IN THE MATTER OF the Afghanistan Public Interest Hearings before the Military Police Complaints Commission, pursuant to subsection 250.38(1) of the *National Defence Act*.

DECISION TO RECOMMEND FUNDING FOR LEGAL COUNSEL FOR THE B.C. CIVIL LIBERTIES ASSOCIATION

A. Overview

1. By Notice of Motion dated January 15, 2009 the complainant, the B.C. Civil Liberties Association, made a motion in writing requesting that this Commission recommend that the Government of Canada provide funding for legal counsel in the Afghanistan Public Interest Hearings.
2. On January 21, 2009 the Registrar invited all parties to respond to the motion. Only the Government of Canada did so. The Government of Canada took no position on the motion, but did request the Commission to specifically address three points. I address these three points in Section E below. Counsel for the Government of Canada also stated that if a recommendation is made, it will be considered by the Government of Canada.
3. For the reasons set out herein, I am recommending that the federal government provide funding to the B.C. Civil Liberties Association for the purposes of funding legal counsel, Mr. Paul Champ, to participate in the hearings.

B. The Test to be Applied

4. There is nothing in the *National Defence Act*¹ which governs this Commission, or in the *Rules of Procedure for Hearings before the Military Police Complaints Commission* or *Afghanistan Public Interest Hearings Rules*, regarding recommendations for the funding of counsel for complainants to participate in public interest hearings. I find, however, that this Commission has the discretion to recommend to the Government of Canada that funding be provided for a complainant's legal counsel.
5. The Federal Court, in the case of *Jones v. Canada (Royal Canadian Mounted Police Public Complaints Commission)*,² has held that the RCMP Public Complaints Commission has a discretion to recommend that the Government of Canada fund legal counsel to represent complainants at a public interest hearing held pursuant to the *Royal Canadian Mounted Police Act*³ (the "RCMP Act"). The Federal Court considered the powers and mandate of the RCMP Public Complaints Commission under Part VII of the *RCMP Act*. The Federal Court held that, although the *RCMP Act* did not confer on the Public Complaints Commission the power to directly pay the legal fees of a complainant, the *RCMP Act* did not preclude the Public Complaints Commission from making a funding recommendation to government.
6. In the *Jones* case, Justice Reed considered the mandate of the Public Complaints Commission and held that:⁴

The Commission has an obligation under subsection 45.45(5) to ensure that "the parties [which includes a complainant] and any other person" are afforded "a full and ample opportunity" to present evidence, to cross-examine witnesses and to make representations. If the Commission considers that for the purposes of the present inquiry, "a full and ample opportunity" can best be achieved by the complainants having counsel, then it is open to the Commission to recommend that the state fund counsel.

¹ R.S.C. 1985, c. N-5

² *Jones v. Canada (Royal Commission Public Complaints Commission)*, 1998 CanLII 8157 (F.C.); (1998), 162 D.L.R. (4th) 750.

³ R.S.C. 1985, c. R-10

⁴ *Jones, supra*, at para. 19

7. Justice Reed held that the decision was within the Public Complaints Commission's complete discretion, and the Commission had the authority to prevent duplication of representation and argument. She held that:⁵

The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel...they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.

8. I accept these findings of Justice Reed, and find them applicable to this motion. The *Jones* decision related to the APEC public interest hearings convened by the Public Complaints Commission under Part VII of the *RCMP Act*. I note that the legislative scheme with respect to those hearings is very similar to the legislative scheme governing public interest hearings convened by the Military Police Complaints Commission.
9. In addition to the factors identified by Justice Reed, I have also considered the funding decisions of Justice Dennis O'Connor in both the Walkerton⁶ and Arar⁷ Inquiries. Although those are public inquiries, there is a similar public interest issue, and the factors enunciated by Justice O'Connor make good sense. Justice O'Connor considered the following factors relevant to funding:
- (a) a party must be able to demonstrate that it would not be able to participate in the proceedings without such funding;
 - (b) the nature of their interest and proposed involvement in the proceeding;

⁵ *Jones, supra*, at para. 25

⁶ Ruling on Standing and Funding, *Report of the Walkerton Inquiry, Part One* (Ontario: Queen's Printer for Ontario, 2002) at Appendix E(ii)

⁷ Ruling on Standing and Funding, *Report of the Events Relating to Maher Arar, Factual Background* (Ontario: Public Works and Government Services Canada, 2006) at Appendix 3(B)

- (c) whether they have an established record of concern for and a demonstrated commitment to the interest they seek to represent;
- (d) whether they have special experience or expertise with respect to the issues in the Commission's mandate; and
- (e) whether the perspective or interest will be otherwise represented.

C. The B.C. Civil Liberties Association Motion

10. The B.C. Civil Liberties Association, one of the two complainants in this matter, has filed two affidavits in support of this motion. The first is an affidavit sworn by David Eby, a barrister and solicitor and Acting Director of the B.C. Civil Liberties Association. The B.C. Civil Liberties Association was incorporated in 1963, and its object is to “promote, defend, sustain and extend civil liberties and human rights in British Columbia and Canada.” His evidence is that the B.C. Civil Liberties Association has limited resources, and relies on *pro bono* counsel to represent it in litigation matters. He states that due to the length and complexity of the hearing, the BCCLA has been unable to retain *pro bono* counsel before the Commission. Mr. Eby's evidence is that unless the B.C. Civil Liberties Association is able to secure counsel, they will be unable to fully participate in the hearing. He also states that: “The BCCLA will coordinate with other parties participating in the hearing. We expect that such coordination will streamline our preparation in a timely manner and will make efficient use of the Commission's time.”
11. The second affidavit is affirmed by Francine Patterson, legal assistant at Raven, Cameron, Ballantyne, & Yazbeck LLP. Ms. Patterson's evidence is that:
 - (a) Mr. Paul Champ has acted as legal counsel for the complainants Amnesty International and the B.C. Civil Liberties Association in several legal matters related to Afghan detainee issues. These include an application and several motions in the Federal Court regarding the extraterritorial application of the *Charter of Rights and Freedoms* to the CF in Afghanistan, and the appeal to the

Federal Court of Appeal. Mr. Champ has undertaken this work on a *pro bono* basis, and he has provided more than 570 *pro bono* hours on the file;

- (b) Mr. Champ has also acted on a *pro bono* basis to date for the two complainants in the MPCC matters and the two associated Federal Court applications, and has provided more than 80 billable hours on these matters;
 - (c) The evidentiary record before the Federal Court in the detainee *Charter* challenge included eight volumes of material, much of which involves issues which may broadly be defined as relating to the handling and transfer of CF detainees in Afghanistan, including Canadian government documents, reports prepared by international bodies regarding human rights practices of Afghan authorities, and issues relating to allegations of torture and abuse of prisoners;
 - (d) The Federal Court of Appeal proceedings involved extensive materials including domestic and international legislation and jurisprudence, treaties, and articles on issues which include international humanitarian law, international human rights law and Canadian domestic law in relation to the Canadian mission in Afghanistan; and
 - (e) Mr. Champ has written and spoken on issues including international human rights law, the use of military force and human rights, and the law of torture.
12. None of the parties sought to cross-examine on these affidavits, and none of the parties introduced evidence which contradicted the information contained in these affidavits.
13. The B.C. Civil Liberties Association makes the following proposal for legal funding:
- (a) Counsel will be Mr. Paul Champ, who has extensive knowledge of many of the legal and factual issues likely to be engaged. Mr. Champ's normal hourly rate is \$225, but he would be funded at a rate of \$115 per hour;

- (b) 35 hours of preparation time in advance of the hearings;
 - (c) All hours at the hearings, plus an additional 2 hours per day for hearing preparation; and
 - (d) 40 hours to prepare final submissions, including drafting written submissions and oral submissions if required.
14. The B.C. Civil Liberties Association submits that funding for legal counsel “will improve the quality, efficiency and expediency of the proceeding and will assist the MPCC in discharging its mandate.”
15. I note that the B.C. Civil Liberties Association was granted standing to participate as an intervenor at the Arar Inquiry. In his decision, Justice O’Connor noted the long history and involvement of the B.C. Civil Liberties Association with national security and intelligence, anti-terrorism legislation and police accountability. The B.C. Civil Liberties Association was grouped in a coalition with other civil liberties and democracy/sovereignty groups. On the issue of funding, Justice O’Connor held:⁸

I consider the BCCLA as a prime candidate to receive a grant of funding. I was very impressed with their presentation and their history of protecting civil liberties in a national security context.

D. Submissions of the Government of Canada

16. Counsel for the Government of Canada filed a letter with the Commission dated January 30, 2009. The Government took no position on the motion, and provided no evidence.
17. The letter states in part:

⁸ Ruling on Standing and Funding, *Report of the Events Relating to Maher Arar, Factual Background* (Ontario: Public Works and Government Services Canada, 2006) at Appendix 3(B), p. 635.

My client will consider the recommendations of the Commission, if the Commission decides to make one. Should that be the case, it would be of assistance if the Commission articulated why, in its opinion, funding this complainant would be in the public interest when:

- Part IV of the *National Defence Act* assigns to the Commission the responsibility of investigating lawful complaints, not to complainants.
- The *Rules of Procedure for Hearings before the Military Police Complaints Commission* and the *Afghanistan Public Interest Hearings Rules* entrust to Commission counsel a predominant role in the hearing process.
- The Commission is staffed to conduct the hearings. In fact, the Government has acceded to the request made by the Commission for approximately \$4,000,000 in additional funding for that purpose.

18. I address these questions below.

E. Decision to Recommend Funding

19. I exercise my discretion to recommend that the Government of Canada fund legal counsel for the B.C. Civil Liberties Association, for the reasons set out below.

20. I find that the B.C. Civil Liberties Association has demonstrated that it would not be able to participate in the proceedings without such funding. Mr. Eby's evidence is that the B.C. Civil Liberties Association "constantly struggles to find adequate finances to cover its costs," and is unable to find *pro bono* counsel for the lengthy and complex hearings anticipated here. I note that Mr. Champ and the firm of Raven, Cameron, Ballantyne and Yazbeck LLP have, in the highest traditions of the legal profession, dedicated a great deal of *pro bono* time acting for the complainants, and are to be commended for that commitment to the provision of *pro bono* legal services. However, given the complexity and length of the Afghanistan Public Interest Hearings, it is unrealistic to require a participant to locate counsel able to dedicate the time and resources on a *pro bono* basis.

21. In terms of the nature of the party's interest and proposed involvement in the proceeding, the B.C. Civil Liberties Association is a complainant and as such is a party to these proceedings with participatory rights as set out in the *National Defence Act*, the *Rules of Procedure for Hearings before the Military Police Complaints Commission* and the *Afghanistan Public Interest Hearings Rules*. Given the nature of the issues and the length and complexity of the hearings, I find that for the purposes of these public interest hearings, a "full and ample" opportunity to participate is best achieved by the complainant having legal counsel.
22. I find that the B.C. Civil Liberties Association has an established record of concern for and a demonstrated commitment to police accountability and civil liberties issues in general, as well as specific concern for issues regarding the treatment of detainees in Afghanistan. The latter concern is demonstrated by the *Charter* challenge in Federal Court in which it has participated, the two complaints it has jointly lodged before this Commission, and its helpful participation in the Commission's procedures to date.
23. I also find that the B.C. Civil Liberties Association, as represented by Mr. Champ, has special experience or expertise with respect to issues relevant to the Afghanistan Public Interest Hearings including police accountability, domestic and international humanitarian law and human rights laws, criminal law, and the Canadian mission in Afghanistan including the transfer of detainees.
24. I have also considered the factors identified by Justice Reed in the *Jones* decision. All of the other parties are represented by conscientious, experienced and highly competent legal counsel. Legal representation of the complainants, particularly by counsel with knowledge of the factual and legal issues engaged, will improve the quality, efficiency and expediency of the proceedings. I expect that counsel for the B.C. Civil Liberties Association will assist in narrowing the issues and evidence, and will fully cooperate in expeditious conduct of the proceedings.
25. I am concerned that Amnesty International not be separately represented in this matter, as in my view this would duplicate the views already represented by the B.C. Civil Liberties

Association. Justice Reed in the *Jones* decision noted that the Public Complaints Commission had the authority to prevent duplication of representation and argument. In that case, she noted that funding could be provided to counsel on the condition that they also represent other students who might wish to be represented. Justice O'Connor formed "coalitions" for the purpose of standing and funding, to avoid the duplication of representation and argument.

26. Given that Amnesty International and the B.C. Civil Liberties Association have jointly acted through one counsel in the Federal Court and Federal Court of Appeal *Charter* proceedings, as well as in the MPCC-related proceedings to date, I expect that the two complainants will continue to act together. It is a condition of my funding recommendation that Amnesty International not separately appear through counsel or any agent. If they seek to do so, I will recommend that funding be terminated for the B.C. Civil Liberties Association.
27. The Government of Canada requested that I address three issues. The first question posed by counsel for the Government of Canada is why funding this complainant would be in the public interest when: "Part IV of the National Defence Act assigns to the Commission the responsibility of investigating lawful complaints, not to complainants." On this point, I note that the funding will be for legal counsel to the complainant at the hearing, and not during the investigation.
28. There are certain participatory rights at hearings which are to be provided to complainants. Section 250.44 of the *National Defence Act* provides that:

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

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

There is no obligation under the *National Defence Act* to provide these participatory rights to complainants at the investigation phase.

29. Thus, the purpose of recommending funding for the complainant, particularly when all other parties are represented by experienced legal counsel, is to assist the complainant in effectively exercising participatory rights at the hearing. In this case, the Commission considers that the “full and ample opportunity” can best be achieved by the complainant having legal counsel.
30. The second question posed by the Government is why counsel would be required when the *Rules of Procedure for Hearings before the Military Police Complaints Commission* and the *Afghanistan Public Interest Hearings Rules* entrust to Commission counsel a predominant role in the hearing process. I agree that the Rules do entrust Commission counsel with a predominant role in the hearing process. I expect Commission counsel to lead the evidence in a fair, thorough and expeditious manner. That being said, counsel for all of the parties may be of assistance to the Commission, particularly when raising issues within their area of expertise and background. I expect the B.C. Civil Liberties Association to make a contribution to the work of the Commission from the position of their particular interest and expertise in the issues. I stress that I expect the complainant, as represented by Mr. Champ, not to duplicate the work of Commission counsel, but to assist Commission counsel in the fact-finding work of the Commission throughout the hearings.
31. The final issue upon which the Government of Canada expressed a desire for comment is why the Government should fund counsel for the complainant B.C. Civil Liberties Association when the Commission is staffed to conduct the hearings and the Government has provided the Commission with funding for the hearings. On this point, I note that the Commission does not have the authority to fund counsel for the complainants. Justice Reed held in the *Jones* case that in a similar legislative context, the Public Complaints Commission does not have the authority to provide funding for counsel to complainants directly. On the question of whether the Public Complaints Commission had the authority to issue an order to provide funding she held as follows:⁹

⁹ *Jones, supra*, para. 5

It seems reasonably clear that the Commission does not have such authority. This follows in large measure from the terms of subsection 45.45(13) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (“the *RCMP Act*”). That subsection provides for payment by the Commission of certain expenses incurred by complainants in certain circumstances. The payment of legal fees to allow them to be represented by counsel before the Commission is not among these. The presence of authority to pay for some expenses with an absence of authority to pay for legal fees leads to the conclusion, by implication, that the Commission does not have that authority to pay for the latter. In addition, the authority to pay amounts from the public purse is not usually a power that exists unless expressly conferred.

32. Section 45.45(13) of the *RCMP Act* referred to by Justice Reed is almost identical to section 250.46 of the *National Defence Act*, which applies to the Afghanistan Public Interest Hearings. This Commission has the authority under the *National Defence Act* to pay travel and living expenses of complainants appearing before the Commission. By implication, the Commission does not have the authority to pay for legal fees for complainants.
33. As a result, if the beneficial aspects of funding legal counsel for the B.C. Civil Liberties Association are to be attained, the funding will have to be provided by the Government of Canada on recommendation of this Commission.

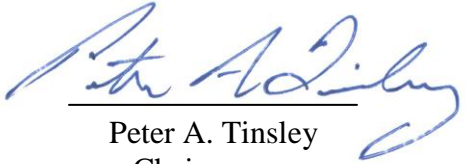
F. Conclusion

34. For the reasons set out above, I recommend that the Government of Canada fund legal counsel to the B.C. Civil Liberties Association on the following terms:
 - (a) Counsel is to be Mr. Paul Champ, who has extensive knowledge of many of the legal and factual issues likely to be engaged;
 - (b) Mr. Champ’s normally hourly rate is \$225. I recommend that he be funded at a rate of \$115 per hour in accordance with the B.C. Civil Liberties Association proposal, which in my view is a reasonable rate. Mr. Champ was called to the Bar of Saskatchewan in 2000. I have reviewed the Department of Justice guidelines

on remuneration for legal agents, and the rate of \$115 per hour falls within these guidelines;

- (c) 35 hours of preparation time in advance of the hearings;
 - (d) All hours at the hearings, plus an additional 2 hours per day for hearing preparation to a maximum of ten hours per day in accordance with Department of Justice Guidelines for legal agents;
 - (e) 40 hours to prepare final submissions, including drafting written submissions and making oral submissions if required;
 - (f) Counsel shall offer to provide representation to Amnesty International, if the B.C. Civil Liberties Association will so consent; and
 - (g) If Amnesty International seeks to appear separately represented by counsel or an agent, then funding for counsel for the B.C. Civil Liberties Association should be terminated.
35. I do not have the authority to order the Government of Canada to fund counsel for the B.C. Civil Liberties Association. However, since in my view it will both enable the complainant to fully participate and will assist the Commission, I recommend that the Government of Canada fund legal counsel for the reasons and on the terms I have set out in this decision.

DATED at Ottawa, Ontario this 5th day of February, 2009.


Peter A. Tinsley
Chairperson