



MILITARY POLICE COMPLAINTS COMMISSION

IN THE MATTER of a conduct complaint under section 250.18 of the *National Defence Act* by Mr. Shaun Fynes and Mrs. Sheila Fynes.

RULING ON REQUEST FOR ADJOURNMENT OF CLOSING SUBMISSIONS

MPCC 2011-004 (Fynes) Public Interest Hearings pursuant to
Section 250.38(1) of the *National Defence Act*

On November 16, 2012, the Commission received a letter from Col (ret'd) Michel Drapeau, counsel for the complainants, requesting that closing submissions be delayed until a decision has been made about this Commission's recommendation for additional funding for the complainants' legal representation. In the alternative, Col (ret'd) Drapeau requested that the date for oral closing submissions remain January 9, 2013, with the written submissions to be filed on January 2, 2013, and written reply submissions to be dispensed with.

The presentation of the closing submissions had initially been scheduled for November 15, 2012. It had been agreed that each Party would produce written submissions of no more than 100 pages by November 5, 2012, and that both Parties could file written submissions replying to the other Party's submissions by November 9, 2012. Following a request for an adjournment made by Department of Justice counsel Ms. Elizabeth Richards on behalf of the subjects of the complaint, I made an order on November 1, 2012, to adjourn the presentation of closing submissions to January 9, 2013, with the dates for serving and filing of the written submissions and reply submissions to be determined once consultation with the Parties had taken place. The request for adjournment had been opposed by the complainants, and in determining the new date for the closing submissions, I took into account the scheduling issues they raised.

On October 30, 2012, I issued a recommendation that the Government of Canada grant additional funding to the complainants for the preparation of written closing submissions, reply submissions and oral submissions. This recommendation was transmitted to the Minister of National Defence on the same day. At this time, no response to the recommendation has been provided to this Commission or to the complainants.

In his adjournment request, Col (ret'd) Drapeau emphasized that considerable work has already been completed in preparation of written closing submissions, with the anticipation that a positive response will be provided by the Minister of National Defence to the Commission's recommendation for additional funding. He indicated that the funding recommendation has been made in recognition of the complexity and the extent of the work remaining, and of the need to ensure that the complainants could continue to participate fully and meaningfully in the Public Interest Hearing. He advised that he is confident that the written closing submissions will be completed, served, and filed without delay. However, he argued that it would nevertheless be unfair and inequitable to expect a relatively small law office to continue to undertake further unpaid work preparing the written reply submissions and the oral submissions required in such a complex matter given that there is no assurance that any additional funding will be forthcoming.

Department of Justice counsel Ms. Richards provided submissions in response to this request on November 23, 2012. She argued that the request was inconsistent with Col (ret'd) Drapeau's prior representations to the Commission that the closing arguments must proceed as quickly as possible. In particular, she stated that the request contradicted the complainants' strong opposition to the subjects of the complaint's October 23, 2012 request for an adjournment of the closing submissions. She noted that Col (ret'd) Drapeau had not requested any postponement of the proceedings at the time the recommendation for additional funding was sought, and that it was clear he was prepared to proceed to closing arguments without any guarantee that such funding would be provided. In light of this, and the fact that counsel for the complainants had previously indicated that written closing submissions were very nearly complete, Ms. Richards concluded that there was no basis for requesting any delay of the closing arguments. She submitted that the closing submissions should take place as scheduled on January 9, 2013.

In terms of the timing for filing and serving written submissions, Ms. Richards agreed that the submissions could be filed on January 2, 2013, as suggested in Col (ret'd) Drapeau's request. She did not, however, consent to dispensing with the written reply submissions, as requested by the complainants in the event that the submissions were not postponed. Ms. Richards suggested that reply submissions could be filed by noon on January 8, 2013. Ms. Richards added that she would be prepared to proceed on the basis of written submissions only, if preparation for oral submissions was too onerous for counsel for the complainants.

On November 23, 2012, Col (ret'd) Drapeau advised that his position with respect to the suggestions made by Ms. Richards was that, owing to the uncertainty regarding supplemental funding, the written closing submissions should be delivered by January 2, 2013, the written reply submissions should be dispensed with, and the oral submissions should proceed on January 9, 2013.

DECISION

Having considered the submissions of both Parties, I have decided to deny the request for an adjournment of the closing submissions until a decision is made about this Commission's recommendation for supplementary funding.

As indicated in my decision to recommend that additional funding be granted to the complainants for the preparation of written and oral closing submissions, I continue to be of the view that such funding is essential to ensure that the complainants' statutory right of participation can be exercised fully and to preserve the integrity, fairness and appearance of fairness of these proceedings. However, it is also important, and mandated by statute, that this Hearing proceed as expeditiously as considerations of fairness permit.¹

The complainants' initial Motion to this Commission for a recommendation that public funding be provided for their legal representation during this Public Interest Hearing was made in September 2011. I granted this Motion on October 26, 2011, and issued a recommendation to the Government of Canada to provide funding as requested by the complainants. The funding requested included 40 hours of pre-hearing preparation for two counsel for the complainants, as well as time spent attending the Hearing, with two additional hours of preparation for each day of Hearing. On March 16, 2012, the Minister of National Defence advised me that this recommendation would be implemented. As a result, funding was provided to the complainants in accordance with their request. Unfortunately, the complainants' request did not include any hours for preparation of closing submissions.

In the summer of 2012, consultation took place with the Parties to determine a preliminary schedule for the filing of written closing submissions and the presentation of oral closing submissions. It was at that time that the Parties agreed to the initial schedule for closing submissions, with oral submissions then scheduled for November 15, 2012. Nevertheless, it was not until October 19, 2012, that the complainants filed a Motion seeking a recommendation that additional funding be provided by the Government of

¹ *National Defence Act*, R.S.C., 1985, c. N-5, s. 250.14.

Canada for the preparation of closing submissions. I made that recommendation on October 30, 2012.

At this time, it is not known when a decision concerning additional funding will be made by the Government of Canada, or what that decision will be. It would no doubt be preferable if a funding decision was made in the near future and if the additional funding recommended was granted, thereby ensuring that the complainants can exercise fully their right to participate. However, these proceedings cannot be held in abeyance indefinitely while the supplementary funding decision is awaited.

The complainants and the subjects have equal, substantial and direct interests in the Public Interest Hearing. Fairness to one Party cannot be achieved at the expense of the other. In this instance, it would not be fair to the subjects of the complaint to grant an indefinite adjournment of the closing submissions, particularly in light of the fact that the current uncertainty as to funding is in part the result of the complainants' own decisions about the funding recommendations they requested, and the timing of such requests. Serious allegations have been made about the conduct of the subjects of the complaint, and they do have a right to see these proceedings completed as expeditiously as considerations of fairness will permit.

I also note that Col (ret'd) Drapeau has advised this Commission in his submissions opposing a previous request for adjournment that most of the work to prepare the complainants' written closing submissions has been completed.

In light of all of these considerations, I am of the view that, balancing both Parties' entitlement to fair and expeditious proceedings, it would not be appropriate to adjourn the closing submissions. As a result, oral closing submissions will be heard as scheduled on January 9, 2013.

In light of the uncertainty surrounding the funding issue, the complainants have asked that the written submissions be filed on January 2, 2013. This request was not opposed by counsel for the subjects, and is reasonable. The complainants have also requested, should the submissions not be postponed entirely, that written reply submissions be dispensed with, and that any reply submissions be made during the oral closing submissions. However, the subjects of the complaint have asked for the right to make written reply submissions. In light of the complexity of these proceedings, the seriousness of the allegations involved, and the anticipated length of the written submissions, this request is also reasonable. The complainants' current predicament with respect to funding, while unfortunate, should not preclude the subjects from receiving their own opportunity to be heard.

As a result, both Parties will be provided with an opportunity to file and serve written reply submissions, but will not be under any obligation to do so. In this manner, the subjects will be able to present written reply submissions, and the complainants will be free to present their own written reply submissions, or to make any necessary reply submissions during the scheduled oral submissions. In my view, this strikes a fair and practical balance between the expediency sought by the subjects, and the concerns raised by the complainants about the burden of preparing for the submissions phase without any guarantee of supplementary funding.

Finally, I note that Department of Justice counsel mentioned the possibility of dispensing with oral submissions if preparation was too onerous for counsel for the complainants. This suggestion was not accepted by the complainants. In light of the complexity of these proceedings and the substantial and serious interest of the complainants in this matter, they should receive an opportunity to present oral closing submissions as they have requested.

For these reasons, closing submissions will proceed on the following terms. Written submissions not exceeding 100 pages shall be served and filed by each of the Parties by 4:00 pm on January 2, 2013. Each of the Parties may serve and file written reply submissions not exceeding 30 pages by 12:00 pm on January 8, 2013. Oral submissions will be heard on January 9, 2013. Each Party will be allocated up to three hours to make their submissions. The Parties may make reply submissions within the time allotted to them for the oral submissions.

IT IS HEREBY ORDERED that the request for an adjournment of the closing submissions is denied. The request in the alternative to dispense with written reply submissions is denied. The parties are to serve and file written closing submissions by 4:00 pm on January 2, 2013. The parties may serve and file written reply submissions by 12:00 pm on January 8, 2013. Oral closing submissions will be heard on January 9, 2013, commencing at 9:00 am.

DATED at Ottawa, Ontario this 30th day of November, 2012.



Glenn M. Stannard, O.O.M.
Chair