



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 October 23, 2012, the Commission received a letter from Department of Justice counsel Ms. Elizabeth Richards, requesting an adjournment of the closing submissions to be presented following the evidence heard in this matter.

After consultation with counsel for all Parties, the presentation of the closing submissions had been scheduled for November 15, 2012. It had also been decided that each Party would produce written submissions of no more than 100 pages by November 5, 2012, and that both Parties may file written submissions replying to the other Party's submissions by November 9, 2012.

In her October 23 letter, Ms. Richards indicated that the subjects of the complaint cannot confirm that all relevant evidence has been heard and that the evidentiary portion of the Hearing can be closed. She explained that additional time was required to review the voluminous evidence called to date in order to assess whether additional steps were necessary and, in particular, whether a request would be made for additional evidence to be heard. Ms. Richards argued that her clients' "right to make meaningful answer and defence requires that they not be required to prepare final submissions at the same time that these issues are being considered."

Ms. Richards indicated that she would be in a position to provide information about the subjects' proposed course of action by November 16, 2012, and would then be in a position to discuss scheduling if further steps or the calling of additional evidence were sought. In the event the subjects of the complaint determined they did not require further evidence or other steps, Ms. Richards requested that the closing submissions be rescheduled to a convenient date after December 10, 2012. She also requested that a new



schedule for the prior exchange of written materials be set, and that this schedule allow the subjects of the complaint sufficient time to prepare those materials. Specifically, she requested a period of no less than 3 weeks between the date on which the decision about whether to request further evidence or take other steps was made and the filing of the written submissions.

On October 26, 2012, counsel for the complainants, Col (ret'd) Michel Drapeau, advised that he "vehemently opposed" the request for the adjournment. He noted that the non-adversarial nature of the proceedings meant that its focus was not to try a case or a charge against any person or institution, but to inform the public of the facts inquired into by the Commission. He submitted that, in light of the extensive evidence amassed by the Public Interest Hearing (including over 90 witnesses and many thousands of pages of documentary evidence) over a period of six months, it would be neither reasonable nor fair to delay the proceedings while the Department of Justice considered whether or not it would present evidence that could potentially be of assistance to the Commission in making its findings and recommendations.

Col (ret'd) Drapeau contended that the purpose of closing submissions is "to frame the evidence in the best possible light, in the representation of the interests of the respective parties." He also noted that it is not the Commission's role to punish misconduct – implying that the subjects of the complaint are not placed in jeopardy by any potential findings and recommendations of this Public Interest Hearing. Col (ret'd) Drapeau argued, moreover, that the Department of Justice's duty to fully represent its clients was muddied by the fact that the Department represented more than the thirteen subjects of the complaint, but also "the seventy-or-so" witnesses who testified and were entitled to Department of Justice representation under Treasury Board policies as current or former employees of the Canadian Forces or the Department of National Defence. In his submission, the issues that may ensue from this arrangement do not give rise to grounds for delay.

Col (ret'd) Drapeau argued that the subjects of the complaint have not been denied fairness; instead, they have been given the opportunity to present both documentary evidence as well as testimony and, through their counsel, the right to cross-examine witnesses and to be cross-examined by their counsel following their testimony in chief. He submitted that the subjects did not, as characterized by Ms. Richards, have "a right to make a meaningful answer and defence," but instead the right "to have the evidence presented in the most favourable light, based on the evidence before the Commission."

Col (ret'd) Drapeau concluded by noting that his small office of two lawyers had already completed some ninety percent of the written closing submissions, and expressed surprise that an organization the size of the Department of Justice required more time to complete its submissions. He also advised the Commission that, in part due to reorganization of work related to his participation in this matter, his availability in December 2012 would be extremely limited, if not non-existent, as court matters had been scheduled throughout the month.

DECISION

I have decided to grant the request for an adjournment. The date for presentation of closing submissions will be set to January 9, 2013.

As I have often reiterated in the course of these proceedings, it is of importance, and indeed mandated by statute, that this Hearing proceed as expeditiously as considerations of fairness permit.¹ It is also necessary that the Hearing be governed by fairness and that its conduct be perceived to be fair.

Having assessed the elements of fairness and expediency in conjunction with the submissions of the Parties, I am of the view that fairness requires a short adjournment of the closing submissions as requested by counsel for the subjects of the complaint. I am also of the view that fairness to one Party cannot be achieved at the expense of the other. Hence, in order to ensure that the adjournment does not cause hardship to counsel for the complainants, I have decided to select a date in January rather than in December as was requested.

While the interests of the subjects in these proceedings do not approach those of an accused facing criminal charges, they are entitled to basic procedural fairness, as well as respect for the statutory right of participation afforded to all Party in Public Interest Hearings.

The subjects of the complaint have a serious reputational interest at stake. As Parties before the Hearing, they are entitled to be afforded a "full and ample opportunity, in person or by counsel, to present evidence, to cross-examine witnesses and to make representations at the hearing."² In order to exercise this right of participation, they have requested time to analyze the totality of the evidence to determine whether they consider that additional steps or evidence are necessary. This request is reasonable.

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

² *National Defence Act*, R.S.C., 1985, c. N-5, s. 250.44.

Considering that there were 61 days of evidence, 91 witnesses and thousands of pages of exhibits, it is not unreasonable for the subjects of the complaint to require time to assess the evidence in order to determine whether they wish to request that additional evidence be called or that other steps be taken. If there is additional evidence that this Commission needs to hear in order to make fully informed findings and recommendations about the matters raised in this complaint, it is important that this evidence be heard. This is paramount both to the quality of the Hearing process and to the fairness of the proceedings.

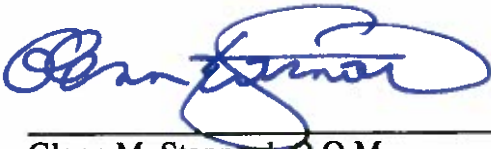
Conversely, it is not unreasonable for counsel for the complainants to have rearranged their schedule based on the previously scheduled dates for the closing submissions. As such, it is important to ensure that fairness to the subjects is not achieved at the expense of the complainants. For this reason, I have taken into account the complainants' counsel limited availability in December, and the hardship that would be involved in having to review lengthy submissions from the other Party and prepare reply submissions during a short period, while having to appear before other courts and tribunals on other matters at the same time. For this reason, I have concluded that the closing submissions should be postponed to January.

Certainty to the Public Interest Hearing process is also important. Any delay must be reasonable and consistent with both the statutory right of participation and the statutory requirement that this Hearing proceed as expeditiously as considerations of fairness permit. For these reasons, the scheduling of closing submissions cannot be contingent upon decisions by Department of Justice counsel about whether to take additional steps or request that additional evidence be called. Further, if additional evidence is to be requested, the Commission must be advised as soon as possible, in order to ensure that the process can continue to progress. For this reason, counsel for the subjects should advise the Commission as soon as possible, and no later than November 16, 2012, of their proposed course of action.

For all of these reasons, I have decided to set January 9, 2013 as the date for the presentation of the closing submissions before the Commission. I will reserve any Order on the schedule for the exchange of written submissions, in order to allow for consultation to take place with the Parties.

IT IS HEREBY ORDERED that the request for an adjournment of the closing submissions is granted. The date to present closing submissions will be set for January 9, 2013, at 9:00AM. Each Party will have 3 hours to present their submissions. It is also ordered that counsel for the subjects of the complaint will advise the Commission no later than November 16, 2012, at 4:00PM as to whether or not the subjects request that additional evidence be called or other steps be taken.

DATED at Ottawa, Ontario this 1st day of November, 2012.

A handwritten signature in blue ink, appearing to read "Glenn M. Stannard", written over a horizontal line.

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