



## 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 HEARING

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

On September 6, 2011, I issued a decision to conduct a Public Interest Hearing into this complaint. Following a Case Conference held on October 19, 2011, the date for the commencement of the Hearing was set for February 27, 2012. At the Case Conference, a motion was brought by Col (ret'd) Michel Drapeau, counsel for the complainants, requesting this Commission recommend that public funding be provided for their legal representation during the Hearing to be held into their complaint. On October 26, 2011, I issued a decision recommending that the Government of Canada grant funding for the complainants' legal representation. I transmitted my recommendation to the Honourable Tony Clement, President of the Treasury Board of Canada, on the same day.

On December 7, 2011, the Commission received a letter from Col. (ret'd) Drapeau, advising that no funding decision had yet been made; he requested that the Commission seek an indication from the Government of Canada as to when it would make this determination. Col. (ret'd) Drapeau wrote that if no decision was forthcoming, he would have no choice but to bring a motion to delay the commencement of the Hearing. On December 13, 2011, I wrote to the Honourable Tony Clement, to apprise him of Col. (ret'd) Drapeau's concerns and provide a copy of his letter. To date, no decision has been made by the Government of Canada on the matter.

On December 30, 2011, the Commission received a letter from Col. (ret'd) Drapeau, requesting that the commencement of the Hearing be adjourned until the later of: a) two months from full disclosure; or b) two months from a decision regarding funding. A Case Conference was held on January 17, 2012, to hear submissions on the matter and to receive updates on the pre-hearing preparation process.

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Three compelling factors are central to the motion: delay, fairness to the parties, and disclosure. All three must be balanced carefully.

Col. (ret'd) Drapeau advised the Commission that, as a retired couple with a son living with autism, the complainants have no spare income that would enable them to meet the enormous expense required to exercise their legal rights regarding the death of their eldest son, Cpl. Stuart Langridge. He argued that the uncertainty regarding public funding made it impossible for him to invest the time required to review the materials already disclosed, and that funding was necessary if the complainants were to fully participate in the Hearing. He added that the pending disclosure of further documents only compounded the complexity of the proceedings and the resulting need for legal representation. He submitted that it would be unfair if the grieving parents who were at the heart of the complaint were the only party at the Hearing without funded legal representation.

Regarding concerns about delay, Col. (ret'd) Drapeau emphasized that the complainants had a singular interest in seeing the Hearing proceed forthwith, since they had sought answers about this matter since 2008. Nevertheless, he contended that the adjournment was necessary because the complainants would be relegated to being mere spectators unless they had legal counsel acting on their behalf at the Hearing to cross-examine witnesses, make submissions, and to introduce evidence where appropriate. An adjournment would permit them to await the funding decision and the additional disclosure, and permit their counsel to adequately prepare for the Hearing in the event that public funding was provided.

Department of Justice counsel Ms. Elizabeth Richards, representing the subjects of the complaint, opposed the motion and argued that fairness required an expeditious commencement of the Hearing. She contended that her clients were in fact the party with the greatest interest in having the Hearing commence forthwith. This was because the subjects faced serious allegations being heard in a public forum, and they were in personal jeopardy of negative findings being made, or of disciplinary proceedings being taken against them. She emphasized that the Hearing was not meant to be an adversarial and contentious process but an investigative, fact-finding one, and argued that this minimized any unfairness that might be caused by the absence of funded counsel acting for the complainants. The interests of the complainants would therefore be satisfied by the fact that Commission counsel will present the evidence fairly and accurately.

With respect to delay, Ms. Richards was also concerned about the fact that a two-month adjournment would take the Hearing schedule into the Canadian Force's active posting

season, which generally runs from the end of June until the end of August. This would create considerable disruption and difficulty for her clients, many of whom would be expected to move to new locations with their families during this time. She submitted that her clients understandably want the opportunity to explain how they conducted themselves, and to attempt to clear their names, before the deployment period begins.

In terms of disclosure, Ms. Richards argued that it was rare in her experience that full disclosure would be made well in advance of the commencement of a hearing. New documents frequently emerge before a hearing begins, and even during the proceedings as new information comes to light. She remarked that it is reasonable to expect experienced counsel to manage such materials as they arise, and respond accordingly.

Finally, Ms. Richards submitted that, if the Commission were to grant an adjournment, it should be a brief one, of one month at the most, with a new date fixed immediately in order to provide certainty for her clients.

Commission counsel and counsel for the Canadian Forces Provost Marshal (CFPM) provided updates on the documentary disclosure process. They advised the Commission that at present, most of the materials in the Military Police files for these investigations have been disclosed to the Parties, and that some revisions to the redactions and the production of a set of additional annexes are expected to be produced soon. As for the additional disclosure requested by the Commission, a significant number of documents have already been received and disclosed to the Parties. The total volume of the outstanding materials is not known at this time, as the documents still need to be reviewed for redactions and then assessed by Commission counsel for relevance. Commission counsel advised that it is expected that all additional disclosure materials should be received by mid-February.

I have decided to grant the request for an adjournment in part, and to postpone the commencement of the Public Interest Hearing to Tuesday, March 27, 2012.

The Commission is directed by statute to "deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit."<sup>1</sup> I agree with the subjects that delays should be minimized as much as possible. However, I also agree that it is important for the complainants to have certainty on the question of public funding and to review the materials that have been produced, and will be produced, if they are to meaningfully participate in the Hearing. Fairness is generally not served by delay, but this must be balanced against the Parties' right to participate fully.

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

The complainants and the subjects have equal, substantial and direct interests in the Hearing, and Parliament has granted them full and equal rights to participate.

Not only must the hearings be governed by fairness, but the conduct of the hearings must be perceived as fair. As stated in the October 26, 2011 funding decision, the complainants will have no choice but to appear at the Hearing unrepresented unless they receive public funding. This would produce a situation in which one party is represented by highly qualified counsel at public expense while the other party is without legal representation. Commission counsel noted during the Case Conference, furthermore, that all current and former Government of Canada employees identified as potential witnesses are entitled to legal representation at public expense. As pointed out by Ms. Richards, this is an employment entitlement for the subjects and the witnesses. However, this disparity of resources could create an appearance of unfairness, and could negatively impact on both the hearing process and on public confidence in this Commission's independent oversight role.

On January 16, 2012, the Commission received a letter from Department of Justice counsel Alain Préfontaine; he advised the Commission that Government is still considering the Commission's funding recommendation. The Commission hopes that a decision on public funding is imminent. In these circumstances, a brief adjournment that permits the complainants to await the funding decision and to make arrangements that enables them to participate is appropriate.

An additional consideration is that the outstanding disclosure materials will not likely be produced before mid-February, 2012. Given the volume of documents in consideration, it is likely that new and relevant materials will be identified and, therefore, the parties will all require time to review these new documents. Finally, as a practical matter, the exigencies of scheduling counsel and witness appearances during Ontario and Quebec's respective and divergent March break periods would likely have required some period of adjournment in any event.

Balancing all of the above factors leads the Commission to the conclusion that a brief adjournment of one month is consistent with the competing concerns surrounding fairness, disclosure, and delay. However, it must emphasize that, absent extraordinary circumstances, the proceedings will move with all due speed after the adjournment. The Hearing will and must proceed expeditiously. The Parties should be prepared to proceed accordingly.

**IT IS HEREBY ORDERED** that the request for an adjournment of the Public Interest Hearing is granted in part, and the commencement of the Hearing is rescheduled to Tuesday, March 27, 2012, at 9:00 AM.

DATED at Ottawa, Ontario this 23<sup>rd</sup> day of January, 2012.



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Glenn M. Stannard, O.O.M.  
Chairperson