



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 recommendation that the Government of Canada grant funding for the complainants' legal representation.

On December 30, 2011, the Commission received a letter from Col (ret'd) Drapeau, requesting that the commencement of the Hearing be adjourned pending full disclosure or a decision regarding public 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. That motion was granted in part; I ordered a one month adjournment with the hearings set to commence March 27, 2012.

On March 12, 2012, Col (ret'd) Drapeau informed the Commission that, due to the fact that no funding decision had yet been made, he was no longer in a position to represent the complainants at the Hearing. Col (ret'd) Drapeau indicated that he had represented the complainants before the Commission since September 2011 on an entirely *pro bono* basis, but could not continue to invest the time and resources that would be required to represent them at complex public hearings spanning many weeks. He indicated that he was forced to withdraw his legal representation accordingly

On March 16, 2012, I received a letter from the Honourable Peter MacKay, Minister of National Defence, advising that he would be implementing the Commission's recommendation for public funding for legal representation. On March 17, 2012, Col (ret'd) Drapeau provided notice to the Commission that he was now again acting as solicitor of record for the complainants.

On March 18, 2012, Col (ret'd) Drapeau delivered a written request for an adjournment and postponement of the Hearing to the Commission. He has requested a four to six-week adjournment of the commencement of the Hearing in order to prepare. He has also requested a one-week adjournment at the beginning of May, 2012, and the beginning of June, 2012.

Col (ret'd) Drapeau chiefly argued in his submissions that the scope, quantity, and complexity of the matters to be addressed during the Hearing necessitated an adjournment of 4-6 weeks to obtain full disclosure, obtain a schedule of witnesses and their will-say statements, and permit adequate preparation time. He made reference to the relative imbalance of resources as between the Parties, with particular emphasis on the impact this had on the time he could commit to preparation up to this point.

Additionally, Col (ret'd) Drapeau advised that upon withdrawing from his representation of the complainants, he committed to two major events and as a result will be out of the country between March 29 and April 2, inclusive, and between May 1 and May 5. He added that was also committed to another urgent matter on March 28 and as such could not be available on that date.

Col (ret'd) Drapeau also argued the necessity of a monthly pause through the course of the Hearing owing to the fact that the complainants could not be expected to give their sustained and undivided attention, day in and day out, for 10 to 12 weeks of testimony and submissions concerning topics that will often be sensitive and upsetting.

Department of Justice counsel Ms. Elizabeth Richards, who represents the subjects of the complaint, delivered written submissions on March 19, 2012. Ms. Richards strenuously opposes any adjournment or pause. In her submissions, she stressed the need to proceed as expeditiously as possible, and relied on the arguments she made before the Commission regarding the motion to adjourn heard on January 17, 2012. In particular, she noted that the subjects of the complaint are anxious to proceed and to clear their names of the serious and public allegations they face; and that fairness demands that any delays be minimized to the greatest extent possible. She indicated that there are no extraordinary circumstances that would justify a second adjournment, following the Commission's last ruling setting March 27 as a firm date for the start of the Hearing. She

added that Col (ret'd) Drapeau has by his own admission dedicated significant time and resources to the matter and should be expected to be familiar with the file. Additionally, she noted that if Col (ret'd) Drapeau was unable to appear on a given date, there did not appear to be a reason why Mr. Joshua Juneau, who assists Col (ret'd) Drapeau on this matter, could not appear as counsel in his stead.

Having read these submissions, and Col (ret'd) Drapeau's reply, I am satisfied a brief adjournment of one week – between March 28, 2012 and April 3, 2012 – should be granted.

I note that the Government's decision to provide funding for the legal representation of the complainants came almost five months after the Commission's recommendation was issued, and little more than one week before the Public Interest Hearing was scheduled to commence. Under the circumstances, and with little indication of whether and when funding would be granted, it was not unreasonable for Col (ret'd) Drapeau to withdraw from representing the complainants and to consequently stop preparatory work and accept under commitments. In fact, completing the necessary preparatory work would have been difficult prior to the issuance of the funding decision. While Col (ret'd) Drapeau has indicated that he devoted time and resources on a *pro bono* basis pending receipt of the funding decision, it could not reasonably be expected that, without funding, the full extent of the work required to review the voluminous documentary disclosure and to prepare for these complex hearings could be completed.

This situation created great uncertainty and difficulty for the complainants as the Hearing drew near, and it would not be in keeping with basic fairness considerations to also now force them to proceed without counsel during the first week of the Hearing, or to deny their counsel the minimum preparation time required to be ready for the first week of evidence.

Further, as pointed out by Col (ret'd) Drapeau, new documents continue to be received by the Commission and disclosed to the Parties, and these documents will have to be reviewed in preparation for the Hearing. It would be unrealistic to assume that the Hearing can now proceed exactly as planned without prejudice to the complainants who, in a very real sense, have only recently been in a position to fully retain counsel. As I stated in my decision of January 23, 2012, not only must the hearings be governed by fairness, but the conduct of the hearings must be perceived as fair.

On the other hand, and in keeping with my previous decision regarding the Hearing start date, I must reiterate that these hearings should proceed in a timely fashion. I am mindful of the compelling concerns raised by Ms. Richards. The reputation interests of the

subjects are at stake, and a lengthy adjournment of a further month would be unacceptable, particularly in light of the fact that Ms. Richards has advised the Commission early on of the hardship that could result for the subjects of the complaint if the Hearing was not completed prior to active posting season.

However, to grant the complainants no window at all for additional preparation and unavoidable absences would be to deny them the effective assistance of counsel in a complex, lengthy and demanding proceedings that will involve voluminous evidence.

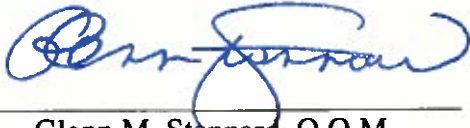
For these reasons, a brief adjournment of one week strikes a balance between the competing fairness interests of the Parties. In light of issues with the scheduling of witness testimony, the Hearing will commence on March 27, 2012, with opening statements and the testimony of the first witness. The Hearing will then be adjourned until April 3, 2012, at which time the hearing of the evidence will continue. This will provide additional preparation time for all counsel, and also permit an accommodation for Col (ret'd) Drapeau's planned absence.

With respect to the request for a pause in the months of May and June, such pauses are indeed often welcome in the midst of complex and lengthy hearings. In light of the amount of preparatory work that is expected to be involved in the first weeks of the Hearing, and the expected receipt of additional disclosure still to come, a pause in early May would be warranted. This will also accommodate Col (ret'd) Drapeau's commitment. As a result, I have determined that the Hearing should be adjourned during the week of April 30, 2012, and should resume on Monday, May 7, 2012.

In light of the interests of the subjects and witnesses, the Commission will endeavour to complete the Hearing before the active posting season begins. As a result, decisions about any subsequent pauses in the Hearing schedule will be made as the matter proceeds, taking into consideration the progress made in hearing the evidence.

IT IS HEREBY ORDERED that the request for an adjournment of the Public Interest Hearing is granted in part. The commencement of the Hearing remains scheduled for March 27, 2012. After that date, the Hearing will be adjourned to April 3, 2012, at 9:30 AM. The Hearing will then proceed until April 26, 2012, adjourn for one week, and resume on May 7, 2012.

DATED at Ottawa, Ontario this 21st day of March, 2012.



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