



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.

DECISION TO RECOMMEND FUNDING FOR LEGAL COUNSEL TO PREPARE CLOSING SUBMISSIONS FOR THE COMPLAINANTS, MR SHAUN FYNES AND MRS SHEILA FYNES

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

On September 26, 2011, the complainants, Shaun and Sheila Fynes, filed a Motion requesting that this Commission recommend that public funding be provided for their legal representation during the Public Interest Hearing to be held into their complaint. A Case Conference was held on October 19, 2011, where the complainants' counsel, Col (ret'd) Michel Drapeau, presented oral submissions in support of the Motion. Counsel for the subjects of the complaint, Department of Justice counsel Ms. Elizabeth Richards, took no position on the Motion. Counsel for the Government of Canada, Mr. Alain Préfontaine, provided written submissions that were read into the record.

On October 26, 2011, I issued a recommendation that the Government of Canada provide public funding for legal representation for the complainants. On March 16, 2012, the Honourable Peter MacKay, Minister of National Defence, informed the Commission that the Government of Canada would implement the Commission's recommendation and provide funding for legal representation for the complainants on compassionate grounds.

The public funding provided for legal representation for the complainants was capped at 424 hours for Col (ret'd) Drapeau, at a reduced rate of \$175.00 per hour, and 424 hours for Mr. Joshua Juneau, at a reduced rate of \$100.00 per hour. This was intended to provide each lawyer with 40 hours of preparation time prior to the commencement of the hearings and, during the anticipated 12 weeks of testimony, six hours per day of attendance at the hearings, and two hours per day for preparation. An additional amount was allocated for reasonable disbursements and costs for additional days of hearings.



On October 19, 2012, Col (ret'd) Drapeau filed a Motion seeking this Commission's recommendation that additional public funding be provided by the Government of Canada for the preparation of closing submissions on behalf of the complainants.

In the Motion, Col (ret'd) Drapeau noted that closing arguments for the Commission's benefit and consideration could extend to 100 pages of written submissions from each of the Parties, with three hours allocated to each Party for oral submissions, and the opportunity to make written reply submissions of up to 30 pages. Col (ret'd) Drapeau expected that preparing these submissions would require a considerable investment of time. He emphasized that Mr. and Mrs. Fynes were not in a financial position to pay for the legal representation required, as was previously established by affidavit evidence received during the initial request for public funding for legal representation.

Col (ret'd) Drapeau estimated that \$3500.00 remained from the public funding previously granted by the Government of Canada. He requested that this Commission recommend that additional public funding be allotted to provide for 100 hours of preparation each for himself and Mr. Juneau, at the reduced hourly rates of \$175.00 per hour and \$100.00 per hour respectively.

On October 24, 2012, Department of Justice counsel Mr. Alain Préfontaine provided a brief response to the Motion on behalf of the Government of Canada. He stated that the Government of Canada relied on the submissions that were provided in response to the complainants' original funding request. Mr. Préfontaine advised that, should this Commission decide to recommend supplemental funding, the Government of Canada would consider that recommendation.

In essence, Mr. Préfontaine's submissions continue to be as follows. First, that the decision of the Federal Court in *Jones v. Canada (Royal Canadian Mounted Police Public Complaints Commission)*¹ spoke to the existence of the Commission's discretion to recommend public funding, but that there was no mechanism to address how the discretion ought to be *exercised*. He emphasized that section 250.44 of the *National Defence Act*, which provides that parties to a Hearing 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 does not *guarantee* the right to legal representation, but merely *permits* it.

¹ 1998 CanLII 8157 (F.C.); (1998), 162 D.L.R. (4th) 750.

² R.S.C. 1985, c. N-5.

Mr. Préfontaine's submissions also stated that, while the Federal Court observed in *Jones v Canada* that decision-makers prefer to achieve equality of legal representation for parties, this equality of representation could be accomplished through the efforts of Commission counsel.

Relying on the criteria as to when and why to recommend public interest funding articulated in the decision of the Supreme Court of Canada in *R. v. Caron*,³ Mr. Préfontaine also argued that this case did not warrant a recommendation for public funding. He submitted that other realistic options existed for bringing the issues to a hearing. However, Mr. Préfontaine also stated, as he did in his response to the present Motion, that the Government of Canada would consider the recommendation of the Commission, should the Commission decide to make one.

No submissions were received from Ms. Richards on behalf of the subjects of the complaint. As noted above, she took no position on the original funding motion, and I take the lack of further submissions to mean that this remains the case.

DECISION

Having considered the written submissions presented by Col (ret'd) Drapeau for the complainants, and by Mr. Préfontaine for the Government of Canada, I have made the decision to recommend that the Government of Canada provide supplementary funding for the legal representation of the complainants, in order to enable them to continue to participate fully in this Hearing.

For the reasons set out in my October 26, 2012 decision to recommend funding for the complainants' legal representation, I remain convinced that the "full and ample opportunity" to participate to which the complainants are entitled pursuant to the *National Defence Act*⁴ can only be achieved through continued legal representation, including during the closing submissions phase.

The enormous collection of documents spanning many thousands of pages amassed and entered into evidence, along with the testimony of 91 witnesses over the course of six months, amply illustrates the depth and complexity of this matter. At the conclusion of the hearing phase of a Public Interest Hearing that has amassed such extensive evidence on such a large and complex array of issues, it would be difficult if not impossible for the complainants to articulate, draft, and deliver closing submissions that fully and meaningfully represented their concerns and interests.

³ *R. v. Caron*, 2011 SCC 5.

⁴ R.S.C. 1985, c. N-5, s. 250.44.

It would be equally unrealistic to expect an unrepresented party to face the daunting task of drafting reply submissions after receiving and reviewing closing submissions prepared by the team of able counsel representing the subjects of the complaint.

Col (ret'd) Drapeau grounded the October 19, 2012 Motion on the fact that that Mr. and Mrs. Fynes' financial circumstances remain as indicated in the oral submissions and affidavit evidence provided in support of the original funding motion. I remain satisfied that, without public funding, the Fynes would not be able to afford the expense of legal representation for the purpose of preparing and delivering closing and reply submissions. As I previously noted, even in these times of necessary fiscal restraint, the scale of this expense from a governmental perspective was, and continues to be, a relatively small price to pay to ensure that the statutory rights of the complainants can continue to be exercised and that fairness and its appearance continue to be preserved.

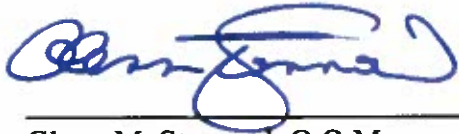
While it is unfortunate that this request for funding for the preparation of closing submissions was not made within the initial funding motion or at an earlier time in the course of the Public Interest Hearing, I have concluded that it is necessary to grant the request and to issue the recommendation, in order to ensure that the integrity and fairness of these proceedings are preserved.

RECOMMENDATION

For all these reasons, I have decided to issue a recommendation to the Government of Canada to grant additional funding for the complainants' legal representation. I recommend that this funding be granted at the reduced hourly rates suggested in the Motion: \$175 for Col (ret'd) Drapeau and \$100 for Mr. Juneau, and that any amount remaining from the funding previously granted be applied towards the additional hours necessary. I recommend that funding be granted for each counsel for the requested 100 hours each to prepare written closing submissions, prepare for and deliver oral submissions, and prepare written reply submissions. Considering the volume of evidence heard in the course of the Public Interest Hearing, and the length and complexity of the submissions anticipated, I consider that the amount of hours requested is reasonable, and that providing funding at this level is necessary to allow the complainants to continue to participate meaningfully in this Public Interest Hearing.

IT IS HEREBY RECOMMENDED that the Government of Canada provide supplementary funding to the complainants for the preparation of closing submissions and reply submissions and legal representation at this Hearing, in accordance with the rates and for the number of hours outlined in these reasons.

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



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