



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 TO COMMENT ON THE INTERIM REPORT

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

On November 5, 2012, the Commission received a request from Col (ret'd) Michel Drapeau, counsel for the complainants, asking that the Commission provide a copy of its Interim Report to the complainants "in the same time and manner" that it will be provided to the Minister, the Chief of the Defence Staff or the Deputy Minister and the JAG and the Canadian Forces Provost Marshal pursuant to section 250.48 of the *National Defence Act*.¹ Col (ret'd) Drapeau also requested that the complainants be provided with a copy of the Notice of Action that must be issued to the Commission by the Canadian Forces Provost Marshal, the Chief of the Defence Staff or the Deputy Minister of National Defence after receipt and review of the Interim Report pursuant to section 250.51 of the *NDA*. In addition, he requested that the complainants be permitted to provide comments on the Interim Report and the Notice of Action, and that these comments be taken into consideration by the Commission in the drafting of the Final Report.

In his request, Col (ret'd) Drapeau discussed the legislative framework governing the Interim Report, the Notice of Action, and the Final Report. He characterized the Notice of Action as an "exclusive right to make representations on the MPCC Interim Report," and argued that this legislative framework violates and disregards the common law principles of both procedural fairness and natural justice. He added that the procedure set out by the *NDA* amounted to a "unilateral and *ex parte* privilege granted to DND/CF" that would result in the Parties being accorded unequal procedural rights.

¹ *National Defence Act*, R.S.C., 1985, c. N-5, s. 250.48 ["*NDA*"].

Col (ret'd) Drapeau argued that procedural fairness is a principle of fundamental justice entrenched within s. 7 of the *Canadian Charter of Rights and Freedoms*² as well as section 2(e) of the *Canadian Bill of Rights*.³ He added that procedural fairness in "this constitutional dimension has primacy over all legislation, including the *National Defence Act*, which is the enabling legislation mandating the MPCC to investigate conduct complaints against the military police." For that reason, he submitted that the Commission "is vested with the duty to treat any unconstitutional provision as having no force or effect, negating its effect to the extent of the inconsistency." In the event that it was determined that the Commission's mandate did not extend to rulings on the constitutional validity of the provisions of the *NDA*, Col (ret'd) Drapeau requested that the Commission read s. 250.48 of the *NDA* as giving both Parties equal participation concerning the Interim Report and Final Report.

On November 16, 2012, Department of Justice counsel Mr. Alain Préfontaine provided a written response expressing his opposition to the complainants' request. It is not clear whether these submissions were provided on behalf of the subjects of the complaint, the Canadian Forces Provost Marshal, the Department of National Defence, the Government of Canada, or all or some of them. In the past, Mr. Préfontaine has presented submissions in these proceedings on behalf of the Government of Canada, and has also appeared on behalf of the subjects of the complaint during the testimony of one witness before the Commission.⁴ No submissions were received specifically on behalf of the subjects of the complaint.

In his submissions, Mr. Préfontaine argued that the Commission's mandate does not extend to adjudicating claims or disputes between parties; instead, the Commission was created to investigate complaints concerning the conduct of members of the Military Police and to make findings and recommendations concerning the complaints. As a consequence, he submitted, the Commission lacks the jurisdiction required to review the constitutional validity of s. 250.48 of the *NDA*.

Mr. Préfontaine argued that Parliament intended that the Parties and the institutional representatives (the Department of National Defence, the Canadian Forces, and the military police) be treated differently, and that their rights and obligations therefore be different. During the Hearing stage, he noted, parties possess participatory rights by the operation of s. 250.44 of the *NDA*. Conversely, the institutional representatives do not have such participatory rights. At the end of the Hearing, however, the roles change and the institutional representatives are charged with responding to the findings and

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7 ["*Charter*"]."

³ *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2(e).

⁴ See *Transcripts of Proceedings*, vol. 33, 12 June 2012 & vol. 34, June 13, 2012.

recommendations presented in the Interim Report, pursuant to s. 250.48 of the *NDA*. In addition, Mr. Préfontaine asserted, the fact that the Parties are designated as recipients only of the Final Report pursuant to s. 250.53(2) of the *NDA* – and not of the Interim Report pursuant to s. 250.48 – makes it clear that Parliament consciously excluded them from the Interim Report phase. By necessary implication, Mr. Préfontaine argued, this exclusion means that any participatory rights of the Parties during the Interim Report phase were purposively overridden by statute. For these reasons, he submitted that there is "no legal basis to grant the request [the complainants] now make."

DECISION

I note first that this decision is confined to the request to comment on the Interim Report and to receive and comment on the Notice of Action.

I have considered the submissions made by Col (ret'd) Drapeau on behalf of the complainants in support of the request, and those of Mr. Préfontaine in opposition. I have concluded that there is no right, constitutional or otherwise, for a Party to comment on an Interim Report or a Notice of Action under the *NDA*.

Col (ret'd) Drapeau cited the decision of the Newfoundland Supreme Court, Trial Division, in *Woolworth Canada v. Newfoundland (Human Rights Commission)*⁵ in support of his argument that both parties must have the same right to see and comment upon the Interim Report. Central to the complaint of bias in that case was the fact that the Human Rights Commission had given one party the investigator's report and the opportunity to make submissions as to whether or not that commission should appoint a board of inquiry in the matter. In other words, the Human Rights Commission made a decision to invoke the adjudication of a board to hear the complaint, a decision affecting the rights of all parties, while having invited **only one of those parties** to make submissions in advance of that decision.

That decision was found, in the circumstances, to give rise to a reasonable apprehension of bias. It should be noted, however, that the procedure respecting the Interim Report is markedly different in purpose, substance and effect.

The Commission does not provide the Interim Report to any of the Parties to the Hearing in order to solicit comments and submissions about the substance of the findings and recommendations. Instead, the Commission is required by statute to provide its findings and recommendations to certain Military Police and Department of National Defence

⁵ *Woolworth Canada Inc. v. Newfoundland (Human Rights Commission)* (1994), 114 Nfld. & P.E.I.R. 315, 1994 CarswellNfld 54 (Nfld. S.C. (T.D.)).

officials in order for them to consider the actions to be taken in response to those findings and recommendations. The Notice of Action is not a means of providing editorial comment that could modify or influence the Commission's decisions. Rather, it is a means of providing information to the Commission about the actions that will or will not be taken in response to the Commission's findings and recommendations, and the reasons for any decision not to take action. The Commission can then comment on the intended actions or inaction in its Final Report.

Neither the complainants nor the subjects of the complaint have a statutory or constitutional right of comment on the Interim Report or on the Notice of Action. It is therefore not the case, as argued in support of this request, that one side possesses a right that the other does not. As argued by Department of Justice counsel, the Interim Report and the Notice of Action engage the "institutional representatives" rather than the Parties. The broader institutions must determine what actions to take, if any, in response to the findings and recommendations that I will make – and if no action is to be taken, those institutions must explain why not. There is no statutory provision for any other parties to be involved at this stage.

In this case, the subjects of the complaint, the Canadian Forces Provost Marshal and the Department of National Defence have all been represented by the same team of Department of Justice and other Government counsel before this Hearing. This may be a cause of some concern for the complainants, and it may create an unfortunate appearance that the Interim Report is being provided to one Party and not to the other. It should therefore be noted that the multiple representation by the Department of Justice must not give rise to a situation where the subjects of the complaint have access to this Commission's report before the complainants do. The multiple representation is also not to be used to provide any opportunity for the subjects of the complaint to have input as to the contents of the Notice of Action. Department of Justice counsel involved in this matter must take all necessary measures to ensure that no such improprieties occur. That having been said, however, the multiple representation alone does not constitute sufficient grounds to conclude that the complainants must be granted a right to comment on the Interim Report and Notice of Action.

With respect to the constitutional arguments raised by the complainants, it was argued that procedural fairness and equal treatment are principles of fundamental justice protected by the *Charter*. On that basis, Col (ret'd) Drapeau invited me to find that the impugned provisions of the *NDA* were of no force or effect to the extent of the inconsistency with those principles. This submission was strongly opposed by Mr. Préfontaine, who denied that the Commission had any jurisdiction to make such determinations.

Section 7 of the *Charter* reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.⁶

As stated by Lamer C.J. (as he then was) in *Re B.C. Motor Vehicle Act*, "[t]he principles of fundamental justice [...] are not a protected interest, but rather a **qualifier of the right not to be deprived of life, liberty and security of the person.**"⁷ The principles of fundamental justice, informed in part by natural justice and procedural fairness, are not themselves constitutional rights. The constitutional right guaranteed by section 7 only arises in circumstances where there has been or is threatened to be, a deprivation of life, liberty or security of the person. In this case, it is difficult to see how the interests of Parties before a Public Interest Hearing can be thought to involve such an actual or threatened deprivation, so as to allow them to invoke that *Charter* guarantee.

Section 2(e) of the *Canadian Bill of Rights* is also inapplicable in this situation. The guarantee to a fair hearing in this section applies where the hearing in question involves a determination of the individual's rights and obligations.⁸ This Commission has no mandate to find criminal or civil liability and cannot make any order affecting the legal rights and obligations of the Parties. The Commission's only mandate is to make recommendations, and therefore, as with section 7 of the *Charter*, the threshold to trigger the right protected by section 2(e) of the *Canadian Bill of Rights* is not met.

As for procedural rights themselves, including the right to fairness, principles of fairness have been applied throughout the proceedings to ensure that the Parties' statutory right to participate could be fully exercised. Each Party was granted the opportunity to bring evidence, cross-examine witnesses and make representations. The Commission's findings and recommendations will be based on the evidence heard in the Public Interest Hearing where both Parties participated fully. The process by which governmental authorities advise the Commission of their intended response to the findings and recommendations through the Notice of Action is a different process that does not engage the same participatory rights for the Parties.

⁶ *Charter*, *supra* note 2, s. 7.

⁷ *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at para. 24 [emphasis added].

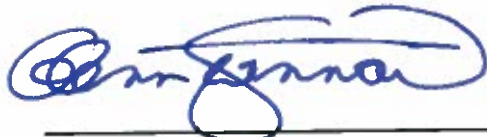
⁸ *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 at para. 59; *McBain v. Canada (Canadian Human Rights Commission)*, 1985 CarswellNat 161 (FCA).

I find that no violation of the requirements of natural justice or procedural fairness results from allowing only the institutional recipients of the Interim Report to comment on the findings and recommendations through the Notice of Action. Similarly, no violation occurs by not permitting the Parties before the Hearing to receive or comment on the Notice of Action. This process does not unfairly deprive anyone of a fundamental right guaranteed by the *Charter*, by the *Canadian Bill of Rights* or by the general principles of administrative law. It is therefore unnecessary to discuss in further detail the constitutional and jurisdictional arguments made by Col (ret'd) Drapeau and Mr. Préfontaine.

For all of these reasons, I have concluded that neither the law nor the constitution provide for the requested right to comment on the Interim Report and to receive and comment on the Notice of Action.

IT IS HEREBY ORDERED that the complainants' request to be given the right to comment on the Commission's Interim Report, and to receive and comment upon the Notice of Action, is denied.

DATED at Ottawa, Ontario this 29th day of November, 2012.



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