Military Police Complaints Commission

Commission d'examen des plaintes concernant la police militaire

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 REPRESENTATION 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*

INTRODUCTION

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. Affidavits from the complainants were filed in support of the Motion, and an additional affidavit was filed on October 17, 2011, providing details about the complainants' financial situation.

On October 5, 2011, Department of Justice counsel Mr. Alain Prefontaine filed written Submissions in response to the Motion on behalf of the Government of Canada.

At the Case Conference held on October 19, 2011, 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. Prefontaine, advised the Commission in advance that he would not be presenting oral submissions to supplement his written submissions, and he did not attend the Case Conference. His written Submissions were read into the record.

DECISION

Having considered the oral and written submissions presented by the Parties and by the Government of Canada, as well as the written evidence filed in support of the Motion, I have made a decision to recommend that the Government of Canada provide funding for the legal representation of the complainants, in order to enable them to participate fully in this Hearing.

1) Authority to Issue a Funding Recommendation

For the reasons set out by the Federal Court in *Jones* v. *Canada (Royal Canadian Mounted Police Public Complaints Commission)*[1] and by this Commission in its decision to recommend funding in the Afghanistan Public Interest Hearings,[2] it has been established that this Commission has a discretion to recommend funding for legal representation for a Party to its Hearings. As stated by Justice Reed in *Jones*, a decision to recommend funding is a matter within the Commission's "complete discretion," and the factors relevant to this decision are for the Commission to determine.[3]

The governing principle is that where the factors to be considered in reaching a discretionary decision are not set out in the legislation, the decision-maker can determine the appropriate factors, in light of the purpose and object of the applicable statute:

> In *Electric Power & Telephone Act (P.E.I.), Re*[4] the Prince Edward Island Court of Appeal held that where legislation is silent as to the factors which an administrative decision-maker must take into consideration, the decision-maker has the discretion to determine the appropriate factors. Those factors, however, must be related to the purpose and object of the statute conferring the discretion.[5]

2) Relevant Factors And Their Application In This Case

Justice Reed's reasons in the *Jones* case provide useful guidance as to the factors relevant to the exercise of the Commission's discretion regarding a funding recommendation.

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

[2] *Decision to Recommend Funding for Legal Counsel for the B.C. Civil Liberties Association*, 05 Feb 2009, MPCC 2007-006, 2008-24 & 2008-42.

[3] *Jones, supra*, at para. 27.

[4] (1994), 116 Nfld. & P.E.I.R. 181; 363 A.P.R. 181 (PEI CA). See, in particular, para. 14-16.

[5] Macaulay & Sprague, *Hearings Before Administrative Tribunals*, Fourth Ed., 2010, Thomson Reuters (Carswell), at p. 5B-31.

a) The Quality of the Hearing Process

One of the factors that Justice Reed suggested would be "crucial for the Commission" was "whether legal representation of the complainants would improve the quality of the proceedings before it."[6] I agree that ensuring the proper conduct of the Hearing is a crucial factor. Like the hearings at issue in the *Jones* case, this Hearing is expected to last for many weeks, to involve a large amount of evidence, both documentary and oral, and to address complex issues.[7] For these reasons, and as was the case in *Jones*, it would be difficult if not impossible for unrepresented complainants to deal with these proceedings. Providing legal representation for the complainants will contribute to the proper conduct of the Hearing and will improve its quality.

b) Statutory Right of Participation

Pursuant to s. 250.44 of the *National Defence Act*,[8] the complainants 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."

In the *Jones* case, a section of the *RCMP Act*[9] on which s. 250.44 was modeled and which is, in all respects relevant here, identical to s. 250.44, was considered. Justice Reed wrote:

> The Commission has an obligation under subsection 45.45(5) to ensure that "the parties [which includes a complainant] and any other person" are afforded "a full and ample opportunity" to present evidence, to cross-examine witnesses and to make representations. If the Commission considers that for the purposes of the present inquiry, "a full and ample opportunity" can best be achieved by the complainants having counsel, then it is open to the Commission to recommend that the state fund counsel.[10] [emphasis added]

In the present case, I am convinced that the "full and ample opportunity" to participate to which the complainants are entitled pursuant to the *National Defence Act* can only be achieved through legal representation. In light of the complexity of the issues, the anticipated volume of the documentary disclosure, and the anticipated number of witnesses, the complainants would simply not be able to exercise their statutory right to cross-examine, to present relevant evidence and to make meaningful representations to the Commission without the assistance of counsel.

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[6] *Jones, supra*, at para. 25

[7] See *Jones, supra*, at para. 18.

[8] R.S.C. 1985, c. N-5.

[9] R.S.C. 1985, c. R-10.

[10] *Jones, supra*, at para. 19.

The affidavit evidence before me, which was not challenged by any of the Parties or by counsel for the Government of Canada, convinces me that Mr. and Mrs. Fynes would not be able to pay for their legal representation without funding from the Government. Their income is moderate; they have no significant assets or investments; and they have children, including one son who is autistic and whom they help financially. The overall cost for their legal representation at the Hearing, even at the reduced rates which their counsel propose to charge, would range somewhere between $125,000 and $200,000. I am satisfied that, without public funding, the Fynes would not be able to afford this expense and could not be represented. Because of the anticipated length of the proceedings, it is not realistic to expect that the complainants will be able to find counsel who would be willing or able to represent them *pro bono*.

On the other hand, and even in these times of necessary fiscal restraint, the scale of this expense from a governmental perspective is not excessive. Indeed, it would in fact appear to be a relatively small price to pay to ensure that this Public Interest Hearing can proceed properly; that the statutory rights of the complainants can be exercised and that fairness and its appearance can be preserved.[11]

In his Submissions, Mr. Prefontaine cautions against the adoption of a "circuitous logic" that would lead to a conclusion that, because of the participatory rights enacted in s. 250.44 of the *National Defence Act*, recommendations for public funding would always have to be issued for all Parties and "everyone else enjoying the same participatory right."[12]

I am of the view that s. 250.44 does not determine how the discretion to recommend public funding ought to be exercised. Rather, as found by Justice Reed in the *Jones* decision, a statutory right to participate as set out in s. 250.44 is a factor relevant to the exercise of the discretion to make a funding recommendation.[13] This does not mean that taking into account the statutory right to participate will lead to an automatic funding recommendation for all individuals with participatory rights. On the contrary, in order for a recommendation to be warranted, there must be a demonstration that, in the context of a particular hearing, the participatory right cannot be exercised properly without legal representation, and that the individuals requesting the recommendation for public funding cannot otherwise afford the cost of their own legal representation. As set out above, all these matters have been demonstrated in the present case.

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[11] On the issue of fairness, see *infra* "c) Fairness and Equality of Representation"

[12] *Government of Canada Submissions, supra*, at para. 5.

[13] *Jones, supra*, at para. 19.

c) Fairness and Equality of Representation

An additional factor that needs to be considered in the context of a decision as to whether to recommend funding is fairness.

In order for a hearing to be able to fulfill its purpose to further the public interest, fairness at the hearing is paramount. In the context of Hearings such as the present one, fairness may require equality of representation. In *Jones*, Justice Reed observed, "[t]here is considerable support for the proposition, however, that without state-funded legal representation the complainants/applicants will be at a great disadvantage – there will not be a level playing field."[14] [emphasis added]

She went on to remark:

> My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel, a description that we all know from experience applies to Mr. Whitehall, they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.[15] [emphasis added]

The same considerations apply in the present case. Ms. Richards, Department of Justice counsel who at the Case Conference was able to confirm that she now acts for all the subjects of the complaint, previously advised the Commission in her request for an adjournment of the Case Conference, that, as present or former members of the Canadian Forces, all the subjects were entitled to seek legal representation at public expense in accordance with the applicable Treasury Board policy, which may entitle them to representation by the Department of Justice or by outside counsel.

Justice Reed's comment about "conscientious, experienced and highly competent counsel" applies fully to Ms. Richards, who has appeared before this Commission in the past and who will be representing the subjects here. Without public funding, the complainants will have no choice but to appear unrepresented. The apparent unfairness that would result from a situation where one party is represented by highly qualified counsel at public expense and the other party, despite having expressed the desire to be represented, is left without legal representation because of lack of public funding, would negatively impact on the hearing process and on public confidence in this Commission's independent oversight role.

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[14] *Jones, supra*, at para. 7.
[15] *Jones, supra*, at para. 25.

Mr. Prefontaine has argued that equality in representation is already achieved in this case. He cites the role of Commission counsel and the fact that "the representational model at play in an adversary proceeding, like a trial, does not apply to the inquisitorial hearing conducted by the Commission to investigate a conduct complaint."[16]

I agree that this Commission's proceedings are investigative rather than adjudicative. However, for the purposes of the present Motion, this is not a reason to refrain from recommending funding for counsel.

In *Jones*, Justice Reed was also dealing with an investigative or "inquisitorial" rather than an adjudicative or "adversarial" proceeding. She found that such categorizations do not diminish the importance to the proceedings of legal representation for the Parties:

> [20] Another argument made by counsel for the R.C.M.P., as support for the proposition that the Commission lacks authority to make a recommendation of the type in question, is based on the nature of the inquiry proceedings. It is argued that: the proceedings are not adversarial in nature; the complainants initiate the process but then have no direct interest that is affected thereby; the named R.C.M.P. members are the ones who are at risk; the Commission counsel presents the evidence to the Commission, essentially acting as a prosecutor.
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> [21] I do not find that description to be complete. [...] While the proceedings are theoretically not adversarial, there is much about them that engenders all the trappings of such a process, e.g., the right of all to cross-examine, the definition of complainants as "parties", the fact that the Commission cannot ban all lawyers from the room (one of the applicants' suggestions) or prevent cross-examination of the witnesses (another of the applicants' suggestions). [...]
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> [22] The inquiry is public; it has many of the trappings of an adversarial proceeding; the Commission cannot turn it into a purely investigative type of proceeding; the Commission cannot prevent the presence of counsel acting on behalf of individuals who appear before the Commission; it cannot prevent the cross-examination of witnesses. I am not persuaded that the nature of the proceeding leads to a conclusion that independent legal representation of the complainants is a matter about which the Commission should not be concerned.[17]
> [emphasis added]

Even taking into account the nature of the proceedings, which are dictated by the statute itself, Parliament has seen fit to provide for a statutory right of participation for the Parties in s. 250.44. The complainant and the subject of the complaint are the only two parties specifically designated as Parties by the statute.[18] From this legislative scheme, it

[16] *Government of Canada Submissions, supra*, at para. 7-8. See also para. 14-21.
[17] *Jones, supra*, at para. 20-22.
[18] *National Defence Act*, ss. 250.44 (a).

is clear that they are both equally deemed to have a substantial and direct interest in a hearing.

In this context, to appear to equate the interests of the complainants with those of the Commission and to argue that the role of Commission counsel is to further their right to participate, is as misguided as it would be to propose to equate the interests of the subjects of the complaint with those of the Commission and to suggest that their participatory rights can be furthered by Commission counsel. As the title makes clear, Commission counsel is counsel for the Commission. As my counsel, Commission counsel's role is to present as much information as possible to the Commission and to test its accuracy in order to ensure that findings and recommendations can be made on the basis of information that is complete and accurate. The complainants and the subjects each have their own distinct interests in the proceedings and Parliament has recognized these interests as requiring specific and equal rights of participation.

Further, as pointed out by Col Drapeau in his oral submissions at the Case Conference, the legislation and applicable regulations assign an important role for all the Parties in the hearing process and provide for "full, complete and meaningful participation."[19] Pursuant to the *National Defence Act*, Parties can present evidence, both documentary and viva voce, cross-examine witnesses, and make representations.[20] The *Rules of Procedure for Hearings before the Military Police Complaints Commission*[21] further provide that Parties can file documents, present motions, participate in pre-hearing conferences, and request the issuance of summons.

For all these reasons, I agree with Justice Reed that the Commission has a legitimate interest in the issue of the complainants' legal representation

3) The *Caron* Case

Mr. Prefontaine also argues that the factors to be considered in determining whether to issue a recommendation for public funding in proceedings like this Hearing are those set out in the Supreme Court of Canada decision in *R.* v. *Caron.*[22] He goes on to submit that the factors enumerated in *Caron* suggest that the Commission ought not to recommend funding for counsel for the complainants.

[19] Military Police Complaints Commission, *Transcript of Case Management Conference*, MPCC 2011-004, at p. 33-34.
[20] See s. 250.44 of the *National Defence Act.*
[21] SOR/2002-241. See Rules 12, 17, 29, 30, 33 and 39.
[22] 2011 SCC 5.

In the first place, and as argued by Col Drapeau in his oral submissions,[23] I find that the *Caron* case has no direct application to the present situation. *Caron* dealt with the limited circumstances of litigation in which the interests of justice require a court to issue an *order* to *compel* Government to provide funding, as opposed to the situation here where the Commission is being asked to make a *recommendation* for funding. Unlike in *Caron*, this is not a situation where an intrusion into matters generally determined by the legislative or executive branches of Government is being contemplated.[24] This Commission can only recommend that funding be granted. The Government will then have to assess this recommendation and come to its own determination.

Further, however, it is my view that even if the test set out by the Supreme Court of Canada in *Caron* were applicable, a recommendation for funding would still be warranted here. Indeed, to the extent that the factors adopted in *Caron* could serve as a guide to this Commission in the exercise of its discretion, I find that they support issuing a funding recommendation in this case.

On the first factor listed in *Caron*,[25] of a genuine inability to fund their own counsel and a lack of other realistic options for bringing the issues to trial, I find that the complainants "genuinely cannot afford" to cover the cost of their representation. Further, I am of the view that no other realistic options exist for bringing the complainants' issues and perspective to a hearing. As indicated above, the Parties' interests are not represented by Commission counsel; their participation is essential to the process; and the extent of their participation is not as limited as Mr. Prefontaine suggests.

On the second *Caron* factor – that the "claim" be *prima facie* meritorious and "at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means"[26] – I find that the complainants' interests here fulfill this requirement. It is not known at this time what findings or recommendations may ultimately be made about the allegations in the complaint. That is a determination that will be made on the basis of the evidence presented at the Hearing. However, it has already been determined that the issues raised in the complaint are sufficiently serious to warrant calling a Hearing in the public interest.[27] The complainants clearly have a direct interest in the issues raised, as the investigations in question related to the death of their son and to the manner in which the complainants themselves were treated by the Canadian Forces. The *National Defence*

[23] Military Police Complaints Commission, *Transcript of Case Management Conference*, MPCC 2011-004, at p. 32.
[24] See *Caron, supra*, at para. 6 & *Government of Canada Submissions, supra*, at para. 1.
[25] See *Caron, supra*, at para. 39.
[26] *Caron, supra*, at para. 39.
[27] See September 6, 2011 Decision to call a Public Interest Hearing, MPCC 2011-004.

Act recognizes their right to participate in the process. It would, in the circumstances, be contrary to the interests of justice if they were unable to participate simply because they lack the financial means to retain counsel.

The third *Caron* factor is that the issues transcend individual interests, be of public importance, and have not been resolved in previous cases.[28] In this connection, I find that the issues here are of public interest beyond the complainants' individual interests.[29] I find further that the complainants' full participation is also in itself in the public interest so as to ensure that the Public Interest Hearing proceeds properly and that all issues are fully brought to light before the Commission. I also find that many of the issues raised by this complaint, in particular with respect to the independence and impartiality of the Military Police, have not been examined in previous cases.

Finally, the *Caron* decision suggests that public funding should only be granted where its absence "would work a serious injustice to the *public* interest."[30] [emphasis in original] That is the case here. The independent oversight regime put in place by Part IV of the *National Defence Act* is meant to foster public confidence in the Military Police and as such this regime furthers the public interest. By definition, Public Interest Hearings are called because it is in the public interest to address the issues raised through this process.[31] Public confidence in the process, and thus the ability of the process to fulfill its purpose, will in turn be dependent on the Parties' ability to act on their statutory right to participate in the proceedings. If the process cannot function properly because one of the Parties is unable to exercise this right to participate because of lack of access to legal representation that would otherwise be necessary, the public interest that warranted calling the Hearing in the first place is affected.

The words of Justice Reed find application here:

> While the complainant may initiate the proceeding, he or she, in a case such as the present, acts as a representative of the public interest - the public interest in ensuring that the police do not overstep the bounds of what is proper conduct. The public interest is as important as the R.C.M.P. members" private interests in their jobs and reputations.[32]

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[28] *Caron, supra*, at para. 39.

[29] See September 6, 2011 Decision to call a Public Interest Hearing, MPCC 2011-004.

[30] *Caron, supra*, at para. 5.

[31] See *National Defence Act*, s. 250.38.

[32] *Jones, supra*, at para. 21.

I find accordingly that the general *Caron* requirement that the absence of funding work "a serious injustice to the *public* interest" is also met and that providing funding for legal representation for the complainants in this matter is in the public interest.

RECOMMENDATION

For all these reasons, I have decided to issue a recommendation to the Government of Canada to grant 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 Drapeau and $100 for Mr. Juneau. I recommend that funding be granted for each counsel for the requested 40 hours of preparation, as well as for the time spent attending the Hearing, with two additional hours of preparation for each day of Hearing. Considering the volume of materials involved, I consider that the amount of hours requested is reasonable, and that providing funding at this level is necessary to allow the complainants to participate in this Public Interest Hearing into the investigations related to their son's death.

In correspondence addressed to the Commission, Mr. Prefontaine, as counsel for the Government of Canada, indicated that the Government "will consider the recommendation of the Commission, if the Commission decides to make one." I accept at face value Mr. Prefontaine's assurance that this Commission's recommendation will be considered, notwithstanding the position he took in his Submissions.

IT IS HEREBY RECOMMENDED that the Government of Canada provide funding to the complainants for their 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 26th day of October, 2011.

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