JUN 3 0 1997

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

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T-498-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the Inquiries Act, R.S.C. 1985, c. I-11 into The Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon, pursuant to Order in Council, P.C. 1995-442.

BETWEEN:

LIEUTENANT-GENERAL PAUL ADDY

Applicant

- and -

THE HONOURABLE GILLES LETOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, and THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

T-408-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11 into The Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon, pursuant to Order in Council, P.C. 1995-442.

BETWEEN:

BRIGADIER-GENERAL ERNEST B. BENO

Applicant

- and -

THE HONOURABLE GILLES LETOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

T-433-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. 1-11 into The Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon, pursuant to Order in Council, P.C. 1995-442.

BETWEEN:

LIEUTENANT-GENERAL (RETIRED) GORDON M. REAY

Applicant

- and -

THE HONOURABLE GILLES LETOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, and THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

T-459-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-II into the Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon, pursuant to Order in Council, P.C. 1995-442.

BETWEEN:

LIEUTENANT GENERAL (RET) JAMES C. GERVAIS

Applicant

- and -

THE HONOURABLE GILLES LETOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

T-508-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11 into The Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon.

BETWEEN:

COLONEL J. SERGE LABBE

Applicant

- and -

THE HONOURABLE GILLES LETOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

T-706-97

IN THE MATTER OF an Inquiry Pursuant to Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11 into the Chain of Command System, Leadership Within the Chain of Command, Discipline, Operations, Actions and Decisions of the Canadian Forces and the Actions and Decisions of the Department of National Defence in Respect of the Canadian Forces Deployment to Somalia and a Report Thereon.

BETWEEN:

LIEUTENANT COLONEL (RET'D) J. CAROL A. MATHIEU

Applicant

- and -

THE HONOURABLE GILLES LÉTOURNEAU, COMMISSIONER and CHAIRPERSON, PETER DESBARATS, COMMISSIONER, THE HONOURABLE ROBERT RUTHERFORD, COMMISSIONER

Respondents

REASONS FOR ORDER

TEITELBAUM, J:

INTRODUCTION

The Court heard together six applications for judicial review in proceedings that raise similar issues of fact and law. For the purposes of these reasons, I shall refer to a global term, "the Applicants". However, I shall also consider the individual situations of the Applicants or their specific arguments at the appropriate moments.

The Applicants are senior military officers. They want to stop the *Commission of Inquiry into the Deployment of Canadian Forces into Somalia* (hereinafter the "Commission" or "Commissioners")[1] from potentially making adverse findings of misconduct against them. Specifically, the allegations of misconduct relate to the training and leadership of the Canadian Airborne Regiment (hereinafter "CAR") prior to the deployment of the CAR on an ill-fated peace-keeping mission to Somalia. The Commission issued notices to the Applicants under section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11 (hereinafter "Section 13 Notices"). Section 13 of the *Inquiries Act* reads:

> No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

The Commission advised the Applicants in the Section 13 Notices of the allegations that could be considered by the Commission in its Final Report. The Applicants now seek Orders prohibiting the Commission from acting under the Section 13 Notices. In effect, the Applicants argue that the Court must order the withdrawal of the Section 13 Notices because the Commission violated their rights to procedural fairness. According to the Applicants, the Commission acted unfairly when it refused to withdraw the Section 13 Notices even after it was unable to complete its investigation into all aspects of the Somalia peace-keeping initiative. The Applicants' claims for judicial review therefore involve both the scope of fairness, the deference owed Commissions of Inquiry in such matters and the

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[1] Purists will insist that there is technically no "Commission of Inquiry" but Commissioners who are appointed to undertake an inquiry. For the sake of simplicity, I refer to both the "Commission" and "Commissioners" interchangeably throughout these reasons.

rights of Section 13 Notice holders. To understand these difficult issues in their proper context, I must first devote considerable attention to the facts, including the chronology of events and the Applicants' identities.

FACTS

The Commission's Terms of Reference

On March 16, 1993, a young Somalian boy named Shidane Arone had been tortured and killed by members of the CAR. This was not the first and only profoundly disturbing incident during the deployment of the CAR to Somalia. On March 4, 1993, slightly more than a week before the death of Mr. Arone, two Somalian nationals had been shot as they tried to enter the Canadian compound. One of the Somalis was killed, and there were some allegations that he had been shot "execution-style".

On March 20, 1995, by Order-in-Council P.C.1995-442, the Privy Council established the Commission under Part I of the *Inquiries Act*. Put simply, the Commission was ordered to investigate and report on how Canada's military establishment had acted and responded before, during and after the deployment of Canadian soldiers to Somalia. The March 20, 1995 Order-in-Council stipulated a specific mandate and "Terms of Reference" for the Commission. The Commission had:

> [t]o inquire into and report on the Chain of Command System, leadership within the chain of command, discipline, operations, actions and decisions of the Canadian Forces and the actions and decisions of the Department of National Defence in respect to the Canadian Forces deployment to Somalia and, without restricting the generality of the foregoing, the following matters related to the Pre-Deployment, In-Theatre, and Post-Deployment phases of the Somalia Deployment:
>
> Pre-Deployment (prior to 10 January 1993)
>
> (a) the suitability of the Canadian Airborne Regiment for service in Somalia;
>
> (b) the mission and tasks assigned to the Canadian Airborne Regiment Battle Group (CARBG) and the suitability of its composition and organization for the mission and tasks assigned;
>
> (c) the operational readiness of the CARBG, prior to deployment, for its mission and tasks;
>
> (d) the adequacy of selection and screening of officers and non-commissioned members for the Somalia deployment;

(e) the appropriateness of the training objectives and standards used to prepare for deployment of the Airborne Regiment;

(f) the state of discipline within the Canadian Airborne Regiment prior to the establishment of the CARBG and within the CARBG prior to deployment;

(g) the effectiveness of the decisions and actions taken during the training period prior to deployment by leadership at all levels of the Airborne Regiment to prepare for its mission and tasks in Somalia;

(h) the effectiveness of the decisions and actions taken by leadership at all levels within Land Forces Command to resolve the operational, disciplinary and administrative problems that developed in the Canadian Airborne Regiment and the CARBG in the period leading up to the CARBG deployment in Somalia;

(i) the effectiveness of the decisions and actions taken by Canadian Forces leadership at all levels to ensure that the CARBG was operationally ready, trained, manned and equipped for its mission and tasks in Somalia;

In-Theatre (10 January 1993 to 10 June 1993)

(j) the mission and tasks of the Canadian Joint Task Force Somalia and the suitability of the composition and organization of the Task Force for its mission and tasks;

(k) the manner in which the Task Force conducted its mission and tasks in-theatre and responded to the operational, disciplinary and administrative problems encountered, including allegations of cover-up and destruction of evidence;

(l) the extent, if any, to which cultural differences affected the conduct of operations;

(m) the attitude of all rank levels towards the lawful conduct of operations, including the treatment of detainees;

(n) the appropriateness of professional values and attitudes in the Task Force and the impact of deployment in Somalia on those values and attitudes;

(o) the extent to which the Task Force Rules of Engagement were effectively interpreted, understood and applied at all levels of the Canadian Forces chain of command;

(p) the effectiveness of the decisions and actions taken by leadership at all levels of the chain of command within the Task force in response to the operational, disciplinary and administrative problems encountered during the deployment;

(q) the effectiveness with which information concerning operations, discipline and administration and problems encountered in-theatre was reported through the chain of command:

(i) within the Canadian Joint Task Force Somalia,

(ii) from Canadian Joint Task force Somalia Headquarters to National Defence Headquarters,

(iii) within National Defence Headquarters;

(r) the effectiveness of the decisions and actions taken by leadership at all levels of National Defence Headquarters in response to the operational, disciplinary and administrative problems encountered during the Somalia deployment;

Post-Deployment (11 June 1993 to 28 November 1994)

(s) the manner in which the chain of command of the Canadian Forces responded to the operational, disciplinary and administrative problems related to the Somalia deployment.

(Pages 15-19, Respondents ' Application Record[2])

The March 20, 1995 Order-in-Council itemized certain topics for study under three different phases of the Somalia peace-keeping mission. The first was "Pre-Deployment" or before the CAR left for Somalia (prior to January 10, 1993). The second phase was "In-Theatre" or the actions on the ground in Somalia (January 10, 1993 to June 10, 1993). The third phase of the Commission's Terms of Reference was "Post-Deployment" or public disclosure of the killings, their aftermath and allegations of a cover-up (June 11, 1993 to November 28, 1994).

Capsule Profiles of the Applicants:

Lt-General (LGen) Paul Addy: was Deputy Chief of Defence Staff (Intelligence, Security and Operations) at National Defence Headquarters in Ottawa from July 1992 until January 29, 1993.

Lt-General (Ret.) (LGen) James C. Gervais was Chief of the Land Forces Command at the time the CAR was deployed to Somalia. LGen Gervais retired from his position on January 8, 1993.

Lt-General (Ret.) (LGen) Reay was Deputy Commander of Land Force Command from June 1991, through January 1993. After January, 1993, he was Commander of Land Force Command until his retirement in November, 1995.

Brigadier-General (BGen) Ernest B. Beno was Commander of the Special Service Force from August 7, 1992 until July 8, 1994. During BGen Beno's tenure as Commander of the Special Service Force, the CAR, now disbanded, was one of the units under his command before and after its deployment to Somalia.

Colonel J. Serge Labbé is a serving officer in the Canadian Armed Forces. He was "In-Theatre" Commander of the Canadian Joint Forces in Somalia from December 14, 1992 until approximately June 17, 1993. He was appointed to the rank of Brigadier-General effective July 1, 1993, but this appointment was suspended pending the completion of the Commission.

Lt-Colonel (Ret.) Carol Mathieu was the CAR's Commanding Officer on the ground in Somalia. He took over this post in October 1992 after the original Commander, Lt. Col Morneault, was dismissed by BGen Beno.

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[2] All references to the "Respondents ' Application Record" refer, except where otherwise noted, to the record filed in T-408-97, *Brigadier-General Ernest B. Beno* v. *The Honourable Gilles Létourneau et al.* The Respondents raised a preliminary issue over the admissibility of Volume II of Brigadier-General Beno's four volume Application Record because it was not filed at the same time as the Applicant's Originating Notice of Motion. At the beginning of the hearing, Counsel for BGen Beno sought leave to file Volume II. Volume II consists of an affidavit identifying and attaching excerpts from transcripts of the Somalia Inquiry, the transcript of a Press Conference held by the Commissioners on February 12, 1997, Briefing Notes, documentary reports and a transcript from an interview conducted on a newscast. The only contentious item was the transcript from the interview held on the television news broadcast (Exhibit "K" to the Affidavit of Madeleine Schwarz, Volume II of BGen Beno's Application Record. Counsel for the Commission raised objections to that item because that document was not part of the record of the Inquiry. On this preliminary matter, I hold that Volume II of BGen Beno's Application record is admissible, save for "Exhibit "K". In any event, none of the parties made any references to Exhibit "K" during the course of the hearings.

The Initial Section 13 Notices:

In September, 1995, prior to the commencement of the Commission's evidentiary hearings, four of the six Applicants received their initial Section 13 Notices[3]. With one minor exception, the Section 13 Notices were identical and concerned allegations of misconduct in the "Pre-Deployment" Phase[4]. In essence, the initial, "generic" Section 13 Notices advised the Applicants that findings could be made against them because of the doubtful effectiveness of decision-making within the chain of command on the selection and screening of officers and non-commissioned members of the CAR. The Applicants are also alleged to have fallen short of their duties in evaluating the operational readiness of the CAR, especially given its state of discipline. As discussed below, each Applicant subsequently received an individual and particularized Section 13 Notice.

The Commission's Hearings

The Commission hearings themselves were divided into three phases to mirror the three phases outlined in the Commission's mandate. The hearings began on October 2, 1995 with attention devoted to the "Pre-Deployment " phase of the Somalia operation. The Commission 's evidentiary hearings into the "Pre-Deployment" phase ended on February 22, 1996. During this phase, the Commission heard testimony about widespread and rampant discipline problems in the CAR prior to its Deployment to Somalia in December, 1992. Some CAR soldiers were suspected of harbouring extreme racist views, burning an officer's car after a drinking binge and being involved in a shooting spree at a park in their home base in Petawawa, Ontario (page 117, Vol. I., BGen Beno's Application Record). Although some of the Applicants[5] applied for and received status as parties before the Commission with full rights of participation, all of the Applicants were represented by counsel

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3 LGen Gervais: pages 21-23, Applicant's Record; LGen Reay: pages 60-63, Applicant's Record, Col Mathieu: pages 26-28, Applicant's Record; Col Labbé's initial Section 13 Notice was dated December 21, 1995, pages 44-46, Applicant's Record. LGen Addy's was dated February 6, 1996, pages 33-35, Application Record; and BGen Beno: pages 681-685, Applicant's Record.

4 Col Labbé's Section 13 Notice was an abbreviated version and contained only a single allegation concerning the constitution, composition and operational readiness of the Canadian Airborne Regiment Battle Group (CARBG) (pages 47-48, Application Record of Col Labbé).

5 BGen Beno, Col Labbé, and LCol Mathieu were granted party status.

throughout. Four of the six Applicants testified before the Commission in the "Pre-Deployment" phase in January and February 1996.[6]

The Commission's Report was initially due on December 22, 1995. However, the hearings, as is often the case with such complicated proceedings, took longer than expected. The Commission only began the "In-Theatre " phase of the evidentiary hearings on April 1, 1996. An unexpected twist in the Commission's hearing process developed when allegations of document tampering and destruction unexpectedly seized the agenda from April 24, 1996 through August 30, 1996. The Commission therefore sought and obtained extensions to postpone the original due date of the final report (P.C. 1995-1273 of July 26, 1995, P.C. 1996-959 of June 20, 1996, pages 22 and 27, Respondents ' Application Record). Finally, in November 1996, the Commission sought a third extension of time and presented the Privy Council with possible deadline dates for three separate scenarios: (i) September to December, 1998; (ii) April to June 1998: or (iii) December 31, 1997 (pages 38-45, Respondents ' Application Record).

However, the Privy Council rejected all of the scenarios. The Government of Canada was apparently growing impatient just as the Commission was in the midst of the "In-Theatre" evidence and was about to begin the "Post-Deployment" phase. During the "Post-Deployment" hearings, the Commission would have addressed the issue of whether senior military and public officials had sought to cover-up or minimize the killing of Mr. Arone and the March 4, 1993 shooting. The Government therefore denied the Commission's request for an extension. In fact, by a letter dated January 10, 1997, the Government ordered the Commission to finish its hearings by March 31, 1997 and to hand in a final report by June 30, 1997 (pages 46-47, Respondents' Application Record). Order-in-Council 1997-174, dated

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6 BGen Beno: January 29 through January 31, 1996, inclusive; LGen Reay: February 13 through February 15, 1996 inclusive and on June 18, 1996; LGen Gervais: February 15, 19, 20, 1996; and LGen Addy : half a day on February 19, 1996. As individuals intimately involved in both the "Pre-Deployment" and "In-Theatre" phases, Col Labbé and LCol Mathieu testified about both phases during separate single appearances for three consecutive weeks in February, 1997.

February 4, 1997, gave legal effect to the Government's January 10, 1997 letter to the Commission (page 48, Respondents' Application Record).

After the Government's refusal to extend the evidentiary hearings, at a press conference held on January 13, 1997, the three Commissioners voiced their disappointment (pages 250-273, Respondents' Application Record). During the Press Conference, Commissioner Rutherford stated at pages 268-269:

> I am dismayed by the turn of events that has led to the premature termination of this Inquiry...Ihave always been prepared to take the time that is necessary to do the job that has been assigned to us and do it well. It is not without some disquiet that I admit to feeling betrayed by the fact that the opportunity to fully complete this important endeavour is to be denied to me and my fellow Commissioners. The sense of loss that I feel here, however, is not personal. The loss is one that will be felt by the Canadian military and the Canadian people.

The Commissioners decided to continue on despite what they called the Government's "truncation " of their original mandate. However, with one exception, the Commission did withdraw all Section 13 notices issued to individuals implicated in the "In-Theatre" and "Post-Deployment" Stages of the Somalia Deployment.[7] And yet, except for one, all Section 13 Notices issued to individuals in the "Pre-Deployment" stage stayed in effect (page 437, Respondents ' Application Record). In fact, in late January, 1997 and early February, 1997, the Commission issued a flurry of revised, particularized Section 13 Notices to the Applicants.[8] As with the first Section 13 Notices, there are some "boiler-plate " allegations, albeit with slight variations, in all six Section 13 Notices. For example, all of the revised Notices stipulate that the Applicants failed, either to provide for, advise or ensure training for the troops in the Rules of Engagement, and the Law of War or the Law of Armed Conflict, including the Geneva Convention on the Protection of Victims of Armed Conflict. Five of the six Applicants are also alleged to have failed in their duties as

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[7] The Section 13 Notice issued to General Boyle is at issue in T-1089-97, *General Jean E. Boyle* v. *The Honourable Gilles Létourneau, et al.* This case is scheduled to be heard during the week of June 23, 1997 before the Federal Court of Canada, Trial Division.

[8] See: pages 25-26, LGen Gervais' Application Record; pages 96-97, LGen Reay's Application Record; pages 126-128, Vol. I, LGen Addy's Application Record; pages 190-192, Respondent's Application Record in BGen Beno; pages 47-48, Col Labbé's Application Record and pages 32-33, Application Record of LCol Mathieu.

Commanders or Commanding Officers as these terms are defined in the Queen's Regulations and Orders, Section 4.20 and in military custom.[9]

However, unlike the first Section 13 Notices, the Notices issued in January and February 1997 were not entirely identical. Each Section 13 Notice varied in outlining how the Applicant had allegedly failed in the "Pre-Deployment" phase. The specific contents of the Notices depended on the recipient's rank and responsibilities in the military chain of command. Nonetheless, on a general level, all of the Notices concerned the alleged significant leadership and discipline problems within the CAR prior to its deployment to Somalia. BGen Beno's second Section 13 Notice is the most detailed about the state of discipline within the CAR prior to the deployment and describes incidents of alcohol abuse, missing weapons, the wearing of racist tattoos and the flying of Rebel flags. Other Notices were more specific to the recipients' roles in declaring the CAR operationally ready for the Somalian peace-keeping mission.

All of the second Section 13 Notices advised the Applicants that they had until February 17, 1997 to make written submissions, "including representations as to what [they] view[ed] as essential evidence necessary to be adduced bearing on the matters set out" in the Notices. Finally, the Notices also informed the Applicants that they would be given "an additional opportunity to make a concluding oral statement or submission to the Commissioners" at the conclusion of the Commission's hearings.

At another press conference held on February 12, 1997, the Commission clarified its scheduling plans in light of the shorter time frame imposed by the Government truncation (pages 274-277, Respondents' Application Record). Chairman Létourneau confirmed that the Commission's evidentiary hearings would conclude on March 14, 1997. He also announced that the next four weeks would be devoted to the presentation of evidence by individuals named in the outstanding Section 13 Notices. Three weeks were set aside for

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[9] LGen Reay is the exception.

the hearing of witnesses and one week for oral submissions by the parties named in the Section 13 Notices. In effect, there would be a separate phase or "Section 13 hearing" to give the recipients of the Section 13 Notices an opportunity to rebut the allegations contained in the Section 13 Notices.

The Applicants resisted the Commission's proposed procedures, relevancy criteria and time constraints for the presentation of Section 13 rebuttal evidence. Between February 17 and March 21, 1997, the Applicants brought separate motions before the Commission asking it to cease all activity, refrain from issuing a final report or at least withdraw the Section 13 Notices issued against them. As reasons, the Applicants invoked both the seeming unfairness of the Commission continuing even after the Government had truncated its hearing process and the Commission's refusal to hear all of their proposed witnesses in the rebuttal stage. One of the Commission's Counsel, Ms. Barbara McIsaac, Q.C., responded to some of the motions in a brief letter dated March 3, 1997 (page 86, Application Record of BGen Beno). The Applicants were informed that their motions before the Commission would be dealt with once all of the evidence from Section 13 Notice Holders has been received. However, some Applicants, like BGen Beno, withdrew from the entire Section 13 Hearing process and called no witnesses, filed no written submission and made no oral arguments. Some, like LGen Gervais, LGen Addy, and LGen Reay, filed written submissions, albeit under "protest" in the later two instances. Finally, LGen Addy, Col Labbé and LCol Mathieu made oral submissions.

On March 27, 1997, the Commission formally dismissed the motions filed by the Applicants (pages 221-228, Respondents' Application Record). The March 27, 1997 decision was specifically in response to LGen Reay's actual motion before the Commission. However, the decision was made applicable to the similar motions filed by the other five Applicants. The parties now agree that for the purposes of the current judicial review applications, the March 27, 1997 decision of the Commission is the decision under review. In their decision, the Commissioners held that they were under a duty to report and had no

jurisdiction to decline to do so. Furthermore, the Commissioners concluded that the "Pre-Deployment" phase of the Commission's evidentiary hearings had been "self-contained" and autonomous. The Commissioners also stated that the Commission could proceed under an abbreviated time frame and confine potential Section 13 findings of misconduct to the "Pre-Deployment" Phase. Finally, the Commissioners determined that the Applicants had enjoyed a full opportunity to be heard on the allegations contained in the Section 13 Notices concerning the "Pre-Deployment" phase.

Yet another moment of drama in this long tale of legal manoeuvres occurred on March 27, 1997, the same date as the decision under review. Madame Justice Simpson of the Federal Court, Trial Division held in *Dixon* v. *The Commission of Inquiry into the Deployment of Canadian Forces to Somalia and The Governor in Council*, T-309-97 and *Dixon* v. *The Governor in Council*, T-317-97 (hereinafter collectively *"Dixon"*) that the cabinet or Governor-in-Council had acted illegally in its amending Order-in-Council of February 4, 1997.[10] Madame Justice Simpson deemed the February 4, 1997 Order-in-Council *ultra vires* the Governor-in-Council because it had not eliminated matters from the Commission's mandate in sufficiently clear and unmistakable terms. To correct the problems of clarity and impossibility of performance, the Governor in Council was invited to either impose a new deadline which would allow the Commission to complete its entire mandate or eliminate specified matters from the Commission's mandate. On April 3, 1997, in P.C. 1997-456, in accordance with Madame Justice Simpson's decision in *Dixon,* the Governor-in-Council formally amended the Commission's mandate (page 88, Respondents' Application Record). The Commission's revised Mandate now requires it to address the "Pre-Deployment" issues in its final report due on or before June 30, 1997. The Commissioners also have the discretion to inquire and report on the "In-Theatre" and "Post-Deployment" phases within the June 30, 1997 deadline.

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[10] Madame Justice Simpson's Order is currently under appeal in A-281-97, filed on April 8, 1997.

With the Commission's reporting deadline fast approaching, the current applications for judicial review made their way to the Federal Court on an expedited basis. In their Originating Notices of Motion, the Applicants had sought to prohibit the Commission from issuing the report. However, the Applicants subsequently abandoned this first form of relief and now primarily seek the withdrawal of the Section 13 Notices. Two Applicants, Col Labbé and LCol Mathieu, request an alternative form of relief: they want the Court to prohibit the Commission from making any findings of fact or credibility with respect to the "In-Theatre" phase that could identify those Applicants by rank or position.

ISSUES:

In essence, all of the Applicants contest a single issue: the fairness of the Section 13 Notices. However, the unfairness is described in a rather intricate two-fold argument. First, the Applicants invoke the overarching unfairness of the decision to make potential findings of misconduct only for the "Pre-Deployment" phase when the three phases of the Commission had been inextricably linked both in action and public perception. This is what I call the "linkage" argument. Second, the Applicants cite the unfairness of the separate Section 13 Hearing procedures, including the number and identity of permitted witnesses. This is the "Section 13 Hearing" argument. Some Applicants like LGen Addy, LGen Reay and LGen Gervais raise the separate issue of the sufficiency of the particulars provided in the revised Section 13 Notices. All of the Applicants submit that they were not given a "full opportunity to be heard" under Section 13 of the *Inquiries Act*. The linkage argument is also the keystone for the second argument concerning the "Section 13 Hearing" procedures. According to the Applicants, because the three phases of the Somalia mission were linked, they were entitled to call and cross-examine witnesses from the "In-Theatre" phase even though their Section 13 Notices were only ostensibly devoted to "Pre- Deployment" matters. Before analyzing the linkage and Section 13 Hearing arguments, I shall outline the standard of review in questions of procedural fairness and Commissions of Inquiry.

STANDARD OF REVIEW:

The standard of review for public commissions of inquiry has recently sparked considerable judicial comment. In the key case of *Canada (Attorney General)* v. *Canada (Commissioner of the Inquiry on the Blood System - Krever Commission)* (1997), 142 D.L.R. (4th) 237 (F.C.A.) (hereinafter *"Krever"*), the Court reviewed the conduct and decisions of the Honourable Horace Krever, Commissioner for an inquiry into the safety of Canada 's blood system. Commissioner Krever issued Section 13 Notices after the close of the inquiry's public hearings. However, the recipients of the Section 13 Notices then contested the fairness of this gesture, and the contents of the Section 13 Notices themselves. Mr. Justice Décary for the Federal Court of Appeal in *Krever* found, with one exception, that the Commissioner had not exceeded his jurisdiction or violated principles of procedural fairness. Before reaching this conclusion, Mr. Justice Décary crafted a particular standard of review, what he called at 252, a "dual standpoint of restraint and vigilance" .

The first criterion of restraint is necessary for a number of reasons. First, restraint is required, as in *Krever* and the cases at bar, when Applicants seek to prohibit a Commission from acting on the basis of the "hypothetical" (*Krever, supra*, at 252) findings contained in Section 13 Notices. The Section 13 Notices at issue in *Krever* and the current proceedings merely set out potential, not conclusive, findings. However, Mr. Justice Décary did not rule out, on the basis of prematurity, the principle that one could obtain an order for the withdrawal of Section 13 Notices. The Court found at 248 in *Krever* that the appellants were not to be deprived of their right to seek, in advance, to prevent the Commissioner from making potential adverse findings. Contrary to Mr. Justice Richard 's holding at the trial level, *Canada (Attorney General)* v. *Canada (Commissioner of the Inquiry on the Blood System in Canada - Krever Commission)*, [1996] 3 F.C. 259 (T.D.), Mr. Justice Décary dismissed the fact that the appellants could apply to have the findings set aside when the report was published. Nonetheless, the Court in *Krever* recognized a gulf between principle and practice. Mr. Justice Décary remained cautious and concerned about the speculative nature of such anticipatory applications for judicial review and urged, at page 250, "extreme restraint ".

The role and function of commissions of inquiry is the second reason for a restrained approach to judicial review. In *Krever*, at 250, Mr. Justice Décary described commissions of inquiry as "an integral part of our democratic culture". The Court cited Mr. Justice Cory's comprehensive characterization of commissions of inquiry in *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at 137-138 (hereinafter *Phillips*). In essence, commissions of inquiry cross many institutional boundaries and perform a multitude of important roles. The Courts have acknowledged their strengths, including independence, wide-ranging investigative powers, a long-term perspective on a particular problem and an enviable status in the popular and political imagination.

However, by the same token, the second criterion of "vigilance" in the standard of review is a necessary counterpoint to the respect enjoyed by commissions of inquiry as public institutions. In *Krever*, Mr. Justice Décary noted at 251 that commissions of inquiry should not enjoy "blind respect". In effect, in performing their review functions Courts are advised to take a "vigilant" stance over the rights of individuals. Courts must keep individual rights in focus as they examine the fairness of a commission of inquiry's actions in its search for the "truth".[11] Mr. Justice Décary raises the spectre of inquiries that might embrace a purely utilitarian, "ends justifies the means" philosophy. In doing so, he states at 251, an obvious, yet crucial, point: "...the courts must not allow an inquiry to continue when a commissioner is ostensibly abusing his powers and transforming his role from investigator into inquisitor".

It would be an error, however, to overstate the "vigilance" expected of the Courts in this instance. In the same paragraph of the *Krever* decision outlining the "dual standpoint of restraint and vigilance", Mr. Justice Décary elaborated at 252 on his overall approach. The Court will intervene only if "the appellants' arguments are more than speculation, and are sufficiently serious...[or] only if the actions of the Commission, as established by the sending of the notices, are sufficiently troubling that the Court has no choice...." (my

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[11] I have taken the liberty of putting the "truth" in quotations in the light of Mr. Justice Cory's fashion in *Phillips*, *supra*.

emphasis). The use of such qualifying words as "sufficiently" and "no choice" tempers somewhat the rigour of the "vigilance". It is not enough for a Court to be troubled; it must be "sufficiently" troubled by the Commissioner's actions to warrant the bold step of intervention.

Finally, on the issue of the specific grounds of review, Mr. Justice Décary stated unequivocally at 250 in *Krever* that the threshold is a high one: "The courts should intervene only when the content of the notice implies an obvious excess of jurisdiction or discloses a flagrant breach of the rules of natural justice". In *Krever,* the Court devoted much of its attention to the jurisdictional issue. The appellants in that case had concentrated their arguments on the power of the Commissioner to issue notices that amounted, in their opinion, to potential findings of civil or criminal liability. However, Mr. Justice Décary also addressed the appellants ' procedural concerns about the fairness of the delivery of these notices at the end of the hearings. On both grounds of review, he rejected the appellants' arguments.

In conclusion, therefore, on the standard and grounds of review, the parties vigorously disputed how the *Krever* decision should apply to the current facts. The Applicants argue that *Krever* is not directly applicable since the Court in that case was primarily concerned with the issue of the specific nature of the findings that a Commissioner could make. In the cases at bar, according to the Applicants, the issue is not the nature of the findings nor whether they amount to charges of civil and criminal liability. Instead, they submit that the Court must decide whether the Commission ought to be prohibited from making any findings. They state that the Commission should be prohibited from making only "Pre-Deployment " findings of blame when all three phases of the Commission 's hearings were inextricably linked. However, there was no disagreement about the primary role and relevance of *Krever.* The case provides clear guidance and criteria for the resolution of questions of procedural fairness and Commissions of Inquiry. In my approach to the linkage

argument and the Section 13 Hearing procedures, I will bear in mind the hallmarks of "restraint " and "vigilance".

DISCUSSION:

A. The Interrelated Phases or Linkage Argument

As stated above, the Applicants argue that because the three phases of the Commission's mandate, "Pre-Deployment", "In-Theatre" and "Post-Deployment", were inextricably linked and triggered by a single event, it would be unfair for them to be the only ones singled out for formal blame. According to the Applicants, the linkage between the three phases will shape how the public will perceive the final report. The Applicants submit that, in the public mind, it would be immaterial that findings of misconduct will only be confined to the "Pre-Deployment" phase. Due to the inescapable tendency to make causal connections between the "Pre-Deployment" and "In-Theatre" phases, the Applicants would bear public responsibility and ignominy, if not formal findings of misconduct in the actual report, for the "In-Theatre" deaths in Somalia. To buttress their claims that the three phases were interrelated, the Applicants cite such factors as the trigger of the Commission and the conduct of the hearings. In contrast, the Commission argues, as it concluded in the March 27, 1997 decision under review, that the three phases of the Commission's mandate are autonomous. According to the Commission, it can fairly and fully make possible findings of misconduct in the "Pre-Deployment" phase, irrespective of what occurred "In-Theatre".

The Commission itself specifically rejected the ostensibly interrelated nature of the three phases in its decision of March 27, 1997. The Commission stated:

> It appears clearly from the terms of reference given to the Commissioners that the pre-deployment phase is **delineated in time**, refers to specific powers and duties, and involves a specific chain of command which is in fact a different chain of command from the one that had responsibility for the in-theatre phase. In other words, for the purposes of this motion, **the pre-deployment phase is autonomous.** The applicant was under a misapprehension when he concluded that the Commissioners are endeavouring to determine a link between the applicant's conduct during the pre-deployment phase and the misconduct in Somalia of the Canadian Forces. With regard to the applicant, what the Commissioners are reviewing are his alleged shortcomings and failures in assuming his duties and exercising his authority prior to deployment. **Such alleged failures or shortcomings can exist and be considered on their own terms.** The alleged failures and shortcomings that are of concern to us relate to the applicant's exercise of authority in the period prior to 10 January 1993 as defined by the terms of reference.
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> (emphasis added)

(page 3 of the decision, page 225, Respondents' Application Record)

To do justice to this complex issue of linkage and recognize its far-reaching consequences, I must now describe in greater detail important elements in the Applicants' chain of reasoning. These points include: (i) the trigger for the Commission; (ii) the Commission's mandate; (iii) the conduct of the hearings; (iv) the role of public perception and (v) the contents of the Section 13 Notices.

(i) The Trigger for the Commission

At first blush, the trigger for the Commission itself is an apparent point of linkage and adds weight to the Applicants' arguments that the phases of the hearings were interrelated and cannot now be fairly separated for the purpose of the Section 13 Notices. Like most inquiries, the Commission was triggered by a particular incident and not sparked by a general situation or undefined malaise about the status of the military. In the current proceedings, the particular incidents were the deaths in Somalia in March, 1993. The controversy, dispute and purported cover-ups over the murder of Mr. Arone and the March 4 shooting gave birth to the Commission. In the words of Commissioner Rutherford from the January 13, 1997 Press Conference, "there is a larger tragedy here. The death of Shidane Arone, the ultimate trigger of this Inquiry, might have been given a greater meaning had this Commission been permitted to complete its work" (page 272, Respondents' Application Record). The second tragedy, although not nearly so grievous as the first, is that the whole truth behind Mr. Arone's death will likely never come to light.

Given its raison d'être, I agree with the Applicants that it is surprising that the Commission should now take an atomistic view of its potential findings of misconduct under Section 13 of the final report. However, Commissioner Rutherford did not equate the trigger for the Commission with its overall goal. He ended his comments at the same January 13, 1997 Press Conference by stating, "We were in a position to allow the next generation of Canada's soldiers and the Canadian public to remember all of this as the point

in our history when we corrected the mistakes of the past and resolved the systemic problems that appear to have plagued the Canadian Forces long before Somalia" (page 272, Respondents' Application Record). Earlier, he had remarked on the role played by ordinary service men and women in the armed forces in the Commissions' work: "Our purpose has been, through an admittedly painful and very public examination, to look through their experiences at the larger system of which they are a part and attempt to understand where the system failed them..." (page 271, Respondents' Application Record). Thus, according to the Commission, the Inquiry was never designed or intended to confine its findings or report to a single act or incident. In effect, the Commission now argues that it can still fairly evaluate the training and leadership of the CAR regiment before it left for Somalia, irrespective of what actually happened on the ground in the Canadian compound on the nights of March 4 and March 16, 1993.

To buttress this argument, Counsel for the Commission sought to draw an analogy between the Commission's work in this instance and a hypothetical investigation into a plane crash. The investigative team might uncover failings and missteps before the plane ever took off that in and of themselves warrant sanctioning. For instance, if the ground crew was drunk and improperly trained in aircraft maintenance, put improper fuel in the craft or the aircraft company routinely used black market parts, such findings deserve to be known, regardless of what happened in the air. Of course, the cause of the crash itself and questions such as whether pilot error had a role in the actual disaster, and whether company officials attempted to cover-up the details, are relevant, but these issues do not make the first findings of malfeasance insignificant. Thus, in the case at bar, the Commission might find according to the Section 13 Notice issued to the Applicants that the CAR had been improperly trained and led. This potential finding in and of itself is important for the future performance and morale of the Canadian military.

In my opinion, the plane crash analogy sheds light on how the Court should approach the linkage argument. I am satisfied that the Commission can make findings of misconduct

for "Pre-Deployment" events, irrespective of what happened "In-Theatre". However, I am also not insensitive to some of the shortcomings of the plane crash analogy. If the ground crew is to be faulted for insufficiently fuelling the craft, it is important to know the plane's intended destination. Was it going on a commuter flight or a transatlantic voyage before the crash? In other words, if the Applicants are to be named for misconduct, it must be in relation to the training and leadership for a specific mission to Somalia. For instance, one could liken the Commission's work to an entirely different enterprise and make an analogy to a jigsaw puzzle. To examine and make sense of an individual piece, we must already have a picture of how the individual pieces should fit together as a whole. In other words, if we know from the outset that the jigsaw puzzle is not complete because some pieces have gone astray, why bother to labour over the puzzle in the first place? It is only in their interrelatedness that the pieces of the puzzle have value or meaning. In a similar vein, according to the Applicants, the "Pre-Deployment" phase of the Somalia Affair only makes sense in relation to what went after it, the death of Shidane Arone on the ground in Somalia.

However, once again, the Court is left with an imperfect image or analogy that fails to encompass the subtleties and intricacies of the current proceedings. The jigsaw puzzle analogy is also misleading because it presumes that all the pieces, namely the three phases of the Somalia deployment, do fit together in a neat package or picture. A jigsaw puzzle is an artificial construct, with a set number of pieces and a suitable age category. In real life, or in this instance, the Inquiry into the Somalia deployment, we do not know how many pieces there are before we begin or whether they are indeed pieces from the same puzzle!

Overall, I hold that the plane crash analogy adopted by the Commission is a reasonable one. More importantly, judicial deference to commissions of inquiry extends to the commission's interpretation of its mandate. In *Krever*, Mr. Justice Décary noted at 247 that, "the Courts allow commissioners great latitude in relation to the interpretation of the

scope of their mandates, and it is difficult to imagine how a commissioner might make recommendations that would be of any use for the future if he or she were unable to look to the past for guidance". Mr. Justice Décary also remarked at 246 on the breadth of the Commissioner 's mandate in *Krever*. He held at 247 that it was open to the Commissioner to focus on the conduct of particular individuals even though the terms of reference did not expressly highlight the conduct of the individuals in question, but addressed certain "events". Mr. Justice Décary quoted from the Supreme Court's decision in *Bisaillon* v. *Keable*, [1983] 2 S.C.R. 60 at 80.

Finally, irrespective of the myriad number of analogies, some more persuasive than others, I am satisfied that the Commission has made a reasonable interpretation of its mandate. There is cause for concern any time senior military officers, or "the ground crew", are allegedly falling down on the job, and are alleged to have erred in their duties in relation to such vital topics as training of the troops. Thus, even if the CAR had never gone to Somalia, the fact that an elite unit of the Canadian military might have been infiltrated by rogue soldiers allowed to go unchecked, and improperly led, is not a trivial issue. The Court is not prepared to say that the Commission is wasting its time in making such a discrete finding or that the Commission is frittering away public funds because there will not be a comprehensive review of causation in the final report. If pundits might decry the limited utility of the ultimate report, then they must take their complaints to the Government that truncated the Commission's mandate.

(ii) The Mandate and Terms of Reference

The Commission's mandate and terms of reference support the Commission's argument that it can fairly divide its findings of misconduct into discrete and autonomous packages. In effect, there are two large sections in the original March 20, 1995 Order-in-Council establishing the Commission: (i) the basic principles of investigation; and (ii) the terms of reference for each component phase, namely "Pre-Deployment", "In-Theatre" and "Post-Deployment"".

Madame Justice Simpson remarked at 7 in *Dixon, supra*, on the rather "extraordinary" breadth and scale of the Commission's mandate. The general principles paragraph in the mandate establishes six large topics for study with respect to the Somalia deployment: (i) the chain of command system; (ii) leadership within the chain of command; (iii) discipline; (iv) operations; (v) actions and decisions of the Canadian Forces; and (vi) actions and decisions of the Department of National Defence (page 7, *Dixon, supra*). In addition to these six general topics, the Terms of Reference itemize specific questions for investigation in each phase. However, the Terms of Reference are prefaced with the phrase, "without restricting the generality of the foregoing...", the foregoing in this instance being the six general topics listed above. In effect, the Commission's overriding task is to report on the six main topics and how these themes are manifested in each phase. The first topic, "the chain of command system" is the common and crucial element over all three itemized phases since it is the prime mechanism in the military for fixing responsibility. The Commission correctly noted in its March 27, 1997 decision that the "Pre-Deployment" phase "involves a specific chain of command which is in fact a different chain of command from the one that had responsibility for the in-theatre phase." During the course of oral argument, the Commission presented into evidence a diagram that clearly indicated the separate chains of command for the "Pre-Deployment" and "In-Theatre" operations (Exhibit R-1). The accuracy of this diagram was not contested by any of the parties. In fact, the diagram had been an exhibit during the course of the Commission's own evidentiary hearings.

It is noteworthy as well that nowhere in the mandate or terms of reference are the specific deaths in Somalia expressly itemized. However, there is a reference in the "In-Theatre" Terms of Reference to the "treatment of detainees". The name Shidane Arone is indelible in the annals of Canadian history, never to be forgotten, but the absence of an express mention indicates that the Commission had to look beyond a particular incident on the ground in Somalia and investigate a wider web or system. Indeed, under the April 3, 1997, Order in Council, the Commission must report solely on the "Pre-Deployment" phase.

The fact that the Government was compelled to revise the mandate in the wake of Madame Justice Simpson's decision in *Dixon,supra* does not detract from the validity of the revised mandate. None of the parties before the Court did or could contest the validity of the mandate. Cynics will conclude that the Government in this Order only confirmed its official document to what the Commission intended to do anyway in the wake of the Government truncation. In any event, the Commissioners now argue that they are legally bound to observe the terms of the amending Order in Council P.C. 1997-456 of April 3, 1997. This revised mandate stipulates that the Commissioners are required to address all of the elements from the "Pre-Deployment " phase but have **discretion** to inquire and report on the "In-Theatre " and ""Post-Deployment"" stages. In effect, the Commissioners cite the revised mandate to make a virtue out of necessity. In other words, the revised, albeit truncated mandate, was thrust upon the Commissioners and they had to play the cards dealt them by the Government. I agree that the separate character of each phase is confirmed by the latest amending Order in Council.

(iii) The Conduct of the Hearings

On the issue of the conduct of the hearings themselves as a point of linkage, the Applicants argue that in practice, the dividing line between the three phases of the Commission's hearings was rather porous. The Applicants also cite an ostensible express assurance from the Commission Chairman and the Commissioners' comments from the January 13, 1997 Press Conference as proof that the Commission's hearings were interrelated. First, on the question of practice, during the cross-examination of Commission Counsel Barbara McIsaac, Q.C.,on her affidavit sworn April 9, 1997, she was asked whether "...whatthe Inquiry was doing from time to time was determining whether events which occurred in the Phase I time frame may have had an impact on what occurred in Phase II of the "In-Theatre"". She responded, "That's fair as one aspect of the Inquiry, yes" (page 308, Respondents' Application Record). Ms. McIsaac also recognized that the Commissioners themselves during the cross-examination of some witnesses occasionally asked questions about whether events in the "Pre-Deployment" phase might have had an

impact on "In-Theatre" events. She stated, "I think from time to time all counsel and all witnesses tended to slide from one phase to the other as was inevitable".

Contrary to the Applicants' arguments, in my opinion, the infrequent slippage between the three phases does not negate the overriding tendency and conduct of the Commission. I note that in the excerpts from Ms. McIsaac's cross-examination quoted above, she qualified her statements with such phrases as "fair as one aspect" and "from time to time". Consequently, the Commission, by and large, attempted to conduct the hearings as if they were in fact discrete and autonomous. In fact, witnesses, including the Applicants themselves, only testified on the "Pre-Deployment" events during the "Pre-Deployment" phase of the Commission's hearing process. It was understood that if a witness appeared for a second time during either the "In-Theatre" or "Post-Deployment" phase, he or she could only then be questioned about events in that time frame. The Commission also had to issue a separate Section 13 Notice for each phase because the allegations in the Notices were confined to each phase. If an individual was also found to be worthy of adverse findings for his alleged misconduct in another phase of the deployment, a separate Section 13 Notice was issued. Indeed, during the course of oral argument, the Court learned that some of the Applicants in the case at bar, namely Col Labbé and LCol Mathieu, had received Section 13 Notices for "In-Theatre" allegations. However, these "In-Theatre" Notices were withdrawn in mid-January, 1997.

However, I recognize that in practice the three phases were not hermetically sealed. Nonetheless, the Commission's abiding intention and general course of conduct was to keep the three phases separate. It is also noteworthy that the Applicants did not draw the Court's attention to any evidence of the Commission making findings of "causal connections " in the "In-Theatre" phase between the "Pre-Deployment" evidence and "In-Theatre" events. The "In-Theatre" phase began in the spring of 1996 but it was soon put on hold until the fall of 1996 while the Commission had to investigate the allegations of document tampering. Be that as it may, the Commission had some solid months of "In-

Theatre" evidence before the Government truncated the mandate. I am struck by the absence of any questioning of "In-Theatre " witnesses on how "Pre-Deployment " actions might have borne any fruit "In-Theatre ". Evidence of such questioning would have strengthened the Applicants' submission concerning the linkage argument and the Commission's course of conduct. The absence of such evidence is equally telling on the issue of linkage.

The Applicants also allege that besides the common understanding of how the Commission would proceed as an interrelated enterprise, there was an express statement to that effect from the Commission itself. For instance, BGen Beno alleges that the Commission made an undertaking that no findings would be made against him until the whole of the Commission's evidence-gathering had been completed. On May 7, 1996, in their reasons dismissing a motion brought by BGen Beno for the disqualification of the Commission Chairman on the ground of bias, the Commissioners remarked:

> As was stated to counsel for the Applicant during the private meeting with the Commissioners convened at his request, findings concerning the Applicant's credibility or any determination as to whether adverse commentary should be made against him will not be made until all the evidence that is to be called over the entire range of events that this Commission has been asked to investigate has been heard.
>
> (pages 34-35, Application Record of BGen Beno)

The other Applicants cite the assurance given to BGen Beno to buttress their individual claims that since the Commission's three phases were inextricably linked, any curtailment of the Hearings themselves requires a withdrawal of all Section 13 Notices, including Notices concerning actions in the "Pre-Deployment" Phase.

In contrast, the Commission argues that BGen Beno has misconstrued the meaning of the Commission's May 7, 1996 comments. While I acknowledge that the import of the Commission 's remarks are open to interpretation, I am satisfied that they must be read in the context of the specific allegations of bias. There was in fact no explicit or implied binding undertaking that no findings of misconduct under Section 13 Notices would be made

against BGen Beno until all of the evidence, in all three phases, had been heard. The assurance, such as it was, related primarily to the issue of how BGen Beno's credibility was to be assessed against the backdrop of all of the evidence, and not a single line of questioning. The single line of questioning concerned BGen Beno's credibility about whether he had passed information up the chain of command on the removal of rogue soldiers from the CAR. In *Létourneau* v. *Beno*, [1997] F.C.J. No 509 (C.A.), Court No. A-124-97,[12] May 2, 1997, (hereinafter *Beno*), the Court of Appeal recognized at 14 that the "Chairman was clearly reacting to Beno's testimony; in the circumstances, his comment cannot reasonably be seen as indicating a tendency to decide on some basis *other* than the evidence" (emphasis in original).

I also recognize that the second intention of the Commission in its May 7, 1996 remarks was to hear the evidence from all three phases before there was a separate Section 13 rebuttal hearing. In its November, 1996 letter requesting an extension of time with three possible time frames and deadlines, the Commission also indicated that the Section 13 Hearing stage would be the last element to be completed. Despite the fact that the Commission could not follow through on this original intention, I do not find that it committed a flagrant breach of procedural fairness. The Section 13 Notices at issue in the current proceedings were almost entirely confined to "Pre-Deployment" matters, and the "Pre-Deployment" evidence was comprehensively addressed and canvassed during the Commission's hearings. And of course, the Commission could not follow its intention because of intervening events, including the Government's truncation of the Hearings in January.

I therefore also reject BGen Beno's argument that the Court should apply the doctrine of legitimate expectations to the Commission's May 7, 1996 comments. BGen Beno argues that his expectations were two-fold: (i) he expected that any adverse findings would be made after all of the evidence had been heard in all three phases of the Commission;

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[12] Leave to Appeal to the Supreme Court of Canada filed on June 11, 1997.

and (ii) that he would be able to call witnesses of his choice concerning the rebuttal of the Section 13 Notices. The second expectation involving the ability to call witnesses shall be discussed more fully below in relation specifically to the Section 13 Hearing argument. The general principles of the doctrine of legitimate expectations are applicable to both expectations but the application of this doctrine is not uniform. At this point, I will therefore confine my conclusions to a discussion of general principles and the first expectation.

The doctrine of legitimate expectations is part of procedural fairness. It is a question of fairness and public policy that an individual's legitimate expectations about the process and procedures of an administrative tribunal should be honoured. There are two components to determining the applicability of the doctrine: (i) whether the tribunal made an undertaking to follow set procedures; and (ii) whether the undertaking was not in conflict with the tribunal's statutory duty (*Attorney General of Hong Kong* v. *Ng Yuen Shiu*, [1983] 2 A.C. 629).

I hold that the doctrine of legitimate expectations is inapplicable for a number of reasons. First, as I stated above, because of their context and intervening events, I do not find that the Commission's comments on May 7, 1996 are a binding undertaking. Second, it is not necessary to invoke the doctrine in the present circumstances. In *Old St.Boniface Residents Assn. Inc.* v. *Winnipeg (City)*, [1990] 3 S.C.R. 1170 (hereinafter *Old St. Boniface*), Mr. Justice Sopinka stated at 1204:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to **make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission**, where based on the public official, a party has been led to believe that his or her rights would not be affected without consultation [my emphasis]

There is no need for the Court to "supply" the omission in BGen Beno's case because Section 13 of the *Inquiries Act* affords him the right to make representations. The doctrine of legitimate expectations exists to ensure that he has the right in that first place,

but it does not grant substantive rights (*Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at 557-558). Moreover, the doctrine does not even stipulate the content of the right (*Kioa* v. *West* (1985), 159 C.L.R. 551 (Aust.) at 617). It has also been held that Section 13 codifies the common law duty of fairness owed to the Applicants (*Hurd* v. *Hewitt* (1994), 20 O.R. (3d) 639 (C.A.) at 647). Thus, although BGen Beno is not seeking a substantive right in this instance, the only ostensible procedural right that he could invoke is the right to make representations and is not relevant to the linkage of the three phases or the choice of witnesses.

In addition to a specific assurance, the Applicants also rely on candid, arguably intemperate comments, made by the Commissioners during the January 13, 1997 Press Conference. The Applicants argue that the Commissioners' own remarks appear to cast a cloud of doubt on the work of the Commission and the fairness of its future prospects. For instance, Commissioner Desbarats characterized the Inquiry as a "broken contract" (page 262, Respondents ' Application Record) in which he "agreed to participate under protest" (page 264, Respondents ' Application Record). Commissioner Rutherford was equally forthright when he stated that the Government had "crippled" the inquiry at a crucial juncture (page 271, Respondents ' Application Record). Finally, the Chairman Mr. Justice Létourneau expressed his dismay because an opportunity had been lost:

> The feeling was that too much attention had been focused upon the activities of soldiers of lower rank and that not enough effort had gone into examining the role and responsibility of higher ranking officers, senior bureaucrats and senior government officials. The deadline that is now imposed upon us makes it impossible for us to comprehensively address the question of the accountability of the upper ranks.
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> (pages 252-253 , Respondents ' Application Record)

If the Commissioners themselves perceived unfairness in the process, then the Applicants submit that they have opened the Pandora 's box for the Applicants' own allegations of unfairness at the hands of the Commissioners.

I find that the Commissioners did air their frustration at the Government truncation in a very public display of displeasure. However, the Applicants cite only a few particularly colourful passages from the Press Conference that do not convey the whole picture of the Commissioners' intentions and perceptions of past and future work. The Commissioners did not spend the entire Press Conference lamenting the Government 's action. Indeed, the bulk of the Commissioners ' comments were devoted to discussing how they intended to proceed, regroup in the wake of the Government 's action and "yet produce a creditable report " (page 270, Respondents ' Application Record). As Commission Counsel aptly noted during the course of oral argument, the Government truncation meant that the Commission had to halt its advance. However, even though the Commission could not "comprehensively address the failings of higher ranking officers, senior bureaucrats and senior government officials", it could still fairly address the issue, albeit less comprehensively since senior bureaucrats and government officials would escape scrutiny because of the truncation. The advance might have been halted, but the Commission had already gained invaluable ground and was not about to forsake that hard won territory. Commissioner Rutherford stated during the Conference that "this is work that should be allowed to be done as it has been done to date - completely, comprehensively and professionally " (page 269, Respondents 's Application Record). One can clearly infer from his words that the "Pre-Deployment" phase, "the work to date ", can be carved off from the remainder of the abortive proceedings.

Finally, Commissioner Létourneau stated:

> I have no doubt that what we have been labouring at for these many months has been extremely worthwhile and beneficial to the Canadian public and its military institution. Although our mandate has been truncated, we will nevertheless endeavour, in the days ahead, to shed as much light as is possible in the circumstances on the contentious events that the Government has asked us to investigate.
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> (Page 261, Respondents ' Application Record)

(iv) The Role of Public Perception

Ultimately, the Applicants ' linkage argument rests not on the trigger of the Commission, its mandate or the conduct of the hearings themselves, but the public

perception of linkage. The Applicants argue that a report confined solely to "Pre-Deployment" findings of misconduct would be unfair because it will subject them to unjust and unwarranted opprobrium. The Applicants craft a chain of reasoning to support their claim. First, they argue that the Commission may make findings of misconduct only in the "Pre-Deployment" stage. There are not outstanding Section 13 Notices for the "In-Theatre " phase so the Commission cannot actually make formal findings of "misconduct " in that phase. However, according to its revised mandate, the Commission does have the discretion to describe "In-Theatre" and "Post-Deployment" events. Second, if one presumes that the Commission will exercise this discretion, it will possibly describe the deaths in Somalia. Third, according to the Applicants, even if the Commission does not draw an explicit causal connection in its report between the "Pre-Deployment" misconduct in the training of the CAR, the public itself will draw its own conclusions and blame the Applicants for the Somalia deaths. Since media accounts of the Somalia inquiry have often spoken "in the same breath " about the murder of Mr. Arone and the problems of soldiers run amok and lax leadership in the "Pre-Deployment" phase, the Applicants argue that they will become enshrined in public perception as instrumental to the murder of Mr. Arone (pages 109-120, Application Record of BGen Beno).

I am not insensitive to the appeal of the argument of the public perception of linkage. It is not inconceivable that an adverse finding under Section 13 for involvement in the "Pre-Deployment" phase will bring with it a global sting of shame. The Applicants are or have been career military officers, and the blight on their names will not be easily effaced if they are named pursuant to Section 13 Notices. The Privy Council held in *Mahon* v. *Air New Zealand*, [1984] 3 All E.R. 201 (P.C) at 820-821 that an individual whose interests may be adversely affected by the finding had a right to present any rational argument that could conflict with the finding. The Privy Council also explicitly recognized that "interests" is a broad concept that encompasses one's career and reputation. I also consider it a question of happenstance that actors in the "Pre-Deployment" Phase are the only ones receiving Section 13 Notices of potential adverse findings in a final report. In the

Commissioners ' comments from the January 13, 1997 Press Conference, there is no real sense that "Pre-Deployment" individuals are the only ones deserving of possible censure.

However, the Applicants have centered their arguments on linkage and public perception on two unwarranted inferential leaps of imagination that do not pass muster under the strict *Krever, supra* criteria of extreme restraint. First, they are asking the Court to **presume** what the Commission will or will not write in the June 30, 1997 Report. Second, the Applicants are asking the Court to **speculate** on what the public might or might not think given the uncertain contents of the final report and media leaks. Such requests enter into the realm of pure speculation and conjecture. Mr. Justice Décary cautioned at 250 in *Krever, supra* against "dramatiz[ing] ...the implications " of the Section 13 Notices, especially because the Notices only represent a possibility and not a certainty. Once the Court begins to speculate in this fashion, all possibilities are open. Indeed, much of the Applicants ' oral submissions were given to spinning out possible scenarios concerning the final report. The Applicants speculate that the public will tar them with the same brush as the infamous "In-Theatre" actors. However, is it not also plausible that the report will not set the public imagination aflame? A cynical citizenry, jaded by the Government 's unprecedented action in truncating the Commission 's mandate, could as equally dismiss the whole enterprise. In such an event, the final report will quickly fade from the public radar screen. I mention this admittedly more remote possibility to indicate that speculation could go both for and against the Applicants. I am therefore exceedingly reluctant to tailor the determination of a key concept like whether a "flagrant breach of natural justice" has occurred to such a slippery concept as what the <u>public</u>, a notoriously unpredictable animal, might think about the Applicants' reputations in a Report that has yet to be made public.

I also agree with the Commission that the possible and purported damage to the Applicants' reputations must not trump all other factors and interests. The institution of a public commission of inquiry carries with it certain inherent risk to the reputations. However, a policy choice is made to balance the individual rights of the Section 13

recipients with the abiding societal interest to release the commission's findings. As Mr. Justice Décary noted for the Federal Court of Appeal at 252 in *Krever, supra*:

> At the outset, I would note that a public inquiry into a tragedy would be quite pointless if it did not lead to identification of the cause and players for fear of harming reputations and because of the danger that certain findings of fact might be invoked in civil or criminal proceedings. **It is almost inevitable that somewhere along the way, or in a final report, such an inquiry will tarnish reputations and raise questions in the public's mind concerning the responsibility borne by certain individuals.** I doubt that it would be possible to meet the need for public inquiries whose aim is to shed light on a particular incident without in some way interfering with reputations of the individuals involved. [my emphasis]

In effect, Mr. Justice Décary recognizes that reputations are almost inevitably vulnerable with a commission of inquiry. Such inquiries often achieve a high level of publicity because they are usually sparked by public controversies or incidents. In the words of Mr. Justice Cory at 138 in *Phillips, supra* "in times of public questioning, stress and concern, they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem".

The Court must balance the risks to an individual's reputation and the social interests in publication of a report in determining the standard of fairness. Since fairness varies according to the context of a particular situation (*Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682 to 684), it is necessary to briefly characterize commissions of inquiry. In the case at bar, although the Commission's functions are investigative or inquisitorial, it still must pay due heed to individual interests. In fact, the Commissioners made numerous and express statements to that effect. During the opening statement at the evidentiary hearings, Commissioner Létourneau remarked:

> Although the rules of evidence applicable in adversarial proceedings such as a trial do not apply to this inquiry, common sense and fairness require that the final conclusions and recommendations of this inquiry not be based on mere speculation, unsubstantiated rumours, innuendo and unreliable or incredible evidence. This is particularly the case when the reputation of participants in the inquiry, members of military personnel or citizens may be detrimentally affected by these conclusions or recommendations.
>
> (page 97, Respondents' Application Record)

The Commission made similar comments at the opening of the "In-Theatre" phase (pages 106-107). The Commission was therefore very conscious of its own role within the larger framework of the Commission as an institution. The characterization of the Commission as investigative is entirely accurate despite some appearances that Commissions of Inquiry are often trials in the court of public opinion (Sopinka J. in "The Role of

Commission Counsel" in Pross, Christie, Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 75 at 76). In fact, the Commission does have the coercive powers to compel the attendance of witnesses under Section 5 of the *Inquiries Act*, *supra*. As well, the Commission operated under a public, not to mention media spotlight. However, one cannot push the trial analogy too far. The Federal Court of Appeal in *Beno*, *supra* held that Mr. Justice Campbell had erred in the trial division decision (*Brigadier-General Ernest B. Beno* v. *The Honourable Gilles Létourneau et al*, Court No. T-1311-96, February 21, 1997) when he characterized the Commission as "trial-like". The Federal Court of Appeal stated at 11-12 in *Beno*:

> In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate...The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties: the Commission can only "inquire" and "report".

Nonetheless, the Court of Appeal in *Beno* did agree that the stakes were often high for those implicated and named in the final report of a Commission of Inquiry.

(v) The Contents of the Section 13 Notices

Finally, I arrive at the last, most important and difficult point of ostensible linkage, the contents of the Section 13 Notices. Mr. Justice Décary delineated at 263 in *Krever, supra* the two components or elements in the Section 13 requirement of "reasonable notice":

> Section 13 requires "reasonable notice" ("préavis suffisant" in the French version). The words "reasonable" and "suffisant" include a content element and a time element. A person who receives a notice must have a good idea of the misconduct that is imputed to him or her and must have sufficient time, before the report is made, to prepare and present an adequate response.
>
> The content of the notice may vary depending on when it is given: a notice given before the hearings commence will likely be less detailed than one given after the hearings have concluded.

I shall first consider the contents of the Section 13 Notices before examining the timing of the delivery of the Section 13 Notices under the separate argument of the Section 13 Hearings.

On the issue of the contents of the Section 13 Notices, one must look to their specific wording to uncover whether they reveal any linkage between the phases. The Section 13

Notices contain allegations or expressions of opinion (see *Krever, supra* at 249). It is important therefore to examine these opinions to see if they draw any explicit or implicit causal connections or links between the "Pre-Deployment" and "In-Theatre" phases. If there is such linkage, then judicial intervention seems warranted. At first blush, according to the prefaces of the Section 13 Notices, the Notices are confined to the "Pre-Deployment" phase. For instance, the first Notices issued mainly in September 1995, before the start of the Commission's hearings, warned of possible adverse findings "that may be made against you during the pre-deployment phase of the Commission's evidentiary hearings".[13] In a similar vein, the particularized Section 13 Notices issued on January 31, 1997 and February 4, 1997 stipulate in the preface that "pursuant to the section 13 Notice already delivered to you and based upon the evidence adduced before the Inquiry..",[14]adverse findings might be made.

I then carefully examined the six particularized Section 13 Notices. In my examination, I asked myself the following question: "If the Applicants chose to rebut these allegations, would they have to refer to "In-Theatre" witnesses and evidence?" Now my question might be criticized for insisting on a practical impossibility along the lines of the fabled request, "to not to think of a pink elephant". Nonetheless, it brought to the forefront the issue of the specific wording of the Section 13 Notices, the crucial element in the Applicants' linkage argument.

By a large margin, the answer to my questions was negative. In other words, allegations such as the alleged failure to train and test the troops in the Law of War, or the Applicants' alleged knowledge of the significant leadership and discipline problems in the CAR prior to the Deployment, are squarely within the "Pre-Deployment" phase. What actually happened or could have happened in Somalia "In-Theatre" would not substantially alter the complexion or characterization of these allegations. In my opinion, therefore, except where noted below, the Section 13 Notices are not a substantial element of linkage

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13 *Supra*, note 3 for the specific page numbers in the Applicants' Records.

14 *Supra*, note 8 for the specific page numbers in the Applicants' Records.

between the phases. Linkage remains a question of degree and not a black and white issue. In effect, the three phases may be more or less loosely or tightly linked, and some elements in the chain are more important than others.

However, in my review of the wording of the Section 13 Notices, the response to my question was not a resounding no. There were some undercurrents or implicit links between the "Pre-Deployment " phase and subsequent "In-Theatre " events. Such allegations could only have been framed in hindsight in the first place, or rebutted by the Applicants with reference to ""In-Theatre" evidence ".

Four of the six Section 13 Notices in issue address whether the Applicant exercised poor and inappropriate leadership in the "Pre-Deployment" phase by failing to include or ensure an "adequate Military Police contingent"[15] (my emphasis). It is clear that the adequacy of the contingent cannot be assessed in a vacuum or solely with reference to "Pre-Deployment" events. This allegation can only be framed, evaluated or rebutted with the hindsight of "In-Theatre" events. In a similar vein, the Section 13 Notice of Col Labbé raised an allegation concerning whether the CAR deployed with "adequate signals personnel and other support personnel" (paragraph 2, page 47, Application Record of Col Labbé). This too, because of the use of the word "adequate", should be severed from the remainder of the Section 13 Notice and struck out.

Finally, LGen Addy's Section 13 Notice raises two more objectionable allegations that warrant judicial intervention. The specific allegations in LGen Addy's Notice concern the Rules of Engagement and the manning ceiling. Some of the other Section 13 Notices raise similar concerns about those exact topics, but in the other Notices there is not the same troubling linkage or causal connection in the very wording of the Notices. I shall first consider the allegation on the issue of the "Rules of Engagement". LGen Addy's Section

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[15] See paragraph 6, page 97, Application Record of LGen Reay; paragraph 6, page 26, Application Record of LGen Gervais; paragraph 4(d), page 127, Application Record of LGen Addy and paragraph 1, page 47 Application Record of Col Labbé.

13 Notice contains two allegations on the Rules of Engagement. Paragraph 4(b) of LGen Addy's Section 13 Notice alleges that he allowed the CAR to deploy "without making provisions for the troops to be trained or tested on the newly-developed Rules of Engagement" (page 127, Application Record of LGen Addy). This allegation is four square within the "Pre-Deployment" phase and can be rebutted or questioned without the benefit of hindsight. It therefore does not need to be struck. The other five Section 13 Notices contain the identical or strikingly similar purely "Pre-Deployment" allegation.[16] However, the second allusion to the Rules of Engagement in LGen Addy's notice is unique to this Notice and sufficiently troubling that it requires to be struck out. Paragraph 4(c) alleges that LGen Addy allowed the troops to deploy with "Rules of Engagement which were confusing, inadequate and lacking in definition". This characterization of the Rules of Engagement as "confusing" and "inadequate" necessarily begs the question of how the Commission arrived at those adjectives if it were not in light of "In-Theatre" events or circumstances. Paragraph 4(c) of LGen Addy's Notice should therefore be severed from the remainder of the Notice and struck out.

The second colourable allegation in LGen Addy's Section 13 Notice concerns the manning ceiling. Paragraph 4(f) of LGen Addy's Notice states that he acted in the "Pre-Deployment" phase "without adequately assessing the impact the manning ceiling of 900 land (army) personnel would have on the mission" (my emphasis). The use of the term "impact" clearly calls upon a recognition or knowledge of "In-Theatre" events. Contrast the wording of LGen Addy's Section 13 Notice on the manning ceiling with the phrasing employed in LGen Reay's and LGen Gervais' Section 13 Notices. They are alleged to have failed to "undertake/ensure that a proper estimate of the potential implications of establishing the manning ceiling at 900 land (army) personnel " (paragraph 5, page 97, Application Record of LGen Reay, paragraph 5, page 26, Application Record of LGen Gervais). In the case

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[16] Paragraph 3, page 97, Application Record of LGen Reay; paragraph 3, page 26, Application Record of LGen Gervais; paragraph 3, page 136, Respondents' Application Record for BGen Beno; paragraph 3, page 47, Application Record of Col Labbé and paragraph 5, page 33, Application Record of LCol Mathieu. Col Labbé's Notice contains an additional component. In addition to training and testing, the troops had to "understand" the Rules.

of both LGen Reay and LGen Gervais, the emphasis is on their alleged failure to undertake/ensure a "proper estimate... of the potential implications" within the system of military decision-making. The actual number of individual personnel deployed on the ground in Somalia is less crucial than the methods or means of arriving at that estimate. However, the allegation in LGen Addy's Notice is narrowly tailored to the actual "impact" of the 900 personnel in Somalia. It is therefore closely allied to the "In-Theatre" phase and should be severed from the rest of the Section 13 Notice and struck out.

Nonetheless, despite my serious objections to the few allegations described above, the difficulties are not so substantial that they necessitate the entire withdrawal of the Section 13 Notices. Instead, I hold that the objectionable allegations can be severed from the bulk of the inoffensive Notices. The objectionable portions can therefore be struck from the Notices with no lingering damage to the integrity of the Notices or the procedural rights of the Applicants.

The Court in *Krever, supra* at 250 established some guidelines on the interpretation of Section 13 Notices: "the allegations are not (or should not be) stated in legal language and **must not be held under a magnifying glass**" (my emphasis). Perhaps I might be accused of splitting hairs in scrutinizing each allegation in the Section 13 Notice in this fashion. However, in the unprecedented circumstances of the cases at bar, in which a Commission has had the "proverbial rug pulled out from under it" by the Government, the Court must pay particular attention to the specific contents and phrasing of the Section 13 Notices. In *Alberta (A.G.)* v. *Canada (A.G.)*, [1947] A.C. 503, Viscount Simon, delivering the judgement of their Lordships states, on the subject of severability, at 518:

> This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is intra vires "either in whole or in part," but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

This is the test for whether a portion of a statute could be severed. The doctrine of severability has also been applied to decisions of adjudicators. (See *Starr* v. *Chase*, [1924] S.C.R. 495.) To my knowledge, the doctrine of severability has not been applied to a Section 13 Notice. However, the several allegations in the Notices are not inextricably bound to one another. The objectionable allegations can be severed from the whole. Each allegation is framed independently of the others.

In reaching the conclusion that the entire Section 13 Notices should not be withdrawn but only certain allegations struck, I have attempted to pay due heed to both the need for "restraint" and "vigilance",the vantage points or criteria announced in *Krever*. The Court was faced with three options: (i) withdraw the Section 13 Notices entirely; (ii) keep the Section 13 Notices; or (iii) sever the few objectionable allegations and maintain the bulk of the allegations. The third option struck the proper balance between the dual standpoints of "restraint" and "vigilance".Withdrawing the Section 13 Notices in their entirety was a most drastic option. The Court accords deference to the Commission to interpret its own mandate. It must also not allow the speculative nature of public perception on possible Section 13 Notices to dictate what the Commission can and cannot do with regards to the Section 13 Notices.

Yet the Applicants cite Madame Justice Arbour's example when she acted as a Commissioner for The Commission of Inquiry into Certain Events at the Prison for Women (hereinafter "Prison Inquiry"). In her final report, despite having initially issued Section 13 Notices, Madame Justice Arbour declined to act under them or make particular adverse findings against the individuals. (*Report of the Commission of Inquiry into Certain Events at the Prison for Women,* Public Works and Government Services Canada, 1996 at page xii (hereinafter *"Report of the Prison for Women"*)). Madame Justice Arbour cited several elements behind her decision, including the fact that many persons had not been called to testify and therefore had no opportunity to address allegations that might have been made

against them. As well, she recognized that the witnesses called were "called for the sake of expediency, as the ones who had the most to contribute to the unfolding of the narrative".

I have two broad comments in relation to the Prison Inquiry. First, the circumstances of that Commission are not directly comparable to the current proceedings. There were two types of Section 13 Notices issued in the Prison Inquiry. At least one of those forms of Section 13 Notices differed substantially from the Notices issued in the current proceedings. The Notice began, "You have not been called to testify and there will be no explicit unfavourable report or other findings of misconduct naming you in the report of this Commission." (*Report of the Prison for Women, supra* at 305). Second, it is not the Court's role to second guess or applaud the Commission's interpretation of its mandate. As Mr. Justice Décary noted in *Krever*, the Court gives great latitude to the Commission in this regard. In other words, what Madame Justice Arbour perceived to be fair in the context of the Prison Inquiry, its particular mandate and the conduct of the hearings themselves, stands on its own terms. However, the Commission in the cases at bar can equally and reasonably reach a different conclusion on the fairness question based on its own understanding of its particular mandate. Thus, when a Court actually orders the entire withdrawal of the Section 13 Notice, it is a dramatic instance of intervention. An order imposed by a Court differs significantly from a Commission's choice to decide on its own terms to refrain from acting under Section 13 Notices.

The first option of withdrawing the entire Section 13 Notices was also not a viable alternative because the linkage argument cited by the Applicants, the crux of their submissions, had a decidedly mixed result. The Applicants shape the linkage argument to be an "all or nothing" proposition. In other words, either the three phases were linked for all purposes, including findings of blame, or they were not. However, I subscribe to a more nuanced perspective. Thus, in its March 27, 1997 decision, the Commission equally should not have written in absolute terms concerning the linkage question. However, this overstatement is not fatal to the Commission's decision to issue Section 13 Notices to actors

implicated in the "Pre-Deployment" phase. The Commission stated in its March 27 decision that the "applicant was under a misapprehension when he concluded that the Commissioners are endeavouring to determine a link between the applicant's conduct during the pre-deployment phase and the misconduct in Somalia of the Canadian Forces" (my emphasis). I have highlighted "are" because it speaks in the present tense about the Commission's intentions. The "misapprehension" in this instance concerns what the Commission originally endeavoured to do and what it must do now in light of how it proceeded and the Government's truncation of its mandate.

The Court in this instance is faced with a peculiar dilemma. Although I find that the three phases were linked conceptually or "in principle", "in practice" the Section 13 Notices at issue and the potential findings are largely discrete and distinct. There is now a disjunction between theory or original intentions, actual practice and ultimate outcomes. The theory in this instance is what the Commission envisioned and the practice is how it sought to achieve this vision. I am certain that if the Government had not truncated the Commission's mandate, the Commission would have ultimately endeavoured to draw a comprehensive and causative picture of the Somalia deployment. However, the Commission would have had to make the causative links one of its last acts in this hypothetical, uninterrupted inquiry. In actual fact, the Commission proceeded in a piece-meal, step-by-step fashion in each phase. As Commissioner Rutherford noted at the January 13, 1997 Press Conference, the Government had curtailed the Commission just when it could "begin pulling many of the separate threads of the investigation together and weave from the events and the experiences of individuals the whole cloth of the problems faced by the Canadian Armed Forces and the Department of National Defence" (my emphasis) (page 271, Respondents' Application Record).

The image of separate threads is an apt description of the Commission's conduct. Each phase was examined on its own terms, irrespective of what happened before or after that phase. In effect, the separate threads were only going to be spun together when the

Government truncated the Commission's hearings. Eventually, the threads would have, and should have been, but for the Government's abrupt and unprecedented action, been part of the entire garment. This weaving cannot now be done but the threads themselves, or the Commission's evidence gathering during the "Pre-Deployment" stage are in and of themselves, things of value and significance.

With the few exceptions noted above, the Section 13 Notices frame allegations that are confined to the "Pre-Deployment" phase. The bulk of the allegations or questions could be answered or rebutted without reference, knowledge or allusion to "In-Theatre" events. Thus, the linkage is in fact a question of degree, and some points of linkage are less important than others. In their arguments, the Applicants do not emphasize the linkage in the Notices themselves but devote greater attention to potential linkage in the public mind, a more slippery and contentious point. Finally, the evidentiary hearings themselves proceeded generally in an "autonomous" and discrete fashion, with evidence more or less scrupulously confined to each particular phase.

However, I am sufficiently troubled by those instances in which the Notices do implicitly draw links between "Pre-Deployment" allegations and "In-Theatre" evidence to hold that those particular allegations should be severed from the remainder of the Notices and struck out. I am alert to the particular need for vigilance in the cases at bar because of the Government 's unprecedented actions in truncating the Commission 's mandate. Much could get lost, including individual rights, in the dash to complete the Commission 's work. Indeed, in their March 27, 1997 decision dismissing the Applicants' motions, the Commissioners were at pains to underline the fact that they had heard "126 witnesses, had 183 days of sittings and reviewed more that 150,000 pieces of documentary evidence." I approach the Respondents' argument that at this advanced stage of the inquiry, "the public interest must prevail over the private interests of the Applicants...." (para. 141, page 51, Respondents Memorandum of Fact and Law in BGen Beno) with caution. The March 27, 1997 decision reads in part:

> The pre-deployment phase itself which ran between October 2, 1995 and February 22, 1996 involved the reception of extensive testimony from 46 witnesses and included thousands of pieces of documentary evidence. The report of the Commissioners on the institutional and systemic problems revealed by the evidence embraces much more than the applicant's personal interest and is intended to serve the larger interests of the military institution and the Canadian public.

The Commission had a most difficult and daunting task, nothing less than an investigation into the military chain of command and how it appeared to fail a Somalian youth and the vast majority of decent Canadian soldiers tarnished in the wake of the Somalia Affair. One wants the efforts of the Commission to bear some fruit and to fulfil the greater public policy objectives associated with Public Inquiries. However, as the Federal Court of Appeal acknowledged in *Krever, supra* at 251, the respect accorded commissions of inquiry must not "amount to blind respect". One cannot minimize the cautionary words of Bryan Schwartz in "Public Inquiries", in 1990 Isaac Pitblado Lectures, *Public Interest v. Private Rights: Striking the Balance in Administrative Law,* at 264-265, (quoted in *Krever* at 252) against the zeal of commissioners, anxious to perform their duties, "carried away with the general enthusiasm for reform to the point that individual conduct cannot be fairly evaluated".

In the cases at bar, in their zeal to issue particularized Section 13 Notices in January and February 1997, the Commissioners did not tailor all of the allegations to the "Pre-Deployment" phase. In doing so, they violated the Applicants ' rights to procedural fairness. What was mere speculation becomes a greater certainty if the wording of the allegations themselves implicitly crosses the line. Those allegations that implicitly spill over into the "In-Theatre" phase are objectionable because there are no outstanding Section 13 Notices for the "In-Theatre" phase. After all, as I stated earlier, the Commission can only make potential adverse findings of misconduct if it has issued a Section 13 Notice. However, if the allegations in the ostensibly "Pre-Deployment" Section 13 Notices beg the question of "In-Theatre" evidence and its repercussions, the Commission is making an implicit charge of misconduct for that phase. The Commissioners could be accused of trying to kill two birds with one stone. In other words, in a single Section 13 Notice, they are potentially laying blame in two phases simultaneously.

I agree that the Commission acted properly in trying to salvage its work, but in doing so, it created serious errors in the wording of several of the Section 13 Notice allegations. The Commission did not compromise enough according to the dictates of fairness and should have eliminated those allegations that crossed over implicitly into "In-Theatre" evidence. However, I also reject the Applicants' arguments that this is a case of a "job half done", being better not done at all. It is ironic that the Section 13 Notices for the "Pre-Deployment" phase would remain when the murder of Shidane Arone "In-Theatre", the trigger for the Commission in the first place, and allegations of cover-up in "Post-Deployment", would escape formal blame. However, the standard of judicial review is not irony, but fairness. If the vagaries and mysteries of Government conduct lead to ironic results, that is a separate issue than the fairness of the Commission's conduct to the Applicants in the cases at bar.

The third option of severing the few objectionable portions of the Section 13 Notices presented itself as a means of preserving both the dual standpoint of restraint and vigilance and the linkage argument's mixed legacy or results. However, I am satisfied that the Commission in this instance has not taken on the dubious mantle of "inquisitor", abused its powers or committed a flagrant breach of natural justice. Except for those exceptions noted above in the wording of the Section 13 Notices, the linkage argument is not what Mr. Justice Finlayson in *Howe* v. *Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) called "the clearest of cases" requiring judicial intervention. In severing and striking out the allegations concerning the adequacy of the Military Police contingent, signal patrol, the "impact" of the manning ceiling and the ostensibly "confusing" nature of the Rules of Engagement, the Court preserves the bulk of the unobjectionable and fair Section 13 Notices.

Finally, according to Counsel for the Commission, the Court can assume that, if adverse findings are made, they will be qualified and placed in their proper context of the

shorter time frame. This argument has merit. However, where as in the Section 13 Notices of LGen Addy, LGen Reay, LGen Gervais and Col Labbé, the allegations themselves misconstrue the context of the Notice and deviate from "Pre-Deployment" evidence, the Court must intervene to prevent an injustice. However, by the same token, in *Krever, supra,* at 260 the Court recognized that Commissions of Inquiry are often faced with daunting tasks, but that Courts should not lightly intervene merely because of these difficulties: "I am certain that the Commissioner will understand that he would be venturing onto dangerous ground if, in his final report, he were to persist in using some of the terms he used in the notices....". The Commission of Inquiry in the cases at bar must tread rather gingerly in its Final Report. It is entitled to make findings of misconduct in the "Pre-Deployment" phase because it has issued Notices to that effect. However, no such findings of misconduct, blame or fault can be made for the other phases because the Section 13 Notices were withdrawn for those later stages. In effect, the Section 13 Notice is necessary to underpin the finding of misconduct. The Commission will also therefore not be able to make or draw any causal connection between the misconduct that it might find in the "Pre-Deployment" phase and the events that occurred "In-Theatre". By severing objectionable allegations, the Court trusts that it will aid the Commission in its efforts to fully and fairly craft its final report. The Commission must accomplish a form of literary slight-of-hand by carefully crafting its final report to avoid any suggestion that the "Pre-Deployment" misconduct actually caused the deaths in Somalia or the other unfortunate incidents that marred Canada's heretofore justifiable pride in the actions of our peace-keepers. I am satisfied that because of the severing of the allegations noted above, the Commission in its final report will not draw or be permitted to draw any conclusions or pinpoint any failings in the "In-Theatre" Phase based on what it might find in the "Pre-Deployment" Phase.

B. The Section 13 Hearing Procedures

As we have seen, the first argument on linkage concerns the overarching fairness of the Commission's decision in the light of future public interpretation of the final report and the potential blight to the Applicants' reputations. The linkage argument also informs the

Applicants' second primary argument: the Section 13 Hearing procedures set for four weeks in March and April 1997. More specifically, the Applicants argue that because they were not permitted to call "In-Theatre" witnesses, they were denied a "full opportunity to be heard" under Section 13 of the *Inquiries Act*, *supra*. Several but not all of the Applicants also take issue with some procedures, including the timing of the Section 13 Notices and the sufficiency of particulars, that are not an adjunct of the linkage argument.

Before examining the timing of the Section 13 Notices, the sufficiency of particulars and the availability of witness testimony, I shall briefly review the contents of Section 13 of the *Inquiries Act*. Parliament enacted Section 13 of the *Inquiries Act* so that the individual likely to be named in a report could rebut the allegations of misconduct in the time between the receipt of the Section 13 Notice and the issuance of the final report. Section 13 does not specify how this rebuttal is to be done, except for stipulating that the recipient must receive "reasonable notice" and "a full opportunity to be heard". Earlier, I had quoted Mr. Justice Décary's comments in *Krever*, *supra* on the scope of the "reasonable notice" component. In effect, there are two elements shaping the reasonableness of a Section 13 Notice: its timing and the particulars provided.

I. The Reasonable Notice

(i) The Timing of the Notices

The Applicants argue that the revised Section 13 Notices came at a terribly late hour in the waning days of the Commission. According to the Applicants, the Commissioners further exacerbated the time crunch by issuing individualized and revised Section 13 Notices when there was no time for each recipient to completely canvass the contents of the allegations through witness testimony.

In my opinion, the Applicants have taken an unduly broad characterization of the statutory duty of fairness owed them under the terms of Section 13 of the *Inquiries Act*. As

Mr. Justice Décary noted at 264 in *Krever*, the Section 13 Hearing Stage is not a process with absolute guarantees.

> The appellants were given an opportunity to respond to the notices and to adduce additional evidence, if necessary. The time they were given for doing this was a little short, I would agree, but the Commissioner was flexible and I am not in a position to say that it was impossible for the appellants to respond adequately within the time allowed or within a longer time frame, which they did not really make any attempt to obtain...

I am struck by Mr. Justice Décary's use of the phrase, "not in a position to say that it was impossible". In effect, Mr. Justice Décary seems to be stating that a Section 13 Notice is reasonable even if its timing creates difficulties for the recipient. As long as these obstacles do not reach the extremely high threshold of "impossible...to respond adequately", then the timing of the Section 13 Notice does not violate procedural fairness. Thus, the Court of Appeal held in *Krever* that procedural fairness had not been violated even when Section 13 Notices were issued at the very end of a Commission of Inquiry's evidence gathering. Mr. Justice Décary did not insist on an exhaustive amount of time between the receipt of the Section 13 Notices and the issuance of the final report. Indeed, he even conceded at 264 that the time in *Krever* was a "little short".

Of course, it is foreseeable, as in some of the cases at bar, that the Applicants' unwarranted demands would have made practically any time frame "impossible". As Madame Justice L'Heureux-Dubé acknowledged at 685 in *Knight*, *supra,* "the aim is not to create 'procedural perfection', but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome." In this regard, some of the Applicants were "perfectionists" and erred in making excessive demands for the Section 13 Hearing stage. In effect, the time constraints were even further increased. For example, after he was invited to submit a list of possible witnesses for the Section 13 Hearings, BGen Beno's counsel proposed calling 48 witnesses on behalf of BGen Beno's alone (pages 95-99, BGen Beno's Application Record)! Even if the Commission had enjoyed the extension of time originally sought in November 1996 and submitted its final report as late as December, 1998, the Commission could not have reasonably entertained all of BGen Beno's requested witnesses. Indeed, the Commission's letter from November, 1996 that requested an

extension, originally envisioned, depending on the respective scenario, either 44, 30 or 16 days for the Section 13 Hearings for all three phases (page 45, Respondents' Application Record). In fact, none of these proposed time frames is much longer than the three weeks set aside in March, 1997 for the rebuttal of the Applicants' purely "Pre-Deployment" Section 13 Notices.

In paring the list of witnesses', the Commission in its discretion had to keep in mind not only the undeniable time constraints, but also to consider the duty of fairness owed to the Applicants and such factors as the relevancy of the proposed witnesses' testimony to the contents of the Section 13 Notices. I am not prepared to say that the time constraints were the Commission's prime or only concern. In the Opening Statement cited above, the Commission announced in clear and unequivocal terms its commitment to fairness (pages 94-99, Respondents' Application Record). This commitment did not fall by the wayside because of the exigencies of time. As late as the February 1997, Press Conference, Chairman Létourneau reiterated the Commission's obligation to provide recipients of the Section 13 Notices their rights to procedural fairness: "This witness accommodation and consequent time allocation is required as a matter of law in order to ensure fairness to those individuals who have received notices pursuant to section 12 and 13 of the *Inquiries Act* and are likely to be adversely affected by what may be said of their conduct in the final report of the Inquiry" (page 275, Respondents ' Application Record).

I agree that time is a heavy taskmaster and appears to be the rationale for many of the decisions taken both by the Commission and the Applicants themselves. Indeed, the Court itself recognizes the exceedingly time sensitive nature of the disposition of the current applications for judicial review since the Commission's Report is due by June 30, 1997. "Time's winged chariot" haunts the disposition of these cases. I am not unsympathetic to the Applicants' claim that the dictates of time, and not concerns for fairness, can seem to seize the levers of power in the Commission's decision-making process. However, the Applicants can point to no concrete evidence. The Applicants had three weeks to present witnesses although they now dispute the seeming convenience of the Commission's

scheduling. The Applicants decry the fact that the number of permitted witnesses seemingly dovetailed with the number of available days. However, the Commission denies the primacy of time in its decision-making, even as it acknowledges that time did have an undeniable role. Indeed, in a letter dated March 3, 1997 from Commission Counsel to the Applicants on the subject of the proposed witnesses, the Commission indicated a very limited flexibility: "...whilewe will try to accommodate you, the sooner we are made aware of any difficulties, the better." (page 227, Respondent's Application Record in LGen Addy's file). However, the Commission was certainly flexible in the means chosen for the presentation of rebuttal evidence. Besides witness testimony, an additional week was set aside for final oral submissions. Finally, the Applicants were permitted to file unlimited written submissions.

(ii)Particulars

The second element in the "reasonable notice" stipulated under Section 13 of the *Inquiries Act* concerns the required detail of the Section 13 Notices. All of the Applicants except BGen Beno and LCol Mathieu allege a denial of procedural fairness because of the purported inadequacy of the particulars provided by the Commission. In effect, the Applicants argue that the Section 13 Notices were not "reasonable" because the particulars were insufficient and did not allow them to know which witnesses to call in order to rebut the allegations. The Applicants argue that the paucity of the revised Section 13 Notices is obvious, especially because they were expressly designed by the Commission to "provide greater specification and particularization of the matters previously conveyed...in [the] Section 13 Notice(s)"[17]. In its March 27, 1997 decision under review, the Commission simply concluded on the issue of particulars, "there is no merit whatsoever in the applicant's counsel's contention that his client has been treated unfairly because he has not been given particulars of his alleged shortcomings" (page 225, Respondents' Application Record).

Although four of the six Applicants raise the issue of the particulars, for simplicity's sake, I shall largely confine my remarks to LGen Gervais's case. The facts, issue and legal

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[17] *Supra* note 8 for the page numbers of each revised Section 13 Notice in the Applicants' Records.

analysis are generally the same for the other relevant Applicants on this question of particulars.

LGen Gervais's then Counsel first requested particulars on February 7, 1997 after receipt of the January 31, 1997 revised Section 13 Notice (pages 27-29, Application Record of LGen Gervais). Specifically, LGen Gervais wanted to know more about the contents and status of the "standards" and "military customs" invoked in the Notice in relation to his alleged failures in leadership. LGen Gervais also sought to pinpoint in the Commission's record and documentary evidence the source for the allegation that he had knowledge of discipline problems in the CAR prior to its deployment. After LGen Gervais had a change in counsel, his new advocate on February 10, 1997 repeated the earlier concerns about the particulars provided in the Section 13 Notice and the "matter of disclosure" (page 31, Application Record of LGen Gervais). More letters were exchanged until February 25, 1997, the day the Commission, according to LGen Gervais provided him with "a purported response" (para. 29, page 207, LGen Gervais' Application Record).

However, the Applicants do not merely criticize the adequacy of the ostensibly particularized notices. They also argue that the Commission breached their rights to procedural fairness because of the Commission's laggard response to their repeated requests for particulars. For instance, LGen Gervais argues that his Counsel had to continually prod the Commission into action. As well, counsel for LGen Reay faxed a request to the Commission for particulars in a letter dated February 26, 1997. There was some breakdown in human and/or technical communications and the letter never reached the Commission. The requested particulars were only sent to LGen Reay on March 20, 1997, when the Section 13 Hearings had already commenced.

There is not an abundance of caselaw on the required degree of detail in Section 13 Notices. In effect, there is not one blanket rule for all situations. The Court must therefore look to the timing of the Section 13 Notices within the context and progress of the

Commission's hearings. Mr. Justice Décary did recognize in *Krever, supra* at 263 that "a notice given before the hearings commence will likely be less detailed than one given after the hearings have concluded". The implication in this instance is that a Notice delivered towards the end of the hearings, as in *Krever* and the cases at bar, should be more detailed. However, Mr. Justice Décary also stated at 263 in *Krever* that "a person who receives a notice must have a **good idea** of the misconduct that is imputed to him or her..." (my emphasis). The rather mild phrase "good idea" does not stand for an extremely high threshold tantamount to full disclosure in criminal or disciplinary proceedings.

On this issue of "full disclosure" and Section 13 Notices, in *Labbé* v. *The Honourable Gilles Létourneau et al.*, F.C. (Trial Division), Court No:T-133-97, March 27, 1997 (hereinafter *Labbé*), Mr. Justice MacKay offered some guidelines and general principles. However, *Labbé* is not directly applicable since it arose in a slightly different context. Col Labbé had been summoned to appear as a witness before the Commission. He then sought an order prohibiting his appearance as a witness because he alleged that the original Section 13 Notice did not provide sufficient particulars. Col Labbé argued that natural justice required "full disclosure" of the contents of the Section 13 Notice before his appearance.

In his reasons, because of the quirks in the timing of the motion, Mr. Justice MacKay did not discuss the revised Section 13 Notice issued to Col Labbé on January 31, 1997. The motion was originally filed January 27, 1997. On January 30, 1997, Mr. Justice Pinard denied Col Labbé's request for an interlocutory injunction. The motion for an expedited hearing of Col Labbé's application for judicial review was then heard on February 4, 1997 before Mr. Justice MacKay. Mr. Justice MacKay denied the motions from the bench but provided his reasons for these decisions on March 27, 1997. Despite the seemingly distinct context of the *Labbé* decision, it is persuasive authority for the required level of detail in a Section 13 Notice. On this more general level, *Labbé* concerns the fairness of the Commission's chosen procedures in relation to Section 13 Notices.

Mr. Justice MacKay clearly rejected Col Labbé's argument on full disclosure. He concluded at 8: "I am not persuaded that the principle of fairness supports a finding that Colonel Labbé is owed a duty by the Commission that would **require more than a reasonable disclosure** of areas to be the subject of testimony and documents to which he may expect to be referred..."(my emphasis). Mr. Justice MacKay explained this conclusion by referring to the nature of Commissions of Inquiry as investigative bodies. He also stated at 8 that "a witness appearing voluntarily or by summons at investigative hearings of an inquiry is not faced with 'a case to be met' which requires disclosure of the sort directed by *R* v. *Stinchcombe*, [1991] 3 S.C.R. 326 or by *Gough* v. *National Parole Board of Canada*, [1991] 2 F.C. 117 (T.D.), (1991), 122 N.R. 79 (F.C.A.).

I recognize that Mr. Justice MacKay was speaking in *Labbé* of a particular, earlier stage in the Commission's proceedings and in the context of a witness summoned to testify. In effect, Mr. Justice MacKay did not directly address the particulars that would be required at the Section 13 Hearing Stage. However, Mr. Justice MacKay did underline the fact that Col Labbé was no ordinary witness. He had already by that time received Section 13 Notices for the "Pre-Deployment" and "In-Theatre" actions, the later Notice withdrawn in January, 1997. The Court in *Labbé* also acknowledged at 13: "Opportunity must be provided for comment by any such persons about whom the Commission may ultimately propose to make findings of misconduct. But that stage of the Commission's work has not been reached". I conclude that the "reasonable disclosure" required when a witness has received a Section 13 Notice prior to his or her appearance is only slightly higher in the actual Section 13 Hearing stage. In any event, even if the threshold for particulars is actually significantly higher, I am satisfied that the Section 13 Notice recipient, like the witness, is not faced with "a case to be met". The overriding principle remains that Section 13 Notice Holders, like the Applicants in the cases at bar, are not faced with criminal charges or statutory provisions.

In my opinion, the Commission responded to the requests for particulars with sufficiently detailed and comprehensive letters. The Applicants did have a "good idea" of the misconduct imputed to them. It might not have been an "exhaustive idea", but this is not what fairness requires. For instance, the Commission did not have to specifically pinpoint the documentary material relevant to every Section 13 Notice allegation. However, since the Commission's documentary record numbered in the tens, if not hundreds of thousands of pages (not unlike these judicial review proceedings!),some pinpointing had to be done. And in fact, the Commission did specify to LGen Gervais certain relevant documents:

> With respect to the appropriate "military custom", your client is well-positioned to advise you of the details of what is expected of a commander. To assist you, you may wish to refer to the briefing given to the Commission of Inquiry by MGen Dallaire (speaking on behalf of the CDS) on June 20, 1995 (see Vol. 3, pages 477-85;p.507,p.541-45;p.547;p.549-50).
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> (page 43, Application Record of LGen Gervais)

Now it is true that the Commission did not provide everything that the Applicants were seeking. The duty of fairness does not require the Commissioners to give prior approval to the Applicants' intended submissions. However, this is what the Applicants appeared to be seeking.

However, I note that LGen Gervais did seek further particulars on the adequacy of the Military Police contingent, one of the objectionable allegations that I have previously determined should be severed from the Section 13 Notices and struck. Counsel for LGen Gervais asked:

> With respect to the allegations contained in paragraph 6 of the section 13 notice, if it is asserted that LGen Gervais had any knowledge or belief that the Military Police contingent was inadequate, and the specific evidence relied upon in support of the allegation that the contingent was inadequate at all. Please advise by what standard this measure will take place, and whether it is a measurement based on an objective and discernable standard that existed at the material time, or some other standard. Please provide copies of the standards.
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> (page 38, Application Record of LGen Gervais).

In response, Commission Counsel indicated that the adequacy of the Military Police contingent is merely a subset of the larger issue of the reporting system in place in the "Pre-Deployment" phase. On this topic, Commission Counsel advised LGen Gervais that he may

"want to consider making detailed submissions relating to the estimate which was performed by his Headquarters, including, among other items, the discussion of the number of MPs which would deploy and the impact of the manning ceiling" (page 43, Application Record of LGen Gervais). It is interesting to note that Commission Counsel continued to characterize the issue of the adequacy of the Military Police contingent as a matter falling squarely within the "Pre-Deployment" sphere. However, I am satisfied that the allegation does beg the question of "In-Theatre" evidence and as such, makes an implicit allegation about the "In-Theatre" phase. In the absence of "In-Theatre " Section 13 Notices, the Commission is acting unfairly in making this allegation. Nonetheless, on the specific issue of the sufficiency of particulars, the Applicants complain of the quantity, and not the quality of the details provided by the Commission. The fact that the Commission might have erred in providing particulars is not in and of itself an issue of procedural fairness. I am satisfied that the Commission respected the procedures concerning the required number of particulars, even if the actual content of some of the particulars was misleading about the true nature of the allegation.

I also agree with the Applicants that the delivery of the particulars was belated in some instances. This is especially true in LGen Reay's case. Indeed, the Commission acknowledged this fact in its March 27, 1997 decision. However, this relatively late timing is not a fatal misstep that warrants the extraordinary intervention of the Court. In conclusion, therefore, on the issue of particulars, I am satisfied that the Applicants did receive reasonable disclosure and that the particulars provided by the Commission do not represent a breach of procedural fairness.

II. The Full Opportunity to be Heard

(i) The Calling of "In-Theatre" Witnesses

The second component of Section 13 of the *Inquiries Act* concerns the "full opportunity to be heard". I note at the outset that the law does insist on a "full"opportunity. However, the nature of a "full"opportunity is undetermined. As Mr. Justice Décary noted

at 262 in *Krever, supra:* "the *Inquiries Act* does not impose any code of procedure". Like the Commissioner in *Krever*, the Commission is authorized by the terms of reference to craft its own procedures and methods. While it is true that the Commission must respect procedural fairness in establishing these procedures, including Section 13 of the *Inquiries Act,* there are no hard and fast rules on what constitutes fair procedures in these circumstances. In *Krever* at 262, Mr. Justice Décary repeated his earlier cautionary words about judicial intervention:

> The concept of procedural fairness is a shifting one; it changes depending on the type of inquiry and varies with the mandate of the commissioner and the nature of the rights that the inquiry might affect. A public inquiry under the *Inquiries Act* is not, I would point out, a trial, the report of a commissioner is not a judgment and his recommendations may not be enforced. **Thus a commissioner has broad latitude and discretion, and the courts will question his procedural choices only in exceptional circumstances** (my emphasis).

The Courts have recognized that Section 13 codifies the Applicants' common law rights to procedural fairness (*Hurd, supra*). At issue therefore is the content of the Applicants' statutory right to be heard under Section 13 of the *Inquiries Act*. The caselaw on the common law right to be heard is helpful and of interest for providing context and history for this statutory right. However, some of this jurisprudence, such as *Re The Ontario Crime Commission, ex parte Feeley and McDermott* (1962), 34 D.L.R. (2d) 451 (O.C.A) (hereinafter *"Feeley"*) is not directly applicable. In *Feeley,* the issue was whether standing should be granted to an individual to participate in an inquiry when the inquiry itself was established to investigate criminal conduct alleged against the individual. However, the Applicants have cited *Feeley* to be the leading case on the extensive nature of their right to cross-examine their choice of witnesses. In particular, they invoke the following passage at 475 of the decision:

> In the present inquiry, allegations of a very grave character have been made against the applicants, **imputing to them the commission of very serious crimes.** It is true that they are not being tried by the Commissioner, but their alleged misconduct has come under the full glare of publicity, and it is only fair and just that they should be afforded an opportunity to call evidence, to elicit facts by examination and cross-examination of witnesses and thus be enabled to place before the commission of inquiry a complete picture rather than incur the risk of its obtaining only a partial or distorted one. This is a right to which they are, in my view, fairly and reasonably entitled and it should not be denied them. Moreover it is no less important in the public interest that the whole truth rather than half-truths or partial truths should be revealed to the Commissioner. [my emphasis]

The use of the phrase "very serious crimes" cannot be lightly dismissed despite the entreaties of the Applicants to read *Feeley* without bearing in mind that conditioning term. I conclude that such a strained reading is untenable. The stakes are certainly higher in instances of criminal charges than in the context of commissions of inquiry. As I stated previously, commissions of inquiry are not trials. In a similar vein, Mr. Justice Décary also recognized in *Krever* at 269, that "a final report is not a decision and the case law that may have developed in relation to decisions made by administrative tribunals, particularly in disciplinary matters, does not apply".

The key issue for the Applicants in the context of the "full right to be heard" is the number and choice of witnesses permitted them during the Section 13 Hearings. The Commission invited the Applicants to prepare lists of witnesses that they wished to present during the Section 13 rebuttal phase set for three weeks in March, 1997. Now the Applicants allege that the Commission arbitrarily picked only a select few of the witnesses named.[18] And of the witnesses named, time would not permit the Applicants to adequately canvass an issue with a witness. The Applicants submit that they were offered only a semblance of a hearing, but not the "**full**" right expressly stipulated by Section 13 of the *Inquiries Act, supra.*

The Commission in its responses to the proposed witnesses did reject the bulk of the suggested names. As reasons for rejecting the proposed "In-Theatre" witnesses, the Commission cited both the criteria of "relevancy" and "time". According to the Commission, the suggested individuals "have only evidence to offer pertaining to incidents or events which due to time constraints cannot be addressed by the Commissioners in their hearings or which do not relate to matters raised in ...[the] Section 13 Notice" (page 102, Application Record of BGen Beno). Other witnesses were rejected on the ground of duplication because they had already testified during the "Pre-Deployment" phase. Finally, for a third category

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[18]. For instance, in the case of LGen Reay, the Commission decided to allow 4 of the 10 requested witnesses, although LGen Reay had originally submitted 22 names, and not the revised list containing 10. Col Labbé submitted the names of 18 prospective witnesses and was advised that he could call 2 of the 18. Col. Mathieu submitted the name of 12 witnesses and was permitted to call 4.

of witnesses, the Applicants were permitted to only file affidavits, because the Applicants had presented insufficient justification for the necessity of *viva voce* testimony from those individuals.

In response, the Applicants dispute the fairness of the Commission's rationale for categorizing and rejecting the majority of the witnesses. First, the Applicants rely on the linkage argument to argue that they should have been permitted to call "In-Theatre" witnesses despite the fact that the Section 13 Notices were ostensibly devoted to "Pre-Deployment" allegations. On the second issue of the purported duplication, the Applicants allege that they were only permitted to cross-examine witnesses on their involvement and actions in a particular stage. They were encouraged to defer questions about a specific phase until later in the proceedings, but now that the Government has truncated the Commission's mandate, the cross-examination process is incomplete. According to the Applicants, it is now misleading of the Commission to defend its action in the Section 13 Hearing phase by citing the Applicants' ostensible full participation and complete rights to cross-examination during the evidentiary phase. According to the Applicants, the Commission cannot now justify its refusal to permit the presentation of witnesses on the ground of needless duplication and repetition of the evidence. In fact, there is no duplication, because the truncation of the Commission meant that the "In-Theatre" evidentiary hearings were incomplete. Finally, as for the ability to seek affidavits from witnesses and provide unlimited written submissions, the Applicants argue that any purported gesture of fairness and generosity on the Commission's part was a sham tainted by the truncation of the Commission's mandate.

According to the Applicants, Chairman Létourneau implicitly acknowledged their power and prerogative to call their choice of witnesses for the Section 13 Hearings. At the February 12, 1997 Press Conference held to clarify the Commission's proceedings in the wake of the

Government's action, Chairman Létourneau stated:

> The month of March must be reserved for the calling of witnesses identified as necessary by the parties to our proceedings. This witness accommodation and consequent time allocation is required as a matter of law to ensure fairness to those individuals who have received notices pursuant to sections 12 and 13 of the *Inquiries Act* and are likely to be adversely affected by what may be said of their conduct in the final report of the Inquiry. In all likelihood, these will not be high profile witnesses of the kind suggested.[19] Rather, they will be witnesses who are able to speak to important points of evidence and issues raised in earlier phases of our proceedings.
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> (page 275, Respondents' Application Record)

In interpreting the Commissioner's comments, the Applicants highlight the phrase "calling of witnesses identified as necessary by the parties". However, this remark should not stand for the proposition that the Commission was abdicating its role to set the terms and conditions for the Section 13 Hearings. After all, during the same February Press Conference, Commissioner Létourneau qualified the nature of the proposed witnesses as individuals who "are able to speak to important points of evidence and issues raised in earlier phases of our proceedings" (my emphasis). In other words, the witnesses "identified as necessary by the parties" must still relate to the earlier phases of the proceedings or the "Pre-Deployment" matters actually set out in the Section 13 Notices. As Commission Counsel noted in their letters to the Applicants rejecting the bulk of the requested witnesses, "relevancy" and not just time, was a determining factor. Since the vast bulk of the Section 13 Notice allegations concerned strictly "Pre-Deployment" events, the Commission correctly determined that the majority of the suggested witnesses, who would have testified on "In-Theatre" events, were not relevant to the rebuttal stage. It is important to underscore the fact that the hearings in March were specifically devoted to providing the Applicants an opportunity to rebut the allegations contained in the Notices. Indeed, as the Commission's Supplementary Rules for the Section 13 Hearings indicated, relevancy was a prime concern (page 215, Respondents' Application Record).

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[19] This is a reference to the fact that some had clamoured for the Commission to call senior government and military officials in the waning days of the Commission to address the alleged cover-up of the death of Shidane Arone. Commissioner Létourneau had to deny these requests because the Commission intended to bring to a close its examination of the March 4, 1993 shooting death. In effect, the Commission had to proceed as if it were a case of one cover up at a time.

The Court has previously rejected the all or nothing characterization of the linkage argument. There is therefore little merit to the claim that natural justice required that the Applicants should have been allowed to cross-examine witnesses on the "In-Theatre" events. However, I noted previously that a few of the Section 13 Notice allegations did implicitly raise "In-Theatre" questions like the adequacy of the Military Police contingent. What then of the Applicants' rights to call "In-Theatre" witnesses to rebut those allegations? And yet, in examining how the Applicants' actually justified the proposed "In-Theatre" witnesses, I can conclude that the refusal to recall "In-Theatre" witnesses did not result in a flagrant breach of natural justice. For instance, LGen Gervais did not even submit a list of witnesses. On the other hand, in his written submissions, LGen Addy did specifically address the nature of the evidence and the witnesses necessary to rebut the allegations concerning the military police contingent, the Rules of Engagement and the manning ceiling (pages 138-140, Application Record of LGen Addy). The Commission determined that it was prepared to receive only the affidavit evidence of Admiral Anderson, one of the proposed witnesses. However, for several of the proposed witnesses suggested specifically in relation to those objectionable allegations, namely General de Chastelain, LGen Gervais, Col Labbé and LGen Reay, the Commission was prepared to hear none on the grounds that they had previously testified (page 93, Application Record). I am troubled by this fact. However, because I have ordered that the allegations should be severed from the bulk of the unobjectionable notices, the Commission will not be able to make findings of misconduct against LGen Addy in relation to those matters. The harm that LGen Addy complained of, the taint to his public reputation because of the linkage between the "Pre-Deployment" and "In-Theatre" phases is therefore avoided. The same principle holds true for LGen Reay and Col Labbé, the other Applicants with severable allegations in the Section 13 Notices.

For other Applicants, those like BGen Beno with no objectionable allegations, it is easier to dismiss the fact that they were not permitted to call "In-Theatre" witnesses. BGen Beno in his justification for calling such figures as Private Brown, one of the CAR soldiers present and involved the night Mr. Arone was tortured and murdered, one of the many individuals on March 16, 1993 who saw and heard what happened, could offer no specific

reason for calling this witness on "Pre-Deployment" events, except for the ostensible public linkage: "These are the officers and men associated with the March 16 incident. They will all be questioned to establish that the event of March 16 had nothing to do with anything BGen Beno did or did not do in his role during "Pre-Deployment" Commander SSF" (page 99, Application Record of BGen Beno).

In other words, counsel for BGen Beno implied in the witness list and reiterated this point during oral argument that the CAR's training was not the root cause of the deaths in Somalia. Rather, the Applicants should have been permitted to point to the presence of a "few bad apples" within the troops as the source of the havoc on the ground in Somalia. "The few bad apples" comment highlights the rather paradoxical role of linkage in the Applicants ' arguments before the Court. The Applicants were at pains to argue the linkage of the three phases in support of their primary argument concerning public perception. They urged the Court to consider the basic unfairness of someone being blamed specifically for "Pre-Deployment" actions when it is all but inevitable that the public will perceive him as responsible for everything subsequent to the "Pre-Deployment" phase. However, for the purpose of the Section 13 Hearing argument, the Applicants seek to dispute the link. According to the Applicants, fairness required that they be permitted to undermine the link between "Pre-Deployment" actions and "In-Theatre" events. But in order to dispute the link, the Applicants insisted on the need for calling "In-Theatre" actors. A further irony arises once we recognize how the Applicants justify calling the proposed "In-Theatre" actors for the Section 13 Hearings ostensibly devoted to "Pre-Deployment" events. The individuals on call to dispute the link are only warranted if one accepts in the first place that such a linkage exists and needs disputing!

The fact that "In-Theatre" witnesses were never heard by the Commission is an undeniable loss for the Commission, the military and the citizens of this country. Thus, the parties agreed during the course of the oral hearing that if the Commission had had "world enough and time", or its complete time frame, it would have called key and crucial witnesses

and actors from the "In-Theatre" phase. Such a loss, however, is not to be characterized as a particular act of unfairness endured by the Applicants in the cases at bar. The Court cannot forget that they come seeking an order to withdraw Section 13 Notices for "Pre-Deployment" actions.

Another element dictating restraint is the right and ability of the Commission to serve as "master of its own procedure" (*Knight*, *supra* at 685.) As long as the Commission respected the rules of fairness, it could devise as it saw fit, the hearing schedule and the relevancy criteria for the anticipated witnesses. The rule of fairness and the "full right to be heard" is not a rule of excess subject to every demand of the Applicants, including in the case of BGen Beno, the calling of 48 witnesses. As the Commission's decision dated March 27, 1996 notes rather perceptively:

> Taken cumulatively, the total number of witness requests was approximately one hundred and four (104) witnesses. (There were some overlapping requests, making the actual number of individuals named somewhat smaller than the number of requests). This number compares with the one hundred and twenty six (126)[20] witnesses heard over the entire life of the Commission of Inquiry. It was therefore obvious to the Commissioners, without a more persuasive justification, that a great many of these requests could not be accommodated. Beyond this, however, the Commissioners had requested that the parties and affected individuals justify their requests in terms of necessity of calling the prospective witnesses. Many of the requests were accompanied by little or no justification, or by an insufficient rationale. These unjustified requests were refused.
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> (page 226, Respondents' Application Record)

Now certainly, not all of the Applicants made such outrageous requests as 48 witnesses. LGen Addy, for instance, proposed a more limited list of witnesses, including his British, French and American counterparts who could testify to the international military standards for those in his position and the operation of a chain of command in joint force operations. According to LGen Addy, these witnesses were necessary to rebut the Commission's allegation that he had fallen short of military custom. However, LGen Addy was permitted to file the affidavits of his proposed witnesses.

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[20] In their memoranda of fact and law, the Respondents cite a slightly different figure of 116 witnesses heard during the entire lifetime of the Commission.

Furthermore, the Applicants have perhaps overemphasized the significance of witness testimony in sketching out the parameters of their "full right and opportunity" to be heard according to Section 13. The Applicants always had the option of filing unlimited written submissions. Indeed, LGen Addy did take advantage of this opportunity and filed lengthy final submissions, albeit under "protest" (Vol. II, Application Record of LGen Addy). Mr. Justice MacKay considered the appropriateness of written submissions as a means of being heard in the Section 13 Hearing context in *Labbé* at 13:

> Even if, as now appears, any person against whom findings may be made will not have an opportunity to call witnesses or adduce their own evidence in the course of public hearings, as once was contemplated, there can still be opportunity for response in writing by any person to whom the Commission gives notice of a possible specific conclusion that would fall within s. 13 of the Act.

When the Commission refused the bulk of the Applicants' requests for witnesses, the Applicants reacted in different ways. Some like BGen Beno, withdrew from the entire Section 13 Hearing process and did not participate in any fashion. Others, like LGen Addy, did file written submissions, albeit under protest, and make final oral submissions.

Given the decidedly mixed participation rate in the Section 13 Hearings, the Commission submitted that the Applicants had in fact declined the offer to be heard, rather than the Commission actually denying them this right. The Commission therefore urged that the Applicants should be estopped from alleging procedural unfairness because the relief sought in a judicial review application is discretionary (*Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3). According to the Commission, the Court should decline to exercise its discretion when, as the Federal Court of Appeal noted in *Krever* at page 264, the Applicants are the author of their own misfortune: "If the appellants chose not to respond, simply on the assumption that this Court would make a decision favourable to them, they have no one to blame but themselves..".

In my opinion, however, the doctrine of issue estoppel is inapplicable. First, most of the Applicants, with the exception of BGen Beno, did more or less participate in the Section 13 Hearing Process. Second, the Respondents did not suffer any detriment from the Applicants ' partial or total refusal to participate in the Section 13 hearing. I am also

certain that, especially in the case of LGen Addy, who did his utmost to participate in the process at every turn, there was no deceit or ill-will on the Applicants' part. I am satisfied therefore that in principle, the Applicants can seek judicial review. However, if as in BGen Beno's case, the Applicants, chose to bear the risk of not participating at all in the process, it ill-behooves them to now seek redress for the unfairness of the process.

I therefore conclude that the Applicants were not denied procedural fairness merely because they were not permitted to call every proposed witness on their lists. As the Commission explained in its decision dated March 27, 1997, the Commission had to pare down the prospective witness lists. Now the Applicants might accuse the Commission of using a broadsword and not a scalpel to perform this paring exercise, but there is no doubt that such paring had to be done within the Commission's own procedures, criteria and the fairness guarantees owed the Applicants. I am satisfied that the Commission did not commit a flagrant violation of natural justice in the Section 13 Hearing process in relation to the issue of calling witnesses.

(ii) The Calling of Specific Witnesses

However, BGen Beno offers a variation on the bulk of the Applicants' arguments concerning the receipt of the revised Section 13 Notices. He alleges that he was given a specific assurance from Commission Counsel that he would have an opportunity to cross-examine certain witnesses like General Boyle, author of key documents written in the "Post-Deployment" phase of the Inquiry. These documents apparently lay blame on BGen Beno for alleged "Pre-Deployment" failings. According to BGen Beno, two other witnesses, LGen Reay and Colonel Joly, are also crucial to the documents and his Section 13 Notice allegations. LGen Reay reprimanded BGen Beno in the wake of the blame provoked by the findings in the Post Deployment documents. However, BGen Beno alleges that LGen Reay himself had his own suspicions about the operational readiness of the CAR prior to its deployment. Indeed, BGen Beno submits that LGen Reay had Col Joly destroy documents which supposedly documented LGen Reay's own qualms about the CAR prior

to its deployment. BGen Beno portrays himself as the sacrificial lamb in the operational sphere for the powers that be in the higher realms of the chain of command. BGen Beno alleges that he should have been permitted to recall and cross-examine LGen Reay and Col Joly in the Section 13 Hearings in March. The goal would have been to uncover whether LGen Reay had in fact been involved in a cover-up to destroy documents revealing his own knowledge of disciplinary problems in the CAR prior to its deployment to Somalia.

General Boyle's appearance before the Commission was during the unexpected document tampering and destruction "mini-phase" in the summer of 1996. At that time, he did not testify about the actual contents of documents prepared by him in the Post Deployment phase. Instead, his testimony was confined to the methods within the Department of National Defence for funnelling documents to the Commission. LGen Reay testified during the "Pre-Deployment" phase but it was understood that he would return during the aborted Post Deployment phase to shed further light on the basis of his critical evaluation of BGen Beno's alleged failures in the "Pre-Deployment" phase. Col Joly was originally set to testify during the "Pre-Deployment" phase, but his appearance was subsequently moved to the "In-Theatre" phase. However, the truncation forestalled his appearance.

In his list dated February 17, 1997 of 48 prospective witnesses for the Section 13 Hearings, BGen Beno submitted the names of General Boyle, LGen Reay and Col Joly (pages 95-99, Application Record of BGen Beno). However, on February 27, 1997, Commission Counsel, Mr. Ian Stauffer, provided him with a mixed response to this request. To simplify its response to the lengthy list, the Commission categorized the witness requests (pages 102-104, Application Record of BGen Beno). First Commission Counsel determined that BGen Beno had provided insufficient justification for requiring General Boyle's *viva voce* evidence. However, Mr. Stauffer also stated that the Commission was prepared to receive General Boyle's affidavit evidence. Second, Commission Counsel ruled that LGen Reay and Col Joly would not be recalled because they fell into the category of eight

witnesses who had already testified before the Inquiry, and BGen Beno had already had an opportunity to examine those witnesses. A third category of witnesses included the 26 names of mainly "In-Theatre" actors. The Commission decided not to entertain these witnesses because they had no testimony to offer on matters raised in the Section 13 Notices Hearings in March, 1997. Finally, BGen Beno was informed that he could call 8 of his proposed 48.

BGen Beno now submits that the Commission did not honour his legitimate expectations that he would be permitted to call and cross-examine such witnesses as General Boyle, LGen Reay, and Col Joly. In my opinion, however, as I stated previously in relation to the topic of the Commission's ostensible undertaking to BGen Beno during the bias decision-making process on May 7,1996, the applicability of the doctrine of legitimate expectations to the current judicial review proceedings remains doubtful. The doctrine affords protection to those who would otherwise enjoy no right to make representations or be consulted (see *Old St. Boniface, supra*). As well, the doctrine cannot set out the scope of the content of the right to make representations, including BGen Beno 's expectation that he would have his choice of witnesses. However, even if the doctrine of legitimate expectations could apply in principle, in practice, BGen Beno has failed to satisfy the legal criteria of the doctrine. Earlier, I outlined these criteria: (i) a binding undertaking and (ii) an undertaking not in violation of the Commission's statutory duty.

On closer inspection, the express assurance cited by BGen Beno is not very clear nor concrete. More importantly, it certainly does not specify that the Commission was undertaking to allow BGen Beno to call General Boyle in the Section 13 Hearing rebuttal phase on the contents of BGen Beno's Section 13 Notice. It does not even stipulate that General Boyle would speak to "Pre-Deployment" actions and allegations in general. BGen Beno's counsel wrote to the Commission on July 31, 1996 and stated:

> I wish to confirm our conversation today that General Boyle's testimony before the Inquiry on this occasion will be directed to issues which have arisen in connection with the so-called documents and DPGA issues. I understand that the Commission will call General Boyle again in the post-deployment phase of the hearings, sometime later this year or early next, at which time he will be **questioned in relation to the manner in which the chain of command responded to the problems related to the Somalia deployment.** This is a matter of particular interest to my client and I will have a number of questions for General Boyle on that issue. In light of your

> assurance that General Boyle will be returning for this purpose, I do not intend to question General Boyle during his attendance in the month of August. (my emphasis)
>
> (page 138, Application Record of BGen Beno)

There is little in this letter to substantiate the claim that the Commission made a specific undertaking about the Section 13 Hearing or rebuttal phase. Rather, the July 31, 1996 letter reveals that General Boyle was to speak to the "manner in which the chain of command responded". In other words, it was envisioned by even BGen Beno's own counsel that General Boyle's "Post-Deployment" testimony would be devoted to the method or process in which the military blamed individuals for "Pre-Deployment" actions. Admittedly, the basis in the evidence for the laying of blame is a necessary component of this process-oriented analysis. However, BGen Beno's own characterization or justification for calling General Boyle in his prospective witness list dated February 17, 1997 highlights the same process or systemic elements in General Boyle's proposed testimony:

> 9.Gen Boyle-He will be questioned on his Somalia working group and **its role in the placing of blame for events in Somalia in both Deployment and Post-Deployment phases.** Specifically, Gen Boyle will be questioned concerning briefings gave (*sic*) the Minister of National Defence and the Chief of Defense (*sic*) Staff, and perhaps others, which contain factual inaccuracies and may tend to deflect responsibility from Senior Headquarters Command. Gen Boyle will be questioned as to his public statement reflected in the media which present a set of facts which are not supported and which reflect adversely on BGen Beno and others. Additionally, Gen Boyle will be asked about the DeFaye Inquiry and **the role it played in the placing of blame** for events in Somalia. **Gen Boyle will also be questioned concerning the role he played affecting BGen Beno's posting during the course of this Inquiry in his efforts to control events.** (my emphasis)
>
> (Page 98, Application Record of BGen Beno)

Once again, as in the original July 31, 1996 letter, the February 17, 1997 witness list from BGen Beno's own counsel emphasized the relevance of General Boyle's testimony to his role in the institutional structure or method of laying blame. Indeed, nowhere in the characterization of General Boyle's proposed testimony does BGen Beno expressly highlight its possible connection to the "Pre-Deployment" allegations contained in the Section 13 Notice at issue in the proposed hearing. This is a curious and revealing omission and further casts doubt on the ostensible binding character of the undertaking.

The ostensible undertaking for LGen Reay is even weaker. BGen Beno can point to no express statement from the Commission during the course of the Hearings but merely cites a rather garbled exchange between LGen Reay himself and BGen Beno's Counsel:

> Mr. Carr-Harris: Q. General, you have indicated in your evidence that on the subject of what General Beno knew in the fall of '92 which might have driven unable to list those things in detail at this point without reference to some of your subsequent investigation.
>
> I gather we are going to have an opportunity to do that at some later stage?
>
> Lieutenant-General (Ret.) Reay: A. I gather that is the case, yes.
>
> (pages 132-133, Application Record of BGen Beno)

In effect, the Commission never actually heard *viva voce* evidence from LGen Reay on "the subject of what General Beno knew in the fall of' 92". It is therefore odd that BGen Beno should now argue that LGen Reay's thoughts in response to "Post-Deployment" documents will colour how the Commission will treat its potential findings of misconduct under the Section 13 Notices.

The documents in question include the "de Faye Report ", "Briefing Notes for the Minister of National Defence" and an "After Action Report". The de Faye Report, comprised of some twenty volumes, was produced in July 1993 by a committee convened by the Chief of Defence Staff. Specifically, the de Faye report targets BGen Beno for his failure to rein in certain majors in the CAR before the deployment to Somalia (pages 552-636, Application Record of BGen Beno). General Boyle implicitly referred to the de Faye document in his preparation of two other documents critical of BGen Beno. The After Action Report briefly referred to BGen Beno's alleged lack of decisiveness in the transfer of potential trouble-makers from the CAR in the "Pre-Deployment" phase (page 359, Application Record of BGen Beno). The Minister of National Defence 's Briefing Note prepared in mid-November 1993 also had a small reference to BGen Beno. It stated that "it remained unclear" whether BGen Beno had acted appropriately to ensure operational readiness (page 351, Application Record of BGen Beno). Thus, besides the de Faye Report, the criticism of BGen Beno is veiled or slight in the other documents.

To buttress this argument concerning the legitimate expectation or undertaking, BGen Beno submits that the integrity of the Commission's Record is crucial to the fairness of the Commission's potential findings of blame for "Pre-Deployment" actions. According to BGen Beno, since the documents casting aspersions on his conduct in the "Pre-

Deployment" phase form part of the Commission's record, they will influence the final determination of his possible misconduct in the report itself. BGen Beno has always maintained that these documents are inaccurate and misleading, and that he should have a right to cross-examine their authors. BGen Beno now submits that he is a victim of the technicalities of time because the documents are conceptually "Post-Deployment" but actually speak witheringly of his "Pre-Deployment" actions.

It is true that Commissioner Létourneau did acknowledge in his opening statement the existence and weight of the documents:

> ...Itis important to understand that the Commissioners are not limited to the evidence gathered through these evidentiary hearings. **Subject to fairness**, and we will later develop this notion, they are entitled to look at other existing evidence or evidence gathered in other proceedings.
>
> For example, the Commissioners have the power, we would say the duty, to look at the evidence adduced in the various Court Martial proceedings held against those who were charged in relation to incidents occurring in Somalia
>
> In the same way, they can and have looked at the report of the Internal Board of Inquiry [de Faye Report] established by the military after the Somalia incidents. This report and the transcripts of the Court Martial proceedings have been filed with the record of the inquiry along with other material such as the Geneva Convention, Canadian Forces Administrative Orders on Racism, Harassment, Discrimination, Conduct of officers and Warrant officers, military accountability and the Chain of Command to name some of the material filed. All of this material is there for the Commissioners to consider, analyze, and make whatever recommendations are necessary at the end of the inquiry.
>
> (my emphasis)

(pages 96-97, Respondents' Application Record)

I have highlighted "Subject to fairness" to indicate that the Commission has not adopted the position that it will endorse in a blanket fashion the findings or conclusions of other documents. The use that the Commission will make of these other documents is not unlimited or unqualified. In contrast, BGen Beno argues that there is overlap in the Terms of Reference between the Commission and the De Faye Board's Terms of Reference. Indeed, Commission Counsel during her cross-examination admitted this fact (page 349, Respondents' Application Record). However, this similarity in Terms of Reference does not support BGen Beno's claim that he in particular was unfairly singled out. By the same token, since the documents in question relate to the institutional role or method of laying blame, BGen Beno is presuming that the Commission will rely on the documents to make actual findings of misconduct. After all, the Commission had its own hearings on the "Pre-

Deployment" phase. The Court cannot therefore speculate that the Commission will prefer ostensibly "misleading" documents that have little direct bearing on the Section 13 Notice allegations to the actual testimony presented to the Commission.

In any event, even if the doctrine of legitimate expectations does apply because the assurance in the letter dated July 31, 1996 is an undertaking, it cannot trump the Commission's statutory duty to report on "Pre-Deployment " events. Arguably, the Commission's revised mandate of April 3, 1997 does set out the Commission's duties, although they are not purely classified as "statutory". As Mr. Justice Richard noted at 296 in the trial division decision in *Krever, supra:* "Even if I were to find that the doctrine of legitimate expectations were to apply, this statement could not alter the Commission's mandate ". In *Krever*, the Section 13 Notice recipients had argued that the Commissioner had made statements that he would not make findings of civil or criminal liability. In the cases at bar, General Boyle's proposed evidence is confined to the "Post-Deployment" phase as part of the official reaction to the Somalia events. It does not directly relate to "Pre-Deployment" actions. As well, General Boyle's analysis of "Pre-Deployment" events is not a substitute for the Commission's evidence on these matters. It is not for the Court to presume, especially in the light of the Commission's statements on the qualified utility of the documents, that the Commission will cite those documents to make findings of fault.

However, I do recognize that the Commission did not fully comprehend the import of General Boyle's proposed testimony. In its letter rejecting the request to call General Boyle, the Commission stated that BGen Beno could otherwise obtain General Boyle's testimony in affidavit form. However, this fact would prove of little solace or consolation to BGen Beno. After all, if a party is adverse in interest to an individual, as BGen Beno has characterized General Boyle, then how would an affidavit suffice or substitute for cross-examination? It would have been more accurate, perhaps, if the Commission had characterized General Boyle as a witness whose proposed testimony was not germane to the Section 13 Notice allegations. As well, the Commission erred in the same February 26, 1997 letter by slotting Col Joly into the category of witnesses who had already testified. It is clear

that such was not the case because Col Joly's testimony was postponed but the truncation intervened. Nonetheless, despite these faulty characterizations, these slight errors are not the type of miscues that reach the extremely high threshold of a "flagrant violation of natural justice".

Finally, on the issue of specific witnesses, LGen Reay submits that General Vernon, a witness crucial to his credibility, never did testify despite assurances to that effect during the "Pre-Deployment" hearings". However, I believe that LGen Reay is overstating his concerns in this instance since his "credibility" is not a specific allegation in any of the Section 13 Notices. As well, the Commission correctly argues that it was in fact willing to hear the evidence of General Vernon and that a full day had been set aside for his testimony (page 132, Application Record of LGen Reay).

In *Krever supra*, Mr. Justice Décary stated that the Court must intervene when there has been a flagrant violation of natural justice or an excess of jurisdiction. As I stated above, the Commission did not commit such a flagrant violation, save for crafting several allegations for "Pre-Deployment " Section 13 Notices that implicitly crossed over into "In-Theatre " evidence. In the absence of "In-Theatre " Section 13 Notices, the Court must step in to prevent an injustice and violation of the law. However, the Court has tailored its response to these violations by severing and striking out the objectionable allegations, leaving intact the bulk of the Section 13 Notices. By equal measure, some Applicants like LGen Addy offer a slightly different characterization of the Commissions's actions. They argue that the Commission excluded relevant evidence because it refused to hear witnesses in the Section 13 hearings who could have testified on "In-Theatre " events. According to the Applicants, the Commission in excluding this evidence committed a separate breach of natural justice, one that amounts to an excess of jurisdiction. Some Applicants are at pains to characterize the Commission's alleged acts of unfairness and violations of natural justice as a matter of jurisdictional error. This characterization is done primarily for strategic

purposes because of the remedy of prohibition sought by the Applicants. The test for a writ of prohibition is found in Section 18 of the *Federal Court Act*, R.S.C. 1985, c.F-5.

However, I have difficulty accepting the Applicants ' arguments on the jurisdictional issue. First, I am satisfied that the Commission did not exclude relevant evidence as it pared the Applicants ' witnesses list. The Commission emphasized the relevancy of the witnesses to the Section 13 Notices in its scrutiny of the prospective witness lists.

Second, the Commission argues that "relevancy" in this instance depends on the eye of the beholder. According to the Commission, its framing of relevant evidence must trump the Applicants ' since it is the Commissioners who actually have the power to define the scope of the issues. The Commission cites the case of *Université du Québec* v. *Larocque*, [1993] 1 S.C.R. 471 (hereinafter *"Larocque")* to support this submission. In *Larocque,* the Chief Justice held at 487 that it is fully within the jurisdiction of an administrative board, commission or other tribunal to define the scope of the issues and to chose to admit only the evidence it considers relevant to the issues as so defined. It is only when the administrative board, commission or other tribunal refuses to consider relevant evidence to the issue as defined by the board that the decision to exclude the evidence might be considered to be a breach of the rules of natural justice. Mr. Justice Lamer was speaking in *obiter* in *Larocque*, and the issue of the exclusion of relevant evidence was not pursued during the course of oral submissions, so I shall abstain from making any final determination of the applicability of this principle. As well, I need not rule conclusively on the Commission 's rather novel argument on relevancy for the purposes of the current proceedings. However, if one did apply this interpretation of *Larocque* to the current proceedings, "the scope of the issues" defined by the Commission is its mandate and the division of the phases into three separate and autonomous entities with distinct Section 13 Notices for each phase. The "relevant evidence " would be the proposed witnesses for the Section 13 "Pre-Deployment " rebuttal hearings. Thus, according to the Commission, they would have excluded relevant evidence if they had in fact denied the Applicants the

opportunity to call "Pre-Deployment " witnesses. However, since this was not done, there was no such breach or excess of jurisdiction.

RELIEF

Of all the Applicants, Col Labbé and LCol Mathieu, both individuals more intimately implicated in the "In-Theatre " phase, have sought a rather extraordinary form of relief. Both Applicants seek an Order prohibiting the Commission from making "any report of any **findings of fact or credibility or in any way,** either directly or indirectly, identifying the Applicant by way of specific name, rank, title or position, for any actions involving him subsequent to the commencement of the **"In-Theatre" Phase** of the Somalia Inquiry" (my emphasis, pages 453 and 196, Application Records of Col Labbé and LCol Mathieu).

Why would Col Labbé and LCol Mathieu alone of the Applicants seek this particular form of relief? These two Applicants have gained a certain notoriety for statements attributed to them during the "In-Theatre " phase of the Somalia deployment. Col Labbé is alleged to have offered a "case of champagne to the first soldier to shoot a Somalian " while LCol Mathieu supposedly told the troops that it was permissible to shoot Somalian civilians pilfering goods from the Canadian camp as long as the soldiers aimed "between the skirts and the flipflops". One can therefore imagine why these Applicants would be anxious to prevent the Commission from making even vague statements "of fact or credibility...identifying the Applicant...for any actions....".

Neither Col Labbé nor LCol Mathieu cite any jurisprudence or precedent for the argument that a Court should prohibit a Commission from making findings of fact, not even misconduct, absent a Section 13 Notice. Instead, the Applicants argue that in the wake of the Government 's truncation, the Court should take extraordinary measures to safeguard their hard-won reputations. The Applicants Col Labbé and LCol Mathieu submit that they will be implicitly targeted in the final report in relation to the "In-Theatre" phase. However,

their grounds are tentative and add a third speculative leap to the already doubtful public perception linkage argument. In addition to the claim based on what the Commission might say on "Pre-Deployment" actions in the final report and the public's potential linkage of these potential findings to "In-Theatre" events, Col Labbé and LCol Mathieu raise the issue of what the public might believe based on "In-Theatre" findings of fact. Once again, I shall simply state that the Court is not beholden to speculation and media leaks in its determination of the fairness guarantees.

In support of their argument, Col Labbé and LCol Mathieu rely on certain questions posed by Commission Counsel in their final written submissions to the Commission. On March 6, 1997, to assist the Applicants' Counsel in their preparation of the Applicants' final submissions for the "Section 13 Hearings", Commission Counsel distributed to all parties, a copy of their final submissions on the "Pre-Deployment" and the document-tampering issues. Commission Counsel's final submissions on "In-Theatre" evidence were distributed about two weeks later on March 19, 1997 (pages 139-187, Respondents' Application Record).

In relying on Commission Counsel's final written submissions to argue for an order of prohibition, Col Labbé and LCol Mathieu commit a number of errors. First, the Court would have to dismiss the express statement in the January 31, 1997 revised Section 13 Notices that "the Commissioners, in writing their Final Report, will limit their comments regarding ....possible misconduct to ["Pre-Deployment "] matters" or the matters particularized in the Notices themselves. Second, Col Labbé and LCol Mathieu appear to have misconstrued the import of the Commission Counsel's written submissions. These written submissions are not determinative of the findings made by the Commissioners themselves in the final Report. Indeed, the Role of Commission Counsel as defined by the Commissioners from the outset clearly states, "At the end of the hearings, Commission Counsel will summarize the issues and evidence for the Commissioners **but will not make submissions regarding their views of the evidence or on the findings or recommendations**

which the Commissioners should make " (my emphasis) (pages 109-110, Respondents' Application Record). Third, Commission Counsel will not participate in drafting the final report so the final decision rests with the Commissioners on whether they can fairly and fully answer or make findings of fact, not misconduct, in response to Commission Counsel 's questions and in the absence of "In-Theatre" Section 13 Notices. Thus, the Court cannot presume that the Commission will make findings of fact on the alleged inflammatory and reprehensible comments about "Champagne " and "Flipflops" without the Commission paying due heed to the effects of the truncation and the procedural rights of the Applicants. In its Opening Statement, the Commission discussed how it would dismiss rumour and innuendo in favour of the actual evidence presented before the Commission (page 98, Respondents ' Application Record).

It appears as if Col Labbé and Col Mathieu are overshooting the mark. The basis of the claim to prohibit the Commission from making any credibility findings, even without "naming names " is that the Commission will act on its discretion to make findings on the "In-Theatre " and "Post -Deployment " stages even in the absence of Section 13 Notices. The Commission's revised mandate in the Order-in-Council of April 3, 1997, does give it the "discretion" to report on the "In-Theatre" phase. However, I am satisfied that fairness to the Applicants is not imperilled if the Commission does make such generalized credibility findings in its final report. The Court should be reluctant to be cast in the role of censor by the Applicants. Such a sweeping restriction on findings of fact would effectively tie the hands of the Commission even in the absence of orders prohibiting the making of findings of actual misconduct pursuant to the Section 13 Notices.

Another distinct form of relief is sought by LGen Gervais. He seeks an Order prohibiting Commissioner Létourneau from participating in the making of any potential adverse findings. However, this and some of the other original forms of relief sought have been overtaken by the frantic pace of events. The basis of LGen Gervais ' claim was Mr. Justice Campbell's trial decision in *Beno, supra.* Mr. Justice Campbell had found a

reasonable apprehension of bias in Commissioner Létourneau 's conduct towards BGen Beno. According to LGen Gervais, since he had been BGen Beno's commanding officer, any finding of misconduct against BGen Beno would necessarily implicate him. Therefore, if Commissioner Létourneau was prohibited from making findings against BGen Beno, the same prohibition should apply up the chain of command to LGen Gervais. However, Mr. Justice Campbell's decision in *Beno* was subsequently overturned by the Federal Court of Appeal which found that there was no bias. LGen Gervais 's ground of relief is therefore moot.

Now that I have outlined the rejected forms of relief, I shall briefly reiterate the chosen form of relief. Ultimately, I have decided not to order the withdrawal of the Section 13 Notices but simply to strike out the objectionable portions. I hold that those portions are severable from the rest of the Section 13 Notices. Each paragraph in the Section 13 Notice is a complete entity. The overall integrity of the Section 13 Notices is not disturbed by severing those portions.

In an attempt to sort through the parties' competing claims, I have resorted to several imperfect analogies, including allusions to a plane crash, a jigsaw puzzle and a knit sweater. I shall conclude with yet another metaphor, albeit one that also falls short in capturing the nuances and niceties of these proceedings. The facts of these cases appear to defy the usual constraints of the language and the dry judicial terminology, so one must resort to metaphor. Imagine then for an instant that the Commission and the Applicants are opposing baseball teams. The game is underway, the rules are set. The analogy is not accurate of course since the Commission also sets some of the ground rules, Be that as it may, the players go about their business until the Government, say the team owners! cuts off the number of innings. Now the Applicants would have the Commission quit the field because of the Government 's action but the Commission insists that it can fairly play on. The Court is thrust into the role of the Baseball Czar or Commissioner of Baseball, on call to preserve the integrity of the game, the essential rules of fairness, or what Mr. Justice Décary in *Krever* said at 268 was

our sense of "play[ing] fair". By severing the few objectionable portions of the Section 13 Notices, the Court recognizes that the Commission has put an extra spin on its fast ball. However, such a breach is not enough to warrant calling off the entire game. The game is afoot, there have been no other flagrant breaches of procedural fairness, so play on.

In crafting the baseball analogy, I have endeavoured not to trivialize the repercussions of being named for potential misconduct. By the same token, the Court has also recognized the undercurrent of utter solemnity in these proceedings for all the parties. The Government's unprecedented truncation of the Commission has also cast a pall on Commissions of Inquiry as viable public institutions. I conclude therefore with comments made by Commissioner Desbarats at the January 13, 1997 Press Conference: "For a government to act in a way that infringes on the independence of a public inquiry is alien to our political tradition and endangers principles of accountability. In future, I'm sure there will be many people who will think twice about serving on public inquiries because of this example" (page 267, Respondents' Application Record). One can only hope that he is mistaken but still fear otherwise.

"MAX M. TEITELBAUM"

J U D G E

OTTAWA

June 17, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-408-97
STYLE OF CAUSE:	BRIGADIER-GENERAL ERNEST B. BENO v. THE HONOURABLE GILLES LETOURNEAL ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM

DATED: JUNE 17, 1997

APPEARANCES:

Mr. David Scott and Mr. Larry Elliott	FOR APPLICANT
Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS

SOLICITORS OF RECORD:

Scott & Aylen Ottawa	FOR APPLICANT
Langlois Gaudreau Montreal	FOR RESPONDENTS

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FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-498-97
STYLE OF CAUSE:	LIEUTENANT-GENERAL PAUL ADDY v. THE HONOURABLE GILLES LETOURNEAU ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM

DATED: JUNE 17, 1997

APPEARANCES:

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Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS
Mr. William Vanveen and Mr. Graham Jones	FOR INTERVENORS

SOLICITORS OF RECORD:

Greenfield & Barrie Owen Sound Burke-Robertson Ottawa	FOR APPLICANT
Langlois Gaudreau Montreal	FOR RESPONDENTS
Gowling Strathy & Henderson and Shields & Hunt Ottawa	FOR INTERVENORS

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-433-97
STYLE OF CAUSE:	LIEUTENANT-GENERAL (RETIRED) GORDON M. REAY v. THE HONOURABLE GILLES LETOURNEAU ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM

DATED: JUNE 17, 1997

APPEARANCES:

Mr. Robert Houston and Ms. Margaret Jarmoc	FOR APPLICANT
Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS
Mr. William Vanveen and Mr. Graham Jones	FOR INTERVENORS

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Gowling Strathy & Henderson and Shields & Hunt Ottawa	FOR INTERVENORS

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-459-97
STYLE OF CAUSE:	LIEUTENANT-GENERAL (RET) JAMES C. GERVAIS v. THE HONOURABLE GILLES LETOURNEAL ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997
REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM	
DATED:	JUNE 17, 1997

APPEARANCES:

Mr. Thomas A. McDougall and Mr. Andrew Lenz	FOR APPLICANT
Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS

SOLICITORS OF RECORD:

Perley-Robertson, Panet, Hill & McDougall Ottawa	FOR APPLICANT
Langlois Gaudreau Montreal	FOR RESPONDENTS

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-508-97
STYLE OF CAUSE:	COLONEL J. SERGE LABBE v. THE HONOURABLE GILLES LETOURNEAU ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM

DATED: JUNE 17, 1997

APPEARANCES:

Mr. Stuart E. Hendin and Mr. Robert Sullivan	FOR APPLICANT
Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS
Mr. William Vanveen and Mr. Grahaim Jones	FOR INTERVENORS

SOLICITORS OF RECORD:

Hendin, Hendin & Lyon Ottawa	FOR APPLICANT
Langlois Gaudreau Montreal	FOR RESPONDENTS
Gowling Strathy & Henderson and Shields & Hunt Ottawa	FOR INTERVENORS

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-706-97
STYLE OF CAUSE:	LIEUTENANT COLONEL (RET) J. CAROL A. MATHIEU v. THE HONOURABLE GILLES LETOURNEAU ET AL
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	May 26, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE TEITELBAUM

DATED: JUNE 17, 1997

APPEARANCES:

Mr. Marc Cigana and Mr. Stuart Hendin	FOR APPLICANT
Mr. Raynold Langlois and Mrs. Chantal Chatelain	FOR RESPONDENTS
Mr. William Vanveen and Mr. Graham Jones	FOR INTERVENORS

SOLICITORS OF RECORD:

Lapointe, Schachter, Champagne & Talbot Montréal Hendin, Hendin & Lyon Ottawa	FOR APPLICANT
Langlois Gaudreau Montreal	FOR RESPONDENTS
Gowling Strathy & Henderson and Shields & Hunt Ottawa	FOR INTERVENORS

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