

Commission of Enquiry

**Into the events which occurred in Western Kingston and related areas
in May 2010**

RESPONSE TO NOTICE OF ADVERSE FINDINGS
COMMENTS

Re: Major Marlon Kennedy

- a. The above captioned Officer has been served with a Notice of Proposed Adverse Comments dated the 13th of April 2016, advising him of proposed Findings by the West Kingston Commission of Enquiry before which he attended as a Witness.
- b. Major Marlon Kennedy has been served a Notice Under Section 7a (2) of the Commissions of Enquiry (Amendment) Act 2013.
- c. The Commission has invited the Officer to make a written Statement or written Submissions that is relevant to the proposed adverse comments within fourteen (14) days.
- d. Major Kennedy sets out herein below his written submissions to the proposed adverse findings as follows:

1. PROPOSED ADVERSE FINDING PARAGRAPH 10.185

The decision of Major Marlon Kennedy and indeed all members of the Jamaica Defence Force who entered the area of operation initially to take persons into custody must be assessed using the principles of

proportionality and making a realistic assessment of the prevailing circumstances in the area of operation at the time. The Commission should bear in mind that Major Kennedy and others had intelligence reports of some 300 armed men having entered Tivoli Gardens to bolster the existing Tivoli Gardens gang. In detaining the men, Major Kennedy did not act in an arbitrary manner but rather acted with reasonable and probable cause having been informed by the intelligence that he received that the gunmen were in the main, men of a certain age, attired in a particular way, that is to say in white t-shirts and jeans and in some instances were from outside the community.

In the circumstances, he had a duty to secure, as best he could, the sector for which he was responsible. In order to carry out this duty effectively and responsibly, bearing in mind that he was entering a community from which his troops were being fired at, he had to take the initial step of restraining and controlling all persons found in the area of operation until their identification could be properly established and it was determined that it was safe to allow them to proceed along their way. Confirmation that there were several persons who did not reside in the community came from Lt. Colonel O'Gilvie who said he came across several young men who admitted that they were not from the West Kingston area and who maintained that they were staying over for the night. He also came across citizens who observed young men in the community unknown to them.

The procedure Major Kennedy followed was to take these persons into custody and deliver them to the Police who are best able to investigate and process them.

The restraint of innocent citizens occurred recently in Australia, North America and in Europe where all citizens, including women and children at the site of an attack were ordered to “come out with their hands over their heads or on their heads.” They were then taken into custody and it was only after they were processed and identified as not being part of the criminal/terrorist group, that they were allowed to go on their way. This is standard operating procedure and it is done to protect the citizens as well as to ensure that members of the security forces are not opening themselves to the risk of being attacked by persons with whom they interact. An unarmed citizen for example, could be one who has just hidden a weapon and is awaiting the opportunity to grab that weapon and fire at the members of the security forces who have just walked by him.

The Supreme Court in the United Kingdom recently had to deal with the issue of proportionality in the case of *Beghal vs Director Of Public Prosecution [2016] 1 All ER 483* (A copy of the said case is submitted herewith for ease of reference). In this case, the Appellant had gone to visit her husband who was in custody in France for terrorist offences. On her return to the United Kingdom she was stopped, questioned and detained for some time. She refused to answer questions and was charged under the Terrorism Act of 2000 on a charge of not answering these questions. She challenged the procedure she was put through and the

matter came before the Supreme Court. In his Judgment LORD HUGHES at page 501, paragraph 46 adopted the formulation of LORD SUMPTION of proportionality earlier set out in the leading case of *BANK MELLAT vs. HM TREASURY (No.2) [2013] UK SC 39* as follows:

- i. is the objective sufficiently important to justify limitation upon a fundamental right?
- ii. is the measure rationally connected to the objective?
- iii. could a less intrusive measure have been adopted?
- iv. has a fair balance been struck between individual rights and the interests of the community?

When these principles are applied to the conduct of Major Kennedy, the Commission ought to properly conclude that the detention was a fair balance struck between individual rights and the interests of the community. In the circumstances, no adverse finding should be made regarding the conduct of Major Kennedy.

Dated the 5th day of May 2016



LINTON P. GORDON