Date: 20070131

Docket: T-1683-02

Citation: 2007 FC 104

Ottawa, Ontario, January 31, 2007

PRESENT: MR. JUSTICE SIMON NOËL

BETWEEN:

PATRICK BERNATH

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion brought pursuant to rule 51 of the *Federal Courts Rules*, SOR/98-106 (Rules), by a former soldier in the Canadian Forces, Mr. Patrick Bernath, who is appealing the order of Prothonotary Tabib dated September 9, 2005 dismissing as an abuse of process under rule 221 of the Rules his claim for relief in the amount of $4,510,000.00 in damages under section 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11 (Charter) for breach of his right to security of the person under section 7 of the Charter. In this proceeding the applicant is represented by himself.

[2] Briefly put, the prothonotary ruled, after having reviewed the final decision of the Chief of Defence Staff (CDS) on the grievance filed by Mr. Bernath for relief of an injustice he alleged he had suffered, that, contrary to the contentions of the respondent, Her Majesty the Queen, this decision did not constitute *res judicata*. However, at paragraph 70 of the impugned order (*Bernath v. Her Majesty the Queen*, 2005 FC 1232), the prothonotary ruled that the applicant's pleading had failed for the following reason:

> . . . the Chief of Staff had the necessary jurisdiction to hear and determine the plaintiff's claim as formulated in his amended statement of claim, that this claim could and should have been raised in the course of the plaintiff's grievance filed under the *National Defence Act*, and that the plaintiff's action constitutes, therefore, an abuse of process.

[3] On the one hand, Mr. Bernath is asking this Court to review the prothonotary's order on the ground that she made a number of errors of law when she made her determination in this matter. On the other hand, the respondent argues that the order should be upheld because of abuse of process, but also on grounds of *res judicata*. In the alternative, the respondent alleges that the appropriate remedy in this case is an application for judicial review of the decision of the CSD pursuant to sections 2, 17 and 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. She further cites a limitation period submission that was rejected by the prothonotary but is not disputed in the context of this appeal.

[4] In view of the relevant case law, where the prothonotary's decision strikes out a pleading under rule 221 of the Rules, this is a final decision for procedural purposes and the appeal judge, under rule 51 of the Rules, will hear the matter *de novo* (see *Merck and Co. v. Apotex Inc.*

(2003), 30 C.P.R. (4th) 40 and *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425). Therefore, I must proceed herein with a re-examination of the case as a whole, carefully examining the impugned order, the memoranda of facts and law submitted by the parties, the documents filed by each of them, and the documentary evidence and oral submissions made in this Court. As a result of the directions issued to the parties during the hearing, asking them to clarify certain unresolved issues, the additional observations filed by way of reply were of great usefulness in my analysis.

I. The facts

[5] Concerning the narrative of this case, I rely entirely on the report and summary of the facts related by the prothonotary in her reasons for order at paragraphs 1 to 18 inclusive:

> 1. PROTHONOTARY TABIB: In 1985, while he was in excellent physical and psychological health, Patrick Bernath joined the Canadian Forces reserve. He later became a member of the Canadian Armed Forces and advanced to the rank of Master Corporal. Thirteen years later, barely 30 years of age, injured in the shoulder, suffering from a post-traumatic stress syndrome, MCpl Bernath requested and obtained his release from the Armed Forces. He said he was disappointed and betrayed by a military administration that, according to the allegations in the statement of claim, not only refused to recognize or treat his injuries but denigrated his suffering and humiliated him.
>
> 2 MCpl (rt) Bernath is receiving a full disability pension for his injuries and illnesses. A grievance filed in regard to the circumstances that had caused and aggravated his injuries and his post-traumatic stress syndrome, and that ultimately led to his early release, resulted in certain remedies of an administrative nature, but no additional monetary compensation.
>
> 3 According to MCpl (rt) Bernath, the disability with which he must now live and the loss of his military career are the result of Her Majesty the Queen's violation of the rights guaranteed to him by the *Canadian Charter of Rights and Freedoms* (the Charter). He is therefore suing the Crown for monetary relief pursuant to section 24 of the *Charter*.
>
> 4 The Crown has moved to dismiss the action and strike out the proceeding on the basis that the Chief of Staff's decision on the grievance has the effect of *res judicata* and bars the plaintiff's action. In the alternative, the Crown argues that the cause of action as a whole is out of time.

THE FACTS:

5 The facts on which the plaintiff's action is based, and which I take as proved for the purposes of this motion, appear as follows in the statement of claim filed on October 30, 2002, and subsequently amended with further particulars.

6 Although in perfect physical and mental condition when he enrolled in the Armed Forces, the plaintiff was declared unfit to participate in missions abroad in August 1996, owing to a shoulder injury. Irrespective of this medical classification, the plaintiff was declared fit to participate as a photographer on a peacekeeping mission in Haiti in February 1997. He was given no preparatory training. Despite the physiotherapy treatments required for his shoulder injury, such treatments were not available in Haiti.

7 In September 1997, the plaintiff was assigned to an operation to retrieve bodies from a boat that had foundered at Monrouie, Haiti. Since the Haitians refused for religious reasons to remove the bodies from the water, the plaintiff was forced to physically perform this job, which aggravated his shoulder injury and set off a post-traumatic stress syndrome (PTSS).

8 Although diagnosed in the weeks following this incident, the plaintiff's PTSS was not adequately treated on his return to Canada in October 1997: the plaintiff was refused permission to continue to be treated by his attending physician; sick leave was denied or, if granted, was ignored; medical recommendations concerning the appropriate pace of work were cancelled; and worse still, he was forced to work overtime and treated as a "liar" and "manipulator".

9 Infuriated, and in the belief that he was being harassed in order to drive him out of the Armed Forces and deprive him of the medical care to which he was entitled, the plaintiff resolved to request his release on January 23, 1998, seeing this as the only way to [TRANSLATION] "be treated as I should be". Here again, the route was fraught with pitfalls: two physicians certified that he did not qualify, on medical grounds, for release. However, the plaintiff was declared qualified for release two days later, and his release became effective on April 8, 1998.

10 A grievance filed in 1998, which will be discussed in greater detail later, was not finally decided at the last level until 2001, and not without arousing some controversy as well, given the refusal by the Chief of Staff to send it to the Grievance Board established by a statutory amendment that came into force in June 2000.

11 The circumstances which, according to the statement of claim, make the above facts a breach of the plaintiff's section 7 *Charter* rights, and not mere negligence, results from the system of institutional dependency established by the defendant, through which it controls all aspects of a soldier's life, including access to basic medical care, the culture of mandatory obedience and submission, and the duty imposed on soldiers to obey any lawful order including orders that endanger their life or their health, subject to punishment if disobeyed.

Accordingly, the defendant's actions are alleged to have breached the plaintiff's right to security of his person, contrary to the principles of fundamental justice.

12 However, the action is alleged to qualify for dismissal as *res judicata* or an abuse of process on the basis of the following facts, contained in the defendant's motion record and uncontradicted by the plaintiff:

13 On March 27, 1998, prior to his release, the plaintiff filed a [TRANSLATION] "request for redress", in other words, a grievance, under section 29 of the *National Defence Act*, R.S.C. 1985, c. -5. The grievance relates the following facts:

- The deployment to Haiti notwithstanding his medical classification.
- His involvement in the operation to recover dead bodies.
- The refusal to allow treatment by the physician of his choice, the refusal of recommended sick leave, the denigration, the overtime contrary to medical recommendations.
- The duty to resort to release and its acceptance despite some medical opinions of non-qualification.

14 As one can see, apart from the allegations of delay or irregularities in the processing of the grievance, the plaintiff's grievance results from and is based on the same facts as those that give rise to the present action.

15 The plaintiff subsequently added to the grievance file some recent medical comments and opinions, including medical assessments establishing a connection between the aggravation of his shoulder injury and his service in Haiti. The plaintiff also formally amended his grievance application. The facts at the basis of the application remain the same, albeit reformulated, and the plaintiff develops the following claims:

1. He should not have been deployed to Haiti.
2. His presence in Haiti aggravated the condition of his shoulder.
3. Without this aggravation, he could have healed and continued his career in the Armed Forces.
4. He was not treated appropriately (medically or administratively) on his return from Haiti, witness his PTSS.
5. The plaintiff should not have had to bear alone the consequences of the Armed Forces' unreasonable errors. (The pensions awarded under the *Veterans Act* are not sufficient to compensate for this type of error.)

16 The request for redress was also amended twice, ultimately claiming:

1. The Canadian decoration;
2. The award of the same commendation that might be awarded to his regiment for services in Haiti; and
3. [TRANSLATION] "Monetary compensation to be determined by an arbitration board pursuant to Book VII of Quebec's *Code of Civil Procedure*" (to compensate for the damages caused by the loss of his career within the Armed Forces).

17 A final decision was taken, lastly, at the level of the Chief of Defence Staff, stating the following reasons/conclusions:

> [TRANSLATION]
> - " . . . I do not consider your doctor's recommendation allowing you to go to Haiti as a photographer to be incorrect."
> - " . . . I have no reason to doubt the professionalism and work of the medical experts and I think they did everything they could to provide you with the appropriate healthcare. . . ."
> - " . . . the administrative release procedures were performed correctly and no administrative or medical irregularity could be identified."
> - " . . . your commanding officer had the authority to grant or deny that sick leave. However, in the circumstances, I think it would have been logical to approve the additional recommended sick leave."

18 As for the remedies, the Chief of Staff granted:

> 1. the denied sick leave, consequently pushing back the effective date of release, and the administrative and financial measures resulting therefrom;
> 2. eligibility to receive the Canadian decoration; and
> 3. award of commendation for services in Haiti;

but concluded as follows in regard to the request for monetary compensation:

> [TRANSLATION]
> Finally, concerning your final request, that is, monetary compensation to be determined by an arbitration board, I am unable to grant it to you since no statutory or regulatory provision gives me that authority. You are now a recipient of a pension for the health problems you suffered while you were a member of the CF. The benefits you are getting represent a final compensation to which you are entitled and take into account all of the factors relevant to your situation at the time of your release. In fact, according to section 9 of the *Crown Liability and Proceedings Act* and section 111 of the *Pensions Act*, it is not possible both to receive a pension and to sue the CF after being injured.
>
> In short, I think you have been the victim of some injustice and I approve a partial redress in that I am ordering that the sick leave that you were denied be given back to you, thereby allowing you to receive the CD for your twelve years of good and loyal services. I am further awarding you the commendation of the CDS for your courage and the steps that you took during the recovery of the victims of the wreck of the vessel "La Fierté Gonâvienne" in Haiti. However, I do not support your request for monetary compensation.

II. The new documents

[6] In this proceeding, the applicant submitted some new documentary evidence. Without explanation, he filed 17 documents that were not before the prothonotary when she delivered her order dated September 9, 2005. The respondent opposes the inclusion of this documentary evidence in the applicant's appeal record. The majority of these 17 documents, need I explain, were originally issued by the respondent, and some are in the public domain: *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25*, An Act to amend the *National Defence Act* and to make consequential amendments to other Acts, *as required under section 96 of Statutes of Canada 1998, c.35*, Submitted to the Minister of National Defence September 3, 2003 (Lamer Report); *National Defence Act Review – Response to the Lamer Report*, National Military Law Section, Canadian Bar Association, April 2004; News release, *Defence Minister Releases Results of Bill C-25 Review*, November 5, 2003; News release, *DND Acting Upon Recommendations to Amend the National Defence Act*, April 27, 2006; News release, *Amendments to the National Defence Act: Bill C-25, its review, and Bill C-7*, An Act to Amend the *National Defence Act*, April 27, 2006; Bill C-7, *An Act to Amend the National Defence Act*, April 27, 2006; *Overhauling Oversight – Ombudsman White Paper*; *Formative Evaluation of the Canadian Forces Grievance Board – Final Report*, April 29, 2005. The other documents relate to the applicant personnally. They are private or semi-private in nature: correspondence that has been partly expurgated on the basis of certain sections of the *Privacy Act* or solicitor-client privilege, a letter from the Minister of National Defence to the applicant dated March 2000 and the correspondence of the office of C. Bachand, M.P., concerning Bill C-7, June 2006.

[7] The case law is well settled: fresh evidence cannot be admitted by the Court sitting on appeal of a prothonotary's decision. To render its own decision, the Court must, therefore, rely only on the evidence that was before the prothonotary at the time he or she decided the matter (see *Dawe v. Canada* (2002) 17 C.C. E.B. (3d), 198, 220 F.T.R. 91 and *James River Corp. of Virginia v. Hallmark Cards Inc.,* [1997] 72 C.P.R. (3d) 157). For good reason, private and semi-private documents cannot be considered for the purposes of this appeal and must be excluded. Nevertheless, the documents that are part of the public domain may be admitted in evidence. Mr. Justice von Fickenstein wrote the following comments at paragraph 10 of his decision in *Apotex Inc. v. Wellcome Foundation Ltd.*, 2003 FC 1229:

> It has been established that no new evidence should be admitted by the Court when hearing an appeal from a Prothonotary (*James River Corp. of Virginia v. Hallmark Cards, Inc.*, [1997] F.C.J. No. 152 at paras. 31-32). However, I do not think that this prevents the Court from taking into consideration documents that are part of the public record. In this case both the pleadings and the affidavits are public documents. Consequently they can be taken into consideration by this Court.

However, it is appropriate to note that these public documents submitted by the applicant add very little to the submissions made before the prothonotary and that in this proceeding they were not decisive to the outcome of the point at issue.

III. The preliminary question

[8] Under subsection 221(2) of the Rules, the applicant alleges that in the context of the respondent's motion to strike, before the prothonotary, the respondent could not file additional evidence.

[9] Furthermore, given the import of that provision, when the motion to strike is based on an allegation that the proceeding discloses no cause of action, no evidence shall be heard.

[10] A reading of the motion to strike made before the prothonotary and of the respondent's appeal memorandum of facts and law indicates that the proceeding before the prothonotary pertained both to paragraphs 221(1)(*c*) and 221(1)(*f*) of the Rules, to the effect that a pleading, or anything contained therein, is frivolous or vexatious and otherwise an abuse of the process of the Court.

[11] It is worth noting that these grounds are not listed in subsection 221(2) of the Rules and that when all is said and done, this provision states only one ground for inadmissibility in evidence. Therefore, the respondent could file some additional evidence to support her submissions, since the Rules do not provide any restriction in that regard as to the evidence that is admissible for the purposes of the challenge.

IV. The Canadian Forces grievance resolution procedure

[12] To identify more clearly the points at issue, a proper understanding of the Canadian Forces grievance resolution procedure is necessary. Below are the portions that are relevant to the case at bar from the *National Defence Act*, R.S.C. 1985, c. N-5 (the Act) and from the *Queen's Regulations and Orders for the Canadian Forces*, volume 1, chapter 7 (QR&O), as well as a summary explanation of how this process functions. To ensure a clearer understanding of these reasons, I have appended the *Grievance Manual* and the *Assisting Member Handbook*, two

guides issued by the Director General – Canadian Forces Grievance Authority to assist the key players involved in the grievance resolution process.

(a) *National Defence Act*

(i) Right to grieve

29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

(2) There is no right to grieve in respect of
(*a*) a decision of a court martial or the Court Martial Appeal Court;
(*b*) a decision of a board, commission, court or tribunal established other than under this Act; or
(*c*) a matter or case prescribed by the Governor in Council in regulations.

(3) A grievance must be submitted in the manner and in accordance with the conditions prescribed in regulations made by the Governor in Council.

(4) An officer or non-commissioned member may not be penalized for exercising the right to submit a grievance.

(5) Notwithstanding subsection (4), any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the officer or non-commissioned member.

29.11 The Chief of the Defence Staff is the final authority in the grievance process.

29.12 (1) The Chief of the Defence Staff shall refer every grievance that is of a type prescribed in regulations made by the Governor in Council to the Grievance Board for its findings and recommendations before the Chief of the Defence Staff considers and determines the grievance. The Chief of the Defence Staff may refer any other grievance to the Grievance Board.

29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

(2) Ne peuvent toutefois faire l'objet d'un grief :
a) les décisions d'une cour martiale ou de la Cour d'appel de la cour martiale;
b) les décisions d'un tribunal, office ou organisme créé en vertu d'une autre loi;
c) les questions ou les cas exclus par règlement du gouverneur en conseil.

(3) Les griefs sont déposés selon les modalités et conditions fixées par règlement du gouverneur en conseil.

(4) Le dépôt d'un grief ne doit entraîner aucune sanction contre le plaignant.

(5) Par dérogation au paragraphe (4), toute erreur qui est découverte à la suite d'une enquête sur un grief peut être corrigée, même si la mesure corrective peut avoir un effet défavorable sur le plaignant.

29.11 Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs.

29.12 (1) Avant d'étudier un grief d'une catégorie prévue par règlement du gouverneur en conseil, le chef d'état-major de la défense le soumet au Comité des griefs pour que celui-ci lui formule ses conclusions et recommandations. Il peut également renvoyer tout autre grief devant le Comité.

(2) When referring a grievance to the Grievance Board, the Chief of the Defence Staff shall provide the Grievance Board with a copy of

(*a*) the written submissions made to each authority in the grievance process by the officer or non-commissioned member presenting the grievance;

(*b*) the decision made by each authority in respect of the grievance; and

(*c*) any other information under the control of the Canadian Forces that is relevant to the grievance.

(2) Le cas échéant, il lui transmet copie :

a) des argumentations écrites présentées par l'officier ou le militaire du rang à chacune des autorités ayant eu à connaître du grief;

b) des décisions rendues par chacune d'entre elles;

c) des renseignements pertinents placés sous la responsabilité des Forces canadiennes.

29.13 (1) The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievance Board.

29.13 (1) Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité des griefs.

(2) If the Chief of the Defence Staff does not act on a finding or recommendation of the Grievance Board, the Chief of the Defence Staff shall include the reasons for not having done so in the decision respecting the disposition of the grievance.

(2) S'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.

29.14 The Chief of the Defence Staff may delegate to any officer any of the Chief of the Defence Staff's powers, duties or functions as final authority in the grievance process, except

(*a*) the duty to act as final authority in respect of a grievance that must be referred to the Grievance Board; and

(*b*) the power to delegate under this section.

29.14 Le chef d'état-major de la défense peut déléguer à tout officier le pouvoir de décision définitive que lui confère l'article 29.11, sauf pour les griefs qui doivent être soumis au Comité des griefs; il ne peut toutefois déléguer le pouvoir de délégation que lui confère le présent article.

(ii) Final decision

29.15 A decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court.

29.15 Les décisions du chef d'état-major de la défense ou de son délégataire sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d'appel ou de révision en justice.

(iii) Grievance Board

29.16 (1) There is established a board, called the Canadian Forces Grievance Board, consisting of a Chairperson, at least two Vice-Chairpersons and any other members appointed by the Governor in Council that are required to allow it to perform its functions.

29.16 (1) Est constitué le Comité des griefs des Forces canadiennes, composé d'un président, d'au moins deux vice-présidents et des autres membres nécessaires à l'exercice de ses fonctions, tous nommés par le gouverneur en conseil.

29.2 (1) The Grievance Board shall review every grievance referred to it by the Chief of the Defence Staff and provide its findings and recommendations in writing to the Chief of the Defence Staff and the officer or non-commissioned member who submitted the grievance.

(2) The Grievance Board shall deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit.

29.2 (1) Le Comité des griefs examine les griefs dont il est saisi et transmet, par écrit, ses conclusions et recommandations au chef d'état-major de la défense et au plaignant.

(2) Dans la mesure où les circonstances et l'équité le permettent, il agit avec célérité et sans formalisme.

29.21 The Grievance Board has, in relation to the review of a grievance referred to it, the power

(*a*) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it;
(*b*) to administer oaths; and
(*c*) to receive and accept any evidence and information that it sees fit, whether admissible in a court of law or not.

29.21 Le Comité des griefs dispose, relativement à la question dont il est saisi, des pouvoirs suivants :

a) assigner des témoins, les contraindre à témoigner sous serment, oralement ou par écrit, et à produire les documents et pièces sous leur responsabilité et qu'il estime nécessaires à une enquête et étude complètes;
b) faire prêter serment;
c) recevoir et accepter les éléments de preuve et renseignements qu'il estime indiqués, qu'ils soient ou non recevables devant un tribunal.

29.23 (1) No witness shall be excused from answering any question relating to a grievance before the Grievance Board when required to do so by the Grievance Board on the ground that the answer to the question may tend to criminate the witness or subject the witness to any proceeding or penalty.

(2) No answer given or statement made by a witness in response to a question described in subsection (1) may be used or receivable against the witness in any disciplinary, criminal, administrative or civil proceeding, other than a hearing or proceeding in respect of an allegation that the witness gave the answer or made the statement knowing it to be false.

29.23 (1) Tout témoin est tenu de répondre aux questions sur le grief lorsque le Comité des griefs l'exige et ne peut se soustraire à cette obligation au motif que sa réponse peut l'incriminer ou l'exposer à des poursuites ou à une peine.

(2) Les déclarations ainsi faites en réponse aux questions ne peuvent être utilisées ni ne sont recevables contre le témoin devant une juridiction disciplinaire, criminelle, administrative ou civile, sauf si la poursuite ou la procédure porte sur le fait qu'il les savait fausses.

29.24 Travel and living expenses incurred in appearing before the Grievance Board shall, in the discretion of the Grievance Board, be paid, in accordance with applicable Treasury Board directives, to the officer or non-commissioned member whose grievance is being heard, and to that person's assisting officer or counsel, if

29.24 Lorsque le Comité des griefs siège, au Canada, ailleurs qu'au lieu de leur résidence habituelle, le plaignant et l'officier qui l'assiste ou son avocat, selon le cas, sont indemnisés, selon l'appréciation du Comité et en conformité avec les normes établies par le Conseil du Trésor, des frais de déplacement et de séjour exposés

the Grievance Board holds a hearing at a place in Canada that is not their ordinary place of residence.

pour leur comparution devant le Comité.

29.26 (1) The Chairperson may make rules respecting

(*a*) the manner of dealing with grievances referred to the Grievance Board, including the conduct of investigations and hearings by the Grievance Board;

(*b*) the apportionment of the work of the Grievance Board among its members and the assignment of members to review grievances; and

(*c*) the performance of the duties and functions of the Grievance Board.

29.26 (1) Le président peut établir des règles pour régir :

a) la procédure d'examen des griefs par le Comité des griefs, notamment quant à la tenue d'enquêtes et d'audiences;

b) la répartition des affaires et du travail entre les membres du Comité;

c) la conduite des travaux du Comité et de son administration.

(2) A hearing of the Grievance Board is to be held in private, unless the Chairperson, having regard to the interests of the persons participating in the hearing and the interest of the public, directs that the hearing or any part of it be held in public.

(2) Sauf instruction contraire du président, eu égard à l'intérêt des personnes prenant part à l'audience et à celui du public, les audiences du Comité se tiennent, en tout ou en partie, à huis clos.

29.28 (1) The Chairperson shall, within three months after the end of each year, submit to the Minister a report of the activities of the Grievance Board during that year and its recommendations, if any.

(2) The Minister shall have a copy of the report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Minister receives it.

29.28 (1) Le président du Comité des griefs présente au ministre, au plus tard le 31 mars de chaque année, le rapport d'activité du Comité pour l'année civile précédente, assorti éventuellement de ses recommandations.

(2) Le ministre le fait déposer devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant sa réception.

(b) *Queen's Regulations and Orders for the Canadian Forces* (volume 1 – Administration, chapter 7)

(i) Time Limit

7.02 – TIME LIMIT

(1) A grievance must be submitted within six months after the day that the member knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.

7.02 – DÉLAI

(1) Tour grief doit être déposé dans les six mois qui suivent la date à laquelle le militaire a pris ou devrait avoir raisonnablement pris connaissance de la décision, de l'acte ou de l'omission qui fait l'objet du grief.

(2) A member who submits a grievance after the expiration of the period referred to in paragraph (1) must submit reasons for the delay.

(2) Le militaire qui dépose son grief après l'expiration de ce délai doit soumettre par écrit les raisons du retard.

(3) An initial authority may consider a grievance that is submitted after the expiration of the period if the initial authority is satisfied that to do so would be in the interests of justice. An initial authority who is not satisfied shall provide reasons in writing to the member.

(3) L'autorité initiale peur connaître du grief déposé en retard si elle estime qu'il est dans l'intérêt de la justice de le faire. Elle doit toutefois motiver par écrit son refus au militaire.

(ii) Submission to Commanding Officer (initial authority)

7.04 – SUBMISSION TO COMMANDING OFFICER

(1) A grievance must be in writing, signed by the grievor and submitted to the grievor's commanding officer.

(2) A grievance must include:

(*a*) a brief description of the decision, act or omission that is the subject of the grievance, including any facts known to the grievor;

(*b*) a request for determination and the redress sought;

(*c*) if a person can substantiate the grievance, a statement in writing from that person; and

(*d*) a copy of any relevant document in the possession of the grievor.

7.04 – DÉPÔT D'UN GRIEF AU COMMANDANT

(1) Le grief est fait par écrit et signé par le plaignant, puis déposé devant le commandant de celui-ci.

(2) Le grief renferme les éléments suivants :

a) une description sommaire de la décision, de l'acte ou de l'omission qui fait l'objet du grief, y compris tous les faits qui sont connus du plaignant;

b) une demande en vue d'obtenir une décision et le redressement désiré;

c) si une personne peut établir le bien-fondé du grief, une déclaration écrite de celle-ci;

d) une copie de tout document pertinent qui est en la possession du plaignant.

7.05 – DUTIES OF COMMANDING OFFICER

(1) A commanding officer to whom a grievance is submitted shall examine the grievance and determine whether the commanding officer is able to act as the initial authority in respect of the grievance.

(2) If the commanding officer is not able to act as the initial authority, the commanding officer shall:

(*a*) forward the grievance within 10 days of receipt to

7.05 – OBLIGATIONS DU COMMANDANT

(1) Le commandant qui est saisi d'un grief l'examine et décide s'il peut, à l'égard de celui-ci, agir à titre d'autorité initiale.

(2) S'il ne peut agir à titre d'autorité initiale, le commandant doit :

a) transmettre le grief à l'autorité initiale dans les 10

the initial authority;

(*b*) forward any additional information to the initial authority that the commanding officer considers relevant to the grievance; and

(*c*) inform the grievor of the action taken and, where applicable, provide the grievor with a copy of any additional information forwarded to the initial authority.

jours suivant la réception de celui-ci;

b) transmettre à l'autorité initiale tout renseignement supplémentaire que le commandant estime pertinent au grief;

c) aviser le plaignant des mesures prises et, le cas échéant, lui fournir une copie de tout renseignement supplémentaire transmis à l'autorité initiale.

7.06 – WHO MAY ACT AS INITIAL GRIEVANCE AUTHORITY

(1) Subject to paragraph (2), the initial authority who may consider and determine a grievance is:

(*a*) the commanding officer of the grievor if the commanding officer can grant the redress sought; or

(*b*) the commander, or officer holding the appointment of Director General or above at National Defence Headquarters, who is responsible to deal with the matter that is the subject of the grievance.

7.06 – QUI PEUT AGIR À TITRE D'AUTORITÉ INITIALE EN MATIÈRE DE GRIEFS

(1) Sous réserve de l'alinéa (2), à titre d'autorité initiale peut examiner et décider du bien-fondé d'un grief :

a) le commandant du plaignant, s'il peut accorder le redressement demandé;

b) le commandant ou l'officier titulaire d'un poste de directeur général ou d'un poste supérieur à celui-ci au quartier général de la Défense nationale qui est chargé de décider des questions faisant l'objet du grief.

7.07 – DUTIES OF INITIAL GRIEVANCE AUTHORITY

(1) Upon receipt of a grievance the initial authority shall, within 60 days:

(*a*) consider and determine the grievance;

(*b*) advise the grievor in writing, through the commanding officer if the initial authority is not the commanding officer, of:

(i) the determination and the reasons for it; and

(ii) where applicable, the grievor's entitlement to submit the grievance to the Chief of the Defence Staff;

(*c*) return any documents or things submitted by the grievor if requested to do so; and

(*d*) maintain a record of the grievance, including the determination made and any action taken.

(2) Where an initial authority other than the Chief of the Defence Staff does not determine a grievance within the

7.07 – OBLIGATIONS DE L'AUTORITÉ INITIALE EN MATIÈRE DE GRIEFS

(1) Dans les 60 jours suivant la réception d'un grief, l'autorité initiale doit :

a) étudier et décider du bien-fondé du grief;

b) informer le plaignant par écrit, par l'intermédiaire de son commandant dans le cas où ce dernier n'est pas l'autorité initiale :

(i) de la décision et des motifs à l'appui;

(ii) le cas échéant, du droit du plaignant de déposer son grief devant le chef d'état-major de la défense;

c) renvoyer tout document ou pièce déposé par le plaignant, si une demande est faite à cet égard;

d) conserver le dossier du grief, notamment la décision et les mesures prises.

(2) Si une autorité initiale – autre que le chef d'état-major de la défense – ne prend pas de décision à

period required under paragraph (1), the grievor may request that the initial authority submit the grievance to the Chief of the Defence Staff for consideration and determination.

(3) Where the Chief of the Defence Staff is the initial authority, the time limit under paragraph (1) does not apply.

l'égard du grief dans le délai prévu à l'alinéa (1), le plaignant peut demander à l'autorité initiale de renvoyer le grief devant le chef d'état-major de la défense pour qu'il l'étudie et en décide.

(3) Le délai prévu à l'alinéa (1) ne s'applique pas dans le cas où le chef d'état-major de la défense est l'autorité initiale.

(iii) Submission to CDS (final authority)

7.10 – SUBMISSION TO CHIEF OF THE DEFENCE STAFF

(1) Where a member has submitted a grievance under article 7.01 (*Right to Grieve*) and the decision of the initial authority does not afford the redress that, in the opinion of the member, is warranted, the member may submit the grievance to the Chief of the Defence Staff for consideration and determination.

(2) The grievance must be in writing, signed by the grievor and submitted to the Chief of the Defence Staff within 90 days of receipt by the grievor of the determination of the initial authority.

(3) A member who submits a grievance after the expiration of the period referred to in paragraph (2) must submit reasons for the delay.

(4) The Chief of the Defence Staff or an officer to whom final authority has been delegated may consider a grievance that is submitted after the expiration of the period referred to in paragraph (2) if satisfied that it would be in the interests of justice to do so. If not satisfied, the Chief of the Defence Staff, or the officer to whom final authority has been delegated, shall provide reasons in writing to the grievor.

7.10 – DÉPÔT DU GRIEF DEVANT LE CHEF D'ÉTAT-MAJOR DE LA DÉFENSE

(1) Si un militaire qui a déposé un grief aux termes de l'article 7.01 (*Droit de déposer des griefs*) est d'avis que la décision de l'autorité initiale ne lui accorde pas le redressement qui semble justifié, il peut porter son grief devant le chef d'état-major de la défense pour qu'il l'étudie et en décide.

(2) Le grief est fait par écrit et signé par le plaignant, puis déposé devant le chef d'état-major de la défense dans les 90 jours qui suivent la réception de la décision de l'autorité initiale.

(3) Le militaire qui dépose son grief après l'expiration de ce délai doit soumettre par écrit les raisons du retard.

(4) Le chef d'état-major de la défense ou l'officier ayant le pouvoir de décision définitive peut connaître d'un grief déposé en retard s'il estime qu'il est dans l'intérêt de la justice de le faire. Il doit toutefois motiver par écrit son refus au militaire.

7.11 – DUTIES WHERE GRIEVANCE NOT REFERRED TO GRIEVANCE BOARD

Where the grievance is not of a type that must be referred to the Grievance Board pursuant to article 7.12 (*Referral to Grievance Board*), the Chief of the Defence Staff or the officer to whom final authority has been

7.11 – OBLIGATIONS – GRIEF NON RENVOYÉ DEVANT LE COMITÉ DES GRIEFS

Si le grief n'appartient pas à une catégorie qui exige, en application de l'article 7.12 (*Renvoi devant le Comité des griefs*), un renvoi devant le Comité des griefs, le chef d'état-major de la défense ou l'officier ayant le

delegated shall:

(*a*) consider and determine the grievance;

(*b*) advise the grievor in writing through the commanding officer of the determination and the reasons for it;

(*c*) return any documents or things submitted by the grievor if requested to do so; and

(*d*) maintain a record of the grievance, including the determination made and any action taken.

pouvoir de décision définitive doit :

a) étudier et décider du bien-fondé du grief;

b) informer le plaignant par écrit, par l'intermédiaire de son commandant, de la décision et des motifs à l'appui;

c) renvoyer tout document ou pièce déposé par le plaignant, si une demande est faite à cet égard;

d) conserver le dossier du grief, notamment la décision et les mesures prises.

(iv) Referral to Grievance Board

7.12 – REFERRAL TO GRIEVANCE BOARD

(1) The Chief of the Defence Staff shall refer to the Grievance Board any grievance relating to the following matters:

(*a*) administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;

(*b*) the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;

(*c*) pay, allowances and other financial benefits; and

(*d*) the entitlement to medical care or dental treatment.

(2) The Chief of the Defence Staff shall refer every grievance concerning a decision or an act of the Chief of the Defence Staff in respect of a particular officer or non-commissioned member to the Grievance Board for its findings and recommendations.

NOTES

(A) Pursuant to subsection 29.12(1) of the *National Defence Act*, the Chief of the Defence Staff may refer a

7.12 – RENVOI DEVANT LE COMITÉ DES GRIEFS

(1) Le chef d'état-major de la défense renvoie au Comité des griefs tout grief qui a trait aux questions suivantes :

a) les mesures administratives qui émanent de la suppression ou des déductions de solde et d'indemnités, du retour à un grade inférieur ou de la libération des Forces canadiennes;

b) l'application et l'interprétation des politiques des Forces canadiennes qui concernent l'expression d'opinions personnelles, les activités politiques et la candidature à des fonctions publiques, l'emploi civil, les conflits d'intérêts et les mesures régissant l'après-mandat, le harcèlement ou la conduite raciste;

c) la solde, les indemnités et autres prestations financières;

d) le droit aux soins médicaux et dentaires.

(2) Le chef d'état-major de la défense renvoie au Comité des griefs pour que celui-ci formule ses conclusions et ses recommandations tout grief qui a trait à une de ses décisions ou un de ses actes à l'égard de tel officier ou militaire du rang.

NOTES

(A) Le chef d'état-major de la défense peut, à sa discrétion, aux termes du paragraphe 29.12(1) de la *Loi*

grievance other than one prescribed in article 7.12 to the Grievance Board. The Chief of the Defence Staff's decision under subsection 29.12(1) is a discretionary one. There is no right to have a grievance that is not of a type prescribed by article 7.12 referred to the Grievance Board. The factors assessed by the Chief of the Defence Staff in determining whether or not to exercise the discretion to refer any other grievance to the Grievance Board would include the benefit to be obtained from having the grievance reviewed externally and the capacity of the Grievance Board to investigate independently and make findings.

sur la défense nationale, renvoyer au Comité des griefs un grief autre que celui d'une catégorie prescrite à l'article 7.12. Nul ne peut exiger le renvoi d'un tel grief au Comité des griefs. Les facteurs qui sont évalués par le chef d'état-major de la défense pour déterminer s'il devrait ou non exercer son pouvoir discrétionnaire de renvoyer tout autre grief au Comité des griefs comprennent l'avantage de faire examiner le grief par une autorité extérieure et de compter sur la capacité du Comité des griefs d'enquêter et de formuler des conclusions de façon indépendante.

(B) Subsection 29.12(2) of the *National Defence Act* provides that, where a grievance is referred to the Grievance Board, the Board shall be provided with a copy of:

(B) Le paragraphe 29.12(2) de la *Loi sur la défense nationale* prévoit que lorsqu'un grief est renvoyé au Comité des griefs, celui-ci doit recevoir copie :

> (i) the written submissions made to each authority in the grievance process by the officer or non-commissioned member presenting the grievance;
>
> (ii) the decision made by each authority in respect of the grievance; and
>
> (iii) any other information under the control of the Canadian Forces that is relevant to the grievance.

> (i) des argumentations écrites présentées par l'officier ou le militaire du rang à chacune des autorités ayant eu à connaître du grief;
>
> (ii) des décisions rendues par chacune d'entre elles;
>
> (iii) des renseignements pertinents placés sous la responsabilité des Forces canadiennes.

7.14 – ACTION AFTER GRIEVANCE BOARD REVIEW

(1) After receiving the findings and recommendations of the Grievance Board, the Chief of the Defence Staff shall:

(*a*) consider and determine the grievance;

(*b*) advise in writing the grievor, through the commanding officer, and the Grievance Board of the determination and the reasons for it;

(*c*) return any documents or things submitted by the grievor if requested to do so; and

(*d*) maintain a record of the grievance, including the determination made and any action taken.

(2) Section 29.13 of the *National Defence Act* provides:

"29.13 (1) The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievance

7.14 – MESURES À PRENDRE APRÈS L'EXAMEN DU COMITÉ DES GRIEFS

(1) Après avoir reçu les conclusions et les recommandations du Comité des griefs, le chef d'état-major de la défense doit :

a) étudier et décider du bien-fondé du grief;

b) informer par écrit le plaignant, par l'intermédiaire de son commandant, et le Comité des griefs de la décision et des motifs à l'appui;

c) renvoyer tout document ou pièce déposé par le plaignant, si une demande est faite à cet égard;

d) conserver le dossier du grief, notamment la décision et les mesures prises.

(2) L'article 29.13 de la *Loi sur la défense nationale* prescrit :

«29.13(1) Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité

Board.

(2) If the Chief of the Defence Staff does not act on a finding or recommendation of the Grievance Board, the Chief of the Defence Staff shall include the reasons for not having done so in the decision respecting the disposition of the grievance."

des griefs.

(2) S'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.»

(v) Suspension of Grievance

7.16 – SUSPENSION OF GRIEVANCE

(1) An initial or final authority in receipt of a grievance submitted by a member shall suspend any action in respect of the grievance if the grievor initiates an action, claim or complaint under an Act of Parliament, other than the *National Defence Act*, in respect of the matter giving rise to the grievance.

(2) The initial or final authority shall resume consideration of the grievance if the other action, claim or complaint has been discontinued or abandoned prior to a decision on the merits and the authority has received notice to this effect.

7.16 – SUSPENSION DE GRIEF

(1) Une autorité initiale ou de dernière instance saisie du grief d'un militaire est tenue de suspendre toute mesure prise à l'égard du grief si ce dernier prend un recours, présente une réclamation ou une plainte en vertu d'une loi fédérale, autre que la *Loi sur la défense nationale*, relativement à la question qui a donné naissance au grief.

(2) L'autorité initiale ou de dernière instance doit reprendre l'examen du grief s'il y a eu désistement ou abandon de l'autre recours, réclamation ou plainte avant qu'une décision au fond ne soit prise et que l'autorité en ait été avisée.

[13] The Canadian Forces grievance resolution process provides officers and non-commissioned members with a decision-making body through which they can obtain redress when they feel aggrieved by any decision, act or omission of their employer. The grievance must be individual and not collective. It is a process that is unique to the Canadian Forces, that goes hand in hand with the notion of chain of command.

[14] In theory, the process is a two-level system: (1) at the initial level, the examination by the commanding officer, and (2) at the final level, the consideration by the CDS. In addition, the CDS may, at his discretion, refer a case to the Grievance Board for consideration if there is a

"benefit to be obtained from having the grievance reviewed externally and the Grievance Board has the capacity to investigate independently and make findings" (Note (A) to article 7.12 of the QR&O). However, the CDS's discretion does not avail with respect to the matters listed in article 7.12 of the QR&O:

(a) administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;

(b) the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;

(c) pay, allowances and other financial benefits; and

(d) the entitlement to medical care or dental treatment.

Grievances involving these matters must be reviewed by the Grievance Board. Unlike the CDS, the Grievance Board has a power to investigate, hold a hearing — call and compel witnesses to testify — and make appropriate determinations in the form of recommendations to the CDS. The CDS is the final authority and is not bound by the recommendations made by the Grievance Board. However, where the CDS chooses not to follow the recommendations of the Grievance Board, it must give reasons for his decision (see section 29.13 of the *National Defence Act*).

[15] It is important to note that, at the initial and final levels, the case is processed in writing. There is no provision in the Act or the QR&O providing for a hearing, the appearance of witnesses or the compellability of the latter. These are, so to speak, internal procedural rules,

essentially bureaucratic in nature. If a grievor is of the view that the initial authority has not responded to his request within sixty (60) days after it is filed, he may ask that his grievance be sent to the final level, before the CDS. I note that the CDS has a discretion under section 29.14 of the *National Defence Act*, and thus may delegate his final authority, with the exception of grievances raising issues that must be reviewed by the Grievance Board. The Assisting Member Handbook, a guide issued by the Director General – Canadian Forces Grievance Authority for participants in the grievance resolution process, states at paragraph 3.8 that "The Canadian Forces Grievance Board (CFGB) is an independent administrative tribunal with quasi-judicial powers, mandated to provide findings and recommendations (F&Rs) to the CDS on any grievance that he refers to them. . . ." In this case, the decision was made solely by the CDS.

[16] The grievance resolution process is not exclusive. Subsection 29(2) of the *National Defence Act* provides that there is no right to grieve in respect of "(a) a decision of a court martial or the Court Martial Appeal Court; (b) a decision of a board, commission, court or tribunal established other than under this Act; or (c) a matter or case prescribed by the Governor in Council in regulations." Article 7.16 of the QR&O provides that when a grievance at the initial or final level is under review, it shall be suspended if the soldier initiates an action, claim or complaint under an Act of Parliament other than the *National Defence Act*. Subsequently, if a decision on the merits has been made by the decision-making authority, the review of the grievance is *ipso facto* closed. However, if the action or claim has been discontinued or abandoned, the suspension ends and consideration is resumed at the point where it was at the time of its suspension.

V. Application of the grievance resolution process and the facts of this case

[17] On March 27, 1998, the applicant filed his grievance. It was subsequently amended three times: on May 20, 1998, February 24, 2000 and October 18, 2000. On February 6, 1999, Mr. Bernath requested that his grievance be submitted to the CDS, pursuant to article 7.07(2) of the QR&O, since no decision had been made by the initial authority and more than sixty (60) days had elapsed since the initial filing of his application. The record discloses that the CDS at one point considered referring the applicant's grievance to the Grievance Board, but that this did not occur for reasons that are irrelevant to this case (see respondent's record in reply, letter of May 8, 2000, at page 167). Finally, on January 12, 2001, the CDS made his decision and communicated it to the applicant.

[18] The initial relief sought by Mr. Bernath in relation to the injustice he allegedly suffered was:

- the right to a medical pension and the award of the Canadian decoration (C.D.) (see respondent's record in reply, letter of March 27, 1998, page 9);

[19] These were later amended to include the following (see respondent's record in reply, letter of May 20, 1998, at page 15; letter of February 24, 2000, at page 154; letter of October 18, 2000, at page 169):

- an honest and detailed investigation;
- some explanations;

- apologies and reprimands of the authorities;
- a medical pension through the grant of recognition of time;
- award of the C.D. for 12 years of loyal service;
- a Canadian Forces pension, by granting him recognition of 11 years of service given that he could no longer find appropriate work, and to compensate for his psychological and physical sufferings;
- written apologies from the CDS and certain officers;
- a copy of the Commendation granted by the CDS in 3 R 22-R;
- monetary compensation to be determined by an Arbitration Committee in accordance with Book VII of the Quebec *Code of Civil Procedure* (see respondent's record in reply, letter dated February 24, 2000, drafted with the assistance of an officer, page 154 to page 159);
- a withdrawal of the requests for written apologies by the CDS and certain officers (see respondent's record in reply, letter of October 18, 2000, at page 169).

[20] Here is what Mr. Bernath wrote about the claim for monetary compensation, as evidenced by the letter dated November 7, 2000 (respondent's record in reply, letter of November 7, 2000, page 171):

> [TRANSLATION]
> Concerning my claim for monetary compensation through an arbitration tribunal, don't raise against me some legal reasoning about my pension obtained from Veterans Affairs! Was this statutory initiative available in those cases where unacceptable negligence on the part of the CF authorities completely wrecks a young soldier's career? No! And above all, is the latter question even relevant in the case of a request for redress of an injustice . . .? How would you feel if YOU were in my situation, unable to pursue your career in the CF when you were young, because the CF were determined to deploy you on a mission

> irrespective of the cost, and in disregard of your medical condition and the associated risks; and as a result you were unable to pursue your career? Would you not want to be compensated fairly and impartially?

[21] In reply to the requests contained in the grievance, the CDS, in a decision dated January 12, 2001, congratulated the applicant and praised him for his courage and his determination during his missions and acknowledged his exceptional work in the assistance he contributed following the wreck of the vessel "La Fierté Gonâvienne" off Montrouis in Haiti. As a result, the CDS awarded the Canadian decoration to Mr. Bernath after having recognized the sick leave making him eligible to receive that honour. Furthermore, the applicant and the participants who lent a hand at the shipwreck were awarded the Commendation for services rendered in Haiti. However, the CDS refused to allow Mr. Bernath's final claim for relief, a monetary compensation to be determined by an arbitration committee (see paragraph 5 [18] of this decision for the conclusion on the request for redress).

[22] Accordingly, the applicant has been receiving until now a monthly pension of about $1,900.00 in compensation for the various problems caused by his years of service within the Canadian Forces. This amount was determined by the Veterans Affairs tribunal under the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3.

[23] As we can see, the claim for monetary compensation made in the applicant's grievance makes no reference to the Charter or to any other legislation providing a legal basis for such a type of claim, other than some inferences that can be drawn from Mr. Bernath's letter dated November 7, 2000, in which he argues that he does not in any case agree that his claim for monetary compensation should be dismissed on the basis of the *Crown Liability and*

Proceedings Act, R.S.C. 1985, c. C-50 and section 111 of the *Pensions Act*, R.S.C. 1985, c. P-6 (see the quotation in paragraph 20 of this decision). However, the CDS's decision effectively rejected the claim for monetary compensation, relying for this purpose on the two statutes to which the applicant refers.

[24] The facts alleged in the action brought by motion before this Court under sections 7 and 24 of the Charter are the same as those reported in Mr. Bernath's grievance claim. In short, the two proceedings flow from a similar factual backdrop. However, the amended statement of claim contains some additions concerning a breach of a trustee's obligation and a breach in processing the grievance (see paragraphs 1(i), 1(j) and the Charter grounds alleged (paragraphs 1 (introduction), 10, 55, etc. of the applicant's amended statement of claim dated November 8, 2004, applicant's motion record, volume 2, tab C).

[25] Since the action was brought in this Court by the applicant pursuant to sections 7 and 24 of the Charter, the prothonotary ruled in her order that this particular type of action pertains entirely to the grievance process in the Canadian Forces. In other words, that this process is conducted before a "court of competent jurisdiction" within the meaning of section 24 of the Charter and, therefore, the prothonotary wrote at paragraph 70 of her order:

> . . . that the Chief of Staff had the necessary jurisdiction to hear and determine the plaintiff's claim as formulated in his amended statement of claim, that this claim could and should have been raised in the course of the plaintiff's grievance filed under the *National Defence Act*, and that the plaintiff's action constitutes, therefore, an abuse of process.

For the purposes of this appeal, this is the element of the impugned order that is at the heart of the controversy. In all fairness to the prothonotary, the legal argument set out in this paragraph was not put before her.

[26] In my view, the issue to be resolved in this litigation is the following: Is the Canadian Forces grievance resolution process set out in the *National Defence Act* conducted before a "court of competent jurisdiction" within the meaning of section 24 of the Charter?

[27] If the reply is in the negative, it follows that there cannot be *res judicata* or abuse of process since the grievance process is not *in se* an adequate forum in which to address a question of law arising from the interpretation of the Charter. However, if the reply is in the affirmative, the issue is whether the action brought by the applicant is *res judicata* or whether the motion filed is simply an abuse of process.

VI. Points at issue

[28] From the submissions made by the parties to this case, the points at issue they raise and that will be analyzed herein are the following:

(1) Is the Canadian Forces grievance resolution process set out in the *National Defence Act*, including its components (the initial authority, the CDS or his delegate and the Grievance Board) conducted before a "court of competent jurisdiction" within the meaning of section 24 of the Charter and the tests laid down by the Supreme Court of Canada?

(2) In the affirmative, does the rule of *res judicata* preclude Mr. Bernath's claim based on the grievance he filed under subsection 29(1) of the *National Defence Act*, the decision made by the CDS under sections 29.11 and 29.15 of that Act and the action brought by motion in this Court claiming monetary relief under sections 7 and 24 of the Charter?

(3) Furthermore, in the affirmative, does the fact that the applicant brought an action before this Court with a view to obtaining monetary compensation constitute an abuse of process?

(4) In the circumstances was the appropriate remedy rather one of proceeding by way of judicial review of the CDS's decision under sections 7, 12 and 18 of the *Federal Courts Act*?

(5) In the alternative, can the applicant still proceed by way of an action under section 17 of the *Federal Courts Act* notwithstanding his failure to file first an application for judicial review challenging the decision of the CDS dated January 12, 2001?

VII. Relevant legislation and case law for the purposes of the analysis

[29] With the enactment of subsection 24(1) of the Charter, Parliament provided a mechanism for enforcing the rights and freedoms guaranteed by the Charter (*R. v. Hynes*, [2001] 3 S.C.R. 623, at para. 15). Subsection 24(1) of the Charter reads:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24(1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[30] Subsection 24(1) specifically provides that anyone whose rights or freedoms under the Charter are infringed or denied may apply to a "court of competent jurisdiction" for an appropriate and just remedy. The fundamental question underlying the notion of a "court of competent jurisdiction" has been examined several times by the Supreme Court of Canada, in an effort to determine its tenor. For example, *Mills v. The Queen* [1986] 1 S.C.R. 863 (*Mills*) held that in order to determine whether a court or judicial or administrative decision-maker is a "court of competent jurisdiction" under the Charter, a three-pronged analysis must be undertaken. The three prongs of this analysis, used to identify whether a decision-maker or a judicial or administrative court or tribunal has jurisdiction to grant relief under subsection 24(1) of the Charter, are: (1) the tribunal or decision-maker must first have jurisdiction over the person, (2) the tribunal or decision-maker must have jurisdiction over the subject-matter of the litigation, and (3) the tribunal or decision-maker must have jurisdiction to grant the remedy that is sought. Following *Mills*, this tripartite analysis was adopted and upheld by the Supreme Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

[31] In *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, the Supreme Court resumed the review of the jurisdiction of the court or tribunal under subsection 24(1) of the Charter and developed a functional and structural approach to address more specifically the third prong of the *Mills* analysis, which is to determine whether a tribunal or decision-maker has the power to grant the remedy that is sought. The functional and structural approach advanced is a contextual

evaluation of the relevant factors to determine whether the court, tribunal or decision-maker, by virtue of its function and structure, is an appropriate forum for ordering the Charter remedy in issue.

[32] The tests to consider under the "function" heading are the following: (1) what is the court or tribunal's function within the legislative scheme? (2) would the power to order the remedy sought under s. 24(1) frustrate or enhance this role? (3) how essential is the power to grant the remedy sought to the effective and efficient functioning of the court or tribunal? (4) what is the function of the court or tribunal in the broader legal system? and (5) is it more appropriate that a different forum redress the violation of Charter rights?

[33] The appropriate tests under the "structure" heading are the following: (1) whether the proceedings are judicial or quasi-judicial, (2) the role of counsel, (3) the applicability or non-applicability of traditional rules of proof and evidence, (4) whether the court or tribunal can issue subpoenas, (5) whether testimony is given under oath, (6) the expertise and training of the decision-maker, (7) the institutional experience of the court or tribunal with the remedy in question, (8) the workload of the court or tribunal, (9) the time constraints it operates under, (10) its ability to assemble an adequate record for a reviewing court, and (11) other similar operational factors.

[34] To determine whether the CDS is a tribunal of competent jurisdiction within the meaning of section 24 of the Charter, an analysis of the Canadian Forces grievance resolution process and

the CDS's role within it must be carried out according to the tripartite analysis of *Mills* and the functional and structural approach laid down in *R. v. 974649 Ontario Inc.* Then a similar exercise will be conducted on the assumption that the intervention of the Grievance Board is required or requested, bearing in mind that this Board has only a power of recommendation and that the CDS remains the competent authority for making the final decision.

VIII. Analysis

1. *Is the Canadian Forces grievance resolution process set out in the National Defence Act, including its components (the initial authority, the CDS or his delegate and the Grievance Board) conducted before a "court of competent jurisdiction" within the meaning of section 24 of the Charter and the tests laid down by the Supreme Court of Canada?*

[35] It will be recalled that the leading case on such matters, *Mills*, set out a tripartite analysis for determining whether a tribunal or decision-maker is a "court of competent jurisdiction" under subsection 24(1) of the Charter, the three prongs of the *Mills* test being: (1) jurisdiction over the person, (2) jurisdiction over the subject matter, and (3) jurisdiction to grant the remedy sought. Furthermore, *974649 Ontario Inc.*, *supra*, developed a functional and structural approach to assess the third prong. The suggested approach lists a number of contextual factors that must be taken in consideration.

[36] It is apparent from the language of subsection 29(1) of the *National Defence Act* that this is a broad rule covering a number of possible situations. However, I would think that the analysis must not be limited to that. It is necessary to consider the legislation and the QR&O as a whole in relation to the three-pronged test in *Mills* as well as all the contextual factors using the functional and structural approach laid down in *974649 Ontario Inc.* Before transposing the tripartite analysis in *Mills* to the facts of this appeal, I think it is useful, even essential, to review first the relevant circumstantial factors in this case in relation to the functional and structural approach. It seems obvious to me that the function and structure of the Canadian Forces grievance resolution process will be determinative in subsequently addressing the *Mills* tests, including the issue of whether the CDS had jurisdiction to grant the relief claimed by Mr. Bernath.

[37] In my opinion, to accurately assess the function of the Canadian Forces grievance process, it is important to have a proper knowledge of its ins and outs. The purpose of this process can be defined only by determining its structural elements. That is the approach I intend to follow herein.

(i) Structure of the tribunal

(i.1) *Are the procedures of the tribunal or decision-maker judicial or quasi-judicial?*

[38] Again, the issue is whether there is authority in the *National Defence Act* and the QR&O for rulings on Charter rights within the grievance process and, parenthetically, granting monetary

compensation as relief for a breach thereof. In this regard, I note that the *National Defence Act* does not explicitly provide that the process is an adequate forum for ruling on Charter issues or for awarding, in some instances, appropriate relief under the Charter. Does the grievance process nevertheless have the mechanisms and is it equipped to determine in a fair, equitable and uniform way any questions of law and remedies that arise under section 24 of the Charter?

[39] In itself, the grievance procedure may be characterized as judicial or quasi-judicial in nature. What requires closer attention is the actual mechanism of resolution of grievances. The question that must be answered is: does this process have the essential attributes to lead to a fair, equitable and uniform resolution of grievances, bearing in mind the type of forum established to hear and determine the substantive issues in the controversy?

[40] As mentioned earlier herein, there are two levels to the grievance resolution process: (1) the initial level, the review by the commanding officer, and (2) the final level, the review by the CDS. The Grievance Board intervenes at the CDS's discretion, or mandatorily if certain questions pertain to the Board's mandate (see article 7.12 of the QR&O). However, it is important to note that the Grievance Board's decisions are simply recommendations that in no case are binding on the second level authority, the CDS, since he remains the final authority whose determination represents the ultimate stage of the grievance process.

[41] The *National Defence Act*, the QR&O and the Grievance Manual issued by the Director General Canadian Forces Grievance Authority, which is a guide for participants in the Canadian

Forces grievance process, provide for the following in connection with this decision-making process:

- They provide that the process is initiated through the filing of a grievance by an officer or non-commissioned member;
- They provide for disclosure of written information that will be used in determining the appropriate decision;
- They provide that legal opinions obtained by the decision-maker are not disclosed because they are "covered by the solicitor-client privilege and are therefore in law considered confidential communication between the lawyer who wrote the opinion and the authority who requested it" (see Grievance Manual, chapter 3, clause 3).
- They provide that there is no hearing under the grievance resolution procedure;
- They provide that no power to issue subpoenas is granted;
- They do not provide any procedure for the filing and exchange of memoranda. However, a grievor may file his submissions and comments, including the reasons behind his claim.
- They do provide that the decisions of the decision-making authorities must be accompanied by reasons.

[42] This is thus an internal grievance resolution system that is unique to the Canadian Forces. The competent authority at each decision-making level is the superior, in the hierarchical order established within the Canadian Forces, of the grieving officer or non-commissioned member. In

fact, there is no independent decision-maker, in the legal sense of the term, who is called on to decide a dispute between the parties.

[43] In a decision-making system such as this, it is hard to perceive the presence of the totality of characteristics peculiar to a quasi-judicial tribunal tasked with determining Charter rights and awarding, where applicable, appropriate relief in some particular circumstances.

[44] As to fundamental rights raised by the Charter, and, therefore, the availability of relief provided for in section 24 of the Charter, they appear to me to be elements so important that they necessarily require an independent and autonomous decision-maker acting within an appropriate forum enabling him adequately to pronounce on such issues. Furthermore, not only does the decision-maker who examines a grievance filed by an officer or non-commissioned member not have the characteristics enabling him to address Charter issues, the grievance process does not offer an adequate forum where questions of law of such fundamental importance as those based on the constitutional rights protected by the Charter can be addressed. The non-disclosure to the applicant of the legal opinions obtained by the decision-maker is significant, it seems to me. How can a decision-making process rule on questions of Charter rights when at no time can the legal opinions even be disclosed to the person affected?

(i.2) *What is the role of counsel?*

[45] The role of the lawyers is limited to advice in the preparation, drafting and examination of the grievance. There is no intention that the lawyer assume a role of representation in the context of the grievance system leading to a decision.

[46] In clause 11 of chapter 2 of the Grievance Manual, it is provided that an officer or non-commissioned member may retain the services of legal counsel, but only at his own expense. However, article 7.03 of the QR&O provides that an officer or non-commissioned member may obtain the assistance of an officer in preparing his grievance, where a request has been made to the commanding officer.

[47] It seems inappropriate to me that a decision-making body should be considered adequate to deal properly with a question involving rights and freedoms when that body is unable to provide a genuine forum for debate and representations concerning the fundamental issues that this type of question is certain to raise.

[48] That being said, to facilitate their work, the decision-makers have at their disposal some members of the personnel who have legal skills. But the product of the legal work that can eventually be achieved from this is not communicated to the grievor. In short, it is not possible in this situation to identify the legal issues, their validity or comprehensiveness; this runs counter to the process for determining Charter rights.

(i.3) *Are the traditional rules of evidence applied?*

[49] As a preliminary point, the *National Defence Act* and the QR&O do not specify the rules of evidence to be followed in such matters. The Grievance Manual and the Assisting Member Handbook provide that “written” documentation submitted to the decision-maker shall be

disclosed to the grievor, with the exception of the legal opinions that remain the property of the decision-maker who is to hear the claim, which are subject to solicitor-client privilege. Upon receipt of the written documentation, the grievor generally has 14 days to respond (see Grievance Manual, chapter 3, clause 3).

[50] This kind of disclosure of documentary evidence cannot be challenged in the form of examination, cross-examination or by any other means. This procedural method bears no resemblance to the rules of evidence normally governing before a judicial or quasi-judicial tribunal. Again, to repeat, the procedures for collecting documentary evidence and its disclosure are set out in the Assisting Member Handbook and Grievance Manual, and not in a statute or even in the QR&O. A guide has no legal value comparable with the authority of the legislation or regulations. It would be wrong to contend that the Canadian Forces grievance procedure is consistent with a predetermined, coherent set of evidentiary rules. The competent decision-making authority is virtually the master of its proof, apart from those cases where it must observe certain rules as mentioned earlier herein. It could even be said that the Canadian Forces grievance procedure has no applicable rules of evidence. This does not facilitate our task when an attempt is made to show that the Forces' grievance resolution system has jurisdiction to rule on issues of Charter rights and the appropriate relief to be granted accordingly.

(i.4) *Can the tribunal issue subpoenas?*

[51] As discussed in paragraph 41 herein, the issuance of witness subpoenas is not a procedure adhered to in the grievance resolution process.

(i.5) *Do witnesses testify under oath?*

[52] Sub-article 7.04(1) of chapter 7, volume I of the QR&O requires that a grievance be made in writing, that it be signed by the grievor and that it be submitted to the commanding officer designated for its determination. Paragraph 7.04(2)(*c*) provides that the grievor may file a statement in writing from any person who can substantiate the grievance. That said, there is no obligation in either the *National Defence Act* or the QR&O that such written statements be filed under oath.

(i.6) *What about the expertise and training of the decision-maker?*

[53] The *National Defence Act* does not require that either the authority at the first decision-making level or the CDS have legal qualifications. The respondent alleges in her supplementary memorandum dated November 30, 2006 that the CDS is not a legal expert but rather an expert on military questions. However, the Grievance Manual states that "analysis teams" work for the Canadian Forces Grievance Board (CFGB) under the authority of a director. I note that this Court has previously recognized that the CDS has some expertise in the control and administration of the Canadian Forces. In *McManus v. Canada (Attorney General)*, 2005 FC 1281, Mr. Justice Hughes wrote at paragraph 19, concerning the expertise of the CDS: "The Chief of Defence Staff can be considered to have certain expertise in controlling and administering the Canadian Forces."

(i.7) *What is the institutional experience in relation to the relief in question?*

[54] The CDS is the final authority for the determination of grievances filed by officers and non-commissioned members of the Canadian Forces. In exercising his jurisdiction, the CDS rules on a multitude of cases, as well as ensuring the leadership and management of the Canadian Forces. As the final authority in the grievance process, the CDS may grant a variety of remedies, such as allocating a period of leave with or without pay, awarding a promotion, granting honorary citations, issuing formal apologies on behalf of the Canadian Forces, authorizing transfers, etc.. That being said, there is no provision in the Act, the QR&O, the Grievance Manual or in any other text in which the CDS's powers of relief are spelled out, that includes the power to grant monetary compensation.

[55] In his decision of January 12, 2001, the CDS himself acknowledges that he lacks the authority to grant such relief:

> [TRANSLATION] Finally, concerning your last request, that is, monetary compensation to be determined by an arbitration committee, I am unable to grant it to you since no statutory or regulatory provision gives me that authority.

Furthermore, the respondent, in her supplementary memorandum dated November 30, 2006, acknowledges in paragraph 39 that the CDS does not have the necessary authority to award monetary relief in the form of damages in a grievance proceeding brought pursuant to section 29 of the *National Defence Act*:

> [TRANSLATION] The respondent's present position is that the CDS lacks the authority to award monetary relief in the form of damages in a grievance proceeding under section 29.

[56] This view that there is no legal basis for the CDS to grant monetary compensation is founded in part on the fact that the applicant was and still is receiving a monthly pension of about $1,900.00, monetary compensation having been determined by the Veterans Review and Appeal Board under the *War Veterans Allowance Act*, R.S.C. 1985, c. W-3. Section 9 of the *Crown Liability and Proceedings Act* provides that no proceedings lie against the Crown on a monetary claim in this situation:

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.	**9.** Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[57] That being said, in her order of September 9, 2005, the prothonotary found that the CDS had the necessary jurisdiction to punish a Charter breach and grant redress in the form of monetary compensation. She writes at paragraph 38 of the impugned order:

> The grievance mechanism under the *National Defence Act* being, as we have seen, even more complete than the one under the PSSRA, the Chief of Staff obviously must have the requisite authority and jurisdiction to apply the *Charter*, determine whether *Charter* rights have been breached, and, where applicable, grant monetary compensation as relief under section 24 of the *Charter* if he determines that the pension otherwise granted is insufficient in the circumstances.
>
> [My underlining]

In my view, this ruling is in contradiction with the Act. Although this is a proceeding with sections 24 and 7 of the Charter as its backdrop, it seems to me that before she could make the ruling she did, the prothonotary had a duty to conduct the tripartite analysis in *Mills* and to consider the functional and structural approach set out by the Supreme Court in

974649 Ontario Inc. As I said before, the prothonotary did not have before her the argument on which this decision is based.

[58] While the Canadian Forces grievance process does not provide for the granting of monetary relief , this analytical factor — the decision-making authority's expertise concerning the relief in question — does not suffice to warrant the conclusion that the grievance system is not conducted before a "court of competent jurisdiction". That is the opinion of the respondent. And she argues that there are some curial authorities to the effect that even if a court or tribunal is unable to grant exactly the same relief as that sought in a proceeding, this does not necessarily make it a tribunal of lesser jurisdiction. In support of this submission, the respondent relies on *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257 (*Okwuobi*) rendered by the Supreme Court and *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69 (*Phillips*), rendered by the Manitoba Court of Appeal. In my opinion, these cases are distinguishable from the case at bar.

[59] In *Okwuobi*, the Supreme Court held that although the Administrative Tribunal of Quebec (ATQ) cannot issue a formal declaration of invalidity when determining whether a statute or part thereof is constitutionally invalid, this does not affect its jurisdiction. The Supreme Court explained that the ATQ has jurisdiction to declare that a statutory provision is invalid, but that this determination was not binding on any future decision-makers, and that this did not affect its jurisdiction as a court of competent jurisdiction within the meaning of section 24 of the Charter. In other words, the Supreme Court held that even if a tribunal cannot grant relief of the

scope that is sought, it is just as much a "court of competent jurisdiction" as a court or tribunal with all the remedial powers necessary to exercise its jurisdiction.

[60] In *Phillips*, the Manitoba Court of Appeal held that a tribunal or arbitrator was not necessarily lacking in jurisdiction to decide the point at issue even though the tribunal or arbitrator lacked express jurisdiction to grant the relief sought. Even if the remedies that the tribunal in question can grant are not exactly the ones sought, the tribunal does not necessarily lose jurisdiction over the subject matter.

[61] To explain its reasoning, the Manitoba Court of Appeal referred to the Ontario Court of Appeal decision in *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160 (*Giorno*). This decision held that an arbitrator lacks jurisdiction to decide a claim if he lacks the authority to remedy the wrong alleged by the applicant. The Court's reasoning is indicated in the reasons, reproduced below, by Mr. Justice Goudge at paragraphs 19 and 20 of *Giorno*:

> [19] It is of no moment that arbitrators may not always have approached the awarding of damages in the same way that courts have awarded damages in tort. In *Weber*, at p. 603, McLachlin J. made clear that arbitrators are to apply the same law as the courts. Laskin J.A. put it this way in *Piko* at para. 22:
>
> > I do not rest my decision on any differences between the power of courts and the power of arbitrators to award damages for a tort, such as the tort of malicious prosecution. I recognize that arbitrators may apply common law principles in awarding damages, and, more importantly, the breadth of an arbitrator's power to award damages does not necessarily determine whether *Weber* applies.
>
> [20] What is important is that the arbitrator is empowered to remedy the wrong. If that is so, then where the essential character of the dispute is covered by the collective agreement, to require that it be arbitrated, not litigated in the courts, causes no "real deprivation of ultimate remedy". The individual is able to pursue an appropriate remedy through the specialized vehicle of arbitration. He or she is not left without a way to seek relief.

[My underlining]

[62] In the case at bar, the decisions highlighted by the respondent are of no use in explaining how the CDS has jurisdiction to make decisions on Charter issues although he lacks jurisdiction to grant the monetary relief claimed by Mr. Bernath. In *Okwuobi*, the Supreme Court held that a tribunal that cannot grant relief to the degree requested by the applicant may nevertheless be a "court of competent jurisdiction" under section 24 of the Charter. This is certainly not so in the case at bar. Here, it is conceded that the CDS can in no way grant monetary relief. Needless to say, the situation in this case is totally different from the one in *Okwuobi*, where the tribunal had the power to make a declaration of invalidity, i.e. the relief sought, but that this declaration that the tribunal could make had no binding effect on subsequent decision-makers, as the applicants had hoped.

[63] In *Phillips*, the Manitoba Court of Appeal held that a decision-maker does not have jurisdiction to dispose of a claim if the decision-maker does not have the necessary authority to grant the appropriate relief for the wrong alleged by the applicant. That is the case here. The applicant here is claiming damages as compensation for the alleged breach of the right to security of his person set out in section 7 of the Charter. As mentioned previously, the CDS does not have authority to award monetary relief and there is no allegation by the respondent that other relief of a similar nature could have been granted by the CDS in the circumstances. Therefore, *Phillips* does not support the submission of the respondent that the CDS is a "court of competent jurisdiction" to decide Charter questions. On the contrary, *Philipps* supports the propositon that, to enforce a Charter right, the tribunal must have the power to grant appropriate relief.

(i.8) *What is the workload of the tribunal?*

[64] The grievance resolution process is a mechanism for resolving claims in military matters commonly resorted to by members of the Canadian Forces. In 2003, the CDS received 135 new cases and the statistics that year show that there were already more than 789 grievances awaiting a decision (Lamer Report, at page 87). It is worth emphasizing again that the CFGB has been delegated authority to act as an officer exercising the final decision-making authority on grievances, in order to reduce the CDS's grievance workload.

(i.9) *What are the tribunal's time constraints?*

[65] It is public knowledge that the CDS has many responsibilities. In addition to being the final authority on grievances filed by officers and non-commissioned members, a task he now shares with the CFGB director, the CDS is also the commander-in-chief of the Canadian Forces and therefore controls its administration. Furthermore, the CDS advises the Minister of National Defence on all questions pertaining to the Canadian Forces and advises, as needed, the Prime Minister and his Cabinet on all questions in relation to military developments. It is obvious that the CDS cannot devote all of his working hours to the resolution of grievances, knowing that this is one of the major responsibilities linked to his position (see Lamer Report, *supra*, at page 98).

(i.10) *Does the tribunal have the ability to assemble an adequate record for the needs of a reviewing court?*

[66] Under article 7.11 of the QR&O, where the grievance is not of a type that must be referred to the Grievance Board, the CDS shall:

7.11 – DUTIES WHERE GRIEVANCE NOT REFERRED TO GRIEVANCE BOARD	**7.11 – OBLIGATIONS – GRIEF NON RENVOYÉ DEVANT LE COMITÉ DES GRIEFS**
Where the grievance is not of a type that must be referred to the Grievance Board pursuant to article 7.12 (*Referral to Grievance Board*), the Chief of the Defence Staff or the officer to whom final authority has been delegated shall:	Si le grief n'appartient pas à une catégorie qui exige, en application de l'article 7.12 (*Renvoi devant le Comité des griefs*), un renvoi devant le Comité des griefs, le chef d'état-major de la défense ou l'officier ayant le pouvoir de décision définitive doit :
(*a*) consider and determine the grievance;	*a*) étudier et décider du bien-fondé du grief;
(*b*) advise the grievor in writing through the commanding officer of the determination and the reasons for it;	*b*) informer le plaignant par écrit, par l'intermédiaire de son commandant, de la décision et des motifs à l'appui;
(*c*) return any documents or things submitted by the grievor if requested to do so; and	*c*) renvoyer tout document ou pièce déposé par le plaignant, si une demande est faite à cet égard;
(*d*) maintain a record of the grievance, including the determination made and any action taken.	*d*) conserver le dossier du grief, notamment la décision et les mesures prises.

[67] The fact that the CDS must make a decision supported by reasons in writing, and to maintain a record of the grievance, including the determination made and any action taken, indicates that the CDS is required, during the grievance process, to assemble a record for the needs of a reviewing court.

(i.11) *What are the conclusions under the "structure" heading?*

[68] Briefly put, the process and procedure governing the grievance system and the role of the CDS as the final authority diverge from the process and procedure ordinarily followed by courts and tribunals considered to have jurisdiction within the meaning of section 24 of the Charter where relief is granted for breaches of Charter rights and freedoms. In particular, I am referring to the fact that the legal opinions available to the decision-makers are not disclosed, that no hearing is held, that no witnesses may be heard, that the process grants no power to issue subpoenas, that the role of the decision-maker under the *National Defence Act* and the QR&O is

what it is and that the power to grant monetary relief is lacking. Thus it is hard to discern, in such a system, a power of a quasi-judicial nature that could be used to enforce Charter rights.

(ii) The function of the court or tribunal

(ii.1) *The tribunal's function within the legislative scheme*

[69] The functional and structural approach laid down in *974649 Ontario Inc.* draws our attention to the function of the tribunal in our analysis of its authority over the relief that is sought. I am not sure whether this will bring any additional insights in view of the obvious conclusions derived from the analysis of the structure of the Canadian Forces grievance process that has already been conducted, but I will pursue the exercise in the interest of examining the issue in depth. The essential issue remains whether, by its function and its structure, the grievance process, apart from the Grievance Board, is an appropriate forum for determining relief based on the Charter. Using the expression chosen by the Supreme Court in paragraph 44 of its judgment in *974649 Ontario Inc.*, *supra*, the tribunal's function is "an expression of its purpose or mandate".

(ii.2) *The tribunal's function within the legislative scheme*

[70] The language of section 29 of the Act covers any decision, act or omission in the administration of the affairs of the Canadian Forces that aggrieves an officer or non-commissioned member. Section 29 is triggered through the filing of a grievance. This language is general, broad and limited only by the following elements:

- a decision of a court martial or the Court Martial Appeal Court;

- a decision of a board, commission, court or tribunal established other than under the Act; or
- a matter or case provided for by the Governor in Council in regulations.

[71] In the case of a grievance claiming monetary relief, the Grievance Manual provides in clause 2.6 that:

> If a review of the member's complaint is largely a claim as it reveals a request for compensation, it may form the basis for a Claim Against the Crown. If that is the case, the member and Assisting Member should review CFAO 59-3 and consult the unit Legal Advisor.

[72] It is even provided in the QR&O, in article 7.16, that an initial or final authority in receipt of a grievance shall suspend any action in respect of the grievance if the grievor initiates an action, claim or complaint under an Act of Parliament, other than the *National Defence Act*. If the other action, claim or complaint has been discontinued or abandoned prior to a decision on the merits, the initial or final authority shall resume consideration of the grievance. Article 7.16 of the QR&O seems to give priority to actions, claims or complaints under an Act of Parliament other than the *National Defence Act*. Moreover, it is provided that consideration of the grievance is resumed where there has been a discontinuance or abandonment of the proceeding by the grievor. Thus, when a decision on the merits has been made, this ends the grievance proceeding. As I did earlier, I wish to add the following comment. Paragraph 29(2)(*b*) of the *National Defence Act*, which provides that there is no right to grieve in respect of a decision of a board, commission, court or tribunal established other than under the Act, reinforces the duty to suspend

a grievance where an action, claim or complaint is filed under an Act other than the *National Defence Act*.

[73] In the light of these observations, it seems that the legislative intent in relation to the grievance process was to settle problems in labour relations matters. However, this process was not designed to replace the actions, claims or complaints proceedings provided for in statutes other than the *National Defence Act*. Under the grievance process, need we recall, the decision-maker does not have the power to award any monetary relief whatever.

[74] Bearing in mind these comments, I do not think it is necessary, in order to adequately grasp the notion of "function" in this case, to conduct an exhaustive review of the other questions advanced in *974649 Ontario Inc*. From the way in which some are worded, I do not see how a more extended analysis would help to describe more closely the function of the Canadian Forces grievance process. I pursue my analysis, however, if only to adhere to the tests laid down by the Supreme Court.

(ii.3) *Would the power to grant the relief sought under subsection 24(1) frustrate or enhance this role of the tribunal?*

[75] Needless to say, the grievance process would be strengthened if the decision-maker had the power to grant monetary relief under the Charter. This would necessitate major changes in the legislation and the structure of the process, to give the decision-maker the tools needed to make decisions that are enlightened, fair, and in the interests of the administration of justice.

(ii.4) *How essential is the power to grant the remedy sought to the effective and efficient functioning of the tribunal?*

[76] To date, the Canadian Forces grievance process does not give the designated decision-making authority the power to grant monetary relief on grounds of a breach of a right or freedom guaranteed by the Charter. The process seems to function and fulfill its objectives. So this power is not essential in ensuring the proper functioning of the grievance process.

(ii.5) *Conclusion under the "function" heading*

[77] In conclusion, the language of section 29 of the *National Defence Act*, with its restrictions and the duty of the designated decision-making authority to suspend consideration of the grievance if another action, claim or complaint has been initiated, shows that the grievance process has only a limited function: no question of law involving the Charter, and consequential relief thereunder, can be addressed.

[78] The functional and structural approach set out in *974649 Ontario Inc.*, *supra*, suggests that the function and structure of the Canadian Forces grievance process are not designed to provide for monetary relief to remedy a breach of a Charter right.

[79] The two other prongs of the tripartite analysis in *Mills*, to determine whether the Canadian Forces grievance process provides for jurisdiction over the person and jurisdiction over the subject matter, shall be considered for the purpose of completing the analysis.

(iii) Application of the *Mills* tripartite analysis to the Canadian Forces grievance process without considering the role of the Grievance Board

[80] The three-pronged test in *Mills* requires an assessment of the tribunal's jurisdiction over the person, over the subject matter of the dispute and over the remedy that is sought.

[81] From the functional and structural analysis, it can be observed that the grievance resolution process, as designed and structured, could lead to the granting of the remedy sought.

[82] Furthermore, it will be noted from the functional and structural analysis that the grievance process does not provide for the exclusive forum for the resolution of claims brought by officers and non-commissioned members of the Canadian Forces since other actions, claims and complaints under statutes other than the *National Defence Act* can be undertaken. The subsequent introduction of such an alternative claim will stay consideration of the grievance until such time as the alternative claim has been discontinued or abandoned, and if judgment has been rendered on the merits of the case the suspended grievance becomes moot.

[83] In any event, as to jurisdiction over the person, section 29 of the *National Defence Act* provides that the power to exercise jurisdiction over officers and non-commissioned members is governed by the Canadian Forces grievance process. However, as stated earlier, this jurisdiction is not exclusive.

[84] In the case at bar, in regard to jurisdiction over subject matter, it appears that the grievance process was not designed and structured to deal with issues of constitutional law. As mentioned earlier, resort to this grievance mechanism is not exclusive, since non-commissioned members and officers may bring other actions, claims or complaints under other statutes. Furthermore, the structure of the decision-making body, the role of the initial decision-maker and the role of the CDS, the limited forum that the grievance process constitutes, and the non-disclosure to the grievor of the legal opinions obtained by the decision-making authority are only some examples from which it can be concluded that the grievance process does not provide for a court of competent jurisdiction within the meaning of the Charter.

[85] In short, although under the grievance process the decision-maker has non-exclusive jurisdiction over the individual, it does not have jurisdiction over the subject matter of the dispute in question and does not have jurisdiction to grant the requested relief. Accordingly, this process, omitting the authority of the Grievance Board, which will be discussed briefly hereinafter, does not provide for a court of competent jurisdiction within the meaning of section 24 of the Charter.

(iv) In view of the involvement of the Grievance Board in the Canadian Forces grievance process, can it be said that this procedure provides for a court of competent jurisdiction under section 24 of the Charter?

[86] The CDS, need it be recalled, must, under article 7.12 of the QR&O, refer to the Grievance Board any grievance relating to (a) administrative action resulting in the forfeiture of,

or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces, (b) the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct, (c) pay, allowances and other financial benefits, and (d) entitlement to medical care or dental treatment. The CDS also has a discretion to refer to the Grievance Board any claims filed under subsection 29.12(1) of the *National Defence Act*. The QR&O provide in note (A) of article 7.12 that the factors to be considered by the CDS in the exercise of his discretion are "the benefit to be obtained from having the grievance reviewed externally and the capacity of the Grievance Board to investigate independently and make findings".

[87] The decisions of the Grievance Board are recommendations that are sent to the CDS for final determination. The findings and recommendations of the Grievance Board are not binding on the CDS. However, should the CDS decide not to follow the recommendations or findings of the Grievance Board, he must give reasons for his choice. Thus the CDS remains the final decision-making authority for the resolution of grievances and he makes his decisions independently.

[88] The account of the facts at the basis of the applicant's grievance, the question of law he raises and the relief he seeks from these, are not matters subject to the exclusive jurisdiction of the Grievance Board. Some elements of the record indicate that the CDS contemplated using his

discretion to refer the grievance to the Grievance Board, but for reasons unknown this did not happen.

[89] In relation to the Grievance Board, without revisiting the tripartite *Mills* analysis or reconsidering the functional and structural approach, it seems that this Board is no more a court of competent jurisdiction within the meaning of section 24 of the Charter than what is provided for by the grievance resolution process. The Board does not have jurisdiction, under its terms of reference, to deal with the subject matter of a dispute that raises constitutional issues. Therefore, the Grievance Board is clearly not a court of competent jurisdiction within the meaning of section 24 of the Charter.

[90] However, structurally, the Grievance Board has several of the ingredients of a quasi-judicial tribunal.

[91] Section 29.21 of the *National Defence Act* provides that the Grievance Board has the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it. The Grievance Board has an investigative authority that the initial authority and the CDS simply do not have.

[92] The *Canadian Forces Grievance Board Rules of Procedure (Review of a Grievance by Way of a Hearing)*, S.O.R./2000-294 (Board Rules) provide for review of a grievance by way of

a hearing. In the Board Rules, it may be found some features associated with a quasi-judicial tribunal. The following actors will be found therein: Registrar, hearing process officer, grievor, decision-maker and witnesses.

[93] The Board Rules also cover modes of service, production of documents, stay of proceedings, notice of hearing, summons, expert witnesses, interlocutory motions, exchange of written submissions, arguments, etc. These rules of procedure bear no comparison with those applicable at the two levels of decision-making authority of the grievance process.

[94] However, as when the case is before the initial authority and the CDS of the Canadian Forces, the Grievance Board does not disclose to the grievor the legal opinions it has obtained and in the end its power is simply one of recommendation that is not binding on the CDS (see Grievance Manual, chapter 3, clause 4 and the additional written representations of the respondent dated December 19, 2006, at page 5).

[95] The intervention of the Grievance Board in the consideration of a grievance filed under section 29 of the *National Defence Act* cannot, therefore, alter the conclusion I have reached, that the Canadian Forces grievance resolution process has not been designed and structured to address Charter issues or the issue of relief. The Grievance Board, by its structure, adds to the process through the fact that it is an independent authority outside the chain of command, with its own power to "investigate independently and make findings" (see QR&O, article 7.12, note

(A)). In fact, this Board constitutes only one component of the whole process of grievance resolution in the Canadian Forces.

(v) Conclusion

[96] For the reasons stated above, the Canadian Forces grievance resolution process set out in the *National Defence Act*, including its components such as the initial authority, the CDS and the Grievance Board, does not provide for a court of competent jurisdiction within the meaning of section 24 of the Charter.

(2) In the affirmative, does the rule of res judicata *preclude Mr. Bernath's claim based on the grievance he filed under subsection 29(1) of the* National Defence Act*, the decision made by the CDS under sections 29.11 and 29.15 of that Act and the action brought by motion in this Court claiming monetary relief under sections 7 and 24 of the Charter?*

[97] This question is moot in view of the conclusion I reach concerning the decision-making power in the Canadian Forces grievance resolution process in regard to section 24 of the Charter. At this point in the analysis, to ask this question is to answer it. Allow me to explain. The applicant's claim is based essentially on sections 7 and 24 of the Charter, in an effort to obtain monetary compensation owing to the harm he alleges he suffered as a result of the breach of his right to security of his person. For a finding on a motion alleging *res judicata*, it is necessary first that the decision-making body that heard the matter have jurisdiction to determine it. That is an elementary principle. Since I have found in this case that the Canadian Forces grievance resolution process does not provide for a court of competent jurisdiction to address Charter

issues, it lacked the necessary jurisdiction to decide the matter. Therefore, *res judicata* cannot apply in this case.

(3) Furthermore, in the affirmative, does the fact that the applicant brought an action before this Court with a view to obtaining monetary compensation constitute an abuse of process?

[98] Adjudicating a Charter right is in my opinion a completely different question from one that is fundamentally factual, and which requires an analysis of the facts in the light of the relevant documentation. It would be wrong to claim that in both cases — the grievance filed under section 29 of the *National Defence Act*, and the action brought by way of a motion in this Court — the factual frame and the monetary compensation that is sought bear no relationship to each other. But the legal foundation for the two proceedings is clearly not the same. In the case of a grievance, its underlying legal basis its resolution is not self-evident. Of course, there are references to certain QR&Os and to some statutes, and the CDS's decision is largely a fact-based decision that is not preceded by any investigation. In the case of constitutional issues involving the application of the Charter, the decision-maker who has jurisdiction must apply the supreme law of the country to the particular facts of the case. It is not necessary to dwell more on this aspect of the question, since we know that the grievance before the CDS and the supporting documentation did not refer to any question of law involving the application of the Charter.

[99] How can there be abuse of process when the decision-maker did not have jurisdiction to determine a question of Charter law and award consequential relief? Clearly, it would be

inconceivable to make a finding of abuse of process, given the conclusion I reach in regard to the Charter.

(4) *In the circumstances was the appropriate remedy rather one of proceeding by way of judicial review of the CDS's decision under sections 7, 12 and 18 of the* Federal Courts Act*?*

[100] The respondent submits that even if the CDS's decision of January 12, 2001 is not *res judicata*, it would be inappropriate for this Court to deal with the applicant's proceeding as long as that decision, originating from a federal board, commission or other tribunal, has not been set aside by way of judicial review. To support this argument, the respondent refers to *Canada v. Tremblay*, 2004 FCA 172 (*Tremblay*). An extract from the headnote of that case is set out here:

> This was an appeal of an order by a Judge of the Federal Court dismissing the appellant's appeal of an order by a Prothonotary, which, in turn, dismissed the appellant's motion to strike the respondent's action. The respondent brought an action pursuant to *Federal Courts Act*, section 17 three years after retiring from the Canadian Forces in accordance with the mandatory retirement age provisions in article 15.17 of the *Queen's Regulations and Orders for the Canadian Forces* (1994 Revision) (QROCF). In his action, the respondent asked that the articles of the QROCF prescribing the mandatory retirement age, paragraph 15(1)(*b*) of the *Canadian Human Rights Act* (CHRA), under which the QROCF were adopted, as well as paragraph 15(1)(*c*) of the CHRA, be declared inoperative because they are inconsistent with sections 3 and 7 of the CHRA and the *Canadian Charter of Rights and Freedoms*. The respondent was seeking reinstatement in the Canadian Forces as well as damages. The appellant claimed that the respondent's action was barred under section 269 of the *National Defence Act*, and, in the alternative, requested that any relief in the nature of a judicial review be struck.
>
> The issues were: (1) whether the respondent could proceed by action or whether he should have proceeded by way of judicial review; and (2) if he could proceed by action, whether the action was barred by the six-month limitation period provided by section 269 of the *National Defence Act*.

[101] The issue at the heart of this case involved the decision that had led the applicant to retire and the relief sought was tantamount to a declaration of nullity. It is common knowledge that the only way to set aside the mandatory retirement was to challenge this decision by way of an application for judicial review (see subsection 18(3) of the *Federal Courts Act*). On this point, the Court of Appeal allowed the motion to strike in part.

[102] The instant case is distinguishable. No declaration of nullity is sought with respect to the CDS's decision and the legal basis of the proceeding bears no relationship to that of a grievance. The relief sought is limited to monetary compensation. It may be asked, in the light of the *Tremblay* decision, why the applicant should have proceeded by way of a judicial review of the CDS's decision.

[103] Although I do not wish to speculate about the future, the investigation that is part of the current legal proceeding might throw a different light on the factual situation described in the CDS's decision. It must be recalled that the grievance resolution process does not provide any investigatory procedure other than the one that may be conducted under the authority of the Grievance Board. Such is not the case in this instance.

(5) *In the alternative, can the applicant still proceed by way of an action under section 17 of the* Federal Courts Act *notwithstanding that he first filed an application for judicial review challenging the decision of the CDS dated January 12, 2001?*

[104] For the reasons given in response to the previous question, the action under section 17 of the *Federal Courts Act* is available to the applicant. This is a remedy that is distinct from the grievance procedure set out in section 29 of the *National Defence Act*, and is not incompatible with it. Furthermore, since there is no jurisdiction under the Canadian Forces grievance resolution process to determine Charter issues and applications for monetary relief, the applicant could proceed by way of an action before this Court, a forum that has jurisdiction to deal with fundamental issues.

IX. Further considerations

[105] While writing these reasons I had in mind a case decided by the Supreme Court in *Vaughan v. Canada*, [2005] 1 S.C.R. 146 (*Vaughan*), which, briefly, holds that where Parliament has created a comprehensive scheme for dealing with labour disputes, the process set out in the legislative scheme should not be jeopardized by allowing parallel access to the courts.

[106] I am of the same opinion, but I wish to add that Parliament, in doing so, must first have established an adequate forum for the disposition of disputes that raise Charter issues, as it has done for employer-employee relations. No comparison is possible between the public service staff relations dispute settlement regime described in *Vaughan* and the grievance settlement process of the Canadian Forces. The two procedures lack similar components, rules, process and

expertise. Moreover, the problems at issue in *Vaughan* were not the same as those in the case at bar. When it created the public service staff relations dispute settlement system, Parliament gave that system exclusive jurisdiction for the resolution of all disputes arising out of employer-employee relations in the public service. In *Vaughan*, Mr. Justice Binnie held that in view of the exclusive jurisdiction of the public service dispute resolution system, resort to the courts was inappropriate since, even if some decision-makers in this system are not "independent", the existing statutory regime could not be ignored.

[107] In this case the grievance process is a system that does not appear to be as comprehensive and independent in respect of the management of labour disputes within the Canadian Forces. As mentioned previously, the system as such is not exclusive, as paragraph 29(2)(*b*) of the *National Defence Act* provides that other, civilian agencies such as the Human Rights Commission, for example, may deal with employment relations conflicts in settings related to military service. Furthermore, the grievance process is not exclusive, given that article 7.16 of the QR&O requires the authority responsible for examining the grievance to order a suspension until such time as the grievor abandons or discontinues any action, claim or complaint under an Act of Parliament other than the *National Defence Act*, or the grievance is closed where a decision has been made on any secondary actions, claims or complaints that have been brought. Again the Assisting Member's Handbook, in clause 2.7, highlights this aspect as it states, as information for the parties, that "the grievance will be suspended . . . until the civil litigation is complete. . . . If all the grievance points were dealt with in civil court, then the grievance will normally be closed."

[108] Lastly, according to the case law, where there is a right, there ought to be a remedy for any infringement of that right. That adage must prevail where fundamental rights are at stake (see paragraph 22 of *Vaughan*). It will be recalled that the grievance resolution process cannot lead to the granting of monetary compensation in the form of damages, under section 29 of the *National Defence Act*. But unless Parliament uses the notwithstanding clause to override the Charter, Charter rights must be guaranteed and therefore relief granted for any infringement thereof. There is no provision to this effect in the *National Defence Act*. Subsequently, a soldier who believes that any of his Charter rights have been infringed may seek relief by applying to the decision-making body having jurisdiction.

[109] Accordingly, *Vaughan* is inapposite in this case. The grievance resolution process does not provide for a decision-maker with exclusive jurisdiction over labour conflicts within the Canadian Forces. The civilian courts may intervene, depending on the proceeding that is engaged. Under article 7.16 of the QR&O, the grievor may commence a civil proceeding, and, where he does, consideration of the grievance will be suspended. Moreover, as discussed previously, the grievance procedure does not provide for an adequate forum for addressing constitutional questions under the Charter, and no monetary compensation can be granted through this decision-making process.

[110] In any event, the grievance process does indeed provide for a forum capable of addressing a wide range of claims between members of the Canadian Forces and their employer. In my opinion, the legislative intent was to harmonize labour relations in the very particular

environment that is the Canadian Forces. However, this process does not provide for an adequate forum for dealing with issues of fundamental rights. Accordingly, it is appropriate, even essential in this case, to have access to the courts in order to address such issues.

X. Costs

[111] The applicant and counsel for the respondent informed me that they were not asking for costs. There will be no order to that effect.

XI. Conclusion

[112] Since the Canadian Forces grievance resolution process and its components have not been designed and established to address issues of Charter rights and the relief to be granted with respect thereto, this process does not provide for a court of competent jurisdiction within the meaning of section 24 of the Charter. Absent that jurisdiction, which is in itself the substantive question at issue in this proceeding, the rules of *res judicata* and abuse of process are inapplicable. Furthermore, the applicant did not need to proceed first by way of judicial review before bringing his action.

JUDGMENT

THE COURT ORDERS that:

- The appeal of the prothonotary's decision dated September 9, 2005 be allowed;
- The respondent's motion to strike be dismissed.

"Simon Noël"

Judge

Certified true translation
François Brunet, LLB, BCL

APPENDIX 1

***Grievance Manual*, issued by the Director General, Canadian Forces Grievance Authority**

Note: The *Grievance Manual* is set out as it was submitted by the respondent.

CHAPTER 1 – BACKGROUND

1. Appreciating the strong level of dissatisfaction with the existing process, after much study, the foundation for Canadian Forces Streamlined Grievance Process was formally implemented by a 1998 amendment to the National Defence Act (NDA). The new process is defined at NDA section 29 and is amplified by Chapter 7 of the Queen's Regulations and Orders (QR&O).

The Most Significant Changes

2. The most significant changes introduced in the streamlined process are:

a. a clearer definition of the right to submit a grievance (within a six month time limit);

b. a clearer definition of what can and cannot be grieved;

c. a reduction of the number of levels where most grievances can be determined;

d. the establishment of the Chief of the Defence Staff (CDS) as the final redress authority in the grievance process. (This authority may be delegated for specific types of grievances); and

e. the creation of an independent entity called “the Canadian Forces Grievance Board” (CFGB) to investigate and make recommendations to the CDS on grievances the CDS refers to it.

The Purpose of the Grievance Manual

3. This Grievance Manual was developed to assist in the preparation and submission of grievances under the streamlined grievance process. It is a guide only. The Grievance Manual is not a legally authoritative document and has no force of law. The legal framework for the Canadian Forces Streamlined Grievance Process is section 29 of the NDA and Chapter 7 of the QR&O. In the event that anything in this Manual conflicts with either of those references, assume that NDA section 29 and QR&O Chapter 7 override this Manual. If a conflict cannot be resolved, contact the Director General Canadian Forces Grievance Authority (DGCFGA).

Grievance Manual Form and Content

4. Although you are encouraged to read this Manual at least once from front to back, it has been written so that, once you have a basic familiarity with the players and the process, it can also be read in sections without necessary reference to other sections. To facilitate this convenience, from chapter to chapter and section to section, there are intentional redundancies.

5. It is recommended that you read this Manual only after reading section 29 of the NDA and Chapter 7 of the QR&O. These references are not repeated in this Manual. Both are available through the chain of command, from your orderly room or off the DGCFGA Intranet and Internet sites. The full NDA may also be found at QR&O Vol. IV, Appendix 1.1.

CHAPTER 2 - THE KEY PLAYERS

The Grievor

The Right to Grieve

1. Officers or non-commissioned members (NCM) of the CF who believe they have been aggrieved by a decision, act or omission in the administration of the affairs of the CF for which no other process for redress is provided under the NDA, and that is not specifically precluded in the NDA or QR&O, have the right to submit a grievance up to and including the effective date of their release from the CF. This right to submit a grievance includes any member of the sub-component of the Supplementary Reserve. However, former members of the CF, Regular Force or Reserve Force, who have been released and have not transferred to another component of the CF, may not submit a grievance after release, even if the offending decision, act or omission occurred while they were serving members. A release will not be suspended pending resolution of a grievance unless such suspension is warranted for exceptional reasons.

Informal and Other Avenues

2. Potential Grievors are encouraged to seek a solution to their concerns in the least formal and most appropriate means possible. The right to grieve does not preclude a verbal request for resolution directly to the CO prior to submitting a grievance. Mediation is another option when both parties to the dispute agree to meet and seek resolution. Even after a grievance is submitted, so long as the relevant Grievance Authority has not yet rendered a decision, Grievors may still withdraw or suspend their grievances in favour of an informal resolution.

Protection Against Penalty

3. Subsection 29(4) of the NDA states that no member may be penalized for exercising the right to submit a grievance. To that end, documentation related to a grievance will not be placed on a member’s personal file or performance record unless, and only to the extent necessary, to

implement some aspect of the redress granted. However, the submission of a grievance does not mean absolute protection against all possible consequences. Specifically, subsection 29(5) of the NDA states that any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the Grievor.

The Grievance

What May and May Not be Grieved

4. In accordance with the provisions of procedural fairness and the principles of natural justice, the CF Streamlined Grievance Process is designed to review contentious decisions, acts or omissions that occur in the course of administering the affairs of the CF insofar as they affect the personal rights or situation of CF members. Subject to the limitations in the next paragraph, it is those decisions, acts or omissions made by the CDS, or anyone subordinate to or acting under the authority of, or delegation of authority of, the CDS that may be the subject of consideration or determination under this grievance process.

5. The issues CF members may not grieve under the streamlined grievance process are:

a. a decision of a Summary Trial, Court Martial or the Court Martial Appeal Court (CMAC);

   (Members dissatisfied with decisions at their Court Martial may only appeal to the CMAC. Members dissatisfied with a decision at their Summary Trial may only apply for review by a review authority in accordance with QR&O 108.45. If displeased with this "Review of Finding or Punishment of Summary Trial", the only recourse is through the Federal Court.)

b. a matter for which another process for redress is specified under the NDA;

   (For example, the Military Police Complaints Commission is established under the NDA to consider and determine conduct or interference complaints related to military police duties. Such complaints may not, therefore, be the essence of a grievance under NDA section 29.)

c. a decision of a Board, Commission, Court or Tribunal not established under the NDA;

   (Such entities are the Canadian Human Rights Commission (CHRC), Privacy Commissioner, Access to Information Commissioner and Official Languages Commissioner. However, such matters involving decisions, acts or omissions by members of the CF may be the subject of a grievance so long as the CDS has the authority to grant the redress sought and the relevant Board, Commission, Court or Tribunal has not previously decided the issue on its merits.)

d. a matter or case prescribed by the Governor in Council in regulations;

   (This includes any matter, case or decision specifically identified in any of the QR&Os as one that is precluded from being the essence of a grievance under NDA section 29.)

e. a decision made under the Code of Service Discipline.

Administrative Restrictions

6. There are a few other prescribed restrictions, these being essentially administrative in nature, that must also be respected for the submission of a grievance under the CF streamlined process:

a. a grievance may not be submitted on behalf of someone else. The decision, act or omission being grieved must have occurred (or not occurred as applicable) to the Grievor personally;

b. a grievance may not be submitted jointly with another member. Members who believe that they have been aggrieved and wish to submit a grievance, must do so individually; and

c. a grievance may not contain language or comments that are insubordinate, disrespectful or are otherwise a violation of the principles of "Good Order and Discipline" unless such language or comments are essential for the purpose of clearly stating the grievance.

Minimum Content

7. To be considered a formal submission, a grievance must be in writing, must be signed and must be submitted to the Grievor's CO. As a minimum, the grievance must include:

a. a brief description of the decision, act or omission that is the subject of the grievance, including all supporting facts known to the Grievor;

b. a request for determination (adjudication) and a clear statement of the full redress sought; ie, what the Grievor ultimately wants to "make things right" must be obvious;

c. a copy of all substantiating documents in the possession of the Grievor and a description of the particulars and location of any other relevant documentation known to the Grievor; and

d. if any person can substantiate the grievance, a statement in writing from that person. If a statement is not possible or is not available, full contact details should be provided.

Suspension of a Grievance

8. QR&O 7.16 (1) mandates that a redress authority in receipt of a grievance submitted by a member shall suspend action in respect of that grievance if the Grievor initiates any action, claim or complaint under an Act of Parliament, other than the NDA, regarding the matter giving rise to the grievance. QR&O 7.16 (2) directs that, in the event of such a suspension, the redress authority shall resume grievance consideration if the other action, claim or complaint has been discontinued or abandoned prior to a decision on the merits and the redress authority is notified to that effect. A note to this particular QR&O article clarifies that a member retains the right to grieve where a grievance has been so suspended until such time as decision on the merits of the action, claim or complaint under the Act of Parliament other than the NDA. However, if after submitting a grievance a member pursues an alternative process that is defined under the NDA, QR&Os, DAODs or related CF policy document, Mediation for example, pending completion of the alternative process, the grievance may only be held in abeyance with the Grievor's consent.

The Assisting Member

9. Where a member requests assistance in the preparation of a grievance, the CO is required to detail an officer or NCM to assist that member. Ideally, the officer or NCM so detailed should be an individual selected by the Grievor. However, if this is not practical, the CO may appoint someone else. The Grievor is not obliged to accept or use the substitute offered by the CO.

10. The role of the Assisting Member is limited to ensuring that the Grievor is familiar with the grievance rules and procedures and to helping the Grievor to articulate clearly, completely and concisely, the grievance and the redress sought. While the Assisting Member may assist in all aspects of information and evidence gathering in support of the grievance at each level, it is the Grievors' responsibility to make their own case. The Assisting Member is not the Grievor's advocate, lawyer or representative and is not permitted to speak formally on behalf of, or in any way officially represent the Grievor while the grievance remains within the grievance process.

Legal Advice and Representation

11. Grievors are not entitled to CF, DND or Justice legal advice or representation. Grievors may engage civilian legal counsel or other representative, but only at their own expense. When a Grievor elects to retain a lawyer, or like empowered representative, and the CF is formally advised in writing that it is that representative with whom the CF is to correspond regarding the relevant grievance, all subsequent correspondence will thereafter be sent directly to, and only to, that designated representative. It is then the Grievors' responsibility to obtain details and copies from their representative. Duplicate contacts, and duplicate copies, will not normally be made.

The Commanding Officer (CO)

12. The CO is the first level responsible to, and obliged to, receive a grievance. Although the CO must advise the Grievor in writing once the grievance is received, the Grievor is responsible to ensure the CO has received the grievance. Where the CO is not the Base, Wing or Formation Commander, it is also up to the CO to advise the chain of command if deemed appropriate. However, involvement by the chain of command must be limited to facilitate rapid staffing, and in any case, is restricted by law on a strict need to know basis. Beyond the CO who receives the Grievance, the only individual who may formally staff it at the first level is the Initial Authority.

The Initial Authority (IA)

13. The IA is the individual who can "consider and determine" (that is, review and decide with full authority) the issue being grieved. The IA is the Grievor's CO if the CO can grant the redress sought. Otherwise, the IA is the Commander, or the officer holding the appointment of Director General or above at NDHQ, who is responsible to deal with the issue grieved. Multiple issues may require more than one IA. Officers may not act as IA if they rendered the decision being grieved or if they are in any other way the subject of the grievance. Where such a conflict of interest exists, the grievance is referred to the next superior officer in the chain who is an IA.

14. The following table identifies the usual IA for many of the most common issues grieved:

GRIEVANCE ISSUE	IA	NOTES
Career Administration	DGMC	Depends on the level of and time since issue grieved.
PER	DGMC	Only after every effort at informal resolution in consultation with the CO who wrote the PER grieved.
Posting	DGMC	Depends on who is the Task Force Generator.
Promotion	DGMC	Only for NDHQ controlled promotions.
Release	DGMC	Exceptions exist; ie, with some OCdts and Ptes.
Financial Benefits	DGCB	Only if beyond the financial authority of the chain.
Medical/Dental	DGHS	Depends on medical/dental chain and level of denial.
Training (not released) and (in/out-service) }	Relevant ECS → Comd CFRG →	ECS for environmental controlled training. Comd CFRG for other/residual/national level training.

The Chief of the Defence Staff (CDS)

15. The CDS is the final authority in the CF Streamlined Grievance Process. A file sent to the CDS is first received by the Director General Canadian Forces Grievance Authority (DGCFGA). Depending on the issue raised, DGCFGA either prepares it on behalf of the CDS or staffs it for referral to the Canadian Forces Grievance Board (CFGB). Although any grievance may be referred to the CFGB, some issues must be referred to it. These include grievances about a decision, act or omission of the CDS in respect of the Grievor and the rare circumstance where the CDS is both the initial and final redress authority. For grievances not mandatorily referred to the CFGB, the CDS may delegate final grievance authority. For grievances that are referred to the CFGB, although the findings and recommendations of the CFGB do not bind the CDS, if the CDS differs from them, a written explanation must be provided to the Grievor and the CFGB.

Director General Canadian Forces Grievance Authority (DGCFGA)

16. The DGCFGA is delegated under NDA section 29.14 (see also Chapter 3, para 31 below) to exercise the CDS powers, duties and functions to act as the final authority (FA) for grievances not compulsorily referred to the CFGB. The process for handling grievances by the DGCFGA is essentially the same as that for the CDS except that the DGCFGA may not consider and determine any grievance that is within the prescribed category of grievances mandatorily referred to the CFGB. Additionally, grievances concerning a decision, act or omission by DGCFGA, whether as an IA or in former postings, must also be sent to the CDS for final determination.

DGCFGA is the central staffing agency for all grievances submitted to the CDS level. Specifically, it is DGCFGA staff who initially receive and review all CDS level submissions to ensure that those grievances that must be mandatorily referred to the CFGB are forwarded in a timely fashion along with all available supporting documentation held by the CF at any level. DGCFGA also has the responsibility to advise the CDS regarding grievances that should properly be referred to the CFGB, to analyze, process and provide options and impact assessments on CDS level grievances not referred to the CFGB and to provide advice and guidance to all CF members concerning the rules and regulations pertaining to the CF Streamlined Grievance Process. Once the CDS or DGCFGA renders a redress decision, the grievance file then comes full circle by being sent back to DGCFGA for staffing. DGCFGA transmits the original of the CDS or DGCFGA redress decision to the grievor, through the grievor's CO as applicable, along with a copy of the decision to the CFGB, if the CFGB was involved, and, if the decision requires action, to the appropriate enacting authority. DGCFGA then monitors and confirms completion of all action required to effect the decision of the CDS or DGCFGA.

The Canadian Forces Grievance Board (CFGB)

17. The CFGB is the external and independent "arms length" legal body, established by the NDA, that is mandated to investigate and review grievances referred to it by the CDS and to provide findings and recommendations to the CDS regarding grievances so referred. The CFGB has the power to summon witnesses, to compel the production of evidence when the Board

considers it necessary and to determine and modify its own rules of procedure. The CFGB does not have the authority to grant or deny redress regarding any grievance; it may only provide the CDS with findings and recommendations. The CDS has the authority to refer all grievances to the CFGB but must refer the following types of grievances as prescribed in QR&O 7.12:

a. administrative action resulting in the forfeiture of, or deduction from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;

b. the application or interpretation of Canadian Forces policies relating to the expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;

c. pay, allowances and other financial benefits; and

d. the entitlement to medical care or dental treatment.

18. Grievance types that may be referred but are not mandatorily referred to the CFGB include:

a. PERs;

b. postings (no matter who is the Task Force Generator);

c. promotions;

d. training (environmental and national level); and

e. other career action or issue not otherwise referred to the CFGB.

19. The factors assessed by the CDS or DGCFGA in determining whether or not to exercise their discretionary authority to refer a particular, non scheduled grievance to the CFGB include the benefit to be obtained from having the grievance reviewed externally and the capacity of the CFGB to investigate independently and to make relevant findings and recommendations.

CHAPTER 3 - THE PROCESS

Process Essentials

1. Under the CF Streamlined Grievance Process there are only two levels with the authority to grant or deny a grievance: the Initial Authority (IA) and the Final Authority (FA). The FA is the Chief of the Defence Staff (CDS) or his delegate. The Commanding Officer (CO), even if not an IA, also plays a key role, as does the CFGB. However, prior to examining how these key players in the streamlined grievance process interact and handle grievances, it is important first to be

familiar with three essential process elements: Consideration and Determination, Disclosure and Time Limits.

Consideration and Determination

2. “Consideration and Determination” is the legal phrasing for the process by which the person with the authority to decide a grievance:

a. inquires and investigates to confirm all relevant facts are available before a decision is made;

b. reviews and studies all the available facts before a decision is made; and

c. makes the decision to grant full or partial redress or to deny entirely the redress sought.

Disclosure

3. Legally speaking, “disclosure is the process that, in accordance with procedural fairness and the principles of natural justice, entails the uncovering of and then making known to the Grievor, the documentary evidence that will be relied upon by the redress authority in the consideration and determination of the grievance, and in then permitting the Grievor to make relevant and precise written representation regarding that evidence, and to submit additional relevant evidence, prior to the grievance being decided.” In essence then, disclosure means first ensuring the Grievor receives a copy of the written information that the deciding authority will use to make the decision. Then, in the event that something in the information provided is incomplete or wrong, it means allowing the Grievor sufficient time (normally 14 days) to provide relevant written representation or feedback. One notable exception to the principle of disclosure occurs with legal opinions. Legal opinions are protected from disclosure when they are obtained by the grievance authority, or on behalf of that authority, because they are covered by the solicitor-client privilege and are therefore in law considered confidential communication between the lawyer who wrote the opinion and the authority who requested it.

4. Although disclosure occurs each time the grievance is considered by an authority who can also determine the grievance, be it at the initial or final level, specific documents will only be disclosed once during the life of the grievance. In other words, at any subsequent redress level, disclosure will only provide the Grievor with copies of documents containing new information that were not previously made available to the Grievor or the Grievor’s “legal” representative.

Time Limits

5. One of the main reasons that the streamlined grievance process was adopted was the chronic observation that the former process took too long. Hence, under the streamlined process, except

at the CDS level, every time a grievance is handled it is subjected to strict time limits. For quick reference, these time limits (noted in calendar days) are detailed in the following table:

ACTIVITY	TIME LIMIT
Member wishes to submit a Grievance.	**No later than six months** after the occurrence of the issue raised in the grievance, or the day that the member knew, or ought reasonably to have known, that the offending decision, act or omission in question occurred. The IA may extend the deadline when it is in the interest of justice to do so.
CO receives/forwards Grievance to the IA. (Assumes CO not IA.)	**Within 10 days** from the day the CO receives grievance from the Grievor. Comments and other file information added by the CO must be provided to the Grievor by the CO when the grievance file is forwarded to the IA.
IA receives Grievance and effects disclosure.	**At least 14 days** are normally given for Grievor response. Disclosure is repeated at every level where it is evident the Grievor has not yet had an opportunity to comment on any file document/information that may be relied upon by the authority considering and determining the grievance.
IA determines Grievance/Grievor sent IA decision.	**Within 60 days** from receipt of grievance. If the IA is unable to consider AND determine the grievance within 60 days, and the Grievor is not willing to grant an extension, the Grievor may request that the Grievance be forwarded to the CDS level. When the CDS is the IA, there is no time limit for grievance consideration and determination.
Grievor submits Grievance to CDS for final determination.	**Within 90 days** from the day the Grievor receives the IA decision. The CDS or DGCFGA, depending on the subject of the Grievance, may extend the deadline if it is in the interest of justice to do so.
CDS (or DGCFGA) receives Grievance and effect disclosure.	**Same process per IA disclosure to Grievor detailed above.** Only those file documents that were not previously disclosed are disclosed at this level.
CDS (or DGCFGA) determines Grievance/ Grievor sent decision.	**The CDS (or DGCFGA) does not have a time limit.** While a grievance is at the CDS level, the Grievor will be provided with updates as applicable.

The Steps in the Process

6. There are three basic steps to the CF Streamlined Grievance Process:

a. Grievance Preparation and Submission,

b. IA Consideration and Determination, and

c. CDS Consideration and Determination.

Each of these steps, along with their interrelation, is defined in the pages that follow and is also graphically represented in the "CF Grievance Process Matrix" detailed at Annex A.

Step One - Grievance Preparation and Submission

7. CF members who believe that they have been personally and individually wronged by anything that was said or done to them, or should have been said or done to them but was not, must first determine if the issue with which they are concerned is one that may, or can best be, redressed through the CF Streamlined Grievance Process. There may be another, less formal, procedure that members would find better suits their issue: Mediation perhaps. The issue may be one for which another process is tailor made; ie, a harassment complaint is best dealt with under the provisions of CFAO 19-39. Ultimately, if a CF member decides that a concern needs to be submitted as a grievance under the CF grievance process, and the essential issue is not one that is precluded by the NDA or QR&O, then the member may submit a grievance. Although members are encouraged first to attempt to resolve any issue verbally, they are not obliged to do so.

8. CF members have six months to submit a grievance from the date they knew, or ought reasonably to have known, of the offending decision, act or omission that they believe demands redress. When it is in the interest of justice to do so, the IA may extend this deadline. By way of example, the time limit may be extended to recognise delays or complications beyond the control of the member or if there are circumstances when the member is simply not physically or emotionally capable of proceeding with a grievance as soon as six months after a given incident.

9. A member's decision to pursue an informal resolution does not extend the six month grievance submission deadline; the clock starts ticking from the date the member knew, or ought to have known, of the issue being grieved, not the day the issue is submitted to the informal process or withdrawn from it. However, should a member continue with the informal process to the end and then not be satisfied with the final CF decision taken, unless a settlement-agreement or other legally binding resolution mechanism has been entered into by the member and the CF through the informal process, the member may then grieve the informal process decision within six months of the date of that decision, so long as the matter is not barred by the NDA or QR&O grievance process exclusions. When the informal or alternative process in question is Mediation that has been authorized by the relevant adjudicative authority, the submission deadline is calculated from the date that the Mediation process is abandoned and deemed unsuccessful by either party.

10. Once members confirm that the issue they wish to grieve may be grieved, and that they have met the appropriate time limits (all things considered), they may request that their CO appoint a member to assist them in the preparation of their grievance. A specific member may be requested and will normally be provided unless it is impractical to do so. If the CO cannot provide the Assisting Member requested, an appropriate alternative shall be offered.

11. With the advice and guidance of the Assisting Member, the Grievor prepares the grievance, providing as much detail, and including as much evidence, as the Grievor believes is necessary to support the arguments raised and convince the grievance authority to grant the redress sought. Although Grievors may expect that every reasonable accommodation will be extended by the CF to ensure that they are able to present a timely, accurate and properly documented case, in the end, it remains the Grievor's responsibility to prove the case, not the CF's. Once the grievance is prepared in writing and signed by the Grievor, the Grievor submits it to the CO. It is the Grievor's responsibility to ensure that the CO receives the grievance. At the same time, it is the Grievor's right to receive timely written confirmation that the CO has received the grievance.

Step Two - IA Consideration and Determination

12. At the first level of adjudication, a grievance can only be considered and determined by an Initial Authority (IA.) An IA has only 60 days from the day a grievance is received to consider and determine that grievance and advise the Grievor of the IA's decision. The CO who receives a grievance may or may not be the IA. If the CO would normally qualify as the IA, but the grievance alleges a decision, act or omission by that CO, the CO is disqualified and must forward the grievance to the next senior officer in the chain of command who is an IA for that issue.

13. It is possible that more than one person will qualify as an IA for the purposes of a particular grievance. In such a case, if the Grievor's CO has redress authority, that CO is the IA. If the Grievor's CO does not have the redress authority, or is otherwise disqualified from being the IA, that CO, in discussion with other COs, the chain of command, the subject matter expert and, as required, DGCFGA, identifies the IA. It is possible that no one below the CDS will have authority to grant the redress sought. In such a case, the CDS becomes both the IA and the final redress authority and performs both functions simultaneously. Under these circumstances, to ensure objectivity, prior to considering and determining such a grievance, the CDS must first refer the file to the Canadian Forces Grievance Board (CFGB) for investigation and recommendation(s).

14. There may be several complaints within one grievance and different IAs may have to exercise authority in relation to the various issues raised. In such a case, the Grievor's CO may determine that it is necessary to send a full copy of the grievance file to more than one IA for consideration. If, in this instance, the Grievor's CO subsequently acts as IA for any issue in the grievance, that CO remains responsible as the conduit for the final response to the Grievor. If the Grievor's CO is not an IA for any of the issues, and a primary IA is not obvious, handling may be discussed with the Director General Canadian Forces Grievance Authority (DGCFGA). Even then, the Grievor's CO remains responsible to ensure that the Grievor receives timely feedback.

15. The CO has 10 days to identify who is the IA and to get the grievance to that IA. If it is necessary to forward the grievance, the file is to contain the originals of all relevant documents. The CO may include additional information and comments, such as expressing substantiated support or non-support for redress. When the Grievance is forwarded, the CO informs the

Grievor of the identity of the IA and the date that the grievance was forwarded, and provides the Grievor with a copy of any additional information and comments forwarded by the CO to the IA. A CO who serves as IA is also required to so inform the Grievor at the outset. Whether IA or not, the CO may also need to advise the chain of command on a strict need to know basis.

16. Once received, the IA formally, in writing, acknowledges the date of receipt of the grievance to the Grievor. If the IA is not the CO of the Grievor, this acknowledgement is sent to the Grievor through the Grievor's CO. The IA may then propose an informal resolution to the grievance without rendering a formal decision. If the informal resolution addresses all issues in the grievance and the Grievor signs accepting it as full satisfaction of the grievance, the letter of acceptance is appended to the grievance file. Then, once the informal resolution is implemented, the file is closed and the Grievor has no further right to submit a grievance on the same issue.

17. IA consideration and determination involves the gathering of relevant information, communicating with the Grievor (including full disclosure and feedback) and making every reasonable effort to resolve the grievance at the lowest level possible. (It is important to note that disclosure takes place during the IA's 60-day time limit and normally entails the Grievor being given 14 days from receipt of all documents to review those documents and provide the IA with written comments.) If the IA believes that the grievance cannot be adjudicated within the 60-day time limit, the IA may request that the Grievor grant a specified period of extension in writing. So long as the Grievor remains satisfied that the grievance is still under active consideration, it is generally in the Grievor's interest to grant such extensions so that the IA may complete the investigation. Notwithstanding, after 60 days, if the Grievor so demands, the grievance must be forwarded immediately to the CDS level. Thereafter, it is the CDS level that will assume ultimate responsibility for the conduct and coordination of the investigation into the substance of the grievance prior to the file undergoing final consideration and determination.

18. When the CDS is the IA, there is no time limit. However, every reasonable effort will still be expended in providing a quick response and resolution to the grievance. When, due to the nature and complexity of a grievance, CDS level consideration and determination requires an extended period, updates will be provided to the Grievor as applicable.

19. Once a decision is reached by an IA, the Grievor is advised in writing of the decision and the reasons for it. If the IA is not the Grievor's CO, the IA sends the response to the Grievor's CO who then forwards it to the Grievor. When the IA is not the CDS, along with the response, the IA ensures that the Grievor understands the Grievor's right to submit the grievance to the CDS level within 90 days of receipt of the decision of the IA if the Grievor is not satisfied with the IA decision. (Note that, where the CDS has served as the IA, there is no provision for resubmission within this grievance process.) Next, in order to protect all parties, and in particular to capture the date of receipt, the Grievor's CO completes an "Application for Redress of Grievance – Decision of Initial Authority Transmittal Form," shown at Annex B to this Manual, attaches it to the IA's decision and ensures the Grievor signs, dates and returns the original ink copy of the form to the CO for inclusion on the Grievor's grievance file. Where the Grievor is no longer a

serving member of the CF, the IA sends the IA decision directly to the Grievor using Registered Mail or some other suitable means that will generate tangible evidence of receipt by the Grievor.

20. If requested by the Grievor, the IA is obliged to return all supporting material submitted by the Grievor. All remaining documentation related to the grievance, that is not subsequently required and/or forwarded for CDS level review, is retained and securely stored by the IA for a minimum period of five years and is then destroyed in accordance with A-AD-D11-001/AG-001, "Record Scheduling and Disposal Manual."

21. Grievors who are not satisfied with the IA's response may submit their grievances through their CO for consideration and determination by the CDS level. Released members submit their CDS level grievances directly to DGCFGA. Submission must be in writing and signed and must be received by the CO within 90 days from the date the Grievor received the IA's decision. If appropriate reasons are given, and if satisfied that it is in the interest of justice to do so, the CDS or DGCFGA may exercise discretion to extend the 90-day time limit. Submissions should include the Grievor’s current home address and telephone number to facilitate timely administration.

Step Three - CDS Consideration and Determination

22. Grievances sent to the CDS level for consideration and determination are initially received and processed by the Director General Canadian Forces Grievance Authority (DGCFGA). Files that must, or should, be referred to the Canadian Forces Grievance Board (CFGB) in accordance with QR&O 7.12 are identified, authorized and forwarded. Remaining files are staffed by DGCFGA.

23. Throughout the period that a grievance is at the CDS OR Final Authority level efforts will continue to be made to find an informal resolution.

24. Once the final decision has been made, DGCFGA ensures that the file is complete and then forwards the decision to the grievor, through the grievor’s CO if the grievor is still a serving member. If the grievor has been released, the decision is forwarded directly to the released member by DGCFGA. If the grievance is one that was investigated by the CFGB prior to CDS consideration and determination, and the decision of the CDS differs from the findings and recommendations made by the CFGB, a written explanation of the reason(s) the CDS chose not to accept the CFGB findings and recommendations is included in the response of the CDS to the Grievor. DGCFGA also ensures that a copy of all CDS decisions and explanations regarding files first processed by the CFGB has been provided to the Chair of the CFGB.

25. If the decision of the CDS or FA is to grant full or partial redress, DGCFGA forwards the decision to the appropriate policy holder/authority for action. DGCFGA then continues to monitor and follow-up the file until the action directed by, or on behalf of, the CDS is completed.

The file is only closed when DGCFGA receives written confirmation from the organization so directed that the action ordered by the CDS or FA has been completed.

26. All documentation relating to the grievance is retained by DGCFGA for five years after completion of all file action and is then destroyed in accordance with the Defence Subject Classification and Disposition System (DSCDS)

27. As a CDS level redress decision is, under the Federal Court Act, the same as a ruling by a Federal Board, Commission or Tribunal, Grievors may seek "Judicial Review," at their own expense, before the Federal Court within 30 days of the date the CDS level decision is made. Grounds for such application lie in a perceived error of law or of fact, in the appearance that the decision was made in breach of the duty of fairness or of the principles of natural justice, without due consideration of the evidence, or where the deciding authority seems to have acted in any other way that is contrary to the law. As remedy, the Federal Court could declare the decision invalid, quash it, set it aside or could refer the matter back for reconsideration and determination.

New Facts

28. If a member submitting a grievance to the CDS level presents new facts that were unknown, or could not reasonably have been known, to the member at the time that the grievance was considered and determined by the IA, in accordance with the provisions of QR&O 7.17, consideration of the grievance by the CDS or FA may be stopped and the CDS or FA may refer the file back to the IA for reconsideration and determination. When a grievance is referred back to the IA, the IA must reconsider the grievance and confirm, amend or rescind the initial determination. Whether the IA determination is confirmed, amended or rescinded by the IA, the Grievor may still resubmit the grievance to the CDS level within 90 days of the Grievor's receipt of the latest IA decision if the Grievor is not satisfied with that latest determination.

Delegation of CDS Final Redress Authority

29. Section 29.14 of the NDA provides that:

"The Chief of the Defence Staff may delegate to any officer any of the Chief of the Defence Staff's powers, duties or functions as final authority in the grievance process, except

a. the duty to act as final authority in respect of a grievance that must be referred to the Grievance Board; and

b. the power to delegate under this section."

ANNEX A - CF GRIEVANCE PROCESS MATRIX

ANNEX B - INITIAL AUTHORITY DECISION TRANSMITTAL FORM

APPENDIX 2

***Assisting Member Handbook*, issued by the Director General, Canadian Forces Grievance Authority**

Note: *The Assisting Member Handbook* is reproduced as it was submitted by the respondent.

Part 1 – Introduction

1.1 - Aim

Both grievors and Assisting Members are key participants in the CF Grievance Process. This handbook is designed to guide grievors and Assisting Members in the preparation, submission and resolution of a complaint in the CF grievance system. The proper preparation and clear communication of a complaint and the efforts of a well-informed assisting officer enable the grievance process to operate in the most effective and efficient fashion. Armed with the information found in this handbook, grievors and their Assisting Members will be able to create well-written complaints in order to achieve a fair and timely resolution of their grievances.

Part 2 - Dispute Resolution

2.1 - General

Disputes arise on a daily basis in the administration of the CF. Disputes between the CF and its members that cannot be resolved on the spot can turn into grievances. However, engaging the complaint resolution process can be lengthy and labour intensive. The CF is committed to the early resolution of disputes. The best grievance is one that can be avoided completely by a quick and fair resolution of the complaint at the unit level. It is therefore important that CF authorities explore informal resolution of a dispute at the earliest stages of a grievance.

2.2 - Seeking an Informal Solution

Before a CF member takes the time and effort to write and submit a written complaint to the unit CO, the member should ask a trusted superior to help find an informal, or administrative solution to the problem from the person or organization that is causing it. This can be done without undermining the right to submit a grievance, should the attempted administrative solution not remedy the complaint.

2.3 - If the Informal Solution Fails

If the CF member has asked for help on a problem and has had no satisfaction, there are other resources available at the Base, Wing or region to provide further assistance, depending on the nature of the complaint. Alternatives are described below.

2.4 - Harassment or Abuse of Authority

In some cases, the underlying complaint relates to interpersonal relationships in the workplace. Difficult interpersonal relationships often give rise to allegations of harassment and abuse of authority. In those circumstances a complaining CF member should be referred to DAOD 5012-0, which provides guidance on the resolution of harassment matters. Every Base or Wing has a Harassment Advisor who is available to provide advice on the best approach to the problem. Harassment-based disputes may be resolved very quickly at the unit level. The harassment complaint process should be used before the grievance process, given that it is specifically designed for such issues. It is important to inform the grievor that they retain the right to grieve if they are unsatisfied with the outcome of the harassment investigation.

2.5 - Alternate Dispute Resolution

All major bases/wings and every CF region have an alternate dispute resolution center (DRC). DAOD 5046-0 governs the operation of this resource. The member should be referred to the DRC staff to determine of the problem can be resolved through that means. Again, if the grievor is amenable to this process and consents, the lengthy grievance process may be averted.

2.6 - Claims Against the Crown

Complaints sometimes arise where the only appropriate relief is money. If a review of the member's complaint is largely a claim as it reveals a request for compensation, it may form the basis for a Claim Against the Crown. If that is the case, the member and Assisting Member should review CFAO 59-3 and consult the unit Legal Advisor.

2.7 - Civil Litigation

Civil litigation is always available to the grievor. Care must be taken when assisting a grievor who decides to hire a civilian lawyer and proceed in civilian courts. Unless authorized in advance, the CF will not normally reimburse a grievor for legal fees and court costs. In addition, experience has shown that the courts will not normally entertain a case based on a grievance until the CF grievance process is exhausted. Only the Canadian Human Rights Commission will accept complaints before the CF grievance process is complete. Once a claim based on a grievance is filed in a civil forum, QR&O 7.16 that the grievance will be suspended (that is, no action will be taken by the CF) until the civil litigation is complete. If the member revives the grievance following litigation, DGCFGA will review the complaint to see if any issues are still

outstanding. If all the grievance points were dealt with in civil court, then the grievance will normally be closed. As a matter of law, a grievor will not normally be awarded a remedy from several different sources on the basis of the same complaint. If there are unrelieved grievance points, then the grievance process will continue in the normal fashion to respond to them.

Part 3 - Duties Of The Participants

3.1 - The Aggrieved Member

The grievor has the duty to submit the grievance within six months of the date the decision, act or omission became known, or, if late, provide valid reasons for the late submission. The grievor may make an oral complaint initially, but the grievor has a duty to present a written grievance in a manner that is clear and understandable and which identifies an appropriate remedy. The written submission must be signed by the grievor (or the grievor's personal representative in cases where a power of attorney is being exercised, or the grievor has retained a lawyer, or a deceased grievor is represented by an executor). The grievance must be presented in a manner that reflects the standards of conduct described in QR&O 19.14 and QR&O 7.04. It must not contain language that is insubordinate or otherwise constitute a breach of discipline. The grievor must also provide substantiation for all grievance points.

3.2 - The Assisting member

QR&O Art 7.03 states that a CO shall appoint an Assisting Member upon the request of the member, and where practical the appointee should be the grievor's selection. By regulation, the role of the assisting officer is to assist the grievor in the preparation of the submission. In practice, the role is more expansive. The Assisting Member's job does not end with the submission of the grievance to the CO. Where possible, the Assisting Member should remain available to assist the member throughout every step of the process. Experience shows that the appointment of an Assisting Member is a key step in the preparation of a well-stated and substantiated grievance. CO's are encouraged to appoint Assisting Members even though they are not required to do so.

The role is analogous to that of the Assisting Member in the CF disciplinary process. Assisting Members must use their skills and experience to help the grievor apply the regulations and prepare the grievance submission. They must ensure that the grievor is aware of the procedures for the submission of grievances and should ensure that the submission complies with the rules laid out in QR&O Art 7.04. They must also enable access to CF regulations and instructions and any other documentation that pertains to the grievance.

QR&O Art 7.02 imposes a six month time limit on the submission of a grievance. If the grievance is presented to the CO beyond the six-month submission deadline, the Assisting Member must help the grievor develop and communicate valid reasons for the delay to the CO.

The IA (or CO as IA) must consider the reasons and accept the late submission if it is in the interests of justice to do so. If the IA is not satisfied that the interests of justice demand acceptance of the late submission, the grievance may be declined, with written reasons provided to the grievor.

If there are alternative resolution mechanisms that would provide a direct and speedy solution, the Assisting Member should encourage the grievor to explore them. The full grievance process is lengthy and can be labour intensive. A process that is faster, less formal and more flexible should be actively considered.

A grievor may not have good grounds for a grievance. An assisting officer has a professional responsibility to point out these shortcomings and assist the grievor to develop a better grievance, or if there are no grounds, to advise the grievor to abandon the submission. An Assisting Member is not an adjudicative authority in the process, and should not attempt to judge the grievor's submission. An Assisting Member has a responsibility to discourage a member from pursuing a grievance that has no foundation.

If you are asked to help the grievor make complaints that are spurious or untrue, you must inform the grievor of the need to conform to normal discipline and military courtesy. If you are placed in a position where your ethics or responsibilities to the CF may be compromised, you should request that you be removed from the appointment.

Where possible, you should endeavour to remain Assisting Member throughout the entire process. You will know the grievor and the complaint better than anyone else, which will facilitate submissions to higher adjudicative authorities. Should you or the grievor get posted, advise the grievor to request a replacement. If the grievor should be released during the process, ensure that both the unit and DGCFGA have the grievor's forwarding address, and that the grievor has the DGCFGA contact numbers.

If the grievor is being medically released prior to resolution of a grievance, ensure that the grievor is informed of the resources available at the regional office of "The Centre" (DCSA), or a Veterans' Affairs pensions advocate, or Legion Service Officer for continuing assistance and support.

3.3 - The Commanding Officer

QR&O 7.10 gives the CO10 calendar days to respond to the grievor’s submission. Within the 10 day time limit, the CO may attempt informal resolution, or activate the Good Grievance Network (GGN), but must identify an IA. The CO should also attempt informal resolution, unless reasonable attempts have already been made by the grievor. If the CO’s attempt fails, the GGN is consulted to determine if the grievance is suitable for diversion. If it is, then grievance may be diverted, but only with the written informed consent of the grievor. If consent is obtained, then the grievance is managed and resolved by alternate methods.

At this time, the CO may also interview the grievor, or the grievor may request to see the CO under the provisions of QR&O 19.12.

If the grievance is not suitable for diversion, or the grievor does not consent to diversion, then the CO contacts the Registrar at DGCFGA to register the grievance in the NGS database and obtain a grievance file number. This number is to be entered in the proper box on the intake form and is to be quoted in all future correspondence and queries.

The CO then identifies the appropriate IA. If the CO is not the IA, the grievance file is forwarded, with CO's relevant comments on or attached to the intake form, to the IA. At this point any new material appended to the file by the unit is disclosed to the grievor.

If the CO is the IA, the CO considers and determines the grievance and gives a written response to the grievor. If the grievor is satisfied with the response, you facilitate the implementation of the remedy. If the grievor is unsatisfied with the response, you help the grievor prepare the file for submission to the Final Authority (FA) in accordance with QR&O 7.10. Be careful of time limits here, and ensure that all documentation, including any addition made by the unit, is forwarded to DGCFGA through the CO.

If the FA election is past the time limit, assist the grievor in making a persuasive argument, with valid reasons, to support late acceptance of the grievance.

3.4 - The Good Grievance Network

The Good Grievance Network (GGN) consists of all complaint resolution resources available on the Base or Wing, or in the region. At a minimum, the GGN consists of the unit CO, the local DJA, Base or Wing HQ HR staff, a representative from the local Dispute Resolution Centre (Base or Regional) and a member of DGCFGA. The GGN assists the CO by analyzing the nature of the grievance and directing the matter into the appropriate dispute resolution route, with the informed consent of the grievor. See Annex A for a more detailed description of the GGN.

3.5 - The Initial Authority

The IA is the individual who can "consider and determine" the matter being grieved. The CO is the IA if the grievance is a matter for which the CO can grant the requested remedy. Otherwise, the IA defined is the Commander (as in a Base, Wing, Formation or Command setting), or the officer holding the appointment of Director-General or above at NDHQ, who is responsible for the regulation or policy that gave rise to the complaint. A list of IAs for the most common grievance topics may be found at Annex B.

QR&O Art 7.07 gives the IA a 60 day time limit to consider and determine the grievance. The IA must provide written reasons for the decision to the grievor through the grievor's CO. Should the

IA be unable to consider and determine the grievance within the 60 day limit, the IA will normally ask the grievor for an extension of time, in order to properly answer the complaint. It is in grievor's best interest to grant the extension, The IA has the expertise and resources to thoroughly review the complaint and provide a reasoned response. It is critical to the fair resolution of the complaint that the IA be permitted to provide a response. However, if the grievor does not wish to grant a time extension, then the IA shall submit the grievance for CDS level adjudication through DGCFGA.

3.6 - Director General Canadian Forces Grievance Authority

DGCFGA provides the management and support functions to NGS and also has an interest in the grievance throughout its life-cycle. DGCFGA is the centre of excellence and a repository of knowledge for grievance matters. The analysis teams have the expertise to provide real-time advice to NGS users. The DGCFGA Mission, Values and Business Lines are attached.

DGCFGA holds the grievance registration and tracking functions for the NGS. Should your grievor have a question abut the progress and status of the grievance, contact the DGCFGA Registrar. However, the DCFGA staff will not comment on the merits of any grievance while it is being prepared for adjudication.

3.7 - The Canadian Forces Grievance Board

The Canadian Forces Grievance Board (CFGB) is an independent civilian body that reports to the MND. Grievance matters that relate to human rights, compulsory release and the financial well being of CF members require attention by an outside agency. Those matters are listed at QR&O 7.12. Should the grievor's complaint fall into one or more of those categories, the CFGB will analyze the case and provide findings and recommendations to the CDS. The Board will send the grievor a copy of the findings and recommendations that they are submitting to the CDS for determination.

Once a grievance has been referred, the CFGB will contact the grievor directly. The Board will be in contact to obtain a Privacy Act waiver so that they can have access to DND/CF records to assist in the analysis of the file. The grievor should limit the access requested in the waiver to the specific types of information needed to do the analysis. The Board will also be sending a disclosure package. Review the disclosure package, as documents may have been omitted, or mistakes have been made in the facts or the analysis.

3.8 - The Final Authority

The Canadian Forces Grievance Board (CFGB) is an independent administrative tribunal with quasi-judicial powers, mandated to provide findings and recommendations (F&Rs) to the CDS on any grievance that he refers to them. Specific grievance types referred to the CFGB generally include matters related to human rights, compulsory release and the financial well being of CF

members. QR&O 7.12 “Referral to Grievance Board” provides the detailed description of the types of grievances submitted to the CFGB. Should the grievor's complaint fall within one or more of those categories, the CFGB will review and analyze the case and provide their F&Rs to the CDS for final adjudication. While not bound by these F&Rs, the CDS must provide reasons should his decision differ from the recommendations set forth by the CFGB.

When the CFGB receives the grievor’s file from the Director General Canadian Forces Grievance Authority, it will send a letter of acknowledgement to the grievor and disclose all of the information the file contains. Further, the CFGB will obtain a Privacy Act waiver to have access to any additional relevant DND/CF records required in the analysis of the file. The CFGB will invite the grievor to submit any additional related information. In the event new information is acquired, the CFGB will subsequently disclose to the grievor.

A CFGB grievance officer conducts an in-depth analysis, which may involve a lawyer, following which the assigned Board Member develops the final F&Rs. The CFGB can hold formal hearings and call witnesses should it deem necessary. The F&Rs are subsequently forwarded simultaneously to both the grievor for his information, and the CDS for his decision. The grievor should thoroughly review the CFGB F&Rs when received and, if necessary, make any further representations to the CDS prior to the grievance receiving final adjudication. The CDS, who may accept or reject the CFGB’s F&Rs, will communicate his decision(s) directly to the grievor, with a copy sent to the CFGB.

Part 4 - Developing The Good Grievance

4.1 - Early Dispute Resolution

The CF has an overriding interest in the early resolutions of disputes. The CF Grievance Process has no interest in winners and losers. Its interest is in:

a. dealing with a matter formally only after informal approaches have been explored;

b. dealing with a matter formally only after other processes specifically designed for the matter have been used (for example, harassment under DAOD 5012-0);

c. well stated and well substantiated grievances;

d. a prompt and fair decision making process; and

e. reasoned decisions fully grounded in law, policy and equity.

4.2 - The Good Grievance

A “good grievance” submission is well stated, well substantiated and clearly identifies the redress that is being sought. Good grievances assist the grievor and the adjudicative authorities by being readily understandable, economical of staff effort and promoting a reasoned response. The following characterize a good grievance:

a. the matter grieved is clearly identified.

b. there is specific reference to the decision, act or omission giving rise to the grievance.

c. there is clear description of how and why the decision, act or omission is wrong and adversely affects the grievor (This will normally involve identifying the standard for what should have happened and the gap between that standard and what actually happened).

d. the relevant facts and supporting documents necessary to establish the basis for the grievance are fully gathered and presented in an organized manner.

e. the remedy that the grievor seeks is clearly identified and achievable within the CF.

The appointment of an Assisting Member is not mandatory unless requested by the grievor. But, experience shows that and Assisting Member facilitates the preparation of a good grievance. COs are encouraged to appoint one in every case.

4.3 - Two-step Analysis

To create a good grievance, use the following two-step analysis:

a. **Step One:** Is the decision, act or omission complained of grievable? To determine if the decision is grievable, ask three questions:

    1. **Does the member have the right to grieve?** Determine if the matter is a problem for which the CF has responsibility. Is the decision, act or omission something which occurred in the day-to-day affairs of the CF or DND? Is the decision, act or omission derived from regulation or direction issued by another governmental body, which the CF transforms into orders? If the CF deals with the issue or implements the policy, it is a grievable matter.

        In plain language, a member may submit a complaint about something that has happened to them as a result of their service in the CF that has had a negative impact in them personally.

    2. **Is the member aggrieved?** It is not sufficient that the aggrieved member merely disagrees with a decision, act or omission caused by the application of CF policy or decision. The member must show that the implementation of the particular decision or policy has had a negative impact on him or her. The requirement to show how the CF member is genuinely aggrieved is not normally complicated. It

is sufficient to establish that the decision, act or omission that is being challenged has an effect on the CF member personally. For example, the effect can be demonstrated by providing evidence of lost promotion opportunities, denied financial benefits, or harassment in the workplace.

3. **Is the matter provided for by another process?** There are other mechanisms of complaint in the CF that are created by other regulations. The most common example is the Code of Service Discipline. As the NDA and regulations provide internal review process for summary trials, the outcome of a summary trial is not grievable.

   There are other processes available for specific types of complaints. While they do not exclude the grievance process, it is preferable to use them before the grievance process:

   a) if the matter is a Claim Against the Crown, refer to CFAO 59-3 and consult the unit Legal Advisor;
   b) if the matter is a case of harassment or abuse of authority, refer to DAOD 5012-0 and consult the unit Harassment Advisor; or
   c) if the matter is suitable for dispute resolution, consult the staff of the local DRC.

b. **Step Two:** Has the grievance been well stated and well substantiated? A good grievance consists of three parts, all of which must be present. Ask yourself the following three questions:

   1. **Is there a specific complaint?** The complaint must be based on an underlying decision, act or omission. The incident must have happened to, or had and effect on the grievor. A grievor may not base a complaint on an act done to someone else.

   2. **Are there supporting facts?** The onus is on the grievor to prove the complaint. The grievor must provide sufficient facts to show that there was a real problem and it has gone unresolved. If not, assist the grievor in obtaining the necessary substantiation to support the complaint. If not prohibited legally, the grievor should be granted access to the documents necessary to state and substantiate the grievance.

   3. **Has an appropriate remedy been sought?** The remedy requested by the grievor should be commensurate with the nature of the grievance and clearly identified in the grievance. It is essential at the beginning of a grievance that the grievor and Assisting Member assess the type of remedy that is appropriate and that is available from within the CF and state it clearly in writing.

Conclusion: Determine if the complaint meets the criteria in both steps. If the answer is yes to both, it can be processed well as Redress of Grievance. If the case does not meet the criteria in step one, then the complaint is probably not a grievance and alternate solutions should be explained. If the case meets the criteria for step one, but not step two, then it is a grievance, but needs more substantiation before it is ready to be submitted for adjudication.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1683-02
STYLE OF CAUSE:	PATRICK BERNATH v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 18, 2006
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Simon Noël
DATED:	January 31, 2007

APPEARANCES:

Patrick Bernath	FOR THE APPLICANT
Pierre Salois	FOR THE RESPONDENT

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