

Federal Court



Cour fédérale

Date: 20151021

Docket: T-677-14

Citation: 2015 FC 1185

Montréal, Quebec, October 21, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

COLONEL BERNARD OUELLETTE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Colonel Bernard Ouellette seeks judicial review of the February 28, 2014 decision by the Chief of the Defence Staff [CDS] acting as the Initial Authority and denying his grievance.

[2] For the reasons exposed below, the Court finds that the CDS erred in deciding as an Initial Authority and will thus grant Colonel Ouellette's application.

I. Background

A. *Command in Haiti, brief overview*

[3] Colonel Ouellette is a senior officer with over 30 years of service in the Canadian Forces. He was deployed to Haiti on July 28, 2009, as Commander of the Canadian Task Force Port-au-Prince [the Task Force], which reported to the Commander of Canadian Expeditionary Force Command [CEFCOM] headquarters in Ottawa. As such, his role was to supervise the administration, discipline and operational employment of the Canadian Forces members, whose number varied between 4 and 9.

[4] Colonel Ouellette was also the Senior Canadian Military Representative involved with supporting the United Nations Stabilization Mission in Haiti [MINUSTAH] as its Chief of Staff [COS]. He was not in command of the UN force, but rather coordinated the work of about 8,432 persons, and was assisted by a staff of 150.

[5] His deployment was set to end on or about July 21, 2010.

[6] On January 12, 2010, a massive earthquake struck Haiti, leaving about 300,000 dead and resulting in a chaotic environment, causing difficulties and a considerable amount of work for the Task Force. Colonel Ouellette lost all his MINUSTAH staff, save for his administrative assistant, Ms. Vloria Merlaku.

[7] At the end of January 2010, Colonel Ouellette housed Ms. Merlaku in his room at Canada House 1, the secure accommodation rented by the Canadian Forces staff, as her apartment was unsafe. Certain Task Force members raised concerns about an adverse personal relationship between Colonel Ouellette and Ms. Merlaku, and complained about its impact on their commander's availability, on their morale and cohesiveness. On April 10, 2010, Ms. Merlaku moved out of Canada House 1 and relocated to another place. The existence of an adverse personal relationship was denied by both parties, and the investigation could not conclude to such a relationship or to misconduct.

B. *Removal of Command*

[8] On June 28, 2010, the Commander CEFCOM removed Colonel Ouellette from both his positions in Haiti and repatriated him to Canada. The decision was based on the Commander CEFCOM's conclusion that, although there was still uncertainty regarding the adverse personal relationship, the majority of the Task Force *perceived* that it was occurring, and Colonel Ouellette had not done anything to resolve this perception which negatively impacted the morale and the cohesiveness of the Task Force members. This failure resulted in the chain of command's loss of confidence in Colonel Ouellette's ability to effectively exercise the functions of command.

[9] The Removal Notice was signed by Commander CEFCOM. However, it seems clear that the possible course of actions had been discussed with the CDS who allegedly directed the Vice Chief of Defence Staff to remove Colonel Ouellette, or who, at the very least, endorsed the

decision to remove Colonel Ouellette. In any case, it seems clear that the CDS was involved in the decision.

C. *Grievance and grievance process*

[10] On November 4, 2010, Colonel Ouellette submitted a grievance through his chain of command concerning his removal from command, pursuant to subsection 29(1) of the *National Defence Act*, RSC 1985, c N-5 [the Act].

[11] Colonel Ouellette submitted that the decision to remove him from command was premature and based on unfounded allegations. He submitted that this decision caused him great prejudice and that he was unreasonably treated by the Commander CEFCOM. He asked that: (1) his reputation be restored by the Canadian Forces; (2) his work and realizations in Haiti, from July 28, 2009 to June 28, 2010, be acknowledged by the Canadian Forces, specifically during and after the January 12, 2010 earthquake; and (3) due consideration be given to his family which went through tough times.

[12] On December 13, 2010, Colonel Ouellette's grievance was forwarded to the Director General, Canadian Forces Grievance Authority [CFGGA]. In fact, the administration officer of the Canadian Forces Support Unit [CFSU] in Ottawa determined that the Commander of the CFSU could not act as Initial Authority in the matter, according to section 7.06 of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], and sent the matter to the CFGGA to determine who could act as the Initial Authority.

[13] On December 21, 2010, the Director General CFGA sent two letters to Colonel Ouellette. One letter confirmed that his grievance had been received at the Final Authority level, and the other indicated that the grievance had been discretionarily referred to the Canadian Forces Grievance Board ([the Committee], as it was then known) as per section 7.12 of the QR&O. On January 11, 2011, the Committee informed Colonel Ouellette that it had received his grievance, that it would review it and provide its Findings and Recommendations to him and to the Final Authority who would issue its decision.

[14] Colonel Ouellette objected to the process depriving him of the Initial Authority stage of the grievance process. However, the Committee explained that the CDS would be the only one with the authority to review the decision being grieved, and that no Initial Authority decision could be rendered at this time.

[15] On March 24, 2011, in June 2011, and in January 2013, Colonel Ouellette's grievance was augmented.

[16] On December 29, 2011, the Committee issued its document titled Findings and Recommendations in order to assist the CDS in his determination as Final Authority, and recommended the grievance be upheld.

[17] The Committee declared being shocked by the manner in which Colonel Ouellette had been treated, after finding, namely, that there was insufficient evidence to conclude that his

conduct could in any way have justified his superior's loss of confidence, his removal from command, and his repatriation to Canada.

[18] The Committee also concluded, among other things, that the grievance should have been referred on a mandatory basis rather than on a discretionary basis as it concerned a decision by the CDS, according to subsection 29.12(1) of the Act and subsection 7.12(2) of the QR&O, and that the CDS himself therefore had to decide as Final Authority.

[19] The letters addressed to Colonel Ouellette from November 2010 to August 2013 all identify the CDS as the Final Authority.

[20] However, on September 4, 2013, the Director General CFGA informed Colonel Ouellette that his grievance had been reviewed by one of CFGA's analysts prior to the CDS rendering a decision as the Initial Authority.

[21] Colonel Ouellette reacted against the use of this analysis by the CDS in rendering his decision as Final Authority.

D. *Impugned decision*

[22] On February 28, 2014, the CDS dismissed Colonel Ouellette's grievance with reasons, acting as the Initial Authority in the grievance process. The CDS stated he disagreed with the Committee, and that he was required to act as the Initial Authority, having no discretion in this regard as per subsection 7.06(2) of the QR&O. He also indicated that subsections 7.07(2) and

7.07(3) of the QR&O contemplated having the CDS acting as Initial Authority and that the circumstances did not allow for the grievor to submit his grievance to the Final Authority at this stage.

[23] The CDS indicated, at page 9 of his decision, that he was unable to make a fair assessment as to whether or not Colonel Ouellette had engaged in an inappropriate relationship, but believed it was unnecessary to do so in order to determine if his removal was the appropriate response. The perception of the inappropriate relationship and the Colonel's inaction to dispel this perception caused the loss of confidence that justified the removal.

[24] Colonel Ouellette was invited to ask for reconsideration to the Final Authority in the grievance process, who in this case, is also the CDS.

[25] On March 18, 2014, Colonel Ouellette applied for judicial review of the CDS February 28, 2014 decision before this Court.

II. Position of the parties

A. *Colonel Ouellette*

[26] Colonel Ouellette submits the CDS erred on six grounds in that it (1) acted without jurisdiction, (2) failed to observe a principle of natural justice as he, Colonel Ouellette had the legitimate expectation that he was participating in a procedure leading to a Final Authority decision by the CDS, (3) breached rules of natural justice and procedural fairness on five other

counts, (4) based its decision on four erroneous findings of facts, (5) caused him great prejudice, and (6) failed to consider the facts of the case.

[27] Colonel Ouellette apprehends that the CDS changed his role from that of the Final Authority to that of the Initial Authority in order to eliminate the impact of the Committee's Findings and Recommendations.

(1) Lack of jurisdiction

[28] Colonel Ouellette submits that the CDS did not have jurisdiction to act as the Initial Authority since the matter had been referred to the Committee under subsection 7.12(2) of the QR&O. This provision is found in Section 3 of Chapter 7 of the QR&O, which bears the title Final Grievance Authority, thus making the referral that of a person acting as the Final Authority.

[29] Furthermore, Colonel Ouellette submits that the CDS also exceeded his jurisdiction by deciding on an issue that was not the subject of his grievance.

(2) Legitimate expectation

[30] In the official correspondence from the Department of National Defence from November 2010 to August 2013, Colonel Ouellette points to no less than 11 documents, identifying the CDS as the Final Authority. He thus had the legitimate expectation that he was participating in a procedure leading to a Final Authority decision by the CDS, and would have otherwise

challenged this process had he known or believed his grievance was considered by the CDS at the Initial Authority stage.

(3) Breaches in procedural fairness

[31] Colonel Ouellette submits that his right to procedural fairness was not respected prior to his removal from command as (1) he had no opportunity to respond to allegations, (2) he was unaware of intent to be removed from command, (3) the CDS based his conclusions on an issue that was not the focus of the grievance, (4) the CDS admitted to procedural failures, and (5) a de novo review is not authorized at law.

(4) Erroneous findings of facts

[32] Colonel Ouellette submits that the CDS erred on four accounts by (1) concluding that the morale of the troops was significantly affected by the actions of the applicant, as that statement has no logical basis, (2) making significant, material and wrongful timeline errors, (3) making a wrongful interpretation of evidence regarding the transmission of emails by Task Force members, and (4) concluding that the perception of an inappropriate relationship constituted a violation of pertinent orders.

(5) Caused great prejudice

[33] Colonel Ouellette contends that it would cause him great prejudice if the CDS were to be accepted as an Initial Authority determination as the CDS would subsequently be reviewing his

own decision, and as the CDS would then be exempted to give due consideration to the Committee's Findings and Recommendations.

[34] Indeed, when a matter is referred to the Committee, the CDS must adopt the reasoning of the Committee or provide reasons for any departure. Moreover, it would be prejudicial for Colonel Ouellette to endure another delay before the final determination of his grievance, as he would face the certainty of being deprived of the benefit of some of the substantial career recommendations advanced by the Committee, as he is planned to retire before the final determination is rendered.

(6) Failure to consider the facts of this case

[35] Colonel Ouellette submits that the CDS failed to appreciate the extraordinary and dramatic difficulties he found himself in after the earthquake, particularly after having lost almost all of his United Nations staff. Colonel Ouellette accepted that Ms. Merlaku sleep at his location since there were security concerns in the area where she was temporarily lodging. On March 3, 2010, the Old Esmeralda cruise ship arrived in Port-au-Prince's temporary harbour and offered accommodations to all United Nations staff who could apply for accommodation there. However, Ms. Merlaku stayed at Colonel Ouellette's location until April 10, 2010, as this was justified by resource, logistic, operational, leadership and cost factors.

[36] Finally, the Task Force members, who complained about Colonel Ouellette after being on theatre for approximately a week, did not direct their complaint to him directly or to their immediate superior in Haiti as would be required under the normal procedure, but rather to the

CEFCOM Public Affairs Office in Ottawa, thus indicating that their motives were neither sincere nor genuine.

B. *The intervener, the Military Grievances External Review Committee*

[37] The Committee (as it is now known) has been permitted to make submissions on two points; (1) its role in the grievance process and its jurisdiction to review cases and issue Findings and Recommendations to the CDS in his capacity as Initial Authority, in accordance with the Act and the QR&O, and (2) the impact on future and potentially also past decisions taken within the Canadian Forces grievance process as a result of the departure from previous practice which occurred with the CDS's decision to act as Initial Authority in a case already referred to and reviewed by the Committee.

(1) Findings and Recommendations to the CDS as Initial Authority

[38] The Committee submits that under the statutory scheme that has been in place since 2000, it does not, and never did have jurisdiction to review grievances for the CDS acting as Initial Authority. Hence, the CDS cannot act as Initial Authority after the issuance of its Findings and Recommendations.

[39] In its submissions, the Committee reviews the Canadian Forces' grievance process, its own role and powers and the particular facts in this case.

[40] The Committee first points out that this Court has taken note of Parliament's intention to "expedite grievance resolution by eliminating decision making layers and establishing an independent external CFGB [Committee] to provide findings and recommendations to the CDS" (*Gabriel v Canada (Attorney General)*, 2008 FC 1254 at para 35 [*Gabriel*]). When Parliament streamlined the process by eliminating one level of decision making, it did not add an external independent review by the Committee with the intent that it would multiply its interventions, at various stages, which would result in erasing the efficiency improvements adopted in 2000. The intent was rather to provide the CDS, as Final Authority, with an external and expert view on the matter before he would render the final decision (*Rifai v Canada (Attorney General)*, 2014 FC 529 paras 71-74).

[41] Furthermore, the two step grievance process has been described by the Court on various occasions, whereby the Court indicated that the Committee would make recommendations to the CDS, who is the Final Authority (*MacLellan v Canada (Attorney General)*, 2014 NSSC 280 at para 38 and *Riach v Canada (Attorney General)*, 2011 FC 1230 at paras 13-15).

[42] The Committee points out that it is not disputed that the CDS or his/her delegate must act as Final Authority or that the CDS could in some instances act as Initial Authority.

[43] However, the Committee disagrees with the respondent who asserts that the statutory scheme imposes an obligation upon the CDS to act as Initial Authority when no other officer can. The Committee submits that sections 7.06 and 7.07 of the QR&O, rather direct who must be the Initial Authority and the time limit it shall respect. Hence, according to this position, a

grievance may, in some cases, go directly to the Final Authority without an Initial Authority decision.

[44] The Committee also submits that, although the statute does not specify that referrals to the Committee are made by the Final Authority, this is clear from a reading of the provisions of the Act in their entire context. In fact, section 29.11 of the Act states that the CDS is the Final Authority and the following provision, subsection 29.12(1), states that the CDS shall or may refer, depending on the type of grievances.

[45] Moreover, the Defence Administrative Orders and Directives [DAOD], the Canadian Forces internal directives, provide for the duties attached to the Initial Authority process and to the Final Authority process. DAOD 2017-1 specifically provides that it is the Final Authority who determines if the grievance is of a type that is to be forwarded to the Committee for Findings and Recommendations.

[46] The Committee agrees that the CDS could review its own Initial Authority decision. However, if the CDS decides to act as the Initial Authority, the Act requires him or her to do so before the file is referred to the Committee. In fact, subsection 29.12(2) of the Act imposes requirements to refer certain materials, including the decision made by each authority in respect of the grievance. Hence, the CDS would have to refer his or her own Initial Authority decision to the Committee.

[47] Moreover, the Act specifies that the CDS must provide reasons for discarding the Committee's recommendations (subsection 29.13(2) of the Act). Hence, these reasons are key in the process at the final level, given the finality of the CDS's decision and that the next available recourse for the Canadian Forces members is a judicial review application before this Court.

(2) Impact on present and potentially on past decisions

[48] Finally, the Committee submits that prior to this question arising, the report of Findings and Recommendations was provided to the CDS or his or her delegate at the final stage of the grievance process. Hence, if this Court finds that the CDS must indeed act as Initial Authority in certain files, and can do so after a Committee review, there will be an issue as to whether past files could be reopened. In fact, in those files where the CDS would have been the appropriate Initial Authority, the final decision which had followed the Committee's Findings and Recommendations and the CDS's decision might potentially be no longer final.

C. *The Attorney General of Canada*

[49] The respondent submits that the application should be dismissed, first as it is premature, and second, in the alternative, as the decision of the CDS is reasonable.

(1) The application is premature

[50] The respondent submits that Colonel Ouellette's application is premature as only Final Authority decisions are subject to review by this Court, and as the CDS properly acted as the Initial Authority.

[51] On the first point, the respondent argues that Colonel Ouellette is challenging an Initial Authority decision, which is the first step in the two level military grievance process, and that he has thus not exhausted the available remedies, and cannot therefore ask the Court to intervene.

[52] The respondent further submits that Colonel Ouellette's assertion that it would be improper for the CDS to act as the Initial Authority and then as the Final Authority when reviewing his own earlier decision is without merit. In fact, the legislative scheme contemplates and permits this situation (*Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at para 4).

[53] The respondent first describes the Canadian Forces' two level grievance process, and refers the Court in particular to subsections 7.07(2) and (3) of the QR&O, as they were then, which explicitly contemplate that the CDS may act as an Initial Authority in certain circumstances. Furthermore, the respondent contends that the CDS has the discretionary authority to refer grievances to the Committee for consideration, and that, as per subsection 29.12 (1) of the Act, this discretionary power is not expressly or implicitly limited to the level at which he is acting.

[54] On the second point, the respondent contends that the CDS finding that he was obligated to act as the Initial Authority is adequate.

[55] In fact, since the decision to remove Colonel Ouellette from command was signed and initiated by the Commander CEFCOM, the CDS was the next superior officer in the chain of command, and was thus obligated to act as the Initial Authority, to consider and determine the

grievance. Furthermore, under the QR&O, as they then read, only two circumstances allowed the grievance to proceed directly to the Final Authority, when requested by the grievor: (1) when an Initial Authority, other than the CDS has failed to determine a grievance within 60 days of receiving it (section 7.07 of the QR&O) and (2) where a grievor is not satisfied with the redress granted (section 7.10 of the QR&O), and neither applied in this case.

[56] Moreover, the respondent submits that Colonel Ouellette had objected to his grievance proceeding directly to the Initial Authority on the basis that he was entitled to the benefit of an Initial Authority decision. It was only after Colonel Ouellette made a complaint regarding the lack of an Initial Authority decision, and that the Committee commented on this issue, that the CDS advised him that he would be acting as the Initial Authority. As Colonel Ouellette was given the opportunity to make submissions on this issue, his claim of a breach of legitimate expectation is without merit. In any event, the doctrine of legitimate expectation only applies to representations which are procedural in nature and cannot override statutory schemes. In the present case, the CDS was under a statutory obligation to act as an Initial Authority.

[57] The respondent submits there is no statutory indication that the CDS could not refer a grievance to the Committee while acting as the Initial Authority. If Parliament intended to limit referral to the Committee only at the Final Authority level, it would have done so explicitly. In any event, if the CDS did not have the authority to refer the matter to the Committee, this alleged error does not impact his or her obligation to act as the Initial Authority. The only impact would be that the Committee was without jurisdiction to review the grievance and its Findings and Recommendations need not be considered. There is no evidence that the decision would be

different absent the Findings and Recommendations, which were for the most part not accepted by the CDS.

(2) The decision of the CDS is reasonable

[58] As a preliminary matter, the respondent submits that Colonel Ouellette's record includes evidence not before the decision maker. In fact, Colonel Ouellette relies upon an affidavit containing documents and information which were not before the CDS. His Memorandum of Fact and Law also includes documents and information not in evidence before this Court and all this new information should therefore be struck and not considered by this Court.

[59] The respondent submits that the standard of review is that of reasonableness.

[60] Alternatively, the respondent submits (1) that the decision to remove Colonel Ouellette from command was an appropriate response, (2) that the CDS findings are supported by the evidence, (3) that the grievance process did cure earlier breach of procedural fairness, (4) that the CDS properly considered the Committee's Findings and Recommendations and provided reasons for rejecting its conclusions and (5) that the CDS reasonably rejected the objections to the delay in processing the grievance.

III. Issues

[61] The issue as raised by the respondent is determinative in this case. If the Court concludes that the CDS had to act as the Initial Authority, and could in fact act as such even after having

deferred the grievance to the Committee, then the application is indeed premature under section 29.15 of the Act. On the other hand, if the Court concludes that the CDS had no obligation to act as an Initial Authority, and in fact could not act as such given the facts, then it must return the case for adjudication, by the CDS, as Final Authority. In any event, it appears unnecessary for the Court to examine, on its merits, if the decision is reasonable or not.

IV. Standard of Review

[62] This issue is related to the interpretation of the CDS's "own statute or statutes closely connected to its function, with which it will have particular familiarity", with regards to the present facts, and the issue, of whether the CDS acted as the Initial Authority or as the Final Authority, is therefore subject to deference in judicial review and will be reviewed under the reasonableness standard (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*), 2011 SCC 61 at para 34; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54; *Moodie v Canada (Attorney General)*, 2015 FCA 87 at paras 51, 52).

V. Analysis

[63] For the reasons set out below, and given the particular facts of this case, I find that the CDS had to decide as the Final Authority, as the matter had been referred to the Committee even though no Initial Authority decision had been rendered. I will therefore allow the application for judicial review.

[64] In making this determination, the Court only considered the information that was available to the CDS at the time of his decision and which was, accordingly, included in the Certified Tribunal Record. No circumstances warrant departing from the general principle that judicial reviews are conducted on the basis of the record before the decision maker (*Callaghan v Canada (Chief Electoral Officer)*, 2011 FCA 74 at para 82).

[65] The Court wishes to stress again the particular fact scenario of the present case as the CDS was involved in the decision to remove Colonel Ouellette from command, would have been the Initial Authority, and is the Final Authority. The CDS was thus part of the decision to remove Colonel Ouellette from command, and is the decision maker, at both levels, in reviewing this very decision. An independent review by the Committee thus understandably appears even more necessary.

[66] The military grievance process is governed by the Act, the QR&O and the Administrative Orders and Directives. It is well documented and the Court will thus only briefly highlight its main components.

[67] The right to grieve is stated at section 29 of the Act, the text of which is reproduced in annex.

[68] The grievance process consists of two levels. Section 29.1 of the Act provides that the Initial Authority and subsequent authorities are the ones designated in regulations made by the Governor in Council, and section 29.11 states that the CDS is the Final Authority in the process.

[69] The regulations, found at Chapter 7 of the QR&O, govern the conditions under which the grievances can be submitted. The military grievance process begins when the grievor submits a grievance to his Commanding Officer, who acts as the Initial Authority if he or she can grant the redress sought, or forwards it to the proper responsible officer if he or she cannot. A grievor who is dissatisfied with the Initial Authority's decision may ask for revision by the Final Authority, who is the CDS, or in some cases, his or her delegate.

[70] The referral to the Committee is provided for at section 29.12 of the Act, thus immediately following the designation of the CDS as the Final Authority, and must be made by the CDS. Depending on circumstances, the referral is either mandatory or discretionary. Although section 29.12 of the Act is explicit that the referral must be executed by the CDS, it does not explicitly limit it to when the CDS is acting as Final Authority, and the respondent thus contends that the CDS can also refer a grievance to the Committee when acting as Initial Authority.

[71] The Court disagrees with the respondent's position. The structure and objectives of the relevant provisions of the Act and the QR&O lead to the conclusion that referral to the Committee must be made by the CDS only when acting as Final Authority. The respondent's position that a referral to the Committee could be made at both the Initial Authority and the Final Authority stages appears inconsistent with the objectives pursued by the amendments to the Act and the QR&O, i.e. the expedition of the grievance resolution process (*Gabriel* at para 35).

[72] This interpretation is also consistent with the Grievance Process Table contained in the DAOD 2017-1 which contemplates that the Final Authority must determine whether a grievance will be forwarded to the Committee and that the Final Authority will determine the grievance upon receipt of the Committee's Findings and Recommendations.

[73] Furthermore, the case law from this Court also leads to the conclusion that the referral to the Committee is made by the CDS when acting as the Final Authority, not as Initial Authority. In considering whether the CDS had provided sufficient reasons for rejecting the Findings and Recommendations of the Committee, Justice Mandamin stated that the Committee's Findings and Recommendations constitute the "penultimate review before the CDS's own review of the grievance" (*Smith v Canada (Chief of the Defence Staff)*, 2010 FC 321 at para 26). Moreover, Justice S. Noël noted that the decisions of the Committee are sent to the CDS for final determination (*Bernath v Canada*, 2007 FC 104 at para 87).

[74] In this case, given that the CDS was involved at the decision-making level and possibly at both levels of the review process, the Court is satisfied an Initial Authority decision was not mandatory and that it was unreasonable to conclude otherwise.

[75] Furthermore, Colonel Ouellette pointed out that all the official correspondence he received from the Department of National Defence from November 2010 to August 2013 concerning his grievance identifies the CDS as the Final Authority. I am satisfied that Colonel Ouellette had a legitimate expectation that the CDS would act accordingly. The correspondence

amounts to clear, unambiguous and unqualified representation about the administrative process that was to be followed (*Canada (Attorney General) v Mavi*, [2011] 2 SCR 504 at para 68).

[76] For the aforementioned reasons, this application for judicial review will be allowed and the matter referred back to CDS for a Final Authority decision, using the Findings and Recommendations issued by the Committee in December 2011.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is allowed.
2. The February 28, 2014 decision is quashed.
3. The matter is remitted to the Chief of the Defence Staff for a new determination as Final Authority on the basis of the present reasons.
4. Costs are granted to the applicant in the amount of \$6,000.

“Martine St-Louis”

Judge

ANNEX

- 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.
- (2.1) A military judge may not submit a grievance in respect of a matter that is related to the exercise of his or her judicial duties.
- (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.
- 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.
- (2.1) Le juge militaire ne peut déposer un grief à l'égard d'une question liée à l'exercice de ses fonctions judiciaires.
- (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) 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.

(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-677-14

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DATED: OCTOBER 21, 2015

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