Federal Court Cour fédérale

Date: 20140530

Dockets: T-580-12
T-581-12

Citation: 2014 FC 529

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 30, 2014

Present: The Honourable Mr. Justice Annis

BETWEEN:

NABIL RIFAI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In this decision, I am deciding on two applications for judicial review under section 18.1 of the *Federal Courts Act*, RSC (1985), c F-7.

[2] The first application, docket T-580-12, refers to military grievance 53856 filed by the applicant on January 25, 2010, regarding his release from the Canadian Forces Reserves (the

"release grievance"). The decision to release him seems to have been made on November 30, 2009, and communicated to the applicant orally on or around December 8, 2009. After some discussion, LGen Devlin was appointed initial authority (IA) for this grievance. The release grievance file never reached the point of decision, or the stage of final decision of the final authority (FA).

[3] The second application, docket T-581-12, refers to the decision made on February 10, 2012, by Colonel ("Col") Gauthier, the Director General of the Canadian Forces Grievance Authority (CFGA) and the delegate of the Chief of the Defence Staff (CDS), in grievance 54810 filed on March 19, 2010, regarding a remedial measure (the "remedial grievance"). The CDS is the FA with respect to any grievance, but may, in certain cases delegate this task. So as to avoid confusion, the acronym "FA" will be used to designate the CDS and his delegate Col Gauthier, unless it is necessary to be more specific.

[4] I am dealing with both applications in one decision because they influence each other and it is essential to understand the context of the issues that both factual chronologies be integrated. Furthermore, the two files were argued together.

The applicant's self-representation

[5] Mr. Rifai had no legal representation when he filed his application. He only hired counsel when he had difficulty following the *Federal Courts Rules*, SOR/98-106 (the "Rules"), regarding the filing of documents and faced a motion of the Attorney General that his applications be struck. It is a complex case and his counsel seems to have been given a limited mandate. Counsel

did not sign the written submissions, including the applicant's memorandum and seems to not have attempted to put the file in better order. Consequently, serious deficiencies persist in the documentation submitted by the applicant, which makes the task of ruling on merits more difficult.

[6] With respect to the documents supporting his application, the applicant seems to have done his best to follow the Rules. He cited six documents in support of his two applications. However, he then filed two binders of documents, one for each application and each containing the same collection of nearly 400 pages, all presented without an affidavit.

[7] The respondent then filed a motion including an affidavit in which were appended the documents filed by the applicant. The motion was presented in writing under section 369 of the Rules and decided on the basis of claims in the motion file. The respondent asked the Court to require that the applicant number the pages, link each document to one or more of the allegations, and in general put his file in order. On June 28, 2012, Prothonotary Morneau ordered that the applicant serve and file an amended affidavit that would correct the deficiencies.

[8] The applicant then filed two amended affidavits that referred to a large number of documents, but not the entirety of those that were originally filed. In making its decision, the Court must limit itself to this documentation, which is filed before it by affidavits.

[9] In the end, despite the filing of amended affidavits, the applicant did not file several essential documents; he did not even file the two grievances, or the recommendations of the

independent Canadian Forces Grievance Board ("the CFGB" or "the Board") regarding the remedial grievance—recommendations that were rejected in part by the FA by substituting a more serious measure than that which had been suggested by the Board.

[10] The Attorney General did not file an affidavit. He cross-examined the applicant on his affidavit. He took the opportunity to file the two grievances and additional submissions in one of the grievances, as well as an exchange of e-mails between the parties, which took place following the filing of the notices of application for judicial review.

[11] The Attorney General apparently understood that there was a minimum duty to ensure that the background documents are in evidence so that the Court may know the nature of the grievances. However, the Attorney General did not make the effort to place into evidence the rest of the essential documents, such as the recommendation of the Grievance Board that Colonel Gauthier had rejected. No document or other evidence was submitted to explain the slow processing of the release grievance.

[12] The Court is concerned by how the evidence was submitted. It recognized that it is not able to make definitive findings, especially in light of the fact that the applicant was represented at the very end of the process. The fact remains that it is difficult to understand that the applicant, representing himself, almost had his application struck because of the lack of organization in his documentation. Apparently, he could have exercised his rights under section 317 of the Rules to obtain all the documents relevant to processing both grievances, which he was allegedly then able to submit, thus ending the presentation problems in the file.

[13] Without being aware of what occurred while the applicant was without legal assistance, the Court notes that the Attorney General of Canada has a duty to ensure that there is no denial of justice in the fact that a party who is self-represented does not know the basics that would prevent his application from being dismissed for procedural reasons.

[14] The problem for self-represented parties, as an aspect of the desire to promote access to justice, is one of increasing concern and commentary from the courts. The Canadian Judicial Council recently updated the Statement of Principles on Self-represented Litigants and Accused Persons, online: http://publications.gc.ca/collections/collection_2007/cjc-ccm/JU14-6-2006E.pdf. The Council stated in this guide that

> … judges, court administrators, members of the Bar, legal aid organizations, and government funding agencies each have responsibility to ensure that self-represented persons are provided with fair access and equal treatment by the court;
>
> (Page 1)
>
> [Emphasis added]

This includes the following obligation:

> Judges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation. (Page 2)
>
> [Emphasis added]

[15] As indicated, the Court has no knowledge of what happened during the preliminary steps preceding the application for judicial review. However, the loss of employment by an applicant is a serious subject to which the courts attach particular importance, wishing to ensure that vulnerable parties do not experience any injustice because of difficulties with access to the courts resulting from not being represented. In this case, the applicant did not know that a procedure existed to request relevant documents, a procedure that someone could have easily brought to his attention so that not only would he have avoided the risk of having his application struck for procedural deficiencies, but also the Court would have benefitted from a complete record.

Remedies sought

(1) T-581-12: Remedial grievance

[16] In the application relating to the remedial grievance, the applicant seeks "cancelation of any and all disciplinary actions invoked and issued against SLt Rifai."

[17] I consider that the central issue is whether the FA had acted reasonably in rejecting the Grievance Board's recommendation that the remedial measure be upheld but simplified given that the mandatory procedure was not followed in issuing the measure, and in finding that it could nevertheless decide on an appropriate remedial measure. On the basis of the undisputed facts, I find that it was unreasonable and I set aside its decision.

(2) T-580-12: Release grievance

[18] The application relating to the release grievance is an instance where the Court must allow the applicant some flexibility to ensure that his application is properly considered. First,

the applicant was seeking in his application submitted in English: "a reinstatement, back pay, compensation, and an answer from the chief of land staff in this grievance." The notice of application was corrected, apparently at the time of the submission, by adding to it in handwriting the sentence: "SLT Rifai requires a mandamus".

[19] In his memorandum, the applicant seeks a *mandamus* order. However, the issues proposed by the applicant raise the theme of abuse of process:

> [TRANSLATION]
>
> **42**. Do the armed forces unlawfully omit or refuse to make a decision regarding the applicant's grievance or unreasonably delay the applicant's file?
>
> **43**. Do the armed forces commit an abuse of process or law with respect to the applicant?

[20] The application in T-580-12 explains that:

> SLt Rifai now seeks this enlightened court's decision in this matter because the unjustified delays have compromised any and all faith SLt Rifai might have had in the grievance process. SLt Rifai seeks this legal remedy because the grievance process has demonstrated that it has not acted impartially, cannot act impartially and refuses to act impartially in this matter. The deficiency in impartiality is so severe so as to bring the grievance process into disrepute.

[21] The applicant adds that:

> First by the respondent's behavior they have brought the grievance process into disrepute and this to a point where no applicant could ever believe or expect to receive an impartial adjudication in a grievance with the Canadian Armed forces.

[22] In light of the circumstances of writing the application and the fact that the applicant as represented only late in the process, I consider that it is appropriate to show flexibility in interpreting the description by the applicant of his application. I use as a model Justice Décarie in *Canada v Roitman*, 2006 FCA 266 (*Roitman*). The Court wrote in paragraph 16:

> [16] A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court. . . .

[23] I am aware that in *Roitman*, the issue was to establish the meaning of a document in the context of an application for an [TRANSLATION] "impossible" result. In this case, where the issue is to protect the interests of justice, the principle applies with even greater force; it must be ensured that the application is interpreted according to its true intention.

[24] The applicant properly positioned this Court in the context of a *mandamus* application the issue of whether the respondent intentionally acted in bad faith and committed an abuse of the grievance process by delaying the treatment of the release grievance for the illegitimate reason of discouraging the applicant and preventing him from continuing to the end.

FACTUAL CONTEXT

Transfer to the Reserve

[25] The applicant enrolled in the Canadian Forces in September 2005 as an Infantry Officer in the regular force. Facing difficulties relating mainly to his family situation, he wanted to

transfer to the reserve force in early 2008. He took steps with three different reserve units in Montréal. He worked as a volunteer with the first one, les Fusiliers Mont-Royal (FMR), during the training year from fall 2008 to spring 2009, but ended up finding a place with the third unit, the 4th Battalion, Royal 22e Régiment (4 R22eR).

[26] In the fall of 2009, officers of the regular force and the reserve force approved the transfer and a message to this effect was issued. To complete the transfer procedure, the applicant had to leave the regular force and be enrolled in the reserve force. He became an officer of the 4 R22eR as of September 18, 2009.

[27] At that time, the applicant right away accepted a deployment contract offer of six months to participate in Operation Podium (OP), an operational mission of the Forces with the 2010 Winter Olympics in Vancouver.

[28] In circumstances that will be described below, the applicant was released from the Forces on or around December 8, 2009. The underlying facts of both military grievances provide the account of what happened.

Questioning on the transfer and qualities of the applicant

[29] The applicant's problems started the morning of September 22, when Lieutenant-colonel (LCol) Roy, commander of the FMR, contacted LCol Boisvert of the staff du Land Force Quebec Area (LFQA) and questioned the qualities of the applicant, who was newly enrolled as an officer of the 4 R22eR, as a candidate for transfer to the reserves.

[30] The LFQA includes regular and reserve army formations and units that are based in Quebec, in particular the 34 Canadian Brigade Group (34 CBG), a reserve formation that groups together the reserve units of western Quebec, among them the 4 R22eR and the FMR. The headquarters (HQ) of the LFQA are in Montréal.

[31] The applicant described the role of LCol Roy in his amended affidavit as follows:

> [TRANSLATION]
>
> 97. Since this matter began, it has become clear that this entire matter took place because SLt Rifai's supervisor who wanted to give a written warning in July 2009, LCol Roy, was not happy that the SLt decided to change to another unit for his transfer, furthermore from FMR to 4 R22eR.
>
> 98. Therefore, he undertook a hidden campaign against the SLt with another senior member of the Canadian Forces to create this situation.
>
> 99. <u>This campaign took place without SLt Rifai's knowledge.</u>
>
> [Emphasis added]

[32] Following his conversation with LCol Roy, LCol Boisvert requested that Mr. Rifai's record be sent to LFQA HQ. LCol Dufour, Chief of Staff of 34 CBG, requested explanations before he had the record sent to LFQA. Between September 22 and October 1, in a series of e-mails, LCol Boisvert explained to LCol Dufour that only the Commander (Comd) of LFQA could authorize the applicant's enrolment in the reserve force. The transfer message had been sent on September 1 based on assurances that there was no problem in the individual's file, but in fact there were problems.

[33] Following his conversation with LCol Roy, LCol Boisvert noted that the applicant withdrew from Phase 4 of basic training as Infantry Officer in 2008 and that his memo of February 22, 2008, requesting authorization to withdraw was a pretext for his inability to manage stress. The commentary by the infantry school approving the withdrawal had indicated that the applicant did not have the 'moral fibre' to be an Infantry Officer [Emphasis added]. LCol Boisvert had also noted in the record that a remedial measure had been issued with respect to the applicant during the past 12 months and noted that rather than [TRANSLATION] "facing the music" the applicant had changed his transfer to go to another unit. In addition, the applicant had communicated directly with the commander of the 4 Health Services Group during its search for another unit. Given this, the staff found itself in an illegal situation, the applicant having enrolled as a reservist without formal authorization.

The remedial measure of October 2009

[34] At the end of September 2009, the applicant was sent on a training exercise in preparation for Op Podium. On October 15, another officer working on the operation, Major Blanchet, communicated with a colleague, Major Siket, about the applicant. Major Blanchet stated that he had to have a conversation with Mr. Rifai relating to his performance and conduct and that Mr. Rifai [TRANSLATION] "is fully aware that our bde currently needs him, in our Coy Op Podium, as DO."

[35] The next day, on October 16, 2009, in an e-mail sent at 7:55 a.m., LCol Dufour said to Major Blanchet and Major Siket:

> [TRANSLATION]
>
> Dear Sirs,
>
> I would like to make it quite clear that in my mind, we hear his too often for a SLt.
>
> [I] know that we are short AOs. But the Coy Podium will not lead to a problem situation in Vancouver and the question is what are the chances that he will goof off once he gets there? And if he goofs off, the Comd will ask us if we expected it and if so, why we sent him. We must ask ourselves the question.
>
> In short, we have to keep an eye on him.

[36] Later the same day, LCol Dufour placed the applicant under counselling and probation (C&P) for not complying with the directives. The written record of the action states:

> [TRANSLATION]
>
> 1. You have demonstrated a (*check one*) ___ **conduct** or x **performance deficiency**.
>
> 2. The detailed description of the deficiency is as follows:
>
> When he was employed as a duty officer during the Athlète Rusé ex at Valcartier, as part of the training of Coy Tac Res JTFG of Op Podium, SLt Rifai showed on several occasions his inability to comply with issued directives (non-recurring dispatch task, obtaining any material on the equipment list before arriving on duty, using his personal vehicle against issued orders), despite the fact that he received appropriate and repeated directives requiring that he pay attention to the orders issued.
>
> [Emphasis added]

[37] The form then specified that "If you fail to overcome the above-mentioned deficiency, you may be subject to further administrative action", after which was added by hand the words [TRANSLATION] "including release from the forces".

[38] There is no evidence in the record detailing the conduct targeted by the remedial measure. The impugned decision relating to this measure (in docket T-581-12) described some facts, but they are not confirmed by any evidence, including the findings of facts drawn by the Grievance Board, which we will discuss below.

The procedure for remedial measures

[39] The Forces' remedial measures are imposed under the *Defence Administrative Orders and Directives* (DAOD) 5019-4, "Remedial measures" (the "Directives" or the "DAOD 5019-4"). They are not disciplinary punishments but are administrative actions that aim to correct conduct or performance deficiencies. There are three levels of remedial measures that may be imposed on a member of the Forces. In increasing order of severity, they are: initial counselling (IC), recorded warning (RW), and Counselling and Probation (C&P). An initiating authority may select the appropriate remedial measure without being required to go from an IC to a RW then to a C&P.

[40] The Directives stipulate that the C&P, the most serious measure, has repercussions on careers; it is accompanied by ineligibility for promotions, most professional training courses, and postings (apart from operational deployments) during at least the minimum monitoring period,

which is six months. The Directives order that each deficiency, whether of performance or conduct, is the subject of a separate remedial measure:

> A deficiency shall be categorized as a conduct deficiency or a performance deficiency, but not both. Identification of the CF member's deficiency serves to focus on the monitoring objectives and to facilitate any staff or third party review of the CF personnel record.
>
> If a CF member demonstrates different deficiencies at the same time, each deficiency shall be dealt with separately . . . .

[41] According to the Directives, to impose a remedial measure, it is necessary to first issue a notice form. In the case of a C&P, it is Form DND 2827 - *Notice of Intent to Place on Counselling and Probation* (Form B), which gives notice of the intent to adopt the measure. It is followed by Form 2826 (Form A), which details the measure taken.

[42] When the initiating authority gives members who are subject to the remedial measure Form B, it must also send them copies of all the documents that justify adopting the proposed C&P and that will be reviewed to make a final decision. Members must then be given a reasonable deadline, of at least 24 hours, so that they may present arguments in writing to the initiating authority. Members may request assistance or extra time to present their arguments. The initiating authority must examine the member's arguments, as appropriate, and must then decide whether a remedial measure should be imposed and if so, which one. If the decision is made to impose a C&P, the initiating authority must then fill out Form A and give it to the member.

[43] In this case, no prior notice using Form B was given as required by the regulations. The applicant was not entitled to the 24 hour period or to an opportunity to present his arguments before the initiating authority and he was not entitled to assistance as required by the policy. It was all done immediately.

[44] The applicant states in his affidavit that during the meeting of October 16, it was suggested that he would perhaps be more comfortable in the ranks than as an officer, but that he refused.

Cancellation of the Class C contract relating to the OP

[45] A few days later, the applicant's deployment was terminated and he returned to Montréal. The applicant described the termination of his Class C contract for the OP in his amended affidavit in docket T-580-12 as follows:

> [TRANSLATION]
>
> 51. In October, SLt Rifai verbally notified these superiors that family problems were developing in his home. His spouse had some concerns that possibly had to be addressed by SLt Rifai.
>
> 52. His superiors advised him that family situations developed for them as well and that he should not worry about them too much.
>
> 53. It became increasingly clear that his participation in this operation was not welcome by his superiors.
>
> 54. SLt Rifai sought advice from his colleagues and superiors. He advised his superiors that he would possibly request his removal from Coy Tac Res JTFG.

> 55. On October 16, 2009, SLt Rifai received a remedial measure, counselling and probation, from LCol Dufour, the new Chief of Staff of 34 CBG.
>
> 56. The remedial measure that is also before this court (T-581-12).
>
> 57. During this meeting, it was suggested by his superiors that SLt Rifai should hand over his commission and join the members of the rank. SLt Rifai refused.
>
> 58. SLt Rifai then requested leave days, which were granted, but with termination of the Class C contract by his superiors.
>
> 59. SLt Rifai left the operation to return to his home.

[46] On November 13, 2009, Major Blanchet informed LCol Dufour by email that he had conducted a second follow-up interview with the applicant with respect to a prior remedial measure, but that given the C&P of October 16, this measure seemed to have failed, and that any subsequent follow-up had to be with reference to the C&P. Major Blanchet finally noted:

> [TRANSLATION]
>
> "I also believe that we must be honest with the individual and tell him of the intent not to keep him in the CF (Canadian Forces). I would like to speak to you in person regarding this file."
>
> [Emphasis added]

[47] No evidence on file shows that the applicant was notified at that date that the Forces intended to fire him.

Cancellation of enrollment

[48] On November 23, 2009, the Colonel Commandant of the 34 CBG, Colonel Lapointe, sent a letter for execution by LFQA HQ and for the information of 34 CBG HQ and Comd of 4 R22eR, saying that despite the unapproved transfer from the regular force, the applicant's Class C contract had been kept because he was needed for Op Podium. However, he then voluntarily withdrew from this operation. His record called into question his leadership. A decision of the LFQA Commander was still expected, but in the meantime Colonel Lapointe recommended reconsidering given that irregular enrollment was being cancelled. The relevant passages of the letter are:

> [TRANSLATION]
>
> 1. Following the acceptance of the authorization message in reference A, (*service number*) SLt Rifai was transferred from the regular force to the reserve force, on September 18, 2009, as part of 4 R22eR.
>
> 2. The e-mail exchange between LCol Boisvert and LCol Dufour (attached) confirms that the Comd had not approved his transfer from the Regular force to the Primary Reserve.
>
> 3. The member was retained at Class C as part of OP PODIUM so as not to negatively impact operations.
>
> 4. SLt N. Rifai requested to voluntarily withdraw from Coy Tac Res of OP PODIUM. His class C employment ended on October 30, 2009. <u>We are entitled to question his leadership skills and his dedication to the Canadian Forces</u>.
>
> 5. Knowing <u>that the record is still waiting for the decision of the Comd</u>, we recommend by this letter that you kindly reconsider, <u>even cancel the enrollment</u> of the above in the Primary Reserve.
>
> [Emphasis added]

[49] On November 30, Colonel Lapointe wrote to the Comd of 4 R22eR, LCol de Sousa, to give him the documents noted in his letter in support of his recommendation for cancellation, and the original of the C&P remedial measure of October 16 and the recorded warning (RW) that had

been given to the applicant on July 7, 2009, while he was performing voluntary service with the Fusiliers Mont-Royal. Colonel Lapointe expected LCol de Sousa to undertake administrative follow-up.

[50] A hand-written note from LCol de Sousa affixed to the letter and dated November 30, 2009, gives the order to cancel the enrollment: [TRANSLATION] "In light of this new information, please cancel SLt Rifai's enrollment".

[51] On December 8, LCol de Sousa notified the applicant for the first time, orally, that his enrollment application in the reserves had never been completed and that following the events, the chain of command had decided not to continue with his enrollment. The applicant states in his affidavit that:

> [TRANSLATION]
>
> 60. On December 8, 2009, SLt Rifai was notified by the Comd of 4 R22eR, LCol De Soussa, that the enrollment application had not yet been properly completed and that the chain of command had decided following the events and recommendations that his enrollment in the primary reserve would not be completed.
>
> 61. He was informed that since his exit from the regular force was properly done and that his enrollment in the primary reserve force was poorly done, that SLt Rifai is now no longer member of the Canadian Forces.
>
> 62. Furthermore, SLt Rifai was ordered not to present himself to any function or activity, operation or anything of the Canadian Forces.

Filing of the applicant's two grievances

[52] On December 10, 2009, the applicant submitted an application for assistance in initiating a grievance. In his amended affidavit, he described several factual situations, supported by documentary evidence, in support of his allegation of bad faith in the grievance process. First, he described the applicant's refusal to provide the officer with the assistance he sought.

> [TRANSLATION]
>
> 63. On December 10, SLt Rifai made a request for assistance in initiating a grievance with 4 R22eR, as is his right under the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os) (P-41).
>
> 64. None of the three people named by SLt Rifai for assistance was provided. SLt Rifai was categorically informed that the three people were outside the country and were not available.
>
> 65. SLt Rifai then asked one of the people named by him. He informed him that he was in the country, that no such request was made by the chain of command and that notwithstanding the precedent that he was not comfortable getting involved in the file given the people involved (P-42).
>
> 66. SLt Rifai had not yet received any response on this issue of assisting officers and on the fact that he was lied to regarding this application by the Department of National Defence.
>
> 67. SLt Rifai has not yet received a reply to this application.
>
> . . .
>
> 85. Given the seriousness and the passing of time, SLt Rifai went ahead with the grievance, although he had not received the assistance and advice that would have allowed him to better prepare and make his requests.

[53] On January 25, 2010, the applicant filed an application for redress of grievance contesting his release from the Canadian Forces (T-580-12, the release grievance). He sought to [TRANSLATION] "reverse the decision not to complete his enrollment in the primary reserve force

within the 4 R22eR" and to have [TRANSLATION] "restitution of the amounts, promotion and other things that he would have received". He requested [TRANSLATION] "more assistance in writing, understanding and following the steps of the grievance process and to understand all the remedies available".

[54] The applicant states that on February 7, 2010, he received a notice of release under article 5E of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os). This document was not before the Court. However, the applicant filed a document entitled [TRANSLATION] "Description of reasons for release; Guide for employment insurance" in which are indicated the various reasons for release including the following three relevant examples:

[TRANSLATION]

Reason	**Description**	**Explanation**
5(d)	Cannot be employed in a profitable manner	Mainly for administrative reasons only, the reasons may be the failure of one training level, administrative burden OUT of the member's control, etc.
5(e)	Regular enrollment	Several reasons such as level of education not met, existing medical problem at the time of enrollment.
5(f)	Unable to continue service	Applies to any member who, because of factors IN HIS POWER, imposes an excessive administrative burden without showing improvement in his conduct. Generally considered to be a disciplinary release.

[55] On February 16, 2010, the applicant filed an addendum to his release grievance referring to the notice received on February 7. He requested [TRANSLATION] "an audit of the procedure that led to these circumstances".

[56] On March 19, 2010, the applicant filed an application for redress of grievance disputing the C&P of October 16, 2009 (T-581-12, the remedial grievance); he requested the cancellation of the remedial measure.

[57] The applicant filed a second addendum to his release grievance of April 26, 2010. First, he requested a copy of the correspondence cited above by the Court, which had been mentioned in the documents that he had received, as well as any other relevant document. Afterward, he described in his notice of application that he had not received the following documentation:

> Sixth not all of the relevant information although in their possession was submitted to SLt Rifai. An email detailing a knowingly unlawful act committed to SLt Rifai by higher ranking military personnel that could have had an incidence on SLt Rifai was not given to him. And this also serves as motive for the continuing oppression ….

[58] He also raised in this addendum his objection to LFQA HQ acting as initial authority (IA) (the first level decision-maker in the grievance process) for the release grievance. In his amended affidavit, the applicant explained his reasoning, alleging bad faith:

> [TRANSLATION]
>
> 74. In addition, at the time of filing his grievance, there was an issue regarding the initial authority. SLt Rifai twice objected to the issue of initial authority because he did not believe that the initial authority chosen was the most appropriate (P-44, P-45 and P-46).
>
> 75. And twice the Department of National Defence advised that the most appropriate initial authority had been chosen. [*Note from the Court: The applicant refers to two letters that LCol Boisvert wrote.*]

> 76. Since the grievance was filed, it has become clear that the person and level chosen was the person and level involved at the centre of this subject, of this grievance (P-47 and P-48).
>
> 77. The original initial authority, although he claimed to be impartial and removed from the subject was involved at the centre of the dispute from the start, believing that their involvement would always remain hidden behind different levels of hierarchy.
>
> 78. The one and only reason for the insistence on the original initial authority was to find a way to cover their tracks and ensure that the grievance ended with the final authority for adjudication.

The processing of the two grievances

[59] It would seem that the IA responsible for the remedial grievance was unable to make a decision within the deadline of 60 days authorized by QR&O 7.07. The applicant refused to grant an extension. Therefore, the record was sent directly to the FA. The FA chose to refer it to the independent Board (the grievance scheme will be assessed below).

[60] The file submitted to the Court does not provide other information on this grievance besides what can be found in the decision of the FA made on February 10, 2012. However, it is indicated that the decision of the FA that in November 2011 the Board had given its opinion that the remedial measure of October 16, 2009, was invalid and had to be cancelled and had found that the circumstances allegedly gave way to a less severe measure by two levels, i.e. initial counselling (IC) rather than C&P.

[61] The FA accepted the Board's opinion that the measure had not been issued in accordance with the Directives and was thus not valid. Nevertheless, it continued the analysis by undertaking a '*de novo*' review of the underlying facts. Differentiating his situation from that of the Board

with respect to the breach of the Directives, it imposed on the applicant a remedial measure of recorded warning (RW), which was more severe than the measure recommended by the Board. He found that the applicant's conduct had been [TRANSLATION] "reprehensible" and declared that [TRANSLATION] "this is not the conduct of an officer".

[62] During this time, the release grievance remained with an IA in Ottawa. On March 1, 2012, the sixth extension that the applicant had consented to ended without anyone asking whether he was granting another.

[63] On March 20, 2012, the applicant filed these applications for judicial review—docket T-581-12 (the release grievance) and docket T-581-12 (the remedial grievance)—with the Federal Court.

[64] He gave the following explanation why he filed his applications:

> [TRANSLATION]
>
> 107. The grievance was submitted in good faith and SLt Rifai has been waiting for a reply from the initial authority (the second) for more than 18 months now.
>
> 108. In the past, the initial authority, the Chief of Land Staff (CLS) requested an extension several times; however, at the time of the last expiration no application was made. And SLt Rifai had to turn to this honourable court.
>
> 109. The CLS refuses or neglects to provide a reply to the grievance. Goes beyond the statutory periods.

> 110. According to SLt Rifai the initial authority prefers not to give a reply and thereby forces the grievance to the last level, the final authority, the head of National Defence.
>
> 111. A grievance sent to the final authority must necessarily pass through the defence grievance board and issue a recommendation that the final authority is not required to follow.
>
> 112. In addition, given all the circumstances of this file, it is clear that the impartiality and the capacity of the grievance system to adjudicate this grievance are no longer possible.

[65] On March 22, 2012, the grievance management authority communicated with the applicant by e-mail to know whether he wanted to approve a final extension for processing the release grievance by the IA. It was not explained why, after 18 months of waiting, the IA was able to make a decision before the end of the next month, just after the application for judicial review was filed.

> [TRANSLATION]
>
> Dear Mr. Rifai,
>
> The CLS has not yet made his decision on your grievance. He is currently away and will be back next week.
>
> Therefore, I request a final extension until April 30, 2012, to allow the CLS to make his decision.
>
> I await your confirmation.
>
> Thank you.

[66] The applicant replied that the date was already [TRANSLATION] “past due” and that he had initiated legal proceedings on March 20. The officer of the CFGA sent a second e-mail to verify whether he wanted to say if he was allowing the deadline. He was also asked, in case he would

not allow the IA the delay to continue processing the grievance, if he wanted to exercise his right to require that the grievance be sent directly to the FA so that he could make a decision.

[67] The officer also offered as an alternative that the applicant could withdraw his grievance, without explaining why after the whole process that he had followed and after filing an application in court, the applicant would want to accept this suggestion.

> [TRANSLATION]
>
> Dear Mr. Rifai,
>
> I have noted your comments.
>
> However, you have not answered my question.
>
> Would you allow the delay or not?
>
> If not, would you like your file to be sent directly to DGCFGA, i.e. the final authority for grievances? Or do you want to withdraw your grievance?
>
> Please let me know.
>
> Thank you.
>
> [Emphasis added]

[68] Mr. Rifai replied that he was expecting the grievance to be suspended while waiting for the Federal Court's decision.

The grievance process

[69] Military grievances are governed by the *National Defence Act*, RSC (1985), c N-5, and the QR&OS. The relevant legislation is reproduced at Appendix A. I mainly quote the QR&Os.

[70] Complainants present their grievance to their commanders. If commanders have the authority to act, they act as initial authority (IA). If not, grievances must go up to officers at the next higher rank who may act as IA. The CFGA in Ottawa will designate these officers. In this case, the docket before the Court does not explain who the IA was for the remedial grievance, as this level was passed very early anyway. As explained, LGen Devlin was appointed IA for the release grievance.

[71] Article 7.07 of the QR&Os obliges the IA, within 60 days following receipt of the grievance, to inform the complainant in writing of the decision and supporting reasons. If the IA cannot make a decision within the statutory period, the complainant has the right to request that his grievance be sent directly to the higher level, that being the final authority (FA). Also, if the complainant remains dissatisfied following the IA's decision, he may request that his grievance goes up to the FA. As indicated above, the FA is the Chief of Defence Staff (the CDS), designated as such in article 7.08 of the QR&Os. In practice, however, the function is often performed by a delegated officer such as Colonel Gauthier, the officer who decided the remedial grievance in this case.

[72] Section 29.16 of the *National Defence Act* created the Canadian Forces Grievance Board (the "CFGB" or the "Board"). The Board is composed of a chair, at least two vice-chairs and

other members required to perform its functions. Its members are appointed by the Governor in Council. Those who work full time are exclusively devoted to performing the functions of the Board. Section 29.21 confers on the Board the powers of an independent Tribunal; it may summon witnesses, administer oaths and receive the required evidence.

[73] In accordance with article 7.12 of the QR&Os, the FA may send some grievances to the Board and must send some other grievances to the Board, in particular those that concern release from the Forces. Therefore, the Board reviews the case and makes recommendations. In this case, the FA had chosen to send the remedial grievance to the Board; he was obliged to send the release grievance to the Board. The Board presented its recommendations to the FA and to the complainant. In this case, no information was provided to the Court regarding the reasons that pushed the FA to refer the remedial grievance to the Board, given the deadline that this necessarily implies.

[74] In accordance with section 29.13 of the *National Defence Act*, the FA is not bound by the conclusions and recommendations of the Board. However, if he chooses to disregard them, he must provide reasons for his choice in his decision.

[75] In accordance with article 7.16 of the QR&Os, the processing of any grievance must immediately be suspended if the complainant uses a remedy under a federal law other than the *National Defence Act*. This includes both applications for judicial review to the Federal Court filed by the applicant in this case.

Issues

[76] In application T-581-12 – the remedial grievance:

1. Was Colonel Gauthier's decision reasonable given that he accepted the opinion of the Board regarding the procedural error in the original measure?

2. Was Colonel Gauthier's decision reasonable despite the fact that he cancelled the measure based on performance and created a new measure based on conduct?

[77] In application T-580-12 – the release grievance:

1. Could an abuse of power by delaying a decision justify a *mandamus* order?

2. If so, do the facts in this case show an abuse of power by the defendant in the delay caused to the release grievance?

Standard of review

[78] The standard of review applicable to application T-581-12 (review of the remedial grievance decision) is that adopted by this Court in *Tainsh v Canada (Attorney General)*, 2011 FC 1180 at paragraphs 22 and 23:

> [22] The adequacy of reasons may be regarded as one aspect of procedural fairness and therefore subject to review based on correctness (see *Canada* (*Minister of Citizenship and Immigration*) *v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

> [23] This Court held in *Smith v Canada* (*National Defence*), 2010 FC 321, 363 FTR 186, that the decisions of the CDS are questions of mixed fact and law reviewable on a standard of reasonableness. As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[79] As regards T-580-12, the possibility of obtaining *mandamus* orders is determined by the correct application and the principles of the relevant facts. The test for an allegation of unreasonable delay in making a decision is described in *Liang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 758 at paragraphs 24, 26:

> [24] *Mandamus* is a discretionary, equitable remedy. The parties agree on the legal test for *mandamus*, as set out in *Apotex Inc v Canada* (*Attorney General*), [1994] 1 FC 742 at para 45 (CA), aff'd [1994] 3 SCR 1100, which has been applied in the immigration context (see for example *Conille v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 FC 33; *Vaziri v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1159):
>
> 1. There must be a public legal duty to act.
>
> 2. The duty must be owed to the applicant.
>
> 3. There is a clear right to performance of that duty, in particular:
>
>   (a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
>   (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:

(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

(b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant.

6. The order sought will be of some practical value or effect.

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought.

8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

. . .

[26] The parties agree on the test for whether there has been an unreasonable delay, as articulated in *Conille*, above, at para 23:

... three requirements must be met if a delay is to be considered unreasonable:

(1) the delay in question has been longer than the nature of the process required, *prima facie*;

(2) the applicant and his counsel are not responsible for the delay; and

(3) the authority responsible for the delay has not provided satisfactory justification.

Application T-581-12

Decision on the remedial grievance

[80] The grievance concerning the remedial measure was analyzed by the Board under article 7.13 of the QR&Os. The conclusions and recommendations of the Board are not included in the evidence before this Court. However, it is recognized in the final decision on the grievance that the Board had recommended to cancel C&P and had found that an IC had been adequate in the circumstances. According to Colonel Gauthier's reasons, the Board had based itself on the applicant's junior rank and the fact that there was no evidence on the record showing whether it was a repeat offence or the applicant had already been counselled on this conduct.

[81] The applicant had stated in his additional comments of October 10, 2011, that the notice of intention process in force under DAOD 5019-4 was not followed before imposing the measure and that, consequently, the measure was invalid and should be permanently cancelled. This argument was rejected by the Board. In November 2011, the applicant received a copy of the Board's conclusions and recommendations. After reviewing them, Col Gauthier made his decision on February 10, 2012. There was no evidence besides the text of the decision that would indicate the process followed by the FA to come to his decision.

[82] Col Gauthier explained that, in his reasoning, he consulted several sources, including senior staff officers of the applicant's chain of command in Montréal and officer advisors to National HQ in Ottawa, before making his decision:

> [TRANSLATION]
>
> I have examined all the available correspondence and taken note of the comments of the senior staff officers from your chain of command and National Defence Headquarters (NDHQ) mandated to advise me on the issues raised in your grievance. I also took into account the additional comments that you submitted throughout the process, including your comments of October 10, 2011. I also reviewed the conclusions and recommendations submitted by the Canadian Forces Grievance Board (CFGB) which, pursuant to article 7.12 (Discretionary Referral to the Grievance Board) of the *Queen's Regulations and Orders for the Canadian Forces,* completed an independent analysis of your request. In accordance with the principles of procedural fairness, you have received disclosure of this correspondence, along with the conclusions and recommendations of the CFGB. Finally, I note that you have chosen not to provide any additional comments following receipt of the conclusions and recommendations of the CFGB by choosing not to send us the reply form, as requested of you in the letter from the CFGB of November 25, 2011.

[83] Col Gauthier noted that he shared the majority of the observations, conclusions and recommendations issued by the Board in his report and that he is satisfied that the Board's summary of the relevant facts is "complete and faithfully represents my understanding of the issues in your case". Unfortunately, this summary is not before the Court.

[84] The Colonel accepted the Board's view that the original remedial measure is invalid because of the deficiencies in the process required by DAOD 5019-4. He noted that:

> [TRANSLATION]

> Since DAOD 5019-4 leaves no discretion in this regard to the initiating authority, it is the Board's view that this C&P was not issued in accordance with the procedure in force and that, consequently, it must be cancelled. I agree with this conclusion.

[85] However, he was of the view that he could correct this procedural error. He explained:

> [TRANSLATION]
>
> Since you have now had several opportunities to share your comments regarding the faults alleged against you, I consider this breach of procedural fairness corrected. Therefore, I will conduct a *de novo* assessment myself of the facts alleged against you to determine whether a remedial measure is in order and, if so, which one.

[86] Regarding the circumstances of the recorded warning of July 7, 2009, the colonel sees no link with the deficiencies alleged in the cancelled C&P. In other words, he concluded that the facts of October 2009 should be retained.

[87] However, Col Gauthier does not agree with the Board's opinion that an IC would have been adequate in the circumstances. He gave the following description of the applicant's deficiencies:

> [TRANSLATION]
>
> According to the note of Captain (capt) B. Leclerc, your company (Coy) Comd, you demonstrated <u>reprehensible conduct</u> on October 4, 2009. In addition to not following the directives that you received you did not seem to take them seriously. This incident alone would have been sufficient to place you in IC. You were told at this time that there would be consequences if this conduct was repeated. I am satisfied that this was a clear message, with a witness, and that you knew you had been warned, although a formal IC was not written.

> During the next week, once again you disobeyed the orders by not looking for other duties, as you were ordered to do, when your duty officer work shifts were ending. Again, instead of taking responsibility for your actions, you responded nonchalantly that you had finished your "number". This is not the conduct of an officer, however junior he might be.
>
> [Emphasis added]

[88] Col Gauthier considered [TRANSLATION] "that a RW is the minimum remedial measure that must be given to you in the circumstances." He criticized the applicant for his conduct, writing in his decision:

> [TRANSLATION]
>
> You are an officer. Although it may be recognized that at the rank of second lieutenant you may lack some knowledge and experience that may influence your performance, your conduct, however, must be irreproachable. That has not been the case in the events in question.
>
> [Emphasis added]

[89] Col Gauthier ordered that the original C&P be cancelled and that it be replaced by [TRANSLATION] "a RW for conduct deficiencies which would use the same terms as the C&P". This seems to imply that the new RW would include the handwritten note that the consequence for a repeated offence may include release from the forces.

Analysis of the decision

[90] I am of the view that the application for judicial review in this record must be allowed because the procedural deficiencies of the DAOD cannot be corrected in retrospect by the FA. In

addition, the FA exceeded its authority by replacing an invalid measure of performance with a new measure of conduct.

A. *Procedural fairness required by the DAOD applies to the FA and the Board.*

[91] The Directives detail the elements of procedural fairness that must be present when a remedial measure is issued. This creates legitimate expectations with respect to the procedure to follow (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, at para 26).

[92] In this case, several important elements of procedure were not followed when the remedial measure was imposed on the applicant: he was not given written notice of the intent to adopt counselling and probation, or copies of all the documents that would justify the adoption of the proposed C&P and that would be examined so as to make a final decision. The applicant was also not eligible for the reasonable period of at least 24 hours after receiving the written notice to make arguments in his defence, was unable to exercise his right to request assistance and an additional period to present his arguments, and did not have opportunity to present arguments to LCol Dufour, who was the initiating authority. The applicant received only a verbal warning on or around October 15 from Major Blanchet and the evidence does not show that it was specified that a remedial measure was planned. Then, on October 16 the C&P was imposed.

[93] These procedural deficiencies are significant and compromise the procedural fairness of the decision. The applicant did not have the opportunity to be heard and have his arguments considered before a final decision was taken. In addition, he was deprived of the possibility of

being informed in advance by the initiating authority and to see the documents relevant to the remedial measure.

[94] Therefore, I consider that Colonel Gauthier acted reasonably in accepting the opinion of the Board that the measure was invalid. However, I reject his conclusion that the breaches in fairness had been corrected during the redress of grievance process and that he could conduct a new analysis and rule on the grievance.

[95] In *Schmidt v Canada (Attorney General)*, 2011 FC 356 (*Schmidt*) at para 16-20, Justice Barnes explained that the Canadian Forces grievance process may remedy procedural errors that have affected the initial decision when it "does afford to a grievor recourse to a true *de novo* assessment of the case" (para 20). Justice Barnes quotes at para 16 three paragraphs of the decision *Taiga Works Wilderness Equipment Ltd v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 (*Taiga Works*), where the British Columbia Court of Appeal discusses this point:

> [36] The above review of the jurisprudence demonstrates that *Cardinal* does not stand for the broad proposition put forward by the employer that an appellate tribunal has no power to cure breaches of the rules of natural justice and procedural fairness. It is apparent from *Supermarchés Jean Labrecque Inc.* and *Mobil Oil* that the Supreme Court of Canada accepted that *Harelkin* (and *King*) and *Cardinal* can stand side by side. The fact that the Supreme Court of Canada mentioned both *Harelkin* and *Cardinal* with approval means that *Cardinal* cannot be taken to have overruled the proposition established by *Harelkin* (and *King*) that a breach of the rules of natural justice or procedural fairness can be cured by an appellate tribunal in appropriate circumstances.
>
> [37] I think it is fair to say that *Cardinal* stands for the proposition that a breach of the rules of natural justice or

> procedural fairness cannot be overlooked on the basis that the reviewing court or appellate tribunal is of the view the result would have been the same had no breach occurred. As demonstrated by the post-*Cardinal* authorities to which I have referred, *Harelkin* and *King* continue to stand for the proposition that appellate tribunals can, in appropriate circumstances, cure breaches of natural justice or procedural fairness by an underlying tribunal. The question then becomes how one should determine whether such breaches have been properly cured.
>
> [38] As did Huddart J.A. in *International Union of Operating Engineers* and Berger J.A. in Stewart, I prefer the approach advocated by de Smith, Woolf and Jowell in *Judicial Review of Administrative Action*. One should review the proceedings before the initial tribunal and the appellate tribunal, and determine whether the procedure as a whole satisfies the requirements of fairness. One should consider all of the circumstances, including the factors listed by de Smith, Woolf and Jowell.
>
> [Emphasis added]

[96] In *McBride v Canada (Minister of National Defence)*, 2012 FCA 181 (*McBride*) the Court also declared that the grievance process of the Canadian Forces may remedy procedural errors that have affected the original decision, in the following words:

> **3- If there was any unfairness, whether it was cured by subsequent disclosure prior to the decisions of the Grievance Board and the CDS?**
>
> [41] Mr. McBride argues that the deficiency of procedural fairness that occurred in this case was not remedied by the subsequent disclosure of the specific records relied upon by the Director, Medical Policy, in imposing the MELs. He relies on the decision of the British Columbia Court of Appeal in *Taiga Works Wilderness Equipment Ltd. v. British Columbia* (*Director of Employment Standards*), 2010 BCCA 97, [2010] B.C.J. No. 316 [*Taiga*] in support of this position. In particular, he says that when the factors enumerated below are considered, the proper conclusion is that the procedural defect in the earlier proceedings was not remedied by the Canadian Forces' subsequent disclosure. These factors are taken from Stanley A. De Smith, Sir Harry Woolf &

Jeffery A. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) and are quoted in *Taiga*:

> i) the gravity of the error committed at first instance;
>
> ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing;
>
> iii) the seriousness of the consequences for the individual;
>
> iv) the width of the powers of the appellate body; and
>
> v) whether the appellate decision is reached only on the basis of the material before the original decision maker or by way of re-hearing *de novo*.

[42] The difficulty is that these factors are to be considered only in cases where the question at issue is whether the original deficiency of procedural fairness has been cured by an appeal proceeding. The relevant passage reads as follows:

> Whilst it is difficult to reconcile all the relevant cases, recent case law indicates that the courts are increasingly favouring an approach based in large part upon an assessment of whether, in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness. At one end of the spectrum, when provision is made by statute or by the rules of a voluntary association for a full rehearing of the case by the original body (constituted differently where possible) or some other body vested with and exercising original jurisdiction, a court may readily conclude that a full and fair rehearing will cure any defect in the original decision. However, where the rehearing is appellate in nature, it becomes difficult to do more than to indicate the factors that are likely to be taken into consideration by a court in deciding whether the curative capacity of the appeal has ensured that the proceedings as a whole have reached an acceptable minimum level of fairness. Of particular importance are (i) the gravity of the error committed at first instance, (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (iii) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body and (v) whether the appellate decision is reached only on the

> basis of the material before the original tribunal or by way of rehearing de novo.
> *Taiga*, cited above, at para 28, (emphasis added).
> [Emphasis by the Court of Appeal]
>
> [43] In this case, both the Grievance Board and the CDS considered the matter *de novo* and in each instance, made a fresh decision on the basis of Mr. McBride's entire file and the submissions made at each level. In my view, the proceedings were not, therefore, appellate in nature and so the factors identified by Mr. McBride, while useful, are not a template for assessing whether the original deficiency of procedural fairness was remedied.
>
> [44] I think it is more useful to frame the question in terms of whether, given the circumstances as a whole, the procedure was fair. I have no hesitation in concluding that it was.
> [Emphasis added]
>
> [45] Before the Grievance Board considered Mr. McBride's case, he received the disclosure he had requested during the AR/MEL process. He was invited to make submissions to the Grievance Board and he did so, with full knowledge of both the contents of his health record and the specific records that the Director, Medical Policy, relied on in imposing the MELs. The same is true of the proceedings before the CDS. Each of these proceedings was a *de novo* consideration of Mr. McBride's file, culminating first in a non-binding recommendation that his grievances be dismissed, and then in a final decision by the CDS that his grievances be dismissed. In the circumstances, I find that the deficiency of Mr. McBride's right to procedural fairness was cured by these subsequent *de novo* hearings.

[97] In this case, it is impossible for me to conclude that "in all the circumstances of the hearing and appeal, the procedure as a whole satisfied the requirements of fairness" (*McBride* at para 42) when these circumstances include the possibility for the decision-maker to be exempted from the requirements of fairness.

[98] Procedurally, given that the respondent did not take care to ensure that the entire file that went before the Board was part of the evidence submitted in these proceedings, the Court is not able to "determine whether the procedure as a whole satisfies the requirements of fairness" (*Taiga Works*, above, at para 38). I note that when it is a *de novo* analysis where the decision-maker must justify his decision beyond a procedural error committed previously in the process and that the respondent before the Court tried to defend this decision, it is the respondent's obligation to ensure that the entire file is before the panel so that the Court may make the required analysis.

[99] In short, the Court is unable to determine from the file before it in this case what evidence was put before the Board, which were the exact terms of the Board's recommendation, or whether the applicant had been advised of the possibility that the FA could conduct a *de novo* analysis and notified him that he had to write his replies accordingly.

[100] Furthermore, in my view, the original omission of following the Directives is a breach procedural fairness that cannot then be repaired and that invalidates the entire procedure. As I described above, the purpose of the Directives is to guarantee procedural fairness so that the members of the Forces may dispute remedial measures that have a major impact on their careers.

[101] In this case, it seems that, among other problems, the applicant had not received the assistance that he had requested to prepare his two grievances; assistance that would have allowed him to put forward additional arguments from the beginning. The Court does not have,

in the record, evidence that would demonstrate what assistance was provided to the applicant, whether by an assisting officer or counsel or a paralegal.

[102] I am of the view that the Federal Court of Appeal did not intend, in *McBride*, to allow the Board or the FA to justify retroactive relief of the fairness requirement at all times. In *McBride*, it was possible to produce the documents requested before the final stage of revision and the applicant was thus fully aware of it and of the possibility of basing his arguments on them. In this case, it is impossible for the applicant to go back and receive the notice sent 24 hours before the imposition of the disciplinary action and the assistance of an assisting officer or counsel to defend himself before the final decision was made. Furthermore, the initiating authority cannot do an about-face and provide him with the documents justifying the action or review these documents, because it allegedly seems that no relevant documentation was written.

[103] Finally, a critical point; it is not clear that section 29.13 of the *National Defence Act* accepts that an FA conduct a *de novo* review, even in a situation where the procedural fairness requirements do not invalidate the entire process. Read carefully, nothing in this section suggests that the FA is authorized to start the analysis again without constraints.

[104] I am of the view that section 29.13 provides that the FA will show some restraint toward the Board. Except in cases of recommendations that are clearly erroneous or that attract unexpected consequences, the FA should not deviate from the conclusions drawn from the law and the facts by the Board to undertake a *de novo* process or substitute its opinion for that of the Board. It is a specialized tribunal with powers enabling it to come to conclusions in the area of

military remedial measures. The FA, however, does not have any expertise in law or in the area of making findings of fact based on evidence. The intent of the legislation could not be, through section 29.16, to allow the FA to set aside the Board's decisions without showing that these decisions were not reasonable.

[105] Therefore, I do not understand how rejecting the Board's recommendation for procedural reasons could allow the FA to then substitute its opinion to that of the Board with respect to substantive findings. In addition, how could the applicant imagine that the procedural errors of the Board that he exposed would end up in the FA inflicting a more severe remedial measure on him?

[106] First, the FA should have shown some error in all the Board's reasoning that invalidated its conclusion that an IC was the most appropriate remedial measure, so as to be able to review the evidence *de novo*. It did not do so. Rather, it substituted its opinion for that of the Board, alluding to a part of the evidence without explaining how it found the erroneous recommendation based on all of the evidence before the Board.

[107] Moreover, I do not agree that Colonel Gauthier had sufficiently informed the applicant regarding the process that he would follow in considering the Board's report. He described the basis for his analysis as follows:

> [TRANSLATION]
>
> … Finally, I note that you have chosen not to provide additional comments following receipt of the conclusions and recommendations of the CFGB by choosing not to send us the

> reply form, as requested of you in the letter from the CFGB of November 25, 2011.

[108] It was hardly clear what the applicant was to do in the circumstances. He seems to have been satisfied with the result regarding the Board, which would have little impact on his career and, thus, he would not have seen the need to present additional submissions. Did he have to repeat the submissions seeking that the Board's recommendation would be invalid because of procedural errors, without knowing that, if they were accepted, Colonel Gauthier would use this reasoning to undertake a *de novo* consideration?

[109] I also find worrisome the comments of the FA that he had [TRANSLATION] "read the comments of the officers . . . from National Defence HQ whose duty it is to advise me as to the topics raised in your grievance". It seems that the applicant should have been informed of the content of these comments if they had an effect on the decision; otherwise, he was not aware of what was said and had no opportunity to reply. The record does not contain any evidence showing what information was provided to Colonel Gauthier or how he used it in coming to his decision.

[110] As a final point, I would make another observation regarding procedural fairness in passing, although I do not base anything in my decision on this point. Col Gauthier stated that he had based his decision on comments from senior staff officers of the applicant's chain of command. Many of these officers would seem to have prejudices that weigh heavily against the applicant of which he was not informed and that were used as hidden reasons justifying his release.

[111] Indeed, and it will be discussed below, some of these officers, as can be seen in the respondent's documents, seem to have gone to the point of carrying out the applicant's release from the Canadian Forces for the unreasonable and fictitious reason that he had himself chosen to resign from the regular force so as to join the reserve force and that through an accident of bureaucracy completely unrelated to the applicant, his subsequent enrollment in the reserve force was never completed, despite working and being paid in the position for two months. The real reason for his release was that his senior officers did not believe that he had the moral fibre required to be an officer.

[112] It is my opinion that if the applicant's senior officers did not make the effort to treat him with fairness and candor with respect to his release, I do not see how an opinion based on their comments could serve as a basis for Col Gauthier's decision.

[113] However, there is no evidence on this issue in the remedial grievance given the fact that the issue relates mainly to the release grievance. Therefore, I will simply remark that there was the appearance of a problem of procedural fairness that was not raised.

[114] Nevertheless, for the reasons described above, I set aside Col Gauthier's decision and I return the file to the FA with the directive that the applicant's grievance will be allowed and the corollary remedies to this decision implemented.

B. *Col Gauthier's decision is based on an assessment of the applicant's conduct despite the fact that the scope of the remedial measure was limited for reasons of performance*

[115] I am of the view that the decision seems to have gone beyond the parameters of the grievance as described in the C&P. This was a remedial measure regarding performance and not conduct. It would seem that the Board made the same error, since Col Gauthier described his reasoning as follows:

> [TRANSLATION]
>
> The CFGB, after comparing what is alleged against you in the RW [of July7, 2009] and the C&P, found that there was no link between the deficiencies of one or the other. In its view, the RW refers more to performance deficiencies while the C&P relates to conduct.

[116] The Directives clearly provide that performance and conduct must be dealt with separately, explaining that "[a] deficiency shall be categorized as a conduct deficiency or a performance deficiency, but not both. . . . If a CF member demonstrates different deficiencies at the same time, each deficiency shall be dealt with separately". In this case, only the performance category was checked. Further, the description of deficiencies—[TRANSLATION] "inability to comply with the directives"—does not suggest bad conduct.

[117] However, the reasoning of Col Gauthier is based on conduct deficiencies. In his decision on the grievance, Col Gauthier referred to several moments where he found that the applicant demonstrated [TRANSLATION] "reprehensible conduct". He even made a distinction between the applicant's performance and conduct: [TRANSLATION] "Although . . . you may lack the knowledge and experience that may influence <u>your performance</u>, <u>your conduct</u> must be irreproachable".

[118] In my view, the Board's conclusion, [TRANSLATION] "that the C&P affects conduct" should not have led to a *de novo* analysis of conduct; rather, it should have led Col Gauthier to note that the original measure was invalid if the description of the deficiencies were really at odds with the chosen category.

[119] Finally, if the replacement action must be understood to include the possibility of passing directly to release in the case of a repeated offence, it seems as disproportionate as the original invalid measure.

Request T-580-12: Release grievance

(1) *Could an abuse of power in delaying a decision justify a mandamus order?*

[120] In his memorandum, the applicant seeks a *mandamus* order, relying on the innovative argument that the respondent had committed an abuse of process by delaying the decision on the release grievance. I repeat his submissions regarding this dispute:

> [TRANSLATION]
>
> 42. Are the armed forces illegally neglecting or refusing to make a decision on the applicant's grievance or are they unreasonably delaying the applicant's file?
>
> 43. Are the armed forces committing an abuse of process or of right with respect to the applicant?

[121] Normally the issue of an intentional delay that would constitute an abuse of process would be treated separately as an issue of procedural fairness and would not rely on a *mandamus* remedy. It is a separate cause of action that may give rise to remedies that include a stay of the

grievance process, which would dispose of the remedial grievance. However, the Court, in interpreting this applicant's argumentation, is not prepared to consider this issue as purely an issue of abuse of process. The application is for a *mandamus* order and it is a remedy that is solidly based in the arguments presented.

[122] The question for the Court, in assessing the applicant's arguments, is whether an allegation of intentional delay may be taken as a factor that should be considered in a *mandamus* application and may correct other deficiencies in the application, such as the consequences here of the applicant's consent to several extensions and his choice not to exercise his right to have the file passed to the FA.

[123] In my view, it is logical to accept the applicant's submissions, with a view to supporting the integrity of the redress of grievance process and in the interests of justice. For example, if the applicant may demonstrate that the delays caused by the repeated applications for extensions by the respondent were part of an intentional strategy aiming to exhaust him and motivate him to abandon his grievance, then his consent to the extensions should not pose an obstacle to a *mandamus* order in his favour.

[124] Therefore, the issue is to apply the *mandamus* principles to a factual situation, without having to modify these principles. I think that the scenario before the Court is rare, even unique, because in most cases applicants would instead seek a stay of the grievance process if they are able to show bad faith in the processing of their file. In this case, the manner of presenting the issue relies above all on the self-represented applicant's lack of legal knowledge, in an attempt to

pose a complex issue in a specialized field. Further, he would like the case to be decided by LGen Devlin in person, which would be exceptional for a grievance from an officer of his rank, since LGen Devlin was the commander of the land forces. He made his application with this purpose.

[125] Therefore, I ultimately agree that an allegation of bad faith or an abuse of process may excuse an applicant from having to show some of the elements required for a *mandamus* order, when the factual situation leads to such flexibility.

(2) *Do the facts of this case show abuse of power by the respondent in the delay caused by the release grievance?*

[126] The principles that govern the *mandamus* orders are set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 (FCA) (*Apotex*), especially at para 45. The decision of Justice Tremblay-Lamer in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33, [1998] FCJ No 1553 (QL) (TD) (*Conille*) is also very relevant to this case. I quote the relevant excerpts as follows:

> *Apotex* at para 45:
>
> [45] Several principal requirements must be satisfied before mandamus will issue. The following general framework finds support in the extant jurisprudence of this Court (see generally *O'Grady v. Whyte*, [1983] 1 F.C. 719 (C.A.), at pages 722-723, citing *Karavos v. Toronto & Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.), at page 297; and *Mensinger v. Canada* (*Minister of Employment and Immigration*), [1987] 1 F.C. 59 (T.D.), at page 66.
>
> . . .

> 3. There is a clear right to performance of that duty, in particular:
>
> > . . .
> >
> > b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; see *O'Grady v. Whyte*, *supra*, citing *Karavos v. Toronto & Gillies*, *supra*; *Bhatnager v. Minister of Employment* and Immigration, [1985] 2 F.C. 315 (T.D.); and *Canadian Wildlife Federation Inc. v. Canada* (*Minister of the Environment*), *supra*.
> >
> > . . .
>
> 6. The order sought will be of some practical value or effect: *Friends of the Oldman River Society v. Canada* (*Minister of Transport*), [1990] 2 F.C. 18 (C.A.), per Stone J.A., at pages 48-52; affd [1992] 1 S.C.R. 3, per La Forest J., at pages 76-80; *Landreville v. The Queen*, [1973] F.C. 1223 (T.D.); and *Beauchemin v. Employment and Immigration Commission of Canada* (1987), 15 F.T.R. 83 (F.C.T.D.).
>
> . . .
>
> 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

Conille at para 23:

[23] From the reasons of the Court, it appears that three requirements must be met if a delay is to be considered unreasonable:

(1) the delay in question has been longer than the nature of the process required, prima facie;

(2) the applicant and his counsel are not responsible for the delay; and

(3) the authority responsible for the delay has not provided satisfactory justification.

[127] Without the allegation of abuse of process related to the delay in processing the grievance, I would immediately reject the application for a *mandamus*. The applicant granted numerous extensions in a process that gives him the right to go up to the next level of review by simply refusing to continue to the first level. He then initiated an application for judicial review without communicating a last time with the grievance authority or declaring a clear time frame.

[128] I do not consider the offer by the respondent to provide a decision in five or six weeks. This offer was made after the submission of the notice of motion and should not be part of the tribunal record. It is in fact an offer of settlement agreement through which the respondent proposes to do what he should have done without waiting for the applicant and in a rather short period. Besides the offer to settle, I agree to consider the documents dated after the notice of application filed by the respondent because they also contain evidence supporting the applicant's arguments. If the Attorney General wants to put before the Court a document assisting the opposing party, I will not stop him.

[129] Following the criteria in *Conille*, I find that the applicant meets the first and third part of the test. As regards the third factor, the respondent filed no evidence to justify the delay in this case.

[130] For the first factor, I note that the time that the army commander took to process the release grievance is considerably longer than the time that the delegate took to process the remedial grievance. The release grievance was first filed two months before the remedial grievance and it is much more important for the applicant. Indeed, the remedial grievance is

essentially not applicable if the applicant does not succeed in the release grievance. Thus, a wait period of more than two years (from January 25, 2010, to March 22, 2012) without an initial decision made by the IA appointed for the release grievance seems disproportionate when compared to the total period of 24 months (from March 19, 2010, to February 10, 2012) for processing the remedial grievance, which includes an analysis begun at the IA level, the transfer to the FA and an analysis by the Board, before going to the final step of the analysis by the FA and the promulgation of Colonel Gauthier's decision. The respondent brought no evidence regarding the normal time required to process a grievance and was not able to argue that there were systemic delays or that the delay was not unusual.

[131] The difficulty for the applicant is present in relation to the second factor. It may be considered that he had contributed to the delay by consenting to the extensions without establishing a deadline. I agree that he did not want to advance the grievance by refusing to accept another extension given his hope that LGen Devlin would hear his grievance.

[132] Nevertheless, the issue as presented by the application refers to <u>the genuineness</u> of the reasons for the requests for extensions. The Court did not receive any documentary evidence on this topic. Neither the applicant nor the respondent filed any documentation on the process except the statements in the applicant's affidavit and the documents attached to the cross-examination of the applicant by the respondent.

[133] Consequently, the issue must be decided based on the sufficiency of the applicant's evidence. The Court must, specifically, determine whether the applicant built a *prima facie*

argument of abuse of process that is complete enough to cause a transfer of the burden of proof to the respondent, which would force the respondent to explain and reason his applications for extensions. Only if the burden was thus displaced, would the applicant succeed in his aim to be granted a *mandamus* order.

The circumstances of the applicant's release

[134] The applicant claims that the grievance process is an extension of his release from the Forces, which he submits was conducted in bad faith. He testified that the real reason for his release was hidden so that he would not know that it was motivated by his performance or his conduct rather than by administrative problems with the acceptance of his transfer from the regular force.

[135] The letter from Colonel Lapointe and the documents communicated to LCol de Sousa on November 30, 2009, seem to leave no doubt that the applicant had been released as unable to work. The applicant was not advised of this fact and he was not provided the documents that described the LFQA's displeasure with his officer-like qualities. This documentation was only disclosed during the redress of grievance process and only after the applicant had discovered the existence of these documents by finding references to them in the correspondence. These facts seem to support a very credible argument that the release should be cancelled for lack of procedural fairness and that the applicant should be reinstated as an officer, probably in the reserve force.

[136] Normally, this would not be sufficient to prove an abuse of the grievance process. However, in this case the criticisms of the applicant included attacks to the effect that he did not have the moral fibre to be an infantry officer. This characterization had harmed him in secret since the time of his first application for transfer to the reserve force, in 2008. His supervising officer at the infantry school had made the remark at the time of the applicant's application to be withdrawn from Phase 4 of training dated February 22, 2008. LCol Roy, commander of the applicant's first reserve unit, raised problems relating to the applicant's file with LCol Boisvert and he concluded that the commander of the LFQA would refuse to approve the transfer. In turn, LCol Boisvert communicated criticisms of the applicant's character to LCol Dufour, indicating to him that the applicant was [TRANSLATION] "unable to manage stress" and that he did not have "the moral fibre to be an Infantry Officer".

[137] LCol Dufour seems to have considered these criticisms by imposing the remedial measure, given that he suggested that the applicant would be more comfortable in the ranks and that he added to the C&P form that one consequence if he did not correct the deficiencies could be his release from the Forces. Then, Colonel Lapointe referred to the e-mails between LCol Dufour and LCol Boisvert and concluded: [TRANSLATION] "We are entitled to question leadership qualities".

[138] All the documentation concerning the different remedial measures imposed on the applicant, as well as the e-mails between senior officers, was provided to LCol de Sousa. He accepted the recommendation of Colonel Lapointe and refused the applicant's enrollment in the

reserve force despite the fact that he was working and was being paid for a few weeks as an officer of the reserve force.

[139] These factors underlying the applicant's release were not disclosed to him. The fact that his release was organized behind the scenes by the LFQA was not disclosed. He only learned these facts because he noticed the references to the e-mails in the correspondence that he had been provided with and requested their disclosure.

[140] The applicant also claimed that the official explanation of his release was misleading for two reasons: first, the release from his nine-year contract with the regular force had been approved specifically so that he could be transferred to the reserves and, thus, it could not be said that he voluntarily left the Forces; and, second, it could not be said that he had not served as a member of the reserve force because it had then been decided not to accept his enrollment.

[141] The internal documentation certainly suggests that the request for the applicant's resignation from the regular force was conditional on his acceptance in the reserve force. There does not ne seem to be any explanation for the respondent's claim that the cancellation of his approval of the transfer would affect being accepted in the reserve, but not leaving the regular force, even more so because it is clearly admitted in the e-mails before the Court that the administrative problem stemmed from the LFQA neglecting to properly check the file—[TRANSLATION] "our pants are around our ankles".

[142] The matter carries some irony because of the fact that the applicant can logically argue that if the transfer had never been properly approved, his resignation had also not been approved and, thus, he remained a member of the regular force. A calculation of the damages on this base—that of an officer of the regular force prevented from presenting himself to work since 2009—would probably reach a higher total.

[143] The argument that the applicant never became a member of the reserve force is contradicted even more vigorously by the facts. The documentation unequivocally shows that his enrollment had been accepted by both entities, that an official message was issued and that a deployment contract as a reservist had been signed. There is no doubt that the applicant accomplished tasks and was compensated as a reservist. The accumulated evidence of bad faith is found in the respondent's internal e-mails indicating that a decision had knowingly been made to keep him as a reservist because staff was needed for Op Podium. Despite LCol Boisvert's statement that the Forces were in an illegal situation because of the irregular transfer, the LFQA permitted the applicant's deployment with Op Podium to continue until his voluntary return on October 30, 2009, as stated in Colonel Lapointe's letter: [TRANSLATION] "The member was kept in Class C in the OP PODIUM for the purpose of not negatively affecting operations".

[144] This suggests that the decision to refuse the transfer had been intentionally placed on hold and was only implemented once the applicant had left the OP. Even there, it appears that he had to abandon the deployment as the only means to be able to return to take care of his wife, who was experiencing personal difficulties. In the absence of any explanation, which is difficult to conceive of and could contradict the multiple clear documents that the applicant had presented on

these points, I am of the view that the applicant built a strong *prima facie* presumption of bad faith from the respondent.

[145] I also consider that unless he is able to produce evidence that may contradict his internal documents, the respondent cannot deny that the reason that he claims (unapproved transfer / refusal of enrollment) was designed to guarantee that the applicant was found outside the Forces apparently by his own choice. The respondent's original statement to the applicant was that he had voluntarily resigned from the regular force and, thus, was not subject to an involuntary release. It is the only scenario that the Court sees could explain the extraordinary situation where an officer would be released from the Canadian Forces without receiving any documentation certifying this fact, given the circumstances, and indicating that he had made the decision.

[146] The other possibility is that no one wanted to take responsibility for the decision, and that it had been calculated that if the release was not documented, the applicant would not know how or against whom to complain. In his redress of grievance, the applicant had initially appointed LCol de Sousa, his commander, as the decision-making authority and he had described events relating to LCol de Sousa's refusal to accept his enrollment. He had to modify the text of his redress of grievance later, once he had received the official release form.

Release under article 5(e) of the QR&Os

[147] The official document certifying the applicant's release was provided to him approximately two months after he received oral notice of his release. This document is not part of the evidence before the Court. A reference in the applicant's amended affidavit indicates that

he was released under article 5(e) of the QR&Os. The applicant filed a document entitled "Description of the reasons for release", meant to be a guide for employment insurance and referring to article 15.01 of the QR&Os. This document describes a release 5(e) as [TRANSLATION] "regular enrollment", which I take as an incorrect writing of [TRANSLATION] "irregular enrollment". The explanation accompanying this category is: [TRANSLATION] "several reasons such as non compliant level of education, medical problem existing at the time of the enrollment".

[148] Based on the documents filed by the applicant, it appears that the respondent continued to claim that the applicant's release resulted in an administrative error during his enrollment in the reserves as an integral part of his transfer from one component of the land forces to the other. The documents clearly show that, to the contrary, the release was for the reason of unsatisfactory performance or conduct. It had nothing to do with an administrative error and the real reason should not have played a role in an internal transfer.

[149] The fact that the document certifying the release, which was filed during the grievance process, repeats the incorrect statement of the reasons for release and thus the circumstances of the release, contradicting the internal correspondence of the military authorities, created a *prima facie* presumption that the respondent was engaged in an abuse of the process of redress of grievance.

[150] Furthermore, the very fact that the respondent provided a formal release document to the applicant is a change to his original explanation. If the applicant had really resigned from the

regular force without his enrollment being accepted in the reserve force, no release document from the reserve would have been required. The question must also be posed as to what was the applicant's status at the time of his supposed release. If the transfer had not been approved, it would seem that the release would apply to his employment with the regular force and, thus, that his full-time officer salary had not been paid.

[151] In my view, in light of the circumstances of the supposed release and the clear problems attached to it, the applicant succeeded in establishing a *prima facie* presumption of bad faith by the authorities involved in the release process, by the fact that the situation had been depicted in an erroneous manner and that this action was unjust and intentional.

Refusal of assistance with the applicant's grievance

[152] The applicant alleges that he was misled regarding the assistance available to prepare his grievance; he confirmed that he was told that the staff that he had requested were out of the country, while that was not true. The respondent did not dispute this statement in his argumentation or during cross-examination of the applicant.

[153] The applicant continued to request assistance with his grievance. In an addendum filed on April 26, 2010, he complained that the assistance provided was insufficient because he was not able to freely choose the officers <u>that he wanted</u>. I note that the evidence before the Court shows that one of the officers named refused to act because he was facing a possible conflict of interest. I do not see in the evidence the information that would support a conclusion that the applicant was refused assistance with his grievance, besides his undisputed statement that he was lied to about the availability of some officers.

Dispute on the choice of the LFQA as IA

[154] The evidence that the applicant had to object to in the original choice of IA for his release grievance concerns me. I am further concerned that it was LCol Boisvert who replied to the applicant, sending him a letter indicating that he did not see any problem in the IA remaining an officer in the LFQA. I agree with the applicant, who believed that the prior involvement of LCol Boisvert and the LFQA in the file had made the staff of this HQ unable to work as IA. I also agree with him that the commander of the LFQA was allegedly involved in the approval or refusal of the transfer and release under article 5(e).

[155] In the end, LGen Devlin was substituted for the LFQA officers, the commander of the land force. Therefore, the redress of grievance was sent to a high-ranking officer; a lieutenant general, while the FA is a general. The respondent reacted to the applicant's complaint and the evidence does not reveal any conflict of interest for the IA, especially since the applicant wanted to have his grievance decided by LGen Devlin.

Extensions of the deadline for processing the grievance

[156] The file submitted to the Court did not contain any document on the extensions that took place between May 13, 2010, and filing the notices of application on March 20, 2012. The only relevant evidence is the statements in the applicant's affidavits for which the IA had proposed several extensions that he had accepted, but that after the end of the last extension on March 1, 2010, none other had been requested before the filing of the notice of application.

[157] The applicant stated that he had turned to the Court for a solution after 18 months of waiting. I consider that the respondent could not be exempted for the time spent sorting out the issue of an appropriate IA and, thus, that the total time instead is closer to two years.

Decision on the remedial grievance

[158] Before the end of the last extension for the release grievance, on March 1, 2012, Colonel Gauthier had made his decision of February 10, 2012, in the remedial grievance. As noted above, Colonel Gauthier rejected the recommendation of the Grievance Board and through a *de novo* analysis imposed a more severe remedial measure than that which the Board had suggested. The applicant expressed the consequence of this decision as erasing his last hope that he would be treated fairly in the grievance process. He also cited this decision as his motivation for wanting to receive a decision from LGen Devlin, the IA.

[159] In my view, it would be a reasonable conclusion for the applicant to lose faith in the ability of an independent employment tribunal specializing in military grievances, following these events. It would be unusual to see as a consequence to reverse a decision for violating standards of procedural fairness, including neglecting to follow written directives, an even more negative result for the complainant. Furthermore, the circumstance surrounding the "*de novo*" decision of Colonel Gauthier who had shaken the applicant's faith the most in the process would be the colonel's observation that he had [TRANSLATION] "taken note of the comments of the senior staff officers from your chain of command". These were the same officers whose conduct had been described above and who had concluded that the applicant did not have the "moral fibre" required to be an officer.

[160] From the point of view of discouraging the applicant and motivating him to abandon his grievance, Colonel Gauthier's decision certainly helped to indicate how things could have turned out with the release grievance. He noted in his amended affidavit that he had lost confidence in the system, given that the recommendation of the independent Tribunal could be abandoned and replaced by a final decision based on comments by officers who believed that he was unable to work as an Infantry Officer.

[161] However, I do not see how the process in a connected grievance could be characterized as an abuse of power as the basis of these facts. There was no suggestion that Colonel Gauthier's decision was affected by bad faith. It is purely speculation on the applicant's part.

Suggestion to abandon the grievance

[162] I am also concerned by the fact that the staff charged with advancing the file did not request a new extension before the deadline of March 1, 2012. It appears to be a strategy of giving way, a hope that if the file is set aside, the applicant, seeing the issue of the first grievance as deceiving for him in terms of the FA, would abandon his second grievance without waiting for the IA decision.

[163] It would seem that it was the hope of the grievance authority in Ottawa, given his spontaneous and surprising suggestion that the applicant consider the possibility of abandoning his grievance, even after he had advised Ottawa that he had filed an application for judicial review. This alternative was offered at the same time as the assurance that a legal process was not required because LGen Devlin could render his decision in five weeks or the file could be

sent to the FA. In the circumstances, I find that the suggestion to abandon shows that the grievance authority had attempted to discourage the applicant and hoped that he would drop his grievance. Again, however, it is only speculation to attribute bad faith to the staff of the grievance authority as motivation for their inappropriate comments on this topic.

Conclusions on the mandamus application

[164] Relying on the respondent's documents and in the absence of any kind of defence by the respondent, the applicant established a *prima facie* presumption that there was bad faith in the circumstances of his release, involving organizations of the regular force and the reserve force and possibly involving high-ranking officers, given the level of authority required to refuse his transfer and issue a formal document of release. However, it was not enough to come to a *prima facie* conclusion of abuse of power with respect to the staff responsible for the advancement of the grievance.

[165] The applicant also succeeded in raising concerns with the Court regarding the lack of assistance in the first steps of the grievance, at least in formulating his requests, no evidence was filed on the subsequent steps. I also agree that the IA should not have been chosen among the officers of the LFQA initially and that LCol Boisvert should not have been involved in the matter, in attempting to defend the choice of IA.

[166] However, more persuasive evidence is required on the events that took place after the filing of the grievance and the delay in its processing and especially in the absence of explanation on the part of the applicant for refusing any extension of the file in the remedial grievance, while

granting six extensions to the respondent in the Release grievance. This suggests that he concluded that there was a benefit for him in accepting the delay.

[167] I may suppose that the applicant was patient for long months in waiting for LGen Devlin's decision because once the file left Montréal for Ottawa and was in the hands of a very high-ranking officer, he was confident that he would receive a fair decision, while he was not granted an extension to the IA for the remedial grievance because he did not feel the same confidence. However, this is only a theory. It remains that the applicant was to bring better evidence to explain his choice not to have direct access to the FA.

[168] In these circumstances, it is difficult to excuse the fact that the applicant had never warned the respondent of his intention to refuse other extensions, by establishing a fixed deadline after which he reserved the right to bring the matter to justice.

[169] Finally, this is an inference that requires that the applicant meets a significant burden of proof. Despite the factors on which he based his arguments, he did not reach the threshold required to support a finding of fact that the delay was due to illegitimate reasons.

[170] For these reasons, the *mandamus* application is rejected.

[171] That said, given my concerns relating to the possibility of abuse of process in the treatment of the release grievance, which relates to the comments from the applicant's senior officers, I order that if this grievance is sent to the FA, the applicant would be allowed to amend

his grievance to add the issue of abuse of process. I do not see any reason why the FA would not have jurisdiction to assess the issues of procedure that developed throughout the grievance process. Furthermore, I believe that the CDS would want to be aware of problems possibly affecting the integrity of the procedures and would not object to reviewing the matter.

[172] Furthermore, given my concerns regarding the applicant's access to the documents and the deficiencies in both files that include very relevant documentation, I order the respondent to provide the applicant with all the documents in his possession that were created before March 22, 2012, and that affected the applicant's release from the Forces and the processing of his grievances. If some of these documents are subject to privileges, the respondent should identify them and provide the evidence.

Costs

[173] I award costs to the applicant in T-581-12. If the parties cannot agree on the amount, the applicant is granted the right to present written submissions of a maximum of three pages within 14 days of the publication of this judgment. These may contain as an appendix a bill of costs and the required documentation. The respondent is then granted 14 days to file a reply with respect to the costs.

[174] I do not award any costs in T-580-12 because I find that the issue is new and I am not persuaded that the interests of justice were properly served in ensuring that the applicant could bring his case fully before the Court.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. In docket T-580-12,

    a. the application is allowed;

    b. the decision of Col Gauthier dated February 10, 2012, is cancelled with instructions that the grievance should be returned before the final authority with instructions to allow the grievance and award to the applicant all related relief; and

    c. the respondent is ordered to pay the applicant the legal costs, with the amount to be set by a separate order, if necessary.

2. In docket T-580-12,

    a. the application is rejected;

    b. on the condition that the grievance advances to the level of the final authority;

        i. the applicant will have the right to modifier his grievance to argue before the final authority that there was abuse of process by the initial authority in illegally omitting or intentionally refusing to make a decision relating to his grievance; and

ii. the respondent is ordered to disclose to the applicant with an index in chronological order all the documents in his possession that are relevant in the circumstances to the applicant's release and the procedures followed in processing both grievances up to March 20, 2012, with the exception of those that are privileged, which will have to be stipulated.

c. There are no orders relating to the legal costs.

"Peter Annis"

Judge

Certified true translation
Catherine Jones, Translator

APPENDIX "A"

Legislative and Regulatory Framework

National Defence Act, RSC 1985, c N-5	*Loi sur la défense nationale*, LRC 1985, ch N-5
…	**[…]**
29.13 (1) The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievances Committee.	**29.13** (1) Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité des griefs.
Reasons	Motifs
(2) If the Chief of the Defence Staff does not act on a finding or recommendation of the Grievances Committee, 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.
…	[…]
29.16 (1) The Canadian Forces Grievance Board is continued as the Military Grievances External Review Committee, 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) 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, est prorogé sous le nom de Comité externe d'examen des griefs militaires.
Full- or part-time	Temps plein ou temps partiel
(2) The Chairperson and one	(2) Le président et l'un des

Vice-Chairperson are each full-time members and the other members may be appointed as full-time or part-time members.

vice-présidents occupent leur charge à temps plein. Les autres membres sont nommés à temps plein ou à temps partiel.

Tenure and removal

Durée du mandat et révocation

(3) Each member holds office during good behaviour for a term not exceeding four years but may be removed by the Governor in Council for cause.

(3) Les membres sont nommés à titre inamovible pour un mandat maximal de quatre ans, sous réserve de révocation motivée du gouverneur en conseil.

Re-appointment

Mandat renouvelable

(4) A member is eligible to be re-appointed on the expiry of a first or subsequent term of office.

(4) Leur mandat est renouvelable.

Duties of full-time members

Fonctions des membres à temps plein

(5) Full-time members shall devote the whole of their time to the performance of their duties under this Act.

(5) Les membres à temps plein se consacrent exclusivement à l'exécution des fonctions qui leur sont conférées par la présente loi.

Conflict of interest – part-time members

Conflits d'intérêts : membres à temps partiel

(6) Part-time members may not accept or hold any office or employment during their term of office that is inconsistent with their duties under this Act.

(6) Les membres à temps partiel ne peuvent accepter ni occuper de charge ou d'emploi incompatible avec les fonctions que leur confère la présente loi.

Remuneration

Rémunération des membres

(7) Members who are not

(7) Pour leur participation aux

officers or non-commissioned members are entitled to be paid for their services the remuneration and allowances fixed by the Governor in Council.

travaux du Comité des griefs, les membres qui ne sont ni officiers ni militaires du rang reçoivent la rémunération et les allocations fixées par le gouverneur en conseil.

Travel and living expenses

(8) Members who are not officers or non-commissioned members are entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of work, if full-time members, or their ordinary place of residence, if part-time members, subject to any applicable Treasury Board directives.

Frais

(8) Ils sont indemnisés, en conformité avec les instructions du Conseil du Trésor, des frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel soit de travail, s'ils sont à temps plein, soit de résidence, s'ils sont à temps partiel.

Status of members

(9) Members who are not officers or non-commissioned members are deemed

(*a*) to be employed in the public service for the purposes of the *Public Service Superannuation Act*;

(*b*) to be employees for the purposes of the *Government Employees Compensation Act*; and

(*c*) to be employed in the federal public administration for the purposes of any regulations made pursuant to section 9 of the *Aeronautics Act*.

Statut des membres

(9) Ils sont en outre réputés :

a) faire partie de la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*;

b) être des agents de l'État pour l'application de la *Loi sur l'indemnisation des agents de l'État*;

c) appartenir à l'administration publique fédérale pour l'application des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.

Secondment

(10) An officer or a non-commissioned member who is appointed as a member of the Grievances Committee shall be seconded to the Grievances Committee in accordance with section 27.

Détachement

(10) L'officier ou le militaire du rang qui est nommé membre du Comité des griefs y est détaché en conformité avec l'article 27.

Oath of office

(11) Every member shall, before commencing the duties of office, take the following oath of office:

I, do solemnly swear (*or* affirm) that I will faithfully and honestly fulfil my duties as a member of the Military Grievances External Review Committee in conformity with the requirements of the *National Defence Act*, and of all rules and instructions under that Act applicable to the Military Grievances External Review Committee, and that I will not disclose or make known to any person not legally entitled to it any knowledge or information obtained by me by reason of my office. (*And in the case of an oath*: So help me God.)

Serment

(11) Avant d'entrer en fonctions, les membres prêtent le serment suivant :

Moi, je jure (*ou* j'affirme solennellement) que j'exercerai fidèlement et honnêtement les devoirs qui m'incombent en ma qualité de membre du Comité externe d'examen des griefs militaires en conformité avec les prescriptions de la *Loi sur la défense nationale* applicables à celui-ci, ainsi que toutes règles et instructions établies sous son régime, et que je ne révélerai ni ne ferai connaître, sans y avoir été dûment autorisé(e), rien de ce qui parviendra à ma connaissance en raison de mes fonctions. (*Dans le cas du serment, ajouter :* Ainsi Dieu me soit en aide.)

…

[…]

29.21 The Grievances Committee has, in relation to the review of a grievance

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

referred to it, the power

pouvoirs suivants :

(*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;

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*) to administer oaths; and

b) faire prêter serment;

(*c*) to receive and accept any evidence and information that it sees fit, whether admissible in a court of law or not.

c) recevoir et accepter les éléments de preuve et renseignements qu'il estime indiqués, qu'ils soient ou non recevables devant un tribunal.

Queen's Regulations and Orders for the Canadian Forces (QR&Os)

Ordonnances et règlements royaux applicables aux Forces canadiennes (ORFC)

7.06 - WHO MAY ACT AS INITIAL GRIEVANCE AUTHORITY

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

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

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

1. the commanding officer of the grievor if the commanding officer can grant the redress sought; or

1. le commandant du plaignant, s'il peut accorder le redressement demandé;

2. the commander, or officer holding the appointment of Director General or above at

2. le commandant ou l'officier titulaire d'un poste de directeur général ou d'un poste supérieur à

National Defence Headquarters, who is responsible to deal with the matter that is the subject of the grievance.

celui-ci au quartier général de la Défense nationale qui est chargé de décider des questions faisant l'objet du grief.

(2) If the grievance relates to a personal decision, act or omission of an officer who is the initial authority, the officer shall refer the grievance to the next superior officer having the responsibility to deal with the matter that is the subject of the grievance and that officer shall act as the initial authority.

(2) Si le grief se rapporte à une décision, un acte ou une omission de l'autorité initiale, celle-ci doit renvoyer le grief à l'officier qui lui est immédiatement supérieur et qui a compétence à l'égard de la question faisant l'objet du grief; ce dernier dès lors agit en qualité d'autorité initiale.

(G) [P.C. 2000-863 effective 15 June 2000]

(G) [C.P. 2000-863 en vigueur le 15 juin 2000]

7.07 - DUTIES OF INITIAL GRIEVANCE AUTHORITY

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

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

1. consider and determine the grievance;

2. advise the grievor in writing, through the commanding officer if the initial authority is not the commanding officer, of:

    1. the determination and the reasons for it; and

    2. where applicable, the grievor's entitlement to submit the grievance to

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

1. étudier et décider du bien-fondé du grief;

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

    1. de la décision et des motifs à l'appui;

    2. le cas échéant, du droit du plaignant de déposer son grief devant le chef d'état-

the Chief of the Defence Staff;

major de la défense;

3. return any documents or things submitted by the grievor if requested to do so; and

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

4. maintain a record of the grievance, including the determination made and any action taken.

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

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

(2) Si une autorité initiale - autre que le chef d'état-major de la défense - ne prend pas de décision à 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) Where the Chief of the Defence Staff is the initial authority, the time limit under paragraph (1) does not apply.

(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.

(G) [P.C. 2000-863 effective 15 June 2000]

(G) [C.P. 2000-863 en vigueur le 15 juin 2000]

(1) 7.08 - CHIEF OF THE DEFENCE STAFF

(1) 7.08 - CHEF D'ÉTAT-MAJOR DE LA DÉFENSE

Section 29.11 of the *National Defence Act* provides:

L'article 29.11 de la *Loi sur la défense nationale* prescrit :

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

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

(G) [P.C. 2000-863 effective 15 June 2000]

(1) 7.12 - REFERRAL TO GRIEVANCES COMMITTEE

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

1. administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;
2. 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;
3. pay, allowances and other financial benefits; and

(G) [C.P. 2000-863 en vigueur le 15 juin 2000]

(1) 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 :

1. 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;
2. 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;
3. la solde, les indemnités et autres prestations financières;

4. 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 Grievances Committee for its findings and recommendations.

(G) [P.C. 2000-863 effective 15 June 2000; P.C. 2013-1068 effective 18 October 2013 – heading, portion before (1)(*a*), and (2)]

a) *NOTES*

(A) Pursuant to subsection 29.12(1) of the *National Defence Act*, the Chief of the Defence Staff may refer a grievance other than one prescribed in article 7.12 to the Grievances Committee. 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 Grievances Committee. 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 Grievances Committee would include the

4. 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.

(G) [C.P. 2000-863 en vigueur le 15 juin 2000]

a) *NOTES*

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

benefit to be obtained from having the grievance reviewed externally and the capacity of the Grievances Committee to investigate independently and make findings.

conclusions de façon indépendante.

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

1. the written submissions made to each authority in the grievance process by the officer or non-commissioned member presenting the grievance;
2. the decision made by each authority in respect of the grievance; and
3. any other information under the control of the Canadian Forces that is relevant to the grievance.

(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 :

1. des argumentations écrites présentées par l'officier ou le militaire du rang à chacune des autorités ayant eu à connaître du grief;
2. des décisions rendues par chacune d'entre elles;
3. des renseignements pertinents placés sous la responsabilité des Forces canadiennes.

(C) [15 June 2000; 18 October 2013]

(1) 7.13 - DUTIES AND FUNCTIONS OF GRIEVANCES COMMITTEE

Subsection 29.2(1) of the *National Defence Act* provides:

(C) [15 juin 2000]

(1) 7.13 - FONCTIONS DU COMITÉ DES GRIEFS

Le paragraphe 29.2(1) de la *Loi sur la défense nationale* prescrit :

"29.2(1) The Grievances Committee 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."

«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.»

(C) [18 October 2013]

(C) [18 octobre 2013]

(3)7.16 - SUSPENSION OF GRIEVANCE

(3) 7.16 - SUSPENSION DE GRIEF

(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.

(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) 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.

(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.

(G) [P.C. 2000-863 effective 15 June 2000]

(G) [C.P. 2000-863 en vigueur le 15 juin 2000]

(a) NOTE

A member retains the right to grieve where a grievance has been suspended under paragraph (1) of this article.
(C) [15 June 2000]

a) *NOTE*
Dans le cas où un grief a été suspendu aux termes de l'alinéa (1) du présent article, le militaire conserve le droit de poursuivre son grief.
(C) [15 juin 2000]

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DOAD 5019-4, Mesures correctives

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS :	T-580-12 and T-581-12
STYLE OF CAUSE:	NABIL RIFAI v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
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APPEARANCES:

Jérome Dupont-Rachiele	FOR THE APPLICANT
Chantal Sauriol	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Private law firm of Jérome Dupont-Rachiele	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT