



Canadian Forces
Grievance Board

Comité des griefs des
Forces canadiennes

ANNUAL REPORT

CANADIAN FORCES
GRIEVANCE BOARD
ANNUAL REPORT 2004

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March 31, 2005

The Honourable William Graham
Minister of National Defence
National Defence Headquarters
MGen Georges R. Pearkes Building
101 Colonel By Drive
Ottawa, Ontario
K1A 0K2

Dear Minister:

Pursuant to section 29.28(1) of the *National Defence Act*, I hereby submit the 2004 annual report on the activities of the Canadian Forces Grievance Board for tabling in Parliament.

Yours truly,

A handwritten signature in blue ink, appearing to read "Diane Laurin". The signature is written in a cursive style with a large initial 'D'.

Diane Laurin
Chairperson

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MESSAGE FROM THE CHAIRPERSON

Every year can offer an organization some form of milestone. Last year's was an operational strategy, the implementation of which placed the Board firmly on the path toward a steady-state operation. 2004's milestone, I am extremely pleased to report, is that it was the Canadian Forces Grievance Board's most productive year to date.

Setting us on this course was, for the most part, due to certain key initiatives that were on-going throughout the year, namely: continued investment in our employees, re-engineering our internal grievance process, and building upon a body of knowledge and precedents.

The expertise essential to the review, analysis and understanding of grievances has largely been developed internally. Over the past year there was continued emphasis placed on broadening the knowledge and the expertise of Board Members and staff. For example, employees underwent training to learn more about administrative law in the military context and effective writing. Learning events, specialized training, workshops, and fostering team work and exchanges were also key components of the year's success.

A significant body of precedents accumulated over the years is also allowing us to leverage our organizational knowledge: it has helped improve the consistency of our recommendations and has been instrumental in speeding up the review process. It will undoubtedly, over time, improve the timeliness of our recommendations.



Our ultimate objective is of course to render fair and impartial findings and recommendations in a timely manner. However, the grievance system can also serve to highlight issues that are seen by Canadian Forces members as dissatisfiers and reflected in recurrent grievances. Thus a deficient policy, or one that is misunderstood, and which may have an impact on morale, can be identified and rectified. The Board feels a special responsibility to highlight these issues of widespread concern and to recommend remedial action where justified. Looking at the root cause of recurring grievances allows us to offer recommendations formulated to initiate positive change at the organizational level within the Canadian Forces.

Diane Laurin
Chairperson

Identifying inequities has resulted in, for the most part, a positive and in some cases pro-active, response from the Chief of the Defence Staff, serving as tangible proof of the Board's value to administrative military justice. We will continue to seek feedback from the Canadian Forces on initiatives they have undertaken as a result of our recommendations. It is a valuable measure of our work and testament to the difference we are making.

As I mentioned earlier, this has been our most productive year to date. However, we have not met the goals of our 2003 operational plan, primarily due to a shortage of Board Members. Achieving a steady-state of operations remains our number one objective; while expediency is one of our goals, it cannot be at the expense of a thorough and fair process.

Henry Ford once remarked, "Coming together is a beginning, staying together is progress, and working together is success." In my years with the Board, I have seen this organization come together and have experienced the remarkable ties that bind the Board's talented and dedicated team to its work. We strongly believe in what we do. Today, I can report with confidence on the remarkable results that demonstrate we are carrying out our mandated role as an impartial, fair and independent reviewer of certain types of grievances. I believe the quality of our findings and recommendations is excellent and I am gratified by the positive response we have received in this regard.

Throughout the course of our work, the Board has established a very good working relationship with the Canadian Forces and the Department of National Defence. We intend to continue to foster open and productive dialogue with the grievance process' key players and stakeholders, and we have experienced an excellent collaboration with the office of the Chief of the Defence Staff and the Vice Chief of the Defence Staff.

While we may not have always been in agreement with some issues, it is always understood that our ultimate goal is to have a fair and impartial process that serves justice and works towards the betterment of working conditions and morale in the Canadian Forces.

A handwritten signature in blue ink, appearing to read "David Lammie". The signature is written in a cursive, flowing style.

PART

I *One*

MISSION

To review grievances, in order to render fair and impartial findings and recommendations in a timely and informal manner to the Chief of the Defence Staff and the grievor.

VISION

The Board's grievance review skills and expertise will be recognized through the quality of its findings and recommendations.

This will be realized when:

- The principles of integrity and fairness guiding the Board create a climate of confidence in members of the Canadian Forces;
- Members of the Canadian Forces are confident that the Board's findings and recommendations are objective, timely, fair and impartial;
- The work of the Board has a positive impact on the conditions of work for military personnel and contributes to a better understanding and application of regulations, policies, and guidelines;
- Other public agencies, in Canada and abroad, consult the Board regarding their own grievance management and review processes.

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WHO WE ARE

OUR ORIGINS

The Canadian Forces Grievance Board is an administrative tribunal with quasi-judicial powers. Its mandate is to review grievances referred to it by the Chief of the Defence Staff (CDS), in accordance with the *National Defence Act* (NDA) and Chapter 7 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), and to subsequently provide its findings and recommendations to both the CDS and the grievor.

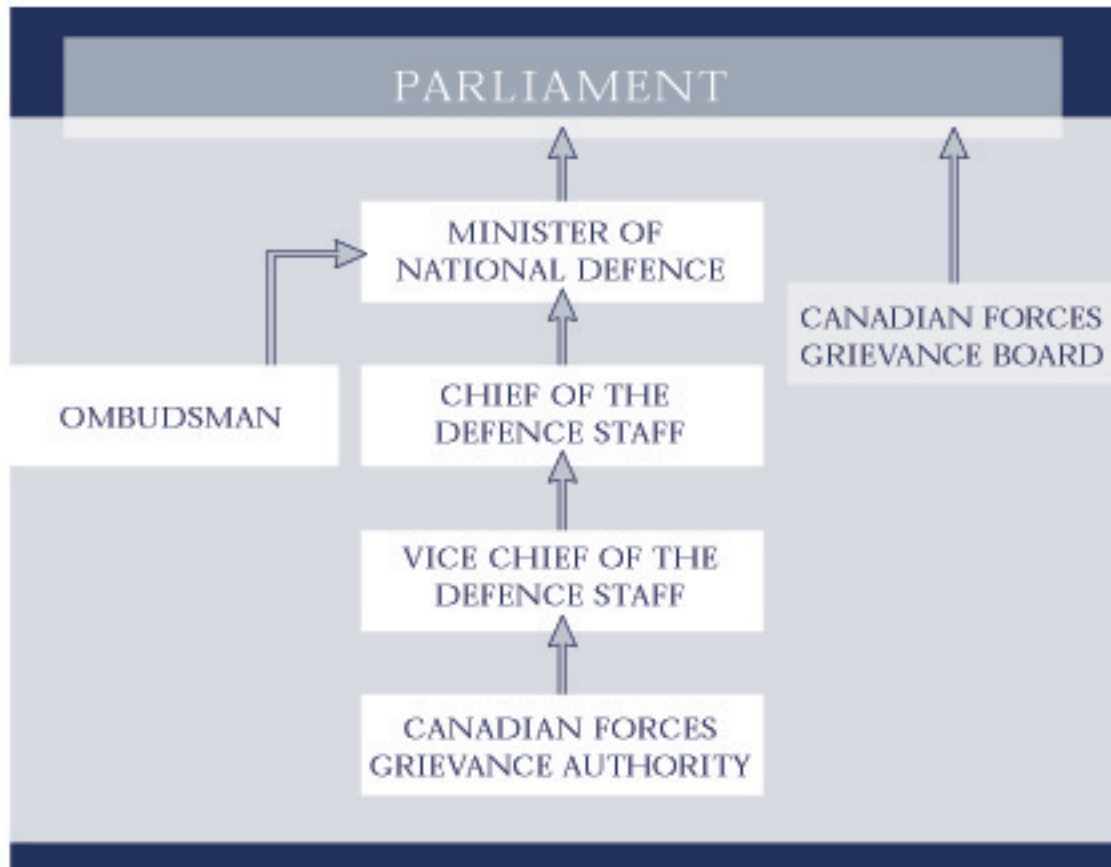
In the early nineties, a number of studies and working groups, internal to the Canadian Forces, were initiated to help identify and propose solutions for inequities that existed with the military's complaint resolution methods. A series of recommendations ensued, including those put forth by the Doshen Report¹, that were aimed at modernizing the system as a whole. In 1996, the Armed Forces Council ordered a streamlined grievance system be developed and in 1997, the Minister of National Defence (MND) submitted his *Report to the Prime Minister on the Leadership and Management of the Canadian Forces*². This particular report included two recommendations relating to the grievance system: the removal of the Minister as final arbiter and the creation of an independent review board.

As a result of these and other studies and inquiries, including the Special Advisory Group and the Somalia Commission of Inquiry, the Canadian Forces Grievance Board was created on March 1, 2000, in accordance with amendments made to the *National Defence Act* in 1998. The amendments focused on simplifying and improving the timeliness of the grievance process and the Board received its regulatory authority and officially began operations on June 15, 2000.

¹ BGen (ret'd) L.T. Doshen, *A Report on the Study of Mechanisms of Voice/Complaint Resolution in the Canadian Armed Forces*, November 1995.

² The Honourable Douglas M. Young, 25 March 1997.

CFGB REPORTING TO PARLIAMENT



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A UNIQUE ROLE

The Board is the first and only civilian body in the world that reviews military grievances. In its role as an administrative tribunal, it conducts objective, transparent and independent reviews of grievances, with due respect to fairness and equity for each member of the Canadian Forces (CF), regardless of rank or position. It ensures that the rights of military personnel are considered fairly throughout the process and that the Board's own Members act in the best interest of the parties concerned. Ultimately, it is part of the Board's long-term objective to contribute to the improved working conditions for CF members, have a positive effect on morale, and to instil confidence in the effectiveness of the improved grievance process.

As an administrative tribunal, the Board enjoys an independence from the Department of National Defence (DND), which has overall responsibility for the policy area in which it operates. The Board consists of Governor in Council appointees, who decide, alone or in panel, on any given case. Board Members are responsible to review grievances and issue findings and recommendations to the Chief of the Defence Staff.

The Board has quasi-judicial powers: it can summon civilian or military witnesses, and compel them to give oral or written evidence³. Any hearings by the Board would normally be held in private, unless the Chairperson deems that a public hearing would benefit the participants and would serve in the public's interest.⁴

Under the NDA, the Governor in Council may appoint to the Board a full-time Chairperson, at least one full-time Vice-Chairperson, one part-time Vice-Chairperson, and any other Members, full- or part-time, needed to carry out its functions. Appointments may be for up to four years and may be renewed; Members may be removed by the Governor in Council for cause.

THE BOARD'S GRIEVANCE PROCESS

The following is the two-tiered CF grievance process. CF members cannot submit a grievance to the Board directly; they are required to submit their grievances to their Commanding Officer first. The first adjudication level is with the Initial Authority. If the grievor is not satisfied with the decision rendered there, he or she may submit the grievance through their Commanding Officer to the CDS for review.

All grievances referred to the Board are reviewed to ensure they have been properly referred in accordance with the provisions of Chapter 7.12 of the QR&O and subsection of 29.12(1) of the NDA, and that the Initial Authority decision has been included. The Board also makes certain that the basic information and documentation are included with the grievance file and subsequently discloses the file to the grievor. The Board will also invite the grievor to submit additional comments concerning the case.

Once a grievance file has been thoroughly reviewed by the Board Member(s) assigned to the grievance file, the Board Member(s) make their findings and provide recommendations to the CDS, who is the final authority. Although not bound by the Board's findings and recommendations, if the CDS does not act on a finding or recommendation, he is statutorily obliged to provide reasons for not doing so.

³ *National Defence Act, Sec. 29.21*

⁴ *Ibid, Sec. 29.26(2).*

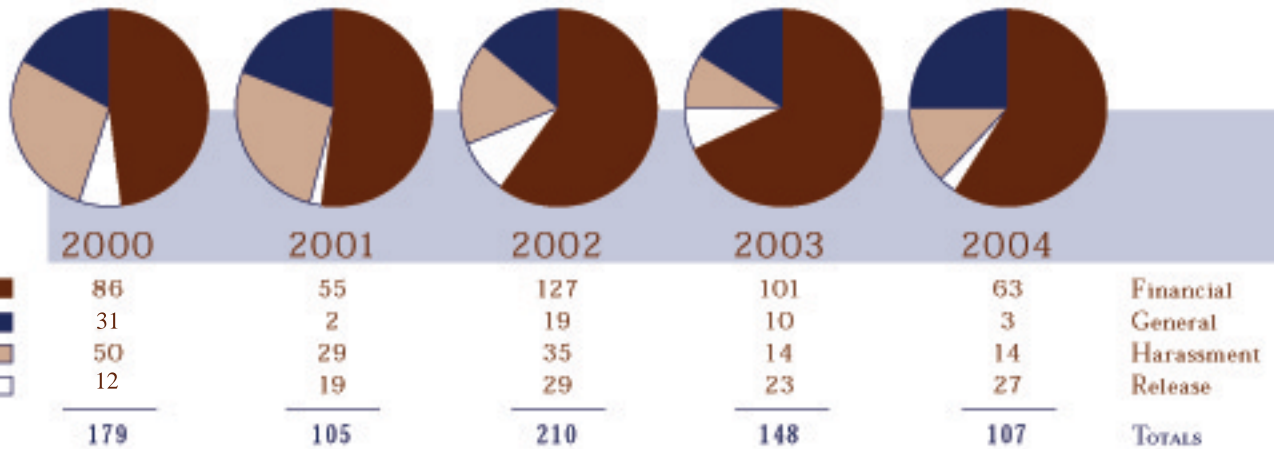
If the grievor is not satisfied with the decision rendered by the CDS, he or she may pursue a judicial review before the Federal Court. Depending on the type of grievance, the grievor may also pursue other avenues, such as the Canadian Human Rights Commission, the Privacy Commissioner, Access to Information Commissioner or the Official Languages Commissioner.

GRIEVANCES THAT COME TO THE BOARD

Table I provides an overview of the general categories of grievances that the Board has received over the past five years. Financial issues continue to dominate the caseload, averaging 57% over five years while the percentage of harassment cases referred to the Board has declined since 2000, down from 28% to 13% in 2004.

TABLE I

Distribution by year received at the Board



DIFFERENTIATING OUR ROLE

In 2004, the Board continued to tackle the major challenge it has faced since 2000, which is to ensure members of the CF understand the Board's role within the military grievance system and its relationship to other administrative bodies, such as the Canadian Forces Grievance Authority (CFGGA), and the Office of the Ombudsman.

One significant difference between the Board and the Ombudsman's Office is that a member of the CF must first submit a grievance (in matters that are subject to the grievance process) before he or she submits a complaint to the Ombudsman. That is, he or she must usually exhaust the grievance recourse(s) available to them before approaching the Ombudsman.

A grievance is submitted pursuant to the provisions of the *National Defence Act* and regulations, whereas a complaint to the Ombudsman is submitted in accordance with provisions of a Ministerial Directive and a Defence Administrative Order and Directive (DAOD). Further, the authority of the Board and the CDS to review and decide a grievance is derived from the NDA, whereas the Ombudsman's authority is found entirely within Ministerial Directives.

CHAPTER 7.12 (QR&O) – REFERRAL TO GRIEVANCE BOARD

- (1) The Chief of the Defence Staff shall refer to the Grievance Board any grievance relating to the following matters:
 - (a) administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;
 - (b) the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;
 - (c) pay, allowances and other financial benefits; and
 - (d) the entitlement to medical care or dental treatment.
- (2) The Chief of the Defence Staff shall refer every grievance concerning a decision or an act of the Chief of the Defence Staff in respect of a particular officer or non-commissioned member to the Grievance Board for its findings and recommendations.

(G) (P.C. 2000-863 of 8 June 2000 effective 15 June 2000)

SECTION 29.12(1) *NATIONAL DEFENCE ACT*

The Chief of the Defence Staff may refer any other grievance to the Grievance Board.

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While the Board must deal with all grievances submitted to it, the Office of the Ombudsman may refuse to deal with a complaint. However, the Ombudsman can intervene in grievable matters if he considers there are compelling reasons to do so, such as: “access to a complaint mechanism will cause undue hardship to a complainant; the complaint raises systemic issues; or the complainant and the competent authority agree to refer the complaint to the Ombudsman.”⁵

The Board only has jurisdiction over grievances lodged by current members of the CF, whereas the Ombudsman can deal with complaints brought forward by a number of parties, including former members of the CF, current or former employees of DND, and members of their immediate families.

And finally, the Board forwards its findings and recommendations to the CDS, whereas the Ombudsman forwards his reports on complaints to the competent DND or CF authority.

REACHING OUT

In 2004, the Board decided to step up its efforts in implementing its external communications strategy, developed to better inform Board stakeholders about its role within the grievance review process. To this end, a series of presentations and visits took place over the course of the year.

For example, the Chairperson met with several key players within DND and the CF — the new Minister of National Defence (appointed in June 2004), the CDS and the new Vice Chief of the Defence Staff (VCDS) (appointed in September 2004) — bringing all three up to date on the Board’s *raison d’être*, contribution and progress.

The Chairperson also gave presentations in the fall to the Military Law Section of the Canadian Bar Association and the Armed Forces Council, and participated in a field study exercise organized by the National Security Studies Course at the Canadian Forces College. It involved visits to the North American Aerospace Defence Command (NORAD), the United Nations (UN) and the Pentagon, and included exposure to planning sessions on military strategies, diplomatic perspectives and international defence issues. But perhaps the real benefit of this event was the opportunity for the Chairperson to meet with key senior military officials and exchange on the military culture and operations.

Other outreach activities in 2004 included a presentation by the Director, Grievance Analysis and Operations, to the investigative staff from the Office of the Ombudsman. To further their training and understanding of military culture, the Operations Sector attended a one day session at the Canadian Forces Leadership and Recruit School in Saint-Jean, Quebec. This afforded an opportunity for both organizations to learn from one another and share views on issues of mutual concern.

The Board will continue to actively pursue opportunities to reach out to its stakeholders. It is becoming better known within DND and the CF, but it must continue raising its profile through better communications. The aim of its outreach is to demonstrate that the Board does make a difference to grievors and non-grievors alike in the CF and to help dispel some of the confusion about its role in contrast to those of other oversight mechanisms.

⁵ Ministerial Directives for Office of the Ombudsman, Sec. 13(2)

PRIVACY MATTERS TO US

In the summer of 2004, the Office of the Privacy Commissioner conducted a review of the Board's practices in the handling of personal information. The purpose of the review was to understand how the Board manages its personal information holdings, to assess its compliance with Sections 4 through 8 of the *Privacy Act*, and to provide guidance and education on matters of privacy. This is particularly critical with small institutions, and moreover with organizations such as administrative tribunals.

The practices in the collection and use of personal holdings were studied, as were the Board's public listings in *Info Source*, contracting activities, staff awareness of their rights and obligations under the *Act*, and security issues surrounding the handling and electronic transmission of information.

The final report was released in July and confirmed the Board's high level of compliance with the *Privacy Act* and its fair information principles. The review found no instances of the personal information of CF members being used by the Board for purposes other than those for which it was collected.

For the Board, this means CF members can have confidence in the Board's practices in the collection and use of their personal information, a critical component in a grievance review.

2004 OPERATIONAL HIGHLIGHTS

CONSOLIDATING KNOWLEDGE AND GAINING GROUND

Over the past four and a half years, the Canadian Forces Grievance Board has been building on its expertise and body of knowledge. Now with some history behind it, it is better equipped to assess its workflow and conduct its business more efficiently. For example, each year has seen the Board steadily increase its production and closure rate. In 2004, it completed more cases than it received for that period, making it the most productive year to date. This increase in the number of cases completed results from a number of process changes introduced to increase efficiency; the talent and dedication of the Board's employees and Members have also been major factors.

An ongoing activity at the Board has been to build on its knowledge management; over the year, a database of Board recommendations and CDS decisions was finalized and a reporting model was developed that produces analyses on the internal precedents the Board has accumulated. Reinforcing our knowledge using the information that has been input into the Board's Case Management and Time Tracking System (CMTTS) and the application of that knowledge is also critical to the Board's effectiveness. The use of the model increases efficiency by identifying similar cases occurring under similar circumstances, which improves the consistency and timeliness of the Board's findings and recommendations.

This year also saw the Board consolidate its review of the decisions made by the Chief of the Defence Staff, thereby enabling it to consider the impact of these decisions on future cases. The Board has been made aware of several circumstances in which the findings and recommendations it presented have or will be used as an instrument to promote and justify changes to certain Treasury Board or CF policies. In fact, the Board has been openly encouraged by key players, such as the Standing Committee on

National Defence and Veterans Affairs (SCONDVA), to look beyond the individual grievance to recommend policy, regulatory or broader ameliorative change, when justified.

VALUING OUR RESOURCES

The Board is necessarily a knowledge-based organization because it requires specialized expertise to review grievances in a military context. As a result, employees are its key resource, most notably in operations. In 2003–04, it developed a staffing strategy to ensure that it had a sufficient number of qualified human resources to fulfil its mandate.

The Board nurtures in-house expertise through mentoring and training programs, learning frameworks for professional development, and a variety of knowledge-sharing activities for its staff and Members. The Board recognizes that it has to sensitize its employees to the military culture and to this end organized a series of exchanges with key stakeholders throughout the year. As Board Members and employees learn more about the CF and its environment, they can bring a more informed perspective to their work.

The year also saw the Board being approached by interested parties to learn more about the organization's grievance review process, its knowledge management practices and CMTTS. It has played host to, as well as participated in, a number of external meetings, consultations and demonstrations, in an effort to exchange and share best practices. The Board will continue in its commitment to learning. It recognizes that skills enhancement and keeping abreast of developments in its field are key to its success as an organization, as well as an investment in its future.

LIGHTENING OUR CASELOAD

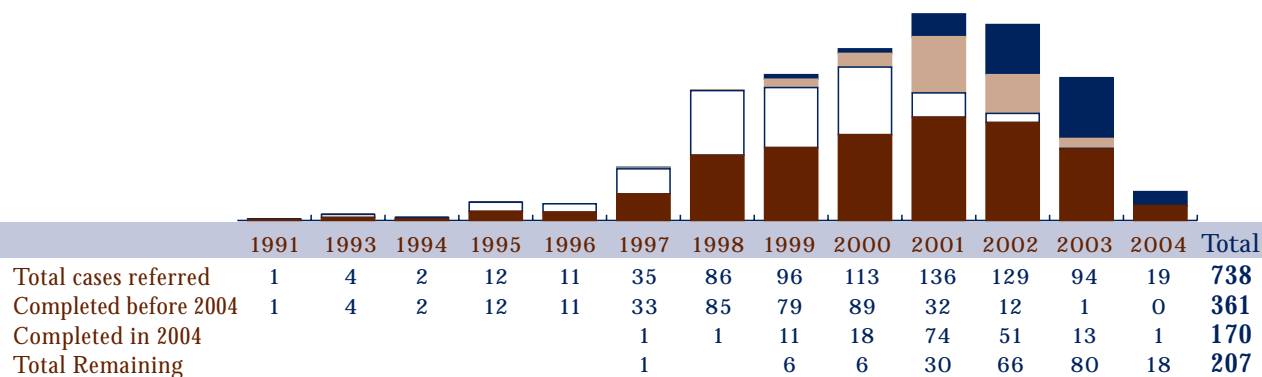
In its first fiscal year of operations, the Board inherited a backlog of 177 cases from the former CF grievance system⁶. Over the years, the Board continued to receive grievances predating 2000 for a total number of 291, of which 280 have now been completed. This backlog, coupled with the additional cases it received each year (100–150) has made attaining a steady state difficult. In August 2003, the Board submitted to the Minister of National Defence an operational plan that it developed in consultation with the CF. The sole objective of the plan was to deal with the inventory of cases that the Board had received on or before December 31, 2003, and these files constituted the bulk of the Board's work for 2004. In line with the plan, the Board undertook to streamline its internal processes, much of which was implemented over the course of the year.

In 2004, the Board began with an inventory of 274 active cases; it made 282 recommendations and 473 findings related to 170 grievance cases, up from 127 cases in 2003. **Table II** shows how many files are left for the Board to review, along with the date the grievance was filed with the CF. As of December 31st 2004, 78% of all backlog cases were completed as part of the 2003 operational plan.

⁶ Grievances filed prior to the 1998 amendments to the NDA, but which came into force on June 15, 2000.

TABLE II

Caseload Status by Year Grievance Filed as of December 31, 2004



BOARD VACANCIES

To reduce the backlog and keep up with current grievance files posed a significant challenge to the Board throughout 2004, given that it never fully achieved a key condition of its 2003 operational plan — the appointment of additional Board Members by the Governor in Council. Only the one position of Vice-Chairperson, full time, was filled in December and this after a year and a half vacancy, during which the Chairperson performed the duties incumbent to both positions.

Staffing these positions is outside of the Board's control, and the remaining vacancies continue to represent a resource deficit for the organization's operations. As a result, the Board's original 2003 operational plan deadline of December 2004 has been moved to summer 2005. Nevertheless, it is a testament to the teamwork between employees and Members presently at the Board that production for 2004 was as successful as it was.

OVERVIEW OF CDS DECISIONS

In 2004, the CDS provided decisions on 187 grievances. For the most part, the CDS partially or fully endorsed the Board's recommendations, disagreeing with the Board in 28 of his decisions. The Board is not bound by previous CDS decisions in rendering its findings and recommendations, however, they are obviously given great weight. There is a subjective element in the determination of grievances given that they sometimes deal with the application of policies to specific situations.

While the CDS does provide decisions in relation to Board recommendations that will have an immediate relief for the grievor, the Board also makes recommendations whose effects will not be seen in the short term because they will involve changes in regulations, directives and policies.

TABLE III
CDS decisions rendered in 2004

CDS DECISIONS RENDERED IN 2004				
CFGB FINDINGS AND RECOMMENDATIONS (F&R)		CDS fully and partially endorses CFGB's F&R	Case withdrawn at CDS Level	CDS disagrees with CFGB's F&R
Upheld & Partially Upheld	81	60	1	20
Denied	101	93		8
Withdrawn	2	2		
Not Grievable	1	1		
No Standing*	1	1		
Mediation	1	1		
Total	187	158	1	28

**No standing – Party does not have the right to make a legal claim or seek judicial enforcement of a duty or right (e.g., a non-member of the CF)*

BALANCING FAIRNESS AND EXPEDIENCY

The *National Defence Act* mandates the Board to conduct its reviews expeditiously, yet fairly, to ensure the equitable treatment of all parties concerned. To the best of the Board's knowledge, all stakeholders in the process are striving to resolve grievances within the one year time limit proposed by the former Chief Justice of the Supreme Court of Canada, Antonio Lamer, in his 2003 report⁷. However, the Board stands by the principle that a fair review must take precedence over expediency and is always mindful that factors outside of its control can affect its operations. Fortunately, as the past few years have shown, these objectives are not mutually exclusive.

Table IV shows an overview of the Board's workload to date, from 2000 to 2004. The closure rate for the year 2002 was reflective of the Board's challenge with regard to production, but in 2003 productivity increased, and in 2004, the Board reached a closure rate (# cases completed / # cases received) exceeding that of any previous year. By the end of the 2005–06 fiscal year, the Board is expected to reach a one-to-one closure rate.

⁷ The Right Honourable Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer, P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35, 2003.*

TABLE IV

CFGB WORKLOAD OVERVIEW	2000	2001	2002	2003	2004
# of cases in process at beginning of the period	0	165	170	255	274
# of cases received for the period	179	105	210	148	107
# of cases completed for the period	14	100	120	127	170
# of cases returned to DGCFGA for re-evaluation	0	0	-5	-2	-4
# of cases remaining in the process at the end of the period	165	170	255	274	207
Closure rate [# cases completed / # cases received]	0.07	0.95	0.58	0.86	1.65

Note: A common methodology developed with the DGCFGA in 2003 entailed adjustments with regard to reporting on grievances; grievance statistics from previous years may not be exactly comparable with the current data. For example, at end of fiscal year 2002-2003, 261 grievances remained at the Board, and at that time certain grievances covering a number of issues were accounted for separately. Today all issues from the same grievor are considered a single grievance.

MANAGING FOR RESULTS

The Canadian Forces Grievance Board has to deliver on a challenging and unique mandate, namely the fair and expeditious review of military grievances. The efforts required to achieve its key results demand that sound management practices are in place to support it in this role. This includes ensuring that the Board has the tools necessary to measure, monitor, evaluate and report on its performance results at many levels.

Acquiring the proper management tools to achieve this has been in development for some time. Throughout 2004, for example, the Board did considerable work to refine and finalize its Results Based Management Accountability Framework (RMAF), which is now aligned and linked to its Management Resources and Results Structure. This Framework includes the Board's governance structure, its Results Chain and a performance measurement and reporting strategy, all of which are aligned with the Board's strategic outcomes, as well as the enabling activities that support the Board's main activity and purpose. It also spells out the performance indicators and the ways in which relevant information on results will be gathered to assess organizational performance.

AN EFFECTIVE MANAGEMENT TOOL

Case Management and Time Tracking System

The Board's main activity is to review grievances and issue findings and recommendations. At the heart of its operations is the Case Management and Time Tracking System (CMTTS), a system that serves a double purpose. As a management tool it provides timely results based performance information and enables the organization to promptly measure its effectiveness and productivity. For example, a work flow of tasks gives the progression on grievance files, including the projected completion of a grievance

file, and the time spent on a file at each step of the grievance review process. At any point in time, management and statistical reports can be obtained on all facets of operations to be used for decision making. In the near future, the system will allow the Board to capture the resources, both human and financial, associated with the process.

The beauty of this system is that it is also a critical tool for creating, managing and leveraging knowledge. It enables employees to access case-related information, search a database for precedents, e.g. Board findings and recommendations, CDS decisions and case summaries, as well as conduct impact analyses of decisions rendered by the CDS.

BEYOND THE SYSTEM

Employee Performance Management System

In 2004, the Board piloted its Employee Performance Management System (EPMS) developed in consultation with employees and union representatives. Considerable work has been done with regard to performance and standards, as well as competencies. However, some adjustments will have to be done in order to better align individual work to organizational objectives and harmonize the EPMS with the performance and results-based approach implemented by the Board.

CONCLUSION

Efforts that the Board has applied throughout the years with regard to the grievance process, staff management and operations, have yielded many benefits, including improved efficiency on several levels and increased productivity. Furthermore, the quality and consistency behind our findings and recommendations has been maintained throughout and will continue to be a priority for the Board.

The organization's periodic performance review, as well as the examination of its processes, procedures and management practices, will allow the Board to maintain its steady pace. In an ever-changing environment, it is imperative that the Board support this approach and it is our intention to do just that.

PART II *Two*

The grievance system is, to some degree, a barometer of current issues of concern to members of the CF. Several recurring grievances on the same issue may indicate a poor policy, the unfair application of a policy or a misunderstood policy. In some cases, the underlying law or regulation may be out of date or otherwise unfair.

The Board feels a particular obligation to identify issues of widespread concern which may well have implications for morale for members of the military, and where appropriate, provide recommendations for remedial action to the CDS.

The following section sets out five issues which have attracted numerous grievances, prompting the Board to recommend policy and legislation changes.

A sampling of grievance cases follows.

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NOTABLE GRIEVANCE ISSUES

ACTING RANK/PAY

The issue of Acting Rank arises in grievances by members who have performed higher ranking duties without receiving compensation at that higher level. Members operationally deployed to locations outside Canada, such as Bosnia, have complained that they performed duties of higher ranked positions, yet they did not receive equivalent compensation. In settings that are not operational theatres, members who have filled in or replaced higher ranked members in the same unit as themselves for long periods have complained about being paid less than those who would normally have filled the higher ranked positions. A third scenario leading to this type of grievance is the posting of a member to a position for which the required rank is one level above that held by the grievor.

In its findings submitted to the CDS, the Board stated that it is unfair to have members perform without receiving the pay associated with the rank of the position they fill. The CDS has in all instances responded positively by fully or partially upholding the grievances.

These grievances highlight the concerns of the Board in relation to those of the CDS. The Board has referred to equity, as well as to the spirit of the Standing Committee on National Defence and Veteran Affairs (SCONDVA) recommendation that members should immediately receive acting pay for work performed beyond their rank. Although the CDS has not disagreed with the application of the SCONDVA recommendation, he has pointed to several other principles that remain of importance to the CF. For instance, the CDS has said that granting an Acting Rank While So Employed (AWSE) promotion does not set aside the merit principle given that AWSE promotions are the product of qualifications, not merit. Furthermore, the CDS has found that once the appropriate CF authorities have determined that a particular rank level is required for a position, career management authorities cannot claim that a lower ranking member may fill the position. He has, nevertheless, also stated that filling a position at a higher level remains a privilege that does not automatically confer a right to higher pay.

In addition, the CDS does not accept the analogy between either the civil service or the RCMP and the CF, given that enrolment in the CF confers a very different status to a CF member than that of employment in either the civil service or the RCMP. The CDS has also commented on the system of pay in the CF to call attention to the fact that global pay already compensates a member for performing higher level duties exceptionally and for relatively short periods. The CDS concluded, that a member who performs higher ranking duties for more than 12 months should be entitled to a higher rate of pay. However, he has also found in favour of grievors who have acted for a lesser period.

Overall, the CDS has emphasized the CF value of fair play to say that many factors, including the current operational tempo of CF operations, are sufficient reasons to allow for greater flexibility in applying the current regulations governing Acting Rank/Pay.

The Board has issued findings and recommendations on this issue in several grievances. In response to the Board's systemic recommendation that the CDS clarify when exceptions to the Acting Rank policy should be granted, the CDS has ordered a review of the Acting Rank policy (which includes the AWSE policy). He also directed that certain grievors be granted the acting rank that they sought, even though they did not satisfy all of the criteria specified in CF policies. In these cases, the grievors lacked the formal training qualifications required for the rank of the positions that they filled temporarily.

POST LIVING DIFFERENTIAL FOR RESERVISTS

On June 8, 2000, under article 205.45 of the QR&O (now Compensation and Benefit Instructions for the Canadian Forces [CBI] 205.45), which took effect retroactively, to April 1, 2000, Treasury Board established a taxable benefit to stabilize the cost of living of CF members and their families when a posting required the member to move to a place of duty in Canada with above average living costs (Post Living Differential Area [PLDA]). The regulation was later revised to more accurately reflect the intentions of the CF. The first revision was authorized by Treasury Board on January 9, 2001, and took effect retroactively, on April 2, 2000.

As a general rule, the Post Living Differential (PLD) will be paid to a Regular Force (Reg F) member whose principal residence is located in a PLDA, regardless of whether the member's furniture and effects were moved to that location at public expense. For a member of the Reserve Force (Res F) (Classes B and C), the PLD is payable only if that member has been authorized to move furniture and effects to his or her place of duty at public expense.

Consequently, the Reservist serving on long-term Class B or C service already in a recognized PLDA in his or her home area and the one moved at public expense to a PLDA do not receive the same treatment. Whereas both have voluntarily chosen to serve in such an area, only the Reservist who chose to move to a PLDA for a period of Class B or C service is entitled to PLD, despite the fact it is not a service-imposed move. The result is that two Reservists can be working side by side on long-term callout but be treated differently. One will, and the other will not, receive PLD. This inequitable treatment has serious implications for morale.

The Board recently dealt with nine grievances about PLD for Reservists. In its findings and recommendations, the Board said that the current policy does not articulate why the two are treated differently in terms of PLD, nor is it self-evident why the Reservist serving on full-time duty in his or her home area should be disentitled to PLD. The Board found that this results in Reservists being treated unequally without cause.

The Board recommended that the regulation be amended to extend this benefit to all Reservists serving on a full-time basis in a PLDA. Furthermore, given the number of grievances before the Board on this issue, it recommended that immediate consideration be given to reviewing and revising CBI 205.45.

The CDS recently issued a series of decisions on this subject. As to the rationale behind the differential treatment, the CDS stated that a Reservist who accepts a voluntary callout in an area where they have

already chosen to reside does not experience the cost-of-living increase that a Reservist posted to a PLDA must contend with. He concluded that the current system compensates Reservists for costs in cases where the CF has required them to be in a higher cost area (the Reservist has the choice to accept or refuse, unlike the Regular Force member). He disagreed with the Board's conclusion that the current PLD regime treats Reservists unequally without cause and stated he was not prepared to accept the Board's recommendation that CBI 205.45 be amended.

SUBMARINE SPECIALTY ALLOWANCE

The Submarine Specialty Allowance (SUBSPA) is a separate monthly allowance, established in 1980, paid to submariners who are qualified to the level required by the CDS and serving on submarines. The governing regulations also permit payment of the allowance to members in some training situations and to shore-based qualified submariners but only to those in a specific number of designated positions, currently capped at 75 by Treasury Board. In 1980, the CF had only one class of submarines, the Oberon. In 1998, a second class, the Victoria, was added to the Canadian fleet. Submarine-qualified personnel working in shore-based positions in support of this new class were at a disadvantage in terms of the SUBSPA, as all available designations were already in use.

The practical result is that two submariners, equally qualified, performing the same tasks and working side by side, may be paid at a different rate, in that one may, and one may not, be in a designated position.

The Board has issued findings and recommendations in nine separate grievances, all dealing with entitlement to be paid the SUBSPA. Unfortunately, as a result of the explicit regulatory criteria, the Board has been unable to recommend to the CDS that he grant the SUBSPA to any of these grievors. However, the Board is very cognizant of the inherent unfairness and inequity of the current system and the negative effect which it must undoubtedly have on the morale of affected members.

Since 1998 when the major difficulties with the SUBSPA first arose, the CF has commissioned a minimum of three studies, one of which is now four years old. Grievances have been forthcoming since 1999. In addition, the issue of the SUBSPA has been referred to both the Chief of the Maritime Staff and the Assistant Deputy Minister (ADM) (Human Resources – Military) for study. To date, no changes have been made to correct the inequity.

The Board has expressed to the CDS that this lack of progress is unacceptable. The CF has admitted to understanding the concerns about the structure of the SUBSPA for numerous years and yet has not provided a solution. For the sake of equity between members and the morale of the submarine community, the Board has strongly encouraged the CDS to ensure that the issue of the SUBSPA be dealt with expeditiously.

In line with the findings of the Board, the CDS has consistently denied grievances related to entitlement to SUBSPA for those in shore-based, non designated positions. He has acknowledged that the current SUBSPA framework is a source of dissatisfaction for submariners and that more positions merit designation than the current cap allows. He has reported that a review of the SUBSPA system is actively under way but declined to make any changes to the current system until he has received the results of this review.

THE UNIVERSALITY OF SERVICE PRINCIPLE

Many grievances arise from the release of CF members whose medical condition has affected their ability to fulfil military duties. The types of medical condition that have led to releases and related grievances include coronary heart disease, diabetes, epilepsy, poorly functioning limbs and allergy.

The CF policy with respect to members with reduced ability to fulfil duties is much more stringent than that of the public service or private sector employers. The higher standards applied to CF members is based on the fact that an armed force must function effectively in combat.

Even though many members of the CF perform duties different from those of frontline combatants, their ability to function adequately within a given military occupation is only part of the CF requirement. The CF also requires that all CF members be able to perform any of the general military duties that may be required in the armed conflict environment. This requirement for CF members is called the universality of service principle.

The universality of service principle stems from two premises: first, whatever their trade or profession, CF members are soldiers first; and second, the duty of a member is to be ready to serve anytime, anywhere and under any conditions. This duty to perform applies universally to all members of the CF.⁸ The view that the CF can require its members to serve anytime, anywhere and under any conditions is based primarily on sections 31 and 33 of the *National Defence Act*. Section 33 imposes on Regular Force members the obligation to perform at all times any lawful duty. Sections 31 and 33 deal with the obligation of Reserve Force members to perform lawful duties when they are called out for an emergency. The combined effect of these provisions, according to court judgements, is that all CF members, Regular or Reserve Force, must meet the performance standards established for general military duties.

With the objective of ensuring that all CF members have the capacity to perform the general (universal) military duties, the CF has established performance and medical standards. These standards come into play at the recruiting stage and when a CF member has a medical condition affecting physical or mental abilities. CF medical authorities will assess the condition of a member and determine whether that person has medical employment limitations related to the performance standards for general military duties. If the member has limitations that prevent, or could prevent, their performing general military duties, CF authorities must decide whether they can stay in the CF.

Because the *Canadian Human Rights Act* (CHRA) prohibits discrimination on the basis of disability, this *Act* has had an impact on CF policies related to the universality of service principle. Section 15 of the CHRA deals with discriminatory acts based on bona fide occupational requirements. In cases of termination of employment, subsection 15(2) of the CHRA requires an employer to establish that accommodation of a person whose disability placed a burden on the employer would cause undue hardship to the employer's operations. Subsection 15(9) of the CHRA, however, states that this requirement for justification of a bona fide occupational requirement "is subject to the principle of universality of service under which members of the Canadian Forces must ... perform any functions that they are required to perform."

⁸ Recent court decisions that apply these premises are *Irvine v. Canada (Canadian Armed Forces)*, [2003] F.C.J. No. 850 and *Irvine v. Canada*, [2005] No. 149.

Although subsection 15(9) of the CHRA limits the CF's obligation to demonstrate the undue hardship of accommodation, the CF policy permits accommodation of a member by delaying release for up to three years.

In its reviews of grievances related to the application of the universality of service principle, the Board has made findings about the propriety of the assessment of the medical employment limitations of CF members, about their claims that their medical employment limitations did not prevent them from performing the necessary duties, and about the adequacy of accommodation afforded them. The Board has supported most of the CF's assessments of medical employment limitations and the impact of the limitations on a member's capacity to fulfil duties. In some cases, the Board has found that the CF should have granted a longer period of accommodation.

The CDS has agreed with most of the Board's recommendations on these grievances. He has, nevertheless, disagreed with some of the Board's findings on the severity of the employment limitation assigned by the CF to the grievors' medical condition. The differing points of view have arisen from differing appreciations of the performance standards for general military duties and the impact the medical condition has on the performance of duties.

RECOVERY OF AN OVERPAYMENT – WRITE-OFF OF A DEBT

The Board has dealt with two cases in particular relating to pay rates where overpayments were made due to an error outside of the CF members' control.

One case was the result of a Force Reduction Program in 1992, whereby the grievor underwent a compulsory occupational transfer and was required to relinquish his appointment of Master Corporal. The grievor's pay was inadvertently administered under the wrong paragraph of QR&O 204.30, from 1992 to 2001. As a result the grievor was overpaid at the Master Corporal level over a four year period. The Board found that the grievor had provided no evidence of exceptional circumstances that would have allowed this debt to be written off.

In another case, the grievor, having remustered (change of occupation) from a Specialist I military occupation to a Standard military occupation, continued to be paid at the former rate, from October 1997 to September 2001. Despite numerous attempts on his part to have the matter corrected his pay record was finally reviewed and the overpayments were confirmed.

In both cases, the grievors were told by the CF that the overpayment must be recovered which in turn gave rise to their grievances. The Board found that the relevant legislation, subsection 155(3) of the *Financial Administration Act* and Article 203.04 of the QR&O with respect to the recovery of money by the Crown were clear: overpayments must be recovered by the CF if at all possible. Therefore, the Board recommended that the CDS deny the grievances.

In the first case, the Acting Chief of the Defence Staff (A/CDS) found that the grievor was not in a position to understand, nor could he or should he have understood the nature of a pay transaction. Pay rates are imposed and administered by a specialized body of information easily available to pay staff but the member is not always familiar with this information. The CF directed a compulsory change in the grievor's occupation, the QR&O did not provide a simple pay entitlement and the grievor was not in a position to question the decision of pay authorities. Consequently, the CF had a duty to advise

competently, accurately and completely. Applying the Policy on Deletion of Debts Due to the Crown, which provides for the remission of overpayments, the A/CDS found it unreasonable to collect the overpayments and considered the correct approach to be a submission to the Governor in Council to seek remission of the debt which arose from administrative error and without the grievor's knowledge.

This approach was also taken in the second grievance. The CDS partially upheld the grievance and concluded that there was no evidence of an order stating that the grievor had been remustered for inefficiency, as required by the applicable QR&O at the time. Therefore, the grievor had a vested right to pay. Although a CF member is responsible to ensure that his pay is correct, the CDS considered the change in the grievor's situation was initiated by the CF, and that the grievor did question the accuracy of his pay. Having relied on and been assured by the appropriate authorities that his pay was accurate, the grievor could not have known about the administrative error. Consequently, referring to the Policy on Deletion of Debts Due to the Crown, the CDS was satisfied that the "unreasonable to collect" criterion was met.

In both cases, the ADM (Fin CS) was directed to explore the feasibility of a submission to the Governor in Council through Treasury Board to seek remission of the debts. The ADM (Fin CS) was also directed to explore the feasibility of amending the NDA and the *Canadian Forces Superannuation Act* (CFSA) to adopt a standardized and comprehensive approach for authorities to deal with the recovery of overpayments.

A CASE SAMPLING

The following case summaries were chosen for this year's annual report according to their level of interest and relevancy for the readership. They are grievances for which the Board either submitted findings and recommendations to the Chief of the Defence Staff in 2004 or received his decision for that same period.

RELEASE – DRUG POSSESSION – APPROPRIATE RELEASE ITEM

The grievor was released under item 2(a) (Unsatisfactory Conduct) of the Table 2 QR&O 15.01, after pleading guilty to two charges of possession of a narcotic. An additional claim of trafficking was found to be unsubstantiated and resulted in no charges being laid. Nevertheless, the allegation of trafficking was relied on in release proceedings. The grievor initially objected to the release and denied any involvement in drug trafficking. He subsequently changed his position, requesting only that his release item be changed to permit future enrolment in the reserves.

The Board found that the allegation of trafficking was unreliable and ought not to have been considered by the Canadian Forces in determining the grievor's release, leaving only the conviction for two counts of possession of a narcotic on which to base the release. The Board found that an item 2(a) release was inappropriate in the circumstances of this case, considering the questionable reliability of the evidence uncovered by the CF National Investigation Service, the lack of prosecution on the trafficking charges and the grievor's consistent protestations on the trafficking allegations. The apparent weakness of the case for trafficking lent itself to a reconsideration of the release item, from 2(a), "Unsatisfactory Conduct," to 5(f), "Unsuitable for Further Service." Therefore, the Board recommended that the CDS uphold the grievance by changing the release item from 2(a) to 5(f).

The CDS concurred with the Board's recommendation, as he was satisfied that there was a doubt about the seriousness of the circumstances giving rise to the grievor's release and directed that the grievor's release item be changed from 2(a) to 5(f).

APPROPRIATENESS OF RELEASE – SUFFICIENCY OF ADMINISTRATIVE REVIEW – AVAILABLE REMEDY

Shortly after the grievor enrolled in the Reserve Force, he was arrested by civilian police for allegedly carrying a concealed weapon in a public place and possessing a prohibited weapon. In addition, at the time of his arrest, he was dressed in uniform.

The CF investigated but concluded no military charges were to be laid. The grievor's unit noted a prior incident of the grievor wearing his uniform in public and expressed concern about the grievor's suitability to handle weapons. They also noted that training involving weapons handling was imminent. An Administrative Review Board (ARB) recommended that the grievor be released under item 5(f), "Unsuitable for Further Service." The commanding officer concurred and directed that the grievor be released. The grievor was not actually released until three years later, although he was not notified of this delay.

The Board found that the regulations and orders governing release of Reserve Force members were not followed, in that the grievor was not provided with either a recorded warning or counselling and probation prior to the notice of intent to Recommend Release. The Board found that the CF did not provide a sufficiently compelling reason for this omission. The Board also found that the evidence relied on by the ARB was incomplete and unsubstantiated and appeared to have come from personal knowledge of the ARB members. The Board also found that the ARB was not conducted in accordance with the principles of natural justice and procedural fairness, as a result of the lack of notice, disclosure and opportunity to make submissions. Finally, the Board found that the CF was responsible for the unreasonable delay in effecting the grievor's release. The Board recommended that the CDS uphold the grievance and order a new review and that the CDS refer the claim for compensation to the Director, Claims and Civil Litigation (DCCL), to consider compensation for the delay and inconvenience caused to the grievor on his release.

The CDS concurred and said that the ARB's findings and recommendations were not supported by sufficient evidence. The process followed did not respect the principles of procedural fairness. To provide redress, he directed that the release message be cancelled and that the grievor be returned to his original regiment and given training opportunities comparable with those of his peers. The CDS also agreed the case merited a review as a potential claim against the Crown and referred the matter to the DCCL.

TRANSFER FROM RESERVES TO REGULAR FORCE – MEANING OF "ENROL" – ENTITLEMENT TO RELOCATION BENEFITS ON RELEASE

In 1988, the grievor enrolled in the Reserve Force at Toronto, Ontario. Several years later, while studying in Kingston, he transferred to the Regular Force. The transfer process was carried out at the Canadian Forces Recruiting Centre in Kingston. In 2001, in anticipation of release, the grievor, now posted at Kingston, Ontario, applied to have his furniture and effects moved to his place of enrolment,

Toronto, Ontario. He was informed he was entitled to have his furniture and effects shipped only to his place of enrolment in the Regular Force, Kingston.

The Board noted that pursuant to section 24 of the *National Defence Act*, transfer, as an act of a legal nature, is different from enrolment, which is provided for in another provision of the *Act*, section 20. CF administrative practices provided for a similar process for transfers from the Reserve Force to the Regular Force and enrolment, in that both were carried out in recruiting centres. However, despite transfer from the Reserve Force to the Regular Force component, membership in the CF remains constant. The obligation to serve in a specific component changes, but there is no release from the obligation to serve. The Board determined that this was the key factor.

The Board found that the grievor enrolled in the CF at Toronto, Ontario, and was entitled, on release from the CF, to have his furniture and effects moved back to Toronto. The Board recommended that the CDS uphold the grievance. The Board also recommended that the CDS direct the appropriate authorities to modify administrative procedures and documents to ensure a clear differentiation between transfer and enrolment, in conformity with the *National Defence Act*.

The CDS agreed with the findings of the Board and granted the requested redress. He also stated that he had previously directed a review of enrolment documentation to remove ambiguity between the terms “transfer” and “enrol” and that he had been informed that that review was ongoing.

SAME-SEX PARTNER RELATIONSHIP – REFUSAL OF REIMBURSEMENT OF LEGAL FEES – DISCRIMINATION

The grievor had been reimbursed the full amount of legal fees associated with the purchase of a residence in 1995. The CF recovered one half of it, however, because the grievor had become co-owner of the residence with a partner of the same sex. Their relationship was not considered a common-law spousal relationship.

On December 17, 1996, the CF revised its policies with respect to granting benefits to its members in same-sex partner relationships. The CF change followed a similar change in Treasury Board policies related to members of the public service. These policy changes occurred subsequent to court decisions over the 1992 to 1995 period, covering discriminatory practices based on sexual orientation.

In January 1997, the grievor submitted a claim for reimbursement of the one-half of the legal fees that the CF had recovered. She was advised, however, that the new CF policy of December 17, 1996, was not retroactive, and she was not entitled to the reimbursement.

The Board found on the basis of all available documentation that the grievor’s claim for full reimbursement was adversely affected by discrimination on the prohibited ground of sexual orientation. The Board found that the CF should take action to correct this unequal treatment and recommended that the CDS uphold the grievance by directing that the grievor receive that part of the benefit for reimbursement of legal fees that had originally been recovered.

The CDS agreed with the Board that the grievor was discriminated against but concluded that he did not have the authority to grant the redress and referred the case to the Director, Claims and Civil Litigation.

REIMBURSEMENT OF CHILDCARE COSTS – FAMILY CARE ASSISTANCE PROGRAM

The grievor was requesting reimbursement of costs she incurred in providing care for her minor child while she was deployed in Bosnia.

The Board concluded that the grievor was ineligible for benefits under the Family Care Assistance Program, as the program only became effective on April 1, 2000, following the events of this case, and it contains no provisions allowing for its retroactive application. The Board also concluded that the grievor failed to prove the *prima facie* existence of discrimination.

The Board did, however, recognize the unfairness of the situation. It recommended that the CDS ask the Minister of National Defence to exercise the discretionary authority accorded him under article 209.013 of the QR&O and grant the grievor reimbursement equivalent to the childcare costs she incurred during her qualification course and deployment in Bosnia.

The Acting CDS disagreed with the Board's conclusion that the circumstances justified the exercise of the discretionary powers accorded the Minister of National Defence under article 209.013 of the QR&O. He therefore declined to follow the Board's recommendation and denied the grievance. According to the Acting CDS, at the time the complainant was deployed, there were no circumstances similar to the situation covered by article 209.013 of the QR&O. Thus, this article did not provide for reimbursement of childcare costs incurred by a member of the CF.

COMPASSIONATE TRAVEL ASSISTANCE

Two cases of interest came to the Board in relation to the issue of Compassionate Travel Assistance (CTA). In the first case, in August 1999, the grievor was posted to the Northwest Territories. The following year, he was granted compassionate leave to visit his ailing father in the United States, who passed away shortly thereafter. The grievor sought reimbursement for his travel.

The previous regulation had allowed members serving at isolated posts to travel to the place of residence of the person who was critically ill or who had passed away, regardless of the location of that residence. In such instances, transportation costs were reimbursed for both member and spouse if the spouse accompanied the CF member on the journey. This benefit did not restrict travel to destinations within Canada, nor was it a taxable benefit. When article 209.51 of the QR&O concerning the CTA came into effect, on June 1, 2000 (replaced by Compensation and Benefit Instructions [CBI] 209.51, in September 2001), the previous regulation governing compassionate travel from an isolated post was repealed. The CTA, however, restricts travel to within Canadian borders and is a taxable benefit.

The Board recommended that the CDS uphold the grievance and initiate reimbursement of the grievor's transportation expenses, pursuant to QR&O paragraph 209.013(2). The Board also recommended that during the review of the CTA policy, consideration be given to expanding the CTA benefit to cover travel outside of Canada and to make the benefit non-taxable.

The CDS agreed in part with the Board's findings and recommendations. The CDS determined that the three conditions under QR&O (CBI) 209.013 were met:

- *Different, but not dissimilar, circumstances.* The grievor's circumstances were not dissimilar to those set in the CTA policy. He was granted compassionate leave as a result of the very serious illness of his father. His circumstances, however, were different in so far as he flew from Canada to the United States, where his presence was required, rather than to another location in Canada.
- *Consistency with the purpose of Chapter 209.* The main purpose of the CTA policy is to compensate CF members for transportation as a result of the serious illness or death of a family member. In the view of the CDS, compensating CF members who have family members living outside of Canada for the portion of their travel in Canada is consistent with this purpose. This is confirmed by the recent amendment to CBI 209.51.
- *Equitable in the circumstances.* In 1998, the Standing Committee on National Defence and Veterans Affairs (SCONDVA) recommended that "a clearly defined policy on compassionate leave and travel arrangements be developed to ensure that military personnel and their families can be certain of being able to travel in an appropriate fashion as soon as possible whenever family emergencies occur." The government accepted this recommendation, and the CTA policy came into effect in June 2000.

The CDS then recommended the exercise of the ministerial discretion to give the grievor the same treatment as provided for by the changes made to the CBI 209.51 regarding CTA, effective in May 2003, except with respect to the extent of the benefit that should be paid. The CDS was satisfied that the amended CBI 209.51 fulfilled the SCONDVA recommendation and addressed the Board's recommendation that consideration be given to expanding the benefit to cover travel outside Canada.

In the second case, the grievor was posted in western Canada, when his child passed away. The grievor and his wife wanted their child buried in the Atlantic region, where they were from. When they returned after the funeral, the grievor submitted receipts under CTA. His claim was not paid, because, he was told, it fell outside current CF regulations governing CTA.

The Board found that the grievor was granted compassionate leave, his son was "an immediate family member," and the presence of the grievor and his wife was required in the Atlantic region. The grievor was, therefore, entitled under subsection 209.51(3) of the CBI to receive CTA. The Board recommended that the CDS uphold the grievance.

The CDS disagreed with the Board's interpretation of subsection 209.51(3) of the CBI, specifying that the meaning of the phrase "where their presence is required" is not broad enough to cover the cost incurred by the grievor's and his wife's personal decision to bury their child at an alternative location. The CTA was not designed to cover costs associated with burials. The CDS denied the grievance.

RIGHT TO GRIEVE – PARAGRAPH 29(1) OF THE *NATIONAL DEFENCE ACT* – STANDING

The grievor sought compensation for the loss of employment income suffered by his spouse when the family had to move from one permanent married quarters (PMQ) to another on the same base.

The spouse ran a daycare facility from the first PMQ; however, the Board found that the grievor had not suffered a negative and personal impact due to the denial of compensation for his wife's loss of wages. Consequently, the Board concluded that the grievor did not have the "standing" to submit a grievance pursuant to paragraph 29(1) of the *National Defence Act* and recommended that the CDS deny the grievance. The Board also recommended that the CDS refer the matter, which constituted a claim by the grievor's spouse against the Crown, to the DCCL for consideration and decision.

Although the CDS agreed with the Board that the grievor's claim would best be treated as a claim against the Crown and denied the grievance, the CDS did not agree with the Board's finding on the issue of "standing." The CDS concluded that the decision by the CF to rationalize married quarters was clearly an administrative issue, best kept within the affairs of the CF. Moreover, the CDS took the position that the loss of income by the grievor's spouse would have had an effect on family income and consequently a negative effect on the grievor.

POST LIVING DIFFERENTIAL – PLACE OF RESIDENCE – GEOGRAPHIC AREA

The grievor contested the fact that his place of residence, the City of Blainville, did not fall into the geographic area of Montreal for the purpose of the Post Living Differential (PLD).

The CF's decision was based on a policy supposedly issued by the Treasury Board Secretariat, although the Board has never received confirmation of its existence, stipulating that the daily traveling time between residence and workplace shall not exceed 45 minutes. The average estimated time required by the grievor to cover the distance between Blainville and his place of duty in Montréal was 75 minutes during normal traveling times on weekday mornings.

The Board concluded that the grievor did not meet the criteria of article 205.45 of the QR&O, because his residence was not located in a Post Living Differential Area, which made him ineligible for PLD. The Board also concluded that the 45-minute rule should not be absolute and that the nature of the Greater Montreal Area warrants an exception to this rule. The Board also concluded that the cities of Pointe-Calumet, Ste-Marthe-sur-le-Lac or St-Eustache were no more justified in being included in the Montreal area for the purpose of PLD than the city of Blainville. In fact, the Board was convinced that residents of these cities traveling to work in downtown Montreal during peak hours were unable to cover the distance in less time than the grievor, who lived in Blainville. The Board accordingly recommended that the CDS support the grievance by placing the city of Blainville within the geographical boundaries of the Montreal area for the purpose of PLD.

The CDS denied the grievance. In his decision, he recognized that the travel time of 45 minutes was too variable, particularly within a major metropolitan area, to be a dominant factor. Nonetheless, the CDS was satisfied that the boundaries of the Montreal area for the purpose of PLD had been drawn with reference to the predominant factor, namely, the dominant physical characteristics within a reasonable radius of the major point of service in the Montreal area, subsequently taking into account the time factor and the location of the municipalities. The CDS found that the grievor's secondary arguments, namely, the average cost of a house in Blainville and the property tax rate compared with neighbouring cities, were elements used solely to determine eligibility for PLD and not the delineation of geographic areas. Finally, the CDS concluded that the inclusion of the city of Blainville in the Montreal urban community and the fact that the Blainville School Board was the same for certain municipalities included in the Montreal area were not factors affecting the boundaries of a geographic area for the purpose of PLD.

DISCRIMINATION ON THE BASIS OF MARITAL AND FAMILY STATUS – COMPASSIONATE POSTING

The grievor served in a military occupation that entailed her being called on to serve aboard ship. She was a single parent with no relatives in Nova Scotia, and she refused a posting at sea, as she needed to find adequate care for her child. The grievor requested compassionate posting or status, but the chain of command refused. The grievor was released from the CF for compassionate reasons 13 months after her request for compassionate status. In October 1998, the grievor submitted her grievance explaining that she felt she was unjustly released, having not been given a fair opportunity or sufficient time to find a solution to her situation. She sought financial compensation for the emotional hardship and financial difficulties she faced because of the loss of her job.

The Board supported the grievance and found that the grievor was the victim of discrimination. It concluded that the circumstances of her release constituted a *prima facie* case of discrimination on the basis of both marital and family status. It also found that the CF did not have an adequate defence: its actions were not based on a *bona fide* occupational requirement. More specifically, the CF chose not to accord compassionate leave to the grievor, an internal policy that was open to the grievor. The Board found that by choosing not to grant compassionate leave to the grievor, the CF chose not to accommodate her. The Board recommended that the CDS uphold the grievance and compensate the grievor.

The CDS found no *prima facie* case of discrimination. According to the CDS, the grievor's release was not related to her being a single parent; rather, the grievor's choice not to go to sea — and to breach her occupational requirements — caused her release. Even though the CF judged that it had no obligation to accommodate the grievor, the CDS found that the CF had accommodated the grievor during a period of two years, beginning with her pregnancy and ending with her release.

In determining that the CF was justified in refusing the grievor a compassionate posting, the CDS concentrated on the grievor's statements to the effect that she would simply not leave her child under the care of another. The CDS felt justified in not applying the compassionate leave, given that the grievor's statements meant that no solution, even a two-year time allotment of a compassionate posting or status, would suffice to resolve her situation. Therefore, because the grievor failed to meet the universality of service principle's requirements, the CDS disagreed with the Board's findings and recommendations and denied the grievance.

DRESS CODE POLICIES – SHORT HAIR – EXEMPTIONS – DISCRIMINATION

Early in 2000, the CF adopted a policy on Aboriginal hair dress by way of the Canadian Forces General Message (CANFORGEN) 126/98. The policy allowed Aboriginal CF members to wear long hair and braids if they so requested in writing and if they were in fact part of the Aboriginal community. Permission would be subject to operational and safety requirements. Later in 2000, the CF incorporated this policy into a new dress code that also permitted other religious and cultural groups, such as members of the Sikh community, to wear long hair.

The grievor complained that this policy was discriminatory, as he could not also wear his hair long. In particular, he pointed to the statement in CANFORGEN 126/98 about uniforms and the need to eliminate differences between members of the CF, to highlight the anomaly of allowing certain members to wear longer hair than others.

The Board found that the CF respected the grievor's right to equality. Canadian jurisprudence differed from American jurisprudence on equality: Canadian law prescribed substantive equality, whereas American law adopted formal equality. As such, Canadian law did not dictate that all groups be treated identically. In particular, the Board noted the 1995 Federal Court of Canada case of *Grant v. Canada* that found the RCMP respected the equality provision, despite its adoption of a policy permitting Sikh members to wear a turban while wearing the RCMP uniform. The Board also highlighted the recent Supreme Court case of *Anselem* to substantiate its finding that freedom of religion mandated, at times, that members of religious groups be allowed to display their religious symbols.

The Board found that the real issue in this grievance was not the isolated issue of being able to wear long hair but that of religious freedom. In this particular grievance, there was no evidence that the grievor ever requested accommodation for his own religious beliefs. If CF members who are of the Sikh faith or Aboriginal requested to wear their hair long, the dress policy was lawful in allowing them to do so. The Board recommended that the CDS deny the grievance. The CDS concurred.

FUNDING FOR THE IN VITRO FERTILIZATION MEDICAL PROCEDURE – QUALITY OF LIFE

The grievor contested the denial of funding for the in vitro fertilization (IVF) medical procedure. She maintained that the policy in place when she first requested the treatment allowed for the funding and that any subsequent change in policy should not disentitle her to these benefits. She further claimed that the funding should be granted to improve her quality of life and reduce the considerable stress she suffered.

The Board found that the operative policy did not specifically authorize funding for IVF at the times relevant to this grievor. Notwithstanding this, the considerable stress under which the grievor found herself, along with the resulting depression — which adversely affected her ability to function as a member of the CF — was of such a nature that it required action to restore the grievor to an operationally effective level within the CF. Furthermore, providing the treatment would be consistent with the principles guiding the provision of health care within the CF and the aims of the quality of life initiatives to provide treatment. The Board, therefore, recommended granting the funding for IVF.

The CDS partially agreed with the Board, when he confirmed the Initial Authority decision to provide the grievor the financial funding for any prescribed medication incidental to the IVF treatment. However, the CDS disagreed with the Board and was not prepared to approve the funding, stating that IVF is not a recognized scientific treatment for depression, that no significant periods of depression had affected the grievor's ability to perform her job, and that there was compelling medical evidence that the grievor's depression would not be caused by her infertility alone. The CDS also found that other federal or provincial medical insurance plans made provision for funding IVF based on the grievor's medical condition, and, therefore, authorizing this funding would be contrary to the policy provided for in the CF Spectrum of Care.

It is important to note that in previous findings and recommendations, the Board reasoned that the CF did not compromise another grievor's right to equality if it did not grant funding for the IVF treatment for the wife of a CF member. In contrast, the Board reasoned in this grievance that the grievor, who would be the recipient of the medical procedure, would benefit greatly from it, including helping her overcome her depression.

REIMBURSEMENT OF DEPENDANT RELOCATION COSTS – INTEGRATED RELOCATION PILOT PROJECT – SEPARATE MODE OF TRANSPORTATION

The grievor was seeking reimbursement for the cost of relocating his dependant from Kingston, Ontario, to the grievor's new post in Northwest Territories by a mode of transportation other than the one used by the family. The request was denied by the Director, Compensation and Benefits Administration (DCBA), on the grounds that all family members were required to travel by the same mode of transportation under the Integrated Relocation Pilot Project, except in "exceptional circumstances." According to the CF, "exceptional circumstances" meant cases of medical restrictions or limitations on the mode of travel.

The Board stated that the DCBA policy of allowing separate travel only for serious and well-documented medical reasons is too restrictive and not in accordance with the overall objectives of the program. Despite the fact that the grievor travelled by personal motor vehicle and the separate travel of his dependant was for non-medical reasons, the Board found that the grievor was entitled to reimbursement for his dependant's airfare to the grievor's new posting.

The Acting CDS concurred with the Board's findings and recommendations and upheld the grievance. The separate travel was justified under the circumstances, and the grievor's request was consistent with the stated purpose of the Integrated Relocation Pilot Project policy, which is to relocate CF members at the most reasonable cost for the public while minimizing the detrimental effect on members and their families.

INTEGRATED RELOCATION PROGRAM PILOT PROJECT – LIABILITY OF THE CANADIAN FORCES FOR THE ACTS OR OMISSIONS OF CONTRACTORS – AVAILABLE REMEDIES

The grievor was posted to Gagetown from Greenwood. He purchased a house in Fredericton and subsequently discovered that the amount of his relocation benefits was insufficient to cover his

mortgage default insurance. He grieved to recover the cost of the mortgage default insurance, on the basis that the contractor hired by the CF to administer the relocation program had provided him with incomplete and incorrect advice.

In this case, the Board expanded its previous determination of what was grievable, finding that services provided by contractors retained by the CF to administer its affairs remained the responsibility of the CF. Therefore, the quality of service and sufficiency of benefits received was grievable under subsection 29(1) of the *National Defence Act*. The Board also found that there were three potential vehicles available for awarding redress but that no redress was warranted in the grievor's particular circumstances.

In this case, it recommended that the CDS deny the grievance. The Board also recommended that the CDS review the relocation program to ensure that members posted to areas involving short-distance moves were being adequately compensated. If they were not, the Board recommended that the CDS approach Treasury Board to make the necessary amendments to the regulations. The Board also recommended that the CDS review the adequacy of the system of quality control and complaint management under the relocation system.

If the system was not adequate, the Board recommended that the CDS approach Treasury Board to make the necessary amendments or additions to the regulations to ensure members have adequate access both to reliable information and to a substantive first-level complaint mechanism.

The CDS agreed with the Board's recommendation to deny the grievance but stated that he was satisfied with the system of quality control in place. He declined to make changes to the compensation for members posted short distances but referred the issue to the Assistant Deputy Minister (Human Resources – Military) for his information.

ENTITLEMENT TO POSTING ALLOWANCE – NEGLIGENT MISREPRESENTATION

The grievor contested the recovery of the posting allowance after relocation from Moncton to Gagetown, New Brunswick, following his transfer from the Primary Reserve to the Regular Force. The regulations do not entitle a member to receive the posting allowance in the case of a posting to his first place of duty after transfer to the Regular Force, which was the case here.

The Board found that Royal LePage relocation services wrongfully confirmed to the grievor that he was entitled to the posting allowance. The Board found that the grievor's situation met the five-criteria test for negligent misrepresentation and that he had actually suffered damages by relying on incorrect information provided to him on his relocation benefits. Consequently, the Board recommended that the CDS uphold the grievance and refer this file to the DCCL for financial compensation.

The CDS agreed with the Board that the grievor was provided with incorrect information, but he concluded that it had not been established that the grievor suffered financial loss and hardship by relying on Royal LePage relocation services information. Consequently, the CDS disagreed with the Board's recommendation to refer the file to the DCCL for financial compensation and denied the grievance.

ENTITLEMENT TO RELOCATION BENEFITS – TRANSFER FROM RESERVE TO REGULAR FORCE

The grievor was a Reservist from Ontario, on Class B service in Victoria, when he applied for enrolment in the Regular Force. His application was accepted; however, his request for reimbursement of costs associated with a house purchase and relocation expenses was denied.

The grievor alleged that the denial arose from an error made at the time of his transfer from the Reserve Force to the Regular Force, with respect to the location of his “ordinary residence.”

The Board found that for the grievor to be entitled to the reimbursement of costs associated with the purchase of a home, he must first be authorized to move at public expense. However, in accordance with CF policy, the Board found that members who transfer from the Reserve Force to the Regular Force may be entitled to relocation benefits only if (a) they are already permanent residents within the area of responsibility of the recruiting centre at which they transferred; and (b) by implication, they are subsequently required by the CF to move outside of that location.

Because the grievor’s application for transfer was processed at the recruiting centre in Victoria, he was not entitled to a move at public expense to the Victoria area, regardless of where he deemed his “place of ordinary residence” to be. The Board also found that the grievor was not entitled to a move at public expense while serving as a Class B Reservist.

Furthermore, the Board found the CF’s decision to treat Reservists who transfer to the Regular Force in the same manner as individuals who enrol in the Regular Force for the purposes of relocation benefits might lead to unjust results. The Board recommended that the CF review and amend current relocation policy and procedures, with a view to distinguishing between the concepts of enrolment and transfer and creating opportunities to develop new relocation policies geared toward Reservists who choose to transfer to the Regular Force.

The CDS concurred with the Board’s recommendation to deny the grievance. He declined to act on the Board’s recommendation to review relocation policies geared toward Reservists, stating that the policy, as written, has sufficient latitude to compensate Reservists for relocation expenses, where warranted.

A CASE BEFORE THE FEDERAL COURT OF CANADA

By virtue of section 18.1 of the *Federal Courts Act*, a grievor may apply to the Federal Court (Trial Division) for a review of CDS decisions on Board findings and recommendations. Grounds for such application are limited to a perceived error of law or of fact, in the appearance that the decision was made in breach of the duty of fairness or of the principles of natural justice, without due consideration of the evidence, or where the deciding authority seems to have acted in a way that is contrary to the law.

In September 2004, the Federal Court reviewed a CDS decision. In the case in question, the grievor took 11 days off work to complete his move from Trenton to Ottawa. The grievor had been granted a five-day special leave for relocation, pursuant to paragraph (3) of CF Administrative Order (CFAO) 209-36 and was eventually granted two additional leave days. However, he had to draw on his bank of annual leave credits to cover the other four days he was absent from work. Eventually, the grievor was granted two additional days as time for the supervision of the loading and unloading of his furniture and effects. Concerning the two other days — one spent waiting for an electrician and the other spent attending an inspection of the new residence — they were not recognized as being part of the official relocation time. The grievor filed a grievance on this issue and others and he was subsequently dissatisfied with the CDS' decision. He then asked the Federal Court to review each finding made by the CDS.

From the outset, the Honourable Justice Campbell explained that the Court could consider only one of the points under dispute. But before delving into the point in question, the Court examined the issue of the applicable review standard. In this regard, given the nature of the expertise and authority of the CDS, the Honourable Justice Campbell determined that the Federal Court could only intervene if a patently unreasonable error had been made.

The Honourable Justice Campbell ruled that, on the preponderance of probabilities, the information available could be deemed as supporting the plaintiff's contention that the two days spent waiting for the electrician and inspecting the new residence were necessary for his relocation. The plaintiff did not use the two days for "personal reasons". The Court therefore quashed the CDS' decision which had been based on the Board's recommendations.

The case was referred back to the CDS for reconsideration. Following the Federal Court's decision, the CDS granted the plaintiff two further compensatory days of leave.

APPENDICES

- Financial Table
- Board Member Biographies
- Contact Us

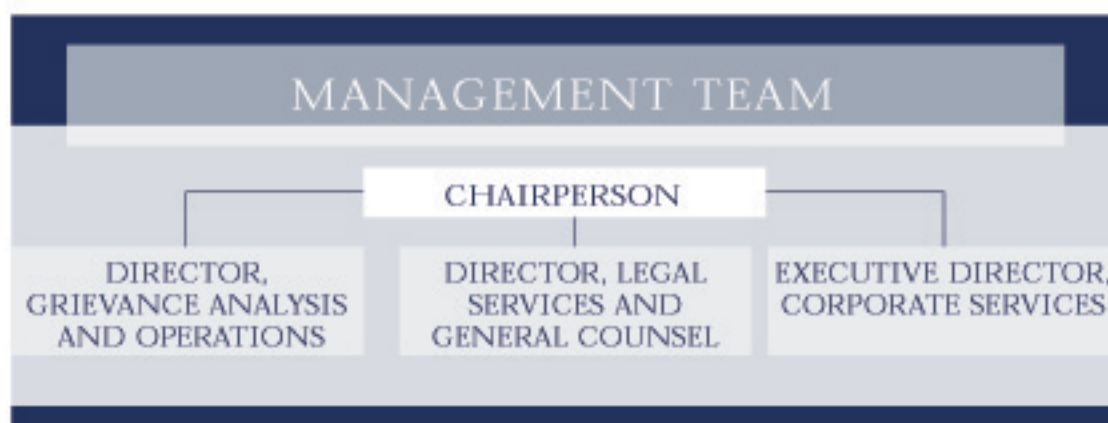
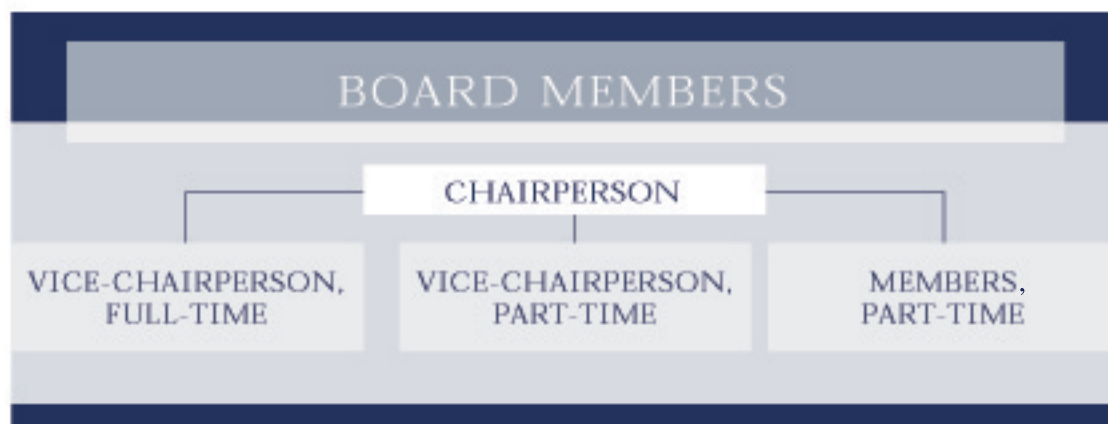
CANADIAN FORCES
GRIEVANCE BOARD

Table Financial

PLANNED SPENDING 2004-2005*	
<i>(In dollars)</i>	
Salaries, wages and other personnel costs	3,252,496
Contribution to employee benefit plans	390,300
Subtotal	3,642,796
Other operating expenditures	2,680,586
Total planned expenditures	6,323,382

**As of January 31, 2005.*

BOARD



CANADIAN FORCES
GRIEVANCE BOARD

ANNUAL REPORT 2004

MEMBER

Biographies

BIOGRAPHIES

Ms. Diane Laurin was named Chairperson for the Canadian Forces Grievance Board on March 1, 2004. Ms. Laurin had been acting in that role since June 2, 2003, fulfilling the duties of full-time Chairperson, as well as those of full-time Vice-Chairperson, an appointment she had held since November 1, 1999.

Ms. Laurin is co-founder of the Board, the first administrative tribunal mandated to review military grievances referred to it by the Chief of the Defence Staff. In this capacity, she has been instrumental in developing the Board's operational infrastructure and has played a key role in the implementation of new legislation (Bill C-25) and its regulations.

Prior to joining the Board, Ms. Laurin worked at the Montreal Urban Community (MUC) as a member of senior management for eleven years, four of which were spent at the Montreal Urban Community Police Service (MUCPS).

From 1995 to 1998, Ms. Laurin was Assistant-Director and Chief of Staff to the Director of the Police Service. She participated in major files involving citizen security, public morality and criminal activity, as well as intercultural and race relations. Some examples are the ice storm, the Stanley Cup riots, the motorcycle gang wars and the Barnabé Case.

Ms. Laurin also took part in several projects touching upon collective agreement negotiations, work relations and professional ethics. She participated in a project called "Towards Neighbourhood Policing" which necessitated the re-engineering of the MUCPS and led the department to thoroughly review its mission and work practices.

Ms. Laurin began her career as a nurse, then obtained a Bachelor of Law degree from the University of Montreal (1982) and has been a member of the Quebec Bar Association since 1983. Ms. Laurin practiced immigration and civil law.

Ms. Laurin is member of the Canadian Bar Association and the Council of Canadian Administrative Tribunals; she is also on the board of directors for the Professional Development Centre for Members of Canadian Administrative Tribunals.



Diane Laurin
Chairperson

BOARD

Biographies

James Price began with the Board in January 2004, as a team leader in the Operations Sector, and was appointed as full-time Vice-Chairperson in December of that same year. He brings to the position extensive experience in all areas of military law, including the military justice system, international law and operational law.

Originally from Twillingate, Newfoundland, Mr. Price joined the University Naval Training Division in 1966 while attending Memorial University. After seven years of active service, he attended Dalhousie University, graduating with a masters of public administration in 1976 and a bachelor of laws in 1980, the same year he was called to the Bar of Newfoundland.

He engaged in private legal practice before joining the Canadian Forces (CF) in 1981, as a legal officer in the Office of the Judge Advocate General (JAG).

During his time with JAG, Mr. Price served as director of prosecutions and appeals, where, in addition to coordinating prosecutions and appeals in the CF, he guided the section through its transition to an independent prosecution service. He subsequently served as the deputy director of the new Independent Military Prosecution Service.

After serving as Assistant Judge Advocate General (Europe), Mr. Price was appointed a military judge by the Governor in Council in 2001, a position he held until 2003. During this time, he presided over cases involving both service offences and offences under the *Criminal Code of Canada*.



James Price
Vice-Chairperson

MEMBER

PART-TIME MEMBERS

Naomi Z. Levine was appointed as a part-time Member of the Board on March 21, 2000. Ms. Levine, from Winnipeg, Manitoba, is a lawyer, ethicist, chartered mediator and workplace dispute consultant, with extensive experience in conducting inquiries. She is also a harassment consultant for the University of Winnipeg and Red River College. As a lawyer, Ms. Levine has specialized in criminal, labour and corporate law, among others. She obtained a bachelor of arts from the University of Winnipeg and a masters of arts and a bachelor of laws from the University of Manitoba. She has a weekly radio column, "Ethics and Law," on CBC Winnipeg.

Naomi Z. Levine



Wendy E. Wadden was appointed as part-time Member of the Board on March 31, 2000. Ms. Wadden, from Sydney, Nova Scotia, is a lawyer in private practice since 1984. She has been a full time instructor in the School of Business at Cape Breton University since 1987 and is a member of the Nova Scotia Barristers' Society and the Cape Breton Barristers' Society. She has a Bachelor of Commerce (Honours) and a Bachelor of Law from Dalhousie University. During her time at Cape Breton University, Ms. Wadden served as a member of the Academic Council, the Academic Appeals Committee, as Chair of the School of Business, and Vice-Chair of the School of Business. She has been an active member of community oriented organizations such as Crime Stoppers, Second Chance and the Interagency Committee on Family Violence.

Wendy E. Wadden



Michel Crowe was appointed as a part-time Member of the Board on February 28, 2003. He studied law at the University of Montréal before being called to the Bar of Quebec in 1968. He served in the Canadian Armed Forces from 1962 until 2000, first with the reserve force for five years in the Canadian Officer Training Corps and as an infantry officer in the Régiment des Fusiliers Mont-Royal. He then transferred to the regular force as a military lawyer with the Office of the Judge Advocate General (JAG) in 1967. He served as Assistant Judge Advocate General in Lahr, Germany, as well as in the province of Quebec. Mr. Crowe appeared as counsel before the Court Martial Appeal Court and headed several subdivisions of the JAG head office at National Defence Headquarters. He also served as legal advisor for Supreme Headquarters Allied Powers Europe, participating in several international negotiations with NATO. Mr. Crowe taught civil law and the laws of war at the Royal Military College of Saint-Jean-sur-Richelieu, Quebec, and continues to teach military law. Throughout his military career, he has counselled on military grievances and is accredited as a mediator by the Bar of Quebec.



Michel Crowe

On May 6, 2003, Ms. Gwen Barbara Hatch was appointed as a part-time Member. Ms. Hatch, from Winnipeg, Manitoba, is a partner with the law firm of D'Arcy & Deacon. She has extensive court experience and has appeared at all levels of court, including the Supreme Court of Canada. She has been in private practice since 1981. Ms. Hatch is very active in her community and professional associations, serving as chair of the St. Boniface Hospital and Research Foundation, as well as being on the Board of Sturgeon Creek United Church. She has held the positions of course head and instructor for the wills and estates and ethics bar admission courses, respectively, for the Manitoba Law Society, and as board member of Family Mediation Canada–Family Mediation Manitoba, Society of Trust and Estate Practitioners. Ms. Hatch was also the recipient of the Queen's Golden Jubilee Medal in 2002.



Gwen Barbara Hatch

CONTACT US

CONTACT US

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Canadian Forces Grievance
Board Staff