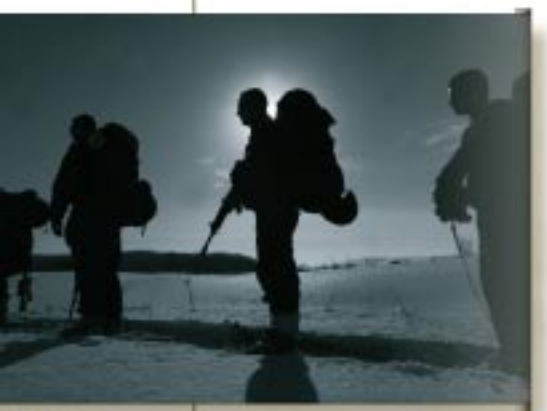
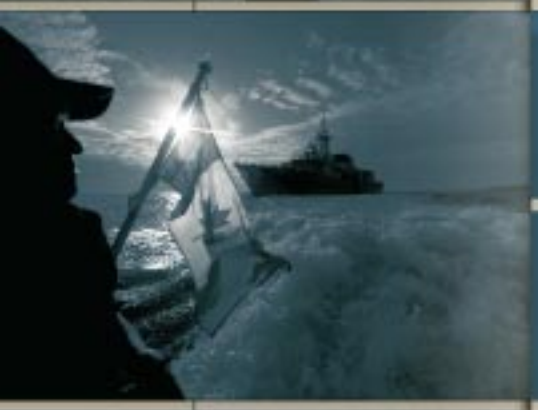
Special Report to the
Minister of National Defence

May 2010 | Pierre Daigle





THE CANADIAN FORCES GRIEVANCE PROCESS:

Making It Right for Those Who Serve

Ombudsman
National Defence and Canadian Forces
Défense nationale et Forces canadiennes

Canada

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Making It Right for Those Who Serve

May 2010

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Introduction

1 We expect a great deal from the men and women who join the Canadian Forces. They are required to perform unique tasks under unique and strenuous conditions. When a person enrolls in the Canadian Forces, he or she becomes subject to a broad liability to serve. Canadian Forces members are required to follow lawful orders, and can be required to serve, and potentially sacrifice their lives, in dangerous military operations.

2 Canadian Forces members are not like other government employees. They cannot form unions. Courts have confirmed that there is no legally enforceable employment contract between the Crown and Canadian Forces members. Courts have held that, due to the nature of their relationship, Canadian Forces members do not have the same range of legal remedies that are available to most Canadians in normal employment relationships. However, Canadian Forces members do have access to a mechanism to challenge decisions or actions that they feel are unfair, and that is the Canadian Forces grievance process.

3 The Canadian Forces grievance process exists, in large part, because of the nature of the relationship between the Crown and Canadian Forces members. This process was intended to allow Canadian Forces members to address their issues and/or complaints informally and expeditiously within the chain of command. Generally, the issues raised are human resources matters such as postings, benefits, evaluations, medical issues and release from military service.

4 By virtue of the *National Defence Act* (R.S.C. 1985, c. N-5), the Chief of the Defence Staff is charged with the "control and administration" of the Canadian Forces. The *National Defence Act* also designates the Chief of the Defence Staff as the final decision-maker or "final authority" in the grievance process.

5 Since the Ombudsman's Office began receiving complaints in 1998, we have received many concerning the Canadian Forces grievance process. A number of those complaints concern the fact that the Chief of the Defence Staff lacks the authority to deal with, and determine, all aspects of a grievance.

6 Indeed, the Canadian Forces grievance process does not allow Canadian Forces members to have *all* aspects of a grievance resolved. For example, when the Chief of the Defence Staff makes a decision, the Canadian Forces member may be advised that certain parts of the complaint or some issues cannot be determined under the grievance process. This usually happens when the military member is seeking monetary compensation, such as loss of wages or reimbursement of an expense. The Canadian Forces member is informed that those aspects must to be dealt with under another process.

8 This other process involves submitting a "claim against the Crown" to the Director Claims and Civil Litigation, which is part of the Office of the Legal Advisor for the Department of National Defence and Canadian Forces. The lawyers in that office provide legal advice to the Department of National Defence and the Canadian Forces in all areas of law except those areas for which the Judge Advocate General is solely responsible (such as military law, military discipline and the military justice system). However, they perform their work on behalf of the Department of Justice Canada. This is because Justice Canada has the mandate to provide legal advice to the Government of Canada.

9 When a claim for compensation arising from a grievance is made, it is a Department of Justice lawyer who determines if compensation should be paid to the Canadian Forces member, regardless of the amount or any decision made by the Chief of the Defence Staff regarding the grievance. The Chief of the Defence Staff has no authority or say.

10 It seems unreasonable that the Chief of the Defence Staff cannot order compensation – which, in some cases, is less than $50 – for Canadian Forces members in the context of a grievance. More time can be spent on paperwork than is required to pay out such a claim. It also seems unreasonable that a departmental lawyer, whose role is advisory in nature, has decision-making authority regarding compensation when the Chief of the Defence Staff does not. It simply defies logic that the Chief of the Defence Staff is trusted to manage Canada's military operations in Afghanistan and elsewhere but is not given the authority to pay out a $50 claim.

11 Moreover, in most of the cases that the Ombudsman's Office has reviewed, Director Claims and Civil Litigation has refused to pay monetary compensation to the Canadian Forces member – even when that member's claim has been supported by the Chief of the Defence Staff. According to statistics provided by the Director General Canadian Forces Grievance Authority for the period between 2000 and 2007, the Director Claims and Civil Litigation has made decisions on monetary compensation matters in 52 grievances that were referred to it by the Chief of the Defence Staff. And he has granted compensation in only 15 of these 52 cases.

12 When claims are rejected, Canadian Forces members are informed by Director Claims and Civil Litigation that they must initiate legal action against the Government of Canada in order to obtain compensation. However, legal action will rarely be heard by a court because previous courts have ruled that there is no legally enforceable employment contract between the Crown and Canadian Forces members.

13 The grievance system is supposed to provide soldiers, sailors, airmen and airwomen with a mechanism to challenge Canadian Forces actions and resolve matters without the need to use the courts or another process. This is not currently possible.

14 It should also be noted that the Ombudsman's Office is not the first to recognize this problem nor is it the first to make recommendations to the Department of National Defence and the Canadian Forces that it be fixed. In 2003, after an external independent review, the former Chief Justice of the Supreme Court of Canada, Antonio Lamer, recommended that the Chief of the Defence Staff be given authority to settle financial claims in grievances. Within the Canadian Forces itself, the Director General Canadian Forces Grievance Authority has recommended that steps be taken to implement Chief Justice Lamer's recommendation. The Canadian Forces Grievance Board has also highlighted this as an important issue affecting members of the Canadian Forces. Despite all of this support for change, including Ministerial acceptance of Chief Justice Lamer's recommendation and assurance that it was being implemented, nothing has been done. However, with clear direction to act from the current Minister of National Defence, we are optimistic that the problem will finally be resolved and the system will be improved to better serve the men and women of the Canadian Forces.

15 If a Judge Advocate General officer in Afghanistan has the authority to award compensation to an Afghan farmer for damage to his property, it makes no sense that the Chief of the Defence Staff cannot grant financial compensation to fully resolve a legitimate grievance from a Canadian Forces member. And it is highly desirable for the simple reason that, in certain circumstances, fairness cannot be achieved by any other means.

16

Ombudsman's Mandate to Review

17 The *Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces* (the mandate) set out the Ombudsman's powers and duties. Under paragraph 3(3) of the mandate, when a complaint is made about an existing mechanism (including the Canadian Forces grievance process), "the Ombudsman may review the process only, to ensure that the individual or individuals are treated in a fair and equitable manner." The complaints received by our office have indicated to us that there is an important question that needs to be addressed: Is it fair to Canadian Forces members that the Chief of the Defence Staff cannot deal with all issues arising in their grievances under the Canadian Forces grievance process?

18

How the Grievance Process Works

19 If a Canadian Forces member feels an action or decision of the chain of command is unfair, he or she may file a grievance disputing that action. The *National Defence Act* provides that right to all Canadian Forces members. The grievance can be about any decision, act or omission in the administration of the affairs of the Canadian Forces (where there is no other redress process provided for under the *National Defence Act*). There are a few specific matters that cannot be the subject of a grievance, such as a decision of a court martial or the Court Martial Appeal Court.

20 Previously, the Canadian Forces grievance process was extremely complicated, with numerous levels of review within the chain of command. In 1998, the process was amended with the view of making it more streamlined. There are now just two levels of review. The Initial Authority is the first level of review, and is usually the military member's commanding officer or an entity within the Canadian Forces that has the power to actually grant the redress requested by the member.

21 If the Canadian Forces member is unhappy with the decision of the Initial Authority, he or she has the right to have the matter reviewed by the Chief of the Defence Staff as the Final Authority. This is consistent with his role of being charged with the 'control and administration' of the Canadian Forces.

22 The *National Defence Act* provides that the Chief of the Defence Staff may delegate the right to decide certain grievances to "any officer." This applies to all grievances except those cases referred to the Canadian Forces Grievance Board, which the Chief of the Defence Staff must decide personally. The Director General Canadian Forces Grievance Authority is the 'officer' that has the delegation from the Chief of the Defence Staff to decide any grievances that the Chief of the Defence Staff does not have to decide personally.

23 Regulations in the *National Defence Act* provide that certain issues must be referred to the Canadian Forces Grievance Board for their review prior to the Chief of the Defence Staff making a decision in the grievance. The Grievance Board has the role of independently reviewing certain types of grievances and providing its findings and recommendations to the Chief of the Defence Staff. If the Chief of the Defence Staff disagrees with the findings or recommendations of the Grievance Board, he must explain his reasons for doing so in his decision.

24 The Chief of the Defence Staff's decision in a grievance is final and binding. It can, however, be challenged by an application for judicial review in the Federal Court of Canada. In addition, under the Ombudsman's Ministerial

Directives, our office can review a grievance to ensure that the grievor was treated in a fair and equitable manner.

25 According to the Canadian Forces Grievance Manual,[1] when the grievor submits his or her grievance, he or she must provide a "clear statement of the full redress sought; *i.e.*, what the grievor ultimately wants to 'make things right' must be obvious." The Grievance Manual also states:

26 > *2.7 Use of Appropriate Complaint Process*
>
> *The following complaint processes should be investigated prior to considering or accepting a grievance:*
>
> ….
>
> *b. Claim Against the Crown. Should a complaint involve a claim for compensation in the form of damages,* DAOD 7004-0 *(Claims By or Against the Crown and Ex-gratia Payments) is to be consulted to obtain guidance on the procedure for resolving a claim against the Crown.*

27 However, what exactly a claim against the Crown consists of, and why it cannot be dealt with under the grievance process, or how it differs from a grievance, is not clear nor is it explained. There is also no guidance regarding grievances where the issue of monetary compensation is tied to other issues that can be handled by the grievance process.

[1] The *Canadian Forces Grievance Manual* can be found at: http://www.cfga-agfc.forces.gc.ca/pub-man/gm-mg/index-eng.asp.

Complaints Received by the Ombudsman

The following are some examples of the many complaints received by the Ombudsman's Office. They illustrate the real difficulties encountered by some Canadian Forces members when they submit a grievance under the Canadian Forces grievance process.

Example 1:

This Canadian Forces member was a Class A Reservist. He was relieved from military duty without pay. He grieved this decision, and the grievance was denied at the Initial Authority level. The Canadian Forces member then submitted the grievance to the Chief of the Defence Staff. Given the subject matter, the grievance was referred to the Grievance Board. The Grievance Board recommended that the Canadian Forces member's removal from duty be cancelled. However, the Grievance Board acknowledged that this action, in itself, would not address the damages suffered by the Canadian Forces member, which included lost wages. In its findings and recommendations, the Grievance Board recommended that the grievor be compensated financially and stated:

> *Ideally, this monetary award would encompass the lost wages and other monetary damages that the grievor suffered as a result of the flawed decision to relieve him from duty.*

The Chief of the Defence Staff agreed with the Grievance Board's findings and recommendations that the grievor had been wrongly relieved from duty, stating:

> *I am satisfied that [the grievor] should not have been relieved from the performance of military duty…. it was not in the public [sic] best interest to relieve [the grievor] from duty, considering the information available at the time. Alternatives should have been considered, as stated by the CFGB [Canadian Forces Grievance Board].*

However, the Chief of the Defence Staff went on to say that he could not actually compensate the Canadian Forces member for the wrong treatment:

> *I do not have any authority to award financial compensation in the grievance process. However, I will refer [the grievor's] file to the Director of Claims and Civil Litigation for consideration of a monetary award that would encompass the loss of wages*

> *and other monetary damages that [the grievor] suffered as a result of [the grievor's] relief from duty.*

37 Even though both the Grievance Board and the Chief of the Defence Staff clearly explained why the Canadian Forces member had been wrongly relieved from military duty, the Director Claims and Civil Litigation wrote to the Canadian Forces member requesting that he provide a written submission as to why financial compensation should be granted to him. The grievor provided the statement as required. The Director Claims and Civil Litigation responded on a "without prejudice" basis,[2] informing the grievor that, while the Chief of the Defence Staff found the decision to relieve him from duty was invalid, he was going to deny the claim for compensation:

38 > *The civil courts have stated that there is no employment contract between Her Majesty and members of the [Canadian Forces], that a person who enrolls in the military does so at the pleasure of the Crown and that such relations between Her Majesty and Her military members do not give rise to remedies in the civil courts.*

39 As a result, this Canadian Forces member did not receive any compensation for his lost wages, even though the Chief of the Defence Staff had determined that he was wrongly relieved from his military duty and that he lost wages as a result. So, even though the Chief of the Defence Staff has the right to determine that the Canadian Forces member should have been entitled to work and was wrongly relieved from military duty, he does not have the authority to financially compensate the Canadian Forces member for the injustice and resulting lost wages.

40 **Example 2:**

41 The complainant was a Reservist and a former Regular Force member. He was an annuitant under the *Canadian Forces Superannuation Act*, and was required to take a break in his Reserve service in order to retain his status as an annuitant. He requested a break in service time to maximize his work days. However, the complainant's requested break was not approved, with the result that he lost 35 days that he otherwise could have worked and been paid for. The complainant grieved the decision, and the Chief of the Defence Staff concluded the approval process for the request was not followed and that there was no good reason for his request to have been denied. The Chief of the Defence Staff agreed that this resulted in the loss of pay for 35 days but had to refer the monetary claim to Director Claims and Civil Litigation.

[2] Sending correspondence on a "without prejudice" basis means that the writer of the letter is not legally bound by any admissions or statements made in the letter, and that the letter will be seen as part of negotiations between the parties, and thus not be used in any legal proceedings.

42 Director Claims and Civil Litigation reviewed the file. The complainant's claim for lost wages was denied on the basis that there was nothing in the claim to indicate that Crown servants were negligent, and because there was no employment contract between the Crown and members of the Canadian Forces. Director Claims and Civil Litigation also said that the Chief of the Defence Staff should consider an administrative resolution to the grievance:

43 > *In your case, there is nothing allowing me to conclude that Crown servants have been negligent. Although Crown servants at [your unit] failed to submit your request for deferral of your mandatory annuitant break to the appropriate authority for a decision, the evidence reveals that [your unit] earnestly believed that they had the requisite authority to make the decision and did so in good faith.*

44 > *Notwithstanding the above, there is no employment contract in law between Her Majesty and members of the CF. One of the consequences is that a military member cannot sue the government for damages stemming from his/her conditions or terms of service. Such matters are in my view within the exclusive jurisdiction of the military redress of grievance statutory scheme.*

45 **Example 3:**

46 This complainant was offered and accepted a contract of employment as a Cadet instructor. He made arrangements to be at the Canadian Forces base where he would be working for the entire summer, including giving up his lodgings, part-time civilian employment, and a spot on a trade-related training course. The day before his contract was supposed to begin, he was informed that it was being cancelled. As a result, the complainant was not able to earn the $8,000 salary associated with the contract, and was left without a place to live and the opportunity to attend his trade-related course.

47 The complainant grieved the cancellation of his contract. The Chief of the Defence Staff's delegate, Director General Canadian Forces Grievance Authority, found the decision to cancel the complainant's contract had been within the discretion of the relevant individual and the reason for the cancellation had been valid. However, the Director General Canadian Forces Grievance Authority also determined that, in reaching the decision, the decision-maker had not taken other relevant factors into account, and that the timing of the cancellation was unfair to the complainant. The Director General Canadian Forces Grievance Authority forwarded the file to Director Claims and Civil Litigation in order to determine if there was a potential claim against the Crown.

48 After reviewing the file, Director Claims and Civil Litigation informed the complainant:

49 > *… in law there is no employment contract between Her Majesty and members of the CF. One of the consequences is that a military member cannot sue the government for a breach of employment contract or wrongful dismissal. I therefore conclude that the Crown is not liable in this case and cannot compensate you for the damages stemming from the cancellation of your Class "B" Reserve Service offer.*

50 These are just three examples of cases where compensation could not be ordered by the Chief of the Defence Staff or his delegate as part of a decision under the grievance process. As quoted above in the Director Claims and Civil Litigation's letter in Example 2, the grievance process is designed to deal with all issues arising out of the Canadian Forces member's terms of service. However, it currently does not. Nowhere in the *National Defence Act* does it specifically state that the Chief of the Defence Staff does *not* or cannot have the power to order financial compensation as part of a grievance decision. However, that is how it has been interpreted and nothing has been done to provide the Chief of the Defence Staff with specific authority to address compensation issues within the grievance process. This has created a practical impediment to ordering financial compensation as part of a grievance decision.

51 This assumed lack of authority to approve compensation in appropriate circumstances has created unfairness in the grievance process. Those who reviewed these cases within the grievance process determined that the grievors should receive compensation. Presumably, if the authority to provide compensation existed within the grievance process, these grievors would have received compensation. However, the grievance process was completely unable to resolve the unfairness that was evident to the Chief of the Defence Staff and/or his delegate. And, when these cases were referred to the Director Claims and Civil Litigation, a Treasury Board Secretariat policy (known as the *Policy on Claims and Ex Gratia Payment*) was applied, rather than the principles governing the grievance process.[3] The decisions by the Director Claims and Civil Litigation to deny compensation in these cases were based on the unique nature of the relationship between the Crown and members of the Canadian Forces, in which the Crown's legal responsibilities are limited. Under the strict reading of this Treasury Board policy, it was determined that, based on this relationship, there is no liability or legal obligation to compensate. Yet the grievance process, which is supposed to take this

[3] The *Policy on Claims and Ex Gratia Payment* was replaced on October 1, 2009 by the *Directive on Claims and Ex Gratia Payments*, which can be found at: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=15782&section=text#cha1.

relationship into account, was unable to provide the grievor with a remedy for the injustice it found had been committed against him/her. This leaves Canadian Forces members, who have been found to be 'wronged,' with no way to get compensated for this 'wrong.'

52 # Relevant Policies and Commentary

53 There are policies, directives, and practices that apply when the Government of Canada is considering and authorizing financial expenditures. In addition, since our office is not alone in identifying this as a problem, it is useful to look at some previous recommendations that have been made to fix the grievance process and the way in which they have been received.

54 ## *Government of Canada Policies*

55 The fact that the Chief of the Defence Staff is not always the final decision-maker for all aspects arising out of a grievance is only part of the problem. Another problem is that the policies under which financial compensation aspects of the grievance are being considered by legal advisors are general, government-wide policies. They were not developed with the same goals (*i.e.*, timely and informal resolution of complaints) as the Canadian Forces grievance process. In fact, they are often at odds with those goals. Therefore, when they are applied, the result can be completely unfair to Canadian Forces members with grievances.

56 The *Financial Administration Act* (R.S.C. 1985, c. F-11) provides Treasury Board with the responsibility over the financial management of the federal government. Treasury Board delegates certain powers to ministers and deputy heads of departments, subject to any terms and conditions that it considers appropriate. In turn, ministers and deputy heads are able to delegate certain spending powers to individuals under their jurisdiction to allow for the efficient functioning of the department. Under the definitions in the *Financial Administration Act* and the *Public Service Employment Act* (S.C. 2003, c.22), the deputy head for the Department of National Defence is the Deputy Minister of National Defence.

57 The Treasury Board *Directive on Claims and Ex Gratia Payment* provides deputy heads with the authority to settle claims and make *ex gratia* payments. The purpose of the directive is to ensure the efficient and effective resolution of claims by, and against, Her Majesty in Right of Canada (the Crown) arising from government operations. The directive also allows deputy heads to designate officials to exercise the spending and certification authorities set out in the directive.

58 There is an important difference between settling a claim and making an *ex gratia* payment. The directive defines a claim as a "claim in tort or extra-contractual claim for compensation to cover losses, expenditures or damages sustained by the Crown or a claimant." An *ex gratia* payment is defined as a "benevolent payment" that may be "made in the public interest for loss or expenditure incurred where the Crown has no obligation of any kind or has no

legal liability or where the claimant has no right of payment or is not entitled to relief in any form." It is to be used only when there is no other statutory, regulatory or policy vehicle to make the payment.

59 The directive clearly states that any authority thereunder may be exercised by an official designated by the deputy head to do so. It does not state that the decision-making function to settle claims needs to be carried out by a lawyer – only that, in certain cases, the person exercising the authority is to request legal advice from Legal Services. Obviously, in deciding to pay out such claims, anyone exercising the function would and should fully consider the legal advice received, and it would play a significant role in the decision about a given claim.

60 If the deputy head or his designate are not of the opinion that a person seeking financial compensation has a valid and legitimate claim against the Crown, the person's situation may warrant consideration under the *ex gratia* part of the directive. Generally, *ex gratia* payments are used when there are no other reasonable means by which to compensate the wronged person. So, even when it is determined that the government is in no way liable to pay a person making a claim against the Crown, there is a mechanism that allows a benevolent payment when it is appropriate and just to extend compensation. However, the directive expressly prohibits making an *ex gratia* payment to fill perceived gaps in existing legislative, regulatory or policy schemes.

61 The Treasury Board directive states that, with respect to the authority to approve *ex gratia* payments, any *ex gratia* payments over $2,000 are to be approved by the deputy head.

62 The Ombudsman's Office has recommended the making of *ex gratia* payments in a number of cases where, for various reasons, there was no legal requirement for the Department of National Defence and Canadian Forces to pay money to a person who had been treated unfairly. These recommendations were implemented, and the payments made, because the Ombudsman's investigation demonstrated that fairness required it.

63 *Department of National Defence and Canadian Forces Internal Policy*

64 Within the scope of the financial authority delegated to them, federal government departments set up systems delegating the financial authority to different officials within those departments. This allows the efficient day-to-day running of departments without the need for the Minister or Deputy Minister to approve each expenditure regardless of its amount or significance.

65 The Delegation of Authorities for Financial Administration for the Department of National Defence and the Canadian Forces provides guidance to delegated authorities for financial administration within the organization.[4] For the Department of National Defence and Canadian Forces, the Deputy Minister has delegated the following powers with respect to paying liability claims:

66 - Full authority to settle claims to the Department of National Defence and Canadian Forces Legal Advisor;

67 - Up to $200,000 to Director Claims and Civil Litigation;

68 - $25,000 to Assistant Judge Advocates General and $10,000 to Legal Officers (Canadian Forces members) on operations; and

69 - $25,000 to Legal Counsel, $15,000 to Senior Claims Analysts, and $10,000 to Claims Analysts (within the Office of the Department of National Defence and Canadian Forces Legal Advisor).

70 Concerning *ex gratia* payments, the Deputy Minister has delegated the authority to make *ex gratia* payments up to the amount of $2,000 to the Department of National Defence and Canadian Forces Legal Advisor, Director Claims and Civil Litigation, Assistant Judge Advocates General and Legal Officers.

71 While the Deputy Minister has chosen to delegate his power to settle claims and make *ex gratia* payments as set out above, he also has the ability to delegate his authority to others. For example, the Ombudsman's Office has been delegated the full authority to settle claims and make *ex gratia* payments so that it can function independently and at arm's length from the Department of National Defence and Canadian Forces.

72 *Recommendations of the Independent Review of the* National Defence Act *(2003)*

73 As stated in the introduction of this report, the Ombudsman's Office is not the first entity to highlight the problem of the Chief of the Defence Staff lacking the authority to resolve all financial aspects arising in a grievance.

74 In 2003, former Chief Justice of the Supreme Court of Canada, Antonio Lamer, was appointed to conduct the first review of Bill C-25, which amended

[4] This document (issued January 30, 2008) can be found at: http://admfincs.mil.ca/dfpp/delegation/delegation_e.pdf. DAOD 7004-0 is available at: http://admfincs.mil.ca/admfincs/subjects/daod/7004/0_e.asp.

provisions of the *National Defence Act* in 1998. In his report, released and tabled in Parliament in November 2003, the former Chief Justice discussed the purpose of the Canadian Forces grievance process:

75 *Soldiers are not second class citizens. They are entitled to be treated with respect, and in the case of the grievance process, in a procedurally fair manner. This is a fundamental principle that must not be lost in a bureaucratic process, even a military one. Grievances involve matters such as benefits, personnel evaluation reports, postings, release from the Canadian Forces, medical issues and harassment – all matters affecting the rights, privileges and other interests of CF members. From the grievor's point of view, pursuing a grievance takes time, often costs money, and in many cases is very stressful. Further, unlike in other organizations, grievors do not have unions or employee associations through which to pursue their grievances, nor do grievors generally have recourse to the Federal Court or to the Ombudsman while a redress of grievance is within the grievance process. It is essential to the morale of CF members that their grievances be addressed in a fair, transparent, and prompt manner.*

76 *Although a new grievance process was introduced by Bill C-25, the redress of grievances is not part of Canada's military justice system. While grievances must be treated fairly and with administrative justice, grievances should be seen as a human resource issue as they involve matters that affect the morale, well-being and quality of life of Canadian Forces members. Unlike military justice, which is by its very nature adversarial, the grievance process should be approached by the grievor, the Canadian Forces, including the CDS and the Canadian Forces Grievance Authority, as well as the Grievance Board in a cooperative manner. Effectively responding to grievances is critical to maintaining a high morale among Canadian Forces members.*

77 ….

This current grievance process was never intended to be as complicated and bureaucratic as it is presently. It was intended to be an informal procedure through which matters that affect a CF member can be dealt with quickly. While the manner in which the Canadian Forces organizes its grievance process is

78 *not for me to determine, I am concerned that the process be organized so as to deal with grievances in an informal and expedient manner.* [5]

79 In particular, he made the following recommendation concerning the powers of the Chief of the Defence Staff:

80 *A further measure that would reduce the red tape in reviewing grievances and speed up the grievance process would be to ensure that the CDS and/or the CFGA have the necessary internal management authority to make decisions regarding financial compensation and claims, including claims against the Crown and ex gratia payments. Currently, the CDS has not been given the necessary authority to settle financial aspects of grievances.*

81 ***(81) I recommend that the Chief of Defence Staff be given the necessary financial authority to settle financial claims in grievances and that the Chief of Defence Staff be entitled to delegate this authority.***

82 The Minister of National Defence at the time, John McCallum, responded to the Chief Justice's report, stating that he supported this recommendation and that action was underway to implement all supported recommendations. Specifically, the Minister's response stated:

83 *Of the eighteen recommendations in former Chief Justice Lamer's Report that deal with the Canadian Forces Grievance Process, sixteen are supported and action is underway to implement them. The remaining two recommendations in this area - those dealing with funded judicial review to the Federal Court and subpoena power for the Canadian Forces Grievance Board - require further study and consultation.*[6]

84 Despite the fact that the Minister of National Defence of the time agreed that the Chief of the Defence Staff should have the authority to settle financial claims in grievances, the Ombudsman's investigation revealed that the Department of National Defence had not actually taken any concrete steps over the past six years to implement former Chief Justice Lamer's recommendation.

[5] 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, November 2003. Available at http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf.
[6] Comments of the Minister of National Defence on the First Independent Review of Bill C-25, available at http://www.forces.gc.ca/site/reports/review/comments_e.asp.

85 The Director General Canadian Forces Grievance Authority has raised the matter internally within the Canadian Forces, recommending that steps be taken to implement this recommendation. One of the arguments raised in favour of providing the Chief of the Defence Staff with this authority is that, while his decisions are to be final and binding, he does not actually have the ability to bring finality to a matter if there is an issue of financial compensation left outstanding. Even if the Chief of the Defence Staff feels that financial compensation is warranted, the Director Claims and Civil Litigation may – and quite often does – determine otherwise. According to statistics provided by the Director General Canadian Forces Grievance Authority for the period between 2000 and 2007, the Director Claims and Civil Litigation has made decisions on monetary compensation matters in 52 grievances that were referred to it by the Chief of the Defence Staff. And he has granted compensation in only 15 of these 52 cases.

86 Is it fair to the men and women of the Canadian Forces that the Chief of the Defence Staff must defer this portion of their grievance to a departmental lawyer? The short answer is no. We believe it is unreasonable and unfair that Director Claims and Civil Litigation, whose role is to provide advice, has more decision-making power than the Chief of the Defence Staff on matters concerning the well-being of Canadian Forces members. In addition, the fact that these matters are referred to the Director Claims and Civil Litigation is confusing and discouraging to Canadian Forces members.

87 *Canadian Forces Grievance Board*

88 As stated above, the role of the Grievance Board is to independently review certain types of grievances submitted to the Chief of the Defence Staff, and to provide him with written findings and recommendations. The Chief of the Defence Staff then makes the final decision.

89 In its 2006 annual report, the Canadian Forces Grievance Board highlighted what it stated was a "recurring problem" within the grievance process:

90 > *An issue that has been identified previously but remains a recurring problem within the current grievance system is that neither the Initial Authority nor the CDS (the Final Authority) have claims adjudication authority. The authority to settle claims against the Crown or to give ex gratia payments to members of the CF has been delegated to the Director Claims and Civil Litigation (DCCL) from the Legal Advisor to the Department of National Defence and the Canadian Forces. Accordingly, in cases where the Board has recommended that grievors receive financial compensation as one of the remedies to the resolution of their grievances, the CDS has been limited to referring the cases to the DCCL for his review and*

determination of the merit of such compensation. While the Board and the CDS have often shared the view that some grievors had a valid claim or that the circumstances of their cases deserved to be considered for an ex gratia payment, the DCCL may not necessarily agree.

91 *….While the Board acknowledges that the CF grievance system provides a broad range of remedies, such as retroactive promotion, the Board is of the view that administrative remedies are not always sufficient. An administrative payment can be made only when there is an entitlement (i.e. under the Compensation and Benefits Instructions). However, for those cases where grievors suffer a wrongdoing for which an entitlement or a change of status cannot be ordered, administrative remedies are of little assistance. For example, the Board has reviewed many harassment grievances where either the complainant or the respondent has suffered serious emotional and career-related damages. In those cases, possible remedies are very limited and while the CF may not be liable for what has happened, in several cases, the Board and the CDS have agreed that there is a moral obligation to compensate these grievors.*

92 *Having to wait for the DCCL's review and determination with respect to possible claim settlements or ex gratia payments delays the ultimate outcome of the grievance process. Considering that the CDS is the final authority, the Board strongly believes that he should be given the authority to settle claims and to award ex gratia payments when he determines that the circumstances warrant such payments. This authority was identified as an important tool to a prompt resolution of grievances by Chief Justice Lamer in his National Defence Act Review and Recommendations dated September 2003 (the "Lamer Report"). Justice Lamer had recommended that such authority be obtained, however, it has yet to be implemented.*

93

Analysis

94 ## *Arguments Against Giving the Chief of the Defence Staff the Power to Grant Compensation*

95 The following are arguments and reasons provided by certain entities within the Department of National Defence and the Canadian Forces to the Ombudsman's Office as to why the Chief of the Defence Staff *should not* have the power to grant financial compensation under the grievance process.

96 ### A. "The military cannot be in charge of money"

97 When the Ombudsman investigative team met with Director Claims and Civil Litigation, they asked what prevented the Chief of the Defence Staff from being able to grant financial compensation as part of the grievance process. They were told that the "military cannot be in charge of the money." They were told that as a matter of basic principle, the military cannot spend money without the approval of Parliament.

98 The Ombudsman's Office has no desire to argue against the basic principle of ensuring democratic control of the armed forces – indeed, given the mandate of our office, it would be ridiculous to do so. However, it must be pointed out that military officials do exercise discretion with financial consequences within the context of a number of government policies. In fact, the previous Assistant Deputy Minister for Finance and Corporate Services at National Defence was an active Canadian Forces member. Moreover, as noted earlier, certain Judge Advocate General officers have the power to settle claims and make *ex gratia* payments. And many military officers are delegated other financial authorities, such as the authority to enter into contractual relationships, write off debts and provide hospitality. These, and other spending powers, have been delegated by the Deputy Minister and the Minister within the context of various laws and policies.

99 Ombudsman investigators have not been presented with any convincing arguments to demonstrate that permitting the Chief of the Defence Staff to exercise a clearly defined compensation power within the context of the grievance process, and with duties and accountabilities set out in a specific government policy, would frustrate the principle that the military must be accountable to Parliament for its budget and spending.

100 ### B. Reviewing monetary claims requires an expertise that the Chief of the Defence Staff does not have

101 It was also suggested that the Chief of the Defence Staff does not have the expertise required to determine the merits or the value of a specific claim, whereas the Director Claims and Civil Litigation does. Should this be the case, we believe that it is possible for the Chief of the Defence Staff to acquire the expertise. It is also possible for the Chief of the Defence Staff, when appropriate, to obtain advice from legal advisors with respect to determining the merits and the value of compensation appropriate in any given case.

102 More importantly, with regard to determining whether compensation is appropriate given the circumstances of a grievance, the Department of National Defence has argued that this requires legal expertise, as the analysis under the *Treasury Board Directive on Claims and Ex Gratia Payments* is legalistic. However, we believe that the application of this policy is one of the things that is unfair to Canadian Forces members. Given the disadvantages they face as a result of their unique legal employment status, financial matters arising as part of a grievance should not be determined by the legalistic approach required by the directive. Instead, we believe they should be determined according to the principles of the grievance process. The point is that the Chief of the Defence Staff is best placed to determine the grievance and to provide an appropriate remedy if the grievor was treated unjustly.

103 In fact, as a result of our investigation, we have come to the conclusion that the Director Claims and Civil Litigation does not have the expertise or the mandate to look at claims for monetary compensation within the spirit of the Canadian Forces grievance process. The result is often unfair to members of the Canadian Forces who may be told that they have been treated unjustly, but then find that there are only limited ways to make up for the injustice. The Department of National Defence has agreed that, if a different legislative or administrative scheme were established that provided funds based on principles in accordance with the grievance process, the Chief of the Defence Staff would likely be the appropriate authority to make these kinds of decisions.

104 C. Administrative remedies currently available under the grievance process are sufficient

105 According to the Director Claims and Civil Litigation, there is an attempt to have the Chief of the Defence Staff develop “creative” ways to make up for his lack of authority to grant compensation by using “administrative means.” These may include the granting of leave days – something the Chief of the Defence Staff has the discretion to do – in lieu of financial compensation. It was not clear if the creative remedies were related to the matters being grieved, or if they were intended as a substitute for remedies that the Chief of the Defence Staff is not capable of granting.

106 The Director General Canadian Forces Grievance Authority, who functions both as the delegated Final Authority and as the administrator for grievances where the Final Authority is the Chief of the Defence Staff, has characterized forms of compensation based on existing policies as administrative solutions. According to the information gathered by our investigative team, every attempt is made to resolve grievances administratively. In our opinion, the use of such "creative" measures is not appropriate. If a Canadian Forces member is actually entitled to receive monetary compensation, then that is what he or she should receive. It is not morally or ethically appropriate to substitute that entitlement with an 'administrative remedy.'

107 At the same time, according to the Grievance Authority and the Canadian Forces Grievance Board, there are still a number of cases where a fair resolution cannot be achieved through administrative means. As a result, the entities involved in the grievance process have expressed, in principle, their support for former Chief Justice Lamer's recommendation that would give the Chief of the Defence Staff the ability to grant financial compensation.

108 The use of the administrative measures demonstrates that the Chief of the Defence Staff does have powers with monetary implications, which are exercised within the bounds of the grievance process and other applicable policies. If this is possible, there is no good reason why he should be prevented from doing the same with monetary compensation when that is what is required to rectify an injustice.

109 *Why the Chief of the Defence Staff Should Be Able to Grant Compensation*

110 Our office has been presented with numerous reasons why the Chief of the Defence Staff should not be able to grant monetary compensation within the grievance process. However, we believe that, within an appropriate regulatory and policy framework, it is possible for the Chief of the Defence Staff to be given the power to grant monetary compensation in the context of a grievance. More than that, we believe that it is essential that the Chief of the Defence Staff has this authority in order to make the grievance process more responsive and fairer to members of the Canadian Forces.

111 Requiring grievors to submit a claim against the Crown after what is often a very long grievance process is unfair because it adds complexity and legality to what is supposed to be an informal, equitable process. Instead of the Chief of the Defence Staff's decision being final, many grievors find out that they have to begin a new process, this time attempting to convince the Director Claims and Civil Litigation, a lawyer functioning in an advisory capacity, that they should get the compensation that the Chief of the Defence Staff could not grant.

112 In addition to being unnecessarily complex and lengthy, the problem in the case of grievances by Canadian Forces members is that, as a result of their unique employment status, there are many cases where the matter that they have grieved would not give rise to legal liability on the part of the Crown. So when the matter is considered outside of the grievance process and under the Treasury Board policy, it is difficult to justify a payment as the settlement of a claim.

113 For this reason, we have often seen letters from the Director Claims and Civil Litigation telling the grievor that they will not pay, but that if he or she wishes to pursue the matter, a legal action should be started. However, as we know, the legal action will very rarely succeed because, as the Director Claims and Civil Litigation pointed out in the first example, "*The civil courts have stated that there is no employment contract between Her Majesty and members of the CF, that a person who enrolls in the military does so at the pleasure of the Crown and that such relations between Her Majesty and Her military members do not give rise to remedies in the civil courts.*"

114 We have found that applying the claims settlement analysis to compensation within the Canadian Forces grievance process is unfair to Canadian Forces members. The grievance process was designed to determine if members of the Canadian Forces were treated according to standards voluntarily assumed by the Crown towards them, despite the lack of a conventional legal employment relationship. When that system determines that someone was treated improperly, but then bases the remedy on a policy that does not take this unique relationship into account, it is not fair.

115 Assessing financial compensation within the grievance process as a claim under the Treasury Board *Directive on Claims and Ex Gratia Payments* is also unfair to Canadian Forces members. A similar analysis under the same directive, if it were to be applied to a public servant making a similar argument, might yield a different result since the public servant's claim might lead to a successful action in court. For example, the request for compensation of a government employee who had not received payment for hours he/she was improperly prevented from working might be granted as a claim under the directive because he/she might be able to sue the Crown for lost wages. But a similar request for compensation by a military member could not be considered as a claim because, as a Canadian Forces member, he/she is under a different employment regime.

116 In addition, the grievance process and the process for determining claims and *ex gratia* payments are significantly different. The Canadian Forces grievance process is a transparent administrative process with a statutory foundation and decision-maker, and a legal regime with commonly understood principles governing the consideration, decision-making, and review processes. Canadian Forces members make representations and have the right to see any counter-

representations. When a final decision is reached, the member must be informed of the decision as well as the reasons behind it. The *National Defence Act* and the *Federal Courts Act* (R.S.C. 1985, c. F-7) set out the circumstances and manner of a court challenge to a grievance decision and, during the course of a judicial review, the court is able to look at the entire grievance file.

117 In contrast, the process by which the Director Claims and Civil Litigation considers whether compensation should be paid is not as transparent. The claimant submits a claim, which is reviewed by a lawyer who is not bound to inform the claimant what other information is being considered. The lawyer then applies a Treasury Board directive and informs the claimant of the decision, usually in a "without prejudice" letter, and with no duty to give reasons. The lawyer's decision cannot be challenged, and the correspondence that the claimant has received cannot be used by the claimant in court should the claimant elect to pursue the claim there.

118 The system is also unfair because it creates a situation where challenging a decision is incredibly complex when compensation is denied. As a result of this complexity and unlikelihood of success, we believe that many Canadian Forces members are intimidated and discouraged from exercising all of their legal options.

119 Even if Canadian Forces members were to determine early on that the matter about which they would like to complain is not within the Chief of the Defence Staff's power to remedy, it is unlikely that a court would accept to hear such a case without the Canadian Forces member having first attempted to use the Canadian Forces grievance process. This is because, as a matter of legal principle, courts require that a person exhaust internal departmental grievance procedures before they will consider the person's claims arising out of their employment.

120 If a Canadian Forces member has gone through the grievance process and then started a claim against the Crown, which was denied by the Director Claims and Civil Litigation, it is not always clear what legal options are available. Should he or she challenge the decision of the Chief of the Defence Staff by way of judicial review? Or should the individual commence a claim against the Crown? This puts Canadian Forces members in a very difficult situation when they want to use the courts to pursue the monetary portion of their grievance.

121 At times, the answer to these questions is not clear even to the Federal Court. In at least one case involving a former Canadian Forces member, the court (incorrectly) assumed that the Canadian Forces grievance process was sufficient to deal with all aspects of his grievance, including monetary compensation. As a result, the Court ruled that the grievor's claim was barred as an abuse of process since the matter had already been adjudicated by a competent tribunal. The case involved a claim for monetary compensation that

was denied by the Chief of the Defence Staff during the grievance process. In answering the question, "Did the Chief of [the Defence] Staff have jurisdiction to grant relief under section 24 of the Charter?" the court replied:

122 *… the plaintiff insists that the Chief of [the Defence] Staff ruled, in his decision, that he did not have jurisdiction to grant the monetary compensation requested ... I do not agree with such a broad interpretation as the plaintiff would give to the decision in question. To my way of thinking, it is clear, from the actual text of the decision, that any defect of authority that may have been invoked by the Chief of [the Defence] Staff in his decision is limited to the way in which the monetary compensation sought by the plaintiff was to be established, namely, "Monetary compensation to be determined by an arbitration board."*

123 ….

It is very clear to me, however, that the Chief of [the Defence] Staff thought he had the necessary jurisdiction to grant monetary compensation to the plaintiff, provided the facts and the applicable law allowed it.

124 ….

There is no doubt that the Chief of [the Defence] Staff … had the requisite jurisdiction to determine, in the context of a claim for redress or a grievance, an officer's right to receive monetary compensation .... [7]

125 While this decision was overturned,[8] it illustrates the confusion that can easily arise when the Chief of the Defence Staff does not have the authority to deal with all aspects of a grievance. The system was confusing to the Federal Court, where Canadian Forces grievances and federal Public Service grievances are often challenged. How can we expect a Canadian Forces member fighting a battle against the chain of command, and usually without any legal assistance, to know what to do?

126 Finally, in this case, the court alludes to a very important principle underlying the Canadian legal system: namely, that there is no right without a remedy. Simply put, a proper review process must be able to not only determine whether someone was treated fairly or according to applicable standards, but

[7] *Bernath v. Canada*, 2005 FC 1232, paragraphs 27-32, overturned by 2007 FC 104.
[8] *Bernath c. sa majesté la Reine* 2007 CF 104 (FCA). The Federal Court of Appeal allowed the grievor's claim to proceed, ruling that the Canadian Forces grievance system was not a "court of competent jurisdiction" as the Chief of the Defence Staff did not have the jurisdiction necessary to grant the remedy that the grievor sought, or an appropriate alternate remedy.

must also be able to correct any unfair or improper treatment. Courts that are able to find someone guilty of a crime have the power to impose appropriate sanctions, and tribunals that determine if an individual's rights were infringed are supposed to have the power to grant remedies for any infringement.

127 We believe that this legal principle meshes with an important military concept: Leaders must be given the tools and authority needed to accomplish the goals for which they are responsible. In the case of the Canadian Forces grievance process, the Chief of the Defence Staff has not been given the authority to act as the final authority with certain monetary aspects of grievances.

128 In this sense, the grievance process is deficient. We have seen complaints where there was a clear decision that the grievor was treated unfairly but the Chief of the Defence Staff had to inform the grievor that he was unable to grant the compensation sought, as he did not have the authority to do so. It is not fair to members of the Canadian Forces that the Chief of the Defence Staff can find that they have been treated unfairly but, in many instances, does not have the ability to grant the compensation that will, at least to some extent, make up for the unfair treatment. The chain of command, which is entrusted to ensure the well-being of our troops, must have the tools and authority it needs to take care of them. In turn, military members need to be confident that the chain of command has the ability to take care of them.

129

Conclusion

130 As the Final Authority in the Canadian Forces grievance process, and as the person charged with the control and administration of the Canadian Forces, the Chief of the Defence Staff is uniquely aware of the challenges that grievors face and is uniquely able to determine when a grievor merits a monetary payment or compensation of some kind. The Chief of the Defence Staff is in the perfect position to balance the needs of a specific grievor against the needs of the Canadian Forces as a whole. He can also take into account general institutional issues within the context of grievances, such as the need for an effective grievance system as a way of building morale by demonstrating responsiveness and accountability on the part of senior Canadian Forces leadership. In short, when the Chief of the Defence Staff looks at the question of financial compensation within the context of a grievance, he is applying all of the principles that are intended to govern the grievance process, and keeping in mind the unique legal relationship between the Crown and Canadian Forces members.

131 Earlier, we outlined some of the unique features of the employment regime governing Canadian Forces members:

132 - They are not employees with an employment contract; rather, when they enroll in the Canadian Forces they become liable to service for a fixed period of time;

133 - The Crown has limited what responsibilities it assumes towards members of the Canadian Forces as specified in laws, regulations, and policies governing the employment and compensation of Canadian Forces members;

134 - Canadian Forces members cannot join unions or participate in any form of collective action; and

135 - The Crown retains a royal prerogative eliminating liability for damages inflicted in the defence of Canada, or the training or maintaining efficiency of the Canadian Forces.

136 To balance all of this, Canadian Forces members are given the right to seek redress of any grievance they may have with the administration of the Canadian Forces. The grievance process is in place as an informal alternative to litigation. It is also intended, to some degree, as an equitable system, concerned with the fair treatment of Canadian Forces members, rather than a strict legal-based system.

137 The Director Claims and Civil Litigation, however, is not part of the grievance process and does not play a role in the management of military personnel. In fact, he reports to the Deputy Minister of Justice and does not fall within the reporting structure of the Department of National Defence and Canadian Forces. The Director Claims and Civil Litigation also looks at a claim in a very different way than the Chief of the Defence Staff looks at a grievance. As mentioned earlier, according to statistics provided by the Director General Canadian Forces Grievance Authority for the period between 2000 and 2007, the Director Claims and Civil Litigation has made decisions on monetary compensation matters in 52 grievances that were referred to it by the Chief of the Defence Staff. He has granted compensation in only 15 of these 52 cases.

138 The Ombudsman's Office has been involved in a number of individual cases that make up these statistics and we have found the process of arguing claims to the Director Claims and Civil Litigation frustrating. The approach taken by the Director Claims and Civil Litigation in considering compensation in the context of a grievance appeared to have been that, if it was a claim, the grievor should go to court. Conversely, if it was not a claim, and there was no policy that the Chief of the Defence Staff could have applied, then any payment could only be "gap-filling," which was prohibited under the Treasury Board policy/directive. Practically speaking, this approach all but prevented any compensation to Canadian Forces members.

139 This was an overly narrow interpretation of the policy, which we understand has been put to rest. However, even with today's more generous approach, grievors are not being treated fairly. Compensation related to their grievances is being determined by someone outside of the grievance process and in accordance with a policy that does not take into account the unique legal status of the Canadian Forces and Canadian Forces members. The specific goals of the Canadian Forces grievance process take that unique status into account.

140 The Ombudsman's Office is not questioning the process for examining claims against the Crown. We understand the reason for this system. Rather, what we question is the appropriateness of this process being applied to one specific aspect of a grievance. Canadian Forces members, faced with the huge legal hurdles relating to their unique employment status, deserve to have at their disposal a grievance process in which their entire grievance is considered.

141 Regardless of how generously the claims and *ex gratia* payment directive is interpreted, one cannot help but conclude that it is not the most appropriate tool for determining compensation arising in the context of a Canadian Forces member's grievance. Ideally, such compensation should be considered according to the goals of, and the philosophy behind, the grievance process, by the same decision-maker, and within one administrative process with one set of procedural rules.

142

Recommendations

143 Our office has investigated complaints arising from the grievance process for years. We have come to the conclusion that the Chief of the Defence Staff should be given the power to determine compensation issues when they are related to the matter that is the subject of the grievance. Under the current system, if one intrinsic aspect of a Canadian Forces member's grievance cannot be decided within that grievance process, it is decided by an authority wholly unrelated to that process, and according to different substantive and procedural rules. This is unfair to Canadian Forces members relying on the only tool at their disposal to resolve their grievances.

144 Ombudsman investigators were presented with many explanations as to why the Chief of the Defence Staff should not be able to determine compensation, ranging from the constitutional to the institutional. We have dealt with those arguments in this report. We cannot agree that giving the Chief of the Defence Staff the power, within defined limits, to decide compensation within the grievance process would offend age-old principles giving Parliament ultimate control of the military. Likewise, the Ombudsman's Office does not accept that policies cannot be re-written to grant the final decision-maker in the grievance process that ability, nor do we accept that to do so would require a wholesale reorganization of the management structure of the Department of National Defence and the Canadian Forces.

145 We have reached the conclusion that the grievance process is unfair to Canadian Forces members. As such, it needs to be changed, and the Ombudsman offers the following recommendations so that Canadian Forces members are treated fairly. Just as former Chief Justice Lamer recommended, we recommend that:

146 **1. The Chief of Defence Staff be given the necessary financial authority to settle financial claims in grievances and that the Chief of Defence Staff be entitled to delegate this authority.**

147 In providing the Chief of the Defence Staff with the necessary powers, the Department of National Defence and Canadian Forces should not forget the *raison d'être* of the grievance process. It was set up so that Canadian Forces members could deal with matters in which they felt wronged, in an informal and expeditious manner, taking into account and recognizing the unique relationship between Canadian Forces members and the Crown. If a Canadian Forces member's grievance has a financial aspect to it, it should be dealt with under that process. As is stated in the Canadian Forces Grievance Manual, "unresolved or poorly resolved complaints undermine military morale and effectiveness" and "the effective resolution of complaints, on the other hand, fosters confidence in both the CF and the complaint resolution process." These

are important words, and the grievance process should reflect this sentiment. We therefore recommend that:

148 **2. Decisions regarding financial compensation arising out of a grievance be governed by the same guiding principles that guide the Canadian Forces grievance process.**

149 The above recommendations, if followed, will fix the systemic unfairness. However, we are also concerned about those who may have been treated unfairly in the past.

150 As discussed in our report, this flaw in the grievance process is not new. This problem has been the subject of many complaints to the Ombudsman's Office. It has been the subject of reports and recommendations in the past. However, until this time, the Department of National Defence and Canadian Forces has not fixed it. This has resulted in the continuing unfair treatment of Canadian Forces members. Therefore, to acknowledge this, it is recommended that:

151 **3. The Chief of the Defence Staff's power to determine financial compensation within the grievance process apply to grievances that are already in the system, but have not yet been decided at the time that the authority is granted; and to grievances that have already been decided under the streamlined grievance process.**

152 This recommendation, if implemented, will give the Canadian Forces the ability to rectify past unfairness. However, corrective action can only be taken where the problem is known. Some cases are known, such as where Canadian Forces members complained to our office or went to court. In other cases, it is likely that Canadian Forces members simply gave up on ever receiving compensation.

153 To ensure fairness across the board, the Canadian Forces must act to identify those grievances where the Chief of the Defence Staff or his delegate had determined that a grievor had been treated improperly, but was unable to remedy the improper treatment due to an inability to order financial compensation so that those grievances can be reviewed in light of the new powers allocated to the Chief of the Defence Staff. Therefore, we recommend that:

154 **4. Director General Canadian Forces Grievance Authority identify all grievances previously decided under the streamlined grievance process where the Chief of the Defence Staff or his delegate had determined that the Canadian Forces member had been treated improperly but was unable to grant a suitable remedy.**

155 **5. The Chief of the Defence Staff or his delegate reconsider that aspect of those grievances identified under Recommendation #4, and order, where appropriate, a suitable remedy.**

156 Identifying those files is not a task that needs to wait until the powers are given to the Chief of the Defence Staff. This work should be started immediately so that when the powers are finally given to the Chief of the Defence Staff, those grievances can be reviewed quickly.