

**Date: 20080214**

**Docket: T-1183-07**

**Citation: 2008 FC 190**

**Ottawa, Ontario, February 14, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**LEADING SEAMAN D.M. MORPHY (RET'D)**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Leading Seaman David M. Morphy (ret'd) seeks judicial review of a decision of the Chief of Defence Staff dismissing his grievance regarding the quality of the medical care that he received while a member of the Canadian Forces.

[2] Leading Seaman Morphy asserts that in dismissing his grievance, the Chief of Defence Staff erred in failing to provide reasons for disagreeing with the findings and recommendations of the Canadian Forces Grievance Board.

[3] The Chief of Defence Staff further erred, Leading Seaman Morphy contends, by ignoring evidence, and by relying on demonstrably unreliable evidence.

[4] Finally, Leading Seaman Morphy submits that the Chief of Defence Staff acted in a procedurally unfair manner by relying on medical evidence obtained by the Director General Canadian Forces Grievance Authority, without first submitting that evidence to be considered by the Canadian Forces Grievance Board.

[5] For the reasons that follow, I find that the Chief of Defence Staff did not provide reasons for disagreeing with key findings made by the Canadian Forces Grievance Board, as required by the *National Defence Act*. As a consequence, the application for judicial review will be allowed.

## **Background**

[6] In 1983, Leading Seaman Morphy enlisted in the Canadian Navy as a Supply Technician in the Canadian Forces Logistics Branch. In the summer of 1985, he injured his back while participating in compulsory training. He subsequently aggravated the injury during a fitness test a few weeks later. Leading Seaman Morphy then sought medical assistance from Canadian Forces medical personnel, who subsequently diagnosed him as suffering from “muscle strain lumbar spine”.

[7] Leading Seaman Morphy continued to suffer difficulties as a consequence of his back injury, leading him to seek medical assistance from time to time over the next several years.

[8] In March of 1990, while he was stationed in Germany, Leading Seaman Morphy once again sought medical attention for his back problems. At this time, Canadian Forces medical personnel ordered that he undergo a bone scan and an x-ray to determine whether he was suffering from bilateral spondylolysis.

[9] The bone scan was conducted by Dr. Merette, who was a Canadian Forces doctor. Dr. Merette's report noted that he was not trained to interpret the results of the test. However, he went on to say that he saw no sign of significant capitation over the lower spine.

[10] At this time, Leading Seaman Morphy was also referred to a German radiologist by the name of Dr. Christian Gospos, who saw him on April 12, 1990. Upon his review of Leading Seaman Morphy's bone scan, Dr. Gospos recommended that he receive a CAT scan of the lower lumbar spine.

[11] A CAT scan was not carried out in 1990, evidently because Leading Seaman Morphy's back pain had since abated. He was not aware at this time that a CAT scan had been recommended by Dr. Gospos.

[12] Leading Seaman Morphy returned to Canada in the spring of 1993. He continued to experience lower back pain, and again sought the assistance of Canadian Forces medical personnel from time to time.

[13] According to the Forces' medical records, in April of 1993, Leading Seaman Morphy was seen by a doctor with respect to his ongoing back pain. The doctor ordered that his spine be x-rayed. Although the doctor noted that a CAT scan had been ordered in 1990 and had never been carried out, the doctor did not order that a CAT scan be performed at that time.

[14] Leading Seaman Morphy sought medical assistance from Canadian Forces medical personnel for his back pain in the fall of 1993, again in 1994, and in early 1998. At no time was a CAT scan performed.

[15] In July of 1998, he was again experiencing problems with his back. He was seen on a regular basis by Canadian Forces doctors between July and November of 1998, and also received intensive physiotherapy.

[16] Around this time, Leading Seaman Morphy submitted an Access to Information request for his medical records. It was only when he received his records from the Canadian Forces that he discovered that Dr. Gospos had recommended that he undergo a CAT scan in 1990.

[17] Leading Seaman Morphy then asked his Canadian Forces doctor that a CAT scan be completed. He was subsequently referred to an orthopaedic specialist, who ordered a "CT myelogram (CAT)" of his lumbar spine.

[18] A CAT scan was performed in December of 1998. The scan indicated an “annular bulging of the L4-5 intervertebral disc”, and moderate to severe stenosis at the L4-5 level.

[19] As a result of this diagnosis, on January 6, 2000, Leading Seaman Morphy underwent spinal fusion surgery.

[20] On November 9, 2000, while he was recovering from the surgery, Leading Seaman Morphy was promoted to Master Seaman. However, the promotion was deferred by his Commanding Officer, as he had been determined to be temporarily medically unfit.

[21] Leading Seaman Morphy was subsequently found to be suffering from a permanent incapacity, and as a result, was released from the Canadian military on January 16, 2002.

### **Leading Seaman Morphy’s Grievance**

[22] On July 12, 2002, Leading Seaman Morphy submitted a grievance to his Commanding Officer in which he alleged that medical authorities under the employ of the Canadian Forces failed to provide him with “proper and timely medical care”. He alleged that this had caused him pain and hurt, diminished his physical capabilities, caused him to lose career opportunities, income, and downstream annuity benefits, and had resulted in his premature release from the Canadian Forces.

[23] Leading Seaman Morphy’s grievance is a lengthy document. However, he summarizes the essence of his grievance in the following terms:

Aggrieved by a series of decisions and/or acts of omission by the C.F. medical authorities from as early as 1985 to the date of my surgical operation in 2000, for which no other process for redress is provided under the *National Defence Act*, I grieve the fact that the said C.F. medical authorities failed to provide me with proper and timely medical care as it was their duty to do and my entitlement to receive and, in so failing caused me physical pain, over an extended period; impaired my quality of life; and, contributed to the loss of significant career opportunities with attendant loss of income and downstream annuity benefits culminating with a premature release from the Canadian Forces in July 2002 causing me additional economic losses.

[24] By way of relief, Leading Seaman Morphy sought a declaration that Canadian Forces medical authorities had not provided him with proper medical care. In addition, he sought an apology from the Chief of Defence Staff, and asked that a promotion board reassess his performance for the period between 1990 and 1998, so as to determine the impact that his handicap had on his performance and potential for promotion during that time. He also sought financial compensation for his pain and injuries.

### **The Treatment of Leading Seaman Morphy's Grievance**

[25] The *National Defence Act* and the *Queen's Regulations & Orders for the Canadian Forces* set out the procedures to be followed in relation to grievances filed by members of the Canadian Forces. The relevant provisions of the legislation are set out in an appendix to this decision.

[26] In accordance with these procedures, a grievance is to be decided first by an “initial authority”. Where the redress sought by a grievor is not afforded by the initial authority, he or she may then submit the grievance to the Chief of Defence Staff for consideration and determination.

[27] Where, however, a grievance relates to “the entitlement to medical or dental care”, article 7.12(1)(d) of the *Queen’s Regulations & Orders* provides that the Chief of Defence Staff must first refer the grievance to the Canadian Forces Grievance Board (CFGB).

[28] In accordance with these procedures, Leading Seaman Morphy’s Commanding Officer forwarded the grievance to the Director General Health Services (DGHS), as the Initial Authority. On December 16, 2002, the DGHS found that Leading Seaman Morphy had received “proper and timely health care consistent with [his] medical condition.”

[29] Specifically, the DGHS noted that in 1990, the notation “Asx”, meaning “asymptomatic”, had been recorded on the file copy of Leading Seaman Morphy’s bone scan. The DGHS was of the view that this meant that Leading Seaman Morphy’s medical condition had been assessed, and the fact that he had become asymptomatic suggested that a CAT scan was not appropriate at the time.

[30] The DGHS also observed that Leading Seaman Morphy had not sought treatment for his back injury for three years after the CAT scan was originally recommended. Moreover, in 1998, the specialists with whom Leading Seaman Morphy had consulted noted that he had been receiving

excellent treatment, and that despite his successful surgery, he continued to suffer from some back pain.

[31] Dissatisfied with this decision, Leading Seaman Morphy then requested that his grievance be forwarded to the Chief of Defence Staff. However, as the grievance related to medical treatment, it was instead referred to the CFGB, in accordance with Chapter 7, article 7.12 of the *Queen's Regulations & Orders for the Canadian Forces*.

[32] In accordance with section 29.2 of the *National Defence Act* and article 7.13 of the *Queen's Regulations & Orders*, the mandate of the CFGB is to provide findings and recommendations to the Chief of Defence Staff and the grievor.

[33] On April 28, 2006, the CFGB concluded that “given that the grievor’s medical chart contained the specialist’s recommendation for a CAT scan, it is reasonable to conclude that the prudent course of action would have been to proceed with the CAT scan in 1990.”

[34] The Board further found that the notation indicating that Leading Seaman Morphy was asymptomatic had been improperly attributed to Dr. Gospos by the DGHS, and that, in any event, in the eight years following his notation, no Canadian Forces medical doctor ever saw fit to act upon the recommendation.



[35] As a consequence, the failure of the Canadian Forces to act on Dr. Gospos' recommendation, coupled with Dr. Merette's 1990 notation that he was not trained to review Leading Seaman Morphy's bone scan, led the Board to conclude that "due diligence was not rendered to the grievor."

[36] These findings, together with the fact that Leading Seaman Morphy had for six years been highly recommended for immediate promotion in his Personal Evaluation Reports (PERs), then led the Board to find that "he was not promoted as a result of his back problems."

[37] The Board rejected a number of other allegations raised by Leading Seaman Morphy in his grievance. In particular, the Board did not accept that in acting as the Initial Authority reviewing Leading Seaman Morphy's grievance, the DGHS was biased as it was also the authority responsible for the actions of the doctors whose conduct was being reviewed. In the Board's view, any concerns of bias at the first level would be mitigated by the findings of subsequent decision makers.

[38] Insofar as the issue of remedy was concerned, the Board observed that section 9 of the *Crown Liability and Proceedings Act* prohibited any payment being made in respect of the death, injury, damage or loss in respect of a claim where a pension or compensation has been paid or is payable.

[39] As Leading Seaman Morphy had previously been granted a lump sum payment from Veterans Affairs, the Board found that he was prohibited from any financial compensation from the Canadian Forces.

[40] The Board also rejected his request for an apology. However, the Board recommended that Leading Seaman Morphy's file be reviewed, in order to determine the extent to which his back injury had impaired his promotional opportunities. The Board further recommended that the Chief of Defence Staff retroactively grant him the appropriate promotion.

[41] On May 9, 2006, Leading Seaman Morphy was advised that the Board's findings and recommendations were being forwarded to the Chief of Defence Staff for a final decision, in accordance with subsection 29.2(1) of the *National Defence Act*. He was subsequently invited to make submissions in response to the Board's report, but declined to do so.

[42] Although the Chief of Defence Staff is the final authority with respect to grievances of this nature, the responsibility for reviewing grievances at the final level to ensure that all of the documentation necessary to make a final decision is available has been delegated to the Director General Canadian Forces Grievance Authority ("DGCFGA").

[43] A grievance analyst with the DGCFGA then reviewed Leading Seaman Morphy's file and prepared a report for the Chief of Defence Staff, recommending that the grievance be denied.

[44] The analyst did not agree that the Canadian Forces had failed to provide Leading Seaman Morphy with proper medical care. Relying on information received from the Director of Medical Policy, who had evidently consulted with an outside specialist, the analyst found that it was not unreasonable for Leading Seaman Morphy's physicians to have chosen to defer the CAT scan based on the results of his 1990 x-ray and bone scan.

[45] Moreover, it was not clear that Leading Seaman Morphy's condition in 1990 was amenable to surgery, or that surgery would have succeeded in alleviating his pain.

[46] The analyst also concluded that the fact that an individual received positive evaluations was not, by itself, determinative of whether the individual would be promoted, as there were other factors taken into consideration in this regard.

[47] Based on a review of historical promotional statistics, the analyst concluded that it was only in 2000 that Leading Seaman Morphy's scores were high enough to qualify him for promotion, at which time he was offered the chance to participate in a Junior Leadership Course. Completion of this course is necessary to be considered for promotion.

[48] Leading Seaman Morphy's counsel was provided with a summary of the analyst's report, and was offered the opportunity to make submissions in response to the report.

[49] In his submissions, Leading Seaman Morphy objected to the jurisdiction of the DGCFGA to “re-review or reconsider a matter raised in the grievance proceedings before remitting it to the final authority for decision”, the “gathering and introduction of ‘fresh’ evidence and the recasting of issues” after the conclusion of the CFGB hearings and the unlawful intervention of the DGCFGA between the conclusions of the CFGB and the final authority.

### **The Decision of the Chief of Defence Staff**

[50] On May 10, 2007, the Chief of Defence Staff, denied Leading Seaman Morphy’s grievance in its entirety. It is this decision that underlies the application for judicial review.

[51] The Chief of Defence Staff dealt first with the allegation that the DGCFGA acted beyond its authority and jurisdiction. Relying on *Armstrong v. Canada (RCMP)*, [1998] F.C.J. No. 42 (F.C.A.), he concluded that the process followed in this case was consistent with procedural fairness and the prerogative of the adjudicative authority to be assisted with its assessment.

[52] The Chief of Defence Staff also rejected Leading Seaman Morphy’s assertion that fresh medical evidence had been improperly introduced at the final level, without having first been submitted to the CFGB for scrutiny. In this regard, he noted that although the Board can conduct hearings, it has no adjudicative authority, and its findings and recommendations are not binding on the Chief of Defence Staff.

[53] Turning to the substance of Leading Seaman Morphy's grievance, the Chief of Defence Staff stated that he "was not in a position to make a finding of malpractice". He then stated that he would consider the allegations in Leading Seaman Morphy's grievance "to the extent that they might have had a bearing on your promotion, your attendance on the PLQ [the successor to the Junior Leadership Course] and your release from the CF."

[54] The Chief of Defence Staff then noted that Leading Seaman Morphy's grievance alleged "unskilful practice by physicians". Despite his earlier assertion that he was not in a position to make findings of malpractice, he then went on to cite medical negligence jurisprudence for the proposition that "the standard of care imposes the duty on people of exceptional skill or knowledge to act as would a reasonable and prudent person possessing the same or similar skills or knowledge under similar circumstances".

[55] The Chief of Defence Staff then stated that in order for him to find that Leading Seaman Morphy had been aggrieved by deficient medical care, the burden was on Leading Seaman Morphy to persuade him that the care that he had received did not meet the standard of care imposed on physicians at the time in question, and that this failure "caused or directly contributed to the medical condition at the source of [the] denial of your promotion and your release".

[56] Central to the Chief of Defence Staff's finding that Leading Seaman Morphy had not demonstrated that the medical care that he had received was inadequate was the following statement:

Upon review, I find that there is insufficient evidence to establish that your physicians' actions in 1990 failed to meet the standard of care to which they were bound, or that a different diagnosis would have resulted in a different outcome. I note that your EXPRES test results show that you remained physically fit and generally healthy until 2000. While the continuity of your care might not have proved ideal to you, based upon my reading of your grievance, I cannot conclude that you were aggrieved in regards to the quality of the medical care you received in 1990 nor that there exists a causal link between that care and the medical condition resulting in employment limitations imposed in 2000. These limitations justified denial of his promotion and release.

[57] The Chief of Defence Staff recognized that the Canadian Forces Grievance Board had recommended that further investigation be carried out, in order to determine whether Leading Seaman Morphy should have been promoted. However, he found that a review of past merit board results for supply technicians demonstrated that it would have been impossible for Leading Seaman Morphy to have been promoted before 2000, as his scores were too low for him to qualify for a promotion, given the number of supply technician positions available in 1998 and 1999.

[58] The Chief of Defence Staff also observed that Leading Seaman Morphy's selection for promotion to Acting/Lacking Master Seaman in 2000, as well as his attendance at the PLQ course had both been deferred because of his temporary medical condition, and that he had been released when it was determined that his medical employment limitations were permanent in nature.

According to the Chief of Defence Staff, Leading Seaman Morphy had failed to establish that these

limitations were inappropriate, or that there was a link between his medical condition, and the alleged shortcomings in his medical care.

[59] As a consequence, the Chief of Defence Staff concluded that Leading Seaman Morphy had been treated fairly and equitably, pursuant to the relevant policies. Moreover, as he had not been entitled to a promotion prior to 2000, and had been medically unfit since 2000, the grievance and requested redress were denied.

### **Issues**

[60] Although Leading Seaman Morphy has raised a number of issues on this application, I am of the view that the determinative questions are whether the Chief of Defence Staff erred in failing to properly address the central issues raised by the grievance, and whether his reasons satisfied the requirements of the *National Defence Act*.

### **Standard of Review**

[61] Leading Seaman Morphy submits that the standard of review to be applied to final level grievance decisions of the Chief of Defence Staff is that of reasonableness, whereas the respondent says that the decision must be reviewed on the standard of patent unreasonableness.

[62] While an issue as to the sufficiency of reasons will normally be characterized as a question of procedural fairness with the result that the issue of standard of review will not arise, in this case the questions that arise with respect to the reasons of the Chief of Defence Staff are the extent to

which the reasons addressed or responded to the central issues raised by the grievance, and whether the reasons satisfied the requirements of subsection 29.13(1) of the *National Defence Act*. These are questions of law, and mixed fact and law. As a consequence, it is necessary to identify the appropriate standard of review to be applied to these aspects of the decision under review.

[63] In order to ascertain Parliament's intention as to the level of deference to be accorded to a particular decision maker, it is necessary to carry out a pragmatic and functional analysis. In this case, a review of the factors identified by the Supreme Court of Canada in cases such as *Dr. Q. v. British Columbia College of Physicians and Surgeons*, [2003] 1 S.C.R. 226, 2003 SCC 19, discloses that:

- a) The *National Defence Act* contains a privative clause that insulates decisions of Chief of Defence Staff from review, except for judicial review in this Court. This militates in favour of according deference to these decisions;
- b) Insofar as the purpose of the legislation in issue is concerned, in *Armstrong v. Canada (Attorney General)*, 2006 FC 505, aff'd 2007 FCA 157, Justice Layden-Stevenson observed that the purpose of the *National Defence Act* is to provide for the management, direction and administration of the Canadian Forces. The grievance provisions of the Act are intended to provide for the efficient resolution of grievances or disputes. As such, the issues are not polycentric, but are of a private or personal nature. Justice Layden-Stevenson concluded that this suggested that some



deference should be shown to decisions of the Chief of Defence Staff, a view with which I concur.

- c) Insofar as the expertise of the Chief of Defence Staff is concerned, Justice Layden-Stevenson noted in *Armstrong* that as the most senior officer in the Canadian Forces, the Chief of Defence Staff is charged with control and administration of the Forces. As such, he would be conversant with all facets of the military context, unlike the court, suggesting a high level of deference. That said, while the promotional procedures within the Canadian Forces at issue here would fall squarely within the expertise of the Chief of Defence Staff, to the extent that the grievance relates to the adequacy of the medical treatment received by Leading Seaman Morphy, this is a matter outside the expertise the Chief of Defence Staff. This would suggest a less deferential standard of review should be applied to this aspect of the decision.
- d) The final factor is the nature of the questions raised by the application for judicial review. As was noted earlier, the issues here are questions of law, and mixed fact and law, again suggesting that a less deferential standard should be applied.

[64] Taking all of these factors into account, I agree with Leading Seaman Morphy that the appropriate standard of review to be applied to the decision under review is that of reasonableness. That is, the decision must be able to withstand a “somewhat probing examination”: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

## Analysis

[65] A review of Leading Seaman Morphy's grievance discloses that it related to the medical care that he received from the Canadian Forces, not just in 1990, but for the whole period from 1985 to 2000.

[66] Indeed, the grievance makes specific reference to "a series of decisions and/or acts of omission by the C.F. medical authorities from as early as 1985 to the date of my surgical operation in 2000".

[67] While the grievance certainly reflects Leading Seaman Morphy's preoccupation with the fact that a CAT scan was not done in 1990, as had been recommended by Dr. Gospos, it is clear from the wording of the grievance that his concerns also related to the failure of Canadian Forces medical personnel to carry out the test when his back pain continued to recur through the 1990's.

[68] Indeed, the operative section of Leading Seaman Morphy's grievance is entitled "Medical Authorities Failed to Rely on Available Diagnostic Tools – 1990-1998".

[69] Moreover, paragraph 17 of the grievance states:

However, even though *spondylosis* was suspected in 1990 and a CT scan of the lower lumbar spine was recommended, for the next eight years the C.F. went on ignoring this recommendation forcing me to both continue to live in pain and to maintain a regimen of work assignments which only added and worsened the growing pain... [emphasis added]

[70] The Canadian Forces Grievance Board found that given the specialist's recommendation that a CAT scan be carried out, "the prudent course of action would have been to proceed with the CAT scan in 1990".

[71] However, the Board then went on to state that:

For another eight years, military doctors with access to the grievor's medical records, and, ergo, the diagnosis, ignored it and did not provide him with assistance and relief ...

Clearly, the grievor's medical doctors had a duty to ensure that he received medical attention for the diagnosis of low back pain ... in 1990. Given that the grievor's medical chart, which contained the specialist's recommendation for a CAT scan and Dr. Merette's notations that he was not trained to read a bone scan, and that a plain film bone scan was required were ignored for eight years, it is evident that due diligence was not rendered to the grievor. [emphasis added]

[72] The Chief of Defence Staff did not accept the Board's finding that the medical care that Leading Seaman Morphy had received had been inadequate. In coming to this conclusion, he stated that "I find that there is insufficient evidence to establish that your physicians' actions in 1990 failed to meet the standard of care to which they were bound, or that a different diagnosis would have resulted in a different outcome". [emphasis added]

[73] The Chief of Defence Staff then went on to say that "I cannot conclude that you were aggrieved in regards to the quality of the medical care you received in 1990 nor that there exists a

causal link between that care and the medical condition resulting in employment limitations imposed in 2000. [emphasis added]

[74] Thus it is clear that the focus of the Chief of Defence Staff's analysis was on the failure of the Canadian Forces to carry out a CAT scan when it was first recommended in 1990. No consideration was given to Leading Seaman Morphy's allegations relating to the failure of Canadian Forces medical personnel to carry out the test when his back pain continued to recur through the 1990's.

[75] Moreover, no reasons were given by the Chief of Defence Staff for not accepting the finding of the Canadian Forces Grievance Board that Leading Seaman Morphy had been denied adequate medical care by reason of the failure of Canadian Forces medical professionals to carry out the CAT scan in the period from 1990 to 1998.

[76] It is true that in accordance with subsection 29.13(1) of the *National Defence Act*, the Chief of Defence Staff is not bound by any finding or recommendation made by the Canadian Forces Grievance Board.

[77] However, subsection 29.13(2) of the *National Defence Act* mandates that where the Chief of Defence Staff does not act on a finding or recommendation of the Board, he must include the reasons for not having done so in the decision respecting the grievance.

[78] In this case, no reasons were provided for the decision not to accept the Board's finding that the failure of Canadian Forces medical personnel to carry out the CAT scan for eight years after it was first recommended meant that Leading Seaman Morphy was not provided with adequate medical care.

[79] In argument, counsel for the respondent provided detailed submissions as to why the Board's finding in this regard was not supported by the evidence. That may or may not be the case, but that is not the issue. Having not acted on the Board's finding that inadequate medical care had been provided to Leading Seaman Morphy for the 1990-1998 period, it was incumbent on the Chief of Defence Staff to provide reasons for rejecting the Board's finding in this regard. This he failed to do.

[80] The Chief of Defence Staff then went on to find that no causal link had been established between the medical care that Leading Seaman Morphy received in 1990, and his medical restrictions and the employment limitations imposed in 2000, which, he found, justified the denial of a promotion and a medical release. No consideration was given, however to whether a causal link existed between the medical care that Leading Seaman Morphy received between 1990 and 1998, and the career consequences that he suffered in that period and beyond.

[81] Moreover, while the Chief of Defence Staff did consider whether Leading Seaman Morphy's performance scores were sufficient to qualify him for a promotion in 1998, 1999 and 2000, he did not do as the CFGB recommended and consider the extent to which Leading Seaman

Morphy's back problems had impaired his promotional opportunities. Nor did he give any reasons for not having done so, as required by the provisions of section 29.13(2) the *National Defence Act*.

### **Conclusion**

[82] As a consequence, the application for judicial review is allowed, with costs.

[83] The May 10, 2007 decision of the Chief of Defence Staff is set aside, and the matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that this application for judicial review is allowed, with costs. The May 10, 2007 decision of the Chief of Defence Staff is set aside, and the matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

“Anne Mactavish”

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Judge

## APPENDIX

### *National Defence Act*

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

[...]

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

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

[...]

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

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

[...]

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

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

[...]

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

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

[...]

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

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

[...]

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



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

le pouvoir de délégation que lui confère le présent article.

(b) the power to delegate under this section.

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

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

[...]

[...]

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

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

### *Queen's Regulations & Orders for the Canadian Forces*

#### **7.12 – REFERRAL TO GRIEVANCE BOARD**

#### **7.12 – RENVOI DEVANT LE COMITÉ DES GRIEFS**

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

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

[...]

[...]

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

d) le droit aux soins médicaux et dentaires.

(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.

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

**7.13 DUTIES AND FUNCTIONS OF GRIEVANCE BOARD**

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

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

**7.14 – ACTION AFTER GRIEVANCE BOARD REVIEW**

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

- (a) consider and determine the grievance;
- (b) advise in writing the grievor, through the commanding officer, and the Grievance Board of the determination and the reasons for it;

[...]

**7.13 – FONCTIONS DU COMITÉ DES GRIEFS**

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

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

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

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

- a) étudier et décider du bien-fondé du grief;
- b) informer par écrit le plaignant, par l'intermédiaire de son commandant, et le Comité des griefs de la décision et des motifs à l'appui;

[...]

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1183-07

**STYLE OF CAUSE:** LEADING SEAMAN D.M. MORPHY (RET'D)  
v. THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 11, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Mactavish, J.

**DATED:** February 14, 2008

**APPEARANCES:**

Me Marc-Aurèle Racicot  
Col. Me Michel Drapeau  
Me Zorica Guzina

FOR THE APPLICANT

Mr. Robert B. Carter

FOR THE RESPONDENT

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