

DEPARTMENT OF NATIONAL DEFENCE

OFFICE OF THE
JUDGE ADVOCATE GENERAL



CANADA

MINISTÈRE DE LA DÉFENSE NATIONALE

CABINET DU
JUGE-AVOCAT GÉNÉRAL

MEMORANDUM

NOTE

1457-11 PROCEDURAL FAIRNESS
(D Law/C)

Dec 92

ADM(Per)

PROCEDURAL FAIRNESS
CAREER ADMINISTRATION

Ref: Research Paper - "Procedural Fairness and Canadian Forces
Administrative Review Boards" Sep 92
(copy enclosed)

1. During the past twenty years the concept of "procedural fairness" has been given an increasingly higher profile under Canadian law. Procedural fairness involves the setting of standards for the process by which administrative decisions are made, particularly by governmental organizations. This concern over procedural fairness is not only reflected in the common law. Many of the legal rights found in the Canadian Charter of Rights and Freedoms involve procedural fairness issues (i.e., right to a fair trial, independent and impartial tribunal, etc.).

2. The CF, as a governmental institution which makes a large number of administrative decisions, particularly in the area of personnel management, has not escaped judicial scrutiny concerning compliance with the legal requirements of procedural fairness. In the past few years a number of successful court challenges have been made to the personnel management system on the basis that CF personnel administrative procedures did not comply with the law. Those decisions include Diotte v. Canada (1992), Lee v. Cairns et al (1992), Duncan v. MND (1990) and Dressler v. Canada (1989). The apparent failure of CF personnel administrative procedures to meet evolving legal standards, and the increasing frequency with which procedural fairness grounds were being raised in court challenges prompted a tasking for a research paper to be written to look at the legal requirements of procedural fairness and its potential impact on the CF personnel administrative system. That research paper is enclosed at Ref.

3. The paper was designed as an internal JAG project to raise the level of awareness of procedural fairness issues for legal officers. It was not intended to design changes to the existing personnel management system. I am strongly of the

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opinion that any changes necessary to ensure compliance with Canadian law could only be made with the input of the staffs required to administer that system. However, the procedural fairness paper has identified a number of potential deficiencies in the manner in which boards such as the Career Review Board, Career Medical Review Board and Security Clearance Review Board operate. It is my recommendation that in light of these identified deficiencies a more detailed review of the CF personnel management system be undertaken in order to more completely assess the degree to which it complies with Canadian law. Such a review would not have to be limited to the administrative review boards. It could be expanded to include all aspects of personnel administration. One method which could be considered for such a review is a working group consisting of personnel from your organization and legal officers. As you are aware a similar working group is presently reviewing summary trial procedures under the chairmanship of DGPP.

4. Further review of the impact of the legal requirements of procedural fairness on the personnel management system would provide an opportunity to limit future litigation by ensuring that there is a "fair" and legally defensible personnel career system in place for CF members.

Peter R. Partner
Cmdre
JAG
992-3019

Encl.