

## Potential pitfalls for members of the Canadian Forces when engaging legal counsel

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There are numerous pitfalls that members of the Canadian forces (CF) can encounter when engaging private legal counsel, when seeking resolution of CF-related complaints, including litigation. An obvious observation is that, when retaining private counsel, a CF member should retain a lawyer who is competent and knowledgeable with the CF's administrative regimes. A challenge that many CF members face is that there are not many lawyers, outside of the CF, who possess and maintain such expertise. The lawyer must also possess experience and knowledge pertaining to the broader aspects of public and administrative law. After all, challenges to statutory decision-making within the CF will not be determined solely, or even principally, based upon CF practices and policies. Statutory provisions and common law principles pertaining to judicial review will factor prominently in such litigation.

The previous article in this series identified potential problems that can arise from a CF member's insistence that all communication must be through private counsel. This final article will focus on two specific pitfalls relating to complaint resolution for CF members:

1. Unnecessary or counter-productive litigation; and
2. The use of unnecessarily strident or antagonistic language.

### **CF members should be wary of unnecessary or counter-productive litigation**

Anyone perusing legal databases, such as the Canadian Legal Information Institute (CanLII) website, will likely note that there are several cases in which CF members (whether represented by counsel or self-represented) have brought either actions or applications before either the Federal Court or a provincial Superior Court of Justice, without first exhausting the internal remedies available to them, such as the Canadian Forces' statutory grievance process. Such litigation can potentially cost thousands of dollars, and represent cautionary tales for CF members contemplating this course of action.

In some cases, CF members may bring actions (e.g. law suits) seeking damages for decisions, acts, or omissions arising in the administration of the affairs of the Canadian Forces. As described in my previous Blog articles, such actions, brought before the CF member exhausts internal remedies, particularly simultaneously with those internal remedies, can be counter-productive. They are typically the subject of motions brought by counsel for the Attorney General of Canada to strike the proceeding, on the basis that the plaintiff (or applicant) has not first exhausted the 'adequate alternative remedy' represented by internal dispute

resolution mechanisms, such as the CF grievance process. These motions are nearly uniformly granted. Often, they are granted with an award of costs against the party who brought the action (meaning: the CF member).

Thus, the CF member would be responsible not only for paying his or her own counsel, but also for paying part of the costs incurred by the Attorney General of Canada. These costs orders can vary, but amounts between \$5,000.00 and \$15,000.00 are not uncommon. Where a matter was particularly complex, the 'cost awards' can be even higher. And these costs are in addition to what a CF member would have had to pay his or her own counsel. Even if a CF member is self-represented, he or she could still be liable for a significant percentage of the Attorney General's costs. Moreover, any litigation initiated by a CF member concurrent with his or her grievance will automatically suspend the consideration and determination of the grievance<sup>1</sup>, thereby delaying adjudication within this 'alternative remedy'.

Grievors should also be wary of seeking litigation that leads to a largely pyrrhic victory. Ultimately, litigation is a tactic of 'last resort' when less time-consuming or costly remedies are either exhausted or not practicable. Legal counsel who is well-versed in the legislation, policies, and practices of the Canadian Forces can guide CF members (or former members) in the suitable and most cost-effective mechanisms to seek a remedy. This counsel can also describe the likely outcomes of various courses of action, thereby permitting the CF member to make an informed decision regarding the remedies he or she wishes to pursue, and the likely cost, depending upon whether the process is largely successful, or unsuccessful.

Unnecessary legal costs and delay are not the only potential pitfalls that CF grievors and complainants may encounter, whether or not they retain private counsel. A common pitfall is the use of unnecessarily strident or antagonistic language.

### **Avoid unnecessarily strident or antagonistic language**

Grievances and other CF complaints submitted under a legislative or policy framework will often arise from circumstances that are both highly personal and sensitive. Emotions run high. A CF member is ill-served by provocative language. The legislative framework of the CF grievance process expressly prohibits insubordinate language: QR&O sub-article 7.08(4) states: "A grievance shall not contain language or comments that are insubordinate or otherwise constitute a breach of discipline, unless the language or comments are necessary to state the grievance."

Grievances and similar complaints can be separated into three distinct functional categories: (i) determinations where the decision-maker must grant redress; (ii) determinations where the decision-maker cannot grant redress; and (iii) determinations in which the decision-

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<sup>1</sup> Queen's Regulations and Orders for the Canadian Forces (QR&O), Art 7.27.

maker may exercise discretion. The third category is larger than many people may otherwise believe.

Practical examples of these three categories are: (i) the grievor's circumstances satisfy all conditions required for payment of a financial benefit or reimbursement of an expense under the Compensation and Benefits Instructions (CBI); (ii) the grievor asks for interest on the late payment of a financial benefit, absent a court order directing that interest be paid; and, (iii) the grievor asks the redress authority to quash or alter a remedial measure such as a Recorded Warning or Counselling and Probation.

The first two examples represent determinations in which the decision-maker has no discretion. Sometimes, unit administrators erroneously refuse to authorize payments where a CF member is entitled to the payment. Typically, these are remedied once a better informed decision-maker examines the relevant factors. Similarly, if a CF member's circumstances do not meet the requirement for a payment, administrators generally have no latitude to approve such payments. Other than presenting additional facts that may alter the circumstances, neither polite nor impolite representations will generally alter the decision-making circumstances<sup>2</sup>. That is not true of discretionary determinations.

When a grievor or other CF complainant makes representations to a CF decision-maker on a discretionary matter, the manner in which those representations are made will influence the decision-maker. Unnecessarily strident, antagonistic or confrontational representations will not serve the interests of the complainant or grievor. While a statutory decision-maker must not make a determination based upon whether he or she 'likes' the grievor or complainant, the tone and manner of the complainant's or grievor's representations will certainly influence the decision.

If a statutory decision-maker's determination is challenged before a court of competent jurisdiction (for CF decision-makers such as the final authority in the grievance process, this will typically be the Federal Court) the standard by which the decision will be reviewed, where the determination involved matters over which the decision-maker has expertise, will typically be 'reasonableness'<sup>3</sup>. The decision-maker must still be 'correct' (a higher standard of review) where the determination turned on the law.

In the third example given above – a grievance concerning a remedial measure – a reviewing court will afford the final authority in the grievance process a significant degree of deference<sup>4</sup>. The court will likely only quash such a determination if the decision-maker

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<sup>2</sup> That said, impolite or antagonistic representations may still goad a statutory decision-maker to adopt an intransigent and improper position. Even if the grievor is subsequently successful on judicial review by the Federal Court, such recourse may well have been avoided through the use of balanced and temperate representations.

<sup>3</sup> See, for example, *Higgins v Canada (Attorney General)*, 2016 FC 32 (CanLII).

<sup>4</sup> *Ibid*, per Elliott J, para 77. See also *Canada (Attorney General) v Boogaard*, 2015 FCA 150 (CanLII)

acted unreasonably, made the determination in a manner that was procedurally unfair, lacked transparency or justification, or misapplied the law.

An experienced decision-maker – and the final authority in the CF grievance process can tend to be characterized in such a manner – can present defensible determinations that nevertheless may have been significantly influenced by the demeanour or tone of the grievor's representations. A grievor (or grievor's counsel) who offers antagonistic, bombastic or otherwise unnecessarily confrontational representations, or who impugns the integrity of the redress authorities, their staff, or CF decision-makers generally, can create obstacles to success that need not otherwise arise. Conversely, a grievor (or grievor's counsel) who offers professional, well-reasoned, balanced and articulate representations is much more likely to set conditions for a favourable outcome.

Often, decisions that are the subject of grievances are not completely one-sided. A decision (or act or omission) that affects a CF member may have some meritorious aspects, albeit, perhaps not sufficient to justify the outcome that actually arose. A CF member who acknowledges his or her own errors or shortcomings that may have influenced the initial decision (or act or omission) that gave rise to a grievance is much more likely to influence the eventual redress authority in a favourable manner.

These considerations should guide a CF member when preparing representations or when selecting private counsel. A CF member should ask him- or herself: Am I looking for legal counsel who will default to litigation, or do I want to be advised and represented by counsel who will employ the optimal mechanisms and tactics to achieve my desired end-state? Am I looking for counsel who will 'stick it to the CF', who will impugn the character or professionalism of CF decision-makers because it will make me feel better, or do I want counsel who will take steps to advance my interests in a productive manner and in the most efficient and economical way possible?