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Compulsory Release and Duty of Fairness

by Kostyantyn Grygoryev

Introduction

The Canadian Armed Forces (CAF) may release a soldier for a variety of reasons, which could broadly be classified as "voluntary" and "involuntary." An involuntary release may be triggered by a sentence of a court martial, unsatisfactory performance, reduction in strength of the force, medical disability, as well as some other reasons.[1] The releasing authority has a substantial degree of flexibility – for example, a service member subject to a release on medical grounds might be offered retention for a limited period of time. In a case when a member displays unsatisfactory conduct, the degree of the severity of the conduct may lead, for example, to counselling and probation, or outright release. Effective management of the human resources requires some measure of flexibility in release administration. But, as the Supreme Court of Canada (SCC) stated, flexibility implies discretion, and discretion attracts a duty of procedural fairness.[2] Yet, with respect to some involuntary release cases in the CAF, procedural fairness is breached. This article will examine the manner in which the CAF deals with remedying the breach of the procedural fairness changed following the SCC decision in the *Dunsmuir v New Brunswick* case.[3]

Duty of Fairness

The duty of administrative actors to act fairly in making decisions originated in the common law system as a principle of natural justice. This principle has two components – *audi alteram partem* (hear the other side) and *nemo judex in sua causa debet esse* (no-one may be judged in his/her own cause).[4] In administrative decision-making the "natural justice" concept has mostly been replaced by the concept of "duty of fairness," because of perception that the expression "natural justice" is too closely associated with the judicial process.[5]

But duty of fairness retained the same principles: an opportunity to be heard, and the impartiality of the process:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.[6]

Supreme Court of Canada Collection. Photo by Philippe Landreville

Supreme Court of Canada

Duty of Fairness and Public Office

The origins of application of the common law duty of fairness to the decision makers in public offices can be traced to the UK case *Ridge v Baldwin*.[7] In Canada, the SCC broadened the principles of duty of fairness to apply to all public authorities whose decisions affect the "rights, privileges, or interests of an individual," confirmed that the duty of fairness was owed to the public office holders, and extended the duty of fairness to the office holders "at pleasure."[8] Appointment "at pleasure" means than an employee may be dismissed without a cause. In creating "at pleasure" appointments, the legislatures intend that the appointees have no security of tenure – in other words, they are subject to the will of the Crown.[9]

The *Dunsmuir* Decision

The *Dunsmuir* case arose out of a wrongful dismissal claim by a David Dunsmuir. Mr. Dunsmuir worked for the Department of Justice of the Province of New Brunswick. As a Legal Officer, he was a public servant under the Civil Service Act. But also, as a Clerk of the Court, he was deemed to serve "at pleasure." Mr. Dunsmuir was dismissed without a cause, but with a notice. Following a grievance process, and several rounds of court appeals, Mr. Dunsmuir's case reached the SCC. The SCC made a watershed decision that public employees whose employment is governed by a contract are not owed the duty of fairness. While Dunsmuir as a Clerk was a holder of an office "at pleasure," as a Legal Officer, he was also a contractual employee in public service. The Supreme Court found that the distinction between the two classes of employment was difficult to maintain in practice.

When the Crown acts as any other private sector employer in hiring its employee, it should be able to act in the same way when terminating them. Under the common law, both parties to an employment contract may end their relationship without providing a cause, provided they gave adequate notice. The contract is presumed to address the issues of procedural fairness, and there is no compelling reason to impose a duty of fairness on an employer.

Nonetheless, the Court realized that there were still situations when a public law duty of fairness applied. One situation occurs when a duty of fairness is implied in the statute governing the employment relationship; and the second when an office holder is deemed to be serving "at pleasure." Both these situations apply to the members of the Canadian Armed Forces.

Duty of Fairness in the Canadian Armed Forces Context

The CAF members belong to the class of "certain officers" who "serve at pleasure" and do not have a contractual relationship with the Crown.[10] The Federal Court of Canada highlighted the fact that civil courts have no jurisdiction to hear an action for wrongful dismissal from the military service.[11]

Elements of duty of fairness are present in many places in various regulations, orders, and directives concerning administration of the Canadian Armed Forces. For example, *audi alteram* element can be found in DAOD 5019-2, "Administrative Review."[12] The DAOD has a section, "Procedural Fairness," that specifies the minimum steps to ensure fairness of the administrative review process. In release administration, when a CAF member receives a notice of intent to recommend (involuntary) release, the notice must include the reasons for the recommendation, and the CAF

member has 14 days to submit objections. If the CAF member objects to the release, but the release proceeds, the CAF member must be advised of the reasons why the release is proceeded with, despite the objections.[13] The *nemo judex* element is present, for example, in the grievance process, where an officer whose act, decision, or omission in the matter of the grievance cannot act as the initial grievance authority.[14]

Breach of Duty of Fairness in Involuntary Release

The duty of fairness can be breached by either violating the *audi alteram* or *nemo judex* elements. Analysis of the Canadian Forces Grievance Board (CFGB) findings and recommendations in the grievances related to involuntary release may provide examples of how a duty of fairness has been breached:

> Provision of reasons for the release. A breach of procedural fairness was found when "the reasons justifying the release were totally inadequate,"[15] when "the decision maker had not provided proper reasons,"[16] or for not providing any written reasons at all.[17]
>
> Not providing the grievors with a notice of a contemplated decision.[18]
>
> Non-disclosure. Procedural fairness is breached when the relevant information is not disclosed, either to the decision-maker,[19] or to the grievor.[20]
>
> Not providing an opportunity to make representations to the decision maker.[21]

The *Dunsmuir* Effect

The *Dunsmuir* decision is most famous for elimination of the "patently unreasonable" standard of review, and for establishing that a contractual employment relationship nullifies considerations of duty of fairness (unless required by a statute). But what was its effect upon treatment of the breach of duty of fairness in compulsory release administration in the Canadian Armed Forces? It may be beneficial first to point out what the *Dunsmuir* **did not** change. It did not eliminate procedural fairness considerations from the release decisions. Since CAF members serve "at pleasure," and procedural fairness is a statutory requirement in the release administration, both pre-[22] and post-*Dunsmuir* cases[23] considered duty of fairness, and whether it was breached in the release process.

Yet, the *Dunsmuir* changed how the breach of procedural fairness is remedied. The key rested in two lines of the decision that did not attract many analysts' attention:

> Breach of a public law duty of fairness does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio*.[24]

The CFGB and the Chief of Defence Staff (CDS), prior to *Dunsmuir*, took the position that in release cases where procedural fairness was breached, the subsequent review during a grievance process could cure the breach.[25] Often, grievors requested reinstatement as a remedy for unjustified compulsory release. But reinstatement is only available in a very narrow set of circumstances – when the release was by a decision of a service tribunal or a court, and such a decision is later rescinded.[26] Reinstatement is not available to administratively-released CAF members.[27] Prior to Dunsmuir, therefore, if the release was found to be unjustified, the CDS could only offer a grievor a reenrollment.[28]

After reviewing the *Dunsmuir*, the CFGB came to the conclusion that the approach of offering re-enrolment was incorrect. When the duty of fairness was breached during the release process, the decision must be void *ab initio*. The CDS's inability to reinstate the CAF members is, thus, irrelevant, "…since the decision to release a member in breach of their right to procedural fairness renders the release decision void as if it never had occurred."[29]

Conclusions

The *Dunsmuir* had a significant positive effect upon remedying the breach of procedural fairness in cases of compulsory release of CAF members. Re-enrollment was not a true remedy to the "wrongfully released" CAF members. It did not restore an aggrieved member to a position similar to that prior to the release: the reenrollment was not guaranteed (if, for example, the member's trade was at full capacity, and was not enrolling new soldiers), and the lost wages and benefits could not be recovered (since the CDS did not have a statutory authority to provide financial compensation). After the *Dunsmuir*, the CFGB, in cases of a breach of procedural fairness during a release decision, has been consistently recommending voiding the release *ab initio*.[30] In one of the first post-*Dunsmuir* cases dealing with the breach of a duty of fairness, the CFGB stated:

> [E]rrors in procedural fairness cannot be cured by a subsequent review. The Board observed that the jurisprudence in these situations has consistently been that CAF members are owed a high degree of procedural fairness, especially in administrative proceedings that could lead to their release.
>
> [S]ince the grievor was released without procedural fairness, his release should be rendered void ab initio, such that his employment relationship with the CAF be deemed to never have ceased.[31]

In practice, given the frequent rotation of the military personnel in key decision-making positions, and considering the degree of flexibility available to a decision-maker, after reconsidering the release decision with "fresh eyes," the CAF member may not even be released at all.

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NOTES

1 QR&Os Volume I – Chapter 15: Release. Available from http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/vol-01/chapter-chapitre-015-eng.asp#cha-015-21.

2 *Canada (Attorney General) v Mavi*, [2011] SCJ No 30, at paras 54–55.

3 *Dunsmuir v New Brunswick*, [2008] SCJ No 9 [*Dunsmuir*].

4 *Canadian Cable Television Assn. – Assoc. canadienne de télévision par câble v American College Sports Collective of Canada Inc.*, [1991] FCJ No 502 at para 13 (Fed CA).

5 *Kioa v West*, (1985) 159 CLR 550 at 583 (HCA).

6 *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 1999 CarswellNat 1124 at para 28.

7 [1963] 2 All ER 66.

8 *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, at p 653.

9 "At pleasure," Pocket Dictionary of Canadian Law, 5th edition, Carswell, p. 42.

10 *Codrin v Canada* (Attorney General), 2011 FC 100 at paras 57-59.

11 *Gallant v R* (1978), 91 DLR (3d) 695 (FCTD), 1978 CarswellNat 560 at para 7.

12 DAOD 5019-2 "Administrative Review." Available at http://www.admfincs-smafinsm.forces.gc.ca/dao-doa/5000/5019-2-eng.asp

13 QR&Os Volume I – Chapter 15: Release.

14 QR&Os Volume I – Chapter 7: Grievances. Available at http://www.admfincs-smafinsm.forces.gc.ca/qro-orf/vol-01/chapter-chapitre-007-eng.asp#cha-007-06.

15 CFGB Case #2012-062. Available at http://www.cfgb-cgfc.gc.ca/English/2012-062.html.

16 CFGB Case #2012-029. Available at http://www.cfgb-cgfc.gc.ca/English/2012-029.html.

17 CFGB Case #2011-115. Available at http://www.cfgb-cgfc.gc.ca/English/2011-115.html.

18 CFGB Case #2012-049. Available at http://www.cfgb-cgfc.gc.ca/English/2012-049.html; CFGB Case # 2011-110. Available at http://www.cfgb-cgfc.gc.ca/English/2011-110.html.

19 CFGB Case #2012-043. Available at http://www.cfgb-cgfc.gc.ca/English/2012-043.html.

20 CFGB Case #2011-110, *supra*, at note 26; CFGB Case #2011-109. Available at http://www.cfgb-cgfc.gc.ca/English/2011-109.html; CFGB Case #2010-092. Available at http://www.cfgb-cgfc.gc.ca/English/2010-092.html.

21 CFGB Case #2011-110; CFGB Case #2011-109; CFGB Case #2010-096. Available at http://www.cfgb-cgfc.gc.ca/English/2010-096.html.

22 *Garnhum v Canada (Deputy Attorney General)* (1996) 120 FTR 1, 1996 CarswellNat 1715 (FCTD) [*Garnhum* cited to CarswellNat]; *Legere v Canada* (Attorney General), 2006 FC 969 [*Legere*].

23 *Donohue v Canada (National Defence)*, 2010 FC 404; *Tainsh v Canada (Attorney General)*, 2011 FC 1180; *Jones v Canada (Attorney General)*, 2009 FC 46.

24 *Dunsmuir, supra* note iii at para 108.

25 Canadian Forces Grievance Board 2010 Annual Report: Grievance Highlights. Available at <http://www.cfgb-cgfc.gc.ca/english/Reports_AR_2010_4.html#part02> [CFBG 2010 Annual Report].

26 QR&Os Volume I – Chapter 15: Release.

27 *Garnhum*, *supra* note xxii at para 8.

28 CFGB Case # 2009-043. Available at http://www.cfgb-cgfc.gc.ca/English/2009-043.html; *Garnhum*, *supra* note xxii; *Legere supra* note xxii.

29 CFGB 2010 Annual Report, *supra* note xxv.

30 CFGB Case # 2012-062; CFGB Case 2011-115; CFGB Case # 2012-049; CFGB Case # 2011-110.

31 CFGB Case # 2010-096.