PROCEDURAL FAIRNESS

AND

CANADIAN FORCES ADMINISTRATIVE REVIEW BOARDS

Captain J-G Perron
September, 1992

FOREWORD

Captain Perron's study of procedural fairness and the career administrative review boards used in the CF is an important first step in ensuring the CF has an effective, fair and legally defensible process to deal with the careers of its personnel.

During the past 20 years procedural fairness, which previously was largely linked to criminal trials, has begun to be applied by courts to administrative proceedings. This expansion reflects both an increasing reliance within society on administrative tribunals, and a desire by individuals to have input into the decision making processes which govern their lives.

Captain Perron concludes that the present career administrative tribunals studied: the CRB, CMRB and SCRB, fail two basic requirements of procedural fairness. Those requirements are the right to know the information presented to the deciding authority, and giving the individual affected the opportunity to make representations. Captain Perron recommends that CF members be provided with the information upon which a recommendation or decision is to be made, subject to security or other factors. He also suggests that the person affected by the decision making process be given an opportunity to make meaningful representations to the applicable review board. I fully support those recommendations.

Putting such recommendations into effect will undoubtedly change the way in which release recommendations are made. Change can be both unsettling and costly. However, change is not new to military society. For example, with respect to the military justice system major changes have been made throughout history. The Army Discipline and Regulation Act, 1879, the National Defence Act (in 1950) and the more recent changes to the court martial system are but a few examples of social pressures (and sometimes legal pressure) resulting in change. In Canadian society in the 1990s the question of procedural fairness has taken on a new importance although it has been developing for well over a decade. It is inevitable that the CF will increasingly be placed in a position of having to examine whether its standards of procedural fairness reflect the requirements of Canadian society as a whole.

It is clear from Captain Perron's paper; a lengthening line of cases involving the CF; and the general trends in administrative law that the CF personnel system is seriously deficient in complying with procedural fairness requirements. There appear to be two options. One is to do nothing and force the courts to impose change on the CF. The other route is to recognize the inevitability of change, the reasons for that change and take steps to manage the required alterations to the system in order to keep the effectiveness of the CF a primary goal. CF members reflect Canadian society as a whole. They have demonstrated a willingness

to force the CF to reflect the "norms" of fairness in our society when the military will not do so on its own.

One additional comment. Change comes at a cost. The recommended changes in this paper could require the allocation of additional resources. However, a review of personnel administrative bodies also provides an opportunity to streamline the system. For example, rather than having a number of different boards perhaps consideration could be given to having one board which deals with all problems. Subject matter experts (medical, career, security, etc.) could be called to present evidence before the board. A legal officer could also sit as an advisor (rather than a board member as is often the case) to deal with issues of procedural fairness. The result might be an overall less costly proceeding providing greater fairness to the individual.

Captain Perron's first class foray in the domain of "procedural fairness" was necessarily limited by the time available for this summer project. Many other procedural fairness issues remain to be considered (ie. the need or requirement for reasons, etc.). In addition, this work 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. Effective changes to that system could only be completed with the input of the staffs required to run them. This work will have met its objective if it prompts discussion, gives a higher profile to procedural fairness in military context and ultimately provides a first step towards ensuring a "fair" and legally defensible personnel career system for CF members.

Finally, special mention should be made of the efforts of Mr. Bill Kenney of the JAG library staff who conducted the initial research on the topic of procedural fairness.

K.W. Watkin
Lieutenant-Colonel
Director of Law/Claims

INTRODUCTION

Nulli vendemus, nulli negabimus aut differemus, rectum aut justitiam. (**Magna Carta 1215**)
(To no man will we sell, or deny, or delay, right or justice.)

The concept of treating people in a just and fair manner has been a focal point of social movements throughout history. We all have the same basic demand when we interact with others; that is to be dealt with fairly and respectfully. This paper will begin by examining the progression of this movement, in a legal perspective, from its beginnings in the criminal law domain to its subsequent application in the realm of administrative law. The numerous English and Canadian judgements which have examined the elements of "natural justice", and have ultimately created the modern concept of procedural fairness, will figure prominently in this part.

Procedural fairness is often described by its two major components: the "Audi alteram partem" (duty to be fair) rule and the "Nemo judex in sua causa" (one who judges is neither interested nor biased) rule. This paper will be restricted to a study of the duty to be fair. The notice of the hearing, the hearing and the decision represent the three distinct parts of the duty to be fair rule. They will be examined in the light of Supreme Court of Canada and other courts decisions of the past 15 years.

The application of the law to the Canadian Forces will follow. More precisely, this paper will examine how the Security Clearance Review Board, the Career Review Board and the Career Medical Review Board each apply the different components of the duty to be fair

rule in their respective proceedings.

Procedural deficiencies, that is to say procedures which do not meet the criteria determined by the courts, in the SCRB, the CRB and the CMRB will then be singled out. Recommendations concerning the correction of any deficiencies noted will conclude the paper.

I PROCEDURAL FAIRNESS (DUTY TO BE FAIR)

A. EVOLUTION OF THE RULE

Procedural fairness has evolved from one of the common law's building blocks, the old and venerated principle of natural justice. The terms natural justice and procedural fairness will be used throughout this paper. These terms are now considered somewhat synonymous but this has not always been the case. The following outline will trace the historical progress of the well-established concept of natural justice to our wider modern concept of procedural fairness.

As Lord Reid so aptly wrote in the 1963 English decision Ridge v. Baldwin[1], natural justice constitutes "what a reasonable man would regard as fair procedures in the circumstances". A 1976 Ontario Court of Appeal decision described this concept as the

> "basic principles of fair procedure which are an indispensable concept and the basis of the safeguards of individual rights in our judicial system"[2].

Natural justice protects the individual from the arbitrary use of governmental resources by the people in power. The concept of natural justice is not one which can be defined in a few lines or in a rigid manner. Nonetheless, it can best be described by its two basic rules; namely the "Audi alteram partem" rule (that the parties have enough notice and the opportunity to be heard) and the "Nemo judex in sua causa" rule (one who judges is neither

---

[1] [1963] 2 All E.R. 66(H.L.) p.71

[2] R v. Ontario Racing Commissioners, ex parte Morrissey (1969), 8 D.L.R.(3d) 624(Ont.H.C.), p. 628

interested or biased). This paper will not address the issue of bias on the part of decision makers ("Nemo judex in sua causa"); rather it will concentrate on how individuals are treated by the decision makers ("Audi alteram partem")

For most of our legal history, natural justice was only applied in judicial proceedings (ie. criminal law) and was not considered in other fields of law. The principles of natural justice were well understood by the courts because they had been part of the legal fabric of our society since the 13th century. In the 20th century, the courts started paying more attention to the administrative law since this aspect of governmental intrusion in the citizen's life became increasingly more prevalent. Therefore, the citizen's need for protection against possible abuses by the representatives of the State was recognized in an administrative law context just as protection against abuses in the criminal law domain had been acknowledged some 700 years earlier. Through a series of decisions, the SCC has examined the principles of natural justice and applied them to the realm of administrative law. In doing so, it modified the traditional perception that natural justice was a concept belonging in the judicial/quasi-judicial field and procedural fairness was a "flexible replica" of natural justice found in administrative decision making. This legal metamorphosis began cautiously and evolved through numerous decisions of the SCC.

The concept of the duty to be fair was introduced in Canada in 1979 when Laskin CJ stated in Nicholson v. Haldimand-Norfolk

Regional Bd of Commissioners of Police[3]:

> "I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in Bates v. Lord Hailsham ([1972],1W.L.R.1373), at page 1378, "that in the sphere of so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.... What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question..".

The movement towards procedural fairness had thus been initiated. At that point there existed two standards of protection for the individuals: natural justice in the judicial/quasi-judicial domain and the new "duty to be fair" in the "administrative" domain.

Chief Justice Laskin had brought to light the need for wider protection from "injustice" than was offered by the traditional concept of natural justice. He also warned against the difficulties of trying to differentiate between judicial and administrative actions on the part of the public bodies. This concern was echoed and further developed in Martineau v. Matsqui Institution Disciplinary Board (Martineau (No2))[4]. Dickson J, later Chief Justice of the Supreme Court, wrote that the requirements of the application of the principles of fairness to administrative

---

[3] Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, p.324-325

[4] [1980] 1 S.C.R. 602, p.628

decisions depended on the nature of the exercised powers:

> "Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad of decision-making processes with a flexible gradation (sliding scale) of procedural fairness through the administrative spectrum."

He then stated:

> "In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between the duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldily conceptual framework."

The 1989 SCC decision, Syndicat des employes de production du Quebec et de l'Acadie v. Canada(Canadian Human Rights Commission) (SEPQA)[5] confirmed that both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice. The court stated that:

> " the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates."

In Thomson v. Canada[6], the SCC (Cory J) confirmed the principle, originally expressed by LeDain J in Cardinal v. Kent Institution(Director)(Cardinal)[7], that there is:

> "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".

---

[5] [1989] 2 S.C.R. 879, p.896

[6] Thomson v. Canada(Deputy Minister of Agriculture)(1992) 89 D.L.R.(4th)(SCC) 218

[7] [1985] 2 S.C.R. 643

In effect then Justice Dickson created a spectrum in which one extremity is the judicial process (ie courts) and the other extremity is the legislative process The center of this spectrum is composed of the numerous administrative actions of the different public bodies. Judicial decisions require a rigid structure of procedural safeguards for the individual. These safeguards are sternly overseen and protected by both the courts and in enactments such as the Canadian Charter of Rights and Freedoms(the Charter)[8]. Actions of a legislative nature or of general scope performed by a public authority are in principle not bound by the duty of procedural fairness unless a legislative provision requires the contrary. Such was the case in the SCC decision A.G. Canada v. Inuit Tapirisat of Canada[9]. The SCC held that the Governor in Council in deciding an appeal from a motion to amend a CRTC order fixing the rate structure of a public service, had performed an action of a legislative nature and for that reason was not bound in the name of fairness to hear the persons affected. The Homex Realty and Development Co. v. Village of Wyoming(Homex Realty)[10] decision demonstrated that the Inuit Tapirisat decision was good law but that each action deemed to be a "legislative function" had to be scrutinized and not just accepted at its face value. In the Homex Realty decision the SCC concluded that although the by-law was made

---

[8] ss. 7 to 14 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 [en. by the Canada Act 1982(U.K.), c.11, Schedule B]

[9] [1980] 2 S.C.R. 735

[10] [1980] 2 S.C.R. 1011

in the proper form and was "an exercise of the Council's legislative function", in substance it was a decision with application to one company only. Therefore, because the Council had in reality taken a decision not of a general nature but expressly aimed at influencing an individual's rights or concern, its decision was deemed to be of an administrative nature. Therefore the rules of procedural fairness had to be applied in its dealings with Homex Realty.

Administrative actions were divided in two categories: ministerial and administrative. Ministerial actions implied an action taken by a public agent pursuant to strict guidelines which provide no flexibility or decision-making in performing such an action. The issuance of a driving permit is the typical example of a ministerial action. The clerk (public agent) issuing the permit must request the appropriate documents as required by law and have the applicant pass the tests according to the law or its regulations. The applicant, having satisfied those requirements, is entitled to the permit. The clerk has no decision to make in the matter. Therefore, there is no need for procedural fairness. On the other hand, an administrative action implies that a decision affecting an individual was taken and therefore the need for procedural fairness is present.

B. EXTENT OF PROCEDURAL FAIRNESS

1. Generally

That a public body must act according to the principles of procedural fairness is a straightforward matter. What is more

complex and less clear is the extent to which the administered individual will benefit from the protection offered by procedural fairness. The answer lies with the spectrum/sliding scale theory expressed by Justice Dickson. By creating this spectrum/sliding scale, the SCC has acknowledged that not all administrative actions are subject to the same requirements of procedural fairness. In (SEPQA), the SCC (Sopinka J) stated that the:

> "... content (of procedural fairness) will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided.The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals."

Madam Justice L'Heureux-Dube wrote in the SCC decision Knight v. Indian Head School Division No. 19 (Knight)[11] "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case." The extent of application of procedural fairness will depend on the competing interests in the case and the possible repercussions to the individual[12]. No set rule has been dictated by the SCC, however, the court has stated: "Generally speaking,fairness requires that a party must have an adequate opportunity of knowing the case that must be met,of answering it and putting forward the party's own position."[13]

---

[11] [1990] 1 S.C.R. 653, p. 670

[12] Canada(M.E.I.) v. Chiarelli(1992), 90 D.L.R.(4th)(SCC) 289, p.311

[13] Thomson, supra, note 6

2. The Charter

The elements of procedural fairness are often included in the statutes that create administrative bodies. Canadian legislators have also demonstrated the importance they attach to the principle that one must be treated fairly by specifically including it in two important "constitutional" documents. Section 2(e) of the Canadian Bill of Rights[14] confers on any person whose cause is heard before a federal board, commission or tribunal the "right to a fair hearing in accordance with principles of fundamental justice for the determination of rights and obligations", regardless of whether the agency is quasi-judicial or administrative. Section 7 of the Canadian Charter of Rights and Freedoms[15] states that " Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In addition many of the other legal rights found in those enactments (ie. s.11 of the Charter) involve procedural fairness.

In Reference re Motor Vehicle Act(B.C.)[16], Lamer J pointed out that "it would be wrong to interpret the term 'fundamental justice' as being synonymous with natural justice". However, La Forest J also indicated in R v. Lyons[17]:

"It is clear that, at a minimum, the requirements of

---

[14] RSC 1985, Appendix III

[15] Supra, note 8.

[16] [1985] 2 S.C.R. 486

[17] [1987] 2 S.C.R. 309

> fundamental justice embrace the requirements of procedural fairness ... It is also clear that the requirements of fundamental justice are not immutable; rather they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another."

Sopinka J in Canada (M.E.I.) v. Chiarelli[18] confirmed this by writing:

> "The scope of principles of fundamental justice will vary with the context and the interests at stake. ... Similarly, the rules of natural justice and the concept of procedural fairness, which may inform principles of fundamental justice in a particular context, are not fixed standards"

Therefore procedural fairness, and by extension the duty to be fair, is included in the Charter in the concept of fundamental justice. Its application is remains dependent on the factors of the individual case before the court.

3. The Common Law/Administrative Law

The references to procedural fairness in the Charter and the Canadian Bill of Rights highlights the importance placed on the concept. However, it must be stressed that "legal rights" in the Charter apply when an individual's "right to life, liberty and security of the person" might be affected. This most often occurs in the context of criminal or regulatory matters involving public order offences for which penal consequences (imprisonment, significant fines,etc.) might be applied. The requirement for procedural fairness also exists independently of the Charter embodied in an area of law termed as "administrative law". In

---

[18] Supra, note 12, see also Knight (note 10) and SEPQA (note 5)

terms of assessing the procedural fairness applicable to decision making bodies in respect of career matters (release, occupational transfers etc.) it is the non-Charter law which will most often apply. The Supreme Court of Canada has stated in Martineau (No 2) that regardless of whether it is included in the governing statute, an individual must have the opportunity to present a case "whenever a person's rights or interests are affected". The Knight and Thomson decisions have confirmed this by stating that an employer who is a public body, whose powers are derived from statute, must exercise these powers according to the rules of administrative law. The administrative body must therefore give the individual an opportunity to present that person's position.

4. When Does Procedural Fairness Apply?

The Cardinal judgment, confirmed by Knight, provides a test to determine if there may be a general right to procedural fairness, autonomous of the operation of any statute. This three part test is:

i- the nature of the decision to be made by the administrative body;

ii- the relationship existing between that body and the individual;

iii- the effects of that decision on the individual's rights.

i- Nature of the Decision: Decisions of a legislative and general nature will be treated differently from acts of a more administrative and specific nature. Legislative decisions do not entail a duty to act fairly unless required by the governing

statute, however, the administrative acts will always be subject to a minimum of fairness. L"Heureux-Dube J added to this in the Knight decision by stating that:

> "the finality of the decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect."

ii- Relationship: There exists numerous types of relationships linking the individual with the administrative body; employer-employee (Knight), prisoner-prison director (Cardinal); 'administered citizen'-board (Radulesco[19]). The closeness of the relationship has a direct bearing on the need for procedural fairness. A decision by a body aimed directly at an individual will demand an element of procedural fairness much greater than one which affects a class of people.

iii- Effect of the Decision: There is a right to procedural fairness only if the decision is a significant one and has an important effect upon the individual. For example, a decision to terminate employment will require more elements of procedural fairness than a decision to reallocate job titles.

C) EFFECT OF THE BREACH

A breach of the duty to act fairly is considered by the courts as an excess of jurisdiction or an ultra vires act. The individual

---

[19] Radulesco v.Canadian Human Rights Commission, [1984] 2 S.C.R. 407, p.410

who is directly and adversely affected by such a decision may seek redress in the courts and request that the court quash the administrative action. The failure of a public body to accord a fair hearing renders the decision invalid even if the result would likely have been the same had a full and fair hearing been granted.[20] Procedural fairness is not an absolute right. The courts have declared that an individual may abandon any claim to it, or may lose this right through negligence.[21]

II CONTENT OF PROCEDURAL FAIRNESS

The concept of procedural fairness can be broken down into a number of components. These components are: the notice, the hearing and the decision.

A. Components of fairness

The "duty to be fair" can best be described by the following elements which constitute the rule:

1. a notice of the hearing;
2. the hearing:
   - a- hearing in person,
   - b- hearing 'in camera',
   - c- submission of evidence,
   - d- hearing of witnesses,
   - e- cross-examination of witnesses,
   - f- adjournment,
   - g- representation by counsel;
3. the decision.

The degree to which any of these components must form part of

---

[20] Cardinal, supra, note 7.

[21] Leaf v. Canada(Governor in Council), [1988] 1 C.F. 575

the procedures of a decision making body will depend upon the nature of the decision being made. The following outline sets out the basic requirements of each of the components of procedural fairness.

1. Notice of the Hearing:

It is necessary for a person to receive a proper notice in order to be able to prepare a defence to charges, allegations or material contrary to that person's interests. Failure by an agency to give such a notice is considered a denial of fairness which generally entails the decision being declared invalid. In R. v. Ontario Racing Commissioners, ex parte Morrissey[22], the Ontario High Court of Justice emphasized a notice that complies with the rules of procedural fairness means:

> "a written notice, setting out the date and subject-matter of the hearing, the grounds of the complaint...the basic facts in issue and the potential seriousness of the possible result of such a hearing."

In Supermarches Jean Labrecque Inc. v. Flamand[23], L'Heureux-Dube J wrote that even where there is no specific reference to the "duty to be fair" rule in the governing legislation, the setting of the date and place of a trial is not a purely administrative act, and that failing to give the parties or their counsel of record prior notice is not consistent with that fundamental rule.

Preparation for the hearing also falls in this component. It implies having enough time to properly prepare one's case. In order

---

[22] Morrissey, supra, note 2

[23] [1987] 2 S.C.R. 219

to do this, the individual must be apprised of reports and documents in the agency's possession that constitute the case or that are prejudicial to the individual's case. In Cramm v. Commissioner of the Royal Canadian Mounted Police[24], the Federal Court of Appeal quashed a disciplinary decision on the ground that the tribunal failed to disclose all of the evidence before it. The recent Chiarelli decision has confirmed the rule that an individual must be informed of the substance of the information used by the administrative body, however, that the body is not forced to divulge its sources. The court recognized, in certain situations, there exists competing individual and state interests (ie. national security) and it is the public body's responsibility to find the proper balance between the two. Thus, the SCC has not established any clear definite disclosure rules; it has left that decision to the particular public bodies.

2. The Hearing:

The hearing is the most important part of the administrative process and also of the need of procedural fairness. It has been stated in numerous SCC judgments that "every administrative body is the master of its own procedure and need not assume the trappings of a court." Most court decision on the subject of procedural fairness have dealt with the hearing.

a) Hearing in Person or In Writing

The right of a person to be heard is the most elementary protection of all. Certain circumstances require that an oral

---

[24] [1985] 1 F.C. 422(FCA)

hearing be held. Wilson J stated in Singh v. Minister of Employment and Immigration[25] that " ...In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing." The Singh case, which dealt with the application for refugee status, determined the need for an oral hearing will be dependent on the possible effects of the board's decision on the individual. The SCC has also identified other circumstances where it will suffice for an individual to submit comments in writing ("paper hearing") provided the individual is fully aware of all the facts alleged against him/her. The Radulesco, Cardinal and Knight judgments have all stated that there is no need for a "structured" or "formal" hearing if it can be found that the individual knew of the information upon which a decision was being made and had the opportunity to present a position. These decisions dealt with a complaint filled with the Canadian Human Rights Commission, administrative segregation within a federal penitentiary and the termination of employment with a school board respectively. The SCC has judged that a "paper hearing" is adequate in situations of this sort.

b) Hearing 'in camera'

Non-judicial bodies are not under any legal obligation to conduct their procedures in public unless their empowering act so provides. It is nonetheless to that particular agency's advantage to conduct its business in an open manner since this will prevent

---

[25] [1985] 1 S.C.R. 177, p. 213-214

any perception of potential irregularities engendered by a secretive process. As Pratte J of the Federal Court of Appeal stated in St-Louis v. Treasury Board[26]:

> "Adjudicators...are in the same situation as tribunals other than the courts which are not expressly required by law to hold hearings in public; they are not governed by the rules applicable to the courts, although its desirable for them to apply the same principles..."

A later decision by the Federal Court Trial Division, Southam Inc. v. Minister of Employment and Immigration[27], expanded on this by stating that:

> "Paragraph 2(b) of the Charter guarantees everyone the freedom of expression, including freedom of the press and other media of communication. The application of the Charter will occur when the rights protected by article 7, namely life, liberty and security of the person, are threatened by the acts of the administrative body. Courts that have had to interpret this constitutional provision have held that freedom of the press encompasses a right of access to judicial proceedings."

Rouleau J then wrote:

> "After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public."

He did conclude by stating that competing interests, such as national security, could create an exception to this rule.

c) Submission of Any Relevant Evidence

Its an essential component of any defence for the person to be

---

[26] [1983] 2 F.C. 332 (C.A.), p.334

[27] [1987] 3 F.C. 329 (Fed. TD), p.335-336

allowed to produce any relevant evidence pertaining to the allegations against her/him. In the SCC decision Roberval Express Ltee. v. Transport Drivers, Warehousemen and General Workers Union, Local 106[28], Chouinard J wrote:

> "In my view, there is more here than a question concerning the weighing of evidence. ...A refusal to hear admissible and relevant evidence is so clear a case of excess or refusal to exercise jurisdiction that it needs no further comment."

In Grain Workers'Union Local 333 v. Prince Rupert Grain Ltd[29], Lacombe J on behalf of the Federal Court of Appeal decided that, because the Canada Labour Relations Board had "afforded the parties full opportunity to call whatever evidence they wished to tender on the question...[the lis of the matter before the board]", the Board had conformed with that particular requirement of procedural fairness.

The courts have given conflicting signals regarding the questions of the level at which the opportunity to make representations must be given to a person affected by a decision. In Re Abel and Advisory Review Board[30], the Ontario Court of Appeal declared that the principles of fairness could be applied in the case of boards which have purely recommendation making functions. These boards are created to provide the deciding authority with the information it needs to make a decision. As the deciding authority usually puts much trust in the board's recommendation; there was a

---

[28] [1982] 2 S.C.R. 888, p. 904

[29] [1987] 3 F.C. 479 (FCA),p. 486-487

[30] (1980), 31 O.R.(2d) 520 (CA)

need for fairness at that stage (the board) of the administrative process.

In Cardinal the Supreme Court of Canada indicated that representations must be made at the ultimate deciding authority. This judgement appeared to indicate that a person was not necessarily entitled to make representations before a board which was making recommendations to that ultimate deciding authority. However, more recently in Thomson v. Canada, the SCC ruled that representations made before the Security Intelligence Review Committee (SIRC) provided sufficient procedural fairness. The individual was not given an opportunity to make further representations to the ultimate deciding authority, the Deputy Minister of the Department.

In Thomson the decision to limit procedural fairness to the recommendation body was undoubtedly affected by the considerable attention paid to procedural fairness by SIRC. Requiring procedural fairness at the recommendation level is an attractive option in the sense that such boards are designed to screen matters coming before senior officials. However, in cases where the recommending board does not provide the same level of procedural fairness the individual could be provided an opportunity to make representations on the recommendations made to the deciding authority.

d) Hearing of Witnesses

It is generally accepted that the right to be heard in one's

defence includes the right to present witnesses.[31] But this right is flexible and will be affected by where the courts locate the administrative tribunal on the procedural fairness spectrum.[32] Therefore, if the courts accept that a "paper hearing" is sufficient in procedural fairness terms then it is doubtful that the same court would require that witnesses be heard by the adjudicative body.

e) Cross-examination of Witnesses

In Corporation of the Township of Innisfil v. Corporation of the Township of Vespra[33] the SCC ruled that a party to a case must have the opportunity to cross-examine the other party's witness when an oral hearing is conducted. But this right is not automatic and where the case stands on the scale of procedural fairness will determine if that right is available to the parties. If a complete defence to the allegations can be made by producing evidence there may not exist the need to cross-examine witnesses.[34] It was clearly stated by Estey J in Irvine v. Canada(Restrictive Trade Practices Commission)[35] that the doctrine of fairness does not provide the appellant with a right to cross-examine witnesses at the inquiry.

---

[31] see Nanda v. Public Service Commission, [1972] F.C. 277 (FCA), Crabbe v. Minister of Transport, [1972] F.C. 863 (FCA) and supra, note 24

[32] Roper v. Executive Committee of the Medical Board of the Royal Victoria Hospital, [1975] 2 S.C.R. 62

[33] [1981] 2 S.C.R. 145

[34] see Lipkovits v. Canadian Radio-Television and Telecommunications Commission, [1983] 2 F.C. 321 (FCA)

[35] [1987] 1 S.C.R. 181

f) Adjournment

The courts have stated that, unless the governing statute directs otherwise, an adjudicator has full discretion concerning the granting of adjournments. Sopinka J wrote in the SCC judgment of Prassad v. Canada(M.E.I.)[36]:

> "...and such discretion is guided by the general principle that a "full and proper inquiry" be held. In exercising this discretion to adjourn, the adjudicator may consider such factors as the number of adjournments already granted and the length of time for which an adjournment is sought."

Other factors which will influence the right to an adjournment are the need for the preparation of an adequate defence or the production of evidence. Keeping in mind the courts have consistently confirmed the fact that administrative tribunals are "considered to be masters in their own houses...[in the absence of specific rules laid down by statute or regulation]", this aspect of procedural fairness will vary according to the facts of each case.

g) Representation by Counsel

This is not an absolute right and its necessity will depend on the nature of the proceedings and the impact of the potential decision on the individual's liberty or livelihood.[37] In Howard v. Stony Mountain Institution[38], Thurlow C.J.stated:

> "It appears to me that whether or not a person has a right to representation by counsel will depend on the circumstances of the particular case, its nature, its

---

[36] [1989] 1 S.C.R. 560

[37] Re Royal Canadian Mounted Police and Re Husted, [1981] 2 F.C. 791 (Fed. TD)

[38] [1984] 2 F.C. 642 (FCA)

> gravity, its complexity, the capacity of the inmate himself to understand the case and present his defence. This list is not exhaustive."

He further stated that, if the circumstances of the case warrant it, representation by counsel is not a matter of administrative discretion but is a matter of one's right to procedural fairness.

3. The Decision

Administrative tribunals are not required to give reasons for their decisions unless their governing legislation mentions otherwise. The SCC has not established any common law rule which requires tribunals or boards to fully substantiate their decisions. However the court has mentioned that:

> [the obligation of giving reasons] "reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and if taken, the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed.[39]

But Lamer J has indicated in Blanchard v. Control Data Canada Ltd.[40] that an absence of reasons would amount to "an infringement of the rules of natural justice." This case dealt with labour law, it is evident Justice Lamer used the term natural justice in the same sense as procedural fairness.

It does appear from these SCC decisions that an administrative

---

[39] Northwest Utilities Ltd. et al. v. Edmonton, [1979] 1 S.C.R. 684

[40] [1984] 2 S.C.R. 476

decision would be upheld if it at least contains a minimum of substantiation. One leading text[41] has indicated elements of a decision that would provide a complete substantiation. Those elements are:

a) given by persons who have heard all the evidence,

b) based substantially on the evidence submitted at the hearing,

c) contain reasons, and

d) reviewable by the persons making it should they later realize that an element of procedural fairness was omitted.

III APPLICATION OF THE LAW TO THE CANADIAN FORCES

The Canadian Forces (CF) exists under the authority of the National Defence Act(NDA)[42]. The NDA authorizes the enactment the Queen's Regulations and Orders(QR&Os), the Canadian Forces Administrative Orders(CFAOs) and other instructions and orders for the control and governing of the CF. Being a public body the CF is thus governed by the principles of administrative law. The courts have insisted that the need for procedural fairness is more prominent when the concerned administrative body's actions are aimed at an individual, and will influence that individual's rights or interests.(Martineau No2)[43]

---

[41] Dussault and Borgeat, Administrative Law, a Treatise, Second edition volume 4, p 294

[42] RSC 1985, Chap. N-5

[43] Supra, note 4

A. Administrative Decisions in CF

A myriad of administrative decisions are taken every day in the CF. A number of these decisions have career implications; some are minor, others are major. They are made pursuant to the NDA, the QR&Os, the CFAOs and other administrative directives issued under the authority of the Chief of the Defence Staff (CDS) such as Chief Personnel Career Development - Operating Procedures Manual (CPCD OPM). For example, with respect to releases sections 23 and 30 of the NDA deal respectively with the obligation to serve and release from the CF. Chapter 15 of the QR&Os further legislates on the topic of releases. CFAO 15-2 amplifies chapter 15 of the QR&O.

Decisions range from a broad application, such as establishing a new policy concerning manpower levels, to a more specific application such as the compulsory release of a member for medical reasons. They are taken by officers within the chain of command (ie. commanding officers (COs)) and officers occupying staff positions at National Defence Headquarters (NDHQ). Before making a decision on a CF member the NDHQ deciding authority often benefits from recommendations produced by the appropriate review board. Such boards include: the Career Medical Review Board (CMRB), the Career Review Board (CRB) and the Security Clearance Review Board (SCRB). These boards deal with the different administrative problems at a national level. Local administrative decisions, usually by a CO, are taken depending on the nature of the problem, ie. complexity and severity, and the administrative directive stating the procedure which must be employed in the particular case. The use of

review boards and their decision making process will be explored in this section.

As has already been indicated the degree of required procedural fairness will be directly related to where the courts place the decision making body on the spectrum of procedural fairness. One model for the placement of the different types of administrative decision making in the CF is set out below:

Spectrum of Procedural Fairness in CF

CM	ST	RG	RELEASE	ADVERSE IMPACT	POSTING& PROMOTIONS	POLICY
			CMRB,CRB SCRB,C&P,RS	CMRB,CRB,SCRB RW,C&P,RS		

The Knight decision seems to indicate that the common law requirements of procedural fairness would apply to courts martial (CM), summary trials(ST), redress of grievance(RG), release decisions and adverse impact decisions. Courts martial and summary trials clearly must abide by the principles of procedural fairness. These tribunals exercise judicial functions. Courts martial involve the use of strict procedural rules that govern all criminal courts. Summary trials are conducted according to more flexible rules of procedure. Compulsory release of the CF member is one of the most adverse administrative actions. A compulsory release may occur following a number of different administrative processes. The reasons for this type of release are given in QR&O article 15.01 and CFAO 15-2. The CMRB, CRB and SCRB can all lead to

recommendations to release the service member. It is clear that as a result of the Knight decision each of these review boards would attract the minimum guarantees of procedural fairness. Adverse impact decisions are those which influence the member's career in a negative manner. Those decisions might take the forms of a recorded warning or posting restrictions, as is the case in certain CMRB recommendations, or when a member is retained in the CF with restricted employment following a CRB or SCRB recommendation.

Recent case law involving the CF[44] has ruled that members of the CF have the right to have their release determined in accordance with the principles of procedural fairness. Similarly, the Duncan v. M.N.D.[45], which dealt with the staffing of severity appeals, held that the applicant must have "direct access to the mind or conscious understanding of the decider, the adjudicator".

Independent of the type of action undertaken, a member who has been adversely affected by such a decision may attempt to change the decision by means of the redress of grievance procedure as prescribed by section 29 of the NDA, QR&O articles 19.26 and 19.27 and CFAO 19-32. The scope of the grievance process, with its goal of providing civilian and military overseers of the military with an effective means of reversing injustice, makes the redress of grievance process a particularly important administrative decision

---

[44] see Diotte v. Canada (26 May 1992), Ottawa-T-233-89 (F.C.T.D.), Dressler v. Canada (Minister of National Defence) (1989), 31 F.T.R. 185 (F.C.T.D.) and Downey and Simpson v. R (16 May 1985), Ottawa T-937-85 (F.C.T.D.)

[45] (1990),32 F.T.R. 199 (F.C.T.D.)

making body. The redress of grievance (RG) system is therefore situated on the spectrum of procedural fairness such that compliance with fairness principles must be met. The procedures presently in place in CFAO 19-26 appear to provide considerable procedural fairness. Those procedures could provide a useful framework within which to develope disclosure procedures for other administrative decisions. It might even be argued that flaws in procedures existing at the review board and deciding authority levels could be overlooked because the CF member can utilize the apparently procedural sound grievance system. It is clear, however, from Diotte v. Canada[46] that a second level review cannot cure a procedural defect in the first instance. Therefore, it is not possible to argue that bodies such as the CRB, CMRB or SCRB do not need to provide procedural fairness since the individual affected can "appeal" any decision through a procedurally fair grievance system.

Posting and promotion decisions may represent important repercussions on a member's life. However these decisions may be distinguished from releases and adverse impact decisions in that they are not aimed at restricting an individual or depriving a member of an interest. These decisions are taken to fulfil service requirements: the need to have the best individual at a certain position and the requirement to have the most qualified members in each classification/trade in the appropriate rank. They also do not have the same impact on an individual that a release decision

---

[46] Supra, note 44

will have, although it might be argued the failure to get promoted might inevitably lead to an earlier release. Finally, policy decisions which are usually general in nature are not subject to the rules of procedural fairness[47].

B. CF ADMINISTRATIVE BODIES - PROCEDURES

Having situated the review boards on the procedural fairness spectrum, attention will now be focused on reviewing how these boards operate with the goal of ultimately assessing whether they met the requirements of procedural fairness.

1. Security Clearance Review Board (SCRB)

The Security Clearance Review Board (SCRB) provides advice to the CDS and the Deputy Minister(DM) on the allocation of security clearances to CF members or employees of the DND. The need for a SCRB arises when the Director Security Clearances(DSC) does not feel confident in granting security access to the level requested. DSC will direct that a Special Investigation Unit(SIU) investigator interview a CF member or a DND employee when a routine security clearance investigation uncovers unusual circumstances. This interview will provide the individual the opportunity to explain the unusual circumstances affecting his security clearance. If this interview does not provide sufficient explanation, the individual will be interviewed by the commanding officer or equivalent civilian supervisor. This latter security clearance interview provides the SCRB with an objective view of the circumstances from a person outside of the normal security clearance investigation

---

[47] see Inuit Tapirisat, supra note 9

process. Where it is determined that a CF member or DND employee's security clearance needs to be reviewed the matter is referred to an SCRB.

There is no statutory or Government Security Policy (GSP) requirements for a SCRB. The GSP encourages the use of such boards. The SCRB appears to perform a useful practical function by screening cases before they reach the deputy head (CDS for military personnel, DM for civilians) decision making level.

Chief Intelligence and Security (CIS) is the chairman of the SCRB. The board is composed of a representative from DPCO or DPCOR, Director Civilian Staffing(DCS) if subject is a civilian, DPLS, DGSecur and an additional senior security officer nominated by DG Secur. Each member has one vote in each case before the board. DSC is present as a special advisor to the board. Associate ADM(PER) sits as co-chair when the case involves an employee of DND. The board secretary, DSC 2-2, prepares a work sheet that includes a synopsis of the security, personnel, and career information relevant to each case and distributes it to each board member. Board members make their decision based on the information contained in the file and may also request the input from advisors specialised in security related fields. Board members may also request that the member or employee which is the subject of the board appear in person to answer specific questions. The board takes a vote to determine which security clearance should be recommended for the person. This recommendation and the reasons for which the security clearance should be denied are sent to the CDS

or the DM for approval.

The only information that an individual receives concerning the case is the information that the SIU investigator, the CO and possibly the SCRB are willing to provide. Direct representations by the individual in this process are possible only if the SCRB requests the person's attendance. The only other input may be through the reports of the SIU investigator and the CO.

2. Career Review Board(CRB)

A CRB will examine a member's career when unusual circumstances arise and affect that member's employability in the CF. CFAOs 19-20 (sexual abnormality), 19-21 (unauthorized use of drugs), 19-31 (misuse of alcohol), 19-39 (personal harassment) and 34-25 (personality disorders) state the policy regarding each of the deficiencies that warrant a member being assessed concerning suitability as a serving member of the CF. Also, CFAO 9-1, (Officer Classification Training - Commissioned Officers - Disposal of Unsuitable Candidates), prescribes the policy and procedure in respect of officers who fail basic or classification training.

CRB procedures are different for officers and NCMs. CRBs for officers are governed by CPCD OPM 203-7 while CRBs for NCMs are governed by CPCD OPMs 310-1 (drugs), 310-2 (alcohol), 310-3 (sexual abnormality) and 310-4 (personality disorder).

a) **Officers:** Once a problem has been perceived certain measures are required according to the pertinent CFAO. The action is initiated by the officer's CO; and will result in certain procedures being undertaken, ie.investigation. The officer will be

informed in various degrees throughout this process according to the nature of the deficiency that is alleged, and the directions included in the applicable CFAO. A notice of intent to recommend release pursuant to QR&O art. 15.21 and 15.22 is the official document which informs the officer of the reasons for release and provides the individual with the opportunity to respond to the allegations.[48] The investigation report and the appropriate documentation is then forwarded to the NDHQ. The officer does not, however, have the right to see the information upon which a decision is to be made prior to objecting to the notice of intent to recommend release.

The Director Personnel Career Administration Officers 2-3 (DPCAO 2-3) prepares the file and presents it to the CRB. The CRB handles the case in a 'secretarial manner' when dealing with training failures at the Basic Officer Training Course (BOTC) or during officer classification training. That is to say that the board does not sit as a whole but that the file is passed from one member to another and each board member will write an opinion on the case. The handling of a case 'secretarially' can itself be a breach of procedural fairness. This can arise particularly where the members of the board use information not on the 'record' itself. For example, if a medical officer consults a medical file and that information is not made available to other board members or the person whose case is reviewed. 'Secretarially' handling a file provides for administrative ease but it may easily fly in the

[48] see also CFAO 15-2, Appendix 2, Annex A

face of the goals of procedural fairness.

In all other situations the board will meet formally. The board will then make a recommendation and pass it on to the deciding authority. This deciding authority is identified in CPCD OPM 101-2. A decision will be made concerning the officer's suitability to continue service in the CF. The officer will then be informed of the decision. The only input the member may have in this process is through the notice, or by a statement in the event of a training failure. There is no opportunity mandated for the individual to see and make representations concerning the information being presented to the board. If the officer does not agree with this decision it can be challenged by means of the redress of grievance procedure.

b) **NCMs:** The CRB process is initiated in a similar manner to that followed in the case of officers. Not all NCMs are served with a notice of intent to recommend release form.[49] The investigation report and the appropriate documentation is forwarded to Director Personnel Careers Administration Other Ranks 5-2 (DPCAOR 5-2) who is the secretary of the CRB. There exists different CRB procedures for NCMs depending on the nature of the deficiency reported.

i. Unauthorized use of drugs (with conviction), misuse of alcohol and personality disorders: DPCAOR 5-2 fills out a form (Annex A to CPCD OPM 112-3) and attaches the pertinent documentation to it as

---

[49] QR&O 15.36 prescribes that a Notice of intent to recommend release will be delivered to a NCM who is above the rank of sergeant or to a NCM below that rank but has served ten years or more in the Regular Force, see also CFAO 15-2, Appendix 2, Annex A.

per CPCD OPM 112-3. This CRB is composed of only one person, namely DPCAOR 5-2. The file is then sent to the deciding authority, DPCAOR 5.

ii. Unauthorized use of drugs (without conviction): DPCAOR 5-2 fills out a form (Annex A to CPCD OPM 104-4) and attaches the pertinent documentation to it as per CPCD OPM 310-1. The CRB is a secretarial board consisting of DPCAOR and Director Personnel Legal Services 2 (DPLS 2). Interestingly, the employment of a lawyer on an administrative board can create concerns over procedural fairness. As was set out in Brett v. Ontario[50], the lawyer should not act as member of the board and also act as its legal advisor. Each board member's comment is recorded on this form. The Director General Personnel Careers Other Ranks (DGPCOR) is the deciding authority. The decision of DGPCOR in recorded on the form.

iii. Sexual misconduct: DPCAOR 5-2 fills out a form and attaches the pertinent information to it as per CPCD OPM 310-3. The CRB is a secretarial board consisting of DPCAOR, DPLS 2, Director Health Treatment Services (DHTS) and DGPCOR. Each board member's comment is recorded on this form. Assistant Deputy Minister (Personnel) (ADM(PER)) is the deciding authority. The ADM(PER) decision is written on a separate cover sheet attached to the CRB form.

3. Career Medical Review Board(CMRB)

The Career Medical Review Board (CMRB) operates according to CFAO 34-26 and OPM 118-1. NCMs' CMRBs are convened formally and

---

[50] Brett v. Ontario (Board of Directors of Physiotherapy), (1991) 77 D.L.R. (4th) 144 (Ont. Div. Ct.)

officers' CMRBs are convened either formally or secretarially. The CMRB's mandate is to recommend either retention with or without career limitations, remuster, or the release of a member. The notice of intent to recommend release form is not used in the CMRB process.

a. **Officers:** The CMRB process is initiated when a medical officer prepares a CF 2088 form (Notification of change of medical category or employment limitations). This form is processed through the CF medical system and finally returns to the officer's unit. The officer is briefed on the possible repercussions of a change in the medical category by the CO and signs the form. A CF 285 report is written by a Personnel Selection Officer (PSO) and may contain the comments of the member. The member does not see the CF 285 report. DPCAO 2-3 receives these forms and prepares each file according to OPM 118-1. There are two types of CMRBs: one for majors and below and one for lieutenant-colonels (LCol) and above.

The CMRB for majors and below is composed of DPCAO, 3 career managers and a representative of DHTS. The deciding authority for the release of majors and below is the DGPCO. The composition of the CMRB for LCols and above varies according to the rank of the officer who is the subject of the board. The chairperson of the CMRB for a LCol or a Col is CPCD. ADM(Per) acts as chairperson for the CMRB for a Brigadier-General (BGen) and above and CPCD becomes a member. The Surgeon-General sits on these boards. One or two other members form the board and they represent the other two

services which are not represented by the chairperson. If the board is chaired by ADM(PER) that member will represent the service not represented by ADM(PER) or CPCD. Director Senior Appointments acts as secretary for the boards. The deciding authority for LCols and above is the CDS. There is no provision for the member affected by the decision of the board to see the information upon which the CMRB will decide or to make representations before that body.

b) **NCMs:** The CMRB process is initiated in the same manner as the CMRB for officers. DPCAOR 5-3 prepares each file according to OPM 118-1. The CMRB is composed of DPCAOR 5, 3 DPCOR Section or Subsection Heads (minimum rank of captain) and a representative of DHTS. The CMRB recommendation is sent to the deciding authority, DPCAOR. As with the officers CMRB there are no provisions for disclosure of material to the person affected, or an opportunity to make representations before the board.

IV PROCEDURAL FAIRNESS DEFICIENCIES IN THE CRB,CMRB,SCRB

The lack of a complete notice, the non-disclosure of the evidence held by the boards and the lack of a proper opportunity to make representations by the member are the three major areas of procedural fairness deficiencies in these boards. The other components of fairness appear to be sufficiently covered by the present procedures in use in the different boards.

A. Career Review Medical Board - Officers and NCMs

i) Notice: Although the member is required to sign the CF 2088 form, that signature represents only an acknowledgement of the

possible employment limitations or the possible career consequences resulting from a CMRB recommendation. The form does not inform the member of when the CMRB will consider the case.

ii) Disclosure of evidence: The CF 2088 form does not contain precise information on the Medical Officer's (MO) diagnosis. The member must get that information from the MO. The member does not have access to the evidence utilised by the CMRB other than the information received from the MO.

iii) Member's representations: The member, in both the officers' and the NCMs' CMRBs, does not have the opportunity to provide any direct input in the decision-making process. The CF 2088 form does not provide the member the opportunity to comment on the case or to bring forward any medical evidence to support the member's position. The present CMRB procedure does not provide the member with the opportunity to present any medical evidence to the board.

One result of this lack of an opportunity to make representations before a CMRB is that for members who complain about their release to the Canadian Human Rights Commission their first opportunity to take a meaningful part in assessing the validity of their medical problem is during the investigation of the complaint. This system can be contrasted with that followed by the RCMP where the individual is represented by a doctor who is a member of the decision making body. In addition, there is provision for the member to make representations.[51]

---

[51] Royal Canadian Mounted Police Regulations 1988 SOR/91-177 and RCMP Administrative Manual, Appendix X-3-8

B. Career Review Board - Officers

i) Notice: All officers receive sufficient notice by way of the notice of intent to recommend release form which contains an outline of the reasons for the proposed release.[52]

ii) Disclosure of evidence: The officer does not have access to the evidence used by the board.

iii) Member's representations: The officer may indicate disagreement with the release recommendation and provide contradictory evidence to substantiate this disagreement on the notice of intent to recommend release form. However, there is no further provision of any opportunity to make representations to the decision making authority.

C. Career Review Board - NCMs:

i) Notice: As mentioned earlier, some NCMs are served with a notice of intent to recommend release and will thus receive an outline of the reasons for the release. NCMs who are below the rank of sergeant or have less than 10 years of service do not presently receive any official notice of their possible release in certain situations. Release procedures, other than in the case of drug offenses, misuse of alcohol or sexual abnormality, will be initiated only after the member has been warned of the alleged performance or personal deficiencies. These warnings assume the form of the recorded warning(RW) and the counselling and probation (C&P). Nonetheless, in exceptional circumstances, it is possible

[52] see QR&O 15.21

for a CO to initiate the release procedures, summon the member for the announcement of the release and have the member sign the documentation without the member having any warning of it.

ii) Disclosure of evidence: As in the case of the officer's CRB there is no provision for the member affected to be informed of the evidence being presented to the board.

iii) Member's representations: There are no opportunity for the member to make representations, either in writing or orally to the CRB.

D. SECURITY CLASSIFICATION REVIEW BOARD Officers and NCMs

i) Notice: A member, officer or NCM, will not receive any formal notice that a SCRB will be conducted. The member will be interviewed by the CO and should be, at that time, informed of the possible convening of a SCRB for the case.

ii) Disclosure of information: The member does not have access to the information used by the board.

iii) Member's representation: The member may address the board personally if the board request the member's presence but otherwise the board procedures do not provide an opportunity make any representations. The SCRB procedures are presently under review as a result of the Marin Report. Many of the recommendations in that report were procedural in nature, including the right to make representations.

V RECOMMENDATIONS

1. A notice of intent to recommend release should be served to all members who face release procedures. The present form, when used, affords the member the opportunity to present initial arguments against the release and the pertinent QR&O provides adequate time for the member to properly prepare a position. However, the individual should also be provided notice of any subsequent review board hearings so that person can take a meaningful part in the decision making process. Therefore it is recommended that all persons having their cases heard by a CMRB, CRB or SCRB be given notice of the hearing of the applicable board.

2. Members should be informed of the information to be used against them by a board. In many cases the individual could be provided with a photocopy of the material to be considered by the board. The Chiarelli[53] decision provides the background to determine how much information should be given. In a security related case, or certain drug cases, a summary of facts without identifying sources might be acceptable whereas disclosure of all information might be called for in other cases. The amount of information to be disclosed can be indicated in broad guidelines for each type of administrative procedure. However, as is always the case in administrative law, the facts of each case will determine the level of disclosure applicable.[54]

---

[53] Supra, note 12

[54] see also Access to Information Act, RSC 1985 Chapter A-1, sections 15 to 23

3. In keeping with the Abel[55] decision, the CF should give the member the opportunity to address the board considering the case, at least in writing, and be informed of the board's recommendation. The member should also be able to address the deciding authority concerning any recommendations made by the board. This will probably lengthen the "administrative chain" somewhat; however, considering the present speed of the process, it should not distort it considerably.

4. It is recommended that review board proceedings be "paper" hearings unless circumstances (ie issue over credibility of witnesses) require oral representations.

5. The courts have never dictated any precise format for administrative hearings. Courts have assessed the compliance of each public body with the components of procedural fairness by judging each case according to the nature of the hearing and the effects of the decision on the administered individual.[56] The present format of the different boards is probably adequate if the previous recommendations were incorporated in their operating procedures. The supplemental steps and the inherent staffing that these recommendations require will most assuredly mean an increased work load for the staff officers and the administrative personnel responsible for the preparation and conduct of the boards. This aspect of the recommendations should be studied by the appropriate NDHQ authorities to determine if the present procedures can be

---

[55] Supra, note 30

[56] see Cardinal, supra note 7 and Radulesco, supra note 19

streamlined and consolidated to avoid undue duplication of effort.