

Canadian Human Rights Tribunal

**Tribunal canadien des droits de la
personne**

BETWEEN:

MARTIN GAGNON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

REASONS FOR DECISION

T.D. 04/02

2002/02/14

PANEL: Pierre Deschamps, Chairperson

[TRANSLATION]

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I. INTRODUCTION

[1] The Tribunal has before it a complaint that was filed with the *Canadian Human Rights Commission* (hereinafter the *Commission*) on December 16, 1996, in which the complainant, Martin Gagnon, alleges that he was discriminated against on the basis of his marital status, contrary to section 7 of the *Canadian Human Rights Act* (hereinafter the *Act*). At the hearing, the Tribunal allowed amendment of the complaint to include, as another basis, section 14.1 of the *Act*.

[2] In his complaint, Mr. Gagnon, who is a member of the Canadian Armed Forces (CF), alleges that, because of his involvement in a sexual and personal harassment grievance filed with the CF in 1990 by his wife, who is also a CF member, and a sexual harassment complaint brought by her before the *Commission* in 1992, he himself was the victim of several incidents of discrimination involving his superiors.

[3] Mr. Gagnon also claims that his postings after he left CFB Halifax in 1992 were offered with the intent of hurting his career, particularly as they were outside his area of expertise, namely the occupation of Finance Clerk. Lastly, Mr. Gagnon claims that certain positions within the CF were not offered to him after he left Halifax, with a view to hurting his chances for advancement within the CF.

II. CONTEXT

[4] The evidence shows that Mr. Gagnon has been married to Mrs. June Gagnon since July 2, 1977 (exhibit C-2). Like her husband, Mrs. Gagnon is a member of the Regular Force of the CF. She has the same occupation as Mr. Gagnon, namely that of Finance Clerk. Mrs. Gagnon was not called as a witness in this proceeding.

[5] The evidence shows that Mr. Gagnon began his career in the CF on November 5, 1970 as a Finance Clerk in the Land Element (exhibit C-2). In 1986, Mr. Gagnon opted to join the Navy.

[6] When he enrolled in the CF, Mr. Gagnon became part of the section that includes all the Finance Clerks of the CF. According to the witness Mr. Delisle, who was career manager for the Finance Clerk occupation from 1990 to 1994, Finance Clerks perform accounting and finance duties in the Comptroller's sections in the CF.

[7] It appears from exhibit C-2 that, from 1971 to 1992, Mr. Gagnon was stationed successively at CFB Shilo (1971-1975), at CFB Bagotville (1975-1979), on HMCS Skeena (1979-1981), in Ottawa (1981-1984), on HMCS Saguenay (1984-1986), in Ottawa (1986-1989), and in Halifax (1989-1992). On July 15, 1992, he was transferred to Ottawa, where he has since held several different positions.

[8] Furthermore, it appears from exhibit C-2 and exhibit C-3 that, between 1970 and 1989, Mr. Gagnon was promoted successively to the ranks of Leading Seaman (1974), Master Seaman (1976), Petty Officer Second Class (1978), Petty Officer First Class (1986) and, lastly, Chief Petty Officer Second Class (1989). The evidence also shows that, since 1989, Mr. Gagnon has

not received any promotion within the CF. According to Mr. Gagnon, he became eligible for promotion to the rank of Chief Petty Officer First Class in 1991.

[9] The facts leading to the complaint filed with the *Commission* in 1996 by Mr. Gagnon are set out below.

[10] In June 1990, according to Mr. Gagnon's testimony, Mrs. Gagnon was sexually harassed by a Major and personally harassed by a Captain. At that time, Mrs. Gagnon filed a grievance through the CF grievance system.

[11] It appears from Mr. Gagnon's testimony that, since her grievance concerned her immediate superiors, his wife had to contact the Colonel who was her commanding officer at the time to explain the nature of her grievance to him. According to Mr. Gagnon, his wife was called to an initial interview before Colonel McLean and Chief Warrant Officer Pike in June 1990, which interview lasted two hours. According to Mr. Gagnon, his wife had a second interview a week later. In his testimony, Mr. Gagnon does not say who was present at the second interview.

[12] According to Mr. Gagnon, following her second interview his wife was called to a third interview, which she refused to attend. Because Mrs. Gagnon had defied the direct order to attend the interview, disciplinary charges were laid against her in July 1990, according to Mr. Gagnon's testimony.

[13] In his testimony, Mr. Gagnon stated that, subsequent to the grievance filed by his wife within the CF, he took several steps to support her, since, in his opinion, his wife's grievance was not being properly handled by the CF.

[14] In his testimony, Mr. Gagnon indicated that the first step he took was in June 1990, shortly after the first interview his wife had been called to attend. It appears from Mr. Gagnon's testimony that, at that time, he sought advice from Commander Barnes, counsel to Admiral Anderson, Commander of Maritime Command at Halifax. Commander Barnes, finding himself in a conflict of interest situation, then referred him to Major Hearst in the Office of the Judge Advocate General (JAG) in Gaagetown.

[15] Mr. Gagnon's second step, in late June 1990, was to contact Major Hearst for legal advice. In his testimony, Mr. Gagnon stated that he communicated with Major Hearst twice for advice, and once to inform him that disciplinary charges had been laid against Mrs. Gagnon. Mr. Gagnon stated in his testimony that, during one conversation, Major Hearst told him that what was happening in regard to his wife was not right. Counsel for the respondent objected to this testimony on the ground that it was hearsay.

[16] Mr. Gagnon also stated that he subsequently took a third step, seeking advice from the Federal Rights Office. During his testimony, Mr. Gagnon remained vague as to the advice he was given at that time.

[17] Mr. Gagnon reported in his testimony that, after this third step, he arranged an appointment for his wife with the Chief Warrant Officer of Maritime Command. According to Mr. Gagnon,

this happened in July 1990. At that time, according to Mr. Gagnon, his wife obtained some moral support and received some advice.

[18] It appears from Mr. Gagnon's testimony that, wanting to put some pressure on the CF, his wife, at his suggestion, approached a federal Liberal MP. According to Mr. Gagnon, this action was taken in February or March 1991. One or two meetings took place. Mr. Gagnon stated in his testimony that he was not present at these meetings. According to Mr. Gagnon's testimony, things improved after that.

[19] In his testimony, Mr. Gagnon reported that, in her grievance proceedings within the CF, his wife had the support of an assisting officer, in the person of Lieutenant-Commander Joanne Thibault. He also stated that Lieutenant-Commander Thibault informed him, during a telephone conversation he said took place in fall 1990, that it would be better if he were no longer involved in his wife's complaint. Lieutenant-Commander Thibault was not called as a witness. At the hearing, counsel for the respondent objected to Mr. Gagnon's testimony in regard to Lieutenant-Commander Thibault's comments, alleging that it was hearsay.

[20] In his testimony, Mr. Gagnon also reported that, Lieutenant-Commander Thibault informed him, in a telephone conversation on February 21, 1995, that in July or August 1990, during a jogging session with Colonel McLean and Commander Smith, Colonel McLean had told her that if Mr. Gagnon continued to interfere in his wife's case, it would destroy his career. Neither Colonel McLean nor Commander Smith was called as a witness. At the hearing, counsel for the respondent objected to the facts related by Mr. Gagnon being admitted in evidence, alleging that they were hearsay.

[21] Lastly, Mr. Gagnon reports in his testimony that, in 1994, his wife received an official letter from the Chief of Staff of the Canadian Forces. According to Mr. Gagnon's testimony, the Chief of Staff apologized and acknowledged that Mrs. Gagnon had been sexually and personally harassed. According to Mr. Gagnon's testimony, his wife nevertheless appealed to the Minister of Defence, since no action had been taken against Colonel McLean for intimidation and abuse of power.

[22] According to Mr. Gagnon, from June to December 1990 he felt no repercussions as a result of his involvement in his wife's complaint. He stated that, during that period, he got along very well with his immediate superior, Commander Andrea. According to Mr. Gagnon's testimony, it was only once he was posted in May 1991 to Maritime Command Headquarters, Director Cost Logistics, reporting to Captain Jarvis, that his problems began.

[23] In his testimony, Mr. Gagnon related a number of incidents that occurred between May 1991 and May 1992 while he was in Halifax, which incidents he links to his involvement in the complaint filed by his wife. Three of these incidents involved Captain Estey, and the rest, Captain Jarvis.

[24] From Mr. Gagnon's testimony it appears that the first incident involving Captain Estey occurred in May 1991, a week or two after he began working at Maritime Command Headquarters in Halifax. Mr. Gagnon related the first incident as follows:

[translation]

"I was working on the fourth floor. I had to report... I had to go to the fifth floor, to the Command Comptroller's shop. I was looking for Master Warrant Officer Velma Walsh.

When I got to the fifth floor, I met Navy Captain Estey. He was the Command Comptroller. It's the equivalent of Colonel.

I wrote all that in English. He asked me in French, "*Who are you looking for, Chief?*" I said, "*I'm looking for Master Warrant Officer Velma Walsh.*" He looked at me. "*Ah, you mean the lovely Master Warrant Officer Velma Walsh.*" I said, "*No, I'm looking for Master Warrant Officer Walsh.*" Then he indicated that she was in Chief Warrant Officer Garrett's office.

I went into Chief Warrant Officer Garrett's office. Velma Walsh was sitting down. They had half-walls. Navy Captain Estey, a very tall man - six foot two, six foot three - he looked over the wall and asked me, "*When I made that comment 'Are you looking for the lovely Master Warrant Officer Walsh', was that sexual harassment?*"

I said, "*Yes it is, but it's not up to me to make a complaint, it's up to Master Warrant Officer Walsh.*" He went away⁽¹⁾."

[25] Mr. Gagnon testified that, after this first incident, he understood that Captain Estey intended to make fun of his wife's sexual harassment complaint and his personal involvement in the complaint. He said that he found the comment sarcastic.

[26] According to Mr. Gagnon, a second incident occurred in June 1991, again involving Captain Estey. In his testimony, Mr. Gagnon related that incident as follows:

[translation]

A. It was an afternoon. I know it was about 1540 hours. I was coming out of the elevator on the main floor of Headquarters. Navy Captain Estey came into the elevator. He said, ...

Q. Before telling us that, what year was it, what month, do you know?

R. May '91, the first. I think it was June, June '91.

Q. O.K. What did he say to you?

A. He said, "*I would love to have your hours of work*" because I was leaving after at 1540 hours. I told him I worked from 0730 hours to 1530 hours. I put in ten minutes overtime because I didn't like his comment.

I was on my way... I was leaving and that's when I heard him say to me, I'll say it in English, *"If I had you in my shop, I would show you how much sympathy I have for you."*⁽²⁾

[27] The third incident involving Captain Estey occurred, according to Mr. Gagnon, in September 1991. In his testimony, Mr. Gagnon related this incident as follows:

[translation]

"I came back from the gym. It was one o'clock in the afternoon. I was in the process of making some Queen's Regulations amendments. The Regulations are always changing, we have to make amendments, change the Regulations.

I remember I had my head down and Navy Captain Jarvis was discussing something with Commander Banks, and he was standing just in front... just in the entrance to his office, and sitting down, I could see him from my office, but he could see me.

I guess he thought I was sleeping, because he shouted at me, *"Wake up, Chief. If you... if going to the gymnasium makes you too tired, stop going."* I answered, *"Going to the gym does not make me tired. Contrary, it makes me more alert."* I said that in English. *"It makes me work better in the afternoon."*⁽³⁾

[28] Mr. Gagnon stated in his testimony that he was upset by these various incidents and decided to approach Captain Jarvis to inform him about the three incidents that had occurred with Captain Estey. It appears from Mr. Gagnon's testimony that Captain Jarvis was at the third level in the chain of command.

[29] Mr. Gagnon stated that during a meeting with Captain Jarvis on October 2, 1991, at which Lieutenant-Commander Gregory and Lieutenant Pacher were present, he informed Captain Jarvis what had happened with Captain Estey. According to Mr. Gagnon's testimony, Captain Jarvis then told him that he would talk to Captain Estey about it. Mr. Gagnon added that the subject of his wife's case was raised during his conversation with Captain Jarvis. According to Mr. Gagnon, Captain Jarvis told him at that time that his involvement in his wife's case was not appropriate and that he should let the system handle it.

[30] Following that meeting, Mr. Gagnon was called to meet with Captain Estey, with whom he had a conversation about his wife's case. According to Mr. Gagnon's testimony, Captain Estey more or less apologized. Mr. Gagnon reportedly then told him to leave him alone. According to Mr. Gagnon, there were no further incidents with Captain Estey.

[31] With regard to Captain Jarvis, Mr. Gagnon reported in his testimony various incidents involving him personally. According to Mr. Gagnon, these [translation] "little incidents" indicated to him that something was going on with Captain Jarvis.

[32] According to Mr. Gagnon, the first incident occurred in August or September 1991. In his testimony, Mr. Gagnon related the incident as follows:

[translation]

"One morning when I arrived, it, it happened in the fall, during... it, it was fall '91, August, September. One morning, I arrived, I said good morning to him right away.

Q. To whom?

A. To Navy Captain Jarvis. He was nearby. He looked at me and didn't answer, he ignored me. Another morning, I was in the hallway on the fourth floor where I work. I was talking with Chief Warrant Officer Montbourquet. Navy Captain Jarvis came along and he said good morning right away to Chief Warrant Officer Montbourquet, completely ignoring me.⁽⁴⁾"

[33] According to Mr. Gagnon's testimony, it was after this incident that he decided to ask to be transferred with his wife. He then asked for a second meeting with Captain Jarvis to inform him that he was going to ask for a transfer. The meeting took place, according to Mr. Gagnon's testimony, in late October or early November 1991 in the presence of Lieutenant Pacher. The latter was never called as a witness.

[34] During that meeting, Mr. Gagnon told Captain Jarvis why he was requesting a transfer. Mr. Gagnon stated in his testimony that he told Captain Jarvis that he was tired of the animosity shown towards him, that his reputation had been tarnished, that he was seen as a trouble-maker, and that it was better for him to go somewhere else and start over.

[35] According to Mr. Gagnon's testimony, Captain Jarvis then told him that the only person he had heard make derogatory comments about him was Captain Hamilton. The latter reportedly insinuated that he, Mr. Gagnon, had convinced his wife to file a complaint. At the hearing, counsel for the respondent objected to this part of Mr. Gagnon's testimony on the ground that the statements reported by Mr. Gagnon were hearsay.

[36] Mr. Gagnon also reported that, during this second meeting, he discussed his wife's case in greater depth with Captain Jarvis. At that time, he gave Captain Jarvis a five-page document relating all the incidents connected with his wife's complaint. According to Mr. Gagnon, the day after the meeting, Captain Jarvis gave him back the document and told him, "I have a lot of sympathy for your wife, but I have none for you".

[37] The evidence shows that, following the incidents related above, Mr. Gagnon, accompanied by his wife, met in fall 1991 with his career manager at the time, Mr. Delisle. According to Mr. Delisle, both expressed at that time a desire to be transferred to Ottawa. According to Mr. Delisle, there was a discussion regarding Mrs. Gagnon's complaint during that meeting.

[38] In January 1992, Mr. Gagnon was informed by Mr. Delisle that there was a position available in Ottawa at Director Information System Delivery (DIS DEL), a position that Mr. Gagnon, according to his testimony, considered a bit beyond the scope of his occupation. Mr. Gagnon nevertheless accepted the transfer. In his testimony, Mr. Gagnon noted that Captain Jarvis supported his transfer request at that time.

[39] Mr. Delisle, in his testimony, stated that a number of factors influenced his decision to offer Mr. Gagnon the position at Director Information System Delivery, in particular the operational requirements in Ottawa and the fact that Mr. Gagnon's had said he preferred to continue his career in Ottawa. In his testimony, Mr. Delisle stated that he was not under any pressure at that time, particularly from superior officers, to transfer Mr. Gagnon to Ottawa.

[40] The evidence also shows that two other incidents involving Captain Jarvis subsequently occurred. In his testimony, Mr. Gagnon reports an initial incident that occurred in May 1992. Mr. Gagnon relates this incident as follows:

[translation]

"A. O.K. It was in '92, in May '92, Chief Petty Officer Second Class Broyden had been promoted... received his promotion to Chief Petty Officer First Class. Navy Captain Jarvis was doing the presentation. He took the Chief Petty Officer Second Class epaulettes off Chief Petty Officer First Class Broyden's shoulders and put the new epaulettes with the new rank in place.

Then he threw the Chief Petty Officer Second Class epaulettes down on the floor and told me... I'll say it in English... he told me, "*Chief Gagnon, pick up that extra set of rank, you're going to need them.*"⁽⁵⁾"

[41] In his testimony, Mr. Gagnon stated that, in view of the earlier incidents, he interpreted Captain Jarvis's gesture to mean, "You're going to be Chief Petty Officer Second Class for a long time and I'm going to make sure of that".

[42] Lastly, Mr. Gagnon reported in his testimony a final incident involving Captain Jarvis, which he said occurred in June 1992, a few days before he left for Ottawa.

[43] According to Mr. Gagnon, while he was shredding some confidential documents, Captain Jarvis asked him, "Do you think your wife's case is finished because you're going to Ottawa?". Mr. Gagnon stated that he then answered, "No, I know it won't probably be finished because I know my reputation has been destroyed here, but at least if I go to Ottawa, I won't be able to defend myself and fight back alone. I'm going to have resources". In his testimony, Mr. Gagnon stated that he found Captain Jarvis's question suggestive.

[44] The evidence shows that in July 1992, Mr. Gagnon moved to Ottawa with his wife. He was posted to Director Information System Delivery (DIS DEL), where he worked as computer system support. In his testimony, Mr. Gagnon stated that he had no training for his new job and that he knew nothing about his new duties.

[45] The evidence also shows that, after his transfer to Ottawa in July 1992, Mr. Gagnon was transferred several times.

[46] For example, the evidence shows that, in 1993, Mr. Gagnon agreed to be assigned to a special one-year project related to the review of the Finance Clerk occupation. In his testimony, Mr. Delisle, Mr. Gagnon's career manager at the time, stated that he had been contacted by Rear-Admiral Keeler, who had asked him to designate some senior non-commissioned officers to represent and review the occupation. According to Mr. Delisle, Mr. Gagnon was very positive in his acceptance of what he was offered at that time. Mr. Delisle also noted that Mr. Gagnon was not in any way obliged to accept the position he was offered. According to Mr. Delisle, it was a high profile position.

[47] In his testimony, Mr. Delisle stated that he had been given *carte blanche* to select the required candidates. In addition, he stated that he was guided in his selection of Mr. Gagnon for the special project by the fact that Mr. Gagnon had been a career manager, was an experienced Finance Clerk, had worked with several aspects of the occupation, and had a good record.

[48] For his part, Mr. Gagnon related in his testimony that, as far as he knew, his name had been suggested by Rear-Admiral Keeler. He stated that he was reluctant to accept the posting at that time. He explained that he then asked his career manager at the time, Mr. Delisle, if he was obliged to go. In his testimony, Mr. Gagnon stated that he did not remember exactly what Mr. Delisle's answer was, but submitted that, in his opinion, it boiled down to saying "when a Rear-Admiral suggests your name, you obey". Mr. Delisle, in his testimony, maintained that Mr. Gagnon's name had never been suggested to him by Rear-Admiral Keeler.

[49] The evidence shows that, in 1994, at the end of the special project on the review of the Finance Clerk occupation, Mr. Gagnon's career manager, Mr. Delisle, offered him the option of returning to Director Information System Delivery or going to Montreal. For personal reasons, Mr. Gagnon decided to stay in Ottawa. He was then assigned the task of teaching himself the COBOL computer language, with the help of a computer-based tutoring system. Mr. Delisle, in his testimony, stated that Mr. Gagnon agreed with the return to Director Information System Delivery.

[50] In his testimony, Mr. Gagnon reported that learning the COBOL language over a period of about seven months proved to be so difficult that he was unable to accomplish this task. Mr. Gagnon stated that if he had succeeded in learning the COBOL language, he could then have been posted to the financial information system.

[51] The evidence shows that, in 1995, after the position he held at Director Information System Delivery was abolished, Mr. Gagnon accepted a position in Director General Programs and Budgets (exhibit I-1). There, Mr. Gagnon worked under two individuals against whom he filed a grievance, namely Commodore Jarvis and Rear-Admiral Keeler. According to Mr. Doucet, the position Mr. Gagnon was offered was a good opportunity for advancement for him.

[52] Lastly, the evidence shows that, in June 1997, Mr. Gagnon accepted a transfer to Canadian Forces Medical Group Headquarters in Ottawa, to replace an officer there for a period of one

year. In his testimony, Mr. Gagnon explained that Mr. Doucet, his career manager of the time, then informed him that the position he formerly held had been moved from the finance classification to the supply classification and that he had to transfer him somewhere else. The evidence also shows that Mr. Doucet offered him the option of going to work at either Medical Group Headquarters or Navy Headquarters. Mr. Gagnon testified that, because of the complaint he had filed with the Commission in December 1996, going to work at Navy Headquarters was out of the question for him.

[53] In 1998, Mr. Gagnon continued to perform the same duties he performed in 1997 following an internal reorganization in the Medical Group. According to exhibit C-2, he is performing the same duties today that he performed in 1998.

III. THE PARTIES' CLAIMS

[54] In its written argument, the Commission alleges that, as a result of his involvement in the sexual and personal harassment complaint filed by his wife, Mr. Gagnon was discriminated against by the CF. It ties this discrimination to the fact that Mr. Gagnon was Mrs. June Gagnon's husband.

[55] The Commission also alleges that the facts introduced in evidence are sufficient to establish a *prima facie* case of discrimination on the basis of marital status, thus obliging the respondent to provide a reasonable explanation that is not pretextual for the fact that Mr. Gagnon has not been promoted since 1989.

[56] In its written argument, the respondent alleges that Mr. Gagnon was not discriminated against by the CF, that both Mr. Gagnon's career managers assigned Mr. Gagnon to positions for which Mr. Gagnon had the necessary qualifications, that at no time did they discriminate against him because of his marital status, and that if Mr. Gagnon was not promoted, it was because his performance evaluations were not strong enough.

[57] The respondent also claims that Mr. Gagnon's complaint cannot be upheld, because it does not meet the basic test of section 3 of the *Act*, since it is based not on the fact that Mr. Gagnon is married, but on the fact that he is married to a particular individual. The Commission and the complainant challenge this interpretation of the notion of marital status.

IV. THE LAW

[58] Section 7 of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual or, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. According to section 3 of the *Act*, a person's marital status is a prohibited ground of discrimination.

[59] Section 14.1 of the *Act* specifies that it is a discriminatory practice for a person against whom a complaint has been filed with the Commission, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[60] In matters of discrimination, it is now trite law that the initial burden of proving that a person was discriminated against on the basis of one of the grounds set out in the *Act* rests with the person alleging discrimination. The standard of proof is the balance of probabilities.

[61] According to the case law, the person alleging discrimination is required to show a *prima facie* case of discrimination⁽⁶⁾. In the matter before us, the onus is on the Commission and Mr. Gagnon to show such a case.

[62] According to O'Malley, a *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent⁽⁷⁾.

[63] The case law recognizes that, once a complainant has established a *prima facie* case of discrimination, the burden of proof shifts to the respondent to provide an explanation deemed reasonable according to the balance of probabilities test, which is to say an explanation that is not merely a pretext⁽⁸⁾. Once the explanation is provided, the burden falls to the complainant and the Commission to show that the explanation provided is pretextual and that the true motivation for the respondent's actions was in fact discriminatory.

[64] Evidence of discrimination may be direct or circumstantial. Since discrimination is not a phenomenon that is displayed overtly, as noted in the *Basi* decision, but is very often covert and subtle⁽⁹⁾, "*there are rarely cases where one can show by direct evidence that discrimination is purposely practised*"⁽¹⁰⁾.

[65] With regard to circumstantial evidence, a tribunal may, according to B. Vizkelety, conclude that there has been discrimination where the evidence offered in support of the complainant's claims renders this conclusion more probable than the other possible conclusions or hypotheses⁽¹¹⁾.

[66] Lastly, it is not necessary for the person alleging discrimination to prove that the discrimination was the basis for the respondent's alleged conduct. It is sufficient for the person to prove that it was a basis for the conduct⁽¹²⁾.

V. ANALYSIS

[67] Before examining the particular facts of this case, it is essential for the Tribunal to determine whether the fact that someone is married to a particular individual, and not the simple fact of being married, is a prohibited ground of discrimination contemplated by section 3 of the

Act. In particular, the Tribunal must determine if the identity of the spouse can be included in the notion of marital status found in that section.

[68] In this regard, the respondent alleges that Mr. Gagnon's complaint has no legal basis, because it is based not on his status as a married person, but rather on the fact that he is married to a particular individual. According to the respondent, the term *marital status* found in section 3 of the *Act* cannot be interpreted as including, as a prohibited ground of discrimination, the fact of being married to a particular individual.

[69] In support of this claim, the respondent invokes the decision of the Federal Court of Appeal in *Cashin*⁽¹³⁾ and that of the Canadian Human Rights Tribunal in *Le Blanc*⁽¹⁴⁾.

[70] Relying in particular on the opinion expressed by MacGuigan J. in *Cashin*, the respondent submits that the identity of a particular spouse cannot be included in the notion of marital status because this identity is purely individual. In this regard, the respondent refers to the following excerpt from the opinion of MacGuigan J.:

"In fine, what the Act (*Canadian Human Rights Act*) discourages is discrimination against an individual, not in his/her individuality, but as a group cypher, identified by a group characteristic. Consequently, the identity of a particular spouse cannot be included in the notion of marital status because it is purely individual rather than a group aspect of life"⁽¹⁵⁾.

[71] According to the respondent, membership in a group clearly identified by a given characteristic is essential for a valid recourse based on one of the prohibited grounds of discrimination specified in section 3 of the *Act*. In this regard, the respondent subscribes to the opinion expressed by MacGuigan J. to the effect that the *Canadian Human Rights Act* offers protection only "*against certain specified forms of discrimination, all of which are based on group membership of some kind whether in natural groups like race and colour or in freely chosen groups like marital status*"⁽¹⁶⁾.

[72] The complainant and the Commission obviously do not agree with the respondent's claims in this regard. Relying in particular on the 1988 Supreme Court of Canada decision in *Brossard*⁽¹⁷⁾, and the decision rendered in 2000 by the Ontario Court of Appeal in *Ontario (Human Rights Commission) v. Mr. A et al.*⁽¹⁸⁾, the complainant and the Commission allege that a complaint based on the fact that a person is married to a particular individual falls within the category of complaints based on marital status.

[73] In regard to the *Brossard* decision, it is important to note that Beetz J., without deciding the question, considers the possibility that the notion of marital status could include the fact of being married to a particular individual. In this regard, the Tribunal finds it relevant to reproduce the following excerpts from the opinion of Beetz J.:

"It is not necessary in this instance to decide whether the identity of a particular spouse is included in the notion of marital or civil status and I refrain from so

doing. I am inclined, however, to think that in some circumstances the identity of a particular spouse might be included in marital or civil status.

(...)

Furthermore, an employer may exclude a candidate for employment because of the employer's particular animosity for the spouse of the candidate. Thus the candidate is excluded because of the particular identity of his or her spouse and for no other reason. This might well be discrimination based on marital or civil status but I repeat that it is not necessary to decide this question to dispose of this appeal⁽¹⁹⁾ .

[74] It appears from these two excerpts that, according to Beetz J., it is conceivable that, in some circumstances, the identity of a particular spouse might be included in marital status. The circumstances are not specified; however, Beetz J. offers the example of an employer who excludes a candidate for employment because of the particular animosity he may have for the candidate's spouse.

[75] Even if the Tribunal were to consider that, strictly speaking, the fact of being married to a particular individual is not contemplated by the term *marital status*, the fact remains that, according to the case law, being married to a particular individual may, in some circumstances, if other conditions exist, be a condition that can give rise to a complaint of discrimination on the basis of marital status. This has been recognized in particular in *Cashin* and *Le Blanc*.

[76] In *Cashin*, the Federal Court of Appeal concluded that a complaint based on a person's marital status was justified, being of the view that, apart from the fact that the complainant was married to a particular individual, the evidence showed that the respondent differentiated adversely in relation to married women who took their husband's surname. MacGuigan J. concluded that this was discrimination based on a primary incident of marital status and that discrimination practised in this way was against a group rather than an individual.

[77] In *Le Blanc*, the Canadian Human Rights Tribunal, which said it was bound by the decision of the Federal Court of Appeal in *Cashin*, also concluded that there was discrimination on the basis of marital status in that case, basing its conclusion on the fact that "Marie Louise was a unionized employee and that Le Blanc was a supervisor for the same employer at the same workplace"⁽²⁰⁾. In addition, according to the Tribunal, the discriminatory treatment Mr. Le Blanc suffered "would not have occurred without the relationship between a management employee and a union employee at the same place of employment"⁽²¹⁾.

[78] It therefore appears that, in *Le Blanc*, the Tribunal deemed decisive the fact that the spouses had the same employer and the same workplace at the time the discrimination against Mr. Le Blanc occurred, after his wife filed complaints with the *Commission*.

[79] In the present case, the Tribunal is of the view that the facts in *Le Blanc* and this proceeding are similar, insofar as the two spouses involved in this case have the same employer, namely the Canadian Armed Forces, and had the same workplace at the time several of the incidents

perceived as being discriminatory occurred, namely CFB Halifax. All these things taken together lead the Tribunal to conclude that Mr. and Mrs. Gagnon belong to a particular group, namely that of spouses who are members of the Canadian Armed Forces.

[80] On the basis of the principles established by MacGuigan J. in *Cashin* and by Beetz J. in *Brossard*, and the application of these principles in *Le Blanc*, the Tribunal concludes that the ground on which the present complaint is based, namely discrimination on the basis of marital status, is justified under the circumstances.

[81] The Tribunal should also note that the scope of the notion of marital status found in several statutes dealing with human rights is a question that should soon be decided by the Supreme Court of Canada⁽²²⁾.

[82] That being said, the Tribunal is of the view that in matters of discrimination, considering the purpose of the *Act* and the importance of attacking all forms of discrimination in Canadian society, it is, as has been said many times, essential for the courts to give a broad and liberal interpretation to human rights provisions. It should therefore come as no surprise that, in matters of discrimination based on marital status, there has been, for some years now, a sustained trend in case law that recognizes that the fact of being married to a particular individual may give rise to a complaint based on marital status⁽²³⁾.

[83] Having disposed of the question of the scope of the term *marital status* found in section 3 of the *Act*, the Tribunal must now determine, on the basis of the facts entered in evidence, if Mr. Gagnon was indeed discriminated against because of his marital status and, in particular, if the fact that he has not been promoted since 1989 is a result of discrimination against him by the respondent.

[84] It should be noted again here that Mr. Gagnon and the Commission bear the initial burden of proving that Mr. Gagnon was discriminated against and that the discrimination he suffered might be a reason why he has not been promoted since 1989.

[85] Mr. Gagnon claims that he has not been promoted since 1989 because of his involvement in his wife's grievance and complaint. He also claims that the CF deliberately hurt his chances for advancement in the CF and destroyed his reputation (exhibit C-1).

[86] In support of his claims, Mr. Gagnon referred in his testimony to a number of incidents that occurred after he became involved in his wife's grievance and complaint and that involve some of his superiors, in particular Captain Estey, Captain Jarvis, Colonel McLean and Lieutenant-Commander Thibault. Worth noting is the fact that none of these individuals was called as a witness to contradict Mr. Gagnon's statements.

[87] Mr. Gagnon also relied on the fact that, after he left Halifax in 1992, he was constantly transferred and deliberately assigned to positions that were not suited to his skills, the direct effect of which was to hurt his chances for promotion in the CF.

[88] The Tribunal intends to examine, in turn, each of the incidents to which Mr. Gagnon referred that occurred after his wife filed her complaint, and the different transfers he was offered after he left Halifax, with a view to determining whether or not Mr. Gagnon was discriminated against by the respondent.

[89] In the Tribunal's view, not all the incidents to which Mr. Gagnon referred during his testimony can be considered discrimination against him. As counsel for the respondent rightly pointed out, some are trivial in nature.

[90] There is no doubt in the Tribunal's mind that some of Mr. Gagnon's superiors did not appreciate his involvement in the grievance and complaint filed by his wife. Some did not hesitate to let him know how they felt.

[91] For example, it seems to the Tribunal that Captain Estey's remark with regard to Master Warrant Officer Walsh was directly related to the fact that Mr. Gagnon had become involved in his wife's grievance and complaint. Clearly, this remark was intended to make fun of Mr. Gagnon. But can it be considered discrimination related to his marital status? The Tribunal does not believe so. As unwarranted as it was, it is nevertheless not discriminatory in nature.

[92] With regard to the other two incidents involving Captain Estey, namely his comments about Mr. Gagnon's working hours and about his lack of energy at work, it is difficult to establish a clear link between them and Mr. Gagnon's involvement in his wife's grievance and complaint. At a minimum, they reveal a certain animosity on Captain Estey's part towards Mr. Gagnon.

[93] It should be noted here that, following Mr. Gagnon's meeting with Captain Jarvis in October 1991, Mr. Gagnon met with Captain Estey, who, according to Mr. Gagnon, more or less apologized for his behaviour towards him. The evidence does not reveal any other incident involving Captain Estey and is silent as to what role the latter might have played in the transfer process and the promotion system.

[94] With regard to Captain Jarvis, the Tribunal cannot view as discrimination on the basis of Mr. Gagnon's marital status the fact that, on one occasion, Captain Jarvis chose not to speak to Mr. Gagnon or the fact that he told Mr. Gagnon he had no sympathy for him. In the view of the Tribunal, the evidence presented by Mr. Gagnon and the Commission is not sufficiently supported to allow us to identify in these incidents a "scent of discrimination", to repeat the expression used in *Basi*.

[95] As for the fact that Captain Jarvis indicated to Mr. Gagnon that he did not approve of his involvement in Mrs. Gagnon's grievance and complaint, the Tribunal sees this as the expression of a personal opinion reflecting Captain Jarvis's point of view. Could this be seen as a threat of retaliation or as discrimination against Mr. Gagnon? The Tribunal does not believe so.

[96] The situation is very different, however, when it comes to Captain Jarvis's actions during the promotion ceremony for Chief Petty Officer Second Class Broyden. The Tribunal has no reason to doubt that the incident described by Mr. Gagnon in his testimony occurred. Throughout his testimony, Mr. Gagnon appeared as a credible witness who was not given to exaggeration.

Moreover, had the respondent wanted to contradict Mr. Gagnon's testimony in this regard, it could have called Captain Jarvis, now Commodore Jarvis, as a witness. Captain Jarvis was not called as a witness to establish that he had not acted as described above or to explain his actions.

[97] In his testimony, Mr. Gagnon reported that he interpreted Captain Jarvis's actions as meaning that he was going to be Chief Petty Officer Second Class for a long time and that Captain Jarvis was going to make sure of that. In the absence of an explanation by the respondent, it is difficult for the Tribunal to interpret Captain Jarvis's actions in any other way.

[98] The Tribunal concludes that it was Captain Jarvis's intention to hurt Mr. Gagnon's military career following the latter's involvement in the grievance and complaint filed by his wife. However, it is not possible to determine, from the evidence presented, what kind of concrete action might subsequently have been taken by Captain Jarvis to accomplish this. That being said, the Tribunal must nevertheless examine the effect of Captain Jarvis's actions within the broader context of the CF transfer and promotion system.

[99] Furthermore, in the Tribunal's view, there is another disturbing incident involving one of Mr. Gagnon's superior officers that deserves to be examined, namely the incident involving Colonel McLean.

[100] In his testimony, Mr. Gagnon, reporting what Lieutenant-Commander Thibault had said, stated that the latter told him that, during a jogging session in which she had participated, Colonel McLean told her that if Mr. Gagnon continued to interfere in his wife's case, it was going to destroy his career. Neither Colonel McLean nor Lieutenant-Commander Thibault was called as a witness in this case to dispute Mr. Gagnon's statements.

[101] During Mr. Gagnon's testimony, counsel for the respondent objected to this part of his testimony on the ground that it was hearsay. According to section 50 of the *Act*, hearsay evidence may be accepted by the Tribunal. That being said, the Tribunal is aware that it must, under the circumstances, exercise caution when determining whether the witness's testimony is credible. In this case, the Tribunal sees no reason to doubt the accuracy of the statements reported by Mr. Gagnon, who, as noted earlier, seemed to the Tribunal to be a credible witness who was not given to exaggeration.

[102] The remark made by Colonel McLean, if it is true, and in the Tribunal's view it is, has such far-reaching implications that it calls for an explanation. Yet no witness was called at the hearing to dispute the statements reported by Mr. Gagnon in his testimony. The Tribunal is convinced that Mr. Gagnon could not have invented such statements and that if they had been inconsistent with the reality, the respondent would beyond any doubt have called those alleged to have made them to contradict Mr. Gagnon.

[103] Under the circumstances, the Tribunal, relying on an authoritative doctrine, concludes that the individuals who were not called as witnesses would not have contradicted Mr. Gagnon's testimony⁽²⁴⁾.

[104] The Tribunal is of the view that the two incidents related above show that neither Captain Jarvis nor Colonel McLean appreciated Mr. Gagnon's involvement in the grievance and complaint filed by his wife, and that they intended to make him pay the price, although it is not possible for the Tribunal to determine how.

[105] The Tribunal concludes that the two incidents described above involving Captain Jarvis and Colonel McLean are sufficient to establish a *prima facie* case of discrimination against Mr. Gagnon because of his marital ties to Mrs. Gagnon and his involvement in the latter's grievance and complaint. The onus is therefore on the respondent to provide a reasonable explanation that can justify the discriminatory behaviour of Captain Jarvis and Colonel McLean towards Mr. Gagnon. The respondent provided no explanation for their behaviour, neither of the two officers having been called as a witness.

[106] Before deciding what effect these two incidents had on the fact that Mr. Gagnon was not promoted to the rank of Chief Petty Officer First Class after his involvement in his wife's grievance and complaint, however, the Tribunal must examine the other incidents invoked by Mr. Gagnon in support of his complaint.

[107] Apart from the incidents described above, Mr. Gagnon alleges, in support of his complaint, that after his transfer to Ottawa in 1992 he was placed in positions he knew nothing about, that he was transferred five times in six years, and that this had a very negative effect on his performance evaluations and jeopardized his chances of promotion. Mr. Gagnon also alleges that the transfers he was offered were motivated by a desire to hurt his chances for advancement because of his involvement in the grievance and complaint filed by his wife.

[108] To assess the validity of these allegations, the Tribunal must examine the transfer system in effect in the CF during the 1990s in the light of the evidence presented in this case.

[109] With regard to transfers of CF members, the evidence shows that each non-commissioned member of the CF is assigned a career manager. In this regard, the evidence shows that Mr. Gagnon's career manager was Mr. Jean-Eudes Delisle from 1990 to 1994, and Mr. Alain Doucet from 1994 to 1998. The evidence also shows that Mr. Gagnon was himself a career manager from 1984 to 1989. Both Mr. Doucet and Mr. Delisle were called as witnesses by the respondent. Both testified calmly and temperately, and the Tribunal sees no reason to question their testimony.

[110] It appears from Mr. Delisle's testimony that a career manager's responsibility is to look after the postings of CF personnel, and in particular to send those whose careers he is managing on courses. He also ensures that these individuals have the qualifications required for transfer and promotion purposes.

[111] According to Mr. Delisle, the career manager is required to meet with those whose careers is managing every two years, to discuss with them their choice of career options, their transfers, and their postings, having regard to their wishes.

[112] According to Mr. Doucet, anyone who does not agree with a proposed transfer can file a grievance. They can also inform their commanding officer. In his testimony, Mr. Doucet stated that personally he has met very few members who have refused the posting they were offered.

[113] In their respective testimonies, both Mr. Delisle and Mr. Doucet stated that, as career managers, they were the only ones who made transfer decisions with respect to those whose careers they were managing, and that their decisions were not subject to review unless there was a complaint.

[114] Called upon to explain in his testimony how transfers work, Mr. Delisle explained that the career manager knows when positions become available. According to normal procedure, the career manager, through the member's superior NCO, contacts the member who showed interest in a position during an interview and offers the member the position. It appears from both Mr. Delisle's and Mr. Gagnon's testimony that transfers are offered on the basis of a member's need to be transferred after a certain period of time in the same region, or a person's stated preference for a particular region.

[115] Under cross-examination, both Mr. Delisle and Mr. Doucet explained that the career manager does not have the job description for the position to which a person is transferred. The career manager works only with a list identifying the position, its location, the rank required to hold the position, and any special qualifications required. The job description is found within the organizations. According to Mr. Delisle, even though a career manager does not have the job description for a given position for the purposes of his or her work, there is nothing to prevent the person being offered a transfer from making inquiries as to what duties the position involves.

[116] Mr. Delisle also explained in his testimony that a person who is offered a position may make it known that he or she is not interested in the position being offered and may, particularly for family reasons, refuse the position. In his testimony, Mr. Delisle also stated that when a person is transferred, approval from that person's superiors is not required.

[117] Mr. Delisle, who was Mr. Gagnon's career manager from 1990 to 1994, stated that Mr. Gagnon never showed any hesitation whatsoever in regard to the positions he was offered. This statement was never contradicted by Mr. Gagnon. According to Mr. Delisle, Mr. Gagnon never indicated to him that he wanted a specific position or a position in which he could develop a particular expertise. Nor did he ever ask for positions in which he would have had to supervise subordinates. Mr. Doucet, for his part, stated categorically in his testimony that Mr. Gagnon never refused the transfer proposals he was offered while he, Mr. Doucet, was his career manager between 1994 and 1998. Moreover, the evidence clearly shows that Mr. Gagnon always accepted the transfers he was offered.

[118] During cross-examination of Mr. Delisle, counsel for the *Commission* sought his opinion regarding the usual number of transfers during a given period, and the usual time required to obtain a promotion. Mr. Delisle stated in his testimony that while it was unusual for a member to be transferred five times in six years, it could happen in a context of cuts and budget restrictions. He was unable to provide any further details. Mr. Doucet, for his part, noted in his testimony that

some posting changes may be due to a restructuring within the organization, or to staff cuts within the CF.

[119] In the light of these facts, the Tribunal concludes that Mr. Gagnon always accepted the transfers he was offered by his two career managers, that he never filed any grievance with respect to any of his transfers, that for personal reasons, following his transfer from Halifax to Ottawa, he never wanted to leave Ottawa, and that there was no overt interference by high-ranking CF officers to influence Mr. Gagnon's two career managers with regard to the transfers offered to Mr. Gagnon. In this regard, the Tribunal sees no reason not to believe Mr. Gagnon's two career managers, who have stated that they alone made the decisions concerning Mr. Gagnon's transfers.

[120] Within this context, the Tribunal cannot conclude that the transfers offered to Mr. Gagnon between 1992 and 1997 by his two career managers were offered with a view to deliberately hurting his career and his chances for advancement in the CF, or that they indicate any discrimination against him on the basis of his marital status, or that they represent retaliation against Mr. Gagnon because of his involvement in the grievance and complaint filed by his wife.

[121] The Tribunal therefore concludes that the complainant and the Commission have not established a *prima facie* case of discrimination with respect to Mr. Gagnon's various transfers after he left Halifax.

[122] In view of the other allegations made by Mr. Gagnon in his complaint, the Tribunal must now consider whether Mr. Gagnon was discriminated against in relation to the promotion system in effect in the CF in the 1990s.

[123] It appears from the evidence that the promotion system in effect in the CF in the 1990s was based essentially on the annual evaluation of non-commissioned members of the CF.

[124] In this regard, the Tribunal gathers from Mr. Gagnon's testimony that each non-commissioned member of the CF was, in principle, evaluated each year within his or her unit by a board. This evaluation covered both the performance and the potential of the CF member. It culminated in the preparation of a performance evaluation report (exhibit C-4).

[125] The performance evaluation report included a number of sections for evaluating a CF member. In particular, there were sections on the member's identification, qualifications and type of employment, the assessment by the member's supervisor of the member's performance, the assessment by the member's commanding officer of the member's potential for promotion, and a recommendation by the unit's commanding officer with regard to a possible promotion.

[126] According to Mr. Gagnon, even before the formal evaluation of a CF member began, a consensus was reached within the unit as to which candidates should be at the top of the unit's merit list if they were to have a hope of obtaining a promotion the following year. Once the individuals who should be recommended for a promotion had been identified within the unit, they were assigned a number of points based on performance and potential that would make them competitive with the candidates from other sections and other units.

[127] It also appears from the evidence that, according to the CF promotion system, a points ceiling was established for each unit, thus limiting the number of individuals who could be recommended for a promotion.

[128] It appears from Mr. Gagnon's testimony that, once the evaluation of members within a unit was completed, the performance evaluation reports were forwarded to a promotion board. This board was responsible for the national classification of candidates by employment categories, for example that of Finance Sergeant. In his testimony, Mr. Delisle explained, however, that before members could be promoted to a higher rank, they must have served for a certain time in their current rank. Only the records of CF members eligible for promotion would be submitted to the promotion board.

[129] According to Mr. Delisle's testimony, the career manager was responsible for preparing the records to be submitted to the promotion board. In addition, the career manager had the opportunity to designate two of the members of the promotion board for a given occupation, such as that of Finance Clerk. According to Mr. Gagnon's testimony, the career manager never participated in the promotion board's deliberations.

[130] According to Mr. Gagnon's testimony, a promotion board was made up of four people. The board chair was generally the highest-ranking officer. According to Mr. Delisle, the promotion board for a given occupation met once a year in the fall. According to Mr. Gagnon, the board examined the candidates' last three evaluation reports. Mr. Delisle, for his part, stated that, when the board conducted its assessment, it had before it all of a member's performance evaluation reports. He explained in his testimony that the purpose of having all the reports was to avoid penalizing anyone by taking just one evaluation into account. According to him, the board looked at a person's whole career. In this regard, the Tribunal is of the view that Mr. Delisle's testimony must be preferred to Mr. Gagnon's.

[131] According to Mr. Gagnon, each member of the board was authorized to award eight points with respect to a CF member's performance over the previous twelve months, based on the evaluation report. Another two points were used to evaluate the member's potential.

[132] According to Mr. Gagnon, the number of points awarded to a CF member with respect to potential was decided by the board chair after consultation with the other board members. The assessment of potential took into account bilingualism, level of education, experience and physical fitness.

[133] In his testimony, Mr. Gagnon said he did not know if leadership performance was included in the evaluation of performance or the evaluation of potential. According to him, additional points were awarded by the promotion board for this aspect. Also according to Mr. Gagnon's testimony, there could not be too great a discrepancy in the evaluation done by each of the board members. The board members had to agree on the final number of points an individual should receive.

[134] The evidence shows that the promotion board, upon completion of its deliberations, drew up a merit list for the following year's promotions. The candidates were ranked by the board in descending order, with the most deserving candidates being placed at the top of the list.

[135] Asked about the role career managers played in relation to the promotion board, Mr. Gagnon stated categorically that the career manager did not take part in the promotion board's deliberations. According to him, the career manager could not in any way interfere in the evaluation process and, for example, advocate for a candidate he might know. In his testimony, Mr. Delisle added that the role of the career manager in relation to the promotion board was to prepare the records for the board.

[136] In the light of these facts, the Tribunal must now examine Mr. Gagnon's performance evaluation reports for the period 1990-2000 and assess whether the items introduced in evidence establish a *prima facie* case of discrimination with respect to the evaluation of Mr. Gagnon's performance.

[137] The performance evaluation reports entered in evidence by the Commission (exhibit C-4) show that Mr. Gagnon had evaluations of 7.8 in 1990, 7.9 in 1991, 8.0 in 1992, 7.6 in 1993, 7.4 in 1994 and 7.3 in 1995. These evaluations concern the preceding year's work. The evidence shows that after 1995 the points system was abolished.

[138] With regard to the evaluation report for 1990, the Tribunal notes that Mr. Gagnon's commanding officer, Commander Andrea, considered him an excellent choice for promotion to the rank of Chief Petty Officer First Class; Commander Andrea highly recommended him. In 1991, Commander Andrea again recommended that Mr. Gagnon be promoted to the rank of Chief Petty Officer First Class. In both these performance evaluation reports, Mr. Gagnon was deemed to have a strong potential for promotion. With regard to his evaluation report for 1992, his commanding officer, Captain Jarvis, highly recommended him for a promotion.

[139] In 1993, that is after he had left Halifax, Mr. Gagnon's performance evaluation report simply stated that he was recommended for a promotion, and that was all. His commanding officer, Mr. E. Gyalokay, made no particular recommendation. In 1994, Mr. Gagnon's commanding officer recommended him for a promotion, and that was all. In Mr. Gagnon's performance evaluation report for 1995, his commanding officer, Mr. E. Gyalokay, considered him ready to assume responsibilities of a higher rank.

[140] In 1996, the year in which the points system disappeared, Mr. Gagnon's performance evaluation report placed him in the Normal category. No recommendation for promotion appears in his performance evaluation report. The same goes for the 1997 evaluation. In 1998, Mr. Gagnon's performance evaluation report shows a high rating. In addition, the written assessment noted that he had the potential to advance to a higher rank and that he was ready to assume the responsibilities associated with the rank of Chief Petty Officer First Class.

[141] In 1999, the evaluation by Mr. Gagnon's supervisor was very positive. With regard to his potential for promotion, Mr. Gagnon was considered ready to be promoted. With regard to the

year 2000, the evaluation by Mr. Gagnon's supervisor was positive. The officer reviewing Mr. Gagnon's record considered him ready to be promoted.

[142] In his testimony, Mr. Gagnon stated that the 7.8 rating obtained in 1990 and the 7.6 rating obtained in 1993 were, in his opinion, very high. He also considered the 7.3 rating obtained in 1995 a good rating. The Tribunal should point out here that Mr. Gagnon considered these ratings very high or good in light of the circumstances, in particular the fact that he was posted to a section where his skills as a Finance Clerk were not used, and the fact that he did not have to supervise anyone.

[143] It also appears from Mr. Gagnon's testimony that, until the points system was abolished in 1996, a candidate had to have a score of 8.3 or 8.5 or an even higher score to have any chance of being promoted. According to Mr. Gagnon, a score of 8.3 or 8.5 was an exceptional evaluation. This point of view was shared by Mr. Delisle. The latter stated in his testimony that a Chief Petty Officer Second Class whose performance evaluation reports showed successive scores of 7.6, 7.4 and 7.3 had no chance of being promoted, as this sequence indicated that the person was no longer progressing.

[144] In his testimony, Mr. Delisle acknowledged that when a person changes jobs there is a learning period and that this can affect the person's score during an evaluation. Mr. Delisle stated that this is why the promotion board must look at all the performance evaluation reports.

[145] Based on these factors, the Tribunal concludes that, during the period 1990-1996, Mr. Gagnon did not obtain the score required to have a hope of being promoted and ranked high on the national merit list. As for his subsequent evaluations, the evidence does not allow the Tribunal to conclude that Mr. Gagnon should have been promoted.

[146] In his oral argument, counsel for the Commission wished to make the point that Mr. Gagnon, throughout his career in the Armed Forces, had been promoted on an almost regular basis. In this regard, the Tribunal wishes to make the point that it took Mr. Gagnon eight years, from 1978 to 1986, to reach the rank of Petty Officer First Class.

[147] Furthermore, the fact that other CF members with the rank of Chief Petty Officer Second Class were promoted to the rank of Chief Petty Officer First Class an average of 4.2 years after reaching the rank of Chief Petty Officer Second Class (exhibit C-6) is not in and of itself proof that the CF discriminated against Mr. Gagnon with respect to promotion. The evidence presented by the Commission in this case does not indicate where these individuals were ranked on the national merit list. No merit list was introduced as evidence in this case.

[148] From the evidence presented, the Tribunal therefore concludes that the fundamental reason Mr. Gagnon was not promoted to the rank of Chief Petty Officer First Class after his transfer to Ottawa in 1992 is the fact that, during the period 1990-2000, Mr. Gagnon did not achieve the score or the level required to have a hope of being promoted. Taking into account the promotion system's operation established by the evidence, Mr. Gagnon's positive performance evaluations in the most recent years, in and of themselves, do not allow the Tribunal to conclude that Mr. Gagnon should have been promoted.

[149] The Tribunal does conclude, however, that there is no hard evidence in this case of interference by the military hierarchy in the evaluation of Mr. Gagnon's performance in the 1990s. The evidence is silent as to the role that Captain Jarvis, Colonel McLean or other CF members might have played in the CF promotion process with a view to hurting Mr. Gagnon's chances of promotion or preventing him from obtaining the promotion he wanted.

[150] The Tribunal therefore concludes that the Commission has not established a *prima facie* case of discrimination against Mr. Gagnon with respect to the promotion process described above.

[151] However, having earlier concluded that Mr. Gagnon and the Commission had succeeded in establishing a *prima facie* case of discrimination in relation to the incidents involving Captain Jarvis and Colonel McLean, and that the respondent had provided no reasonable explanation for their alleged discriminatory behaviour, the Tribunal should now determine the relief to which Mr. Gagnon is entitled.

VI. REMEDIES

[152] The remedies that may be ordered by the Tribunal if it concludes that there was discrimination are described mainly in section 53 of the *Act*.

[153] It should be noted that section 53 of the *Act* was amended in 1998⁽²⁵⁾ and that the Tribunal now has greater powers of redress. However, in view of the fact that the complaint was filed before these amendments came into force, the Tribunal will apply in this case the remedies that were in effect prior to the legislative amendments of 1998.

[154] Under section 53 of the *Act*, as it read prior to the legislative amendments of 1998, the Tribunal may, in particular, order the person found to be engaging or to have engaged in the discriminatory practice to do as follows:

- 1) make available to the victim, on the first reasonable occasion, such rights, opportunities or privileges as are being or were denied the victim as a result of the (discriminatory) practice;
- 2) compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
- 3) order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine if it finds that the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice.

[155] In its written argument, the Commission asks the Tribunal for the following remedies:

1. an order to the effect that Mr. Gagnon is to be promoted to the rank of Chief Petty Officer First Class effective from December 16, 1996 with all the advantages and privileges pertaining to that rank;
2. an order providing for the correction of Mr. Gagnon's military record to ensure that this record reflects his promotion to the rank of Chief Petty Officer First Class effective from December 16, 1996;
3. an order providing for the payment to Mr. Gagnon of compensation for lost wages covering the period from December 16, 1996 to April 19, 2001;
4. an order compelling the respondent to adjust the complainant's pension and the other benefits owing to the complainant to reflect his promotion effective from December 16, 1996;
5. an order pursuant to section 53(2)(e) of the *Act* to pay compensation for the pain and suffering experienced by the complainant;
6. an order compelling the respondent to apologize to the complainant;
7. an order obliging the CF members involved in the complainant's career since 1990 to participate in a sexual discrimination awareness program;
8. interest on the above-noted special damages as from the date of the complaint, pursuant to section 53(4) of the *Act*;
9. any other remedy that the Tribunal may deem appropriate.

[156] Having concluded that the respondent has provided a reasonable explanation as to why Mr. Gagnon was not promoted to the rank of Chief Petty Officer First Class after 1989, the Tribunal cannot order that Mr. Gagnon be promoted to the rank of Chief Petty Officer First Class.

[157] Conversely, having concluded that some superior officers, namely Captain Jarvis and Colonel McLean, discriminated against Mr. Gagnon because of his involvement in his wife's complaint and that no explanation was provided by the respondent to deny or explain their behaviour, which behaviour the Tribunal considers conduct unbecoming an officer of the Canadian Armed Forces, the Tribunal orders that the high command of the CF apologize to Mr. Gagnon.

[158] Furthermore, since the evidence showed that Mr. Gagnon was deeply hurt and humiliated by the unacceptable discriminatory behaviour of Captain Jarvis and Colonel McLean, the Tribunal orders the respondent to pay Mr. Gagnon the sum of \$3,000 as compensation for the pain and suffering he experienced as a result of this behaviour.

VII. ORDER

[159] Having regard to the reasons set out above, the Tribunal allows Mr. Gagnon's complaint in part, and orders as follows:

- a) that the respondent's high command, within thirty days of this decision, provide a letter of apology to Mr. Gagnon for the unacceptable discriminatory behaviour that two of its officers, namely Captain Jarvis and Colonel McLean, showed towards him;
- b) that the respondent pay the complainant the sum of \$3,000 to compensate him for the pain and suffering the complainant experienced as a result of the discrimination against him;
- c) that the respondent pay interest on the compensation awarded for pain and suffering in accordance with the rate prescribed in Rule 9 (12) of the Tribunal's *Interim Rules of Procedure*, said interest to be calculated as from December 16, 1996;
- d) and that the total amount awarded to compensate for pain and suffering, including interest, not exceed \$5,000.

ORIGINAL SIGNED BY

Pierre Deschamps, Chairperson

OTTAWA (Ontario)

February 14, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T619/0701

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APPEARANCES:

Martin Gagnon Complainant

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1. ¹ Transcript, pp. 137-138.

2. ² Transcript, p. 140.

3. ³ Transcript, p. 141.

4. ⁴ Transcript, p. 145.

5. ⁵ Transcript, p. 151.

6. ⁶ *Ontario Human Rights Commission v. Etobicoke*, (1982) 3 C.H.R.R. D/781 (S.C.C.); *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, (1986) 7 C.H.R.R. D/3102 (S.C.C.); *Basi v. Canadian National Railway Company (No. 1)*, (1988) 9 C.H.R.R. D/5029 (C.H.R.T.), paragraph 38474.

7. ⁷ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd*, supra, note 6, paragraph 24782.

8. ⁸ *Basi v. Canadian National Railway Company (No. 1)*, supra, note 6, paragraph 38474; *Grover v. National Research Council of Canada*, (1992) 18 C.H.R.R. D/1 (C.H.R.T.), paragraph 152.

9. ⁹ *Grover v. National Research Council of Canada*, supra, note 8, paragraph 158.

10. ¹⁰ *Basi v. Canadian National Railway Company (No. 1)*, supra, note 6, paragraph 38481.

11. ¹¹ B. Vizkelety, *Proving Discrimination in Canada*. Toronto, Carswell, 1987, p. 142.
12. ¹² *Holden v. Canadian National Railway*, (1990) 14 C.H.R.R. D/12 (F.C.A.), paragraph 8.
13. ¹³ *Cashin v. Canadian Broadcasting Corp.*, (1988) 9 C.H.R.R. D/5343.
14. ¹⁴ *Le Blanc v. Canada Post Corp.*, (1992) 18 C.H.R.R. D/57.
15. ¹⁵ *Cashin v. Canadian Broadcasting Corp.*, supra, note 13, paragraph 40117.
16. ¹⁶ *Idem*, paragraph 40115.
17. ¹⁷ *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.
18. ¹⁸ 50 O.R. (3d) 737. This decision is currently on appeal to the Supreme Court: *B. v. Ontario (Human Rights Commission)*, [2001] C.S.C.A. No. 29, Docket No. 28383.
19. ¹⁹ *Brossard (Town) v. Quebec (Commission des droits de la personne)*, supra, note 17, at page 299.
20. ²⁰ *Le Blanc v. Canada Post Corp.*, supra, note 14, paragraph 65.
21. ²¹ *Ibid.*
22. ²² *B. v. Ontario (Human Rights Commission)*, supra, note 18.
23. ²³ *Cashin v. Canadian Broadcasting Corp.*, supra, note 13; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, supra, note 17; *Le Blanc v. Canada Post Corp.*, supra, note 14; *Ontario (Human Rights Commission) v. Mr. A*, supra, note 13; *Dewetter v. Northland Security Guard Services Ltd.*, (1996) 29 C.H.R.R. D/8 (B.C.C.H.R.); *J. v. London Life Insurance Co.*, (1999) 36 C.H.R.R. D/43 (B.C.H.R.T).
24. ²⁴ Sopinka, J., Lederman, S.N. and Bryant, A.W., *The Law of Evidence in Canada*. 2nd Ed. Toronto, Butterworths, 1999, paragraph 6.321.
25. ²⁵ S.C. 1998, chap. 9.