T.D. 1/92
Decision Rendered on February 4, 1992

CANADIAN HUMAN RIGHTS ACT
R.S., 1985, c. H-6 (As amended)

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF the complaint filed under Section 7 of the Canadian Human Rights Act.

BETWEEN:

MARCEL GAUVREAU

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

BANQUE NATIONALE DU CANADA

Respondent

TRIBUNAL:

WILLIAM I. MILLER, Q.C.

DECISION OF TRIBUNAL

APPEARANCES:

Me. Robert Monette & Me. Jean A. Savard
Counsel for Responsdent

Me. Rene Duval
Counsel for Commission

Me. Marcel Gauvreau
Counsel representing himself.

DATES & PLACE OF HEARING:

MONTREAL, QUEBEC

April 24, 1989 Pre-Trial Conference
March 28, 1990 Pre-Trial Conference
Sept 4-7, 1990, Hearing
Nov 8-9, 1990, Hearing
Dec 19-20, 1990, Hearing.

INDEX

I. APPOINTMENT OF TRIBUNAL

The President of the Human Rights Tribunal Panel appointed Me. Gilles Mercure on November 2, 1988 as a Tribunal to enquire into the complaint lodged by Me. Marcel Gauvreau (the Complainant) on January 26, 1987 with the Canadian Human Rights Commission (the Commission).

Me. Mercure presided at a Pre-Trial Conference on April 24, 1989 at Montreal, Quebec (where all subsequent Hearings in this case took place) at which time the Respondent presented a Preliminary Motion to postpone the start of the Hearings on the ground of lack of jurisdiction. That matter

was taken under advisement but before that Tribunal could render its decision on Respondent's Motion, Me. Mercure was appointed to the Superior Court Bench, thus terminating his jurisdiction in this case.

The undersigned was thereupon appointed on November 21, 1989 by the President of the Human Rights Tribunal Panel as replacement to Me. Mercure to enquire anew into the complaint.

Since the parties were not in agreement to allow the present Tribunal to render a decision on Respondent's Motion based upon the transcript of the Pre-Trial Conference proceedings which had taken place April 24, 1989, the Parties were re-convened to a second Pre-Trial Conference on March 28, 1990 at which time they were given the opportunity of re-presenting their arguments on Respondent's Motion. Following such Hearing, the Tribunal rejected Respondent's request to postpone and ordered the Hearings into the complaint to proceed at the earliest available date.

../2

II. THE COMPLAINT:

The Complaint as filed (Exhibit HR-2) alleges discrimination on the ground of physical disability, contrary to the provisions of Section 7, of the Canadian Human Rights Act RSC 1985, CH-6 (as amended) ('The Act") and reads as follows:

La Banque Nationale du Canada a agi de facon discriminatoire en refusant de m'embaucher à cause de ma deficience. Ceci est Contraire l'article 7 de la Loi canadienne sur les droits de la personne. Je me deplace en fauteuil roulant suite à la poliomyélite. En septembre 1986, la Banque Nationale m'a approche pour m'offrir le poste de directeur des services juridiques. Une semaine apres l'entrevue, Me Chatillon m'annoncait que j'etais son candidat et m'informait des conditions salariales. La Banque Nationale a pris des references a mon sujet aupres de 4 personnes differentes. J'ai eu 2 rencontres avec Monsieur Michel Belanger, president du conseil et chef de la direction, les 5 et 13 octobre.

Le 14 octobre, j'ai rencontre le president, Monsieur Berard. Le meme jour, Me Chatillon m'annonca qu'elle m'avait obtenu un espace de stationnement gratuit et elle me suggera le 12 novembre

comme date d'entree en fonctions. Le 17 octobre, Me Chatillon m'apprenait qu'elle sentait une reticence chez Monsieur Berard et le 22 octobre, que ma candidature n'avait pas fait l'unanimite parmi les membres de la haute direction. Je considere que je suis la personne competente pour occuper le poste de directeur des services juridiques a la Banque Nationale. Je n'ai recu à ce jour aucune raison valable pour expliquer ce revirement etant donne l'entente formelle relative à mon embauche. Je suis convaincu que c'est parce que je me deplace en fauteuil roulant que la Banque Nationale a decide de ne pas m'embaucher."

../3

It is evident that the complaint is to be dealt with under subsection (a) of Section 7 of the Act, which states:

Section 7:

"It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

Subsection 3(1) of the Act states that disability is a prohibited ground of discrimination:

"For all purposes of this Act, race national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination."

Section 25 of the Act contains a definition of disability:

"disability" means any previous or existing mental or physical disability and includes dependence on alcohol or a drug."

III. FUNDAMENTAL PRINCIPLE OF THE ACT:

Because of the special nature and, indeed, uniqueness of the Canadian Human Rights Act, the Tribunal deems it useful before undertaking an examination of the facts and law of this case, to emphasize the basic purpose of the Act in order to allow for its proper interpretation, as set forth in Section 2:

../4

2. "The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap..."

As McIntyre J. stated in the frequently cited Supreme Court of Canada Judgment of Ontario Human Rights Commission & O'Malley vs SimpsonsSears Limited, (1985) 2 SCR 536, ("O'Malley") a broad intrepretation is suggested in order to achieve the purpose of the Act. McIntyre J. stated: (at p. 547)
of The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.'

While McIntyre J. was dealing with the Ontario rather than the Canadian Human Rights Act, it is not open to question that the dictum applies equally to the Canadian as well as to the Ontario Human Rights Legislation.

../5

IV. THE FACTS:

At the date of the Hearing into the present complaint, the Complainant Marcel Gauvreau ("Complainant"), a resident of Montreal, was a 42 year old Attorney, married and the father of 2 children. Either at the end of the month of August or early September, 1986, although he was still employed at the time, he received a call from a Headhunter, Guy Djandji ("Djandji"), who advised him of an opening for a position of Director of Legal Affairs of a Financial Institution and enquired as to whether he was interested in the job. Being somewhat unfulfilled in his current job, he gave a positive response. An exploratory meeting between them took place on or about September 8th at which time Djandji revealed that the Respondent Bank was the client who was seeking to fill the vacant position. When Complainant expressed interest in the job, Djandji undertook to arrange a meeting with Me. Louise Vaillancourt Chatillon ("Chitillon") who was Vice-President in charge of legal matters and Secretary of the Bank at the time and who was responsible for filling the position. The Complainant also provided Djandji with a series of references for further follow-up.

A meeting between Complainant and Chatillon and Roger Bilodeau ("Bilodeau"), the latter at that date being the Director of Human Resources, took place on September 23, 1986 and according to Complainant, lasted about l 1/2 to 2 hours.

Chatillon and Bilodeau expressed interest in Complainant's background, his varied experience at the Quebec Securities Commission, the Bank of Montreal and Domtar Inc. where he was or had been employed as an

../6

Attorney and particularly his administrative experiences. From all indications, both sides appeared pleased with the outcome of this first encounter. Chatillon was later to record in her Personal Confidential Notes that Complainant "was an excellent candidate." (Exhibit R-4)

According to Complainant, during the course of this meeting, Chatillon corroborated that she was the person who had the responsibility for doing the hiring. She also indicated that 2 other candidates were being considered for the position and Complainant was advised that a follow-up meeting might take place.

Indeed, a second meeting did take place the following week on September 29, 1986 when Chatillon invited Complainant to lunch at Place Bonaventure. During this rendezvous they discussed many of the aspects of the job to be filled including Complainant's philosophy and ideas about how he would go about directing the Bank's Legal Services Department, which Chatillon said, was low in morale and required restructuring. Complainant testified that Chitillon expressed a keen interest in him, advised him that the position carried with it a salary of $ 68,000 yearly subject to annual revisions, and that he was her choice for the position.

According to Complainant, after discussing a number of other items in some detail, including his request to be provided with a free parking spot at the Bank's Head Office premises and other matters relating to the position, Complainant came away from the meeting with the conviction that "he had the job"; and that he immediately advised both Djandji and his wife of this, although Djandji had no recollection of such call. Chatillon indicated that arrangements would be made for Complainant to meet with 3

../7

of the Bank's Top Officers Marcel Belanger ("Belanger"), Chairman of the Board; Andre' Berard ("Berard"), Chief Operations Officer and Chatillon's Superior, Vice-President Gilles Roch ("Roch"). Complainant testified that he was told by Chatillon that these meetings were mere courtesy visits or simply formality calls although Chatillon testified that these meetings were also an essential part of the hiring process.

The evidence reveals that , in any event, that same afternoon, Chatillon arranged for a meeting between Complainant and Mr. Be1anger to take place 2:30 P.M. on October 6. She also arranged for a meeting with Mr. Roch, scheduled to take place at 3:15 P.M. Unfortunately, instead of having a 45 minute meeting with Belanger, the meeting was brief, lasting perhaps only 15 to 30 minutes since Be1anger was suddenly faced with an unexpected conference call.

It appears that neither Belanger nor Complainant were content with their brief first meeting, but each for different reasons. Belanger

later related to Chatillon that he was not convinced that Complainant was the best available choice on the market whereas Complainant felt that Belanger, being pressed for time, touched only briefly upon Complainant's experiences at the Bank of Montreal and at the Quebec Securities Commission in the few minutes they met and that it was not a very productive meeting. However, Belanger agreed that they should meet again.

A second meeting between them took place the following week on October 14 at which time Complainant spoke about his plans to re-organize and expand the Bank's Legal Affairs Department. The meeting ended, according to Complainant, with Belanger appearing to be satisfied with

../8

the answers given by Complainant to the various questions put to him by Belanger.

It appears, however, that Belanger was of a different frame of mind. Although he conceded that Complainant possessed the professional qualifications for the job, he nevertheless had mixed feelings since he questioned Complainant's leadership potential and capability to direct a "team". In a nutshell, Belanger felt that Complainant was interested only in legal affairs and nothing else. Being in a state of doubt, he requested that Complainant meet with Berard, the Bank's CEO, with the feeling that he would go along with Berard's recommendation. Complainant, however, indicated to Chatillon that Belanger appeared to be quite positive about him.

In the meantime, Complainant also had a brief encounter with Gilles Roch who, according to Complainant, merely extended to him a cordial welcome to the Bank.

A meeting took place between Complainant and Berard on October 15, 1986, as requested by Belanger. According to Complainant the first part of the meeting dealt with Complainant's experiences in Banking, particularly his administrative background, productivity and budgets. They also discussed Complainant's plans for the legal department and Berard indicated his satisfaction with the practical side of Complainant's experience. Although both Complainant and Berard testified that the matter of the Bank's international operations was dealt with during their discussions, each had a somewhat different recollection as to the extent of importance which each attached to this subject. Berard stated that he questioned Complainant as to his readiness to consider a

higher position such as Vice-President of international operations or such similar

../9

post in the not too distant future, while Complainant denied that any such offer was made.

Following this meeting, Complainant met with Chatillon and indicated that it appeared to him that Berard would be making a positive recommendation about him. He enquired whether Chatillon was prepared to fix his starting date for the position. When, according to Complainant, she replied, "why not?", it was agreed that he would assume the position on November 12, 1986. Complainant testified that Chatillon stated that she would be in contact with him the following day to prepare the announcement of his resignation from Domtar and his appointment to the position of Director of Legal Affairs at the Bank. Complainant also testified that she also undertook to send him a letter on the following day confirming these developments.

Complainant failed to receive the confirmation letter and on October 17th, he was advised by Chatillon that "there were little problems". Complainant, on the other hand, was advised by Djandji that "there were no major problems" and that as far as he was concerned, Complainant was Chatillon's candidate and that he had closed his file. Complainant further testified that Djandji stated there was no need for concern, and it was only a matter of finalizing matters in a day or so.

However, Complainant testified that when he telephoned Chatillon on October 22, 1986 from Orlando, Florida, where he was away on business, she advised him that there was no unanimity amongst the Bank's top executives as to his appointment to the position. Chatillon told him that, as a consequence, the position was not his; that it remained unfilled; and, that he would not be commencing November 12th. When Complainant asked Chatillon

../10

for further explanations she replied that it could not be discussed on the telephone.

Following his return to Montreal, Complainant telephoned Chatillon for the purpose of arranging a meeting in order for Chatillon to provide him with the reasons for what appeared to Complainant to be Respondent's about-face and change of attitude in not having hired him. A meeting was fixed to take place on October 30. At that meeting, according to Complainant's testimony, Chatillon advised him that Berard believed that he did not possess the corporate profile for the job; that he did not have the potential to become a Bank Vice-President, and that he did not have the required entrepreneurship. These reasons seem to be consistent with those recorded by Chatillon in her Personal Confidential Notes which are contained in (Exhibit R-4). These notes also contain reference to the effect that Berard was not convinced that Complainant was the best available candidate on the market. Also, that he was considered to be too much of a "fonctionnaire" i.e., somewhat akin to a civil servant type and that in the final analysis Complainant's candidacy was not satisfactory.

These explanations did not appear to satisfy Complainant and he immediately wrote the Bank a letter dated November 4, 1986, (Exhibit HR-3) in which he advised Chatillon that he was holding Respondent liable for their refusal to hire him for the available position. This, in turn, led to the present Complaint.

It is necessary, at this point, before embarking upon a discussion of the law and the legal issues to be decided in this case, to briefly describe the background of the principal personalities in this case. The Respondent, of course, is one of Canada's chartered Banks and its 2 top officials, testified at the Hearings.

../11

The Complainant was born in 1947 and contracted polyomyelites in 1952 shortly before his fifth birthday. He has been confined to a wheelchair ever since. The evidence, revealed that he is and has been fully mobile, apparently having mastered the apparatus to such extent that he is able to function, move about and travel in every which way including by means of automobile and airline notwithstanding his physical disability. He is married and the father of 2 children.

Following his education at Ecole des Hautes Etudes Commercial where he obtained a B.Sc.Com. degree, majoring in Administration, in 1970, he took his law studies at Universite de Montreal where he obtained an LL.L. degree in 1973. He was admitted to the Quebec Bar in 1974 and has been a member ever since.

His legal and professional experience was acquired principally in 3 positions which he held prior to the events which gave rise to the present Complaint. Complainant served as a Legal Advisor at the Quebec Securities Commission from May 1975 to May 1979 and during these 4 years served in a variety of positions. These included the preparation of legal opinions relating to administrative law and securities; representing the Commission before the Courts and Tribunals; and, during a period of one year he replaced the Director of Appeals and Director of Market Supervision.

Complainant was then employed at the Bank of Montreal as Legal Counsel for the Eastern Canada Region for a period of over 6 years. His principal functions and responsibilities consisted of advising the Bank with respect to mortgage loans; new products; the Treasury and Securities; compliance with Federal and Provincial

../12

Legislation; and representing the Bank on different Committees of the Canadian Bankers' Association.

Upon leaving the Bank of Montreal Complainant joined Domtar Inc. in September 1985 as Legal Counsel where according to him he directed a team of 8 persons and attended to all sort of administrative and legal matters. He acted as Legal Counsel to the Treasurer and Secretary on all matters relating to securities and corporate finance and earned $ 67,000 annually. According to Gilles Pharand ("Pharand"), Complainant's Superior at Domtar, the staff under Complainant's responsibility comprised 2 persons. The evidence with respect to the size and composition of Complainant's staff while he was at Domtar was, however, conflicting since there was disagreement as to whether they were talking about legal or non-legal personnel.

Of even greater significance than the mere recital of Complainant's background and experience, as above noted, were the contents of 3 Exhibits produced at the Hearing, the first of which, Exhibit HR-1, was a Management Performance Appraisal of Complainant issued by the Bank of Montreal in October 1984 under the signatures of that Bank's Senior Manager, Law and Corporate Counsel and Senior Vice-President, Corporate and Legal Affairs. Complainant was given an overall rating of outstanding in such appraisal.

Exhibits HR-7 and HR-8 consisted of 2 confidential Reports prepared by the Bank's Headhunter Djandji, the first of which, Exhibit HR-7, described, in summary form, Complainant's qualifications for the position of Director of Legal Affairs. Rather than dealing with excerpts, the Tribunal considers it appropriate to recite this Report at length: "Rapport sommaire d'entrevue Confidentiel Me Marcel Gauvreau September 1986"

../13

Me Gauvreau possède une éxperience très pertinente au poste de directeur des affaires juridiques à la BNC puisqu'il a oeuvre durant plusieurs années au sein d'institutions financières. Tout dàbord, à la C.V.M.Q. ou il a travaillé quatre ans, il s'est occupé de dossiers très variés qui l'ont familiarisé aux aspects juridiques ainsi quàux dimensions de réglementation, enquetes et gestion de l'organisme. Par la suite, à la Banque de Montréal on lui a confié des responsabilites croissantes: d'abord auprès des succursales pour ensuite desservir le service de Trésorerie. Il dirigeait, a l'époque, un avocat, un avocat-stagiaire et une petite equipe de personnel de soutien. De 1979 à 1985, le service des affaires juridiques fut reduit et ensuite transfere à Toronto. Durant sa derniere annee, Me Gauvreau avait reussit a batir l'infrastructure administrative nécessaire pour le fonctionnement lien direct" des deux bureaux, de Toronto et de Montreal. Bien que l'offre lui fut faite, il refusa de demenager a Toronto pour des raisons d'ordre personnel.

Me Gauvreau est un individu sérieux et calme, qui impose par son assurance et sa credibilité. C'est un individu qui nous semble hautement motive a accomplir un travail rigoureux et de haute qualité professionnelle. Pour cela, il examinera avec minutie tous les aspects d'une situation et saura dégager les variables importantes et definir les strategies d'interventions adequates.

Au plan gestion, Me Gauvreau semble avoir perfectionne ses talents au plan de l'organisation et de l'utilisation éfficace des ressources à sa disposition. Il a un style de gestion ouvert et il sait entrainer et former son personnel. Il delegue bien et se garde disponible pour aider ses subordonnes dans la réalisation de leur travail. A cet égard, nous croyons que Me Gauvreau possede un leadership professionnel évident.

../14

c'est-à-dire qu'il est en mésure d'influencer les efforts de ses collaborateurs, dune part, et de se faire ecouter par ses "clients", d'autre part.

Au plan personnel, Me Gauvreau est un individu chaleureux et qui sait établir de bons liens de confiance avec les autres. Il semble très perseverant et engage dans ce qu'il entreprend. Son dynamisme est contrôle et il procède avec méthode et tenacité dans làtteinte de ses objectifs.

Face au poste disponible à la BNC, M. Gauvreau se dit fort interesse et très motive a y accéder. En effet, il nous indique que toute sa carrière le prepare pour un tel poste, tant au plan du contenu professionnel quàu plan gestion. Dàutre part, après un an chez Domtar, il constate avec deception, qu'il ne partage pas le style de gestion centralisateur qui caractérise le service et se sent très limité dans son action. Il est actuellement activement à la recherche d'autres opportunites de carrière.

A notre avis, les compétences juridiques de Me Gauvreau ainsi que sa connaissance intime du milieu bancaire, son style de gestion et sa personnalité ouverte et châleureuse en font un candidat fort intéressant au poste disponible à la Banque Nationale du Canada."

In Exhibit HR-8, Djandji reported the results of his communication with 4 different Executives who knew of Complainant's experience and background in his former positions at the Bank of Montreal and the Quebec Securities Commission. The highlights of this Report were to the effect that all references obtained were favourable and positive to Complainant; that he was a good organizer; that he was efficient and had boundless energy.

In the words of Mr. Bill Mandzia, Complainant's Superior at the Bank of Montreal, "Complainant had the

../15

ability to get things done well". This report was replete with superior adjectives, including that of Complainant being described as a lawyer of excellent calibre for the Bank; that he was not a lawyer's lawyer but rather a businessman's lawyer; and that Complainant was a perfect candidate. The Report concluded with a statement to the effect that no

negative information about the Complainant's character or competency was obtained.

On the other hand, Complainant was not without his detractors. Pharand, Domtar's Associate Director of Legal Services, testified that he had doubts about Complainant's competence in matters such as public financing involving Trust Debentures and Securities. He also indicated that if he were obliged to select his successor at that time, he would have been inclined to choose someone in his department, other than Complainant, who appeared to him to possess greater experience and more knowledge.

Yet despite such unflattering testimony, Pharand conceded that he still saw fit to give Complainant an increase in salary the following year and would probably have given him another increase next September if Complainant remained in the employ of Domtar. The evidence is somewhat uncertain as to whether the increases awarded and to be awarded to Complainant were automatic and in line with the company's policy or whether they were attributable to Complainant's performance. Mr. Pharand's evidence on this point was ambiguous.

Another witness called on behalf of Respondent, Peter Blaikie ("Blaikie"), a partner in the law firm with which Complainant was associated between 1987 to 1990, (a period subsequent to the events which form the basis of the present complaint) testified that his associates doubted

../16

Complainant's competency or his expertise in areas of commercial, banking and securities law. Although Blaikie had little if no personal working relationship with Complainant, his testimony reflected the view or consensus of his associates, none of whom testified.

Blaikie testified that Complainant was terminated in January 1989 with the understanding that he would remain in the firm's premises and continue to draw his salary during the ensuing 12 months. Such arrangement was actually continued to the end of July 1990. However, since Complainant had not succeeded in finding a new position by that date, a new arrangement was agreed upon pursuant to which Complainant, while not physically remaining in the law firm's premises would nevertheless continue to receive remuneration until January 1991. He was also permitted to make use of the firm's telephone number. The proof indicates that Blaikie's law firm

agreed to such accommodation in order to assist the Complainant in his search to find new employment.

The Tribunal is of the view that there is surely no small contradiction between Blaikie's firm having terminated the Complainant's actual employment with his firm for the reasons given, i.e., lack of competency and expertise, on the one hand, while on the other hand, having extended to Complainant such an overly-generous severance package coupled with a continuing association arrangement which, although highly commendable, is somewhat difficult to reconcile.

V. THE ISSUES:

The principal issue in the present case is to determine whether Respondent's decision not to employ

../17

Complainant for the position of Director of its Legal Affairs Department was due to his physical disability which would constitute a discriminatory practice in contravention of Section 7 of the Act.

In order to arrive at its decision, it should be noted that it was not necessary for the Tribunal to make a finding, for instance, as to whether Respondent had actually hired Complainant or had made a formal offer of employment to the Complainant or whether a written confirmation of a job offer had actually been agreed upon or been given. The Tribunal is not here faced with an issue of civil responsibility for breach of contract. The Tribunal, rather, is obliged to consider the facts as a whole and by applying them to the principal provisions of the Act cited above, determine whether on the balance of probabilities, Respondent's decision to refuse to hire Complainant was motivated by his physical handicap.

VI. THE LAW AND BURDEN OF PROOF:

Having set out the relevant Sections of the Act which are applicable to the parties in the present case and which the Tribunal must consider in determining whether or not there was discrimination on the basis of Complainant's physical disability, the Tribunal will now consider

the law which must be applied to the present case. More specifically, who has the burden of proof and what order of proof is to be followed.

The law and burden and order of proof in discrimination cases of this kind was accurately set out in the decision of Julius Israeli vs Canadian Human Rights Commission et al., (1983) 4 CHRR D/1616, as follows (at page 1617):

../18

"The burden of proof in discrimination cases is important, as is the order of presentation of the evidence. Cases of refusal of employment on discriminatory grounds before boards of inquiry in Canada, whether at the federal or provincial level all seem to employ the same burden and order of proof. The Complainant must first establish a prima facie case of discrimination. Once this is done, the burden of proof shifts to the employer to provide a reasonable explanation for the otherwise discriminatory behaviour.

Finally, the burden shifts back to the Complainant to prove that this explanation was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory."

That Tribunal made reference to a series of other cases which had applied the same burden and order of proof, in discrimination cases of which 2 in particular were quoted and which this Tribunal as well deems wo rthwhile to cite. First, that of Offierski vs Peterborough Board of Education, (1980) 1 CHRR D/333 which succinctly describes the shift of the burden to the employer as follows:

"Upon establishing a prima facie case, the burden shifts to the employer to provide an explanation that is reasonable. This can be done by adducing evidence that shows the Complainant to be not as well qualified as the successful applicant for the position i.e. that there is no discrimination on the factual evidence..... "

Second, in Ingram vs Natural Footwear, (1980) 1 CHRR D/59, the Tribunal took the proof one step further when it stated at paragraph 473:

"Once the employer has come forward, however, the burden rests with the Complainant to prove, on the balance of probabilities, that the explanation put forward is false and pretextual."

../19

In the Israeli decision, the Tribunal also set out the criteria for a determination of a prima facie case of discrimination, as follows (at page 1618):

"The requirements for a prima facie case of discrimination also seems to be relatively fixed in the case law. The Complainant must show: 1. that he belongs to one of the groups which are subject to discrimination under the Act eg. religious, handicapped or racial groups; 2. that he applied and was qualified for a job the employer wished to fill; 3. that although qualified he was rejected; and 4. that thereafter the employer continued to seek applicants with Complainant's qualifications."

The above propositions have since been followed in a number of other Judgments including Morisette vs Canada Employment and Immigration Commission (1987) 8 CHRR D/4390; Dhami vs Canada Employment and Immigration Commission (1989) II CHRR D/253; as well as Canadian Broadcasting Corporation vs O'Connell et al. (1990) 12 CHRR D/69; These, therefore, are the guidelines which this Tribunal has followed and applied to the evidence presented at the Hearing in the present case.

VI. COMPLAINANT'S ALLEGATION OF DISCRIMINATION:

Complainant alleges that he was discriminated against by the Respondent on the basis of physical disability by having refused to hire him for the position of Director of its Legal Affairs Department notwithstanding that he possessed the required qualifications for the position. Complainant additionally alleges, although as already pointed out, it is not essential for this case, that a meeting of the minds awarding him the position had already taken place prior to his subsequent rejection;

../20

The principal evidence and submission made on Complainant's behalf with a view to establishing a prima facie case include the following:

i) That he possessed the qualifications, experience and requirements for the position of Director of Respondent's Legal Affairs Department, as set out in the 6 page job description prepared by Respondent;

(Exhibit HR-4)

ii) That following meetings with the Respondent's Headhunter and its Vice-President in charge of Legal Affairs, who had the responsibility for making the decision, he was advised that he was the latter's first choice for the position;

iii) That consistent with the above, many related matters were dealt with or finalized confirming his employment including a starting date; salary; free parking facilities; priorities in reshaping the Legal Affairs Department; discussion of confidential files; personnel problems; plus other matters such as the merger with the Mercantile Bank and a possible trip to Alberta in connection with a pending file.

iv) That he was selected for the position from among an initial group which included dozens of potential candidates which list was ultimately reduced to 6 and then to 3 finalists of which he was the final choice;

../21

That Complainant was rejected following a meeting with Respondent's CEO notwithstanding that the Vice-President had informed him that such meeting was merely a courtesy call and that she had the authority to employ him;

Complainant was informed by Vice-President Chatillon that her choices in hiring in the past were always respected by the Bank's top officers;

That prior to his rejection, Complainant had met and received the approbation of at least 3 of Respondent's Vice-Presidents and Department Directors who were consulted during the hiring process;

That the reasons given for his rejection were based upon factors or criteria which formed no part of the job description circulated by Respondent.

The Tribunal is satisfied that the Complainant has established a prima facie case of discrimination against him in the present case. Indeed, the evidence is so persuasive that it is difficult to see how, at this stage, one can arrive at any other conclusion. In the Tribunal's opinion the Complainant has discharged his initial burden of proof thereby shifting the onus to the Respondent to justify its decision in having refused Complainant employment in the face of the facts established. The Tribunal therefore declares that it has no hesitation in finding that the Complainant has established

../22

a prima facie case of discrimination against Respondent on a prohibited ground, namely, that of his physical disability.

VIII. RESPONDENT'S RESPONSE TO THE ALLEGATIONS OF DISCRIMINATION:

Having established a prima facie case, the burden now shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. It should be pointed out, at once, that this is not a case where Respondent acknowledges its discriminating behaviour, but offers a BFOR defence under Section 15(a) of the Act to justify its otherwise illegal discrimination. In fact, throughout the entire proceedings, the Respondent has vigorously contested the complaint charging it with discrimination.

In support of its position of denying any wrongdoing under the Act, Respondent has alleged the following facts and urged the following submissions, each of which the Tribunal has considered in light of the evidence produced at the Hearing. Since Respondent has submitted a multi-faceted response to the complaint, it is the Tribunal's intention to deal with each of Respondent's submissions in depth.

Briefly, Respondent seeks to justify its actions and decision of refusal to employ on the following grounds:

a) No formal offer of employment was ever extended to Complainant;

b) No written confirmation of having been hired was ever given to Complainant;

c) Respondent's 5 stage hiring process had not been completed;

d) Complainant did not demonstrate leadership qualities nor did he possess ambition, drive or entrepreneurship;

../23

e) Complainant was nervous and unprepared for his meetings with Respondent's 2 top officers;

f) Complainant did not possess the potential to attain a higher position of Vice-President;

g) Complainant was not competent according to a previous and subsequent employer;

h) Complainant's qualifications were inferior to those of the successful candidate;

i) Respondent's top Executives had the final authority to employ;

j) Complainant was not the best candidate in the market place;

k) Complainant lacked credibility;

l) Complainant lacked mobility for the job;

m) Complainant was too much of a theoretician, academician or functionary type;

n) There was no intention to discriminate;

o) The investigator declared the complaint unfounded;

(a) Lack of formal offer:

Respondent contends that no formal offer of employment was ever extended to Complainant and therefore Complainant could not possibly have accepted an offer which was never made. Respondent drew an analogy with

the hiring process which Complainant had encountered at Domtar which was preceded by a final offer. This surely has no bearing on the present case.

However, while the parties may not have technically exchanged the formality of an offer, followed by an acceptance, as already pointed out, we are not here dealing with a civil suit based on breach of contract. For purposes of the present case, it will suffice that as

../24

between the Respondent's Vice-President in charge of Legal Affairs and being the Officer charged with the responsibility for filling the position of Director of Legal Affairs, Chatillon had, in the Tribunal's view, reached a meeting of the minds with the Complainant. The proof reveals that Complainant was her choice to fill the position from among the large number of initial candidates considered and gradually weeded out. Such decision had been preceded by 2 indepth meetings with her and other officers of Respondent as well as another meeting with the Bank's recruiter, Djandji.

Although an inordinate amount of Hearing time was spent on the questions as to whether or not an offer had been made and accepted, the evidence reveals that when Complainant testified that he accepted the Bank's offer, he was in fact referring to accepting the Bank's salary proposal made to him by Chatillon which constituted clear indication that they were in agreement as to a major component of the conditions relating to the position to be filled. (Transcription:p. 99)

(b) Absence of written confirmation:

Respondent contends that in the absence of a letter or other written confirmation emanating from the Respondent, there was no commitment or obligation on the part of the Bank to hire Complainant. However, here again, there is no requirement that any such writing exist in order to sustain a complaint of discrimination under the Act.

In any event, Complainant testified to the effect that following his second meeting with Vice-President Chatillon on September 29th, she undertook to send him a letter the following day confirming that he would commence

../25

his job on November 12, 1986. This testimony is confirmed by Chatillon's personal notes of events (Exhibit R-4). Nevertheless, although a letter of confirmation appears to have been agreed upon, it was never sent.

(c) Hiring Process not completed:

Respondent contends that its 5 stage hiring process not having been finalized, it is unlikely that Complainant could have been hired for the job without him having met the Bank's 2 top executives, Michel Belanger, Chairman of the Board and Andre Berard, Chief Operations Officer, which Respondent contended were the last 2 stages of the hiring process. It is an undisputable fact that following his 2 meetings with Chatillon and prior to his 2 meetings with Belanger and his meeting with Berard, Complainant had every reason to believe that he "had the job". This belief was based upon the fact that he was the first choice of Chatillon who had the responsibility to do the hiring and who possessed the jurisdiction to employ the Bank's next Director of Legal Affairs. Although meetings with Be1anger and Berard were envisaged, there was an indication that since Berard was out of town, that Complainant would be introduced to him following his return and only after Complainant had taken up his position. It appears that only as a result of Belanger's expressed reservations about hiring Complainant that arrangements were made to have Complainant meet Berard soon after his return.

An examination of the evidence on this point reveals, however, that the so-called 5 stage hiring process

../26

which Respondent contends was a prerequisite to finalizing any employment decision was uncertain and unclear and certainly not constant or rigid. In fact, at various points of the evidence and argument, the different stages of the hiring process were alternately referred to as involving either a 3-step process (Djandji T.p. 349); a 4-step process (Chatillon T p. 905) (Respondent's Attorney's Notes, pp. 6, 7, 19 & 24). Nor was each stage of the hiring process ever clearly defined by the witnesses with any degree of certainty.

Moreover, proof of the flexibility and variableness of Respondent's hiring process is indicated by the fact that when Respondent subsequently hired Johanne Labrecque Remillard ("Remillard") for the position, she was

not obliged to meet with either of the Respondent's 2 top officers. So much for the 3, 4 or 5-step hiring process of which meetings with Be1anger and Berard were deemed by Respondent to be integral parts.

In any event, the Tribunal does not regard this particular aspect of the Respondent's hiring practice, be it a 3, 4 or 5-step process, of being of any greater pertinence or significance to this case than were the points which were raised pertaining to lack of a formal offer or of a written confirmation of employment.

(d) Meetings with Mr. Belanger:

Respondent contends that Complainant performed so poorly during his 2 meetings with Belanger on October 6 and 14, to the point of characterizing them as "disasterous", that it appeared to justify Belanger's initial reaction of "lack of enthusiasm" and of "not being impressed" with Complainant.

../27

The meetings between Complainant and Belanger being important developments in the chronology of events which transpired in this case, requires that the Tribunal examine each of these meetings separately.

Respondent urged that Complainant was not prepared for his first meeting with Belanger, gave a poor presentation or performance and this justified Belanger's conviction that Complainant was not the best candidate in the market place and thus left him with a mixed feeling about Complainant's candidacy.

Complainant testified that his first meeting with Belanger lasted a mere 15 to 20 minutes, was a very brief encounter since, upon his arrival for their appointment, which had been arranged a week earlier, Belanger was pressed for time. A brief discussion of Complainant's background took place and Belanger agreed to meet with him again.

The Tribunal fails to see how, on the basis of such a brief encounter, which from all accounts lasted no more than 30 minutes, if that, the Respondent's Chairman could justifiably conclude that he was not convinced that Complainant was the person for the job. Indeed, Chatillon's Personal Notes (Exhibit R-4 p.2) confirm that on the basis of what appears to have been a fleeting meeting, Belanger indicated that he was not convinced that Complainant was the best choice on the market. Perhaps,

more remarkable, is the fact that Exhibit R-4 reveals that the Complainant's Curriculum Vitae was not in Belanger's possession at that meeting since Chatillon only undertook to provide him with a copy following the meeting.

The criticism levelled against Complainant that he was unprepared for this meeting cannot be taken seriously.

../28

In the first place, the Tribunal asked itself what sort of preparation was Complainant expected to do, (besides having equipped himself with a copy of the Bank's annual Report which he did) particularly when he was led to believe that he was only carrying out a courtesy call? Respondent does not say. Admittedly,. their first on-the-fly meeting satisfied neither party. But notwithstanding that Complainant refused under persistent cross-examination to categorize the meeting as having been a disaster, (T.p. 203) Respondent's Attorneys persisted in putting this word into Complainant's mouth as if such admission would somehow add validity to Respondent's decision in having rejected Complainant for the position.

Their second meeting the following week left Belanger with "mixed feelings" based upon his impression that while Complainant appeared to possess the professional qualifications for the job, such as experience, knowledge of the law and his banking background, he was less certain about Complainant's "leadership" qualities or capacity to direct a team. Leadership takes many forms but Belanger failed to further define or qualify the term in the context of the position to be filled.

Complainant, on the other hand, concluded that it had been a productive meeting which had gone well and he was convinced that Belanger was positive about his candidacy. He testified that in fact, he related his feelings to Chatillon who makes reference to them in her Personal Notes (Exhibit R-4). Curiously, however, Chatillon's notes contain no summary or observations as to the substance of Belanger's feelings about the meeting.

Belanger's testimony (T.p. 713) reveals that their meeting dwelt on Complainant's interest in the position to

../29

be filled, namely that of Director of the Respondent's Legal Affairs Department and "for nothing else", as shown by the following exchange: (T.p. 713)

Belanger:

"R. Dans notre conversation il avait ete surtout question du poste premier que lion pouvait envisager pour lui, c'est-à-dire celui etait l'objet de notre discussion. Nous avons pas eu de grands debats sur les autres aspects, mais tous ce que nous avons pu discuter indiquait son interet d'abord et avant tout pour le poste de directeur des Affaires juridiques, pas pour d'autres choses.

Q. Et est-ce que vous avez aime une telle reponse?

R. Ca avait des effets positifs puisque ça repondait aux besoins du poste dans l'immédiat, mais ça répondait pas à cet autre idéal que nous avions de trouver des gens qui puissent être disponibles pour se déménager en d'autres postes à d'autres moments de leur carrière."

(underlined by Tribunal)

In light of the subsequent meeting which took place between Complainant and Bérard the following day during which Bérard concentrated on 2 issues, practically to the exclusion of anything else, namely, Complainant's alleged lack of interest in Respondent's international banking operations and Complainant's alleged lack of interest in assuming a future Vice-Presidency, it is noteworthy that neither of these matters had been touched upon during the two meetings between Complainant and Bé1anger. Nor, for that matter, were these matters ever touched upon during other meetings or discussions which took place between Complainant and either Châtillon, Djandji, Roch or anyone else.

../30

(e) meeting with Mr. Bérard:

Respondent concedes that while Bé1anger requested that Complainant meet with Bérard "for a second opinion", he was prepared "to go along". (T.p. 1052)

The meeting with Bérard took place October 15, 1986. Although Complainant reported to Châtillon that it was his impression following the meeting that Bérard intended to make a favourable recommendation on his behalf, the contrary was true. Bérard was somewhat unequivocal to the effect that based upon this one meeting with Complainant (it appearing that no one had discussed Complainant's candidacy with him prior thereto) he concluded that Complainant lacked ambition and drive; did not demonstrate any entrepreneurship; and gave no indication that he had the potential to become a Vice-President of the Bank;

The Tribunal finds it strange that the subject matters which formed the basis of their meeting dealt with 2 specific areas that at no time previous had been raised in any meetings or communication between Complainant and the Respondent's officers, representatives or headhunter. The two subject matters, in particular, deserve examination, namely, the Bank's international banking operations; and possible promotion to a Vice-Presidency. Also, deserving of the Tribunal's comment is the the whole issue of Complainant's response to Bérard's enquiry as to the Complainant's "mobility".

It is apparent from the evidence that Complainant became Vice-President Châtillon's first choice for the position based not only upon his banking and administrative background and experience gained at the Bank of Montreal,

../31

at the Quebec Securities Commission and at Domtar, but as well upon his perceptions and ideas about restoring the image and morale of the Respondent's Law Department which at the time was in need of overhaul and restructuring. Châtillon's testimony reveals her surprise when she learns that Complainant was rejected following his meetings with Bé1anger and Bérard:

Châtillon: (T.p. 693)

Q. Parce que je pense que vous avez dit que Me Gauvreau était votre choix, votre premier choix.

R. Oui. Moi ça ne m'était jamais arrivé.

Q. Oui. Est-ce que vous avez été prise par surprise par la décision finalement à la suite de son rendezvous avec Bélanger et Bérard?

R. Ca été une évolution, ga été une série de déceptions là, si je peux m'exprimer ainsi. Après le premier rendezvous avec monsieur Bérard évidemment j'ai été une peu surprise par la tournure des événements.....

Châtillon's previous meetings with Complainant led them to believe that it would take a three to five year period to restore the Legal Affairs Department to the desired state and condition. The singular priority was the fulfillment of the requirements which were detailed in the Description of Functions (Exhibit HR-4) and the performance of the Director's specifications contained in (Exhibit HR10). More significantly, neither document contained any reference, directly or indirectly, about the Bank's interest or concern about its prospective Legal Affairs Director assuming a Vice-Presidency or becoming involved in its international operations. Moreover, the 7 page letter exchanged between the Respondent and its Headhunter made absolutely no reference to either of these subject matters.

../32

It is in light of these facts that the Tribunal finds that the subject matters stressed by Bérard during his meeting with Complainant, were a somewhat distant and unrelated matter to the position to be filled. Yet, it was on the basis of Complainant's answers to the questions which Bérard submitted to him on these somewhat, if not extraneous subject matters, certainly far removed from those contained in the job description, which led Bérard and in turn, the Respondent, to reject Complainant's candidacy for employment.

Bérard dealt at some length with the Bank's operations in the international field and questioned the Complainant's readiness to undertake work in this area. When Complainant indicated that he would consider doing so in a few years, in effect, after having completed the mandate for which he had been led to believe he was being engaged for, it appears to have brought about Bérard's negative reaction.

In the same vein, when Bérard dealt extensively with Complainant's possible readiness to assume a higher position such as Vice-President of the Bank, and Complainant gave a similar guarded response, Bérard's reaction seemed to be one of characterizing Complainant as apparently being a man lacking in drive, ambition and entrepreneurship. To all intents and purposes, the evidence creates an impression, drawn particularly from the subject matters stressed by Bérard during this meeting, that the position for which Complainant was being recruited and considered by Châtillon and Djandji was considerably different from the one which Bérard concluded Complainant was not the best candidate on the market to fulfil.

../33

The Tribunal is persuaded that the interview conducted by Bérard during his meeting with Complainant presented Complainant with somewhat of a catch-22 situation. If Complainant answered, as he did, that he could not consider embarking upon a position involving the Bank's international operations or assuming a Vice-Presidency for a few years until he had completed the Mandate for which he was being hired, he was criticized as lacking in drive, ambition and entrepreneurship. This would result in him being rejected for the position applied for, as he in fact was. Should he, on the other hand, have played up to the Respondent's CEO and indicated a readiness to assume either of the above functions, (admittedly of greater importance or more advanced than the one he was being recruited for) he probably would have been rejected on the ground that he was not seriously interested in fulfilling the functions described in the job description for Director of Legal Affairs. To have expected Complainant to have answered "yes" to Bérard's enticement of a higher position rather than a "No" which, in the circumstances was a proper reply, strikes the Tribunal as being a poor basis upon which to have rejected Complainant's candidacy.

Although Respondent's Attorney argued that this situation was analogous to that dealt with in the case of Avtar (Terry) Dhami vs Canada Employment and Immigration Commission (1989) 11 CHRR D/253, where the complaint was dismissed, the Tribunal does not consider the facts in that case to bear any similarity or relevancy to the present case. In Dhami, the Complainant candidate gave a wrong answer to a critical question, in addition to scoring a failing mark. The point, however, is that the critical question wrongly answered formed an integral part of the subject matter of the exam. It was not some unrelated or foreign question. In the circumstances of the present case, the subject matter was indeed, if not unrelated, certainly

../34

not within the framework or purview of the position to be filled as had been considered up to this point in time by all parties involved in the hiring process based upon the Bank's written guidelines and terms of reference.

Seen in the context that the person eventually selected to fill this position was not required at all to meet with the Respondent's CEO, before being hired, it renders the meeting between Complainant and Bérard and more particularly the subject matters discussed between them, somewhat less significant and pertinent than might otherwise have been the case.

Moreover, the Tribunal has asked itself whether it was plausible that the Bank's CEO, who appears to have made the decision to reject Complainant's candidacy for the position, would have seriously considered offering the Complainant a position of Vice-President of the Bank or a position in its international operations in the near term or, for that matter, in the distant future, when he did not consider him desirable to direct their Legal Affairs Department? The Tribunal does not think so.

(f) Complainant's lack of competency:

Since Pharand, Complainant's Superior at his previous employer Domtar Inc., had testified that he had not been impressed with Complainant's competency, Respondent has argued that this supports the decision of Respondent's 2 top officers in having rejected Complainant's candidacy. However, this argument is not acceptable in the circumstances of the present case since, as already noted, the reasons advanced by Respondent for its refusal to employ Complainant were entirely different. In fact, Respondent's 2 top officers conceded that Complainant may have possessed ample professional

../35

qualifications and competency for the job, but they suggested that Complainant nevertheless lacked "leadership, drive and ambition".

Moreover, Pharand's perception of Complainant's alleged lack of competency were somewhat equivocal and, more importantly, evidently not so clear-cut

and of a nature to preclude Complainant from receiving a regular salary increase.

The Tribunal sees even less relevancy in Blaikie's testimony regarding his law firm's opinion about Complainant's alleged incompetency in certain areas of law. It should appear evident that the practice of law in a private law firm is considerably different than that experienced in an institutional Legal Affairs Department. Moreover, there was no proof presented to this Tribunal that Blaikie's associates possessed any greater degree of competency or expertise in the particular areas of law mentioned than was possessed by Complainant, since no proof was made on this point.

Irrespective of the above, the Tribunal fails to see how an unsubstantiated view or opinion about Complainant's competency or expertise, at a period in time subsequent to the events with which we are here concerned, can possibly lend support to Respondent's actions by means of retroactive application.

(g) Successful Candidate's superior qualifications:

It is a hard-edged fact that prior to Camplainant's meetings with Bélanger and Bérard that Complainant was Châtillon's first choice for the position and this to Bé1anger's awareness, as evidenced by the following exchange with the Tribunal: (T.p. 735)

"INTERROGE PAR LE TRIBUNAL:

Q. Monsieur Bélanger, si je comprends bien votre position, quant vous avez fait le

../36

petit rendezvous pour le 15 minutes, la première fois ....

R. Une demi-heure.

Q. Une demi-heure, c'était avec la connaissance que Me Gauvreau était le premier choix de Me Châtillon, n'est-ce pas?

R. C'était à ce moment-là le premier choix, oui.

Q. C'était à votre connaissance?

R. Oui."

It was only following Complainant's meetings with Bélanger and Bérard that Complainant was gradually informed that the job was not his. Respondent argued that the eventual successful candidate Rémillard, possessed superior qualifications for the position and that this justified Respondent's decision to reject Complainant.

The first fact to be noted in this regard is that Rémillard was not among those competing for the position during the period that Complainant's recruitment by process of elimination was taking place. Rémillard's candidacy and appointment to the position only took place in early 1987, some 4 months following Complainant's rejection. It was never a matter of a competition between Complainant and Rémillard. It is therefore significant to bear in mind that Complainant was not rejected for the position because Rémillard allegedly possessed superior qualifications.

However, although the Tribunal does not wish to substitute its opinion for that of Respondent, based upon the written and oral testimony available to it, the Tribunal is far from convinced that Rémillard's qualifications and suitability for the position of Director

../37

of Respondent's Law Department were superior to those of Complainant. On the contrary, their respective curriculum vitaes, references, professional backgrounds and experiences left little to choose between them. While Rémillard had 2 more years of seniority at the Bar plus an M.B.A., it would appear that Complainant had a decisive advantage in that his years of legal knowledge and experience gained in the Law Department of the Bank of Montreal over a period of 6 years would have been of greater value and use to Respondent Bank. Moreover while the bulk of Rémillard's work experience was concentrated primarily at Hydro-Quebec, except for a 1½ year stint at the Montreal Stock Exchange as Assistant to then President Bélanger, by contrast, the Complainant's work experience in legal affairs was gained at 3 different institutions.

But of considerably greater interest to the Tribunal is what is revealed from a comparative analysis of the written Reports which emanated from Djandji with respect to Complainant as compared to that of Rémillard.

Djandji's confidential report submitted to Respondent in September 1986 regarding Complainant (Exhibit HR-7) emphasized his qualifications, and

experience for the available position of Director of Legal Affairs Department. In addition to Complainant's leadership qualities, Djandji refers, more than once, that it is for that available position that Complainant is being recommended. The contents of this report make this abundantly clear.

It will also be readily noted that nowhere in this Report is there any mention or reference to the candidate being required to possess the potential, willingness or readiness to ascend to any higher position at the Bank or to engage in the Bank's international operations. Djandji's highly recommendable Report about Complainant concerns itself strictly with the requirements of the available position as described in the Job Description.

../38

Yet when one examines the 2 Reports sent by Djandji to the Respondent in January and February 1987 (Exhibits R-1 and R-2) respecting Rémillard's qualifications, there suddenly appears not one but many references to the fact that she is a particularly apt candidate "because of her potential"; "because of her ambition to accept more important positions, in the future"; and "because of her potential to accept greater responsibilities". As already noted, these factors were the very same ones which Bé1anger and Bérard cited were lacking in Complainant and which moved them to reject Complainant's candidacy. Not only does the "potential" factor appear in the Reports themselves but as appears from Exhibit R-1, Djandji makes particular reference to it in his covering letter of February 2, 1987.

The dissimilarity in the 2 sets of reference Reports leads us to re-examine the principal documents which emanated from the Bank in July and August 1986, which comprised a 6-page Job Description (Exhibit HR-4) and a 7-page Guideline (Exhibit HR-6) exchanged between the Respondent and its Headhunter Djandji. There is neither mention nor reference of any kind to the issue of "potential"; to the issue of "moving to a higher or superior position"; or, to the issue of "preparedness to assume greater responsibility beyond that of Director of Respondent's Legal Affairs Department".

As already seen, the evidence reveals that during her recruitment, Rémillard was not obliged to meet with either of Respondent's 2 chief executive officers. It is in that context that the presence or absence of the quality of "potential" as between Complainant and Rémillard

ought to be considered. Respondent's witnesses explained that it wasn't necessary for Rémillard to have met Bélanger during her recruitment since she had previously worked with him as

../39

his Executive Assistant when he was President of the Montreal Stock Exchange some years earlier. They therefore knew each other. Considering, however, that the position of Director of a Legal Affairs Department is considerably different in scope and carries with it greater onerous responsibility, compared to that of an Executive Assistant, one would think that after a lapse of a few years some kind of meeting or interview with Rémillard would have been warranted.

Bélanger however satisfied himself as to Rémillard's qualifications for the position of Director of Legal Affairs by telephoning her then current employer for a reference. It is to be noted that Bélanger took no such initiative with respect to checking Complainant's references. The fact that following her appointment she quickly ascended to the position of Corporate Secretary and Vice-President of Public Relations in addition, reveals nothing as regards her performance in the position of Director of Legal Affairs, where she did not remain long.

Finally, notwithstanding the Respondent's insistence that their hiring process involved a multi-step hiring process whether it consisted of 3, 4 or 5 stages, Respondent's Attorneys conceded (T.p. 1001) that Rémillard was hired only after the 2nd stage of the process had taken place. In the overall, the Tribunal is left with the conviction that insofar as the relative candidacies of Complainant and Rémillard are concerned the competition, if one wishes to call it that, bearing in mind what the Tribunal has said earlier, was not a fair contest in that the candidates were not subjected to the same criteria but rather to a double standard and differential treatment. They were certainly not competing, as it were, on the same level playing field.

../40

(h) Top Executives veto power:

The evidence reveals and it was not denied that Châtillon had the authority to carry out the recruitment process and to select the successful candidate.

Dia : (T.p. 312)

Q. Est-ce que dans le dossier qui nous intéresse vous saviez qui avait la responsabilité de l'engagement de la personne qui éventuellement serait engagée?

R. C'était le consensus qui allait se dégager de la réunion... enfin, Louise Châtillon était la cliente, c'était la vice-présidente au service juridique. Donc, la décision venait d'elle."

Indeed, Châtillon herself acknowledged that her choices were always respected by top management:

Châtillon: (T.p. 659)

"..... et je lui avais indiqué qu'habituellement ces rencontres n'étaient qu'une formalité et que nos choix étaient respectés par la direction."

Respondent has argued that its top Executives, its Chairman and Chief operating officer possessed inherent authority to override Châtillon's preference or choice in virtue of the fact that final authority usually rests with a corporation's Chief executives. This proposition is not disputed. However, such proposition must be examined in the context of the circumstances of this type of case.

The Tribunal has already drawn attention to the evidence which revealed that the various stages of the hiring process varied from 3 to 5 stages - none of which were ever ascertained with any degree of clarity. The disparity between the number of steps referred to as well

../41

as whether meetings with the Respondent's 2 top Officers were or were not essential components of the hiring process, were also never established with any certainty. And, as the proof revealed, Complainant was subjected to meetings with both; Rémillard with neither.

When questioned by Commission Counsel as to why he wanted Complainant to-be seen by Bérard (particularly in light of the fact that since Bérard was out of town, it was not intended for them to meet in the first place (Exhibit R4, p.1, last paragraph), Bélanger responded that one of the reasons was that Bérard would be more involved in legal affairs:

Bélanger: (T.p. 714)

Q. Pourquoi monsieur Bérard, [stenography error - should read Bélanger] pourquoi vouliez-vous que monsieur Bérard le voit?

R. Bien, pour un tas de raisons. La première c'est que en tant que chef des opérations c'est beaucoup plus lui que moi qui aurait été impliqué à suivre et à diriger les affaires qui pourraient passer par les mains du directeur des Affaires juridiques."

However, when Bérard was asked about that, he replied:

Bérard: (T.p. 756)

"Si Me Gauvreau avait été embauché par la Banque il n'aurait pas travaillé dans mon giron."

In fact, the proof reveals that neither Bé1anger nor Bérard had much awareness or contact with the operations of the Legal Affairs Department. Clearly, it was Châtillon, Vice-President in charge of Legal Affairs who was fully aware of and had a first hand knowledge of

../42

Respondent's Legal Affairs Department and the problems which beset it.

Taking an overview of the proof as a whole one is left with the distinct impression that the available position which the Respondent's Headhunter and its Vice-President in charge of Legal Affairs sought to fill, was not the same position which Respondent's top Executives seemed to be recruiting for. They seem to have been on different wave lengths and operating at cross-purposes.

Little wonder that while Complainant, to use the words of Respondent's Legal Counsel, "had beaten the competition" (T.p. 1145), he was rejected for the position because, in essence, Respondent's 2 top

Officers were not convinced that Complainant possessed the potential to move higher, nor possessed the qualities of leadership, drive, entrepreneurship or was not someone who was interested in becoming Vice-President of the Bank. The essence of Respondent's position is best reflected by its Legal Counsel's closing argument:

Mtre. Monette: (T.p. 1145)

"....Gauvreau a gagné sa compétition, il a battu tous les candidats qui existaient quand il s'est présenté devant Louise Châtillon. Il a gagné, il a passé à la dernière étape, il a été candidat finaliste, puis il a perdu en finale.

"A-t-il perdu au profit de quelqu'un d'autre?" Réponse: non. C'était pas..il n'y avait pas deux personnes, un en chaise roulante, l'autre pas en chaise roulante, et on a pris celui n'était pas en chaise roulante.

Au contraire, quand sa candidature a été refusée on a recommencé à zéro une nouvelle démarche, annonce dans les journaux, et cetera. Il n'a pas perdu au profit de quelqu'un d'autre, il a été le meilleur,

../43

mais c'était pas assez bon encore. Ca, c'est correct, puis ga c'est une autre affaire, mais il n'a pas perdu au profit de quelqu'un d'autre."

The Tribunal interprets that to mean that although Complainant beat out the entire list of candidates for the job, he did not win it, not because there was someone else with superior qualifications, but rather because, as good as Complainant was, he simply was not good enough.

While the Tribunal accepts Respondent's proposition that CEOs possess, as it were, veto power, in the hiring process, such discretion cannot be exercised in an arbitrary fashion and free of accountability insofar as human rights legislation is concerned.

(i) Best candidate in the market place:

Throughout the testimonies of Respondent's 2 top Executives, they state time and again, that Complainant was not the best available candidate

in the market place. Thus, despite having been the finalist from among the large list of candidates and notwithstanding being the evident choice of and receiving the approbation of Châtillon; Djandji; Bilodeau; and Roch all of whom had been involved at one stage or another in the hiring process up to the point of the meetings with Bé1anger and Bérard, Complainant was rejected. Bélanger testifed (T.p. 716) that Châtillon's objective was not merely to recruit a Director of Legal Services but to hire the best one in the market place.

However, here again, when one examines the initial letter of exchange of August 7, 1986 (Exhibit HR-6) or other pertinent data relating to the recruitment, nowhere

../44

is there any indication or reference to the fact that the eventual successful candidate need necessarily be "the best one in the market place". From the point of view of salary, for example, the amount offered, in the high sixties, appears to be within the norm or range for the position, which leaves one to question what was there in the attributes or benefits of the job which would ensure that it results in attracting the supposedly best available candidate in the market place? There was no proof made on this point. Nor was it ever explained to the Tribunal's satisfaction what were the components which made up the best available candidate in the market place. The Tribunal has concluded that the reference to the "best available candidate in the market place" was a subjective one and existed only in the eyes of the beholder. However, on the basis of the proof adduced in this case, it was not objectively determined with any degree of certainty.

Complainant's lack of credibility:

This case turns primarily on a question of fact and the credibility of witnesses is, naturally, of the utmost importance. It therefore comes as no surprise that Respondent's Attorneys mounted a vigorous attack on Complainant's credibility. The main thrust of this attack was centered on Respondent's contention that Complainant's reply to what appears to have been a simple question, was false and constituted an attempt by Complainant to mislead the Tribunal. It arose from the following exchange during the Hearing on September 5, 1990.

"Gauvreau: (T.p. 169)

Q. Je comprends que encore aujourd'hui vous êtes chez Heenan Blaikie?

R. C'est exact."

../45

Respondent's Attorneys allege that they subsequently put a similar but more exacting question to Complainant, namely, whether Complainant was still in the employ of Heenan Blaikie. Respondent further alleges that Complainant gave a similarly affirmative reply. Unfortunately, due to a mechanical malfunction in the official stenographer's recording equipment some 15 minutes of hearing testimony were left un-recorded, including that portion of the evidence pertaining to the follow-up question put by Respondent's Attorney and the Complainant's reply, as alleged by Respondent.

The Tribunal invited Respondent's Attorneys to recall the Complainant to the stand and reput their follow-up question but they declined to do so. Under the circumstances the Tribunal saw no alternative to allowing the record to remain as it stands.

However, as regards the substantive issue as it relates to credibility, the Tribunal, having reviewed the evidence pertaining to this issue, has concluded that Complainant's answer to the particular question put to Complainant pertaining to his association with Heenan Blaikie, was neither false nor intended to mislead. At the very least the exact nature of the ongoing relationship between Complainant and Heenan Blaikie, at the time of the Hearings in the present case, was sufficiently unclear and unusual enough to the extent that Complainant's affirmative reply, if not absolutely or technically correct, was not false either.

Blaikie's testimony indicated that at the date of the Hearing, Complainant was still receiving his regular severance remuneration which was to continue until January 1, 1992 and that he was still entitled to make use of the firm's telephone number. Moreover, Heenan Blaikie's firm indicated that they wished to assist Complainant in finding a new position. Blaikie was not certain as to when

../46

Complainant actually left the firm's premises. Under the circumstances the Tribunal is unable to conclude that Complainant's answer was false or that it was made with an intention to mislead. Moveover, the Tribunal is of the view that in having given the answer which he did Complainant believed it to be true and he had reason to so believe.

In any event, the Tribunal fails to see how this issue affects or harms Complainant's credibility as regards his evidence pertaining to the present complaint. In fact, the Tribunal found that in presenting his evidence, the Complainant was a sincere and truthful witness and is deserving of credibility.

(k) Complainant's Lack of Mobility:

A considerable amount of testimony as well as argument relating to Complainant's mobility for the position to be filled was taken up at the Hearings. Unfortunately, a large measure of the time spent on this issue was, in the view of the Tribunal, due to the ambiguity of the word or term "mobility". It consequently led to a misunderstanding between the parties as to what interpretation each of them attributed to that word or term.

According to the Job Description and other related written outlines or terms of reference about the job as determined by the Respondent and furnished to their Headhunter, the position to be filled was at the Respondent's head office in Montreal. Some reference is made in the data with respect to providing for communication with or travel to regional offices at Toronto and New York for purposes of budget, legal matters and serving on various committees of the Bar and Bankers Association. There are no other references in any of the

../47

written data produced as exhibits, which relate to the functions of the position to be filled, which call for any other type of or significant travel to be carried out by the Respondent's Director of Legal Affairs.

Nevertheless, during the course of his meeting with the Respondent's C.E.O., Complainant was asked whether he was mobile. Complainant, no doubt aware and possibly sensitive about his physical disability, replied that he was confined to a wheelchair. This reply was given notwithstanding that the evidence established that Complainant was fully mobile and not restricted in any way in his movement and was mobile by means of automobile and airline.

Bérard, however, reacted somewhat negatively to Complainant's reply as appears from the following exchange:

Bérard: (T.P. 748)

Q. Alors on va les épulecher une à une. Vous avez parlé de mobilité. Est-ce que c'est quelque chose que vous avez parlé avec monsieur Gauvreau?

R. Oui, c'est quelque chose qui m'a frappé en fait dans la rencontre avec monsieur Gauvreau, ceci dit sans méchanceté. J'ai posé très candidement à Me Gauvreau "êtes vous mobile", et je me souviens très bien que Me Gauvreau m'a dit "je suis en chaise roulante" et je me souviens d'avoir ajouté "Monsieur Gauvreau, le fait que vous étes en chaise roulante clest votre problème, c'est pas le mien".

Ca m'a surpris que ma question de mobilité, j'entendais par mobilité bien sûr parce qu'on avait parlé un peu ensemble avant, le désir, la capacité, le vouloir d'être partout, d'aller à l'extérieur pour la Banque. Vous savez, quand vous allez chercher des talents à l'extérieur vous

../48

avez besoin d'une personne qui est apte et qui a la volonté de pouvoir assumer des fonctions pas seulement à Montréal, la Banque est partout dans le monde, il me faut des gens qui ont le désir d'être à Hong Kong aujourd'hui, d'être à New York demain. Alors c'est dans cette veine que jàvais posé cette question, et la réponse m'avait laissé perplexe je vous l'avoue.

The Tribunal does not believe that Complainant's reply to Bérard's question warranted the negative reaction exhibited by Bérard. Whether the question relating to Complainant's mobility put to him by Bérard was intended to refer to his functional mobility, which appears to be what Bérard had in mind, as distinct from his physical mobility, which is what Complainant thought Bérard had in mind, should have been irrelevant since, on the one hand, there was ample evidence that Complainant was fully physically mobile, albeit confined to a wheelchair, while on the other hand, the question of mobility as it relates to travel to such exotic places as Hong Kong "and the world", really seemed to be outside the

parameters of the functions of the Director of the Legal Affairs Department as defined by Respondent.

The Tribunal sees no basis for concluding that Respondent's C.E.O. was justified in rejecting Complainant's candidacy on the ground of his alleged lack of mobility, of whichever kind, functional or physical.

(1) Complainant's Academician Nature:

Among the different negative perceptions held by Respondent's C.E.O. about Complainant was that he was too much of the "functionary" type or too much of an "Academician" to warrant the position of Director of the Respondent's Legal Affairs Department. Bérard readily

../49

acknowledged that he used those terms to describe Complainant when he was interviewed by the Commission Investigator, prior to the Hearing.

Bérard: (T. p. 769)

Quelles étaient vos impressions apres cette rencontre? Que M. Gauvreau était trop théoricien. Ce n'était pas un "doer". Il n'avait pas le sens pratique nécessaire a l'institution."

Bérard: (T. p. 770)

"R. La personne qui m'a interviewé m'a mentionné que j'avais utilisé le mot "théoricien". C'est effectivement exact.

Q. Maintenant, est-ce que, je sais que ça fait longtemps encore une fois, est-ce que dans les conversations que vous avez eues subséquemment a la rencontre avec Me Châtillon vous lui auriez dit que votre impression c'était que Gauvreau était trop théoricien?

R. Je répète, quand je fais appel à ma mémoire, quand je fais appel aux faits je pense avoir employé le mot "fonctionnaire". Non seulement je pense avoir, je suis certain dàvoir mentionné a madame Châtillon que Me Gauvreau avait un côté fonctionnaire qui ne cadrait pas avec la fonction."

Bérard: (T. p. 774)

Me DUVAL: Tout simplement la, parce que monsieur le Président avait des questions, cette phrase-la vous l'avez dites: "C'est un académicien"?

R. Ecoutez, j'ai signé le document, alors de toute évidence je reconnais avoir employé ce qualificatif."

Much less evident from the evidence is whether Bérard also referred to the Complainant as a "theoretician". In all

../50

likelihood it was a term which he may have used during his meeting with a Commission Investigator.

Be that as it may, the 3 terms all appear to be interchangeable and connote the same style or personality. What is less certain, however, is where and on what basis this perception of Complainant was obtained. It certainly did not arise or emanate from the Headhunter's confidential Report (Exhibit HR-7) in which Complainant was described as possessing leadership qualities, perseverance, dynamism and tenacity, all of which qualities would appear to mitigate against the characterizations attributed to him by Bérard.

Moreover, Complainant's Performance Appraisal, issued by Bank of Montreal, his previous employer, leaves no doubt that Complainant's personal attributes and potential are anything but "functionary", "academic" or "theoretical", in nature, as appears from the following passages:

(Exhibit HR-1, P. 4)

"Personal Attributes

Marcel's attention to detail, organizational skills and management personality justify promotion to a higher senior management role in the Legal Department."

"Potential

Marcel's performance over the last three years, coupled with the major contribution he has made to the department in the last year reflect abilities to assume administrative and legal

responsibilities at the highest levels of senior management with the Legal Department."

../51

Respondent's Attorneys attempted to undermine the impact of this Appraisal by suggesting that the Bank of Montreal could afford to be generous in their assessment of Complainant since the Report was prepared in October 1984 shortly before Complainant was to leave their employ. However, Respondent's characterization of the evidence on this point is somewhat-divorced from the facts for at least 3 reasons.

First, although the Appraisal was issued in October 1984 it is in evidence that the Bank of Montreal had invited Complainant in June of 1985 to move to Toronto as Assistant General Counsel. This would appear to indicate that the Bank of Montreal stood firmly behind their earlier assessment of Complainant.

Secondly, Châtillon's "Off the Record" confidential notes (Exhibit R-4, p. 3) confirms that at about the time of Complainant's second meeting with Bélanger, she personally contacted Derek Jones of the Bank of Montreal, one of the signatories of the Appraisal, who gave Châtillon very good references about Complainant. Concurrently with that, Châtillon recorded in her notes that she requested Me. Coulombe, an outside Attorney of the firm Desjardins, Ducharme, to conduct in a discreet manner, a search or survey of references about Complainant in the market place. She notes that these references were very good.

Third, there was no proof made to support Respondent's Attorneys' suggestion that the Bank of Montreal would issue an inaccurate or misleading Appraisal about Complainant with the intention of misleading a prospective employer or that the Bank of Montreal had anything to gain by doing so.

In light of this and other relevant evidence, the Tribunal is obliged to conclude th-it Bérard's

../52

characterization of Complainant as not being "a doer", is hardly substantiated or convincing.

(m) Absence of Intention:

Respondent has argued that there was no evidence of intention on the part of Respondent to discriminate against the Complainant. Moreover, they suggest that it is somewhat inconceivable and hardly likely that persons such as Respondent's Chairman and Chief Operating Officer, pillars of the community would engage in discriminatory behaviour. It was established in proof that both Bé1anger and Bérard have on numerous occasions lent their support to humanitarian and philanthropic causes. Indeed, in 1987 Bérard even headed the fundraising campaign of the Association of Parapelegics of which Complainant has been a member of its Board of Directors for many years.

Following a gradual evolution, Canadian Human Rights Legislation is now drafted and intended to be interpreted in a manner which holds that it is not necessary to prove an intention to discriminate in order for there to be a violation of human rights legislation. This dictum clearly results from the Supreme Court of Canada Judgments of O'Malley (supra) and K.S. Bhinder v. Canadian National Railway (1986) 7 CHRR D/3093 and followed in Action Travail des Femmes vs. Canadian National Railway (1987) 1 SCR 1114, where the Chief Justice stated (at p. 4138):

"...the Supreme Court in the Simpson-Sears and Bhinder decisions has already recognized that Canadian human rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well. In particular, the prohibition of discrimination in the Canadian Human Rights Act has been held to reach situations of "adverse effect discrimination": Bhinder] But unintentional discrimination

../53

in another form, with potentially greater consequences in terms of the number of people who are disadvantaged ..."

The principle that it is not necessary to prove that discrimination was intentional in order to find that a violation of human rights legislation has occurred was also applied in Pasqua Hospital et al v. Beatrice Harmatiuk (1987) 8 CHRR D/4242; Johanne Morisette V. Canada Employment and Immigration Commission (1987) 8 CHRR D/4390

and Corlis V. Canada (Employment and Immigration Commission) (1987) 8 CHRR D/4146.

As was stated in Sandra Hapeluch v. Walter Smith (1986) 8 CHRR D/3915, what the Tribunal has to decide in the present case is not whether or not Bé1anger and Bérard and consequently the Respondent, deliberately wanted to discriminate against the Complainant, but whether, in fact, by their actions, they did.

It is therefore not necessary under the law for the Tribunal to arrive at a finding that the Respondent and its officers had intended to discriminate against Complainant in order to conclude that they have violated the Canada Human Rights Act.

(n) investigators Recommendations:

Although limited references were made by the Parties with respect to the Investigation conducted by an Investigator pursuant to Section 44 of the Act, the Report was not produced into evidence. However, Respondent submitted that it was the Investigator's conclusion that the Complaint was not well founded and that the Canadian Human Rights Commission should not have authorized this complaint to proceed to a Hearing before a Tribunal.

../54

It is, however, clear from a reading of the Act, that the Investigator's Report is in no way or manner intended to bind the Tribunal. The Investigator's Report, moreover, having been submitted to the Canadian Human Rights Commission, it was in the latter's discretion to act in accordance with its jurisdiction as set forth in this Section.

The Tribunal therefore comes to its decision without having taken cognizance of or made reference to the investigation carried out or the Investigator's Report submitted to the Commission. While Respondent's Attorneys are free to be critical of and to question the decision-making powers of the Commission, it is not to this Tribunal that these criticisms ought to be directed.

Discriminatory practices cases do not generally lend themselves to "smoking gun" solutions. People who commit discrimination, intentionally or unintentionally, generally do not leave their calling card. It is not fashionable, nor for that matter legal, to engage in illegal discrimination and therefore no one readily admits to it (unless

they have a BFOR defense to offer). Frequently, these cases must be resolved by means of circumstantial evidence or on the issue of credibility.

The Tribunal in the present case, however, considers the following three particular aspects of the evidence as qualifying, if not quite actually as a "smoking gun", at least appears to border on it:
(1) The main criticism levelled against Complainant seeking to justify his rejection for the position essentially boils down to a claim that he did not appear eager or even interested in assuming a higher position at the Bank whether it be in the area of the Bank's international operations or as a Vice-President of the Bank. The evidence was contradictory as to whether

../55

Complainant was offered either. This led the Respondent's 2 top officers to characterize Complainant as lacking in ambition, drive and potential.

Nowhere, however, in any of the evidence, particularly the documentary evidence, does there appear one iota of reference to these factors being a condition, function or requirement for the position until that is, after Complainant's rejection and upon Rémillard being recruited.

(2) The Respondent's engagement of Guy N. Djandji as its Headhunter by letter August 7, 1986 (Exhibit HR-6) began the recruitment process to hire someone to fill the position of Respondent's Director of Legal Services. Among the conditions of his engagement, the Respondent agreed that Djandji's proposed fee would be $ 16,500.00 to cover the "research, recruitment and selection", (page 6). it was understood that his remuneration would be invoiced in 2 installments of $ 8,250.00 each - the first to be submitted at the end of August, and the second at the time the Respondent would finally select its candidate. Djandji, as appears from the evidence, was an integral part of the recruitment process and maintained a close liaison with both Complainant and Respondent's Vice-President Châtillon as the hiring process unfolded.

An examination of the 2 Accounts submitted by Djandji to Respondent (Exhibit T-3) clearly indicates that the first Invoice was submitted on September 8, 1986, while the second Invoice was submitted on November 3, 1986 just about at the time of Complainant's final meeting with Respondent's Vice-President Châtillon. A satisfactory explanation has not been provided to the Tribunal as to why the second and final Invoice would

have been submitted by Djandji to the Respondent at the time it was if the Respondent had not already made its final choice. The fact

../56

that Respondent only saw fit to pay the second installment Invoice on February 6, 1987 does not lessen the significance of Djandji's billing dates.

(3) Exhibit R-4, "Personal & Confidential Notes & Off the Record" concerning Complainant prepared by Respondent's Vice-President Chatillon at some undetermined date following Complainant"s rejection, was produced following Respondent's objection. A debate then ensued as to whether the document was protected by lawyer-client privilege of confidentiality and was therefore not subject to production. The Tribunal ruled that the document was not so protected but the Exhibit was finally produced by consent of all parties.

In the Tribunal's view, notwithstanding that the document was prepared with a view to Respondent possibly making use of its contents in a defence to any future claim by Complainant, it can to that extent be deemed to be a self-serving instrument. The Tribunal nevertheless considers its contents as mitigating against Respondent's version of the facts in respect of many issues which have been dealt with in this case both as regards what is contained in this Report as well as what was omitted.

Certainly, much of its contents, not only as regards facts, real or imagined, but its reflections and arguments, appear to the Tribunal to be quite inconsistent with the actual conduct of the Parties during the events in question. Returning to the question of credibility, the Tribunal is inclined to favour the testimony of Complainant and the contents of the other documentary evidence produced, particularly in those instances where they are in conflict with Exhibit R-4. The Tribunal was not satisfied with the testimony of Châtillon regarding the circumstances leading up to the preparation of this document and the contents itself. In the opinion of the it appears to be a case of too much selective

../57

in a number of instances during their testimony Respondent's 2 top Officers declared that Complainant simply did not possess the proper "corporate profile". Unfortunately, they never defined nor were they called upon to explain exactly what they meant by the term "corporate profile". Be that as it may, such perception either singularly or in conjunction with their other characterizations or perceptions of Complainant, i.e., lacking potential, drive, ambition, entrepreneurship, and leadership, do not suffice, in the Tribunal's opinion, to justify their rejection of Complainant's candidacy for the position of Director of Respondent's Legal Affairs Department in light of the preponderance of other contradictory evidence which is to be preferred.

IX. CONCLUSION:

In view of all of the foregoing the Tribunal is persuaded that the reasons and explanations provided by the Respondent in response to the complaint laid in the present case are not, on the balance of probabilities, reasonable or acceptable. Respondent has failed to satisfy the Tribunal that Complainant was rejected for the position of director of its Legal Affairs Department for reasons other than illegal discrimination.

The Tribunal has concluded that the reasons and explanations given by the Respondent were implausible and pretextual and merely constituted a pretext for the illegal discrimination carried out against Complainant. In any event, the Tribunal need not find that that was the sole reason, but it surely, in the opinion of the Tribunal, was the proximate cause, a very substantial part of the reason.

../58

Therefore, having considered the evidence and the arguments of Legal Counsel and the jurisprudence and authorities cited by the Parties, the Tribunal:

DECLARES that the Respondent National Bank of Canada has illegally discriminated against the Complainant Me. Marcel Gauveau by having refused to employ him as Director of its Legal Affairs department because of a prohibited ground of discrimination, namely, his physical disability, thus violating Section 7 of the Canadian Human Rights Act.

Since the Parties agreed at the opening of the Hearings that the issue of remedy, if required, was to be held in abeyance pending a determination of the well-foundedness or otherwise of the complaint, the

Tribunal retains jurisdiction to hear evidence with respect to remedy,following the expiry of a delay of 30 days of the present decision, at the initiative of either party.

In conclusion, I would be remiss in my duty were I not to commend Legal Counsel of both parties for their very thorough preparation and able presentations of this case. Their efforts were of great assistance to the Tribunal.

Dated at Montreal, December 6, 1991

WILLIAM I. MILLER, Q.C.
TRIBUNAL