

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

PHYLLIS P. McAVINN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STRAIT CROSSING BRIDGE LIMITED

Respondent

REASONS FOR DECISION

T.D. 13/01

2001/11/15

PANEL: Pierre Deschamps, Chairperson

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I. INTRODUCTION

[1] This case arises out of a complaint alleging discrimination on the basis of sex (gender) contrary to section 7 of the *Canadian Human Rights Act* (the 'Act'). More specifically, the complainant, Ms. Phyllis McAvinn, alleges that, in 1997, she was not hired as a bridge patroller on the Confederation Bridge because she was a woman.

II. BACKGROUND

[2] Ms. Phyllis McAvinn was born in Summerside, Prince Edward Island. She obtained her High School diploma in 1985. In July 1985, she started working for Marine Atlantic Ferry Service, the largest single employer in the Borden/Carleton region in Prince Edward Island. She worked for Marine Atlantic for a period close to 12 years. During her employment with Marine Atlantic, she

worked as third cook, second cook, waitress, cashier, engine room assistant, dockhand and ordinary seaman (deckhand) (Exhibits C-1 and C-2).

[3] In 1993, the announcement was made that a bridge would be built to link Prince Edward Island to the mainland. The Confederation Bridge project involved the participation of different entities: Strait Crossing Development Inc. (SCDI), the original contractor, Strait Crossing Joint Venture (SCJV), the company responsible for the construction of the bridge, Strait Crossing Bridge Limited (SCBL), the company ultimately responsible for operating the bridge after its construction and, finally, the three shareholders of these companies, namely Strait Crossing Inc. (SCI), G.T.M.I. (Canada) Inc. and Ballast Needham Canada Limited (Exhibit R-15).

[4] The construction of a fix link between PEI and the mainland meant the end of the ferry service and the laying-off of some 600 people. The shutting down of the ferry service in turn meant that 600 or so people stood to lose their jobs at the same time and that the great majority of them would be looking for a job.

[5] Like many other Marine Atlantic employees, Ms. McAvinn did not believe at first that the fixed link would ever happen and that the ferries would be shut down. It is only when she saw the bridge structure go up in 1995 that Ms. McAvinn started realizing that she would be losing her job upon the completion of the bridge.

[6] Under the Northumberland Strait Crossing Project Regional Benefit Agreement, signed October 7, 1993, by SCDI, SCI, Northern Construction Company Ltd., G.T.M.I. (Canada) Inc. and the Government of Canada, Marine Atlantic employees were awarded a right of first refusal with respect to job openings on the Confederation Bridge. Clause XV of the Agreement (Exhibit R-1) reads as follows:

"Provide the right of first refusal for all permanent jobs relating to the operation of the Facility to employees of Marine Atlantic Inc. whose jobs will be made redundant by the operation of the Facility provided such employees have the qualifications or may be trained for the positions being offered".

[7] As a Marine Atlantic employee, having been with the company since 1985, Ms. McAvinn was covered by the Agreement and was entitled to preferential treatment in securing a job with SCBL.

[8] In order to provide guidance to Marine Atlantic employees who stood to lose their jobs, a transition committee was struck in 1993 by Marine Atlantic. It was comprised of people from Marine Atlantic, the different unions representing Marine Atlantic employees and the Government of Canada. The committee's mandate was to look at the possibilities of work placements for the soon to be displaced Marine Atlantic employees. SCBL had no representatives on the committee but some of its representatives were invited to attend some of the committee's meetings for information purposes.

[9] Marine Atlantic further provided its employees with the possibility of retraining in an area of their choice. Before an employee could take time off from the company, he had to obtain the

company's authorization. Marine Atlantic paid the retraining tuition fees; the fees became taxable income for the employee. While retraining, a Marine Atlantic employee would receive up to 80% of his salary, a portion being Employment Insurance Benefits.

[10] Ms. McAvinn testified that, in the spring or summer of 1996, she went over to see Mr. Richard Gillis at Marine Atlantic. It stems from the evidence that Mr. Gillis, who, according to Ms. McAvinn, worked for HRDC, was the person in charge at Marine Atlantic for orienting Marine Atlantic employees towards new jobs.

[11] Ms. McAvinn testified that she asked him what were the jobs available on the bridge. Mr. Gillis named off jobs from a list he had. In her testimony, Ms. McAvinn stated that, when he mentioned the job of bridge patroller, she made it clear to him that it was the job she would like to get. According to Ms. McAvinn, Mr. Gillis told her that she had to go to school for that, more specifically that she needed to take the Law and Security course at Holland College (Exhibit C-5).

[12] In July 1996, Ms. McAvinn, after having obtained the authorization of Marine Atlantic, registered at Holland College for the fall session of the Law and Security course. It stems from Ms. McAvinn's testimony that some employees at Marine Atlantic who wanted to take the Law and Security course were not able to do so in the fall of 1996 because Marine Atlantic could not give them or would not give them the time off. This seems to have been the case for the divers employed by Marine Atlantic. Ms. McAvinn testified that she herself had no problem getting leave from Marine Atlantic to attend Holland College.

[13] The evidence establishes that, in September 1996, Ms. McAvinn started the twenty-six week Law and Security course at Holland College. According to Ms. McAvinn, forty-eight students took the Law and Security course, amongst them many women. Seven of the students in the Law and Security course were Marine Atlantic employees. They were Kevin Praught, Les Thomas, Leigh MacKey, Jamie Hagan, John Profit, Andrew Noonan and herself. The course was said to be both physically and academically very demanding.

[14] According to Ms. McAvinn, the fact that there were only seven Marine Atlantic employees in the Law and Security course led her and the others to believe that they stood a very good chance of landing a job as bridge patroller on the Confederation Bridge. Ms. McAvinn testified that she did not know at the time how many bridge patroller positions might be available.

[15] It stems from the evidence that the Law and Security course offered by Holland College covered a broad range of topics. In fact, it covered areas such as surveillance and airport security, asset protection, the criminal code, firearms training, spray training, baton training, handcuffs, speed cuffing, defensive tactics training, how to deal with difficult people, verbal judo, suicide attempts, bomb threats, first aid, law, human resources, weapons control, self-defence, surveillance tactics, effective note taking, dangerous goods, workplace hazardous material information sheets and communication skills.

[16] Ms. McAvinn testified that, while attending Holland College, she herself took a course on written reports. According to her testimony, the course covered things such as accident reports,

incidents and memos. Ms. McAvinn further stated in her testimony that, in the course, she was taught how to write a report and how to take down notes, times, dates, facts, etc.

[17] The evidence shows that, in October 1996, Mr. Dave Holmes, a former RCMP officer, was invited to Holland College as a guest speaker by the course instructor to address the Law and Security class.

[18] Mr. Holmes had assumed on April 1, 1994, the position of Security Manager with SCJV. Initially, Mr. Holmes had been hired by SCI but he was subsequently seconded to SCJV. According to his testimony, he was never an employee of SCBL and was at no time involved with SCBL in the bridge operations, nor in the hiring of bridge patrollers, the posting of jobs, the interview or the selection processes.

[19] Mr. Holmes testified that, when he visited Holland College in October 1996, he was informed that, in addition to regular students attending the Law and Security class, there were a couple of persons from Marine Atlantic taking the course.

[20] According to Mr. Holmes' testimony, the assumption was, in October 1996, that the bridge would have its own police authority. He testified that he was not personally aware of the discussions that were going on at the time as to the type of function that was to be conducted on the bridge. It was only in late December 1996 that he was advised that the policing on the bridge would be done by the RCMP.

[21] Thus, under the assumption, in October 1996, that the bridge would have its own police authority, Mr. Holmes advised the class that it would be beneficial to anybody applying for the job to have the Law and Security course or the Police Academy course. According to Ms. McAvinn, Mr. Holmes told the class that those wanting to work as bridge patroller had to have the Law and Security course. Ms. McAvinn is corroborated on this by Mr. Jamie Hagan who was present when Mr. Holmes addressed the Law and Security class.

[22] Without deciding if Mr. Holmes made such a statement, it must be noted here that, at the time of Mr. Holmes' visit to Holland College, the job description for the bridge patroller position had not yet been completed. It was only completed in January 1997. In addition, it must be noted that, at the time, it was assumed by all that both the police and security functions on the Confederation Bridge would be part of the bridge patroller job. This ended up not being the case. Thus, one cannot rely on Mr. Holmes' statement as establishing that the Law and Security course was a requirement for the bridge patroller position.

[23] Ms. McAvinn graduated from Holland College on March 22, 1997. The deadline for applying for the bridge patroller position was March 27, 1997. Ms. McAvinn sent in her application on March 25, 1997 (Exhibit C-8). Ms. McAvinn testified that the only job she sought in March 1997 was the bridge patroller position at SCBL.

[24] According to Ms. McAvinn's testimony, it was her daughter who typed her application but she was the one who told her daughter what to put in her application. With her application, Ms. McAvinn sent in a resume. Both the application form and the resume were dropped off at SCI.

Ms. McAvinn however forgot to send in the letters of reference she had obtained in the past (Exhibits C-9 to C-14).

[25] The evidence establishes that, overall, 243 applications were received by SCBL. The evidence further reveals that there were about 35 jobs available for the 243 applications received. Amongst the 35 jobs available, there were 9 bridge patroller jobs, eight full-time and one part-time.

[26] The evidence further shows that people applying for a job with SCBL could apply for more than one position (Exhibit HR-7). In addition, the evidence shows that some people who had applied for one position were hired for another position. As for Ms. McAvinn, the evidence shows that she applied for only one position, that of bridge patroller.

[27] According to the evidence, everyone who put in an application was given an interview and subsequent to that, the applicants were screened down to a second interview.

[28] On March 22, 1997, before the interviews were conducted, additional training through the School of Justice at Holland College was made available to any future successful applicants for a bridge patroller position who did not have the proper training. The evidence shows that a short version of the Law and Security course called the First Responder's course was arranged by SCBL; a WHMIS (Work Hazard Material Information Systems) and Dangerous Goods course was also set up, as well as a course on how to deal with disabled individuals.

[29] Ms. McAvinn was first interviewed by Mr. John Forgeron. The interview took place in Mr. Forgeron's office at the SCJV construction building on or about April 1, 1997. According to Ms. McAvinn, the interview lasted between 10 and 15 minutes.

[30] The evidence shows that Mr. Forgeron had been hired as Human Resources Manager by SCI in January 1994. As Human Resources Manager, he was responsible for all human relations functions at the Confederation Bridge project during construction. At the time, he had around 20 to 25 years of experience in the human resources field. In 1997, Mr. Forgeron was seconded by SCI to SCBL to help out in the selection process of employees.

[31] According to Mr. Forgeron's testimony, he was never involved in the assessment of the personnel needs for the bridge operations, nor in the determination of the various positions which might be available in relation to the bridge operations, nor in the job description process. He was only involved in the interview process for staffing purposes.

[32] What took place during Ms. McAvinn's first interview is best described in the narrative she wrote in May 1997, shortly after she was informed that she was not going to be hired by SCBL as bridge patroller (Exhibit C-22). Her oral testimony did not significantly differ from that narrative. Her written account of the interview was never challenged nor disputed.

[33] In her narrative, Ms. McAvinn describes how the interview proceeded in the following terms:

The first interview I had was with Mr. Forgeron. He didn't ask me many questions. He did ask me how I liked the Law and Security course. I told him that I really enjoyed the course. I told him how I forgot to put my written letters of referral in with my resume and I asked him if he wanted them. He replied "No, after all, it's not like your going to give me a bad refferal letter about yourself." We both sort of laughed. I said " I suppose not, but sometimes referral letters are sealed, and I have had bosses give a potential employers letters like that and I didn't know if it was good or a bad referral." He smiled and said "No, that's o.k., I'll take my chances on the phone."

I explained I put on my application that I could be available for work in the month of May, but further explained, I can't really be available until the end of May, the day my job ended at Marine Atlantic. If I did, I could lose my severence package. He said not to worry about that, because Strait Crossing and Marine Atlantic were working together. He also said that it wouldn't affect me.

He had asked me what would I say was my downfalls. I replied to him that I would have to say "Computers", I explained to him that I had only started computers this year and wasn't overly great with them. He said that wouldn't be a problem with them. He them asked "What would you say was a good quality, about yourself?" I said that I was a good worker and that I'm a frank person. I them said "I don't know if frank is always great, but I'm honest. Mr. Forgeron then replied, "There's nothing wrong with that." He them asked if I was bilingual, I said "No". He said it's not really a requirement anyway. He asked me if I had any questions. I asked what would the hours be per day? He said that the day consisted of eight or twelve hour days. He said that he wasn't quite sure at this time what they were going to be doing as far as the hours for each day.

He explained the medical coverage, basically what it was for each employee and told me that the rate of pay would be around \$10.30 an hour or close to that range. He asked if I had a problem with that. I said "No, that will be no problem".

Mr. Forgeron got up and said it was nice meeting me and that he had a lot of people to interview yet. I thanked for his time and the interview. I asked him when should they be getting back to me to let me know when they would be hiring me. He laughed and said "Oh you are getting hired are you?" I laughed and said, Oh yeah ". He laughed and said "I don't know about you." He walked me out of the office and down the hall to leave. (sic throughout)

[34] In cross-examination, Ms. McAvinn acknowledged that the first interview was short, informal, casual and easygoing; she further acknowledged that, during the first interview, there were no questions put to her about working alone or working alone at night, about shift work, no suggestion or comment about being a woman, or about her not being able to do the job because she was a woman; she also acknowledged that in the first interview, she was relaxed, not nervous, nor anxious, that she felt confident.

[35] It stems from the evidence that, after the completion of the first round interviews, Mr. Forgeron drew up a list of the candidates selected for a second interview and sent it to Mr. John Francis, SCBL's general manager, so that he could initiate the second round interview process.

Ms. McAvinn's name was not on the list. Ms. McAvinn was nevertheless called for a second interview. The explanation for this turn of events can be found in Mr. Francis' testimony.

[36] In his testimony, Mr. Francis stated that, after the first interview, Ms. McAvinn's name was brought to him by Ms. Sharon Murphy, who had, as Mr. Forgeron, interviewed people in the first round interviews. He reviewed Ms. McAvinn's resume with Ms. Murphy and instructed her to include Ms. McAvinn in the second round interviews. According to Mr. Francis, Ms. Shona Wilson then scheduled Ms. McAvinn in for a second interview. According to Mr. Forgeron, he was not involved in the discussions and the decision that led to Ms. McAvinn getting a second interview.

[37] In his testimony, Mr. Francis stated that the reason he insisted Ms. McAvinn be put in a second round of interviews was because of the fact that she had completed the Law and Security course. He felt she was worthy of a second interview even though he did not know her personally although he heard her name before and might have seen her on graduation day at Holland College.

[38] Mr. Francis testified that at the time he gave instructions for Ms. McAvinn to be called for a second interview, he was not provided with any specific reasons why Ms. McAvinn had not made the first cut. Mr. Francis further testified that he did not discuss with Mr. Forgeron the reasons why Ms. McAvinn was not recommended for a second interview, stating that he trusted his people.

[39] The evidence shows that Ms. McAvinn was not the only person on whose behalf Mr. Francis intervened. The latter also intervened on behalf of Mr. John Profit who had been interviewed by Ms. Murphy. Mr. Profit had not been recommended for a second interview. Since he had taken the Law and Security course, Mr. Francis felt that he too should be scheduled for a second interview.

[40] According to Ms. Murphy, for the second round of interviews, the field of candidates had been narrowed down to 100 people. According to her testimony, for the second round interviews, two panels were struck. Ms. McAvinn's second interview took place before a panel composed of Mr. John Forgeron, the same John Forgeron who had conducted the first interview, Mr. Arnold Wood, who chaired the panel, and Mr. Jacques Verrette. As for the other panel, for finance and administration, it was led by Mr. Michel Le Chasseur. Ms. Murphy supported him.

[41] At the time of her second interview, Ms. McAvinn did not know and was not told that she had not made the cut to go to the second interview. Mr. Francis testified that he never told Ms. McAvinn and that he had no evidence that she was told by anyone else. The Tribunal finds that Ms. McAvinn was never told or made aware of the fact that she had failed the first interview.

[42] Mr. Wood is a civil engineer, hired in 1995 by SCI and subsequently seconded to SCJV. In early 1997, he applied for the maintenance and patrol manager position at SCBL. He was offered and accepted the job in late February or early March 1997.

[43] As maintenance and patrol manager for SCBL, Mr. Wood was responsible for the seasonal and regular maintenance of the bridge, for the supervision of the maintenance employees, for long-term inspections of the bridge, snow cleaning and grass cutting. He was also responsible for setting up procedures for the bridge patrollers. Once hired, the bridge patrollers would report directly to him and so would the maintenance people.

[44] Mr. Wood testified that, after having been hired, he worked with Jacques Verrette setting up the bridge patrollers' duties (Exhibit R-13), determining how many people would be required based on the shift cycles, what time they would start, etc. Mr. Wood further testified that he had nothing to do with the planning and preparing for bridge operations, for determining job functions, staff planning and preparing job descriptions.

[45] Mr. Verrette is a civil engineer, employed by Janin Ltd., who was seconded to SCBL in 1996. While working for SCBL, he became a member of the committee charged with developing the operations and maintenance manual for the running of operations on the Confederation Bridge. As a member of the committee, he participated, in early 1997, in drafting the job descriptions found in Exhibit HR-5. He also participated in the determination of the staffing needs for the bridge operations. In his testimony, Mr. Verrette stated that he was not involved in the process of receiving the job applications or of going through them.

[46] The panel chaired by Mr. Wood interviewed for all candidates expressing interest for those positions that would report to him, such as bridge patroller, skilled labourer/driver, electrician/mechanic. According to Mr. Wood, the interviews were scheduled for a half-hour and were very informal. According to Mr. Wood's testimony, his panel interviewed between 50 and 60 people over a two to three day period in April 1997.

[47] The evidence reveals that each panel was provided with a copy of the candidate's application form and resume if he had sent one. Each panel was also provided with Sample Guidelines for Interviewing Job Applicants (Exhibit R-12), the job description for the position of bridge patroller (Exhibit C-3) as well as for other positions, the bridge patroller typical shift duty (Exhibit R-13), the interview schedule and, in some cases, a one pager on the candidate's qualifications based on the initial screening (Exhibit HR-3).

[48] Mr. Wood testified that the second round interviews were designed to find the right fit, the right personalities, the right personal qualities so as to have a good working team. Mr. Wood further testified that, in the second round interviews, he was personally looking for the right person for the job and the best personalities because the bridge patroller would be working with the public. The purpose of the interview was thus, according to Mr. Wood, to gauge the candidates' personalities and abilities to perform the functions or duties of a bridge patroller. Consequently, it was envisaged that if someone lacked certain skills, that person would be trained so as to acquire the needed skills, such as first aid, WHMIS, etc.

[49] As for Mr. Forgeron, asked about what he was looking for in the second-round interviews, he responded that he was looking for people who could think on their feet, take training and people who had the ability to communicate and handle situations if they came up.

[50] As for Mr. Verrette, he indicated in his testimony that, for the bridge patroller position, he was looking for people having all the aptitudes to fill the job, including some background regarding dangerous goods, safety and security. He also indicated that the panel was looking for people able to work on the bridge, alone, on day and night shift and during the weekend. He further testified that the panel was also looking for people able to fill out the daily shift report or accident report, able to help the maintenance crew as well as people having basic mechanic experience to give good service to the customers. In Mr. Verrette's mind, the most important thing was to have people having the ability to represent SCBL.

[51] According to Ms. McAvinn, her second interview took place in the middle of April 1997, in the same building as the first one, i.e. SCJV's construction building, but not in the same office. Mr. Forgeron testified that the interviews were scheduled to be an hour long, the range being between half an hour and an hour. According to Ms. McAvinn's testimony, her interview lasted about 10 minutes. According to Mr. Forgeron's testimony, more than 15 applicants were interviewed for the bridge patroller position. Ms. McAvinn was the only woman interviewed for that position.

[52] How Ms. McAvinn's second interview went is clearly described in the narrative she wrote in May 1997 shortly after she learned that she had not been hired (Exhibit C-22). Her testimony in her examination in chief does not differ significantly from her written account, the accuracy of which was never challenged by the Respondent. Ms. McAvinn's account of what took place during the second interview is as follows:

Mr. John Forgerone interviewed me with two other gentlemen, Mr. Arnold Wood and Mr. Jacques Berette. They introduced themselves and told me to have a seat. Mr. Wood asked me did I ever emergency respond at any time. I said, "Yes, a woman took a seizure on the ships and I explained how I had handled the situation. I retrieved a pillow and a blanket, I found one of my co-workers to see if there was a doctor or nurse was aboard the ship. I had my co-worker stand at the other end of the aisle so that people wouldn't be standing over top of the woman taking seizure staring. As I watched to make sure that the woman didn't hurt herself, she started to come around and the captain had called for an ambulance to be waiting for the ship to dock.

Mr. Jacques Berette asked me if I had a class 4 and 5 license? I said yes, that I've had them for about twenty years now, I got them when I was in Ontario. He said that I needed an Island license, I replied that mine is an Island license, I have an Island license class 4 and 5. He asked me if I could drive a standard and I said "Yes." Mr. Arnold Wood asked me if a car broke down could I boost. I said yes, I know that red goes with red, black goes on black and you match the negatives to the negatives and the positives to the positives. Mr. Wood also ask would I mind working shift work and being alone at night. I told him that I didn't mind at all, I also included that I've worked nights by myself before. He said "You're going to have to do a lot of driving ...". I said, "I understand and I don't have a problem with that at all." He asked me about dangerous goods and I told him I worked deck and that we would have to park certain dangerous goods other dangerous goods because of dangerous chemical reactions. He asked, "Like what?" I said propane tanks were kept back away from other trucks and empty propane tanks are more dangerous than full propane tanks because of the fumes. And you'd never park a diesel fuel truck near a fertilizer truck or you'd make dynamite. I told him I also had a WHMIS course at Marine

Atlantic and with the Unit 2 School Board I had a chemical course, because of chemical reactions, for example, you would not use Javex and Draino in a toilet because the fumes could kill you or you could very well blow the toilet right off the floor.

Mr. Wood asked me had I applied for any other positions with the company besides this job. I said "No." He said would you be interested in any other jobs? For a second I just looked at him, thinking it was an odd question. I said "Well, this is the job I trained for and I feel that I'm qualified for this position, but that's not saying down the road I may see a job or see someone doing a job and think, that looks like an interesting job and I'm sure I can handle that responsibility. The three gentlemen just looked at one another and Mr. Jacques Berette said you will have to drive a lot. I said, "I have no problem with that and I understand." (sic throughout)

[53] Ms. McAvinn testified that she had mixed feelings about her second interview. In her testimony, she stated that she knew that she had answered the questions that she was asked but, at the same time, she felt that she had been asked odd questions. She felt she had not blown her interview, that she was prepared, knew her stuff and presented herself well. She also felt that if the interviewers had checked with Marine Atlantic and had phoned her referrals, the interviewers would have found that she was a good employee.

[54] In her testimony, Ms. McAvinn further stated that, during the second interview, she felt the interviewers were trying trick questions on her, like the one on how to go about boosting a car. She had the feeling that, for the interviewers, a woman normally would not know how to boost a car or most women would not. She felt that some questions should not have been put to her, such as 'do you mind being alone at night' or that men would not have been asked questions such as 'how one goes about boosting a car'. She felt that the interviewers were quick on the questions and that, if in the interviewers' mind there was something that they thought she might not know, they would focus on that; but then when they found that she knew the answer, they would jump on the next thing. She felt that the interviewers did not inquire enough about certain things, such as the placards in relation to dangerous goods.

[55] It stems from the evidence that Mr. Wood's panel had three piles: a yes pile, a maybe pile and a no pile. In his testimony, Mr. Forgeron referred to these piles as piles A, B and C. In pile A were the candidates who were highly considered; they were the ones to whom one would like to make an offer. The B pile contained the maybes and the C, those to whom no offer would be made. According to Mr. Forgeron, the criteria used to determine if a candidate would be in pile A, B or C were qualifications, experience and personality.

[56] According to Mr. Forgeron and Mr. Wood, after having interviewed each candidate, the three members of the panel got together and discussed in which category the candidate would be put in. The evidence is not clear as to how many candidates found themselves in the A, B or C piles. Mr. Forgeron's testimony on this point is inconclusive.

[57] According to Mr. Forgeron, the candidates in the A pile were put in some sort of a ranking but without any specific criteria being used, the focus being on the general presentation of the

candidates. According to Mr. Verrette, the candidates chosen for the 8 full-time bridge patroller positions were all in the first pile and the part-time patroller was in the second pile.

[58] Mr. Forgeron testified that, at the end of the second interview, Ms. McAvinn ended up in the no pile; he personally gave her a C, which was the same assessment he had made of her after the first interview. As for Mr. Wood, he testified that Ms. McAvinn ended up in the maybe pile at the end of her interview and in the no pile at the end of the day.

[59] According to Mr. Francis' testimony, after the second round interviews were completed, Mr. Verrette provided him with a list of the recommended candidates. Mr. Francis asked Mr. Verrette if the recommended candidates were the best people for these jobs; Mr. Verrette answered yes. Mr. Francis testified that he did not in any way question the recommendations forwarded to him by Mr. Verrette. He ordered that the recommended individuals be offered employment with SCBL.

[60] The evidence shows that Ms. McAvinn's name was not on the list of people recommended for the bridge patroller position. Mr. Francis testified that he had no idea why Ms. McAvinn did not make the short list after the second interview.

[61] According to Ms. McAvinn's testimony and narrative of the events which took place in April 1997 (Exhibit C-22), on Friday, April 25, 1997, she received phone calls from friends who had applied for the bridge patroller job and had received a call from SCBL informing them that they had been hired. Ms. McAvinn testified that, later that Friday, she contacted Ms. Shona Wilson who told her that all the applicants had not been interviewed yet and that she would get back to her on Monday, April 28. According to Ms. McAvinn, she never did.

[62] On Monday, April 28, 1997, Ms. McAvinn called SCBL and was, according to her narrative, told by Ms. Wilson that the competition had been stiff and that she had not been hired. Ms. McAvinn testified that, later that day, she went to SCBL to see Mr. Forgeron. She met him in the same office where she had had her first interview. She asked him why she had not been hired. His response, according to her testimony, was 'stiff competition' and 'better qualified people'.

[63] According to Ms. McAvinn, when she stated that the application asked for the Law and Security course and that she knew someone who had been hired who did not have the course, Mr. Forgeron replied that that person had a military background. According to Ms. McAvinn, Mr. Forgeron never gave her a straightforward answer as to why she was not hired and as to what she was lacking. At the end of the meeting, she made it known to him that she was going to lodge a human rights complaint.

[64] Following her meeting with Mr. Forgeron, on Monday, April 28, 1997, Ms. McAvinn tried to contact Mr. Francis through Ms. Wilson. She was unable at the time to speak to or meet with Mr. Francis.

[65] Ms. McAvinn testified that she went back to SCBL the following day, April 29, 1997 where she met Ms. Sharon Murphy. According to Ms. Murphy's private note (Exhibit R-14), the meeting might have taken place on April 28, 1997.

[66] According to Ms. McAvinn, the meeting with Ms. Murphy lasted 10 minutes. In her testimony, Ms. McAvinn stated that, at the time, she made it known to Ms. Murphy that something had gone wrong in her interviews and that she was being discriminated against because she was a woman and that she would be going to Human Rights.

[67] According to Ms. McAvinn's testimony and narrative (Exhibit C-22), as well as Ms. Murphy's private notes (Exhibit R-14), Ms. Murphy told her that the reason why she was not hired was because people more qualified than her had been hired and the competition was stiff. Ms. McAvinn testified that she replied that some people did not have everything that was on the application form but that she had everything that the company had asked for. According to Ms. McAvinn, she was then told by Ms. Murphy that those who did not have the listed requirements would be sent on a course. At the end of the meeting, Ms. McAvinn told Ms. Murphy that she was going to make a human rights complaint.

[68] Ms. McAvinn testified that, after her meeting with Ms. Murphy, she was able to talk to Mr. Francis on the phone. She stated in her testimony that she explained to him her situation, the fact that some of the people hired for the bridge patroller position did not have the Law and Security course, that they did not have the training nor the experience she had. According to Ms. McAvinn, Mr. Francis replied that he had full confidence in his people, that the people who were hired were more qualified than her and that he was not at liberty to discuss other applicants with her. Ms. McAvinn testified that she then told Mr. Francis that she felt that she had been discriminated against because she was a woman and that she was going to file a human rights complaint. According to Ms. McAvinn, Mr. Francis replied that it was her choice.

[69] Ms. Murphy testified that offers of employment were sent out around April 28, 1997 and the letters of rejection shortly thereafter (Exhibits HR-4 and C-18). The evidence shows that on April 29, 1997, a letter signed by Mr. Francis was addressed to Ms. McAvinn informing her that she had not been hired for the bridge patroller position (Exhibit C-18).

[70] The evidence establishes that the first people hired for the bridge patroller position started work on May 12, 1997. According to Mr. Francis' testimony, no offers were tendered for the bridge patroller positions until all of the interviews for the job were completed. Mr. Francis however acknowledged that on May 12, 1997, people were still being interviewed for other jobs.

[71] Of the seven Marine Atlantic employees enrolled in the Law and Security course, five were hired: Jamie Hagan, Les Thomas, Andrew Noonan, Leigh MacKey, Kevin Praught. The two who were not hired were John Profit and Phyllis McAvinn, both of whom, it must be noted, had not made the cut in the first round interviews.

[72] According to Ms. McAvinn, four of the applicants hired for the bridge patroller position had not taken the Law and Security course. Three, Andrew Noonan, Jamie Hagan and Jeff Warren did not have their class 4 and 5 driving licences before they were hired. Furthermore, according

to Ms. McAvinn, one person she could not identify did not have the Dangerous Goods Training. Another person did not have the St. John Ambulance Training.

[73] On this, Ms. McAvinn is corroborated by Mr. Francis who acknowledged in his testimony that some of the people who were hired as bridge patrollers did not have WHMIS or Dangerous Goods Training or the Law and Security course; these people were, according to Mr. Francis, sent on training courses. Those who did not have the class 4 and 5 driving licences were given the opportunity to obtain them.

[74] According to Mr. Francis' testimony, in relation to the 35 positions available with SCBL, some women were hired, but none as bridge patrollers. One woman was hired as a supervisor of toll traffic operations, one in relation to bridge control operations. Women were also hired in the administration office, e.g. an accountant and a book-keeper. The exact number of women hired was not provided by Mr. Francis.

[75] Ms. McAvinn testified that in May 1997, she called Mr. Kevin Pytyck. According to Mr. Francis' testimony, Mr. Pytyck was at the time the contract administrator for SCDI. He was responsible for the public relations and marketing aspects of the project, sponsorship programs and so forth. According to Mr. Francis' testimony, he had no responsibility and no involvement whatsoever with SCBL. He was never involved in the hiring process. It stems from Ms. McAvinn's testimony that she asked Mr. Pytyck why SCBL was not hiring any women. According to Ms. McAvinn, Mr. Pytyck's response was: 'If you had shut your mouth'. Mr. Pytyck was never called as a witness.

[76] The evidence establishes that Ms. McAvinn's employment with Marine Atlantic was terminated on May 31, 1997. Upon termination of her employment, she received a severance package (Exhibit C-54). The evidence shows that she received an amount of \$25 061.66 representing 41 weeks of severance based upon 3.5 weeks of severance for each year of service. The amount Ms. McAvinn received was dictated by the special agreement negotiated between Marine Atlantic and her union, the Canadian Auto Workers (CAW).

[77] Ms. McAvinn also received a health benefit package for a period of 24 months, representing one year for each period of 5 years worked with Marine Atlantic. In addition, as part of her severance package, she received her medical coverage, her group life insurance, her extended health care and dental benefits for a period of 24 months after May 31, 1997. At the end of this 24 month period, the evidence shows that she could have purchased at her own cost an additional 12 months' coverage. Ms. McAvinn testified that, at the end of the period, she opted to go with her husband's coverage because it was cheaper.

[78] After being turned down by SCBL in April 1997, Ms. McAvinn updated her file with SCBL on a regular basis in order to keep alive her chances of landing a job with SCBL. She also sought employment elsewhere and sent out many job applications. She applied to a number of security firms who did business in PEI, and more specifically in Summerside but was never hired. The evidence shows that, in 1997, she sent out 67 applications, 112 in 1998 (Exhibit C-25), 108 in 1999 (Exhibit C-26) and 92 in 2000 (Exhibit C-27). The evidence shows that she was successful in only two job applications.

[79] According to Mr. Wood's testimony, after the initial nine patrollers were hired, some moved on to other jobs. There were thus openings in the bridge patrol department. The first opening occurred in October 1997. Mr. Greg Bairsto was hired. Ms. McAvinn testified that Mr. Bairsto was never a Marine Atlantic employee. She testified that he had not been on the Law and Security course with her but that she thought he had apparently taken the course. At the time, Ms. McAvinn was not called for an interview.

[80] Mr. Woods testified that the candidates to be interviewed were drawn from a pool of candidates that was contained in a file at SCBL. According to him, there were not that many candidates. Mr. Wood testified that he first looked at a "selected" list of best people, made some calls, set up interviews and made a recommendation to John Francis who made the final decision. According to his testimony, this is how he filled additional vacancies that occurred in the bridge patroller positions as time went on.

[81] Ms. McAvinn testified that, in March or April 1998, after she had filed her two human rights complaints, she was contacted by Mr. Arnold Wood to attend an interview for the job of casual patroller. The interview took place at the SCBL offices and, according to Ms. McAvinn, lasted 20 minutes. Both Mr. Wood and Mr. Francis were present. According to Ms. McAvinn, the interview was conducted by Mr. Wood.

[82] Mr. Wood testified that Ms. McAvinn's name was on file and her qualifications, according to him, were good. According to Mr Wood, not more than eight persons were interviewed at the time. Mr. Wood testified that, with respect to that interview, the focus was on the daily activities of bridge patroller and the ability of the candidate to perform these activities. Ms. McAvinn never contradicted Mr. Wood's testimony on this point.

[83] According to Ms. McAvinn's testimony, Mr. Wood read her the procedures of what a bridge patroller does during the day, from the beginning of the shift to the end of the shift. Ms. McAvinn recalled being asked if she would have a problem, if the bridge shut down, to stand out in the cold; she replied no, that she had worked maintenance on the ships before in the winter time. According to Ms. McAvinn, Mr. Francis did not talk to her at all during the course of the interview.

[84] Ms. McAvinn testified that, at one point, Mr. Wood left the room to make photocopies of certain documents Ms. McAvinn had brought with her. She remained in the room with Mr. Francis. According to Ms. McAvinn's testimony, when she tried to explain something to him while Mr. Wood was away, Mr. Francis told her not to talk, that there was no sense in repeating herself twice and that she should wait until Mr. Wood came back.

[85] Ms. McAvinn testified that at the end of the interview, Mr. Francis asked her where she had been working, if she was on unemployment and if she had had a chance to do any writing or report writing. Asked if she had any questions, Ms. McAvinn inquired about who else was getting hired and the possibility for her to spend a day or two of her own time on the job in the event she was hired to familiarize herself with the job.

[86] In her testimony, Ms. McAvinn stated, that, at the time of the third interview, she was scared and had mixed feelings about the interview. Since she had filed a human rights complaint, she felt that SCBL was probably not serious about hiring her. She felt that she had been called up for an interview to make it look good to human rights. According to Ms. McAvinn, the interview was a big farce; nothing but a joke.

[87] Ms. McAvinn testified that, after her third interview, she got a call from Mr. Wood who told her that she had done exceptionally well in the interview. He however informed her that unfortunately she had been beaten out by another candidate, that she just did not have what they needed in her field of expertise but to keep trying. In his testimony, Mr. Wood acknowledged phoning Ms. McAvinn and informing her that a better candidate had been hired.

[88] Ms. McAvinn testified that, within a month, she called John Francis and inquired about what field of expertise Mr. Wood had been talking about. Mr. Francis told her that he would not discuss other applicants with her. According to Ms. McAvinn, Mr. Francis added: 'You are not going to win'. Ms. McAvinn stated in her testimony that she felt at the time that Mr. Francis did not seem to understand what she was saying. That was the last conversation she had with people from Strait Crossing Bridge Limited.

III. COMPLAINT

[89] Ms. McAvinn filed a complaint first, with the Prince Edward Island Human Rights Commission, on April 30, 1997 (Exhibit C-21) and subsequently, on October 1, 1997, with the Canadian Human Rights Commission (Exhibit C-23). The complaint filed with the PEI Human Rights Commission was subsequently dropped when it was discovered that the Commission had no jurisdiction over the operation of the Confederation Bridge.

[90] In her PEI human rights complaint, Mrs McAvinn alleged three grounds of discrimination: age, sex and political belief. In the complaint filed with the Canadian Human Rights Commission, Ms. McAvinn alleged only one ground of discrimination: sex or gender.

[91] Ms. McAvinn's complaint to the Canadian Human Rights Commission gave rise to two investigation reports. The first one, Exhibit R-18, dated November 17, 1998 recommended that a conciliator be appointed in an attempt to bring about a settlement of the complaint; the other, Exhibit R-19, dated March 31, 1999, recommended that the complaint be dismissed as unfounded. It is not for the Tribunal to inquire as to why Ms. McAvinn's complaint was referred to the CHRT even though a recommendation had been made to dismiss the complaint. Suffice it to say that the referral did generate a lot of acrimony on the part of the Respondent.

[92] It stems from an analysis of Ms. McAvinn's complaint form that her complaint is primarily based on the fact that, in her second interview, she was asked questions like "Are you afraid to be alone at night?" and "Can you drive a standard?" She also alleges that she later found out that several men who were interviewed were not asked these questions.

[93] Ms. McAvinn further contends, in her complaint, that she was more qualified than some of the men hired as bridge patrollers. Her contention is based on the fact that some of the men hired as bridge patrollers had not taken the Law and Security course which, she asserts, was supposed to be a requirement.

[94] For its part, the Respondent contends that Ms. McAvinn was never discriminated against in the hiring process for the job of bridge patroller on the Confederation Bridge. It further contends that the sole reason Ms. McAvinn was not hired as a bridge patroller in April 1997 was because the candidates in her competition were superior, more qualified than her. Those involved in the interview process strongly denied that gender was ever an issue.

IV. THE LAW

[95] Under section 7 of the *Canadian Human Rights Act (CHRA)*, it is a discriminatory practice, directly or indirectly, to refuse to employ any individual on a prohibited ground of discrimination. Gender or sex is a prohibited ground of discrimination under section 3 of the *Act*.

[96] It is now settled law that, in a discrimination case relating to employment, the burden of proof is on the complainant to establish a *prima facie* case of discrimination⁽¹⁾. Once that is done, the burden then shifts to the Respondent to provide a reasonable explanation for the conduct in issue. The explanation must be at least equally consistent with the conclusion that discrimination on a prohibited ground is not the correct explanation for what occurred. Thus, it will not be sufficient for the Respondent to refute a *prima facie* inference of discrimination by merely suggesting any rational explanation; it must offer an explanation that is credible on all the evidence.

[97] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a finding in the complainant's favour in the absence of an answer from the Respondent. The allegations made by the complainant must be credible in order to support the conclusion that a *prima facie* case has been established.

[98] In an employment context, a *prima facie* case requires, according to *Shakes v. Rex Pak Limited*⁽²⁾ proof of the following three elements:

- a. that the complainant was qualified for the particular employment,
- b. that the complainant was not hired,
- c. that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

[99] If the Respondent does provide a reasonable explanation for the otherwise discriminatory behaviour, the complainant then has the burden of demonstrating that the explanation was

pretextual, and that the true motivation behind the employer's actions was, in fact, discriminatory.

[100] Direct evidence of discrimination is often times difficult to establish. Discrimination is not a practice that one would expect to see displayed overtly. Thus, there might be at times no single act that clearly reflects discriminatory conduct or no obvious discriminatory behaviour; discrimination can be practiced in a subtle way. Nonetheless, the Complainant and the Commission have the onus of establishing discrimination.

[101] In many instances, proof of discrimination will be based on circumstantial evidence. In such a context, it falls upon the Tribunal to review all of the circumstances of the case and determine if there is proof of discrimination or not. In this respect, the Tribunal is entitled to draw an inference of discrimination where the evidence adduced in support of it renders such an inference more probable than the other possible inferences or hypotheses.

[102] In order to succeed in a case of discrimination relating to employment, it is not necessary that discriminatory considerations be the sole or primary reason for the actions in issue. It is sufficient that the alleged discrimination be one of the factors that influenced the employer's decision.

[103] The belief or feeling, however profound or strong, that the complainant has been discriminated against is not sufficient to establish discrimination. Facts must be proven that clearly show that the person alleging discrimination was the object of some form of unbecoming behaviour based on a prohibited ground listed in the *CHRA*.

[104] In cases such as the present one, it may well be that the elements upon which a complaint is founded will not support a finding of discrimination. The evidence might however establish that a discriminatory conduct occurred which was not perceived at first as such by the complainant. Thus, in determining if there was discrimination, it is the duty of the Tribunal to look not only at the initial allegation of discrimination but to consider the entirety of the evidence.

V. ANALYSIS

[105] From the beginning, Ms. McAvinn had her heart set on the bridge patroller job. She felt confident that she would get the job because she had taken the relevant training and had the required qualifications, except for bilinguism which she considered an asset. It is clear from Ms. McAvinn's testimony that she never got over the fact that people who had not taken the Law and Security course or did not have, at the time of the interviews, their class 4 and 5 driving licences were hired. Throughout these proceedings, she has constantly asserted that she was more qualified than the people who were hired for the job of bridge patroller, except maybe for one person.

[106] The evidence shows that when Ms. McAvinn got the news that she was not being hired, she was devastated. She felt that she had been had. Throughout her ordeal, her belief that she had been the object if not the victim of a grave injustice gave rise to a lot of bitterness and, in the Tribunal's view, obscured Ms. McAvinn's judgment.

[107] The Tribunal is of the view that during her testimony, Ms. McAvinn was really never able to distance herself from the belief that she had been discriminated against in her second interview. This led her to format her answers so as to always bring at the forefront her relentless belief that she had been discriminated against in the second interview because she was asked questions that other candidates were not asked.

[108] The Tribunal finds that Ms. McAvinn's stubborn belief and firm conviction that she had been discriminated against led her at times to make rash if not irrational statements which are unsupported by the evidence, statements such as:

- ◆ people who did not have all the listed specification in the job description would be trained because the company did not want women as bridge patrollers;
- ◆ men were trained and groomed all the way after they were hired to eliminate her;
- ◆ Marine Atlantic had its fingers in the pie with respect to hiring.

[109] Called upon in cross-examination to state what formed the basis of her sex discrimination complaint, Ms. McAvinn answered with a litany of examples. Most notably, she referred to the following:

- ◆ the way she was interviewed;
- ◆ the letter she received from Mr. Francis stating that she was more than qualified but, unfortunately, the company could only hire a few;
- ◆ the fact that the company would not give her an explanation for why she was not hired;
- ◆ the way the company came across to her in the interview process;
- ◆ the questions that she was asked and the way these questions were asked;
- ◆ the fact that she was not given enough time to give full answers to the questions that were put to her like on dangerous goods;
- ◆ the additional training given to people who had been hired without the qualifications;
- ◆ the way she was treated when she went over to find out why she was not hired;
- ◆ the remarks made when she said that she would file a human rights complaint;

- ◆ the fact that they did not ask enough questions pertaining to the job;
- ◆ the way she was questioned by Jacques Verrette;
- ◆ the questions asked by Arnold Wood which she felt would not have been asked to a male person - like driving a standard, being alone at night or afraid at night alone - and which were like trick questions - how to boost a car;
- ◆ the fact that she was asked if she had applied for any other job;
- ◆ the fact that some of the people hired did not have the class 4 and 5 driving licence;
- ◆ the fact that she had taken the Law and Security course and that some of the candidates hired had not;
- ◆ the amount of service with Marine Atlantic;
- ◆ the fact that the company did not check with Marine Atlantic with respect to her track record with Marine Atlantic;
- ◆ the fact that the company did not phone Holland College to get information about any of the candidates;
- ◆ the fact that there were too many unanswered questions;
- ◆ the fact that when she phoned to ask if she had been picked after she had found out that people had been hired, that she was told that the company had not completed the interview process;
- ◆ the fact that she was told that she would be driving a lot.

[110] By themselves, all of these 'allegations' do not prove that Ms. McAvinn was discriminated against because of her sex or gender and do not substantiate a complaint of sex or gender discrimination. As previously stated, in a human rights complaint, the perceptions and beliefs of a complainant are not sufficient to establish discrimination. There must be solid evidence, direct or circumstantial, that some form of discrimination did take place.

[111] Thus, in order for Ms. McAvinn to be successful in her complaint, she must prove that she was not hired for the bridge patroller position because she was a woman. Applying the criteria found in *Shakes* to the present case, Ms. McAvinn must prove that she was qualified for the job of bridge patroller, that she was not hired and that a male person no better qualified than her subsequently obtained the job. However, if SCBL is able to provide a reasonable explanation, which will not be considered a pretext, as to why Ms. McAvinn was not hired as a bridge patroller on the Confederation Bridge, the Tribunal will have no other alternative but to dismiss the complaint.

[112] In making these determinations, the Tribunal must not only look at the initial complaint but also at all of the evidence adduced in the course of the hearing. Thus, even though Ms. McAvinn's complaint alleges that she was discriminated against in her second interview, the Tribunal is of the view that facts having to do with Ms. McAvinn's first interview are highly relevant to the determinations that the Tribunal has to make with respect to the present case. The Tribunal is thus called upon not only to examine what took place in the course of the second interview but also of the first one.

[113] Everyone who testified on the subject acknowledged how important an interview is in a selection process. Ms. McAvinn herself acknowledged that it played an important role. According to Ms. Murphy, who was very much involved in setting up the interview process at SCBL, the interview is the most important part of a candidate selection process. Having all the requirements or attributes set out for a job does not assure a person of getting the job she applied for.

[114] Thus, even if a person has all the qualifications and experience listed in a job description, if that person fails to make a good impression in her interview, if she does not present herself well, if she does not do well in the communicative aspects of the interview, that person will probably not get the job she applied for. In any selection process for a job, the job interview is very important, if not crucial.

[115] According to Ms. Murphy, the interview process put in place at SCBL in 1997 for the selection of employees was comprised of two sets of interviews. According to Ms. Murphy's testimony, she was asked with Mr. Forgeron to participate in the first round of interviews because of her human resources experience and the fact that she was familiar with bridge operations.

[116] Ms. Murphy testified that, in the first round interviews, the weighting was more on the general attitude of a candidate. In cross-examination, Ms. Murphy added that, in a first interview, she herself concentrated her efforts on getting to know how a candidate would relate with the members of the team the candidate would be working with. She further stated that qualifications and experience were not the most predominant factors in a first round interview, nor was WHMIS or Dangerous Good Training, but that good communications skills and experience dealing with the public were imperative.

[117] Asked what she would use in a first interview to determine whether someone had the appropriate skill set to advance to a second interview, Ms. Murphy testified she would be looking at how a person related current experiences or most recent past experiences to the job responsibilities she was looking for, how that person interacted with her, if he or she demonstrated a keen interest in the position, had a positive attitude, was willing to embrace a change and was adaptable. As for Mr. Forgeron, asked what particular skill he considered more important than any others with respect to the first interview, he testified that he was looking for somebody who could handle situations, who was personable and who had good communication skills.

[118] It is with these elements in mind that the Tribunal will proceed to analyze how Ms. McAvinn's first interview was conducted in order to determine if she was discriminated against because of her gender. It must be noted here that Ms. McAvinn never formally complained of any form of discrimination with respect to the first interview. Her complaint, as stated above, is essentially based on the fact that, in her second interview, she was asked questions that were not put to men, and on the assertion that she was equally or better qualified than the nine men who were hired for the bridge patroller position.

[119] As already established, Ms. McAvinn was first interviewed by Mr. Forgeron. Asked in his examination in chief what he specifically recalled from his first interview with Ms. McAvinn, Mr. Forgeron answered as follows⁽³⁾:

A. I was concerned about the application because it was typed and in past experience, generally, a one-page application that is typed is more trouble to do than what it is worth. And I was concerned about her literacy skills.

Q. And do you recall anything else?

A. Not particularly. I had discussions with David Holmes, regarding his visit to the Holland College Security course. And he had indicated that he'd been told that there was some difficulty with literacy skills for people from Marine Atlantic in the course ---

Q. Okay ---

A.---which raised my concern even a lot more than what it was, just with the application.

Q. Anything else you can recall with respect to the interview of Phyllis McAvinn?

A. It was an enjoyable interview. I enjoyed meeting with her. She was very pleasant at the time. And that's basically it. I mean, I ---

()

Q. Is there anything that stands out in your mind at all?

A. No, not particularly.

()

Q. As you recall today, what was your impression of Phyllis McAvinn?

A. I thought she was a nice person.

Q. Yes?

A. I was concerned about her ability to deal with situations that she might come across on the bridge and I was concerned about her report writing skills.

[120] Asked how he would have rated Ms. McAvinn in relation to other people that he interviewed at the time, Mr. Forgeron answered⁽⁴⁾:

A. My major concern, as I mentioned before with Phyllis was just the literacy skills - but she was a good candidate.

Q. Did she stand out in comparison to the other applicants ---

A. No, I'd say ---

Q. --- head and shoulders over them, or the same, or what?

A. ---I'd say the other candidates were head and shoulders above her, with the experience that they had.

[121] Asked why Ms. McAvinn's name was not among those who were passed on for a second interview, Mr. Forgeron replied⁽⁵⁾:

A. Because I was concerned about literacy skills.

Q. Anything else?

A. That was the main issue.

Q. Was there other issues? When you said "main issue", were there other issues?

A. Well I questioned - well I guess I didn't really question - I think the candidates that were in her competition were superior. And that's basically the way I looked at it.

[122] The Tribunal finds that the main reason why Ms. McAvinn was excluded by Mr. Forgeron from the second round interviews was because of her presumed lack of literacy or writing skills. Repeatedly, in his examination in chief, Mr. Forgeron raised this point as the main concern, if not the sole concern, he had with respect to Ms. McAvinn's application.

[123] In cross-examination, Mr. Forgeron acknowledged that, neither the instructor, nor Mr. Holmes ever said to him that there were specific concerns about the literacy skills of Ms. McAvinn. If such is the case, and the Tribunal believes it is, it is surprising to find that Mr. Forgeron did not seem to have had any concern about the literacy skills of the other Marine Atlantic employees who had taken the Law and Security course and had applied for the bridge patroller job with SCBL. According to the evidence, these candidates seem to have sent in handwritten applications whereas Ms. McAvinn sent in a typewritten one, an element which by itself, according to Mr. Forgeron, was sufficient enough to raise concern about her writing skills and her ability to fulfil the job of bridge patroller.

[124] The evidence establishes that Ms. McAvinn was never asked by Mr. Forgeron in the course of the first interview why she had sent in a typewritten application. The fact of the matter is Mr. Forgeron never inquired about Ms. McAvinn's literacy skills. Asked in cross-examination why, if he had concerns regarding her literacy skills, he did not ask Ms. McAvinn to undertake tests that might truly assess these skills, he insinuated that, had he done so, he could have been the object of a discrimination complaint.

[125] It is noteworthy that, according to the *Sample guidelines for interviewing job applicants* (Exhibit R-12) which, according to Mr. Forgeron, were prepared by himself, an interviewer could ask a candidate questions about specific skills such as reading, writing, typing, computer literacy and speaking. These were not considered discriminatory questions according to Exhibit R-12.

[126] Given this, the Tribunal finds that Mr. Forgeron should have at least inquired about Ms. McAvinn's literacy skills if he had any doubts or concerns about these skills. According to the guidelines he himself prepared, it would not have been improper for him to do so. The fact that he made no inquiry into the matter shows bias on his part with respect to Ms. McAvinn's abilities to fulfil the duties of bridge patroller.

[127] The Tribunal finds, furthermore, that Mr. Forgeron's other explanation as to why Ms. McAvinn was not recommended for a second interview, namely his concerns with respect to her inability to deal with situations that she might come across in her work as bridge patroller, is not supported in any way by the evidence. There is nothing in Ms. McAvinn's curriculum vitae or in her interviews which lends support to this claim.

[128] After having carefully reviewed the evidence, the Tribunal finds that there is not a shred of evidence that could have led Mr. Forgeron to put truly in doubt Ms. McAvinn's ability to write or to deal with situations. There is nothing that stems from Ms. McAvinn's account of her first interview and from Mr. Forgeron's recollection of what took place in the course of the first interview that would lead a reasonable person to assert that Ms. McAvinn had poor literacy skills and would be unable to "deal with situations" that would arise on the bridge.

[129] Given that the purpose of a first interview was primarily to assess, in Ms. Murphy's opinion, one's communication skill set, given that, according to Mr. Forgeron, the purpose of a first interview was to try and put people in categories that were best suited for what they had, given also the fact that Ms. McAvinn did not have, according to Mr. Forgeron, a bad interview, given finally Ms. McAvinn's overall qualifications and experience, as described in her application form, the Tribunal finds that Ms. McAvinn should logically have been recommended by Mr. Forgeron for a second interview.

[130] The evidence shows that Mr. Forgeron did not recommend Ms. McAvinn for a second interview. The evidence further establishes that it was because of Mr. Francis' intervention that Ms. McAvinn was called for a second interview. Asked why he had recommended Ms. McAvinn for a second interview, Mr. Francis answered that it was mainly because she had taken the Law and Security course.

[131] The Tribunal is of the view that the rejection of Ms. McAvinn's application by Mr. Forgeron after he first interviewed Ms. McAvinn severely jeopardized if not annihilated her chances of being hired in 1997 as a bridge patroller. As will be seen hereafter, Mr. Forgeron was the key figure in the overall interview process of candidates for the bridge patroller position. He was the person whose opinion had the most weight in the final determination of who would be hired.

[132] As found previously, Ms. McAvinn's second interview took place before Mr. Wood, Mr. Forgeron and Mr. Verrette. Mr. Wood chaired the panel. According to Ms. McAvinn's complaint, it was during her second interview that she felt she had been discriminated against, mainly because she felt she was asked questions which were not asked to male candidates.

[133] At the hearing, Ms. McAvinn was subjected to a long and grueling cross-examination by the Respondent counsel with respect to the specific questions that were put to her during her second interview. The Tribunal must note here that Ms. McAvinn was in her answers often non-responsive to the questions put to her by the Respondent counsel. Her demeanour can explain why the cross-examination was so tedious and why the Respondent counsel had to repeat over and over again his questions in order to obtain clear answers.

[134] In her cross-examination, Ms. McAvinn was asked to spell out the *verbatim* of the questions put to her during her second interview and the order in which these questions were put to her. Her answers were at times at variance with the narrative she had written in 1997, shortly after she had learned that she had not been hired. In answering the questions, she even skipped the question on 'do you mind shift work/do you mind being alone at night' which is one of the key questions in relation to her discrimination complaint. The intensity of the cross-examination as well as Ms. McAvinn's fragile state of health when she was testifying might explain these variations and the oversights.

[135] The tribunal finds that it cannot rely on Ms. McAvinn's account at the hearing of the questions put to her during the second interview to determine with any certainty the exact wording of these questions.

[136] The tribunal finds that the narrative of the second interview written shortly after Ms. McAvinn learned that she had not been hired (Exhibit C-22) best reflects the questions that were put to her and the order in which they were put to her in the second interview. According to the narrative, Ms. McAvinn was asked in the second interview the following questions in the following order:

() He (Mr. Verrette) asked me if I could drive a standard and I said "Yes."

Mr. Arnold Wood asked me if a car broke down could I boost. I said yes, I know that red goes with red, black goes on black and you match the negatives to the negatives and the positives to the positives.

Mr. Wood also ask would I mind working shift work and being alone at night. I told him that I didn't mind at all, I also included that I've worked nights by myself before, (). (sic throughout)

[137] The Tribunal has to decide if the questions referred to above were discriminatory in nature in the context of an interview for the job of bridge patroller, more specifically, the Tribunal has to determine if the questions asked were the type of questions not asked to male candidates.

[138] Mr. Wood testified that he was not able to recall the specific questions put to Ms. McAvinn in the course of the second interview, nor the order in which these questions were put. Nor were Mr. Forgeron or Mr. Verrette. This is quite understandable. Mr. Verrette testified that no standard questions were prepared in advance to present to the applicants during the interviews. Furthermore, none of the interviewers seem to have taken notes during the interview.

[139] Four of the successful candidates for the bridge patroller position were called as witnesses by the Commission: Jamie Hagan, Andrew Noonan, Jeff Warren and Les Thomas.

[140] In relation to the second interview, Mr. Hagan was able to recall some of the questions he was asked. He stated that he remembered being asked what he would do if a car broke down on the bridge, if he knew how to boost a car (he was not asked to demonstrate how). He clearly did not recall being asked if he was afraid to be alone or work alone at night. He did not believe that he was asked if he could drive a standard.

[141] As for Mr. Noonan, asked what questions were put to him in the course of the second interview, he testified that he was asked a question about shift work. He recalled saying that he worked in a garage when he was young and presumed that he must have been asked something about mechanics or breakdowns or something of the sort. He testified that he did not think he was asked to demonstrate how to boost a car. Mr. Noonan testified that he did not clearly remember being asked whether he was afraid to be alone or work alone at night, but thought that something to that effect was asked because he remembered saying that he was not scared of the bogeyman or something like that or that it had been a while since he had been scared of the bogeyman. He recalled being asked if he could speak French but did not remember any of the other questions he was asked in the second interview.

[142] As for Mr. Warren, the only question he recalled being asked was a question asked by Mr. Wood about cement. At the hearing, he was not able to remember being asked about shift work, whether he could boost a car, whether he was afraid to be alone at night. He did not remember being asked questions about how to respond to an emergency, about his driving qualifications or about his feeling about leaving Marine Atlantic.

[143] As for Les Thomas, he did not recall much about the interviews and could not be precise on many things; his testimony is replete with 'I don't remember', 'I'd be guessing'. The Tribunal finds his testimony unreliable as to what questions were put to him in the course of the second interview.

[144] In view of the evidence adduced and given that the complainant has the burden of proof, the Tribunal finds that the questions about driving a standard, boosting a car, working shift and being alone at night, as phrased by Ms. McAvinn in her narrative, were not questions driven by gender. These questions were legitimate questions in relation to the bridge patroller job.

[145] The Tribunal furthermore holds that the evidence does not establish on a balance of probabilities that Ms. McAvinn was the only person to whom these questions were put. None of the people hired as bridge patrollers called by the Commission as witnesses were able to recall the exact questions put to them in the course of the interview. The Tribunal shares the view expressed by Mr. Verrette in his testimony that the wording of the questions might have been at times different but that the meaning of the questions was the same and so were the topics covered during the interviews.

[146] Having found that the questions put to Ms. McAvinn in the course of her second interview were not, on a balance of probabilities, discriminatory in nature or gender driven, the Tribunal finds that Ms. McAvinn's allegation that she was discriminated against in the second interview because of the questions put to her is ill founded.

[147] This finding does not, however, lay this matter to rest. The Tribunal must now determine if, looking at the evidence as a whole, Ms. McAvinn was nonetheless discriminated against because of her gender. For this, the Tribunal must analyze the reasons which led the second interview panel not to recommend hiring Ms. McAvinn for the bridge patroller job. Two things must be considered here, i.e. was the Law and Security course a requirement and did Ms. McAvinn fail to perform satisfactorily in her second interview.

[148] It must be noted here that the Law and Security course is one element of the job description for the bridge patroller position (Exhibit C-3) which lists the qualifications and experience that candidates for the job should possess when applying for the job.

[149] Throughout these proceedings, the Complainant and the Commission have maintained that the qualifications and experience listed in Exhibit C-3, most notably, the Law and Security course, were requirements and not only assets that a candidate could possess. As for the Respondent, it has contended adamantly that the Law and Security course was not a requirement for the bridge patroller job, arguing that people could be trained if they were lacking one or more of the qualifications listed in Exhibit C-3.

[150] Was the Law and Security course a requirement for the bridge patroller job? Mr. Forgeron testified that it was not, that it was more of a guideline. He is contradicted on this by Mr. John Wood who applied for all of the jobs at SCBL.

[151] The evidence establishes that Mr. Wood was first interviewed by Mr. Forgeron but never got a second interview. Before the Tribunal, Mr. Wood testified with poise and in a forthright fashion. He never showed any sign of bitterness towards SCBL even though he was not hired as bridge patroller.

[152] In his examination in chief, Mr. Forgeron stated that he did not recall the interview he conducted with Mr. Wood. An account of this interview is however found in a 'To whom it may concern letter', undated, written by Mr. Wood and filed as Exhibit HR-6. The letter reads as follow:

To whom it may concern:

This letter is to state the facts about my interview with John Forgerone, concerning my application for the Bridge Security job with Straight Crossing Inc. (SCI).

On about the first week or so of April I was contacted by SCI for an interview. The person doing the interview was John Forgerone. The first thing he said was that I only had 12 minutes for the interview, because one of my fellow crew members had taken 18 minutes and stated to let's get on with it. After taking to his phone for about 2 minutes, which I thought you were suppose to pick up to use, he turned his attention to me.

He asked me what position I was applying for, because I had applied for all of them. I said I applied for all of them because I wanted a job and figured that I was qualified for at least one or two of them. After going through several job descriptions for which he said I was not qualified, I asked about the Bridge Security job, he stated that I did not qualify for that position. He stated that you had to have a Law and Security course from Holland College. He stated that it was listed on the job description list sent to Marine Atlantic as one of the qualifications. He stated that I was best qualified for the job of Bridge Controller, I said that there were lots controllers who are more qualified than myself. He said the controllers had some experience but lacked the computer skills, for which I was fully qualified, he said with my computer skills I was qualified for the job of Bridge Controller and could easily be trained in the other aspects of the job. He then said the interview was over and I would be contacted if I qualified for any of the jobs. I must say that this up() my expectations of getting a job.

In my opinion the whole process was a farce, how can SCI put qualifications on paper stating you had to have these qualifications to get hired and then hire people who were not qualified. I would suggest that you look into whether or not Stan Baker was contacted about any or certain employees who had an interview. It is my understanding that he was contacted about some employees and not others. (sic throughout)

[153] Mr. Wood's testimony was never challenged, nor was the accuracy of his letter. Furthermore, in his examination in chief, Mr. Forgeron never denied having made this statement in the course of Mr. Wood's interview. After having been referred to Exhibit HR-6 and the relevant excerpt, Mr. Forgeron answered that the Law and Security course was not a requirement for the bridge patroller position, that it was a guideline. His answer was given after he had been asked the following question⁽⁶⁾:

Q. Now separate and apart from whether or not you stated that to him (Mr. Wood), was that a requirement for the bridge patrollers' position, if a person had the Law and Security course in order to be a bridge patroller. (Emphasis added by the Tribunal)

A. No, it wasn't a requirement.

[154] To say the least, Mr. Forgeron's stance with respect to the Law and Security course is ambivalent if not inconsistent. The uncontradicted fact remains that Mr. Forgeron did tell Mr. Wood that the Law and Security course was a requirement. The fact that people who did not have the Law and Security course were hired and later trained does not in any way weaken this view. One cannot one day make it a requirement so as to eliminate a candidate, and the next, not

make it a requirement and use it to support a decision not to hire someone. One cannot have it both ways. All things considered, the Tribunal prefers Mr. Wood's testimony to that of Mr. Forgeron with respect to the issue of the Law and Security course being a requirement or not.

[155] As for Ms. McAvinn's performance in her second interview, Mr. Wood testified that Ms. McAvinn's second interview was not a bad interview, nor was it one of the better ones; it was a fine interview. According to Mr. Wood, the interview was not as conversational as some of the other interviews; the communication, the interaction between Ms. McAvinn and the interviewers was not there. According to Mr. Wood, that was the main thing. For him, gender was not an issue.

[156] As for Mr. Forgeron, asked what he specifically recalled from Ms. McAvinn's second interview, he answered that it did not stand out in his mind any different than any other interview. According to him, Ms. McAvinn conducted herself well; she was pleasant and well presented and answered all the questions put to her. He noticed no shortcomings in her interview technique. Like Mr. Wood, Mr. Forgeron stated that gender was not an issue.

[157] As for Mr. Verrette, he testified that he had no recollection whatsoever of the particular interview with Ms. McAvinn, nor of any of the other interviews he conducted.

[158] Given Mr. Verrette's lack of recollection and Mr. Forgeron's vague recollection of Ms. McAvinn's interview -[it must be noted here that in his cross-examination, Mr. Forgeron acknowledged that when interviewed by the Canadian Human Rights Commission in February 1998, he stated that, to his knowledge, Ms. McAvinn had not proceeded any further than the first interview]- , the Tribunal is left with Mr. Wood's impression of Ms. McAvinn's performance in the second interview.

[159] In short, it would have been Ms. McAvinn's poor interaction with the panel that would have been the key factor for not considering her application favorably. The Tribunal finds that the reason proffered by Mr. Wood is not credible in view of the discussion that took place between the panel members after Ms. McAvinn's interview. The overwhelming evidence points to the fact that it was Ms. McAvinn's "lack of literacy skills" which killed any hopes she might have had of becoming a bridge patroller.

[160] According to Mr. Wood's testimony, after Ms. McAvinn had left the interview room, a discussion took place between the panel members. Mr. Wood testified that Mr. Forgeron pointed out that her application was all typed and that they did not have a sample of her handwriting. According to Mr. Wood, Mr. Forgeron felt that, because the duties of a bridge patroller are observation and report writing, - reports had to be filled out for everything -, this was something that would prevent Ms. McAvinn from getting the job because of the report writing. In his testimony, Mr. Forgeron stated that he did not recall that there was any dispute among the panel members as to which pile Ms. McAvinn's application should be put into.

[161] It must be stressed here that, according to Mr. Wood, Mr. Forgeron was a key figure if not the key figure in the interview process. Mr. Wood testified that, at the time of the interview process, he had no experience interviewing individuals whereas Mr. Forgeron had. In Mr.

Wood's words, Mr. Forgeron was the "**hiring guru**" (emphasis added) for he was responsible for human resources for SCJV. The other members looked at Mr. Forgeron for his impressions about a candidate.

[162] In view of this evidence, the Tribunal finds that Mr. Forgeron played a decisive role in the selection process. His say had overall a determinative impact on who would be hired and who would not. This is interestingly illustrated by the case involving Mr. Paul Thompson. According to Mr. Wood, there was some disagreement among the panel members with one candidate with respect to the second interview rounds. Mr. Thompson was Mr. Wood's choice. However, John Forgeron and Jacques Verrette had liked someone else better. Mr. Wood decided to go along with them. At the end of the day, Mr. Wood was however pleased that Mr. Thompson was hired.

[163] The Tribunal finds that, in the end, the key reason why Ms. McAvinn did not make the second cut was not because of her poor interaction with the panel members but because she had sent in a typewritten application. This fact, it turns out, gave rise to serious concerns about her literacy skills and her ability to fill out reports, which was deemed essential, at least for Mr. Forgeron, with respect to the bridge patroller job.

[164] The Tribunal gives no credence to Mr. Forgeron's assertion that he went into the second interview with an open mind. Mr. Forgeron himself stated that, going into the second interview, he still had concerns regarding Ms. McAvinn's literacy skills. The evidence clearly establishes that he did nothing to alleviate his concerns or dispel his doubts; he never really inquired about Ms. McAvinn's abilities or skills fearing, it seems, that, had he done so, a discrimination complaint might be brought against him.

[165] As previously stated, in a discrimination case relating to employment, the Commission and the complainant have to establish a *prima facie* case of discrimination by proving that the complainant was qualified for the particular employment, that the complainant was not hired and that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint, subsequently obtained the position.

[166] From the evidence adduced, can it be said that Ms. McAvinn's gender had anything to do with the fact that she was not hired as a bridge patroller in 1997 by SCBL? As stated earlier, rarely will one be confronted with overt gender discrimination. The evidence will usually be circumstantial and the Tribunal will have to infer from different indices the existence of elements of discrimination.

[167] Ms. McAvinn is the only female candidate who applied for the bridge patroller job. She is the only former Marine Atlantic employee who completed successfully the Law and Security course and whose application raised doubts about her literacy skills suggesting that the bridge patroller job depended essentially on one's writing skills. Even though Ms. McAvinn had experience in emergency response, dangerous goods, first aid, and more, she was nonetheless passed over for the job whereas men having Armed Forces training or training as an ambulance attendant, volunteer fire fighter training or police patrol experience who did not have some of the basic qualifications for the job seemed to have attracted more interest on the part of the interviewers.

[168] To add to this, there is the uncontradicted and unchallenged testimony of Mr. Hagan, hired as a bridge patroller in 1997, who asserted in his testimony that, in a conversation he had with Mr. Arnold Wood and Mr. Mackie, another bridge patroller, about hiring additional bridge patrollers, Mr. Wood allegedly stated: "I guess we're gonna have to hire women this time". In his testimony, Mr. Wood never denied having made that statement. The Tribunal finds no reason not to believe Mr. Hagan. As for Mr. Mackie, he was never called as a witness.

[169] The Tribunal is of the view that these elements put together give rise to an inference that gender was a factor, albeit not the only one, in the selection process for the bridge patroller job and that some form of maleness was part of the job profile for the bridge patroller position.

[170] The Tribunal is further of the view that Ms. McAvinn was unfairly treated in the overall selection process. Unless one is prepared to say that pity caused Ms. McAvinn to get a second interview, which would be offensive to SCBL, one must come to the conclusion that a judgmental error was committed when Ms. McAvinn was not referred to a second interview. Furthermore, if one relies on the criteria, as set out by Ms. Murphy in her testimony, as to what should guide an interviewer in a first interview, it is beyond doubt that Ms. McAvinn should have been referred to a second interview because she met all of these criteria. SCBL did eventually realize this and Ms. McAvinn was called for a second interview. Mr. Francis, who had not interviewed Ms. McAvinn and thus was unaware of her true performance, stated in his testimony that the reasons he ordered that Ms. McAvinn get a second interview were because of her background and the fact that she had taken the Law and Security course. Unfortunately for Ms. McAvinn, Mr. Forgeron was a member of the second panel.

[171] In view of these findings, the Tribunal must, in light of the criteria set out in *Shakes*, proceed to determine if Ms. McAvinn has proven that she was qualified for the job she applied for, that she was not hired and, finally, that those hired, i.e. men were no better qualified than her.

[172] Ms. McAvinn was not hired for the bridge patroller job. The evidence on that point is clear. As for her qualifications, the Tribunal finds that Ms. McAvinn was qualified for the bridge patroller job. In fact, the evidence establishes that Ms. McAvinn had all the qualifications found on the bridge patroller job description (Exhibit C-3 and C-7), except for bilingualism. The evidence clearly shows that Ms. McAvinn had taken the Law and Security course which, the Tribunal holds, was a requirement for the bridge patroller job. Even if that had not been the case, the Tribunal is of the view that the twenty-six week long course Ms. McAvinn completed successfully provided her with the basic training needed for job. The course was, according to many, very demanding both academically and physically. Furthermore, Ms. McAvinn's past work experience at Marine Atlantic clearly shows that she was a good worker, had experience with the public, dangerous goods, emergency response and was used to physical work, shift work as well as working in a male environment.

[173] As for her literacy skills, the evidence shows that, in the Law and Security course, Ms. McAvinn did have training in accident report writing. It was never suggested that she failed that portion of the course. Moreover, when one looks at the bridge patroller's duties (Exhibit R-13), accident reporting represents a small portion of the bridge patroller job.

[174] With respect to the qualifications of the other candidates, the Tribunal finds that some of those hired were, at the time of their hiring, less qualified than Ms. McAvinn. The evidence establishes that four of the applicants hired for the bridge patroller position, namely John Daigle, Jeff Warren, Brent McDonald and Robert Stright, had not taken the Law and Security course. These applicants were however able, once hired, to take a First Responder Course offered by The Justice Institute of Canada in order to obtain the training required by the bridge patroller job (Exhibit HR-13).

[175] It is true that qualifications by themselves are not necessarily conclusive. How one performs during an interview is a crucial aspect of any selection process. In this respect, the evidence shows that Ms. McAvinn did not have a bad interview; it was not one of the better ones but it cannot be said that she performed poorly in her interviews. The fact that she finally ended up in the C or "No" pile after the second interview has more to do with Mr. Forgeron poorly rating her in her first and second interview because of his concerns for her literacy skills than any real shortcomings in her interviews.

[176] In this instance, the Tribunal finds that Ms. McAvinn was qualified for the job of bridge patroller, that she was not hired as a bridge patroller and that a person no better qualified than Ms. McAvinn was hired. Therefore, the Tribunal concludes that the Commission has made out a *prima facie* case of discrimination.

[177] Thus, it is incumbent upon the Respondent to provide an explanation which is equally consistent with the conclusion that discrimination on the basis of gender or sex is not the correct explanation for what occurred.

[178] Throughout these proceedings, the Respondent has maintained that better candidates were hired, candidates who, according to Mr. Forgeron, were head and shoulders above Ms. McAvinn and who had performed better than Ms. McAvinn in their interviews.

[179] Asked why Ms. McAvinn did not make the cut the second time around, Mr. Forgeron answered that it was just that the other candidates were better, that they had the qualifications, the experience, the attitude and the personality to go with them. According to Mr. Forgeron, those hired who did not have the Law and Security course had other relevant experiences such as army or firefighter training and could be trained. As for Mr. Wood, he stated in his testimony that he was very pleased with the qualifications of the people being hired. As for Mr. Verrette, he testified that at the end of the interviews, the panel had no difficulty choosing the candidates best suited for the bridge patroller positions.

[180] The Tribunal does not dispute the fact that the candidates hired, whether because they had the proper qualifications and experience or could be trained, were able to fulfil adequately the position of bridge patroller. Nor does it dispute the fact that an employer is entitled to hire the best candidates available for a job and will normally do so.

[181] This said, after careful consideration of all of the evidence, the Tribunal finds that, in the present case, the exclusion of Ms. McAvinn was motivated by reasons that had nothing to do with her real abilities to fill the job of bridge patroller and her performance in her two interviews.

The reasons given, i.e. her unproven lack of literacy skills and inability to deal with situations, sound more like a pretext designed to exclude her from the bridge patroller job so as to get, as stated by Mr. Wood, a nice team that would fit together, would work well together, would be willing to work the hours because there were shifts and they wanted to work that specific job. It seems as if Ms. McAvinn did not have what was needed to be part of the team, mainly good literacy skills and the ability to deal with situations, and that she could not be trained so as to acquire what she was lacking.

[182] In the present instance, the Tribunal finds Ms. McAvinn's complaint under section 7 of the *Canadian Human Rights Act* to be substantiated.

VI. THE REMEDIES

[183] Having found that Ms. McAvinn was discriminated against because of her sex (gender) in the interview process which took place at SCBL in the spring of 1997, it remains to be determined what remedy should properly be provided to Ms. McAvinn. In this regard, the Tribunal is governed mainly by section 53 of the *Act*, as well as jurisprudence which has established that in cases of discrimination, the goal of compensation is to make whole the victim of the discriminatory practice, taking into account principles such as reasonable foreseeability and remoteness⁽⁷⁾.

[184] In the present case, the Commission and the complainant request the following remedies:

- a. a letter of apology;
- b. an order requiring the Respondent to appoint the complainant to the position of bridge patroller at the first possible opportunity;
- c. should the Tribunal find that an order requiring the respondent to appoint the complainant to the position of bridge patroller at the first possible opportunity is not appropriate in the circumstances, an order for future lost wages reflecting a reasonable period in addition to, and on the same basis as, the lost wages requested above;
- d. an award for lost wages, plus interest, subject to gross-up to compensate for tax consequences of receiving a lump sum in one year;
- e. payment of the employer's portion of premiums, or an amount equivalent, to reflect all employment and employment-related benefits, including Canada Pension Plan, Employment Insurance, entitlement under the employer-sponsored pension plan and the supplementary health care plan;
- f. payment of an amount equivalent to the benefits received from Employment Insurance which must be re-paid by the complainant;

- g. an award for pain and suffering as per s. 53 (2) of the Canadian Human Rights Act;
- h. reimbursement for tuition fees paid to take the Law and Security course;
- i. an order that the Respondent's managers and employees who are responsible for the hiring of personnel undergo sensitivity training in relation to systemic attitudes that adversely affect women during hiring processes;
- j. reimbursement for legal costs.

[185] The complainant and the Commission ask the Tribunal to order that SCBL provide the complainant with an apology.

[186] The Tribunal is of the view that management at SCBL showed insensitivity with respect to Ms. McAvinn's allegation that she had been discriminated against in the selection process for the bridge patroller position. From the start, Mr. Francis dismissed her allegation as unfounded, stating that he had total confidence in his people. He never ordered an internal investigation into the matter as he should have done.

[187] The Tribunal thus orders that a letter of apology be provided to the complainant by the General Manager of SCBL within thirty days of this decision.

[188] The complaint as well as the Commission request that the Respondent appoint the complainant to the position of bridge patroller at the first possible opportunity.

[189] It must be stressed here that, in human rights cases, where a complaint of discrimination is found to be substantiated, it is the duty of the Tribunal to attempt to restore the complainant to the position that he or she would have been in, but for the discrimination. In so doing, the Tribunal must be satisfied that there is at least a serious possibility, if not a probability that the complainant would have received the position but for the discrimination⁽⁸⁾.

[190] In the present case, the question then is whether Ms. McAvinn would have, on a balance of probabilities, been hired as a bridge patroller on the Confederation Bridge had it not been for the discrimination she was subjected to. In this respect, Ms. McAvinn must demonstrate that, leaving aside her unproven illiteracy, she would have stood a fair chance of landing a job as a bridge patroller.

[191] The evidence, as previously noted, clearly establishes that Ms. McAvinn had all the qualifications and training required for the bridge patroller job. Furthermore, according to those who interviewed Ms. McAvinn, the latter had no major shortcomings in her interviews. The fact remains that, after May 1997, her application remained on file at SCBL and that she was called in 1998 for an interview for a casual bridge patroller position. Furthermore, it must be noted here again that Ms. McAvinn benefits from a right of first refusal as a former Marine Atlantic employee.

[192] After having given careful consideration to the issue of reinstatement, the Tribunal orders that SCBL provide Ms. McAvinn, at the first reasonable opportunity, a position as bridge patroller. The Tribunal is well aware of Ms. McAvinn's present medical condition. Nonetheless, as long as Ms. McAvinn's recent illness does not prevent her from fulfilling the duties related to the bridge patroller position, the Tribunal is of the view that she should be reinstated as bridge patroller. If Ms. McAvinn is not able to be reinstated as bridge patroller, the Tribunal orders that she be compensated according to the Tribunal's findings with respect to lost wages.

[193] Section 53(2)(c) of the *Act* states that when a complaint is substantiated, a Tribunal may make an order that the person found to have engaged in the discriminatory practice compensate the complainant for any or all wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

[194] The Tribunal is aware that when determining lost wages, there must be a causal connection between the discriminatory practice and the amount of wages found to have been lost as a result [\(9\)](#). The test to be applied when making such a determination is that of reasonable foreseeability. The time during which a causal connection exists is a matter to be determined in the circumstances of each case.

[195] In her opening remarks, counsel for the complainant indicated that her client was seeking an award for lost wages equivalent to ten years salary with benefits. She expressed the view that ten years was an appropriate period of time for the total of past and future loss of income.

[196] The evidence establishes that Ms. McAvinn stopped working for Marine Atlantic on May 31, 1997. The evidence also establishes that Ms. McAvinn benefited, as a former Marine Atlantic employee, from a right of first refusal with respect to any permanent job related to the operations of the Confederation Bridge. The position of bridge patroller was such a job. Furthermore, it stems from the evidence that, had Ms. McAvinn been hired as a bridge patroller with SCBL, she could, in all probability, have expected to work there until she was ready to retire. She could also have expected to access other jobs within SCBL, Mr. Francis having stated that SCBL hired internally. Furthermore, the evidence shows that individuals having been hired at first as bridge patroller occupied other jobs within SCBL later on.

[197] After consideration of all of the evidence, the Tribunal agrees with the complainant counsel's submission and finds that ten years is an appropriate period of time in the present context. This finding is, however, subject to the Tribunal's findings with respect to the reinstatement of the complainant in the bridge patroller job and to mitigation of damages.

[198] According to Exhibit C-51, Ms. McAvinn declared as earned income for the year 1997 \$13,232 of which \$8,418 came from Marine Atlantic and \$4,814 from the PEI Department of Agriculture. She also received \$9,728 in Employment Insurance Benefits before and after June 1st, 1997. It must be noted here that because of her severance package, Ms. McAvinn was not eligible for Employment Insurance Benefits from July 14, 1997 through June 5, 1998 (Exhibit C-55). As a result of having received some employment benefits in the summer of 1997, she had to pay back some \$600.

[199] According to Exhibit C-52, Ms. McAvinn declared as earned income in her 1998 income tax return \$6 889 of which \$6 831 came from the PEI Department of Agriculture and \$58 from the Western School Board. She also received \$868 in Employment Insurance Benefits.

[200] According to Exhibit C-53, Ms. McAvinn declared for the year 1999 as earned income \$7 583 all of which came from the PEI Department of Agriculture as well as \$10 875 in Employment Insurance Benefits.

[201] For the year 2000, the Tribunal was not provided with Ms. McAvinn's income tax return. However, the evidence establishes that from January through to May 2000, she received Employment Insurance Benefits in the amount of \$217 a week for a period of four weeks (Exhibit C-62). From July 2 to September 3, she earned \$501 while working in a bakery (Exhibit C-60). From September 10 to September 24, she worked 10 shifts and ten extra hours for the PEI Department of Agriculture at an hourly rate of \$12.05 (Exhibit C-61). From September 24 to December 31, 2000, Ms. McAvinn testified that she did not work.

[202] In awarding compensation for lost wages, the Tribunal must consider whether the complainant made any attempt to mitigate her loss of wages by seeking other employment and remuneration. The onus of proof lies with the Respondent to satisfy the Tribunal that the complainant failed to take reasonable steps to mitigate her loss⁽¹⁰⁾.

[203] In this respect, the evidence shows that, after being turned down by SCBL, Ms. McAvinn sent out hundreds of applications in search of a job. The evidence establishes that she sent out 67 applications in 1997 (Exhibit C-24), 112 in 1998 (Exhibit C-25), 108 in 1999 (Exhibit C-26) and 92 in year 2000 (Exhibit C-27). Out of all those applications, she got two jobs: one with the provincial Department of Agriculture (Exhibits C-28, C-30, C-40, C-42 and C-45) and the other in a bakery shop.

[204] It must be said here that there is no evidence that the applications Ms. McAvinn sent out were always in response to a job advertisement and that the companies to which she sent an application were all in fact in search of applicants to fill a specific job. Thus, the fact that Ms. McAvinn was able to obtain only two jobs with all the applications she sent over a period of 4 years should not lead the Tribunal to the conclusion that Ms. McAvinn was unemployable.

[205] The Tribunal finds that Ms. McAvinn deployed sustainable efforts to find employment once she learned that she would not be hired by SCBL and that she took reasonable steps to mitigate her loss of wages. One must keep in mind that, in Prince Edward Island, jobs are hard to come by.

[206] Given these findings, the Tribunal concludes that Ms. McAvinn is entitled starting June 1, 1997, to be wholly compensated for her loss of income as a result of not being hired as bridge patroller, subject to a ten year limitation period and her instatement in the position of bridge patroller. The amount of the loss shall be the income she would have earned as a bridge patroller less the employment income earned during the period extending from June 1, 1997 onwards.

[207] In relation to her loss of income and given that the complainant should be wholly compensated for the income losses she sustained, the Tribunal is of the view that the complainant is entitled to receive payment of the employer's portion of premiums, or an amount equivalent, to reflect all employment and employment-related benefits, including Canada Pension Plan, Employment Insurance, entitlement under the employer-sponsored pension plan and the supplementary health care plan.

[208] In their final submissions, the parties did not address the issue pertaining to the Employment Insurance Benefits received by the complainant after June 1, 1997 and the impact of these benefits on the award for lost wages. Both the Commission and the Respondent referred in their authorities to the case of *Bernard v. Waycobah Board of Education*⁽¹¹⁾. After having carefully reviewed that decision as well as the provisions of the *Employment Insurance Act*, the Tribunal is of the view that there is no need to make any deduction for the Employment Insurance Benefits received by the complainant after June 1, 1997. The Tribunal leaves it to the parties to determine who will remit the required amount to the Receiver General as required by law.

[209] The Commission and the complainant ask the Tribunal to provide for a gross-up amount to compensate for the tax consequences of receiving a lump sum in one year.

[210] Given that the task of the Tribunal is, insofar as possible, to put the complainant in the same position that she would have been in, but for the discriminatory conduct of SCBL, the Tribunal is of the view that it would be unfair to Ms. McAvinn if she was to suffer a more onerous income tax burden by reason of receiving a lump sum than she would have incurred had the monies been paid to her as salary over the period extending from June 1, 1997 to the present day and beyond. Accordingly, the Tribunal orders SCBL to pay to Ms. McAvinn an amount sufficient to cover the additional income tax liability that she will incur as a consequence of receiving a lump sum award for lost wages⁽¹²⁾.

[211] Ms. McAvinn seeks an award for pain and suffering under section 53 (2) of the *Canadian Human Rights Act*.

[212] Ms. McAvinn testified that, as a result of her not being hired as a bridge patroller in May 1997, she experienced sleeping and stomach problems, anxiety, tension and stress, as well as pain in her left shoulder and left arm. For these problems, she consulted on May 23, 1997, Dr. Senan Cusak, her family physician for nearly 17 years.

[213] Dr. Cusak testified that, when Ms. McAvinn came to see him on May 23, 1997, she was extremely upset and seemed more anxious and depressed than the previous times he had treated her for anxiety. He felt that her condition had worsened: she had insomnia, loss of appetite, loss of weight, headaches, tension, tension headaches, muscular tension.

[214] Upon seeing Ms. McAvinn, Dr. Cusak decided to refer her to Dr. Chris Stewart, a psychiatrist, fearing that Ms. McAvinn might be severely depressed (Exhibit R-10). He wanted Dr. Stewart to eliminate that possibility. It was the first time, since 1992, that Dr. Cusak felt that

this was needed. Dr. Stewart saw Ms. McAvinn within a few days and reported back to Dr. Cusak on May 30, 1997 (Exhibit R-11).

[215] Ms. McAvinn testified that she went to see Dr. Stewart because she was experiencing pain in her neck and shoulder, as well as stress, anxiety, depression, migraine headaches, sleeping and stomach problems. She also testified that she never told him that she was worried about her financial situation.

[216] It clearly stems from the evidence, notably from the medical exhibits filed, that Ms. McAvinn has a long history of stomach problems, migraine headaches and anxiety dating as far back as 1992.

[217] In her testimony, Ms. McAvinn acknowledged that in 1992, she experienced tension and stress and received prescription medication for anxiety and depression. She also acknowledged that before May 1997, over a period of time of approximately 33 months, she was prescribed and received medication for her stomach ailments. Ms. McAvinn linked the stomach problems she experienced before May 1997 to her working conditions on the ferry.

[218] According to Dr. Cusak, Ms. McAvinn suffers from chronic anxiety, which is accompanied by stomach problems, migraines, insomnia, pain in the neck, and possibly gastritis. According to Exhibit R-7, between August 20, 1992 and May 23, 1997, Ms. McAvinn went to see Dr. Cusak on numerous occasions for the following health problems: anxiety reaction or state (5 times), duodenal ulcer (3 times), acute gastritis (5 times), migraine headache (4 times), non organic sleep disorder (twice). The evidence further establishes that between July 1997 and September 2000, Ms. McAvinn consulted Dr. Cusak seven times for acute gastritis, twice for migraine headaches, three times for anxiety reaction and once for a duodenal ulcer.

[219] It must be noted here that Ms. McAvinn was reluctant, in the course of her testimony, to admit and even denied having suffered from any sleep disorder prior to May 1997 as well as having taken medication for that disorder. She is contradicted on this by Dr. Cusak and by the different exhibits filed in relation to her visits to Dr. Cusak and the medication prescribed to her.

[220] Dr. Cusak testified that, in his opinion, the worsened condition he observed in Ms. McAvinn could not be solely attributed to the fact that she was not hired as bridge patroller but that other factors could have come into play. The Tribunal cannot ignore the fact that in 1997, Ms. McAvinn suffered an important financial loss in relation to an apartment she was operating. In cross-examination, she testified that this loss did cause her some hardship. She furthermore testified that she never told Dr. Cusak about the loss she had incurred.

[221] The Tribunal finds that Ms. McAvinn was suffering, well before the event that befell her in May 1997, from sleeping and stomach disorders as well as anxiety, stress and migraine headaches. The Tribunal further finds that the worsening of Ms. McAvinn's condition in May of 1997 was, in all probability, caused in great part by her not being hired as a bridge patroller.

[222] After careful consideration of all of the evidence and considering the amount that can be awarded for pain and suffering under section 53 of the previous *Act*, since the present complaint

was filed in 1997, the Tribunal awards Ms. McAvinn \$2 000 for the pain and suffering which can be directly attributed to her non-hiring by SCBL.

[223] As for the reimbursement of the tuition fees related to the Law and Security course, the evidence establishes that Ms. McAvinn's tuition fees in the amount of \$6 800 were paid by Marine Atlantic and were considered as taxable income. However, the evidence shows that Ms. McAvinn claimed a deduction of \$3 570 in 1996 (Exhibits C-4 and C-59) and \$2 615 in 1997 (Exhibits C-4 and C-51) for a total of \$6 385 in her income tax return for these years. The Tribunal finds that the tuition fees, which became part of Ms. McAvinn's income, were for all intent and purposes off-set by a deduction nearly equal to the income. The Tribunal thus does not grant any award for the reimbursement of the tuition fees.

[224] The Commission requests that an order be issued that would compel the Respondent's managers and employees who are responsible for the hiring of personnel to undergo sensitivity training in relation to systemic attitudes that adversely affect women during hiring processes.

[225] The Tribunal finds that the evidence with respect to the existence of any form of systemic discrimination within SCBL in relation to its hiring policies that would warrant the issuance of such an order is inconclusive. The Tribunal is not prepared to draw any inference from the interview process for the bridge patroller position of the existence of any form of systemic discrimination. Counsel for the Commission acknowledged in her final submissions that she simply did not know enough about the hiring of other women in the organization to conclude that SCBL is a workplace free of systemic discrimination.

[226] The evidence shows that SCBL has over the years employed a number of women in a variety of jobs. Individuals such as Linda Waite, Anne Compton, Christine McNeill, all former Marine Atlantic employees, were hired by SCBL in positions or jobs other than the bridge patroller position. At the time of the hearing, SCBL has three female bridge patrollers.

[227] This said, the Tribunal is however of the view that the Respondent should improve its procedure with respect to its dealing with human rights complaints.

[228] In the present case, Mr. Francis stated in his testimony that he received a copy of the first complaint around May 12, 1997. Once notified that Ms. McAvinn had filed a complaint with the PEI Human Rights Commission, Mr. Francis testified that he reviewed the complaint and referred it to legal counsel. He did the same with respect to the complaint filed subsequently with the Canadian Human Rights Commission. Mr. Francis further testified that, at the time, he felt that the complaint was groundless and that he never asked Ms. Murphy or any one of the second round interviewers for the documents in their possession in relation to the hiring process.

[229] Mr. Francis testified that he never instituted an internal investigation. According to Ms. Murphy, if an investigation had taken place, it would have been conducted under the direction of the bridge operations/bridge management group, of which she was a part.

[230] Asked, in cross-examination, how she would act if she were to receive today notice of a human rights complaint against her organization, Ms. Murphy, who once was in charge of

Human Resources with the Hibernia project and whose testimony the Tribunal finds to have been truthful and honest, testified that she would immediately initiate an investigation.

[231] Ms. Murphy further testified that her investigation would be directed at the allegations identified in the complaint as well as to the process itself. She also testified that she would talk to those who had conducted the interviews, would review their notes and would try to determine if the complaint was valid or not. According to her testimony, these are all measures that a professional would take in the face of a human rights complaint. These measures are a far cry from those taken by SCBL with respect to Ms. McAvinn's complaint.

[232] The Tribunal is of the view that management at SCBL should be compelled to set up internal procedures as to how to deal with human rights complaints in the future.

VII. ORDER

[233] For the foregoing reasons, the Tribunal declares that Ms. McAvinn's rights under the *Canadian Human Rights Act* have been infringed by the Respondent, and orders:

- i) that a letter of apology be provided to the Complainant by the General Manager of SCBL within thirty days of this decision;
- ii) that SCBL provide Ms. McAvinn, at the first reasonable opportunity, a position as bridge patroller. If Ms. McAvinn cannot be instated in the position, the Tribunal orders that she be compensated for a period of ten years starting June 1, 1997;
- iii) subject to her instatement as bridge patroller, that SCBL pay to Ms. McAvinn the difference between the employment income actually received by her and the income that she would have received, had she been hired as bridge patroller as of June 1, 1997;
- iv) that SCBL pay to Ms. McAvinn an additional amount sufficient to cover the additional income tax liability that will ensue as a consequence of receiving a lump sum for the loss of income referred to above;
- v) that SCBL pay to Ms. McAvinn the sum of \$2000 for pain and suffering;
- vi) that simple interest calculated on a yearly basis at the Canada Savings Bond rate be paid on the sums awarded pursuant to this decision:
 - a) on lost wages from June 1, 1997; and
 - b) on the award for pain and suffering, from April 27, 1997;
- i) and that SCBL put in place internal procedures as to how to deal with human rights complaints in the future.

[234] In the event the parties are not able to come to an agreement as to the amounts payable under one or more of the heads of damages referred to in this decision, the Tribunal reserves its jurisdiction to determine the amounts payable. The parties are to make submissions to the Tribunal, in writing, within thirty days from the date of this decision.

[235] At the hearing, the parties agreed to argue the issue of legal costs once the Tribunal had rendered its decision on discrimination. The decision being rendered, the Tribunal invites the parties to submit written submissions on this issue within 30 days of this decision.

Pierre Deschamps, Chairperson

OTTAWA, Ontario

November 15, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

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DECISION OF THE TRIBUNAL DATED: November 15, 2001

APPEARANCES:

Phyllis P. McAvinn On her own behalf

Lisa Goulden For the Complainant (up to March 5, 2001)

Leslie Reaume For the Canadian Human Rights Commission

Eugene Rossiter For Strait Crossing Bridge Ltd.

1. *Basi v. Canadian National Railway*, (1988) 9 C.H.R.R. D/5029 (C.H.R.T.), at page D/5037, paragraph 38474. See also, *Folch v. Canadian Airlines International*, (1993) 17 C.H.R.R. D/261; *Bernard v. Waycobah Board of Education*, (2000) 36 C.H.R.T. D/51; *Singh v. Canada (Statistics Canada)*, (1999) 34 C.H.R.T.D/203; *Uzoaba v. Canada (Correctional Services)*, (1996) 26 C.H.R.R. D/361.

2. (1982) 3 C.H.R.R. D./1001, at page D/1002.

3. Transcript, pp. 2707-2709.

4. Transcript, p. 2710.

5. Transcript, p. 2711.

6. Transcript, p. 2743.

7. *Canada (Attorney General) v. McAlpine*, [1989] F.C. 530 (C.A.).

8. *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.).

9. *Ibidem*.

10. *Bernard v. Waycobah Board of Education*, supra note 1.

11. Supra, note 1.

12. *Singh v. Canada (Statistics Canada)*, supra note 1.