

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

GEORGE A. MORRIS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

REASONS FOR DECISION

T.D. 17/01

2001/12/20

PANEL: Athanasios D. Hadjis, Chairperson

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[1] The Complainant in the present case alleges that his employer, the Canadian Armed Forces ("**Canadian Forces**"), discriminated against him by denying him a promotion because of his age.

I. THE COMPLAINT

[2] On September 26, 1996, Mr. George A. Morris, filed his complaint with the Canadian Human Rights Commission ("**Commission**") in which he claims that the Canadian Forces did not promote him from the rank of Warrant Officer to the rank of Master Warrant Officer because of his age. Mr. Morris points out that when he completed a prerequisite course for such a promotion in February 1990, he was just under 46 years of age.

[3] In response, the Canadian Forces contend that Mr. Morris did not reach the higher rank because his place on each of the National Merit Lists prepared annually, measuring his performance and potential against his peers in his regiment, was simply too low and any vacancies at the rank of Master Warrant Officer were filled by the "more deserving" employees at the top of the merit lists. According to the Respondent, age is not a factor in the establishment of the Merit Lists.

[4] Due to the extensive use of abbreviations in this decision, I have attached a glossary at the end, for the reader's assistance.

II. THE FACTS

A. Mr. Morris's Career in the Canadian Forces

i) His Ranks and Postings

[5] Mr. Morris was born on April 1, 1944. He enrolled in the Canadian Forces as a Non-Commissioned Member ("NCM" or alternatively "**Member**"), on June 11, 1963, in Halifax, Nova Scotia. He commenced his service in the infantry at the rank of Private and, in 1968, he was promoted to Corporal. In 1974, he was elevated to Master Corporal and in 1977, to Sergeant. Finally, on September 18, 1981, he achieved the rank of Warrant Officer.

[6] Mr. Morris was initially posted to Petawawa, Ontario, where he received his basic training, following which he was assigned to the "1 Canadian Guards" in Picton, Ontario, in the autumn of 1963. In 1966, the Complainant was posted to the second battalion of the Royal Canadian Regiment ("**RCR**") at Petawawa, where he remained until 1975, when he was assigned to the Canadian Armed Forces Recruiting School in Cornwallis, Nova Scotia.

[7] In 1978, Mr. Morris was posted to the first battalion of the RCR ("**1 RCR**") in London, Ontario. After serving at Canadian Forces Base Borden, Ontario, for a one-year period between 1980 and 1981, he returned to the 1 RCR battalion and remained there until 1987.

[8] On July 15, 1987, Mr. Morris was assigned to work with the Lincoln & Welland Regiment, which is a unit of the Reserve Forces (or Militia), based in St. Catharines, Ontario. Until 1992, Members of the Regular Forces who were posted outside their regiment, or "extra-regimentally", to such units were said to be on a Regular Support Staff posting. In 1992, although he remained at the same location, Mr. Morris's posting was officially re-designated as being to the Lincoln & Welland Regiment, apparently as a result of a change in the administrative structure of the Canadian Forces.

[9] In 1994, Mr. Morris was sent on to the Hamilton, Ontario detachment of the RCR Battle School, although he maintained his residence in St. Catharines. He remained with the Battle School until his mandatory retirement from the Canadian Forces on his 55th birthday, April 1, 1999. He has continued to reside in St. Catharines since that time. After leaving the Canadian Forces, he gained employment with the Niagara Regional Police, serving initially as a court escort officer. He has since been promoted to the job of court supervisor for the Niagara Region.

ii) His Duties

[10] The evidence presented in this case regarding Mr. Morris's duties was essentially limited to the period subsequent to his achieving the rank of Warrant Officer in 1981. In that year, while posted at the 1 RCR battalion in London, he was employed as a mess hall manager. In the following two years he was assigned as a Signal Platoon Warrant Officer, involved in the organization of the signal platoon stores. By 1984, Mr. Morris was employed as the Company Quartermaster Sergeant of a mechanized infantry rifle company. He continued in these duties during the following two years, but he was also assigned to act as a Company Sergeant Major of a rifle company. Some of these employments required him to perform tasks with his battalion away from London, and occasionally overseas, in places such as Cyprus, Norway and Australia.

[11] During his posting at the Lincoln & Welland Regiment, Mr. Morris was principally employed as a Unit Training Assistant ("UTA") responsible for the quality and standards of the training in the unit. He also served as an Operations Warrant Officer and was assigned periodically to act as the Company Sergeant Major of Battalion Headquarters Company and other staff as well. Among the many tasks that he performed outside of his functions as a UTA, were the coordination and organization of unit exercises and other activities.

[12] While at the Battle School in Hamilton, commencing in 1994 and until his retirement in 1999, Mr. Morris was employed as a Standards Warrant Officer, evaluating the quality of the training being conducted in Militia units. He also instructed courses and generally provided advice and assistance to the Militia units.

B. The Regiment's Procedures for Promotion

[13] Mr. Morris's allegation that he was not promoted from the rank of Warrant Officer to Master Warrant Officer because of his age cannot be properly examined without an understanding of the process by which Non-Commissioned Members were promoted. For the purposes of brevity only, I will be using the masculine gender when referring to NCMs and other members of the Canadian Forces. The feminine gender is obviously also intended to be included in these references.

[14] The ranks of NCMs progress in the following order: Private, Corporal, Master Corporal, Sergeant, Warrant Officer, Master Warrant Officer and Chief Warrant Officer. Canadian Forces Administrative Order 49-4 ("**CFAO 49-4**") sets out the policy for promotion of NCMs in the Regular Force. While the evidence before me did not specify whether this policy remains in force today, it apparently was in place in the period during the early 1990's when the Complainant alleges he should have been promoted.

[15] According to CFAO 49-4, in order for a Warrant Officer to become eligible for promotion to the next level, he would have to successfully complete the 7th Qualification Level course ("QL7", also referred to as "TQ7"). Mr. Morris completed this course in February 1990. There is no dispute that by that point in time, Mr. Morris also met several of the other conditions detailed in CFAO 49-4, namely that he had served three years in his current rank, that he met the required medical standard, that his recent performance and conduct was satisfactory and that he was recommended for promotion by his Commanding Officer. However, the Canadian Forces take the position that he was not promoted because the remaining conditions were never satisfied,

alleging primarily that his rankings on the annual Merit Lists were too low, in light of the applicable promotion quotas and actual vacancies available in each year.

i) Merit Lists

[16] Each year, the Royal Canadian Regiment would prepare the National Merit List for each of the NCM ranks above Corporal. The rather complex procedure leading up to the formation of these lists began at the unit where the NCM was employed.

[17] Within the regiment, each battalion constituted a unit, which itself was composed of several companies. In each company, there were usually three platoons with one Warrant Officer each. There was also a Warrant Officer assigned to serve the entire company. Consequently, there were four Warrant Officers typically present in each company.

[18] Towards the end of every financial year (usually the 31st of March), the commanders of a platoon would meet with the company's commander for the purpose of assessing the relative performance of the company's Warrant Officers and other NCMs, over the preceding financial year. Each platoon commander would argue the merits of his Warrant Officer with the goal of convincing the company commander that he performed the best amongst the four who were being evaluated. Documents such as letters of assessment and commendations that the Warrant Officers had received in the previous year would be consulted during these exchanges. At the close of these discussions, the company commander would prepare a list ranking the company's Warrant Officers from first to last.

[19] About a month later, the Unit Merit Board would meet, composed of the Regimental Sergeant Major, the Drill Sergeant Major as well as all of the company commanders and Company Sergeant Majors. The meeting would be chaired by the Deputy Commanding Officer of the unit. Each company commander would put forward the qualities of his NCMs and attempt to convince the other board members to place them as high up as possible on the unit's Merit List. At this stage, the ranking was achieved by consensus of all the participants. Once an agreement was reached as to the relative rankings of the Warrant Officers, each company commander then returned to his company and he, together with the platoon commanders who directly supervised the Warrant Officer, would prepare the Member's Performance Evaluation Report ("PER"). A similar procedure was followed with respect to the other NCM ranks.

[20] Warrant Officers who served extra-regimentally at Reserve units, as was Mr. Morris's case from 1987 to 1994, were evaluated in a similar fashion by their supervisors and commanding officers. The Reserves were not divided up into battalions but regional Areas, with Ontario being referred to as the Central Militia Area. Thus, the Unit Merit Board for the Reserves was conducted at the Area level, and Warrant Officers were usually compared to their colleagues within that Area.

ii) The Performance Evaluation Report

[21] The PER played a vital role in the progress of a Non-Commissioned Member's career. According to the Canadian Forces' "Non-Commissioned Members Merit Board Guidance

Manual" applicable in 1992, the PER was "designed to reflect ratings on those aspects of performance which are most critical to effective performance".⁽¹⁾ Although the style of the PER form occasionally changed from one year to another, its content was essentially the same throughout the 1980's until 1995.

[22] The first page of the document identified the Member and provided him with the opportunity to list any courses that he desired to take, state his top three posting preferences and make any additional remarks he found appropriate. The Member did not contribute to the second page other than to sign an acknowledgement to the effect that he had been briefed on certain portions thereof.

[23] This second page outlined the Member's evaluation and consisted in part of a "Quantitative Assessment" based on a numerical scale. In addition, there was a narrative section consisting of the "Narrative Assessment", which would be drafted by the Member's supervisor together with the next higher ranked reviewing officer, and a separate "Remarks" section would usually be completed by the commanding officer of the unit. It was also the commanding officer's duty to indicate in this section whether he recommended the NCM for promotion. The Member's ranking amongst others at the unit, in his rank and/or his Military Occupation (or Military Operational Code ("MOC")), would also be identified.

[24] The "Quantitative Assessment" related to fourteen aspects of employment and was divided into two categories. The first described how well the Member did his work based on aspects such as applying job knowledge and skills, motivation, response to direction, initiative and performance under stress. The second part assessed his leadership by grading his abilities in areas such as communicating, gaining cooperation and developing subordinates. The Members were assessed according to the following scale:

4 - unsatisfactory

5 - marginal

6 - competent

7 - good

8 - very good

9 - superior

10 - outstanding

[25] Once the Member was numerically graded in each of the fourteen aspects, the scores were totalled and averaged so as to derive the average score, often referred to as the "PER Score". This overall figure was entered into a separate section of the PER form and was identified as the "Score Average". Thus, for instance, if a Member's PER showed ten 8 scores and four 9 scores in

his Quantitative Assessment, as was the case in Mr. Morris's 1991 PER, a Score Average of 8.3 would be entered on his PER form.

[26] While it would appear that the PER Score was derived directly from the numbers entered on the detailed Quantitative Assessment, in fact, the opposite would occur. Unit Merit Boards would assign a Member his PER Score based on his ranking vis à vis his colleagues in the unit. It was understood that PER Scores that exceeded 8.4 were "outstanding", those that were from 7.5 to 8.4 were "superior", 5.0 to 7.4 scores were average and 4.9 or lower were unsatisfactory. ⁽²⁾ Thus, the first ranked Warrant Officer would likely be assigned a score of 8.5 or higher, although exactly which score he would receive was dependant on how worthy the Unit Merit Board considered his performance. This decision would have a bearing on the remaining Members on the list. If the first ranking NCM was given a score of 8.6, for instance, the second ranked individual could not be assigned a higher score, irrespective of whether his company commander felt the member deserved a higher score. There would also be restrictions placed on the number of persons in a unit who could be awarded an outstanding score, regardless of how many may have performed to that level in a given year. Thus, an outstanding performer could nonetheless find himself assigned a mere "superior" score by his Unit Merit Board.

[27] As a result of these score control processes, when a supervisor would prepare a subordinate's PER, he would score within the Quantitative Assessment category in such a way as to ensure that the overall average matched the PER Score that the Unit Merit Board had already assigned to that individual. Thus, if I refer back the example of Mr. Morris's 1991 PER, if his supervisor had intended to assign him seven 9 scores and seven 8 scores (an average of 8.5), he would have been prevented from doing so, in order to avoid exceeding the Score Average of 8.3, already assigned to Mr. Morris by the Unit Merit Board.

[28] For these reasons, it became possible for a PER Score to not truly reflect the level of a Member's performance in a given year.

iii) The Regimental or National Merit Board

[29] Once the PERs were completed and duly signed, the unit (battalion), or in the case of the Militia, the Area, would forward them to the Career Manager of the Royal Canadian Regiment, who was posted at National Defence Headquarters ("NDHQ") in Ottawa. The Career Manager would oversee the personnel files of all the Non-Commissioned Members in the RCR. According to the testimony of Chief Warrant Officer (CWO) John Ginn, who served as Career Manager between 1993 and 1997, he oversaw the files of between 1800 and 1900 individuals. His duties included insuring that the files were updated regularly, as well as visiting the battalions in order to meet with Members and conduct briefing sessions. Perhaps his most significant responsibility was as the guardian of the Regimental Merit List. Whenever a vacancy would open up within the Regiment that needed to be filled through a promotion from the next lower rank, the Career Manager would promote a Member "off the list", in the order of the rankings.

[30] The Regimental Merit List was compiled by the Regimental Merit Board, also referred to as the National Merit Board, during a meeting conducted over a series of days, usually in the month of November of each year. This Board was composed of high-ranking representatives of the

Canadian Forces, consisting, for the most part, of battalion commanding officers together with their Regimental Sergeant Majors (the highest ranking NCMs in a battalion).

[31] The Career Manager, together with other NDHQ staff, assisted the Regimental Merit Board in the conduct of its proceedings. The members of the Board were guided through the process by a publication that was distributed to them, entitled "Non-Commissioned Members Merit Board Guidance Manual", issued on the authority of the Chief of Defence Staff. In addition, at the outset of the meeting, the Career Manager would meet with the Board members and explain to them the procedure that had to be followed for the formulation of the Regimental Merit Lists. The Career Manager did not, however, actually participate in the process of merit ranking conducted by the Board.

[32] The Career Manager would provide the Board members with the personnel file of every NCM being assessed, also referred to as the "PER File". This file contained every PER ever completed regarding the NCM together with all course reports, letters of commendation and a one-page résumé of his career. The Board members would study each file one at a time and evaluate the NCM based on a scoring system ranging from 0 to 10. In contrast to the Merit Boards at the unit and lower levels, the Regimental Merit Board did not only assess the Member's performance but his potential and second official language ability, as well. Thus, according to the version of the guidance manual applicable from 1992 onwards, Regimental Board members were instructed to evaluate an individual by assigning the allocated points as follows:

- Performance – 0 to 8 points (80 %);
- Potential – 0 to 1.8 points (18 %);
- Second language ability – 0 to 0.2 points (2 %).

[33] The 1986 guidance manual, Exhibit R-17, which was apparently utilized until 1992 (the parties in this case did not produce any manuals with respect to the intervening period), provided for a similar distribution but did not allocate a specific point value for second language skills. Thus, from 1986 to 1991, 80 % of the score was allocated to performance and 20 % to potential, the latter encompassing bilingual ability.

a) Assessment of Performance

[34] According to the various guidance manuals entered into evidence, covering a period extending from 1986 to 1996, the rating of performance was to be determined by an assessment of the overall performance standard of the candidate, based mainly on his PERs and course reports. The performance assessment was not to be based solely on his most recent PER but rather on as many "as are deemed necessary to provide an accurate overall evaluation of each member's performance". However, there was some disagreement in the evidence as to how the performance assessment was actually conducted.

[35] CWO Ginn, called as a witness by the Respondent, testified that during his briefing session, he advised the Regimental Board Members to review three prior PERs at a minimum before rating a candidate's performance. CWO Ginn also asserted that the scoring for performance is entirely mechanical inasmuch as Board members were instructed to merely calculate the average of the PER Scores from all of the PERs being consulted for the assessment. This average score, based on a denominator of 10, was recalculated to a score with a denominator of 8 to reflect the above-mentioned 80% weight assigned to performance. This figure then constituted the final assessment of the candidate's performance.

[36] The evidence of another witness for the Respondent, Lt. Col. Mike Zuwerkalow, who participated on Regimental Merit Boards from 1995 to 1998, differed substantially. He testified that ordinarily he based a performance assessment on the Member's PER for that reporting period and that he would "glance back" to the PERs of a variable number of other years, depending on the individual's situation and in order "to get a better picture" of him. More importantly, Lt. Col. Zuwerkalow indicated that the process of assessing performance was not mechanical at all. He used his own judgment in determining the performance score based on a maximum available grade of 8 points, taking into consideration factors such as the candidate's PER Score(s) and his ranking amongst other Members of the same rank within the unit.

[37] The discrepancy in the evidence of CWO Ginn and Lt. Col. Zuwerkalow is all the more striking considering that the former was the Career Manager at the first two Regimental Merit Boards on which the latter sat and that in 1997 and 1998, CWO Ginn participated as a member of the Board alongside Lt. Col. Zuwerkalow.

b) Assessment of Potential

[38] The instructions found in the guidance manuals themselves, from year to year, regarding the assessment of potential, are not as consistent as in the case of performance. From 1986 to 1991, the document handed to the members of the Regimental Merit Board (Exhibit R-17) stated that the potential rating was to be a general appraisal of the individual's capability to rise to the higher ranks of the Canadian Forces, covering such considerations as leadership, supervisory ability, experience, qualification, personality, physical fitness and linguistic ability in the second official language. No undue external influence was to be placed on any particular item of potential and no specific percentage of the points allotted to potential was assigned to any particular potential factor in advance. However, individual boards could structure or partially structure potential themselves.

[39] Beginning in 1993, Boards were required to detail in their final reports, every factor that was used in the assessment of potential and what point weight was assigned to each. Significantly, though, it appears that the form provided to the Merit Board, on which these details were to be submitted, contained a list of pre-printed "suggested" factors. The instructions accompanying the form stipulated that the Board could use, delete or augment these factors by others deemed more appropriate. The suggested factors were the following: leadership, experience, employability, physical fitness, extra activities, education/upgrading, reliability and professional judgment.

[40] In 1996, the Board was no longer merely informed that no emphasis was to be placed on any one particular factor, but that **all** selected factors were to be considered in deriving the potential score. In addition, for the first time, Board members were provided with the following elaboration of the elements comprising some of the above-mentioned suggested factors:

- **Leadership:** reliability, initiative, personal attributes, supervisory jobs;
- **Experience:** number of postings, operational vs. static, employment/element types, foreign (UN, Alert, etc.), expertise, skills;
- **Learning (course reports):** qualifications, education, upgrading;
- **Professional judgment:** (points awarded to members based on Board members' professional judgment);

[41] No elaboration was provided for the factors of employability, reliability, physical fitness and extra activities/secondary duties.

[42] The reports issued by the post-1992 Regimental Merit Boards contained the detailed breakdown of the factors upon which they had relied to assess potential and the weights assigned to each. In most years, a consistent approach was adopted by the Boards. For instance, from 1995 to 1997, each factor was assigned a maximum available point score of 0.1, except for physical fitness at 0.4 and professional judgment at 0.8. However, exceptionally in 1994, the Board report did not attribute any individual maximum point score to each factor, but instead declared that a 1.8 point score would be assigned overall to all of the factors (except for physical fitness which was expressly excluded as a factor in that year). In addition, a note was added by that Board to the effect that points related to the factors of experience, employability and professional judgment had been awarded to candidates based on the "professional judgment" of the Board.

c) Assessment of Linguistic Ability in the Second Official Language

[43] From 1992 until 1995, if a Member's PER file demonstrated that he had an integral or functional second language ability, he was awarded the full 0.2 point score. However, even if he lacked this ability, a Regimental Merit Board member could award him a 0.1 point score based on the Member's interest or initiative. In the event that he demonstrated no second language ability and no interest in second language training, 0 points were awarded.

[44] In 1996, the Canadian Forces apparently adopted a linguistic profile standard somewhat akin to that which is utilized in the Federal Public Service, based on a person's reading, writing and oral interaction abilities. This standard became the basis for scoring in that year and points ceased being allotted merely for interest or initiative.

d) The Scoring Process before the Regimental Merit Board

[45] Contrary to the procedure followed at the lower level merit boards where NCMs were rated through a process of discussion and debate amongst the supervisors, commanders and

commanding officers within the units, assessments at the Regimental Merit Board level were made on a more individual basis. All of the guidance manuals required that the Board members conduct their evaluations "without consultation". Evidence was adduced to the effect that all of the PER Files for a given rank were distributed equally amongst the Board members sitting around the conference table. As every member would evaluate the data and arrive at a score that would be written onto a chart placed before him, he would pass the file to the member seated next to him, who would proceed with his assessment of the same candidate, in a similar manner.

[46] There was some evidence, however, that the members did not, in fact, examine each file alone but rather in teams of two, consisting typically of the Commanding Officer of each battalion together with the Regimental Sergeant-Major from his battalion. This method of proceeding was explicitly referred to in the reports of the Regimental Merit Boards conducted in 1991 and 1992. Moreover, Lt. Col. Zuwerkalow, who participated on the Boards of 1995 to 1998, indicated in his testimony that the members worked in pairs.

[47] Although no clear or direct evidence regarding this matter was adduced by either the Commission or the Respondent, after carefully consulting the reports of several Regimental Merit Boards and comparing them with the scores produced on the Merit Lists, I have concluded that one evaluation was prepared per team and not per member.

[48] Once the examination by the Board members of all the PER Files for a given rank was completed, the files were returned to the Career Manager, who also collected the scoring charts from the Board members. The scores from these charts were immediately entered electronically into computers by the Career Manager's staff and tabulated. The guidance manuals restricted the permissible degree of variance between the highest and lowest overall merit scores to be accorded by the Board members, to no more than 0.5 point.⁽³⁾ The staff, therefore, initially scrutinized the results to verify if the lowest and highest score given by the Board members to each candidate fell within the permissible range of variance. If the range was exceeded, the Board was notified and some discussion would ensue, in order to reconcile the high or low scores. Once this reconciliation was successfully achieved, the modified scores were entered into the computer.

[49] The Career Manager's staff then printed out the results in the form of a table on which the names of the NCMs assessed were to be listed in the order of their total scores (performance, potential and linguistic ability combined), from the highest to the lowest. This Regimental Merit List was then brought to the chairperson of Regimental Merit Board. According to the evidence of Lt. Col. Zuwerkalow, the Board members were not shown the list but were informed who the top ranked NCMs were. Both he and CWO Ginn testified that it was only at this point that the members of the Board acquired any knowledge about the rankings of the candidates.

[50] The work of the Regimental Merit Board having been completed, the Career Manager retained the list. The Board members were obliged to keep all information acquired during the entire merit scoring process in strictest confidence. The Career Manager guarded the Merit List under tight security. No one was allowed access to the document other than he and his commanding officer. Whenever a vacancy occurred in the following calendar year that needed to be filled by promoting a Non-Commissioned Member from the next lower rank, the Career

Manager staffed the position by consulting the Merit List and selecting whomever was then top placed on the list.

C. Mr. Morris's PERs

[51] Mr. Morris was promoted to the rank of Warrant Officer in September 1981, while serving at the 1RCR battalion in London, Ontario. His first two PERs were signed by his commanding officer in July 1982, and May 1993, respectively, but he was not eligible for further promotion, having not as yet served three years in his current rank, as required by CFAO 49-4. His PER Score in 1982 was 6.7 and in 1983, it rose to 8.0. The Narrative Assessments in both documents suggested that with more experience, he would become a very good candidate for promotion to the next rank.

[52] By 1984, Mr. Morris had cleared the three-year threshold but having not as yet been assigned entry into a QL7 course, he still lacked an essential prerequisite to promotion. NCMs were apparently selected to take the course based on how well they had performed in the preceding years. Mr. Morris's PERs between 1984 and 1986 were fairly consistent. His 1984 and 1985 PER Scores of 7.1 fell into the "average" category, although the 7.9 of 1986 jumped to the "superior" level. In 1984, the commanding officer's recommendation indicated that Mr. Morris was "suitable" for promotion, one step below the best available recommendation, "highly suitable". In the following year, this rating was dropped a notch to "likely to become suitable" but returned to "suitable" in 1986. Nationally, between 1984 and 1986, he was ranked between 72nd and 76th on the Regimental Merit Board List.

[53] In 1986, the ratings by rank and MOC within the unit were inscribed on PERs for the first time and Mr. Morris was 6th amongst 23 in this rank and 5th amongst 19 in his MOC. His PER in that year was described in the Narrative Assessment as constituting a "very good" report. This comment was repeated in the 1987 PER, when Mr. Morris was ranked 5th of 24 in rank and 3rd of 20 in MOC. His PER Score rose to 8.3 (still superior) and the Commanding Officer again declared him "suitable" for promotion. The Commanding Officer stated in his Narrative Assessment that Mr. Morris could perform the duties of a Company Sergeant Major (a position normally filled by a Master Warrant Officer) "without difficulty", and he was "recommended for an early promotion" to Master Warrant Officer. Later in that year, the Regimental Merit Board ranked him 43rd out of 84 Warrant Officers nationally.

[54] In July 1987, at about the same time as the PER for that year was being completed, Mr. Morris was posted extra-regimentally to the Lincoln & Welland Regiment in St. Catharines. In his first PER at this new posting, finalized in June 1988, his PER Score dropped slightly to 8.1. However, the Commanding Officer's recommendation now indicated that he was "highly suitable" for promotion. The Commanding Officer added that Mr. Morris was "highly recommended for the [QL7] course and for promotion at a rate faster than his peers".

[55] Since Mr. Morris's unit was no longer a battalion, he was now compared to other Members serving as Regular Support Staff to the Reserves, within his Area. Mr. Morris was ranked 4th amongst 43 others in his rank and 2nd amongst 19 in his MOC. Following the Regimental Merit

Board assessment later in the year, his national ranking also rose to 20th amongst 85 Warrant Officers.

[56] The PER Score in the 1989 PER remained at 8.1, but curiously, the Narrative Assessment included such comments from his supervisor as "Warrant Officer Morris' performance during this period was excellent", and such remarks from the Commanding Officer as "He will make a fine Master Warrant Officer and is ready for promotion now". The Commanding Officer also declared that Mr. Morris was "highly suitable" for promotion. Apparently, in that year, the PERs of Regular Support Staff did not indicate their ratings as against the entire Central Area, but their place of posting instead. Mr. Morris therefore ranked 1st amongst 5 in his rank and 1st amongst 2 in his MOC. Nationally, he reached 17th of 99 Warrant Officers assessed by the Regimental Merit Board.

[57] It seems that as a result of his improving performance, Mr. Morris was assigned to attend the QL7 course of January 1990, which he completed on February 9, 1990. He passed the course but finished in the bottom third of his class of 28 students. The Reviewing Officer stated that Mr. Morris should "seek to broaden his tactical knowledge yet he is fully capable of assuming the duties and responsibilities of a [Company Sergeant Major]".

[58] In his 1990 PER, Mr. Morris was again deemed "highly suitable" for promotion and "more than capable of assuming the rank of [Master Warrant Officer] ". His PER Score rose to 8.4, just under the "outstanding" range yet the Narrative Assessment stated that his performance was "very good". This phrasing appears at odds as well with his ranking in the Central Military Area, which was 2nd of 39 Warrant Officers and 2nd of the 18 Members in his MOC. His supervisor did remark however that his performance as an acting Company Sergeant Major for two months was superior. Nationally, Mr. Morris moved up to 14th on the Regimental Merit Board List, out of 103 candidates.

[59] The 1991 PER posed similar anomalies. Mr. Morris was ranked, within the Central Area, 1st amongst 46 in his rank and 1st amongst 19 in his MOC. His PER Score however remained below the outstanding range, at 8.3, and his supervisor wrote that his performance was "very good". Even more curious was the fact that although the Commanding Officer inscribed in his Narrative Assessment that Mr. Morris was "highly recommended for promotion now", the entry "suitable" for promotion had been ticked off instead of "highly suitable". The Regimental Merit Board dropped Mr. Morris's national ranking slightly to 23rd out of 103.

[60] In Mr. Morris's 1992 PER, it was the Narrative Assessment that stood out. The Commanding Officer said he was one of the "hardest working, most conscientious Warrant Officers within the district" and that he was highly recommended for promotion. His supervisor wrote that his performance during the period was "outstanding". Yet, the PER Score dropped again by one decimal point to 8.2. In this year, his PER again did not state his ranking as compared to others in the Central Area, but rather, to the relatively few members at his posting. He placed 1st of 3 others in his MOC (comparisons against others in the same rank ceased in this year). His national ranking remained unchanged at 23rd out of 102.

[61] In 1993, Mr. Morris achieved what would be the highest PER Score in his career as a Warrant Officer, 8.6, falling within the "outstanding" range. The Narrative Assessment reflected this score, referring to his performance and support as outstanding, describing him as "unquestionably capable of assuming the rank of [Master Warrant Officer]". New PER forms were distributed in this year, that no longer described a Member's suitability for promotion, but rather his supervisory and leadership potential, which in Mr. Morris's case was identified as "high", the uppermost level available. He was again ranked 1st amongst 3 in his MOC and nationally, the Regimental Board rated him 16th out of 91.

[62] Mr. Morris's 1994 PER was his last to be prepared while he was posted at the Lincoln & Welland Regiment in St. Catharines. His PER Score dropped just under the outstanding level, at 8.4. He was described as a "superior, highly proficient Senior [Warrant Officer]" who was "highly recommended for promotion to [Master Warrant Officer] now". His supervisory and leadership potential was again identified as "high". He was ranked locally 2nd amongst 6 in his MOC and 27th of 136 nationally.

[63] On July 30, 1994, Mr. Morris was posted to the Hamilton, Ontario detachment of the RCR Battle School. His first PER while at this location was completed in July 1995, when Mr. Morris's age was 51. His PER Score dropped dramatically to 7.4, at the upper end of the "average" range. The Commanding Officer remarked that his performance was "above average" but that he had "average potential". The supervisory and leadership potential rating was lowered to "normal". Rankings by MOC were not provided but the Narrative Assessment indicated that he fell into the third quarter amongst the nineteen Warrant Officers in the Hamilton detachment. Nationally, his ranking came down to 51st out of 136.

[64] Beginning in 1996, PERs no longer contained numerical PER Scores. Remarks similar to those entered in Mr. Morris's 1995 PER reappeared in his 1996 report, including references to his "average potential". He again placed in the third quarter of the 19 Warrant Officers posted to Hamilton. His national ranking was not recorded, presumably because his rating fell into the lower half of all the candidates assessed by the Regimental Merit Board.

[65] Mr. Morris's 1997 report remained "normal" or average and his final PER in 1998 rose slightly to "superior".

III. THE LAW

[66] Mr. Morris alleges that the Respondent discriminated against him by denying him a promotion because of his age, contrary to Section 7 of the *Canadian Human Rights Act* ("*CHRA*"), which states the following:

It is a discriminatory practice, directly or indirectly,

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

b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

According to Section 3 of the *CHRA*, age is included amongst the prohibited grounds of discrimination.

[67] The burden of proof rests on the complainant to establish a *prima facie* case of discrimination.⁽⁴⁾ In *O'Malley v. Simpsons-Sears Ltd.*,⁽⁵⁾ the Supreme Court of Canada explained that a *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.

[68] Once the *prima facie* case is established, the burden then shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. If the respondent provides such an explanation, the complainant has the eventual burden of demonstrating that the explanation provided was merely a pretext and that the true motivation behind the employer's actions was in fact discriminatory.⁽⁶⁾

[69] It is not necessary that discriminatory considerations be the sole reason for the actions in issue in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors for the employer's decision.⁽⁷⁾ The standard of proof in discrimination cases is the civil standard of the balance of probabilities.

[70] In *Basi v. Canadian National Railway (No. 1)*,⁽⁸⁾ the Canadian Human Rights Tribunal stated the following:

Discrimination is not a practice that one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.

A tribunal should therefore consider all circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[71] The test that is applicable when considering circumstantial evidence was summarized by Beatrice Vizkelety in her text, *Proving Discrimination in Canada*.⁽⁹⁾

The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard [of preponderance of the evidence], may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

[72] In *Shakes v. Rex Pax Ltd.*,⁽¹⁰⁾ it was held that in the case of a complaint of discrimination in an employment selection process, the Commission usually establishes a *prima facie* case by proving:

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

The Canadian Human Rights Tribunal modified this multi-part test in *Israeli v. Canadian Human Rights Commission*⁽¹¹⁾ to address situations where the complainant is qualified but is not hired and the respondent continues to look for a suitable candidate.

[73] It has been held that while these tests are helpful, they may not appropriately identify the elements of *prima facie* case in every employment related case.⁽¹²⁾ As the Canadian Human Rights Tribunal concluded in *Singh v. Statistics Canada*:⁽¹³⁾

In the Tribunal's view both the *Shakes* and the *Israeli* tests serve as useful guides, and will be appropriate for direct application in many hiring or promotion cases. Neither test should, however, be automatically applied in a rigid or arbitrary fashion in every hiring or promotion case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether the complainant has satisfied the *O'Malley* test, that is: if accepted, is the evidence before the Tribunal complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent?

[74] The present case does not fall squarely within the fact patterns of either *Shakes* or *Israeli*. The issue for Mr. Morris is not that he was not hired but that he was not promoted. Moreover, promotions were not decided on an individual basis but rather on the basis of a merit list created annually through a fairly complex process. Nonetheless, certain similarities do exist, particularly with respect to circumstances in *Shakes*, for although Mr. Morris was not promoted, there is evidence that in each of the years at issue, a minimum of one Warrant Officer in the RCR was promoted to Master Warrant Officer, and that in 1993, at least sixteen Warrant Officers were promoted.

[75] It is not necessary to know whether those Warrant Officers were in fact qualified or were perhaps of the same age as Mr. Morris, in order for a *prima facie* case to be made out. As the Tribunal in *Chander v. Department of National Health and Welfare*,⁽¹⁴⁾ pointed out, if the evidence establishes that discrimination was a factor in denying the Complainant an employment opportunity, irrespective of the qualifications and characteristics of the other candidate, the *prima facie* case will have been made out and the burden will have shifted to the Respondent to provide an explanation.

IV. ANALYSIS

A. The Commission's Evidence of Discrimination

[76] The Commission alleges that there is both direct and circumstantial evidence in this case that age was a factor in Mr. Morris's not having been promoted by the Respondent to the rank of Master Warrant Officer.

i) Direct Evidence of Discrimination

a) Mr. Morris's Conversation with Career Manager Ginn

[77] Mr. Morris testified that in February 1994, he met with CWO Ginn, who had been posted to NDHQ to serve as the RCR Career Manager several months earlier. As is often the case when NCMs meet with the Career Manager, Mr. Morris wanted to know what his PER Scores and rankings on the national Merit Lists were, for the preceding years.

[78] After providing this information, CWO Ginn stated that he was considering posting Mr. Morris to another location in order to "force him to make a decision". Mr. Morris believes this to have meant that he should make a decision to leave the Canadian Forces. CWO Ginn then commented that the Complainant had remained at the Lincoln & Welland Regiment for too long and that he had to be posted elsewhere in order to "bring in younger Warrant Officers into the position and give them a better chance".

[79] Mr. Morris replied that it was the previous Career Manager, CWO Don Riley, who had decided that he should stay at this posting. As CWO Riley confirmed, in a letter that he wrote in 1997, he chose to keep Mr. Morris in St. Catharines for several reasons including the fact that Mr. Morris's last position at 1RCR in London, as Company Quarter Master Sergeant of Administration Company, was the most senior Warrant Officer's position in the battalion. CWO Riley felt that sending Mr. Morris to another posting at that point in his career might not have kept him in competition for promotion.

[80] Despite this explanation, CWO Ginn repeated that Mr. Morris had stayed too long at his current posting and that he would be moved to bring in younger Warrant Officers into the position. Mr. Morris testified that the Career Manager also mentioned that the new posting would not be back at the battalion in London "because basically of my age".

[81] Most telling was CWO Ginn's explanation for why Mr. Morris had not been promoted. Although his performance score was high, the Career Manager said Mr. Morris's potential was the main factor, especially as it related to his age and lack of bilingualism. He went on to tell the Complainant that "from here on in", his potential would be dropping each year. After some other unrelated discussion, the conversation ended. In July 1994, just as the Career Manager had

declared during the interview, Mr. Morris was assigned to a new posting, at the Battle School in Hamilton.

[82] The Respondent called CWO Ginn as a witness in this case. He did not recall the conversation described by Mr. Morris, explaining that he usually met with about one thousand NCMs annually in his capacity as their Career Manager. He acknowledged therefore that it would not be surprising for Mr. Morris to have a more detailed recollection than he.

[83] I have no difficulty accepting Mr. Morris's version of the conversation. Clearly, as the person directly affected by the matters being discussed, he had every reason to take note of all that was said. It must still be determined, however, whether the Career Manager's comments constitute direct evidence that Mr. Morris was not promoted to Master Warrant Officer because of his age.

[84] The evidence is clear that promotions were made based on the annual regimental Merit Lists. Mr. Morris could not have been promoted off those lists until he had passed his QL7 course in February 1990. The Regimental Merit Board met three times between that time and the date when CWO Ginn was appointed Career Manager. He therefore did not have any input in the Merit List ranking process with regard to Mr. Morris, prior to the meeting of the Board in the fall of 1994. Furthermore, CWO Ginn's participation at the Regimental Merit Board's meetings from 1994 to 1996 was limited to advising the Board members on the process and, while this may have influenced them in their decision-making, the scoring was ultimately conducted by the dozen or so Board members and not him. From 1997 on, when CWO Ginn actually sat as an assessor on the Regimental Merit Board, he participated as only one of several involved in the rating process. There is no **direct** evidence that his bias, if any, against older candidates was shared by any of the other members who sat with him, nor even by those who were present prior to his active involvement in 1997.

[85] For these reasons, I do not find that Mr. Morris's recollection of his conversation with CWO Ginn constitutes direct proof of discrimination on the basis of age. This does not however imply in any way that the evidence cannot form one of the elements leading to the establishment of a *prima facie* case of discrimination based on circumstantial evidence.

b) CWO Ginn's Directions to the Regimental Merit Board

[86] Counsel for the Commission directed me to CWO Ginn's testimony to the effect that he regarded the length of time left in a candidate's career as being a factor to be considered under employability when assessing that person's "potential" score, at the Regimental Merit Board. This matter was related to the issue of whether it would be financially viable for the Canadian Forces to promote someone who is likely to retire in a relevantly short period of time. The Commission suggested that his opinion, when considered together with the Career Manager's role and influence over the proceedings at the Regimental Merit Board, is clear and direct proof that discrimination was practised against the Complainant.

[87] However, for the same reasons as set out above, I do not find that CWO Ginn's participation in the process was important enough to create a link between his opinions and the establishment

of the rankings on the Regimental Merit Lists. But I reiterate that this evidence may yet constitute one of the elements of a *prima facie* case based on circumstantial evidence.

c) Anecdotal Evidence from Mr. Hobbins and Major Guitard

[88] Captain Gary Guitard served with Mr. Morris when the latter was at the 1RCR battalion in London. For a period commencing in 1992, he served as Mr. Morris's supervisor at the Lincoln & Welland Regiment. Mr. David Hobbins was employed by the Respondent in the Regular Forces for twenty years, between 1980 and 2000, retiring at the rank of Warrant Officer. Both individuals were called as witnesses by the Commission and, at the time of the hearings, Mr. Hobbins was employed by the Niagara Regional Police and Mr. Morris was his supervisor.

[89] Major Guitard and Mr. Hobbins both testified that age was an issue in the ranking being conducted by merit boards at the unit or lower levels. Mr. Hobbins recalled a specific case where he was told by the other participants at a merit board that the 34-year old Corporal whom Mr. Hobbins was supporting should be ranked lower than another Corporal who was only 22 years old because the latter "had more potential".

[90] Major Guitard also testified that he had, on occasion, felt pressure to move a first-ranked Member to a lower ranking if that individual had not been promoted for several years, since his continued presence was viewed as blocking younger Members from being promoted.

[91] The Commission contended that these experiences constituted direct evidence of discrimination on the basis of age. However, I do not see how these recollections directly demonstrate that Mr. Morris was a victim of discrimination.

ii) Circumstantial Evidence of Discrimination

[92] The facts that the Commission contends establish a *prima facie* case of discrimination based on circumstantial evidence can be divided into two groups: those that relate directly to the Regimental Merit Board process and those that arise outside of the process *per se*.

a) Evidence Arising Outside of the Regimental Merit Board Process

1. Anecdotal Evidence

[93] According to Mr. Morris, it was understood in the Canadian Forces that once a Warrant Officer was enrolled in and had completed his QL7 course, it was only a matter of time before he was promoted to the rank of Master Warrant Officer. Not every Warrant Officer was entitled to take the course, but rather only those who had performed well enough to be recommended for entry.

[94] Major Gary Guitard served in the Regular Forces between 1972 and 1992, and has served since then in the Reserves. He testified that he has known well over one hundred Warrant Officers who have completed the QL7 course and the only one who was not promoted shortly thereafter was Mr. Morris.

[95] The Respondent's witnesses were asked to comment on this evidence. Capt. Sean Ahern, who joined the Canadian Forces in 1983, testified that he knows "two or three" persons who took the course two years prior to his testimony who had not as yet been promoted. This, however, still leaves open the possibility that those individuals would be promoted in the future, as there was evidence adduced that some Warrant Officers were elevated to the next rank as many as four years after taking the course. Consequently, Capt. Ahern's testimony did not really contradict Major Guitard's evidence.

[96] The evidence of the other Respondent witnesses regarding this matter lacked specifics. CWO Ginn declared that he knew "a number" of Warrant Officers who had not been promoted after taking their course, and Lt. Col. Zuwerkalow stated that he knew of "more than one". Considering the likelihood that these officers would have been acquainted with hundreds of Warrant Officers between them, over their years in the Canadian Forces, this evidence demonstrates that, at the very least, it was exceptional for a Warrant Officer to **not** be promoted once he had completed the QL7 course.

2. Extra-Regimental Postings

[97] The Commission submits that because older Members are more likely to have performed every task available at their battalions over the years, they are more likely to be posted extra-regimentally. Mr. Morris testified that this was the reason provided to him for his transfer from London to the Lincoln & Welland Regiment, by his Career Manager at that time, Master Warrant Officer Douglas. It is argued that because such Members are away from their battalions, they are less likely to be "seen" by the Regimental Merit Board members and that, consequently, those younger Warrant Officers who remain back at the unit will be graded more favourably on their merit.

[98] However, this submission fails to take into account the fact that usually only two persons from each battalion, working as a team, sit on the Regimental Merit Boards. The rest of the members are from other battalions or units. Even if these two members did have personal knowledge of a candidate and his performance, the evidence does not establish that if they had wanted to show him some preferential treatment, they would have been able to influence the scoring being conducted by the other members of the Board. I therefore find that this argument is not supported by the evidence.

3. Posting to the Battle School

[99] Mr. Morris testified that in 1994, another Warrant Officer ("Mr. S."), was posted along with him, to the Battle School. Mr. Morris estimates that this Warrant Officer was about 39 years old at that time, meaning that he was about eight years younger than Mr. Morris. Mr. S. performed the same tasks at the Battle School as Mr. Morris. In their first PERs after their transfers, Mr. Morris was assigned a PER Score of 7.4 and was ranked in the third quarter among the 19 Warrant Officers in the District, while Mr. S. was ranked first.

[100] When Mr. Morris inquired as to why he had dropped so low in that year (he had received a PER Score of 8.4 and was ranked 2nd of 6, in the preceding year), he was informed by "the

officers" (no specific names were given by Mr. Morris) that it was because it was his first PER at a new unit and that such a drop in score is normal in these circumstances. Mr. Morris contends that if such is the case, Mr. S. should not have been ranked first either, as they were both in essentially the same situation. On cross-examination, Mr. Morris admitted that it was possible that Mr. S. quite simply was an outstanding performer whose high ranking was merited.

[101] Nevertheless, he found this an unlikely explanation, considering the short period of time that Mr. S. was at the Battle School before getting the high score and the explanation given about lower scores being normal for any Member at a new posting. Consequently, Mr. Morris and the Commission submit that the only possible explanation for the high score of Mr. S. is the fact that he was much younger than Mr. Morris and that the Respondent sought to encourage the advancement of younger Members.

[102] However, no evidence was adduced as to whether any other Warrant Officers were recently transferred to the Battle School, and if so, what their ages were and how they had been scored and ranked on their PERs. In the absence of this information, the only evidence available is limited to the above-described comparison of the two individuals. I find that this evidence is insufficient for the purposes of drawing any conclusions with respect to whether age was a factor in the preparation of Mr. Morris's PERs at the Battle School.

a) Evidence Directly Related to the Regimental Merit Board Process

1. Knowledge by the Board of a Candidate's Age

[103] Regimental Merit Boards were not provided with the dates of birth of the Members being assessed. Yet, it is clear that from the other information available in the PER Files of the candidates, the Board members could easily ascertain the approximate age of a Non-Commissioned Members.

[104] For instance, prior to 1996, the date of an individual's enrolment in the Canadian Forces and his seniority date (that is, the date when he was promoted to his current rank) were supplied. At all times, the Member's date of first posting was shown as well as whether his term of service had been "indefinitely" extended beyond 20 years. Finally, since the PER File contained all of a Member's PERs since joining the Canadian Forces, it would seem that one could easily determine the number of years served merely from the thickness of the file itself. Mr. Morris testified, based on his many years of experience training recruits, that the average age of an individual joining the Canadian Forces as a Non-Commissioned Member is about nineteen. The Respondent did not present any evidence to contradict this conclusion and in fact, in introducing some of its own data, the Respondent essentially adopted the same approach of assuming that most recruits enter the military at approximately that age.

[105] I therefore find that although the age of a candidate being assessed was not explicitly disclosed to the Regimental Board, the Board members could determine the age of that individual without any difficulty.

2. The "Non-Commissioned Members Merit Board Guidance Manual"

[106] The Commission contends that the guidance manuals prepared by the Respondent and remitted to the members of the Regimental Merit Board demonstrate that age was a factor in the promotion process.

[107] The manuals prior to 1994 contained the following clause, which made reference in part to a candidate's age: ⁽¹⁵⁾

It is emphasized, that unless specifically career-restricted in rank, *members are not precluded from consideration by a merit board due to medical or compassionate restrictions, age, application for voluntary release, lack of MOC or rank qualification, counselling and probation, or approaching [compulsory retirement age], as long as they are eligible for promotion by virtue of time-in-rank or meet the [Other Ranks Career Development Programme] criteria. The reason for this is apparent as, with the exception of age and approaching [compulsory retirement age], the other factors may well be of a temporary nature. [The Director Personnel Career Administration Other Ranks] will ensure that no member will be promoted or offered new terms of service at the time they are due to be actioned unless he/she meets all the prerequisites for promotion or selection.*
(*My emphasis*)

[108] Counsel for the Respondent suggested that this provision was, in effect, a non-discrimination clause designed to prevent the merit board from discriminating against a candidate during the evaluation process, because of his age. However, a close reading of the text reveals that the Board is not being told that it is prevented from treating a person's age as a factor in assessing him. Instead, the Board is being informed that a Member will not be precluded from being evaluated by the Regimental Merit Board just because, for instance, that person happens to be subject to a medical restriction at that time or, of relevance to this case, because he happens to be of a certain age. I do not see in the phrasing of this clause any instruction to the Board members that they are forbidden from considering a person's age as a factor when assessing him.

[109] Commission counsel pointed out that if indeed this section was intended to prevent discrimination, one would have expected to see some of the other usually prohibited grounds of discrimination, such as disability, religion or marital status. No such grounds are mentioned in the clause. The Commission went on to suggest that from the reference to age in this provision, it can be inferred that the Respondent had recognized the tendency or pre-disposition of participants in its merit list process, to be unwilling to accept older NCMs for promotion. In order to counter this tendency, the Respondent felt compelled to instruct the Merit Board to assess the older candidates.

[110] In support of this inference, the Commission pointed to the following comment made by the Respondent's witness, Capt. Lee Gibbard, who is a complaints investigation analyst for military careers at NDHQ in Ottawa, during cross-examination: ⁽¹⁶⁾

Q. With respect to the inclusion of age here, what is your information as to why it is specifically included here?

A. I would think it is kind of like a morale thing. If you have got a senior member that is 50 years old and it was well known or well documented that you would not get promoted beyond 50 years old then why remain in the Canadian forces if there is no room for development or rank progression.

Q. What do you mean by "well documented"?

A. Within the community of the Canadian forces, itself. It is just like any grape vine that works in any corporation. The Canadian forces works the same way.

Q. When you say "well documented" what does that mean?

A. Not documented but well verbalized – is that a word?

Q. Are you telling me, sir, that at a certain point there was this perception that if you were 50 years old you wouldn't get promoted?

A. Not that I am aware of, no.

(My emphasis)

The Commission argues that Capt. Gibbard's initial answers attested to the possibility that age had been included in the clause because of a perception within the Canadian Forces, that older NCMs could not get promoted because of their age, notwithstanding his later denial of any actual knowledge thereof. I note that except for a short hiatus of about three years, Capt. Gibbard has been a member of the Canadian Forces since 1973. In the present case, he has acted as the principal representative of the Respondent and, in that capacity, he was in attendance at each sitting of this Tribunal.

[111] In the 1994 manual, the clause remained essentially unchanged but for one very important modification: the reference to "age" was removed. Capt. Gibbard speculated that perhaps this omission arose through administrative oversight, essentially suggesting that someone forgot to copy over this word into the newer text. However, I note that the section was also reworked in order to clarify the reference to compulsory retirement age, by adding the following sentence:

Members in their last year of service prior to [compulsory retirement age], who are otherwise eligible, will be considered by the Merit Board.

It would seem that the clause had not been copied over from the previous version of the manual in a mechanical fashion, but that some thought had been given in amending it. Moreover, in the subsequent manuals of 1995 and 1996, additional aspects were rephrased but at no time was any reference to "age" reinserted.

[112] The first occurrence of a typical non-discrimination declaration is found in the Report that the 1996 Regimental Board produced, after compiling the Merit List for that year (Exhibit R-23). The Board, in setting out briefly the nature of its activities, stated that at no time during its

deliberations did any member use race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for which a pardon has been granted as factors in determining performance or merit.

[113] Overall, the Commission submits that the original inclusion of age in the clause demonstrates that the Respondent had recognized that a problem existed with respect to older NCMs and the manner in which their opportunities for promotion were restricted because of their age. The Commission suspects that by 1994, the Respondent realized that the clause as drafted, allowed people to infer, as Capt. Gibbard had suggested, that within the Canadian Forces, there existed a prevailing belief that older Members could not get promoted. For this reason, the reference to age was deleted from the text.

[114] I find that this interpretation of the facts, as submitted by the Commission, is more probable than that which was provided by the Respondent, thereby supporting the inference that there existed, within the Canadian Forces, a widely held opinion that older Members did not get promoted.

3. Statistical Evidence

[115] It has been held that statistical evidence regarding systemic issues in a workplace may constitute circumstantial evidence from which it may be inferred that discrimination probably occurred in an individual case.⁽¹⁷⁾ However, such evidence must have a direct relationship to the particular incidents that are the subject matter of a human rights complaint.⁽¹⁸⁾

[116] The Commission presented certain statistics regarding promotions from the rank of Warrant Officer to Master Warrant Officer. Mr. Morris acquired these figures in 1997 from the Respondent through an access to information request. The data was therefore restricted to those individuals who had not yet retired and were still members of the Canadian Forces in 1997. Ages were not provided with the data but, as indicated earlier, it would appear that most Members joined the Canadian Forces at about nineteen years of age. Since the dates of enrolment were supplied, the Commission calculated the ages of the Members in question on this basis.

[117] Of the nine RCR Warrant Officers who took the QL7 course in 1990 together with Mr. Morris, five had left the Canadian Forces by 1997. All of the remaining four had been promoted to the rank of Master Warrant Officer within periods ranging from 9 months to 28 months following the end of the course. Three of these individuals were between 32 and 36 years of age when promoted, but the fourth was 44.

[118] In addition, of the 39 Master Warrant Officers still serving in the RCR in 1997, fourteen had been promoted to that rank at age 40 or greater, although nine of them were from 40 to 42 years of age when promoted. The remaining group of five was composed of individuals who were from 43 to 45 years of age at promotion, but for one person who was 47. Not one of the 39 was over 44 years old when he passed his QL7 course and no one older than 47 was promoted. The Commission contends that all of these figures constitute circumstantial evidence that age was a factor in the promotion practices of the Respondent.

[119] The Respondent countered that the size of the number of individuals being studied, particularly regarding the total of five persons in Mr. Morris's QL7 course, is just too small a group from which to draw any conclusions, and any differences that show up between age groups may simply be a result of random fluctuations.⁽¹⁹⁾ By contrast, in cases such as *Blake v. Mimico Correctional Institute*⁽²⁰⁾ and *Singh*,⁽²¹⁾ where employment statistics were taken into consideration in assessing the circumstantial evidence of discrimination, the data related to hundreds of individuals. When dealing with small data groups, on the other hand, statisticians regularly subject their findings to statistical testing in order to determine if any differences in the results are statistically significant.⁽²²⁾ No such testing was conducted in the present case.

[120] I agree that the data regarding the persons in Mr. Morris's QL7 course constitutes too small a sample from which to draw any reliable conclusions. I also find that similar difficulties arise with respect to the larger set of data. In addition, one should be careful in drawing inferences from the fact that only five (or 13%) of 39 Master Warrant Officers were appointed at an age of over 42. We simply do not know how many, if any, Warrant Officers who fell into this age group were available and qualified to be promoted. It is possible that, in fact, the proportion of available Warrant Officers who were qualified to be promoted and who were over 42 years of age was less than 13%.

[121] The possibility also exists that fewer older Warrant Officers were promoted than their younger colleagues because there were simply not as many older Warrant Officers who had successfully passed their QL7 courses. Counsel for the Respondent suggested that since it is the better performing Warrant Officers who will be admitted into the course and who will successfully complete it, these more competent NCMs are likely to rise through the ranks fairly quickly and reach the level of Master Warrant Officer before their 40's. Such information regarding the relative flows of younger and older QL7-qualified Warrant Officers would have constituted a more reliable basis for analysis.⁽²³⁾

[122] An additional and obvious problem regarding the larger data set is the absence of any information concerning those Master Warrant Officers who had retired from the Canadian Forces prior to 1997.

[123] For these reasons, I find that the data with respect to the 39 Master Warrant Officers is of limited probative value. I am aware that Mr. Morris acquired the data through an access to information request and thus, to some extent, only the information that the Respondent had provided to him pursuant to that request was presented. However, nothing prevented the Commission from at least attempting to obtain and produce the additional information that was lacking.

4. Age as a Factor in the Assessment of Potential

[124] As I explained earlier, potential represented 18% of a Warrant Officers's total merit score and was to be assessed based on factors such as leadership, experience, employability and professional judgment. In some years, each factor was assigned a specific weight in the scoring but in other years, namely 1991 to 1994, there was essentially no breakdown provided and it would seem that each assessor was free to weigh the factors in any manner he felt appropriate.

[125] The evidence bears out that these rules were not consistently followed. CWO Ginn maintained that when a specific value was assigned to a factor, that weight was never exceeded in the assessments being conducted. However, Lt. Col. Zuwerkalow declared that he would look at all the potential factors together and come up with an overall score.

[126] In addition, until 1996, the factors were not defined in the documentation submitted to the Board members, thereby allowing members to derive different understandings of what each factor meant. For instance, Lt. Col. Zuwerkalow explained that he assessed employability based on the candidate's qualifications and his willingness to go to any posting. CWO Ginn agreed that qualifications are important but added that it was also important to consider whether the NCM would need to be moved in order to be employed. If so, he added, one would have to examine how much time that individual had remaining in his career and whether it was "financially viable" to incur the expense of posting him elsewhere.

[127] Assuming that 80% of the merit score was determined based on a person's performance alone and was derived in a more or less mathematical manner from his PERs, (particularly from his PER Scores), the assessment of potential is the area where subjective discretion, encompassing the possible use of factors which are prohibited under the *CHRA*, was most likely to have been exercised. I would note again, however, that contrary to CWO Ginn's evidence, Lt. Col. Zuwerkalow testified that he looked beyond the PER Scores when evaluating performance, bringing into question the degree of subjectivity involved in assessing performance as well.

[128] The Respondent introduced into evidence partial copies of the Warrant Officer Merit Lists (known formally as "Promotion Board Reports") produced by the Regimental Merit Board for the years 1991 through 1997. The identities of the NCMs other than Mr. Morris were omitted for reasons of confidentiality. The lists were organized in the order of the Members' national rankings and contained their respective merit scores, broken down into performance, potential and linguistic ability. What is striking about this evidence is that in most years, the performance portion of Mr. Morris's score was quite high (11th in 1991, 14th in 1992, 9th in 1993, and 12th in 1994). However, his potential was rated amongst the lowest, and far below that of most of the other candidates who received similar high performance scores. In fact, it was not possible to determine exactly how low ranked Mr. Morris's potential scores were because the Respondent chose to not provide any pages of the Merit Lists beyond those on which Mr. Morris's name fell. For instance, although Mr. Morris's performance in 1994 was 12th ranked, his potential score was the lowest of the 46 candidates appearing on the two pages of the list produced by the Respondent. The possibility therefore exists that in that year, some of the candidates listed on the subsequent pages of the report had higher potential scores than Mr. Morris and that his ranking on potential was even lower than 46th. Mr. Morris's age in that year was 50.

[129] The Commission submits that the exceptionally low scores accorded to Mr. Morris on potential, when contrasted with his high performance scores, suggest that the Regimental Merit Board discriminated against him because of his age. However, no information was provided by either party regarding the ages and PER File content of the Warrant Officers who received better scores on potential. It is possible that this evidence would have demonstrated that the others were younger in age and that the content of their PER Files did not differ significantly enough from

Mr. Morris's to justify his poorer potential score. Although one would ordinarily expect such comparative evidence to be led by the Commission for purpose of establishing its *prima facie* case, ⁽²⁴⁾ Counsel for the Commission suggested that these findings could nonetheless be reached by drawing a negative inference from the Respondent's failure to produce this information.

[130] However, at this stage of the analysis, the burden of proof remains on the Commission to establish a *prima facie* case. While elements of that case can certainly be drawn from the evidence actually adduced by the Respondent, the Commission should not attempt to do so through a negative inference derived from evidence that the Respondent has **not** introduced. The issue of negative inferences could, of course, be raised later, in the context of the Respondent's explanation or defence, but this can only arise once the *prima facie* case has been made and the burden of proof has shifted.

[131] Therefore, my only findings at this stage are with respect to the limited information actually available from the Merit Lists. It is certainly likely that Mr. Morris was one of the older Warrant Officers being evaluated in each year. For instance, based on the statistics which Mr. Morris obtained through his access to information request referred to earlier, it is evident that of the sixteen top-ranked Warrant Officers on the 1992 Merit List (all of whom were higher ranked overall than Mr. Morris), one individual ("Mr. W.") was about 46 years old, one other about 40, and the remaining fourteen, in their 30's. Mr. Morris was 48 years old in that year. I find that it is more than probable that most, if not all, the higher ranked Warrant Officers were younger than Mr. Morris throughout the period in question.

[132] It is also worth noting that during the hearing, the Respondent was able to point out, though not with complete certainty, the Board's 1991 scores for Mr. W., when he was 44 years old. Interestingly, although his performance was 4th ranked, his potential was rated 19th, thereby perhaps substantiating the Commission's contention that older candidates were accorded lower scores on potential.

[133] Overall, I find that the evidence demonstrates that Mr. Morris received a strikingly low score on potential, from 1991 to 1994, at a time when he was probably one of the older, if not the oldest, of those Warrant Officers who had at the same time received high scores for performance.

c) Conclusions Regarding Circumstantial Evidence

[134] In summary, I have made the following findings with respect to the evidence that the Commission argues constitutes circumstantial evidence that Mr. Morris was a victim of discrimination based on his age.

[135] The Commission did not establish that the likelihood for older Members to be posted extra-regimentally had an adverse effect on those Members. In addition, it cannot be inferred from Mr. S.'s being ranked the top Warrant Officer in his first PER at the Battle School that Mr. Morris was discriminated against in the preparation of his initial PER at the same posting. I have also concluded that no finding, one way or another, can be made on the basis of the limited statistical evidence presented by the Commission in this case.

[136] On the other hand, the anecdotal evidence bears out that it was very exceptional for a Warrant Officer who had successfully completed his QL7 course to not be promoted thereafter to the rank of Master Warrant Officer.

[137] Regarding the evidence relating to the "non-preclusion" clause found in the guidance manuals, I have drawn the inference that a view prevailed within the Canadian Forces, that older members could not get promoted. This inference is supported by the evidence of Mr. Hobbins and Major Guitard to the effect that age was an issue in discussions at unit and lower level merit boards.

[138] Along the same lines, although I find that CWO Ginn's opinions and his remarks to Mr. Morris did not in and of themselves constitute direct evidence of discrimination in Mr. Morris's case, I find that these facts were nonetheless proven and that they can be considered in assessing the case based on circumstantial evidence. With respect to the probative value of this evidence, the Respondent directed me to the decision in *Spurrell v. Canada (Armed Forces) (No. 2)*.⁽²⁵⁾ The complainant in that case alleged that he was denied employment by the Canadian Forces as an air traffic controller and navigator because of his age. A recruiting officer had apparently confirmed this as the reason for the refusal. The Tribunal did not place any weight on the recruiting officer's remarks, concluding that they were based on a misunderstanding and lack of information concerning the complainant's file. Essentially, the Tribunal dismissed the evidence because it came from the individual "who happened to be the person at the desk" when the complainant made an inquiry at the recruiting office.

[139] However, the circumstances in *Spurrell* differ significantly from the present case. CWO Ginn was the career manager for all the RCR when he interviewed Mr. Morris in 1994. His duties included advising the members of the Regimental Merit Board. Within a few years, he himself sat on the Board as an assessor. I therefore find that *Spurrell* can be distinguished from the present case and that this evidence regarding CWO Ginn should be accepted.

[140] Finally, I have determined that Regimental Merit Board members used some subjectivity in scoring potential. I find that it is more probable than not that the individuals who were scored higher than Mr. Morris on potential by the Regimental Merit Boards, for the years 1991 to 1994 in particular, were younger than him.

[141] All of these findings of fact lead me to conclude that the evidence adduced in this case renders the inference more probable than any other, that age was a factor in Mr. Morris's not being ranked as high on the national Merit Lists, particularly in the years 1991 to 1994, relative to the other Warrant Officers being assessed. I have therefore determined that the evidence is complete and sufficient to justify a verdict in the Complainant's favour, in the absence of an answer from the Respondent, and that therefore, a *prima facie* case of discrimination, with respect to the Merit List process on the basis of which promotional decisions were made by the Respondent, has been established. It is particularly striking that, at the same time as there existed this apparently common perception within the Canadian Forces that older Members did not get promoted, the Regimental Merit Board gave Mr. Morris a score for potential which was lower than other younger warrant officers.

[142] It is true that, according to CFAO 49-4, promotions were subject to applicable promotion quotas for the year and the actual available vacancies, at the higher rank. However, my findings that Mr. Morris was issued a lower national ranking on account of his age renders these conditions of no effect. In other words, had Mr. Morris's score not been reduced because of his age, his ranking could have been elevated to a level that would have resulted in his being called upon to fill one of the available vacancies. There was evidence adduced that as many as ten promotions to the rank of Master Warrant Officer were made annually and direct evidence of at least sixteen promotions in 1993. I therefore do not consider the matter of quotas and vacancies an obstacle to my concluding that a *prima facie* case has been made out in this case.

[143] Some suggestion was made by the Respondent that it was unlikely that all the members of the Regimental Merit Board would have uniformly discriminated against Mr. Morris when assessing his potential. Had one or two of the assessors rated him too low overall, those scores would have exceeded the permissible variances of 0.5 to 1.0 points, and the Board would have had to revisit the scoring and make the necessary adjustments. However, this argument fails to take into account the widely held view within the Canadian Forces that older Warrant Officers do not get promoted, Capt. Gibbard having himself referred to the possibility that this situation was "well-known" or "well-documented". In this context, it is entirely possible, and even likely, that the six teams of two persons making the evaluations at the Regimental Merit Board considered Mr. Morris's age as a factor when assessing his potential.

[144] Accordingly, I maintain that, applying the test set out in the *O'Malley* case, the evidence before me, if believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent. The *prima facie* case has been made out and the burden now shifts to the Respondent to provide a reasonable explanation for its actions.

B. The Respondent's Explanation

[145] The Canadian Forces' basic explanation for why Mr. Morris was not promoted to the rank of Master Warrant Officer is that, in each year, the number of qualified applicants ranking ahead of him on the Merit List exceeded the number of promotional opportunities available. This position assumes that Mr. Morris was justifiably assigned the ranking that he received on every annual Merit List. However, as I have already determined, the Commission has made out a *prima facie* case that age was a factor in the assignment of low scores to Mr. Morris. In response, the Canadian Forces put forth several reasons to explain these low scores and thereby demonstrate that age was not a factor.

i) Extra Activities and Educational Upgrading

[146] The Canadian Forces encourage their Members to upgrade their education and perform extra activities outside their military duties, within the broader community. While serving at the Lincoln & Welland Regiment, Mr. Morris had begun volunteering with the Niagara Regional Police Auxiliary. In addition, he completed courses at a community college in subjects as varied as sociology, criminology, computers and law enforcement. These studies were first mentioned in Mr. Morris's 1992 PER. The extra activities were first referred to in the 1993 PER.

[147] The Respondent suggested that Mr. Morris might not have received as high a recognition for these activities and studies, when assessing his potential, because of the fact that they were not directly related to the military. He may thus have given the impression to the Regimental Merit Board that he was preparing himself for his life after retirement from the Canadian Forces, instead of improving himself for his career within the military.

[148] I have difficulty accepting this argument. Extra activities within the community by their nature are not intended to be military in scope, Lt. Col. Zuwerkalow himself having testified that Mr. Morris's outside work was commendable. As CWO Ginn pointed out, such activities should improve a Member's score, not reduce it. Similar comments were made about his educational upgrading as well.

[149] In addition, even though Mr. Morris was receiving low scores on potential from at least 1991, the Regimental Merit Board could not have had any knowledge of his outside courses prior to 1992, nor of his volunteer activities, prior to 1993.

ii) Lack of Communication Skills and Knowledge of French

[150] Some evidence was adduced to the effect that Mr. Morris's ability to communicate in writing needed improvement. The Respondent suggested that this might have adversely affected his Merit Board score. However, this matter was never mentioned on any PER and, considering the evidence that it was unlikely for more than one or two persons on the Regimental Merit Board to have been acquainted with Mr. Morris, it would seem impossible for this problem to have influenced the Board's scoring.

[151] The Board would, however, have been aware from his PER File of his inability to speak French. He attempted unsuccessfully, on several occasions, to learn the language. As I indicated earlier, by 1992, second language skills were no longer assessed as part of potential. In any event, even in prior years this skill did not account for more than 10% of the potential score, or the equivalent of 2% of the overall score. Furthermore, the evidence shows that he received some points in this category during this earlier period, seemingly in recognition of his efforts at trying to learn French. For these reasons, I find that his lack of bilingualism cannot explain his low scores on potential.

iii) Leadership

[152] CWO Ginn testified that in his briefings to Regimental Merit Board members, he advised that leadership, as a factor for potential, should be assessed in part on the basis of how successful a candidate was in his QL7 course. Since Mr. Morris was in the bottom third of his QL7 class, the Respondent argued that his score for potential would have dropped as a result. However, CWO Ginn also pointed out that leadership was not only assessed based on a candidate's QL7 results but also on the Merit Board members' professional judgment, after reviewing his PER File.

[153] Lt. Col. Zuwerkalow, on the other hand, stated that he relied on the quantitative assessment of "supervisory/leadership potential" that appeared on the second page of the PER Form,

commencing in 1992. He also agreed that the evaluation of leadership was closely linked to the Merit Board members' professional judgment of the individual, relying on such matters as his dress, the way he conducted himself, and his ability to lead by example.

[154] From 1992 through 1994, Mr. Morris's supervisory/leadership potential was marked in his PERs to the highest available level ("high"). In the narrative portions of his PERs, one finds numerous favourable references to his conduct including that he had a positive attitude, and an ability to organize and inspire subordinates, and that he was conscientious, hard working and highly respected by all the members in the unit.

[155] I find that there is little indication in Mr. Morris's PERs, particularly during the most relevant years of 1991 to 1994, to support the Respondent's suggestion that he lacked leadership qualities, such that his rating for potential would have been adversely affected.

iv) Mr. Morris's Unwillingness to Move to a New Posting

[156] On the first page of the PER forms, Members were asked to indicate three posting preferences. No evidence was adduced to explain the intended purpose of this information. The guidance manuals provided to the Regimental Merit Boards gave detailed explanations with respect to the second page of the PER, where narrative and quantitative assessments were indicated, but no similar illumination was given regarding the first page. As I explained earlier, that page was composed principally of information that identified the Member, such as his name, his social insurance number, and the name and location of his unit. The Member was asked to provide his input on four matters: courses completed since the last PER, courses desired, general remarks, and finally, top three posting preferences.

[157] In Mr. Morris's 1990 PER, which was prepared some months after he had completed the QL7 course, he listed the Lincoln & Welland Regiment, in St. Catharines, for all three of his posting preferences, and remarked that he requested "to remain in location until promoted". In 1991 and 1992, Mr. Morris wrote "Western Ontario" as his three posting preferences and commented, "If not promoted, to remain 'IN SITU'". In 1993, his preferences changed to first - Southwestern Ontario, second - United Kingdom, and third - United States. In 1994, his preferences were CFB London, St. Catharines and CFB Halifax. In 1995, they were altered to London (Ontario), Halifax, and finally Southern Ontario.

[158] The Respondent submits that these posting preferences essentially sent a message to the Regimental Merit Board that Mr. Morris was unwilling to leave Southern Ontario and St. Catharines, in particular. It was suggested that these declarations would have affected his score with respect to the factor of employability. As I indicated earlier, employability was never defined in the guidance manuals, other than to be included in the list of suggested factors to be considered in assessing potential. Both CWO Ginn and Lt. Col. Zuwerkalow testified that the Regimental Merit Board would interpret a desire to stay in one place as restricting employability, thereby negatively affecting that Member's score on potential. However, they also conceded that in the military, the ultimate decision as to where a soldier is posted is the Canadian Forces' to make, irrespective of his preferences. Furthermore, CWO Ginn suggested employability is scored more as a function of a Member's experience and qualifications. He also said that the

issue of a Member's mobility may in fact be more related to whether it would be financially viable for the Canadian Forces to move him to another location in order to give him a promotion. The suggestion here would appear to contradict the Respondent's submission for it implies that employability is more affected by where a Member is currently posted than whether he is willing to move.

[159] As I elaborate below, ultimately, the only way to properly assess the reasonableness of this explanation is by comparing Mr. Morris's PERs with those of his peers who placed higher on the Merit Lists. This information was unfortunately never presented. Consequently, I cannot make a finding that Mr. Morris's posting preferences constitute an explanation for his low potential scores.

v) Absence from Regular Forces and Lack of Deployments on Operational Missions

[160] The Respondent argues that by remaining extra-regimentally posted from 1987 to 1994, Mr. Morris's military skills dropped, thereby affecting his potential as a Master Warrant Officer. It was also suggested that his failure to be deployed overseas on operational missions, in places such as the former Yugoslavia and Somalia, meant that he lacked experience, which was also a factor for assessing potential.

[161] The Commission pointed out, however, that both the posting to the Lincoln & Welland Regiment and the absence of overseas deployments were not Mr. Morris's decisions to make. As I indicated earlier, Mr. Morris's career manager from 1990 until 1993, CWO Riley, decided to keep him posted extra-regimentally. None of Mr. Morris's PERs prepared during his posting to St. Catharines ever indicated that his skills had dropped in any way. In addition, Mr. Morris had been receiving low potential scores since at least 1991, when he had still only been away from the battalion for four years.

[162] Furthermore, the evidence shows that usually, it is circumstances beyond the control of an individual Member that determine if he will be sent on an overseas mission or not. The fact is that prior to 1990, the Canadian Forces had few overseas deployments, aside from UN duties in places such as Cyprus, where Mr. Morris did in fact do a tour earlier in his career. Over the last decade when Canadian troops were more frequently called upon to serve throughout the world, Mr. Morris had already been assigned to work away from his battalion, and as a result, was less likely to join on such missions.

[163] However, assuming that a lack of such experience is taken into account by the Regimental Merit Board in assessing the experience factor, and even if Mr. Morris were not assigned any personal responsibility for having failed to go on any operational missions, the mere fact that this lack of experience appeared in his PER File would have been sufficient to adversely affect his score regarding this factor. As such, his lack of experience cannot be discounted as a partial explanation for his low score on potential, irrespective of whether or not it came about as a result of Mr. Morris's own doing. To properly decide whether this explanation is reasonable, however, one again needs to compare Mr. Morris's situation with that of his higher ranked colleagues.

vi) Professional Judgment of the Regimental Merit Board Members

[164] It is clear from the evidence adduced that at the core of the Regimental Merit Board members' assessment of potential was what CWO Ginn described as their "gut feel" about a candidate. The guidance manuals specifically referred to the factor of "professional judgment" but both he and Lt. Col. Zuwerkalow alluded to the possibility that this element was integral to the assessment of the other factors as well. Some degree of subjectivity therefore appears to have been involved in the assessment of all the factors of potential.

[165] Counsel for the Respondent submitted that there is nothing inherently wrong or discriminatory in a selection or promotion process that includes some subjective element. For instance, leadership ability is an essential requirement for a senior NCM and this cannot easily be objectively assessed. Some level of subjective evaluation by the employer is necessary. As such, due deference should be accorded to the senior military staff who sit as members of the Regimental Merit Board. In the absence of any evidence to the contrary, the inference should be made that the Board members acted in good faith, at all times.

[166] The Respondent referred to the Canadian Human Rights Tribunal decision in *Folch v. Canadian Airlines International*.⁽²⁶⁾ In that case, the female complainant alleged that she was not hired as a pilot by the respondent in part because of her sex, age and racial or ethnic origin. The airline argued that its pilots must at some point act as captains of its aircraft and that the board that had interviewed the complainant had determined that she lacked the command ability that captains required in order to properly fulfill their duties. In dealing with the issue of whether a more objective test should have been used to assess this ability, the Tribunal stated the following:

It may be that a better system for hiring pilots could be devised but that is not the issue that is before the Tribunal. There is no doubt that assessment of criteria such as potential command ability involves subjective judgment. But even Captain Cranston, who was called as an expert witness by the Commission, acknowledged that it was necessary to make an evaluation of potential command ability of pilot candidates and that this necessarily involved a subjective judgment. The fact that the Respondent used subjective criteria in its evaluation of the applicants does not in itself render their hiring decisions subject to attack. Where subjective criteria are used, it may be necessary to scrutinize the hiring decision more carefully to ensure that subjective assessments are not being used to mask discrimination.⁽²⁷⁾

Similarly, the Respondent suggests that any subjectivity involved in the Regimental Merit Board process is necessary in order to ensure that promotions are granted only to those Members who possess the leadership skills, experience and other factors which the rank of Master Warrant Officer demands.

[167] The Respondent also referred to the finding in the Ontario Board of Inquiry decision in *Offierski v. Peterborough Board of Education*⁽²⁸⁾ to the effect that the respondent school board's administrators who had interviewed the complainant "acted honestly and in good faith" in denying her admission to a course that would have qualified her for a promotion. The Board of Inquiry stated that "one cannot second guess" their determination that she lacked certain leadership qualities, and went on to state that the administrators:

[...] are professionals at what they are doing, they knew the qualifications of the other applicants - not known to this Board of Inquiry - and so long as they act lawfully - as I have found - an Inquiry such as this has no right to second guess their decision [...].⁽²⁹⁾

[168] This decision of the Ontario Board of Inquiry dates back over twenty years and with all due respect, it is my opinion that human rights tribunals are entitled to review and even second-guess the acts of respondents, particularly in the presence of circumstantial evidence that discrimination based on a prohibited ground was a factor in those acts. It is interesting to note that the 1992 decision in *Folch* did not suggest that a blind faith should be bestowed upon respondents who make decisions using subjective criteria, but rather that the decision must be scrutinized more carefully to ensure that the "subjective assessments are not being used to mask discrimination".

[169] A comparison of the facts in *Folch* with the present case reveals a significant distinction. The notes and comments of each member of the interview board had been produced in *Folch*, and the Tribunal had the benefit of knowing exactly for which reasons the complainant was deemed to lack the necessary qualities and skills. With the benefit of this information, the Tribunal was able to conduct a careful scrutiny of the hiring decision and determine that her application had been "fairly considered" by the interview board. No such evidence was adduced before me, largely because the Regimental Merit Board members were only required to assign a numerical score for each candidate without being required to provide any supporting explanation. It would have been helpful to have heard the testimony of at least one of the persons who sat on the Merit Boards that assessed Mr. Morris's best PERs, from 1991 to 1994. However, Lt. Col. Zuwerkalow first sat on the Board in 1995 and CWO Ginn, in 1997. I am therefore not able to scrutinize the activities of the Merit Board in the manner in which the *Folch* Tribunal could.

[170] In the absence of any such explanations from the Merit Boards for why they had downgraded Mr. Morris on potential, the Respondent put forth the justifications for the low scores that I just discussed above. However, the only real way for me to assess if these explanations are justified would be by comparing Mr. Morris's profile with those of the other Warrant Officers who ranked ahead of him. As I stated earlier, this evidence was never adduced.

[171] The evidence pertaining to the other Warrant Officers is presumably in the Respondent's possession and there was no suggestion made that it is no longer available. In fact, the Respondent presented the PERs of one of the other candidates who was promoted to Master Warrant Officer, Mr. W., who was 46 years old when he was promoted in 1993. He was cited as an example of an older Warrant Officer who was elevated to the next rank at an age similar to Mr. Morris's. It would seem natural for the Respondent to lead evidence, regarding other Warrant Officers, in light of the Canadian Forces' defence that Mr. Morris's employment profile was lacking when compared to other Warrant Officers, with the result that he received a very low score on potential.

[172] The explanation proffered by the Canadian Forces for having chosen to not adduce, nor even disclose to the Commission, such evidence with respect to other Warrant Officers, was provided by Capt. Gibbard in his testimony:

Q: Any reason why you didn't give us those documents?

A: Let me think about this for a second.

THE CHAIRPERSON: Should I ask the same question I asked earlier; were they on the disclosure lists?

A: That is one instance but that is not the reason I probably did not do that. I am not a merit board member and I cannot score potential. I score performance only as an investigator. That is all I can go by. I can't read into a PER the member's potential because I am not a member of that member's occupation. It would be impossible for me to do so and it would be pure speculation.

Even though this representative of the Canadian Forces may have felt that he was not in a position to assess the relative potential of all the candidates, the question of how potential was scored is highly relevant to Mr. Morris's complaint and the Tribunal certainly has the authority to deal with all matters related to the complaint, including the process by which a complainant was assessed by his employer as compared with other employees.

[173] A broader issue is raised with respect to the parties' disclosure obligations. Prior to the commencement of the hearings, the Tribunal instructed the parties to disclose to each other all documents in their possession which are relevant to the case and for which no privilege is claimed, in accordance with Sub-Paragraph 6(1) (c) of the Canadian Human Rights Tribunal's Draft Rules of Procedure. The PERs of all persons against whom Mr. Morris was rated are clearly relevant, since they constitute the only manner for determining if Mr. Morris's low scores on potential were due to the explanations provided with respect to the designated factors. Yet, this material was never disclosed.

[174] The Respondent's failure to adduce this evidence before the Tribunal serves to undermine all of its explanations for Mr. Morris's low score on potential. Even if it were true that, for instance, an absence of any assignments on operational missions would be detrimental to a Member's assessment, how can I determine that Mr. Morris was in fact marked down for this reason, without having had the opportunity to compare him with the younger, higher ranked Warrant Officers, in order to examine the level of experience that they had? Without any information about the other Warrant Officers, I am simply unable to determine that any of the explanations given by the Respondent justifies Mr. Morris's score. For these reasons, I find that all of the above-mentioned justifications given by the Respondent do not constitute a reasonable explanation so as to satisfactorily rebut the Commission's *prima facie* case of discrimination.

vii) Inflated PERs of Warrant Officers Working in the Reserves

[175] From 1993 through 1997, the Regimental Merit Boards remarked in their final reports that PERs from Reserve units, "in many cases", appeared to be inflated, particularly when written and reviewed by Reserve personnel. Mr. Morris was of course posted at a Reserve unit from 1987 to 1994. Until 1992, Major Guitard, while a member of the Regular Forces, was the supervisor who prepared Mr. Morris's PERs. It appears that the PERs of 1993 and 1994 were prepared by Reserve personnel pursuant to his posting's being officially re-designated as being to the Lincoln & Welland Regiment.

[176] Could this opinion, on the part of the Regimental Merit Boards, have influenced their scoring of Mr. Morris? To begin with, their comments were limited to the PERs, which are principally used to assess the performance of candidates. In any event, Mr. Morris was ranked very highly by the Board on performance alone, throughout the 1991 to 1994 period. It would hardly seem that his posting at the Reserves had any influence on the Board's assessment.

[177] Moreover, as Lt. Col. Zuwerkalow pointed out, quite often, the narrative assessments and PER Scores did not properly reflect Mr. Morris's ranking within his unit. For example, in 1991, he was the first ranked out of 46 Members, yet was only assigned a PER score of 8.3. This could be attributed to the high score controls policy. Nonetheless, this situation demonstrates that if anything, in Mr. Morris's case at least, the quantitative and narrative assessments on the PERs could hardly be considered inflated, but in fact, undervalued.

[178] Finally, as in the case of the factors for potential, the absence of any evidence regarding the other Warrant Officer candidates weakens any argument that inflated PERs adversely affected Mr. Morris's score on potential. It is entirely possible that some of the higher ranked Warrant Officers were also posted at Reserves units and that their PERs were prepared by Reservist staff. If that were the case, it would seem less likely that his being in the Reserves would have explained his low score.

[179] For these reasons, I find that the view expressed by the Regimental Merit Boards that Reserve unit PERs were inflated, does not explain why Mr. Morris received his exceptionally low scores on potential.

viii) The Promotion of Other Warrant Officers Aged 40 and Older

[180] As I indicated in my earlier discussion concerning the statistical evidence in this case, Mr. Morris acquired, through an access to information request, data demonstrating that of the 39 Master Warrant Officers still serving in the RCR in 1997, fourteen had been promoted at age 40 or higher. It could be argued that these figures support the Respondent's claim that older persons are not discriminated against in promotions to that rank. However, the same problems which presented themselves to the Commission regarding sample size and the absence of a flow analysis prevent any inference from being made here as well.

[181] Furthermore, as I have already pointed out, most of those 39 individuals were promoted in their early 40's and none at an age greater than 44 years old. In contrast, Mr. Morris was already 47 in 1991 and by 1993, when he earned a PER Score of 8.6 he was 49. Although the difference may not seem large at first glance, one must keep in mind that compulsory retirement would

come only a few years later, at age 55. In his 1994 conversation with Mr. Morris, CWO Ginn himself alluded to the significance every year can make when he advised Mr. Morris that his potential would now be dropping continuously each year.

[182] The evidence does show that Mr. W. was promoted at age 46. However, merely demonstrating that some other person bearing the same characteristic as that which is the gravamen of Mr. Morris's complaint, does not necessarily prove that this characteristic was not a factor in Mr. Morris's not being promoted. A similar situation emerged in the case of *Chander* (30), where the Canadian Human Rights Tribunal accepted that one or more of the persons who were promoted instead of the complainants may have been members of a visible minority group, just like the complainants were. Nonetheless, the Tribunal held that this possibility did not prevent it from making a finding of discrimination with respect to the employer's refusal to promote the complainants. Similarly, the possibility that one or more of the Warrant Officers who were promoted to the next rank were arguably close in age to Mr. Morris does not preclude me from concluding, based on all of the evidence, that a *prima facie* case of discrimination was made and that a reasonable explanation was not provided by the Respondent.

ix) Career Manager's Instructions to the Regimental Merit Board

[183] Counsel for the Respondent referred to the CWO Ginn's testimony to the effect that, while serving in his capacity as Career Manager, he specifically advised Regimental Merit Board members to not use age as a factor in their assessments. However, of those years in which Mr. Morris received his most successful PERs, CWO Ginn counselled the Board only in the final year, 1994. There was no evidence adduced as to what CWO Ginn's predecessors may have told the Merit Boards. Furthermore, as I have already found, the non-preclusion clause in the guidance manuals did not forbid the use of age as a factor in any year.

[184] Finally, I have some difficulty accepting the premise that CWO Ginn would have pronounced such an instruction to the Merit Boards, considering his comments in 1994 to the Complainant about his decreasing potential and CWO Ginn's testimony that the time left in a Member's career is an element to be taken into account in assessing potential.

[185] I am therefore not satisfied that the Regimental Merit Boards were instructed to not use age as a factor, particularly prior to 1994.

C. Conclusion Regarding the Respondent's Explanations

[186] For all the above reasons, I have determined on a balance of probabilities that the Respondent has not provided a reasonable explanation for the discriminatory acts practised against the Complainant.

V. REMEDIES

[187] Having concluded that the Respondent is liable to Mr. Morris, it remains to be determined which remedy, if any, is appropriate. In putting together a remedy, the Tribunal's jurisdiction is governed by Section 53 of the *CHRA*. As the Federal Court of Appeal stated in *Canada (Attorney General) v. Morgan*⁽³¹⁾, in cases of discrimination, the goal of compensation is to make whole the victim of the discriminatory practice, taking into account principles of reasonable foreseeability and remoteness.⁽³²⁾

A. Promotion, Lost Wages and Benefits

[188] The Commission and Mr. Morris have requested that he be promoted to the rank of Master Warrant Officer, effective June, 1992, that this promotion be reflected on his military service records and that he receive lost wages and other related damages as of that time. It was in that month that the last of the four other Warrant Officers from his regiment who had completed the QL7 course with him and had remained in the Canadian Forces, was promoted.

[189] The remedial powers provided in Paragraph 53 (2) (b) of the *CHRA* extend to allow Tribunals to order promotions where it has been determined that such promotions have been denied for discriminatory reasons.⁽³³⁾ In *Morgan*, Mr. Justice Marceau stated that, to create a right for compensation, it is not required that the position would certainly, nor even probably, have been obtained, had it not been for the act of discrimination. In his view, a mere possibility, provided it was a serious one, would suffice.⁽³⁴⁾ In his dissenting opinion from the same case, Mr. Justice MacGuigan held that a probability of actual loss of position had to be established.⁽³⁵⁾ Considering that in the present case, promotions are made on the basis of the annual National Merit Lists, I do not accept the suggestion that the basis for determining if a promotion was possible or probable should be the date when the last other student of the QL7 course was promoted.

[190] I have, however, determined that Mr. Morris's age was a factor in the assessment of his score on potential and had it not been so, his score would have been higher as would have been his overall ranking, particularly on the Merit Lists of 1991 to 1994. Neither party adduced complete evidence of how many Warrant Officers were promoted every year, although some witnesses suggested that as many as ten promotions occur yearly. Some determinations can be made based on the data obtained through Mr. Morris's access to information request, even though these figures only reflect the situation with respect to those Members who were still with the Canadian Forces in 1997. As such, all that can be said is that, at a minimum, the following number of promotions to the rank of Master Warrant Officer were made in the years indicated, based on the Merit Lists which the Regimental Merit Boards had prepared in the immediately preceding year:

1990 = 1 promotion

1991 = 4 promotions

1992 = 1 promotion

1993 = 16 promotions

1994 = 2 promotions

1995 = 5 promotions

1996 = 2 promotions

As I have said, it is possible that more promotions were made in each year. Of course, one can assume that the Respondent has at its disposal the exact numbers of actual promotions made in each year but it chose not to adduce this evidence.

[191] Obviously, 1993 stands out from the others. In the 1992 Merit List, on which the 1993 promotions were based, Mr. Morris was ranked 23rd overall, but 14th on performance alone, and at least 23rd, if not lower, on potential (the Respondent having not produced the remaining pages of that Merit List). Thus, had Mr. Morris been assigned an overall ranking equivalent to that of his performance, he would have been promoted in 1993.

[192] Considering my findings regarding the effect of his age on his score for potential, I find it possible, and even probable, that Mr. Morris would have received a ranking for potential equivalent to at least that of his performance and that he would have therefore been promoted in 1993. However, based on these estimations, he still would likely have been ranked in the bottom third of those promoted in that year and since promotions are made throughout the calendar year according to the order of the Merit Lists, Mr. Morris would likely not have been promoted prior to the last four month period of the year. I therefore order the Respondent to promote Mr. Morris to the rank of Master Warrant Officer, effective September 1, 1993.

[193] I further order the Respondent to pay to Mr. Morris the difference between the salary he actually received at the rank of Warrant Officer and that which he would have received as a Master Warrant Officer, from September 1, 1993, until the date of his retirement from the Canadian Forces, on April 1, 1999. I also order the Respondent to pay to Mr. Morris the difference between the retirement severance compensation that he received at the rank of Warrant Officer and the sum that he would have received as a Master Warrant Officer.

[194] I order that Mr. Morris's pension and other benefits be adjusted to reflect his rank at the level of Master Warrant Officer, as of September 1, 1993.

[195] In addition, I direct the Canadian Forces to pay to Mr. Morris an additional amount sufficient to cover any additional income tax liability that he may incur as a consequence of receiving the above-mentioned compensation, in this manner. ⁽³⁶⁾

[196] I also order the Respondent to pay to Mr. Morris simple interest on all of the above-mentioned awards. The interest will be calculated in accordance with the rules governing civil proceedings in the Province of Ontario and will run from the date of the complaint until final payment of these awards.

B. Special Compensation

[197] Prior to the amendments made to the *CHRA* in 1998,⁽³⁷⁾ Sub-Section 53(3) stated that if a Tribunal finds that a victim of a discriminatory practice has suffered in respect of his feelings or self-respect as a result of the practice, the Tribunal may require a respondent to compensate the victim a sum not exceeding five thousand dollars. The Commission has requested that the Canadian Forces be ordered to pay Mr. Morris the maximum.

[198] From the evidence adduced, and notably from Mr. Morris's testimony, it is clear that Mr. Morris and other military men and women like him have a deep sense of commitment towards the Canadian Forces. On numerous occasions, Mr. Morris did not refer to the Respondent as his employer but rather as his family. Thus, the greatest disappointment for him, when he realized that he was not promoted because of his age, was that his family had let him down. One must keep in mind that he joined the Canadian Forces when he was still a teenager and never left them until his retirement two years ago. This disappointment was compounded by the fact that his colleagues soon began to make jokes at his expense. He became very depressed, which took some toll on his family at home, as well.

[199] Taking into consideration all of the circumstances, I order the Canadian Forces to pay to Mr. Morris the sum of \$3,000 as special compensation. Simple interest on the special compensation shall run from the date of the complaint as well, at the rate stipulated above with respect to the lost wages and other compensation. However, in no case should the amount payable on account of special compensation, including interest, exceed \$5,000.00.⁽³⁸⁾

C. Retention of Jurisdiction

[200] In the event that the parties are unable to agree on the calculation of Mr. Morris's entitlement pursuant to this decision, I retain jurisdiction to hear any further submissions which the parties may wish to make, provided, however, that any request to make such additional submissions be submitted in writing and received by the Tribunal no later than ninety days from the date of this decision.

VI. GLOSSARY

1RCR 1st Royal Canadian Regiment

Canadian Forces Canadian Armed Forces

CFAO-49-4 Canadian Forces Administrative Order 49-4

<i>CHRA</i>	<i>Canadian Human Rights Act</i>
Commission	Canadian Human Rights Commission
CWO	Chief Warrant Officer
Member	Non-Commissioned Member
MOC	Military Occupation or Military Operational Code
MWO	Master Warrant Officer
NCM	Non-Commissioned Member
NDHQ	National Defence Headquarters
PER	Performance Evaluation Report

Athanasios D. Hadjis, Chairperson

OTTAWA, Ontario

December 20, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

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DECISION OF THE TRIBUNAL DATED: December 20, 2001

APPEARANCES:

George A. Morris On his own behalf

Ian Fine and Carla Qualtrough For the Canadian Human Rights Commission

Lois Lehmann and Liz Tinker For the Respondent

1. Chapter 3, Section 2.

2. The evidence of some of the witnesses heard in this case differed slightly as to the numerical values assigned to each of these ranges. The ranges that I have indicated above reflect those applicable with respect to the narrative section to be completed by the commanding officer, as set out in Chapter 3, Paragraph 3(c)(4) of the Non-Commissioned Members Merit Board Guidance Manual prepared in 1993, Exhibit R-19.

3. A difference of 1.0 point was permitted in the case of combat arms Members. See, for instance, Chapter 1, Section 5 c) of the Non-Commissioned Members Merit Board Guidance Manual, dated August 1, 1992, Exhibit R-18.

4. *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202 at 208; *O'Malley v. Simpsons-Sears Ltd.*[1985] S.C.R. 536 at 558.
5. *O'Malley, ibid.*
6. *Basi v. Canadian National Railway Company (No. 1)* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at paragraph 38474; *Grover v. National Research Council of Canada* (1992) 18 C.H.R.R. D/1 (C.H.R.T.), at paragraph 152; *Chander v. Department of National Health and Welfare*, [1995] C.H.R.D. No. 16, (C.H.R.T.), at page 10, aff'd [1997] F.C.J.No. 692 (F.C.T.D.); *Singh v. Canada (Statistics Canada)* (1998) 34 C.H.R.R. D/203, (C.H.R.T.) at paragraph 162, aff'd *Canada (A.G.) v. Singh* (April 14, 2000) T-2116-98 (F.C.T.D.).
7. *Singh* (C.H.R.T.), *ibid*, at paragraph 174; *Holden v. Canadian National Railway Company* (1991) 14 C.H.R.R. D/12 (F.C.A.) at paragraph 7; *Chander* (C.H.R.T.), *ibid*, at page 11; *Pitawanakwat v. Canada (Secretary of State)* (1992) 19 C.H.R.R. D/10 (C.H.R.T.) at paragraph 85.
8. *Supra*, note 6, at paragraph 38481.
9. (Toronto: Carswell, 1987), at page 142.
10. (1981), 3 C.H.R.R. D/1001 at paragraph 8918. (Ont. Bd. Inq.)
11. (1983), 4 C.H.R.R. D/1616 (C.H.R.T.), at page 1618, aff'd (1984) 5 C.H.R.R. D/2147 (C.H.R.T.- Rev. Trib.)
12. *Chander* (C.H.R.T.), *supra* note 6 at pages 11-12; *Singh* (C.H.R.T.), *supra*, Note 6, at paragraph 174.
13. *Singh*, (C.H.R.T.), *ibid*.
14. See *Supra*, note 6
15. This passage was found at Chapter 2, Section 6 of each of the 1986, 1992 and 1993 manuals.
16. Transcripts, January 10, 2001, Volume 8, pages 1260-61.
17. *Chopra v. Department of National Health and Welfare*, (April 6, 1998), T-792-96, (1998) 146 F.T.R. 106 (F.C.T.D.), "*Chopra No. 1*", at paragraphs 17-22; *Chopra v. Department of National Health and Welfare*, [2001] C.H.R.D. No. 20, ("*Chopra No. 2*"), at paragraph 207; *Singh*, (C.H.R.T.) *supra*, note 6, at paragraph 163.
18. *Blake v. Mimico Correctional Institute*, (1984) 5 C.H.R.R., D/2417, (Ont. Bd. Inq.), at paragraphs 20129-20130; *Chopra No. 2, ibid*, at paragraphs 208-212; *Dhanjal v. Air Canada* [1996] C.H.R.D. No. 4, (C.H.R.T.) (Q.L.), at paragraph 173.

19. *Blake, ibid*, at paragraph 20206.
20. *Supra*, note 18.
21. *Supra*, note 6.
22. *Chopra No. 2, supra* note 17, at paragraph 196.
23. *Ibid*, at paragraph 230.
24. See *Crouse v. Canada Steamship Lines*, T.D 7/01, June 18, 2001, (C.H.R.T.), at paragraph 63.
25. (1992) 18 C.H.R.R., D/102, (C.H.R.T.)
26. (1992) 17 C.H.R.R. D/261, (C.H.R.T.).
27. *Ibid*, at paragraph 165.
28. (1980) 1 C.H.R.R., D/30 ,(Ont. Bd. Inq.).
29. *Ibid*, at page D/36.
30. *Supra*, note 6.
31. (1991) 21 C.H.R.R. D/87, (F.C.A.), at paragraphs 9-12.
32. See also *Green v. Canada (Public Service Commission)* [2000] 4 F.C. 629 (F.C.T.D.), at paragraphs 141-146; *Singh* (C.H.R.T.), *supra*, note 6, at paragraphs former pages 79-80.
33. *Canada (Attorney General) v. Uzuoba* [1995] 2 F.C. 569, (1995) 26 C.H.R.R. D/428 (F.C.T.D.).
34. *Supra*, note 32, at paragraph 5.
35. *Ibid*, at paragraph 38.
36. *Singh*, (C.H.R.T.), *supra*, note 6, at paragraph 289.
37. See *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, S.C. 1998, c.9, s. 29.
38. *Singh*, (C.H.R.T.), *supra*, note 6, at paragraph 300; *Canada (Attorney-General) v. Hebert*, F.C.J. No. 1457; *Green, supra*, note33, at paragraphs 178-183.