

T.D. 5/93
Decision rendered on April 8, 1993

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c.h.-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

PAUL LAGACÉ

Complainant

CANADIAN HUMAN RIGHTS COMMISSION

Commission

CANADIAN ARMED FORCES

Respondent

DECISION OF TRIBUNAL

Tribunal:

Alfred Georges Lynch-Staunton

Appearances:

René Duval
Counsel for the Canadian Human Rights Commission

Donald J. Rennie and Captain B. Cathcart
Counsel for the Respondent

Dates & Location

of Hearing: - November 16 to 19, 1992 Victoria, British Columbia

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Paul M. Lagacé, the Complainant, is a Master Corporal in the Canadian Armed Forces, (CAF) the Respondent, who filed a complaint dated May 16, 1988 at Kamloops, British Columbia and an amended complaint dated June 30th, 1988 at North Bay, Ontario with the Canadian Human Rights

Commission, the Commission, alleging discrimination on the basis of marital status and family status which complaints were filed as Exhibits HR-6 and HR-7 respectively. Both complaints are worded exactly the same except Exhibit HR-7 contained one additional paragraph giving a further complaint as follows:

"I registered for the dependant's Dental Plan in September 1987 and outlined that my marital status was common-law. I was accepted and paid 8 months of premium. It was cancelled effective 1 May, 1988 and I was told that common law relationships are not accepted under the Plan."

Both Exhibits are attached to this decision. In the course of calling evidence, Counsel for the Commission, R. Duval, Esq., advised this tribunal that the Complainant had made a previous complaint dated July 16, 1984 in which the Complainant challenged the housing policy of the Respondent. In that complaint it was alleged by the Complainant that the Department of National Defence engaged in a discriminatory practice because of marital status and family status in that the Complainant was denied private married quarters (PMQ) because he was not legally married in that he was living in a "common-law" relationship. The matter, along with another complaint by one John F. Schaap, also a member of the CAF was heard by a Canadian Human Rights Tribunal chaired by John R. A. Douglas, Esq., who dismissed both complaints by decision rendered February 29, 1988. See John F. Schaap and Paul M. Lagacé

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vs Canadian Armed Forces 9CHRR 37792-37857. The Complainant along with Schaap applied to quash the decision which was done by a majority decision of The Federal Court of Appeal on December 20, 1988, per Hugesson J. (Pratte J. concurring) who held that marital status in the Canadian Human Rights Act does not mean the status of a married person but, rather the status of a person in relation to marriage, namely whether that person is single, married, divorced or widowed. It was not necessary to deal with the Complainants' complaint of family status. See Lagacé et al vs. Canadian Armed Forces 95 NR 132. I was also advised by both Counsel and the Complainant that as a consequence of this decision all matters as set out on page two of the amended complaint were settled. It is my understanding that the policy of the Respondent concerning marital status affecting such things as housing, dental benefits, screening packages, trailer pads and the like were retroactively changed as a result of the Federal Court of Appeal decision. The sole issue, in this case, therefore, is whether the Complainant's application of November 16th, 1987, for the officer Candidate Training Plan (OCTP) was

rejected by Major R. J. Dunsdon on the basis of the Complainant living in a common-law relationship. In leading evidence I was advised by Counsel for the Commission that he would be calling evidence of events that occurred prior to the date of the OCTP application to give me an understanding of the background of this complaint. Counsel for the Respondent objected on the ground of relevancy but withdrew his objection when Mr. Duval assured me that his sole purpose was to give me background information and not, in any way,

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revisit any evidence that had been called concerning the previous complaint dealt with by the Federal Court of Appeal and certainly not any facts or evidence that may have been considered in arriving at any of the settlements alluded to. Mr. Duval also indicated his purpose was simply to show a chronology of events and not a chronology of any discrimination. It was reiterated that the sole issue centered around the allegation by the Complainant of discrimination based on marital status as it applied to the application for OCTP and the action by Major Dunsdon in dealing with the application. Mr. Duval did, however, indicate that some of the background evidence may have a bearing when considering the allegations by the Complainant. I ruled that this evidence would go to weight. Aside from evidence concerning damages the sole evidence in chief was given by the Complainant. The Complainant enrolled in the Canadian Armed Forces (CAF) in April 1974 as a recruit following an enrolment interview report dated April 29, 1974, entered as Exhibit HR-8. He had completed Grade 12 but was not bilingual. He requested to be sent to Cornwallis, Nova Scotia, as he wished to learn English. On completion of basic training at Cornwallis he was posted to an Armoured Regiment, in Calgary, Alberta, being The Lord Strathcona's Horse (Royal Canadians) (LdSH). He was posted to the Middle East and employed in peacekeeping duties in 1976 for seven months. Prior to being posted to Egypt he quit smoking and quit drinking in 1977 shortly after his return to Calgary. He then became physically active and also became involved with alcoholics anonymous which active participation remains to this day and has not "had a drink since".

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In 1978, he became a crewman and appointed a corporal. The Complainant was interested in improving his education and career but his opportunity was limited for advanced education in the Armoured Corps. He applied to be commissioned through his supervisor who suggested at the time, that the Complainant would not make a good crewman officer because of his interests and suggested a change of trade. The Complainant, therefore, remustered

and trained as an Air Defence Technician. His Course Report, Exhibit HR-11 dated December 7, 1978, rated him as an "All student ranking him third out of thirty. He was posted to Canadian Forces Station Kamloops, B.C. and worked in his trade as an Air Defence Technician in the rank of Corporal.

While in Kamloops in early 1979 he became seriously involved in the Alcoholic Rehabilitation Program (ARC) and was most interested in helping others in the ARC through the military. He also became involved with the Indian Friendship Centre and Crisis Centre as well as the Canadian Kung Fu Association. He met his common-law wife, Amy, through the former in February 1979 and commenced co-habitation in January 1980. This relationship has lasted to this day and is most stable in all respects.

The Complainant assumed a father role in all respects towards her son. She was uncomfortable with marriage due to her previous relationship and did not want to divorce as she did not want to jeopardize her native status.

In the spring of 1980 the Complainant was selected by his Commanding Officers (CO) to attend a two week program in alcohol and drug studies at the University of Sherbrooke in that summer. The Complainant became eligible for promotion to Master Corporal upon completion of a

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Junior Leadership Course in February 1981. The Course Report, Exhibit HR-12, dated February 1981, signed by the Commandant, Major carpenter, indicated "Corporal Lagacé displayed an above average leadership potential". Also in 1981 the Complainant attended the second phase of the alcohol and drug program mentioned earlier which would assist in being chosen to attend the ARC program. He was selected for the ARC Program but was unable to attend as he was posted to Canadian Forces Base North Bay, Ontario, effective June 15, 1982. In September 1981 he commenced a course of studies, through a University Program, by correspondence, eventually graduating with a Bachelor of Arts in psychology and sociology from Simon Fraser University. He completed this four year full time course in eight and one-half years on his own time by self study being awarded the Governor General's silver medal. He testified that he focused on psychology, sociology and human behaviour as he wanted to become a personnel selection officer. On being posted to North Bay he was denied Permanent Married Quarters (PMQ) on the grounds he was not married and living common-law and filed the complaint mentioned earlier. The Complainant described the in-clearance procedure after arriving in North Bay and testified that, amongst other things, he was interviewed by a Father Dobrowski a CAF padre who stated at page 116 of the transcript of evidence "why don't you leave your Indian wife, send her and her son back to B.C., move into the barracks,

continue your education. A nice young Catholic boy like you, can find himself a nice Catholic girl, someone of your own kind." At this point in the Complainant's testimony I enquired if Father Dobrowski was

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being called as a witness. Mr. Duval stated at pages 116 and 117 the following:

"I'm not calling this gentleman. I don't know if my friend is thinking of calling him. And again, my case and Mr. Lagacé's case if we were to look at the denial in abstract, in a vacuum, if we were to try to assess major Dunsdon's remarks in a vacuum. This incident, as others that are going to be related to you, will hopefully help you to understand what perceptions there were of Mr. Lagacé by his superiors.

Because, we claim that this perception that they had of him, perception that we would claim was based on his unusual marital arrangement, is the cause for his rejection from the program in question.

We -- you know, this is not the case where we could lead evidence as to what was in the mind of the people who made the decision, we could infer that from whatever they said, and this is why I'm going to call evidence on what the Major told him -- on what the Lieutenant Jodoin told him.

And then it may simply be an illustration of what, in general, the people in the establishment thought of Mr. Lagacé.

I'm not saying that this evidence will convince you of that but I should certainly be permitted to call this evidence. otherwise we would be asking you to play God, to read other people's mind, and this is again background information.

He, as part of his in-clearance procedure, has to see the padre. The padre raises the subject matter of his family arrangement. He gives the answers that he gave and he gets the comments.

That doesn't mean that the Major six years later discriminated against him, but that gives you another indication of what the Forces think is wrong with not living in the more traditional way of living.

The Complainant testified that in the fall of 1982 he applied for enrolment in the University Training Plan Men (UTPM) which was one of the methods of applying for a commission in the CAF in order to

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become an officer. He made this application having completed one year of University by correspondence. He was not successful in his application as the Personnel Selection officer (PSO) indicated that the Complainant's intellectual abilities on entering the service was substantially below average and that the Complainant in the PSO's estimate would not be able to complete University level courses much less a degree. The Complainant also testified that the PSO referred to the Complainant's family situation.

The Complainant, at the time, was experiencing a number of personal problems concerning extra housing, denial of Ontario Health Insurance Plan, illness of his wife and that his doctor was "down my back" because of his inability to enrol in the Ontario Health Insurance Plan. He, therefore, applied for a transfer which was denied. The Complainant was re-tested for intellectual ability in 1983 at the officer level and was found to be well above average "I was in the top 75 per cent" page 123 (whatever this means). Also in 1983 the Complainant' again, applied for UTPM and provided a letter from Simon Fraser University showing he had advanced standing. He was turned down by Personnel Selection on the basis of "family background" and a rating of below average. Page 125. In December, 1983, the Complainant filed a redress of grievance in accordance with Queens Regulations and Orders 19-26 (Q R & 0 19-26) which dealt with the CAF housing policy mentioned earlier. On February 6, 1984, the Complainant met with his Commanding Officer (CO) Major Nickerson "to discuss the matter of my redress which dealt with common law relationships not being recognized in the Forces" page 127. At this point, Counsel for the Respondent

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objected on the ground of relevancy in that this kind of evidence was unfair in assessing whether Major Dunsdon acted in a discriminatory manner.

Counsel for the Commission submitted that this evidence was important in determining whether the issue in this case was a reflection of a perception held concerning the Complainant at the time. Mr. Duval indicated that he was ready to concede that the Padre's statements referred to above "were a little more removed because it probably was prompted by his Catholic training" page 128. I ruled that the evidence was admissible and would go

to weight. The Complainant testified, page 133, in relation to Major Nickerson:

"He started out pointing out that I had become an administrative burden and that this common-law thing was not -- it wasn't very well viewed at the time and the pressures at that time was that I would be released. The threat was there, it was inferred" and "He said something to the effect of going out of the military or going to the Human Rights Commission about a military problem. I shouldn't have done that, was his position. I can't remember his exact words, but he was very upset. I am trying to remember the words that he used because they were very direct".

In the fall of 1985 the Complainant made a third application for enrolment in UTPM which was reviewed by Captain Gilman, a PSO, who reviewed the first two applications and, according to the Complainant, felt that the Complainant had been underrated by Captain Madill, the PSO, who had reviewed the first two applications. The review report was entered as Exhibit HR-26 (later in the proceedings). The Complainant testified, page 139, "Well, he pointed out that there were certain, there was one area that he was concerned about and that was my family situation once

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again". A reading of the applicable paragraph of Exhibit HR-26 indicates a concern expressed by Captain Gilman relating to questions of finance, loan assistance, money management, cost of continuing education and family support on the local economy. The report states that:

"Corporal Lagacé has maintained a consistent common-law relationship since his tour at Kamloops (Jan. 79 to June 82). There is no evidence that his trade employment, training or academic studies have been adversely affected by his personal circumstances".

Captain Gilman rated the Complainant's officer potential as average. At the time of this third application the Complainant had fifty-four credits towards a BA degree being close to two years of university study. The Complainant testified that on February 13, 1986, he received a verbal warning from a Major Parent, the Complainant's CO, in the presence of a Captain Cochran. This verbal warning is actually headed verbal counselling and it was entered as Exhibit HR-25 which is attached. This verbal counselling was in relation to an interview the Complainant gave to the news media concerning his complaint to the CHRC relative to the CAF housing policy and his family situation. The Complainant testified that Major Parent pointed out that there were internal procedures that were available

in which to complain and that the Complainant should have given adequate time for the authorities to deal with the matter rather than voice negative views on housing to the media. The Complainant also testified that Major Parent stated "This common-law thing will cloud your career Paul" page 144.

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The Complainant's supervisor, MWO Carlyle, informed the Complainant that he had not been successful in his third application for commissioning as he was not suitable. The Complainant later determined that a message, entered later as Exhibit R-2 by the Respondent's Counsel, obtained under the Personal Information Act and placed on his personal records stated that his performance had not been high enough to become an officer. At this point in the Complainant's testimony several Performance Evaluation Reports (PER) covering a number of years were entered as Exhibits HR-13 (1983), HR-14 (1984), HR-15 (1985), HR-16 (1986), HR-17 (1987), HR-18 (1988), HR-19 (1982), HR-20 (1990), and HR-21 (1991).

In July 1986, the Complainant was posted to Kamloops. Prior to leaving North Bay the Complainant requested a house hunting trip to Kamloops because there were no PMQs available in Kamloops. He, therefore, purchased a mobile home and requested a trailer pad on the station at Kamloops which was approved in early May 1986. On the day of leaving North Bay, and the moving packers having arrived, the Complainant was advised by message that the trailer pad was rescinded. The Complainant testified that he would go public. His supervisor requested time to look at the situation and two hours later a message was received cancelling the previous message and saying "Yes now you could be moving onto the trailer again". When asked by Mr. Duval how these events would lead to an understanding of what the Complainant felt Major Dunsdon thought of the Complainant he stated at page 156, "He orchestrated it" in that

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"the message came from Kamloops, under his direction and it was sent by the base or the station orderly room. I believe there is no -- I mean, he didn't call me on the phone, he just, he sent the message through the orderly room." The Complainant then described the in-clearance procedure at Kamloops and testified there was no greeting party and that normally he would meet the CO but didn't. He also testified (not in the chronology of events) that when one leaves a base that there is a plaque from one's mess or in the case of Kamloops a certificate which was given to everybody for their participation at the radar site (being Kamloops) as last serving members. A xeroxed certificate was entered as Exhibit HR-22 which the

Complainant testified was not signed and that Major Dunsdon would normally have signed it. He testified 62 other people received signed certificates.

The Complainant then testified that the PER, Exhibit HR-16 covering 1986, was signed by Major Dunsdon on January 27, 1987. Exhibit HR-16 is highly complimentary and shows a good report by his supervisor WO Hayes. Major Dunsdon's remarks are "Corporal Lagacé has a very high level of competence and a proven desire to excell in all his endeavours. He is ranked 7th out of 32 Corporals on this station and 2nd in his trade". Evidence was also given that the Complainant refused to sign this PER. As a consequence Major Dunsdon wrote a letter, Exhibit HR-23, dated February 3, 1987 to National Defence Headquarters (NDHQ) which is attached. The Complainant also testified that when he obtained documents pursuant to the Personal Information Act that he found a message dated

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July 1987 concerning a redress of grievance which was being "held at this headquarters" and testified that he was surprised this document was with his personal file in that a redress of grievance is never associated with performance evaluation or confidential PER files. There is no evidence as to which headquarters is being referred to and in any event this evidence is of no assistance.

The Complainant testified that in November, 1987, he completed an application for Commissioning in the Officer Cadet Training Plan (OCTP) which was entered as Exhibit HR-24. He testified that there was not point in applying for the University Training Plan as he was just about into his fourth year of University and that OCTP didn't require University. He further testified he wished to become an officer in the Personnel Administration, Logistics or Security fields. Captain Halpen, the Complainant's supervisor, told the Complainant that it would be futile to apply for UTPM which is the reason for the application for OCTP. It is this application and the events surrounding it that is the central issue in this case. The application pursuant to Canadian Forces Administration Order 9-26 (CFAO 9-26) entered as Exhibit HR-34, sets out the form to be completed and prescribed the policy and procedure governing this plan. The form is in three parts. Part 1 is to be completed by the applicant, Part 2 is to be completed by a medical officer and Part 3 is to be completed by the applicant's Commanding officer. Exhibit HR-24, which is attached, shows Part 3 was completed by the Complainant's Commanding Officer, Major R.J. Dunsdon on January 4, 1988. Major Dunsdon did not

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recommend the Complainant stating "I recommend that at least one or two PERs as a MCpl (Master Corporal) be assessed prior to a recommendation for OCTP". The evidence of the Complainant is that at this point he had served eighteen months from June 1986 to January 1988 under Major Dunsdon without committing any offenses or filing any complaints. The Complainant stated that he was advised by Warrant Officer Hayes that the application had been turned down by Major Dunsdon whereupon he was given an appointment to see Major Dunsdon which occurred on January 7th 1988, in Major Dunsdon's office. The Complainant's evidence concerning this meeting is set out hereunder pages 183-185:

"Q. And it clearly does not recommend that your application be processed further, so did you ask him why he made the recommendation that he's made?

A. Yes, I did.

Q. And what was his answer?

A. He spoke for a while, but some of the issues that were brought were the fact that I had complained against the system was poor reflection of officer qualities, and that in order to become and officer, you must support regulations, regardless of whether you agree with them or not.

Q. Okay, now if we could just pause for a second and I'd like to ask you, complain outside of the system, what complaints was he referring to?

A. I assume he was referring at that time to my complaint against the non-recognition of common-law relationships for housing.

Q. Okay, so --

A. So I asked him about that, and he asked me, well why don't you just get married and avoid all these problems.

Q. He said that?

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A. Yes.

Q. Now, at the time when he told you about you complaining outside of the system, what other complaints than the Human Rights complaint that was then pending, had you made outside of the system.

A. The only time that anything was referred outside the system was the complaint to the Human Rights Commission on the housing, and at one point, the issue of the media contact in 1986.

Q. Now, in what context did he say, why don't you just get married and avoid all these problems?

A. The context was that common-law relationships were simply not acceptable.

Q. Okay, did he make any other comments?

A. We spoke for a while but there's nothing really outstanding that I can recall, other than the general outline was, you're disapproved because of your situation."

The Complainant then testified he met with Lieutenant Jodoin who was temporarily replacing Capt. Halpon as the Complainant wanted to see Capt. Belec the base Personnel officer in Chilliwack. The Complainant's evidence in regard to this interview is as follows, page 186 and 187:

"A. I asked him basically how I could proceed to become an officer, since this was the fourth time I was being turned down, at various levels, from commissioning.

Q. Yes?

A. And he explained that I had a record of being a troublemaker.

Q. Yes?

A. And that as such, the issue of my family, personal life, these things all come into a factor of consideration, prior to commissioning.

Q. Did he make any specific statement with respect to

your family situation?

A. His view was that, because my spouse was common-law, the officers' mess, I assumed, performs on a different level. I've never been a party to the officers' mess proceedings. However, the impression I got and what he stated was that my common-law would not be readily accepted among the officers' mess."

The Complainant also testified regarding the meeting with Capt. Belec in early March 1988 concerning a career review. That testimony page 192 is set out hereunder:

"He explained that the career review was basically outmoded, I suppose, but he did explain that to participate in commissioning, I had made an error in discussing a problem with the media, and that this was poor reflection on my career."

I now turn to the evidence in chief given by Major Dunsdon the Respondent's first witness. Major Dunsdon retired from the service in 1988 upon completion of his tour as Commanding Officer of the Kamloops station. His service extended from 1962 as a pilot to involvement in many aircraft programs, a tour in Europe, instructor, operational planning, staff college, Commander of a squadron, a staff officer and finally Commanding Officer of the station at Kamloops. While CO he was responsible for the close down of the station which was going on at the time that the Complainant filed the complaint herein. He had under command 110 military personnel including 32 Corporals and 55 to 60 civilians. His first recollection of the Complainant involved the Complainant's transfer in from North Bay and a problem concerning a trailer pad. He testified he had not known the Complainant previously. There were 5 or 6 trailer pads some of which were used

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by civilian personnel. On receiving notice to close down the station a policy had been introduced to restrict the movement of trailers in because of problems associated with closing the station down. On being advised by one Sgt. Black, the deputy Station Warrant officer, whose duties included housing accommodation, that Master Corporal Lagacé would be experiencing a problem as he understood a pad had been reserved, Major Dunsdon immediately made an exception and made a pad available for the Complainant's use. He testified, most emphatically, that there was no order or direction to specifically exclude the Complainant by stating "oh, absolutely not. As a matter of fact, the reverse is true. changed the order, the recommendation that we had on the station at that time, to accommodate his trailer", page 301. This evidence is completely at odds with the perception by the Complainant when he indicated that Major Dunsdon orchestrated the non-

availability of a trailer pad. I accept the evidence of Major Dunsdon in this regard and completely reject the suggestion by the Complainant as preposterous. How the Complainant can make this suggestion having regard to his knowledge of the system, his experience concerning postings including a previous posting to Kamloops, the fact that there were some 110 military personnel including 32 Corporals for whom Major Dunsdon was responsible and that neither knew the other previously is beyond me.

With regard to Exhibit HR-22, the Certificate presented to the Complainant, Major Dunsdon explains he did not remember it but would have signed it if it came across his desk. He remembered

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signing a "massive group of these things" about 10 or 20 per day. When asked if he recalled not signing it because he disliked the Complainant he testified at page 301:

"A. Oh, absolutely not. As a matter of fact, the reverse is true. I changed the order, the recommendation that we had on the station at that time, to accommodate his trailer.

Q. Okay. I'm going to refer you to an exhibit, HR-22, which is a farewell certificate. Do you recognize this certificate?

A. Yes, absolutely; this was put together by some of the people on the station sort of to -- as a memento for everybody of the last people there that closed the station down.

Q. Right. And this one in particular is Master Corporal Lagacé's. Have you seen that before?

A. I don't remember specifically seeing this one before, no.

Q. Okay, you'll notice down in the corner that there's a spot for the commanding officer's signature?

A. Yes.

Q. You were there, should you have signed that?

A. If it had come across my desk. I can remember signing a massive group of these things. As a matter of fact, I had my secretary bring them in, about 10 or 20 a day, because I was

finding my signature getting a little ratty, when I tried to do more of them.

Q. Do you recall not signing it because you disliked Master Corporal Lagacé?

A. Oh, absolutely not. I don't -- I can't remember exactly when this came out, but I think Master Corporal Lagacé left the station some time earlier. It may be that he was given this before, in fact, they were all signed. Because I think that these were handed out at the last mess dinner one of the formal functions we have when we close down the station."

He testified if he was empowered to do so he would sign it and

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would apologize for not having done so. I also accept this evidence. The entry of this Exhibit by the commission is, in my view, a feeble attempt to try and show some prejudice by Major Dunsdon as against the Complainant.

With regard to the in-clearing procedure at Kamloops station related by the Complainant, Major Dunsdon testified that it was a normal procedure for him to meet with newly arrived personnel. He stated he did not recall having a meeting of this nature with the Complainant. His testimony was that "It may just have been overlooked. It was in the summer period. It may have been that I was not there, away on leave or some other function at that time", page 303. He did not recall receiving any specific request from the Complainant either directly or through the chain of command to meet with the Complainant. If there had been such a request he would have met Lagacé stating at page 303 "Oh, absolutely. My standard policy was to meet with everybody". Major Dunsdon was shown Exhibit HR-16 which he recognized as being the Complainant's first PER with his (Dunsdon's) signature. Major Dunsdon testified that he would have read the comments before he signed.

He indicated that the PER was an excellent one and that the Complainant "ranked very highly among the list of Corporals on the station and in fact this PER was probably what got him his promotion to Master Corporal", page 305. Major Dunsdon recalled that the Complainant refused to sign the PER as the Complainant did not think the PER accurately reflected what he had done up to that stage. Major Dunsdon testified that it was explained to the

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Complainant that the signing of a PER didn't necessarily mean acceptance of the PER. On being shown Exhibit HR-23 Major Dunsdon explained that it was normal procedure to have everybody sign their PERs and that if the person involved didn't sign then it had to be noted that the person had in fact seen the PER and had been debriefed. Regarding the last sentence of paragraph 3 of this Exhibit Major Dunsdon testified at page 308:

"A. Because I felt it to be true at the time, I assume It's -- there weren't that -- I didn't have that much to do with Corporal Lagacé in any manner, but this came up on top of, I believe I'd seen in his unit PERs file, you know, there was some recorded warnings from North Bay about dealing when held been asked not to with the press, or something in that regard.

My whole impression here was, after talking to his warrant officer that, in fact, that he was confrontational on quite a few issues, so I recorded it here, just to make sure that it was listed."

Major Dunsdon also testified that what was in his mind at the time of writing the letter was the verbal counselling, referred to earlier, and comments made to him, by Warrant Officer Hayes, the Complainant's supervisor, concerning the question of being confrontational. WO Hayes who dealt with the Complainant on a day to day basis had indicated to Major Dunsdon that the Complainant was confrontational on quite a few issues.

Major Dunsdon then testified he recalled the Complainant's application for the OCTP program which as stated previously is the central issue in this case. He testified that the application would pass through three levels of the chain of command being his warrant officer, the station warrant officer and a captain prior to reaching him. Major Dunsdon did not remember in detail any recommendations that

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were made but remembered some discussions with WO Hayes. He stated that he had some written recommendations which were not strong. One of the factors to be considered was leadership potential which at this point was difficult to assess considering the Complainant's very recent promotion to Master Corporal, the first level of leadership in the service. He testified that without overwhelming strong support he would delay a recommendation until there were further PERs in which to assess the Complainant's leadership abilities. In relation to his comment concerning the Complainant bucking or ignoring the system Major Dunsdon indicated the reasons were threefold, being the existing verbal counselling, the Complainant's refusal to sign his PER and certain incidents related by the Complainant's supervisor.

Major Dunsdon also testified that he didn't over-react in this regard. As a Commanding officer he is not in direct contact with the men and, therefore, must, when making recommendations, rely on the men's file, discussions with supervisors and PERs. In this case the PER relative to the Complainant as a Master Corporal did not place him at the top of the Master Corporal list although his tract record as a Corporal was excellent.

He was 6th or 7th of 32 Corporals on the station which earned his promotion to Master Corporal. Major Dunsdon testified that a slightly lower rating in the Complainant's PER as a Master Corporal was normal as his immediate supervisors would only have a limited time to assess the Complainant as a Master Corporal. It is normal that a first PER in any rank would be lower than the previous PERs but would grow as the person developed capabilities in the rank involved. This testimony, relative to the

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Complainant, is borne out by the eight PERs covering the years 1983 - 1988 and 1990 and 1991 being Exhibits HR-13, HR-18 and HR-20 and HR- 2 1.

Major Dunsdon signed the OCTP application form, Exhibit HR-24 on January 4th, 1988, and after a discussion with the Complainant, on January 7th, 1988, testifies as follows, page 313 and 314:

"A. After I had signed it, in fact, I had Master Corporal Lagacé in and had a discussion on it, and then it went into my out basket. My admin staff would look after it in whatever way is done. I'm not too sure what that would have been. It should automatically, of course, have gone up and was approved and recommended. If I had agreed with it, it would have gone up through the chain. In this case, where I requested a delay on it, and an assessment later, I don't know."

Major Dunsdon had requested the meeting because he felt the Complainant deserved an explanation of his action. He testified that during the discussions the Complainant expressed some considerable concern and Major Dunsdon offered to write a letter to the CO at Halberg asking him to review the application in one years time. Major Dunsdon testified further that the posting to Halberg was changed before the Complainant left so no letter was sent. on being shown paragraph 3 of Exhibit HR-7, the amended complaint, Major Dunsdon was asked if he made the comments shown. His testimony at page 316 and 317 in this regard is set out below:

"A. The family situation is a consideration. We had some discussion, and the whole person is looked at, particularly if you're going into

officer training. I don't -- there was no specific talk on my part that, you know, his family status at that time being a consideration.

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Q. Mm-hmm?

A. We then had some brief discussion, I guess, on some other things. I don't know exactly what the words were but Master Corporal Lagacé seemed to have problems in quite a few areas that went back to what he perceived as a problem with his common-law status.

Q. Mm-hmm?

A. So I said something to the effect, "Why don't you get married?"

Q. And you said that statement, why?

A. Yeah, it was a question. And I forget exactly what his answer was, but I believe it had to do with the fact that he didn't want to get married or she didn't want to get married.

Q. Was it because you disagree with common-law relationships?

A. Oh, absolutely not. As a matter of fact, the world is changing very rapidly now. There's considerable numbers of my peers and senior officers in the service that I know of in common-law relationships. As a matter of fact, if I had to guess, I would guess that probably 15 to 20 per cent of the station of CF Kamloops at that time were living in some form of a common-law relationship, whether in fact it was certified as such over any period of time.

Q. So is it fair to say that today, as in 1987, you had no particular objection whatsoever to common-law relationships?

A. Absolutely none.

Q. And more particularly, your recommendation on the OCTP application of November, '87 was in no way founded upon Master Corporal Lagacé's marital status?

A. Absolutely not."

I now deal with the evidence in chief of Captain François Jodoin the next witness called by the Respondent who in 1988, was stationed in Kamloops in the rank of Lieutenant as a systems standards and training officer. He did not remember a discussion in early January of 1988 with the Complainant.

He indicated he

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understood the complaint. He testified he was responsible for the top portion of the application form being completed in accordance with CFAOs which would then be forwarded to the Commanding Officer. He did not have any responsibility for Exhibit HR-24 after Part 3 was completed. He indicated that after the form was completed by the Commanding officer that it would then be forwarded to the Base PSO at Chilliwack from the station orderly room. His final evidence, at page 382 and 383 is set out below:

"Q. Right, okay. Did you tell Master Corporal Lagacé on January 7th that your personal life is looked at closely when you're an officer?

A. I do not remember.

Q. Did you tell Master Corporal Lagacé that you common-law-his common-law wife would not fit into the officers' mess?

A. I did not say that.

Q. And how do you know you didn't say that?

A. Because I was living common-law myself.

Q. Did you feel like your wife fit in?

A. Certainly."

The evidence on cross-examination of Captain Jodoin by Mr. Duval was very short. Jodoin did not remember having a discussion with the Complainant, that in the fall of 1987 there were few applications for the OCTP and that the Complainant's application could have been moved to Chilliwack even if the Co did not recommend it. He stated that he was still living common-law which has not been a problem and that he doesn't know whether other individuals have problems in this respect. The balance of his evidence which is relevant and set out below is taken from pages

385 and 386:

"Q. Good. Did you, in your discussion with Lagacé suggest that his common-law relationship could be a problem?

A. I did not say that.

Q. Are you sure?

A. Certainly. I did not mention that specifically his common-law relationship could have been a problem because --

Q. Is it possible that you did?

A. I say it's impossible.

Q. It's impossible?

A. Because I was living common-law myself --

Q. Good --

A. -- and did not experience any problems.

Q. Have you said anything to Lagacé about his various redresses and grievances and complaints in this discussion, as being one of the explanations for his application to have failed?

A. I have not.

Q. You have not. It's not even possible that you did?

A. Not possible

Q. Did you suggest in your discussion to Lagacé that if someone does not agree, they should either get out of or obey the policy? Did you or did you not?

A. I did not.

Q. You did not? Did you tell Lagacé that, "We do not want troublemakers in the commissioned ranks."

A. I did not."

I now deal with the cross-examination of the Complainant by Mr. Rennie, Counsel for the Respondent.

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On being shown Exhibit HR-24 the Complainant agreed that there were some positive comments in Major Dunsdon's assessment and recommendation concerning education, volunteer work, physical fitness and sports. He stated at page 219 "Major Dunsdon was not particularly negative about my performance or my accomplishments." He also agreed that Major Dunsdon's assessment was one he was entitled to make and that it was not unreasonable although not necessary but agreed that his remark "not necessary" was a matter of opinion. He agreed that leadership and potential to be an officer are subjective qualities to assess. He stated that he couldn't interpret what Major Dunsdon was intending when asked if Major Dunsdon was being unreasonable when asking for a year of proven performance in his new rank. He did not file a complaint as soon as he saw Major Dunsdon's recommendation. He indicated that after the meeting of January 7th, 1988 the comment by Major Dunsdon as to bucking or ignoring the system lead him to believe that Major Dunsdon assumed that his redress of grievance and complaint with the CHRC was a negative factor against his career. He agreed that was an assumption. He did not agree with the policy directive that disallows a member from seeing the narrative in a PER. He also agreed it was possible he was wrong in assuming that Major Dunsdon held the grievance he took against him. He didn't know what was in Major Dunsdon's mind when making the recommendation. He agreed that the military looks at stability and family relationships and such things as finances, alcoholism, drug dependency, gambling and further agreed that his records indicated financial management problems. He has met officers who are

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married, divorced, widowed, single and common-law. The Complainant agreed he filed the complaint, Exhibit HR-6, the day after finding out from Captain Belec, the PSO in Chilliwack, that his application had not been processed and after he had been convicted on April 28th, 1988 of disobeying a direct order. He agreed that the filing of the Complaint was five months after his application for OCTP. The Complainant agreed that he did not enquire of Major Dunsdon as to why his application did not go forward. He assumed that the application did not go forward because major Dunsdon didn't like people living common-law. After I directed the Complainant to

answer the question he agreed he did not take any steps to ensure that his application got to Chilliwack once he found out it had not gone forward.

He didn't know whether the imminent closure of the station and the resulting disruption in administration was the reason the application didn't go forward. He assumed that Major Dunsdon had deliberately ensured that the application didn't get to Chilliwack but conceded it was possible that "it might have been accidental".

He agreed it did not make sense that Major Dunsdon wanted to ruin his career when Major Dunsdon made positive remarks in his 1986 and 1988 PERs Exhibits HR-16 and HR-18 respectively. He further agreed that if major Dunsdon disliked him because of marital status and started to ruin his career he would not have made the comments he did. He further agreed that Major Dunsdon's assessment of his attitude towards adherence towards rules in a subjective Assessment. He agreed that an assessment a year later

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by a different Major on a different base that his occasional indifference to regulations and orders indicated a lack of discretion and poor judgement showed the same trait as observed by Major Dunsdon. He further agreed that Major Dunsdon's offer to write a letter in support of his application to another Base Commander was a generous offer. He agreed it was possible that not being accepted had nothing to do with his common-law status and that it was possible he was rejected on the merits. He agreed he was wrong in his impression that he would be released in 1984 in relation to his conversation with Major Nickerson. He also stated at page 249:

"A. I believe Major Dunsdon discovered the situation with my common-law relationship and the fact that we had been involved in the news media, and that he chose to basically exclude me from the station."

Counsel for the Respondent filed a letter dated December 16th, 1983, as Exhibit R-1, by Lieutenant Colonel B. Grieves' the Complainant's Co in 1983, in which the Complainant was advised that his application for UTPM would not be considered further. The Complainant agreed that this document indicates that he was rejected for reasons dealing with merit and competition. He agreed there were valid reasons for rejecting his application for UTPM in 1986. He agreed that an application for special commissioning in 1990 was not rejected on the basis of his marital status but because it was processed too late. He also agreed that in this connection, he was boarded and found unsuitable. He further agreed that throughout his military career he has been well treated concerning many avenues affecting his career. He also agreed that

it was a hard fact of life that some bad things occurred. He agreed, with respect to the verbal counselling, Exhibit HR-25, that he was entitled to go to the Courts and Tribunals "of this land" and that nobody would stop him but that the case should be argued before the tribunal and not the media. He agreed it was military policy not to speak to the press without his CO's authority. He agreed that it was possible he wouldn't have succeeded in the OCTP and there was no guarantee of success. He also agreed that he knew he wouldn't be commissioned and took a degree as insurance when he would be released in 1994. He took advantage of every opportunity and benefit available.

On re-examination, because of the suggestion that the Complainant waited 5 months to file a complaint (referred to above) and therefore raised an implication of fabrication, Mr. Duval submitted he was entitled to call additional evidence. No objection was taken by Mr. Rennie. I ruled Mr. Duval was entitled to call evidence and to offer any documents in support.

He therefore submitted, Exhibit HR-32, being a letter dated February 2nd, 1988, written by the Complainant to Barbara Westerman the investigator previously mentioned. This letter is attached.

At this point in the evidence, after a discussion as to whether the interests of the Complainant and the commission were identical, the Complainant, having left the stand, stated at page 293:

"THE WITNESS: Sir, I have no problem at all with that. My hope in filing the complaint was to clear up a problem

area. It wasn't really aimed at me."

I now deal with the evidence of Major Dunsdon on cross-examination, pages 318 to 376, which was somewhat lengthy. I am compelled to say that Major Dunsdon stood up very well, notwithstanding that the events in issue occurred some four years earlier.

In his cross-examination Mr. Duval referred to a so-called statement or notes prepared by one Barbara Westerman, an investigator or officer of the CHRC as a result of an interview she had with Major Dunsdon on December 12th, 1989. Major Dunsdon testified that after the notes were prepared by the interviewer that "Yes, I didn't read it, but we went through it and I

signed --- ". He agreed that he initialled each page. On my questioning Major Dunsdon stated that he and the investigator sat and talked for 4 or 5 hours at the end of which he was presented with the statement and after going through it agreed that in essence it was what he said. He testified the statement was the investigators handwriting, that the investigator read over special things and he initialled each page and signed the document. No one else was present and he was not under oath.

This statement was not entered in evidence and was simply used by Counsel for the Commission at certain times in his cross-examination. Mr. Dunsdon confirmed that he said "Why don't you just get married and avoid all these problems" and that this was said in general conversation. On being shown the statement he made

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to the investigator he agreed with the second sentence of the first whole paragraph which reads:

"It was not until I had a conversation with Lagacé in the spring of '88 about him wanting a commission that I found the reason why he didn't marry his wife. I asked him bluntly why he did not get married and avoid these problems ---"

On being asked what, in his mind, were the problems Lagacé would be avoiding he gave the following answer at page 321:

"A. He seemed to, I think, have some problems with it. He felt that it was affecting him, and affecting his career, because of this perception about what the military was doing.

A. Now, did you tell Lagacé that getting married would make his life simpler, during that meeting?

A. I probably suggested it would make his life simpler."

Major Dunsdon acknowledged he made the following statement to the investigator page 322:

"It would have made his life a lot simpler to not have to fight battles every time he turned around. Either that or get out of the service where his common-law situation wouldn't have such an effect."

And then stated to Mr. Duval:

"A. I don't believe that I said it in the context that it's stated in here. But we had a general discussion about where he was going, obviously, the man wanted to pursue -- he had pursued very effectively his education at that time, and he wanted to pursue officer training within the service."

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He acknowledged, though, that the statement to the investigator reflected accurately what was discussed and that the investigator did not misrepresent whatever was told to her. He then testified further at page 323 to 327 as follows:

"Q. Good. Now, taking -- using Page 8 of the statement, I want you to help the Tribunal to understand the sentence which states:

if ... or get out of the service where his common-law situation wouldn't have such an effect."

What was in your mind, sir? And in what way was his common-law situation, in what way was it relevant to his military career or whatever? What effect did it have, in your opinion?

A. I think the main effect that it had was in his perception.

Q. His perception?

A. Yeah.

Q. But in your statement, you're suggesting him -- you're putting him to a choice. Shut up and go by the rules, or leave the Forces where there'll be no problem with your common-law status, is what you're telling him, aren't you?

A. That was what we discussed, this whole effect.

Q. Now, you're speaking of -- I'm sorry, and I don't mean to interrupt you. Any time that you want to say something, okay. Now here is a gentleman that, according to your testimony, seems to have a wrong perception, i.e., that his status is a problem. An you are there to discuss that with him. And the thing you -- among other things, you tell him that indeed, you'd better leave the Force where there would be less problem with your status. Are you not confirming his fears, suspicions or whatever he allegedly had imagined when you said that, sir?

A. It wasn't done in that way. It was after we discussed his -- my reasons which were stated for refusal of sending the thing -- the recommendation forward, that we discussed this in some general terms here, and in fact, you know, Master Corporal Lagacé seemed to feel that his common-law relationship was in fact the peak of all of his problems at that time, which I don't believe that it was.

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Q. But yet you said that if he was to get out and go to another situation where it would not be a problem. You stated that to him.

Now I have a question for you: one of your concerns with his application was that this person had been fighting the system, trying to fight the system, was it not? But how is it -ignore the system? Did you not make that comment, and I'm going to refer you to the document in question, which you've been shown already, which is the application itself.

A. Mm-hmm?

Q. It's dated -- it's HR-24, I don't know if you still have it.

A. No, I don't. Thanks.

Q. Last sentence:

"He has had a tendency in the past to buck or ignore the system if he does not agree."

A. Mm-hmm.

Q. And when you meet with him, what you tell him is that, well, you'd better shut up or get out of the Armed Forces where you will have less problem with your marital status. Aren't you telling him that he shouldn't have complained or fight whatever he felt he had been denied because of his family status?

A. No, in fact, there was -- the two things that I knew were hard copy was that he had been verbally warned, although it was written into his PERs file, about some discussions outside of the service with reporters. The other thing that I had personally known about was in fact his refusal to sign his PER.

The other thing is that I don't do recommendations for promotion or anything else in total isolation. I had some discussion with his immediate

superiors. They were not particularly happy about his recommendation going forward. At that time, he was briefed that the reason that this was delayed was because he had only had a very short period of time as a master corporal. We couldn't assess his PER.

And at that time, as a matter of fact, I told him, and he'll remember this very well, that I would support a letter and send a letter to his new CO recommending that he be reviewed after he has another PER under his belt.

So it wasn't at that time that I was telling him that he had to do anything. It was that I had briefed on my

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recommendation that in fact it would be -- have one more PER under his belt as a master corporal in a supervisory position, that he would be looked at again".

He then testified that he didn't know whether the verbal warning should have been on the Complainant's file, but that he saw it, and that it was normal procedure for him to check the Complainant's personal file in dealing with the Complainant's application for OCTP.

In relation to comments made by the Complainant's supervisor, Warrant Officer Hayes, concerning the application, the evidence is as follows at page 335 and 336:

"Q. Well, from whom else did you get negative input then, Mr. -- what's his name? Hayes? The warrant officer? Was he the only one to make negative or reserved comments on Mr. Lagacé's application?

A. I think that I want to state at this time, I didn't feel that there was any really negative comments out there. In fact, he was -- Master Corporal Lagacé was definitely a competent technician. And held shown definite capabilities. I mean, the fact that he was taking a degree course by correspondence, that he was working with the alcohol rehabilitation people, were absolutely positive factors in his favour, and that's what, you know, had earned him his promotion to master corporal.

When I sit down, though, to make the final judgement there, I have to take in the fact -- all the perceptions that I've got, because I don't know the man directly. I was uncomfortable with this one, because, in fact, he was not directly and overwhelmingly supported by his supervisors. So I delayed his application.

Q. All right. So the truth is that this warrant officer was not really negative. He was just not strongly recommending, is that it?

A. That's right."

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Major Dunsdon was shown Exhibit HR-16, the 1986 PER, in which he had written that Corporal Lagacé has a very high level of competence and ranked him 7th out of 32 Corporals on the station. In answer to the question as to why he told the investigator the Complainant had the lowest personal score of anyone on the base in his trade, Major Dunsdon explained that this evaluation was when the Complainant was a Master Corporal and that a PER in the first year of rank is generally lower. He also explained that the Complainant was one of 3 or 4 Master Corporals and also explained that a numerical score often does not equate to a narrative and there were shortcomings in the whole PER system. He indicated that it was possible to get scores of other people in the same period as the Complainant.

In his examination-in-chief Major Dunsdon testified he did not know the Complainant but stated to the investigator at page 7 of his statement "when he arrived in '86, I knew about his family situation, that he was common-law". He explained that he would know of the Complainant and his family because of the trailer pad incident referred to by the Complainant and of the common-law situation probably from the assistant station warrant officer.

Major Dunsdon was shown Exhibit HR-25 being the verbal counselling document and testified that the Complainant is challenging the housing policy. He also testified that the Complainant's personal/confidential file arrived at the station at about the same time as the Complainant. Major Dunsdon also said at page 345:

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"A. I think it's probably worth my stating at this time too, you know, that I agreed with what happened here in North Bay, and I agreed that the policy -- the policy was in effect at that time, but I didn't particularly agree with it either. And as, you know -- when I got to the station, I didn't have, as I stated, any problem with other personnel that were in common-law situations."

Major Dunsdon testified that the letter he offered to send to the CO at Halberg station (who was a friend) was not sent because of a change in the Complainant's posting and because of the Complainant's disobedience of a direct order concerning non-attendance at a mess dinner.

In reference to the dental plan mentioned in the complaint Major Dunsdon conceded that he told the investigator at page 17 of the statement and page 347 of the transcript:

"Q. At the top, let me read it first.

"In about fall of '87, Lagacé had insisted that the station orderly room put his wife and child on the dental plan. It was against the rules, but he did it anyway. The corporal that dealt with him was really put out. it got to me and was cancelled... "

A. Mm-hmm.

"Q. I agreed that his wife and child should have had it. If held come to me, I would have helped him with a grievance. Because of his attitude of insisting, I decided he was not appropriate for a commission."

In answer to Mr. Duval's question as to what was wrong in fighting for his rights concerning the dental plan Major Dunsdon testified at page 348:

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"A. But in this case, to ask somebody else, another non-commissioned officer, to do something against the rules, was not the way it should have been done. He should have, at that time, written up some sort of a grievance, sent it through me or somebody else, and it would have gone up. As a matter of fact, because I agreed with him totally on -
-"

Mr. Duval then entered a letter from Captain Hussey to the Complainant dated March 3rd, 1988 as Exhibit HR-33 cancelling the dental care plan.

Major Dunsdon agreed that he stated to the investigator at page 18 of his statement:

"However, after I told him I couldn't support his application but if he didn't get involved in any more incidents here and stayed clean for the month... " - I read month - " ... at Holberg, I'd write a letter to the commanding officer at Holberg recommending that he be given

OCTP. However, because of the dinner incident about March/April, '85 (sic) I withdrew this offer."

Major Dunsdon then stated to Mr. Duval that he didn't know whether the application referred to was for OCTP or whether it was an application by the Complainant to go to Chilliwack as a Drug Counsellor. He also agreed with Mr. Duval that he made the following statements to the investigator:

"I then planned to make a weak recommendation to get him to Chilliwack, but after the dental plan incident, I changed my mind."

"I also knew he was doing good work in terms of education and counselling downtown, but he also had a redress of grievance and a Human Rights complaint. I didn't want to let my judgment be coloured by the fact that he was bucking the system."

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He then testified he couldn't remember specifically whether he had taken the Junior Leader report, Exhibit HR-12, into consideration when making his recommendation. He further testified that the "negative input" from the Complainant's supervisors was the question of the dental plan. He also testified that he had an impression that the Complainant was confrontational but could not give any instance when the Complainant did not work within the system. In answer to the question, page 367 "He's entitled to file a grievance?" his answer was "oh, absolutely. As a matter of fact., I agreed with his grievance".

He also testified that there were two non commissioned members, male and female that were living together in the same trailer in a common-law relationship which he allowed.

Counsel for the Commission called one expert, Ms. Debbie Wilson an actuary, with the consulting firm of William M. Mercer Limited. She testified that her area of interest was "I deal primarily in pension plan evaluations as well as expert witness". She submitted a report, Exhibit HR-1 which were calculations to assist the Tribunal in determining the loss the Complainant may have suffered as a result of not being placed with the OCTP in question and thereby having to retire from the CAF effective April 1st, 1994.

Counsel for the Respondent called four witnesses from the CAF being Major M.D. McCormack, who was qualified as an expert, Captain D.J. Zaharychuk, Captain T.A. Jackson and Captain

L.P. Cooper.

Major McCormack, who has a great deal of experience concerning the commissioning of personnel, and whose evidence I accept, explained the various commissioning programs available. He submitted a report, Exhibit R-3, concerning the Complainant's application for OCTP being the subject of this complaint with a view to establishing an accurate estimate of the probability of Master Corporal Lagacé being selected by the 1988 OCTP (M) board. Major McCormack testified that the application was not received at National Defence Headquarters by him but couldn't attribute responsibility to anyone. He indicated that administrative mistakes often happen. He likened this incident as similar to a subsequent application made by the Complainant involving a Captain Wong, a PSO, in which that application arrived at NDHQ after the appropriate selection board had sat.

Captain D.Z. Zaharychuk of the Director of Posting, Careers and Administration, Officers, DPCAO 3-2, testified that he is responsible for promotion policy and officer merit boards and that his area of expertise is the promotion policy from officer cadet to the rank of Colonel.

Captain T.A. Jackson, with 34 years service, commencing as a signal man in the Royal Canadian Corps of Signals at age 17, was commissioned from the rank of Warrant Officer Class II (WO II) now known as Master Warrant Officer (MWO). He testified he is

responsible for the administration of the Officer Career Development Plan which is normally applicable to all entry plans being Regular officer Training Plan (ROTP), Direct Entry Officer Plan (DEO), Officer Candidate Training Plan (OCTP), civilian and military, and the University Training Program for non-commissioned members (UTPMNCM), and the Commission from the Ranks Program (CFRP).

Captain L.P. Cooper, with 20 years service, spent 8 years as a finance clerk, entered the UTP and since being Commissioned served as a Station Controller, Senior Finance Officer, and for the last two years as a Staff Officer for Pay Accounting Policy and Procedure. She, amongst other duties, does pay projections for Personal Legal Services (DPLS) and "Human Rights". She produced a document entitled "Hypothetical Pay

Projections" which was filed as Exhibit R-4 with no objection and a "Calculation of pay difference" as Exhibit R-5 both relating to the Complainant.

I should point out that Counsel for the Commission filed at the commencement of these proceedings a book entitled "Book of Exhibits" as Exhibit "All containing 23 tabs of which many were marked as Exhibits as the evidence unfolded. Mr. Duval indicated that tabs 11, 12, 13, 14, 15, 18 and 22 are not being entered as Exhibits and do not form part of his case as these tabs dealt with the matters that had been settled.

I now outline the submission of each Counsel dealing with the issue

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in this hearing and with the question of compensation.

Mr. Duval submitted that there were two issues as follows:

- a. Was the Complainant's OCTP application of November 16th, 1987, denied on the prohibited ground of discrimination?
- b. If the answer to the first is yes, what compensation is appropriate in the circumstances of this case?

He submitted that the evidence that is directly relevant to the first issue is the evidence of Master Corporal Lagac6, Major Dunsdon and Captain Jodoin. He then canvassed the law briefly submitting that the Canadian Armed Forces may be held liable for acts done by certain individuals who may have discriminated, that motive or intention is irrelevant, that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment" interpreted as being in some way related or associated with the employment and that the employer may be held liable even if the acts of discrimination were done outside the workplace and outside working hours. He referred to the Standard of Proof and that once a Complainant has established a Prima Facie case of discrimination he is entitled to the relief claimed in the absence of justification. The only justification, is proof, the burden of which lies on the employer, of a BFOR (Bona Fide Occupational

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Requirement). This proof is upon a balance of probabilities. In other words he submits that once there is a Prima Facie case of discrimination the burden shifts to the Respondent to demonstrate the justification upon a balance of probabilities. There is a burden of persuasion. Not only a burden of introducing evidence but a burden of persuasion. Did the Respondent through the evidence called persuade me that the Complainant was not discriminated against? He further stated that the presence of a prohibited ground of discrimination when there are other non-prohibited grounds is sufficient to establish a breach provided it is the proximate cause. He further pointed out that not only has the Respondent the burden referred to above but any defence must be construed narrowly. He submits that the evidence taken at face value could warrant a finding in favour of the Complainant if the evidence is not met. He then advised the Court that he would be focusing almost exclusively on the OCTP application with which we are concerned. He referred to Exhibit HR-8 the enrolment document, Exhibit HR-11, the Air Defence Technician Course, Exhibit HR-12 the Junior Leadership Course, the earning of a degree and award of the Governor General's Medal as being highly relevant as showing motivation and discipline. He makes the point that the Complainant is uncontradicted when he stated that Captain Holpen suggested that he apply for OCTP feeling that the Complainant had a good chance and that Major Dunsdon did not consult Captain Holpen when considering the application. He also makes the point in referring to Exhibits HR-16 and HR-17 and the comments by WO Hayes which are supportive of the application that this evidence is not

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contradicted. He then makes the point that Major Dunsdon's evidence is that Major Dunsdon heard some "negatives" from WO Hayes but couldn't be specific. Mr. Duval submitted the only specific incident that Major Dunsdon could point to concerning his perception of the Complainant fighting the system was the dental plan. Major Dunsdon then submitted that there was nothing wrong in the Complainant trying to exercise his rights concerning the dental plan based on the Federal Court of Appeal decision that marital status encompasses a common-law status and that people are to be assessed for their individual merit rather than through characteristics. He referred to Exhibit R-3 and the Complainant's PERs and points out the fact that the only year the Complainant was below a scoring of 7 was in 1987 the year in which the application in question was made and the dental plan was applied for and subsequently cancelled. He then referred to the verbal warning, Exhibit HR-25, which should not have been on the Complainant's personal file. He then indicates that the Complainant gave evidence that he has

had only two redress of grievance and one charge and that this evidence is uncontradicted. He made a point that the 1984 complaint to the CHRC has been held against him by Major Parent and Captain Belec. In reference to paragraph 15 of Exhibit R-3, being Major McCormack's report, he indicates that there is no evidence before this tribunal that the Complainant had a history of lack of discretion, poor judgment and disregard for rules and regulations. He asserted that the distinction between the Complainant and other people in the armed forces that may be living in a common-law situation was that the Complainant was

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assertive of his rights. He seemed to compare the Complainant's common-law situation with that of the common-law situation of Captain Jodoin pointing out that there was no evidence that Captain Jodoin's marital situation was known. He also made the point that Hayes, Holpan, Belec and Parent were material witnesses who could have contradicted the evidence of the Complainant and therefore help this tribunal to understand the sequence of events or incidents and that it was open to me to make a negative inference from the failure of calling witnesses that could have enlightened this tribunal.

Mr. Duval then referred to the discussion between the Complainant and Major Dunsdon on January 7, 1988, which was sought by the Complainant in order to find out why he had not been recommended for OCTP. He submitted that the Complainant says that Major Dunsdon said the following:

a. "You have to accept the rules"

b. "Why don't you just get married and avoid all these problems?"

And then submitted that Major Dunsdon conceded that he (Major Dunsdon) told the investigator the following:

a. He knew the Complainant before the Complainant arrived in Kamloops.

b. "I asked him bluntly why he didn't get married and avoid these problems".

c. It would have made his life a lot simpler to not have to fight battles every time he turns around, either that or get out of the service where his common-law situation wouldn't have such an effect.

- d. Telling the investigator that the Complainant was a special case.
- e. Telling the investigator that he (Dunsdon) believed the Complainant had the lowest personal score and was then confronted with scores that the Complainant had achieved in two PERs.
- f. Due to the Complainant's attitude of insisting decided that he was not appropriate for a commission.
- g. Thought of recommending the complainant but changed his mind as a result of the mess dinner incident.
- h. That the Complainant did good work but had a redress of grievance and a Human Rights Complaint.
- i. That bucking the system was relevant.
- j. Telling the investigator that in the hierarchy if you don't get along with your boss you do not get promoted.

Mr. Duval also pointed to the fact that Major Dunsdon rushed to say that he didn't want the question of redress of grievance and Human Rights Complaint to colour his judgement and also pointed to the fact that Major Dunsdon conceded telling the investigator that had he seen the good Junior Leadership Course report that was a positive consideration but in cross-examination he seemed to have never seen this report that the Complainant was in the one third upper level.

He submitted that it is beyond question that Major Dunsdon in the discussion as to why he had not recommended the Complainant said "Why don't you get married to avoid all these problems?" and that one of the problems the Major was thinking of was the fact that the Complainant was not being recommended. He further submitted that the Major seemed to be one of the few individuals in the CAF "to whom the beginning new philosophy of the forces with respect to

marital status, to whom this policy did not reach". He submitted that Major Dunsdon did not recommend the Complainant because:

- a. The Complainant's common-law status.

b. The Complainant's effort by way of grievance and complaint to the CHRC to have his status recognized.

He submitted it is a relevant point concerning the completion of part 3 of the application to look at the French version of paragraph 11 of the CFAO which leaves no doubt about Mr. Duval's suggestion that unless the recommendation is to be supported part 3 should not be completed. He further submitted that there cannot be a more drastic way of denying something than not processing it. Major Dunsdon admitted that the application was not processed. Mr. Duval submits that no one linked the non-processing of the application with the closing of the base and that the burden of establishing there was nothing wrong with what happened lies with the Respondent and this burden had not been met. In dealing with Captain Jodoin's evidence Mr. Duval says that Captain Jodoin testified that Major Dunsdon could have referred the Complainant to Chilliwack to evaluate the Complainant. Mr. Duval indicated that he was surprised that Captain Jodoin said "I don't remember" and then when he doesn't remember to deny the alleged conversation between the Complainant and Captain Jodoin.

Mr. Duval then moved to the question of compensation and indicated that in his view there was little difference between the evidence of the actuary that he had called and that of Captain Cooper

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concerning past loss of salary. He referred to future loss and also referred to hurt feelings. He indicated there was no claim being made for punitive damages.

I now turn to the argument submitted by Counsel for the Respondent.

Mr. Rennie submitted that this case is not:

- a. A review of the correctness of the verbal warning given in 1986 or what motivated it.
- b. The correctness or accuracy of the performance of the Complainant as a Corporal and Master Corporal as reflected in his PERs.
- c. A review of the summary trial and conviction that took place in April, 1988, before Major Dunsdon.
- d. A review of the assessment made by Major Dunsdon concerning the Complainant's application for OCTP.

The issue is, he submitted, "Did the Canadian Forces, through, in this case, Major Dunsdon differentiate adversely in relation to Master Corporal Lagacé on the basis of his marital status"? In other words, he submitted, was the assessment of Master Corporal Lagacé's potential in the OCTP program affected by, motivated by, his marital status? Was the Complainant's common-law status the proximate cause of that assessment.

He submits that in weighing the Complainant's evidence against what is in the record the answer is clearly no it was not. He then makes 17 precise points in relation to Major Dunsdon's evidence that he submits irrevocably points to the conclusion that the Complainant's marital status was not the cause of Major Dunsdon's assessment. The points are as follows:

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On his arrival at CFS Kamloops Major Dunsdon did not know Master Corporal Lagacé save that he saw his name on a list of incoming personnel.

2. Major Dunsdon had ordered trailer pads to be shut down, on advice from engineering, due to the impending close down of the station but when he discovered that Master Corporal Lagacé and his common-law wife and child would be severely inconvenienced, ordered a pad to be made available all within a period of 2 hours.

3. Major Dunsdon testified he had nothing against officers who lived in a common-law relationship and that fully 20% of the officers on the station were probably living common-law and that common-law relationship were quite common.

4. The first matter he had to deal with on assuming command of the station was the situation of two non-commissioned members (one male and one female) who wished to live together in a trailer on the station and he reversed the decision of the previous commanding officer in that respect.

5. He testified that he wished the Complainant well in his complaint that was filed with the Tribunal in 1984 and personally thought it was well founded. This was not just a convenient bit of testimony the Major had thought of but in fact, Exhibit HR-23, being the letter dated February 3, 1987,

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written by the Major to NDHQ after the Complainant refused to sign his PER, stated "I do not disagree with his right to grieve any perceived injustice in the system. In fact, it may well be that this refusal has some merit". His concern was with the Complainant's high profile that the Complainant received from the media and the Complainant tended to be confrontational concerning any regulation or procedure with which he does not agree. The Major's evidence before this Tribunal agreed with the letter he wrote. The Major did not care about the fact that the Complainant lived in a common-law relationship but he did care about the Complainant's attitude towards military regulations and policies.

6. He bore the Complainant no ill will. He gave him two PERs with good positive results and that the first one probably resulted in the Complainant's promotion to Master Corporal. The second one in which there was a score of 6.9 which Counsel for the Commission asked this Tribunal to draw an inference of intentional ill motive to discriminate, was made only after the Complainant had served less than a year as a Master Corporal.

7. He called the Complainant into his office after completing part 3 of the application in order to explain to the Complainant the reason for not supporting the application. This was something the Major was not required to do. Why would the Major call in the Complainant to tell the

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Complainant that the application was premature and more proven performance was needed if in fact the Major didn't like the Complainant Is common-law relationship and suggested this to be a total inconsistency?

8. Major Dunsdon testified that he genuinely believed the application was premature and stated "I recommend that at least one or two PERs as a Master Corporal be assessed prior to a recommendation." Counsel submitted this was good advice and that the Complainant agreed with Counsel in cross-examination that was fair advice from a Commanding Officer.

9. On January 7th, 1988 the Major offered to write to the Complainant's new Commanding Officer in Holberg a letter of recommendation should the Complainant choose to apply for OCTP next year. This is hardly consistent with the allegation that the Major discriminated on the basis of marital status.

10. Exhibit HR-24, the application itself, is largely positive. The Complainant agreed there were many positive things that were true and fair comment. The Major said that the Complainant's activities indicated potential and recognized the Complainant's self improvement through education, volunteer work and physical fitness. Again not consistent with one who wanted to adversely affect the Complainant because of a common-law situation.

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11. The Complainant seized upon the comment "He has a tendency in the past to buck or ignore the system if he does not agree" and the Complainant said "I assumed he's talking about the fact that I complained." But there is no proof only an assumption. The problem with this theory is that what the Major said was well founded in fact to which the Complainant in cross-examination agreed. The points alluded to by the Major was the verbal counselling, refusal to sign a PER, no ringing endorsement from his line officers and supervisor, signing up of his dependents for the dental plan by exercising his authority as a Master Corporal over a Corporal when the Complainant knew he was ineligible under the regulations in force at that time and threatening to go public concerning the trailer pad incident which was cleared up in 2 hours. Counsel submitted there was independent corroborative evidence out of the mouth of the Complainant himself which says that he is confrontational. concerning the critical comment in the Complainant's PER, Mr. Rennie submits Counsel for the Commission makes much of the fact that the line officers were not called as they were material witnesses. Mr. Rennie submits that they were in fact material to the Commission's case. Mr. Rennie, then, makes two points, firstly that there is no significance in Captain Halpen encouraging the Complainant and secondly that positive comments in a PER doesn't necessarily mean suitability for OCTP.

12. The Major when asked if marital status had anything to do with

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what lay behind his comments in the OCTP application said absolutely not.

13. Concerning the comments "Why don't you get married?" the Complainant admits that this was said in an informal context and the Major stated that it was more of a question. Mr. Rennie

submits that when a question "Why don't you get married and avoid the problems?" equals discrimination that this is a gigantic leap further than Parliament ever intended. With respect to the comments that the Complainant's family situation "Is a consideration when looking for officer-like qualities" no one disagrees that this is a consideration. The Complainant agreed it is appropriate to look at stability of financial management, stability of the relationship be it common-law, married, widowed or divorced, and alcohol and drug dependency are all aspects of one's personal life to be appropriately considered in assessing leadership potential. The Complainant admitted that there had been alcohol and financial management problems in the past which were overcome and which should not, in this enquiry, be looked at in detail but the fact is that the Major knew of them.

The final point Mr. Rennie makes concerning Major Dunsdon's evidence was that the Major was cross-examined on a statement that Mr. Rennie had not seen, written three years prior to this enquiry, after a five or six hour interview, written by an investigator not under oath and without Counsel. Mr. Rennie submits that the Major

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had no difficulty in dealing with the statement and he saw no inconsistencies and it would be no surprise to him if there were inconsistencies.

Concerning the evidence of Captain Jodoin, Mr. Rennie submitted that the interesting thing about Jodoin's evidence is that he himself was living common-law which the Major knew.

As opposed to the 13 points enumerated above Mr. Rennie says that the Complainant offers four points:

1. The trailer pad incident was orchestrated by the Major which Mr. Rennie dealt with earlier.
2. The Major was not on base to greet the Complainant on arrival in mid July, The Major says that I try to meet everybody but sometimes do not.
3. The lack of signature on the farewell Certificate. Major Dunsdon thinks it was prepared after the Complainant left the station because it was given out at the last mess dinner. Spontaneously Major Dunsdon said before this enquiry "You know, it should have

been signed, I'm quite prepared to sign it now, and I apologize for the fact that it wasn't signed".

4. The conviction at the summary trial for failing to obey a

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direct order to attend a mess dinner. This arose after the issue in question.

Mr. Rennie also submitted that I am being asked, by the Commission's counsel to infer that Major Dunsdon somehow took steps to ensure that the OCTP application did not get to the NDHQ which Mr. Rennie submits is a huge leap in logic.

Mr. Rennie in referring to Exhibit HR-32, the letter written by the Complainant to Barbara Westerman, and the allegation that "retaliation" was taking place advised this tribunal that retaliation is not discrimination but a criminal offence under Section 59 of the Canadian Human Rights Act. He stated he is not resting his case on this point but that it was an interesting insight as he didn't think the Complainant really believed, in 1988, that his common-law status had anything to do with Major Dunsdon not recommending his application but felt that Major Dunsdon was trying to retaliate.

Mr. Rennie also submitted that he had difficulty in understanding the Complainant's case in that firstly he thought the complaint was about the comments in the application but the Complainant agreed that most comments were accurate and there was some evidence in which Major Dunsdon could draw the conclusion that there was a tendency in the past to buck or ignore the system. He then thought that the comments made during the interview with Major Dunsdon was the problem but then discovered that these comments "are kind of

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more evidence than discrimination". It then seems that the complaint outlined in Exhibit HR-32, the letter to Mrs. Westerman, suggests it's not what was said but that Major Dunsdon is trying to retaliate. Then at this hearing there is a suggestion by Mr. Duval that the complaint is that the application wasn't processed because of the Complainant's common-law status.

Mr. Rennie suggests that the Complainant's case is based on admitted assumption, surmise and perception by the Complainant and that it is met by straight forward unequivocal denial under oath. He further suggests that the Complainant has shown an obvious tendency to exaggerate or distort the significance of conduct in an unreasonable manner. There is also the suggestion that the Complainant imputes to otherwise rational and normal discourse or events discriminatory practices and refers to the incidents in relation to Padre Dobrowski in 1982 and Major Nickerson in 1984. The Complainant is under the assumption that Major Nickerson is going to release him and he finds he is wrong. Mr. Rennie says I can draw the inference that the Complainant drew unreasonable assumptions from the conversations held.

It was also submitted that the evidence of Major McCormack is conclusive that at most what the Complainant lost was a slim opportunity to become an officer under the OCTP because of the tremendous competitive process. He stated that, although the Complainant testified he had no doubt he would be a Captain, there was every reason to doubt he would in fact be a Captain based on statistical probability. He submitted that Major McCormack went one step further showing that

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the Complainant was competing for four positions in logistics and that only three percent of the candidates were successful in attaining selection to either logistics or security. The Complainant would have had to attain a total merit score greater than 99 percent of the candidates boarded in competition for the first logistics position and greater than 98 per cent for the second. similarly he would have had to exceed 93 per cent for the first security slot and 79 for the second.

In addition the complainant would not have had as much time left to serve as his competitors and that there was no relationship between his chosen career (Military occupation Code - MOC) and his present trade both of which would weigh against him. He submits that Major McCormack's report makes it clear that "while many may be called, few are chosen" and that the evidence is unassailable that the Complainant lost nothing more than an opportunity.

In reply, Mr. Duval submitted that a discriminatory ground need not necessarily be the proximate cause but simply one of the causes and referred to some authorities being a decision in the divisional Court of Ontario based on the Ontario Code and a Tribunal decision based on the Federal Act. He also submitted that the reference to an alcohol

problem by the Complainant was that it is part of the discipline of alcoholics anonymous that he continues attendance and submitted that it is meritorious on the Complainant's part to continue this discipline.

He then dealt with the question of whether the Complainant lost a job opportunity as opposed to a job and quoted the Morgan case. He then dealt with the allegation of

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retaliation and submitted that the Complainant being a lay person would not necessarily have used the word retaliation in its true sense and in this regard when I queried the same indicated that the Complainant's Bachelor of Arts Degree was in Psychology and Sociology and that he did not have a law degree. He also submitted that the application not being processed is one of the elements that should be taken into account to decide whether or not the Complainant has been denied the right to make an application and if successful with all the consequences that flows therefrom. He then dealt with, again, the Morgan decision and its interpretation by the Martin decision in so far as putting a cap on damages and he suggested that the two year maximum is simply a guide. He then submitted that he strongly disagreed with Mr. Rennie's suggestion that the "business of prima facie and burden of proof only applies in cases involving rules or regulations". He then refers to authorities by the Supreme Court of Canada that the only defences available are those that are statutorily authorized and they must be construed narrowly. He then submits that the only defence that would fit this case is the one enumerated in Section 15 (a), the so called BFOR of the Canadian Human Rights Act.

In conclusion both Counsel referred me to the pertinent passages of Morgan that dealt with the question of probability and then referred me to the Martin decision of a Human Rights Tribunal chaired by Sidney N. Lederman, Q.C., page 43 dealing with specific damages. They then referred me to page 48 of Mr. Lederman's decision in which he continues with a discussion of Morgan and

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invited me to read these cases.

DECISION

Counsel for the Commission submitted that the evidence taken at face value could warrant a finding in favour of the Complainant if not met.

In my view, on the whole of the evidence, it is crystal clear that the Complainant's case has been met. I agree entirely with the submission by Counsel for the Respondent. I was favourably impressed by the evidence of Major Dunsdon in direct and cross-examination. I was not persuaded by the evidence of the Complainant. In fact I found it preposterous for the Complainant to allege that the trailer pad incident, when he was posted from North Bay to Kamloops, was orchestrated by Major Dunsdon. An officer of Major Dunsdon's calibre and experience who was a commanding officer of a station and responsible for its close out, about to retire from the service and who doesn't know the Complainant and has many other responsibilities is not going to attempt to orchestrate this kind of incident. In fact the solving of the problem within two hours shows professional discretion on the part of Major Dunsdon and corroborates his concern for the welfare of those he commands. With regard to the application for OCTP by the Complainant it is entirely reasonable for Major Dunsdon in making his assessment to want the benefit of one or two PERs to see how the Complainant performs as a Master Corporal. The remarks made by Major Dunsdon during the interview that he called, not requested as Counsel for the Commission submitted, have been taken

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completely out of context by the Complainant. These remarks were simply questions asked by Major Dunsdon in the spirit of a friendly interview in which the Major was counselling the Complainant. The Major had no concern or problem with the matter of the Complainant's marital status which is certainly borne out by the fact that Lieutenant Jodoin, one of his officers was living in a common-law relationship and was subsequently promoted Captain. Lieutenant Jodoin (as he then was) flatly denied that he would have made the remarks that the Complainant's common-law wife would not fit into the officers' mess which evidence I accept. It makes no sense to think otherwise when Lieutenant Jodoin himself lived in a common-law relationship and still does. In addition the Major had no problem concerning the two non-commissioned members who wanted to share a trailer. The implied allegations by the Complainant that the Major was influenced by the Complainant's grievance and complaint to the CHRC concerning the Complainant's marital status in reference to the housing policy of the CAF is without foundation. In this context Major Dunsdon was only concerned with the actions of the Complainant speaking to the press, and in fact the Major testified that he also did not agree with that

policy which is corroborated by the letter he wrote to NDHQ, dated February 3, 1987, Exhibit HR -23, in reference to the non-signing of a PER. With regard to the two allegations set out in the complaint, Exhibit HR-7 concerning family situation and personal life, of course, these areas are looked at closely when looking for officer-like qualities. It is common place that ones family situation and personal life is looked at in all sorts of human

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endeavour when applying for employment, applying for an appointment or seeking promotion. The Complainant agreed that such matters as finance, drug and alcohol dependency and stability of the marital situation are all matters to be taken into consideration in the Commissioning process. These considerations do not imply a disapproval of common-law relationships. There is no evidence, at all, that Major Dunsdon was influenced by the verbal warning except in the context of the Complainant speaking to the press. With reference to his offers to write a letter to the Commanding Officer in Halberg, recommending the Complainant for a future application for OCTP, the Major was quite justified in not doing so having regard to the manner in which the Complainant applied for dental coverage and being found guilty of disobeying a direct order to attend a mess dinner. Major Dunsdon took a serious view of this circumstance and was completely justified. The disobedience of a direct order, except in extreme cases of justification, would in my view be fatal to one aspiring to be an officer. In connection with the Certificate that was not signed I attach no weight except to say that I regard the use of it, by the Complainant, as a pitiful attempt to bolster his case. No ulterior motive can be attributed to Major Dunsdon. In reference to the failure of the OCTP application not arriving in Ottawa I dismiss, out of hand, the implied allegation that the Major did not process the application because he wished to discriminate adversely against the Complainant based on marital status. The evidence is that Major Dunsdon signed part 3 of the application and put it into his out-basket to be dealt with in the ordinary administrative way by the orderly room

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staff. This is corroborated by Major McCormack. It is true that, Major Dunsdon bears final responsibility as a Commanding Officer in this regard but he is entitled and must delegate those administrative functions in order to command effectively. This is common place in any organization. The evidence suggests that the application was simply

not processed due to the close down of the station or by clerical error. To imply that Major Dunsdon deliberately or negligently withheld the processing of the application is not credible. Why would the Major take such a risk when he was about to retire.

Much of the evidence by the Complainant concerning events prior to and subsequent to the OCTP application is not relevant except to place matters in perspective. The one comment I make is I wonder why the Complainant did not take a grievance or further complaint concerning the alleged remarks by Majors Nickerson and Parent. The other point I make is that there is not doubt but that the Complainant's course reports and PERs show that he is well qualified, respected and performs his duties extremely well and that he displays initiative and leadership. But all this does not ensure, at all, that he would be successful in applying for a commission. The phrase "many are called but few are chosen" is apt. His other applications have not been successful. It is my view that the Complainant having received good reports, worked hard and obtained a degree with distinction perceived he could be commissioned and wanted to be commissioned to ensure continued service to age 55 rather than compulsory release in 1994, began to

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perceive there was discrimination based on marital status when he was not successful.

It is my judgment that the Complainant and Commission have not proved a case of discrimination contrary to section 7 of the Canadian Human Rights Act on the prohibited ground of marital status. Having come to this decision it is not necessary to deal with the question of damages or compensation, if any, to which the Complainant may have been entitled. I did however, consider the evidence in regard to damages and compensation as well as submission by Counsel. It is sufficient to say that if I had found that Major Dunsdon was discriminatory, as alleged, in refusing to support the application that this was not or would not be the proximate cause of any damages except for hurt feelings. The Complainant would still have to overcome the fact that the application did not arrive at NDHQ. Assuming, however, that it did, the evidence of Major McCormack and Captains Zaharychuk and Jackson is conclusive that the Complainant would have had almost no chance of being accepted and therefore the question of compensation would not arise. If the Complainant had been accepted it is by no means certain, at all, that he would have eventually been promoted to Captain although he would of course have been appointed an officer

cadet, then promoted to Second Lieutenant and later to Lieutenant assuming he was recommended by the selection board and passed the Basic Officers' Training Course (BOTC). Damages for loss of wages would not have been high having regard to his pay level in the rank of Master Corporal and his employment as an Air

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Defence Technician as well as the two year guideline enunciated in the jurisprudence. An award for hurt feelings, being anywhere up to \$5,000 is extremely subjective and in my view quite minimal having regard to his other failed attempts in obtaining a commission and that there is no evidence of any publication or dissemination of the alleged discrimination. A "guesstimate" without due consideration would be \$1,000.

By way of comment each Counsel submitted for my perusal a book of authorities setting out the principles to be followed concerning prima facie case, burden and onus of proof, proximate cause, intent, liability, standard of proof, liberal interpretation, defence of BFOR and interpretation thereof, damages and compensation. Counsel in argument also referred to cases not in either book and without citation. With great respect, I must say, that I had difficulty in the extreme in analyzing the argument by Commission Counsel. This case is primarily a question of credibility, weight of evidence and a determination of the facts. There were 41 Exhibits of which 35 were entered by the Commission and 6 by the Respondent. One Exhibit, R-3, entered by the Respondent was a report by Major McCormack, an expert witness called by the Respondent which I found extremely useful in considering the likelihood of the Complainant being successful and therefore concerning damages. There were a total of 7 witnesses 2 of whom dealt with assessment of damages from an actuarial and pay point of view. Four volumes of transcript evidence were produced. I further observe that the statement made by Major Dunsdon to

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the investigator was not entered in evidence and therefore as a tryer of fact would not have the advantage of assessing the Statements made by Major Dunsdon to the investigator (and used in a cross-examination) from a context point of view. I observe that one or two of the statements made to the investigator were certainly not statements that Major Dunsdon made to the Complainant at the time of the interview after the assessment of the Complainant's application.

The Complaint by Master Corporal Lagace is dismissed.

ch-Staunton

W06685

File

Canadian Human Rights Commission

COMPLAINT FORM

I, Paul LAGACÉ of P.O. Box 802
complainant street

Kamloops British Columbia V2C 5M4
city province postal code

have reasonable grounds for believing that the Canadian Armed
Forces
respondent

of 101 Colonel By Drive Ottawa Ontario KIA OK2
street city province postal code

is engaging or has engaged in a discriminatory practice on or
about (January 4, 1988 to April 12, 1988)
date

at Canadian Forces Station Kamloops, British Columbia
street city province

on the ground(s) of marital status and family status
in contravention of the Canadian Human Rights Act.

The particulars are as follows:

The Canadian Armed Forces discriminated against me by refusing to
promote me and by treating me differently because of my marital
status and family status in violation of Sections 7 and 10 of the
Canadian Human Rights Act.

"I am a member of the Canadian Armed Forces and I have been living
in a common-law relationship with my wife and her son since 1980.

next page

Dated at this day of 19

city province

postal code

Signature of complainant

Signature of witness

CE DOCUMENT AUSSI DISPONIBLE DANS L'AUTRE LANGUE OFFICIELLE

e 2 - Paul Lagacé

Particulars of complaint (continued)

File No. W06685

On November 16, 1987 I applied for the Officer Candidate Training Plan. believe I am qualified and that I meet all of the criteria.

On January 4, 1988 I was rejected by Major Dunsdon. On January 7, 1988 he informed me that my family situation "is a consideration when looking for officer-like qualities" and said "Why don't you just get married and avoid all these problems". Later that same day Lt. Jodin told me that my common-law wife would not fit into the Officer's Mess because "your personal life is looked at closely when you're an officer".

I also consider the following as incidents of adverse differential treatment:

In December, 1987, in anticipation of reposting to CFS Holberg, I was given a screening package which is normally provided to families in such situations. This package is designed to gather information about the family and is part of an assessment process in determining adjustment at the new location.

I completed the package and sent it to Ottawa. On January 18, 1988 a message was sent from CFS Kamloops to NDHQ Ottawa which stated "Member suitable for posting to C.F.S. Holberg". On January 21, 1988 the screening was rejected saying that "common law not recognized as legal marital status ... any screening

action for common law wife and her dependent son is member's responsibility and not the CF S". On February 1, 1988 I was notified that my posting had been changed to CFS North Bay. This will be a financial disadvantage.

On April 8, 1988 my sponsor in CFS North Bay who has been assigned to help me with my relocation called and advised me to contact the Housing Officer in order to confirm a trailer pad. He had made enquiries of the Officer and been told that there were two spaces available and nobody was on the waiting list. I spoke to the Housing Officer in CFS North Bay on April 11, 1988 and he asked me if I were married and if I had been in CFS North Bay before. He also asked if I were the same person who was living common law and had placed a complaint with the Canadian Human Rights Commission. He then asked "what did the judgment tell you?". He then informed me that there were no trailer spaces available. On April 12, 1988 I received a message from CFS North Bay stating that I did not qualify for a trailer pad because "documents show that you are single".

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May - 1988
Dated at
Complainant

Kamloops this 16 day of

Signature of witness

COMPLAINT AMENDING COMPLAINT FORM DATED MAY 16, 1988

W06685
File
Canadian Human Rights Commission

COMPLAINT FORM

I, Paul LAGACÉ of P.O. Box 802
complainant street

Kamloops British Columbia V2C 5M4
city province postal code

have reasonable grounds for believing that the Canadian Armed Forces respondent

of 101 Colonel By Drive Ottawa Ontario KIA OK2
street city province postal code

is engaging or has engaged in a discriminatory practice on or about (January 4, 1988 to April 12, 1988)

at Canadian Forces Station Kamloops, British Columbia
street city province,

on the ground(s) of marital status and family status
in contravention of the Canadian Human Rights Act.

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The particulars are as follows:

The Canadian Armed Forces discriminated against me by refusing to promote me and by treating me differently because of my marital status and family status in violation of Sections 7 and 10 of the Canadian Human Rights Act.

I am a member of the Canadian Armed Forces and I have been living in a common-law relationship with my wife and her son since 1980.

On November 16, 1987 I applied for the Officer Candidate Training Plan.

I believe I am qualified and that I meet all of the criteria. On January 4, 1988 I was rejected by Major Dunsdon. On January 7, 1988 he informed me that my family situation "is a consideration when looking for officer-like qualities" and said "Why don't you just get married and avoid all these problems". Later that same day Lt. Jodin told me that my common-law wife would not fit into the Officer's Mess because "your personal life is looked at closely when you're an officer".

Dated at North Bay, Ont
City, Province

next page

this 30th day of June, 1988

Signature of witness

CE DOCUMENT EST AUSSI DISPONIBLE DANS L'AUTRE LANGUE OFFICIELLE

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Page 2 - Paul Lagacé

Particulars of complaint (continued)

File No. W06685

I also consider the following as incidents of adverse differential treatment:

In December, 1987, in anticipation of reposting to CFS Holberg, I was given a screening package which is normally provided to families in such situations. This package is designed to gather information about the family and is part of an assessment process in determining adjustment at the new location.

I completed the package and sent it to Ottawa. On January 18, 1988 a message was sent from CFS Kamloops to NDHQ Ottawa which stated -Member Suitable for posting to C.F.S. Holberg". On January 21, 1988 the screening was rejected saying that "common law not recognized as legal marital status ... any screening action for common law wife and her dependent son is member's responsibility and not the CFS". On February 1, 1988 I was notified that my posting had been changed to CFS North Bay. This will be a financial disadvantage.

On April 8, 1988 my sponsor in CFS North Bay who has been assigned to help me with my relocation called and advised me to contact the Housing Officer in order to confirm a trailer pad. He had made enquiries of the Officer and been told that there were two spaces available and nobody was on the waiting list. I spoke to the Housing Officer in CFS North Bay on April 11, 1988 and he asked me if I were married and if I had been in CFS North Bay before. He also asked if I were the same person who was living common law and had placed a complaint with the Canadian Human Rights Commission. He then asked 'what did the judgment tell you?'. He then informed me that there were no trailer spaces available. On April 12, 1988 I received a message from CFS North Bay stating that I did not

qualify for a trailer pad because 'documents show that you are single'.

I registered for the dependent's Dental Plan in September 1987 and outlined that my marital status was common law. I was accepted and paid eight months of premiums. It was cancelled effective May 1, 1988 and I was told that common law relationships are not accepted under the plan.

Dated at North Bay, Ont this 30th day of June, 1988

Signature of complainant

Signature of Witness

Canadian Armed Forces Air Command

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National Defence Headquarters
Ottawa, Canada
KIA OK2

CONFIDENTIAL

Forces armées canadiennes
Commandement Aérien

5225-2 (co)

Canadian Forces Station Kamloops
P.O. Box 4000
KAMLOOPS B.C.
V2C 5R7

3 Feb 87

Attention: DPCAOR 2-3

ANNUAL PERFORMANCE EVALUATION REPORT
REFUSAL TO SIGN
113 455 711 CPL PH LAGACÉ 171

1. The subject member has refused to sign his PER. His mind could not be changed on this even after the CopsO and the CAdO explained that signing a PER did not mean agreement;

only that he had read 4A and discussed the contents of Sections 5A and 5C.

2. His stated reasons for not signing were that:

a. the narrative did not mention his very strong efforts over the first months of the year; and

b. that he had had a previous experience whereby the narrative appeared to indicate a higher score than was given and therefore he did not agree with the directive that disallows the member from seeing the complete PE2.

3. Cpl Lagacé has pushed a grievance through the complete DND grievance procedure that was denied at every level. He is now continuing his grievance in hearings before the Canadian Human Rights Commission. I do not disagree with his right to grieve any perceived injustice in the system. In fact it may well be that this refusal has some merit. My concern is that Cpl Lagacé received a high profile during his previous grievance and his attitude appears to be confrontational on any regulation or procedure he does not personally agree with.

4. I am not prepared to make any recommendations at this time but only feel that my concern should be recorded.

Major
Commanding Officer

Enclosure: 1

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CONFIDENTIAL

HR-24

CFAO 9-26 OAFIC 9-26
A F. X A ANNEXE A

OFFICER CANDIDATE TRAINING PLAN

APPLICATION FORM AND STATEMENT OF UNDERSTANDING

Part 1 - To be completed by applicant

1 113 455 711 MCPL LAGACE

P.M.

(S I.N) (Rank)

(Surname and Initials)

hereby apply to be commissioned through the Officer Candidate Training Plan (OCTP).

2. Date of Birth 31 January 1954 MOC

171 Air Defence Technician

3. Unit CFS Kamloops UIC 2381

Geographic Location: Kamloops, British Columbia

4. I wish to serve in one of the following classifications:

Administration (Pers) 68 (First Preference)

Logistics 69 (Second Preference)

Security 81 (Third Preference)

5. I attach a certified true copy of the marks obtained in my final year of high school.

16 November 87

PART 2

(To Be completed by medical officer)

Medical Category: 21 1 1 2

11 December, 1987

(Date)

Dr. J. L. Mabee

(Signature of Medical Officer)

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PART 3

(To be completed by commanding officer)

Assessment and Recommendation (to include assessment on suitability for commission rank and, where the applicant has previously applied for the OCTP or any other commissioning plan, remarks appropriate to the reasons for which he was not selected)

or is no longer pursuing that plan): MCpl Lagace has proven his capability to advance his education. His work as a volunteer Drug and Alcohol Counsellor and his physical leadership potential cannot yet be assessed. He has buck or moted to MCpl in 1987 and his had a tendency in the past to ignore the system if he does not agree. I recommend that at least one commendation for OCTP.

4 Jan 88

R J Dunsdon, Major

(Date)

(Signature of Commanding Officer)

Ch/Mod. 4/79

or two PERs as a MCpl be assessed prior to a recom-

(Français au verso)

A-I

National Defense

Defence nationale MINUTE SHEET

NOTE DE SERVICE

DOSSIER A

TD - DT.

(TO BE SIGNED IN FULL SHOWING APPOINTMENT, TELEPHONE NUMBER AND DATE)

(ATTACHE DE SIGNATURE, FONCTION, NUMÉRO DE TÉLÉPHONE ET DATE)

REFERRED TO

TRANSMISE A

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DND 317 (JUN 74)

753021870-6223

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VERBAL COUNSELLING

On this date 113 455 711 Cpl Lagace P.M. AD Tech 171 was verbally counselled as to the following matters:

He contravened CF regulations by willingly and without permission discussed and voiced negative personal opinion of CF housing policy with reporters, knowing articles could be published, while the issue of concern was under consideration by higher authorities. This is the third occasion in which Cpl Lagace has publicly challenged and criticized CF policy in the news media. He was verbally advised that such constitutes unsatisfactory conduct and very poor judgement. He was also advised that if members of the CF are concerned about a particular subject, proper procedures and methods of expressing concern are available within the CF system.

Any further occurrence of Cpl Lagace publicly criticizing CF policy will result in Cpl Lagace being placed on Recorded Warning. He was also informed that a record of this verbal counselling will be placed on his Unit Personal File.

(Date) (Signature of Supervisor)

DISTRIBUTION

Unit Personal File
C Maint 0

(Signature of Witness)

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CANADIAN HUMAN RIGHTS ACT
LOI CANADIENNE SUR LES DROITS
DE LA PERSONNE

Exhibit No HR-25

CONFIDENTIAL

P. O. BOX 802
Kamloops, B. C.
V2X 5M4

February 2, 1988

Ms. Barbara Westerman
Canadian Human Rights Commission
Box 6

#600 - 609 West Hastings
Vancouver, B.C.
V6E 4W4

Dear Barbara:

As discussed during our telephone conversation of February 2, 1988, it has become necessary to seek legal recourse against the Department of National Defence for a recent criticism which has resulted in serious negative career implications.

This most recent incident took place on January 4, 1988. While this incident involves a more direct approach, it must be emphasized that many verbal criticisms, by supervising officers, have taken place since my complaint was initiated in 1984. I became concerned about the seriousness of threats on February 13, 1986, when Yajor R. J. Parent stated "This issue of common-law and the Human Rights will certainly cloud your career in the future."

This comment was made during the course of a 'Verbal Warning' interview. Of particular concern is the insertion of this verbal warning in my Confidential Persona'; File. This is contrary to regulations and displays the intent to harm future career progression.

When we moved to Kamloops in June of 1986, I was confident the issue of my common-law relationship and complaint with the Human Rights Commission would not interfere with career opportunities.

However, Major R.J. Dunsdon's comments on my recent Officer Candidate Training Plan Application illustrates my allegation that retaliation' is taking place. I have enclosed a copy of the document. It is important to note that my leadership potential was assessed on a Junior Leaders Course completed in February 1981.

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In an interview with Major Dunsdon on January 7, 1988, I was informed that "to become an officer, you must demonstrate a willingness to accept all the rules even if you don't agree."

During this interview it was also pointed out that my family situation "is a consideration when looking for officer-like qualities". Major Dunsdon clearly indicated that he could not

recommend me because "you have not displayed the qualities necessary to be a good officer, and I can't see how you could fit in the officer ranks." He added, "Why don't you just get married and avoid all these problems." The impression I got from Major Dunsdon's manners was that I had made the mistake of challenging military policies and that I would suffer for it.

Later that day I met with Lt. Jodoin to discuss the most suitable avenue in dealing with my application for Officer Cadet Training. He further emphasized that my common-law wife would not fit into the Officer's Mess because "your personal life is looked at closely when you're an officer."

As mentioned during our telephone conversation, it is very unlikely that any supervising officer will openly admit to the use of retaliatory tactics. However, this is the first written indication that it is taking place. I have managed to acquire more qualifications than necessary, but I can't even get into competition for the programs. I therefore request that an investigation be initiated and if deemed reasonable by the Commission, that charges be brought against the Department of National Defence under Chapter 33, Item 45 of the Human Rights Act, which prohibits the use of intimidation against any individual who has initiated a complaint under the Act. Thank you for the assistance with this matter.

Sincerely Yours,

Paul M. Lagacé

PS. I have also enclosed a copy of the minute Sheet and Verbal Counselling Documents dated February 13, 1986.