T.D. 4/98
Decision rendered on May 15, 1998

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:
KIMBERLEY FRANKE
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

CANADIAN ARMED FORCES
Respondent

TRIBUNAL DECISION

TRIBUNAL: Donna M. Gillis Chairperson
Hervé H. Durocher Member
Jane S. Shackell Member

APPEARANCES: J. Helen Beck
Patricia Lawrence
Counsel for the Canadian Human Rights Commission

Kimberley Franke, Complainant

Darlene Patrick
Jean- Marie Dugas
Counsel for the Canadian Armed Forces

DATES AND LOCATION: October 28 - 31, November 1, 18-22, December 9 -12, 1996
OF THE HEARING February 10 - 14, April 29-30, May 1, 1997
Courtenay, B.C.

MAJORITY
DECISION BY: Hervé H. Durocher and Jane S. Shackell

MINORITY
DECISION BY: Donna M. Gillis

Background of the complainant

The Complainant, Kimberley Franke, then a Corporal in the Canadian Armed Forces, stationed at Canadian Forces Base Comox, B.C. (C.F.B. Comox), filed a complaint with the Canadian Human Rights Commission alleging that the Canadian Armed Forces discriminated against her, on the basis of her sex and making reference to a series of events which commenced in February of 1991.

The complaint which is now before this Tribunal was investigated by the Canadian Human Rights Commission. The Tribunal was informed that conciliation was attempted and, when the matter was not resolved by conciliation, this complaint was referred to a Tribunal pursuant to Section 49 of the Canadian Human Rights Act.

The proceedings before the Tribunal, besides the preliminary exchange of documents and setting of dates which were dealt with by telephone conference, commenced with the hearing of evidence on the 28th day of October, 1996. Evidence was heard during 4 separate weeks between October 1996 and February 1997, and submissions and arguments were heard during a further 3 day period ending the 1st day of May 1997.

At the conclusion of the hearings, the Tribunal was advised that there were two complaints filed by Corporal Franke, simultaneously, in March of 1992. One was filed specifically against the person of Master Warrant Officer (M.W.O.) MacNair who was the Complainant's immediate supervisor at the relevant time, and whose name shall assume more prominence further in these reasons. The other complaint, the one before this Tribunal, was filed making reference to the behaviour of several persons, notably M.W.O. MacNair; Lieutenant Vedova, the most junior Commissioned Officer to whom the Complainant reported; Major Couture, the Complainant's direct superior; Lieutenant Colonel (LtCol) King, the Base Technical Services Officer (B.T.S.O.); Dr. Jacques, the Base Medical Officer; Sergeant Caron and Warrant Officer (W.O.) Boudreau, both members of the Female Base Dress and Deportment Committee at C.F.B. Comox; and where the sole Respondent to the complaint is the Canadian Armed Forces.

The Tribunal was advised that both complaints were investigated by the same investigator at the Canadian Human Rights Commission, and that the first mentioned complaint was not referred to a Tribunal whereas the second mentioned complaint was so referred. The existence of the complaint against M.W.O. MacNair and its early disposition were brought to the Tribunal's attention by Counsel for the Respondent but it was not made clear what, if any conclusions, the Respondent wished the Tribunal to reach as a result thereof and consequently, beyond its mention, nothing further turns on it.

The complaint dated March 11, 1992 which is before this Tribunal makes several direct allegations of comments and gestures, of a lewd, sexual and suggestive nature by M.W.O. MacNair. These will be dealt with under the heading Sexual Harassment Allegations against M.W.O. MacNair. It also makes reference to insensitive and objectionable comments of a sexual or demeaning nature directed at the Complainant by Major Couture. These will be dealt with under the heading Sexual Harassment Allegations against Major Couture.

The complaint filed by Corporal Franke makes mention of the roles played in the events leading up to its filing by Lieutenant Karen Vedova, as well as by Sergeant Caron and W.O. Boudreau and these roles will be discussed later in these reasons.

What became evident quite early in the proceedings was that the complaints of sexual harassment filed with the Canadian Human Rights Commission were viewed by the Canadian Armed Forces as complaints made in retaliation for disciplinary action taken with respect to the Complainant. The Tribunal heard evidence from eighteen ordinary witnesses who all had dealings with the Complainant at C.F.B. Comox during the relevant period. Much of the evidence is contradictory and inconclusive, both as to the nature of the acts or events, and as to their effect upon the Complainant. In addition, the Tribunal heard the evidence of two psychiatrists, Dr. Halliday on behalf of the Complainant, and Dr. Passey, on behalf of the Respondent, and the evidence of Patricia Joan Wright, a therapist who has worked with the Complainant.

The Complainant's evidence

The Complainant testifies that in February, 1991, after hearing of a temporary job opening at the Base Transportation Section of C.F.B. Comox, she transferred from her job as an Administrative Clerk in the Orderly Room for 407 Squadron at CFB Comox to a position as Administrative Clerk for the Base Transportation Section always at CFB Comox. Generally speaking, the transfer was brought about as a result of the Complainant's desire to better herself by gaining the broader range of experience which she felt would be available to her in a one clerk office than that which she could get having regard to the narrower focus of her duties in the larger office at the Orderly Room.

There was evidence given by the Complainant of objectionable behaviour on the part of her former supervisor at the Orderly Room, Petty Officer (P.O.) Dennis Pistun. There was also evidence of the fact that P.O. Pistun had himself been disciplined by the Canadian Armed Forces for differential treatment accorded to male members of the staff he supervised over female members of his staff. Corporal Franke testified that during her tenure at the Orderly Room, she had acted as spokesperson for the female staff members in complaining to the superior officers about the objectionable behaviour of P.O. Pistun and that as a result of her complaint, the behaviour stopped. The evidence of Corporal Franke was that P.O. Pistun would frequently undo his trousers for the purpose of tucking in his shirt in the presence of female officers. She also testified that P.O. Pistun engaged in several incidents of touching of his female staff members and though none of the touching was alleged to have been sexual in nature, it was, according to her evidence, inappropriate.

The Complainant's evidence with respect to P.O. Pistun was not totally corroborated by the evidence of Lieutenant Colonel Rheaume, the Commanding Officer of 407 Squadron, 19 Wing, CFB Comox. He acknowledged that at one point, Corporal Franke had complained of P.O. Pistun tucking his shirt into his pants in an inappropriate fashion. He could not recall any complaint of inappropriate touching and he did confirm that P.O. Pistun was disciplined by way of a recorded warning for differential treatment of female staff members. He testified that P.O. Pistun and Corporal Franke had a personality conflict.

Corporal Patricia Nears contradicted the evidence of the Complainant concerning any inappropriate actions by P.O. Pistun. She testified that P.O. Pistun was a jovial, soft-spoken and fair supervisor who provided all of his staff with the opportunity to obtain the best possible training. She denied having appointed Corporal Franke as a spokesperson to complain to authorities about P.O. Pistun and had no recollection of anyone else in the unit having done so.

Corporal Nears did testify that she witnessed a confrontation between P.O. Pistun, his superior Lieutenant Power and Corporal Franke concerning the compliance of the rings worn by Corporal Franke on her fingers with base dress regulations. She also confirmed that during her tenure at the base orderly room at 407 Squadron, Corporal Franke was verbally reprimanded about a particular haircut and about the way in which she wore her pants inside her boots. Corporal Nears described Corporal Franke as a confrontational person in particular when challenged with respect to her behaviour or apparel, matters which she considered personal (although it is apparent the Armed Forces consider both to be not personal, but rather matters of interest to the employer). She described Corporal Franke as being a positive, strong-willed, forward and open person. Corporal Nears testified that while she and Corporal Franke worked together at 407 Squadron, they would often go for walks and recalls that Corporal Franke was quite straight-forward and open about sexual matters describing herself on occasion to Corporal Nears as being "horny".

The interpersonal relationships of Corporal Franke with her co-workers or her superiors at the orderly room at 407 Squadron were not relevant to her decision to seek to fill the temporary position which opened at the Base Transport Section due to the re-muster of the current Administrative Clerk to duties related to the Gulf war. The initial period of the opening was to be 6 months and it was the Tribunal's understanding that if the then current Administrative Clerk, Corporal Devries Stadelaar was to have returned from the Persian Gulf to his position as Administrative Clerk at the Base Transport Section, that the position occupied by Corporal Franke would have terminated. That was not to be the case however and at the end of 6 months, she was given the option to stay on at the Base Transport Section or return to the Orderly Room and she chose to stay on at Base Transport Section.

Sexual Harassment allegations against M.W.O. MacNair

The Complainant testified that no sooner had she commenced her employment at the Base Transport Section than her superior non-commissioned officer, M.W.O. MacNair commenced making inappropriate comments to her about her dating habits and that he did on occasion make

lewd or suggestive gestures of a sexual nature directed to her. She also testified that at one point, when her superior officer, Lieutenant Karen Vedova was on a trip to Australia, she sent M.W.O. MacNair a postcard of a bare-breasted aboriginal female which M.W.O. MacNair displayed to the Complainant while remarking that the breasts of the person on the postcard were definitely larger than those of Lieutenant Vedova. Corporal Franke testified as well that during the first six months of her tenure at the Base Transport Section, she was told by Corporal Kelley Eadie, another female member of the Canadian Armed Forces who worked in the same section as the Complainant that if she wanted to advance in the section, she would have to "make M.W.O. MacNair feel good about himself". The Complainant testified that Kelley Eadie bragged about getting time off for shining M.W.O. MacNair's boots.

The evidence of the Complainant with respect to the actions of M.W.O. MacNair was largely denied by him. Where M.W.O. MacNair agreed in his testimony with some of the evidence given by the Complainant, the interpretation put on the incidents by him was that they were part of the everyday good natured bantering which took place between members of his staff at Base Transport Section, that no offence was meant by any of the comments, gestures or behaviour and that none was taken. Similarly, the evidence of Kelley Eadie was that the Complainant was self-serving in her evidence, that incidents or statements would be taken out of context and related for the purpose of justifying the Complainant's own actions and reactions. Corporal Eadie testified that Corporal Franke had considerable difficulty getting along with people; that she was reprimanded either for her work or her actions on average once per month; that she participated willingly in sexual and racial bantering while in the canteen and elsewhere at the Base Transport Section. It was also Corporal Eadie's evidence that Corporal Franke had a tendency to retaliate in an angry fashion when anyone brought to light her short-comings. As was the case with several witnesses, events related by the Complainant in her evidence were related in a very different light by Corporal Eadie. An example of this was the comments attributed to Corporal Eadie that she "got time off for shining M.W.O. MacNair's boots". Corporal Eadie admitted making the statement but categorically stated that this was said as a joke and not meant to be taken seriously. This is but one example of things said being taken out of context by the Complainant.

Sexual Harassment complaints against Major Couture

During the same first six months of her employment at Base Transport Section, the Complainant states that the commanding Officer of Base Transport Section, Major Couture made several inappropriate and demeaning comments toward her which can be deemed sexually harassing. She testifies that when Major Couture first transferred into the section, he questioned how she could afford to live in the house she owned on a Corporal's salary. This was found to be inappropriate by Corporal Franke. On one occasion toward the end of August 1991, the Complainant purchased a Harley Davidson motor-cycle at Cold Lake, Alberta and drove it back to CFB Comox on Vancouver Island. Apparently, Major Couture was himself the owner of a motor-cycle and some bantering had taken place about their respective biking experience. On one occasion, for no apparent reason, Major Couture referred to Corporal Franke as "biker mama" and inquired of her when she was going to get a tattoo. Corporal Franke was adamant in her testimony that she found this comment to be extremely offensive, that she complained of it to her superior officer, Lieutenant Karen Vedova in the full expectation that Lieutenant Vedova

would speak to Major Couture and that she would receive an apology. Lieutenant Vedova's evidence will be reviewed later in these reasons.

The Complainant further testified that on another occasion when she entered a meeting room for the express purpose of taking the minutes of the Base Transport Safety Committee, she was addressed as "the sexatary" by Major Couture. On this occasion, Lieutenant Vedova was present and overheard the comment. There was some discussion between the Complainant and Lieutenant Vedova about the inappropriateness of the comment following the meeting. On neither occasion did Corporal Franke demand an apology herself from Major Couture. She cited the chain of command as the reason for her submissiveness at the time.

The evidence of Lieutenant Vedova was that she and the Complainant were relatively good friends while the Complainant worked for her. They discussed many things on many occasions. There was little reluctance on the part of the Complainant to discuss matters of a sexual nature and the Complainant did not appear to be reticent, fretful, or insecure about her position at Base Transport Section. Lieutenant Vedova testified that she was not asked by the Complainant to discuss the harassing incidents with Major Couture nor did she feel it was required of her simply by virtue of her position. Though Lieutenant Vedova acknowledged that both the "biker mama" and the "sexatary" comments were demeaning and objectionable, she felt that at the time they were made, the Complainant did not view the comments as being harassing in nature and that Corporal Franke laughed them off as being no more than the product of an insensitive person, representing no threat to the Complainant or her position.

It appeared to this Tribunal Member from the evidence of the Complainant, her co-workers, her superior officers and her supervisor M.W.O. MacNair, that her relationship with other persons at Base Transport Section were satisfactory until some time in August of 1991. In August of 1991, the Complainant testified that she had commenced drinking at lunch one day with Master Corporal Alexander, another co-worker in Base Transport Section who was a close friend of M.W.O. MacNair and who also reported to M.W.O. MacNair. According to the evidence of Corporal Franke, there was a lot of drinking that went on at Base Transport Section. It is notable that none of the other witnesses, whether interested or not in the outcome of these proceedings, agreed with the Complainant in this respect. Be that as it may, the Complainant further testified that on the day in question, she and Master Corporal Alexander proceeded from the canteen to M.W.O. MacNair's office where they continued drinking and where they were joined by others in the section. According to her own evidence, the Complainant became quite inebriated and in the course of the party, declared to M.W.O. MacNair that she would sleep with him. There was no evidence that M.W.O. MacNair had ever asked this of the Complainant.

We were left with the impression that the Complainant thought all of M.W.O. MacNair's comments and gestures described earlier were in the nature of a "come on" or a form of "mating ritual". Nowhere in her evidence did the Complainant state that M.W.O. MacNair let it be known that he expected any sexual favour from the Complainant.

Following this incident, the Complainant stated that she decided she would no longer go along with the type of bantering that had hitherto taken place in the canteen or in the section; that she would no longer "play the games" that she alleges were being played by the rest of the staff at

Base Transport Section. She vowed not to drink anymore at her place of work and thought it was inappropriate that others should drink there as well. There is no evidence, however, that this personal decision or resolve on the part of the Complainant was communicated to anyone and we are left to speculate as to why the Complainant would find this important or relevant.

A short time after this incident, apparently following the late submission of a report by Master Corporal Alexander, Corporal Franke took it upon herself to speak to Master Corporal Alexander about his perceived drinking problem. She justified this intervention on the basis that she was the Unit Drug Education Coordinator (UDEC), and felt that this designation gave her the authority to counsel Master Corporal Alexander about his behaviour. She did this notwithstanding having discussed the appropriateness of such an intervention on her part with Sergeant Greenly, a superior officer who had himself held the UDEC designation and having been advised by the said Sergeant Greenly that it was not her place to counsel Master Corporal Alexander. Sergeant Greenly went beyond that advice and told her (the Complainant) that having regard to the close friendship which existed between Master Corporal Alexander and M.W.O. MacNair, that she could expect M.W.O. MacNair to become angry and to reprimand her if she should exceed her authority in this fashion.

It was therefore no surprise to us, and indeed it should not have come as a surprise to the Complainant, that the day following her attempt at pointing out Master Corporal Alexander's drinking problem, M.W.O. MacNair did reprimand her severely, using profanity, and advising Corporal Franke in no uncertain terms that she should mind her own business.

The significance of the events surrounding the Complainant's attempt to counsel Master Corporal Alexander on his drinking problem cannot be downplayed since, according to the Complainant's own evidence, her relationship with M.W.O. MacNair was never the same after the incident involving the attempted counselling of Master Corporal Alexander.

In order to fully understand the significance of the Complainant's attempt to counsel Master Corporal Alexander on an alcohol problem, it must be appreciated that the Complainant had been designated Unit Drug Education Coordinator (UDEC) at the relevant time. The terms of reference of the UDEC were as follows:

1. To advise Unit Commanders and/or Section Heads on all matters relating to the DAPP (Drug and Alcohol Prevention Program).

2. To represent his/her unit on the syndicate and base drug education committee.

3. To periodically review and suggest improvements to the wing DAPP.

4. To provide consultative services to unit commanders and/or section heads.

5. To coordinate loading of all DAPP courses within the unit.

Nowhere in those terms of reference is it stated that the Complainant had the right or the responsibility to counsel her peers or persons of superior rank such as Master Corporal Alexander, that remaining the domain of M.W.O. MacNair in the chain of command.

It was clearly acknowledged by the Complainant that M.W.O. MacNair's attitude toward her changed dramatically as a result of the intervention with Master Corporal Alexander. He became more distant and more formal in his dealings with Corporal Franke and she sensed a change in their relationship from that day forward.

As will become obvious from the Complainant's evidence discussed further herein, the Complainant is of the view that her real problems with the Canadian Forces commenced when she was disciplined for insubordination and she testifies that the recorded warning she was handed at that time was the beginning of the end of her career with the Canadian Armed Forces. She also views the recorded warning as being retaliation against her, emanating from M.W.O. MacNair, for her failure to respond positively to and continue to participate in what she says were inappropriate "games", such as drinking and banter in her section. For example, she made a negative remark to M.W.O. MacNair regarding his display of the postcard from Lieutenant Vedova. We shall now examine the events leading up to the recorded warning for insubordination handed out to the Complainant.

In October of 1991, there was in existence at CFB Comox, what is known as the Female Dress and Deportment Committee. This is a committee established by the Base Chief Disciplinarian, Chief Warrant Officer Dougherty (Chief Dougherty). The purpose of the Female Dress and Deportment Committee was to act as a liaison between the Base Disciplinarian and all female non-commissioned members on matters of dress and deportment pertaining exclusively to the female ranks. The Base Disciplinarian has, as an overall responsibility, the duty to oversee all matters of discipline, dress and deportment for all non-commissioned members on the base.

In October of 1991, the two members of the Female Advisory Committee were Sergeant Caron and W.O. Boudreau. Sergeant Caron did not testify before the Tribunal, but W.O. Boudreau did appear as a witness. It is acknowledged by the Complainant that approximately one week before what became known as the "shoe incident", Sergeant Caron had brought to the Complainant's attention the fact that the shoes she was wearing were not regulation. The two members of the committee were at that time, carrying out visits of all units on the base in order to perform their liaison duties where they would at once consult with female members and advise female members with respect to matters of dress and deportment. On the afternoon of October 29, 1991, the two members of the committee appeared, unannounced, at Corporal Franke's office. Generally speaking, the members of the committee tried to schedule their visits at the various units on base with the Unit Disciplinarians, in this case that person being M.W.O. MacNair. Coincidentally, both M.W.O. MacNair and Lieutenant Vedova, the Complainant's two supervisors were absent on the occasion of the visit by the two members of the Female Dress and Deportment Committee. What is apparent from the evidence of both the Complainant and of W.O. Boudreau is that, in the course of the visit, it was noted that the Complainant was still wearing the shoes which were not approved. The Complainant was quick to question why she was being singled out for her unapproved shoes when many women on the base wore shoes which were not regulation and when her own supervisor, Lieutenant Vedova wore shoes which

had no heel. When the members of the committee pointed out to Corporal Franke that they had no jurisdiction over officers such as Lieutenant Vedova, the confrontation between the committee members, especially Sergeant Caron, and Corporal Franke escalated and W.O. Boudreau, being the senior person present, took it upon herself to halt the meeting letting Corporal Franke know that she would hear further from the dress committee the following day.

Although Corporal Franke testified that she had a medical problem with one of her knees as the result of a skiing accident which occurred while she was attending a French course in St. Jean, Quebec either in late 1988 or early 1989, she had not followed the acceptable procedure of obtaining medical authorization to wear a non-regulation shoe until after the incident in question. Corporal Franke testified that at the time of the shoe incident, she had an appointment with the base medical officer to obtain such an authorization and that such an authorization was obtained the day after the confrontation.

Following the confrontation between the Complainant and members of the Female Dress and Deportment Committee members, a series of meetings were held between the said members and M.W.O. MacNair, who was the Complainant's disciplinarian, and Chief Dougherty who was the Base Disciplinarian. As a result of these meetings, notwithstanding some misgivings testified to by M.W.O. MacNair concerning the absence of clear evidence of a prior verbal warning prior to issuing a recorded warning, it was decided to issue a recorded warning to Corporal Franke. Chief Dougherty testified he had seen on her file, a record of such a warning, pertaining to the haircut and rings incident. The terms of the recorded warning are as follows:

Corporal Franke, KD is warned of the following shortcoming, not having heeded previous verbal warnings: that when confronted with shortcomings by your superiors, you acted in a belligerent and challenging manner contrary to the good order and discipline of the CF. Failure to correct the above noted shortcoming will result in counselling and probation (C and P) or a release.

The recorded warning was dated the 26th day of November, 1991 and was signed by M.W.O. MacNair and acknowledged by Corporal Franke.

The recorded warning issued to Corporal Franke for insubordination during the visit of the Female Advisory Committee members was, in our view, the catalyst for all of the subsequent difficulties between Corporal Franke and the CAF, including her complaint before this Tribunal. Corporal Franke viewed the recorded warning as a serious blot on her military record and she was not prepared to accept this form of discipline and to move on with her life.

On the 9th day of December, 1991, the Complainant filed a redress of grievance on her recorded warning and put into motion an investigation within the Canadian Forces Military Structure which progressed through various levels at CFB Comox to Western Air Command at Winnipeg to Air Command Headquarters at Ottawa and ultimately to the Chief of Defence Staff of Canada, at that time, General John DeChastelain.

At about the same time, Corporal Franke's personnel evaluation for her tenure at Base Transport Section was being completed. It was approved by LtCol King, the Base Technical Services

Officer on 13 January 1992, signed by the Complainant and her supervisor, Lieutenant Vedova on January 20, 1992 upon Corporal Franke's return from Christmas leave. The Complainant then submitted a redress of grievance on her personnel evaluation report on the 4th of February, 1992 setting in motion a further redress procedure through various levels, finally culminating in the change of Corporal Franke's evaluation score from a score of 6.9 to a score of 7, this change having been made at the last level of redress, being at the office of the Chief of Defence Staff on the 10th of October, 1994 following the Complainant's departure from the Canadian Armed Forces, following a recommendation to the Chief of Defence Staff with the note that, among other considerations:

"The impact of raising a Corporal's PER score from 6.9 to 7.0 is negligible and will neither change her merit list position nor promotability, especially since she is already released from the Canadian Forces."

On the 16th day of December, 1991, the Complainant launched an internal complaint concerning harassment and abuse of authority thereby putting into motion an investigation procedure within the structure of the military forces which commenced with a summary investigation carried out by Major Bottomly at CFB Comox. Corporal Franke's complaint re: harassment and abuse of authority was initially rejected by LtCol King on the 17th day of February, 1992, a decision which was not changed despite appeals by Corporal Franke to all available levels within the structure of the Canadian Armed Forces and the Ministry of National Defence of Canada.

There is much evidence, including evidence by the Complainant, evidence by her psychiatrist, Dr. Halliday, evidence by her counsellor, Ms. Joan Wright and evidence by the Canadian Armed Forces psychiatrist, Dr. Passey concerning the rapid deterioration which took place to the Complainant's health after the recorded warning and the various attempts at redress by the Complainant. It is apparent to this Tribunal Member that Corporal Franke has become very ill and that the illness, if not caused by the myriad of procedures which she was put through or which she put herself through as a result of her various attempts at redress and the complaint ultimately before this Tribunal, was certainly contributed to by her inability to obtain justification or validation, for any of her grievances within the Military structure.

Dr. Halliday, the Complainant's psychiatrist, diagnosed Corporal Franke as suffering from Post-Traumatic Stress Disorder. This diagnosis is not one which is supported by the DSM IV, the accepted psychiatric diagnostic reference work. Corporal Franke had been referred to Dr. Whittaker, a psychiatrist in Victoria, B.C. This referral was made by her Commanding Officer at CFB Comox, Colonel (Col.) McGee, when it became increasingly apparent that Corporal Franke was suffering from some form of mental or emotional problems in or around June of 1992. Dr. Whittaker's diagnosis was that of "adjustment disorder with depressed mood - resolving (DSM III R 309.00)".

Dr. Passey, a psychiatrist in the employ of the Canadian Armed Forces, reviewed all of the relevant medical documentation concerning Corporal Franke and attended the hearing for the testimony of the Complainant, as well as the testimony of Sherry-Lynn Campbell, Dr. Halliday, Joan Wright, Major Couture and Corporal Nears. Dr. Passey obviously had ample opportunity to observe Corporal Franke while he was in attendance at the Tribunal hearing. Dr. Passey's

opinion concerning the proper diagnosis for Corporal Franke was that of "adjustment disorder with depressed and anxious mood" at the outset but stated that it progressed into a major depression with psychotic features, paranoia, as her various grievances were not upheld through the Military channels.

The actual diagnosis for Corporal Franke's condition either in 1992 or at present is of limited importance to this Tribunal. Either way, it is apparent that Corporal Franke suffers from a form of psychiatric illness. It may be that one illness may be easier to treat than another and it may also be that the failure to properly diagnose and to properly treat Corporal Franke's disorder some years ago, may have contributed to her present state.

What is important from our point of view is to attempt to determine whether the great deterioration in Corporal Franke's health and her current medical condition are due to any form of sexual harassment or discrimination, including discrimination by way of differential treatment and if so, whether a remedy exists under the Canadian Human Rights Act.

The Complainant at all times carries the onus of proof in cases of sexual harassment. Proof generally follows the presentation of clear and cogent evidence. In this case, the evidence of the Complainant and the evidence presented on behalf of the Complainant was not clear and cogent. The evidence of the Complainant tended to be self-serving and exaggerated. The evidence of Dr. Halliday was that the Complainant's medical problems commenced as a result of the incidents of sexual harassment which she endured in the spring and summer of 1991, and that her present condition is due especially to the "secondary injury" as a result of her failure to be validated in her complaints and grievances. He had not commenced any form of active psychiatric treatment because the process of seeking validation would not be terminated until the conclusion of the Canadian Human Rights Tribunal hearing and, presumably, any appeals therefrom.

The evidence of Dr. Halliday was not convincing as to the first issue before us, that is to say the relationship of any sexual harassment or discrimination to Corporal Franke's medical condition. He had simply accepted Corporal Franke's version of events as to the reasons why she felt she had been discriminated against and had not sought to look behind them, even to the extent of failing to take a detailed medical history from Corporal Franke in the course of his meetings with her. He had made no enquiry from Corporal Franke as to any other aspect of her interpersonal relationship with her co-workers or superiors.

The impression we had of the evidence of Dr. Halliday was that it was given in a manner calculated to enhance Corporal Franke's chance of success either in her claim for a greater pension allowance pursuant to the applicable legislation, or to enhance her chance of success in her grievances and her complaint to the Human Rights Commission culminating in the hearing before this Tribunal. Dr. Halliday's insistence that Corporal Franke suffers from Post-Traumatic Stress Disorder in the face of the definition of that disorder in the DSMIV manual, leads one to question the whole of his evidence.

The diagnosis of Post-Traumatic Stress Disorder pre-supposes either the witnessing, or the experiencing of serious traumatic events. The types of events described by Corporal Franke in

her evidence simply do not measure up to the types of events which would give rise to the emotional and mental trauma experienced in situations involving combat, rape, death or serious injury to a loved one, which are the pre-requisites of the diagnosis. This diagnosis is one, however, which permits of the existence of many of the symptoms exhibited by Corporal Franke without there having to be any underlying personality disorder.

Dr. Passey, the psychiatrist called by the Respondent Canadian Armed Forces, described the criteria for a diagnosis of post-traumatic stress disorder thus:

"Post-traumatic Stress Disorder (PTSD) is a psychiatric condition where a person develops characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or a threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (criterion A1). The person's response to the event must involve intense fear, helplessness, or horror (criterion A2). In addition one must also fulfil the B,C,D,E and F criteria as per DSM IV. One can develop Delayed Onset PTSD if the symptoms do not occur until 6 months after the stressor."

Further in his report, at page 5, Dr. Passey gives examples of situations where sexual harassment met the criteria for a diagnosis of Post-Traumatic Stress Disorder:

"These included a female police officer not receiving appropriate back up by fellow officers during dangerous arrests, a female chemical worker being verbally threatened and later exposed (on purpose by a co-worker) to a toxic chemical, a female office worker being verbally and later physically sexually assaulted by her supervisor etc. If the harassment is not an extreme traumatic stressor like these examples then it does not fulfil criterion A1 for PTSD and Adjustment Disorder is the appropriate diagnosis."

Finally, Dr. Passey gives what, in his opinion is the correct diagnosis for Corporal Franke's case as "either Bipolar I or II disorder with grandiose and paranoid features" and stated that she probably also suffered from panic disorder with agoraphobia.

The evidence given by Dr. Passey is preferable to that given by Dr. Halliday. It was given in a more measured way, tended to fit with the medical and psychiatric authorities cited to us, and generally, was more in keeping with the picture one had of the Complainant during her own testimony. It also took into account the history of Corporal Franke's relationships at work.

After a review of the evidence as a whole, Corporal Franke has not proven that she was the victim of sexual harassment or of any discriminatory practices based upon her sex. There is evidence of comments made by Major Couture and of comments and gestures made by M.W.O. MacNair which Ms. Franke deems sexually harassing. On the weight of the evidence, it cannot be said that these comments or gestures were viewed by the Complainant as any form of harassment at the time they were made. This of course does not lead necessarily to the conclusion that the incidents were not sexually harassing. However, we find that the complaint

before this Tribunal was made in retaliation for the disciplinary action for insubordination, which discipline did not arise out of any earlier refusal by Ms. Franke to "play the games" as she alleges, but out of her disrespectful behaviour with the dress committee. The dress committee did not have any secondary agenda to harass Ms. Franke as she alleges. Finally, we find that the incidents alleged are not sufficient to constitute sexual harassment.

Corporal Franke, and the Human Rights Commission, argue that the recorded warning given to Corporal Franke was given in retaliation for her complaints of sexual harassment, or for her decision to "stop playing the sexual games" which allegedly formed a part of the daily or almost daily routine in her office. There was no evidence that any complaint made by Corporal Franke about the actions of Major Couture or M.W.O. MacNair were taken as serious complaints and consequently, it strains credulity to believe that retaliation by them would involve the complicity of at least 4 members of the Base Discipline Committee, M.W.O. MacNair, W.O. Boudreau, Sergeant Caron and Base Chief Dougherty. This firmly held conviction on the part of the Complainant may be, at once, the manifestation of the paranoia and of the grandiose ideation described by Dr. Passey.

The second question which must concern the Tribunal is whether the Complainant was subjected to any adverse differentiation in the course of her employment either because of her sex or because of her complaints of harassment.

There is no question that the Complainant went to great lengths to seek redress for actions which she viewed as being differential treatment, that is to say, her recorded warning, her perceived low rating on her Personnel Evaluation, and the incidents which she alleged constituted harassment.

Consideration of whether Corporal Franke was subjected to adverse differentiation must be informed by a review of the correspondence exchanged between Corporal Franke and many of her superiors at the time of the events. Volume HR-1 of the documents submitted as exhibits contains copies of this correspondence, and the document numbers which follow refer to the contents of that volume as presented to us.

To convey the flavour of Corporal Franke's correspondence requires extensive quoting from her numerous memos. What follows is a review of parts of the correspondence that passed between Corporal Franke and various of her superior officers in connection with her incidents of her recorded warning, her grievance of her PER score, and her sexual harassment complaint; references are to the document numbers in the exhibit book numbered HR-1.

8.3 This document is Corporal Franke's first grievance of the recorded warning. In it, she said (in part):

"The incident...involved my providing honest answers to Sergeant Caron and W.O. Boudreau on questions of my shoes. If I answered a question it was considered insubordinate and if I said nothing the assumption lead them to the same conclusion. Clearly, these two senior NCMs came to my office with the predetermined goal of creating a disciplinary situation. ...The encounter with Sergeant Caron and W.O. Boudreau came the day before my medical appointment suggesting the antagonistic nature of their approach to the issue."

Corporal Franke accuses the base dress committee of dishonest motives, without presenting any reasons for so doing. This presentation of the substance of her meeting with the base dress committee does not address the argumentative nature of her remarks to them.

The response to the memo is document 9.2, in which LtCol King points out that the recorded warning was issued because of Corporal Franke's attitude, and evaluates her behaviour toward the dress committee as "defensive, argumentative and insubordinate and displayed disrespect", which evaluation seems fair based on the evidence we heard from both Corporal Franke and W.O. Boudreau. In her memo, Corporal Franke had also said, in part: "As there has been no previous verbal warnings of the perceived shortcomings it seems inappropriate to have issued a recorded warning." LtCol King in his response deals with this point by referring to a previous incident with M.W.O. Belanger (related to us in the evidence as a dressing down of Corporal Franke for her calling a superior officer by his first name), and goes on to suggest that Corporal Franke should have spoken directly to her superiors, rather than starting by entering into the formal written redress procedure.

10.3 This document is Corporal Franke's first written memorandum regarding her grievance of her PER score. In it she says (in part):

"I have tried repeatedly through the chain of command to have an interview with you to discuss this, however you are continually unavailable to hear my concerns...".

Corporal Franke accuses those who assigned her PER score of partiality because of her earlier grievance of the recorded warning and her harassment complaint (which were at this time still under various levels of investigation). She refers to the fact that copies of certain of her confidential correspondence had not been protected with complete confidentiality (which she later complained of separately, resulting in action by Col. McGee) and concludes "so I cannot at this point see where any objectivity was used in writing my PER". This type of language suggests contempt for Corporal Franke's superiors, rather than rational evaluation of her own performance.

The memorandum goes on to present various gossipy and unflattering remarks about Lieutenant Vedova as well as an unidentified secretary in Corporal Franke's office. These comments are neither relevant nor necessary to the purpose of the memo. The memo concludes "I feel this PER is unjust and written strictly from a personal biased opinion...".

LtCol King's response, document 10.4 notes that he was unaware Corporal Franke had wished to speak to him regarding her PER (she later responds, at document 13.1, in very argumentative terms implying either dishonesty or at least bad faith on LtCol King's part).

In LtCol King's response, he reviews the procedures used to arrive at Corporal Franke's PER score, and suggests that Corporal Franke is unprofessional in using against her employer her knowledge of her own draft PER score which was not ultimately reflected in the final score. It appears these draft scores are intended to be confidential until finalized. LtCol King appears to have assumed that Corporal Franke knew her draft PER score because she had typed the draft;

Corporal Franke says she did not do so, and later calls him (in writing), ignorant for making the assumption (see document 13.1).

LtCol King's response to Corporal Franke also raises the inappropriateness of her comments in her grievance memo regarding others in her office. He goes on to say that in his view her PER score was generous, and that if her grievance were to result in a review and rewriting of her PER scores, it would be lower. He says that a decision to pursue this matter on her part "would in all likelihood be to [her] personal detriment". Corporal Franke in her testimony suggested that she took this as a threat; however, it appears clear from the document as written that the "personal detriment" to which LtCol King refers is the potential lowering of the PER score.

8.5 This document is Corporal Franke's first memorandum regarding her complaints of harassment. In this memo, Corporal Franke details certain actions by M.W.O. MacNair which she says offended or annoyed her. She also repeats gossip which she heard from Cpl Eadie.

The memo distorts the incident in which Major Couture asked how she could afford her home, suggesting that Lt Vedova had raised with her that Couture "couldn't comprehend" the situation; this is not consistent with the Complainant's testimony before us. She goes on to relate the "sexatary" incident, as well as the incident in which Couture asked her "hey Biker Mama, when are you going to get a tattoo?". She states that she told him she had bought her motorcycle "as investment" and would not ever get a tattoo. She says this "attack on [her] personal life style" was totally unwarranted. It is difficult to understand how she could experience Couture's question as an attack on her life style.

Corporal Franke also relates the postcard incident, which she says occurred in September (although this memo is written in December). She describes the postcard as "the most upsetting incident". She says that M.W.O. MacNair showed her the postcard he had received from Vedova, saying that it was "a revealing postcard of a semi-nude woman". Other evidence revealed that the postcard was of a naked Maori woman. The evidence is not clear as to whether the photograph itself was a salacious depiction of a woman's breasts, or a simpler portrayal of a culture in which nudity is not considered shameful. In any event, Corporal Franke says that M.W.O. MacNair compared the Maori woman's breasts with Lt. Vedova's breasts, and that M.W.O. MacNair was "not pleased" with her when she told him that her morals were not the same as his.

In this memo, Corporal Franke relates that the "sexual innuendoes" ended after her argument with M.W.O. MacNair over the alcohol "counselling" incident, but that pressure on her increased in other ways. She then relates the recorded warning incident, presumably as an incident of this pressure. She said she felt that the recorded warning was unfair, and that she is concerned that "this is but the beginning of actions initiated by M.W.O. MacNair to effect my release". She does not say how the two are related, or why she thinks M.W.O. MacNair wants her released. She later goes on to say "although a memo was sent to all sections on professionalism in the work place it is not practiced however greatly preached. Respect for the rank on my part is always shown as I do not deviate from calling all concerned by their rank. It seems that the personnel mentioned in this memo expect to have respect shown them regardless of their

actions". These comments indicate disrespect and contempt for her coworkers, and overstates Corporal Franke's own level of compliance with military regulations.

The response to this memorandum is document 9.3, in which LtCol King advises Corporal Franke that his investigating officer has concluded that the complaint is Corporal Franke's reaction to being placed on recorded warning.

12.1 Corporal Franke's next step was to grieve LtCol King's response to her complaint, which she does at document 12.1. She complains: of the communication to her regarding her contacting the Human Rights Commission; that Lt. Vedova said "my but you've been a busy girl" to her in respect of her actions regarding her complaint; that Major Bottomly was abrupt with her. She accuses Major Bottomly of "editing [her] statement to suit her own personal feeling on the case". She relates the fact that she met with Major Bottomly on at least four separate occasions. She implies that M.W.O. MacNair is responsible for certain anonymous telephone calls that she was receiving at her home, without any proof. She suggests that Couture was unreasonable in not allowing her to leave the office at any time she wished to report to the RCMP with respect to these phone calls. She relates various gossip that she asked Bottomly to insert in her report, being negative statements about M.W.O. MacNair. She suggests that she is being further harassed by not being permitted to visit Cpl. Legault at her place of business. She suggests that her confidential correspondence was deliberately copied and circulated.

In the memo, Corporal Franke again suggests that someone is directing the harassment against her, and is attempting to effect her release. She suggests that her complaints "do not seem to matter" and says she believes "the investigation [of her complaints] was a farce and just another form of intimidation". She goes on to say "your personal opinion of being "very disappointed" is of no interest to me and I prefer in the future not to be subjected to your personal opinions". This is an extraordinarily disrespectful way to communicate with a superior. She goes on to make a number of negative remarks about Major Bottomly's level of experience "in the psychological field" says that Bottomly "should not have been dealing with a case on harassment where she didn't understand all the issues involved. Had she any knowledge in this areas she would know....". She goes on to request that certain individuals be contacted to submit personal opinions of her "not just petty officers who themselves have been put on recorded warnings" - presumably a reference to P.O. Pistun. This is a distortion of the nature of the investigation, in which Bottomly spoke to a great number of individuals. Major Bottomly's lack of experience in conducting this type of investigation does not lead to the conclusion that she misrepresented or manipulated its results.

The response to Corporal Franke's memo is document 12.3, in which LtCol King responds to each of her concerns in even terms, which appears to be consistent with the other evidence.

13.1 This document, referred to above, is Corporal Franke's continuation of her grievance of her PER score. She indicates that she has not received a reply that she feels was "unbiased". As outlined above, she suggests that LtCol. King is dishonest when he says he did not know she wished to meet with him. She calls him ignorant. She refers to his advice as "unwarranted".

Col. McGee's response is document 13.2. He says that her PER score was a "good" score. He states that he is troubled by the tone of her correspondence, which casts aspersions on others. He says that her attitude is perplexing, and tells her that he will not entertain further correspondence which is disrespectful of her seniors, although he will "always receive correspondence from [her] through established processes which is factual and deals with the point at issue". He concludes that her score was higher than warranted, and suggests that she learn from the experience and carry on with her work.

15.1 This document is the continuation of Corporal Franke's grievance regarding the recorded warning. She again criticizes handling by others of her correspondence, which issue had, by the date of this document, been investigated with a report to her of the action taken.

The response is document 15.2, in which Col. McGee tells her that she should not justify her own actions based on her interpretation of what other people seem to be doing. He draws to her attention that the recorded warning was due to her refusal to accept criticism, and notes that her responses indicate that situation has not changed.

Corporal Franke responds in document 15.3 stating, "I believe my redress has been handled in a prejudiced manner" arguing again that she had not received a verbal warning.

17.1 This document is the continuation of Corporal Franke's redress of grievance pertaining to her harassment complaint. In it, she again refers to the threat of disciplinary action if she submitted her grievance to the Human Rights Commission. This had been explained to her in what appeared to be very clear terms several days earlier. The tone of this complaint is whining at best: she says "as I have been repeatedly told by my direct supervisors "I'm only a corporal and I have no opinions" as such I am influenced to believe information and statements passed to me by senior NCMs and junior and senior officers". This is presumably a reference to M.W.O. MacNair, who she says told her "you have no opinion", in response to her complaint that as an NCM, she should not be required to conform with the base dress code unless her senior officers were treated the same. M.W.O. MacNair's remark makes clear his view that her opinions regarding what action should be taken against her superior officers were neither relevant nor welcomed.

The response to this memo (document 17.2) reminds Corporal Franke that remarks made to her regarding her complaint to the Human Rights Commission had already been explained, both in person and by a previous memo.

17.3 In this memo, Corporal Franke again refers to "the animosity displayed by Major Bottomly and her lack of experience in the psychological field". The tone of this memo again makes clear that Corporal Franke neither respects her colleagues on the base, nor believes they are honest.

17.5 In this memo, Corporal Franke complains about a meeting that was scheduled for 3:30pm, the time when she gets off work. She also complains that she was informed of the meeting by Captain Doyle who was to attend with her, rather than LtCol Van Boeschoten, the person who asked for the meeting. It is unclear why she is concerned about these two items. She complains about the delay between March 6, 1992 and March 31, when her grievance of the recorded

warning was submitted to Air Command. She complains that the original date of her memo was March 3, 1992. It is not clear why she is concerned about this. She complains that she still feels traumatised by the "threat" by LtCol King (regarding her contact with the Human Rights Commission), although she concedes that he apologized to her the same day. She relates other incidents which took place which she appears to have found annoying, but which do not reveal any particularly significant matters.

17.6 This is Corporal Franke's memo to the base commander stating "I do not believe that I have gotten a complete nor thorough reply from this base". She repeats these allegations at document 17.7.

17.10 In this document, Corporal Franke writes to Col. McGee requesting "an impartial investigation". She says that "to date it appears my requests have been stalled on this base with every possible tactic available to yourself and your staff being used". Again, this is astonishingly disrespectful. Corporal Franke notes that she does not agree with his conclusion that Major Couture's behaviour, although offensive, was not harassment. She again complains about the statement made to her by LtCol King, which had long since been explained to her. She refers again to the details of her statements regarding what she found to be offensive actions by M.W.O. MacNair and others.

17.11 This is Col. McGee's response to Corporal Franke's grievance regarding harassment. He reviews the circumstances of his meeting which Corporal Franke attended, the "clothing stores" incident, the three allegations against Major Couture, the lack of response by Lieutenant Vedova, and Corporal Franke's comment that she found profanity in the work place offensive. He concludes that none of the incidents related constitute harassment, although he finds Major Couture's remarks inappropriate and insensitive. He notes that Corporal Franke's relationship with Major Couture might reasonably have been expected to accommodate Corporal Franke telling him, herself, that she found his comments offensive. He concludes: "Nonetheless Lt. Vedova had a responsibility to inform Major Couture that his comments were offensive to you, one of their subordinates".

Col. McGee also notes that it has been reported to him that Corporal Franke "frequently dressed provocatively and acted suggestively and licentiously throughout that same period". These remarks are inappropriate. Col. McGee goes on to say that this information "cannot be used to condone the actions of others", but says that the information calls in question Corporal Franke's integrity and credibility (presumably because she had previously told him that she was offended by suggestive conduct of others). He concludes that Corporal Franke's language, dress and behaviour in the work place required change on her part. He also arrives at conclusions regarding Couture, Vedova and the degree of fraternization in the workplace. It does not appear that his views about her dress informed his conclusions about the substance of her complaint. This conclusion was reinforced by Col. McGee's demeanour in his testimony before us.

In a separate memo (document 18.1) Col. McGee comments on Corporal Franke's allegations that the review of her complaints is somehow postponing or delaying the matter. He states that these allegations are untrue and insubordinate, and puts her on "counselling and probation". He

says that because of her statement that she suffered an emotional breakdown, he is sending her for medical observation and psychiatric assessment.

Corporal Franke's pattern of submitting disrespectful correspondence is continued in documents 22.1, a letter which she asks be added to her previous complaints in which she relates various incidents, the significance of most of which is unclear, document 22.6 which repeats numerous of her previous complaints, adds new information regarding Lieutenant Vedova's personal life, and includes the following:

"Upon objectively reviewing these facts I come to the conclusion that no amount of respect could possibly be given by myself to the above mentioned individuals in this situation. I suffered enormously while trying to survive in an abhorrent situation. I query how these individuals are "leaders" in the Canadian Armed Forces with attitudes such as was exhibited to myself and other workers. Yet I am told that I must change my attitude to be more respectful."

She complains that when she told M.W.O. MacNair about individuals that she was dating and their ages, he remarked that they were either too old or too young. It is not clear to us why she was offended by this.

In document 23.4, she relates a number of details of her own personal opinions, and gossip regarding the opinions of others, about P.O. Pistun, in an attempt to discredit him as the source of a previous warning given to her regarding her personal conduct.

At document 23.5, Lieutenant General Commander Huddleston tells her that her points are not germane to her application.

Most items of Corporal Franke's correspondence share some or all of the following characteristics:

a. rude and disrespectful comments, sometimes directed to the recipient of the memo, but sometimes concerning other of her colleagues or superiors;
b. suggestions that her superiors are dishonest;
c. details of numerous incidents, the relevance of which is unclear;
d. repetition of complaints long after they have been explained or otherwise handled, when it is necessary only to ask for a referral to the next highest level of handling;
e. complaints that she is not treated the same as others, whom she implies are "getting away with" the same behaviours she exhibits;
f. unflattering gossip about her co-workers and superiors;
g. remarks intended to present herself as having very high standards of personal conduct as contrasted with almost all the people she is in contact with.

Corporal Franke's correspondence in general reveals an attitude of contempt for those with whom she works. Notwithstanding this tone, those to whom her complaints are addressed at the numerous levels of authority which are required under the military system to respond to her, do so almost unanimously in measured terms. They often remind her of her duty to respond in kind, and suggest to her that her failure to do so is both unprofessional and representative of the

circumstances which led to the recorded warning.
Some comments by Corporal Franke's superiors deserve scrutiny:

i. LtCol King's advice that to pursue further her complaint regarding her PER score would be to her "personal detriment"; Corporal Franke says that she took this as a threat of personal harm. This is not credible. It appears to us, as is noted above, that LtCol King was simply suggesting that she cease forwarding her poorly conceived correspondence, as she risked being re-evaluated at a lower PER score.

ii. Col. McGee's comments regarding her dress and "lascivious" behaviour. This comment was neither relevant nor appropriate unless he intended to discipline Corporal Franke for some matter pertaining to her dress. We do not find that Col. McGee's views about Corporal Franke's dress affected his dealing with the substance of her complaints, and once again draw attention to the manner in which his oral evidence was given.

iii. Col. McGee's statement that he was having Corporal Franke "committed for medical observation and psychiatric assessment". Corporal Franke testified that she interpreted this to mean that Col. McGee was having her committed to a mental institution. This is an exaggerated response not justified in our view by the memo or the circumstances in which she received it. It does not seem surprising to us that Col. McGee would wonder about Corporal Franke's mental state, after having reviewed the correspondence from her to that date, having met with her (at the meeting which she surreptitiously recorded and denied having done so), and having received her memo regarding that meeting (document 17.10).

Having found that the Complainant, Kimberley Franke was not subjected to sexual harassment within the meaning of the Canadian Human Rights Act, and having found that the Complainant was not the subject of differential treatment because of her sex, or because of her complaint of harassment, it is not necessary to determine any of the remaining issues which were raised as follows:

1. The proper remedy in damages which should be awarded to the Complainant as the result of the alleged breaches of the Canadian Human Rights Act; and

2. Whether recovery of damages in these proceedings is barred by virtue of the Crown Liability and Proceedings Act of Canada, or by the Pension Act of Canada.

For the above reasons, the complaint is dismissed.

Dated the day of April, 1998.

_____

H. Durocher, Member

_____

Jane S. Shackell, Member

T.D. 4/98
Decision rendered on May 15, 1998

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:
KIMBERLEY FRANKE
Complainant
and

CANADIAN HUMAN RIGHTS COMMISSION
Commission
and

CANADIAN ARMED FORCES
Respondent

MINORITY DECISION

TRIBUNAL: Donna M. Gillis Chairperson
Hervé H. Durocher Member
Jane S. Shackell Member

APPEARANCES: J. Helen Beck
Patricia Lawrence
Counsel for the Canadian Human Rights Commission

Kimberley Franke, Complainant

Darlene Patrick
Jean Marie Dugas
Counsel for the Canadian Armed Forces

DATES OF HEARING: October 28 - 31, November 1, 18-22, December 9 -12, 1996
February 10 - 14, April 29-30, May 1, 1997

LOCATION
OF HEARING: Courtenay, B.C.

TABLE OF CONTENTS

I. INTRODUCTION

1. On March 11, 1992, Kimberley Franke (the "Complainant") filed a complaint with the Canadian Human Rights Commission that the Canadian Armed Forces (CAF) (the "Respondent") was engaging or had been engaged in a discriminatory practice since February, 1991 on the ground of sex.

2. The particulars of her complaint describe incidents of harassment by her then supervisors, Master Warrant Officer (MWO) Donald Macnair, Lieutenant (Lt.) Karen Vedova, and Major (Maj.) Michel Couture. The incidents, in the Complainant's view, comprise sexual harassment and differential treatment contrary to ss. 14(1) and (7) of the Canadian Human Rights Act.

3. The Complainant enrolled in the CAF on December 10, 1981 at 20 years of age. She was voluntarily released from service on January 10, 1993. At the time of her release she had attained the rank of Corporal, a non-commissioned member in the Canadian Armed Forces. A review of her work history prior to February, 1991, the time the alleged discriminatory incidents began, essentially reveals an unblemished military record until 1989. Those aspects of her employment history, not in dispute, are now outlined in an introductory format.

4. After enrolment in the CAF, she commenced basic training at Canadian Forces Base (CFB) Cornwallis on January 1, 1982. On March 19, 1982, having completed her basic training, she went to CFB Borden to train as a Supply Technician. Her first posting was on June 21, 1982 to CFB Moosejaw, where she remained for five years. During that time, she worked as a Supply Technician.

5. Her first career promotion occurred on January 1, 1986, when she was promoted to Acting Corporal. Between November 17, 1986 and January 27, 1987, the Complainant completed the required courses to be promoted to full Corporal. Examples of favourable comments on the course completion forms read as follows:

A/Cpl Franke is a well mannered student with a good working knowledge of the supply trade . . .

A/Cpl Franke did not hesitate to ask questions on points not covered to her satisfaction. She readily participated in classroom discussions and was frequently observed helping others who were encountering difficulty.

A/Cpl Franke has a pleasing and pleasant personality of which enabled her to get along as a team player. She was appointed Assistant Course Senior for a two week period and carried out her duties in a satisfactory manner.

Her dress constantly met school standards. A delight to have A/Cpl Franke on this course. ... RC Gallant MCpl

A/Cpl Franke passed her QL5 in fine style. An asset to the course she has obvious potential. Very well done. ... RG Medley Major

(Exhibit HR-1, Tab 3, Doc. 3.2)

6. Annual performance evaluations are given to CAF members and documented in a Personal Evaluation Report (PER), covering the preceding calendar year. The member is scored out of 10 for performance. Ten is the top score a member can receive. On January 29, 1987, while still posted at CFB Moosejaw, the Complainant was given her PER for 1986. The Complainant's score was 6.5. Overall, the written comments on the report were favourable as demonstrated by the following remarks:

Cpl Franke is certainly one of the most cheerful and outgoing Cpls who always has a positive outlook on her work. Her attitude and pleasant disposition contribute to a very harmonious work relationship between her, her peers and those sections she supports daily. Some further attention to details are all that is needed to further enhance an overall good performance. S. Jeffrey, Maj, BSupO

Cpl Franke is a dependable and enthusiastic worker, striving to accomplish her assigned tasks to the best of her ability but occasionally forgetting to check the accuracy of her work. She willingly accepted additional work and responsibilities and is alert for possible ways to improve the efficiency of the section.

Cpl Franke is able to relate to her co-workers and is quick to assist them in their duties if required. She gets along exceptionally well with both her supervisors and peers, continuously helping to promote good morale within the section.

Cpl Franke's overall military behaviour is above reproach and is a fine example to others. She is a loyal, dedicated Serviceperson who is a credit to the Supply section and the CF. JJR Lavoie, Sgt

(Exhibit HR-1, Tab 3, Doc. 3.3)

7. The Complainant's official promotion to full rank Corporal (Cpl.) was on February 6, 1987. Five months later, on July 14, 1987, she was posted to CFB Comox, where she remained until her voluntary release.

8. After her transfer to CFB Comox, the Complainant was assessed for suitability for an occupational transfer to the position of Administrative Clerk. During the fall of each year, the CAF has an annual voluntary remuster program. It is at this time that members are evaluated for occupational transfer. A Personnel Selection Report dated September 1, 1987, described the Complainant as an "exuberant, mature and forthright servicewoman who has excellent aptitude." On the basis of her score, her unit support, and her history at work, she was assessed as an average candidate for an occupational transfer to Administrative Clerk.

9. Her first placement in the capacity of Administration Clerk was in the Reception and Dispatch Section in Base Headquarters at CFB Comox dealing with incoming and outgoing personnel. Her initial supervisor was Sgt. Nicole Barber who was replaced by Sgt. Lesage.

10. A letter of appreciation, dated August 23, 1988 written by Capt. R.J. Tassé refers to the Complainant and a Master Corporal (MCpl.) Main for assisting in his transfer to another Base. The letter reads in part:

It has very seldom been my good fortune to be looked after so ably and with such a positive attitude. Without doubt MCpl Main conducts her daily - and sometimes hectic - duties in a manner that reflects great credit to your organization. Cpl Franke, although still fairly new to R&D, always managed to make clients feel like their problem is important and will be handled properly.

(Exhibit HR-1, Tab 4, Doc. 4.1)

11. On the Complainant's first PER as Administrative Clerk, she received a 7.0 rating from Sgt. Lesage whose comments are found on the report dated October 27, 1988:

Franke took great interest in her new trade; even with the minimum knowledge she possessed, she quickly assumed responsibility, carried out her assigned tasks and willingly worked overtime to ensure these tasks were completed in a timely and efficient manner.

Her military appearance was good and she obeyed all orders and regulations. She never sat idle, often assembling different types of forms and claims so they would be ready when required during this past APS and beyond. She accepted the challenge to learn her new trade and gave her full cooperation, handling situations with confidence and good judgement, performing well under stress.

She learned her new duties satisfactorily, accepting constructive criticism and gaining from experience. Cpl Franke was highly cooperative, always willing to help others at anytime. Her easy going manner and good humour enabled her to get along very well with other members in the section. She dealt with all ranks and was always a pleasant individual, loyal and devoted to her duties.

While in R&D she was given the responsibility of handling posting interviews, even with her limited knowledge her responses to questions were well understood and received. During this time, she received one letter of appreciation for a job well done. Cpl Franke is in good physical condition and passed her annual physical test.
R. Lesage, Sgt, R&D Supervisor.

(Exhibit HR-1, Tab 4, Doc. 4.2)

12. Captain Bresnard made the following additional comments:

I concur with this assessment. Cpl Franke has a bubbly and most pleasant personality. She is eager to learn and shows determination, interest and confidence. She will be a definite asset to the Admin trade.

(Exhibit HR-1, Tab 4, Doc. 4.2)

13. From September 12, 1988 to March 10, 1989, the Complainant attended a basic French course held in St. Jean, Quebec. The report provided at the end of the course, dated March 20, 1989, is the first report that refers to the Complainant's "military deportment." The evidence established that military deportment refers to dress and a member's reaction to supervisors. Underlying the issues in the complaint is the Complainant's military deportment, which will be detailed later. The comments contained in the report read as follows:

She puts in a great deal of application in her work, but her progress is not always commensurate with her efforts.

Cpl Franke has shown a great deal of interest and military deportment.

Cpl Franke will have to continue making a serious effort towards learning French. (emphasis mine)

(Exhibit HR-1, Tab 4, Doc. 4.3)

14. While attending the French course, the Complainant injured her knee in a skiing accident. This injury precluded her from doing certain physical activities on the Base, including parades, as she experienced difficulty in wearing the required military footwear during her performance of duties. During the time of the alleged incidents of sexual harassment, the Complainant was wearing non-regulation shoes which materialized into an incident between her and senior members of the Respondent. This incident will be detailed later.

15. In pursuit of career development, the Complainant attended CFB Borden from April 4, 1989 to June 9, 1989, to take a QL3 Administrative Clerk course. She successfully completed this course and received favourable written comments:

Cpl Franke achieved all performance objectives without difficulty.

From the outset of the course, Cpl Franke displayed a positive attitude and good motivation. She encountered no difficulty in grasping the principles of the material being covered, however, when this knowledge was applied to practical situations, her assignments reflected a lack of attention to detail, due to rushing through her work. Once counselled, her daily assignments improved and showed that she did in fact fully understand the fundamentals.

A remuster to this trade, Cpl Franke's participation in some of the course activities was often restricted because of her medical category. However, in the classroom, she never hesitated to get involved in class discussions. Her questions were well thought out and pertinent to the theory being taught.

Cpl Franke was an attentive, cooperative student who got along well with her peers. She had to work hard to maintain the standard of dress required for this course. Her military deportment consistently met the standard. V. Genaille, Sgt.

Cpl Franke is a cooperative and capable servicewoman who put forth a good level of effort to succeed on this course. Under normal levels of supervision and guidance, Cpl Franke should develop into a competent ADM CLK. W.J. McKee, Maj

(Exhibit HR-1, Tab 4, Doc. 4.4)

16. On June 9, 1989, the Complainant commenced working at 407 Squadron in the Base Orderly Room (BOR). It was here that she first experienced difficulties in her employment, involving her male supervisor, Petty Officer (PO) Pistun. Although the complaint before this Tribunal refers to alleged incidents that occurred subsequent to her transfer from 407 Squadron, some aspects of the difficulties were later revealed in the Respondent's own internal investigation of the Complainant's complaint of harassment. For this reason, details of the problems between the Complainant and PO Pistun will be provided in "The Facts" section of the decision.

17. The Complainant received her first PER at 407 Squadron from PO Pistun on January 15, 1990. The PER reflects a 6.8 rating and his comments read as follows:

Cpl Franke, a recent remuster into the Adm Clk trade, is progressing steadily towards her QL4. Cpl Franke's pleasant personality has proven to be an asset when it comes to counter work. She converses easily with all those who come to the Orderly Room and manages to raise the spirits of those around her. Cpl Franke initially depended too much on her military experience rather than on good clerical practices, however, over the last few months she has done much to prove herself. This report includes periods of emotional difficulties for Cpl Franke with personal and medical problems involving surgery to her knee. She is overcoming these difficulties and is starting to take her place as one of the more experienced personnel in the Orderly Room. It is recommended that Cpl Franke be loaded on a QL5A course.

(Exhibit HR-1, Tab 4, Doc. 4.5)

18. On April 23, 1990, a letter of appreciation was sent to 407 Squadron from Lt. Col. A.R. Nelson, in recognition of service his crew received from the Orderly Room staff while stranded in Comox. The letter specifically refers to the Complainant and reads in part:

I am writing this letter in appreciation of the excellent service provided by your Orderly Room staff, in particular Cpl Franke who continued to maintain a professional, helpful and congenial manner throughout what must have been an extremely frustrating time.

(Exhibit HR-1, Tab 4, Doc. 4.6)

19. Another letter of appreciation was sent the following month dated September 26, 1990, from Major R.J. Butt, National Defence Headquarters, to the Commanding Officer of 407 Squadron,

acknowledging the Complainant's work at the Armed Forces exhibit at the PNE in Vancouver. The letter reads in part:

2. As administration clerk, Cpl Franke was tasked to provide administrative support for all aspects concerning the display and in particular for more than 25 CF personnel who manned the display. She also assisted in driving the VIP staff car when required. She was always prepared to handle any situation in a professional and competent manner.

3. Cpl Franke is a good representative of the Canadian Armed Forces and of her unit. Please pass on our appreciation to her for her hard work and a job well done.

(Exhibit HR-1, Tab 4, Doc. 4.7)

20. It is noted that a handwritten note on this letter by PO Pistun reads:

Kim, you should consider a recruiting position. You shine with the public. Well done!

21. On November 6, 1990, the Complainant completed the course work for the Administration Clerk QL5, receiving favourable comments on the course report, which also include references to her dress and military deportment. These comments read as follows:

Cpl Franke achieved all Performance Objectives without difficulty, displaying strength in PO 402 - Prepare Administrative Documents and PO 404 - Operate a Typewriter.

Cpl Franke arrived on the course well-prepared and eager to learn. She was a hard working individual who consistently put forth a good effort. Her home assignments were always completed neatly. Cpl Franke was a very cooperative student who got along very well with her classmates. She was never hesitant to ask questions and never lost a chance to participate in class discussions. Her jovial nature and keen sense of humour often led to very interesting class deliberations, thus promoting group morale. Cpl Franke's overall performance was very good.

Cpl Franke's dress and military deportment met the standard throughout the course. D.A. Melanson, Sgt

Cpl Franke successfully completed the course. She was a well-motivated student with a good sense of humour. Cpl Franke put forth maximum effort throughout the course. She has the potential to become a very effective ADM CLK.
(emphasis mine)

(Exhibit HR-1, Tab 4, Doc. 4.8)

22. The last PER received by the Complainant, prior to leaving 407 Squadron, is dated January 17, 1991. Her overall performance evaluation for the previous year, 1990, was rated as a 7.4 and contains positive and favourable comments about her past work and future work with the Respondent. The comments read:

Cpl Franke is an enthusiastic and energetic individual who, during this reporting period has completed, with high standing, both her TQ4 and TQ5A, wrote two PDP's, passing one and awaiting results on another. In addition, Cpl Franke was attached to DXD for the PNE where her hard work and dedication was recognized with a letter of appreciation.

Cpl. Franke has had a very busy year in which she has steadily progressed through and refined her abilities as an Adm Clk. She has learned well and is willing and capable of handling any task passed her way.

Cpl Franke has demonstrated that she is ready to assume more responsibilities. It is recommended that Cpl Franke be posted as a Chief Clerk to a small orderly room.

Cpl Franke has been medically excused Physical Fitness testing for this reporting period. D.G. Pistun, PO2

Cpl Franke has shown good progress throughout this reporting period. She has the desire and ability to succeed. Cpl Franke's determined and inquisitive disposition is a strong indication of her potential to assume greater responsibilities. G.F. Reaume, Maj

(Exhibit HR-1, Tab 4, Doc. 4.9)

23. The Complainant cites a number of incidents in her complaint which are alleged to have transpired following her transfer from 407 Squadron to the Base Transportation Office (BTnO). The Complainant testified about these incidents and the events surrounding these incidents. Before delving into each of these incidents, suffice to note, that after nine months at the BTnO, on November 26, 1991, the Complainant was issued a Recorded Warning (RW). Simply stated, an RW is one of several administrative devices of the Canadian Armed Forces, designed to raise a member's performance or conduct to an acceptable standard and is used to correct unacceptable behaviour. Subsequently, on December 9, 1991, she filed a Redress of Grievance for the RW.

24. Then, on December 16, 1991, the Complainant submitted an internal memo entitled, "Harassment/Abuse of Authority" to the Base Technical Services Officer (BTSO), Lieutenant-Colonel (Lt. Col.) King, detailing her concerns, and indicating that "due to career implications I am forwarding all copies of this correspondence and the RW to the Federal Human Rights Commission Board." This memorandum was treated by the Respondent as a sexual harassment complaint. The then Base Commander of CFB Comox, Colonel (Col.) McGee, initiated an internal procedure, referred to as a Summary Investigation.

25. Col. McGee appointed Major (Maj.) Nora Bottomley to conduct the Summary Investigation. Major Bottomley was in the CAF from 1970 until October, 1996. She retired from the military with a medical release. At the time of the Summary Investigation she was Executive Assistant to the Base Commander, as well as a Base Public Affairs Officer, and reported to Col. McGee.

26. The terms of reference for the Summary Investigation are encapsulated in a memorandum dated December 17, 1991, under the signature of Lt. Col. King, BTSO. They instruct Major Bottomley to conduct an investigation of a complaint of personal harassment laid by the Complainant, and to obtain statements from all pertinent witnesses. She was further instructed to make findings as to:

a. whether personal harassment did occur;
b. what type of harassment occurred, if any;
c. who suffered from the harassment, if anyone;
d. who caused the alleged harassment; and,
e. any other findings the investigating officer deems appropriate.

27. The final term of reference requested Maj. Bottomley to make recommendations as appropriate.

28. Some of the sixteen individuals who were interviewed by Maj. Bottomley also testified before this Tribunal, including MWO Macnair, Maj. Couture, Lt. Vedova, Base Chief Warrant Officer (CWO) Terrence Doherty, WO Colleen Boudreau, Susan Powers, Cpl. Patricia Mears, Sgt. Nicole Barber, Cpl. Kelley Eadie and MCpl. Paul Lagacé.

29. Major Bottomley concluded in her Summary Investigation Report that no harassment, personal or sexual, took place. Her report was submitted to Lt. Col. King on January 27, 1992. The Complainant was not provided with a copy of Major Bottomley's report while she was a member of the CAF. Major Bottomley's report, including interviews and other appendices, is included in the documentary evidence before this Tribunal.

30. Lt. Col. King wrote to the Complainant on February 17, 1992, that he accepted Major Bottomley's findings, indicating that rather than finding harassment, Major Bottomley found her complaint was a reaction to being placed on RW. After receiving Lt. Col. King's response, the Complainant instituted on March 6, 1992, a Redress of Grievance on her harassment complaint.

31. A separate Redress of Grievance was subsequently filed by the Complainant on January 13, 1992, following the receipt of her 1991 PER. She was given a rating of 6.9.

32. Resulting from the three Redress of Grievances, and other parallel processes generated from these grievances, a voluminous amount of correspondence was created involving many levels of CAF members, up to and including the Chief of Defence Staff. The grievances continued to be processed beyond the time of the Complainant's release, with the final correspondence to the Complainant from the Chief of Defence Staff dated October 10, 1994.

33. Another process, the appointment by the CAF of a Board of Inquiry at CFB Comox in July, 1992 encroached upon the evidence in this hearing. This Board investigated a number of incidents at the Base, one of which included the harassment complaint by the Complainant. Aspects of that inquiry, as it pertains to the matters before this Tribunal, were touched upon in the evidence.

34. Following the RW, the health of the Complainant deteriorated. There is controversy between the Complainant and the Commission, on the one hand, and the Respondent, on the other, about the degree and extent to which the Complainant's adverse health problems are due to work-related events. At the time of the hearing, the Complainant was under the care of her psychiatrist, Dr. William Halliday. It is Dr. Halliday's opinion, that the Complainant is suffering from a disability, Post-traumatic Stress Disorder, directly related to sexual harassment at work. The Respondent disputes Dr. Halliday's diagnosis, and relies on the opinion of Dr. Donald Passey, a military psychiatrist, who is of the view that the Complainant had an adjustment disorder which evolved into a bipolar disorder with paranoid features.

35. The Respondent disputes any liability for the economic redress claimed by the Complainant arising from the alleged harassment.

36. On October 20, 1993, the Complainant applied for a medical pension with Veterans Affairs Canada. She was notified on November 24, 1994, that her application had been approved and she became pensioned for "Adjustment Disorder with Depressed Mood" effective on August 2, 1994. On May 3, 1995, she was notified that her disability for her "nervous condition" was assessed at 10%, retroactive to October 20, 1993. Her monthly pension payments were $163.00 per month.

37. On May 17, 1995, the Complainant applied for an additional pension and a month later applied for a change of diagnosis to "Post-traumatic Stress Disorder (PTSD)." This change of diagnosis request was approved on July 28, 1995.

38. The Complainant made a second application for additional pension on August 3, 1995, which was approved on November 2, 1995. Her disability from "Post-traumatic Stress Disorder," was assessed at 20%, and the Complainant's monthly payments were increased to $449.87.

39. The Complainant participated in the hearing during the initial phase, which included the Canadian Human Rights Commission's case. The Tribunal was then informed by Commission Counsel, the Complainant did not wish to continue to attend the Tribunal hearing and consented to have the hearing proceed in her absence. Responding to a request by the Tribunal, the intentions of the Complainant were clarified by her, and communicated in letters dated February 12, 1997 and February 13, 1997. In the February 13, 1997 correspondence, Dr. Halliday wrote:

> I have examined Ms. Franke on February 10, 11, and 12. I believe that she understands the above and is competent to give her consent to the Tribunal proceeding in her absence.
>
> (Tribunal Exhibit T-2)

40. The hearing proceeded to completion in the absence of the Complainant.

II. ISSUES

1. Did the Respondent discriminate against the Complainant on the basis that the conduct complained of constituted sexual harassment, contrary to s. 14 of the Canadian Human Rights Act?

2. With or without a violation of s. 14 of the Canadian Human Rights Act, did the Respondent differentiate adversely in relation to the Complainant, on a prohibited ground of discrimination, contrary to s. 7 of the Canadian Human Rights Act in the course of her employment, after she complained to the Respondent in December of 1991?

3. If a violation of the Canadian Human Rights Act is found, on the issue of damages, what remedies are available to the Complainant, and what is she entitled to receive?

III. THE FACTS

41. By preliminary comment the Tribunal's task was made difficult due to the preponderance of conflicting evidence and the contradictory versions of events between the Complainant and the Respondent. It is emphasized here, one Respondent witness, MWO Macnair, had little if any recall of some of the alleged incidents. It was his evidence that if they did occur, they could be explained away as not being of a harassing nature. MWO Macnair displayed a general lack of recall to many of the Complainant's allegations and he believes very firmly the Complainant's allegations were made in an attempt to discredit him and to have the RW overturned.

42. An issue arose during the Tribunal hearing of a technical nature involving a separate complaint by the Complainant filed with the Canadian Human Rights Commission against MWO Macnair. Respondent Counsel informed the Tribunal the complaint was not referred to a Tribunal. MWO Macnair testified he received a letter, to that effect, from the Commission.

43. At the time, the Tribunal determined its jurisdiction flows from the complaint before it, and could only deal with the merits of the case properly before it. The Tribunal later heard submissions from Respondent Counsel that factual evidence relating to the separate complaint should be placed before the Tribunal. The Tribunal found no basis for that submission and determined the merits of the technical issue should be dealt with by another forum, which has jurisdiction to deal with the matter.

44. Separate and apart from MWO Macnair lack of recall, another Respondent witness, Lt. Vedova had memory problems. In many instances, she had difficulty expressing what was on her mind.

45. As a result, credibility became a factor in our determination of the facts. In this regard, the Chair assessed credibility, observing each witnesse's demeanour, including the forthrightness, honesty, and attitude of the witnesses. The witnesses' testimony was also checked for consistency with their statements before Major Bottomley and the Board of Inquiry. In the final analysis, proper weight was given to corroborating evidence and the evidence before the

Tribunal was examined for consistency with the prepondence of possibilities, in accordance to the principle laid down in Foryna v. Chorny, [1952] 2 D.L.R. 354 at 356 (B.C.C.A.):

"a practical and informed person would readily recognize as reasonable in that place and in those conditions".

46. As referenced in the Introduction, I will begin with aspects of the Complainant's posting to 407 Squadron.

A. THE COMPLAINANT'S POSTINGS

(i) Posting to 407 Squadron

47. As previously mentioned, it was while the Complainant was posted to 407 Squadron that she first encountered difficulties with a male supervisor. These difficulties arose after June, 1989, when the Complainant had served nine years in the C.A.F. There were five Administrative Clerks in the BOR at 407 Squadron, three female and two male, supervised by PO Pistun. The Complainant believed PO Pistun was demonstrating preferential treatment to the male clerks. She met with PO Pistun's Commanding Officer, Maj. Reaume, on behalf of some female Administrative Clerks to discuss this matter and other unfavourable behaviour by PO Pistun. From late in 1989 to November 1991, Maj. Reaume, now Lt. Col., was the Deputy Commanding Officer (DCO) at 407 Squadron.

48. The Complainant testified PO Piston would place his hands on the female Clerks' shoulders and rub them, or stand in front of them and put his foot on a chair and scratch his genitals. Other alleged behaviour included unzipping his pants to tuck in his shirt thereby exposing his genital area. She also expressed concern about PO Pistun yelling at the female clerks while they were serving the public.

49. As a result of the Complainant's discussion with Major Reaume, PO Pistun was advised to refrain from tucking in his shirts and to be more aware of the environment in the BOR. Separate and apart from this discussion, the documentary evidence reveals a Recorded Warning (RW) was issued to PO Pistun in June, 1990 for "Inability to Properly Supervise and Train Subordinates".

50. The Tribunal heard from Cpl. Patricia Mears about PO Pistun's interactions with the Administrative Clerks at 407 Squadron. Cpl. Mears was posted to 407 Squadron in January, 1989 as an Administration Clerk and worked with the Complainant until she left. Cpl. Mears' immediate boss was also PO Pistun who she described as a very large man, an Elmer Fudd in uniform, round-faced and jovial, very fair, providing his staff with opportunities to receive the

best training they could. She testified she thought PO Pistun was at one point demonstrating differential treatment between male and female members. However, in hindsight, she testified she now realizes the two males who worked in the office were not going to change their work styles because of PO Pistun's efforts.

51. Cpl. Mears' statement to Major Bottomley during the Summary Investigation is supportive of the Complainant's assertions of some of the difficulties she experienced under PO Pistun's supervision, particularly with differential treatment. It is noted in her statement to Major Bottomley dated January 10, 1992, that she cited several problems relating to PO Pistun at 407 Squadron including an example of a "double standard" between males and females and some on-going problems. These specifics were not elaborated in her statement.

52. Cpl. Mears could not recall before this Tribunal any "overly friendly behaviour" by PO Pistun, or whether she asked the Complainant to speak on her behalf about PO Pistun's actions or behaviour. Moreover, before this Tribunal, Cpl. Mears was unable to recall the specifics of her interview with Major Bottomley during the Summary Investigation.

(ii) Posting to Base Transportation Office (BTnO)

53. On February 4, 1991, the Complainant left 407 Squadron and was temporarily posted for a period of six months in the Base Transportation Office (BTnO). The Complainant replaced Cpl. Charles de Vries Stadelaar who was posted to the Middle East on a temporary assignment. The Complainant took the posting, after speaking with Major Reaume. She testified it seemed like a very good opportunity to advance her career. According to the Complainant, the move was also made to get away from PO Pistun.

54. The Base Transportation Section is responsible for the renting and maintenance of all vehicles on the Base. At the time of the Complainant's posting to the BTnO, her administrative supervisor was Lt. Vedova. Lt. Vedova oversaw the drivers' work and the Complainant's work.

55. Lt. Vedova joined the CAF in 1986. Her first tour of duty was Comox. Her first position was the Base Traffic Officer. After a year she then moved to the Base Transportation Office in 1990. She was approximately 24 years old when she supervised the Complainant in 1991. Lt. Vedova reported to the Commanding Officer (CO) at BTnO. At the material time of the complaint the CO was Maj. Couture, who arrived in June, 1991, and reported to the Base Technical Services Officer (BTSO). The BTSO reported to the Base Commander, Col. McGee. While Col. McGee was at CFB Comox, the Base Technical Services Officer was Lt. Col. King.

56. Two drivers in the BTnO were Master Corporal (MC) Alexander and Cpl. Kelley Eadie. There were also civilians working in the BTnO, in secretarial positions: Janet Jenkins, a secretary to the CO, and Susan Powers, secretary to MWO Belanger, who was responsible for the Electrical Mechanical Engineering Section. MWO Belanger was a member of the Army Command, whereas the other members including the Complainant at the Base Transportation

Section, were members of Air Command. As such, MWO Belanger was not a member in the line administration of the Base Transportation Section. He was sharing office space in the Section.

57. The Transportation Comptroller was MWO Macnair who also reported to Lt. Vedova. MWO Macnair was senior in rank to the Complainant. As the senior non-commissioned officer (NCO), he assumed the duties of Unit Disciplinarian for the BTnO. In this role, he was responsible for maintaining unit conduct, dress, deportment and ensured that the orders from the BTnO were passed down the chain of command. It was his duty to instill morale within the Section. In his capacity as senior NCO, and as Unit Disciplinarian, MWO Macnair exercised supervisory responsibilities over the Complainant. In Lt. Vedova's absence, the Complainant reported to MWO Macnair.

58. At the time the Complainant met MWO Macnair, he had been a member of the CAF for approximately eighteen years. He joined the CAF in 1973 and was officially released in August, 1993. MWO Macnair was in Comox from July or August, 1990 until August, 1992.

59. The Complainant functioned as an Administrative Clerk in the BTnO. Her major responsibilities involved budget work. She received incoming correspondence for logging and distribution, and distributed outgoing mail. The Complainant was responsible for keeping administrative documents current, such as the Queen's Regulations and Orders for the Canadian Forces (QR&Os) and the Canadian Forces Administrative Orders (CFAOs). She had to ensure that specific reports left the Section on time and in good order.

60. The Chair will now examine the alleged incidents and the surrounding events that unfolded after the Complainant's transfer to the BTnO in February, 1991.

B. THE MACNAIR INCIDENTS

(i) Dating Officers Comments

61. The complaint before the Canadian Human Rights Commission submitted by the Complainant reads:

> Shortly after I commenced working, MWO Mcnair said to me: "I hear you only date officers," and later asked if I had any dependents. When I responded that I had a son, he remarked: "Oh, that's too bad."
>
> (Exhibit HR-1, Tab 1)

62. The Complainant alleges that very early in her tenure at the BTnO, MWO Macnair made comments to her about dating. The Complainant had separated from her husband in September, 1988. During her service in the BTnO, she and her husband attempted reconciliation which

succeeded in November, 1991. They had one son, who at the time, was six years old and living with the Complainant. The Complainant`s mother had moved in with her to help her with her son.

63. When the Complainant first arrived at the BTnO, she recalls MWO Macnair introducing himself, asked if she was single and whether she had any children. After replying in the affirmative, she testified he then said, "Oh, that's too bad." The Complainant testified MWO Macnair made a further comment about dating, a couple of days later, when she was in Lt. Vedova's office inquiring about budgets. During her discussions with Lt. Vedova, she recalled MWO Macnair saying to her, "So, Kim, I hear you only date officers." The Complainant's evidence is that she was displeased with his question and with annoyance in her voice, told him that she didn't date officers and she didn't date where she works.

64. According to the Complainant, on occasion she would tell MWO Macnair who she was dating to discourage further comments from him. The Complainant testified she recalled remarking to him about a younger man she was dating and was told by him that she should be dating older men. Having heard this response, she later told him about an older man she was dating. The Complainant recalls at other times, MWO Macnair commenting about his salary, his car and asking what was wrong with him.

65. In direct examination, MWO Macnair could not recall any of the alleged conversations about dating between himself and the Complainant. In cross-examination, MWO Macnair testified that he remembered he and the Complainant had numerous and relaxed conversations where both her dating and his dating may have been mentioned. MWO Macnair remembered overhearing the Complainant engaged in a conversation with a group of people in the canteen. He recalled the conversation as inappropriate and of a sexual nature. He found it objectionable enough to later call the Complainant aside and explain the inappropriateness of the conversation. The substance of the latter conversation was also raised by MWO Macnair with Major Bottomley.

66. MWO Macnair was questioned by Major Bottomley during the Summary Investigation on December 19, 1991. Before Major Bottomley, MWO Macnair was unable to recall or denied any conversations with respect to dating, with one exception. He admitted he may have said to the Complainant that he drove a nice car because he had purchased a new T-Bird while the Complainant worked in the Section. He told Major Bottomley the Complainant spent time in the canteen talking about men and the lack of available men to anyone there, including civilian staff, and was sexually aggressive in comments, saying things like, "I gotta get some."

67. Before the Board of Inquiry on July 9, 1992, MWO Macnair was asked whether he commented on the Complainant's dating habits. He responded that he could not recollect having done so. He did remember one specific incident where the Complainant discussed a young man she had met and complained that he was young, to which Macnair commented: "Well, then you should date older men."

68. The Complainant testified she did not convey her concerns about the dating comments to Lt. Vedova. She felt Lt. Vedova had been made aware of her annoyance when the conversation initially took place and believed Lt. Vedova should have dealt with the situation. The

Complainant fully expected Lt. Vedova as her and MWO Macnair's supervisor to take action because of the Complainant's manner in speaking to MWO Macnair, and the lack of "appropriateness" of the topic being discussed.

69. Lt. Vedova's direct evidence was that within the first two weeks of the Complainant's service in the Section, she explicitly remembers the Complainant stating she did not date where she worked. She did not know why the Complainant said this. She described the Complainant's words as louder than normal and emphatic. According to Lt. Vedova, the Complainant spoke these words outside of Lt. Vedova's office. Lt. Vedova was asked the following:

MR. DUROCHER: So she was talking to someone, but you don't know who?

A. I don't know if she was talking to somebody, I think she was making a point with me. And again, I don't -- I recall this -- I recall this vividly. It could have been that she was trying to make a point about -- I don't know again what went on at 407, but I think it was like she was trying to be heard. But again, from what I can -- I don't know if somebody was outside the office, I believe it was just -- just the two of us.

MR. DUROCHER: With no one else in her office?

A. Yeah, somebody could have been. I can't see -- I couldn't see into her office area.

MR. DUROCHER: And there had been no conversation with you preceding that statement?

A. I can't recall if it related or not.
(emphasis mine)

(Transcript Volume 14, page 2272, lines 10 to 25)

70. In Lt. Vedova's statements to Major Bottomley on December 20, 1991, she indicated that the Complainant had told her MWO Macnair had said some of "these things" (e.g., "I'm good looking," "What's wrong with me?", "I make lots of money," "I make as much money as officers," "I drive a nice car"). Before this Tribunal, Lt.Vedova expressed hesitation under cross-examination to affirm this was her response to Major Bottomley. She testified "we may have discussed it, but that was as far as it went". Then later Lt. Vedova testified she and the Complainant did discuss it and could not recall the Complainant being offended.

71. Lt. Vedova described the Complainant to Major Bottomley as a very outgoing person who made comments about sex, and said and did things that were out of line. In response to Major Bottomley`s question of whether she counselled the Complainant on her behaviour, Lt. Vedova indicated that counselling was not the right word, but that she advised the Complainant to keep it toned down a bit. She further indicated that MWO Macnair was not trying to pursue the Complainant but that the Complainant responded to his comments.

72. The Complainant testified she was unhappy with Major Bottomley's line of questioning about the dating comments by MWO Macnair and particularly if MWO Macnair asked her for a

date. The Complainant believed Major Bottomley did not understand her concern about the dating comments. Her exchange with Major Bottomley reads:

Q30 Has MWO Macnair ever asked you for a date?

A30 No, never.

Q31 Then why did you feel it was important to tell him that you did not date?

A31 I wanted to make it quite clear to him that I did not date and that I would never date where I worked.

Major Bottomley also asked about her child in reference to the dating comments:

Q32 In para 3 you wrote 'He made a comment about my dependant status...' What comment?

A32 He said "I hear you have a kid?" and asked me if I was divorced.

Q33 Is there anything wrong with asking that?

A33 I did not think that they were appropriate questions.

Q34 Did you tell him that?

A34 No.

(Exhibit R-7, Tab C)

73. The Complainant's evidence about the dating comments was corroborated by Sherie Campbell, a personal friend and to whom she had confided between May, 1991 and the fall of 1991. The Complainant told Ms. Campbell about comments she made to her male boss who was asking about her dating habits, while her female boss was present. Ms. Campbell testified about the negative impact these discussions had on the Complainant.

74. Cpl. Kelley Eadie, a female driver, and with whom the Complainant established a friendship during their work at the BTnO, testified she heard the Complainant say more than once that she didn't date where she worked. Cpl. Eadie was posted at Comox between 1987 and August, 1991. From there she was posted to Cold Lake, Alberta. Cpl. Eadie's immediate boss was MCpl. Alexander who reported to MWO Macnair. Cpl. Eadie left the military in 1993.

75. Cpl. Eadie had responded similarly on January 16, 1992, to Major Bottomley, during the Summary Investigation. It is noted Cpl. Kelley Eadie also remarked to Major Bottomley that the Complainant used to sit in the canteen and talk loudly about "wishing to get laid", but she described that as just girl talk and it should be of no concern.

76. On the whole, the Chair finds the evidence of Sherie Campbell, Cpl. Eadie and Lt. Vedova sufficiently corroborates the Complainant's complaint that MWO Macnair made dating comments to her. I believe Lt. Vedova was alerted to the Complainant`s concern when she heard the Complainant speaking loudly and emphatically. The Complainant`s tone struck an accord with Lt. Vedova, and she understood the Complainant was trying to make a point with her. The explanation by the Complainant that she was annoyed and wanted Lt. Vedova to do something about the comments is consistent with what Lt. Vedova overheard. Lt. Vedova's responses in the Summary Investigation also corroborate the Complainant's assertions that MWO Macnair made other comments about his salary, and his car, and Lt. Vedova was aware of these comments.

77. With respect to MWO Macnair`s testimony about the Complainant`s conversation in the canteen, I believe a distinction should be drawn between sexual-orientated banter in a cafeteria and the nature of the complaint that is before this Tribunal, which involves a male supervisor questioning a female subordinate about her dating habits. Mr. Churchill, a civilian bus driver, who worked in the BTnO for thirty-two years, recalled a lot of talk in the canteen which he described as, "maybe a little unorthodox," and comments made of a sexual and racial nature in the BTnO. I believe it is particularly important these comments and the comments of the Complainant be assessed in their context, which in this case, arose between colleagues of a similar rank and level in a canteen.

78. MWO Macnair testified about the socialization practices among members of the military on the Base. Socialization is encouraged within the same ranks and discouraged among ranks. The Respondent maintains separate messes for the different ranks. MWO Macnair confirmed that junior officers, when socializing together, portray less decorum because of their age and rank difference than the senior NCOs. Therefore, such talk by the Complainant, I believe, deserves no weight, as it belongs in the category of banter between herself and her peers and is not relevant to the issue before us.

79. I am supported in my views by a response given by MWO Macnair before the Board of Inquiry when asked about the Complainant's behaviour:

A8 I never really felt threatened by Cpl Franke, like that I was going to be led anywhere or put myself in any jeopardy. It was just, it's not uncommon unfortunately it's not uncommon for the young troops, corporals, master corporals, to engage in conversations of that nature, and though it's not condoned and sometimes, and I'm probably as guilty as anybody, I probably see it and dismiss it. It doesn't startle me probably the way it would if it was to occur now. Like it was just the normal soldier talk, the banter, the swearing and probably sexual explicit conversations taking place in the canteen, usually amongst the males. It's only very seldom that our females joined in. Cpl Franke would be the only one that I could say with certainty that did it on any number of occasions.

(Exhibit R-14, page 3)

On the other hand, I believe MWO Macnair`s questions and comments about dating, to a junior member in the Section were inappropriate, given his senior status and rank to the Complainant,

and should have been addressed by Lt. Vedova.

(ii) The Chest and Arm Gestures

80. The complaint reads in part:

- On March 27, 1991, MWO Mcnair came into my office, said he had a sore chest, rubbed his chest, and stuck out his tongue in a lewd manner;

- In May 1991, MWO Mcnair came into my office, flexed his muscles, and remarked to me how "big" he was;

(Exhibit HR-1, Tab 1)

81. Another incident between the Complainant and MWO Macnair allegedly occurred on March 27, 1991. According to the Complainant, he approached her desk and placed his hand on her desk in such a way that she was trapped behind it. She testified MWO Macnair started to rub his left chest very slowly while he ran his tongue over his lips and said, "Kim, I'm feeling chest pains." Not knowing what to do, she picked up the phone and said, "Sir, would you like me to call the MIR and make an appointment for you with a doctor?" MWO Macnair replied, "Oh, no, that's fine," and left. As soon as he left, the Complainant testified she wrote the incident on her calendar, which went missing in December, 1991.

82. The Complainant had some difficulty relating this evidence and during this part of her testimony, the Tribunal observed the Complainant's demeanour changed quite dramatically in relating this event. She stood up, became quite agitated, her voice changed, became increasingly louder and she appeared transfixed as if she was not aware of her actions or her surroundings. Dr. Passey opined about this behaviour during his testimony, which is covered in the section entitled - The Medical Evidence.

83. It is noted the Complainant's direct evidence reflects her similar responses to Major Bottomley and corresponds to her notes which were made in approximately November, 1991. She was not cross-examined with respect to these incidents.

84. The Complainant testified her normal reaction when faced with this situation would have been more forceful, if MWO Macnair was not her supervisor and her MWO. She further testified MWO Macnair intimidated and scared her, so she opted for the only course available to her. The Complainant stated she did not want to cry in front of him and show weakness.

85. The Complainant described another occurrence when MWO Macnair stood in the doorway to her office wearing a short sleeve shirt, flexed the muscle in his left arm, raised his shirt, rubbed his muscle, and said, "Look how big I am Kim."

86. MWO Macnair testified in direct examination he could not recall this incident but because he lift weights he may have reached for his pectoral muscle if he was in pain. His testimony is consistent with his responses to Major Bottomley and the Board of Inquiry. When questioned by Major Bottomley on December 19, 1991, about these incidents MWO Macnair said:

Q19 Around the end of March, did you ever go into Cpl Franke's office, rub your left chest and say "Oh my chest hurts."?

A19 That is quite possible. Around that time I began lifting weights and I remember my chest muscles - the pectoral muscles - were quite sore.

Q20 Were you licking your lips at the time?

A20 I have no idea.

Q21 Did you ever go into Cpl Franke's office, flex your arm and say to Cpl Franke, "Look how big I am, Kim."?

A21 I have no recollection of doing that, but it may have been possible as a result of looking for improvement from the weight lifting.

(Exhibit R-7, Tab D)

87. MWO Macnair provided further explanations to the Board of Inquiry on July 9, 1992, as follows:

Q31 Cpl Franke has made several allegations against you. Have you had an opportunity to review some of them?

A31 Yes, Sir.

Q32 I'm just going to highlight some of them. "Rubbing his chest", "running his tongue over his lips", "telling me he was experiencing chest pains and not looking at all like he was experiencing any pain at all".

A32 What I did, and I remember that specifically, what I'd done is I've been lifting weights, both at the gym and at home at the time and I'd torn a muscle in my pectoral muscle here and I did, I was lifting the cover on the photocopy machine and just that action was enough to cause me to wince and I did put my hand on the left side, or right side of my breast and bit my tongue. When I'm in pain I bite my tongue.

(Exhibit No. R-14, page 14)

88. Lt. Vedova was asked about MWO Macnair flexing his arm by Major Bottomley. She responded in the affirmative:

Q21 Have you ever seen MWO Macnair flex his arm and comment about how big he is?

A21 I've seen him do the flex the arm bit, and say "I'm quite strong You know." He is lifting weights.

(Exhibit R-7, Tab F)

89. The Complainant's version of these allegations is confirmed by Sherie Campbell, who recalled the Complainant telling her about a male boss who made a gesture of rubbing his chest and licking his lips in a sexual manner towards her. Another witness, Layla Mitchell, at the time a Corporal in the military, was working as a dental assistant at CFB Comox. She befriended the Complainant in late 1990. She recalled the Complainant being unhappy with one of her bosses, who Cpl. Mitchell believed to be MWO Macnair, because of his suggestive and lewd gestures he made towards the Complainant.

90. It is reasonable to conclude from MWO Macnair's testimony before this Tribunal, Major Bottomley and the Board of Inquiry that he made gestures of a physical nature to the Complainant and the gestures were directed at his body. The Chair finds the Complainant's version of these incidences more believable than MWO Macnair would have the Tribunal believe, of simply being in the Complainant`s view when he rubbed his chest and flexed his arm muscle due to weight lifting.

(iii) The Postcard Incident

91. The complaint reads in part:

- In September 1991, he showed me a postcard of a partially clothed woman, and compared her bustline with that of a female officer;

- MWO Mcnair told me that he appreciated women "who did not need a commitment, only a physical relationship";

(Exhibit HR-1, Tab 1)

92. In mid September, 1991, Lt. Vedova vacationed in Australia. She sent MWO Macnair a postcard depicting a native woman naked from the waist up wearing a long grass skirt, and considered it "typical of postcards in that country". The Complainant too, had received a postcard from Lt. Vedova and offered to show her postcard to MWO Macnair. The Complainant testified MWO Macnair asked if she would like to see the postcard he received from Lt. Vedova. The Complainant testified she went to his office, and he showed her the postcard, saying, "Her tits aren't as nice as Karen's. Oh, but I've never seen Karen's tits." To divert the discussion, the Complainant testified she asked MWO Macnair about a rodeo trip he had taken in August with other staff. She testified that he then responded, "Oh, that TD trip was just fine, you know I really appreciate it when you meet a woman who likes sex just for sex' sake and they don't need a commitment from you at all, they just want it for physical gratification." The

Complainant testified the conversation continued until she finally said, "Well, you know, sir, those may be your morals but they're not mine", whereupon she stormed out of the office.

93. The Complainant testified that when she first joined the Base Transportation Section, MWO Macnair referred to her by her first name, "Kim", and after the postcard incident, he referred to her as "Cpl. Franke." She believed he had a more distant attitude after this incident, typified at a later meeting, when he couldn't find the minutes, saying to those present, "It's pretty sad when your own clerk doesn't give you copies of the minutes." According to the Complainant she responded, "Excuse me sir, I didn't take the minutes to the meeting, so I don't have them to copy." She testified he then said in front of everyone, "Don't lie to me young lady."

94. The only other evidence of the missing minutes is contained in Major Bottomley's interview with MWO Macnair during the Summary Investigation. Major Bottomley questioned MWO Macnair about this matter. Although MWO Macnair does not initially affirm he reprimanded the Complainant in front of others, he then indicates he apologized to her. I refer to the following questions and answers:

Q28 Did you reprimand Cpl. Franke in the presence of others over not providing the minutes to a previous meeting?

A28 You will have to be more specific.

Q29 At the start of the meeting the minutes were not available and you were quoted as saying, "It sure is embarrassing when our own section doesn't get copies of the minutes." When Cpl. Franke states that she had not taken the minutes to the last meeting, you said something to the effect of, "Don't lie to me young lady. I was there and I remember you took the minutes."

A29 It may have been possible ... it was not meant to be disciplinary. I later apologized to her.

(Exhibit R-7, Tab D)

95. MWO Macnair was not questioned about the postcard in his direct examination, or about the alleged meeting and the missing minutes. However, in cross-examination, he testified he believed the postcard was tacked to the wall in Lt. Vedova`s office which he occupied during her absence, and that he may very well have shown the postcard to the Complainant. MWO Macnair testified he was surprised to get the postcard but not because it had a bare-breasted woman on it. He did not and does not see it as being anything significant. Both Lt. Vedova and MWO Macnair viewed this incident as trivial.

96. MWO Macnair`s responses to Major Bottomley are consistent with his testimony before the Tribunal, that the postcard was attached to the wall in Lt. Vedova's office which he occupied while she was away. During his interview with Major Bottomley, MWO Macnair could not remember showing the postcard to the Complainant and denied making the comment about "tits." He denied before Major Bottomley making any comments of meeting women who enjoyed physical contact.

97. His response to the Board of Inquiry in July, 1992, was equivocal about showing the postcard to the Complainant. He responded as follows:

Q33 You showed her a postcard of a bare breasted woman, telling her that "her tits aren't as nice as Karen's but I've never seen Karen's tits.

A33 No, Sir. I very well may have shown her the postcard although I don't have a firm recollection of that, but I certainly never compared the bust line of that female to Lt Vedova, or Captain Vedova. (emphasis mine)

(Exhibit R-14, Page 14)

98. When Lt. Vedova returned from Australia at the end of September, 1991, she became aware of the postcard incident between the Complainant and MWO Macnair. She testified she did not intend for MWO Macnair to show the postcard to others. She understood MWO Macnair and the Complainant had some kind of "to-do" over it. She responded before this Tribunal as follows:

MR. DUROCHER: Did you ever discuss the incident with Macnair?

A. After or?

MR. DUROCHER: After.

A. I can't recall specifically. It doesn't stand out in my mind, like it was a -- you know, I mean we had a lot of conversations and most of the time it was about work-related things. That one does not stand out. I think it was just he -- you know, he said something about the fact that there were -- you know, they got into some kind of a to-do over it. And I don't know what that to-do was.

MR. DUROCHER: You never picked him up on it saying, you know, it's maybe a little inappropriate to show pictures of naked women to people who work for you?

A. No. This -- I mean this was something that was sent, you know, sent to him, and it was never intended to get out -- you know, I don't know how it was -- how it was shown or why it was shown or whatever. Obviously it was.

(Transcript Volume 14, pg. 2273, line 16 to pg. 2274, line 10)

99. Lt. Vedova testified she did not know what the "to-do" was between the Complainant and MWO Macnair. However, in Lt. Vedova's response to Major Bottomley during the Summary Investigation she was aware of some reaction by the Complainant about a comment made by MWO Macnair at the time of the postcard incident:

Q11 Are you aware of any problems that may have been created as a result of a postcard that you had sent to MWO Macnair?

A11 Can't quite remember, but MWO Macnair had made some comment about something he had said to Cpl Franke about the postcard - some sort of reaction by Cpl Franke? But I cannot remember what it was. The postcard had created some type of - not problem - but...? (emphasis mine)

(Exhibit R-7, Tab F)

100. There was a submission by Respondent Counsel that the Complainant, in the normal course of her duties in distributing the mail, would have seen the postcard and, as such, the Complainant's allegations about MWO Macnair's comment and action should be discounted. I am unable to accept that submission, as it is not the evidence. The Chair finds the preponderance of evidence is that MWO Macnair showed the postcard to the Complainant.

101. I find the Complainant's recollection and recitation of these events consistent from December, 1991, when she first documented the event in a handwritten note which was later formulated into a letter to the Canadian Human Rights Commission on December 11, 1991, and in her subsequent complaint to the CAF on December 16, 1991. Her testimony also corresponds and is consistent with her responses to Major Bottomley on December 18, 1991.

102. The evidence reveals that by September, 1991, the interactions between Lt. Vedova and the Complainant had evolved beyond an administrative relationship. In the spring of 1991, Lt. Vedova asked if she could join the Complainant for walks together, on their noon breaks, and this lasted into the summer time. According to Lt. Vedova, the Complainant confided in her during their walks, and sometimes she spoke about sex. Lt. Vedova never felt, from these conversations, any sense of urgency, intimidation or fear from the Complainant. Lt. Vedova considered herself the Complainant's confidante in these discussions. Apart from these walks, Lt. Vedova testified that she and the Complainant maintained a professional relationship.

103. The Complainant testified that, both in their walks and in the office, she spoke to Lt. Vedova about her concerns regarding MWO Macnair and her Unit CO, Major Couture. The Complainant testified about occasions when Lt. Vedova asked her if she was sleeping with a particular man. The first occurred prior to Major Couture's arrival at CFB Comox. The Complainant was reporting to Lt. Vedova about a telephone conversation with Major Couture. In direct evidence the Complainant testified Lt. Vedova asked her during their conversation if she was sleeping with him. Lt. Vedova's initial response, in her direct evidence about this remark, is that she thinks she would have said this. On further questioning, she denied having said it.

104. Another occasion occurred when the Complainant reported a conversation to Lt. Vedova about a telephone conversation she had with Captain Reid, whom she knew from 407 Squadron about a no cost claim of a rental car. Lt. Vedova then asked the Complainant whether she was sleeping with him. Lt. Vedova denied asking the Complainant about who she was sleeping with.

105. Lt. Vedova's first impression of the Complainant was very positive. She found the Complainant very friendly and liked her personality. She described her as very outgoing, very energetic. She thought things would work out fine. Her positive impressions had waned by December, 1991, when she was interviewed by Major Bottomley during the Summary

Investigation. When asked by Major Bottomley about the Complainant's stability, Lt. Vedova described her as "unstable, manipulative and uppity." That question and answer sequence reads as follows:

Q19 Do you feel that Cpl Franke is stable?

A19 To tell you the truth, no. She is obviously different. She is strong minded. She thinks that she has an alcohol problem. She believes that her problems at work are driving her to drink. She is very manipulative. I do not know any more when she is being sincere. Time off, requests for short leave, she dreams up multiple reasons to go on a course. Perhaps courses are a means to get away from work. I would have to say that she is unstable. She is going to counselling with the BDEC and has volunteered for the ARC. The UDEC position is wrong for her at this time.

Q23 Other comments?

A23 She is a very "uppity" kind of person.

(Exhibit R-7, Tab F)

106. There were occasions when members of the staff socialized together. This created a dilemma for the Complainant. According to the Complainant, she was reluctant to socialize in the Section because of her family commitments. Being a single parent at that time with a young child limited her availability. She testified she was also reluctant because MWO Macnair's questions about dating made her uncomfortable. Nonetheless, the Complainant`s supervisors enjoyed a comraderie and friendship in their work environment.

107. Two events are worthy of mention. On one occasion, staff members participated in a curling bonspiel at another Base. The Complainant did not attend the bonspiel. Both Lt. Vedova and MWO Macnair attended the bonspiel and shared a bedroom with two other males, MCpl. Streeter and Captain Jacklin. Lt. Vedova testified her husband was aware of the sleeping accommodations. The second occasion occurred around August, 1991. There was a rodeo event about the same time as the postcard incident. This event was either at CFB Borden or CFB Trenton in which a contingent of ten members participated, including the Complainant's superiors, Lt. Vedova, MWO Macnair and Major Couture.

108. The Complainant testified that, after the August bonspiel, MWO Macnair continually criticized her work and as a result, she made a conscious decision to socialize with her superiors, "because I had to salvage my career." The Complainant began to socialize more, she began to attend ball games, she went to the canteen and to parties. It seemed to her that her work atmosphere improved and MWO Macnair wasn't criticizing her work anymore.

109. Motivated to get along, she testified she started to drink alcohol at work. On one occasion, she recalled drinking alcohol at noon in the Section canteen with another NCO, MCpl. Alexander. MCpl. Alexander reported to MWO Macnair. She testified they then went to MWO Macnair's office and were joined by MWO Macnair and Lt. Vedova. She recalled getting drunk and saying to MWO Macnair, "Okay, I'll sleep with you. Alright, I'll sleep with you. If that's what you want, I'll sleep with you." She testified that the following morning she went straight to

Lt. Vedova's office to inquire whether she had spoken these words. She recalled Lt. Vedova telling her not to worry, and assuring her no one had taken her remarks seriously. Feeling upset about this incident, the Complainant resolved that she was not going to let it happen again. Lt. Vedova could not recall this incident when she was questioned by this Tribunal.

110. The Complainant also testified about MWO Macnair showing her a bottle of liquor he kept in his bottom, right-hand desk drawer. According to the Complainant, MWO Macnair and Cpl. Eadie's husband would consume alcohol on a frequent basis. Cpl. Eadie testified her husband occasionally met with MWO Macnair for a beer after work. The Complainant further testified about beer being available in the canteen, and that MWO Macnair and MCpl. Alexander would frequently drink in the canteen and then proceed to MWO Macnair's office.

111. The Complainant's evidence of the amount, the availability and consumption of beer on the premises, was disputed by Lt. Vedova, Major Couture, Lyall Churchill and Cpl. Eadie. Cpl. Eadie testified about alcohol being available for "smokers", the events following a sports day and promotions, and at Christmas time.

112. Lt. Vedova testified that staff would partake in about one beer each after a sports day. Major Couture testified there was no drinking during office hours and alcohol was locked in the storage area of the canteen for special occasions to be consumed with permission. Mr. Churchill testified he does not consume alcohol and recalls maybe a Friday beer call, two to three times per year, where people may have had one drink.

113. MWO Macnair testified that perhaps twice or three times a year in his two years in the BTnO, he may have drank alcohol with Sgt. Eadie (Cpl. Eadie's husband) or with one of the other NCOs, or a Master Corporal, if it was his birthday or a promotion occurred in the Section, and at these times he invited them into his office for a drink.

114. It is noted that by August, 1991, there existed a degree of familiarity between the Complainant and her immediate boss, Lt. Vedova, which among other things was prompted by their noon walks. Some of the topics discussed between them touched on personal matters of a sexual nature. The comraderie that existed between Lt. Vedova and the Complainant ultimately eroded Lt. Vedova's administrative role with the Complainant, leaving the Complainant without recourse to her direct supervisor.

115. There also existed a degree of fraternization between Lt. Vedova and MWO Macnair as exemplified in their room accommodation at the bonspiel and the subsequent postcard Lt. Vedova selected to send to MWO Macnair. MWO Macnair's manner of addressing the Complainant by her first name rather than the usual military rank was part of the fraternization. The Chair believes this environment gave rise to the approach by the Complainant's supervisors, MWO Macnair and Lt. Vedova, to minimize the Complainant's concerns, and their mutual indifference to the postcard incident.

116. Based on the whole of the evidence relevant to this incident, the Chair accepts the Complainant's version of what transpired between MWO Macnair and herself. The fact that the matter was raised by MWO Macnair with Lt. Vedova after her return from vacation, supports the

Complainant`s version that she was upset by the incident and both MWO Macnair and Lt. Vedova were made aware of her reaction.

C. THE COUTURE INCIDENTS

(i) Affording a House Comment

117. These comments are not directly complained about and are recited as a background concern of the Complainant to Major Couture's alleged offending comments.

118. Major Couture joined the CAF in 1972. He fully retired in August, 1994. Major Couture was assigned as Commanding Officer of the Base Transportation Section in May, 1991. The first significant communications between the Complainant and Major Couture, as they relate to the issues before this Tribunal, arose as a result of Major Couture's attempts to purchase a home in the Comox area. Major Couture testified that he and the Complainant talked about housing. He asked her opinion on the price of a house and questioned her ability to afford a similar house on a Corporal's salary. He testified the Complainant did not give any impression that his question about her purchasing ability was inappropriate.

119. Major Couture was interviewed by Major Bottomley on this point in December 19, 1991. He acknowledged to Major Bottomley about asking the Complainant how two Corporals (the Complainant and her husband) could afford their home on their salaries, but stated he did not mean to be derogatory to their rank. His statement also indicates the Complainant never mentioned to him that she was offended by his comments.

120. The Complainant testified she was displeased with Major Couture's comments about housing and communicated her concern to Lt. Vedova. Lt. Vedova was not questioned about the housing comments before the Tribunal.

121. The Complainant told Major Bottomley about communicating her concern to Lt. Vedova. Lt. Vedova told Major Bottomley how she found the comments inappropriate. But in Lt. Vedova's response to Major Bottomley, it is not clear whether she communicated the expressed concern to Maj. Couture:

Q8 Cpl Franke stated that Maj Couture commented about her rank and financial status with regards to a house she owned. He had made the comment that they were just Corporals. Do you remember this?

A8 Yes. He questioned how corporals could afford it. He kept repeating it and persisted on the subject. It seemed strange, but it was not harassment, but perhaps unnecessary. He did not necessarily say "just" corporals, but he did say "...only corporals, how can they afford it?" Maj Couture had first commented to me in my office. I was not present at the conversation that Maj Couture had with Cpl Franke. I thought that the comment was inappropriate. I fought for Kim -

I agreed with her on a lot of things. I did not think that comments on her financial situation was right. Rather condescending - "She is just a corporal."

(Exhibit R-7, Tab F)

(ii) The "Sexatary" Comment

122. The complaint reads in part:

- In August 1991, when I reported to take minutes of a meeting, Major Couture asked me if I was the "sexatary";

(Exhibit HR-1, Tab 1)

123. The first incident relating to the complaint of sexual harassment directed at Major Couture by the Complainant arose during a meeting in June, 1991, chaired by Major Couture. The Complainant was preparing to take the minutes of the Publicly Owned Motor Vehicle (POMV) Safety meeting. All the section heads of Base Transportation were present at these meetings, including MWO Macnair and Lt. Vedova. There were approximately ten to twelve people in the meeting of varying ranks. The Complainant testified she was sitting at a desk with a writing pad, waiting to take the minutes, everyone was seated except Major Couture, who was a few minutes late. When Major Couture arrived, he looked and said to her, "So, you're going to be the sexatary." The Complainant described her mouth opening but was unable to formulate a response.

124. Lyall Churchill, the bus driver, testified hearing the remark. He was at the same meeting and recalls Maj. Couture said something to the effect of "Oh, here comes our sexatary now".

125. After the meeting, while the Complainant and Lt. Vedova walked back to the Section, the Complainant testified she asked Lt. Vedova whether she noticed her shocked expression after Major Couture's comment. Lt. Vedova responded, "Yes, I did." The Complainant further recalled asking Lt. Vedova, "How can he be allowed to talk to me like that?", and, further saying, "That is not right." She testified she continued to talk to Lt. Vedova in her office for about an hour telling her she did not want this repeated, wanted it stopped, and wanted Lt. Vedova to get it stopped.

126. Lt. Vedova's direct evidence before this Tribunal was she thought she "may" have been at the meeting when the comment was made. She also recalled some discussion afterwards, but the Complainant made no indication it was serious. Lt. Vedova testified that both she and the Complainant viewed the comment as inappropriate and were quite shocked the comment had been made in an open forum. She further testified that in the discussion with the Complainant after the meeting, the Complainant never asked her to confront the Major "or anything." Contrary to the Complainant`s testimony about the length of the discussion, Lt.

Vedova claims the meeting in her office lasted ten to fifteen minutes. Lt. Vedova testified she felt that confronting Major Couture about his behaviour would place her in an awkward position.

127. Lt. Vedova testified that Major Couture called her a "sexatary" once. The comment was made at a POMV meeting. According to Lt. Vedova, her response to him at the time was, "I'm not the sexatary, I'm not even the secretary." She testified she could not remember what happened after that.

128. In Lt. Vedova's statement to Major Bottomley on December 20, 1991, she recalled Major Couture calling her a "sexatary" on at least three occasions. Her response to the Board of Inquiry was it only happened once to her. She testified before this Tribunal, she did not know what would have prompted her to say three occasions before Major Bottomley.

129. Lt. Vedova read into the transcript part of her statement before the Board of Inquiry in July, 1992, about approaching the Base Technical Services Officer, Major Couture's supervisor, about the "sexatary" comment. She was asked by the Board:

Q. Did you consider the use of the word "sexatary" to be sexual harassment?

A. I was quite offended by it, but I decided that I wouldn't take it further. I actually approached the BTSO and told him about that and told him that I was kind of worried about it but I didn't want to go any further. (emphasis mine).

(Transcript, Volume 14, p. 2235, lines 11-16)

130. During cross-examination, and after being referred to her response by the Board of Inquiry, Lt. Vedova testified she considered the comment made by Major Couture to her very inappropriate but she was not offended, just shocked that someone would ever say something like that.

131. During cross-examination before this Tribunal, Lt. Vedova had difficulty expressing what was on her mind and attempted to modify her answer to the Board of Inquiry in the following question and answer sequence:

Q. So were you offended by the term or were you not offended by the term?

A. Again, I -- you know, what is offence? I don't know.

Q. Well, how did you feel, just tell me how you felt then.

A. Well, I -- because it had a little -- you know, I mean "sexatary," what does that have to do with anything? And even if -- I just thought it was -- I thought it was a very strange comment because, first of all, I wasn't even the secretary. If I was the secretary, I could see the -- perhaps the relation, but I couldn't figure out like why he would even want to -- why he would even say something like that.

And I didn't want to pursue it, it wasn't like -- because I felt what I said finished -- because I did say something and I don't think he remembered hearing it, but I just said, "I'm not the 'sexatary', I'm the UGSO." So I left it at that.

Q. So part of the reason that you felt it was strange then was because of your rank then; is that correct?

A. No, just the fact that I wasn't even the -- I wasn't the secretary. If I was -- that's my -- that's why I can't even -- I don't even understand why the comment was said. Again, if I was in the capacity of a secretary, I could see, you know, for whatever reason or another, I mean somebody making that relation. But I didn't see why he was calling me that.

(Transcript Volume 14, p. 2237, line 5 to p. 2238, line 4.)

132. Lt. Vedova's overall reluctance to respond candidly and honestly was also apparent in the following response to this Tribunal's questions about her reaction to Major Couture when the sexatary comment was made to her:

MR. DUROCHER: Yes, why was your position awkward in that particular situation?

A. Okay. Well, I said what I had to say in terms of -- you know, I mean I said something back to Major Couture and to me, I felt that was -- but if I wanted to pursue anything, I'd be questioning his -- it was more of a behavioural thing, it wasn't the fact that it was an offensive comment, it was just inappropriate.
(emphasis mine)

(Transcript Volume 14, p. 2270, lines 15 to 22)

133. Although Lt. Vedova admittedly found difficulty in approaching Major Couture about his comment to her, she was reluctant and reticent in her responses to acknowledge either her own or the Complainant's predicament, in her guarded responses before this Tribunal. I find, overall, this witness lacked credibility.

134. In my review of Major Couture`s statement to Major Bottomley on January 24, 1992, I find he told Major Bottomley he usually used the term "sexytary" rather than the term, "sexatary", and was unsure whether he actually said "sexatary" or "sexytary." He indicated that the Complainant did not state any objection to his comment.

135. Before this Tribunal Major Couture testified the term "sexatary" was never intended to mean a person and would have been used by him in the context of a joke. There is no further evidence before this Tribunal of the joking nature of the comment and the circumstances existing at the time it was made at the POMV meeting that would support a joking context. Since receiving harassment training in the spring of 1992, Major Couture testified he has never used that term. He now considers the term inappropriate in his understanding of harassment. Under cross-examination he agreed the term could be construed as harassment.

136. Major Couture further testified that he did not, and does not now think, he truly offended the Complainant. He testified he would have immediately and whole-heartedly apologized to the Complainant if she had immediately approached him, providing he believed the things he said to her were hurtful. But because the complaint was lodged after the Complainant received the RW, he viewed it as an act of revenge on her part which, in his mind, destroyed her credibility.

137. Major Couture testified he was surprised to learn that Lt. Vedova had been upset when he called her a "sexatary". He expressed the view that for the remark to be derogatory and hurtful, it would depend on the context in which the word is used. According to Major Couture, he would not intend it to be derogatory.

138. The Chair is satisfied, based on the evidence, that Major Couture referred to the Complainant as a "sexatary" in June, 1991 in a meeting attended by CAF members. I am further satisfied that after the POMV Meeting the Complainant communicated her concern to Lt. Vedova in their meeting and that Lt. Vedova considered the comment inappropriate at the time.

(iii) The "Biker Mama" Comment

139. The complaint reads in part:

- In the summer 1991, in reference to my motorbike, Major Couture referred to me as "Biker Mama";

(Exhibit HR-1, Tab 1)

140. In the beginning of July, 1991, the Complainant purchased a motorcycle, a Harley Davidson. She recalled Major Couture making a remark to her in Lt. Vedova's office at the end of the day. She testified Major Couture walked into the office and after speaking to Lt. Vedova, looked at the Complainant and said, "Hey, biker mama, so when are you going to get a tattoo?" She remembers responding to him, "Excuse me, sir, first of all I bought a Harley Davidson because I had the money, I had $30,000 in the bank, Harley Davidson's do not depreciate, in ten years I will sell it and I'll have more money than what I paid for it." She then went on to say, "And I also belong to a group of women who are promoting respectable people riding motorcycles, they're called 'Women in the Wind', and I'm never going to get a tattoo, I don't have one now and never will I have one." She testified after Major Couture left the office, she turned to Lt. Vedova and said, "Okay, that's enough, that's enough, no more I've had it, I don't want anymore of these comments, at all."

141. The Complainant believed the phrase "biker mama" was derogatory and sought its meaning from other people who rode motorcycles. She testified she was told it means "one of the chicks who rides on the back just to look pretty, on the back of a guy's motorcycle, and that's all you're there for is to look pretty, and be there and hang out with him and be there for the boys."

142. She testified she approached Lt. Vedova rather than Major Couture about her concern because she felt that since Major Couture was her boss, and also a Major, she could not approach him. She preferred that her direct supervisor, Lt. Vedova, deal with the situation. She testified as follows:

Q. Now, why did you react that way with Lieutenant Vedova? Why didn`t you just tell Major Couture directly?

A. Because he was my boss, he was the major, and I really felt that I couldn`t approach him about it. I felt that because she was my direct supervisor, that if I approached her about it, she would deal with it. I felt she should deal with it, that was her position, she was the manager, she should have dealt with something like that.

I didn't feel that it was a corporal's place to deal -- to walk up to a major and say, "Sir, apologize, right now, because that's offensive and I don't like it." I felt that she should have gone to him and explained the situation and said, "What's required is for you to apologize to Corporal Franke and just ensure you don't do it again." And then that would have been fine. But she didn't do what I felt a manager should have done.

The same as with Macnair, I felt that she should have reprimanded him so that these things weren't continuing to happen.

(Transcript Volume 1, p. 100, lines 21-25 to p. 101, lines 1-16)

143. Major Couture did not dispute making the comment, however, he recalled the conversation taking place in the BTnO Canteen. He does not recall any negative reaction from the Complainant. He described a familiarity existed between himself and the Complainant from their fondness for motorcycles and, it was on this basis, he made the comment. He considered his comment to be "friendly" and "non-derogatory" and that it was, not a natural, but a normal comment to make. Both Major Couture and the Complainant were owners of motorcycles and the Major had, at one point, loaned his motorcycle to the Complainant to practice riding in order to pass her test. The Complainant had, at some point, given Major Couture an opportunity to ride her bike.

144. In Major Couture's statement to Major Bottomley, he provided some insight as to his understanding of the term, "biker mama":

Q4 In Aug '91, do you recall saying to Cpl Franke, "Hey Biker Mama, when are you going to get a tattoo?"

A4 It was not meant to be personal in any respect. It was related to the Harley motorcycle she recently purchased. I own a bike and I love Harley's. "Mama" is a term often related to females associated with Harley's. Women associated with Harley's are generally thought of as being rough and tough and get tattoos. It was meant in a humorous text. Cpl Franke does not fit the image of Harley woman. It was meant as a joke. We were discussing bikes in general and I said it as a joke. She did not tell me that she was offended by it nor did I get any impression that she

was offended.
(emphasis mine)

(Exhibit R-7, Tab E)

145. Major Bottomley's interview with Major Couture appeared to be brief. There were only five questions and answers recorded from their interview. After four direct questions about the complaints, Major Bottomley then gave Major Couture an opportunity to make any additional comments. He proceeded to describe the Complainant as "self-serving and manipulative." He referred to her poor staffing procedures for an Administrative Clerk and her frequent errors, not expected of a trained Administration Clerk. He stated she was frequently away from work without valid reason and used the telephone excessively. He remarked about her disrespect to her superiors, referencing examples which were not included in his statement. He concluded that he "certainly felt that any comment I ever made to Cpl. Franke were much more in keeping with her ability to understand the clear intent of the statement."

146. Major Bottomley testified under cross-examination that the term "biker mama" could be offensive, depending upon the individual to whom it is being addressed:

Q. And these remarks were the remarks regarding, you mentioned "biker mama"and "sexatary" do you recall that too?
A. I only recall "biker mama".

Q. Why did you think that "biker mama" could be offensive? A. I think that it's one of the difficult things with harassment as anything could be offensive depending on the individual that's being spoken to. Some mother rides a motorcycle and may not like being called "biker mama".

Q. How would you see that different than just referred to somebody as, well you ride a motorcycle, you ride a bike don't you? A. It's a title.

Q. Do you see the title connected in a way to the person's sex? A. Yes, it could be.

Q. Do you see it's complementary or derogatory or neutral, how do you see it? A. I don't see it as anything. I would say it could be offensive to someone or may not be. I think my whole point there was that he should be counselled in something. It could very well be offensive. We have to be very careful these days in what we say.

(Exhibit R-12, Tab A, p. 21)

147. From both the Complainant's understanding of the term "biker mama" and the interpretation of biker jargon provided by Major Couture to Major Bottomley, the comment is understood within the biker fraternity to discredit females who ride motorcycles. In that context, it is understandable that the Complainant would be offended by the comment.

148. Lt. Vedova testified in direct-examination she could not recall being present when the comment was made, but did recall the Complainant bringing the matter to her attention. Lt.

Vedova stated that if the Complainant had been offended by the comment, she believed the Complainant would have told her she found the comment offensive, and would have been clear in her request that the matter be pursued. She further testified she does not know what she would have done if the Complainant had expressed a concern.

149. In Lt. Vedova's earlier statement of December, 1991, to Major Bottomley, she recalled that Major Couture had made the comment to Cpl. Franke, but felt it was not meant to be degrading, although it could be construed that way. She indicated to Major Bottomley the comment was not appropriate (emphasis mine). Lt. Vedova held a different view before this Tribunal. She was asked in cross-examination about her response to Major Bottomley and, whether in her view, the term "biker mama" is an inappropriate comment. She responded as follows:

A. I don't ride a bike and -- I don't know, it's not offensive to me, I've heard it before, but personally I wouldn't be offended by it, if that's what you're asking.

(Transcript Volume 14, p. 2232, lines 3 to 6)

150. The above response is indicative of Lt. Vedova's reluctance to respond honestly and candidly and is another example of Lt. Vedova's lack of forthrightness before this Tribunal.

151. Major Couture testified in cross-examination that one of the reasons he thought the Complainant would not be offended by the term "biker mama" was because he had seen her in the Comox Mall wearing "short shorts". He assumed, on that basis, the Complainant would understand his remark and not take offence. His reference to short shorts was made during an interview with the Respondent on June 5, 1992, resulting from the Complainant's Redress of Grievance concerning harassment, which will be detailed later.

152. Major Couture acknowledged under cross-examination about a reluctance on the part of a junior ranked member to address a senior ranked member about the senior member's conduct. However, he testified that in the Complainant's case, if her feelings had been hurt to the extent she claims, she would not have had problems coming to him to talk about it. Major Couture believes his conversations with the Complainant, which he described as "open and frank, all the time" gave him that impression about the Complainant. Major Couture held firmly that if his comments truly hurt, he would have been approached either directly from the Complainant or indirectly from Lt. Vedova about the matter.

153. Under cross-examination by the Complainant, Major Couture acknowledged the appropriateness of using the chain of command to address problems, in the following response:

MS. FRANKE: I also dealt with my uncomfortable feelings with "sexatary" and "Biker Mama" by approaching Lieutenant Vedova and felt it had been dealt with through that, and I believed it had been dealt with and passed on to you. Is that not an appropriate way in the military to use the chain of command, when you cannot -- when you're uncomfortable dealing with the person who is calling you a "Biker Mama"and a "sexatary" to go to someone you are comfortable with and letting them express that?

THE WITNESS: Yes.

(Transcript Volume 12, p. 1799, line 17 to p. 1800, line 1)

154. The Chair finds the evidence of Sherie Campbell helpful in assessing the Complainant's reaction to Major Couture's comment, Ms. Campbell testified that when the Complainant had been called a "sexatary" she had been really hurt because she had worked very hard and felt that she was really good at her job. Ms. Campbell advised the Complainant she should tell someone, like a supervisor. The Complainant informed Ms. Campbell her supervisor, Lt. Vedova, was present when the comments were made by Major Couture. When Ms. Campbell asked the Complainant why she did not go above her supervisor's head, she testified the Complainant stated she was afraid of the repercussions and the thought of losing her job.

155. Ms. Campbell's evidence is buoyed by the evidence of Cpl. Mitchell who recalled the Complainant "complained a lot about Major Couture." Cpl. Mitchell recalled a discussion with the Complainant about the "biker mama" comment. The Complainant and Cpl. Mitchell discussed "that whole conversation in a -- that it was a sexist kind of remark and --". Cpl. Mitchell made light of the matter in an attempt to make the Complainant feel better, because the Complainant was feeling so badly. It seemed to Cpl. Mitchell that whenever the Complainant tried to talk about these comments at work, her concerns were minimized and treated jokingly, as if there must have been some problem on the Complainant's part. Cpl. Mitchell found the Complainant's behaviour odd. She described the Complainant as having a really good sense of humour. This did not seem like a joke to Cpl. Mitchell.

156. Another witness, Cpl. Mona Legault first met the Complainant when they were both posted to CFB Comox in 1987 and lived there until June, 1992, when she was posted to Valcartier, Quebec. She finished her time in Comox in Clothing Stores. Cpl. Legault moved onto the Complainant's street in 1989. They lived on the same street until 1992. During the years, they saw each other basically every day. They were not on speaking terms by 1992 when Cpl. Legault left Comox because of an incident at Clothing Stores. This incident will be detailed later. Cpl. Legault testified the Complainant took the comments about "sexatary" and "biker mama" very badly, and was upset and hurt by them. She herself referred to them as demeaning and insulting.

157. Two of the Respondent's witnesses had a different view of the Complainant`s reaction. Susan Powers, MWO Belanger's secretary, testified that the Complainant had come to her after taking minutes of a meeting, telling her she had been referred to as a "sexatary". Ms. Powers testified the Complainant had found the comment to be amusing and did not seem to be bothered by it.

158. Ms. Powers was present when Major Couture brought up the "biker mama" comment and recalls the Complainant laughing and chuckling about it. Cpl. Eadie recalls the comments "sexatary" and "biker mama" and the Complainant thinking they were funny at the time.

159. I am satisfied the comments were spoken by Major Couture and directed to the Complainant. The impact of these comments and the Complainant`s reaction will be canvassed

in my deliberations under the heading: Issue #1.

D. THE BELANGER INCIDENT

160. This incident did not comprise the Complainant's complaint of sexual harassment. Reference to this incident was made in the context of the Respondent's subsequent investigation into the Redress of Grievance following a recorded warning given to the Complainant in November of 1991. The facts of this incident are provided as background information to the subsequent investigations by the Respondent, which are detailed later in the decision.

161. MWO Belanger was a member of the Army division, whose office was located in the Base Transportation Section. He had no direct supervisory responsibilities over the Complainant. Although he was a Warrant Officer, he was not the Unit Disciplinarian for the Base Transportation Section, that role fell to MWO Macnair. MWO Belanger did not testify before this Tribunal.

162. In her day to day office activities, the Complainant had little interaction with MWO Belanger and testified she did not like to deal with him because he would stand in front of his secretary's desk, pull down his pants, tuck in his shirt, in a similar manner done by PO Pistun in 407 Squadron. Further to this conduct, the Complainant recalled MWO Belanger standing in front of her desk and belching loudly.

163. The Complainant's description of MWO Belanger was not shared by his civilian secretary, Susan Powers, who has been employed in the CAF for thirteen years. Susan Powers testified that she did not have any problems with MWO Belanger and did not observe him acting in the manner described by the Complainant.

164. The Complainant described an incident involving MWO Belanger in August, 1991. The Complainant testified she had inadvertently referred to a Sergeant by his first name rather than his rank. The Complainant at the time was engaged in a telephone conversation with the Sergeant about scuba-diving. According to the Complainant, after she called the Sergeant by his first name, MWO Belanger started screaming at her from his office that it was inappropriate to use a Sergeant's first name and it was never to happen again. According to her testimony, MWO Belanger then called her into his office and told her that if he ever overheard her using the first name of a member of a higher rank, she would be given extra duties.

165. Susan Powers was present when the incident occurred, and testified that MWO Belanger dealt with the Complainant at the time the incident arose, that he did raise his voice but did not scream. Ms. Powers could not recall how the Complainant reacted. Cpl. Eadie also testified she observed the incident and that MWO Belanger did not scream at the Complainant but he was firm with her. According to Cpl. Eadie, the Complainant got upset and went to see MWO Macnair. The Complainant did seek out MWO Macnair for advice shortly after this incident. There is conflicting evidence about aspects of this discussion.

166. The Complainant testified that when she met with MWO Macnair, he told her, "Kim, just forget about it, because Belanger is a crusty old army fart, he doesn't have a real position anymore, and he's pissed off about it because he doesn't have a job, so ignore it." In his own testimony, MWO Macnair denied calling MWO Belanger "a crusty old army fart." His direct evidence is that he calmed the Complainant down and had her explain the circumstances of her discussion with MWO Belanger. He recalled then explaining to the Complainant that MWO Belanger had, in fact, done the appropriate thing and was quite within his realm as an MWO to take her to task for failure to follow proper military protocol. MWO Macnair`s statement before the Board of Inquiry accords with his evidence before this Tribunal.

167. Col. McGee testified about his understanding of the Belanger incident which became known to him during a later Redress of Grievance initiated by the Complainant. He recalled MWO Belanger not supporting the Complainant's assertion that he shouted loudly at her. Although Col. McGee viewed the incident as relatively minor, he referred to the Complainant's reaction as major and "I mean it just didn't make any sense for Corporal Franke to speak to Master Warrant Officer Belanger in this way". Col. McGee ws unable to explain how the Complainant responded to MWO Belanger.

168. Lt. Vedova could not recall any specifics of the incident. She remembered the incident happened when she was away. She testified that when she returned to her office MWO Belanger immediately spoke to her and told her what had occurred and what he had done. Lt. Vedova testified she told MWO Belanger she agreed with what he had done. She could not remember if she had discussed the particulars with the Complainant.

E. THE MCPL. ALEXANDER INCIDENT

169. This incident is not referred to in the sexual harassment complaint and is provided as background to the events that transpired in the BTnO after the Complainant`s arrival. The Complainant alleges her working relationship with her supervisors had changed in the fall of 1991, prior to receiving her recorded warning. This incident is canvassed for that purpose.

170. On October 2, 1991, the Complainant testified she received a telephone call about a late report and went to MCpl. Alexander's desk to retrieve the necessary information. As she was obtaining the required information, MCpl. Alexander returned late from lunch smelling of alcohol. According to the Complainant, this was not the first occurrence. She testified she told him, "I think you may have a problem and, you know, if there's something that I can do to help you because I'm the UDEC." UDEC is the acronym for Unit Drug Education Coordinator. The Respondent had established a support program for CAF members to discourage drug and alcohol abuse. The program provided Base and Unit Drug Education Coordinators (BDEC and UDEC) in the different Sections on the Base. The Complainant was the UDEC Coordinator for the BTnO and as a Coordinator, she was aware of resources available to help members with problems from alcohol and drugs. According to the Respondent`s policy, coordinators had no mandate to counsel members for drug and alcohol abuse.

171. Shortly after the Complainant left MCpl. Alexander's office, she testified MWO Macnair came flying up the stairs into her office saying, "I want to see your f-ing list of UDEC responsibilities right f-ing now." The Complainant then pulled the list for him. She described MWO Macnair as angry, telling her it was not her position to counsel a member on any perceived alcohol problem as the UDEC Coordinator. The Complainant testified she had anticipated this response, because she had an earlier conversation with a Sgt. Wade Greely, who was involved with UDEC in CFB Petawawa. According to the Complainant, Sgt. Greely assured her she did have the right to talk to MCpl. Alexander, but cautioned her about repercussions because MCpl. Alexander was one of MWO Macnair's drinking buddies.

172. The Complainant further testified this incident occurred at the time MWO Macnair began to refer to her as "Corporal" instead of "Kim" and she noticed a change in both MWO Macnair's and MCpl. Alexander's attitude toward her.

173. MWO Macnair testified he became concerned when MCpl. Alexander told him why the Complainant had approached him. His concern related to the Complainant approaching a member because any shortcomings with subordinates were his responsibility and should have been brought to his attention. MWO Macnair recalls taking the Complainant aside, thanking her for her concern, but letting her know in no uncertain terms that she had bypassed his role as both the Unit Disciplinarian, and MCpl. Alexander's supervisor. He was concerned because neither her service was sought by MCpl. Alexander nor was the Complainant under direction from the Unit Drug and Alcohol Control Officer to act. MWO Macnair further testified a heated discussion followed between himself and the Complainant because the Complainant felt quite proper in approaching MCpl. Alexander. MWO Macnair felt the Complainant had overstepped her grounds.

174. Lt. Vedova testified that prior to September, 1991, the Complainant told her she wanted to become the UDEC Coordinator. She recalls the Complainant telling her she thought that MCpl. Alexander had a drinking problem. At that time, the Complainant suggested to Lt. Vedova that she was going to approach MCpl. Alexander. Lt. Vedova told the Complainant it was not a good idea, and she did not think it was the Complainant's place. According to Lt. Vedova it was an issue that she and MWO Macnair were handling. When Lt. Vedova heard about the Complainant's approaching MCpl. Alexander, she recalled MWO Macnair being very upset with the Complainant's action.

175. MWO Macnair was asked about the language he used in this situation. He testified he had occasion to say, "damn or fuck" in the office, but he could not recall if he used these words in this situation. In his statement to Major Bottomley during the Summary Investigation, MWO Macnair indicated he may have used the word "fucking" once, but could not remember the specific case. He told Major Bottomley he remembers arguing with the Complainant about the MCpl. Alexander incident because she was not listening to him which was not uncommon, and that a yelling match had ensued between them, and he said to the Complainant, "Bullshit, you get me a copy of your terms of reference and get them on my desk now."

176. Lt. Vedova's statement to Major Bottomley concerning MWO Macnair's language, was that he did use abusive language quite frequently, not usually to females, "but he could have". Her

evidence before the Board of Inquiry, was that MWO Macnair swore "a lot". Before this Tribunal in cross-examination she testified she did not know the meaning of "a lot". She testified she considered Major Bottomley's question about abusive language "leading" and that she was responding to a question not about MWO Macnair's abusive language but about his swearing. These responses from Lt. Vedova before this Tribunal are further illustrations of her indecisiveness and lack of candidness that contribute to a general thread of unreliability in her testimony.

177. MCpl. Alexander did not testify before this Tribunal. It is noted in his statement to Major Bottomley he answered three questions, none of which refer to this incident.

178. Although Major Couture did not testify about the MCpl. Alexander incident, he did testify it was about this time that he started to form a different opinion about the Complainant. Before this time, he described their relationship as very friendly, sharing a similar interest in motorcycles. Then he started noticing the Complainant not spending all her time doing things related to work or was often too long on the phone or away from her office.

F. THE SHOE INCIDENT

179. The complaint reads in part:

- In October 1991, after I had submitted a memo to MWO Mcnair with respect to the non-regulation shoes I was wearing, and made an appointment with the Base Surgeon regarding my knee condition, I was confronted by Sergeant Caron and Warrant Officer Boudreau about my non-regulation shoes. I received a recorded warning for this incident on November 26, 1991, which stated in part:

"... that when confronted with shortcomings by your superiors you acted in a belligerent and challenging manner contrary to the good order and discipline of the CF.

Failure to correct the above noted shortcoming will result in counselling and probation (C&P) or in release."

(Exhibit HR-1, Tab 1)

180. There were mechanisms in place at CFB Comox to deal with NCOs' deportment and dress. One such mechanism, was a Base Discipline Committee headed by the most senior NCO, CWO Doherty. The Committee comprised approximately thirty-five senior NCOs from the various sections. It met about every six months and served as a forum for disseminating new information from NDHQ.

181. A Base Dress Committee was formed by CWO Doherty as an off-shoot of the Base Discipline Committee. It had a component, the Female Advisory Committee, which addressed

female dress regulations. The Base Dress Committee met regularly to disseminate information on parades, upcoming visits, morale and among other things, the welfare among the NCOs.

182. WO Colleen Boudreau (later MWO) and Sgt. Caron were the senior NCOs in their units, and members of the Base Discipline Committee and the Base Dress Committee. Sgt. Caron worked in Clothing Stores and WO Boudreau worked in the Dental Office as a dental hygienist. Their rank and membership on the Base Dress Committee made them responsible for both male and female dress and deportment. They were placed on the Female Advisory Committee by CWO Doherty to assist and advise him on female dress issues.

183. When CWO Doherty first assigned WO Boudreau and Sgt. Caron to the Female Advisory Committee, he asked them to visit all the units on the Base, to introduce themselves to the male supervisor, and to inform the female members about the Base Dress Committee. As WO Boudreau explained, they were to assist females, to listen to their problems and take suggestions or changes up the line of command. The male supervisors could approach the Female Advisory Committee to get opinions and information about female dress and deportment. The senior male NCOs on the Base Discipline Committee had the responsibility to take care of their own units. According to WO Boudreau, it was not necessary for a senior male Warrant Officer to visit other units.

184. WO Boudreau testified the dress regulations helped maintain high discipline and deportment and assisted members to act quickly in emergency situations such as in a war environment.

185. About a week after the MCpl. Alexander incident, the Complainant went to Base Headquarters and was stopped by Sgt. Caron about her shoes. The Complainant was wearing non-regulation shoes. The heels were wedged and about 1/2 inch in height and did not conform to the dress regulations. The relevant shoe regulation reads:

10. Pumps, black, or (navy) white.

a. Civilian plain pattern, leather or patent leather, oval vamp, closed toe and heel, displaying no decorative features and with a standard (not spiked or wedged) heel approximately 5 cm (2 inches) in height. (emphasis mine)

(Exhibit R-6)

186. WO Boudreau testified she interpreted the above regulation to mean a female NCO could wear a shoe with a heel approximately two inches in height. She explained that shoes are purchased by the members and are not "an issue item".

187. The Complainant testified she told Sgt. Caron she had been given permission by her boss, Lt. Vedova, to wear the flat-heeled shoes. Lt. Vedova was wearing shoes similar to the Complainant. Lt. Vedova testified she never gave the Complainant permission to wear the non-regulation shoes.

188. According to the Complainant, Sgt. Caron informed her that the Base Dress Committee was visiting all the Sections, briefing female members on dress regulations and would be coming to her Section. The Complainant testified she later informed Lt. Vedova of her conversation with Sgt. Caron and understood from Lt. Vedova's response that she would talk to the Committee.

189. Directly thereafter, the Complainant testified she made an appointment to visit the Base Surgeon to get a medical chit authorizing her to wear a flat-heeled shoe because of her knee problem. The appointment was scheduled for October 30, 1991.

190. WO Boudreau testified that prior to making a visit to a squadron or unit, a member of the Female Advisory Committee contacted the senior rank of the squadron or unit for the purpose of arranging a visit to the female members at that location. The visit would be arranged at their mutual convenience and the senior ranked member would be present for the visit. According to WO Boudreau, there was, "one or two times that we didn't contact the senior member prior to being there."

191. On these visits the Female Advisory Committee would look for the senior member when they first arrived on the unit. WO Boudreau believed all visits, whether scheduled or unscheduled, were not a surprise to the senior ranked members because as members of the Base Disciplinarian Committee they were aware of the Base Chief's directions to the Female Advisory Committee.

192. WO Boudreau testified that on October 29, 1991, the Base Dress Committee was scheduled to make three visits, one to 407 Squadron, the second to Base Air Maintenance Organization Squadron and lastly a Group Meeting at 422 Squadron. The Base Air Maintenance Organization Squadron was located in the same building as 407 Squadron.

193. At about 2:00 p.m., after having visited 407 Squadron, WO Boudreau testified the Female Advisory Committee decided to make an unscheduled visit at the BTnO before their next scheduled meeting, later in the afternoon, with 422 Squadron. WO Boudreau testified she attempted to make a prior appointment with MWO Macnair but was unsuccessful in reaching him. When the Committee arrived at the BTnO, they went looking for MWO Macnair. Not finding him in his office, they went through the Section looking for him, eventually arriving at the Complainant's office. The Complainant was the only female NCO they found in the Section. She was on the telephone. Lt. Vedova was away from the Section at the time. What then transpired between the Complainant and the members of the Female Advisory Committee differs in some respects between the Complainant's version and WO Boudreau's version of events.

194. Normally, when the Female Advisory Committee made a visit, WO Boudreau testified she did the talking because she was the senior member of the Committee. WO Boudreau testified they waited until the Complainant finished the call and she introduced herself and Sgt. Caron telling the Complainant their purpose for the visit. She then asked the Complainant if she had any problems with the Base Dress Regulations. WO Boudreau testified "they" noticed the Complainant had non-conforming shoes, and Sgt. Caron reminded the Complainant of their earlier meeting. According to WO Boudreau, she noticed the Complainant's non-conforming

shoes from the doorway when they entered her office, and she was unaware that Sgt. Caron had previously addressed the Complainant about her shoes.

195. The Complainant claims her desk had a front privacy panel running the full length of her desk, from the top to the bottom, which precluded any view by the Female Advisory Committee of her footwear. The Complainant testified that Sgt. Caron walked behind her desk, peered over her shoulder to look at her shoes, and said, "I told you that they were against regulations and you would not be allowed to wear them." The Complainant testified she replied, "No, that's not my understanding, my understanding was that you were going to all the Sections to discuss it, and you would be coming specifically here to discuss it with us." The Complainant's testimony is that she told the Female Advisory Committee that Lt. Vedova had given her permission to wear the shoes, and she had an appointment the next day with the Base Surgeon.

196. The Tribunal had a viewing of the BTnO. During that viewing, Lt. Vedova described the different offices, and the furniture. There was some discussion during the viewing of the desks occupied by herself and the Complainant. The desks used by the staff at BTnO during 1991 had been replaced and were no longer in the Section. After the viewing, Lt. Vedova was asked by Respondent Counsel to describe the view. During this testimony Lt. Vedova testified she could not specifically recall the type of desk the Complainant had in 1991. The Tribunal sought clarification of her answer which she provided as follows:

MR. DUROCHER: Ms. Vedova, when we were there, it seems to me that I heard you say that it was closed. [front panel of the complainant's desk]

THE CHAIRPERSON: Yes.

THE WITNESS: Yeah, like I can't confirm -- I mean I saw my desk and I saw the new desk, and in my memory I cannot remember what exact type of desk it was.

MR. DUROCHER: No, I know that there was some discussion about whether it was a steel desk with a formica top or a wooden desk, but it seems to me that I heard you say -- and this was in agreement with Ms. Franke -- that the desk had a full panel across the front. Did I misunderstand?

THE WITNESS: I -- I can't remember if I said that exactly, I may have.
(Transcript Volume 14, p. 2203, lines 1-14)

197. Whether the Complainant`s desk had either a full privacy panel or a partial privacy panel, I find the Complainant's feet had to be positioned in an unusual position to make the heels of her shoes visible to WO Boudreau and Sgt. Caron who claimed to be standing in the doorway. That being unlikely, the Chair accepts the Complainant's evidence that Sgt. Caron walked behind her desk to view her footwear.

198. According to WO Boudreau's evidence, the Complainant became agitated, argumentative, and quite defensive when Sgt. Caron reminded her of her non-conforming shoes and having previously been told by her not to wear the shoes. WO Boudreau recalls being told by the

Complainant she had a back problem and she did not have a medical chit to wear non-conforming shoes. WO Boudreau testified Sgt. Caron advised the Complainant to see her doctor to request an orthopaedic shoe.

199. WO Boudreau's evidence is that the Complainant asked about other female members who were wearing non-conforming shoes. WO Boudreau recalls explaining to the Complainant that the Female Advisory Committee reported to the Base Chief and the Committee was not dealing with officers. It was about this point, according to WO Boudreau, that the Female Advisory Committee noticed the Complainant's ring and referred to it as "gaudy".

200. The Complainant testified she responded to the Committee that she did not think her ring was gaudy and asked if they could seek the opinion of the Base Chief. WO Boudreau decided to curtail any further discussion "before anyone got going too far", and called a stop to the meeting.

201. WO Boudreau testified that normally when they approached an NCO about non-conforming shoes, the member would not respond back, but would acknowledge the fact and change the shoes. If the member had a medical chit that ended the matter. Before leaving, WO Boudreau testified she informed the Complainant she would be calling MWO Macnair in the morning to tell him the Complainant was not wearing regulation shoes.

202. The Complainant viewed her meeting with the Female Advisory Committee as a "set-up" because of the earlier advice from Sgt. Greely about retaliation from MWO Macnair if she approached MCpl. Alexander about drinking alcohol. She also believed Lt. Vedova's absence from the office during the Committee's visit was part of the "set-up". Lt. Vedova returned to the office after the Committee left. The Complainant testified that when she told Lt. Vedova about the visit, Lt. Vedova replied, "I know, I saw them coming out of the building so I hid around the building." Lt. Vedova testified she did not have this conversation with the Complainant.

203. MWO Macnair's statement to the Board of Inquiry as to the purpose of the visit from the Committee was that WO Boudreau and Sgt. Caron had made a "special" visit to see the Complainant, to bring to her attention some of her shortcomings as they related to her dress, and as a result of specific complaints lodged about the Complainant. Before this Tribunal, MWO Macnair was unable to explain his conclusion before the Board of Inquiry. However, he testified his recollection of events was better when he testified before the Board of Inquiry in July, 1992, then before this Tribunal in 1996.

204. The Complainant testified that the same day as the shoe incident, she wrote a memorandum to Base CWO Doherty, channelling it through MWO Macnair, about the heel height restriction in the dress regulations. In the memo, she refers to medical information that prolonged wearing of a high-heel causes back problems and foot problems and inquiring whether the Base Dress Regulation could be amended to allow for a shoe with a heel height of approximately ¼ inch.

205. Following the Female Advisory Committee's meeting with the Complainant, WO Boudreau decided to meet with MWO Macnair the next morning, to suggest either extra training or extra duties for the Complainant because of her "insubordinate attitude". She envisaged at that time a

"day of corporal duty", requiring the Complainant to sit in the dining hall at the junior rank mess, checking meal cards at lunch and dinner hours, and to be available for a 24 hour period for any type of emergency. According to WO Boudreau, the day would be assigned by the Base Chief's Office, no record was required for the member's file, the individual supervisor noted the day, and it did not reflect on promotion or posting opportunities for the member. WO Boudreau testified the day could be reflected on the member's PER.

206. According to WO Boudreau, early in the morning of October 30, 1991, she telephoned MWO Macnair concerning the shoe incident. She asked to meet with him. At 10:00 a.m. WO Boudreau and Sgt. Caron met with MWO Macnair at the BTnO. WO Boudreau testified when she recommended to MWO Macnair a day of corporal duty for the Complainant's insubordinate attitude. She recalled MWO Macnair responding he was not surprised by the Complainant's behaviour, that he too had a previous problem with her and apologized to them. MWO Macnair testified he had not noticed the Complainant's shoes prior to his meeting with the Female Advisory Committee.

207. Following her meeting with the Female Advisory Committee, the Complainant testified she decided to wear high heeled shoes to work the next day until she received her medical chit allowing her to wear flat heels. She testified she removed the "gaudy" ring and wore her wedding rings.

208. The Complainant testified, after coming to work on the morning of October 30th wearing regulation footwear, she was called into MWO Macnair's office and was told by him that she should have listened to Sgt. Caron. MWO Macnair disagrees that the Complainant changed her shoes. MWO Macnair testified as follows:

...When Corporal Franke entered my office, I noticed at that time that she was still wearing the shoes as described to me to be -- well, non-military shoes, as described by Warrant Officer Boudreau.

At that time, I sent her home, I told her to get home, in no uncertain terms, and she was to present herself back in my office, ASAP, as soon as possible, properly dressed.

(Transcript Volume 18, p. 3018, line 8)

209. At the Complainant`s meeting with MWO Macnair, she informed him the statements made by Sgt. Caron were incorrect, and told Sgt. Caron what she understood was the purpose of the visit. According to the Complainant, MWO Macnair told her that something was going to happen and that she would have to apologize to the Committee in a formal meeting, probably in the Base Chief's office and inform them that she had received her medical chit. MWO Macnair did not set a date for this meeting. Subsequently, when the Complainant was requested to meet with him on November 26, 1991, she expected to attend this meeting to apologize to WO Boudreau and Sgt. Caron. Rather, MWO Macnair issued her the following RW:

Is warned of the following shortcoming, not having heeded previous verbal warnings: That when confronted with shortcomings by your superiors you acted in a belligerent and challenging manner contrary to the good order and discipline of the CF.

Failure to correct the above noted shortcoming will result in counselling and probation (C&P) or in release.

(Exhibit HR-1, Tab 6, Doc. 6.4)

210. The Complainant testified she understood from MWO Macnair when he gave her the RW, it was because both he and Major Couture were of the view that she did not show them the proper amount of respect. MWO Macnair testified the RW resulted from the Complainant`s insubordinate attitude to WO Boudreau and Sgt. Caron.

211. The Complainant's testimony about her meeting with MWO Macnair on October 30, 1991 is reasonably consistent with her personal notes, written sometime between November 26, 1991 and December 9, 1991, in which she documented this meeting. Her notes indicate MWO Macnair reminded her of the senior ranks of Sgt. Caron and WO Boudreau and that she had no business contradicting Sgt. Caron's statement. The Complainant indicates she knew Sgt. Caron ranked higher but that Sgt. Caron's statement about the purpose of their visit was wrong from what Sgt. Caron originally told her when they met at Base Headquarters. The notes indicate she was then told by MWO Macnair to see what happens from this incident. The notes read:

... Approximately, 1 week later, I was told I would have to apologize to the women at the Base Chief's office. I said all I had done was voice my opinion but if that was what was required of me then I would make my apologies to them. I didn't feel I had at that time done anything wrong, I had my medical chit for my shoes and as far as I knew it was simply a difference of opinion over what was considered "gaudy". ...

(Exhibit HR-1, Tab 8, Doc. 8.1)

212. MWO Macnair testified he is uncertain whether the shoe incident occurred on October 28 or October 29, 1991, because he was on annual leave. He recalls taking the complaint from WO Boudreau to the Base Chief sometime in the afternoon after his earlier meeting with WO Boudreau. According to his evidence, the shoe incident occurred on October 28, 1991 because he believes he met with the Complainant at about 0830 on October 29, 1991, the day after the incident. At this meeting, he wanted to find out how the Complainant perceived the incident and to inform her that an incident report had been filed with him, and there would be forthcoming events as a result. MWO Macnair testified the Complainant went home and came back later that morning properly dressed. MWO Macnair further testified later that afternoon she came to his office with the memorandum dated October 29, 1991, on heel height restrictions, informed him she thought she had a medical condition and standard military shoes caused a problem with her feet. He recalls her asking his permission to see a medical authority for exemption from wearing military shoes.

213. After her meeting with MWO Macnair, WO Boudreau expected that the Complainant would get a day of corporal duty and that would be the end of it. She testified that both she and Sgt. Caron felt that the Complainant should be punished for both her behaviour and failing to conform to regulations. She testified she understood MWO Macnair wanted to bring the issue to the attention of Base CWO Doherty and that about a month later, the four of them sat down to discuss the matter. According to WO Boudreau's recollection, CWO Doherty did not want to give the Complainant a punishment in the form of extra duty. On direct examination, she stated:

...So they convinced us, and the four of us ultimately agreed, that Master Warrant Officer Macnair would award her a Recorded Warning, which is not a form of punishment but an administrative -- an administrative action to improve a member's conduct and performance.

It has no bearing on promotion or -- although it stays in the unit file, a Recorded Warning has no bearing on promotion, training, postings or whatever so actually what she ended up with was lighter than what we had initially suggested to have done to her. However, we all agreed, and that's what took place.

(Transcript Volume 13, p. 2075, lines 14-24)

214. CWO Doherty's evidence under direct examination was that the members of the Female Advisory Committee brought the situation to his attention which he documented in a disciplinary form. The date is missing from the form. It contains the Complainant's name and rank, and listed the three offences reported by WO Boudreau and Sgt. Caron to CWO Doherty, as being:

1. Wearing unauthorized flat heeled with wedged sole shoes, while in uniform;

2. Wearing a large, gaudy ring while in uniform; and

3. Insubordinate attitude towards MWO Boudreau and Sgt. Caron while being informed of the dress infractions.

(Exhibit HR-1, Tab 6, Doc. 6.3)

215. CWO Doherty testified that WO Boudreau, Sgt. Caron and MWO Macnair came to see him to discuss the infraction. On a scale of one to ten, CWO Doherty rated the insubordination as a ten. He recalled making the recommendation for a Recorded Warning (RW). MWO Macnair testified that in the meeting a number of options were discussed.

216. In view of the serious nature of the insubordination, as perceived by WO Boudreau and Sgt. Caron, MWO Macnair testified they wanted to choose the proper correction that would reflect the serious nature of the Complainant's action.

217. CWO Doherty testified due process required that prior to giving an RW, a member should be given a previous verbal warning. He would not have made the recommendation to issue an RW without the Complainant receiving a previous verbal warning. However, CWO Doherty could not recall before this Tribunal anything that caused him concern on the Complainant's

file. However, as the Base Chief Warrant Officer, his practice was to pull all files pertaining to the member before making his recommendation, which he believes he did in the Complainant`s case.

218. According to CWO Doherty, most cases of insubordination would go directly to a charge, issued under the Code of Discipline, and dealt with by a CAF Tribunal. He testified it was his view, shared by MWO Macnair, WO Boudreau and Sgt. Caron, there was insufficient reason for a charge. However, they could not ignore the Complainant`s action and wanted a record of her action being contrary to regulation performance.

219. When questioned before this Tribunal about previous verbal warnings issued to the Complainant, CWO Doherty recalled an occasion when he and Sgt. Barber had to discuss with the Complainant a haircut. CWO Doherty considered that incident constituted a verbal warning. Also, he testified any shortcomings brought to her attention could be considered a verbal warning. Both CWO Doherty and Sgt. Barber testified about the haircut incident. The haircut incident referred to a haircut the Complainant received while she was working in 407 Squadron. Sgt. Barber was then a member of the Female Advisory Committee and the Base Chief called her to tell her that he was informed of a problem concerning the Complainant's hair by her supervisor. The Complainant was coming to his office and he wanted Sgt. Barber to attend and give a female perspective on the haircut. When the Complainant attended the meeting, she explained that she had not meant for her hair to be cut that way. Sgt. Barber testified she told the Complainant to get her hair cut properly and the Complainant said she would, and did.

220. MWO Macnair referred to the RW as a "wake-up call" that can be fairly serious depending upon the offence. MWO Macnair considered an RW as an administrative tool given to supervisors to assist in the correction of serious shortcomings of individuals. MWO Macnair testified that as the Unit Disciplinarian he had concerns about the issuance of an RW to the Complainant because he had not personally issued her a verbal warning. He was also concerned because he was not aware of a prior verbal warning to the Complainant.

221. This concern is also found in MWO Macnair's statement before the Board of Inquiry in July, 1992. He told the Inquiry he was not totally confident about the RW, having never issued a verbal warning to Cpl. Franke, and went to see CWO Doherty, who MWO Macnair understood had obtained the assistance of a clerk to get a general feel for how the Complainant worked in other places, 407 Squadron, in particular. His statement to the Board further indicates that it was basically the decision of CWO Doherty, that the RW was the appropriate action, and "once we were all in agreement," MWO Macnair had the RW drafted and had the Complainant sign it the next day.

222. MWO Macnair testified he had issued previous RWs during his career, and in most of the previous occasions they were preceded by verbal warnings. MWO Macnair explained that an RW should be related to a previous verbal warning. However, in his view, the seriousness of the offence would dictate whether there was a necessity for a prior verbal warning.

223. MWO Macnair testified CWO Doherty requested him to arrange for Sgt. Caron, WO Boudreau and himself to meet with CWO Doherty to determine how they were going to handle the matter. When they met, there was a discussion among the four of them about appropriate punishment for the Complainant's attitude and resulting insubordination. According to MWO Macnair, CWO Doherty led the discussion about the various options available to correct the shortcomings. They discussed a charge or an RW. MWO Macnair remembers being uncomfortable with the issuance of an RW because he had never issued a verbal warning to the Complainant for this kind of conduct and CWO Doherty told him of an incident with the Complainant at 407 Squadron. MWO Macnair understood at the conclusion of the meeting that CWO Doherty would review the facts as they pertained to this earlier incident. After a week to ten days, MWO Macnair met with CWO Doherty, who informed him that the Complainant had been counselled or had received disciplinary action for an event at 407 Squadron similar to the shoe incident. MWO Macnair then prepared the RW.

224. In MWO Macnair's response before the Board of Inquiry, when asked whether he had been aware of similar behaviour by the Complainant as before the Female Advisory Committee, he indicated the only occasion which came to his mind, was when MWO Belanger took the Complainant to task for calling a senior NCO by his first name. The Belanger incident had not been discussed or considered by MWO Macnair, or Base CWO Doherty at the time they were reviewing the previous verbal warnings prior to the issuance of the RW.

225. When MWO Macnair was first questioned in cross-examination about the Belanger incident, he had doubts about whether a verbal warning had been issued to the Complainant in that circumstance. His response in Transcript Volume 19, at p. 3091, line 8 reads:

A. I wasn't sure if he had -- well, I wasn't sure if he had given her a verbal warning. Like the doubt I had about the verbal warning was I had never issued Corporal Franke with a verbal warning, as it would pertain to the offence listed there.

Again, yes, I remember that -- I believe I considered MWO Belanger's conversation with Corporal Franke to be part and parcel of the same -- where she had demonstrated the same shortcoming. She had called a senior NCO by his first name, contrary to conduct normally expected from one of our soldiers.
(emphasis mine)

226. When questioned further, he denied any doubt on his part about the insufficiency of the Belanger incident. His evidence reads as follows:

Q. But in your mind, that wasn't sufficient, and that was why you still went back to the Base Chief because --

A. No, it would have -- it could have been and probably was sufficient. I wanted to explore all the possibilities. I think I went to the Base Chief after the original meeting we had with Sergeant Caron and himself, at his advisement, that "drop over, Don," perhaps, or words to that effect, we'll just see if, you know -- and that's why I'm sure that he did the research work he did.

Q. Now, I understand that with respect to the Master Warrant Officer Belanger incident, was there in your mind that you didn't consider it a verbal warning sufficient to constitute a verbal warning prior to the Recorded Warning; is that correct or not?

A. No, that's not correct. There's no doubt that he issued her a verbal warning, in the context of a verbal warning. A verbal warning can be anything as simple as stop doing that, to a three hour discussion.
(emphasis mine)

(Transcript Volume 19, p. 3091, line 19 to p. 3092, line 11)

227. MWO Macnair testified he considered MWO Belanger's admonishment of the Complainant, calling an NCO by their first name, demonstrative of the same shortcoming, the Complainant demonstrated later with the members of the Female Advisory Committee as conduct not normally expected from a soldier. When questioned before this Tribunal about the Belanger incident, he testified the incident could have been and probably was sufficient as a verbal warning but he wanted to explore all the possibilities.

228. He testified he reviewed the draft RW with the Base CWO Doherty and Major Couture. Lt. Vedova's only involvement in the issuance of the RW was, according to her own testimony that she was appraised after the fact. She explained the matter was out of her hands and she had no say in what would happen to the Complainant.

229. CWO Doherty's involvement in the issuance of the RW, was not unusual. According to Major Couture, any type of administrative or serious administrative or disciplinarian actions in the case of a junior ranked level, involved consultation with the Base Chief. MWO Macnair was unable to state with certainty whether he consistently contacted the Base Chief in the normal processing of these matters. Ordinarily, in the case of an RW, he testified he would seek the guidance of the member's immediate supervisor, although in his evidence, he was uncertain whether he had brought the matter to the attention of Lt. Vedova. However, he did involve Major Couture who made the final decision for the issuance of the RW.

230. Although an RW is intended as an administrative action rather than a disciplinary action, MWO Macnair testified that during the period of his posting to CFB Comox, in his role as a Unit Disciplinarian, he always issued the RW, rather than the administrative member, in the chain of command. In the same vein, MWO Macnair was asked before the Board of Inquiry why his signature was on the RW rather than Lt. Vedova. He responded at Q24:

Q24 Was Lt. Vedova on course or absent?

A24 I did that again in my auspices as disciplinarian. Albeit it is an administrative form and not a discipline. It dealt basically with a disciplinary. I was involved from the start with the Base Warrant Officer and it just seemed logical that I sign. In hindsight maybe I shouldn't.

(Exhibit R-14, Page 11)

231. Contrary to his evidence before this Tribunal, his statement to the Board of Inquiry is that he discussed the RW with both Lt. Vedova and Major Couture, and believed he discussed it with them while in the draft stage.

232. After receiving the RW on November 26, 1991, the Complainant testified she made a number of inquiries because she was scared that MWO Macnair's real agenda was to release her from the service. She contacted the BC Ombudsman's Office, WCB, her local MP and the local Women's Resource Centre Office, to get information on how to salvage her career. She also made an appointment with the social worker on the Base, Captain Doyle, to find out what she could do.

G. EVENTS FOLLOWING THE RECORDED WARNING (RW)

233. The Commission submits from this time forward, notwithstanding whether a prima facie case of sexual harassment has been established, the subsequent actions of the Respondent are discriminatory. The Commission submits, the discriminatory actions include, but are not limited to, the Respondent`s communications and correspondence with the Complainant, conducted in response to the Complainant's initial Redress of Grievance for the RW, her complaint to the Respondent of harassment and her subsequent Redress of Grievances. The Commission further submits the actions are discriminatory and demonstrate unjustifiable adverse treatment of the Complainant.

234. The Respondent submits, on the other hand, the Recorded Warning was issued because the Complainant went too far with two Senior Female Officers. The Respondent further submits the measures taken by the Complainant after receiving the RW, including her harassment complaint and all Redress of Grievances were in retaliation to fair and reasonable discipline imposed for the insubordinate conduct of the Complainant.

(i) Redress of Grievance for the RW

235. After receiving the RW, the Complainant recalls asking Lt. Vedova to clarify whether the RW was from the Base or the Section. Because the RW contained MWO Macnair's signature, she understood from Lt. Vedova's reply that it had been from the Section. The Complainant was curious about not having received previous verbal warnings. According to her testimony she told Lt. Vedova she was not going to accept the RW and would be seeking redress, and the response she received from Lt. Vedova was, "fine, that's your option, go ahead." The Complainant understood her discussion with Lt. Vedova satisfied the initial step, required for a Redress of Grievance prescribed by OR&O Article 19.26.

236. Besides making several telephone inquiries, the Complainant contacted several members on the Base. She was unhappy with the response from Captain Doyle, the social worker, who she testified told her she should be happy if the RW was rescinded and not to deal with the sexual

harassment. She contacted two other individuals who testified before this Tribunal. They were Major Kimberley Cameron and MCpl. Paul Lagacé. The Complainant had been referred to Major Cameron by Lt. Attelov.

237. There is no established date for the Complainant's meeting with Major Cameron. Major Cameron was posted to Comox from 1992 to 1994, and worked as the Base Comptroller at the Finance offices. The Complainant testified she was seeking from Major Cameron another female's understanding about sexual harassment.

238. The Complainant testified she told Major Cameron she wanted redress for the RW because she believed the RW was in direct retaliation against her for not accepting MWO Macnair's actions, the sexual innuendos and constant connotations associated with his actions, and the comments to her by Major Couture.

239. Major Cameron had a different recall of her discussions with the Complainant. She testified the meeting took approximately 30 - 45 minutes and during the interview, the Complainant related the shoe incident, a concern about not getting a PER she had been promised and receiving an RW without a prior verbal warning. The facts reveal the Complainant did not receive her PER until January 20, 1992. Hence, if the Complainant raised this issue with Major Cameron, their meeting had to occur after that date.

240. On the whole, Major Cameron testified she found her interview with the Complainant confusing and disjointed because of the three separate issues. Major Cameron did not understand the complaint was gender-related. Major Cameron recalled the Complainant seeking her assistance in writing a Redress of Grievance for the RW. Major Cameron testified she did not believe the Complainant's complaints were valid, although initially she was amenable to wordsmithing a redress for the Complainant.

241. The Complainant questioned Major Cameron about a double standard she believed existed with the Female Advisory Committee as between female officers and non-commissioned female members. As far as Major Cameron was concerned, there was no double standard. The Female Advisory Committee dealt with non-commissioned female members, and as Major Cameron explained, in the case of an officer, a concern would go directly to the officer's supervisor for handling.

242. Major Cameron had understood the Complainant was unable to obtain a medical chit for non-regulation shoes for a back problem. She testified her advice to the Complainant was to either wear regulation pumps or to go back to oxfords. Lastly, Major Cameron recalled telling the Complainant that some circumstances merit an RW without a requirement for a prior verbal warning.

243. At the meeting's conclusion Major Cameron was unable to confirm any future assistance to the Complainant but later informed the Complainant of her association with Major Couture that raised a conflict of interest. In this regard, Major Cameron felt she was prevented from providing assistance to the Complainant.

244. Major Cameron had no further direct contact with the Complainant. After the Complainant's case "started developing" on the Base, Major Cameron informed the Base Commander, Col. McGee, of her initial meeting with the Complainant. Major Cameron was subsequently interviewed by the Board of Inquiry and stated "as far as I was concerned, it was a very laughable complaint." When questioned about this statement before the Tribunal, Major Cameron testified that the complaint was not one she considered serious.

245. The Complainant then met with MCpl. Paul Lagacé. Mr. Lagacé was a member of the CAF between 1974 and 1994.

246. The Complainant knew MCpl. Lagacé had filed a complaint with the CHRC alleging discrimination by the Respondent. MCpl. Lagacé met with the Complainant three times, the first time in late November, 1991. When she first met him, MCpl. Lagacé recalled the Complainant outlining her uncomfortable feelings about her work environment she experienced over a period of time, and about comments she found offensive, and how her attempts to deal with the comments had failed. She told him these concerns were posing a serious problem in her personal life as well as her work life, and wanted to know how to deal with them.

247. MCpl. Lagacé suggested to the Complainant that she define in writing her emotional feelings, divide emotions from facts, and summarize the facts in chronological order to see if there was a pattern. He also told her the best approach was to initiate a Redress of Grievance and if she chose that process, he could provide her advice. He also testified, that based on his own experience, she could expect some degree of resistance from the various authorities.

248. About a week later, the Complainant again contacted MCpl. Lagacé. They met at his home. After looking at the Complainant's written chronology and hearing her concerns, MCpl. Lagacé separated the issues, informing the Complainant she could seek a Redress of Grievance for the RW, and to address the harassment concerns through the Human Rights Complaint Procedure. In this respect, he advised her to file a complaint addressing the harassment and the RW as retaliation by the Respondent.

249. MCpl. Lagacé testified he understood at the time the military had no policy on harassment, and for this reason he suggested she approach the CHRC. The documentary evidence reveals a policy existed and when shown a copy of the policy by Respondent Counsel, MCpl. Lagacé explained that as far as he was concerned, the procedure was there, but it was not working. He viewed the Redress of Grievance procedure and the Personal Harassment procedure as having very strong similarities in the timing, the approach, who to speak to and so on.

250. He remembers showing the Complainant a copy of the Redress of Grievance procedure and explaining to her the various steps and how to format her grievance. By the end of their second meeting, he described the Complainant's reaction as "quite overwhelmed and very depressed."

251. His last contact with the Complainant occurred a few weeks later when they bumped into each other at the Base gym. The Complainant mentioned to him she had decided to proceed with

the complaint procedure and the Redress of Grievance for the RW. MCpl. Lagacé`s next involvement was his interview by Major Bottomley during the Summary Investigation.

252. The Complainant testified she had initially combined her sexual harassment complaint with the RW in her first draft of Redress of Grievance because she felt the RW was in retaliation to her reaction to the sexual harassment, but on the advice of MCpl. Lagacé, she then separated the two issues. This resulted in two letters, the first, a Redress of Grievance for the RW filed with the Respondent dated December 9, 1991, and the second letter dated December 11, 1991, addressed to the CHRC outlining her complaint of sexual harassment.

253. Her Redress of Grievance for the RW was addressed to Lt. Col. King. Lt. Col. King did not testify before this Tribunal. On January 16th, 1992, the Complainant received a response from Lt. Col. King. Lt. Col. King's written response refers not only to her unacceptable conduct with the members of the Base Dress Committee, but addressed a new concern. He refers to a display of disrespect by the Complainant to MWO Macnair when he spoke to her prior to issuing the RW. It is unclear from Lt. Col. King's wording, whether his reference to the Complainant's display of disrespect to MWO Macnair is specific only to the shoe incident, or other encounters. Lt. Col. King also refers to the appropriateness of the RW in light of the Complainant's failure to heed a previous verbal warning issued by MWO Belanger. This is the first time the Belanger incident is raised by the Respondent. His response reads in part:

C. ...The Recorded warning was certainly appropriate under the circumstances, given your failure to heed a previous verbal warning issued by MWO Belanger and the seriousness of this particular infraction. In fact, had I been consulted, I would have directed that you be charged as well.

3. I therefore fully support the decision to place you on Recorded Warning and further advise you that any future incident of a similar nature will almost certainly result in both formal charges and C & P. As you are aware, the Recorded Warning will remain on your file, thus affording any future CO the same options. You would therefore be well advised to immediately and permanently modify your attitude and behaviour when dealing with superiors.
(emphasis mine)

(Exhibit HR-1, Tab 9, Doc. 9.2)

254. No explanation was advanced as to how Lt. Col. King came to his conclusion to deny the grievance. The only evidence this Tribunal received with respect to Lt. Col. King's investigations were later provided by Col. McGee, the next level of authority, and to whom the Complainant then advanced her grievance.

255. The Complainant testified Lt. Col. King's reference to the Belanger incident was the first time a previous verbal warning was mentioned to her. Based on her earlier communications with MWO Macnair and Lt. Vedova following the incident, the Complainant testified she thought she could ignore and disregard the incident.

256. Finding Lt. Col. King's response unsatisfactory, five days later, on January 22, 1992, the Complainant advanced the Redress of Grievance to the Base Commander, Col. McGee,

requesting an assisting officer. She responded to the points raised by Lt. Col. King, including her understanding of the Belanger incident. Having received no reply within the 14 day response time, as per the Redress of Grievance procedure, the Complainant sent a memorandum to Col. McGee dated February 12, 1992, seeking his response.

257. The Complainant testified that CFB Comox had instituted security safeguards for handling Redress of Grievances and harassment investigations, and had established safeguards about the distribution and circulation of documentation in the handling of these matters. In both her January 22nd and February 12th memorandums, the Complainant raised concerns about an apparent breach of confidentiality by Sgt. Caron and Major Couture, in handling copies of her Redress of Grievance.

258. Col. McGee testified before this Tribunal. He joined the Royal Canadian Navy in 1958 and came to CFB Comox as Base Commander, for three years, from August, 1989 to August 2nd, 1992. After leaving CFB Comox, he then spent a short three month tour at National Defence Headquarters (NDHQ) and then left the service. He explained his role, as Base Commander, encompassed more administration than operations functions. Col. McGee had approximately 2,000 personnel, both members and civilian personnel, under his command. The BTSO, who was Lt. Col. King and the Base Administration Officer (BAdmO) reported directly to him.
259. Col. McGee testified in view of the Complainant`s ten years of service, he found her refutations, which he described as long-winded, really quite unnecessary for the level of activity in question. He considered the activities relatively minor, and could not understand why the Complainant would blow up in almost every case and challenge people and become confrontational.

260. Col. McGee testified he denied the grievance for the RW because it seemed clear to him the Complainant was argumentative and belligerent and had a history. He believed the relatively routine discussion between the Complainant and the members of the Base Dress Committee was a repetition of something that had happened at 407 squadron. He came to this conclusion by reviewing the documentation. Col. McGee testified he did not become directly involved in the investigation process but relied upon his assisting officers. At no stage in the process did anyone interview the Complainant.

261. With respect to the Complainant's inquiries about the breach of confidentiality of her grievance documents, Col. McGee had the assistance of an Investigating Officer, Major MacKay. Col. McGee testified Major MacKay's investigation revealed that Major Couture had inadvertently left the grievance documents on a photocopier for a short period of time, however, the circumstances were not prejudicial to the Complainant. Col. McGee testified he spoke personally with Sgt. Caron, and he found no evidence of a breach of confidentiality on her part.

262. In Col. McGee's response to the Complainant on February 21, 1992, he refers to the Belanger incident and the ensuing discussions the Complainant had with MWO Macnair and Lt. Vedova about this incident, which "highlighted your shortcomings, constituted less formal but no less valid verbal warnings which you refused to heed." He also refers to a verbal warning the Complainant was given at 407 Squadron and concludes that her actions with the Female Advisory Committee were sufficient in themselves to justify a RW without the necessity of a

prior verbal warning.

263. In his next paragraph, he writes:

> 10. In the process of investigating the circumstances surrounding your Recorded Warning I have been dismayed by your reluctance to accept constructive criticism and guidance when your performance and quality or quantity of work are not at the expected standard. I have also been shocked by the tolerance of your supervisors who put up with your aberrant behaviour in dress, deportment, and self-discipline. As near as I can tell, your PERs do not accurately reflect this anti-military behaviour. I intend to ensure that your supervisors start supervising you sufficiently to motivate you to become the corporal you are capable of being. In the final analysis, your desire to excel as an individual is up to you. However, I will not permit my supervisors to continue to tolerate behaviour which is belligerent, insubordinate or in any way inappropriate. (emphasis mine)

(Exhibit HR-1, Tab 11, Doc. 11.4, Para. 10)

264. Col. McGee could not recall before this Tribunal his source of information about the Complainant's dress and deportment, and the verbal warning at 407 Squadron. The facts reveal that prior to Col. McGee's letters of February 21, 1992, Major Bottomley had published her Summary Investigation Report. Annexed to her report, were copies of the signed statements of all the individuals she interviewed, and some of these individuals commented about the Complainant's dress and attire. Also annexed to the report were copies of two interviews with the Complainant and a copy of a verbal warning dated September 30, 1989, and signed by PO Pistun. Arising from Col. McGee's responses under cross-examination, it is reasonable to conclude Col. McGee had Major Bottomley`s report and this provided a source of information about the Complainant`s dress and the verbal warning by PO Pistun.

265. On February 26, 1992, the Complainant had requested Col. McGee to advance her Redress of Grievance for the RW to the next step. She wanted her grievance forwarded to the third level of adjudication, to Air Command. On March 3, 1992, Col. McGee wrote to the Complainant that he did not forward her Redress of Grievance on her RW to Air Command, "because of the combining of related and unrelated factors". (HR-1, Tab 15, Doc. 15.2). This referred to the Complainant raising the issue of mishandling of her grievance document and the apparent breach of security by the Respondent.

266. On March 18, 1992, the Complainant resubmitted her Redress of Grievance on her RW to Col. McGee, setting out very briefly that she did not believe she had received a prior verbal warning, and stating she believed her redress had been handled in a prejudicial manner and not fairly dealt with. Following this request, on March 23, 1992, Col. McGee forwarded the Complainant's Redress of Grievance request to Air Command. In his correspondence, he refers to the Complainant's other ongoing Redress of Grievances, dealing with her PER score and the harassment complaint.

(ii) The Summary Investigation and Redress of Grievance into the Harassment/ Abuse of Authority Complaint

267. The Complainant formally addressed her concerns of harassment to the Respondent on December 16, 1991 by sending a memorandum to the Base Technical Services Officer (BTSO), Lt. Col. King. She wanted him to stop the retaliation she felt she was being subjected to. She entitled the memorandum, "Harassment and Abuse of Authority". She explained the reference to the abuse of authority referred to MWO Macnair's continuing abuse of authority over her. She testified she was unable to write "sexual harassment" in the document because of her concern for repercussions.

268. On December 16, 1991, the Complainant handed her Memorandum on Harassment and Abuse of Authority to Lt. Vedova. Major Couture was absent at the time, and Lt. Vedova was the acting Base Transportation Officer. Lt. Vedova took the memorandum to Base Headquarters. She later called the Complainant into Major Couture's office to relay a message from Lt. Col. King. In essence, the message was that if the Complainant had not already contacted the CHRC, she should reconsider her actions or disciplinary action could be taken against her. The Complainant informed Lt. Vedova that she had already contacted the CHRC.

269. During that same afternoon, the Complainant received a telephone call from Major Bottomley, who informed her that a Summary Investigation concerning her complaint of harassment had begun. As the Investigating Officer, Major Bottomley requested an appointment with the Complainant that same afternoon. The Complainant testified she told Major Bottomley of her apprehension and reluctance to meet with her. The Complainant testified she was told by Major Bottomley either they meet or there would be no investigation.

270. Prior to meeting with Major Bottomley, the Complainant was requested by Lt. Vedova to attend Lt. Col. King's office. Accompanied by Lt. Vedova, she met with Lt. Col. King. The Complainant testified Lt. Col. King told her that he had been incorrect in telling her that disciplinary action would be taken against her for contacting the CHRC. According to the Complainant, Lt. Col. King told her he had obtained clarification from the AJAG (Judge Advocate General). However, the Complainant testified Lt. Col. King then stated his personal view that she should not contact any outside sources but let the military deal with the matter. The Complainant testified Lt. Col. King's communication of December 16, 1991, did not alleviate her fears.

271. The Complainant believes she met with Major Bottomley on December 17, 1991. She recalls telling Major Bottomley about events from her first days in the Base Transportation Office, her fears, feeling trapped and intimidated, and that she was no longer accepting this behaviour after the postcard incident. She recalled Major Bottomley asking her if her boss, MWO Macnair, had ever specifically asked her for a date. This question bothered the Complainant. She felt Major Bottomley misunderstood her complaint. The Complainant told Major Bottomley the issue was not about dating, but the other things MWO Macnair did.

272. She next met with Major Bottomley on December 23, 1991. This meeting was initiated by the Complainant as a result of anonymous telephone calls she received in the middle of the night. These calls were made on December 15, December 18, followed by a third call on December 21. The Complainant testified on each occasion she would answer the call and there was no response. The calls upset the Complainant.

273. Major Bottomley recommended the Complainant submit a military police report which she did. After filing this report, the Complainant testified she sat at her desk and started crying. She wanted to see the Base Doctor and Major Couture said he would make an appointment.
274. She first saw Dr. Jacques, the Base Doctor, about these calls on December 19, 1991. He prescribed a medication, Ativan, and noted her stress and sleep disturbance. According to Dr. Jacques' medical note of December 23, 1991, he again saw the Complainant and suggested she take the rest of the day off, and file a report with the RCMP about the telephone calls. His medical records indicate, "tension +++ " and refers to the Complainant not sleeping, and the phone calls in the middle of the night (HR-7, Tab 9, pg. 49). The Complainant testified she told Dr. Jacques about the sexual harassment and she felt the RW was retaliation by the men who had sexually harassed her. According to the Complainant, Dr. Jacques' response was: "think what those poor men are going through". This response further upset the Complainant.

275. Towards the end of January, 1992, the Complainant was asked by Major Bottomley to sign her statement documenting their interviews. The Complainant testified she reluctantly signed the statement. The Complainant did not accept some of the responses reflected her answers to Major Bottomley. She requested a copy of the interview tape and was informed by Major Bottomley it was not longer available.

276. Major Bottomley's report of the Summary Investigation dated January 27, 1992, submitted to Lt. Col. King, found no basis to the Complainant's harassment complaint. The Complainant did not receive a copy of Major Bottomley`s report. Major Bottomley concluded in her report that the Complainant's complaint was a reaction to being placed on Recorded Warning. Major Bottomley made the following recommendations:

a. Maj Couture should be counselled on the impact of inappropriate statements regardless of how he feels an individual might interpret such remarks, and he should be warned against any future infractions.

b. Supervisors at all levels should be educated on human rights and the intricacies of harassment.

c. Cpl Franke should be placed under close, direct supervision and on a regular basis, formally counselled on her performance, conduct, and response to direction. Any discrepancies should be recorded and actioned accordingly.
(emphasis mine)

(Exhibit R-7, p. 7/8)

277. Due to illness, Major Bottomley was unable to attend this hearing because of a medical condition. Nevertheless, arrangements were made to have her evidence given in the absence of the Tribunal. The Tribunal has the benefit of the transcription of her testimony. It is noted at the commencement of her direct-examination that Major Bottomley testified the medication and treatment she receives has affected her memory and she has difficulty remembering things.

278. Major Bottomley testified that when she commenced her investigation she was not fully aware of what harassment could be and supplemented her knowledge by reading the definition in military books and went "somewhere in town and got information on harassment".

279. Major Bottomley testified she initially felt the Complainant had a valid complaint. Major Bottomley interviewed individuals from the BTnO who were directly involved in the complaint, as well as some of the Complainant's former supervisors and one former co-worker at 407 Squadron. Major Bottomley's initial views about the validity of the Complainant's complaint, began to change after her interview with Cpl. Kelley Eadie. She testified that comments from Cpl. Eadie about the Complainant going to file a complaint of harassment if things did not go her way. Other comments by Cpl. Eadie motivated Major Bottomley to look further into how the Complainant responded to situations, at both a social or working level. Major Bottomley interviewed former supervisors and peers of the Complainant, in addition to the officers and non-commissioned members of the BTnO.

280. Cpl. Eadie's statement to Major Bottomley was included in the Summary Investigation Report. Although Major Bottomley relied on Cpl. Eadie`s testimony, in two responses Cpl. Eadie admits that she did not know what happened, but was relating an impression. I note there is no date referencing the events referred to by Cpl. Eadie. We refer to questions and answer nos. 30 and 41 of Exhibit R-7, Tab P which are reproduced below:

Q30. You mentioned earlier that Cpl Franke was going to press harassment charges a long time ago. Can you tell me why?

A30. I don't know what happened, but MWO Macnair had to chastise her for something, I don't know, and then I came upstairs and she was in a bad mood and I said what's going on, and she said she was going to press sexual harassment charges cause she said that he looked at her bum. Or something like that. And she said, did you see him, and all this stuff. And I said that I didn't see nothing. So I then talked her out of it. I said, listen Kim, you don't know what you're getting yourself into. Just get along with people, you know. Then she calmed down and everything was great again.

Q41. What do you think over-all, what her opinion was of the MWO?

A41. You know, she used to come down there, and sit in his office and talk to him and everything else, and have a good old time. She'd bring the paper work downstairs so that he did not have to go upstairs to get it, and stuff like that. Everything was great unless she got into trouble. He was nice to her. And as long as he was nice to her, she was fine. But if he had to say something, then she didn't like it. But as far as I'm concerned, it was never harassment, it was something that she had coming to her. She deserved it. Most of the time, when she got in

trouble I was never around to see what was going on anyway. She was telling it. Telling her side of the story. But whenever MWO Macnair gave her trouble it was always in front of somebody like the Lt, or somebody like that. When he had to give her trouble, like drop her down a few notes, he did it in front of the Lt and stuff like that. Even when he gave me trouble he always made sure that someone was present in the room - like for my BMI.
(emphasis mine)
(Exhibit R-7, Tab P)

281. Corporal Kelley Eadie testified before this Tribunal that the Complainant was criticized by MWO Macnair for her behaviour and this upset the Complainant. Cpl. Eadie testified that on at least two occasions, in June and August of 1991, the Complainant wanted to press sexual harassment charges against MWO Macnair. Cpl. Eadie testified about the Complainant coming upstairs in the BTnO and being upset with MWO Macnair. She testified the Complainant asked her if she saw MWO Macnair look at her bum, Cpl. Eadie replied that she never saw anything. Cpl. Eadie further testified the Complainant wanted to press sexual harassment charges and she wanted Cpl. Eadie as a witness. Cpl. Eadie responded that she did not want to be involved and she told the Complainant she needed to, "smarten up and get along with people". Cpl. Eadie recalls the conversation taking place around June, 1991. That was the only occasion Cpl. Eadie recalls the Complainant mentioning sexual harassment. On other occasions, she recalled the Complainant mentioning strictly harassment.

282. Cpl. Eadie was unable to elaborate on the specifics of either the Complainant's behaviour, or the incidents surrounding MWO Macnair's criticism of the Complainant's behaviour. Cpl. Eadie viewed the Complainant's sexual harassment charges as a kind of retaliation and lashing out by the Complainant against her supervisors whenever she got into trouble with them. Cpl. Eadie testified that as late as two weeks prior to the Complainant's complaint of harassment, she received a telephone call from the Complainant, and found the Complainant to be her usual happy self, with no indication of an impending problem.

283. Major Bottomley had concluded the Complainant was not offended by the alleged remarks of Major Couture and MWO Macnair, and therefore, not harassed. She attributed her findings to the observations of the Complainant provided by the various individuals she interviewed.

284. Major Bottomley testified under direct examination that she did not feel that the complaint was justified because there was no hard evidence from MWO Macnair that anything had happened, and the postcard in question had vanished. With respect to MWO Macnair flexing his muscles, she was told by him he had been doing some weight lifting, and there was no harm intended to the Complainant if he had flexed his muscles. As far as Major Couture's "biker mama" comment, Major Bottomley found it was just meant in fun.

285. Major Bottomley made three findings that she listed at the conclusion of her report. The three findings were:

a. Although Maj Couture made remarks to Cpl Franke that were totally inappropriate, there was no harassment intended.

b. There was no evidence of harassment by MWO Macnair.

c. Cpl Franke's complaint is a reaction to being placed on recorded warning.

(Exhibit R-7, p. 7/8)

286. Prior to listing her findings, Major Bottomley expressed the following opinion of the Complainant, describing her as an "emotionally immature, egocentric, and possibly an unstable individual who is unable to accept the discipline of the Canadian Forces." (Exhibit R-7, P. 7/8)

287. Major Bottomley testified before the Board of Inquiry in July, 1992. She was asked to explain the basis of her recommendations in view of CFAO 19-39, the policy on personal harassment. The Board inquired about a section in CFAO 19-39 that requires Commanding Officers to ensure that members or civilians who lodge a complaint in good faith are aware that their action in formalizing a complaint will not in any way jeopardize or penalize their future service or employment opportunities. Major Bottomley felt the complaint was made in good faith because she felt the Complainant confuses things. Major Bottomley explained to the Board that given the evidence before her, she found the complaint was the result of the RW and she had to make further recommendations on how to react to it.

288. Another of Major Bottomley's statement to the Board was that the Complainant started looking back at the remarks made to her after she had received her RW and started to use these remarks in her harassment complaint. She also indicated to the Board of Inquiry the recorded warning was one of the indicators to her that a problem existed with the Complainant.

289. Included in Major's Bottomley's report was a paragraph listing some of the terms individuals interviewed by Major Bottomley used to describe the Complainant. These included:

self-serving...manipulative...belligerent...strong-minded...non-conformist...different...uppity...non-military...outgoing ...expressive....bubbly...spinny...flippent...bouncy...yet rude...impolite ...obnoxious...disrespectful...aggressive...argumentative... subordinate ...argumentative...insubordinate...abusive.

(Exhibit R-7, pg. 5/8)

290. Major Bottomley also included a paragraph regarding language the Complainant was heard to use in the canteen, individual comments about the Complainant's choice of clothing, her actions, and the way she moved. That paragraph reads as follows:

o. Several individuals made reference to Cpl Franke's suggestive use of language in the canteen to include remarks such as: "I gotta find a man." (Annex D, A14); "I'm not getting any." (Annex D, A14); "I gotta get some." (Annex D, A22); "Sex on a beach." (Annex F, A5); and "I sure wish I could get laid." (Annex P, A22). There were also comments about Cpl Franke's choice of attire (Annexe M, A4 and Annex P, A40). Lt Vedova described Cpl Franke's actions as very

suggestive and that she blatantly moved in a provocative manner. She stated that she spoke to Cpl Franke about this (Annex F, A4).

(Exhibit R-7, page 5/8)

291. Major Bottomley was asked in cross-examination why she included these paragraphs in her report. She testified her understanding of harassment was that an individual had to be offended by remarks and that these paragraphs support her finding the Complainant could not have been offended by what was said to her. When questioned further, she did not recall whether as part of her investigation she examined the language generally used in the canteen or to whom the above-noted comments were made.

292. Major Bottomley's findings were accepted by Lt. Col. King. In a memorandum dated February 17, 1992, Lt. Col. King communicated his response to the Complainant. He informed the Complainant that Major Bottomley had found no harassment, personal or sexual, had taken place, and that her complaint was a reaction to being placed on RW. He also informed the Complainant that he was accepting Major Bottomley's recommendations that the Complainant be placed under close, direct supervision, counselled on her performance and conduct and response to direction on a regular basis. In his final paragraph he states:

4. (PB) In summary, I am very disappointed that you chose to lodge a complaint of harassment in an attempt to negate proper administrative action which was initiated to correct your unacceptable attitude and conduct toward superiors. I therefore urge you to accept the validity of your Recorded Warning and to immediately take any steps necessary to address your personal deficiencies in those areas.
(emphasis mine)

(Exhibit HR-1, Tab 9, Doc. 9.3)

293. Following Lt. Col. King's response on her harassment complaint, the Complainant initiated a Redress of Grievance, requesting in part, a new investigation. This was her second Redress of Grievance. On February 20, 1992 the Complainant initiated a Redress of Grievance for the Summary Investigation/Harassment Complaint to Lt. Col. King. In this redress, she cited an incident in the Clothing Stores as another example of the Respondent's continued harassment. This incident arose as a result of information the Complainant received from her friend on the Base, Cpl. Mona Legault, who worked at Clothing Stores.

294. On her breaks, the Complainant would sometimes go to Clothing Stores to confide in Cpl. Legault. Cpl. Legault testified about being informed of a meeting, held in her absence, when other Clothing Stores employees were requested to record all visits that Cpl. Legault received from her husband and the Complainant. Cpl. Legault told the Complainant about the meeting.

295. Lt. Col. King referred to the Clothing Stores incident in his response to the Complainant's Redress of Grievance on the Summary Investigation/Harassment Complaint on March 6, 1992. In her original redress, the Complainant had raised concerns about the completeness of the

statements she signed at the request of Major Bottomley. In his response, Lt. Col. King assured her of the accuracy and completeness of the transcript, as well as highlighting the latitude granted and the patience shown her by Major Bottomley during the Summary Investigation. He refers to the Clothing Stores incident and denies orchestrating a continuing campaign of harassment against her. He informed her that WO Cochrane's direction to his staff in Clothing Stores about visits to Cpl. Legault were general in nature and dealt with all socializing in Clothing Stores.

296. This latter information does not accord with the findings of Major MacKay who conducted a Summary Investigation of the Clothing Stores incident. I do note, however, that Lt. Col. King's response was written prior to Major MacKay's report which is dated April 15, 1992.

297. According to Col. McGee, he had ordered Major MacKay to conduct a Summary Investigation into the Complainant's allegation of further harassment arising from the Clothing Stores incident. The Complainant had also raised a further concern of a breach of security of her grievance documents by Major Couture and Col. McGee ordered Major MacKay to investigate both of these concerns.

298. The documentary evidence reveals that in Major MacKay's report of April 15, 1992 to Col. McGee, both the Complainant and Cpl. Legault's husband had been singled out at a meeting on February 13, 1992, when WO Cochrane, Cpl. Legault's supervisor, briefed the staff at Clothing Stores about reporting visitors to Cpl. Legault. Major MacKay's report contained an interview with WO Cochrane, Cpl. Legault's supervisor. WO Cochrane's statement from the interview confirm the Complainant's impression that she was being singled out:

Q. Was a direction given to the staff of Base Clothing Stores that Cpl Franke and Cpl Couture were to be monitored if they were in the area, specifically if they were in there to see Cpl Legault?

A. The exact ramifications grew from this Sir. Cpl Legault had work problems ... she was borderline under action administratively. Part of that dealt with excessive waste of time socializing and the two individuals that you've just named as being prime candidates as an interference with her work. She worked in an area that they had no business being in and therefore it interfered with the operation and that is why the order was given. It was not to belittle, begrudge or anything else. It was dealing with a work related problem with Cpl Legault and that's why I gave the order.

Q. So it had nothing to do with Cpl Franke or Cpl Couture?

A. It had nothing to do with either one of them in any way, shape or form. They were welcome there for business because it is a place of business and it's open to the public at all times. But due to the problem that I was having with that individual and because of her place of employment, they had no business nor did they have a valid reason to be there.

Q. Was the order issued specifically towards Cpls Franke and Couture?

A. No. I instructed my staff to report on all visitors to Cpl Legault, however, Cpls Franke and Couture were singled out as the two main individuals contributing to Cpl Legault's poor work performance as a result of their constant socializing in Cpl Legault's work area.

Q. Did you direct your staff to tell Cpl Franke and Cpl Couture to stay away from Clothing Stores?

A. No.
(emphasis mine)

(Exhibit R-1, Tab 9, Annex D, D-1/2)

299. With regard to the security breach complaint by the Complainant, Major MacKay had found copies of the Complainant's grievance memo were inadvertently left on a desk in the Base Transportation Office area, and concluded Major Couture was not personally responsible.
300. In both of these incidents, Major MacKay reports there was no malicious intent on the part of the military. In the report he refers to the Complainant feeling persecuted and to her indiscriminate and unfounded accusations and recommends:

6. Cpl Franke appears to feel she is being persecuted at every turn. Her indiscriminate and unfounded accusations of harassment against anyone in a position of authority and her apparent lack of faith in the integrity of the organization in which she works have degraded morale and, contributed to the breakdown of unit cohesiveness, the very issue that CFAO 19-39 para (3) addresses as the bane of harassment in the workplace.

Recommendations

Cpl Franke be counselled on the disruptive nature of her incessant complaints against her superiors and on the genuine intent of the regulation issued as CFAO 19-39.

Further abuse of the intent of CFAO 19-39 should not be tolerated.

If Cpl Franke genuinely feels that she is the target of a perceived conspiracy by her superiors she should be referred to the Base Surgeon or the Base Social Worker for psychological counselling and assessment.
(emphasis mine)

(Exhibit R-1, Tab 9, pp. 5/6 and 6/6)

[CFAO 19-39 is the policy on personal harassment]

301. Cpl. Legault testified before this Tribunal and first became aware of Major MacKay's Summary Investigation into the Clothing Stores complaint and WO Cochrane's statement at this hearing. She testified that at the beginning of 1992, she was called in about her work performance but at the time her problem was personal not social. Cpl. Legault disagreed that

WO Cochrane was having problems with her, by pointing to the fact that her PER score for that year was a 7.4, a similar rating to the previous year`s score.

302. On March 11, 1992, the Complainant executed a complaint form with the CHRC alleging discrimination by the CAF, on the ground of sex, contrary to section 14(1) and (7) of the CHRA. On the same day, she advanced her Redress of Grievance on the Summary Investigation/Harassment Complaint to the attention of Col. McGee, the second level of redress. In her correspondence, she reemphasizes her belief that she was threatened by Lt. Col. King with disciplinary action for submitting a grievance to the CHRC and stresses once again her concern about the accuracy and completeness of the Summary Investigation.

303. The documentary evidence reveals a written request was made on March 17, 1992, by the Complainant to Col. McGee to reopen the Summary Investigation. That request was referred to in Col. McGee's response to the Complainant dated April 3, 1992. In that memorandum, Col. McGee welcomed the Complainant to expand upon her statement to Major Bottomley and suggested she arrange an interview with Major Bottomley. He replied that her conclusions about any disciplinary action for reporting to the CHRC, was incorrect.

304. On April 3, 1992, the Complainant wrote to Col. McGee expressing her desire not to see Major Bottomley again because of her concern over animosity by Major Bottomley and her lack of experience "in the psychological field." She also expresses disagreement with his finding that she had not been threatened by Lt. Col. King about contacting the Commission. (Exhibit HR-1, Tab 17, Doc. 17.3)

305. In the spring of 1992, the Complainant wanted her grievance to be handled off the Base. She sent two requests to Col. McGee to forward her Redress of Grievance on the Summary Investigation/Harassment Complaint to Air Command. Her first request is dated April 3, 1992, followed two weeks later by a second request dated May 14, 1992.

306. On April 13, 1992, Col. McGee ordered Major Bottomley to conduct a supplementary Summary Investigation into the harassment allegations, specifically with respect to determining whether additional information from the Complainant was in accordance with her original statements, and whether amendments should be included in Major Bottomley's initial report. Major Bottomley was to assess the impact, if any, on the original report. Major Bottomley's investigation was to be concluded no later than May 1, 1992. On May 14, 1992, Col. McGee wrote to the Complainant advising her that he had extended the due date for Major Bottomley's report because Major Bottomley's primary duties required her to handle a tragic crash of an aircraft. Col. McGee was unable to explain under cross-examination the reason he had written his memo of May 14, 1992, because the documentary evidence indicates that Major Bottomley's supplementary Summary Investigation memorandum was dated May 6, 1992, one week earlier than Col. McGee`s memo. The Complainant testified that, at this point, she believed, the Respondent would use any tactic available to them to keep the investigation into her grievance at CFB Comox.

307. Major Bottomley was asked by Col. McGee to review the Complainant's original statements about the Summary Investigation. Major Bottomley testified that she could not recall the

individuals she interviewed for her supplementary report. She believed she did not personally interview the Complainant.

308. As part of the Supplementary Summary Investigation review, the Complainant provided further statements. The documentary evidence contains a statement by the Complainant to MWO Janssen. He had questioned her about the length of time she had been traumatized over Lt. Col. King's initial statement about disciplinary action for complaining to the CHRC (the communication made on December 16, 1991). The Complainant testified about this statement and recalls telling MWO Janssen: "Sir, I am still traumatized over that, because every time I turn around someone else is calling me and so it hadn't stopped anyway".

309. Major Bottomley`s rationale for the recommendations contained in her supplementary report reflected her response before the Board of Inquiry, that she just felt this was the thing to do. With respect to Major Bottomley's supplementary report, she made some minor additional changes and amendments to the original Summary Investigation report. These changes had no impact on her initial findings. Her report contains the following:

4. Findings

Cpl Franke appears to have difficulty in perceiving information which results in the distortion of the facts. Also, she seems to have difficulty in discerning the facts from information that is hearsay or opinion.

All indications are that Cpl Franke will continue to pursue this matter until she gets her own way.

The findings at ref are valid. A review of the evidence resulted in a reenforcement of the finding at para 4c of ref which states that Cpl Franke's complaint is a reaction to being placed on recorded warning.

5. Recommendations

a. The recommendations at ref should be actioned accordingly.

b. Cpl Franke should be evaluated by a professional psychiatrist to determine if she does have a perceptual problem.

c. Because Cpl Franke presently has access to personnel documents, recommend a Change of Circumstances Report to suspend her security clearance until a psychiatric evaluation is completed.
(emphasis mine)

(Exhibit R-7, 33 pages after Annex R, page 14/15)

310. Col. McGee testified he then scheduled a meeting for May 22, 1992, with the objective to reduce the rhetoric and to help the Complainant and everyone else deal with the issue of her

alleged harassment and to come to some resolution. The Complainant was reluctant to attend this meeting and expressed her reluctance on May 21, 1992, to the Base Commander. Col. McGee's preference was to have all three of the Complainant's supervisors, Major Couture, MWO Macnair and Lt. Vedova, attend the meeting but due to the Complainant's reluctance, he decided to have only Major Couture attend. Col. McGee testified the meeting was outside the normal kinds of review processes and investigations. The purpose of the meeting was to resolve the issues. Col. McGee had never conducted this type of meeting before.

311. According to the Complainant she attended the meeting at 9:00 a.m. accompanied by Capt. Potts, who had been appointed as her assisting officer, and the social worker, Capt. Doyle. While they were standing outside the meeting room, she testified she pulled a tape recorder from her purse and told them she wanted both to see that she was taping this meeting.

312. Other attendees at the meeting included the BTSO, Lt. Col. King and the BAdmO, Lt. Col. van Boeschoten, the two officers who reported directly to Col. McGee. The Complainant taped the meeting without seeking Col. McGee's permission. The transcript of the meeting was included in the documentary evidence.

313. The meeting focussed on the Complainant's three complaints against Major Couture, the "sexatary" comment, the "biker mama" comment and the comments about her financial well-being and ability to afford a home. Col. McGee introduced each of the separate complaints, asking Major Couture to explain the context in which his comments were made, and then inquired about the Complainant's understanding of the comment once the context was provided by Major Couture.

314. In two separate contexts, Col. McGee referred to an apology by Major Couture. The first arises when he questioned Major Couture about the "biker mama" comment. The transcript reads:

MAJOR COUTURE: On the subject of harassment, we have learned a lot recently and I understand -- I regret, in that perspective, having made the comment.

COLONEL McGEE: Do you understand his feelings on that issue?

CORPORAL FRANKE: Yes I do.

COL. McGEE: Do you accept his apology?

CORPORAL FRANKE: I think the situation has gone beyond acceptance or non-acceptance of an apology though. I've (a short pause) --.
(emphasis mine)

(Exhibit HR-3, p. 16)

315. After questioning Major Couture about his use of the term "sexatary" he asked Major Couture the following:

COL. McGEE: Do you have anything to say to Cpl. Franke about your use of that term?

MAJOR COUTURE: Just that it wasn't meant personally and if it offended you, I apologize.

COL. MCGEE: Do you have anything to say? It did offend you?

CORPORAL FRANKE: Most definitely.

COL. MCGEE: Do you understand Major Couture's explanation?

CORPORAL FRANKE: No, I don't.
(emphasis mine)

(Exhibit HR-3, page 23)

316. Col. McGee testified he felt Major Couture's apologies were appropriate. At one point, in the meeting, after canvassing both Major Couture`s comment and the Complainant`s understanding about Major Couture's comments, Col. McGee asked the Complainant what more he or Major Couture could do following what he referred to as Major Couture's apology to her. When the Complainant started to respond, "Well, I don't feel a verbal apology -- ," she then abruptly left the room in tears and went to the washroom. According to the Complainant she was too upset to continue the meeting. (Exhibit HR-3, Page 31)

317. The Complainant testified she did not believe Major Couture apologized directly for the harassment. A direct apology in her view would have been: "Cpl. Franke, I am sorry that I called you a 'sexatary' and I will not do it again. Do you accept my apology?" If Major Couture had apologized in this manner the Complainant testified she would have accepted his apology. (Transcript Volume 4, page 549)

318. The Complainant testified she wanted an apology for the harassment and the RW removed from her record because she considered the RW retaliation against her. She further testified she felt threatened at the meeting because there was no one there to support her. She considered Capt. Doyle and Capt. Potts "part of the system". She testified under cross-examination as follows:

Q. Just a minute, before you go there I mean, the question that I asked you is you felt threatened at that meeting?

A. Yes, I did.

Q. What part of the meeting was threatening to you?

A. The whole scenario. I'm a corporal, I'm not allowed any support. Captain Doyle is part of the system. Captain Potts is part of the system. So I'm sitting on one side of the table with the Base Commander at the end of the table, or the head of the table, and my harasser across from me with Lieutenant-Colonel King, and I believe the Base chaplain was in there somewhere.

Who was there to support me? I had asked for a lawyer. I was told no, I could not have one. I had asked to bring Manon Bertrand in there, I was told no, she was not a military person, she could not come in there. Who was there for my support? I'm a corporal facing a major. Now, who's going to support me?

(Transcript Volume 4, page 558)

319. Col. McGee testified he was surprised by the Complainant's abrupt departure from the May 22nd meeting. He considered the meeting had been going fairly well. He found the Complainant quite comfortable in talking with himself and Major Couture. He further testified that after the Complainant returned from the washroom, he invited her into his office to discuss whether they should continue with the investigation. While seated chatting, he recalled the Complainant reaching into her purse and pulling out a handkerchief and a tape recorder fell out on the coffee table. He did not question the Complainant about the tape recorder.

320. He testified the Complainant then agreed to go back into the meeting. According to Col. McGee, they finished the meeting. Col. McGee did not provide any further details about what transpired after they reconvened the meeting. The Complainant was not questioned about returning to Col. McGee's office, the tape recorder falling from her purse or finishing the meeting.

321. Three days later on May 25, 1992 and without waiting for a written response from Col. McGee, the Complainant wrote to Col. McGee, referring to the May 22nd meeting and Col. McGee's findings. At the conclusion of her correspondence to Col. McGee, she requests that her redress be sent to Air Command since she did not agree with his findings on May 22nd. Her letter reads in part:

Sir, after hearing this and watching my emotional breakdown from this you then came to the conclusion that his behaviour, although being offensive was not harassment. Even though I had indeed complained to Lt. Vedova about the behaviour, this was not passed on and I was left with the emotional upheaval of fighting for my integrity on my own....

(Exhibit HR-1, Tab 17, Doc. 17.10)

322. Col. McGee testified he was surprised to receive the Complainant's correspondence of May 25, 1992 because he had not produced his findings. He was also surprised at the amount of detail pertaining to the meeting referred to by the Complainant. Col. McGee was not aware the Complainant had tape recorded the meeting. He had noted the Complainant's letter was copied to the Director of the Canadian Human Rights Commission and to a local member of Parliament.

323. Col. McGee was not only surprised but dismayed to see the comments of the Complainant included in her May 25, 1992. One comment that particularly troubled Col. McGee was:

To date it appears my requests have been stalled on this base with every possible tactic available to yourself and your staff being used. The latest being the meeting that was called on

the 21st of May, which I was ordered under Military Code of Order and Discipline to attend and subsequently ordered to respond to questions put forth by yourself.

(Exhibit HR-1, Tab 17, Doc. 17.10)

324. With respect to the Respondent's Redress of Grievance on the Summary Investigation/ Harassment, he defended the actions of himself and his staff, who he described were overwhelmed with the volume of work they had done on the Complainant's behalf. This involved finding out the real circumstances, to understand the real concerns of the Complainant, and that once the procedure is initiated, it has to be followed through, and it takes time to vet the various levels of review necessary.

325. In view of the tremendeous effort expended by Col. McGee and his staff to find out exactly what was behind all of her allegations, the responses from the Complainant never seemed to acknowledge any work that anyone was doing on her behalf. He described the Complainant as being less than helpful in Major Bottomley's investigation, and that she continued to cast aspersions upon Col. McGee and his staff, in having failed to abide by his caution that she change her attitude and tone. He felt that following the May 22 meeting and her letter to him of May 25, 1992, that it was time to take more serious action.

326. Col. McGee testified he disagreed there was any stalling by either himself or his staff. He was following the levels of redress and in his experience, it took time to review the process. He did not consider the May 22nd meeting a "tactic", referred to by the Complainant, but an attempt to find out with the individuals involved what the real circumstances were. He found the Complainant's reference to "Military Code of Order and Discipline," a very strange phrase for a routine meeting. He believed a tremendous effort had been made by him and his staff to find out exactly what was behind the circumstances underlying her allegations, and how they could improve the situation. For example, he testified, an effort had been made to improve Base relations with the commencement of harassment training after receiving the Complainant's first memorandum dated December 16, 1991, which training was never acknowledged by the Complainant.

327. The Complainant testified her reference to stalling tactics was not to lay blame but an assumption that Col. McGee and his staff were using tactics available to them to keep her grievance at their level than comply with her repeated requests since May 14th, 1992, to forward her grievance to Air Command.

328. Col. McGee's response to the Complainant's May 25, 1992 memorandum is dated June 8, 1992. He refers to the investigation into the Clothing Stores incident and informs the Complainant he found no direction was given to report any specific customers or visitors, her name did not appear on any correspondence or record regarding that procedure, and as a result, her allegation was unfounded.

329. Col. McGee then addresses the Redress of Grievance, informing the Complainant he found no evidence of harassment by Major Couture and notes part of Major Couture's defence is that he had no knowledge of her concerns. He makes reference to Lt. Vedova's acknowledging that the

Complainant had mentioned to her being offended by Major Couture's discussions about the affordability of her home, and later about his use of the word, "sexatary" but that the "biker mama" issue was not raised with Lt. Vedova. Col. McGee further writes that Lt. Vedova did not feel the Complainant's comments warranted any further action since they were only mentioned once and there was no more indication from the Complainant that Lt. Vedova should pursue the matter further.

330. Col. McGee wanted the Complainant to stick to the facts, and not to bring other issues into her Redress of Grievance. Notwithstanding this direction, he raises new concerns in his response to the Complainant on June 8, 1992, when he denied her Redress of Grievance for harassment:

9. At the hearing you stated that you found profanity in the workplace offensive. When asked if you ever use profanity, you replied "No, never in the workplace." I have received testimony otherwise. I have been told that throughout your time at the Base Transportation Section you swore frequently using the same type of language in front of and to your co-workers that you have claimed to be offended by in your complaints. I have also been told that you frequently dress provocatively and acted suggestively and licentiously throughout that same period. That is not the type of behaviour one would expect of someone who has claimed otherwise as you have. While I do not use this information to condone the actions of others, it calls into question your integrity and credibility when it is reported that your own behaviour is worse than that of any of the individuals you have made allegations against.

10. I have concluded my investigations into your allegations of harassment and find:

a. No evidence of harassment;

b. Major Couture was insensitive and his behaviour was inappropriate as discussed above;

c. Lt. Vedova was negligent in discharging her responsibilities to represent your concerns to Major Couture;

d. Serious discrepancies in your testimony, thus, credibility and integrity, which cast doubt upon the seriousness and motivations of your allegations;

e. An abnormal degree of fraternization among you and your supervisors which resulted in significant misunderstanding and had deleterious consequences; and

f. Your language, dress and behaviour in the workplace insensitive and inappropriate to a degree beyond the allegations you have raised, thus requiring change on your part.
(emphasis mine)

(Exhibit HR-1, Tab 17, Doc. 17.11)

331. The Complainant's letter of May 25, 1992 was the final straw for Col. McGee. He had already alerted the Complainant in his March 5, 1992 response for her Redress of Grievance for

her PER (Exhibit HR-1, Tab 10, Doc. 10.4) about repercussions should she persist in her manner of correspondence.

332. On June 9, 1992, Col. McGee recommended her for counselling and probation, as well as "having you committed for medical observation and psychiatric assessment to ensure that you receive the best care available." Col. McGee testified he recommended the Complainant for counselling and probation, because throughout the process, there was a number of inappropriate memorandums from her containing allegations about his conduct and that of his staff which casted aspersions upon himself and the Base staff. As far as Col. McGee was concerned, the Complainant had not complied with his request to change her attitude and tone in her correspondence. (HR-1, Tab 18, Doc. 18.1)

333. Since Col. McGee was not the Complainant's direct supervisor, he could only "recommend, to her unit commanding officer, that she be placed on counselling and probation". Col. McGee testified the Complainant was already on RW for this type of behaviour and had been cautioned to be less disrespectful and more tactful in her correspondence. Following her allegation that he was postponing a review at Air Command, he testified the next step was counselling and probation.

334. Col. McGee testified the basis for his decision to have the Complainant committed for medical observation and psychiatric assessment, was his reliance on information he had heard about the Complainant having difficulty seeing the Base Doctor, Major Jacques. For that reason and based on her own reference to an "emotional breakdown" in her May 25th correspondence, he thought he should have some medical advice to confirm whether or not she was having an emotional breakdown and if so, what kind of care should be given to her. Col. McGee testified he did not believe the Complainant suffered an emotional breakdown. As to the normal route of his memorandum, Col. McGee testified it would have gone to the BAdmO, who would have informed the Complainant and Dr. Jacques of its contents.

335. Although he used the word, "commit" Col. McGee clarified he personally was not committing the Complainant . He testified he only wanted her to have access to the Base doctor. Dr. Passey, the Respondent's psychiatric expert, testified there is no military regulation which permitted Col. McGee to commit a member for assessment by a psychiatrist. According to Dr. Passey, that determination remains with the Base medical doctor. Dr. Passey comments on the appropriateness of Col. McGee's language in his June 9th response to the Complainant as follows:

MR. DUROCHER: So in reality, in paragraph 3, paragraph 3 contains a number of misstatements by Colonel McGee. One is the use of the work "committal" or "commit."

THE WITNESS: Yes.

MR. DUROCHER: And the second is that at the very least, what he should have said was that he was committing, or referring would be the better choice of words, for medical observation and/or psychiatric assessment, and possibly psychiatric assessment, if deemed necessary.

THE WITNESS: If I was the senior officer involved, I would probably say something like, by your -- because of your statement that you've suffered an emotional breakdown, I have some concerns about your ability to perform your duties, and as a result I'm ordering you -- because I could do that -- I'm ordering you to the Base Surgeon or to a military doctor, for an assessment and a determination as to whether further treatment or assessment is necessary.

That, I think, would be an appropriate statement, and within the regulations.

MR. DUROCHER: So would this statement by Colonel McGee, in the circumstances be an abuse of this power?

THE WITNESS: Well, it certainly isn't the way I would have put the statement. If he indeed arranged so that she was committed, then I would say it sounds like that could be seen as an abuse of power, because it's then not following our regulations, and it's not allowing the doctor to make the decision.

MR. DUROCHER: And if the doctor gets this, the Base Surgeon, Dr. Jacques, what does he do with this? I mean, in the overall scheme of things, where does he fit in, in the order of command? It is open to him to say, McGee, you're all wet, I'm not going to follow through with this. Or does he say, hmm, I'd better whip Ms. Franke off to Esquimalt, keep McGee happy. What's his reaction, what are his alternatives?

THE WITNESS: Well, certainly either scenario could have well happened, depending on the integrity of the medical officer involved. In this case the referral had already been made prior to this memo, to begin with.

I can only state what I would do if I received something like that, and I would probably phone him back and say I've received your memo, I understand that you have some concerns about this member, and I will do an assessment and determine whether or not a further referral is necessary. And I would leave it at that, I'm trying not to be disrespectful, but well aware of the fact that he cannot commit somebody.

I may even point that out to him, that you may not be aware of the regulations and what sort of power you have, but you're not entitled to commit anyone for medical reasons, only a doctor can do that.

(Transcript Volume 16, pages 2537 to 2539)

336. On June 9, 1992, Col. McGee sent a memo to the BAdmO requesting him to initiate a Change of Circumstances (see Major Bottomley's recommendation in Supplemental report), as he felt the Complainant could not continue to work in the Base Orderly Room processing personnel files. His memo reads:

B Adm O

REQUEST FOR REDRESS OF GRIEVANCE
ALLEGED HARASSMENT - CPL FRANKE

1. The enclosed documents are for transmittal to Cpl Franke.

2. Due to her continuing reluctance to understand military procedures and protocol and the nature of the allegations she has made against others without consideration for their reputation or her own aberrant behaviour I no longer have confidence in her integrity, loyalty or trustworthiness. Thus, I request you to initiate a Change of Circumstance investigation to determine her suitability to continue to process sensitive, protected or classified matter.

(Exhibit HR-20)

337. Col. McGee testified this action was taken because of the Complainant`s response to him before the Redress of Grievance process had been completed and for her going outside the Armed Forces with her allegations.

338. The Complainant's last written correspondence to Col. McGee is dated June 11, 1992. She again requests her Redress of Grievance for harassment be sent to Air Command. By letter dated June 19, 1992, Col. McGee complies with this request.

339. On July 3, 1992, Col. McGee received correspondence from Air Command Headquarters informing him that a Board of Inquiry would be convened in respect of complaints of sexual harassment and the Board was tasked to interview the Complainant. The documentation to Air Command includes besides Col. McGee`s letter, his findings at the second level grievance investigation, including a June 5, 1992 interview with the Complainant`s three supervisors, Lt. Vedova, Major Couture and MWO Macnair about the alleged sexual harassment, a Summary of Actions written by the BAdmO, an interview with MCpl. Alexander, and two other sequence of correspondence, one relating to the grievance and the other relating to harassment and other issues. (HR-1, Tab 19, Doc. 19.2, 19.2.1, 19.2.2, 19.2.3, 19.2.4)

340. The Board of Inquiry was conducted at the Base from July 6 - 19, 1992. Col. McGee was one of the witnesses who testified before the Board. A portion of the Board of Inquiry Statement as it pertains to the complaint before this Tribunal was produced into evidence by the Respondent (Exhibit R-1, Tab 23). The Board of Inquiry's Statement indicates that the Complainant's allegations against MWO Macnair were not substantiated. With respect to the allegations against Major Couture, the specific remark of "sexatary" was found to be sexual harassment within the meaning of the CFAO definition. The Board of Inquiry concluded the Complainant had retrospectively rationalized or distorted a number of events and her allegations at the best were a rationalization and, at worst, wilful distortion.

341. As a result of a routine change of command, Col. McGee left Comox at the end of July, 1992, and was posted to Ottawa.

(iii) Working in the Base Orderly Room (BOR) at Base Headquarters

342. After her meeting with Dr. Jacques in late December 1991, the Complainant was informed by the Base Personnel Administration Officer (BPAdmO), Captain McLachlan, that following her annual leave (vacation), scheduled for December 24, 1991, she was moving to the Base Orderly Room (BOR) at Base Headquarters. This move was agreeable to the Complainant. It is understood by this Tribunal, that the Complainant is not alleging any untoward action on the part of the Respondent concerning this transfer.

343. The Complainant testified that in December, 1991, she was under a great deal of stress. She had reconciled with her husband in the previous month. She found the stress she associated with her work environment affected her home life, and her relationships with her son, her husband and her mother.

344. Upon return from her vacation in January, 1992, the Complainant started to work in the BOR. Her supervisors were MCpl. Cheryl Johnson and PO Peggy Gale. They, in turn, were supervised by MWO Janssen and Captain McLachlan. At her new job, the Complainant found she had less responsibility than at the BTnO section because she was working with about three or four other administrative clerks.

345. The Complainant was under the supervision of PO Peggy Gale in the BOR at Base Headquarters. PO Gale became a member of the CAF in April, 1973 and was posted to Comox in July, 1989. She worked in the Records Section of the BOR where all the confidential personal files on members of the military are maintained. PO Gale supervised the Master Corporals and Corporals who worked in the Records Section.

346. The Complainant described her interactions with her colleagues as becoming decidedly colder. She felt she was being further ostracized because of what she was doing. Her supervisor, PO Gale, testified the other clerks seemed to be a little on edge with the Complainant because they were afraid of saying something that might offend or upset her.

347. PO Gale testified it was her impression the Complainant was being singled out for special treatment. She recalled two complaints from the Base CWO's Office about the Complainant. One of these complaints concerned the Complainant not locking up equipment in the gym while on duty. It was suggested to PO Gale, that the Complainant be given extra duties. After making enquiries, PO Gale was told that in most cases, members assigned to gym duty did not lock up the equipment. Another incident was related to the Complainant's wedding rings. PO Gale was called to Base CWO Doherty's office. He had received a complaint that the Complainant's wedding rings were gaudy, and a concern about another ring she was wearing. PO Gale testified both she and the Base Chief agreed the Complainant could continue to wear her wedding rings but should remove the other ring.

348. It was PO Gale's view, that if she had been wearing similar rings, the incident probably would not have occurred. There apparently were other similar incidents but PO Gale could not

recall the details. PO Gale testified she did not receive any complaints about the other clerks she supervised.

349. PO Gale described the Complainant as being upset a great deal, of being preoccupied with her grievances and spending all her spare time working on them. She further testified the Complainant's preoccupation with her grievances did not affect her work.

350. The Complainant testified that during February, 1992, she had been seeing the Base Social Worker, Captain Doyle, every other week. During her meetings with him, she described herself breaking down and crying. She was unhappy with her meetings with him.

351. The Complainant, at this time, made a change in her personal life. She had been a volunteer worker with Crises Crossroads and Family Services for a year and a half, volunteering for approximately four to ten hours a week, as a member of the Crises Team answering telephone inquiries from a wide variety of callers. The Complainant spoke with the program coordinator, Gwyn Frayne, telling her she had to withdraw from her volunteer duties because of stress. The Complainant testified the Coordinator recommended she speak with the Base Padré. In late February, the Complainant met with the Padré, Major Baker. She recalls telling him of her situation testifying he responded "That's what happens when you buck the system, Kim." She found his response unacceptable. This was the last time she went to Major Baker.

352. The stress the Complainant was experiencing at this time, was recorded by the Base Surgeon on February 24, 1992. Dr. Jacques' note described the Complainant as:

very anxious, on the defensive and very demanding - she is crying and doesn't want to discuss her actual problem. She claims to be able to dissociate her problems from the other persons problems. etc. Provisory Dx is "hysterical personality?"

(Exhibit HR-7, Tab 10, p. 52)

353. On February 24, 1992, Dr. Jacques authorized a one day leave to give the Complainant an opportunity to think about "it". The Complainant's own testimony is that she would sit in her office crying, and not wanting people coming in and see her under so much stress. She took this leave so she could go home and cry. (Exhibit HR-7, Tab 10, p. 52)

354. In support of the Complainant's own testimony about her emotional state in the late winter/early spring of 1992, Cpl. Legault testified she found the Complainant had changed and described her as nervous, always depressed, crying a lot, and having a really hard time dealing with the situation. It was about this time that Cpl. Legault ended her friendship with the Complainant, which to a large extent, resulted from the Clothing Stores incident. After the Complainant found out about the request to record Cpl. Legault's visitors, she stopped going to Clothing Stores.

355. The Complainant described feeling under close scrutiny on the Base. She recalls a complaint made about her sitting at the desk at the gym looking bored. The Complainant had been on duty in the gym on April 27, 1992. She had received authorization to take work to the

gym because the duty involved monitoring people using the gym and she wanted to keep herself busy. On April 28, 1992 she was told about the complaint. She was required to go to the Base Chief's office to explain that she was not bored but was doing work.

356. She recited another incident at the beginning of May, 1992 when she was asked by PO Gale if she could do parade on the long weekend. The Complainant said she would. She was then asked if she minded being inspected by the Base Chief before the parade. The Complainant responded "I will wear my knee brace and I will do your parade but unless you're calling in every other person on that parade square, I do mind". According to the Complainant, the issue was dropped.

(iv) Redress of Grievance for the Performance Evaluation Report (PER)

357. On January 20, 1992, the Complainant received her PER for her work at the BTnO. Her overall rating was 6.9. The Complainant was dissatisfied with the score, she had expected a higher score because two months earlier, she saw her preliminary score together with scores of the other Corporals. Her score was recorded at that time at 7.1. She had seen the preliminary scores on a sheet containing the names of all Corporals in November, 1991 when the sheet left the BTnO. She then filed a Redress of Grievance for her PER, firmly believing the score was part of the retaliation by her superiors to the sexual harassment complaint.

358. The PER contained a reference to the RW. It does not refer to the Belanger incident. Lt. Vedova's comments are as follows:

Cpl Franke's overall performance has been good. She normally carries out her duties ___, however, her adherence to regulations in some cases has been marginal. Cpl Franke ___ planning her work to coincide with and meet the various deadlines. Her very good problem solving capabilities are clearly apparent in her ingenuity of finding answers quickly.

Cpl Franke has adapted well to the stress of her job and has also filled the B Tn O secretary's position in her absence as well as covering off her own duties. She is active within the section on the Social Committee and as UDEC as well as within the community at the Crisis Centre.

3 - When approached by a Sgt and WO on behalf of the Base Dress Committee, Cpl Franke displayed an insubordinate attitude towards these superiors and as a result was placed on Recorded Warning.

5 - promptly finds answers to invoice problems and rectifies them without question.

(Exhibit HR-1, Tab 10, Doc. 10.1)

359. Lt. Col. King also commented on the PER report as follows:

Cpl Franke performs her duties at standard that is generally commensurate with her rank. She has a promising future in the CF

provided she corrects her insubordinate attitude.

(Exhibit HR-1, Tab 10, Doc. 10.1)

360. All three of the Complainant's supervisors at the BTnO, Major Couture, Lt. Vedova and MWO Macnair testified about the Complainant's work performance in their direct examination. Major Couture recalls speaking with Lt. Vedova on at least two occasions about problems he had with the Complainant. He described one occasion when he walked into her office. The Complainant was on the phone, and did not give him the quick reaction he expected. He also had a concern about an inordinate amount of time she spent away from the office. Major Couture testified he relied on Lt. Vedova to advise the Complainant of performance problems, since she was the Mobile Support Equipment Officer, and had the responsibility of overseeing the function of the BOR where the Complainant worked.

361. Lt. Vedova testified she initially found the Complainant to be very friendly and liked her personality. She described her as very outgoing, very energetic, and when the Complainant first arrived, things went very well. Lt. Vedova noted a friction between the Complainant and Janet Jenkins, Major Couture's secretary. The Complainant replaced Ms. Jenkins in her absence as well as carried on her own administrative clerk responsibilities.

362. The Complainant expressed her desire to obtain a good PER score to Lt. Vedova towards the end of her six month posting to the BTnO. This was a primary factor in her decision to remain at the BTnO rather than return to 407 Squadron. On one of her noon time walks with Lt. Vedova, the Complainant mentioned that Major Reaume had called and wanted to know whether she was returning to 407 Squadron. The Complainant told Lt. Vedova she wanted a really good PER. According to the Complainant, Lt. Vedova replied, "Don't worry about it, I'm not going to tell you what to do but I'm going to tell you that you're going to get a really good PER out of us."

363. As time went on, Lt. Vedova noticed errors in the Complainant's correspondence and sometimes the Complainant made interpretation errors about some of the regulations pertaining to writing manuals or the CFAOs. Under cross-examination, Lt. Vedova testified the shoe incident influenced the rating allocated in the PER under the heading "response to direction". This incident lowered the rating to a five (in previous years it had been seven). Lt. Vedova testified without the five, the Complainant's score would have probably been a 7.1. Lt. Vedova considered the PER of 6.9 fairly good except for the required lowering of the score.

364. Lt. Vedova's assessment of the Complainant's PER score of 6.9 as being fairly good is shared by the Base Commander, Col. McGee. His assessment of the PER score and the evaluation given by Lt. Vedova and signed and commented on by Lt. Col. King on January 13, 1992, is that overall it was a good solid average evaluation requiring some attention under the heading "response to direction".

365. MWO Macnair's only input in the Complainant's PER was informing Lt. Vedova to record the shoe incident, as it was his understanding any serious shortcomings that occurred during a reporting period must be recorded in the member's performance report. He stated he had no problem with the Complainant's work until after the arrival of Major Couture when Major Couture raised with him some problems in August or September of 1991. This would have been during the period of time when Lt. Vedova was on holidays and MWO Macnair was supervising the Complainant's work. This would accord with the Complainant's impression of the changing relationship she observed with her supervisors after August of 1991.

366. MWO Macnair recalled approaching or counselling the Complainant about the quality of her work at that time. This concerned spelling errors, mistyped words, and punctuation. He also confronted the Complainant during the MCpl. Alexander incident about approaching MCpl. Alexander.

367. MWO Macnair also recalled counselling the Complainant about a conversation he overheard, as he entered the canteen, between the Complainant and a civilian member who were present in the canteen. The conversation was of a sexual nature which he found objectionable.

368. The Complainant initiated a Redress of Grievance for her PER on February 4, 1992. She writes in para. 3 of her memorandum that "due to the Redress of Grievance on my RW and Memorandum on Abuse and Harassment still being investigated, I do not feel that I can get a PER with an objective score or narrative on it from that section". (Exhibit HR-1, Tab 10, Doc. 10.3). She informed Lt. Col. King she had understood her PER score to be 7.1.

369. On February 25, 1992, she received a response to her Redress of Grievance for her 1991 PER from Lt. Col. King. In his memorandum, he unequivocally denies her grievance and writes, in part:

> 4. The only error in judgement we made during the preparation of your PER was that you, in your capacity as the MSE orderly room clerk, were entrusted with the task of typing your own draft PER along with the others from your Section. Your superiors were relying on your professional integrity in doing so but have since been sorely disappointed by your misinterpretation of the facts and obvious lack of maturity and integrity.
>
> 6. The details you included at ref pertaining to other personnel are disturbing and very questionable. I will not elaborate on them except to say that your comments and my subsequent investigation indicate that it is you who has lost your objectivity. I find the comments and quotes you made to be purely vindictive, self-serving and totally unprofessional; thus unworthy of detailed comment.
>
> 7. Given the facts that have emerged from the recent investigations prompted by your complaints and submissions for redresses of grievance, I am of the firm opinion that your last PER was somewhat generous. Were I to direct that it be reviewed and rewritten, you would assuredly receive a significantly lower assessment than that which you have already received. I therefore deny your redress application and advise you that a decision to pursue this matter any

further would in all likelihood be to your personal detriment.
(emphasis mine)

(Exhibit HR-1, Tab 10, Doc. 10.4)

370. The Complainant's testimony is that she never typed her own PER score and the information in paragraph 4 of Lt. Col. King`s memo was not correct. This was confirmed by Lt. Vedova in her evidence.

371. The Complainant testified she was frightened by Lt. Col. King's comment in para. 7 (above) and she felt there would be further retaliation of some form from the Respondent, and all she could do was wait for it.

372. On February 28, 1992, the Complainant advanced her Redress of Grievance for her PER to Col. McGee for his review. The Complainant`s tone is negative and in paragraph #3, her words are disparaging and unprofessional. She writes:

1. Sir, this is now addressed to you as I have not received a reply that I feel was unbiased.

2. In response to BTSO`s allegation, ref C, para 2, that he was never advised that I had requested an appointment, I shall simply state now that this issue is of no concern of mine and should be discussed with the BPAdmO not myself as I requested the interview through the BPAdmO and I have no reason to doubt the BPAdmO when he informed me that he had indeed requested an interview with the BTSO for myself on this issue.

3. In response to ref C, para 4, I did not create the situation, I did however find myself in an abhorrent state of affairs beyond my control. Due to the obvious ignorance displayed I shall merely state the fact that I did not type the draft on my PER. I wrote in section one my particulars as requested. The BTnO`s secretary typed the draft and I had no knowledge of what was written until I signed it in the BTSO and Lt Vedova`s presence.

4. I query his statement, ref C, para 7, that to pursue this matter further would be detrimental to my person.

5. Against all unwarranted advice from the BTSO I am therefore requesting this be impartially reviewed by your office.

5. For your action, sir.
(emphasis mine)

(Exhibit HR-1, Tab 13, Doc. 13.1)

On March 5, 1992, Col. McGee denied the Redress of Grievance for her PER score indicating he was troubled by the tone of her correspondence. His response reads in part:

2. My concern remains, however, over practices and habits which are characteristic of your performance which warrant substantially lower scores.

3. ...I am troubled by the tone of your ref. Repeatedly, you cast dispersions on others which I cannot condone. ...Your attitude towards your seniors, whether officers or NCMs, is perplexing. This is the Canadian Forces. You will be treated like all of your peers and are expected to behave as your peers are expected to. You must learn your place and learn to operate in it comfortably. I will not entertain any further correspondence from you which is disrespectful of your seniors or slanders others. ...

4. In conclusion, I find that your PER was more than fair in that it did not hold you sufficiently accountable for your behaviour. In other words your score was higher than warranted. Thus, I deny your request for Redress. Your former supervisors erred in not documenting formally in the PER the problems you were having or creating on the job. I do not expect any such errors in the future. ...

(Exhibit HR-1, Tab 13, Doc. 13.2)

373. Col. McGee testified he was simply trying to point out in his response that he did not consider the PER a bad evaluation, and he would have expected a lower aggregate score as a result of the RW. Rather than a "5" score for "response to direction", he would have expected to go towards a "4". According to Col. McGee, the initial draft PER scores that the Complainant may have seen, can be affected as a consequence of what he described as the "X factor". This relates to a process developed by the CAF to provide a mean score for each individual trade, and when individual scores go to the next formation level they are compared against a bell curve, and then the scores are readjusted depending on the results.

374. On April 3, 1992, the Complainant requested Col. McGee to submit her Redress of Grievance on her 1991 PER to Air Command for further consideration. Col. McGee complied with this request and on April 8, 1992, he passed her grievance to Air Command for their consideration.

(v) Sick Leave

375. The medical notes of the Base Doctors who saw the Complainant from March 3, 1991 until her voluntary release were admitted into evidence. On May 25, 1992, the Complainant saw Dr. Mortellaro, a Base Doctor, whose medical notes refer to a request by the Complainant to see a female, non-military specialist in sexual abuse and harassment, a "Dr. Wright", R.N., working at the Crisis Centre in Comox. Dr. Mortellaro notes the Complainant experienced early morning wakenings, anger, agitation, a loss of interest in daily activities, and complained of getting worse and needing counselling. The Complainant expressed to him some past suicidal thoughts wondering "if it were worth living". Dr. Mortellaro did not find these thoughts existed at the visit of May 25, 1991. Dr. Mortellaro's notes conclude that he would find her a suitable counsellor/psychiatrist. (Exhibit HR-7, Tab 10, p. 56)

376. Dr. Mortellaro's notes indicate that on May 26, 1992, he received a telephone call from the Complainant, insisting she see "Dr. Wright" and his explanation that he would attempt to locate a psychiatrist. The Complainant's own testimony is that Manon Bertrand, an employee at the Women's Centre, recommended she see Joan Wright because of Ms. Wright's reputation working with victims of sexual abuse and sexual harassment.

377. On May 28, 1992, the Complainant obtained sick leave for a knee operation. She chose this time for the operation because she was unable to get time off due to stress and believed she could use the recovery period after the operation to pull herself together. She obtained sick leave for her knee for the period May 28, 1992 to about June 7, 1992.

378. While on sick leave for her knee operation, the Complainant's recovery was monitored by the Base Doctors. She was also seen by the Base Doctors for other reasons. It is noted for example, Dr. Mortellaro made three medical notations on June 2, 1992. He informed the Complainant of an arrangement to see a female non-military psychiatrist in Victoria, and that the Complainant seemed pleased with this arrangement. His second notation refers to a telephone call from the Complainant to see Joan Wright and Dr. Mortellaro informing the Complainant she should first see the psychiatrist and "if the psychiatrist desires that she see Joan Wright this is fine with me." The note indicates the Complainant refused to see the psychiatrist and Dr. Mortellaro asks her to discuss this with the Base Surgeon. The last notation by Dr. Mortellaro is that Dr. Jacques spoke with the Complainant and she agreed to see Dr. Whitaker. (Exhibit HR-7, Tab 10, p. 59)

379. Dr. Jacques' own medical notation on June 2, 1992 refers to speaking with the Complainant about his and Dr. Mortellaro's recommendation for her to see a psychiatrist for a first assessment and if the psychiatrist recommends counselling, she'll have the counselling in town. He writes "this is our policy." He describes the Complainant as being very negative at the end of the discussion and stating she had no transport. Dr. Jacques then writes he will organize transport for her, again referring to her as being very negative and, "her attitude so far is very inappropriate and I did mention that to her." (Exhibit HR-7, Tab 10, p. 60)

380. On June 5, 1992, Dr. Jacques approved a further fifteen days sick leave for her knee starting from June 7 until June 23, 1992. Four days later on June 9, 1992, his medical notes indicate the Complainant had missed her appointment. He telephoned her at 9:00 a.m., ordered her to come to the hospital and sent a transport for her. He saw her at 10:00 a.m. and examined her knee. After finishing this examination, his notes indicate that in the presence of another member, he discussed her appointment with the psychiatrist and the Complainant having all types of arguments about not going to the scheduled appointment, and not wanting to see a military psychiatrist. After noting that he made arrangements for a military ambulance to transport her to Esquimalt, he writes:

> The pte has been ordered to see the psychiatrist Wednesday, 10th June 92, at 10h at Victoria, notified in front of a witness. (Capt. Cymbala) R. Jacques MD
> (emphasis mine)
> (Exhibit HR-7, Tab 10, p. 63)

381. The Complainant's own testimony about her visit with Dr. Jacques on June 9, 1992, accords with Dr. Jacques' notes. Following her meeting with Dr. Jacques, the Complainant went home and described herself as really upset. She testified she had a fear she would not be coming home. This fear was based on an earlier conversation she had with another military member, who she understood was committed for three months after an assessment by a military psychiatrist. The Complainant was concerned the same thing would happen to her.
382. At 6:30 a.m., on June 10, 1992, a military ambulance stopped in front of the Complainant`s front door. According to the Complainant, her mother and son witnessed her getting into the ambulance. Although Dr. Mortellaro's note refers to a psychiatrist in Victoria, the Complainant testified she was driven to Esquimalt, under military escort and interviewed by a psychiatrist, Dr. Whitaker.

383. The Complainant testified she believes Dr. Whitaker is a military doctor. The only contrary evidence is found in Dr. Mortellaro's note of June 2, 1992, in which he writes:

"...I have arranged for her to be seen by a female psychiatrist who is not a member of the military, in Victoria (Dr. Whitaker)..."

(Exhibit No. HR-7, Tab 10, p. 58)

384. The Complainant tape recorded her interview with Dr. Whitaker. She was asked by Dr. Whitaker whether she had seen a psychiatrist or been hospitalized for psychiatric reasons. The Complainant told Dr. Whitaker she made a joke during the ambulance ride to the individuals accompanying her, "Look at the escorts, escorting the psycho, or schizophrenic or something." (Exhibit HR-18, p. 45). Cpl. Legault recalled the Complainant telling her about her trip to Victoria by ambulance for a psychological evaluation. Cpl. Legault viewed this action as degrading, "no matter who you are."

385. The Complainant was transported home that evening after her visit with Dr. Whitaker.

386. On June 11, 1992, the morning following her visit with Dr. Whitaker, and while on sick leave, the Complainant received a telephone call from the Base, telling her a driver and a military car would pick her up to take her to Captain McLachlan's office. Accordingly, she was picked up. When she arrived at Captain McLachlan's office, he handed her the memorandum signed on June 9, 1992 by the Base Commander, Col. McGee, dated two days earlier. The full text of the memorandum reads:

1. At ref A you refer to findings or a hearing held on 22 May 92. The findings are as reported at ref B.

2. Your allegations regarding the grievance procedure and review of your complaints at my level as somehow postponing review at Air Command are untrue and insubordinate. You have been formally cautioned about such comments in the past both in memoranda and verbal and recorded warnings. Thus, I find your actions in violation of those cautions and recommend you for Counselling and Probation.

3. Because of your statement that you suffered an "emotional breakdown", I am having you committed for medical observation and psychiatric assesment to ensure that you receive the best care available.

(Exhibit HR-1, Tab 18, Doc. 18.1)

387. After giving the Complainant this memorandum, Captain McLachlan accompanied the Complainant to Lt. Col. van Boeschoten's office. Lt. Col. van Boeschoten was the BAdmO. She was then told by Lt. Col. van Boeschoten that she was being placed on Counselling and Probation. He handed her a document signed by himself, which, in part, reads:

In spite of a RW issued to her on 26 Nov 91 for her belligerent and argumentative manner when dealing with superiors she has continued this behaviour by submitting insubordinate and argumentative correspondence up the chain of command. ...

She was counselled to refrain from issuing this type of correspondence in the future and was cautioned not to be argumentative or belligerent in her verbal dealings with the NCMs and Officers in the future.

Failure to correct this shortcoming will result in her release from the Canadian Forces. (emphasis mine)

(Exhibit HR-1, Tab 18, Doc. 18.3)

388. The Complainant testified that after receiving the two documents, she returned to Captain McLachlan's office to receive a third document. This was Col. McGee's response to her May 25, 1992 memorandum requesting her Redress of Grievance on harassment and abuse of authority, be submitted to Air Command. That memorandum was dated two days earlier, June 8, 1992.

389. As a follow-up to the Complainant's visit with Dr. Whitaker, it appears from Dr. Jacques' medical notes that on June 10, 1992, he received a telephone call from Dr. Whitaker which he documented as:

PTE has no evidence of depression.
- some type of adjustment disorder trigger by stress.
- in contact with reality.
- responsible for her action.
- she also expresses doubt about herself for which she'd like to have help by seeing a counsellor.

(Exhibit HR-7, Tab 10, p. 63)

390. His note indicates that Dr. Whitaker recommended short, paid therapy (or counselling) ten sessions. This accounts for Dr. Jacques informing the Complainant on June 11, 1992, that she would be given ten counselling sessions.

391. Dr. Whitaker did not testify before the Tribunal. I refer to her written report to Dr. Mortellaro dated June 17, 1992. Although Dr. Jacques` earlier note of June 10, 1992, refers to no evidence of depression, Dr. Whitaker`s report discloses a diagnosis of Adjustment Disorder with depressed mood - resolving (DSM IIIR 309.00). The DSM is a Diagnostic and Statistical Manual used by psychiastrists worldwide and lists standard criteria for illnesses. The particular reference is the revised third edition. (Exhibit HR-1, Tab 18, Doc. 18.2). Dr. Whitaker made two recommendations, time-limited psycho therapy in local area and assertiveness training. Dr. Jacques' notes do not indicate if he disclosed to the Complainant Dr. Whitaker's diagnosis.

392. As a result of the counselling and probation, the Complainant's security clearance was reduced. Col. McGee testified the change was made until completion of a follow-up review could take place. The Complainant received notice of her lowered security clearance on June 11, 1992, when she was told about her counselling and probation notice. The Complainant's lowered security clearance necessitated a move from the BOR. According to Lt. Col van Boeschoten's report of June 11th, he writes that the Complainant's access to files in the BOR could be dangerous, in such a way that she may use information from other members' files to further her own cause. The reasons for the Change of Circumstances were recorded by Lt. Col. van Boeschoten as follows:

2. The following change of personal circumstance which could affect the security clearance status of the subject has been noted: Mbr was placed on RW 26 Nov 91 for acting in a belligerent and argumentative manner towards superiors. She has now been placed on C&P for submitting a long series of insubordinate correspondence to the B Comd. It is felt that her having access to files PROTECTED "B" or above could be dangerous in that she may use information from other members` pers files to further her own cause.
3. The following additional factors are present in this case: As a result of her own admission to the B Comd of an emotional breakdown she was referred for medical observation and psychiatric assessment on 10 Jun 92. As a result of that assessment she has been referred to a civilian counsellor for therapy.

(Exhibit HR-1, Tab 18, Doc. 18.4)

393. As a result of her lowered security clearance, she was informed on June 11, 1992, that she was being transferred to the Language Training Centre. After her meeting with Captain McLachlan and Lt. Col. van Boeschoten, the Complainant testified she was driven to Dr. Jacques' office, and was informed she would be given ten counselling sessions. This is confirmed in Dr. Jacques' medical note of that date.

394. On June 22, 1992, Dr. Jacques extended the Complainant's sick leave until July 7, 1992. The sick leave was granted for her knee surgery.

395. On July 7, 1992, Dr. Jacques again extended the Complainant's sick leave because of her knee surgery to July 30, 1992. Sometime during this leave, she was contacted at home by a Base Secretary and informed that she would be required to testify the next morning at the Military Board of Inquiry. She testified the following day and she described the interview by the five member panel as disorienting. She viewed the Board`s process as a type of cross-

examination. She was questioned by a five-member panel positioned in a semi-circle. She testified she barely finished an answer when a panel member asked another question. At a later time, she was called back to sign a statement, which she said she signed under duress because she did not really feel she knew what had happened.

396. The Complainant made her concerns public in June, 1992. She contacted newspapers and provided a press release because she felt this was the only available means to protect herself. At that time she also met with her Member of Parliament, and appeared on a CBC newscast.

(vi) Work at the Language Training Centre

397. At the conclusion of her sick leave in July, 1992, the Complainant returned to work at the Language Training Centre reporting to WO Turcott. Her only work was typing Boy Scout Meeting minutes and correspondence for the one student who was attending the Centre. She found herself attending to personal correspondence because of the lack of work. She considered the move to the Language Training Centre a lateral demotion which she testified created more stress for her. During this time, she saw Dr. Raymond, a military Base doctor, who she described as unsympathetic to her feelings of stress. She testified she would leave his office, and go back to work, sit at her desk and sob uncontrollably.

398. The Complainant testified that in August, 1992, she felt she had been continuously penalized for making her complaints. On August 25, 1992, she wrote a memorandum to Lt. Col. van Boeschoten, the BPAdmO, with references to "further harassment". Her memorandum reads in part:

4. Since this meeting [May 22, 1991] I have been subjected to further harassment:

a. the 9th of June 1992 I was ordered by Dr Jacques to undergo psychiatric evaluation. Colonel McGee made the recommendation that I be "committed for psychiatric evaluation", Ref A refers to the results;

b. the 10th of June 1992 an ambulance came to my home to drive me to Victoria for the evaluation, with my son asking the question: "Where are you going in the ambulance, Mom?"

and,

c. the 11th of June 1992 I was ordered into work by Captain MacLachlan supposedly to receive a response to ref E. Upon my arrival at his office I was handed refs C and D simultaneously;

d. the 11th of June 1992, upon Colonel McGee's recommendation, I was placed on Counselling and Probation using ref E as the basis;

e. the 11th of June 1992, my SECRET security clearance was recommended revoked by Lieutenant Colonel G. van Boeschoten with the reason being that due to my "emotional breakdown" I may try to access other personnel's Protected B files to further my own cause;

f. the 24th of June 1992 I was called by Captain MacLachlan to quote pick up documents unquote and get my sick leave pass. I asked what the documents were and was told I was to sign as having been briefed and understood QR &O 19.36, although I had already had a meeting the BPIO, Maj Bottomley where I was advised on what information I could disclose;

g. the 2nd of July 1992 Private (Reserve) Bedford was shredding a substantial amount of paperwork. Upon being asked what it was she was shredding, her response was "Kim's file". Her comment then was "they are trying to make it look like she is losing her mind";

h. the 31st of July 1992 I was called at 1230 hours after returning from a medical appointment and informed by Captain MacLachlan that I was to report to work, as my sick leave had terminated on the 30th of July 1992. And yet I was never informed by my supervisors of this fact. I had been informed by Sgt Levesque that a message would have to be sent to Air Command for approval for further sick leave and I would be advised; and

j. upon having my security clearance revoked I was again transferred to yet another section.

(Exhibit HR-1, Tab 22, Doc. 22.1)

399. In her August 25th memorandum to Lt. Col. van Boeschoten, the Complainant requested that her memorandum of that date be submitted to Air Command and she sought further redress:

a. my C&P be rescinded;
b. my SECRET security clearance be reinstated;
c. my annual leave taken during employ at Base Transport be returned;
d. financial compensation given so my family may get private counselling as they were directly affected by the events; and
e. I be given a position on the new base board being presently established as per ref G. [Board drafting sexual harassment procedures]

(Exhibit HR-1, Tab 22, Doc. 22.1)

400. Lt. Col. van Boeschoten responded on September 8, 1992. He disagreed with most of the contents of the Complainant's memorandum of August 25th , indicating he would be pleased to consider a revised submission "which sticks to the facts" and that she specify which outstanding application of Redress of Grievance her correspondence applies to. He informs her the meeting between himself and the Base Commander on May 22, 1992, was not intended to create an intimidating or harassing environment but was an honest, open attempt by the Base Commander to gain a more complete understanding of the situation and to possibly attain resolution. He further writes, in part, at no time was harassment intended with the Base Commander's "direction" regarding a psychiatric evaluation and a reduced security clearance, but it was on the basis of what the Base Commander perceived to be an emotional breakdown by the

Complainant, and was seen to be in the best interests of both the individual and the CAF. He also wrote that based on the results of the psychiatric evaluation made known to him on September 3, 1992, he was initiating the action to have her security clearance reinstated. (Exhibit HR-1, Tab 22, Doc. 22.2)

401. Rather than respond to Lt. Col. van Boeschoten's request of September 8, 1992, the Complainant decided to forward her redress directly to Air Command. She sent a letter dated September 21, 1992 with information to Air Command.

402. On September 15, 1992, Air Command under Col. M.P. Areya, forwarded to the Complainant copies of information which was not subject to solicitor-client privilege, concerning her Redress of Grievance for the RW. This was the first time the Respondent disclosed any of the information they had on file to the Complainant and invited her to respond to the information. Included in the information was the memorandum dated September 20, 1989, written by PO Pistun. It documented a verbal warning he gave to the Complainant for her response to him concerning a process for posting messages. This is the same memorandum found in Major Bottomley's Summary Investigation Report.

403. The Complainant testified she did not remember the circumstances surrounding PO Pistun's document, and she had never seen the document until it was disclosed to her by Air Command. According to the document, PO Pistun was issuing the verbal warning for an attitude bordering on insubordination.

404. It is noted that Col. M.P. Aruja, the Deputy Chief of Staff Personnel, Air Command, who wrote to the Complainant on September 15, 1992, forwarding information for her review and comment, wrote a memorandum on the same date to the Commander, Air Command, recommending her grievance be denied without waiting for the Complainant's response. In that memorandum dated September 15, 1992, paragraph #2, he summarizes events surrounding the issuance of the RW. According to his account the RW arose:

> ...as the result of a memo that the member forwarded, for consideration by the BWO, with respect to shoes that were not allowed by the current dress regulations.

(Exhibit HR-1, Tab 23, Doc. 23.2)

It appears his understanding is that the Complainant's memo written October 29, 1991 (see further details under the heading, Shoe Incident) prompted the visit by the Female Advisory Committee.

405. On September 18, 1992, the Complainant wrote to the Deputy Chief of Staff Personnel, at Air Command Headquarters, inquiring about the memorandum written by PO Pistun concerning the verbal warning.

406. According to the medical notes, on September 14, 1992, the Complainant requested a meeting with Dr. Raymond for stress leave. Dr. Raymond was unable to see her and a meeting with a Dr. Ross was scheduled for the following day, September 15, 1992. Dr. Ross' lengthy

notes of that date, confirm the Complainant's request for stress leave. He writes in part about her being very demanding, pushy and angry and that he was unable to grant her request for stress leave because of the complexity of the situation, informing her she would have to speak with Dr. Raymond, which could take up to two or three days for an appointment. (Exhibit HR-7, Tab 10, pages 69, 70, 71).

407. On September 16, 1992, the medical notes read the Complainant presented herself at Dr. Raymond's office with a "civilian report in hand, stating she must see Dr. Raymond." Evidently, she did see Dr. Raymond whose notes indicate he spent one hour and fifteen minutes with the Complainant. His very lengthy notes describe the Complainant as "very aggressive and even threatening," as well as "demonstrated a great deal of anger at ‘ CFB Comox'" and the Complainant wanting Dr. Jacques to authorize eight weeks of stress leave. Dr. Raymond writes he could not justify a leave at the time, although he had agreed she had gone through a very stressful period in her life and it would be beneficial for her to continue her psychotherapy and assertiveness training. His notes indicate the Complainant became very angry when she heard this and threatened to go to the local press or Mary Collins' office if she didn't get her "stress leave" immediately. He advised her not to threaten him and told her this was inappropriate. He did give her the next day off as she was quite flustered. (Exhibit HR-7, Tab 10, pages 72, 73, 74, 75).

408. In Dr. Raymond's medical note of September 16, 1992, he indicates he had a telephone conversation with Joan Wright and writes of his disagreement with her that the Complainant was suffering from post-traumatic stress disorder (PTSD). This is the first occasion the Respondent disagrees with a PTSD diagnosis. It appears from the medical notes that Dr. Raymond discussed with Joan Wright a telephone conversation he had with Dr. Whitaker, who, according to Dr. Raymond`s notes, did not recommend sick leave for the Complainant. Although Dr. Raymond did not believe that an extended period of time off work was warranted, he wrote that he concurred with Ms. Wright's opinion, that continued psychotherapy would be beneficial for the Complainant and outlined his overall plan as follows:

Overall Plan -
1. Will contact Dep Comd Surg. LCdr Cathy Slaunwhite to request 10 additional sessions for Cpl Franke with Ms. Wright (waiting for her to call back tomorrow)

2. Arrange for reassessment by Dr. Whittaker at next available appointment ? Oct.

(Exhibit HR-7, Tab 10, p. 77)

409. Dr. Raymond's notes of September 16, 1992 further elaborate about a telephone conversation with the Complainant that same day. In their earlier meeting that day, he had suggested a follow-up meeting between the Complainant and Dr. Whitaker in which he notes the Complainant had agreed with his plan. In their subsequent telephone conversation he wrote the Complainant had changed her mind about seeing Dr. Whitaker and his notes indicate:

I reiterated that I was requesting a consult with Dr. Whittaker to consider the diagnosis of post-traumatic stress disorder and make a recommendation about sick leave and that neither Dr. Whittaker nor I felt she had a major psychiatric ailment.

(Exhibit HR-7, Tab 10, p. 78)

He then asked the Complainant to reconsider meeting with Dr. Whitaker, writing it was a voluntary referral and the Complainant would not be forced to attend. Dr. Raymond concludes that he had spoken to the Complainant's supervisor, Major Leblanc, who had assurred Dr. Raymond the situation at work would be a supportive one. After he informed the Complainant she could grieve his treatment of her, he wrote that the Complainant thanked him for the call.

410. It appears from Dr. Raymonds' notes of September 17, 1992, that pursuant to the overall plan, he discussed the Complainant's case with two military members, a Lt. Cd. Slaunwhite, whom he noted supported his actions, and Lt. Col. van Boeschoten, the BPAdmO. He does not make any notation about the content of his discussion with Lt. Col. van Boeschoten. He also wrote that he "will discuss case" with a Captain Thompson regarding extending counselling sessions and possibly recommending a category change.

411. On September 20, 1992, Dr. Raymond wrote that he had carefully reviewed the criteria for PTSD in the DSM III, and in his view, the Complainant did not meet the criteria. His notes read:

..she does meet the criteria for having an adjustment disorder as described in DSM III
[and that he intended to discuss this point with the Complainant on her next visit.]

(Exhibit HR-7, Tab 10, p. 80)

412. On September 22, 1992, Dr. Raymond had a one hour session with the Complainant and found her more reasonable. He indicates among other things that the Complainant actually apologized for "acting threatening at their last visit." According to his notes, he informed her he had not heard whether the Base had approved her ten extra psychotherapy sessions and discussed among other things, the diagnosis of PTSD, explaining to her that he felt that she did not meet the criteria for this diagnosis. (Exhibit HR-7, Tab 10, p. 81)

413. On September 23, 1992, Dr. Raymond received approval from Lt. Cd. Slaunwhite for ten extra psychotherapy sessions and funds for assertiveness training at North Island College. His notes further indicate that Lt. Cd. Slaunwhite recommended a temporary category change for the Complainant because it would be unwise to put the Complainant in an isolated or overseas post until she completed her psychotherapy . Dr. Raymond agreed with this. It appears he telephoned the Complainant at work to inform her of "all this." His notes also indicate the Complainant's response was that she understood the reasons for the temporary category and was pleased with her continuing psychotherapy.

414. The Complainant`s own testimony is that on September 23, 1992, she received a telephone call from Dr. Raymond who informed her that she would have to have her medical category

changed to a G403, for the Base to pay for ten additional sessions with Joan Wright. The Complainant felt this request was just another way for the Base to release her.

415. On the same day she discussed with Dr. Raymond the temporary category change, the Complainant commenced assertiveness training. This involved a one day session to help her to vocalize her concerns without getting angry.

416. The Complainant testified that in early October, 1992, she changed her mind about further sessions with Joan Wright because she did not want a temporary category change. She was fearful this was an attempt by the Base to remove her from the military. Her fear is reflected in Dr. Raymond's medical notation of October 2, 1992:

#2/ Does not want 10 extra sessions with Ms. Wright and does not want a temp category - is suspicious that we are trying to eventually put her on a permanent category and "get rid of her."

(Exhibit HR-7, Tab 10, p. 84)

417. The Complainant continued to vacillate about wanting further therapy sessions. About two weeks later, she decided to accept the necessary category change and telephoned Dr. Raymond to again request sessions with Joan Wright. Her indecisiveness proved fatal because by that time the approving authorities had reneged on their approval of additional psychiatric sessions. According to Dr. Raymond's medical notes of October 16, 1992, he informed the Complainant of a medical decision not to approve further psychotherapy sessions. According to his notes, other treatment measures were contemplated, such as regular therapy sessions with himself, an assertiveness training course scheduled for November and regular meetings with the Complainant's support group were "adequate at the present time." He also wrote that at the conclusion of "our meeting", the Complainant informed him she was uncertain as to whether she would continue to see him.
(Exhibit HR-7, Tab 10, pages 87-88).

418. The last medical notations written on November 30, 1992, by an individual who has not been identified, indicates the Complainant had been on annual leave for the past month, with an impression of "acute stress reaction". The Complainant is described as not sleeping well and feeling anxious. The treatment plan suggested two days sick leave and that further sick leave would be inappropriate. The writer notes if the symptons continue, the Complainant should consider taking annual leave, at the supervisor's discretion. (Exhibit HR-7, Tab 10, p. 89)

(vii) Release from CAF

419. On September 29, 1992, the Complainant placed an ad in the local paper, with the support of the Women's Resource Centre in Comox, seeking females who had been sexually harassed to form a support therapy group.

420. The Complainant continued to press for stress leave in the early fall. Because she could not get stress leave, she requested unpaid leave on October 15, 1992. She felt she really needed time to stay at home and two months would help her heal and she did not have the mental capacity to continue to work. This request was denied on October 16, 1992. Thereafter, she decided to take accumulated annual leave (vacation) because she felt that was the only way she could get leave to recover from stress. This leave commenced on October 26, 1992, and continued until January 10, 1993.

421. By October, 1992, the Complainant's relations with all military personnel, both administrative and medical, were showing signs of strain. These relationships rapidly deteriorated from that time forward.

422. On October 5, 1992, she received a response from Lt. General Commander D. Huddleston, Air Command, denying her application for Redress of Grievance for her Recorded Warning. In that memorandum, Lt. Gen. Huddleston, points out that the memorandum from PO Pistun was obtained during the course of the Summary Investigation which was carried out as a result of her harassment complaint at CFB Comox. The Lt. Gen. Commander further points out that PO Pistun was not obligated to provide her with a copy of the verbal warning, or place it on her file, as it was only a record of verbal counselling. At the conclusion of his letter, he denied her application for Redress of Grievance.

423. On October 19, 1992, she initiated her voluntary release from the military. The reasons stated in her written request for release were reported as sexual harassment and subsequent administrative and medical harassment. Although the Complainant testified she refused to sign the release before talking to a release clerk, the document she produced into evidence dated October 19, 1992, has three signatures, her own, Major Leblanc's and Lt. Col. van Boeschoten's. (Exhibit HR-1, Tab 24, Doc. 24.2)

424. The documentary evidence indicates Major Leblanc recommended her release. His remarks on the release form note her leave date might be changed for release under a "4c". The Complainant understood the code meant she was unable to work. (Exhibit HR-1, Tab 24, Doc 24.2)

425. An initial release form was approved by Lt. Col. van Boeschoten on October 19, 1992. He disagreed with her written reasons for release, as demonstrated by the following remarks:

> Release application accepted. Firmly believe that member's allegations have received and continue to receive fair consideration. Member has demonstrated much impatience with the process and involved the media, increasingly, in an effort to support her side of the case. Unfortunately the CF is unable to counter and must stay on the "high road" to avoid impugning those third parties who may have been unfairly maligned. The process of review of Redress of Grievance and B[oard] of I[nquiry] that are outstanding will continue.
> (Exhibit HR-1, Tab 24, Doc. 24.2)

426. The Complainant's evidence about some of the events surrounding her release are somewhat confusing. She had difficulty with the dates of some of the events. She testified she was

requested by Major LeBlanc to attend a meeting in Captain McLachlan's office which she believed was on October 23, 1992, to discuss her release. At her request, Cpl. Layla Mitchell accompanied her. She attempted to tape record the meeting but was ordered to stop. According to the Complainant, Captain McLachlan requested her to sign a second release form (Exhibit HR-1, Tab 24, Doc. 24.4), different in form from the memorandum she was requested to sign on October 19, 1992, (and which it appears she did sign (Exhibit HR-1, Tab 24, Doc. 24.2)). She testified she was informed the prior release memorandum had been ripped up. After her persistent requests, the ripped form was returned to her, which she later pasted back together. The second form entitled "Application for Voluntary Release/ Transfer", is signed by the Complainant, as well as Captain McLachlan, L. Cdr. Garwood and Lt. Col. van Boeschoten. (Exhibit HR-1, Tab 24, Doc. 24.4)

427. She testified that during the October 23rd meeting she received from MWO Janssen, the Administration Branch Disciplinarian, a document entitled, "Branch Disciplinarian Instructions." It outlined several contraventions by her and refers to her failure to comply with the Code of Service Discipline. She was then warned verbally and in writing that a failure to comply with the Code of Service Discipline and the specific directions listed in the document would result in disciplinary action. MWO Janssen wrote that taping verbal interactions without permission and threatening to use outside information when dealing with personnel in the discharge of their duties could be viewed as a form of harassment (by her). This document was signed and dated by the Complainant on October 23, 1992.

428. According to the Complainant, in her experience as an Administrative Clerk, it was unusual to have Commanding Officers and Base officers sign a release on the same day the application is submitted. The Complainant understood the form was generally placed in the mail, thereby taking approximately one to two weeks to obtain all signatures.

429. The Complainant recalled she subsequently attended the Pay Office to discuss available options concerning her monthly pension contributions. The documentary evidence includes a form entitled, "Canadian Forces Superannuation Act Certificate" with the Complainant's signature, but is undated. According to the Complainant's testimony, and consistent with the information found in the form, she was provided with the following four choices:

a. elect to be paid a return of contributions pursuant to Section 19(1) of the Act;

b. elect to be paid a deferred annuity commencing at age sixty years of age;

c. elect to be paid a return of contributions and have it transferred to the PSSA/RCMPSA; or

d. elect to be paid a return of contributions and have it transferred to an RRSP (TD2 required).

(Exhibit HR-1, Tab 24, Doc. 24.5)

430. She testified she elected number (d), a return of contributions to be transferred to an RRSP. The Complainant`s election is now disputed by her. She testified she asked how much her monthly pension would be, but received no answer because "they didn't know." She

testified she was under stress when she made the selection, and in hindsight she should have chosen number (b). She believes she selected number (d) because she was unsure if she was still going to be alive at age 60 or 65 to collect a pension because at the time she was not functioning. She testified she also enquired about which option would be most beneficial to her, but was given no information. Having received no better alternative, she opted for number (d).

431. It is noted the Canadian Forces Superannuation Act Certificate contains a portion which reads:

I have been informed by letter from the Chief of the Defence Staff dated _____ of the financial and other factors relating to the choice of a return of contributions and a deferred annuity.

(Exhibit HR-1, Tab 24, Doc. 24.5)

432. The above portion was never completed and the Complainant testified she never received such a letter.

433. The normal release proceedings required the Complainant to sign a document entitled "Statement of Understanding." This was signed by the Complainant on December 11, 1992 during her annual leave. It specifies a release under item 4C of QR&O 15.01. Before signing this form, the Complainant wrote the following:

In front of a witness - Cpl Lynnette Kelly [Layla Mitchell] they embarrassed me and tried to force me to sign the applicable CFAO to my release after normal working hours. Present were MCpl C. Johnsen, MWO Janssen, Capt McLachlan, Major LeBlanc.

(Exhibit HR-1, Tab 24, Doc. 24.9)

434. On November 26, 1992, the Complainant wrote to her MP, Mary Collins, seeking financial compensation for salary she anticipated losing. The Complainant then sent two other letters to Ms. Collins.

435. During the months of November and December, 1992, while the Complainant was on leave, the group counselling sessions with Joan Wright had stopped. She testified that during this time, she was still crying hysterically and not knowing why, and felt she really needed some help. On December 1, 1992, she saw a civilian family physician, Dr. Graf-Blaine, for stress problems and on December 11, 1992, she attended the Courtenay Mental Health Centre and was referred to an eight-week group program. The Centre arranged for her to see a psychologist, Dr. Catherine Mahoney. The Complainant was interviewed by Dr. Mahoney on December 17, 1992.

436. Dr. Mahoney`s written report contains a section "Provisional DSM III-R Diagnosis" which reads:

PROVISIONAL DSM III-R DIAGNOSIS

Axis I 309.89 Post Traumatic Stress Disorder
309.28 Adjustment Disorder with Mixed Emotional Features
Axis II V71.09 No Diagnosis on Axis II

(Exhibit HR-2, Tab 3)

437. Dr. Mahoney extended an invitation to the Complainant to participate in an eight week group therapy session, starting February, 1993. The focus of the session was on developing self-protective boundaries and self-care routines. The Complainant attended the therapy sessions to get help.

438. According to an agreed statement of events between the Complainant and the Respondent, the last day of the Complainant's annual leave is dated January 4, 1993. The Complainant received her release on February 17, 1993.

(viii) Post Release

439. After the Complainant's release, the Respondent continued to address the grievances initiated by her while in active service.

440. The documentary evidence reveals that on January 30, 1993, Dr. Huddleston, Lt. Gen. Com, Air Command, forwarded the Complainant's Redress of Grievance for her PER to National Defence Headquarters. He recommended partial support for her application in that the score be raised to 7.0 because his letter indicates he could not accept the rationale provided by the BTSO at CFB Comox for reducing her score from its original score to 6.9. The rationale provided to Dr. Huddleston by the Base Commander was that the Complainant's Commanding Officer stated the score was reduced solely because of the X factor. Lt. Gen. Com Huddleston refuted this reason because he found there were approximately 41 high scores available for allocation at CFB Comox.

441. On March 2, 1993, the Complainant wrote to the then Minister of National Defence, Kim Campbell, requesting the Minister to investigate her case.

442. On June 2, 1994, Lt. Col. Brownlee, the Director of Personnel Legal Services for the Chief of Defence Staff, provided the Complainant with a Summary of Grievance and copies of supporting documents. Lt. Col. Browlee invited written comments from the Complainant. It is noted the Summary refers to three grievances, firstly the RW, secondly the PER, and thirdly the Harassment and Counselling and Probation.

443. The Complainant provided a written reply on June 10, 1994. Enclosed in Lt. Col. Brownlee's correspondence of June 2, 1994, was a copy of a letter from Col. McGee's replacement, Wing Commander, Col. Rogers. That correspondence dated June 15, 1993 to Air Command strongly recommended against any upward adjustment of the 1991 PER. The documentation reflects a change of view by Air Command to upwardly adjust the PER

score. This is reflected in a November 3, 1993 communication by the Commander of Air Command endorsing Col. Rogers' conclusions to National Defence Headquarters. In the final analysis the decision at National Defence Headquarters was to raise the PER score from 6.9 to 7.0.

444. On October 10, 1994, a decision was released to the Complainant from the office of the Chief of Defence Staff. Her application for removal of the RW was denied, the Counselling and Probation was rescinded and her PER score was raised from 6.9 to 7.0. The letter concludes with an apology for any unnecessary inconvenience the delays in considering her various complaints at CFB Comox may have caused her. The decision reads:

10 October 1994

Ms. Kimberley Franke

APPLICATION FOR REDRESS OF GRIEVANCE

I have considered your applications for redress of grievance of 9 December 1991, 4 February 1992 and 25 August 1992 regarding a Recording Warning you received, your Performance Evaluation Report (PER) dated 20 January 1992 and the harassment complaints you submitted respecting your being placed on Counselling and Probation, respectively.

I have considrered the comments which you have provided in all your correspondence, including your most recent letter of 10 June 1994, as well as the comments from your superiors at the various levels in your chain of command, and those of senior staff at this Headquarters with responsibility for such matters. Disclosure of documents has been provided to you pursuant to Canadian Forces Administrative Order 19-32.

With respect to the Recorded Warning, I deny your request to have it rescinded as I consider that it was properly awarded. However, I recognize that the application for redress was not well handled by personnel at CFB Comox, and I expect that such mishandling will not recur.

With regard to your 1990-91 PER, I have directed that the score be raised from 6.9 to 7.0. I have also directed that the Counselling and Probation issued to you on 11 June 1992 be rescinded. I understand that you have a related complaint at the Human Rights Commission regarding financial compensation, and I therefore do not consider it appropriate to comment on that.

As I consider that your various complaints were not expeditiously handled by personnel at CFB Comox, I would apologize for any unnecessary inconvenience these delays may have caused. However I consider that my above actions and directions provide sufficient and adequare response, and I would deny further redress. Nevertheless, I would like to take this opportunity to thank you for your service in the Canadian Forces and to wish you well in the future.

A.J.G.D. deChastelain
General
(emphasis mine)

(Exhibit HR-1, Tab 28, Doc. 28.3)

445. It is noted the documentation provided to the Complainant on June 2, 1994, from Lt. Col. Brownlee included correspondence from Col. McGee, dated June 19, 1992 to Air Command. The documentation includes the testimony of three individuals. This was the first time this documentation was provided to the Complainant. The three individuals interviewed were her supervisors, Lt. Vedova, MWO Macnair and Major Couture. The document does not identify the interviewer. Col. McGee could not identify the interviewer in his testimony. It is dated June 5, 1992, and was, therefore, in existence prior to June 11, 1992, the date the Complainant requested her grievance be sent to Air Command. It appears the three supervisors were present at the same time during the interview.

446. When the Complainant received this information in June, 1994, she testified she thought the Base Commander was having "secret meetings about the Summary Investigation". She felt she should have been involved, and given a similar opportunity to respond at that time. She also did not think that after submitting her grievance to Air Command, the Base should be able to provide additional documents to Air Command that were not subsequently provided to her for comment. She testified some of the questions and answers bothered the Complainant, and receiving a copy after the fact confused her. These questions and answers relate to the complaints and all three supervisors' comment on the Complainant's dress. It is noted in the interviews, Lt. Vedova acknowledges the Complainant was offended by Major Couture's questions of her finances. It is also noted in the interviews, MWO Macnair indicates he called the Complainant by her first name, asked the Complainant in casual conversation if his muscles were getting bigger and possibly once may have rubbed his sore pectoral muscle in front of the Complainant. These questions and answers read in part:

Questions to Major Couture

Q. Had she done anything to cause you to conclude that such comments [re biker mama] might appeal to her?

A. No, not specifically. However, I saw her at the Comox Mall and her shorts were so short it caught my attention even from a great distance.

Questions to Captain Vedova

Q. Capt Vedova how often was the subject of the Biker Mama raised with you by Cpl Franke?

A. Never.

Q. How often did she mention Maj Couture's use of the word "Sexatery?" ...

A. Once.

Q. Did you advise Maj Couture of Cpl Franke's concern?

A. No.

Q. Why not?

A. She never mentioned the subject again, so I thought it was just a comment in passing.

Q. Do you realize the seriousness of such comments now?

A. Yes.

Q. Capt Vedova, how often did Cpl Franke mention her concern about Maj Couture's inquiry into the matter of her finances?

A. Once. She said she was offended by it.

Q. What was your response?

A. I agreed with her.

Q. Did you take any action?

A. No, we were just chatting about that like so many other subjects we discussed. I didn't place any particular importance to it.

Questions to MWO Macnair

Q. MWO Macnair, Cpl Franke states that you made a comparison of the physical attributes of Cpt Vedova versus the Maori native. Did you? [the postcard]

A. No. In fact, I didn't think very much about the card - it's the sort of picture one sees in National Geographic all the time. ...

Q. MWO Macnair, Cpl Franke accuses you of making gestures which she interprets as being suggestive, such as licking your lips and flexing your muscles?

A. This really came as a shock to me. I thought we had an ideal working relationship. I called her by her first name, Kim, and expressed a daily interest in her life, chatted with her in the canteen and gave her time off for personal administration. When she says I was flexing my muscles, it was when I was lifting weights and working out regularly and I asked her in casual conversation if my muscles were getting bigger. I never thought of it as being in any way suggestive.

Q. Did you ask for a date or make any other type of advances towards her?

A. No.

Q. Cpl Franke states that you rubbed your chest and licked your lips. What was that about?

A. I had pulled a muscle during my weight-lifting routine and it was sore. I may have rubbed my pectoral muscle in front of Cpl Franke because I did favour it while it was sore, but nothing more than that.

Q. How often?

A. Possibly once, because I'm not even sure I did it...

Q. Did Cpl Franke ever make any overtures to you?

A. Not directly.

Q. What do you mean?

A. I don't want to sling mud.

Q. Slinging mud is not the issue. You are facing some serious allegations and I'm trying to understand what precipitated them and their validity.

A. Her dress was such that it left nothing to the imagination. At the end of the work day she would change clothes. In her civilian clothing she was often braless and would lean over exposing her breasts. Her sports shorts left nothing to the imagination.

Q. She wore sports shorts at the end of the day?

A. No, when she went walking with Capt Vedova.

Questions to Captain Vedova

Q. Captain Vedova how would you describe Cpl Franke's dress when she went walking with you?

A. Provocative. She wore a bikini type outfit.

Q. Did you speak to her about her dress?

A. Yes. I said, "How can you wear something like that?"

Q. What was her reaction?

A. She didn't do anything.

Questions to MWO Macnair

Q. MWO Macnair were there any other indications of Cpl Franke's dressing provocatively?

A. At the golf club she would wear loose clothing which would expose her breasts. (emphasis mine)

(Exhibit HR-1, Tab 19, Doc. 19.2.1)

447. It is noted in Col. McGee's response to the Redress of Grievance for the Summary Investigation/Harassment Complaint, dated June 8, 1992, he refers to the Complainant frequently dressing provocatively and acting suggestively and licentiously. The Chair finds it reasonable to conclude the source of Col. McGee's information to be from the interview notes of June 5, 1992.

448. In June, 1994, the Complainant attended a six-week therapy program in St. Joseph's Hospital, Comox. She testified the program assisted her to learn about things which triggered her and how to recognize when she was uncomfortable.

449. After her release the Complainant contacted the College of Physicians and Surgeons for the Province of B.C. inquiring whether Dr. Jacques and Dr. Raymond were qualified to practise. She also wrote a letter on November 14, 1992, to the Presbyterian Church to complain about Padré Baker.

450. In the year following her release, the Complainant immediately applied to take a course at a college in Courtenay. She took an eight to ten week computerized bookkeeping course. Then she began sending out resumés. She applied for jobs at BC Tel, BC Hydro, City Hall, lawyers' offices and other administrative work without success. She received replies stating the positions were full, or a candidate had been selected. She obtained employment at a video store in close proximity to her home for approximately two months. The job involved receiving and renting videos. After an incident with a customer who referred to her as "sweetheart" and "honey", she quit the job at the suggestion of the manager.

451. The Complainant testified that after the video store incident she could no longer deal with conflict or handle situations in which degrading comments were spoken. She further testified she was unable to deal with men, on any basis, unless they came to her land to do work for her. This, she testified, caused her to change her bank, because her former bank manager was a male. Moreover, she testified she has a dog who accompanies her everywhere she goes. The dog makes her feel safe and is used by her to protect her boundaries and personal space.

452. Her next employment was in 1994 working on a potato farm, during the harvest season. After this brief working period, she started two businesses. She now cleans houses. As well, she and her husband purchased land, and the Complainant raises organic chickens. The

Complainant testified both work situations enable her to manage on her own time, when her health is good.

IV. THE MEDICAL EVIDENCE

453. The Complainant's first assistance with her stress began with counselling sessions with Joan Wright, a counsellor specializing in sexual abuse and harassment. Joan Wright, referred by Dr. Halliday as the Complainant's primary therapist, testified before this Tribunal.

454. Joan Wright is a registered nurse, and as a Counsellor is registered with the B.C. Association of Clinical Counsellors. At the time of her testimony she had sixteen years of counselling experience. Her expertise is in counselling, including sexual abuse, harassment and skills issues. Ms. Wright' experience in sexual abuse began in Ottawa, in 1987, at the Sexual Assault Centre under Dr. George Fraser. She worked with men and women who experienced dissociative disorders. She admitted that in her own practice, prior to seeing the Complainant, she never counselled a client diagnosed with PTSD caused from sexual harassment in the workplace.

455. Respondent Counsel submitted Ms. Wright`s expertise is limited and for that reason urged us to reject Ms. Wright`s testimony. Counsel submitted Ms. Wright lacked training and credentials to make diagnoses, which Counsel argued Ms. Wright attempted to do. The Chair finds Ms. Wright's evidence helpful in the context of the symptomatology she observed from the Complainant that she found similar to her other clients experiencing stressful situations. This evidence was helpful in assessing the Complainant's state of health during the period following the issuance of the RW. Ms. Wright also testified about the counselling techniques and treatment plans she initiated for the Complainant during individual therapy sessions, as well as her observations of the Complainant in group therapy.

456. Ms. Wright first counselled the Complainant on July 15, 1992, following a written request from Dr. Jacques. She subsequently provided the Base doctor with a consultant report recommending a leave of absence for the Complainant due to extreme stress. In this report, she wrote "Post-traumatic Stress Syndrome". This reference from Ms. Wright evoked Respondent Counsel`s concern that Ms. Wright had made a diagnosis beyond her expertise. Ms. Wright testified the condition was not recorded as a diagnosis but inserted in her report because the Complainant was presenting to her a constellation of symptoms similar to other clients she observed who experienced a traumatic event. (Exhibit HR-14, Tab B)

457. The Complainant`s symptoms, Ms. Wright observed in that first session, included a tremendous amount of stress, inability to articulate, extreme agitation, and incoherence. Ms. Wright testified that the Complainant told her in the first session about making active plans to

commit suicide, that she had been prescribed Prozac, 20mg., and felt embarrassed she was unable to control the situation at work, feeling frustrated, powerless, frightened and complained of headaches, nausea, insomnia and depression. Since the Complainant was unable to express to Ms. Wright the incidents causing her stress, Ms. Wright requested she document the incidents. The Complainant did, and brought the information to subsequent sessions.

458. At the conclusion of five counselling sessions, Ms. Wright sent a written report to Dr. Jacques dated September 15, 1992. She advised Dr. Jacques she supported the Complainant in her validation of being a victim of sexual harassment and requested the cooperation of the Respondent in validating the Complainant's experiences. In her report, she wrote:

> ... I found that she presented with a stress syndrome similar to post-traumatic stress disorder. ...
>
> I had understood that National Defence had a policy of zero tolerance to any form of abuse, and as a counsellor to Kimberley Franke, I felt it my role as her therapist to support her in her validation of being a victim of sexual harassment. ...
>
> I would like to request that she be given a leave of absence due to extreme stress. ...
>
> (Exhibit HR-14, Tab 1, Doc. D)

459. After writing her report, Ms. Wright testified she did not hear from Dr. Jacques, but rather received a telephone call from another Base Doctor, Dr. Raymond, in September, 1992. That testimony is corroborated by Dr. Raymond's medical note of September 16, 1992, in which he documents his telephone conversation with Ms. Wright. Both Ms. Wright's evidence and Dr. Raymond's notes are consistent with their opposing views concerning treatment for the Complainant. Ms. Wright recommended a period of leave. Dr. Raymond felt an extended period of sick leave was unwarranted. Dr. Raymond disagreed with Ms. Wright that the Complainant was suffering from PTSD.

460. At the conclusion of the five initial therapy sessions, the Women's Centre requested Ms. Wright to facilitate group therapy sessions for females having similar work experiences as the Complainant. Ms. Wright agreed and group sessions commenced September, 1992. The Complainant participted in these sessions. Ms. Wright described the Complainant`s input in the group helpful and "a catalyst for change within the group". Ms. Wright recalls the Complainant at times being stressed and able to feel supported by the group and able to give support to the group.

461. During these sessions, Ms. Wright provided counselling, assertiveness training and stress management. The sessions were for two hours once a week and the Complainant attended until November, 1992. Ms. Wright testified the group counselling sessions were discontinued as the participants preferred one on one counselling.

462. Ms. Wright did not see the Complainant from November, 1992, until February, 1995. At that time, group counselling sessions for females who had been sexually harassed, co-facilitated by both Dr. Halliday and Ms. Wright, were started in Dr. Halliday's office. The Complainant

attended the sessions regularly from February, 1995, until the fall when her attendance became more sporadic. Ms. Wright provided education, support and therapy in these sessions. Ms. Wright testified group therapy in these sessions with Dr. Halliday included more intensive therapy than Ms. Wright provided in her own group counselling sessions.

463. Ms. Wright again saw the Complainant in group counselling sessions conducted by herself and Dr. Halliday in 1996.

464. Ms. Wright testified about an encounter she had with the Complainant when the Complainant was involved in a motor vehicle accident in April, 1996. The Complainant also related this incident in her testimony. Apparently, the Complainant had driven her car off the road after visiting a friend. The Complainant testified she could not remember the accident. She was eventually taken to the hospital because of a cut above her eye.

465. Ms. Wright testified about being contacted by the Complainant's husband to come to the hospital. When she arrived, she found the Complainant in the Emergency Department in a room, "sitting on a chair, with her legs drawn up to her chest and her arms around herself,...cowering, crying and gasping." Ms. Wright stayed in the hospital with the Complainant for about three hours. During this time Ms. Wright testified the Complainant told her she was afraid that someone was going to hurt her and felt she was in extreme danger. Ms. Wright testified the Complainant would not initially allow a male doctor to examine her. Eventually, the Complainant consented to having a male doctor apply a bandage to her eye. Thereafter they left the Emergency room.

466. Following this incident, and on a referral dated April 1, 1996, from Dr. Graf-Blaine, Ms. Wright again counselled the Complainant. She saw the Complainant for five individual sessions in the month of April, 1996. After they concluded, she privately counselled the Complainant on three occasions over the summer of 1996.

467. Although the Complainant and Ms. Wright believed the Respondent was responsible for Ms. Wright's counselling fees, after submitting invoices for the initial six sessions, Ms. Wright was informed by the Respondent that the Complainant was responsible for the account. The account still remains outstanding.

468. Aside from counselling sessions with Ms. Wright, the Complainant was receiving medical care from her family physician. The Complainant first saw Dr. Graf-Blaine in December, 1992, for stress. The Complainant continued to see Dr. Graf-Blaine throughout 1993, 1994, 1995 and 1996 for her stress problem and other health matters. In March, 1993, Dr. Graf-Blaine prescribed Prozac, an anti-depressant.

469. The Complainant has been treated with various anti-depressant medications since March, 1993 except for a brief period in late 1995, early 1996, when the Complainant stopped taking the anti-depressant, Prozac, at the insistence of her husband. After Dr. Graf-Blaine's initial referral to Dr. Halliday, Dr. Halliday and Dr. Graf-Blaine continued to share the care of the Complainant until April, 1996, and from that time to present, the Complainant has been under the care of Dr. Frederick Halliday.

470. Both the Canadian Human Rights Commission and the Respondent lead expert evidence about the Complainant's medical condition. Dr. Frederick Halliday, testified as an expert in psychiatry with an emphasis on trauma psychiatry (cause of the disease is outside the person). It is his opinion the Complainant is suffering from Post-traumatic Stress Disorder (PTSD), as a result of trauma related to sexual harassment experienced during her term of service at the BTnO.

471. The Complainant's first visit to Dr. Halliday was in January, 1994. Since that initial contact, Dr. Halliday had intermittent contact with the Complainant over the next six months, until July, 1994. She re-established contact with him January, 1995, when she started group therapy with Dr. Halliday and Joan Wright. These sessions continued throughout 1995 and 1996.

472. Dr. Graf-Blaine asked Dr. Halliday to see the Complainant about emotional and verbal abuse and sexual harassment. In particular, she wanted to know if "Post-traumatic Stress" was involved. In Dr. Halliday's first four sessions with the Complainant between January 12 and March 4, 1992, he believed the Complainant was recovered from her situational condition. This was reflected in his January 19, 1994, report to Dr. Graf-Blaine:

> I saw this courageous but stressed 32 year old woman on January 12, 1994. She gave me a detailed and objective report of the harassment to which she has been subjected, including harassment even by the government investigator. Her strength is actually rather amazing when one notes that she has never let up in her resolve in spite of repeated attempts by almost everyone involved to blame the victim.
>
> She certainly warrants all the support we can provide, and I have told her that I will make myself available to do same. At this stage, there is no need for medication, just psychological support.
> (emphasis mine)

(Exhibit HR-11, Tab 11, p. 67)

473. Dr. Halliday stopped seeing the Complainant in June, 1994. He wrote two further reports, one letter written on February 15, 1994 to Ms. Sherri Helgasen, a Conciliator with the Canadian Human Rights Commission. Dr. Halliday refers to the Complainant recovering from a:

> ...situational adjustment reaction, secondary to stresses of harassment in her work place. ... and further to...suffered from anxiety and from depression of physiological proportions, for which she is still taking antidepressant medication.
> (emphasis mine)

(Exhibit HR-11, Tab 11, p. 68)

474. Dr. Halliday was questioned about the above diagnosis. He stated he used situational adjustment reaction as his diagnosis, which he described is essentially the same as adjustment disorder, until he was assured the qualification for PTSD was present in the

Complainant. According to Dr. Halliday, with a situational adjustment reaction, the dysfunctional response to stress does not involve the dissociative, defensive, flashbacks or intrusive thoughts of PTSD. He testified that usually the adjustment reaction is reserved for situations that can be resolved, such as when the person who is doing the thing that is felt as harassment, changes, or, where the person who is feeling harassed, is given some assurance they will be safe. According to Dr. Halliday, when that happens, the process of PTSD is often stopped at that stage, and the diagnosis of situational adjustment reaction is appropriate. Dr. Halliday testified the initial treatment for situational adjustment reaction is essentially the same as for PTSD.

475. His next correspondence in this initial period was to Dr. Graf-Blaine dated May 4, 1994, in which he wrote the Complainant reports a feeling of having lost her identity, having a tendency to be bored, and an inclination to want to vegetate and oversleep, with decreased appetite, but a tendency to get hungry more frequently, and a lessened drive and libido. Dr. Halliday reports to Dr. Graf-Blaine:

> This appears to be an atypical depression, secondary to grief which is both unresolved and still at the anticipated stage. I have suggested that she ask you to refer her to the hospital Day Therapy Program, where she can get some opportunities to share the grief process with others. ... (emphasis mine)
>
> (Exhibit HR-11, Tab 11, p. 69)

476. Dr. Halliday's first written diagnosis of PTSD is contained in his letter dated February 27, 1995, in response to a request from the medical officer for Veterans Affairs Canada for assistance in assessment of the degree of financial compensation in the Complainant's pension entitlement from the Canadian Pension Commission. In his correspondence, Dr. Halliday writes that although his initial diagnosis concurred with that of the medical officer, being "adjustment disorder with depressed mood," that it is now clear to him that the Complainant's condition fits a diagnosis of PTSD, the trauma being the sexual harassment to which she was subjected in the military work environment.

477. The reason given by Dr. Halliday for not expressing a PTSD diagnosis in his early correspondence was due to a problem he had from the beginning with the Complainant. His problem was deciding exactly where on the continuum of diagnostic criteria the Complainant fits. According to the DSM manuals, used by psychiatrists as a statistical and diagnostic reference and the definitions of PTSD found in the manuals, he explained his choices were either a situational traumatic event that will be gone as soon as the patient is relieved of the situation, or a PTSD, that often needs two or more years of therapy. The difficulty for him was discovering the Complainant's symptoms which he testified were hidden at the beginning. The other concern he had with applying the definition in the manuals was responding to society with a diagnosis that was not unfair to the military.

478. Dr. Halliday believes PTSD was first included in DSM III, in 1980. The diagnostic criteria established in the 1980 manual was changed in the DSM IIIR edition, revised in 1987, and again revised in May, 1994, in the DSM IV, the current manual. He explained the changes in this

criteria, from 1980 to 1994, was to restrict the broadness of the definition which he views as a responsibility to society's need to ensure the diagnosis is not too broad, and that restriction has been a factor in his medical responses about the Complainant. Dr. Halliday testified he did not rely on the DSM IV for definition of PTSD for his diagnosis. He views the DSM IV as a research tool.

479. Dr. Halliday testified he never told Dr. Graf-Blaine the Complainant was suffering from PTSD because "that was just something that was shared," and that they discussed this case because he wanted Dr. Graf-Blaine's advice in dealing with it as well as with other cases they were sharing. He testified his reference to "a typical depression, secondary to grief" in his May 4, 1994 correspondence, was a secondary diagnosis and a way of telling Dr. Graf-Blaine that things were getting worse. Moreover, the label he used on his billing records at the time required by the Medical Services Plan of BC, was Post-traumatic Stress Disorder. Dr. Halliday is hesitant to use labels in his practice, and he testified his early correspondence reflects this preference.

480. Dr. Halliday testified that when he first saw the Complainant, he was under the impression she was being heard and that probably very soon, a Tribunal or someone else would validate her and make her feel safe so that she would be over it. He further testified that he was completely naive at the time of many of the symptoms she was having, like how she would react at home, how she would withdraw, how she was afraid to leave her farm, and that this did not show until she trusted him enough to let him see it.

481. Dr. Halliday described PTSD as a consensual label for a group of symptoms demonstrative of someone who has been traumatized by an unusual event, and fears they are not going to be able to protect themselves from being traumatized again. It is characterized by some kind of forgetting, usually a dissociation or splitting off of part of the memory. Dr. Halliday testified there are two other symptoms associated with this disorder, the second being flashbacks and intrusive thoughts and the third, an increased startle response or various kinds of anxiety.

482. The key initial treatment for PTSD, according to Dr. Halliday, is to validate the individual. An emphasis is placed on understanding how the person feels and assuring the person that is how you would feel if that happened to you. As the individual gets the assurance, they begin to trust and their symptoms are not as great and then they can be helped to work through their symptoms, and to make some sense out of it. The individual can be made to feel safe, removing them from the work environment for a period of time. Dr. Halliday testified that with harassment in the workplace, it is necessary to have negotiations as to whether or not the workplace will change and whether the patient has to make adaptations, and how much of each. According to Dr. Halliday, this can only be successfully done by someone who is not involved with the institution, and who does not stand to lose a job or be disciplined or shamed in any way.

483. Dr. Halliday described the Complainant`s behaviour post release, hiding out of her home, not getting out of bed, family members reminding her to shower, screaming at her son, as an agoraphobic condition. He explained that agoraphobia is being afraid of open spaces, therefore one hides out at home. He went on to elaborate that it is not really a fear of spaces, but a fear of social contact. During this time, Dr. Halliday was not worried about the Complainant's safety,

although the Complainant was not going to therapy as much as he wanted. It appeared to him that this was just something "we`d" have to live with until she felt comfortable again.

484. Dr. Halliday was asked about the relevance of the Complainant`s past responses to stressors, e.g., family background and marriage counselling, when dealing with Post-traumatic Stress Disorder. Dr. Halliday believes that a person`s past responses to stressors are important to the treatment process, but not important to a diagnosis for PTSD. He did not consider the Complainant had any prior trauma in the past but, on the contrary, considered her a healthy individual prior to receiving the RW in November, 1991.

485. Dr. Halliday stated that the Complainant has had intrusive thoughts, and she also has a strong ability to dissociate to stop the flashbacks so that her thoughts do not show. He related an incident of an emotional flashback experienced by the Complainant, when the Complainant had an encounter with the Military Police (MP) in October, 1995. This incident was described by the Complainant in her testimony which occurred during her first visit to the Base after her voluntary release.

486. In that situation, she was attending a social function with her husband and friends and felt a need to leave the Base as she was not feeling well. As she was getting into her car she was stopped by an MP car. An officer informed her that one of her car headlights was out. While the officer prepared a ticket, she began to pace, and described that she became more and more agitated while waiting for her husband and friends. She began honking her horn, at which point the MP came over questioning the reasonableness of her action and saying he could give her a ticket for the excessive noise.

487. The Complainant testified she was so upset during the incident that she just turned around and started screaming at the MP and said, "Excessive noise, reasonable person, you don't think I'm a reasonable person?" The incident ended when her husband arrived, saw her screaming at the MP, held her and told her it was okay. After her husband was able to calm her down, she got into her car, accompanied by her friend, Sherie Campbell. They drove around the parking lot once and stopped. She was unable to convince her husband and Ms. Campbell's husband that she wanted to go home. She then asked Ms. Campbell to leave the car and drove home without her husband or her friends. In response to a later request from her husband to return to pick him up, she informed him that she was unable to return to the Base and that he would have to make other arrangements. Sherie Campbell`s version of this event is similar to that related by the Complainant.

488. It eventually became apparent to Dr. Halliday, that the issue was not so much the sexual harassment but what he described as second trauma which, he testified, arises if the individual is not validated or does not feel confident, as in the Complainant's case, that she had someone to go to. Dr. Halliday testified that "understandably" the Complainant was not forthcoming in doing anything about her situation because there was no one she could approach. Therefore, according to him, at that point, the Complainant began to have symptoms, the dissociative flashbacks, feelings of not being safe and probably some subconscious paranoia.

489. Dr. Halliday stated the flashbacks are mainly due to various episodes when the Complainant felt harassed. He described the flashbacks as seeming to have more to do with the inability to be heard by the officers, rather than with the actual sexual events. He testified what is most upsetting is a lack of protection from these behaviours. Dr. Halliday explained the ambulance incident in June of 1991 and certain labels, like unmilitary behaviour and insubordination, are very humiliating for the Complainant and that words which are a reflection on character, are the ones that seem to hurt most and reflected back by the Complainant's behaviour.

490. Dr. Halliday also referred to the Complainant`s subconscious paranoia which he believed started when the Complainant was not being validated and the second injury occurred.

491. According to Dr. Halliday, the Complainant had reason to doubt whether MWO Macnair or Major Couture would give her support. With the delays, the situation begins to percolate and the symptoms of PTSD develop without anyone knowing. Dr. Halliday testified that almost invariably in PTSD, when a person does not feel validated there is an element of paranoia. He described paranoia technically as the point where normal distrust reaches a point where it is out of keeping with what other people believe is appropriate in the situation.

492. Dr. Halliday testified that the shoe incident from the Complainant's perspective, was an effort to try and get her to change her sexual values in a subtle way. Although it may or may not have been the intent of the people talking to her, Dr. Halliday has no doubt that the second trauma or injury, at that point in time, was really great. Dr. Halliday proffered this opinion based on an understanding the Complainant was disciplined for wearing non-regulation shoes. He opined the Complainant had good reason, whether it was true or not, to believe this was an attempt to change her sexual values. It is his belief that at that point in time the Complainant clearly had PTSD.

493. Dr. Halliday testified that the process of the past five years, including the Tribunal hearing, has caused the Complainant second injury.

494. As recently as May 27, 1996, Dr. Halliday supported the Complainant's application for increased pension allotments from the assessment of 20%, in a letter to B. Dublin, of the Bureau of Pension Advocates, outlining his clinical findings, and on that basis, states her disability over the past four years as greater than 90%.

495. With respect to recovery from PTSD, Dr. Halliday testified it is only when the individual begins to have intrusive thoughts and increased anxiety can they be helped. Accordingly he states, when they begin to have this pain and express it, they learn to set boundaries to protect themselves. According to Dr. Halliday, often at this stage, their behaviour is quite bizarre and sometimes even paranoid. In the Complainant's case, her experience with the MP is an example of being unjustly suspicious.

496. Dr. Halliday predicts that it may take two years from when the Tribunal renders a decision for the Complainant to lead a reasonably normal life. Dr. Halliday initially opined that without a positive outcome from the complaint process she would be one of the patients who would not get better and would not lead a normal life. He later modified his opinion by stating

without positive response from the hearing, he believes that she has enough strength, and based on her tremendous effort to fight, that these same strengths will be used in therapy, and she will do well when she gets into therapy.

497. The treatment Dr. Halliday has provided to date has been to validate the Complainant`s feelings and provide therapy in periodic group therapy sessions. After the legal process is over, Dr. Halliday intends to institute confrontational therapy to uncover the Complainant`s defences. This, he indicates, will dramatically change her therapy.

498. Dr. Halliday's opinion is disputed by Dr. Donald Passey, a Lt. Commander in the military. Dr. Passey completed his residency in psychiatry at the University of British Columbia in June, 1995. In addition to providing medical services to the military, Dr. Passey works at the Vancouver Hospital dealing with general psychiatry and stress disorders. Dr. Passey has done research in Post-traumatic Stress Disorder and initiated the first PTSD outreach clinic in Canada to assess psychological trauma in Canadian UN Peacekeepers. Dr. Passey testified as an expert medical doctor specializing in psychiatry, with emphasis on trauma psychiatry.
499. I will address at this time a preliminary matter which has resulted in a submission by Respondent Counsel that the Tribunal draw an adverse finding against the Complainant for not submitting to psychological testing.

500. Prior to the commencement of the hearing, the Tribunal was made aware of a request by the Respondent that the Complainant be assessed by an "independent" medical psychiatrist. Commission Counsel and the Complainant initially expressed no objection to the Respondent's request. Dr. Passey was then presented by the Respondent to conduct the independent assessment. Because of Dr. Passey`s military relationship, the Complainant and Commission Counsel withdrew their consent.

501. Relying on the advice of Dr. Passey, Respondent Counsel then requested the Complainant be assessed by an independent psychologist for the purpose of administering psychological testing known as the Minnesota Multiphasic Personality Inventory, referred to as an MMPI. Both Commission Counsel and the Complainant informed the Tribunal of the Complainant's refusal to comply with the Respondent's request. Commission Counsel submitted the arrangement by the Respondent did not meet a standard of "independence," as the test results would be interpreted by Dr. Passey, a member of the CAF, and secondly, the type of testing was unsupported by Dr. Halliday who considered the test potentially harmful to the Complainant.

502. In addition, Dr. Halliday and Dr. Passey disagreed with the use and ability of an MMPI test. Dr. Passey was of the opinion an MMPI, in the Complainant`s case, would assist him in determining the correct diagnosis, of either PTSD or depression, and provide an indication of the Complainant`s basic personality and how her personality may have interacted with her illness. Dr. Halliday's own view is that an MMPI is unnecessary in this case, and, because of its intrusive nature, it could cause second injury to the Complainant.

503. In Dr. Passey's opinion, the Complainant has personality traits that are strong indicators to him of a possible mixed disorder, and he wanted some objective testing, in the form of an MMPI to make a confirmed diagnosis. As Dr. Passey explains, it is difficult for the Complainant to deal

with people in authority and he bases this belief on the Complainant's difficulties with PO Pistun, MWO Macnair and the Female Advisory Committee. In his opinion, the Complainant finds it distressing and threatening if individuals controlling her future do not go along with her perceptions of whether she should be promoted or how her career should progress. He further testified the RW was a blow to the Complainant, which was perceived by her to be larger than it was, and a type of narcissistic injury. He explained with this type of injury, depending on an individual`s personality, they can become depressed or lash out against whomever is causing the injury. He also believes one of the Complainant`s personality characteristics is a need to be the centre of attention. According to Dr. Passey, the MMPI could help delineate when there is a blurring of two or three psychiatric diagnoses. Dr. Passey indicated there was nothing in the Complainant`s medical records indicative of a personality disorder prior to 1991.

504. Respondent Counsel submits an adverse inference should be drawn from the Complainant`s refusal to take the test, which refusal is supported by the Commission. Respondent Counsel contends the results of the MMPI would support Dr. Passey`s opinions about what really caused the Complainant`s medical condition, which Counsel submits was not the actions of the Respondent.

505. The Chair finds there are factors that compel us not to accept Respondent Counsel`s submission. Clearly, the Complainant was initially willing to submit to an independent assessment until Dr. Passey was selected by the Respondent. This was when the Complainant withdrew her consent. His association with the Respondent, and a member of the same institution alleged by the Complainant to have discriminated against her, would raise and has raised difficulties for the Complainant as to his independence. There is also the fundamental difference of opinion between the opposing medical experts about the validity and usefulness of an MMPI in the Complainant`s case. Moreover, there has been no evidence presented that leads to the conclusion that the Complainant is attempting to suppress evidence because of her failure to take an MMPI test. The Complainant has explained her reasons for refusing to see Dr. Passey, which were supported by the advice of her own psychiatrist.

506. Respondent Counsel relies on the principle enunciated in the case, Beger v. MacAstocker Estate (1996) 140 D.L.R. (4th) 709 (Alta. Court of Queens Bench). Ritter J. noted the principle at p. 723:

[54] The final matter that I intend to deal with before considering the evidence relating to the Plaintiff`s injuries is the question of whether or not an adverse inference should be drawn for failing to call certain medical or quasi medical witnesses. Generally the rule is that the party alleging a fact should prove it to the degree appropriate in the circumstances. This is particularly so when the party had within his or her control clear proof available of any fact in issue. The parties should call that evidence or explain why it is not called and the Court is entitled to expect, in the case of a disputed fact, that the party who has control over the proof will call it. Courts are entitled to clear proof of such if available and the expense is not prohibitive. (Aleksiuk v. Aleksiuk (1991), 112 A.R. 298 (Alta. Q.B.); Murray v. Saskatoon, [1952] 2 D.L.R. 499 (Sask. C.A.); Hidrogas Ltd. v. Great Plains Development Co. of Canada Ltd. (1979), 20 A.R. 483 (Alta. Q.B.), and Levesque v. Comeau (1970), 16 D.L.R. (3d) 425 (S.C.C.).)

507. Adverse inferences are generally drawn in cases where a party is attempting to withhold evidence from the trier of fact, which is not the situation before this Tribunal. For these reasons, I reject Respondent Counsel`s argument to draw an adverse inference against the Complainant and the Commission.

508. Dr. Passey's opinion is based on his observations of the Complainant during her attendance at the hearing, including her delivery of evidence, both direct and under cross-examination, observing the Complainant's interactions with Commission Counsel and Respondent Counsel, the members of the media, and other attendees at the hearing, and in reviewing the Complainant's medical records, including Dr. Ida Graf-Blaine's records, the military's records, Dr. Halliday's records and any other medical records provided by Dr. Halliday.

509. Dr. Passey concluded that the Complainant's illness did not result from PTSD. Under the circumstances of not having personally examined the Complainant, he felt comfortable giving the Tribunal a probable diagnosis or a most-likely diagnosis. It is his opinion the Complainant met the criteria for situational reaction or adjustment disorder in the DSM IV, which in his view her illness appears to have evolved into a depression.

510. Dr. Passey considered the symptoms described by Dr. Halliday and Ms. Wright to be a fairly significant shift in the Complainant's condition, and the most likely diagnosis now, is a bipolar disorder under the DSM IV, of either type I or type II. These symptoms include hypomanic, and manic behaviour, such as the Complainant being cocooned in her bed with no energy, tearful, and not wanting to get out of the house, to becoming very focussed, full of energy, and plucking thirty chickens a day. Dr. Passey explained that bipolar I versus bipolar II is really a degree of illness with bipolar I being the more serious of the two. A manic episode falls under a bipolar I disorder, a hypomanic episode falls under a bipolar II disorder. In addition to these probable diagnoses, Dr. Passey believes the Complainant probably suffered from Panic Disorder with Agoraphobia. He also suggested malingering is also a diagnosis which should be considered as the Complainant, in his view, stands to gain financially, and through the media if she is successful.

511. Coupled with the bipolar disorder, Dr. Passey believes the Complainant also has features of paranoia, and that her fears are greatly in excess of what one would expect vis-a-vis the reality of the situation. Dr. Passey expressed an opinion that he saw no connection between the alleged sexual harassment and the RW and the Complainant's reaction is either manipulation or paranoia on her part.

512. Dr. Passey testified that Dr. Halliday is incorrect in his opinion that an adjustment disorder can proceed to PTSD. According to Dr. Passey, these two diagnoses are mutually exclusive. In his opinion, an adjustment disorder does not meet criteria A of PTSD as defined by the DSM IV, the current psychiatric manual, and the manual applied and used by Dr. Passey in his practice and in his assessment of the Complainant`s illness. In Dr. Passey's opinion the alleged sexual harassment has not fulfilled criteria A of PTSD because the Complainant was not exposed to a traumatic event that involved actual or threatened death or injury or threatened physical integrity of herself or others. That criteria reads:

Diagnostic criteria for 309.81 Posttramautic Stress Disorder

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
(2) the person`s response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behaviour.

(Exhibit R-8, Tab 4, pages 26 and 27)

513. Dr. Passey was of the firm view there was no trauma to the Complainant that would fulfill Criteria A. In terms of depression, he testified it is not clear what causes depression, and in the Complainant`s case all the symptons began after the RW. He indicated the subsequent processes, the Redress of Grievances, the Summary Investigation, the Board of Inquiry were on-going stressors that would contribute to her depressive symptoms. He testified the treatment with depression or adjustment disorder is to try to minimize the stressors to regain an equilibrium.

514. It is possible, in Dr. Passey's view, that an adjustment disorder can evolve to a depression which he believes has occurred in the Complainant's case. Dr. Passey explained the time limits found in the DMS IV for an adjustment disorder are significant. According to his understanding, if the disorder lasts for less than six months, it is acute and for more than six months, it is chronic.

515. He further explained that an acute stress disorder basically fulfills all the criteria of PTSD, except the time criteria. Under thirty days, an individual can have all the symptoms of PTSD, but it is not referred to as PTSD unless the symptoms persist beyond thirty days, then the acute condition is called PTSD.

516. Dr. Passey testified that prior to a diagnosis of adjustment disorder, other things such as depression, PTSD, panic disorder, or anything else that may account for the disturbance must be ruled out. In his opinion, this inquiry was not pursued by Dr. Halliday.

517. Dr. Passey disputed Dr. Halliday`s opinion relating to the Complainant's perception that the RW, and the alleged sexual harassment, are related to a plot to get her to change her sexual beliefs. According to Dr. Passey, the Complainant`s perceptions are either manipulation, or quite likely paranoia, all part of an evolving plot of persecution against her. Dr. Passey stated he found no connection between the alleged sexual harassment and the RW, and formulated this opinion on collateral information which was not available to Dr. Halliday. Dr. Passey testified Dr. Halliday essentially based his PTSD diagnosis on the Complainant's perception. The collateral information relied on by Dr. Passey was the testimony he heard during the days he attended the hearing.

518. Dr. Passey's preferred approach is to gather collateral information before making a diagnosis. In the Complainant's case, this would involve Dr. Passey talking to the Complainant's co-workers, family members, and other sources to corroborate her statements. This is done to determine whether her perception is right. According to Dr. Passey, both Dr. Halliday and Ms. Wright assumed the Complainant's perception was right and did not attempt to get any collateral information. In this case, Dr. Passey would have talked with the Complainant's husband and, if possible her work supervisors. In Dr. Passey's view, collateral information is important, because if the patient's perception is incorrect, that affects the diagnosis and the treatment plan. If the patient's perception is distorted, part of the treatment is to deal with that.

519. It is noted Dr. Passey's approach to collateral information is not shared by Dr. Halliday. Dr. Halliday, in his expert report, writes that "collateral details can certainly enhance the psychiatrist's wisdom but can also pose problems of objectivity. How much verification is needed is a professional judgment." In reference to this opinion, Dr. Halliday was questioned about these remarks in direct examination, and he testified that in trauma cases, the cause is clear to the doctor because that is what the patient said is the cause. As a professional, Dr. Halliday believed the doctor puts emphasis on how the patient experiences the trauma rather than making a judgment of the other players. (Exhibit HR-11, Tab 6)

520. In Dr. Passey's opinion, the Complainant's incident with the military police in October, 1995, could have been a panic attack, associated with paranoia, or it could have strictly been a panic attack, but given the degree of paranoia that both Dr. Halliday and Ms. Wright mentioned in their testimonies, Dr. Passey testified it is most likely that it was secondary to that.

521. Dr. Passey believes the duration and severity of the Complainant's illness is prolonged because of a lack of a definite treatment plan by Dr. Halliday. Dr. Passey believes that with better coordination by Dr. Halliday of the Complainant's anti-depressant medication, perhaps the Complainant would not be as ill as she has been or for as long. Dr. Passey points out that both Dr. Halliday and Ms. Wright were fully focussed only on a PTSD diagnosis, despite the fact that in their own notes there is evidence of depression, mania or hypomania, panic disorder and agoraphobia. In his view, the continued focus on PTSD has been to the Complainant`s detriment, and it has affected the severity and duration of her illness. Another area Dr. Passey found deficient was the lack of a physical exam or biological work-up by Dr. Halliday to rule out a physical condition.

522. Dr. Passey`s other criticism of Dr. Halliday`s treatment of the Complainant is with respect to validating the Complainant's perception. Dr. Passey testified that validating, in a therapeutic role, something that did not occur, can cause difficulties. He stressed that therapy deals with reality and an ability to handle the emotions and actions associated with the reality. Therefore, a physician validating something that is incorrect, according to Dr. Passey, is perpetuating a lie, and that is not helpful to the patient at all. Dr. Passey disagrees with Dr. Halliday's approach to delay active treatment until this process is finished. Dr. Passey thinks the Complainant needs to be treated because she has significant symptomatology and fulfills the criteria for at least two different diagnoses which require treatment.

523. Dr. Passey testified that the Complainant`s perception of the RW as a future incidence of sexual harassment resulted from a paranoia that developed as a result of or was there before the RW and that after receiving the RW the Complainant fell into a depression. Dr. Passey disagreed with Dr. Halliday`s opinion about the shoe incident, and, in his view, the RW was for insubordination and nothing to do with the shoes. When questioned in cross-examination, Dr. Passey could not recall anything that would indicate the Complainant was paranoid prior to receiving the RW. Dr. Passey is of the firm view, "from what I've been privy to" that there was no connection between the RW and sexual harassment and the Complainant`s perception is not based in reality.

524. Dr. Passey stated that until there is closure to this complaint, the process will remain an ongoing stressor for the Complainant. He believes a successful outcome for the Complainant would allow closure and the Complainant should bounce back much quicker. According to Dr. Passey, even an unsuccessful result would provide the Complainant with closure and the time to recover would depend on the therapy.

525. Contrary to Dr. Halliday's belief, Dr. Passey does not believe the Complainant had flashbacks. Dr. Passey was present during the Complainant's testimony when she stood up, her voice rising very quickly, followed by breaking into tears (heading B(ii), The Chest and Arm Gestures). Dr. Passey believed this conduct by the Complainant was either part of her histrionic behaviour (personality features), or a normal reaction to a situation that was remembered as being fairly traumatic.

526. Dr. Passey concluded that Dr. Halliday has developed his own definition for PTSD, and continues to focus on this diagnosis to the Complainant's detriment, which has affected the duration and severity of her illness.

527. Dr. Passey`s opinion is that it is important the process cease, whether successful or unsuccessful. The ongoing process is an ongoing set of stressors for the Complainant. Dr. Passey estimates somewhere between six months and a year for the Complainant to come to closure and move on with her life. He expressed a caveat on his prognosis, and that arises from the Complainant`s degree of paranoia. That, he emphasized, is more difficult to treat than the depression and it may not settle down.

V. ANALYSIS AND DECISION

A. ISSUE #1

Issue: Did the Respondent discriminate against the Complainant on the basis that the conduct complained of constituted sexual harassment, contrary to s. 14 of the Canadian Human Rights Act?

528. Sexual harassment was broadly defined by Chief Justice Dixon of the Supreme Court of Canada in Janzen vs. Platy Enterprises Ltd. [1989] 1 S.C.R. 1252 at page 1284 as:

... unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

529. Elaborating on the nature of the abuse, Chief Justice Dixon refers to Adjudicator Shime's observations in Bell vs. Ladas, (1980), 1 C.H.R.R. D/155, recognized as well by other arbitrators and academic commentators, to the effect that when sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. The effect of unwelcome sexual actions or explicit sexual demands, as described by Chief Justice Dixon, amounts to an attack on the dignity and self-respect of the victim, both as an employee and as a human being.

530. The form which sexual harassment takes, as illustrated by the case law, may range from obvious and overt affronts such as demands for sexual favours, to more subtle forms of conduct. The distinction is noted in the decision of the Canadian Human Rights Tribunal in Kristina Potapczyk vs. Alistair MacBain, (1984) C.H.R.R. D/2285. That distinction has also been recognized in provincial human rights cases, and I refer to the following passage in Kym Louise Lobzun v. Dover Arms Neighbourhood Public House Ltd. (1996) 25 C.H.R.R. 8/284 (B.C. Council of Human Rights), at page D/289:

...Gender-based insults or sexist remarks, as well as comments about a person's looks, dress, appearance (e.g. size) or sexual habits may, depending upon the circumstances, constitute sexual harassment. See Arjun P. Aggarwal's book Sexual Harassment in the Work Place (1992), 2d ed., Butterworths Canada Ltd; at page 11; Egolf vs. Watson (1995), 23 C.H.R.R. D/4 at D/15 (B.C.C.H.R.); and Shaw vs. Levac Supply Ltd. (1990), 14 C.H.R.R. D/36 (Ont. Bd. Inq)).

531. The legal burden of proof rests with the Canadian Human Rights Commission, and the Complainant, to establish a prima facie case that the impugned conduct violates s. 14 of the Canadian Human Rights Act. The Complainant is required to establish her case, on a balance of probabilities. The level of probability does not require proof beyond a reasonable doubt, but does require that there is a greater likelihood the facts advanced by the Complainant are substantially the most probable of the other possible views or interpretations of the same facts.

532. The standard of proof and the burden of proof are summarized by the Canadian Human Rights Tribunal in Melvin A. Swan and Canadian Human Rights Commission v. Canadian Armed Forces (1994) 25 C.H.R.R. D/312, the first federal harassment case concerning racial harassment. In that decision, the Tribunal found the Complainant, Swan, who had joined the C.A.F. in 1978, and who obtained a voluntary release in 1989, had been subjected to instances of harrassing behaviour over a span of years from 1979 to 1989. The Tribunal described a prima facie case as one which covers the allegations made, and which if believed, is sufficient to justify a ruling in favour of the Complainant, in the absence of an answer from the Respondent. The relevant section of the Canadian Human Rights Act (CHRA) under which Swan's complaint fell, s. 14. (1)(c) of the Act, is the same section before this Tribunal, which reads:

14.(1) It is a discriminatory practice,

(c) In matters related to employment, to harass an individual on a prohibited ground of discrimination.

533. Subsection 2 of s. 14 of the Canadian Human Rights Act, expressly includes sexual harassment as a prohibited ground of discrimination, for purposes of subsection (1) of s. 14.

534. It is established law in Canadian human rights cases, an intention to discriminate need not be a governing factor in determining whether the conduct of the alleged harasser constitutes sexual harassment. The Canadian Human Rights Act goes beyond situations of intentional discrimination. This principle is established in such cases as Ontario Human Rights Commission and O'Malley vs. Simpson-Sears Ltd.,[1985], 2 S.C.R. 536; Bhinder vs. Canadian National Railway Company, [1985] 2 S.C.R. 561. The special nature of the Canadian Human Rights Act is to remove discrimination, as opposed to punishing anti-social behaviour, and for that reason, the Supreme Court has established that the motive or intention of those who discriminate are not central to its concerns, Bonnie Robichaud and Canadian Human Rights Commission vs. Her Majesty the Queen, as represented by the Treasury Board, [1987] 2 S.C.R. 84.

535. Counsel for the Respondent, submits the Lobzun decision, supra, a recent decision of the British Columbia Council of Human Rights, is helpful in defining the elements of proof, arising from Chief Justice Dixon's definition of sexual harassment. Counsel referred to paragraph 45, of the decision of Kenneth A. Attafuah, and in particular to the passage that the unwanted conduct must be persistent, thus negating a single incident event. The relevant passage reads at page D/289:

Thus, to constitute sexual harassment, a given conduct must have a sexual nature, be unwelcome and have a detrimental effect on the work environment. It is not necessary for the conduct to be overtly sexual as long as it is gender-related such that it would not be directed at the members of other sex.

Finally, the unwanted conduct must be shown to be sufficiently severe and persistent to create a hostile environment.
(emphasis mine)

536. In light of Mr. Attafuah`s words, Respondent Counsel submits, the only question for the Tribunal's determination is whether the isolated comment of "sexatary" by Major Couture, is sufficient for there to be a finding of sexual harassment. The question of whether a single incident constitutes sexual harassment may be academic if specific actions of the alleged harrassers relied upon by the Commission are accepted by the Tribunal as constituting sexual harassment. The specific actions include the "sexatary" and "biker mama" comments of Major Couture, and, the chest and arm gestures, dating comments and postcard incident with MWO Macnair.

537. Counsel for the Commission, though not readily conceding the requirement that the harassment be more than one event, referred to the following passage from Dr. Arjun P.

Aggarwal's book, Sexual Harassment in the Workplace, (1992), 2nd ed., Butterworths Canada Ltd., would negate sexual harassment as likely being a one incident event:

It is likely that a single unrepeated act is not harassment, unless it results in the denial or removal of a tangible benefit available or offered to other persons in similar circumstances, or unless it amounts to an assault, or is a proposition of such a gross or obscene nature that it could reasonably be considered to have created a negative or unpleasant emotional or psychological work environment. A "normal" proposition or suggestion would probably not have this result. (Pg. 67)

538. In support of the single event incident argument, Commission Counsel refers to the Respondent`s current order CFAO 19-39, prescribing the Canadian Forces Policy on Harassment issued in June of 1995, which for purposes of that Order, defines harassment as:

3. ...conduct exhibited once or repeatedly, that offends, demeans, belittles or humiliates another person, and that the person exhibiting the conduct knew or ought reasonably to have known it would be unwelcome.
(emphasis mine)

(Exhibit HR-24)

539. Commission Counsel submits that whether the harassment is a single act or not, is irrelevant in determining the first element, in the case before this Tribunal. That element, Counsel submits, is whether or not the conduct was unwelcome to the Complainant. For that determination, Counsel submits the test is whether or not a reasonable person, in the victim`s position, would have found it unwelcome.

540. The body of case law developed in response to claims of sexual harassment, establishes the subjective perception of discrimination on the part of a Complainant is not sufficient to substantiate a claim and that some reasonable and objective standard must be applied by which the words, or impugned behaviour or conduct will be judged. The standard test usually adopted by the Courts, and Human Rights Tribunals, is that of the reasonable person's perspective.

541. As noted by Arjun P. Aggarwal in his book, supra, the proper inquiry in such cases, should be whether the Complainant welcomed the particular conduct in question by the alleged harasser. That determination, writes Dr. Aggarwal, should be based on an objective test, "in the sense that it depends upon the reasonable and usual limits of social interaction in the circumstances of the case." (p.65)

542. Counsel contends, the test was approved by the Canadian Human Rights Review Tribunal in Bobbi Stadnyk v. Canada (Employment and Immigration Commission), (1995) 22 C.H.R.R. D/196. In that case, the Review Tribunal was inquiring into an appeal by Stadnyk, against the decision of the Canadian Human Rights Tribunal, which found the Complainant was not sexually harassed during an employment interview with the Respondent. The Complainant had alleged she was sexually harassed, during an employment interview. During the interview she was questioned about her media profile as a survivor of sexual harassment, and how she would

respond to various forms of sexual harassment in the workplace. The Review Tribunal upheld the decision of the Canadian Human Rights Tribunal, which found that the interview conducted by the Respondent, would not, on an objective basis, have constituted a profound affront to the dignity of a reasonable female given the circumstances of the case.

543. Counsel for the Canadian Human Rights Commission submits the Tribunal should go further than the reasonable person standard, and adopt the standard accepted by the Review Tribunal in Bobbi Stadnyk, supra. The Review Tribunal found no error in the application of what it referred to as the "reasonable woman standard" by the initial Tribunal. It is noted, however, the initial Tribunal chose to adopt the notion of the "reasonable victim's perspective", which arose in a United States Court of Appeal decision in Ellison vs. Brady, (1991), 924 F.2d 872 (9th Cir.).

544. The Review Tribunal found in Stadnyk, supra, that the Complainant exhibited the definition of the "rare hypersensitive employees" which was referred to in the Ellison case. To understand that definition, it is helpful to review the facts of the case. The Complainant had been a victim of sexual harassment and had well publicized critical views regarding the conduct of our Federal Government. She applied for a job as a spokesperson for a Federal Department. During her job interview she was fielded questions about how she would respond to various forms of sexual harassment in the workplace since the focus of her criticism was sexual harassment. On that basis, she complained to the Canadian Human Rights Commission.

545. In applying the reasonable victim standard, the original Tribunal noted it was not aware of either that standard, or the standard in the Ellison case having been considered or adopted by any Canadian Court. The reason the initial Tribunal's reasons for adopting the reasonable victim standard is set out at page 32-33 of Tribunal Decision #T.D. 13/93 as follows:

> Bearing in mind the objects of the Canadian Human Rights Act, as set out in section 2 and the Court's clear direction that the Act is to be interpreted in a broad and liberal fashion, I am prepared to adopt the reasonable victim (in this case a woman) perspective for the purposes of this case. In doing so, I am assuming a heightened degree of sensitivity and concern about sexual harassment by the reasonable person (in this case a reasonable woman).
> Even viewing the nature and conduct of the interview from the standard of a reasonable woman who is a previous victim of sexual harassment, I do not find the conduct of the interview, nor the denial of the opportunity, offensive...

546. Dr. Aggarwal points out in his book Sexual Harassment in the Workplace, the reasonable victim standard, rather than the reasonable person standard has been selected in cases of sexual harassment in stereotypical male dominated working environments. The concern is that by using the reasonable person standard, stereotyped notions of acceptable behaviour would remain unchallenged. Elaborating on that concern of the use of the "reasonable person" standard, he states at page 72:

> Second, there are those who feel that the use of the "reasonable person" standard in cases of sexual harassment in the stereotypical men-dominated working environment is not fair and is

prejudicial to the victim. Is unwelcomeness to be measured against what is presently welcomed in her workplace?

547. The Chair is not convinced the reasonable victim perspective is the appropriate test for purposes of this case, nor do I believe its application is substantiated by the facts before us. The selection of that test by the initial Tribunal in Stadnyk, supra, was made, in the face of its decision to dismiss the complaint on the grounds Ms. Stadnyk fitted the definition of the "rare hypersensitive employee".

548. Unlike Stadnyk, Supra, the Complainant, in the case before us, is not a prior victim of sexual harassment in the workplace. On the contrary, she had a relatively positive history of work experiences in the military up until the time she alleges the sexual harassment conduct began after her move to the BTnO. This fact is substantiated by her own evidence and my earlier reference to her performance evaluation reports, and letters of commendation.

549. The evidence of the Complainant's outgoing, bubbly, charming personality and strength of character are not indicative of attributes associated with a hypersensitive individual. Her socializing in the canteen, where she sometimes voluntarily communicated to her peers, personal thoughts of a sexual nature, and at other times listened to jokes having a sexual flavour, or her communications of a sexual nature to Lt. Vedova during their noon walks, are not characterisitics of a hypersensitive individual.

550. Dr. Aggarwal writes the reasonable person standard is commonplace and widely accepted in the determination of whether the challenged conduct is of a sexual nature and in determining whether harassment is sufficiently severe or pervasive to create a "hostile or poisonous" environment. Within these determinations, he adds the objective standard should not be applied in a vacuum, but at the same time, the "reasonable person" standard should consider the victim's perspective and not stereotypical notions of acceptable behaviour.

551. The Chair believes the test of the reasonable person standard is the appropriate test to apply in this case. Further, I believe that in applying the test of the reasonable person standard, the nature of the military environment cannot be overlooked, and the perspective of a reasonable person's reaction must be viewed in that context. The alleged conduct should be examined, and tested against reasonable and the usual limits of interaction in the military.

552. In determining whether there has been a violation of s. 14 of the Canadian Human Rights Act, and flowing from the definition of sexual harassment in Janzen, supra, we must determine whether the conduct and comments complained of were unwelcome. Also, we must determine, whether the conduct and comments were sufficiently pervasive to create a hostile or poisoned environment for the Complainant which had a detrimental effect on her work environment. The standard of the "reasonable person", must be applied in these determinations. Lastly, the Tribunal must decide if the conduct and the comments are of a sexual nature.

553. Consideration of whether the alleged comments and behaviour was unwanted or unwelcome, will be determined in light of the Complainant's own reaction or conduct, at the

time of their occurrences, and whether she conveyed by words or displayed by her behaviour any unwelcomeness. If no protests were made, either expressly, or by her conduct or reaction, that is not to say she accepted those occurences and was not offended by them.

554. Respondent Counsel has argued the Complainant is not a victim of sexual harassment, and that her complaints against her supervisors resulted from her own misperceptions of words or behaviours, which did not truly offend her. Respondent Counsel submits the crux of the case is a disciplinary issue, arising from the Complainant's reaction to receiving a recorded warning for insubordinate behaviour. Accordingly, Counsel contends the Complainant was disciplined for a matter entirely unrelated to her sex, but absolutely related to insubordination in her role as a military member.

555. Respondent Counsel argues if the Complainant was truly offended, she would have demonstrated in a more objective sense, the unwelcomeness of the remarks. Accordingly, Counsel points to the Complainant's complaint to Major Reaume about PO Pistun, and her reaction to the officer at Base Headquarters to the "headlights" comment, Respondent Counsel contends the description of the Complainant by some of the witnesses as strong-willed and strong-minded, would support the submission the Complainant would have verbally protested such remarks as "sexatary", and "biker mama" if she was truly offended by them.

556. The evidence pertaining to the Complainant's dress, particularly relating to her jewellery and the bizarre hairdo she obtained while working in 407 Squadron, which resulted in a meeting with the Base Chief and a request that she obtain a military haircut, portray the Complainant who as a military member, did not observe strict adherence to the military rules and procedures. In addition, the Complainant chose to wear non-conforming shoes, albeit for a legitimate reason, but failed to obtain the proper authorization from the Base Doctor. However, her non-conformity, in this regard, did not concern Lt. Vedova, her supervisor, who considered the Complainant`s dress to be within the regulations, including the flat-heeled shoes.

557. To an extent the Respondent tolerated the Complainant`s non-conformity and lack of strict adherance to military rules, without any overt displeasure. The Complainant`s attitude became an issue with her supervisors, after her confrontation with the Female Advisory Committee in October of 1991.

558. Respondent Counsel would have us believe the Complainant`s non-conformity and defiant behaviour are not compatible with her claim of unwelcomeness to the dating questions, the "sexatary" comment, the "biker mama" comment, the postcard incident and the chest and arm gestures.

559. That, however, is not the evidence. I have canvassed the evidence and find the Complainant expressly conveyed to Lt. Vedova her concern immediately following the "sexatary" and the "biker mama"comments. There is no indication in the evidence of the Complainant participating in any conduct that would encourage these words. Neither, the Complainant and Major Couture`s mutual interest in motorcycles, nor Major Couture`s statement that he saw the Complainant in the mall wearing short shorts, could be construed by Major Couture as an open invitation for the disparaging remark "biker mama". The Complainant`s annoyance was obvious

with her reference to "Women in the Wind", when she indicated these comments were unwelcome.

560. The Complainant did not express in so many words her concern to Lt. Vedova about the dating comments made by MWO Macnair. Her manner and tone following his initial questioning, raised an expectation on the Complainant`s part, that her supervisor, Lt. Vedova, would deal with the situation and would address both MWO Macnair for his inappropriate questions, and the Complainant, for the way in which she responded to a superior officer. I find Lt. Vedova was alerted or should have been alerted by the Complainant`s loud and emphatic statement about not dating where she worked. Lt. Vedova must have understood by the Complainant`s manner of speaking that she was trying to make a point, yet made no inquiries as to the basis of the Complainant`s reaction. It is reasonable to infer Lt. Vedova knew why the Complainant was disturbed and that she was unhappy with MWO Macnair`s dating comments. Lt. Vedova possessed limited experience as a supervisor. I believe it reasonable to conclude she was reluctant to raise a matter which might negatively affect her positive working relationship with MWO Macnair. Both Lt. Vedova and MWO Macnair testified positively about each other's performance within the BTnO. There was also a degree of comraderie both Lt. Vedova and MWO Macnair shared in their social interests which made it difficult for Lt. Vedova to deal with the issue.

561. The conversations about dating habits between a supervisor and a subordinate should have been curtailed, particularly in light of the Complainant's vulnerability, not only as a new member to the Section, but because her personal circumstances as a single parent, being estranged from her husband, which made her more so. The Chair finds MWO Macnair's questions to her troublesome because of his rank and the disciplinary role he held in the Section. In my view, his comments should have prompted immediate action by Lt. Vedova.

562. The evidence reveals the Complainant reacted to MWO Macnair over the postcard incident but did not express a concern to Lt. Vedova. Lt. Vedova was absent at the time. The fact that Lt. Vedova was a perpetrator of the postcard incident, should be carefully weighed. I find Lt. Vedova's involvement in this incident, made it difficult for the Complainant to approach her. Moreover, Lt. Vedova's involvement compromised her ability to reproach MWO Macnair for conduct for which she herself was partly responsible. That is the reason why Lt. Vedova chose to do nothing after being informed by MWO Macnair on her return from vacation of the "to do" over the postcard.

563. It is not clear whether the chest and arms gestures by MWO Macnair were brought to the attention of Lt. Vedova by the Complainant during their numerous noon walks together and talks, generated during these walks. Nevertheless, the Complainant's distress about these actions, were conveyed to her personal friends, both at home and at work. Lt. Vedova made it clear early on to the Complainant that she was not going to challenge either MWO Macnair or Major Couture for what she herself considered inappropriate comments. That left the Complainant with no one to turn to at work.

564. In Potapczyk, supra, the Tribunal adopted the test of constructive knowledge, in the absence of the Complainant expressly conveying her objection to the harassing behaviour. In that case,

the Complainant and other female staff, were subjected to rude physical comments by the employer, and unwanted physical closeness. The Tribunal found that the touching and physical intimacy was illustrative of a kind of a more subtle yet persistent sexual discrimination, constituting sexual harassment based on the grounds that a reasonable person should have known the behaviour was unwelcome. That test according to Dr. Aggarwal, shifts the burden of proof from the Complainant to the perpetrator, to show that his behaviour in question, if not invited or encouraged by the Complainant, was at least acceptable and welcome by her. There is no evidence from the Respondent, other than the canteen talk, which I have found to be irrelevant, that would cause a reasonable person to conclude the conduct would be welcomed by the Complainant, especially given the nature of the military environment.

565. The question arises as to whether the Complainant's reaction to the "sexatary" and "biker mama" comments as described by Susan Powers and Cpl. Eadie , is consistent with the Complainant's assertion that she found the comments unwelcome. Both Ms. Powers and Cpl. Eadie did not think the Complainant was offended by these comments. However, in my opinion, the weight of the evidence meets the objective test. It is not the Complainant`s laughing-nervous response which should be considered when applying the objective test, but instead, the significant course of conduct which followed these incidents and especially in the Complainant expressing her concern to Lt. Vedova. There is also the fact that the Complainant was contemporaneously expressing to her personal friends her objection to the language and conduct.

566. The test for "unwelcomeness" quoted from Dr. Aggarwal's book Sexual Harassment in the Workplace, 2nd Ed., is to adopt a perspective of the reasonable person`s reaction in a similar environment under similar-like circumstances. Most notably, the nature of the military environment and the rank structure imposes limitations by a junior member to confront a superior officer. The expectation within the military environment is that the members, irrespective of gender, submit to the higher authority and rank. This was made plainfully clear with Lt. Vedova`s own reluctance to confront Major Couture when he called her a "sexatary". I believe it is reasonable to conclude the Complainant`s reaction before Susan Powers and Cpl. Eadie was no more than an attempt by her "to laugh it off" due to her discomfort.

567. Immediately prior to the shoe incident, the Complainant's work relationship with Major Couture and MWO Macnair had changed. Major Couture started bringing incidences to MWO Macnair's attention, concerning the Complainant's work performance. The Complainant's relationship with MWO Macnair, had taken a decided turn for the worse, as a result of her well intentioned, but imprudent action, in approaching MCpl. Alexander about a perceived drinking problem. The Complainant's lack of prudence became a factor in her responses to the Female Advisory Committee. The most overt indication of the changing relationship on the part of MWO Macnair was when he no longer addressed the Complainant by her first name, but referred to her as "Corporal".

568. The public humiliation to the Complainant by the "sexatary" comment, her vulnerability because of her personal circumstances, her fear of reprisal from MWO Macnair, both as her superior officer and the Unit Disciplinarian, are other factors that permeated her working environment and contributed to the unfortunate encounter with the Female Advisory Committee in October of 1991.

569. Both MWO Macnair and Major Couture`s criticism of her work in the fall of 1991 was interpreted by the Complainant as her supervisor`s reaction to her decision to no longer accept their treatment of her. This led to a difference of opinion, between the Complainant and the Respondent, as to the reasons for the issuance of the recorded warning.

570. The Respondent contends, there is no connection between the alleged sexual harassment and the recorded warning, which, it submits, ended with the postcard incident. The Respondent further submits that the Complainant was motivated to complain because of retaliation for the recorded warning and that she should be disbelieved because the recorded warning was an independent employment action.

571. By way of comment, it is noted Dr. Passey expressed an opinion that the RW was for insubordination and was not related to the incidents of alleged sexual harassment. With due respect for Dr. Passey`s expertise, I do not believe his opinion can replace the task before this Tribunal, which is to make that determination. The function of psychiatric or psychological testimony was noted by Wilson J. in the Supreme Court of Canada case, Angelique Lyn Lavallee v. Her Majesty The Queen [1990] 1 S.C.R. 852. Tribunal is guided by the views expressed by Wilson J. in Lavallee, supra, and find that ultimately we must decide what relationship, if any, the RW has to the complaints before us.

572. It was reasonable for the Complainant to believe the Female Advisory Committee meeting was a "set up". Both Sgt. Caron and WO Boudreau were members of the Base Disciplinary Committee, and peers of MWO Macnair, who together attended Base Disciplinary Committee meetings, to discuss amongst other things, the dress and deportment of the non-commissioned officers. On October 29, 1991, the Female Advisory Committee visited the Complainant, the only female in the BTnO Section. The visit was unannounced, and there was no urgency for the visit. The visit quickly focussed on the Complainant`s shoes as illustrated by the deliberate peering of the Female Advisory Committee members at the Complainant`s footwear, shortly after their arrival. MWO Macnair's own understanding of the visit, when he was interviewed by the Board of Inquiry in July of 1992 was that the Female Advisory Committee made a special visit to see Corporal Franke. The Complainant's reaction to the Female Advisory Committee`s visit reflected a reasonable perception that she was being singled out. The visit precipitated a defensive reaction by the Complainant to an already negative environment because of the deteriorating relationship with Major Couture and MWO Macnair.

573. The Complainant's evidence indicates she thought she could respond to the Committee by expressing her understanding of the visit and by invoking Lt. Vedova's permission to wear the shoes, and that she was scheduled to visit the Base Doctor the next day. She then became further confused and was taken aback by the reference to her rings. The focus of the Female Advisory Committee members on the Complainant`s footwear does not accord with the proactive purpose of their visits to the other parts of the Base, which was to help the female members with issues relating to dress and deportment.

574. The Complainant's perception that the recorded warning was issued as a retaliatory measure for her decision in the fall of 1991 to no longer abide by Major Couture's remarks or MWO Macnair's conduct and remarks, is supported by the long time delay between the shoe incident,

and the date of issuance of the RW. The Complainant was not made aware of the extent of the seriousness with which the military viewed the matter. She had been initially told by MWO Macnair that she would have to apologize to the members the Female Advisory Committee, with no subsequent follow up of this action. Another factor which supports her perception is the lack of specificity of the actual wording of the recorded warning. There is no reference in the RW to the shoe incident, nor does it name WO Boudreau or Sgt. Caron.

575. The Chair finds the changing work relationship was a factor in the decision to issue the recorded warning. I note in Lt. Col. King`s correspondence of January 16, 1992, in his response to her Redress of Grievance for the recorded warning, he refers to the Complainant`s disrespect to MWO Macnair (Exhibit HR-1, Tab 9, Doc. 9.2), as a reason to uphold the recorded warning. I find, the RW was issued by the supervisors who were themselves unhappy with a changing relationship.

576. Any concerns about the Complainant's work performance by either Major Couture or MWO Macnair were not recorded in Lt. Vedova's evaluation of the Complainant's work performance or in her remarks recorded in the Complainant's PER dated January 1992. On the contrary, Lt. Vedova refers to the Complainant's overall performance, "has been good...has adopted well to the stress of her job." Lt. Col. King writes the Complainant performs her duties at a standard commensurate with her rank and writes in exhibit HR-1, Tab 10.1, "...She has a promising future in the CF provided she corrects her insubordinate attitude. [referring to RW]." It is noted only the shoe incident was recorded on the PER. It is reasonable to conclude both Major Couture's and MWO Macnair's concerns did not merit any comment by Lt. Vedova in the Complainant's formal evaluation.

577. The Tribunal heard from a number of military members about the reason and process for issuing recorded warnings. According to Col. McGee, an RW is an administrative action which usually begins with a verbal warning. This could be followed by a recorded warning and then counselling and probation. Depending on the nature of the infraction, he testified the process can be initiated with a recorded warning. This was the first case Col. McGee dealt with where a recorded warning was issued for insubordination.

578. Major Couture, Base CWO Doherty, MWO Macnair, and Major Reaume testified the normal practice is that a verbal warning precedes the recorded warning. MWO Macnair believed the verbal warning should be related to the recorded warning. The Base Chief is consulted if the matter involves a non-commissioned member. According to Major Couture, this is to ensure a consistency in application.

579. Major Reaume`s evidence best describes the intent of a recorded warning, which is an attempt to correct behaviour or a practice, observed by a supervisor, where there has been insufficient training or lack of application.

580. The recorded warning is documented in the Canadian Forces Administrative Order 26-17. It reads as follows:

General

1. A recorded warning (RW) and counselling and probation (C&P) are administrative devices designed to raise a member's performance or conduct to an acceptable standard. Effective immediately, the term "formal warning" is obsolete.

2. The following policies apply to both RW and C&P:

a. An RW and C&P are not punishments within the context of QR&O 104.02 (Scale of Punishments).
b. An RW and C&P shall not be ordered twice for the same or related shortcomings.
c. A member who is awarded an RW or C&P shall be observed closely, as directed by the commanding officer (CO), and be given every reasonable assistance to overcome the shortcoming and attain the required standard.
d. Normally, an RW and C&P should precede any recommendation for release that is based on a member's shortcomings.

3. An RW or C&P may be ordered for any of the following reasons:

a. Performance or Personal Deficiencies. Although matters involving conduct, leadership traits, self-confidence, etc. are normally resolved by training, counselling, disciplinary action or other measures, any of the foregoing shortcomings may, by their seriousness or repetition, result in an RW or C&P.
b. Drugs. An RW or C&P for unauthorized use of drugs shall be processed in accordance with the special policies, procedures and forms in CFAO 19-21.
c. Alcohol. An RW or C&P for misuse of alcohol shall be processed in accordance with the special policies, procedures and forms in CFAO 19-31.
d. Indebtedness. In cases of indebtedness, the CO shall ensure that provisions of CFAO 19-4 have been followed.
e. Obesity. An RW or C&P for obesity shall be processed in accordance with CFAO 19-34.

Recorded Warning - Policy and Procedures

4. Except for shortcomings related to drugs or alcohol, an RW:

a. may be initiated by a supervisor, CO or higher authority;
b. should not be initiated unless the member has been previously warned verbally of the shortcomings; and
c. has no promotion, training, posting or pay implications.

5. Except for shortcomings related to drugs or alcohol:

a. an RW shall be initiated by completing the form at Annex A;
b. a copy of the RW shall remain permanently on the member's unit file;
c. if the RW is successful, no further career action is necessary at this time; and
d. if the RW is unsuccessful, the member shall be placed on C&P or be released in accordance

with CFAO 15-2.
(emphasis mine)

(Exhibit HR-1, Tab 7, Doc. 7.1)

581. The various members who testified about the issuance of the recorded warning, testified a recorded warning is an administrative process, rather than the more serious disciplinary action of a charge made pursuant to the Code of Service Discipline. I note CFAO 26-17 specifies in paragraph 2a., that a recorded warning is not punishment within the context of QR&O 144.02 (Scale of Punishments). No clarification was provided of the reference to QR&O 144.02. For our purposes, I do not consider this a critical factor in determining whether punishment was intended by the issuance of the RW.

582. CWO Doherty testified there was insufficient reason for a charge, in this case, but they could not ignore the conduct. CWO Doherty recalled recommending recorded warnings for alcohol-related incidents. In most cases, he recalled insubordinate acts went directly to a charge.

583. I find that the evidence clearly reveals, particularly from the testimony of WO Boudreau and MWO Macnair, that the recorded warning was issued to the Complainant as a form of punishment, contrary to the express purpose of CFAO 26-17.

584. It was incumbent upon the Respondent that the exercise of authority under CFAO 26-17 (referenced earlier) be administered fairly. The fact that the recorded warning took on disciplinary proporations rather than corrective measures led the Complainant to believe she was being punished for her deteriorating relationship with both MWO Macnair and Major Couture.

585. The Respondent claims the Complainant did not hesitate to express disapproval to her supervisor, PO Pistun, at 407 Squadron when she found his behaviour offensive. Therefore, the Respondent submits any claim of reprisal from MWO Macnair and Major Couture should be dismissed by this Tribunal. The Respondent points to a similar reaction of the Complainant in approximately June, 1991, about the time the comment "sexatary" was made. On this occasion, the Complainant was at Base Headquarters. She testified a Captain said to her, "Gee Cpl. Franke, it must be cold outside...your headlights are on." The Complainant testified she quietly leaned over to him and said, "Excuse me, sir, could that be construed as sexual harassment?" The Complainant stated the Captain would back away in their subsequent encounters without speaking to her. The Complainant testified she challenged the Captain because he had no supervisor responsibility over her.

586. I believe there are reasonable factors supporting the Complainant's inaction in the circumstances at BTnO. Her training and experience would caution her not to criticize or openly challenge the behaviour of a Major who commanded the Section in which she worked. Lt. Vedova's own sense of awkwardness in approaching Major Couture, when he referred to her as "sexatary" reflected the same reluctance, and is demonstrative of a culture which demands obedience and submissiveness to authority. In the same context, MWO Macnair was the senior NCO and Unit Disciplinarian in the BTnO, and exercised power over the Complainant.

587. Secondly, the Complainant's transfer from 407 Squadron to the BTnO was made in part to provide her an opportunity for career advancement. In fact, almost within the first week or two of her arrival at the BTnO, she related to Lt. Vedova that she received a PER score of 7.6 in her last PER at 407 Squadron and she wanted to get a score of 7.6 or higher to get promoted. The Complainant acknowledged in her testimony she had thought at the time her score was 7.6. I consider this was a reasonable oversight on her part. This conversation accords with Lt. Vedova's testimony. The Complainant was not therefore inclined to jeopardize her own career advancement.

588. Then again, arising from her early conversations with MWO Macnair about dating, the Complainant fully expected to be reprimanded by Lt. Vedova for her manner of addressing her superior. She also expected Lt. Vedova would have taken MWO Macnair to task for the inappropriateness of the conversation. Neither of these events occurred. The Complainant received no direction nor guidance from Lt. Vedova on how best to deal with the situation. Lt. Vedova's role of confidante to the Complainant obscured her administrative role to act on the information she was receiving from the Complainant.

589. Therefore, the Chair finds the Complainant's testimony that she was fearful of reprisals in confronting Major Couture and MWO Macnair reasonable. The Complainant's fears of jeopardizing her career were contemporaneously expressed to her friends, both Cpl. Mitchell and Ms. Campbell, whose evidence corroborates the Complainant's own testimony in this respect.

590. In accordance with the elements arising from the definition of sexual harassment adopted by Chief Justice Dixon in Janzen, supra, the Chair finds the conduct complained of by the Complainant was of a sexual nature. The nature of the conduct ranged from the overt sexual remark of "sexatary", the overt display of the bare-breasted female in the postcard incident, the more subtle "biker mama" remark and the dating comments, and, to the sexual overtones of MWO Macnair`s gestures to his body coupled with the remarks spoken at the time of these gestures.

591. I believe, all the incidents must be viewed in a totality, and not as separate single incidents. The initial comments by MWO Macnair about her dating habits and the initial and sensitive questioning by Major Couture about her financial situation, set into motion a downward spiral with her supervisors that culminated with the shoe incident.

592. Overall, the continuous stream of conduct eroded the Complainant`s working environment, and without leadership from her supervisor, Lt. Vedova, the Complainant had no sense of trust in the system. Her environment was sufficiently poisoned that her reaction to the Female Advisory Committee, whose visit she reasonably perceived as a "set-up", then became intricately connected to the already deteriorating work environment. The recorded warning became a link in this chain of events, which was reasonably understood by the Complainant, as punishment for her lack of acceptance of the status quo.

593. In applying the standard of the reasonable person`s perspective, the Chair believes the complaints of sexual harassment have been sufficiently established by the Commission and the

Complainant. I will now address issue #2.

B. ISSUE #2

Issue: With or without a violation of s. 14 of the Canadian Human Rights Act, did the Respondent differentiate adversely in relation to the Complainant, on a prohibited ground of discrimination, contrary to s. 7 of the Canadian Human Rights Act, in the course of her employment, after she complained to the Respondent in December of 1991?

594. The Commission alleges adverse differential treatment of the Complainant following her complaint of harassment, and a breach by the Respondent of s. 7(b) of the Canadian Human Rights Act dealing with discriminatory practices in the area of employment. The adverse differential treatment, submitted by the Commission, occurred as a result of, and after the Complainant contacted the Canadian Human Rights Commission in December of 1991, and the formulating of her complaint before the Respondent in December of 1991.

595. As I understand the position of the Respondent, if the Complainant loses her principal allegation with respect to sexual harassment under s. 14 of the Act, it would be necessary, if she were to demonstrate a breach of s. 7 of the Act, to show the differential treatment was motivated, on the basis of sex.

596. Section 7(b) clearly, on its face, prohibits adverse differential treatment of employees in the course of their employment, on the basis of their gender. The relevant section reads:

> 7. It is the discriminatory practice, directly or indirectly,
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.

597. In a recent Human Rights Review Tribunal decision, Paul Lagacé and Canadian Human Rights Commission v. Canadian Armed Forces, T.D. 11/96, the Tribunal determined a discriminatory practice under s. 7 of the Canadian Human Rights Act to have occurred, if, in the course of employment, an employee was the object of adverse differentiation because he or she complained about an act of discrimination on a prohibited ground to the Canadian Human Rights Commission.

598. The Federal Court, Trial Division decision in Mary Pitawanakwat v. Attorney General of Canada, Department of Secretary of State and Canadian Human Rights Commission et al (1994), 21 C.H.R.R., D/355 concluded that not every explicit finding of harassment of an individual on a prohibited ground of discrimination in matters relating to employment will necessarily imply a breach of s. 7 of the Canadian Human Rights Act. According to Gibson J., to imply a discriminatory practice, within the meaning of s. 7 of the Canadian Human Rights Act, from an

explicit finding of harassment of an individual on a prohibited ground of discrimination, will depend upon the facts of the case under consideration.

599. In the Pitawanakwat case, supra, the Federal Court, Trial Division was reviewing a decision of the Canadian Human Rights Tribunal respecting a complaint by Mary Pitawanakwat that she was subjected to harassment because of her aboriginal ancestry and that her race was a factor in the dismissal. The Tribunal had found a prima facie case for discrimination had been established under s. 14(1)(c) of the Canadian Human Rights Act. One of the issues before the Federal Court was whether such a finding by the Tribunal necessarily implied a discriminatory practice within s. 7 of the Canadian Human Rights Act. In clarifying the Tribunal reasons, the Federal Court concluded, that the Tribunal implicitly found that the employer engaged in a discriminatory practice, within the meaning of s. 7 of Canadian Human Rights Act against the applicant by refusing to continue her employment and by differentiating adversely in relation to her, in the course of employment on a prohibited ground of discrimination, race. The Federal Court went on to say that not every explicit finding of harassment of an individual on a prohibited ground of discrimination in matters relating to employment, will necessarily imply a breach of s. 7 of the Canadian Human Rights Act.

600. With respect, the issue before us, is not whether an explicit finding of harassment under s. 14 of the Canadian Human Rights Act, will imply a breach of s. 7, but whether, the Complainant received adverse differential treatment in the circumstances following her complaint of harassment, and whether that differential treatment resulted from her complaint of sexual harassment.

601. Commission Counsel contends the sexual harassment complaint is clearly related to the Complainant's sex, because the Respondent took into account the sexual harassment complaint in their treatment of the Complainant and treated her differently than they would have if she had not filed a complaint. Commission Counsel submits the burden of proof rests with the Commission to show there has been adverse differential treatment. Once demonstrated, the burden then shifts to the Respondent to prove a rational defence.

602. Commission Counsel urges the Tribunal to examine the conduct of the Respondent after the Complainant contacted the Canadian Human Rights Commission and after Major Bottomley concluded her Summary Investigation. Counsel contends it is not necessary to prove by direct evidence that discrimination was the motivating factor but the Tribunal can draw reasonable inferences of discrimination from the Respondent`s actions, as was done by the Human Rights Tribunal in the case, Balbir Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029 (Fed. Trib.).

603. In Basi, supra, the Tribunal found discrimination because Canadian National had been unable to provide a credible explanation for the discrepancies in their account of the selection process as it applied to the Complainant, who had applied for a position with Canadian National. Commission Counsel submits the three requirements found necessary by the Tribunal in Basi, supra, for the Complainant to establish his case are applicable to the case before this Tribunal. These requirements are recorded at page D/5037:

The burden, and order, of proof in discrimination cases involving refusal of employment appears clear and constant through all Canadian jurisdictions: a complainant must first establish a prima facie case of discrimination; once that is done, the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Thereafter, assuming the employer has provided an explanation, the complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employer`s actions was in fact discriminatory.

604. The burden on the Complainant was clarified by the Tribunal in Basi, supra, to be that of the civil burden of the preponderence of evidence on the balance of probabilities. The Tribunal found the Complainant was able to draw inferences about the conduct of Canadian National both before and after the alleged acts of discrimination to show the explanation offered by the Respondent was "pretextual". The appropriate test involving circumstantial evidence accepted by the Tribunal for drawing inferences of discrimination is, where the evidence offered in support of the discrimination renders it more probable, than other possible inferences or hypotheses.

605. In the case at bar, Commission Counsel argues we are entitled to examine the reasons provided by the Respondent for issuing the RW and the evidence concerning the prior verbal warning. Counsel argues, akin to Basi, supra, the reasons changed over time, from those raised initially, to the reasons given by the Respondent at the various levels of redress, and to ultimately what was provided in testimony before this Tribunal.

606. Commission Counsel further submits that if there was any animosity on the part of the Respondent vis-a-vis their treatment of the Complainant after filing of her complaint, this would rebut any defence by the Respondent that the differential treatment was justified. Commission Counsel contends the attitude shown by the Respondent to the Complainant following her filing of her complaint of sexual harassment, was antagonistic, and that antagonism was first apparent during the Summary Investigation into her complaint of sexual harassment.

607. A review of the evidence reveals the reasons that unfolded over time concerning a prior verbal warning and the issuance of the RW include:

1) At the time the RW was issued, MWO Macnair was concerned that no prior verbal warning had been issued to the Complainant. MWO Macnair then understood from CWO Doherty about a prior incident with the Complainant at 407 Squadron. At the time of the RW, MWO Macnair did not know what the prior incident was about;
2) After the RW was issued, a reference was made to the Belanger incident by MWO Macnair to Major Bottomley during the Summary Investigation;
3) During the Summary Investigation by Major Bottomley, she uncovered the written verbal warning from PO Pistun to the Complainant dated September 20, 1989, and annexed the warning to her report of January 27, 1992;
4) At the first level of Redress of Grievance, by Lt. Col. King on January 16, 1992, he referred to the Complainant`s display of disrespect to MWO Macnair when he spoke to her prior to issuing the RW, and to the Belanger incident as a justification for the RW;

5) At the second level of Redress of Grievance by Col. McGee on February 21, 1992, he refers to the Postun incident, the Belanger incident and the Complainant`s ensuing discussions with Lt. Vedova and MWO Macnair about the Belanger incident. Contrary to Col. McGee`s understanding, Lt. Vedova`s own evidence is non specific about the discussion she had with the Complainant with respect to the Belanger incident. In addition, I find MWO Macnair expressed no concerns arising from his discussion with the Complainant about the Belanger incident;
6) Col. McGee concludes in paragraph #9 of his letter of February 21, 1992, that the RW was sufficiently justified without a prior verbal warning, whereas the explanations provided earlier seemed to place significant emphasis on previous verbal warnings;
7) Base CWO Doherty raised before the Board of Inquiry in July, 1992, the Complainant`s bizarre haircut she obtained in 1989 and the subsequent meeting he had with Sgt. Barber and the Complainant concerning the Complainant`s haircut. Base CWO Doherty considered this incident constituted a prior verbal warning. Base CWO Doherty could not recall before this Tribunal whether there were any other incidents of a prior verbal warning given to the Complainant;
8) MWO Macnair testified before this Tribunal he considered the Belanger incident a prior verbal warning that justified the issuance of the RW. In his estimation, the two incidents were related, the Belanger incident and the shoe incident.

608. The recommendation made by Major Bottomley, in her Summary Investigation Report, that the Complainant be placed under close and direct supervision subjected the Complainant to such close scrutiny which led to an unfortunate and irretrievable state of affairs. Considering the purposive nature of the Canadian Human Rights Act, found by the Supreme Court of Canada to be essentially concerned with the removal of discrimination, (see Robichaud, supra), it was incumbent upon the Respondent, in the handling of the complaint, to treat her fairly and to dissuade themselves from taking any measures, that were unfair to the Complainant, and resulted in adverse treatment. Major Bottomley`s recommendation reads:

> ...should be placed under close, direct supervision and on a regular basis, formally counselled on her performance, conduct and response to direction. Any discrepencies should be recorded and actioned accordingly.
>
> (Exhibit R-7)

It is difficult to reconcile Major Bottomley`s recommendation with the Respondent's own Order, CFAO 19-39, which prescribes the Canadian Forces Policy on Personal Harassment. Section 7 of that Order directs commanding officers to ensure that members who lodge a complaint "in good faith" are made aware that a complaint will not in any way jeopardize or penalize a member`s future service or employment opportunities. It is noted the Board of Inquiry made an attempt, when questioning Major Bottomley, to have her justify her recommendation, in light of CFAO 19-39. Although Major Bottomley told the Board of Inquiry she found the Complainant had lodged her complaint in good faith, she indicated she made the recommendation because she found the complaint of sexual harassment was made by the Complainant as a result of receiving a recorded warning.

609. Major Bottomley`s recommendation is incompatible with the Respondent`s own Order and inconsistent with her finding of the bona fide nature of the complaint. I find the recommendation had the effect of penalizing the Complainant for her bona fide attempt to ensure a sexual harassment free workplace. Major Bottomley`s finding that the sexual harassment complaint was retaliation for the recorded warning then became pivotal in the manner of the Respondent`s treatment of and response to the Complainant`s grievances. I find the Summary Investigation Report was relied upon by both Lt. Col. King and Col. McGee, in their handling of the Redress of Grievance for the recorded warning and the PER.

610. The Summary Investigation process employed by Major Bottomley, proved ineffectual in dealing with the sexual harassment complaint. It quickly got off the rails, and began very early to focus on the character of the Complainant, rather than the impugned conduct. The lack of training by Major Bottomley, the lack of support for the Complainant, the lack of fair and appropriate measures for both the Complainant and the alleged harassers to tell their story, and to respond to the other side, and the lack of an informed and knowledgeable investigator, attributed to the deficiencies. Major Bottomley lacked expertise and training in investigating complaints of this nature. The lack of defined parameters, and checks and balances to ensure reliability and fairness and maintain a focus, resulted in a character assassination of the Complainant. Major Bottomley compiled the negative remarks and comments about the Complainant in her report, but had little regard for her interview with Sgt. Barber, who rated the Complainant's past performance and attitude favourably. Also, the interview with Lt. S. Power at 407 Squadron seemed to have been dismissed out of hand by Major Bottomley. However, Major Bottomley accepted without question, PO Pistun's negative comments, notwithstanding his own conduct had been subject to discipline. The Complainant's character continued to be an issue in her subsequent Redress of Grievances.

611. Lt. Col. King's disenchantment with the Complainant in bringing her complaint off Base to the Canadian Human Rights Commission is uncontradicted, and was made known to her by his early warning in December, 1991. He admitted and clarified his actions in his March 6, 1992, response to the Redress of Grievance for the Summary Investigation/Harassment:

> 2. ... After checking with the AJAG, I found this was not the case and immediately advised you that I had been mistaken. Thus my communication to you was not a threat but a warning based on my incorrect interpretation of the DNA.

(Exhibit HR-1, Tab 12, Doc. 12.3)

Although Lt. Col. King recanted his warning, he persisted with a personal view that she should not contact any outside sources, but let the military deal with the matter. The Chair finds, Lt. Col. King`s initial reactions set a tone of resentment that prevailed during the handling of her grievances at Base Comox.

612. Both Lt. Col. King and Col. McGee denied in their response to the Complainant`s Redress of Grievance on the Summary Investigation, and in particular, to her subsequent related complaint concerning the Clothing Stores incident, that she was singled out in WO Cochrane's direction to his staff in Clothing Stores about visits to Cpl. Legault. This response does not accord with Major MacKay's findings, contained in his report of April 15, 1992. Major

MacKay`s investigation results support the Complainant`s perception that she was being targeted. The information conveyed to the Complainant about this investigation was false. Major MacKay`s report disclosed, that although there was general information conveyed to the Clothing Stores staff by WO Cochrane, WO Cochrane did refer to the Complainant and Cpl. Legault's husband. Yet, the Complainant was only told about the general nature of the meeting. Also, there was a breach of security found in the handling of the Complainant`s grievance documents. Despite these findings, Major MacKay concluded in his report, that the Complainant had a perception problem. On this basis he recommended counselling for the Complainant on the intent of the Harassment Policy and psychological counselling by either the Base Surgeon or the Base Social Worker.

613. I find Major MacKay`s reference to the Complainant`s indiscriminate and unfounded accusations of harassment against anyone in authority unfair, and demonstrates a growing hostility toward the Complainant.

614. The Respondent`s own procedure in QR&O Article 19.26 and 19.27, which governed Redress of Grievances, entitles a Complainant to pursue the complaint through four levels of redress, if the Complainant does not receive the redress to which "he considers himself entitled". The procedure reads:

19.26 - REDRESS OF GRIEVANCE

(1) If an officer or non-commissioned member thinks that he has suffered oppression, injustice, or other ill-treatment, he may complain orally to the commanding officer.

(2) If an officer or non-commissioned member thinks that he has been wronged by the commanding officer, either because a complainat under (1) of this article has not been redressed or for any other reason, he may complain in writing to the commanding officer.

(3) If the commanding officer has not redressed a complaint made under (2) of this article within fourteen days of its receipt by him, the complainant may submit his complaint in writing to:

(a) the formation commander, where the complainant`s base or other unit or element is part of a formation; or

(b) the officer commanding the command, where the complainant`s base or other unit or element is not part of a formation.

(4) If the complainant who makes a complaint under (3)(a) of this article does not receive from the formation commander the redress to which he considers himself entitled, he may submit his complaint in writing to the officer commanding the command.

(5) If the complainant does not receive from the officer commanding the command the redress to which he considers himself entitled, he may submit his complaint in writing to the Chief of the Defence Staff.

(6) If the complainant does not receive from the Chief of the Defence Staff the redress to which he considers himself entitled, he may submit his complaint in writing to the Minister and, if the complainant so requires, the Minister shall submit the complaint to the Governor in Council. (9 Sep 70)

(7) If the complainant is a commanding officer, a formation commander or an officer commanding a command, his complaint shall first be made in writing and addressed to his immediate superior. In other respects the procedure for making complaints shall be the same as for other officers.

(8) Every complaint shall be submitted through the usual channels except that if a commanding officer, a formation commander, or an officer commanding a command does not forward a complaint to higher authority when requested to do so, then that complaint may be forwarded direct.

(9) Every person to whom a complaint is made under this article shall cause such complaint to be inquired into, and shall, if he is satisfied of the justice of the complaint, take such steps as are within his power to afford full redress to the Complainant or if he has no power to afford full redress, submit the complaint to higher authority.

(10) No officer or non-commissioned member shall be penalized for making a complaint in accordance with this article and with article 19.27.

19.27 - RULES FOR STATING GRIEVANCES:

(1) A statement of grievance presented under article 19.26:

(a) shall

(i) be made as early as practicable while it is still possible to ascertain the facts of the case, and

(ii) be confined to a statement of the facts complained on and to the alleged consequences to the complainant; and

(b) shall not

(i) be made jointly by two or more complainants, or

(ii) be made anonymously, or

(iii) contain a statement known to the complainant to be untrue, or

(iv) include language or comments that are insubordinate or subversive of discipline, except so far as may be necessary for an adequate statement of the complaint.

(2) If a complainant requests assistance in the presentation of his grievance, the commanding officer shall detail an officer to assist him, who shall, if practicable, be an officer designated by the complainant.

(Respondent Book: Law, Regulations and Orders, Tab 7, 3rd page)

615. Apart from an entitlement to pursue her grievances provided for in Articles 19.26 and 19.27, in the responses the Complainant received from Lt. Col. King to her Redress of Grievances, he chastised her for pursuing a legitimate recourse. In his February 25, 1992, response to her Redress of Grievance for her 1991 PER, he writes:

7. ... I therefore deny your redress application and advise you that a decision to pursue this matter any further would in all likelihood be to your personal detriment. ... Given the facts that have emerged from the recent investigations prompted by your complaints and submissions ... I am of the firm opinion that your last PER was somewhat generous. Were I to direct that it be reviewed and rewritten, you would assuredly receive a significantly lower assessment than that which you have already received.
(emphasis mine)

(Exhibit HR-1, Tab 10, Doc. 10.4)

In the January 16, 1992, Redress of Grievance on the recorded warning, he writes :

4. ... I am disappointed to note that at no time during the course of any of your actions did you approach your superiors, including myself, to discuss the situation verbally. ...

(Exhibit HR-1, Tab 9, Doc. 9.2)

In his February 17, 1992 memorandum, after receipt of the Complainant's Redress of Grievance for the Summary Investigation/Harassment Complaint, he writes:

4.(PB) ... I am very disappointed that you chose to lodge a complaint of harassment in an attempt to negate proper administrative action which was initiated to correct your unacceptable attitude and conduct toward your superiors.

(Exhibit HR-1, Tab 9, Doc. 9.3)

With respect to the January 16, 1992 comment by Lt. Col. King, the Complainant had raised the matter with her supervisor, Lt. Vedova. Lt. Col. King`s aggressive and blunt response precipitated equally hostile and aggressive responses from the Complainant.

616. The only mechanism available to the Complainant to advance her side of the complaints, was through written memorandum. There is little guidance in Article 19.27 for stating a grievance, indeed, Article 19.27(b)(iv) lacks specificity. The Complainant had no guidance or advice in expediting her grievances to accord with the Respondent`s expectations. This eventually became a liability for her.

617. Col. McGee testified about his dismay at the Complainant's failure to accept the Respondent`s criticism for the Belanger incident and the shoe incident, and her inability to learn from her mistakes and move on. He continued to be perturbed by the escalation of

correspondence from her, and to the tone and content of her communications. He found her behaviour to be anti-military, which he conveyed in his response to her Redress of Grievance for the RW on February 21, 1992. Also, in that same correspondence Col. McGee refers to how shocked he was at the tolerance of her supervisors putting up with her aberrant behaviour in dress, deportment and self-discipline. I find the source of that information was Major Bottomley`s January 27, 1992 report. That report had not been made available to the Complainant, and which, according to the Respondent`s own Redress of Grievance procedure, the Complainant was entitled to receive, under the disclosure provisions, in CFAO 19-32, an order amplifying QR&O, Articles 19.26 and 19.27. It is noted Section 13 provides that copies of any correspondence or documents, reviewed by an adjudicative authority, in consideration of the application of Redress of Grievance should be sent to the member before the adjudicative authority considers the complaint. This clearly was not done in this case.

618. There were incidences, of differential treatment, while the Complainant was posted in the BOR at Headquarters, under the supervision of PO Gale. I find PO Gale a credible witness, who believed the Complainant was being singled out for special treatment, that her other staff were not receiving. The effect of the treatment on the Complainant, was further isolation, and exclusion by her peers. The Complainant's friend on the base, Cpl. Legault, testified that because of the Clothing Stores incident, "her life was made a living hell".

619. By the time the Complainant wrote her memo of May 25, 1992, she was under considerable stress. She had expressed "suicide ideation" to Dr. Jacques. The lack of a written response from Col. McGee, to her Redress of Grievance, which had been submitted to him on March 11, 1992, frustrated her. The 14 day time period for responding to the second level Redress of Grievance was long overdue. After the May 22, 1992 meeting, the Complainant had come to the conclusion that Col. McGee found no basis for her grievance. Hence, the Complainant believed there was no point in pursing the matter any further on the Base and sent her pre-emptive request to Col. McGee to forward her grievance to Air Command.

620. The evidence reveals that Col. McGee had in fact made up his mind on May 22, 1992, that her complaints of sexual harassment were unfounded, and conveyed his findings to the Complainant during the meeting. It is noted, for example, Col. McGee said the following about Majour Couture`s comment about affording a house:

> Col. McGee: Whether or not he should have asked, I'm just saying that it's really not something that needs to be so strongly defended. It's one of those things that you say, "What's the matter with this guy? Why can't he understand?", and just shrug it off, because the conversation is over in five minutes.
> (emphasis mine)
>
> (Exhibit HR-3, page 11)

621. Further on, when Col. McGee canvassed the Complainant's allegation concerning the ‘ biker mama' comment and after Major Couture expressed his regret, "in that perspective" of making the comment, Col. McGee then asked the Complainant whether she accepted Major

Couture's apology , to which she responded, "I think the situation has gone beyond acceptance or non-acceptance of an apology though. I thought -- (incomplete)". Col. McGee responds in part:

...When I joined the service, the kind of comments that we are talking about today were mild compared to the things that people said about or to one another. So we are going through a transition. We are going through a tremendous intellectual and cultural upheaval. That's why I was concerned that you hadn't mentioned to Major Couture directly your comments, because it would have raised a flag, and those flags are warning signs....
(emphasis mine)

(Exhibit HR-3, page 18)

622. Further on, he states again:

...To me, his apology is another factor that we should consider very seriously, because we are dealing with here really is with history. You found the history uncomfortable and you complained about it, but it is history, and what we have to deal with is today and the future...
(emphasis mine)

(Exhibit HR-3, page 21)

623. When canvassing the "sexatary" comment, the following exchange then took place:

Colonel McGee: You don't understand his explanation?

Corporal Franke: No. I find that there's no cause at any time to call a woman a sexatary, and it was directed at me as I was the only person sitting beside him, and he sat down, looked at me and said, "So you're going to be the sexatary." There was no one else sitting beside us.

Colonel McGee: Let me try to deal with that. You're absolutely right. There is no reason to call anybody a sexatary. I agree. As I tried to explain to you, Corporal Franke, when I joined the service, calling a person a secretary or anything else was mild, and I think you are aware of that. Have you ever used such terms? I don't mean the term secretary, but have you not used terms that are off-colour?

Corporal Franke: I try not to when I'm at work and when I'm in uniform.
(emphasis mine)

(Exhibit HR-3, p. 23 and 24)

624. At a later point, and prior to the Complainant abruptly leaving the meeting in tears, Col. McGee in stressing his limitations for remedial action indicates a finding of sexual harassment against the Complainant's superiors is not an option in the following exchange:

...So, I can't do anything, nobody can do anything about what transpired on a certain date last year. It's over. What we can do is eradicate the problem, prevent the problem from happening and try to get back to normal, and learn from the experience.

Do you see anything else that is possible? Do you see anything else that can be done? Is there something else that we can do?

Corporal Franke: I prefer not to pass judgment on what I think we can do at this time, sir. (emphasis mine)

(Exhibit HR-3, p. 30)

625. Col. McGee had also made it clear in the May 22, 1992 meeting that Major Couture's circumscribed apology was appropriate for his purpose. This is confirmed in his evidence under cross-examination:

Q. And it's my understanding that Major Couture did not apologize for the harassment, but if he offended Ms. Franke with his comments.

A. Well, it was the comments that were of concern, and that's what he apologized for. I felt that that was appropriate.

Q. And in your final response to Corporal Franke, I understood that you found that the comments were not harassment?

A. That's correct, yes.

(Transcript Volume 18, p. 2958-59)

626. In the absence of direct testimony about the order given by Dr. Jacques on June 9th, 1992, Commission Counsel submits the order was made by Dr. Jacques for other than medical reasons. Counsel points to a summary made by the BAdmO which was included in Col. McGee`s correspondence to Air Command when he advanced the Complainant`s Redress of Grievance for Summary Investigation/Harassment to the next step. That correspondence is dated June 19, 1992. The entry by the BAdmO for June 9/92 reads:

09 Jun 92 ... Memo informs her that she is recommended for C&P and is referred for psychiatric assessment because of her own statement that she had suffered an "emotional breakdown" ... [Complainant`s letter of May 25/92]
(emphasis mine)

(HR-1, Tab 19, Doc. 19.2.3)

627. Commission Counsel contends the above entry is an indication that Col. McGee`s own staff interpreted his memorandum of June 9, 1992 to require the Complainant to see a psychiatrist and

not that he was relying on the Base doctor to make that determination. That contrasts with Col. McGee`s recommendation for C&P to the Complainant`s supervisor.

628. Prior to June 9, 1992, the Complainant wanted to see a counsellor because of sexual harassment at work. Her request for a counsellor was pursued by the Complainant with the Base doctors. Dr. Jacques` note of June 2, 1992, refers to a policy requiring a member to be first assessed by a psychiatrist and if the psychiatrist recommends counselling, then the Complainant would see a counsellor "in town" (HR-1, Tab 10, p. 59). The Respondent led no evidence about the policy.

629. There is documentary evidence that Dr. Jacques made an appointment for the Complainant to see a psychiatrist for the purpose of receiving private counselling from Joan Wright. That appointment was made on June 2nd, 1992 for the next Wednesday. The Complainant persisted that she did not want to see a psychiatrist. This is substantiated by the Base doctor`s notes and the Complainant`s own testimony. She was fearful of being committed and removed from her family because of what had happened to a fellow colleague at the Base. The Complainant had not changed her mind by June 9, 1992.

630. There is documentary evidence that Dr. Jacques testified before the Board of Inquiry and in the Respondent`s own review of the Board of Inquiry Report it is noted:

... ...that no pathology was found and the BSurg testified to the Board that he never felt Cpl Franke had a mental disorder. ...

(HR-1, Tab 26, Doc. 26.2, para. 23)

631. What then was the basis for Dr. Jacques` order of June 9, 1992? I find the reason for the order for psychiatric evaluation given by Dr. Jacques, was never adequately explained by the Respondent. I find it is more than mere coincidence that it was given the same day as Col. McGee`s memo committing the Complainant for psychiatric evaluation.

632. Absent any confirmed medical reason for the order, the Chair concludes a reasonable explanation is that the order was made because of the memo signed by Col. McGee on June 9, 1992. By that time, the interviews conducted on June 5, 1992 with Lt. Vedova, Major Couture, MWO Macnair and MCpl. Alexander were completed. These interviews were very critical of the Complainant and were included in Col. McGee`s communication to Air Command when he advanced the Redress of Grievance for the Summary Investigation/Harassment. Col. McGee at that time also had Major MacKay`s Investigation Report and Major Bottomley`s Report of her Supplemental Review of the Summary Investigation. Both Majors recommended the Complainant for medical evaluation.

633. Col. McGee was distressed by the tone of the Complainant`s letter of May 25, 1992, and its pre-emptive request. He was also dismayed by the Complainant`s action in copying her correspondence to outside sources, in this case, the Canadian Human Rights Commission and the Member of Parliament. Col. McGee himself questioned this action during his own

testimony. However, these actions do not provide sufficient rationale to pursue the course of action he took on June 9, 1992.

634. In other respects, the Complainant`s own behaviour is not above reproach. She tape-recorded the May 22, 1992 meeting without prior approval. She denied Col. McGee and his staff any appreciation or recognition for their efforts in responding to her continuous and demanding stream of correspondence. Both Lt. Col King and Col. McGee expressed dismay at the tone and content of the Complainant's correspondence. Rather than check her manner of correspondence, or seek guidance, she continued in the same aggressive tone. The most inappropriate and insensitive accusation of the Complainant was her lack of appreciation of the time delay in Col. McGee's processing of her Redress of Grievance for the Summary Investigation/Harassment due to an air crash disaster in May of 1992, requiring Major Bottomley`s attention.

635. By May of 1992 the relationship between the Complainant and the Respondent was on a downward spiral that had started to seriously affect the Complainant`s emotional state and health, as evidenced in the Base doctor`s medical notes and the Complainant`s own testimony. It further declined with the Complainant`s indiscretion in approaching the media with her fears, and these actions impeded her credibility with the Respondent.

636. The relationship between the Respondent and the Complainant continued to deteriorate with the lowering of the Complainant's security clearance. As a consequence of the lowered security clearance, and flowing from that action, the Complainant was transferred to the Language Training Centre, where she was further isolated. The Respondent provided no explanation why the Complainant was not returned to her former place of work after the Respondent restored her security clearance on September 8, 1992. Needless to say, any viable relations between the Complainant and the Respondent had completely broken down by that time.

637. The reasons for the lowered security clearance as written by Lt. Col. van Boeschoten were attributed to the C&P, issued for her long series of insubordinate correspondence to the Base Commander, and her access to "PROTECTED `B`" (HR-1,Tab 18, Doc. 18.4) could be dangerous. The additional reason cited was her psychiatric assessment of June 10, 1992 which resulted in a referral to a civilian counsellor for therapy.

638. The lowered security lasted from June 11, 1992 until September 8, 1992. The documentary evidence reveals Lt. Col. van Boeschoten reinstated the security based on the psychiatric evaluation made known to him on September 3, 1992. I find this reason alone cannot justify the action in the first place. The only psychiatric evaluation was Dr. Whitaker`s report sent to the Base doctor on June 17, 1992. Dr. Whitaker`s report made little impact on the Base doctor`s opinions of the state of health of the Complainant. The other recorded reason made by Lt. Col. van Boeschoten to lower her security clearance, the C&P, was rendered redundant by the reinstatement.

639. The burden the Complainant and the Commission have to meet is a civil standard of proof. The case law is clear that the Complainant only has to prove the discrimination was a factor in the Respondent`s actions, within the meaning of s. 7 of the Canadian Human Rights

Act; see Mary Pitawanakwat, supra. It may not be the sole reason for the Respondent`s decision or action, as there may be other justifications for the course of action taken.

640. Applying the reasoning in Mary Pitawanakwat, supra, and the reasoning of the Human Rights Tribunal in Basi, supra, I find the Complainant and the Commission have provided sufficient evidence, that the Complainant was the subject of adverse discrimination at a minimum from the period from December 1991, until June of 1992 when the Complainant was closely monitored, and subjected to unreasonable criticisms. Her allegations of a breach of security and the clothing store's complaint had merit, although she continued to be criticized harshy.

640. The Respondent was critical of her raising new issues, notwithstanding their own actions in raising the Belanger incident after the issuance of the R.W., and the uncovering of the Warning of PO Pistum during the Summary Investigation, which was later raised as justification for the R.W.

641. The Respondent warned her about seeking assistance from the Canadian Human Rights Commission, yet, provided no assisting officer during the processing of her harassment complaint, and kept the report from her, which they replied upon in responding to her other grievances.

642. The Respondent has not sufficiently explained the reason for Dr. Jacques' order of June 9, 1991 which, I find was made for other than medical reasons.

643. I find her complaints of harassment was a factor in the Respondent`s treatment of her. In my view, the Respondent has not provided a satisfactory explanation to refute the discrimination and any explanation provided has been rebutted by the Complainant`s own evidence.

644. In the result, the Chair finds that the Respondent discriminated against the Complainant by differentiating adversely in relation to her, because of her harassment complaint before the Canadian Human Rights Commission and her own complaint before the Respondent filed in December of 1991.

C. ISSUE #3

Issue: If a violation of the Canadian Human Rights Act is found, on the issue of damages, what remedies are available to the Complainant, and what is she entitled to receive?

(i) The effect of s. 9 of the Crown Liability and Proceedings Act ("CLPA") R.S.C. 1985 c. C-50 and s. 111 of the Pension Act ("PA") R.S.C. 1985 c. P-6 to this inquiry under the Canadian Human Rights Act

645. The Respondent submits the Tribunal is precluded by virtue of s. 9 of the CLPA and s. 111 of the PA from awarding any damages for economic loss to the Complainant because she is

receiving a pension from Veterans Affairs in respect of this loss. In support of the Respondent`s contention, it relies upon several authorities, dealing with the application of the CLPA and the PA to civil liability suits launched against the federal government in connection with personal injury, death or the destruction of property. See Béliveau St.-Jacques v. Fédération des employées et employés de services publics inc. (1996) 136 D.L.R. (4th) 129 (S.C.C.), Langille v. Canada (Minister of Agriculture) [1992] 2 F.C. 208 N.S. (C.A.); Berneche et al v. Canada (1990) 34 F.T.R. 85, rev'd [1991] 3 F.C. 383 Fed. Ct. (C.A.); Dubois v. Canada (1989) 40 F.T.R. 295 (Fed. Ct. T.D.); Arsenault v. Canada (1995) 104 F.T.R. 28 (Fed. Ct. T.D.); O'Connor v. Canada (1995) 94 F.T.R. 93 (Fed. Ct. T.D.); and, Dufour v. Textron Inc. (July 26, 1993), Toronto 58635/90Q (Ont. Court of Justice, Gen. Div.). In addition to the foregoing, the Respondent relies on Béliveau St.-Jacques v. F.E.E.S.P., [1996] 2 S.C.R. 345, a Supreme Court of Canada case involving a situation of statutory conflict between Quebec`s Charter of Human Rights and Freedoms, (the "Quebec Charter") and the Quebec Act Respecting Industrial Accidents and Occupational Disease (the "AIAOD").

646. The Respondent claims, however, the Tribunal is not prohibited by virtue of these statutes to making a finding as to whether discrimination took place, nor to making a discretionary award of damages for hurt feelings.

647. On this issue, the Commission essentially argues that if a conflict exists between the CHRA and other statutes, the CHRA applies to the exclusion of the other statutes. In support the Commission relies on Canada (Attorney General) v. Uzoaba [1995] 2 F.C. 569 (T.D.). The Commission further submits that the effects of s. 111 of the PA is ambigious when read with other sections of that same Act.

648. S. 9 of the CLPA and s. 111 of the PA read respectively as follows:

CLPA:

No proceedings lie where pension payable

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

No action or proceeding against the Crown where death or disability pensionable.

PA:

111. No action or other proceeding lies against Her Majesty or against any officer, service or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.
(emphasis mine)

649. The beginning of each section refers to "No proceedings" and "No action or other proceeding" respectively. The question arises, whether the complaint upon which this hearing rests is a proceeding barred by virtue of the provisions of the CLPA and the PA.

650. It is noted the word "proceeding" is defined in Black`s Law Dictionary as:

> In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, Tribunals, bureaus, or the like.
>
> (Black`s Law Dictionary, 6th edition, St. Paul; West, 1990 at p. 1204)

651. The Dictionary of Canadian Law includes the following definition of proceeding:

> 3. Includes an action, application or submission to any court or judge or other body having authority by law or by consent to make decisions as to the right of persons.
>
> (Dictionary of Canadian Law, Scarborough; Carswell, 1991 at p. 820)

652. It would be difficult to deny that a "complaint" filed with the Commission pursuant to s. 40 of the CHRA, or an action taken by the Commission once in receipt of a complaint, including the Commission`s request under s. 49 that a Tribunal be appointed, and finally, a Tribunal hearing convened under s. 50 of the CHRA, is a "proceeding" as defined in the foregoing tests, and within the meaning of the CLPA and the PA.

653. The Respondent has taken the position the relevant provisions of the CLPA and the PA only come into conflict with the CHRA at a point where a Tribunal contemplates awarding damages. It is my conclusion, the provisions of the CLPA and the PA do indeed conflict with the CHRA, but, in a much broader manner, than is submitted by the Respondent.

654. The authorities proffered by the Respondent indicate that the provisions of the CLPA and the PA which bar proceedings "in respect of" pensionable claims, have been given a consistently broad interpretation by the Courts, (see Langille, supra). Were the CLPA or the PA to prevail over the CHRA, they would not merely prohibit the awarding of damages, rather, they would prohibit any of the adjudicative machinery provided in the scheme of the CHRA from operating. A Tribunal`s decision on damages would only constitute the very last stage in a long string of barred "proceedings". The fundamental issue then becomes whether the conflict between the two intervening statutes and the CHRA, can be resolved.

655. The issue encompasses a question of conflict of laws, which forms part of the discipline of statutory interpretation. These rules were considered by the Supreme Court of Canada in two cases dealing with conflicts involving human rights legislation. In Insurance Corporation of British Columbia v. Heerspink [1982] 2 S.C.R. 145, a potential conflict arose between the Human Rights Code and the Insurance Act of B.C. The Insurance Act provided that all insurance contracts could be terminated by the insurer conditional only upon the observance of a notice requirement. The Human Rights Code prevents the denial of services

customarily available to the public unless reasonable cause existed for the denial. The Supreme Court issued three judgments, with three Justices signing each decision. Two decisions dismissed the appeal, those of Lamar and Ritchie J.J. Each of these two made obiter remarks concerning the resolution of the conflict.

656. Ritchie J. reviewed the principle of generalia specialibus non derogant. That rule is paraphrased as follows in the text, Discrimination and the Law, Tarnopolsky, W.S. and Pentney, W.F., Scarborough; Carswell, 1994:

(1) Subject to rule (2), to the extent that a subsequent enactment is inconsistent with a previous enactment, the subsequent enactment is deemed to implicitly repealed the previous enactment to the degree of the inconsistency.
(2) Where the subsequent enactment is of a general nature and the previous enactment is of a specific nature, the previous specific enactment is not deemed to be repealed by the subsequent general enactment; rather, the previous specific enactment prevails to the extent of the inconsistency. (Viz. generalia specialibus non derogant.)

657. Ritchie J. noted that, in Canadian law, both conflicting provisions are to be applied to the subject of the specific previous Act "so far as they could stand together". The general subsequent Act is only to be deemed inoperative if the two Acts create a "repugnancy", and then, only to the degree of the repugnancy. He found no such repugnancy in the case at bar and thus concluded that the two Acts could be read together.

658. Lamer J`s decision, while concurring in the result, approached the conflict of laws issue differently. In a now famous passage Lamer J. held as follows:

When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.

As a result, the legal proposition generalia specialibus non derogant cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

Therefore, whilst agreeing with my brother Ritchie that "the two statutory enactments under review can stand together as there is no direct conflict between them", I should add that were there such a conflict, the Code would govern. I find nowhere in the laws of British Columbia that s. 5 of the Statutory Conditions set forth in s. 208 of the Insurance Act, R.S.B.C. 1960, c. 197, as amended, is to be given any special treatment under the Human Rights Code.

[emphasis added]

659. Three years later the Supreme Court of Canada endorsed Lamer J.'s dicta in a unanimous decision: in Winnipeg School Division No. 1 v. Craton [1985] 2 S.C.R. 150. In that case, the Court was faced with a conflict between the Human Rights Act and the Public Schools Act of Manitoba. McIntyre J., for the Court, compared the mandatory retirement provision in the 1970 Public Schools Act to the same provision in the 1980 Public Schools Act. He noted that while the section number of the provision had changed, no significant amendment had been carried out. He thus opined that the 1980 enactment could not be deemed to have implicitly repealed the Human Rights Act`s anti-discrimination provision passed six years earlier.

660. His decision then proceeded as follows:

In any event, I am in agreement with Monnin C.J.M. where he said:

Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.

This is in accordance with the views expressed by Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145. Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims. In this case it cannot be said that s. 50 of the 1980 consolidation is a sufficiently express indication of a legislative intent to create an exception to the provisions of s. 6(1) of The Human Rights Act.

I would therefore dismiss the appeal with costs.

[emphasis added]

661. Justice McIntyre's reasoning in Craton and Justice Lamer's position in Heerspink, both proclaiming the special nature of human rights enactments, were referred to in CN v. Canada (Canadian Human Rights Commission) (Action Travail des Femmes), [1987] 1 S.C.R. 1114 (S.C.C.). In that case the Supreme Court was seized with the question of whether a Tribunal formed under the CHRA had the statutory power to order a remedy consisting of an employment equity program. The Court noted that:

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by

McIntyre J., for a unanimous Court, in Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150...

[emphasis added]

662. The paramountcy of the CHRA over other federal statutes has been explicitly recognized by the Federal Court of Appeal in Canada (A.G.) v. Druken [1989] 2 F.C. 24. In that case the Court was faced with the question of whether a Tribunal constituted under the CHRA could order the Canada Employment and Immigration Commission to cease applying certain sections of the Unemployment Insurance Act on the grounds that the promulgation of the CHRA implicitly repealed all inconsistent statutes. The Court of Appeal, in a unanimous decision, reviewed Craton, supra and then reasoned as follows:

The rule appears to be that when human rights legislation and other legislation cannot stand together, a subsequent inconsistent enactment, unless clearly stated to create an exception to it, is not to be construed as repealing the subsisting human rights legislation. On the other hand, when the human rights legislation is the subsequent enactment, it does repeal by implication the other inconsistent legislation.

663. In the Uzuoba case, relied upon by the Commission in the present matter, the Trial Division had to deal with the allegation that a Tribunal constituted under the CHRA had no authority to order a remedy of reinstatement where to do so would indirectly conflict with the Public Service Employment Act. The Trial Division, relying on Heerspink and Craton, endorsed in Action Travail des Femmes, supra, rejected this argument:

[para17] The law is clear and counsel for the Attorney General agrees that in the case of a direct conflict, the [Canadian Human Rights] Act will apply. However, he argues the conflict here is not direct. It is not clear to me how this argument assists counsel. Indeed, counsel for Dr. Uzoaba submits there is no real conflict between the Act and the Public Service Employment Act. He says that the promotion on merit provisions of the Public Service Employment Act apply in the normal, day-to-day administration of the Public Service and that the [Canadian Human Rights] Act does not purport to displace the Public Service Employment Act in that respect. In practical terms I agree with this submission.

[para18] However, even if the power of a Human Rights Tribunal to order a promotion in the Public Service conflicts with the Public Service Employment Act, I am satisfied that the provisions of the [Canadian Human Rights] Act must prevail.

...

[para20] I think [the] principle of paramountcy must apply... to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the Act. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal,

acting within its jurisdiction under the Act, orders a promotion in order to remedy the results of discriminatory action taken by the employer....

664. Based on the foregoing, the Chair concludes, pursuant to the principle of paramountcy, that s. 9 of the CLPA and s. 111 of the PA cannot bar the operation of the CHRA and specifically cannot prohibit a Tribunal constituted thereunder from granting an appropriate statutory remedy. Contrary to the Respondent's submission, in the absence of any specific statutory override in the language of the CLPA or the PA, the CHRA will prevail.

665. In addition to the fundamental rights paramountcy rule, there are a number of less determinative interpretative principles which would tend to support the primacy of the CHRA. I rely on s. 12 of the Interpretation Act R.S.C, c. I-23 which provides as follows:

12 Enactments deemed remedial

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

666. It is noted the nature and purpose of the CHRA is stated in s. 2:
Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity to make for themselves the lives that they are able and wish to have, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

[emphasis added]

The Supreme Court in Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84 interpreted s. 2 of the CHRA as follows:

The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons Sears Ltd., [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, per Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J. in Canadian National Railway Co. v.

Canada (Canadian Human Rights Commission) (the Action travail des femmes case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

[emphasis added]

667. In a similar context, in Action Travail des Femmes, supra, Dickson C.J. also stated:

[h]uman rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[emphasis added]

668. By virtue of the interpretive principles emanating from its unique remedial status, the Chair concludes the CHRA is not defeated by the operation of the CLPA and the PA. Moreover, I believe in addition to s. 2, other provisions of the text of the CHRA support my finding that the CHRA is to prevail over the CLPA and PA. The fact that Parliament felt the need to explicitly make the CHRA subordinate to the Indian Act in s. 67 of the CHRA is seen as an indication that Parliament envisaged that the CHRA would generally prevail over any other inconsistent legislation in the absence of a specific override. Section 67 of the CHRA reads as follows:

Saving

67. Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

669. With respect to authorities advanced by the Respondent: Langille, Berneche, Dubois, Arsenault, O'Connor and Dufour, supra, do not involve the CHRA. The Chair believes these authorities may, therefore, be distinguished on the basic ground that they do not deal with a conflict of statutes involving human rights legislation. Some of the plaintiffs in these six cases invoked the Canadian Charter of Rights and Freedoms or non-compliance with a federal statute to collaterally support their civil suits. However, in none of these cases was the Court applying the CLPA and the PA to human rights proceedings under the CHRA.

670. I find the fact that the Courts struck down civil suits in these cases has no effect on the human rights paramountcy arguments. The current case with which the Tribunal is seized, however, is not a civil suit in tort or contract; it is a statutory proceeding under a fundamental human rights law, the CHRA.

671. The Supreme Court precedent, Béliveau St-Jacques, supra, cited by the Respondent, is an authority directly referred to by the Respondent which involves a situation of statutory conflict

between human rights legislation and another statute. As previously mentioned, the Béliveau case, supra, involved an apparent conflict between the Québec Act Respecting Industrial Accidents and Occupational Diseases (the "AIAOD") and that province's Charter of Human Rights and Freedoms. (the "Québec Charter"). Ss. 438 and 442 of the AIAOD provided that:

AIAOD:

438. No worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury.

442. No beneficiary may bring a civil liability action, by reason of an employment injury, against a worker or a mandatary of an employer governed by this Act for a fault committed in the performance of his duties, except in the case of a health professional responsible for an employment injury contemplated in section 31.

Where the employer is a legal person, the administrator of the corporation is deemed to be a mandatary of the employer.

S. 49 of the Québec Charter stated:

Quebec Charter:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the Tribunal may, in addition, condemn the person guilty of it to exemplary damages.

672. The majority judgment was delivered by Gonthier J. He examined s. 49 of the Québec Charter and concluded that "...the violation of a right protected by the Charter is equivalent to a civil fault. The Charter formalizes standards of conduct that apply to all individuals." He went on to explain that the violation of a right under the Québec Charter is wrongful behaviour which breaches the general duty of good conduct found in the Civil code. According to him, the Québec Charter did not create a distinct autonomous system of civil liability.

673. In holding that the Québec Charter did not create a discrete form of liability, Gonthier J. expressly rejected any analogy between the CHRA, as interpreted by the Court in Robichaud, and the Québec Charter:

[para124] In Robichaud, La Forest J. first had to interpret a particular statutory enactment, in which he found a specific source of liability distinct from the general law. While in that case there was indeed a new remedy, it does not necessarily follow that the remedy provided for in the Charter, in light of its specific characteristics considered above, differs from the general principles of civil liability simply because of its formal autonomy. Moreover, the relationship between instruments that protect fundamental rights and the general law is not entirely the same

in the common law provinces as in Quebec. Thus, this Court decided in an Ontario case that, because of the prohibition against discrimination in the province's human rights legislation, there could be no parallel development of a discrimination-based tort (Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181). In light of the characteristics of the Ontario legislative scheme, it was decided that bringing an action in the ordinary courts was not possible. Conversely, it must be recognized that the jurisdiction of the Commission des droits de la personne in Quebec is not exclusive and in no way precludes suing in the ordinary courts (s. 77 of the Charter). Moreover, the very nature of the standard of good conduct under the Civil Code goes against the acceptance of an argument that would deny its evolutionary character and its capacity to encompass situations never before contemplated. The Charter's recognition of specific and perhaps still unexplored aspects of this standard of conduct does not in itself justify a new characterization of the liability resulting from its violation. I am therefore of the view that the liability under the first paragraph of s. 49 is directed to the reparation of harm caused to others by wrongful conduct and that it must therefore be characterized as civil liability.

[emphasis added]

674. Having characterized the action brought by the Appellant under the Québec Charter as a generic civil liability claim he could, without much difficulty, conclude that it was a claim specifically barred by ss. 438 and 442 of the AIAOD. As soon as it was evident that the Appellant had suffered an employment injury, these two provisions granted civil immunity to her employers.

675. Gonthier J. then provided additional grounds for his decision:

[para131] This is also the solution indicated by s. 51 of the Charter, which makes a point of stating that the Charter must not, as a general rule, be interpreted so as to extend or amend the scope of a provision of law. Allowing the victim of an employment injury to bring a civil liability action based on the Charter against his or her employer or a co-worker would necessarily call into question the compromise formalized by the AIAOD. That Act is based on the principle of no-fault liability and provides for a mechanism of fixed-sum, but partial, compensation. If section 49 allowed the victim of an employment injury to obtain additional damages, the scope of the AIAOD would thereby be changed.

[emphasis added]

676. In my view, the Béliveau St-Jacques case does not govern the current matter before the Tribunal. This decision was almost exclusively anchored in concepts belonging to the Civil Law Tradition governed by Québec's Civil Code and inspired by French Law. Implicit in Gonthier J.'s judgment is the recognition that the CHRA—and all federal statute law —exists outside the French civil law environment. Thus, it is extremely noteworthy that Gonthier J. distinguishes Robichaud on the grounds that it dealt with the CHRA.

677. Apart from the fundamental difference in legal systems, a simple reading of the provisions being interpreted in Béliveau St-Jacques, supra, indicates that the statutory relationship was different from that existing in the federal sphere. The Québec Charter is differently drafted from

the CHRA, and as mentioned by Gonthier J., specifically states at s. 51 that it is generally not meant to extend or amend a provision of law. In contrast, s. 2 of the CHRA expressly contemplates extending the present laws in Canada.

678. Based on the foregoing analysis, it is my conclusion that to the degree that s. 9 of the CLPA and s. 111 of the PA directly conflict with the CHRA, and bar all proceedings or actions in respect of which a pension or compensation is payable by the Federal Crown, the doctrine of paramountcy dictates that the CHRA must prevail. Therefore, the Tribunal is not prohibited from awarding damages for economic loss suffered by the Complainant in the case before us.

(ii) Damages

679. Having found that sexual harassment took place, and having concluded that the actions of the Respondent subsequent to the issuance of the recorded warning constituted differential treatment against the Complainant on a prohibited ground, and further concluding the paramountcy of the Canadian Human Rights Act over s. 9 of the Crown Liability and Proceedings Act and s. 111 of the Pension Act, I will now determine what, if any damages should be awarded to the Complainant.

680. The Tribunal`s jurisdiction to award damages is governed by s. 53 of the CHRA. The goal of compensation established in the Federal Court, in cases of discrimination, is to make whole the victim of the discriminatory practice, taking into account principles of remoteness and reasonable forseeability (see Canada (Attorney General) v. Morgan, [1992] 2 F.C. 401 (FCA), and Canada (Attorney General) v. McAlpine, [1989] 3 F.C. 530 (FCA), Canada (Attorney General) v. Thwaites (1994) 3 F.C. 38 (F.C.T.D.))

(a) Past Lost Wages

(i) Period of Compensation

681. An entitlement to be compensated for lost wages cannot be for an indefinite period of time. The Federal Court of Appeal in Morgan, supra, has affirmed, that in establishing a period of compensation, common sense applies and some limits be placed upon liability for the consequences flowing from an act, absent bad faith. There is also the consideration that the assessment of damages has to be made subject to the long established common law duty to mitigate.

682. The expert medical evidence in this case is intended to assist the Tribunal in understanding the nature of the Complainant's illness, and whether there is a causal connection between the alleged sexual harassment and the resulting illness. The lack of consensus between the two experts as to the correct medical diagnosis, their opposing views on assessment and treatment and on the type of enquiry a psychiatrist must conduct, makes our task that much

harder. Clearly, Dr. Halliday's diagnosis of PTSD cannot stand with the application of the definition of PTSD found in the DSM IV, in that it fails, on the evidence, to conform to criteria A(1) of that definition.

683. The most relevant factor, quite apart from whether the Complainant is suffering from a depression or another illness, is the time factor relative to when her symptoms first appeared. Dr. Halliday claims it was the shoe incident that triggered the Complainant's illness. Dr. Passey believes her symptoms began to emerge after she received the RW.

684. Commission Counsel has urged us to accept the dicta found in the Human Rights Tribunal decision Cranston et al v. Her Majesty in Right of Canada, T.D. 13/96 (Fed. Trib.) that the duty to mitigate will be offset by evidence of a medical disability resulting from the discrimination. Commission Counsel submits the Complainant's efforts to actively seek treatment and her genuine effort to get help,meet the requirement to mitigate.

685. The Respondent is entitled to expect the Complainant to avail herself of reasonable measures to mitigate her losses, in an effort to lessen the damages flowing from the original discriminatory acts. There is always an opportunity to seek another medical opinion when an illness does not abate. At a minimum, I believe the Complainant ought to have taken this measure, especially in light of Dr. Halliday's decision to delay active treatment of her illness.

686. Both psychiatrists, testified about the Complainant's growing paranoia. I note Dr. Mahoney refers to the Complainant, describing her on-going anxiety attacks and paranoia (in December, 1992). Ms. Wright also described the Complainant as being paranoid. Dr. Halliday commented in his expert report that "her perception is distorted" and that as a result of her paranoia, she could be perceiving things incorrectly (Exhibit HR-11). Neither psychiatric expert could state if the Complainant`s paranoia predated the incidents in the fall of 1991.

687. The Complainant was functioning at her job until the events in the fall of 1991, and her health got progressively worse in the period following her harassment complaint, up to the time of her voluntary release. From the date of her release to the hearing of this case, the Complainant`s illness has not abated during the intervening years. The severity of her illness fluctuated after she left the Armed Forces.

688. Her course of treatment has included the medical care provided by her family physician, Dr. Ida Graf-Blaine, an initial assessment by the psychologist, Dr. Mahoney, individual counselling by Ms. Wright, intermittent sessions with Dr. Halliday, two day therapy sessions at St. Joseph`s Hospital, intermittent counselling in group therapy sessions co-facilitated by Ms. Wright and Dr. Halliday, and intermittent medication.

689. The Chair finds the questions that arose during the testimony of Dr. Passey about Dr. Halliday's diagnosis and treatment of the Complainant, cast some doubt on the conclusions of Dr. Halliday. I am not convinced that all of the Complainant's health problems flowed from the discriminatory acts. Moreover, it is difficult to attribute all of her problems to the shoe incident and the resulting R.W. and the differential treatment which happened so many years ago. As a result of Dr. Passey's testimony, I believe there exists real reservations about the Complainant's

condition, and her claim that the maladies she is experiencing now, flow from the sexual harassment and the Respondent's actions in 1991. In view of Dr. Passey`s testimony, I strongly encourage the Complainant to seek alternate opinions to assist her in her recovery.

690. The Chair finds Dr. Passey's evidence raises some doubt about the relationship between the Complainant's illness and the actions of the Respondent after her move to the Btno. I believe the nature and degree of sexual harassment that occurred in 1991 was minimal. The Complainant's health problems became more predominant in late May, early June of 1992, at least five months after the shoe incident. At that time she was undergoing knee surgery and used this opportunity to get some respite from the stress at work. She was ordered to have a psychiatric assessment, which increased her anguish and stress. It was after this time that her health problems intensified and her relationship with the Respondent began to deteriorate. This was the period of time when her perceptions were affected.

691. I accept the Complainant`s evidence of her earlier bona fide attempts to mitigate her losses by seeking other employment. Her loss of earning capacity was greatly affected by the extent and persistence of her illness, and the lack of effective medical treatment, which has limited her to the kinds of business endeavours she is now developing.

692. The Commission relied on expert actuarial evidence for estimates of the Complainant`s loss of income and pension loss. The evidence was provided in the form of a detailed written Report, supplemented by viva voce testimony of Deborah Wilson, an expert in actuarial science, who co-authored the Report with another member of her firm. The Report is dated October 18, 1996. The Report determines the amount and present values, as of October 1, 1996 (date evaluation), of potential losses for dates of termination at six month intervals, from one year after her date of release until December 9, 2001, the end of her contract with the Respondent. The Report reflects varying assumptions including her salary progression, her life expectancy, inflation, interest for past losses. The actuary imposed a gross discount rate of 7% based on what a person might expect to be able to achieve in terms of a return on money.

693. The Chair is prepared to rely on the estimates provided in the actuarial evidence produced by the Canadian Human Rights Commission. These estimates, I find to be reasonable for our purposes. Pension loss and loss of income were calculated for six month intervals. The estimates assume that the Complainant`s earnings would remain at the 1993 annual rate of $34,656. until 1995, increased to $35,424 in 1996, and based on an assumed inflation rate of 4% per annum, factored in salary increases thereafter at 4% per annum. In addition, the interest for past losses to the evaluation date was calculated at 8.3% per annum, the average yield on three months` government bank rate, and the bank rate in effect in the month before the Complainant's date of release.

694. Based on my findings, and bearing in mind the principles of remoteness and reasonable foreseeability, and the Complainant`s own developing paranoia, which I believe to be a significant factor in limiting the Respondent's liability, I find that a one year cap on past lost wages is appropriate in the circumstances of this case. The one year period properly starts to run from February 10, 1993 until February 10, 1994.

695. Additional to this amount, I award all annual leave taken during 1991 and 1992 due to stress. This has been calculated by Commission Counsel to be 47 actual days, and based on the Complainant`s 1992 salary rate of $34,299., this amounts to $6,179.29.

696. In addition to the amount for lost wages, I award severence pay. At the time of her release, her severence pay entitlement was calculated at the rate of seven days per year`s service at 1/2 rate. This same rate will apply for the one year period.

697. Any earnings received from the Complainant during the period of the past lost wages must be deducted from the total amount. This would include any earnings from the Complainant in her two businesses, the house cleaning and the chicken farm, including her pension earnings from Veterans Affairs, and any U.I. benefits. Any amounts so deducted, are to be repaid by the Respondent to the respective source.

(b) Future Lost Wages

698. Based on Dr. Halliday`s prognosis, the Commission requests future lost wages be calculated for a two year period from the date of a final decision. I find Dr. Halliday`s evidence ambiguous on this point, and I am unable to accept his predictions. Dr. Passey`s prognosis is more favourable. In light of the finding of sexual harassment and the fact that both psychiatrists indicated a positive outcome would greatly enhance the Complainant`s recovery, I believe a one year period from February, 1993, to be reasonable under the circumstances.

699. The amount of future lost wages shall be determined from the actuarial report. The monthly benefit entitlement from Veterans Affairs must be deducted from the total amount and repaid by the Respondent to Veterans Affairs. I accept the pension rate, as purported by Commission Counsel, to be $449.87 per month. I also find that the Complainant is entitled to severance benefits on her future lost wages and this is to be calculated at seven days per year at 1/2 rate.

(c) Pension Benefits

700. The Commission has also sought damages for loss of pension benefits. The Complainant made an election to return of contributions and interest at a time when she was on annual leave because of stress. I believe her preferred option was to defer her pension, and, at the time, did not make an informed decision and was not given an opportunity to explain her options and seek the proper advice.

701. I accept the actuarial report which contains projected pension benefits are tied to the earnings. The Complainant is entitled to receive, based on past and future wage loss for the time period of compensation awarded, the amount of pension loss calculated by the actuary for this additional two year period.

702. I order the Respondent to make any Canada Pension Plan contributions for the period of the lost wages award that the employer would have had to make for the Complainant during that period.

703. Since the parties did not provide us with direction as to how pension payments are to be made, and taking into consideration the employer`s pension plan requirements, I direct the parties to determine this process according to these requirements.

(d) Hurt Feelings

704. Subsection 53(3) of the Canadian Human Rights Act permits a Tribunal to order compensation (to a maximum of $5,000.) to be paid where the Tribunal finds a Respondent has acted wilfully or recklessly, or where the victim of the discriminatory practice has suffered in respect of feelings or self respect.

705. The Complainant has been affected by the sexual harassment she was subjected to while at the BTnO, and the subsequent differential treatment she received from December, 1991 to the date of her voluntary release. The humiliation endured by the Complainant resulting from her ambulance ride, witnessed by her son and her mother, and from her transfer to the Language Training Centre was great. The evidence discloses the impact of being closely monitored, the isolation she suffered because of her advancing her claims, and the continued attacks on her character, caused her embarrassment and shame. For these reasons, I award the maximum amount of $5,000. to the Complainant.

(e) Medical Benefits

706. The Commission claims either as lost benefits or as compensation for expenses incurred, a sum to be awarded for Ms. Wright`s counselling fees. The Commission is also claiming travel expenses at the Treasury Board employer requested rate of 34.5¢ per kilometre for round trip visits the Complainant had with Dr. Halliday, Ms. Wright, for stress-related appointments with Dr. Graf-Blaine, and two appointments with Dr. Bowler regarding blood tests (taken during Dr. Passey`s evidence).

707. I believe that an award for counselling fees incurred by Ms. Wright, is properly authorized by s. 53(2)(c) of the Canadian Human Rights Act "for any expenses incurred by the victim as a result of the discriminatory practice." The evidence reveals that Ms. Wright was never reimbursed for the initial six counselling sessions authorized by the Respondent and which occurred between July 15, 1992 and September 4, 1992. Without the Respondent`s authorization, the Complainant would have been personally responsible for these amounts and on this basis, I order the Respondent to pay directly to Ms. Wright, an amount of $65. for each session, totalling six sessions.

708. I find the Complainant's ten individual sessions with Ms. Wright, six in the month of April, 1996 and four in the month of June, 1996, too remote to have resulted from the discriminatory acts.

709. I believe there is no merit to the Complainant`s claim for travel expenses and award no damages under this claim. Nor is the Tribunal prepared to award the Complainant for future counselling sessions with Ms. Wright.

(f) Interest

710. I have already addressed interest with respect to past wage losses, future wage losses and pension losses, which was included in the actuarial projections at 8.3% per annum. The Commission claims interest be paid at 8.3% per annum on vacation pay, severance pay, hurt feelings, and any other employment benefit, except Ms. Wright's fees. Interest on hurt feelings has been awarded by the Human Rights Tribunal in the 1996 decision, Cranston et al, supra. In that decision, the Tribunal accepted the Federal Court decision, Canada (Attorney General) v. Morgan [1992] 2 F.C. 401 (C.A.) as authority for their order. It is noted, however, that the Tribunal in Cranston capped the sum for damages for hurt feelings, including interest as not to exceed $5,000. for each Complainant. Having regard to this decision, and to awards of interest generally ordered in human rights cases, I order that interest be paid only on the severance pay, and vacation pay, at the rate of 8.3% per annum applied in the actuarial calculations.

711. The Commisson requests an order that psychiatric approvals required by the Respondent for members who seek counselling for sexual harassment be done in a manner that least impinges the member's dignity. There is no evidence of the Respondent's current policy in this respect, or if in fact, the Respondent has a policy. The Chair is not willing to make an order in the absence of specific information.

D. CONCLUSION

712. For the foregoing reasons, the Chair orders the Respondent to:

a) Pay the Complainant one year's salary from February 10, 1993 to February 10, 1994 based on the actuarial report calculations for this period. Additional to this amount is annual leave of 47 days taken by the Complainant during the period 1991 and 1992. Additional to the amount of lost wages is severance pay calculated as per our award.

b) Pay the Complainant one year's salary from February 10, 1994 to February 10, 1995 based on the actuarial report calculations for this period. Additional to this amount of future wages is severance pay calculated as per our award.

c) Pay the Complainant the amount of pension loss calculated by the actuary for an additional two year period, from February 10, 1993 to February 10, 1995.

d) Pay the Complainant $5000.00 for hurt feelings.

e) Pay directly to Ms. Wright an amount of $65. for six individual counselling session she provided to the Complainant.

f) Pay interest at 8.3% per annum on severance pay and vacation pay.

Dated this day of , 1998.

Donna M. Gillis, Chairperson