

T. D. 3/ 89

Decision rendered on February 20, 1989

AND IN THE MATTER of a Hearing before a Human Rights Tribunal appointed under Section 39 of the Canadian Human Rights Act.

BETWEEN:

ISABELLE GAUTHIER, JOSEPH G. HOULDEN, MARIE- CLAUDE GAUTHIER,
GEORGINA ANN BROWN Complainants

- and

CANADIAN ARMED FORCES Respondent

TRIBUNAL: SIDNEY N. LEDERMAN Chairman, JANE BANFIELD HAYNES Member,
NICOLAS CLICHE Member

DECISION OF TRIBUNAL

APPEARANCES: RUSSELL G. JURIANZ and ANNE TROTIER Counsel for Canadian
Human Rights Commission and Complainants, Isabelle Gauthier, Marie- Claude Gauthier and
Georgina Anne Brown
JOSEPH G. HOULDEN In person
BRIAN J. SAUNDERS, LIEUT. COL. A. MacDONALD Counsel for Respondent

DATES AND PLACES OF HEARINGS: Pre- hearing in Toronto October 2, 1986;

Hearings in Ottawa; November 24, 1986; January 26 - 28, 1987; May 31 - June 3, 1988; June 13
- 14, 1988; August 9 - 11, 1988.

1. THE ISSUE

This case concerns three (originally four) persons who complain that they were individually refused entry to combat or combat support employment in the Canadian Armed Forces because they are women. A fourth complainant is a man who alleges that the limitation of combat duty risk to men discriminates against them. The complaints are made under Sections 5, 7 and 10 of the Canadian Human Rights Act (S. C. 1976- 77, c. 33 as amended) (" the Act") which prohibits discrimination on specified grounds, in this instance, sex, in the provision of services and employment, and which prohibits the establishment or pursuit, by an organization, of a discriminatory policy or practice. The Canadian Armed Forces (" CAF") does not deny that its existing practices and policies are discriminatory, but contends that such policies and practices are based on a bona fide occupational requirement, that is, "operational effectiveness", a

requirement sanctioned by Section 14 of the Act, which provides a defence against a charge of discrimination. The Act clearly binds the Crown (Section 63) and members of the CAF who are deemed to be employed by the Crown (Section 48(4)).

In their opening statements counsel for the parties acknowledged, beyond the ambit of the specific complaints, the importance of the hearings for the discussion and resolution of an issue of general societal concern and broad public policy. That issue is, should women generally be permitted to train for and enter into occupations and to perform roles which are combat related, occupations and roles now closed to them; would the operational effectiveness of the CAF be adversely affected by the introduction of women into such occupations and roles; and, can this assessment appropriately be made by professional military judgment. It was these larger issues that counsel and the witnesses addressed. It is these larger issues which are the subject of this decision, as well as the resolution of the specific complaints.

2. THE COMPLAINTS The statement of facts agreed to by counsel for the Canadian Human Rights Commission ("the CHRC") and counsel for the CAF dated November 24, 1986, may be summarized as follows. In a complaint to the CHRC dated December 5, 1981, Isabelle Gauthier alleged that she was refused a transfer, as an administrative clerk, to the Régiment du Hull (a reserve force) because the regiment had already achieved the 10% quota for women personnel permitted to it, and thus discriminated against her by reason of her sex, contrary to Sections 7 and 10 of the Act.

Joseph Houlden, a retired pilot in the armed forces, in his complaint dated November 5, 1982, noted that only male pilots were liable to fly fighter aircraft in fighter roles and fulfill combat duties; women pilots were not permitted to perform these duties. Thus, it is alleged that the policy of exclusion of women from risks assumed by men was discriminatory on the basis of sex, contrary to Section 10 of the Act.

The complaint dated March 7, 1983 of Marie- Claude Gauthier stated that, although she met other criteria for training as a marine engineering technician, the training course was not open to women because it included a posting at sea during such training, and posting on a ship on completion of the course, prohibited to women. She alleged discrimination under Sections 5(a) and 10 of the Act.

Katherine MacRae, a trained mechanic, in her complaint of February 28, 1984 stated that she was informed by an air reserve unit that women were not permitted to enrol for employment in tactical helicopter squadrons, and that the position of helicopter mechanic was thus not open to her. She claimed that she had suffered discrimination on grounds of sex, as covered by Sections 7 and 10 of the Act. In the event, Katherine MacRae and the CAF reached a settlement of the complaint, and the Human Rights Tribunal signed a consent order dated April 18, 1988, under which the CAF paid the complainant \$9,893, acknowledging that the military occupation at issue was open to women at the time the complaint was made, and that refusal to consider the application of the complainant was due to administrative error.

By agreement of the parties the complaints were joined for the purposes of the Tribunal hearing and disposition, the complaints involving substantially the same issues of fact and law as allowed

by Section 32(4) of the Act. Another complainant was added several months later. Georgina Brown, a qualified commercial pilot, in her complaint dated September 4, 1985 alleged that she was not permitted to apply for the position of air force pilot because of her sex. Nor was her application accepted for the position of air navigator because of her sex. She thus claimed discrimination as prohibited by Section 10(a) of the Act. Counsel for the CHRC and the CAF were unable to agree on a statement of facts relating to this complaint. Ms. Brown testified before the Tribunal in January, 1987 and further evidence of her employment and physical record was later introduced by both parties. Nevertheless, the main point at issue in the Brown complaint is closely related to the others.

In summary, all the complainants alleged that the CAF'S policy regarding employment opportunities was discriminatory on the grounds of sex in as much as women were not permitted to apply for or receive training and be at risk in certain occupations, and that this discrimination contravened Sections 5, 7 and 10 of the Act. Section 3 clearly lists sex as one of the proscribed grounds of discrimination; Section 5 defines a discriminatory practice in the provision of goods and services; Section 7 defines the discriminatory practice as refusal to employ, to continue to employ or to differentiate adversely in relation to any employee, and Section 10 states that it is a discriminatory practice for an employer or employee organization to establish a policy or practice that deprives an individual or class of individual of employment opportunities on a prohibited ground, or to enter into an agreement regarding all aspects of employment, recruitment, referral, hiring, promotion, training, apprenticeship, that would deprive an individual of employment opportunities.

The complainants asked for a variety of remedies which might be summarized as the following: compensation for wages lost as the result of curtailed or foregone employment opportunities; the right to be reinstated, or offered employment for which they qualified; special compensation for suffering in respect of hurt feelings and insult; an order that the CAF cease the discriminatory practices and adopt a special programme for the recruitment and hiring of women within the meaning of Section 15(1) of the Act.

This last remedy was of particular concern to Joseph Houlden, a retired pilot and the only male complainant, who sought as a remedy the opening of fighter pilot training and occupation to women, an affirmative action programme regarding women's participation in fighter roles and the establishment of an internal supervisory and monitoring body to supervise such a programme. Section 15(1) of the Act declares it is not a discriminatory practice for a person to carry out a special programme designed to prevent disadvantages, or eliminate disadvantages, suffered by a group of individuals whose disadvantages are based on, inter alia, sex, such programmes improving opportunities respecting goods, services, facilities or employment for that group, in this case, women.

3. THE HEARING On June 11, 1986 this Tribunal was appointed to hear the first four complaints, and on November 24, 1986 the same Tribunal was appointed to hear the complaint of Georgina Anne Brown. All complainants were represented by counsel to the CHRC, with the exception of Joseph Houlden who appeared before the Tribunal on his own behalf and who did not call any witnesses. A short time before the final days of the hearing the complainant,

Katherine MacRae and the CAF agreed to a settlement which was made the subject of a consent order signed by the Tribunal on April 18, 1988.

After a preliminary meeting with counsel in October 1986, the Tribunal held twelve days of hearings in Ottawa: four days in November 1986 and January 1987 and a further eight days of hearings in June and August 1988. Counsel for the CAF called thirteen witnesses, all senior career officers in the Forces, some with operational commands, others serving in staff positions in personnel and recruitment, some with responsibility for broad personnel policy during the 1980's, others concerned with psychological and physical testing and measurement. The CAF's witnesses were Messrs. Flewelling, Hotsenpiller, McLellan, Morton, Munro, O'Connor, Pinch, Spencer, Swan, Thomas, Zuliani and Zypchen, and Ms. Toole.

Each witness provided the Tribunal with written material providing background for and further elaboration of points given in testimony. The CHRC counsel called four witnesses, three of whom had at one time served in the Forces and all of whom were social scientists by training, in psychology, sociology and history. These witnesses also supplied written material. These witnesses were Ms. Cottam, Mr. Cotton, Ms. Park, and Ms. Simpson.

The material entered as exhibits by both counsel was rich in detail and eclectic in scope. It included reports to and from parliamentary committees, social science research reports, journal articles published previous to the hearings or commissioned by one of the parties and historical accounts of women in combat roles. In addition, many exhibits related directly to the CAF: internal memoranda regarding aspects of personnel policy, employment strategy, occupational structure, training, reports of trials conducted of women in non-traditional employment and external Forces documents or position papers and policy statements by the Minister of National Defence. The tribunal members and counsel also viewed two video presentations about the physical ambiance aboard tanks and ships, and during a day visit to Halifax visited a submarine and a destroyer. Counsel for the CAF also commissioned a survey on the role of women in several other national armed forces. The results of the questionnaire were produced as an exhibit. The Tribunal appreciates the care taken by both counsel to present a full background of fact and opinion before they addressed the jurisprudential issues of this case.

4. FEATURES OF THE CANADIAN ARMED FORCES The issue is: does "operational effectiveness" constitute a bona fide occupational requirement of such a nature that the exclusion of women from combat related occupations is justified, even though it is, on its face, a discriminatory practice.

A consideration of the issue requires some knowledge of the goals and structure of the CAF. The "operational effectiveness" of the Forces is judged by the "final product", that is, how the system will work in war. Therefore, the first planning goal is the implementation of operational tactics and long term strategic planning, before and during war, which will lead to a successful conclusion. Peacetime operations and structures are geared to the achievement of this goal. The means taken are those which are assumed, on the basis of past practice of this and other similar nations, to lead to a successful conclusion. However, since the armed forces have not, in recent Canadian history (i. e. since the Korean war in mid 1950's), been called to perform their ultimate function, it is difficult to judge whether they are, in fact, operationally effective. Only the test of

actual or "real" combat can do that. Because of this, there is considerable professional military interest in contemporary combat experience, whether non- traditional (as in guerrilla wars) or more traditional (as in the Middle East and the Falklands in the last fifteen years). However, the goal of operational effectiveness remains paramount and dictates, to some degree, the internal structure of the Forces. It is of especial importance in high risk combat "core" units.

The CAF has three commands, maritime, mobile, and air, each with a separate operational structure of command and, in some cases, unique and separate occupations. In all commands, units or groups are classed by function. Combat units are those which engage the enemy directly. Combat support units enhance combat units by, for example, laying minefields, providing communications and artillery firepower. Combat service support units repair vehicles, provide fuel, medical services and military police (or equivalent support in navy and air units). For example, a battalion might have elements of combat and combat support units, and because of this all members of the battalion would be classified as combat, on the supposition that even combat support unit members must be prepared to engage the enemy directly (i. e. kill) if the occasion arises. The examples given apply to the land forces. Similar examples could be given for naval and air forces. For instance, submarines and destroyers are combat vessels and, therefore, all personnel serving on them are classed as combat, although their military occupation classification may be primarily non- combatant, e. g. cook. Helicopters, depending on the situation, are "combat" craft if they are part of a combat unit actually engaging the enemy. Thus, the function of a unit as "combat" determines the classification of all members of the unit, whatever the occupation, as "combat". Some individuals, of course, are specifically given the designation "combat" since that is, in essence, their occupation, e. g. infantry soldier.

A military occupation is defined as follows: an occupation is the basic occupational group into which a service member is assigned. The grouping is based on a requirement to perform related functions, embracing similar skills and knowledge, associated with the performance of a particular series of duties. Officer occupations may have an advanced level and may also contain sub- occupations. All service members undergo the same occupation training to become occupation qualified. In the regular force there are about 36 occupations (and 40 sub- occupations) for officers and women may be employed in 30 occupations. There are about 100 occupations (and approximately 1600 occupation specialities) for non- commissioned members and women may be employed in about 70 occupations.

The militia (army), naval and air reserve units have a structure of occupations and designations which are mirror images of the regular CAF. This is so because in the event of war, the reserve force members are integrated into the regular forces.

In summary, the whole structure of occupations, command, and related recruitment and training are geared to war, and as a result no, or very few, civilian functions are catered to, but in the absence of war the role of the Forces is to undertake a number of civilian functions such as search and rescue, aid to civil power, and so on.

Selection for, and training for, occupations within the CAF demand sophisticated management and personnel leadership and administration. The CAF competes for qualified entrants with the civilian workplace, and while the Forces may offer training in trades or professions useful and

applicable in civilian life, it demands in return unlimited liability for high risks (i. e. direct combat during war), mandatory posting away from home base with or without promotion, and variable living conditions. In general, all members of the Forces must meet basic general requirements for entry (literacy, health, etc.), then the requirements for a specific occupation (e. g. typing skills for clerk), and then the requirements of the environment in which the individual will serve (e. g. knowledge and practice in ship's fire drill routine). An individual may, therefore, be employed outside his or her job description. By and large, the CAF develops its own personnel practices, so as to ensure a pool of individuals who can be moved around quickly, both operationally and geographically, and who can meet the demands of a range of tasks. As one witness (Colonel Zypchen) declared, "We hire people to do a range of jobs and cluster those jobs as an occupation."

As might be expected in a large labour- intensive organization, recruitment of members, selection and training, are highly centralized, national and hierarchical operations. The process is not dissimilar to that of other large institutional employers but it includes, in addition to the usual formal tests of health, literacy and aptitude, an accent on orientation and life style, emphasizing the team spirit, team relationship and abnormal working hours and conditions that may be part of membership including, for example, posting to a sea environment when the person initially enlisted in an air environment.

In summary, standards for occupations or jobs are set by experts in the field and by the operational commanders. The experts include psychological research officers, and the overall aim is to attract the best recruits, to have not too much attrition during training, and to have a constant flow of qualified applicants who can meet the needs of the Forces. The needs vary enormously, from a large pool of administrative clerks with little specialized education to a much smaller pool of highly qualified and expensively trained helicopter pilots. But each pool must be large enough to provide for a proportion of members absent on leave, further training, rotation from base to base and most importantly to provide for promotion within the various grades or steps within the broad occupational group, that is, to provide a "career" progression because promotion is time based as well as merit based. And in wartime, the pool must provide for replacement of personnel lost or injured in combat.

The result of this concern has been the formulation of a policy setting a minimum male requirement ("MMR") or content within the total personnel strength of each trade or occupation. The minimum male percentage is fixed and determines the number of positions to be filled by either men or women within a trade. The combat arms trades, for example, accept only males, while the dental trades have 100% gender- free positions. The ratio of male to gender- free positions is based on what is, somewhat arbitrarily, considered a satisfactory ratio in relation to service, e. g. sea/ shore, operations/ non- operations, and field/ garrison. An attempt is made to ensure that men are not forced to serve a disproportionate amount of time in positions that are not open to women. That is, while some trades employ both men and women, the latter are not, as a matter of policy, sent to sea or to certain other operational postings. The current proportions of male to gender- free positions is reviewed periodically.

Currently, for example, of about 100 military occupations open to non- commissioned members of the regular forces, 29 are closed to women (i. e. a 100% restriction against women), 16 are

open to both men and women (i. e. gender free), and 55 have varied restrictions. For example, the MMR for airframe technician was 40% originally and now is 8% (but in fact 89% of the trade is male). In other technician jobs the MMR was 30% and now is 6%, but the reality is that the male population in these trades is usually well over 85%. Even in the administrative clerk occupation, where the original MMR was 50% of the total established positions, and is now 32%, males occupy 68% of the positions. In the 35 military occupations for officers, 6 are closed to women, 13 are open, and 16 are restricted. For example, the MMR for pilot positions is 40% but the male complement in fact is 90%.

These policies of applying a MMR "quota" have been justified on good personnel management principles, including the need to recruit, and keep good tradespeople, but unless the MMR is reduced or eliminated in a number of trades and occupations it may well inhibit women who want or are qualified for training, but who may not see long term promotion opportunities. The MMR is intimately linked to the restriction of women to some units, occupations or positions, so as to ensure that they are not exposed to combat.

"The ratio of women to men in certain of the other units, occupations or positions theoretically open to women is limited to the extent necessary to assure the continued effective staffing of those positions restricted to men as a result of the policy of excluding women from combat roles. This aims at ensuring that enough men will be available at any time for transfer to combat positions. Unlike affirmative action quotas, these quotas serve to place a ceiling on the number of women employed in these classifications.

The distinction between duties that are directly or indirectly combat related is not clearly defined, and it is possible to argue that all military personnel are liable to be involved in combat, depending on the circumstances (Equality for All, Report of the Parliamentary Committee on Equality Rights, Ottawa, October 1985, page 51).

While all of these features of personnel selection are not dissimilar from those of a large civilian organization, there are elements unique to the CAF, because it is not only a self-contained institution but also one uniquely responsive to, and totally financed by the "external" civilian society. The CAF is a volunteer force, at every occupational level, officers and ranks, active and reserve. Conscription in any form is highly unlikely during peace and politically unattractive even during war. The CAF is highly structured, even bureaucratic, with its members stationed and active in every Canadian province and territory. It is an important local and national employer, landlord and equipment user. It performs a variety of functions during war and peace. The line of authority runs vertically in a well defined hierarchy of power and command. It emphasizes the "unlimited liability" of its members. These features, common to all contemporary armies (as opposed to guerrilla groups) heighten and enhance important operational requirements: safety of members, leadership, cohesion, esprit de corps. Running parallel to these needs are staff considerations: problems of providing career rotation and maintenance, appropriate personnel selection techniques, satisfaction in job choice and preference, good basic training, neutral standards of performance, provision of a total environment that provides for psychological and material needs.

Because it attempts to meet these requirements, both operational and personnel, the CAF is a unique institution in Canada, but it is not an isolated institution. It has in the past, and must certainly now, reflect societal values and changes, not the least because it is an all-volunteer force. It must, for it could not otherwise attract young recruits, and life in the CAF is essentially a young person's life, offering excellent training and educational opportunities, wages and benefits, career and job promotion and travel. The testimony given to the Tribunal by officers of the Forces explicitly reflects their understanding of and appreciation for the CAF as an institution ultimately responsive to and responsible to the civilian government. While operational considerations clearly place a wide range of power and authority within the hands and judgment of senior officers, the ultimate policy questions affecting the larger role of the CAF in society are determined by the federal cabinet and the civilian Minister of National Defence to whom the Chief of the Defence Staff (a career officer) reports. Part of the larger "political" role consists of active participation in international United Nations peace-keeping missions, membership in various military alliances (NATO and NORAD) and, as required, participation in international training exercises, co-operative staff exchanges and so on with other military forces.

5. WOMEN IN THE CANADIAN ARMED FORCES In 1986, women constituted 16% or 22,384 of the complement of all employees connected with national defence. In the regular CAF women were 9.1% of the total strength of 84,825 or 7,724 women: 1,462 were officers and 6,262 were non-commissioned members. (In 1971, servicewomen totalled 1,596 in all ranks, only 1.8% of total regular military strength.) In the reserves, of a total strength of 24,704, women were 4,111 or 16.6% (577 officers and 3,534 non-commissioned members). Women constituted 33.3% of the civilian employees of the Department of National Defence; they were 10,549 of a total civilian employee group of 31,588 but only 996 women were officer equivalent.

Senior women officers in the forces are not heads of operational units; they are mainly in personnel and nursing. Women officers are distributed in 30 military occupations open to them, but a majority (52%) are concentrated in only two -- nursing (29%) and logistics (23%). There are relatively heavy concentrations of women officers in aerospace engineering, communications and electronics engineering, land, electrical and maritime engineering (210 officers in total), medicine (120), personnel administration (82), with small numbers in other fields, e. g. legal, public affairs, chaplaincy, and intelligence. Women non-commissioned members of the Forces are distributed over a wider range of the 74 occupations in which they may be employed, but again the employment patterns are similar to those in civilian life. Of 6,200 women, 35% are administrative clerks or supply technicians, with heavy concentrations in medical and dental assistants, but there are almost no women in blue collar trades (e. g. there is one plumber gas fitter and two electricians). In general, non-commissioned women are found in about two-thirds of the enlisted trades, but they are very much under-represented in all supervisory ranks. Thus many decisions about women's jobs and employment are made by men.

Women in Canada have a long tradition of military service. Trained nurses served with troops in Saskatchewan during the 1885 Northwest Rebellion and the Canadian Army Nursing Service was organized in 1899 with Canadian Nursing sisters serving with the Canadian contingent in the Boer War. In the next decade, the nursing service became part of the Canadian Army Medical Corps and nursing sisters were appointed to the permanent force. Nurses were mobilized at the 1914 outbreak of World War I and served overseas in hospitals and on hospital ships over

several theatres of war and in combat zones with field ambulance units. Over 53 died while "on service". By virtue of a specific policy decision, the permanent nursing force shrank between the two world wars to only ten nursing sisters and one matron. At the outbreak of the Second World War in 1939 mobilization of medical units proceeded quickly and by the end of the war almost 5,000 nursing sisters had served in the army, navy and airforce medical corps, overseas in hospitals, casualty stations near combat zones, mobile field hospitals and in many theatres of war, but they did not serve on ships, aircraft or in the infantry.

Above and beyond specialized nursing services, the government decided in 1941 to enrol women volunteers for full time military service in order to release medically fit men for combat duty. All three services, army, navy and air force, established women's divisions, and as the war progressed the scope of employment opportunities for women broadened from the more usual routine housekeeping trades (clerks, cooks, fabric workers, drivers, telephone operators) to skilled electrical and mechanical blue collar trades. Over 45,000 women served in the Forces during World War II, earning many distinctions and honours. However, they constituted only 1.4% of the CAF at the time. In other countries and other armed forces, large numbers of women actually participated in support units or fought alongside men to remedy the severe shortage of male personnel. The Soviet Union mobilized about one million women as uniformed troops and half probably fought in combat units. Thousands of women fought in partisan or guerrilla groups or were used as spies and saboteurs.

But everywhere in the years following World War II, the proportion of women in military service fell dramatically, as women were demobilized and returned to civilian life, a deliberate policy decision made by all governments. However, in Canada the signing of the North Atlantic Treaty in 1949 and the 1950 outbreak of war in Korea led to renewed consideration of the employment of uniformed women in an expanding military force. By 1951 the government approved a female component in army (militia) and naval reserves and enrolment of women directly into the three regular forces, army, navy, air. By 1955, more than 5,000 women were in service. Several years later, however, changes in defence policy sharply reduced the number of women and the introduction of more automated equipment in those trades open to women reduced the need for them. In fact, recruiting for women in the air force actually ceased in 1963. In 1965, a ceiling of 1,500 was placed on women eligible for regular forces work. This amounted to 1.8% of the total military force at that time. The ceiling remained in force until the early 1970's. In 1968 the Royal Canadian Navy, the Canadian Army and Royal Canadian Air Force were united into one unified CAF with personnel serving in the sea, land and air element. This unification included servicewomen.

The report of the Royal Commission on the Status of Women in 1970 remarked on the small number of trades in which women in the forces were employed, mainly administrative, technical, and paramedical fields. Several reasons were given. It was uneconomical to train women for trades requiring long and expensive training because they had on average a shorter length of service than men. Many trades open only to men were in combat arms or at sea, where women were not allowed to serve, and women had to be placed in trades which were common enough that groups of at least 35 would be stationed at each base, this being the minimum number justifying the expense of providing special quarters, facilities and supervision. While the rate of pay for men and women was the same, most women worked in trades with lower pay scales.

The Royal Commission recommended changes necessary to provide a climate of equal opportunity for women in Canada. Six recommendations were directed to women in the CAF: standardized enrolment criteria; equal pension benefits for men and women; entry for women into the Canadian military colleges; opening of all trades and classifications to women; termination of practices of prohibiting married women from enrolling and of releasing servicewomen on the birth of a child. The government response was to move, albeit cautiously, in the direction of more equal opportunities, so that operational effectiveness of the Forces would not be compromised. In July 1971 the Defence Council (the Chief of the Defence Staff and operational commanders) directed that there would be no limitation on the employment of women in the CAF other than in the primary combat role, at some remote locations and at sea. Women would not be admitted to military colleges because graduates supplied the combat officer cadre but women would be eligible for subsidized education at civilian universities. In all other respects, such as enrolment criteria, terms and conditions of service, pay and benefits, women were to enjoy complete equality with men.

In September 1974, the Department of National Defence completed a review of the job classifications that could be filled by women. The results were dramatic. Over two-thirds of all classifications were, in principle, made accessible to women; approximately 30,000 positions were theoretically open to both sexes while 40,000 were reserved to men only, because of the limitations on the employment of women established by the Defence Council and for personnel reasons such as the maintenance of a good sea/shore ratio. Over the years officer occupations open to women expanded from 7 (1969), to 22 (1979), to 24 (1983). Total officer classifications were 33, but 9 were closed to women: 3 land combat, 3 air crew, 2 sea operations and the Roman Catholic chaplaincy. The non-commissioned occupations opened to women similarly increased: from 16 (1969), to 63 (1979) to 67 (1983), out of a total of about 100 occupations.

6. THE SWINTER TRIALS With the enactment of the Canadian Human Rights Act in 1978, more studies were undertaken to reassess the potential role of women in the CAF. The Act prohibited discrimination in employment on the basis of sex but provided that it was not a discriminatory practice if a restriction was based on a bona fide occupational requirement. The lack of statutory definition for "bona fide occupational requirement" triggered a review of employment policies, and the consideration of a number of > - 19 factors, such as the effect of unrestricted employment of women on operational capabilities; possible conflict between individual rights and national security; medical considerations affecting employment of women in operations roles (e. g. physical strength and stamina), costs of unrestricted employment of women (benefits, rate of absenteeism, equipment changes), difficulties of recruiting in the last decades of the century; and attitudes of service personnel, their spouses and the Canadian public towards unrestricted employment of service women. These factors were considered at length and various options reviewed. It was decided to open the military colleges to women, and to conduct a series of controlled trials with women in non-traditional roles over the years 1979- 1984, in land, air and sea environments and at the isolated post CFS (Canadian Forces Station) Alert in the high Arctic.

The SWINTER trials (the acronym for Service Women in Non-Traditional Environments and Roles) were elaborate, empirical tests devised by the CAF to provide data, verifiable and quantifiable, on a number of problems that might or would arise if all military occupations were

opened to women without restriction of any kind. These problems were assumed to be physical, psychological and social. At the time the SWINTER trials began, the number of women in the regular forces had risen to over 5,000, or 6.5% of the total, three times greater than 1970. At the same time (1979), almost 4,000 women belonged to the reserve force (19.1% of the total reserve complement). There was also a great expansion during the 1970's in the number of officer occupations open to women (from 14 to 22) and non-commissioned occupations (from 29 to 63).

The purpose of the SWINTER trials was to determine the impact of employing mixed groups in various environments, and the main criterion against which the trials were to be assessed was the effect of mixed gender groups on operational capabilities. Because of the importance of these trials in the determination of future policies for women's employment, and indeed for the justification of exclusion of women from some occupations (in contrast to the declared principles of the Canadian Human Rights Act), considerable time and attention was paid to the design and assessment of the trials. Two points must be made. The number of women involved directly in the trials was small, and the trials did not simulate authentic combat experience. And, perhaps equally significant, the largely male staff and operational personnel, at middle and upper ranks, participated for the first time in a novel experiment, for which the past did not always supply a context in which to make "military or professional judgments". The CAF, in common with many large institutions, also had to restructure, to reorient its personnel policies and to borrow skills and techniques developed in social science theory and experiments and to manage and assess empirical experiments so as to provide a substantial verifiable, presumably reproducible, body of data on human performance and attitudes.

The rationale for "trialing" in this manner was set out in a National Defence memorandum of December 21, 1979 (NDHQ Instruction DCDS 13/79): "The presence of many uncertainties relating to universal or near universal employment of women through the CF (Canadian Forces) argues against an unreasoned or precipitous implementation of the literal requirements of CHRA (Canadian Human Rights Act). To ensure that operational capability is not imperilled, while at the same time moving in the direction of providing an opportunity for men and women to serve in the CF on an equal basis, it has been decided to proceed with the trial employment of women in hitherto all-male roles at selected near-combat units and at one isolated station."

The objectives were to compare individual effectiveness of men and women, compare the effectiveness of groups of women and of men and of integrated groups versus all male groups; to assess the behavioural and social impact of servicewomen on trial units, including the sociological impact on immediate families; to assess the degree of acceptance of the public and Canadian allies on the employment of women in non-traditional roles and environments, and to determine the resource implications of the expanded participation of women in the CAF.

The naval trial, held March 1980 to March 1984, was undertaken aboard HMCS CORMORANT, an unarmed fleet diving support ship which met the policy requirements of the time prohibiting the employment of women on combat ships. Fifteen servicewomen were posted to the ship in support occupations open to women, such as medical assistants, meteorological technicians, administrative clerks, supply technicians, cooks and stewards. The servicewomen undertook the initial course acquainting sailors with naval terminology, ship design and general information

required to perform seaman jobs, such as damage control and firefighting procedures. HMCS CORMORANT has a normal complement of 75 crew members; over the span of the trial the female members, on an average, represented 20% of the crew. Prior to the SWINTER trial, no women had served on any navy vessels, since all were deemed to be potential combat vessels and were also at sea about 150 days per year. The trials did not include the posting of women to "front line combat" vessels such as destroyers, frigates, submarines, minesweepers, although women in the reserves have recently served on unarmed gate vessels (the smallest vessels in the navy).

In order to provide elements of privacy aboard the SWINTER trial vessel, sleeping and toilet facilities were modified, but the usual routine of the vessel was maintained and seamanship duties were performed as appropriate to a ship which operates 24 hours per day. Generally, professional or trade jobs take up half of the day; seamanship duties (standing watch, firefighting, sea rescue) and general husbandry duties (cleaning, laundry) take up the remainder. Women in the SWINTER trial did not operate in the so-called hard-sea trades unique to the naval force. One of these is marine engineering technician, which was and is not open to women because the only place to serve in this occupation is on a combat vessel, with a minimum service of five years after an extensive training period.

In summary, the naval SWINTER trials were concerned with two issues. First, how will mixed gender groups operate in the "intimate" environment of a closed society (the ship), whose personnel perform a variety of functions, under a hierarchical command structure, with less privacy or "solitude" than is found in other jobs within the navy, or indeed within many civilian workplaces? The second issue related to operational effectiveness and the possibility that mixed gender complement, particularly where women were a small proportion of the total, would not exhibit the "bonding" essential for effective combat response. These concerns were also at issue in the land and air forces.

The SWINTER land environment trials took place in a field ambulance and support unit of a brigade in Germany where Canadian land forces are stationed to fulfill Canada's NATO commitments. In the land forces, combat arms units are those "armed to the teeth", infantry, artillery, armoured; combat support units are engineers and signals; combat service support units include military police and nursing services. About 35 women joined a service battalion and field ambulance unit, serving as medical officer, pharmacist, medical assistant, logistics officers, one land ordinance engineer; others came from a variety of trades in which women were already serving. Evidence and testimony emphasized the twin concerns of environment and esprit de corps. On manoeuvres and in combat, officers and men sleep in or near tanks, guns, transport trucks, live with minimum of privacy and share minimal toilet and other facilities. Operational effectiveness is important where both combat arms and support arms face not only personal but also collective danger, including death. Evidence was presented that women individually, and in all women groups, were mobilized during the Second World War and were engaged in direct combat with the enemy, as soldiers, partisan fighters, and so on. The SWINTER trials were, however, designed to test the effectiveness of mixed gender units in service support units which are not usually on the front line of combat but which may, given exigencies of war, be affected by combat activity.

The SWINTER trial in the air environment introduced very small numbers of women to training as pilots and air navigators and engineers, in all- male training, search and rescue and transport units. There were no combat trials for women. At the end of the four year trial period, some 18 women remained; they had performed well and had on the whole been accepted by male colleagues.

The SWINTER trials also included the posting of women, in various trades open to them, to six month tours of duty at the Canadian Forces Station at Alert in the high Arctic. Again, the environment was "hostile" in the sense that the base is entirely self- contained, removed from other communities and no families are permitted. While living conditions are not uncomfortable, the isolation is extreme.

From the testimony presented, it is clear that the CAF undertook the SWINTER trials in a serious and competent manner. Operational commanders and the chief policy makers undertook an extensive review of the data collected at the sites of the trials, both during and after the trials. Some 30 reports were commissioned and completed, based on questionnaires administered to men and women participants, participant observation by social scientists and evaluations of physical and physiological measurements. It is clear that while operational observation and experience were given weight, the importance of psychological and sociological measurements and evaluation was given greater recognition, for the reason that, simply put, there was no question raised, as a result of the trials, about the competence of women to perform their assigned duties. The larger question, therefore, was whether mixed units could operate to a successful level of operational effectiveness and specifically to the level of combat activity and commitment. Because women were not assigned combat duties in the SWINTER trials and because combat situations cannot be easily simulated, the SWINTER trials could not, and did not, provide any data of an acceptable social science kind. But the trials did provide an opportunity for further policy development and a re- thinking of personnel policy and, at a higher level of abstraction, the ways in which the armed forces could or should be responsive to changes in social practice and attitudes during the 1980s.

In May 1983 the Assistant Deputy Minister (Personnel) of National Defence issued a paper, The Canadian Forces Personnel Concept, in which he provided a constitutional" statement in order to bring some degree of order to the development of personnel policies to best satisfy conflicting requirements, such as the effective manning of the Forces, support of the military ethic and the meeting of expectations of service personnel, all in times of changing economic, social, political and technological conditions.

Among the external influences was the policy of equal opportunity, so that the current and potential contribution of all members of the Forces could be recognized and employment limited only by bona fide occupational requirements. The principle of operational effectiveness in time of war or national emergency was stated to be the fundamental criterion against which all personnel policies must be developed and continually assessed. The paper noted that the CAF, as a microcosm of Canadian society, was subject to the pressures of evolving societal attitudes and norms which might be incompatible with the essential requirements of an operationally effective armed force. Throughout this statement of principles, the emphasis was on individual morale within a cohesive operational unit, the support that must be offered to military families to sustain

that cohesion, the importance of strong but sensitive leadership and the necessity to maintain the Forces as representative of Canadian society, with open recruiting and training to satisfy the needs of the operational unit or team.

The final 1984 and 1985 reports of the SWINTER trials include a social and behavioural science evaluation, supported by data collected and analyzed by the Canadian Forces Personnel Applied Research Unit (CFPARU), an in-house unit staffed by trained full-time social scientists holding officer rank. The Unit's senior social scientists prepared final reports on the trials and an 'overview' of the social and behavioural science evaluations made of the trials which involved, over the five year period, approximately 280 women. They collectively served six month tours at Alert, two year postings at sea on a diving tender, four year postings in the field (in Germany) with two combat service support units, and as crew at five transport or transport and rescue squadrons.

Specifically, the evaluation of the Alert trial declared that the mixed gender or integrated workforce and workplace was successful both from the point of view of employees of both sexes and the commander. The women posted were doing familiar tasks, were competent, accepted by men, and the organizational side of the integration process was well thought out. The lessons learned were valuable. There must be a minimum number of women spread over various units and ranks so that the fishbowl effect is minimized and women as individuals and as a group are not the subject of unusual or undue attention. Preliminary assessment and management before women are posted to previously all-male units is essential.

The evaluation of the air trial concluded that social integration had occurred in a satisfactory manner in a majority of squadrons. Women had performed their tasks well, had received no preferential treatment, and a majority of servicemen agreed that women should be fully employed in previously all male units. The commanding officers believed that this integration was successful and did not compromise effectiveness because both men and women were held to the same high training standards. In other words, the inclusion of women would not detract from but would sustain the esprit de corps. The air service was, as a result, prepared to develop a workable rule regarding pregnancy, and to re-assess its physical selection standards so as to be gender-neutral in effect as well as intention.

CFPARU's evaluation of the sea and land trials revealed a more problematic result. Women were judged to perform jobs competently at sea in a supply vessel but neither there nor in the land trials was there satisfactory social integration, from the point of view of all parties. Women complained of the fishbowl effect. Men asserted that women lacked the necessary physical stamina and combat motivation, and received special attention, i. e. favouritism. The Unit's report strongly suggested that many of the problems could be traced to initial poor selection and training, lack of identification of special skills needed, inadequate job definitions, and poor organizational or management preparation.

The objective of the SWINTER trials was to assess the "impact", if any, of servicewomen on the operational effectiveness of the units involved. The assessment of the operational effectiveness was the responsibility of the operational commanders of the trial units. The Personnel Applied Research Unit (CFPARU) was responsible for a social science evaluation to determine "the

human consequences, if any, of introducing servicewomen into previous exclusive male roles and environments". Both assessments were submitted to the chiefs of sea, land and air commands.

The SWINTER trials were undertaken by the CAF not only to document any bona fide occupational restrictions which might continue to exclude women from additional duties (i. e. in direct combat, and in positions with a high minimum male requirement) but also to provide for no unreasonable or precipitous implementation of the requirements of the Canadian Human Rights Act. The units selected for the trials were non-combat or near-combat, a small number of women (no more than 15% of any unit's strength) were assigned to a trial unit at any time, and some temporary employments for women were created which did not necessarily presuppose permanent change. The approach was cautious but the trials were "formal", sanctioned and supported by the highest operational and policy commands, and were described as the most ambitious study of the issue ever undertaken by a western military establishment. Whether the data produced by the SWINTER trials could bolster either the position of those who supported the restriction of employment for women or those who supported the elimination of restrictions, is a moot point. The limitations of the trials, the research methodology, the design of the tests and so on made the "results" less definitive than many had hoped.

7. EQUALITY RIGHTS The SWINTER trials, during the course of four years, served to make the public, the CAF command and lobby groups more aware of each other. The Forces had undertaken many organizational changes during the past 20 years to accommodate changes in Canadian social life, political goals and demography. The Forces had to accommodate external social changes respecting families, rights and freedoms for individuals in the Forces and for their families, the employment of women and minorities, and the introduction of new technologies. Much organizational time and psychic effort was spent to respond to these changes. In many significant ways, the contemporary situation is not unique to the Forces but is common to other large scale organizations, even those that are "armed", such as police forces and coast guard, where established patterns of recruitment and operation have been modified in response to strong external pressures.

The interplay of social and institutional (especially military) change is the hallmark of the post-SWINTER period, from 1984 onwards. As a result of the trials, various incremental changes were set in motion to continue the employment of women in naval and air units where the trials had first placed them. As the naval reports suggested, there was no operational or sociological reason to exclude women from serving in a diving support ship or on other support or gate vessels, all of them unarmed. But the most important externally imposed incentive to formulate and execute a new policy regarding female employment came in 1985 when a Parliamentary Committee on Equality Rights issued a report to Parliament titled Equality For All, with recommendations that all trades and occupations in the CAF be open to women. The committee heard witnesses from women in the Forces, both past and serving, senior officers from Defence Headquarters and several women's organizations. The Committee's mandate, to inquire into and report on equality rights under the Canadian Charter of Rights and Freedoms, was activated by the third anniversary, in April 1985, of the Charter's enactment, and particularly because Section 15 of the Charter with its clear support of the principle of equality between the sexes became operative in that month.

The Parliamentary Committee's recommendation that all restrictions on women's employment be dropped was based on its belief that excluding women from so many job opportunities, most of them related to combat in an indirect way, had adverse consequences: it closed to women many well paid jobs after military service, because military training was not available to them; it hindered their promotion in the Forces because they lacked experience in occupations and units that were combat linked; and it excluded them from experience and training in leadership. Further, as the Committee's report noted, the provisions in the Act, permitting no discrimination on grounds of sex save by reason of a bona fide occupational requirement, had no counterpart in other nations where constitutional law prohibited women from entering combat service. The Committee disposed of the various factors raised in the past and provided some counter arguments. These factors related to individual and group behaviour, stereotypical behaviour, lack of social integration, absenteeism, lack of privacy, danger to the cohesion of units, and societal displeasure at women's exposure to violence and danger. These grounds, said the report, did not constitute a proper basis for bona fide occupational requirements for a job:

"We conclude that the Canadian Armed Forces must revise its present policy, a process that has begun but is proceeding all too slowly." (at p. 57).

The Government's response to the committee report, entitled *Toward Equality*, (1986) was short.

"The Government is fully committed to expanding the role of women in the Armed Forces and will ensure that women will be able to compete for all trades and occupations. The Government shall vigorously pursue this policy in a manner consistent with the requirement of the Armed Forces to be operationally effective in the interests of national security." (at p. 25)

The response of the Canadian Government to the "equality" recommendation was followed immediately by a response from the CAF. A Charter Task Force was set up, one senses with some urgency, to determine the effect on CAF policies of the Government response concerning the employment of women, sexual orientation, mandatory retirement, physical and mental disability and marital status; to examine relevant information (such as SWINTER trial reports); and to develop options so as to meet Government policy objectives (i. e. enhancement of individual rights and freedoms) within requirements of operational effectiveness and efficiency. A Charter Office was set up at national defence headquarters with senior staff officers and authorization to call on whatever resources it needed to complete its work six months later, that is, by October 1986.

But even before this date, the CAF issued new policy statements and operational guidelines as a direct result of Charter Task Force recommendations. The recommendations, made to the Chief of the Defence Staff, covered the initiation of new environmental support measures (compatibility of equipment, spousal education, pregnancy leave and replacement), the opening of some male units to mixed- gender units, and the inception of further trials, the last to include combat units, such as infantry, artillery, armour, field engineering, signals, field intelligence and destroyers. (These trials were to be held if a review of employment policy suggested they would be necessary. In fact, the Chief of the Defence Staff did not wait until December 1988 to evaluate the policy, but proceeded with trials immediately.) The recommendations also included

the introduction of new leadership and indoctrination training concerning mixed- gender employment and the establishment of a trials project office.

In June 1986 the Chief of the Defence Staff issued Canadian Forces Administrative Orders 49-14 and 49-15 to the regular force. CFAO 49-14 laid out a general employment policy for the Forces, which opened up all occupations or units for employment by women members of the Forces, and laid down one caveat:

"any limitation on eligibility for employment resulting from the requirement that a member's participation be able to contribute to operational effectiveness will be confined to the minimum that must be imposed in order to achieve the required standard of operational effectiveness of the regular forces in general."

CFAO 49-15 specifically addressed mixed gender employment in the regular force and reiterated a justification for the exclusion of women in some units and occupations:

"Empirical evidence gained throughout the history of warfare has proven that the operational effectiveness of an armed force is decisively affected by a combination of human factors. In particular, members of an armed force whose primary role is the engagement of the enemy in battle are faced with severe hardship, degrading living conditions, capture and death. The stresses encountered in battle drive members of the units involved to their physical and psychological limits. The ability to continue to perform effectively under these extreme conditions requires a high level of physical and mental strength and stamina. Most importantly, effectiveness in battle is vitally dependent on a strong bonding among the members, which is essential to units' cohesion and morale. Empirical evidence has shown that human stresses are compounded by the added complexities of mixed- gender groups. Concern that such additional stress would seriously jeopardize operational effectiveness has resulted in every major nation in the world maintaining limits on mixed- gender composition in their armed forces, particularly in units which are most likely to face an enemy directly in battle. Consequently, in order not to jeopardize the operational effectiveness dictated by the needs of national security, the composition of some units will remain single- gender male. As a result, a number of military occupations will be restricted to men, and in a number of others, there will be a minimum male component."

While CFAO 49-15 listed in annexes the specific units and occupations which were to be or remain male- only, or which had a minimum male component, the factors to be used to determine the limitations on employment in the future were also specified. They included the ability to maintain high cohesion and morale in mixed gender units based on, but not limited to, considerations which would apply in war- like situations: living, working and "social circumstances" within the unit, the need to work independently or as teams, the degree of mutual confidence essential to successful team work, the degree to which lives of members depend on other team members, and the effect on members' attitudes of the policies of other nations concerning the composition of comparable units. The Order then went on to outline the negative or grave consequences of lowered cohesion and morale in a unit, based on such considerations as whether decreased performance of a unit could have a direct effect on the outcome of a battle, or lead to increased risk to success and safety of units, or lead to additional members of the unit

being killed, wounded or taken prisoner or whether decreased performance could affect morale and confidence of other units, and degree to which the performance of such other units, once affected, could influence the outcome of a battle.

The annexes to CFAO 49- 15 listed 21 units designated as single- gender male, including submarines, destroyers, armoured, artillery and infantry units. Of these units, five were opened up to mixed gender employment some months later, including field ambulances, military police and supply ships. Some 40 military occupations were designated single gender male, including many naval trades, infantry, and artillery; some months later four of these were opened to mixed gender, including air navigator, pilot, flight engineer. Some 71 military occupations were designated as requiring a minimum male component to provide for career progress. These included cook, administrative clerk, medical and other technician jobs, and engineering positions.

In summary, during 1986 the CAF undertook a major revision of personnel policies and employment practices in the light of the SWINTER trial assessment, propelled by the impetus given by the Charter Task Force and the Government's commitment to greater opportunities for all individuals in federal institutions. Previously male- only occupations such as pilot, navigator and flight engineer were now classed as mixed gender; single gender male roles in transport, training and utility and communication units were changed to mixed gender; mixed gender occupations could now serve on unarmed supply ships. Lest these changes appear too great, or to have been ill considered, an amendment to CFAO 49- 15 of October 1987, from the Chief of the Defence Staff stated that changes were based on careful analysis of the results of experience and of trials:

"You will appreciate that the changes detailed above are significant ones and constitute a quantum adjustment to policies which have been placed for a very long time and which have stood the test of war. Operational effectiveness remains our constant and principal concern and we have borne it in mind at the same time as striving to make our policies meet the individual rights and freedoms that are mandated by the constitution. Because I sense that these changes put us at the limits of acceptable risk in the operational effectiveness of the Canadian Forces, I have directed that they be implemented carefully and methodically."

... "However, they are changes made to preserve the individual rights and freedoms guaranteed by the constitution of Canada and I am confident that, with the positive support that has always been the response of the Canadian Forces, we will strike the right balance between according those rights and executing our military responsibilities to our country".

A decision was taken, at the highest policy level, to proceed further and more quickly than the simple re- designation of some units and occupations from male to mixed gender. In keeping with the Charter Task Force recommendation, the Minister of National Defence early in 1987 announced new mixed gender trials called CREW, (Combat Related Employment of Women) to assess the risks involved in employing women in all units and occupations now closed to them, with the single exception of submarines where privacy was the determining factor. The trials now became part of the expanded mixed- gender employment policy discussions coordinated by a workshop group of senior operational commanders and headquarters staff officers.

8. THE AIR FORCE POSITION One significant development occurred in July of 1987. The Minister of National Defence announced that women could now be employed in all air force units, including fighter and combat roles as pilots and navigators. This recommendation, coming from the operational air commander, was agreed to by the Chief of the Defence Staff and accordingly, all restrictions on the employment of women in any or all units in the air environment were removed and women could now enter the long training period for combat air crew occupations. The testimony of Major General Morton was that air units were satisfied that women could be employed in combat roles in mixed gender units without compromising the operational effectiveness of the units, and that, therefore, no further tests or trials need be done. This decision was not based on SWINTER trial results entirely because in that instance trials did not cover fixed wing aircraft, anti- submarine work or high performance fighter aircraft. The commander noted, in fact, that there was a dramatic change in male acceptance of women between the SWINTER trial commencement (1980) and 1987. The air force reaffirmed its high technical and safety standards, applied them to both sexes, undertook considerable education effort among male members, developed a clear pregnancy policy, undertook further neutral or gender free tests of operational equipment needs, and considered the effect of G tolerance on women, using evidence from Canada and other countries. As the air commander testified, the nature of the air force business and environment made the change in employment policy a logical one. Factors such as danger, living space, and environment were less important than physical ability, stamina and acceptance by males. These could be dealt with in a slow and methodical manner. In short the change could be managed without compromising standards and without combat trials.

9. CREW TRIALS AND RECENT POLICY STATEMENTS The CREW trial plans, approved by the Chief of Defence Staff in July 1987 call for two year evaluations beginning in the fall of 1989 of the performance of female personnel on one destroyer (25% of the ship's company to be female), and in units of armoured, artillery, infantry, engineers and signals groups, with from 25% to 50% female membership. Actual trial start dates will depend on the response from servicewomen volunteers and recruits. In a message issued from National Defence Headquarters regarding the CREW tests, the Chief of Defence Staff commented:

"It is essential that our evaluation be comprehensive and accurate. I am confident that the trials as approved will provide us with the necessary scientific data on which to base sound personnel decisions commensurate with our obligation to maintain the highest level of operational effectiveness (Canforgen Message, July 31, 1987).

In a paper entitled, "Implementation of Expanded Mixed Gender Employment Policies: issued on September 23, 1987, the Chief of Defence Staff stated:

"Command Headquarters are to monitor the operational effectiveness of their units and report through the normal chain of command any significant deviations in unit performance that can be attributed to the conversion of units to mixed- gender composition".

The implementation of expanded mixed- gender employment policies, for the regular force (that is, the CREW trials) was the subject of a framework memorandum from the Chief of the Defence Staff dated September 23, 1987. New policies have been formulated regarding broad personnel

concerns, such as liability to serve, replacement of pregnant women, mixed- gender relationships, physical fitness, education and recruiting plans. These policies are to guide operational commanders. Since the autumn of 1987 further research has been undertaken and policies developed. For example, CFAO 19- 38, Mixed- Gender Relationships (February 1988), is an administrative order providing "guidance concerning conduct for mixed- gender relationships involving members of the Canadian Forces, conduct which must be consistent with the high levels of discipline, cohesion and morale that are essential to operational effectiveness, and which must contribute to a positive public version of the forces and conform to the general standard required of all members". Minimum physical fitness standards are being developed, new advertising and recruiting brochures are being written, and leader education programmes are being developed for all ranks, as well as education programs to allay spousal concerns related to mixed gender employment. The specific implementation plans for army and navy show a particular concern for manning levels in view of relatively inflexible accommodation dictated by ship structure and "from a sociological perspective". The army scheme also addressed the female manning levels, in an attempt to provide a minimum of 20% women in a mixed gender unit, but recognized that this may not be feasible because there are insufficient women in certain occupations.

The latest most up to date statement of employment policy can be found in the March 1988 version of CFAO 49- 14 (employment policy), CFAO 49- 15 (mixed gender employment within the regular force) and CFAO 49- 16 (mixed gender employment within the reserve force). The policy statement notes that limitation on eligibility for employment (because of the requirement that a member contribute to operational effectiveness) will be confined to the minimum necessary to achieve the required standard of operational effectiveness of the CAF in general. CFAO 49- 15 specifies that gender is not a limitation except as specified in the case of specific units and occupations:

"The principle that every Canadian should have equal rights and responsibilities in the defence of Canada is implicit in the Canadian Charter of Rights and Freedoms (the Charter). There can be restrictions only when there is a necessity for reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society, as provided for in Section 1 of the Charter. In keeping with the requirements of the Charter, any remaining employment restrictions will be examined thoroughly and scientifically, as soon as possible. The objective is to determine if these restrictions are still essential, and if they also meet the other criteria of Section 1 of the Charter. If they are no longer necessary and justifiable, they will be removed."

The principles of mixed gender employment policy are that both sexes have equality of opportunity for service. Acceptance for employment in specific occupations will be based on gender- free physical standards which accurately reflect the nature of the specific employment. Valid scientific trials will be conducted, to determine how, when and in which occupations remaining restrictions can be removed. Operational effectiveness will not be put at undue risk, and restrictions will be maintained if they are essential to the maintenance of operational effectiveness.

At the moment, four naval units and ten army units are classed single gender male: these are combat units, such as destroyer, submarines, artillery, infantry, armoured, etc. Thirty- three

military occupations are single gender male and fifty- two have a minimum male component. In the reserve force, single gender male units and occupations mirror those in the regular force, as do those in the minimum male component group, although the reserve forces have fewer sub occupations than in the regular forces.

10. DECISION OF THE TRIBUNAL ON THE GENERAL ISSUE The issue underlying all the specific complaints and the one addressed by both the CHRC and the CAF was not the existence of discriminatory practices or policies; it is the adequacy of, or the existence of, a bona fide occupational requirement set by the CAF which would justify the exclusion of women from combat- related occupations and units as members of the Forces. The CHRC and the complainants assert that there was a general exclusionary policy which was applied in specific instances, i. e. in respect of the individual complainants, but that the policy was integral to the structure of the armed forces. Accordingly, the CHRC and the complainants asked for a variety of remedies, both complaint specific and systemic, on the grounds that the discriminatory exclusion of women was not justified as a bona fide occupational requirement. The CAF contended that in both the specific complaints and in the general personnel and staffing policies of the Forces, discriminatory policies were "saved" or justified by the needs and mandate of the Forces to maintain a high level of operational effectiveness. It is to this that we now turn.

The principle of operational effectiveness in time of war or national emergency is the fundamental criterion against which the CAF has developed and continually assesses its personnel policies. Operational effectiveness, or combat readiness and preparedness, determines personnel policy, and that policy by logical extension must seek to minimize the risk or hazards to life and limb that combat readiness might, or usually, entails. In short, as witnesses for the CAF pointed out, combat is a risky business to individuals, units, and ultimately, the civilian population. The goal of operational effectiveness is, ultimately, risk management: to lessen the danger to one's own armed forces and maximize the risk to those of the enemy. It follows that risk lies at the heart of the defence put forth by the CAF. It is alleged that there is too much risk in abandoning or modifying a policy of exclusion of women from combat. The quality and quantity of evidence brought forward to sustain or refute the proposition regarding risk is of the utmost importance, and indeed much of the oral testimony and written material dealt directly or by inference with the matter of risk, i. e. the chance of injury or loss of life and freedom, and of risk assessment and risk management, if not risk avoidance.

The leading case is the Ontario Human Rights Commission et al. v. Borough of Etobicoke [1982] 1 S. C. R. 202 decided in the Supreme Court of Canada. In considering whether a mandatory retirement age for firefighters could be justified as a condition of employment, the Court laid down two tests for a bona fide occupational requirement as set out in the Ontario Human Rights Code, a statutory provision similar to that of the Canadian Human Rights Act. Mr. Justice McIntyre, speaking for the Court, laid down the criteria for the definition or character of a valid bona fide occupational qualification. A limitation on employment to be valid must be "imposed honestly in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code." (at p. 208)

There was no real contention or argument on this point and we find that the CAF has satisfied the subjective element of the bona fide occupational requirement.

Mr. Justice McIntyre's second and objective element of the test of a valid occupational requirement is that the requirement "be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." (at p. 208)

Whether the CAF has shown that the occupational requirement has met the the objective elements outlined by the Court is a matter of the weight and quality of evidence, and the nature of the risk which members of the Forces and the public must assume. In the Etobicoke decision the Court tried to find a balance between the physical attributes required of an individual and the needs inherent in the occupation, i. e. adequate performance, meeting standards of safety and efficiency. Obviously these two elements, individual capability and occupational demands, are related. But how much "slippage" or risk, can you permit in the fit of the human to the occupation? To what extent, and why, should the occupation demands determine the qualities of the individual? More specifically, the Etobicoke decision raises these questions in the case before us. Is sex or gender always or invariably a predictable factor in determining performance? Is the gender factor the same in each and every individual member of the gender group? Does the employment require special skills which may be or are diminished by the gender factor? Does the employment involve unusual dangers to the employee, colleagues and the public that would be compounded by the sex of the employee? The employer, in trying to minimize risk to the general enterprise, is entitled to forestall unpredictable failure of employee performance, either by setting an absolute bar to certain groups or classes on some justifiable ground or by restricting employment opportunities to those individuals who will not be "failures". But this policy of employment restriction, whether group or individual specific, is only justified as a bona fide occupational requirement where the risk of individual failure is sufficient to justify exclusion from employment or where the risk touches upon the safety of public as well as employee groups. In such a case the employer must produce, according to Etobicoke, some clear "scientific evidence" in sufficient quality and quantity to indicate that gender is a danger to public safety because it exposes to undue risk the physical well being of other employees and the community and because it is a factor in the less than adequate performance of the occupation. Where the occupation is dangerous or hazardous, the risk of inadequate performance (measured, for example, in terms of strength, stamina, alertness) of one employee may also redound to the disadvantage or risk of all fellow employees.

The court, in Etobicoke, referred to two cases *Hodgson v. Greyhound Lines, Inc.* (1974) 499 P. 2d 859 and *Little v. Saint John Shipbuilding & Drydock Co. Ltd.* (1980) 1 C. H. R. R. 1) which spanned the debate about permissible employer hiring policies where risk was a factor, if not the determining practical goal. In *Hodgson*, public safety was held to be at sufficiently real risk to justify a bus company's policy of not hiring older drivers. In *Little*, on the other hand, an "over age" crane operator successfully challenged mandatory retirement on the grounds that individual capability, not class exclusion, was the focus of an occupational requirement. The Etobicoke test, as set out by the Supreme Court, sought a via media, and the decision also clarified the problem of evidence. The Court would not make a fixed rule about the adequacy or sufficiency of

evidence required to support an exclusionary policy. But minimal evidence was required, first, of the duties to be performed in the job and second, of the relationship between the affected class (age determined, or sex determined, for example) and the safe performance of the duties. In *Etobicoke*, the Court clearly preferred statistical and medical evidence based upon observation and research as being more persuasive than the testimony of experts with impressionistic views of the duties, performance levels and risk levels.

The Supreme Court of Canada in *Bhinder v. Canadian National Railway Company* [1985] 2 S. C. R. 561, considered the occupational requirement that employees wear hard hats, where the complainant for religious reasons would not do so. Here, the majority of the Court reiterated the applicability of the *Etobicoke* test, and asserted that the employer could meet the test by showing that the occupational requirement was a genuine one and directly related to the occupation, so that the performance of the occupation would be efficient, safe and economical. Even where such a requirement affected a person adversely, the discriminatory effect was nullified or overcome by the genuine occupational requirement which thus became a bona fide occupational requirement under the Canadian Human Rights Act. Setting conditions of work, if such is a genuine occupational requirement, may in fact permit consequential discrimination.

Since the *Etobicoke* and *Bhinder* decisions in 1982 and 1985, the Federal Court of Appeal has rendered judgment in three cases elaborating further on the principles set down in the two major cases. In *Air Canada v. Carson* (1985) 5. C. H. R. R. D/ 2848, the airline employer set a maximum hiring age for pilots, but failed to prove, in the Court's view, that the requirements of the job required a preference for a certain age group because of the relationship of public safety to job performance. MacGuigan, J. after analyzing the *Etobicoke* test, suggested (para. 23294) that the two factors, degree of public risk, and availability of alternatives to the employer (other than the occupational requirement complained of) are inversely proportional and have to be weighed against each other to determine the proper balance: where risk to public safety is small, available alternatives to the occupational requirement will be readily discerned; where the risk is great, suggested alternatives will be scrutinized more carefully. The evidence adduced in support of this proposition must, of course, meet the *Etobicoke* standard.

Mr. Justice MacGuigan (para. 23297) concluded that the *Etobicoke* test involving "sufficient risk of employee failure" means an "acceptable" degree of risk and not intolerable risk. He quoted with approval the statement of the Human Rights Review Tribunal in the *Carson* case:

"The correct legal test of a bona fide occupational requirement as stated in the *Etobicoke* case is whether the requirement is reasonably necessary to the performance of the job. This means the Tribunal must examine both the necessity of the rule and the reasonableness of the rule in the light of the necessity." (para. 23309)

MacGuigan J. stated that Parliament, in legislating the Canadian Human Rights Act, made a fundamental decision to give preference to individual opportunity over competing social values: "This preference is not absolute. Indeed, it is limited in the present context by an employer's right to establish a bona fide occupational requirement. But the courts must be zealous to ensure that Parliament's primary intention that people should for the most part be judged on their own

merits rather than on group characteristics is not eroded by overly generous exceptions. This necessitates a narrow interpretation of the exceptions" (para. 23317).

The Carson decision was followed by two more recent Federal Court of Appeal cases: Greyhound Lines of Canada Ltd. v. Canadian Human Rights Commission and McCreary, (1987) 78 N. R. 192, and Canadian Pacific Ltd. v. Mahon (1988) 1 F. C. 209. The Greyhound case, dealing with hiring age requirements for bus drivers, confirmed the finding of a Human Rights Review Tribunal that no significant relationship had been established between age and ability to perform the job, and that if safety of the public was to be a rationale for an age restriction policy, then the policy must clearly and actually provide for a maximum of safety. In the Mahon case, where medical evidence was also an important evidentiary factor, a diabetic was refused a railway trackman job on the grounds that his physical condition would compromise job performance. A Tribunal found that the risks of hiring a person with this condition were not sufficiently great to warrant a refusal to hire. But this reasoning was rejected on appeal and the Court held that an occupational requirement could qualify as a bona fide occupational requirement under the Act and defeat a claim of discrimination even if the requirement merely eliminated a small risk of serious damage. The Court held the effect of Bhinder and Etobicoke to be this: a job-related requirement that (according to evidence) is reasonably necessary to eliminate a real risk of serious damage to the public must be said to be a bona fide occupational requirement. Of course, the evidence must be sufficient to show that the risk is real and not based on mere speculation.

In the light of the jurisprudence and the interpretation and glosses on the Etobicoke test for a valid bona fide occupational requirement, can the evidence of the CAF support the claim? As stated before, we are of the opinion that the CAF has met the subjective element of the Etobicoke test. Neither party suggested otherwise. The CAF, in excluding women from combat occupations and units, honestly believed that the exclusion was necessary for the adequate performance of its units given the operational goals of the institution, a performance which must be safe and efficient for employees and the nation.

The issue here is whether the CAF's exclusion policy, which on its face is discriminatory, is objectively related to the employment concerned so as to ensure efficient and economic performance without endangering the employee or others. In brief, to find out whether an occupational requirement adopted in good faith for the sake of safety meets the objective test of Etobicoke for a bona fide occupational requirement, one must look into the duties to be performed and the conditions of job performance and compare those requirements against the capabilities and limitations of the class of persons affected. The occupational requirement is stated to be related to safety of the employee, colleagues and the national security or public. According to the Mahon case, a job-related requirement that is reasonably necessary to eliminate a real risk of serious damage to the public must be said to be a bona fide occupational requirement. The question at issue is whether the occupational requirement is justifiable only if it increases safety by a substantial amount and whether the evidence is sufficient to show that the risk is real and not based on mere speculation. Certainly the case law suggests that the higher the perceived risk to the public, the less the employer is under an obligation to look for alternatives to the blanket exclusion of certain groups of persons as employees.

In coming to our decision on the general issue, we carefully considered the evidence presented by both parties including the testimony of witnesses. The sufficiency and weight of evidence in cases of this kind is an important, indeed crucial element in the decision. While the Etobicoke decision and the derivative case law agree that statistical or medical evidence is to be preferred over the anecdotal or "expert" impressionistic evidence, this Tribunal and others, indeed, recognize that some statistical evidence is subject to varying, even contradictory interpretations, as to its "true" meaning or significance. And, in respect of gender relations, there is much evidence which is not statistical, but rather more inferential or sometimes speculative, as to the significance of gender in, for example, job performance. Human relations and many aspects of human performance of occupational duties cannot be "measured" with the same objective tools employed by a doctor treating physical disability. Nevertheless, we are satisfied that the range of evidence presented was sufficient to expose all important points of view or of interpretation on all issues that were germane to the decision.

It is not necessary to recapitulate, save in summary, the points made in argument by counsel. The CHRC and the complainants assert that no bona fide occupational requirement was established by the CAF for the period before June 1986 when the "new" policy (set out in CFAO 49-14, 49-15 and 49-16) attempted to identify the specifics of occupational requirements (in terms of gender). They argue that the pre-1986 general exclusionary policy could not have satisfied the bona fide occupational requirement test.

The CAF's case rested largely on the risk test or element as a factor justifying occupational requirements or demands. In essence, the argument is that the occupational structure within the CAF is rationally related to the tasks to be accomplished. Tasks must be performed to a sufficiently high level of efficiency and safety so that there is no, or only the slightest risk of failure, to the employee, colleagues and the public. These occupational requirements include a mandatory blanket or general preference for all males (or exclusion of all females) in certain types of jobs. This exclusion automatically turns into a bona fide occupational requirement (safe from a charge of discrimination) when and because public safety (as secured by operational effectiveness of the Forces' personnel) is the mandate of the employer. The occupational requirements include, therefore the performance, without failure, of a number of job-related tasks which demand both physical and "social" skills and capacities. Females do not now have or cannot acquire these capacities or skills or alternatively they can acquire them but only at the risk of failure of performance to themselves and others, the failure of performance having serious consequences, i. e. death, injury or capture by an enemy force. For this reason, a blanket exclusion of all females is justified and the Forces need not, as some case law suggests, balance off a right of an individual to be tested for the necessary skills and capacities. Furthermore, the risk of failure of performance is real, not speculative, or it is a sufficiently probable risk, such that public safety would be compromised by the absence of a general exclusionary policy.

The arguments advanced by counsel on the matter of risk were subsumed in the discussion about operational effectiveness, its definition, its cause and its effect and above all, its necessity for the safety of service members and ultimately, the public. A consideration of risk factors, therefore, led inexorably or inevitably to an evaluation of the components of operational effectiveness and an assessment of the ways in which members of mixed gender units performing the same jobs

contributed to that effectiveness. It is worth reiterating that the quality and quantity of evidence was also an issue.

Among the factors which contribute to operational effectiveness are physical capability, adequate environmental conditions, satisfactory social or intergroup relationships, cohesion or esprit de corps. A satisfactory amount of all these factors at a high quality level make an army operationally effective in the estimation of the professional military command. To what extent does the presence of women in combat units weaken the force of any one of these factors so that the total effect is an operational effectiveness that is less than satisfactory, or less than necessary, to meet the CAF's goal of providing a fighting force?

a) Physical Capability

Until the recent past, it was widely assumed that women as a class lacked the physical capability for certain jobs which demanded strength or stamina. This stereotype assumption has been set aside in favour of a gender-neutral occupational physical standard in which individuals are, without respect to gender, tested for the specific job demands. The CAF is now developing such standards and, with the assistance of environmental "medicine" experts, has embarked on a much more sophisticated scientific fitness testing for all enrolled personnel and has begun to develop general fitness training programmes. As a result of these new tests, the risk of failure of performance by women has been eliminated. Women must meet the same standards as men. In some cases this may necessitate some particular training programme for women so as to bring them up to standard in certain areas, e. g. upper body strength. The CAF has available to it the results of many tests of physical capacity and capability carried out by other armies and by civilian research, sufficient for this Tribunal to conclude that there is no risk based on physical capability to the inclusion of qualified women in presently all-male units and occupations. Pregnancy, a uniquely female and temporary condition, has been the subject of some study and considerable concern. The air force has now concluded that the only and fair policy is to remove the woman for the duration of the pregnancy from any occupation which might endanger her life or that of the fetus. From the evidence presented, we again have concluded that a consistent policy on pregnancy could be and was being developed by the Forces and that pregnancy was not an issue in the definition of risk to operational effectiveness but simply a matter of a temporary "disability" or medical condition for which leave was appropriate. The birth of a child to a servicewoman is not a cause for dismissal from the Forces.

b) Environmental Conditions Environmental conditions of service vary enormously from secure offices in Canada to tanks on manoeuvre in Germany, and destroyers on exercises in the Pacific area. It was asserted, particularly by land and sea commanders, that these environments were unsuitable for women in that privacy was at a minimum and toilet and sleeping facilities were both crude and unpleasant, perhaps dangerous, in combat situations. The SWINTER trials did not take place in combat zones, of course, but the evidence presented to the Tribunal indicated clearly that an unusual environment, that is the isolated Alert base, did not in and of itself detract from the performance of their duties by women posted at the base where all service personnel served without families. Modifications to existing physical structures (toilets and bunks) in ships were undertaken on the supply ship which was the subject of the trial and in general these arrangements were judged to be satisfactory. Certainly, in the civilian world the public, for

example, are used to unisex toilets on public transport carriers, and coeducational dormitories and bathroom facilities have not been proven to exert a deleterious influence on job performance. In summary, we have concluded that the environment factor in operational effectiveness of mixed units was less significant and less problematic than it had once been, largely because first, it could be "managed" by minimal structural arrangements in existing facilities, and second, unisex environments and facilities for mixed gender use are now common in civilian life.

We did conclude, however, that there was one exception to our finding that environment was not a factor in the assessment of risk. The submarine is a unique and special environment: an isolated, living and working space, a self-contained combat unit totally independent of the external world and, in essence, a complex machine in which humans live and work in the interstices of the machinery. For this reason, we support the contention of the CAF that privacy constitutes a significant factor in operational effectiveness and that the exclusion of women from occupations which serve in submarines exclusively is a bona fide occupational requirement. The particular or unique intimacy of the submarine as a working combat unit demands a higher threshold of risk avoidance and this in turn justified a higher or blanket exclusion of a class, i. e. women, from employment. In coming to this conclusion, we have considered the cases dealing with privacy namely, *McKale v. Lamont Auxiliary Hospital and Nursing Home District No. 23* (1986) 8 C. H. R. R. D/ 3659, and *Stanley v. Royal Canadian Mounted police*, (1987) 8 C. H. R. R. D/ 3799. However, the Tribunal distinguishes the present issue from those cases on the ground that the privacy element on a submarine affects all crew members at all times, whether working or not. It is not an issue related to an 8- hour work shift, for example, where a person of one gender has the job of supervising the intimate private behaviour of persons of the opposite sex. In a submarine, there is privacy of a sort, but in the usual sense of the word there is no privacy for anyone, whatever the gender or rank.

c) Social Relationships There are factors of a social kind operating in the performance of duties in the CAF. It is alleged by the CAF that gender adds a complicating element to the performance of individuals and of the group when women are added to an all- male unit.

A very large part of the evidence available on the general issue of inter- gender relations is either impressionistic and anecdotal and often based on participant observation, or is more "scientific", based on individual or group surveys using a "standard" regression analysis of the weight of various factors believed to be germane. However the evidence is gathered, the interpretation of its weight and significance can be and is often contestable. After considering the written evidence and oral testimony, we have concluded that the social factors in operational effectiveness and risk minimization were important but not sufficient to exclude a class of individuals from employment. The SWINTER trials and results of other similar trials in other countries, and the experience of the civilian workforce, indicate that education, work experience, leadership, all play a part in removing or modifying stereotypes held by one gender of another, and in this case, particularly held by males in the service about women. Fraternalization, harassment and favouritism were not unknown in many mixed gender units that participated in SWINTER trials, but the evidence also indicates that younger men hold more positive views about women as colleagues, followers and leaders than do other age groups, that individuals who work side by side gain a respect for each other and trust in each other's competence in handling a job, that harassment can be identified and punished and that spousal fears can be allayed. The

experience of the civilian workforce and indeed of post- SWINTER units that have remained mixed gender, suggest that social factors do not themselves compromise operational effectiveness, where the gender relationships are built on shared commitment to a set of work standards and performance levels, and on shared training.

d) Cohesion

One factor of special importance to the CAF is cohesion. According to witnesses, cohesion is more than individuals sticking together, more than a tendency to remain united. It is an essential ingredient of the drive to reach a goal, to perform well and to die for one another, if necessary. The salient point is, can women be trained to develop or express this cohesion? Do men and women in a unit cohere as well as members of a single sex? Is cohesion so essential that any risk, however small, of minimizing its content by including women will result in failure?

While cohesion is a necessary element in any unit of the armed forces, it appears to be of the utmost importance in combat units, as defined and judged by operational commanders. Together with professional training, good equipment, excellent leadership and competent physical training, cohesion ought to ensure that all employees and units operate at as high a level of performance as they are capable of. Conversely, the absence of cohesion was said to lead to greater risk and, therefore, less operational effectiveness. It is difficult to measure, in a scientific way, the presence or absence of cohesion and indeed it appears to reside in the eye of the beholder. Nevertheless, some components did emerge in testimony. Some are eminently practical: individuals must have combat proficiency in terms of professional knowledge and physical skills and presumably some sort of general aptitude. Some elements are learned on the job: knowledge of the mission, evaluation of the enemy. Other elements are less easy to define and are part and parcel of individual or group motivation: personal morale, group morale, stability, cooperation between individuals, the experience of individuals who interact over time as a team, sharing common living conditions and risk, with high levels of trust, loyalty and interdependence.

Other witnesses suggested that cohesion was not learned but developed out of common features, that is social, racial, linguistic or ethnic homogeneity, of members of the group. Others indicated that cohesion could best be developed in and by actual combat or by good leadership. Still others suggested that the presence of cohesion in the group could compensate for lack of individual qualities or qualifications.

Do differences of sex determine the presence or absence of cohesion to a greater or riskier degree than differences of culture or language or race? The evidence of the U. S. Army in integrating black and white soldiers in units suggested that with careful leadership and planning it could be successfully accomplished. Certainly integration was initially done with inadequate leadership and planning although white stereotypes of black men as physically tough was perhaps an element in their final acceptance. The Canadian Army undertook to advance and integrate francophones during the 1970's and this was accomplished successfully. But the question of sex differences was distinguished by the CAF's witnesses. Some suggested that women lacked the spirit of aggression because of social conditioning and that only time and considerable social change would have any effect on this attitude. Others believed that sexual relationships of a

demoralizing nature were bound to arise in small groups, taking the form of romantic or sexual attachments, favouritism by men of women, unhealthy fraternization, competition for the attention of men or women and so on.

It is worth noting here that cohesion appeared to be a less pressing problem for the air force than for the other commands. Individuals can adhere, very successfully, to planes and the gender of the individuals matters very little, if at all. But the navy is less equipment driven and human relationships do count as a factor in operational effectiveness, and the army is "people driven" and puts a high premium, for example, on the bonding or esprit de corps of the regiment whose members remain, work, live and die with the regiment over long periods of time and where the regimental history reconfirms the value of cohesion.

Having considered the evidence at length, we concluded that there was no, or not sufficient evidence of an indisputable kind, to suggest that a mixed gender unit could not develop that cohesion necessary to put in a better than adequate performance. There have been no studies of units during real combat and perhaps there never can be. Nevertheless, the SWINTER trials at Alert suggested that the first step to cohesion, social tolerance or acceptance, can be managed by good leadership and indeed would develop normally as unit members shared common occupational concerns, experience and training.

e) Motivation

Having summarized various factors or elements affecting risk, we are of the view that a variety of motivational elements can be made subject to a management process or will grow out of common service training and experience. No one suggested that women resist discipline any less or more than men, or that those who are determined to succeed have no will. In a volunteer CAF, women may, or may not, volunteer in greater numbers if future postings include combat service. The "intention to serve", however, may be strengthened in light of the evidence that more women at all ages are working throughout their lives and that some at least will regard service in the CAF as a career. Studies on "relative productivity" or absenteeism do not justify a finding that women are uniquely unproductive; women and men have rather similar patterns, although for different reasons. What is clear is that many women who serve now and in the future will suffer some constraints, as is true in civilian life, because of their need to remain with or close to children and families. The motivational factor is, therefore, not an element affecting risk.

f) The Historical Record

The historical record of women in combat is largely anecdotal. No one has ever run a trial of real combat. Nevertheless, the record of women in all- female or mixed gender units in both regular and partisan forces, during the Second World War, is reasonably clear. Women fought beside men in combat and combat support units, were armed, suffered loss of life and injury, inflicted death and injury on others. In short, women were indistinguishable from men in terms of performance. Large numbers of women, over one- half million, served in the Soviet armed forces during the war. Many served in Yugoslavia and women have participated in guerrilla wars since then or in wars of liberation, as in Israel in 1948. Without exception, all nations that had formally recruited women during the war (to replace lost man power and to preserve the integrity of the

homeland) demobilized women at the war's end. As has been recounted earlier in this judgment, the same was done in Canada.

The current comparative record of women in the forces of other states is, by contrast, reasonably well documented, but it is rather difficult to make meaningful comparisons because of significant variations of policy and practice. Three NATO nations (Belgium, Netherlands, Norway) have a policy of no restrictions and employ very small numbers of suitably trained and qualified women in a variety of combat and combat-related roles. In each of these countries conscription is for men only. Women volunteers are a much smaller percentage of the total personnel than in Canada. For example, only 1.48% of Netherlands armed forces members are women while the percentage is 9% in Canada. There are partial restrictions on the employment of women in combat roles in Denmark and France, although the former is now conducting limited navy tests. The number of women admitted to combat roles is very small and the percentage of total armed forces personnel is about 2.4% in each case. The list of nations with combat exclusion of women includes the United Kingdom (women are about 5% of the armed forces) and the United States, where the bar is both constitutional and a long standing policy. Women are about 10% of the U. S. forces and serve in a greater variety of occupations than in any other national force, and they are a significant employee group in many important combat support units. Israel, with 10% of its forces women, has a combat exclusion policy. Other countries with women in the armed forces have not only combat exclusion but also fewer than 1% of women in the total complement. It should be noted that continental European nations maintain their armed forces' strength through male-only conscription. In each nation, except Canada, the armed forces are separate in terms of environments and command. While the comparative and the historical records do not offer any exact models for exclusion or against it, it does not suggest that further movement towards fewer and fewer excluded occupations is out of the question.

g) The Segal Report

Finally we wish to address the matters raised in the report of David R. Segal, professor at an American university, an acknowledged expert in military sociology, who was commissioned by the Minister of National Defence to prepare a paper in 1986 on the impact of gender integration on the cohesion, morale and combat effectiveness of military units. Dr. Segal commented that there was no systematic experimental evaluation of, and little opportunity to study the impact of gender integration and that the definition of "combat" lacked precision so that in contemporary combat situations many so-called support units (many of them integrated or mixed gender) might be as involved in combat as so-called combat units which were male only. He commented at length on cohesion as a factor in the performance of females in mixed units, the unique characteristics of women, physical and psychological differences and concluded at page 26 of his Report: "The major basis for the categorical exclusion of women from combat units are cultural values regarding appropriate roles for women and resistance from male military personnel." He then listed "reasonable steps for the gender integration of military forces", including gender-free selection criteria and job assignment, communication of the integration policy to all personnel, commitment of leadership to integration, physical fitness programmes for women, careful monitoring of the integration process which must integrate women fully and monitoring of the public reaction to gender integration.

With respect to integration and performance, Dr. Segal had this to say at page 19:

"Despite the fact that in the short run, as a new phenomenon gender integration is frequently met with resistance which in turn may constrain cohesion, there is no indication that gender integration negatively affects the performance of military units."

Our decision on the merits of the general issue may be briefly summarized: on the evidence, there is no risk of failure of performance of combat duties by women sufficient to justify a general exclusionary policy. Such a policy cannot, therefore, constitute a bona fide occupational requirement under Section 14(a) of the Canadian Human Rights Act. The CAF policy and practice excluding women from combat duty is, therefore, discriminatory on the grounds of sex under the Act.

Our finding is based on a careful consideration of the evidence. It does not appear to us that a risk was shown to exist of sufficient weight to meet the criteria set down in the case law. The exclusion policy is not reasonably necessary to meet the goals of job performance, and the performance level which trained experienced women are capable of does not compromise safety as evidenced by the SWINTER trials. The continuing exclusion of women from combat duties is not consistent with the actual performance as measured by trials and with the inclusion of women in combat units after training and education.

We believe that women are, with training, capable of combat roles. The experience of women in combat in the Second World War bears this out. The decision of the air force bears this out. Performance was not an issue as a result of SWINTER trials. Cohesion and the physical and environmental elements are susceptible to management. Integration policies and practices can be designed and applied. We agree with the report of Dr. Segal that attitude is a major factor in making integration work. The CREW trials have a significant educational component to them, whatever other technical or physical features may be highlighted. Behaviour can to some extent be mandated, with sanctions and rewards as inducements but attitudinal change may not keep pace, and it is this element that must accompany the implementation of an integration policy. Leadership and commitment to integration are essential at the mid and upper levels of command because it is in the operational units that integration must take place.

In reaching our decision, we acknowledge the changes of policy implemented by the CAF during the past fifteen years. These changes were made in response to external developments, even pressures, such as the passage of legislation (Canadian Human Rights Act, and the Charter of Rights and Freedoms), and to internal personnel needs. These changes were not per saltum. There was no sudden transition, but there is evidence of some deliberate speed in implementation of the most recent policy to test women in combat units through the CREW trials. In recognition of these developments, we have concluded that on the evidence, a bona fide occupational requirement did exist in respect of combat roles for women prior to June 1986 and the publication of new employment policies set out in CFAO 49-14 and 49-15. This conclusion is reflected in the remedies ordered for the complainants in a succeeding section of the judgment.

Generally speaking, policy relating to women's employment in the CAF had its genesis in the recommendations of the Royal Commission on the Status of Women (1970) which were

accepted in part by the CAF, and which had the long term effect of bringing women to the foreground in terms of personnel policy rather than simply as components of a background to male service members. The Canadian Human Rights Act of 1978 further focused on women and the CAF reacted on a step by step basis by examining ways in which human rights issues could be accommodated in the Forces, women being a part, but an important part, of the communities seeking rights protection. This was followed by the design and execution of SWINTER trials, which focused almost exclusively on women and which ended just as a new juridical and legislative period of human rights began with the coming into force, in 1985, of Section 15 of the Charter of Rights and Freedom, a constitutional document specifically bringing attention to equality rights without regard to sex. The expansion of rights and freedoms was discussed and affirmed by a Parliamentary committee and the government of the day in two reports, the last in 1986.

We have concluded that during this period the occupational requirement excluding women from combat units and occupations was adequate to refute a charge of discrimination because it was based on evidence then available. The evidence then in place would not have justified a different finding. In other words, the occupational requirement was adequate because the data about discriminatory practices was inadequate. The CAF proceeded on assumptions, largely shared by civilian society, that there were good grounds for refusing to integrate women into units that were combat related. Women were thought to be physically deficient or psychologically unfit for combat roles. Public opinion generally did not support the entry of women into new or "male" trades and occupations. In the absence of reliable data, the Forces assumed that operational effectiveness would be impaired, or be made more risky, by the inclusion of women in other than the "traditional" female occupations in "safe" environments. Generally speaking, many institutions and organizations, among them the CAF held stereotypic views about women's capacities and capabilities and as a result adopted paternalistic policies to give women special but not equal treatment.

The Tribunal is of the opinion that this situation changed in 1986. In the mid 1980's as the results of SWINTER trials were made available, it became clear on the evidence that a bona fide occupational requirement restricting the employment of women could no longer be sustained. The trial results cast doubts on the proposition, essential to the bona fide argument, that cohesion, an essential element in operational effectiveness, could be or was found only among males and in all male groups. By 1986 the CAF recognized the inadequacy of earlier employment policies vis- a- vis women and in that year enunciated the new principles in documents CFAO 49- 14, 49- 15 and 49- 16 which specified the occupations closed to women in the regular and reserve forces. A number of positions had been opened previously in an ad hoc fashion but 1986 is a signal or dividing point in the history of the Forces as employer.

The employer must balance individual rights, guaranteed by statute and constitution, against a duty to maintain itself in a state of operational readiness for the defence of the nation. Thus, paradoxically, while the new policy modified and lessened discrimination in employment, it raised, by inference, more questions about the adequacy of the bona fide occupational requirement for the occupations still closed. The justification of the requirement now needed more and stronger evidence to support it. The balance between individual rights and collective

security had swung more to the rights side. Only strong evidence could move it to the security side again.

We find that after 1986, and the publication of the policy documents, the occupational requirement faded as a defence to discrimination in employment. The risk to operational effectiveness was not shown, in evidence, to be so great as to overbalance the claims by women to non-discriminatory treatment. Indeed, some of the evidence suggest that the CAF understood that change was inevitable even in combat units. The 1987 statement by the Minister of National Defence deferred to professional judgment about operational readiness but at the same time it strongly endorsed equality rights. The Segal Report commissioned by the Minister, the studies for new physical testing and occupational selection standards, the removal of all restrictions against women in the air force, the commitment to CREW trials focused on women in actual combat units and environments, are all evidence that on the face of it, a number of individuals in the Forces and outside observers believed that the preference for men could no longer be salient feature of employment. No doubt, there are those who honestly believe that the full integration of women into the military is an idea whose time has come and those who equally honestly believe that the risks of integration have not yet been disproven.

Our conclusion is that the occupational requirement no longer has adequate evidence to sustain it. We must, therefore, find that the present policy of the CAF in designating certain specific occupations and units as male-only is a discriminatory practice.

The Tribunal makes the following Order:

1. The CAF CREW trials are to continue but are not to be regarded as trials, but as the lead-up or preparation for full integration, that is, the CREW exercise will be the first stage of implementation of a new policy of full integration of women into all units and occupations now closed to them.
2. Full integration is to take place with all due speed, as a matter of principle and as a matter of practice, for both active and reserve forces.
3. The implementation of the principle requires the removal of all restrictions from both operational and personnel considerations; the minimum male requirement should be phased out; new occupational personnel selection standards should be imposed immediately.
4. There must be internal and external monitoring of the policy with appropriate modifications being made immediately.
5. The CAF and the Canadian Human Rights Commission are to devise a mutually acceptable implementation plan so that the integration of women proceeds steadily, regularly and consistently towards the goal of complete integration of women within the next ten years.

In making this order, we are mindful of the evidence brought before us. Women have proved in the SWINTER trials, and in their performance in recently opened occupations, that they can serve or have the potential to serve in any occupation or unit in the Forces. There is no good

reason to subject women to another round of trials. It may do no nothing to reduce the fishbowl effect, and may provide an excuse for a Fabian policy of delay on the part of servicemen and their leaders. The integration of women into the civilian work force gives good evidence of the commitment women make to jobs and to careers. The Forces need, in a volunteer army, the resources women can and do bring, and in employing them fully the CAF will meet a desirable goal of providing for individual liberties, choices and options for all who qualify as service members. Integration is a focus on the equality of men and women in employment opportunity rather than on the differences. Emphasis on equality provides for a more integrationist result than the latter and can strengthen the cohesion which is so highly valued by the Forces. Operational effectiveness is a gender neutral concept. Both sexes can aspire to undergo the training required to be operationally effective and then competence in the job will provide the best basis for building the cohesion necessary.

Full integration reduces the need to sustain an unreal and spurious distinction between combat arms and combat support. At the moment combat exposure is the goal or summum bonum to which all operational effectiveness must meet. But contemporary warfare will demand as much operational effectiveness from so called support groups as it does from combat units. In effect, every service member will be on the front line, in any future conflict.

There are, the Tribunal recognizes, a number of as yet unresolved issues which affect women perhaps more than men, but these can be dealt with in the same way civilian employers have. If the Forces do not resolve these issues, then it will remain out of step with societal changes and will fail to attract women to a career in the CAF, whatever the occupations. The long term societal trend is clear: women will continue to enter the paid workforce, by choice or by necessity, and more will make the commitment to long term careers. The CAF must be in a position to take advantage of that trend. And it is clear that young men will also continue to enrol in the Forces and they are likely to be not only more at ease with women as colleagues, but also more supportive of them in new roles, than are many of the middle- aged members. These inter-generational attitudinal differences may not lend themselves to easy resolution now but they will probably resolve themselves in time in any case.

The Tribunal believes, on balance, that one can balance risk as well as rights without unduly comprising either. The risk to individual rights is high when women are excluded from any occupations, and the risk to national security is, by comparison, low. But one can bring these risks into better balance, and the integration of women is a step in that direction without unduly compromising national defence.

The Tribunal wishes to reiterate the following single exception to its order for full integration of women, and the ending of all restrictions: women will not serve on submarines or in occupations exclusively served in submarines. The bona fide occupational requirement that acts as a defence to this policy of discrimination is privacy. In the limited environment of a submarine, privacy can be a major consideration for mixed gender crews, and the Tribunal accepts the evidence presented in defence of this restriction. It is, incidentally, a restriction found in virtually all European countries which otherwise permit women in combat roles. If and when the CAF operates types of submarines where privacy issues are not as prominent as in today's submarines, the restriction can be examined again.

11. DECISION OF THE TRIBUNAL ON THE COMPLAINTS

a) Isabelle Gauthier

Isabelle Gauthier was refused employment in October 1981 as an administrative clerk in the Régiment du Hull, an armoured unit of the Reserves, because the Regiment had already met its quota of 10% women of the total complement. The role of the Regiment was to augment the armoured unit of the regular force in Europe in time of emergencies or war. As has been recounted elsewhere, limitations on employment flow not only from the occupation itself, but also from the role or function of the unit in which the holder of the occupation serves. As a result of policy decisions, some occupations are therefore closed, and others have minimum male requirements, because the occupations are direct combat or combat support. The occupation, administrative clerk, is found in all types of units in the Forces, in armed and other combat support arms units on ships and so on. Clerks receive arms training, as appropriate to the environment in which they serve. In 1981, at the time of complaint, all combat and combat support units of the regular and reserve forces were closed to women, as well as combat service support units in the regular force. The reserve units could carry, incremental to their establishment, the garrison troop, providing static support to the combat arms unit. Such a troop was not operationally deployed and women could therefore be members of it. The quota of women in the entire complement, which was set at 10% at the time of the complaint, was succeeded the next year by the annotation of positions, a more precise way of analyzing and defining the positions open to women. This annotation of specific occupations is currently given in CFAO 49-16 (1986). Generally speaking, the policy of the reserves follows that of the regular forces save that in respect of the militia, combat arms units (eg. an armoured regiment) can have a garrison troop of mixed gender. The armoured units are still closed to women and the occupation, administrative clerk, in the reserves has a minimum male component.

At the time Isabelle Gauthier's complaint was filed, employment in the reserves was governed by the National Defence Headquarters Policy Directive of January 7, 1978. The directive stated that female personnel would be assigned only to combat service support or service support unit establishment, but might be carried incrementally on combat establishments for peacetime only. At the time of the complaint, the 10% quota for women for the garrison in the reserve was filled. In 1982, a new policy directive for the reserves was promulgated which opened up all occupations in the militia to women with the exception of direct combat arms occupations, but with a ceiling on the number of female members above authorized current level. When the proportion of women in the Régiment du Hull fell below the authorized level, and after Gauthier had remained on a waiting list until February 1984, she was recalled to employment in the Regiment. The present policy enunciated in CFAO 49-16 does permit militia to carry extra women because of the need for static support functions.

Isabelle Gauthier asks for the following remedy: first, an order from the Tribunal that the present policy is discriminatory, because some occupations in the reserve force units are restricted to males, and women are excluded from specified occupations; second, the sum of \$1,500.00 for suffering and loss of dignity in being refused employment because of a discriminatory policy; and third, lost wages, by virtue of the fact that she was unable to join the Regiment du Hull for a period of a year and a half.

The amount of lost wages was a matter of contention. Counsel for both parties agreed that the claim must be modified in light of the policy of mitigation and accordingly, other income earned by her during the period she was unable to join the Regiment was taken into account. The data regarding her attendance at training sessions provided acceptable evidence of the amount she would have earned taking into account the average rate of non-attendance; individuals are paid only for actual attendance. Counsel for the CAF also argued that compensation should be reduced because of the long passage of time between the filing of the complaint and the establishing of a Tribunal to hear the case, (that is, a period of six years).

We have earlier rendered our decision on the general issue of employment discrimination. Applying the decision to this complaint, we find that a policy of employment which was discriminatory on the grounds of sex existed at the time the complaint was filed. The CAF states that this policy was justified because a bona fide occupational requirement existed, i. e. that militia or reserve groups are attached to combat units and are integrated into them during times of emergency and war. The Tribunal finds this occupational requirement to have been made out as a defence to a finding of discrimination. However, the Tribunal does not think that a case has been made for a policy of establishing a quota or percentage of the total complement for women in the garrison troop which is not operationally deployed and which provides static support to the combat arms regiment. There can be no bona fide occupational requirement as a defence in this instance. Some months after the complaint, the reserve force positions were annotated as being for females or for males, based on considerations of, inter alia, susceptibility to combat or operational duty. This Tribunal finds this policy more equitable than the blanket percentage quota. Therefore the Tribunal finds that a policy of employment discrimination existed in this case from the time the complaint was filed until November 1982 when the employment occupations were annotated. Further, the Tribunal finds that the discriminatory policy continued in effect until the complainant was recalled to the regiment in February 1984.

Therefore, the Tribunal orders:

1. that the CAF pay to the complainant the sum of \$1,000 for suffering and loss of dignity in being refused employment;
2. that the CAF pay to the complainant the amount of \$5,481 for wages actually lost during the period October 1981 and February 1984.

b) Joseph Houlden

Joseph Houlden is a retired air force pilot who filed a complaint in November 1982 alleging that the CAF was guilty of reverse discrimination under Section 10 of the Act, because only male pilots had unlimited liability to fly fighter aircraft in fighter roles and fulfil combat duties, whereas female pilots were not permitted to perform these duties. In a letter dated October 15, 1986, addressed to counsel for the CAF, Mr. Houlden offered a clarification of his complaint. He sought, as a remedy, an order that female fighter pilots be allowed to fly fighter aircraft in fighter roles; that the Forces adopt an affirmative action programme regarding women's participation in fighter roles; that the Forces set up an internal personnel organization to monitor the affirmative

action programme, and that the Forces report annually to Parliament on the progress of the affirmative action programme.

A Human Rights Tribunal has competence to make such an order for the adoption and implementation of special programs and plans under Section 41 of the Canadian Human Rights Act. Section 15 provides that special programmes are not discriminatory if designed to prevent or eliminate disadvantages suffered by any group of individuals, because of their sex.

Mr. Houlden appeared for himself before the Tribunal, and cross-examined Major General Morton, the air force witness for the CAF. Between the filing of the complaint in 1982 and the Tribunal hearing of his argument (10 August 1988) the air force, in mid 1987, removed all restrictions affecting women in all its occupations and units. Mr. Houlden, while supportive of this decision, argued that past policy regarding air force women, including operational restrictions, SWINTER trials, and testing for physiological and physical differences, indicated an extreme caution on the part of the air force to accept change, a caution which did not bode well for the future complete integration of women into the force. He contended that without an affirmative action order, the air force would slip back into discriminatory habits or practices, even though the employment policy had clearly changed in 1987.

At the close of his argument, Mr. Houlden asked for the following remedy: An Order that the air force undertake an affirmative action programme, with a focus on the selection of women for all positions and units within the force, the goal being female participation up to a minimum of one-half of all positions, at all ranks, within fifteen years.

The Tribunal, in order to mandate the development of such a programme, must find discrimination and an inadequate bona fide occupational requirement defence. As is true of the other complaints, the Tribunal holds that the bona fide occupational requirement restricting women's employment failed to be an adequate defence to a complaint of discrimination after June 1986 when a new employment policy was enunciated by the CAF. By that date, the air force had opened, in the previous six years, air crew positions to women: pilots, navigators flight engineers, in all units except combat; and all restrictions on combat were removed in 1987.

Although the Tribunal has found on the general issue that there was a discriminatory policy against women after June 1986, which is not saved by the bona fide occupational requirement advanced by the respondent, the Tribunal will make no order for an affirmative action programme, as requested by Mr. Houlden. The Tribunal believes that the commitment of the air force operational commander, as given in testimony, to the complete integration of women in the air force is an adequate and satisfactory guarantee that the force will not slip back into discriminatory practices as suggested by Mr. Houlden. The decision by the air force to remove all restrictions on women was based on careful planning, research and evaluation. The Tribunal has no reason to doubt the good faith and leadership of the force.

Given its decision, the Tribunal does not need to address the matter of the quota for female participation, as requested by Mr. Houlden. To impose a quota would entail a detailed order of the Tribunal, and the creation of a monitoring organization. This is not desirable for two reasons. First, the Canadian Armed forces is a volunteer force, both in the regular and reserve forces, and

no one can mandate the rate at which women will volunteer to enrol in the air force. In this instance, one cannot order a mandatory quota programme where membership in the organization is entirely voluntary. Second, the evidence shows that the forces are planning to adopt gender free physical selection standards which will apply, inter alia, to individuals in combat roles in the air force. Whether women will meet these standards in sufficient number to constitute half of the combat air crew in the future, cannot be mandated by fiat, but will depend on the qualities and qualifications of the individuals who enrol and apply.

c) Marie Claude Gauthier

Marie Claude Gauthier in early 1983 saw a Department of National Defence poster inviting interested persons to apply for a fully subsidized three- year course, under the Marine Engineering Technical Training Plan (METTP), sponsored by the CAF and taught at the Rimouski Community College. Successful applicants had to meet the enrolment qualifications of the regular forces and to have completed various levels of post secondary education. When she made further enquiries about enrolment, Mme Gauthier was informed by the Forces recruiting officer that the METTP course, which ran from June 1983 to October 1986, was open only to men. The course required students to serve at sea for two months and to accept a posting to a ship on graduation.

The METTP is not open to women because they would have nowhere to serve on graduation. The marine engineering technician occupation has been and still is closed to women because it is "a hard sea trade", that is, tradesmen who serve on board ship, for long periods of time. Only since October 1986 have supply ships been open to women in the regular force. On those ships the complement of marine engineers is large: 46 as compared to 15 on submarines and from 35 to 73 on destroyers. While women may now serve on supply ships, the hard sea trade of marine engineering remains closed to women because there are only three supply ships in the navy, and there would be, according to testimony, no opportunity for career development of men and women, if one sex was limited to jobs on one type of ship only.

The complainant argues that she has suffered denial of access to a service, on a prohibited ground of discrimination, sex, contrary to Section 5(a) of the Canadian Human Rights Act. Section 14(g) provides that such denial may be protected if there is bona fide justification for the denial or differentiation. The respondent alleges that the complaint comes under Section 7 of the Act dealing with employment, because recruiting information specified that individuals had to enrol in the armed forces before they could begin the course. A Section 7 complaint is linked to the bona fide occupational requirement defence under Section 14(a). Counsel for both parties agreed that there was little difference in the standard of evidence required for Sections 14(g) and 14(a). The Tribunal agrees with the CAF that the complaint is covered more appropriately by Section 7 of the Act. The completion of training was intimately linked to future deployment and employment in the Forces. Testimony indicated clearly that the Forces chose to offer the course through the community college so that more recruits might be induced to enter the programme and be available for employment as marine engineers on graduation. The training included sea-going experience in naval ships and was clearly part of a recruitment policy of the regular forces.

For reasons given earlier, the Tribunal decision on the general issue of occupations and units closed to women is that the bona fide occupational requirement defence cannot stand after June 1986, when a new employment policy was set by the armed forces.

Applying this decision to the specific complaint, the Tribunal orders:

1. that the Marine Engineering Technical Training Plan, and the instruction and courses offered as part of it, be open to women applicants who meet the required educational level and have enrolled in the CAF;
2. that the CAF invite Marie Claude Gauthier to apply for a place in the course offered under the Plan.

d) Georgina Brown

Georgina Brown, a licensed commercial pilot, inquired at a Forces recruiting centre in February 1985 about the position of pilot in the regular forces. She was told that applications were not being accepted from women, but that the policy was under review. She was asked to put her name on a waiting list, which she did, so that the recruiting office might contact her if and when the policy of exclusion was changed. She applied for the position of air navigator in March 1985 but was told that applications were not accepted from women. Ms. Brown filed two complaints in September 1985, one in respect of her personal position, the other relating to the general policy of excluding women from certain air-related occupations. Both were joined to the other complaints for the purpose of this hearing. Counsel for the parties could not agree on a statement of facts regarding the complaint and Ms. Brown was called as a witness for the complainant and heard by the Tribunal in January 1987.

Georgina Brown, according to her testimony, was unemployed from October 1984 to June 1985 and wished to continue her flying career. She was, therefore, determined to enrol in the air force. This she was unable to do because of the then policy and she then took non-flying employment with a pharmaceutical company. In late 1986 the CAF recruiting office to which she had originally applied sent her several registered letters informing her that the air force had lifted restrictions on women for the pilot and air navigator occupations, for service in transport, search and rescue and training environments. Early in 1987 Ms. Brown visited the recruiting office, and was given specific details regarding the documents necessary for her application. She did not in fact apply for either position. Additional information made available by counsel later revealed that Ms. Brown's eyesight was not good enough for admission to training as a pilot. After applying for a position in the air force it can take up to a year to be actually enrolled, and many individuals are qualified as air crew but very few are accepted to fly fighter planes. This latter testimony went to the issue of whether Ms. Brown was genuinely prepared to give up her well established job to apply for the pilot or air navigator position and whether there was a claim for lost wages, i. e. wages foregone because she was denied employment.

As already stated, the bona fide occupational requirement defence failed to save the discriminatory policies after June 1986. This complaint relates to events and policies in the previous year, when the occupational requirement was adequate, in the view of the Tribunal. The

Tribunal, therefore, finds that the complaint is unfounded and in consequence we will make no order for the payment of lost wages. Counsel for the complainant asked for payment to cover pain and suffering. The Tribunal has considered the evidence carefully and concludes that there is no valid reason for such an award. The CAF informed the complainant as soon as possible that employment restrictions had been removed, but there is no evidence to suggest that she would have, or did give up, her non-flying position to undertake the training that was open to her (provided of course she was qualified for it). Her actions suggest that she was not seriously discomfited for very long after the initial refusal of the air force to accept her application.

Dated this 14th day of February 1989.

Sidney N. Lederman (Chairman)

Jane Banfield Haynes (Member)

Nicolas Cliche (Member)