

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

HUMAN RIGHTS REVIEW TRIBUNAL

BETWEEN:

PAUL LAGACÉ

Appellant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF THE REVIEW TRIBUNAL

TRIBUNAL: STANLEY SADINSKY Q.C, Chairperson
LINDA-MARIE DIONNE, Member
MIROSLAV FOLTA, Member

APPEARANCES: Paul Lagacé, in person
Eddie Taylor, Counsel for the Canadian
Human Rights Commission
Donald J. Rennie and Capt. Sylvain Lavoie,
Counsel for the Respondent

DATES AND LOCATION

OF HEARING: July 22 and 23, 1996, Kamloops, British Columbia

This is an appeal by Paul Lagacé to a Review Tribunal pursuant to Section 55 of the Canadian Human Rights Act (the 'Act') from the Decision of A.G. Lynch-Staunton (the "Chairman") rendered on April 3, 1993, as # T.D. 5/93. The Chairman dismissed the complaint of Mr. Lagacé against the Canadian Armed Forces ("CAF") that he had been discriminated against on the basis of marital status and family status.

On the appeal before us, Mr. Lagacé appeared in person and Mr. E. Taylor appeared on behalf of the Canadian Human Rights Commission ('CHRC'). Mr. Taylor limited his appearance in support of Mr. Lagacé to arguing points of law on the issues of bias and as to the standard and scope of review that applies on an appeal to a Review Tribunal. Mr. D.J. Rennie and Captain S. Lavoie appeared on behalf of the CAF.

At the outset of the hearing, Mr. Lagacé applied to admit additional evidence on the appeal pursuant to Section 56(4) of the Act. This evidence took the form of two affidavits, one from Captain (Ret'd) Jene Kleinschroth dated October 3, 1995, and the other from Master Warrant Officer (Ret'd) Peter Hooker dated September 5, 1995. After hearing submissions, we ruled that the evidence should be received on the grounds that it was "... essential in the interests of justice to do so". We took into account the fact that Mr. Lagacé was not separately represented by counsel at the prior hearing and that it is desirable to decide matters of this kind on all of the relevant evidence available. In our view, a Review Tribunal is clothed with a broad discretion in this respect and we exercised our discretion in this instance in favour of Mr. Lagacé. (see *A.G. of Canada v. Lambie et al.* F.C. # T-1028-94, December 2, 1994, per Rothstein J.)

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Mr. Lagacé argued his appeal on two basic grounds: i) that the Chairman was biased against him; and ii) that the Chairman erred in accepting the evidence of Major R. Dunsdon in preference to the evidence of Mr. Lagacé. He submitted that the evidence of Major Dunsdon was fraught with inconsistencies, lacked credibility and lacked corroboration particularly in that it was not supported by witnesses who could have been called by the CAF and by documents that were filed before the Human Rights Tribunal.

Mr. Lagacé asked us to overturn the Decision of the Chairman and grant him the remedy of reinstatement in the CAF with retroactive pay, incentives and allowances or alternatively, grant him a monetary award in lieu thereof.

The facts of this case were set out in detail in the Decision of the Chairman. The fundamental issue was whether Mr. Lagacé, who was at the time a Master Corporal in the CAF, was discriminated against on the basis of his marital and family status when he applied for the Officer Candidate Training Plan (OCTP) in November, 1987, and his application was not supported by Major Dunsdon nor forwarded to higher authorities for consideration.

We will first consider the issue of bias and then the substantive evidentiary and legal issues on this appeal.

BIAS

Mr. Lagacé submitted that a reading of the transcript of the proceedings and the Decision of the Chairman disclose bias on the Chairman's part toward him. He directed our attention to

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several places in the Decision where he alleges that the Chairman used language which denigrated Mr. Lagacé and the arguments that he was submitting. (see Decision, pp. 17, 19, 58 and 60) He also directed us to one particular exchange during the course of the hearing where he alleges that the Chairman directed him in an authoritarian manner to answer a question. (see Transcript, pp. 235) Mr. Lagacé, also argued that the Chairman's decision to accept the evidence of Major Dunsdon and reject his evidence constituted and demonstrated bias on the Chairman's part.

Mr. Lagacé, also informed us (as opposed to calling evidence) that during the breaks in the earlier proceedings which were held at the University of Victoria, the Chairman was seen conversing with witnesses for the CAF although apparently on one occasion, the Chairman indicated openly that he was not discussing the case. Mr. Lagacé also informed us that the Chairman had a military background. He submitted that these matters together with what appears in the transcript and Decision constitute bias which should render the earlier proceedings void.

Legal bias is of two types: actual bias; and, a reasonable apprehension of bias. In this case, all parties submitted that we were dealing with a possible case of bias of the second kind.

The test that applies in considering whether there is a reasonable apprehension of bias was clearly enunciated by de Grandpre J. in his dissenting judgment in *The Committee, for Justice and Liberty et al v. The National Energy Board et al*, [1978] 1 S.C.R. 369 at p. 394.

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation

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above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."

This test was stated in similar language in the majority judgment of The Chief Justice at p. 391. (see also *Newfoundland Telephone Company Limited v. Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623; *Energy Probe v. Atomic Energy Control Board et al*, [1985] 1 F.C. 563 (C.A.); and *CBC v. Canadian Human Rights. Commission*, [1993], 71 F.T.R. 214.)

The public policy consideration which is at play is that justice must not only be done but must manifestly and undoubtedly be seen to be done. (see *Canadian Cable Television Association v. American College Sports Collective of Canada Inc.* [1991], 129 N.R. 296 at 313-317 (F.C.A.)) It is also clear from this decision that a reasonable apprehension of bias may include non pecuniary or actual bias when emotional type interests such as partisanship or particular professional relationships may exist. (see p. 316)

We have read the entire transcript of the earlier proceeding and the

Decision of the Chairman and, in our view, they do not disclose bias. The Decision contains a careful review of the evidence and submissions of both Mr. Lagacé and the CAF in a detailed and comprehensive

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manner. The Chairman's choice of language is not unusual in administrative or judicial proceedings particularly when used to describe the evidence or the positions taken by the parties. Nor is it unusual for a trier of fact to ask a witness to answer a question. This is part of the dynamics of a hearing.

In addition, the information submitted regarding the "out of court" conversations and the background of the Chairman do not constitute actual or a reasonable apprehension of bias in themselves nor when considered together with the contents of the transcript and the Decision. Nor does the acceptance of one party's evidence over that of another constitute bias. Rather, such matters go to questions of credibility and the weight of the evidence and as to whether there is sufficient evidence to support particular findings. Indeed, it is often the task in such proceedings to decide which of two parties' conflicting evidence is to be accepted over the other.

In order to establish bias, clear evidence of circumstances that would cause a reasonably informed person to conclude that a decision lacked impartiality is required. While a Review Tribunal is entitled to consider information pursuant to Sections 50(2), 50(3) and 56(2) of the Act, an allegation of bias should be established in a clear and cogent manner having regard to the serious nature of the allegation. In this case, the level of proof offered falls far short of that requirement.

Accordingly, we reject the appeal on the grounds of bias.

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THE EVIDENCE

a) The Scope and Standard of Review

Prior to considering Mr. Lagacé's grounds of appeal based on the evidence, it is appropriate to deal with the jurisdiction of a Review Tribunal and the test to be applied when considering the scope and standard of review of a decision of a Human Rights Tribunal.

The statutory powers of a Review Tribunal on appeal are contained in Sections 55 and 56 of the Act. Its jurisdiction is set out in Section 56(4) which makes it clear that the appeal is based on "the record of the Tribunal whose decision or order is appealed and on the submissions of interested parties." This direction has been the subject of a number of reported cases which have held that where no additional evidence in addition to that before the Human Rights Tribunal is received, the Review Tribunal must accord respect to the conclusions of fact reached by the Human Rights Tribunal. This results from its unique opportunity to assess credibility based on actually having seen and heard the witnesses.

However, it remains the duty of the Review Tribunal to examine the

evidence and substitute its view of the facts if persuaded that there was a palpable or overriding error below. (see *Stein et al. v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Brennan v. The Queen*, [1984] 2 F.C. 799 (C.A.); *Cashin v. CBC*, [1988] 3 F.C. 494 (C.A.); *Lee v. CHRC*, Review Tribunal T.D. 3/95, February 9, 1995.)

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When additional evidence is received, the hearing is to be treated as *de novo* and the additional evidence is to be considered along with the evidence that was heard before the Human Rights Tribunal and the Review Tribunal should examine all the evidence and substitute its view of the facts should it see fit to do so. (see *Cashin v. CBC*, *supra*, p. 501)

However, it must be noted that the hearing before the Human Rights Tribunal in this case occupied some 4 days of hearing, 8 witnesses and 524 pages of transcript of evidence while the additional evidence that we considered comprised 2 affidavits with a total of 12 pages. In such circumstances, some degree of deference must still be given to the earlier Decision particularly on issues of credibility. This should be limited, however, to areas not dealt with in the additional evidence received by us which must be considered afresh along with any prior related evidence.

b) An Overview of The Evidence Relating to the Alleged Act of Discrimination and the Additional Evidence

Mr. Lagacé alleges that when he applied for the Officer Candidate Training Plan (OCTP) in November, 1987, he was given a negative recommendation by Major Dunsdon and his application was not forwarded on for consideration because Major Dunsdon discriminated against him on the grounds that he was living in a common-law relationship. Much evidence on this issue which was adduced before the Human Rights Tribunal was designed to show that a pattern of discrimination existed, culminating in the negative assessment of the application.

Most notably, Mr. Lagacé had made a previous complaint of discrimination on the grounds

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of marital status against the CAF in July, 1984, when he had been denied permanent married quarters. Mr. Lagacé alleges that because he took his complaint outside of the military to the Human Rights Commission and to the press, he became labelled as a "trouble maker" and his career was adversely affected from at least that time forward. When Mr. Lagacé applied for OCTP in November, 1987, this prior complaint had not as yet been dealt with by a Human Rights Tribunal nor by the Courts. Mr. Lagacé alleged that this same discrimination existed in November, 1987, and was the reason for the negative recommendation on his application to become an officer. Mr. Lagacé also submitted that Major Dunsdon contravened Paragraph 11 of CFAO 9-26 in failing to process Mr. Lagacé's application even though it contained a negative recommendation.

As part of an alleged history of discrimination, Mr. Lagacé referred in

his evidence to an incident where he was initially denied a trailer pad when he was about to transfer to Kamloops from North Bay. He also referred to the fact that he was not greeted at Kamloops by Major Dunsdon, the commanding officer, nor did Major Dunsdon sign his farewell Certificate when he left Kamloops.

On the other hand, Major Dunsdon gave evidence before the Human Rights Tribunal that the negative recommendation was not prompted by discrimination on the basis of the common-law relationship but by his conclusion that Mr. Lagacé lacked sufficient officer-like qualities to warrant a positive recommendation at that time. Major Dunsdon indicated that he was sympathetic to Mr. Lagacé's earlier complaint and he noted that a substantial number of officers on the base were living in a "common-law" relationship.

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In his evidence, Major Dunsdon referred to Mr. Lagacé's overall attitude as being confrontational as evidenced by the manner in which Mr. Lagacé had applied for dental coverage when he allegedly pressured a junior non-commissioned officer to accept his application, by the fact that Mr. Lagacé had seen fit to take his earlier grievance to the press and further that this conclusion was supported by a subsequent act of disobeying a direct order regarding an attendance at a mess dinner. Most significantly, Major Dunsdon thought that Mr. Lagacé's application for OCTP was premature as he ought to have an additional Personal Evaluation Report (PER) as a Master Corporal before being considered further for officer training.

Major Dunsdon also gave evidence which explained his involvement in the trailer pad incident and that he had reversed a decision that denied Mr. Lagacé that accommodation. He also testified that he did not deliberately decide not to greet Mr. Lagacé at Kamloops nor to sign his farewell Certificate. Major Dunsdon further testified that Mr. Lagacé's application for OCTP was not processed or forwarded on due to an administrative error.

The additional evidence that we considered was directed to the issue as to whether Major Dunsdon was aware of Mr. Lagacé's history as a 'trouble-maker' when Mr. Lagacé was transferred to Kamloops. If so, it was argued that this would tend to rebut the evidence of Major Dunsdon regarding his involvement with the "trailer pad" incident and his failure to greet Mr. Lagacé on his arrival at Kamloops or sign a farewell Certificate.

In his Affidavit (Exhibit A-1), Captain Kleinschroth deposes that he was an officer at North Bay when Mr. Lagacé was transferred to his unit in 1989. He states that one officer,

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Lieutenant Colonel Reid advised him of Mr. Lagacé's transfer about a month prior to his arrival and he was labelled a 'trouble maker' by senior officers on the base because of his involvement with a human rights issue. He goes on to describe Mr. Lagacé's fine qualities and his educational level of achievement. Captain Kleinschroth then describes how a subsequent application by Mr. Lagacé in the spring of 1990 for commissioning was not approved by the then commanding officer Colonel Waldron. Furthermore, efforts by Mr. Lagacé

to prove himself by becoming editor of the base newspaper were apparently being frustrated by one Captain Roy. When Mr. Lagacé's application was finally considered and rejected, Captain Kleinschroth attributed this to a deliberate plan to reject Mr. Lagacé. Captain Kleinschroth was not called as a witness before the Human Rights Tribunal.

In Master Warrant Officer Peter Hooker's Affidavit (Exhibit A-2), he deposes that he was a Deputy Commander of Detachment Holberg in 1991 when Mr. Lagacé was transferred there from North Bay. He states that about one month prior to Mr. Lagacé's arrival, he was advised that a "trouble maker" was transferring in. This related to Mr. Lagacé's human rights complaint. He states that Mr. Lagacé had a high level of achievement at Comox and that he would have become an officer had it not been for his label as a "trouble maker". MWO Hooker was also not called as a witness before the Human Rights Tribunal.

These Affidavits were submitted for the purposes of contradicting Major Dunsdon's evidence that he did not know of Mr. Lagacé prior to his transfer to Kamloops in 1986 and to establish that Major Dunsdon was part of a conspiracy to insure that Mr. Lagacé would never become an officer. The evidence of his treatment in late 1990 regarding his subsequent

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application for commissioning was designed to show a pattern of conduct on the part of the military which Mr. Lagacé submits was in place in late 1987 and in January, 1988, when Major Dunsdon did not recommend him for OCTP.

c) The Evidence of Major Dunsdon

Mr. Lagacé submitted that the Chairman erred in accepting the evidence of Major Dunsdon when it contained numerous inconsistencies. He also argued that the Chairman erred in accepting the credibility of Major Dunsdon's evidence and in preferring it to his own evidence when Major Dunsdon's evidence lacked corroboration and particularly when it was not supported by documentary evidence.

As to the inconsistencies in Major Dunsdon's evidence, Mr. Lagacé drew our attention to several places in the transcript where he alleges that Major Dunsdon gave contradictory testimony. (see particularly Transcript, pp. 326 and 328, 363; 348 and 356, 357, 359; 314 and 324, 325) He argued that we should reject Major Dunsdon's evidence on this ground and accept his evidence instead.

We have read the evidence of Major Dunsdon as a whole and have considered it together with the additional evidence that we received on this appeal. We have concluded that there is no basis for rejecting this evidence on the grounds of inconsistency. The Chairman had the opportunity to see and hear Major Dunsdon first hand and he accepted his evidence over that of Mr. Lagacé. On our reading of the transcript and on considering the additional evidence, we find

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no basis for rejecting Major Dunsdon's evidence and we accept it. The conclusions that the Chairman reached based on the testimony of Major Dunsdon are supported by the evidence and we accept and adopt those conclusions.

It is the duty of a trier of fact to weigh the evidence submitted by the parties and where there are contradictions in the evidence, to determine which evidence in whole or in part he or she will accept and which will be rejected. It is also the duty of the trier of fact to draw inferences from the evidence. We accept the conclusions reached by the Chairman that in giving Mr. Lagacé's application of November, 1987, a negative recommendation, Major Dunsdon was not discriminating against him because he was living in a common-law relationship. Rather, the negative assessment was based on Major Dunsdon's assessment of Mr. Lagacé's current officer-like qualities. There may well have been a breach of CFAO 9-26 because the application was not processed. However, that is a matter for the military authorities. In our view, that failure does not constitute an act of discrimination.

As to Mr. Lagacé's submissions that the evidence of Major Dunsdon lacked credibility as it lacked corroboration particularly when not supported by the documentary evidence, we repeat that it is for the trier of fact to determine what weight should be ascribed to the evidence adduced. This task has two components. Firstly, a trier of fact must determine whether a witness is credible. Secondly, a trier of fact must determine if the evidence is of sufficient weight or probative value so that it can be accepted or, alternatively, that it requires support from some other source such as the testimony of another witness or confirmation in some written document.

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Mr. Lagacé alleges that the Chairman erred in weighing the evidence of Major Dunsdon and that he should have rejected it in whole or in part due to lack of corroboration. Again, we considered Major Dunsdon's evidence as a whole and we find no reason to reject it on this ground. Mr. Lagacé had a full opportunity to call whatever evidence and introduce whatever documents he wished before the Human Rights Tribunal and it is not sufficient for him to complain that the CAF should have called more evidence or introduced more documents to support the testimony of Major Dunsdon. The procedures of the Human Rights Tribunal provide for pre-hearing disclosure and this was available to Mr. Lagacé if he so desired.

Accordingly, we reject Mr. Lagacé's submissions based on the matters of the credibility and weight of the evidence of Major Dunsdon.

The Grounds for Allowing the Appeal

While we have found that there was no discrimination against Mr. Lagacé in relation to his application for OCTP in November, 1987, on the grounds of marital or family status in that he was living in a common-law relationship, we have also considered the question of whether Major Dunsdon engaged in a discriminatory practice when he considered and took into account the fact that Mr. Lagacé had made an earlier complaint to the CHRC. Much of the evidence was directed to the consequences that flowed as a result of Mr. Lagacé's earlier complaint but it was primarily used by Mr. Lagacé to support

the argument that actual discrimination on the basis of marital and family status existed in 1987.

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That Major Dunsdon did consider the earlier complaint to the CHRC when he provided his negative assessment is clear from the evidence. In his cross-examination at page 355 of the transcript the following appears:

Q. Now, in your--using HR-24, Major, which is the Application of Mr. Lagacé, I think you do have a copy in front of you ? When you wrote the sentence that has been read many times in the record:

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

A. Mm-hmm.

Q. What was on your mind, was, was it not, both his redress and Human Rights complaint about the denial of married quarters in North Bay ? That was what was on your mind sir ? Do you agree or disagree ?

A. That and all of the other factors that we have discussed this afternoon would have been on my mind.

Again, at page 367 of the transcript:

Q. Good. What other instance could you think of of him not going by the rules provided within the system than his complaint to the Human Rights

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Commission ?

A. I can't think of any other except the confrontational attitude about --

Q. That was your impression of the gentleman that he tended to buck the system rather than work through it

A. Mm.

Q. Did you say 'yes' ?

A. Yes.

Did Major Dunsdon engage in a discriminatory practice by considering the fact of the earlier complaint ? Did such consideration constitute an act of retaliation that amounts to a discriminatory practice ?

The proscribed grounds of discrimination are set out in Section 3(1) of the CHR Act:

3(1). For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

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Section 7(b) of the CHR Act deals with discriminatory practices in the area of employment:

7. It is a discriminatory practice, directly or indirectly,
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Under Part III of the Act, remedies may be granted if it is found that a person has engaged in a discriminatory practice and the term 'discriminatory practice' is defined in Section 39 as:

"... any practice that is a discriminatory practice within the meaning of sections 5 to 14."

In our view, Section 3(1) of the Act should be interpreted such that an act of complaining to the CHRC about discrimination on a prohibited ground should constitute a prohibited ground of discrimination in itself. Accordingly, under Section 7, a discriminatory practice would occur if in the course of employment, an employee was the object of adverse differentiation because he or she complained about an act of discrimination on a prohibited ground.

This interpretation is supported by a reading of Sections 59 and 60(1)(c) of the Act which make it an offence to discriminate against a person for having made a complaint under the Act:

59. No person shall threaten, intimidate or discriminate against

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an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

60. (1) Every person is guilty of an offence who

c) contravenes subsection 11(6) or 43(3) or section 59.

While a violation of Section 59 does not expressly provide the person who is the object of the discriminatory act with a remedy, it supports the view that it is a discriminatory practice to differentiate adversely as a result of a person having made a human rights complaint.

This approach is also supported by a consideration of the overall objectives of the Act as set out in Section 2 and the oft cited principles

enunciated by McIntyre J. in the Supreme Court of Canada decision in Human Rights Commission & O'Malley v. Simpson-Sears Limited, [1985] 2 S.C.R. 536. In referring to the nature and purpose of human rights legislation in general and to the Ontario Human Rights Code in particular, Mr. Justice McIntyre says this at pp. 546-547:

There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest

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interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purposes of the enactment.... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious.

While this case dealt with the Ontario Human Rights Code, the same principles apply to the federal Act. (see Bhinder and the Canadian Human Rights Commission v. Canadian National Railway Co., [1985] 2 S.C.R. 561).

While it is true that the fact that Mr. Lagacé had complained to the CHRC was only one factor in Major Dunsdon's consideration of his officer-like qualities, we are satisfied that it was a proximate factor and accordingly constitutes an act of discrimination. Case law has long established that "if a human rights tribunal finds that a complainant's allegation of discrimination based upon a prohibited ground of discrimination was a proximate factor of the respondent's treatment of the complainant, even though other factors may have been present as well, then prima facie unlawful discrimination has occurred." (see Carson et al. v. Air Canada, [1984], 5 C.H.R.R. D/1857 at D/1866; Lambie v. CHRC et al., T.D. 13/95, September 28, 1995; Hunter, Human Rights Legislation in Canada: Its Origin, Development and Interpretation, [1976],

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15 U.W.O.L.R. 21)

Accordingly, we have concluded that although Major Dunsdon did not discriminate against Mr. Lagacé because he was living in a common-law relationship, he did discriminate against him by considering the fact that Mr. Lagacé had taken an earlier complaint of discrimination outside of the military to the CHRC. To discourage a member of the Canadian Armed Forces from protecting the human rights that are afforded to him or her under the law of Canada, is an odious practice that should not be permitted. It cannot be justified on the basis of a self-serving notion of collegial loyalty. It

is to be noted that in this case, Mr. Lagacé's earlier complaint to the CHRC and then to the Federal Court of Appeal was ultimately successful.

We have concluded that the Chairman erred in law by not considering the question as to whether Mr. Lagacé was the subject of discrimination because of his earlier complaint to the CHRC and ultimately the Courts.

Remedies

It is now necessary to determine what loss, if any, was suffered as a result of the discriminatory practice set out above. It appears from the evidence of Major Michael McCormack (including Exhibit R-3) that even if the application for OCT? had gone forward with a positive recommendation, Mr. Lagacé would not have been accepted for the Program. In 1988, there were a total of 131 applications of which 65 were found suitable. From those applicants, only 43 were selected. As of April 30, 1991, of the 43 selected, only 23 had succeeded in obtaining

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commission rank.

In Mr. Lagacé's chosen occupational categories viz. logistics and security, the four available spaces went to the applicants who were ranked 2nd, 3rd, 9th and 28th on the merit list. Accordingly, for Mr. Lagacé to have been accepted, he would have had to be ranked 28th or better.

Major McCormack then compared Mr. Lagacé's qualifications to the applicant who ranked 20th and Mr. Lagacé's PER and course report scores were lower. In addition, Mr. Lagacé had less time to serve until retirement than the person who filled the last security position (28th ranked) and his past experience was not compatible with his chosen occupational categories. Major McCormack was of the opinion that Mr. Lagacé would not have been selected and we agree with that view. In our opinion, on the basis of the evidence there was not a serious possibility let alone a probability that Mr. Lagacé would have been selected even if he had had a positive recommendation. (see A.G. of Canada v. Morgan et al., November 4, 1991, (F.C.A.) Accordingly, he is not entitled to reinstatement, retroactive pay, incentives, allowances or salary differential.

However, on the basis of all of the circumstances, we have concluded that Mr. Lagacé

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is entitled to compensation in the sum of \$3,500 for hurt feelings and loss of self respect pursuant to Section 53(3)(b) of the Act.

Conclusion

For the above reasons, we are of the unanimous view that his appeal should be allowed and the CAF should pay to Mr. Lagacé the sum of \$3,500.

Dated at Kingston, Ontario this 27th of September, 1996.

Stanley Sadinsky, Chairperson

Linda M. Dionne, Member

Miroslav Folta, Member