IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sulz v. Attorney General et al,***
2006 BCSC 99

Date: 20060119
Docket: 25024
Registry: Kamloops

Between:

NANCY SULZ a.k.a. NANCY WILSON

Plaintiff

And

ATTORNEY GENERAL OF CANADA
DONALD W. SMITH, MEMBER OF THE ROYAL CANADIAN MOUNTED POLICE
and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Defendants

Before: The Honourable Mr. Justice Lamperson

Reasons for Judgment

Counsel for the Plaintiff	J. B. Carter L. Schneider
Counsel for the Defendants	T. M. McCaffrey B. Lopera
Date and Place of Trial:	May 30 & 31, June 1 – 3, 6 – 10, 13 – 17, 20 – 23 & 30, September 14 – 16 & October 27, 2005 Kamloops, B.C.

INTRODUCTION

[1] The plaintiff, a former female member of the Royal Canadian Mounted Police ("RCMP"), claims that her immediate supervisors intentionally, or negligently, harassed her to the extent that she became so clinically depressed, she had no choice but to accept a medical discharge.

[2] Her action for damages, brought in tort and contract, is against the former commander of the Merritt detachment, Donald W. Smith, the Attorney General for Canada, and Her Majesty the Queen in right of the Province of British Columbia.

[3] The claim stems from conduct that the plaintiff characterises as harassment by the defendant, Staff Sergeant Smith ("Smith"), now retired, and his two supervisors, Sergeants Angel and Taylor, who were corporals at the relevant time. The latter two are not named as parties to this action. Because ranks and titles within the RCMP change frequently, all RCMP members will be referred to by their current rank.

[4] The claim against the RCMP, apart from vicarious liability for the actions of the defendant Smith, alleges that the RCMP as an organization is directly liable in tort because it took inadequate steps to prevent harassing conduct by Smith and breached an implied term in the plaintiff's employment contract to provide a harassment-free workplace.

[5] The defendants deny the plaintiff's allegations and all liability. Furthermore, the defendants contend that this court lacks jurisdiction, or ought to decline

jurisdiction, over this dispute because the plaintiff's claims would be more appropriately resolved by the Human Rights Commission or by the internal grievance process of the RCMP. Finally, the defendants argue that the plaintiff's action is barred by the operation of several federal statutes.

THE PLAINTIFF'S VERSION OF EVENTS

[6] The plaintiff joined the RCMP in 1988 after completing three years of university. Following her initial police training, the plaintiff was posted to the Merritt detachment as a general duty police officer. That detachment consists of twenty members, nine of whom belong to the highway patrol, which is essentially an autonomous unit. The detachment commander in Merritt has the rank of staff sergeant and is primarily responsible for administration, while two corporals supervise the day-to-day activities of the other members.

[7] When first posted to Merritt, the plaintiff found her first detachment commander, Staff Sergeant Stewart, to be harsh, critical, loud, and intimidating, but nonetheless fair and supportive. Staff Sergeant Stewart was succeeded by a temporary commanding officer who was quite gentlemanly. Under both officers' supervision, the plaintiff received excellent evaluations, was happy with her progress, and looked forward to a lengthy career as a police officer. She became part of a close-knit RCMP community and socialized primarily with other members of the force. That changed in the early part of 1994, when the defendant Smith became the Merritt detachment commander.

[8] The plaintiff was married in May 1991. She and her husband planned to have two children. Their first child, Jessica, was born on April 16, 1993. Following her maternity leave, the plaintiff resumed her duties as a police officer in late October 1993. It was in late April or early May of 1994, that the plaintiff was surprised to learn that she was pregnant for the second time. She and her husband had not planned on having another child so soon. She continued with her usual duties until July, when she was placed on light office duties. On October 26, she went on medical leave due to complications with her pregnancy. Her son, Justin, was born on December 12, 1994. Following his birth, the plaintiff was again took on six months' maternity leave.

[9] Her troubles began when she was assigned to light duties during her second pregnancy. The first serious incident occurred when the plaintiff was assigned to do "self-audits" as part of her light duties. Self-audits involve checking detachment files at random to determine whether members have complied with the appropriate RCMP policies. Because the plaintiff had never done this type of work before, she asked the defendant Smith for some direction. She alleges that Smith's response was "open your fucking eyes and look at the books", referring to the RCMP administration manuals. The plaintiff attempted to do this, but was only able to complete the assignment with the aid of Sergeant Angel, with whom she still had a fairly good working relationship.

[10] The next incident occurred in October 1999, shortly after the plaintiff went on medical leave due to complications with her pregnancy. She and her family, together with a fellow RCMP member and his family, went to Bellingham, U.S.A. on

a shopping trip. This proved to be a major irritant to the defendant Smith and Sergeant Angel, who were of the view that RCMP policy required the plaintiff to obtain the permission of the detachment commander before she left. They were especially annoyed since they felt that if she was well enough to travel, she was well enough to accept light duty.

[11] Upon the plaintiff's return from Bellingham, Sergeant Angel told her that she had done something "stupid" in violating RCMP policy, that she would ultimately have to pay the price, and that she would have to work three times as hard as anyone else to regain his trust. This left the plaintiff feeling very distressed. There is also some evidence that the defendant Smith attempted to find a means of docking her pay in order to punish her for the Bellingham trip.

[12] The plaintiff started to hear rumours that Smith and Angel had made numerous derogatory remarks about this trip in the presence of detachment staff members. Sergeant Angel is said to have remarked to others that the plaintiff would "pay dearly" for her mistakes. It was also during this time that the witness, Bobbie Harrison, a staff member in the detachment, overheard Smith saying derogatory things about the plaintiff.

[13] It should be noted that RCMP Inspector Hanniman testified that the policy of not leaving a duty area without the commander's permission was not well-known and has since been discontinued. It is also noteworthy that, despite the negative reaction of her superiors, no formal reprimand about the trip appears in the plaintiff's personnel file.

[14] The plaintiff testified that shortly after her second baby was born she received a message on her answering machine from one of the detachment clerks stating: "Don says you better get your ass down here and sign these forms or you won't be getting any more pay cheques." As a result, the plaintiff attended the detachment offices with her two children in order to speak with the defendant Smith about filling in the proper forms to enable her to transfer from medical leave to maternity leave.

[15] According to the plaintiff, Smith deliberately made her wait for 15 minutes and then was rude to her when she asked for help with respect to the forms. She testified that he threw a piece of paper at her and told her that it contained the telephone number of a pay clerk who might assist her. When the plaintiff telephoned the pay and compensation section of the RCMP, she was told that she would not lose any pay, that the clerk in question was away for two weeks, and that it was customary for the detachment commander to fill in the forms.

[16] The plaintiff completed the forms to the extent that she could and sent them to the detachment office with a member who had stopped by her house. Later that day, she received a telephone call from an office staff member, Sharon Algate, who said that the defendant Smith had instructed her to read the following note to the plaintiff:

> Yes, I could fill these out for you should I so desire, but I don't, so I won't. As I told you, it is your money and if you don't get them in ASAP you don't get paid, so it is up to you? I have never been at any detachment in E, F or M division where the detachment fills out the appropriate forms for you, and then you just sign them. I can assure you that this detachment won't do it. You're a grown married woman with two children, with six years service in the mounted police and making over $50,000.00 a year, so I think it is time you took on the

> responsibility of getting You're money work done yourself. Remember, if you don't submit the forms, you don't get paid. Should you wish my assistance please ask and I will direct you to where you can find it in the books.
>
> "W.D. Smith"
> Staff Sergeant Detachment Commander

[17] This note was then placed in the plaintiff's mail slot. The plaintiff's complaint is not only about the tone of the letter, but also the fact that it was read to her by a staff member who was working in the general office area where she could be overheard by others, and the fact that the note was then placed in her mail slot which was accessible to others.

[18] When the plaintiff went to the detachment office to try again to complete the forms, she spoke with Sergeant Angel. He allegedly told her that Staff Sergeant Smith did not like her because he thought she could not "cut the mustard" and therefore had no place in the RCMP. Sergeant Angel indicated that he agreed with the staff sergeant's assessment.

[19] The plaintiff says that she believed other staff members who told her that the defendant Smith made loud comments in regard to the plaintiff in the general office area, such as: "You want sexual harassment; I'll show you fucking sexual harassment". Staff Sergeant Smith allegedly permitted Sereant Angel to make comments to the effect that he would "get her" when she returned to work and that she would pay dearly for her mistakes. The plaintiff also heard that Staff Sergeant Smith and Sergeant Angel made derogatory and hurtful statements to Merritt

detachment personnel, suggesting that the plaintiff was afraid of the dark, that she was deliberately screwing the system, and that she got pregnant in order to do so.

[20] All of the evidence regarding rumours and overheard comments is hearsay and therefore not admissible against the defendants to prove that any of these statements were made. Nevertheless, the evidence does play a role when assessing the plaintiff's perception of what was occurring and why she felt demeaned and belittled.

[21] According to the plaintiff, the derogatory comments persisted after she returned to work from maternity leave on June 15, 1995. A seminal point came when she learned that auxiliary constables working at the detachment had been instructed not to ride with her because she was manipulative and afraid of the dark. She broached this matter directly with Auxiliary Constable Joey Starr. He confirmed that those were his instructions. She concluded from this and other lesser incidents that she was losing the trust of her fellow officers.

[22] The plaintiff's testimony is corroborated by that of Constable Starr. He testified that he had occasion to ride with the plaintiff while she was on patrol, even though she never made a point of asking him to do so. One day, after he went on patrol with the plaintiff, he was called into Sergeant Angel's office and instructed not to ride with the plaintiff because she was scared and had to learn how to deal with matters without someone standing at her side. Some days later, Sergeant Angel told Auxiliary Constable Starr that he had misunderstood what he had been told. Despite his second conversation with Sergeant Angel, Auxiliary Constable Starr was

nonetheless of the clear impression that no one was to ride with the plaintiff. His evidence, when viewed as a whole, was neutral. His recollection on that issue was clear and unequivocal.

[23] It was during this period in mid-1995 that the plaintiff contacted her divisional representative, Staff Sergeant Humphries, and provided him with a detailed written description of these events, which was submitted in evidence and referred to as Statement A. Following a discussion with Staff Sergeant Humphries, the plaintiff decided to deal with the matter informally because she wanted to put the problems behind her and continue with her RCMP career.

[24] With this decision in mind, Staff Sergeant Humphries arranged a meeting between himself, the plaintiff, and Inspector Latimer, who worked at the Kamloops subdivision offices. That meeting occurred in Kamloops on June 23, 1995. Inspector Latimer reviewed Statement A with the plaintiff, and advised her that he viewed the situation as a very serious one. He said he would meet with Sergeant Angel and Staff Sergeant Smith. The plaintiff requested that Inspector Latimer not disclose the names of people that she had referred to in Statement A because she was afraid that this might prejudice their positions in the detachment.

[25] By this time, the plaintiff's physical and mental health had deteriorated badly. She had lost her appetite, was twenty pounds underweight, was unable to sleep properly, and was constantly on the verge of tears. On June 27, she saw her family doctor who advised her to go on sick leave and gave her a note to that effect.

[26] Also on June 27, Inspector Latimer called the plaintiff at her home, and told her that he had spoken with both Staff Sergeant Smith and Sergeant Angel, that she need not worry, and that the matter had been resolved. She told the inspector that she was concerned about her supervisors' reactions to his involvement because she had to work the next morning. He said not to worry.

[27] It is apparent that the plaintiff had reason to be concerned since the evidence indicates that the meeting between Inspector Latimer, Superintendent Olfert, and Staff Sergeant Smith had been tense and angry. Smith returned to Merritt in such an irate state of mind that Sergeant Taylor advised the plaintiff to go out in a police car and stay away from the office during her shift on June 28. She did so for a time, but eventually went back to the detachment office, intending to speak with Smith to try to clear the air. Smith was busy, however, and the plaintiff found she could not control her emotions, so she handed in the doctor's note and went home.

[28] The plaintiff once again called Staff Sergeant Humphries, who then arranged a meeting between himself, the plaintiff, Inspector Latimer, and Sergeant Taylor. This meeting took place the following afternoon. Inspector Latimer instructed the plaintiff not to return to work and not to meet with Sergeant Angel or Staff Sergeant Smith unless Staff Sergeant Humphries was present.

[29] A few days later, the plaintiff spoke with Inspector Latimer by telephone and to her dismay, learned that he had given a complete copy of Statement A to the defendant Smith. A meeting was eventually arranged between the plaintiff, Staff Sergeant Humphries, and Sergeant Angel, and a second meeting between the

plaintiff, Staff Sergeant Humphries and Staff Sergeant Smith. At the meeting between Smith, the plaintiff, and Staff Sergeant Humphries, Smith stated that some of the things in her statement were true, some things were not true, and others were misunderstood. He apologized for being "the way he is." Under cross-examination, Smith agreed that the plaintiff may have honestly felt, as she described in Statement A at page 5:

> "I am becoming terrified to come to work, I cannot eat or sleep, I'm on the verge of tears constantly and I'm starting to become convinced it is my fault. I cannot work under these conditions and fear for both my safety as well as my physical and emotional well-being. I am very sorry that this had to come down to this because I feel that I am probably going to be the one to suffer the consequences by being transferred. I do not want to leave Merritt at this point, however, I cannot continue to live and work under these conditions."

[30] The meeting between Staff Sergeant Humphries, Sergeant Angel, and the plaintiff was very emotional. Sergeant Angel admitted that he had made a number of mistakes and expressed remorse.

[31] Around this time, the plaintiff consulted Dr. Carmichael, a psychologist under contract with the RCMP. He suggested that she should return to work on a part-time basis only. However, she chose to work full-time because she wanted to try to normalize her work situation.

[32] The plaintiff's attempts failed. She felt completely ostracized by Smith, who avoided any interaction with her. She also formed the impression that her relationship with Sergeants Angel and Taylor had deteriorated. It is clear from Sergeant Taylor's testimony that he had concerns about the plaintiff's level of

performance as a police officer, and that he discussed his observations with her and also whether she should remain with the RCMP. He testified that it was not his intention to harass her, but that he wanted her to know that change and improvement was needed, and that she should spend more time on the road in order to generate more work.

[33] The plaintiff expressed a wish to transfer to the highway patrol since it operates as an autonomous unit within the Merritt detachment. She submitted a transfer request on October 3, 1995. On October 30, 1995, she received the following notification from the defendant Smith:

> With reference to your letter of the 95.10.03 in this regard please be advised that as of this date there is no open position on highway patrol at this detachment. As you are well aware the position has only been "seconded" from Merritt H.P. to the Kamloops Integrated Traffic Camera Unit for a period of approx. three months. At that time it will be decided if Cst. GARDNER is to be permanently transferred to the K.I.T.C.U. and thus leave a vacancy on the Merritt H.P. Therefore at this juncture I am not prepared to even consider who may or may not be eligible for the vacant position.
>
> It is my understanding that shortly before you wrote your request you had a discussion with Cpl. TAYLOR regarding this possible move. At that time he discussed a number of issues with you, one of which was the fact that should a person wish to be transferred to a specific speciality unit within the R.C.M.P. they should, prior to that transfer, show a good inclination towards, and aptitude for, that particular position. One of the best ways of doing that is going out and performing that particular function in the best way that they can. From perusal of the traffic statistics on a monthly basis for the last four years, and taking into consideration those times when you were O.D.S., you have demonstrated neither, an inclination towards, nor a particular aptitude for, traffic enforcement. It is suggested that you may wish to take Cpl. TAYLOR's advice and decide on your career aspirations, find out what you need to do to obtain them, plan your strategy and then work as hard as you can toward that end and hopefully you will get there.

[34] This letter was another blow to the plaintiff, especially since the letter was copied to Corporal Orton, the supervising officer of the Merritt Highway Patrol, and written on a transit memo that became part of the plaintiff's permanent personnel file.

[35] During this time, there was also a conflict between the plaintiff and Sergeant Taylor over a major file that resulted in the plaintiff being ordered, against her will, to conduct what proved to be an unlawful search of a residence, with the result that she had to endure a stinging cross-examination during the ensuing trial. Another conflict occurred when Sergeant Taylor decided to discontinue a sexual assault investigation that the plaintiff had commenced with respect to two children. During their discussion of the case, Sergeant Taylor told the plaintiff to "think like a cop and not like a mother".

[36] On February 4, 1996, Dr. Carmichael diagnosed the plaintiff as having a major depressive disorder. The plaintiff's weight hovered around 100 lbs. She was not sleeping properly, had difficulty remembering things, and was generally in poor mental and physical health. Dr. Carmichael told the plaintiff to take sick leave, and telephoned the detachment himself to notify her superiors.

[37] Dr. Carmichael then received an angry phone call from Staff Sergeant Smith, who asked for details of the plaintiff's medical condition, alleged that the plaintiff had manipulated Dr. Carmichael, questioned Dr. Carmichael's ability to do his job, and informed him that the plaintiff might have a drug-dependency problem. The plaintiff believes that Staff Sergeant Smith also reported the drug allegation to RCMP

headquarters because headquarters made telephone inquiries with her family doctor, who in turn, notified her.

[38] It was at this time that the plaintiff underwent a pregnancy test that is routinely ordered before anti-depressant drugs are prescribed. She was shocked to learn that she was pregnant for the third time. Her husband had had a vasectomy sometime earlier after they had decided that they did not want any more children, but the vasectomy had failed.

[39] The plaintiff's pregnancy complicated her treatment for depression because she could not safely take anti-depressant drugs. She continued to see Dr. Carmichael regularly throughout her pregnancy as well as after the baby was born on September 28, 1996.

[40] In May of 1997, the RCMP sent the plaintiff to Kelowna to be examined by Dr. Semrau, a psychiatrist. He corroborated the opinions and diagnoses of Dr. Carmichael.

[41] Following that examination, the new divisional representative, Staff Sergeant Howarth, interviewed the plaintiff at her home. On June 24, 1997, Staff Sergeant Howarth sent a report to Chief Superintendent Hrankowski, the officer in charge of administration and personnel for E Division. In his report, Staff Sergeant Howarth acknowledged that his information came from Dr. Carmichael and the plaintiff. He wrote amongst other things: "There is always another side to this BUT if any of this is true, S/Sgt. Smith should not be in the position he is in. I have no reason to doubt Cst. Wilson or Dr. Carmichael." Staff Sergeant Howarth also noted: "Another

question that has to be researched is the fact that S/Sgt. Smith may have been investigated for harassment of a female member a few years ago while stationed in the Yukon and the outcome is believed to be founded. If this is true WHY is this man still in a command position?"

[42] The prior episode of harassment to which Staff Sergeant Howarth referred allegedly occurred when the defendant Smith was posted to the Watson Lake detachment between 1986 and 1991.

[43] He was in charge of that detachment and had supervisory authority over Constable Telup, a female First Nations RCMP member. Constable Telup described incidents in which the defendant exhibited intemperate and insensitive behaviour as well as an incident in which he allegedly made improper sexual advances. Constable Telup did not make a complaint at the time, but eventually went on stress leave.

[44] Some considerable time later, when posted to Whitehorse, Constable Telup talked about these incidents with some fellow members who, in turn, informed M Division headquarters' personnel. As a result, Constable Telup was questioned, and a formal investigation was launched. The resulting report reviewed the various allegations and concluded that most were unsubstantiated, but that some, including the improper sexual advance made by the defendant Smith, were founded.

[45] By the time the investigation was concluded, Smith had been posted to Ganges, British Columbia, which is within the jurisdiction of E Division. The report,

signed by Inspector Juby of M Division and sent to Constable Telup, concludes as follows:

> In all instances where your allegations were determined to be substantiated, the subject members are now posted to southern divisions, and the responsibility for follow-up action rests there. There is only one disagreement with our determinations and that was the allegation of sexual harassment by Sergeant W.D. Smith, which E Division determined to be unsubstantiated. If you have any questions or concerns in regards to these matters, please bring them to my attention.

[46] Constable Telup did not respond to that report. Curiously, there is absolutely no evidence before this court as to why E Division, which did not conduct the investigation, overturned the M Division investigator's finding regarding the allegation of sexual harassment by the defendant.

[47] Staff Sergeant Howarth's report about the plaintiff led to a formal investigation conducted in late 1997 and early 1998 by Inspector Hanniman of the Kelowna Serious Crime Unit, who was a constable at that time. While Inspector Hanniman's investigation was ongoing, the plaintiff commenced these proceedings by filing a writ of summons on July 3, 1997. She did not file a statement of claim until April 2001.

[48] Inspector Hanniman's report segments the plaintiff's complaints into 48 allegations. While investigating the various allegations, he considered the RCMP policies as articulated in various operational manuals and applied the criminal burden of proof in determining whether an allegation was founded or unfounded. Thus, if the plaintiff's version of an event conflicted with the defendant's version, he would, in the absence of corroboration, find that the allegation was not founded.

Inspector Hanniman concluded that five allegations were founded, two allegations could not be determined to be founded or unfounded, and the other allegations were unfounded.

[49] Inspector Hanniman's detailed report was submitted in evidence before this court. Although it is a slightly edited version, it is Inspector Hanniman's product to which nothing has been added. Based on that report, Chief Superintendent Cameron, the officer in charge of human resources for E Division, notified the plaintiff in writing on September 4, 1998, that the investigation was concluded, that her allegations of harassment had been substantiated, but that no disciplinary action could be taken with respect to Staff Sergeant Smith because he had retired from the RCMP in April 1998.

[50] It is of interest, but of little consequence, that Inspector Hanniman's findings were based on proof beyond a reasonable doubt, while Chief Superintendent Cameron stated in his letter to the plaintiff that he applied the civil burden of proof; namely, the balance of probabilities. The essential conclusion was that the RCMP investigation had confirmed the alleged harassment.

[51] This court must, of course, base its decision as to whether or not the plaintiff was harassed on the law and the evidence before it. The findings of Inspector Hanniman and Chief Superintendent Cameron are not determinative of that issue. They are, however, evidence demonstrating how the RCMP dealt with the plaintiff's complaints.

[52] Although the letter from Chief Superintendent Cameron gave the plaintiff some sense of vindication, it did not cure her depression. She remained on medical leave.

[53] In early 1999, the RCMP, through Corporal Rob Smith, inquired whether the plaintiff would consider a medical discharge. He advised the plaintiff that medical discharge proceedings instituted by the RCMP could drag on for years, during which time the plaintiff would receive full salary and benefits, but the detachment would be short-staffed. That problem could be avoided if the plaintiff initiated the discharge process. Corporal Smith told her that she was entitled to superannuation commensurate with her ten years of service. He also recommended that she apply for a Veteran's Affairs disability pension and disability insurance payments from Great West Life which were available for at least two years on the basis that she was totally disabled from carrying on the duties of a police officer.

[54] The plaintiff agreed to initiate a medical discharge by way of a letter sent by her to Superintendent Crkoic, Admin. Services E Division, on January 26, 2000, on the condition that her discharge would not interfere with this litigation.

[55] The defendant ceased to be a member of the RCMP on March 8, 2000. She received full salary up to that date.

[56] Unfortunately, despite extensive psychotherapy and medication, the plaintiff has not recovered from her depression. She remains unable to cope with any form of regular employment.

THE DEFENDANT SMITH'S VERSION OF EVENTS

[57] Not surprisingly, the defendant Smith's perception of events differs from that of the plaintiff. He views himself as a no-nonsense type of person, who tells it like it is, and who is prone to the use of crude language. In his opinion, he was a good detachment commander who concerned himself with the professional development of the police officers under his command. He testified that he assigned the plaintiff to do self-audits while she was on light duties as a means of furthering her professional development. He wanted her to become familiar with police procedures and the various manuals involved. It was for the same reason that he refused to fill out the various forms involved in processing her pregnancy and medical leaves.

[58] Smith's position is detailed in his written response (exhibit 10), to the forty-eight allegations framed by Constable Hanniman. Both in his written response to Inspector Hanniman's investigation and in his testimony, the defendant Smith denied harassing the plaintiff, and in particular, denied saying:

> "Open your eyes and look at the fucking books";
>
> "If she thinks she's going to sit around on her fat ass and be paid for it, she has another think coming";
>
> "Get her ass down here and sign these forms"; and
>
> "You want sexual harassment, I'll show you fucking sexual harassment."

[59] Broadly stated, the defendant denied making any derogatory or inappropriate comments about the plaintiff in the presence of detachment personnel. He agreed

that the plaintiff's performance as a police officer was of concern and that she was, from time to time, the subject of private discussions between him and Sergeant Angel. Smith denied, however, that these conversations included comments that they would "get her" when she returned to work, that she would pay dearly for her mistakes, that she was screwing the system by taking six months off, or that she had gotten pregnant to screw the force. He admitted discussing the possibility that the plaintiff was afraid of the dark with Sergeant Angel, but says that this was done in private.

[60] The only explanation that Smith gave when cross-examined about the fact that some of these admitted discussions became common knowledge within the detachment was that the walls in the detachment were very thin.

[61] The defendant Smith admits that he had the heated conversation with Dr. Carmichael that was described earlier. He admitted to having suggested that Dr. Carmichael's gullibility affected the doctor's ability to do his job and that the plaintiff might have a drug-dependency problem. Smith said he made these comments in good faith to ensure that the plaintiff received proper treatment. He also wanted details of her condition in order to approve her sick leave. Smith denied reporting his suspicions regarding the plaintiff's drug use to E Division headquarters, but admitted to speaking with Dr. Roland Bowman, an RCMP Health Services officer, about that possibility.

[62] The general burden of Smith's testimony is that he treated the plaintiff much like any other member of the detachment, that he tried to be honest and

straightforward with her, and that he endeavoured to further her development as a police officer.

THE EVIDENCE OF SERGEANTS ANGEL AND TAYLOR

[63] A slightly different picture emerges from the testimony of Sergeant Angel. His perception was that the plaintiff was intimidated by the defendant, who was of the "old school", tended to be abrupt, and demanded that people do what they were paid to do.

[64] Sergeant Angel admitted that he was very angry when he heard that the plaintiff had gone to Bellingham while on medical leave. From his perspective, it created a problem in the detachment since other members were upset that she could go to Bellingham shopping, yet was unable to perform light duties. A person who is on sick leave is not replaced, so the plaintiff's work was being shared by the other members. This short staffing can create difficulties, especially in small detachments.

[65] In his testimony, Sergeant Angel agreed that he made inappropriate comments to Sergeant Taylor for which he is now remorseful. He also admitted to having told Auxiliary Constable Starr that there was an unsubstantiated rumour that the plaintiff sought out auxiliary constables to ride with her when she was on the night shift, but Sergeant Angel denied having instructed Auxiliary Constable Starr not to ride with her.

[66] Sergeant Angel recalled discussing with the plaintiff the difficulties she was having balancing her home life with her work, but he did not recall telling her that she did not "cut the mustard" or that the defendant Smith did not like her. While testifying, he did say that the Merritt detachment had a "busy moccasin telegraph," and that he tried to prevent rumours that the plaintiff was afraid of the dark from being spread.

[67] Sergeant Angel agreed that the meeting between himself, the plaintiff, and Staff Sergeant Humphries was a rather emotional. Even though he felt that his comment had been misinterpreted, he apologized for telling the plaintiff that as a female member she had to work twice as hard as a male member and three times as hard to regain his trust.

[68] Sergeant Taylor testified that he recalled Sergeant Angel being agitated about the plaintiff's trip to Bellingham and telling him in private that the plaintiff would have to pay. Sergeant Taylor warned Sergeant Angel that this could be seen as harassing conduct. It is obvious from Sergeant Taylor's testimony that he originally was good friends with the plaintiff and her family. This friendship diminished as Sergeant Taylor became concerned that the plaintiff was socializing more than working and that her file volumes were down.

[69] Sergeant Taylor said he had heard gossip about the plaintiff being afraid of the dark. He agreed that he had personal conversations with the plaintiff during which he tried to tell her what improvements were needed in her performance and

what her supervisors' concerns were. He said that he did this as a supervisor and as a friend, without any intent to harass her.

DISCUSSION

[70] It is obvious that there are two quite different versions of the plaintiff's relationship with Staff Sergeant Smith and Sergeants Angel and Taylor.

[71] Sergeant Angel's testimony was quite direct. He readily admitted to errors and spoke candidly about his motivations. Much the same can be said about the testimony of Sergeant Taylor.

[72] The evidence of the defendant Smith is more troublesome. It is obvious from both his evidence and the evidence of others, especially Dr. Carmichael and Staff Sergeant Humphries, that Smith was very angry with the plaintiff and the situation generally. The meeting that he had with Superintendent Olfert, the head of the Kamloops subdivision, and Inspector Latimer was, by all accounts, a stormy one. Nonetheless, he denied that his behaviour could be one of the causes of the plaintiff's problems.

[73] The plaintiff's assertions as to what she heard was being said about her are, of course, hearsay, and not evidence that the defendant Smith said those things. However, it must be kept in mind that Smith, Angel, and Taylor agreed in their testimony that a lot of these things were said by them, albeit in private conversations that they had with one another in their capacity as supervisors. The evidence as a whole is convincing that they made no secret of their opinions, which became

common knowledge within the detachment. At best that indicates a lack of discretion on their part. The plaintiff had cause to be concerned about the effect these comments had on her reputation with other members of the detachment.

[74] However, this evidence must also be considered in context. The RCMP is a paramilitary organization. One of the functions of the supervising non-commissioned officers is to critique the work of their subordinates in an effort to increase their knowledge and skills. The culture in the RCMP was, until comparatively recently, male-oriented, direct, and undiplomatic, while the plaintiff was, on occasion, overly sensitive.

[75] Her supervisors should have been more sensitive in their use of criticism as a teaching technique, and should have dealt with the problem of her repeated absences in a different manner. Although the defendant Smith asserts that he was merely trying to point out to the plaintiff where improvement was needed to assist her in her development as an RCMP officer, the plaintiff cannot be faulted for believing that his comments, like those made in the letter that he had a staff member read over the telephone to her and those contained in the memorandum rejecting her application for a transfer to the highway patrol, went far beyond constructive criticism.

JURISDICTION

[76] The defendants contend that the legislative scheme implemented by parliament in the ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6 (“***CHRA***”), and the grievance procedures available under the ***Royal Canadian Mounted Police***

Act, R.S.C. 1985, c. R-10, ss. 31 -35 ("***RCMP Act***"), prevent this court from hearing the plaintiff's action. It is argued that this is especially so since the RCMP harassment policy permits an aggrieved person to pursue remedies simultaneously under the ***RCMP Act*** and the ***CHRA***. The plaintiff could have tried to have the defendant Smith disciplined under the RCMP Code of Conduct and simultaneously pursued a claim for compensatory damages from the Human Rights Tribunal. The defendants argue that this court should not assume jurisdiction because the plaintiff has failed to take advantage of the statutory remedies available to her

[77] The defendants rely on ***Chaychuk v. Best Cleaners and Contractors Ltd.*** (1995), 11 .C.C.E.L. (2d) 226, [1995] B.C.J. No. 1203 (QL) (S.C.), where Hood J. dismissed an action for wrongful dismissal and sexual harassment. In that case, Hood J. extensively reviewed the Supreme Court of Canada's decision in ***Seneca College of Applied Arts and Technology v. Bhadauria***, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193, before coming to the conclusion that "any common law action which the plaintiff might have for sexual harassment … is excluded by the provisions of the B.C. Human Rights Act…"

[78] In ***Bhadauria***, the Supreme Court of Canada reasoned that by enacting the ***Ontario Human Rights Code***, R.S.O. 1970, c. 318, the legislature had established a system of administrative and adjudicative or quasi-adjudicative enforcement by boards of inquiry that "does not exclude the Courts but rather makes them part of the enforcement machinery under the Code." The court therefore concluded that the legislature had foreclosed any civil action based directly on a breach of the Code, and also excluded an action based on "an invocation of the public policy expressed

in the Code." It is important to note, however, that at the time ***Bhadauria*** was decided, the ***Ontario Human Rights Code*** contained a privative clause granting the Human Rights Tribunal exclusive jurisdiction over issues of discrimination. That provision was subsequently removed from the Code.

[79] The defendants also rely on the Supreme Court of Canada's decision in ***Weber v. Ontario Hydro***, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583, where the court found that the appellant's action in tort had been correctly struck out because the dispute had arisen under the terms of a collective agreement, thereby making it a matter for a labour arbitrator, not the courts.

[80] The plaintiff contends that the defendants' arguments with respect to the ***CHRA*** are flawed because the plaintiff's claim in this instance involves breach of contract and torts in addition to sexual discrimination and harassment. The plaintiff cites ***Biron v. Kashuba*** (1996), 17 C.C.E.L. (2d) 279, [1996] B.C.J. No. 125 (QL) at ¶8 (S.C.) in support of her contention that the litigation of claims independent of the provisions of the ***CHRA*** should be allowed to proceed in the courts even though there is some overlap because sexual harassment is an integral part of the claims.

[81] Plaintiff's counsel distinguishes ***Chaychuk*** on the grounds that Hood J. found just cause for the dismissal of the employee, and held that the evidence presented no factual basis for an award of damages either in contract or in tort for the wilful or negligent infliction of mental suffering.

[82] The plaintiff also distinguishes ***Weber*** because that case involved a collective agreement that was subject to the ***Labour Relations Act***, R.S.O. 1990, c. L.2, s.

45(1), which mandates arbitration as the only remedial avenue for disputes arising under a collective agreement. While the plaintiff acknowledges that the RCMP harassment policy allows a member to make either formal or informal complaints, to grieve any decision rendered, and to simultaneously pursue a complaint under the ***CHRA***, the plaintiff points out that recourse to such procedures are not mandatory due to the absence of a privative clause. Neither the ***CHRA*** nor the ***RCMP Act*** oust the jurisdiction of the courts over disputes in which no complaint or grievance has been filed.

[83] The plaintiff stresses that she had no wish or basis for launching the grievance procedure suggested by the defendants because both Inspector Hanniman and Chief Superintendent Cameron agreed that Staff Sergeant Smith's conduct amounted to harassment. In her view, there was nothing to grieve. She cites in support the following comments of Dubé J. in ***Clark v. Canada (T.D.)***, [1994] 3 F.C. 323, 76 F.T.R. 241 (F.C.T.D.) at ¶48, a case involving similar claims by a female RCMP member:

> The decision of Rouleau J. in *Desjarlais v. Commr. Of Royal Cdn. Mounted Police* [See Note 28 below] suggests that the complaint procedure and the grievance procedure are distinct, and that no irregularity results from proceeding with the former rather than the latter. The relevance of the grievance procedure to the plaintiff, whose complaint was under investigation, therefore seems uncertain: it is not clear exactly what it is the defendant proposes she should have grieved, since her pending complaint involved a course of conduct, rather than discrete events susceptible of being grieved such as performance progress reports. Further, as I understand it the process outlined in the CSOs of Chapter 11.16 would have required the plaintiff to submit her formal or informal "objection" with respect to those reports to the very immediate and intermediate supervisors she was having difficulty with. [Note 28: (1986), 18 Admin. L.R. 314 (F.C.T.D., at p. 322.]

[84] As in ***Clark***, the plaintiff did lodge a complaint, which eventually triggered a formal investigation. The outcome of that investigation provided some measure of vindication, leaving the plaintiff with nothing to grieve but also little redress. The RCMP paid no compensation to the plaintiff and took no disciplinary action against Staff Sergeant Smith because he had already retired.

[85] Courts, as a rule, show considerable deference to statutory tribunals that have been created to adjudicate disputes in specialized areas such as labour and human rights. The lack of a provision in either the ***CHRA*** or the ***RCMP Act*** expressly limiting the plaintiff's ability to pursue a civil action for damages is, however, significant. Such privative clauses are not uncommon. Had parliament intended to oust the jurisdiction of the courts in these matters, it could have done so. The question is not, therefore, whether this court has jurisdiction to hear an action based on sexual harassment, but rather whether the court ought to decline to exercise its jurisdiction in favour of a statutory dispute resolution process.

[86] In ***Pleau v. Canada (Attorney General)*** (1999), 182 D.L.R. (4th) 373, 1999 NSCA 159, leave to appeal to SCC dismissed without reasons [2000] S.C.C.A. No. 83, the Nova Scotia Court of Appeal allowed a court action to continue despite dispute resolution terms in a collective agreement and a procedure established by the ***Public Service Staff Relations Act***, R.S.C. 1985, c. P-35. In reaching this conclusion, the Court of Appeal analysed the recent Supreme Court of Canada decisions in this area, including ***Weber***. The Court of Appeal concluded that the following three interrelated factors must be considered when determining whether it

should hear a dispute. Cromwell J.A. discussed these issues in the following terms at ¶18-21 inclusive:

> In my view, the judgments of the Supreme Court of Canada in *St. Anne Nackowic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, *Gendron, Weber and O'Leary* show that the decision by courts to decline jurisdiction in disputes like this one is not based simply on a clear, express grant of jurisdiction to an alternative forum. For reasons that I will develop, I am of the opinion that there are three main considerations which underpin these decisions of the Supreme Court of Canada. The three considerations are interrelated, but it is helpful to discuss them individually for analytical purposes.
>
> The first consideration relates to the process for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.
>
> If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process. This was an important question in the *Weber* decision. The answer given by *Weber* is that one must determine whether the substance or, as the Court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on the process for resolution of disputes, the second consideration focuses on the substance of the dispute. Of course, the two are interrelated. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.
>
> The third consideration relates to the practical question of whether the process favoured by the parties and the legislature provides effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy.

[87] The remedies available under the ***CHRA*** appear to be sufficient. Section 53(2) provides for compensation for pain and suffering, special expenses, and wage loss caused by the discriminatory acts. Although the wording of the statute appears to contemplate only past wage loss, the Federal Court of Appeal has determined that the Human Rights Tribunal may award compensation for future wage loss based on tort principles. The Federal Court of Appeal found that the ultimate goal of the tribunal must be the same as that of the courts: to make the victim whole for the damage caused (See ***Canada (A.G.) v. Morgan***, [1992] 2 F.C. 401, 85 D.L.R. (4th) 473 at ¶19).

[88] Because the plaintiff's claims arise from incidents of alleged harassment, the Human Rights Tribunal could have heard at least some of her claims under the procedure set out in the ***CHRA***.

[89] In cases of overlapping jurisdiction, the court's most pressing concern is to prevent the concurrent adjudication of the same action in different forums in order to eliminate the risk of inconsistent findings and the potential for double recovery. These concerns do not arise in the circumstances of this case. No complaint has been filed with the Human Rights Tribunal. As the plaintiff is now time-barred by the ***CHRA*** from pursuing such a complaint, there is no possibility that the tribunal will arrive at a conclusion inconsistent with the findings of this court, or that the plaintiff will recover twice for the alleged wrong done to her.

[90] In ***McKinley v. BC Tel*** (1996), 23 B.C.L.R. (3d) 367, 20 .C.C.E.L. (2d) 169, Drost J. considered whether parliament had intended the ***CHRA*** to prohibit or

otherwise limit the right to pursue a civil action for claims falling within the scope of the statute. He concluded at ¶48:

> It would be contrary to the modern trend of expedition and openness in the justice system to decline to exercise a very broad jurisdiction of this Court except in the clearest of cases.

[91] The present action is not one of the clearest cases. Although her claims are based on allegations of harassment, the plaintiff has alleged facts reasonably supporting causes of action for two independent torts recognized at common law. In addition, the plaintiff has advanced a claim in contract against the Attorney General of Canada for failure to provide a harassment-free work environment. That claim, should it be found to have merit, is independent of the complaint the plaintiff might have brought under the ***CHRA***. Because these proceedings are now the plaintiff's only opportunity to seek redress, it would be wrong for this court to decline jurisdiction and deny the plaintiff an appropriate remedy if she can successful meet the legal tests required to establish the alleged torts and breach of contract.

[92] Given all the circumstances of this case, the court should exercise its jurisdiction over the plaintiff's claims.

THE PLAINTIFF'S ACTION IN TORT AGAINST THE ATTORNEY GENERAL OF CANADA

[93] The defendants contend that even if the court exercises jurisdiction in this case, the plaintiff's claims in tort against Staff Sergeant Smith and the Attorney General of Canada are barred by the operation of several statutes that establish an

immunity for the Federal Crown and its servants in situations where a pension is payable in respect of the facts underlying the civil claim.

(i) *The Crown Liability and Proceedings Act*

[94] At one time the Crown was immune from suit. That changed with the enactment of the ***Crown Liability and Proceedings Act***, R.S.C. 1985, c. C-50, s. 3 ("***CLPA***"), which makes it possible to sue both the Federal Crown and its servants in tort or breach of duty relating to property. Thus, the Federal Crown is vicariously liable for torts committed by its servants in the course of their duties.

[95] Section 36 of the ***CLPA*** defines an RCMP member as a servant in that it states:

> 36. For the purposes of determining liability in any proceedings by or against the Crown, a person who was at any time a member of the Canadian Forces or of the Royal Canadian Mounted Police shall be deemed to have been at that time a servant of the Crown.

[96] The right to sue granted by the ***CLPA*** is, however, circumscribed by s. 9 of the ***CLPA***, which provides:

> 9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the consolidated revenue fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[97] The Supreme Court of Canada recently considered the scope of the statutory bar established by s. 9 of the ***CLPA*** in ***Sarvanis v. Canada,*** [2002] 1 S.C.R. 921, 2002 SCC 28. Iacobucci J., for a unanimous Court, held as follows at ¶28:

> In my view, the language in s. 9 of the *Crown Liability and Proceedings Act,* though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.

[98] The plaintiff's Veterans Affairs pension is a pension awarded "on the same factual basis" as the plaintiff's claims in this action. Both the letter approving the plaintiff's pension application and the decision of the Veterans Review and Appeal Board increasing the plaintiff's award mention the allegations of harassment and conclude on that basis that the plaintiff's disability arose out of, or was directly connected with her service in the RCMP. Consequently, the Veterans Affairs pension triggers the operation of s. 9 of the ***CLPA***, which bars the plaintiff's claim in tort against the Attorney General of Canada and Staff Sergeant Smith in his capacity as a Federal Crown servant.

[99] The same cannot be said about the plaintiff's RCMP Superannuation pension. That pension is payable to her as a result of her regular contributions to the pension plan over her ten years of service with the RCMP. It is not payable "in respect of" the injury on which the plaintiff's civil action is founded.

(ii) *The Government Employees Compensation Act*

[100] The defendant also argues that the plaintiff's claim is barred by s. 12 of the ***Government Employees Compensation Act,*** R.S.C. 1985, c. G-5 ("***GECA***"), which states:

> 12. Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

[101] Section 2 of the ***GECA*** defines "accident" as including a wilful and an intentional act.

[102] The application of the ***GECA*** to RCMP members is subject to the following anomaly. Section 3(1) of the ***GECA*** states:

> 3.(1) This Act does not apply to any person who is a member of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police.

[103] Whereas s. 34(1) of the ***Royal Canadian Mounted Police Superannuation Act,*** R.S.C. 1985, c. R-11 ("***RCMPSA***") states:

> 34.(1) Notwithstanding subsection 3(1) of the *Government Employees Compensation Act,* that Act applies to every member of the Force, as defined in subsection 2(1) *Royal Canadian Mounted Police Act*, except a person or member described in s. 32 or s. 32.1 of this Act.

[104] It is clear that s. 34(1) of the ***RCMPSA*** now allows members of the RCMP to avail themselves of compensation under the ***GECA,*** subject to the exception provided for in s. 32, which states:

> 32. Subject to this Part, an award in accordance with the *Pension Act* shall be granted to or in respect of
>
> …
>
> (b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died,
>
> in any case where the injury or disease or aggravation thereof resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force.

[105] The plaintiff fits within the exception described in s. 32. The Veterans Affairs disability pension was expressly granted under s. 32 of the ***RCMPSA***, with the result that the ***GECA*** does not apply to the plaintiff and, therefore, does not bar her claims.

[106] In light of this finding, it is not necessary to consider the plaintiff's arguments that s. 34 of the ***RCMPSA*** should not be applied retroactively.

[107] Unfortunately for the plaintiff, her exclusion from the ***GECA*** does not assist her in overcoming the statutory bar to her claims against the Attorney General of Canada and Smith as a Federal Crown servant. The ***RCMPSA,*** s. 32, plainly states that an award granted under that section is an award in accordance with the ***Pension Act,*** R.S.C. 1985, c. P-6. At the time the plaintiff was awarded the Veterans Affairs pension, s. 111 of the ***Pension Act*** also barred an action against the Federal Crown and its servants. It read as follows:

> 111. No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of an injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.

[108] That section was amended by ***An Act to Amend the Statute Law in Relation to Veterans' Benefits***, R.S.C. 2000, c. 34, s. 42, in force October 27, 2000, and now simply provides for a stay of proceedings in any action that is not barred by virtue of s. 9 of the ***CLPA*** to permit an application to be made for a pension in respect of the disability. The civil action will continue only if the Veterans Review and Appeal Board refuses to award a pension.

[109] The plaintiff contends that because s. 111 was amended shortly after she was awarded the Veterans Affairs pension, it would be inequitable to bar her claim based on the old version. That argument is not sustainable, and the plaintiff is not assisted by the new version of s. 111 since it only affects actions not barred by s. 9 of the ***CLPA***. Unfortunately for the plaintiff, her action against the Federal Crown and its servants is barred by s. 9 because the Veterans Review and Appeal Board granted her a pension.

[110] Finally, the plaintiff seeks to avoid the operation of the ***CLPA***, s. 9, and the ***Pension Act***, s. 111, by arguing that neither section should be interpreted so as to shield a servant of the Crown who abused his power and acted without authority. The plaintiff's argument is based on ***Young v. McCreary*** (2001), 53 O.R. (3d) 257, 198 D.L.R. (4th) 713 at ¶11, where Sharpe J.A. speaking for the Ontario Court of Appeal stated:

> I cannot accept the proposition that s. 9 should be applied to shield Crown servants from liability without regard to the capacity in which they were acting at the time of the alleged wrong. If an individual who happens to be a servant of the Crown is involved in a motor vehicle accident while on a Sunday drive, surely that individual's weekday status as a Crown servant is irrelevant to liability for damages caused in his or her personal capacity. … It would be inconsistent with established principles of interpretation to hold that s. 9 applies to all actions against Crown servants without regard to the capacity in which they were acting at the time of the alleged wrong.

[111] At ¶14 of the same judgment, Sharpe J.A. concluded:

> In my view, the proposition that s. 9 applies to Crown servants without regard to any consideration of the capacity in which they acted is wrong in law.

[112] The evidence in this case establishes that Smith's conduct in relation to the plaintiff occurred during the course of his duties. The alleged harassment clearly had nothing to do with his private life, as was the situation in the example used by the Ontario Court of Appeal where a Crown servant was involved in a motor vehicle accident while off-duty. All of Smith's impugned actions occurred while he was fulfilling his administrative functions as an RCMP detachment commander. It is, of course, on that basis that the Attorney General of Canada is joined in this action. The fact that Smith may have contravened the RCMP Code of Conduct does not mean that he was not acting in his capacity as a Crown servant.

[113] The conclusion must be, therefore, that the plaintiff is precluded from pursuing an action against the Federal Crown and against the defendant Smith in his capacity as a Federal Crown servant, unless the plaintiff can establish that the

defendants are estopped from relying on these statutory provisions, an argument to which I now turn.

WAIVER AND ESTOPPEL

[114] The plaintiff contends that she accepted a medical discharge from the RCMP, without protest, on the basis that the RCMP waived its right to rely on the statutory bars when it accepted her discharge letter, dated January 17, 2000. The letter contained the following provisions:

> This agreement to discharge does not restrict any other actions or agreements with the force, civil or otherwise.
>
> I make this agreement in good faith and clear conscience in an effort to expedite the process, eliminate unnecessary work on the part of the Force and reduce stress to myself.

[115] Although the plaintiff signed the letter, and insisted that the first provision appearing above be included, the letter itself was drafted by E Division and not by the plaintiff. The plaintiff claims that Corporal R. Smith, who negotiated the discharge, had ostensible, if not actual, authority to accept these terms, and that he did so on behalf of the RCMP. It should be noted in this regard that the discharge letter was sent to the superintendent in charge of administrative services for E Division, who took no objection to its terms. This may indicate that the terms were acceptable to the RCMP.

[116] The plaintiff contends that the added provision means that the RCMP agreed to waive its rights to rely on the statutory bars.

[117] Furthermore, the plaintiff says that she obtained the Veteran's Affairs pension as part of the discharge process on the advice of Corporal Smith, and that at no time did he tell her that accepting the Veteran Affairs pension would bar her court action for damages, which was already underway.

[118] The defendants' position, simply stated, is that the statutory bars are based on public policy and are not capable of being waived by Corporal Smith or any servant of the Crown.

[119] In ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490 at 499-500, 115 D.L.R. (4th) 478, Major J. made the following comments in regard to the common law principles of waiver and estoppel. These comments are equally applicable to this case:

> Recent cases have indicated that waiver and promissory estoppel are closely related: see e.g. *W. J. Alan & Co. v. El Nasr Export and Import Co*., [1972] 2 Q.B. 189 (C.A.), and *Re Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.) at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S.M. Waddams, *The Law of Contracts*, (3rd ed. 1993), at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished.
>
> …
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them.

[120] There is no evidence that any of the parties turned their minds to the statutory bars at the time of the plaintiff's discharge. The agreement was that the plaintiff was

not required to discontinue her legal action. That does not equate with an unequivocal intention by the defendants to abandon any defences available to them. The clause on which the plaintiff's claim of waiver is based makes no reference to pensions. Furthermore, account must also be taken of the fact that the defendant Smith was not a party to the negotiations or the discharge agreement. He cannot, therefore, be treated as having waived the personal protection that the federal legislation affords him.

[121] Unfortunately for the plaintiff, the conclusion must be that the defendants did not waive their rights. Her action in tort against the Attorney General of Canada and the defendant Smith must fail because it is statute-barred.

THE PLAINTIFF'S ACTION IN CONTRACT

[122] Plaintiff's counsel contends that the RCMP harassment policy forms part of the employment contract such that a breach of the policy constitutes an actionable breach of contract. That argument does not answer the preliminary question whether the usual employment law applies to members of the RCMP.

[123] The only reference on that point by counsel was ***Clark***, in which Dubé J. determined that although subsection 13(2) of the ***RCMP Act***, the Regulations establishing the grounds of discharge, and the Commissioner's Standing Orders related to discharge indicate that members of the RCMP may not be dismissed at pleasure, RCMP members are not strictly employees and do not operate under a contract of employment. In consequence, Dubé J. concluded that absent a

collective agreement of some form, the plaintiff could not maintain a cause of action for wrongful dismissal in the court.

[124] However, in ***McMillan v. Canada (M.C.I.)*** (1996), 108 F.T.R. 32, [1996] F.C.J. No. 171 (QL) (F.C.T.D.), a case involving an RCMP member making the same claim as Ms. Sulz, the motions judge refused to dismiss the plaintiff's claim in contract and said at ¶20:

> It would be inappropriate to rely on *Clark* to either support or deny the application of contract law to the terms of employment of members of the RCMP. Dubé J. did not resolve the issue, preferring to rule that the particular facts of the case did not justify recourse to wrongful dismissal. However, there may be other issues of contract law which could apply to members of the RCMP. The plaintiff should have the opportunity to lead evidence at trial of unofficial discrimination in her former workplace. This issue should be decided after full discovery and argument based upon the merits of the case.

[125] The Federal Court of Appeal upheld the motions judge, saying at 237 N.R. 8, [1999] F.C.J. No. 164 (QL) (F.C.A.) at ¶1(C):

> With respect to the Crown's claim that no cause of action in contract can arise out of employment with the R.C.M.P., we agree with the Motions Judge in which he said the issue is not clear. This issue should be left to the trial judge.

[126] Unfortunately, there seems to be no decision on this point in ***McMillan*** or other similar cases.

[127] It may well be that the traditional relationship of police officers to the Crown has changed with the time. However, that question was not addressed either in the evidence or in the legal arguments to the extent that this court can formulate a proper opinion in that respect.

[128] In any event, because s.111 of the ***Pension Act***, referred to in detail at ¶107 - 109 of these reasons, acts as a bar to the plaintiff's contract claim as well as to the tort claims against the Attorney General of Canada and Staff Sergeant Smith, it is unnecessary to decide the general point in the circumstances of this case.

THE PLAINTIFF'S ACTION IN TORT AGAINST THE PROVINCIAL CROWN

[129] The question remains whether the plaintiff can maintain an action in tort against the Provincial Crown and against the defendant Smith in his capacity as a provincial constable under the ***Police Act***, R.S.B.C. 1996, c. 367.

[130] The following sections of the ***Police Act*** are applicable and set out in their relevant parts:

> 11 (1) The minister, on behalf of the government, is jointly and severally liable for torts committed by
>
> > (a) provincial constables, auxiliary constables, special provincial constables and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, and
> >
> > (b) municipal constables and special municipal constables in the performance of their duties when acting in other than the municipality where they normally perform their duties.
>
> (2) Even though a person referred to in subsection (1) (a) or (b) is not found liable for a tort allegedly committed by the person in the performance of his or her duties, the minister may pay an amount the minister considers necessary to
>
> > (a) settle a claim against the person for a tort allegedly committed by the person in the performance of his or her duties, or
> >
> > (b) reimburse the person for reasonable costs incurred by the

> person in defending a claim against the person for a tort allegedly committed in the performance of his or her duties.

(3) The Minister of Finance must pay out of the consolidated revenue fund, on the requisition of the minister, money required for the purposes of subsection (2).

…

14 (1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the government, may enter into, execute and carry out agreements with Canada, or with a department, agency or person on its behalf, authorizing the Royal Canadian Mounted Police to carry out powers and duties of the provincial police force specified in the agreement.

(2) If an agreement is entered into under subsection (1),

> (a) the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial police force,
>
> (b) every member of the Royal Canadian Mounted Police is, subject to the agreement, deemed to be a provincial constable,

21 (1) In this section, **"police officer"** means a person holding an appointment as a constable under this Act.

(2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

(3) Subsection (2) does not provide a defence if

> (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
>
> (b) the cause of action is libel or slander.

(4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious

> liability arising out of a tort committed by the police officer or other person referred to in that subsection:
>
> > (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
> >
> > (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
> >
> > (c) the minister, in a case to which section 11 applies.

[131] The government of Canada and the government of the Province of British Columbia entered into a Provincial Police Service Agreement for the period from April 1, 1992, to March 31, 2012. The agreement authorizes the RCMP to carry out the powers and duties of the provincial police force. Nothing in the agreement indicates that the RCMP members assigned to policing duties within the province are not provincial constables pursuant to s. 14(2)(b) of the ***Police Act.*** Therefore, as a result of s. 11 of the ***Police Act***, the Provincial Crown is jointly and severally liable for torts committed by the defendant Smith in the performance of his duties as a provincial constable, even though Smith himself, by virtue of s. 21, cannot be held liable unless he was guilty of dishonesty, gross negligence, or malicious or wilful misconduct.

[132] The defence suggests that there is a conflict between the provincial ***Police Act*** and the federal legislation cited earlier and that therefore the federal legislation, which bars the plaintiff's actions, should be paramount. Defence counsel argues that this conflict results from the terms of the Provincial Police Service Agreement, in

which the Federal Crown pledged to indemnify the province for damages, with the result that to allow the plaintiff's claim under the Provincial Police Service Agreement would enable her to do indirectly what she cannot do directly: to recover from the Federal Crown.

[133] By enacting s. 11 of the ***Police Act***, the British Columbia legislature decided that the province should assume liability for wrong doing by its police constables. The fact that the federal government has erected certain barriers with respect to federal liability does not create a conflict between the provincial and federal legislation. Each government has legislated in its own sphere and on its own behalf. The fact that the Attorney General of Canada has agreed to indemnify the Attorney General of British Columbia for damages arising from actions brought under the ***Police Act*** does not create a conflict between federal and provincial legislation. The Agreement does not have the force of statute, and agreement to indemnify is not the same as acceptance of liability. Consequently, the question of paramountcy does not arise.

DIRECT LIABILITY OF THE PROVINCIAL CROWN

[134] It should be noted that vicarious liability on the part of the province does not denote fault. Thus, the Provincial Crown may be vicariously, but not directly, liable for Staff Sergeant Smith's actions. However, in the circumstances of this case, the plaintiff also alleges that the RCMP was negligent in failing to monitor Staff Sergeant Smith's conduct towards female members under his supervision. It is, therefore, necessary to determine whether fault should attach directly to the Provincial Crown

by virtue of the fact that the RCMP, as an organization, was negligent in its handling of the problems between the plaintiff and the defendant Smith.

[135] The evidence relating to the Watson Lake harassment allegations indicates that the RCMP had notice that Smith may have had a problem interacting with female members under his supervision. As a result, one would have expected the RCMP to take some precautions when assigning Smith to a command position over female members. In light of Smith's history, one would also have expected that Smith's superiors would take quick action to prevent any recurrence or worsening of the situation. It is obvious from the evidence that Inspector Latimer and Superintendent Olfert dealt promptly with the plaintiff's complaints once they came to official attention.

[136] The question remains, however, why the situation was not monitored and why there was no follow up until 1997. There is no evidence on that issue. Nor is there evidence that Inspector Latimer and/or Superintendent Olfert were aware of the Watson Lake incidents. The failure to consider Smith's past record may indicate some carelessness on the part of the RCMP as an organization. However, the only evidence in that regard is the investigative report from M Division that was subsequently reversed by E Division for reasons that were not canvassed in the evidence. Those bare facts, standing alone, are not sufficient to establish negligence on the part of the organization as a whole.

[137] Accordingly, there is insufficient evidence to support the plaintiff's allegations of negligence by the RCMP. Consequently, it is not necessary to canvas whether

negligence on the part of the RCMP equates with negligence on the part of the Attorney General for British Columbia.

[138] The Provincial Crown is, therefore, not directly liable, but is vicariously liable for any torts committed by the defendant Smith in his capacity as a provincial constable under the ***Police Act***.

[139] The question that remains is whether Smith's actions were tortious.

INTENTIONAL INFLICTION OF MENTAL SUFFERING

[140] The legal test for the intentional infliction of mental suffering was set out by McLachlin J. (as she then was) in ***Rahemtulla v. Vanfed Credit Union,*** [1984] 3 W.W.R. 296, 51 B.C.L.R. 200 (S.C.). The plaintiff must establish that Smith engaged in outrageous or flagrant and extreme conduct that was calculated to produce an effect of the kind that was produced and that caused the plaintiff to suffer a visible and provable illness.

[141] In ***Clark*****,** Dubé J. extracted the following principles from the relevant case law and doctrinal authorities:

> Intentional infliction of mental suffering may arise from a deliberate course of conduct over time.
>
> The defendant's position of authority over the plaintiff's future well-being may increase the quality of outrageousness of the conduct in question.
>
> The defendant's knowledge of the plaintiff's special sensitivity or susceptibility to injury through mental distress may raise conduct that is not otherwise sufficiently extreme to the level of outrageousness that will ground liability.

> The defendant need not have intended to cause an injury of the same extent and seriousness as the injury the plaintiff suffered. It is sufficient if the defendant intended merely to frighten, terrify, or alarm his victim, and was reckless as to the effect of the impugned conduct.
>
> The conduct must be of a kind reasonably capable of causing some unwelcome, uncomfortable, or unpleasant emotional apprehension or sensation in a normal person, or must be of a kind that the defendant knew or ought to have known would be likely to cause such an apprehension or sensation in the plaintiff due to the plaintiff's particular sensibilities.

[142] The evidence demonstrates that the plaintiff was harassed in a variety of ways by the defendant Smith and his subordinate supervisors, Sergeant Angel, and to a lesser extent, Sergeant Taylor, who were corporals at the time. There was no single precipitating event, but a course of conduct spanning a substantial period of time. The fact that many of these acts were committed by the plaintiff's superiors increases their seriousness.

[143] However, while there is no question that Staff Sergeant Smith's conduct toward the plaintiff was unreasonable and insensitive, I am not satisfied that his actions rise to the level of flagrant and extreme conduct that is required to find liability for an intentional tort. The evidence does not demonstrate that the defendant Smith deliberately set out to harass the plaintiff and drive her from the RCMP. His motivation throughout was concern for the proper functioning of his detachment, which was chronically understaffed due to the plaintiff's repeated absences. Although his manner was abrupt, demanding, and unfeeling, his actions were consistent with his experience of the paramilitary command structure of the RCMP. It is clear, especially in light of the establishment and dissemination of a

specific harassment policy, that this command style was no longer appropriate in the modern RCMP. Staff Sergeant Smith should have been more sensitive and aware of the negative effects of his actions. However, his conduct does not demonstrate wilful or reckless disregard for the plaintiff's mental health.

NEGLIGENT INFLICTION OF MENTAL SUFFERING

[144] A successful claim of negligence must demonstrate that the defendant owed the plaintiff a duty of care, that the defendant breached that duty of care, and that damages or injury resulted from that breach.

[145] The defendant Smith, as the officer in charge of the Merritt detachment and the plaintiff's commanding officer, owed a duty of care to the plaintiff. It was his duty to ensure that she could work in a harassment-free environment, as is required by various anti-harassment policies that the RCMP has in place.

[146] There is no question that Smith breached that duty. The evidence demonstrates that he was prone to angry outbursts, particularly when it pertained to the plaintiff. This was substantiated from a number of sources. There was a very angry exchange when he met with Inspector Latimer and Superintendent Olfert shortly after the plaintiff made her first complaint in June 1995. Dr. Carmichael, the RCMP psychologist, also gave evidence of angry exchanges with the defendant. Staff Sergeant Howarth, who was the divisional representative from 1996 to 1998, gave evidence about a telephone call from the defendant Smith, who was extremely irate, both with that witness and with the plaintiff. Smith should have known that his intemperate and, at times, unreasonable behaviour would have negative

consequences for the members of the detachment generally and the plaintiff in particular.

[147] It is obvious that he did little to curb his temper or prevent the rumours that were circulating about the plaintiff, even though he ought to have known, certainly after receiving a copy of the plaintiff's Statement A if not before, that he was causing serious emotional problems for the plaintiff at a time when she was facing significant personal pressures due to her pregnancies. His frequent outbursts and his cutting comments were major causes of the troubled work environment that the plaintiff experienced. It is clear that the defendant Smith violated the RCMP harassment policy, and consequently, breached the standard of care he owed to the plaintiff as a member under his command.

[148] In the circumstances of this case, foreseeability and remoteness are not significant issues. The RCMP established and distributed harassment policies after women were allowed to join the force. All members knew or ought to have known that these policies were meant to forestall harm such as that which occurred here.

[149] Did the defendant's harassment cause or materially contribute to the plaintiff's health problems? The defendants pointed to the fact that the plaintiff had many sources of stress in her life. She had three children within three-and-a-half years. The first child was planned, but the other two were not. One child was colicky for the first three years of its life, and another suffered from the condition known as separation anxiety. The plaintiff's husband's job at that time took him away from home for most of the week. Consequently, the plaintiff was, for much of the time, a

single parent of three infant children who was trying to work full time at a demanding job.

[150] The defence also pointed out that the plaintiff saw Dr. Holmes, her family physician, during her first pregnancy with complaints about assignments given to her by her first commanding officer, Staff Sergeant Stewart. She was diagnosed at that time as suffering from stress and anxiety due to the criticism and pressure coming from her commanding officer. It was at this time that the plaintiff first consulted Dr. Carmichael. He saw her for approximately one hour and forty minutes, and advised her on how to deal with the stress she was feeling. His conclusion was that she was not suffering from any psychological condition at that time. He did not see her again until over two years later on June 20, 1995.

[151] According to the plaintiff, the conflict with Staff Sergeant Stewart was amicably resolved, and she experienced no further problems until the arrival of the defendant Smith.

[152] The defendants also raised the possibility that the plaintiff has a family history of mental difficulties. The evidence, however, is clear that there is none, save for the possibility that her maternal grandmother may have had dementia of the Alzheimer type. There is no evidence to indicate any other type of history, or that the maternal grandmother's problems play a role in the plaintiff's current difficulties. To the contrary, the evidence indicates that the plaintiff was, prior to her problems at work, a healthy, capable woman.

[153] Defence counsel quite properly emphasized that much of the evidence adduced is hearsay and, therefore, not admissible as proof of what actually occurred at the detachment offices. The defendants argued that it is of the utmost importance to assess the actual working environment at the Merritt detachment as opposed to what the plaintiff perceived it to be. Counsel further warned that the evidence must be viewed in light of the fact that the plaintiff has a tendency to personalize comments that are made to her. In other words, defence counsel suggested that it is the plaintiff's personality and the stresses unrelated to her work that is the source of her current problems.

[154] There is merit to this argument. To use a well-known euphemism, the question is whether she had a "thin skull or a crumbling skull?"

[155] There is no doubt that the plaintiff suffers from depression. Dr. Carmichael, in a letter dated August 20, 2003, stated: "Ms. Sulz's diagnosis according to the DSM-IV criteria has been Major Depressive Disorder, single episode, chronic, with anxiety and irritability features." He went on to say:

> Symptoms have included combinations of depressed mood, loss of interest/pleasure in things once enjoyed, low self-esteem, irritability, loss of appetite and weight loss such that at one time hospitalization was considered, significant anxiety, fatigue/loss of energy, strong feelings of guilt, low libido, cognitive impairment (concentration, memory, decision-making), social withdrawal, psychomotor retardation, and hypersomnia/unrefreshing sleep. Thus, she has not been able to pursue gainful employment since the condition was diagnosed in 1996 due to her condition and its unpredictability. It is clear to me that she can never return to police or related work.

[156] Further on in his letter, Dr. Carmichael states that the "[p]roximal cause of the depression is the long period of work place harassment by the detachment commander at the time, S/Sgt. D. Smith, and by two of his subordinates."

[157] Dr. Carmichael repeated this opinion while testifying. He explained that he formed his opinion from the plaintiff's consultations and from the letter the plaintiff received from Chief Superintendent Cameron at the conclusion of the RCMP internal investigation. Although Dr. Carmichael agreed that an unexpected pregnancy can add to the pool of causes for depression, he was adamant that the plaintiff has experienced depression since the birth of her second child, but not because of the birth of that child.

[158] In June 1997, Dr. Roland Bowman, the regional psychologist for the RCMP Health Services, sent the plaintiff to see Dr. Semrau, a psychiatrist under contract with the RCMP. In his report, Dr. Semrau confirmed Dr. Carmichael's diagnosis, and agreed that the depression was an ongoing problem. In forming his opinion as to the cause of the problem, Dr. Semrau relied, of course, on information provided to him by the plaintiff. On page 2 of his letter, contained in exhibit 1, he says:

> I appreciate that I have heard only one side of the story and I am certainly not in a position to carry out an investigation of her allegations. I would simply note that even if only a portion of her allegations are accurate, she has described what amounts to a rather serious psychologically toxic work environment to an extent which would likely cause many or even most people in similar circumstances to experience substantial psychological symptoms as a result.
>
> It was in this context that Cst. Wilson developed a major depressive episode which appears to have begun sometime in 1995 and has continued, with fluctuating intensity, up to the present. The symptoms of this depression have included loss of appetite, substantial weight

> loss, very disturbed sleep, low energy, depressed, irritable and agitated moods, impaired concentration and energy and functional impairments as a wife, mother and police officer. This depressive episode was probably at its worse from about December 1995 until May 1996 and appears to be present at about half its peak intensity at the present time.

[159] Although there are many other stresses in the plaintiff's life, and although she may tend to personalize incidents that others might not, the evidence as a whole shows that the harassment which she experienced in 1994 and 1995 was the proximate cause of her depression, which in turn, ended her career in the RCMP.

[160] The plaintiff has therefore successfully established that the defendant Smith's breach of the duty of care he owed to her caused her serious psychological harm. Although Smith himself is protected from liability for his negligence by s. 21 of the ***Police Act***, the plaintiff has a valid claim for damages against the Provincial Crown based on the principle of vicarious liability.

DAMAGES

(i) General Damages

[161] Following her basic training, the plaintiff hoped to have a long and successful career with the RCMP. Her work and the social contact she had with other members was a very important part of her life. Her sense of self was, to a great extent, wrapped up in her position as a police officer and a member of the RCMP team. Her husband testified that he was attracted to her in part because of her strong, independent personality. The evidence is clear that prior to Staff Sergeant Smith's

arrival as the detachment commander and the plaintiff's second pregnancy, the plaintiff was enjoying her life as an RCMP officer.

[162] Dr. Carmichael, who has known the plaintiff since 1992 and who has dealt with her constantly since 1995, diagnosed her with a major depressive disorder in 1996. He is of the opinion that she will continue to suffer from depression to a greater or lesser extent for the remainder of her life and that her condition will have to be controlled with medication and counselling. Dr. Semrau confirmed this opinion.

[163] Dr. Kaushansky, a neurophysiologist, assessed the plaintiff in January 2004. He summarized his conclusions as follows:

> Although Ms. Sulz's cognitive functioning appears intact, the chronic depression has resulted in an inability to handle stress (and concurrent mental and/or activities) within the greater community. Her continued somnolence and quite rigid pacing of herself around clear daily parameters suggests that Ms. Sulz has developed some methodology in addressing family and community life – such scheduling is typically seen as sacrosanct with little flexibility for the typical vicissitudes of life. However, of importance is that this well-controlled structure does assist her in negotiating her daily affairs within her roles in family and community life.
>
> The medical discharge and its ensuing persistent and refractory depression have significantly impacted upon Ms. Sulz's ability to find other gainful employment within the community. Since her medical discharge, Ms. Sulz has required ongoing psychological intervention and psychotropic support. Given the time since the discharge and the chronicity of her depressive symptomatology, I am most guarded about her ability to return to any competitive employment within the community. In my view, Ms. Sulz might be able to do small and uncomplicated tasks on a part-time basis, in a stress-free environment and under a liberal time frame, but most probably not in the context of the marketplace.
>
> With regard to <u>treatment recommendations</u>, Ms. Sulz will continue to require the ongoing support of a treating psychologist as well as probable ongoing mood stabilizers for the foreseeable future. In my

> view she will always require the support of medical and mental health specialists.
>
> I will also state that had Ms. Sulz ever have needed to leave the RCMP, her level of intellectual functioning would have been sufficient to begin training in another area of interest – however, given what has transpired to date, I believe that she would find any retraining or further academic upgrading towards acquiring new skills quite formidable.

[164] The plaintiff's depression affects her relationship with her husband, her children, and her friends. Her concentration, memory, and ability to make decisions has been adversely affected. She must avoid stress in every aspect of her daily life. Her condition obviously has had a severe impact, not only on her ability to work, but also on the extent to which she can enjoy her life and function as a member of her family and her community.

[165] The defendants' assertion that the plaintiff was more susceptible to depression than others would have been does not excuse the defendant Smith's conduct or lessen the vicarious liability of the Provincial Crown. The defendants must take their victim as they found her. Thus, according to ***Athey v. Leonati,*** [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, the defendants must assume full responsibility for the plaintiff's disabilities that were caused or materially contributed to by the defendant Smith's actions.

[166] Counsel has referred me to the following cases on the issue of general damages:

(a) ***Unger v. Singh*** (2000), 72 B.C.L.R. (3d) 353, 2000 BCCA 94
(b) ***Chancey v. Chancey***, [1999] B.C.J. No. 551 (QL) (S.C.)
(c) ***Wong v. Luong***, 2004 BCSC 1489

(d) ***Nagy v. Canada*** (2005), 41 Alta L.R. (4th) 61, 2005 ABQB 26
(e) ***J.R.I.G. v. Tyhurst***, 2001 BCSC 369

[167] The award for damages in those cases ranges from $90,000.00 to $200,000.00. Based on a review of those cases and a comparison of the plaintiff's injury to cases where plaintiffs have been inflicted with life-long physical handicaps, I assess her general damages at $125,000.00.

[168] In making this assessment, I am aware that this figure is dramatically higher than the $5,000 in general damages awarded by Dubé J. in ***Clark***, a case involving somewhat similar facts. However, the plaintiff in ***Clark*** was able to recover her mental health and did not suffer the kind of lasting injury that the plaintiff in this case will be forced to deal with for the rest of her life.

(ii) Past Wage Loss

[169] The underlying principle in awarding damages is to put the plaintiff in the same position that she would have been in if the tort had not been committed to the extent that this is possible through monetary compensation. Thus, in dealing with pecuniary heads of damage, the award should reflect the plaintiff's actual loss.

[170] The plaintiff's disability commenced in February 1996. Because she continued to receive her full salary until her medical discharge on March 8, 2000, she suffered no wage loss during that time.

[171] After her discharge, the plaintiff received money from:

a) a Veteran Affairs pension;

b) a superannuation pension; and

c) disability benefits from Great West Life.

[172] The Superannuation pension is a pension that the plaintiff contributed to and is entitled to as a result of her years of service with the RCMP. The fact is that if she had worked for thirty-five years she would have contributed more to her pension, and it would have been much larger. She also contributed to the Great West Life insurance disability plan. Payments received from those sources are collateral benefits that should not be taken into account when calculating her past and future wage losses. A tortfeasor should not receive the benefit of the plaintiff's foresight in contributing to insurance and pension plans. Thus, the monies paid and payable under the Veteran's Affairs pension are the only monies that should be deducted from the plaintiff's wage loss claim.

[173] The defence argued that the plaintiff failed to mitigate her losses because she could have compelled Great West Life to continue paying long-term benefits equalling 75% of her salary for a longer period of time. That may or may not be so, but is not a consideration for this court because those payments were collateral benefits and, therefore, not a matter that plays a part in this damage award. Furthermore, no evidence was placed before this court as to the terms of the disability insurance or that the plaintiff was eligible for more payments.

[174] The plaintiff claims that her wage loss for the period between her medical discharge and the trial is $362,475.00. That amount includes money that the

government would have contributed towards her pension. The figure is derived from an expert report filed by Mr. Hildebrand, an economic consultant. The plaintiff agrees that the Veteran's Affairs pension payments totalling $80,441.00 should be deducted from that amount, resulting in a wage loss claim of $282,034.00.

[175] The amount of the wage loss suggested by the plaintiff was based on the 2001 census information pertaining to the annual income of female police officers. The average was $58,700.00, with incremental increases of $1,000.00 per year. The evidence indicates that the plaintiff's income for 2000 was roughly $51,000.00, which is over $7,000.00 less than the national average. This being so, it would be incorrect to use the national average as a base line. After taking account of the plaintiff's Veteran's Affairs pension, I find her past wage loss to be $225,000.00.

(iii) Loss of Future Income Earning Capacity

[176] The assessments by Dr. Mel Kaushansky, a neruopsychologist, and Dr. Gordon Wallace, a vocation rehabilitation consultant, indicate that the plaintiff is competitively unemployable in that she is only capable of working at uncomplicated tasks on a part-time basis, in a stress-free environment, and under a liberal time frame.

[177] In his report, Mr. Hildebrand took a mathematical approach in calculating the net present value of income to retirement at age 57 to be $926,652.00. If the plaintiff were to work to age 60, that amount would increase to $1,080,050.00.

[178] Mr. Carson, who is also an economic consultant, calculated the net present value of the Veteran's Affairs pension to be $278,109.00.

[179] These numbers are useful in that they provide some guidance as to what the plaintiff's future wage losses might be. However, there are obvious contingencies that must be weighed. There can be little doubt that the plaintiff's income would have increased if she had remained with the RCMP. She would have received the usual wage increases and would quite possibly have been promoted if she had not suffered the negative effects of the workplace harassment. Certainly, these factors played a role in Mr. Hildebrand's conclusion that the positive contingencies outweighed the negative contingencies.

[180] His conclusion, as a general proposition, may well be correct. However, it does not take the personal circumstances of the plaintiff into account. Even if she had not suffered from depression, she still would have had to cope with three young children while pursuing a challenging career that, of necessity, entails shift work, unpredictable hours, and the probability of transfers to other locations. Although the plaintiff's condition was caused by the harassment that she experienced, the evidence indicates that her personality is such that the pressures of pursuing a full-time career and raising a family of three children would have weighed heavily on her. Even though she was ambitious, it is, when viewed objectively, questionable whether she would have remained with the RCMP for 35 years. That is a significant negative contingency.

[181] However, even if the plaintiff might have eventually decided to leave the RCMP, the evidence suggests that without the devastating effects of the harassment she would have pursued and obtained some other form of remunerative employment. The plaintiff has three years of university education, and her early performance reports demonstrate that her analytical ability is high. This potential for other employment offsets the negative contingency that she may have decided to leave the RCMP before she completed 35 years of service.

[182] There is evidence that the plaintiff does some work after-hours on an irregular basis for her husband's business, and that she derives some income from that, although she is not paid directly. This will likely continue. There is also the possibility that the amount of work she can do will increase as her children grow older, and as the trauma she has experienced as a result of the harassment and this trial recedes into the past.

[183] Taking all the evidence into account and weighing all the contingencies, I assess her future income loss or diminished earning capacity to be $600,000.00.

(iv) Punitive and Aggravated Damages

[184] The plaintiff seeks punitive and aggravated damages. These two heads of damage are quite distinct.

[185] Aggravated damages are really a part of the general damages award, which is assessed at a higher level than usual for the type of injury suffered in order to compensate the victim for injury to feelings, dignity, pride, and self-respect resulting

from the manner in which the injury was inflicted. Those aspects are central to this litigation and, even though not quantified, have been taken into account in arriving at the general damages award.

[186] Punitive damages are not meant to compensate the victim, but are meant to punish the tortfeasor for egregious conduct that must be deterred. Although the defendants' conduct in this case was tortious, it was not of a nature that calls for the imposition of punitive damages.

CONCLUSION

[187] In summary, the plaintiff is entitled to the following damages:

Past wage loss:	$225,000.00
Future wage loss:	$600,000.00
General damages:	$125,000.00
Total:	**$950,000.00**

[188] This was a difficult trial containing numerous issues, the complexity of which is not readily apparent from these reasons. Accordingly, the plaintiff is awarded her costs on scale 4.

"G.W. Lamperson, J."
The Honourable Mr. Justice G.W. Lamperson