T.D. 11/92
Decision rendered on August 14, 1992

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

HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF Complaints filed under Sections 7 and 10 of the Canadian Human Rights Act

BETWEEN:

DOUGLAS H. MARTIN, ERNEST H. GROSSEK, ROBERT JAMES SLAVIK, DAVID E. KILMARTIN, RONALD McISAAC, J. JACQUES LEMIEUX, RAYMOND BLANCHET, GERALD ROBICHEAU, ROLAND LAVIGNE, PETER McCULLOUGH

COMPLAINANTS

- and -

DEPARTMENT OF NATIONAL DEFENCE and CANADIAN ARMED FORCES

RESPONDENTS

- and -

CANADIAN HUMAN RIGHTS COMMISSION

COMMISSION

DECISION

TRIBUNAL:

Sidney N. Lederman, Q.C. - Chairman
J. Grant Sinclair, Q.C. - Member
Daniel Proulx - Member

APPEARANCES:

René Duval
Counsel for Canadian Human Rights Commission

Barbara A. McIsaac, Q.C.
Meg Kinnear
Counsel for the Respondents

DATES & PLACE OF HEARING 1990 - February 9; May 22, 23 and 24;
June 4, 5, 6; September 24, 25, 26;
1991 - April 8, 9, 10, 11; May 22, 23, 24;
July 30, 31;
Ottawa, Ontario

1. NATURE OF THE COMPLAINTS

This case involves ten Complainants. Nine of the Complainants are former members of the Canadian Armed Forces (CAF) now retired; one of the Complainants, Douglas Martin, is currently a serving officer in the CAF. David Kilmartin and Robert Slavik are retired officers. The other Complainants Raymond Blanchet, Ernest Grossek, Jacques Lemieux, Roland Lavigne, Ronald MacIsaac, Peter McCullough and Gerald Robicheau had attained various non commissioned ranks at their retirement. All of the Complainants except Captain Martin have been compulsorily retired from the CAF.

The basis of the complaints, which is common to all, is that the CAF and/or Department of National Defence by pursuing a compulsory retirement age (CRA) policy, discriminated against the Complainants or deprived them of employment opportunities contrary to sections 7 and 10 of the Canadian Human Rights Act (CHRA). In the case of Martin, his complaint is a slight variation on this theme. Martin was due to retire in 1986, but was given a two year extension with the conditions that he was ineligible for promotion and was limited to a specific, geographical posting. During this extension period, his terms of service were converted to an indefinite period of service with a CRA of 55 and a retirement date of 2002. It is his position that he should not be subject to mandatory retirement. Further, he alleges that his career opportunities were adversely affected by the events which occurred before his service was converted, events which were dictated by the CRA policies.

II. COMPULSORY RETIREMENT AGE POLICIES OF THE CAP

The current CAF terms of service relating to the compulsory retirement age of of f icers and other ranks (OR's) are set out in the

Oueen's Orders and Regulations (Q.R. & 0.) Article 15.17 as amended, Table G, for officers and Q.R. & 0. 15.31 as amended, Table D, for OR's. The CRA is the same for both officers and OR's, namely age 55. These terms of service came into effect for general service officers on April 1, 1976; July 1, 1988 for specialist officers; and April 1, 1978 for OR's. The new terms apply to all of f icers who commenced service after April 1, 1976 (1978 for OR's) and to those officers and OR's whose service commenced prior to that date, but who have been converted to the new terms. But the CRA story is not quite this simple. The large number of exhibits submitted by the parties and the number of witnesses called to explain these policies demonstrate this. Each of the Complainants was retired from the CAF upon attaining his CRA. Only Grossek had reached the age of 55. Martin will be retired at age 55. All of the other Complainants were retired at various ages, but all were under 55. To understand why, it is necessary to review the evolution of the CRA policy.

(a) OLD TERMS OF SERVICE

The main evidence on the current and previous terms of service was given by Major Shirley Pare and Major Edward Razzell, both of whom are with the Directorate, Personnel Careers Administration. Their evidence is summarized as follows:

Under the previous terms of service, the CRA of a serving member of the CAF was determined by either the pre1968/pre-unification terms of service or the post-1968/postunification terms of service. Those members who joined the CAF before 1968, were governed by the "single service" terms of service, each branch of the CAF having its own CRA policies. With the unification of the CAF as of February 1, 1968, new terms of service came into effect which applied to those persons who joined the CAF after that date. However, a serving member could elect at any time before January 31, 1969 to remain under the single service (pre-1968) terms of service or be governed by the post-1968 terms. Once having made the election, the decision was irrevocable.

(b) NEW TERMS OF SERVICE

The new terms of service, which provide for a CRA of 55, were introduced as part of the Of f icer Career Development Program (OCDP) and the Other Ranks Career Development Program (ORCDP) The purpose of the OCDP and ORCDP was to address various problems in the CAF including an imbalance in the age and rank distribution, rank stagnation and slow promotion, high, unforecasted attrition rate among officers and pensions

that were severely penalized because of early retirement ages. There were similar problems with respect to the OR's with the further concern of a large number of members in the latter years of their service retiring at the same time with nobody coming up through the ranks to replace them.

(c) OCDP

The OCDP is a three tier system: - the short engagement (SSE/SE) ; the intermediate engagement (IE) ; and the

indefinite period of service (IPS), with the opportunity for conversion from one period of service to the next succeeding period. officers serve on the SSE while officer cadets and, once commissioned, serve on the SE. The SE terminates after 9 years of continuous commissioned service. Prior to the end of the SE, an officer enters the conversion selection zone for IE, and if the IE is offered and accepted, the officer will serve on an IE for a period of 20 years of continuous service.

Officers enter the conversion zone for IPS, generally after 15 years of service and are considered for selection during the next 5 years. If chosen for IPS, the officer will serve until age 55. If not offered an IPS, the officer serves until the IE is completed. The current practice, however, where no offer is made, is to grant a noncareer status extension for two years beyond the IE, after which time the officer is released from the CAF.

When first introduced, there were certain criteria which determined whether an IPS was offered, namely, rank, merit and quota. Major was the base rank for conversion from IE to IPS (with the exception of two specialty occupations) and no offers were made to officers below the base rank. A quota was imposed at the base rank and by. military occupation which limited the number of officers who would be offered an IPS. When the quota was in effect, offers for IPS were made in order of merit until sufficient officers had been accepted to fulfil service requirements.

At the present time, because of the service need for officers, the base rank is captain and there are no quotas. In general, officers serving on OCDP terms of service who have attained the base rank for conversion, will be offered an IPS automatically.

(d) ORCDP

The ORCDP is also a three-tier system, the three tiers being the basic engagement (BE), the intermediate engagement (IE) and the indefinite period of service (IPS). The BE is for 3 years and may be renewed for a further 3 years. At the four-year point, members, if suitable and given service needs, will be offered an IE which will run for 20 years of continuous service. If not offered an IE at that point, they will be released at the end of 6 years of service.

Commencing in the thirteenth year of service and continuing for the next 5 years, the individual is merit ranked annually and the merit score is accumulated over that period. Factors similar to the OCDP, namely, rank, merit and military occupation determine whether the member will be of f ered an IPS to age 55. Those not of f ered an IPS are released after 20 years of continuous service unless offered a lesser engagement for a fixed period of up to 5 years after which they are released. The current base rank for IPS is either sergeant or warrant officer depending on the military occupation.

(e) TRANSITION PROVISIONS

The introduction of the OCDP and ORCDP did not result in the automatic conversion of all serving members to the new terms of service. To do so would have perpetuated the problems experienced by the CAF at that time. On the other hand, it was considered that the interests of the CAF and the serving members would best be served by giving these members the opportunity, at least, to be considered for the new terms. The decision taken was a compromise, by way of "transition

provisions", between offering the new terms only to new enrolees and offering the new terms to all members of the CAF.

Under the transition provisions for officers, collective offers were made for conversion to the new terms to serving officers in their early years of service, those with less than 9 years commissioned service. Selective offers were made to those approaching the "decision point", the relevant decision point for this case being conversion to IPS.

A three-year conversion zone was established for those officers who, as of April 1, 1976, had attained the later of 17 years of service or 37 years of age until they reached the 20/40 point (that is, 20 years service or 40 years of age). During this period, officers were

considered for offers of IPS, depending on rank, merit, quota and military occupation. Those offered IPS would serve until age 55. Those not offered an IPS within the three-year period would continue to serve under their previous terms of service. For example, an officer who enroled in the CAF in 1970 with a CRA of 50 would enter the conversion zone for IPS at the later of 17 years of service or 37 years of age. If the officer was made and accepted an offer, he/she would serve until age 55. If not, the officer would retire at age 50, subject to being guaranteed a non-career status extension.

Similar transition provisions applied under the ORCDP. Initially, from 1978 to 1986, those members at the 17/37 point (17 years service or 37 years old) entered the conversion zone for IPS offers, and were considered for conversion, depending on rank, merit and military occupation. Additionally, an offer for IPS would not be made if it reduced promotion by more than 20% in the year the member was scheduled to retire. In 1986, the criteria were changed so

that only two ranks, either warrant officer or sergeant, depending on military occupation, were eligible for selection to IPS. If no offer was made during the conversion period, the member would retire upon attaining the previous CRA.

The transition provisions provide the opportunity to serving officers and OR's to be selected for an IPS thereby increasing their CRA to 55, which in most cases is higher than the previous CRA under the old terms of service. If not offered an IPS, the serving member maintains the previous CRA. In most, if not all cases, this will result in the member having more than 20 years of service, which is the maximum for those enroling in the CAF after 1976 and 1978 who are not offered an IPS.

(f) THE COMPLAINANTS AND THE CAP POLICIES

Of the ten Complainants, only Grossek and Martin were made and accepted offers of IPS with a CRA of 55. Grossek was released when he attained his CRA of 55. Martin, as pointed out earlier, is due to be retired when he reaches 55 years.
Slavik, being a specialist medical officer, was not eligible for selection for an IPS because he reached his CRA in 1987, before the OCDP came into effect for specialist officers.
None of the other Complainants were made offers of IPS, either because they had not attained the base rank or did not satisfy the

other eligibility criteria for selection. All were retired when they reached their applicable CRA.

The essence of the complaints, is that the Complainants were compulsorily retired from the CAF upon attaining a specified age and for this reason only. The Respondents did not seriously dispute that this constitutes a discriminatory practice under Sections 7 & 10 of the CHRA. Rather, the Respondents sought to justify the CRA policies as being a "bona fide occupational requirement" ("BFOR") within S.15(a) of the CHRA, or as "regulations" which come within s.15(b) of the CHRA.

The Commission questioned the constitutional validity of both Q.R.& 0. 15.17 and Q.R. & 0. 15.31, and s.15(b) of the CHRA, arguing that these provisions discriminate on the basis of age and thus, contravene s.15 of the Charter of Rights and Freedoms and are not saved by s.1 thereof. In our view, we must deal with the Charter issue only if we conclude that Q.R. & 0. 15.17 and 15.31 come within s.15(b) of the CHRA. And then only the constitutional validity of s.15(b) must be decided.

III. SECTION 15(b) OF CHRA: MAXINUM AGE BY REGULATIONS

Section 15(b) of the CHRA provides that:

It is not a discriminatory practice if

(b) employment of an individual is refused or terminated because that individual has reached... the maximum age that applies to that employment by law or under regulations which may be made by the Governor in Council for the purposes of this paragraph.

The Commission argues that to come within s.15(b), a law or regulation must have been made expressly "for the purposes of this paragraph". The Respondents disagree. They rely on the decision of the Federal Court of Appeal in Pacific Pilotage Authority v. Arnison, [1981) 2 F.C. 206 (F.C.A.). They also

rely on the plain meaning of the words and the legislative objective of this paragraph.

In the Pacific Pilotage case, s. 4(1)(a) of the General Pilotage Regulations, passed under the Pilotage Act, provided that every applicant for a pilotage licence could not be less than 23 years of age or more than 50 years. The Applicant, who had attained 50 years was denied eligibility for a licence and filed a complaint under ss.7 & 10 of the CHRA. The Applicant also argued that s.4(l)(a) could not be validly passed under the Pilotage Act and was ultra wires. The position of the Pilotage Authority was that it was required by law to take this action under s. 4 (1) (a) and relied on s.14(b) (now s.15(b)] of the CHRA.

LeDain, J., held that the regulation was valid and concluded at p. 210 that " ... the refusal of employment in the present case is sufficiently covered by the terms of section 14(b) of the Act... " and theref ore, could not be a discriminatory practice.

In coming to this conclusion, LeDain, J. did not address the conditions of application of s. 15 (b) nor does it appear from the decision that the question was even argued. Thus, we are reluctant to accept this case as decisive authority that Q.R. & 0. 15.17 and 15.31 are protected by s.15(b) of the CHRA.

In making the s. 15 (b) argument, counsel for the Respondents had some difficulty attributing a meaning to the words "for the Purposes of this paragraph" found at the end of paragraph 15(b). Counsel admitted that these words are superfluous and attributed the wording of the paragraph to clumsy drafting. In her view, the obvious legislative

objective is to exempt federal statutes and regulations concerning mandatory retirement from the purview of the CHRA. The paragraph should be interpreted as if it read

"employment of an individual is... terminated... because that individual... has reached the maximum age that applies to that employment by law or under regulations, which, for the purposes of this paragraph may be made by the Governor in Council."

That is, the concluding words are directed towards defining who can make the regulations and only regulations made by the Governor in Council come within the paragraph.

We do not agree. This interpretation could be achieved without the concluding words of s. 15 (b) . Counsel conceded this. If meaning is to be given to these words in the context of the paragraph, it

must be that a statute or regulation must clearly and unequivocally be made for the purposes of the said paragraph if they are to be exempt from the CHRA.

Q.R. & 0. 15.17 and 15.31 contain no reference to the CHRA. This is not surprising because they were passed prior to the enactment of the CHRA. Thus, even in the absence of express wording, it is difficult to accept the argument that they are regulations made for the purposes of s.15(b) of the CHRA.

We must also be mindful of the interpretive principles enunciated by the Supreme Court of Canada in a number of recent decisions with respect to the interpretation of human rights legislation. statutes like the CHRA are legislation whose nature is special, or indeed fundamental or quasi constitutional. They, therefore, must be interpreted in a broad and liberal fashion to achieve their object which is the elimination of discriminatory practices: Winnipeg School Division No. 1 v. Craton, (1985] 2 S.C.R. 150, 156; O'Malley V. Simpson-Sears, (1985] 2 S.C.R. 536, 547; C.N. v. Canada [1987) 1 S.C.R. 1114, 1134-1136; Robichaud v. Canada, [1987) 2 S.C.R 84, 92; R v. Mercure [1988] 1 S.C.R. 234, 268.

The corollary of this interpretive principle is to necessarily give a restrictive interpretation to the exceptions provided in anti-discrimination laws. A restrictive interpretation of paragraph 15(b) of the CHRA leads us to the conclusion that, if the legislature or executive wishes to be entirely free from the application of the CHRA in enacting a mandatory retirement age, it must fulfil the following conditions:

1) it must act either by means of a regulation issued by the Governor in Council or by means of a statute of Parliament; and

2) it must be clear that it has passed this regulation or statute for the purposes of s.15(b) of the CHRA.

This interpretation of s. 15 (b) best agrees with the case law. In Craton, supra, the Supreme Court of Canada ruled that the nature of a human rights statute is such that only a clear legislative declaration allows one to amend, revise or rescind it or to create exceptions to its provisions (supra at p. 156). It is important to stress, in regard to this case, that nothing in the text of Manitoba's Human Rights Act indicated that the legislature had to resort to an express derogation clause in order to set aside the application of the Act to another statute. Consequently, if in order to

guarantee the fundamental status of human rights legislation, the Supreme Court felt it necessary to require an express derogation clause of the legislature in the case of a human rights statute that did not contain any provision to this effect, such an interpretation is all the more necessary when there is an explicit direction in the law to this effect.

We thus conclude that Q.R. & 0. 15.17 and 15.31 are not exempt from the provisions of the CHRA.

IV. SECTION 15(a) of CHRA: THE BFOR DEFENCE

(a) Why 55?

The CAF has accepted 55 as the cut-off age as opposed to 50 or 60 primarily for 3 reasons:

(1) it is the maximum service retirement age with which the CAF has had experience;

(2) it is, in terms of the average age of enrolment, the approximate point that a member will maximize his or her superannuation annuity;

(3) it is the minimum age at which a retiring member with at least 30 years' service becomes eligible for annual cost of living indexing under the Supplementary Retirement Benefit Act.

When one surveys the CRAs utilized by military forces in other countries, one may find a common underlying basis. For example, in the United States the age of retirement for

officers is 60, 62 or 64 years of age depending on rank, and after 30 years of service for enlisted persons. The maximum age of entry into the U.S. military is 30. U.S. servicemen can retire after 30 years of service with 75% of their then current pay. Retirement ages for officers are more or less academic since the vast majority elect to retire after 30 years of service. Retirement ages in other countries vary between 45 and 60 and are often dependent upon rank and years of service. It would appear that if a

CRA is justifiable then the age that appears to be the one selected in any given country may well be dependent upon the point when a member maximizes and is eligible to receive his or her pension allowance. In other words, the CRA that is chosen ensures that the individual leaves with the most enhanced pension package possible. That may explain why a particular age is the CRA; but for the justification of a CRA at all, one must examine whether there is any social, performance or medical necessity for ending individuals' employment merely because they have reached a certain age.

(b) General Legal Principles

The seminal case dealing with the bona fide occupational requirement (BFOR) defence is ontario Human Rights Commission v. Etobicoke (1982) 1 S.C.R. 202. Most human rights decisions of courts and tribunals invoke this case as the starting point in their analysis. The Supreme Court of Canada in that case held that the establishment of a BFOR must rest on evidence produced by the respondent showing that its policy was imposed honestly and in good faith (i.e. the subjective branch of the test) and more importantly, that its policy is

"related in an objective sense to the performance of the employment concerned, in

that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." (Ibid. at page 208)

There is no issue in this case pertaining to the subjective branch. What must be considered is whether the mandatory policy of retirement at a certain age is related objectively to the performance of the military.

Thus, we must examine whether the social, performance and medical reasons advanced by the CAF in justification for its retirement policy meet this objective legal test which can best be described in an abbreviated fashion as one of "reasonable necessity".

(c) Social and Structural Requirements

The CAF is of finite size determined by the Government and it is highly structured. The requirement that the CAF train its own people makes it imperative that there be a steady flow through of personnel from

the lower ranks to the higher ranks and that there be release or safety valves for easing personnel out when and where it may be 'necessary in order to avoid rank stagnation and to promote career development and enhance morale. At specified career points the CAF has developed through the OCDP and ORCDP, the ability to maintain an appropriate balance between youth and experience at all rank levels. There is an exit control at the end of the short engagement (usually 9 years of service for officers and somewhat less for non-commissioned members) and an exit point as well at the end of the intermediate engagement (20 years of service). These are the principal means by which the personnel structure can be modified to

accommodate CAF requirements. In addition, if an officer or member serves beyond the intermediate engagement, there is a final exit point at the CRA of 55 which further contributes to organizational adaptability. The CAF takes the position that a mandatory retirement age of 55 is a necessary control to maintain organizational well-being.

The utilization of these valves creates a present picture of the CAF in which one finds few lieutenants over the age of 28, few captains over the age of 38, few majors over the age of 48. The CAF thereby maintains a highly regulated age-graded system of selections and promotions. It is age-graded in the sense that it is pyramidical in nature with the larger number of younger members with less experience at the base or lower ranks and a small number of older members with more experience in the higher ranks.

Lorne Tepperman, a professor of sociology at the University of Toronto testified in support of a CRA and regarded 55 as an appropriate age. He advanced four main grounds:

(1) all individuals are thereby treated equally with respect. to their exit from the labour force;

(2) less competent or motivated workers do not have to take competency tests;

(3) mandatory retirement tends to promote mobility;

(4) it provides stability in the pension system because demand can be more accurately predicted.

Professor Tepperman testified that mandatory retirement does create rules which protect people from arbitrary, paternalistic, unpredictable and possibly unjust exercise of power. In effect, an employee has comfort that he or she can stay there until he or she reaches a certain age. Secondly, he referred to the humiliation factor. Without a CRA there must necessarily be tests for competence and inevitably someone will be proved incompetent and thereby humiliated. Thirdly, for an organization which is not growing in size the only thing that regulates the age within the structure is the rate of retirement. While experience is a valuable thing, often fresh ideas, and more recent exposure to new technology are equally important for the organization.

With respect to recruitment and re-enlistment, Professor Tepperman testified that a CRA signifies to a recruit that there will be opportunity for promotion and advancement. These are the kinds of practical considerations, more so than notions of duty and patriotism, which motivate individuals to join the modern military. Accordingly, such organizations that want to attract and retain good people are going to have to offer an attractive career structure.

Professor Tepperman concluded that a CRA is both organizationally necessary, humane and justifiable. Whether the CRA should be lower or higher than 55 can be debated, but in his view it should be somewhere in the 50's. Before that age, people have a strong involvement in their career and in raising a family. When an individual gets into his or her 50's, family obligations diminish as do career

ambitions. Thus, it is more financially feasible for them to think about increased leisure or changing jobs or careers.

Although Professor Tepperman's concerns are legitimate in a general sense, they are not compelling in the context of the Canadian military. For one thing, in view of the fact that there are release points after periods of short and intermediate engagements, an individual who is being recruited realizes that there is no career certainty in the CAF beyond those two points, let alone whether he or she will remain to age 55. A potential recruit surely would pay scant attention to the problem of whether there is a guarantee of further advancement and promotion beyond those two periods of engagement when there isn't any assurance that he or she will even make it to that level.

It is true that with the abolition of a CRA, greater emphasis will have to be placed on testing for physical and medical fitness. (More will be said about this later in these reasons). It is our view, however, that the failure to pass such tests at a later stage in one's career will not result in personal humiliation as posited by Professor Tepperman. There is a significant dif f erence between subjecting university professors, for example, to competency tests and subjecting military personnel to fitness and health requirements. The primary role of the military is to prepare for war or civil emergencies and execute government directives in the event of war or civil disturbances. At all times, individual members of the CAF must have the capability to perform as a soldier and to demonstrate such capability, that is, the "soldier first" principle. The raison d'être of testing is to ensure that the CAF, at any given time, can meet its mandate. Given this requirement and expectation which is clearly communicated to each recruit from the beginning, it is

hard to accept the humiliation argument. In any case, the failure to satisfy the appropriate tests does not necessarily lead to release from the CAF. Inability to perform may be dealt with in part through the Career Medical Review Board process where there is the possibility of waiving a medical deficiency; or by a programme which would allow a member to achieve the minimum testing standards.

Professor Tepperman was not aware that mandatory retirement had been abolished in Quebec and in the federal public service. It was abolished in Quebec for some business enterprises in 1982 and phased in over a period of two years to cover the entire business sector. Studies were subsequently conducted to determine what effect abolition had on businesses and salaries. Mr. Noel Boulianne, a member of the Research Directorate of the Quebec Ministry of Manpower, was involved in such studies. He testified that the total number of persons in 1987 who chose to stay on rather than retire was less than 4% of the total of salaried employees. out of that number, a large majority had not served enough years to accumulate the maximum pension and, therefore, continued to work past the former retirement age of 65. Those persons who continued on past that age, on average stayed for a further period of 18.8 months. Moreover, the Task Force Report on Mandatory Retirement, prepared by Professor Ianni in 1988 estimates that less than it of the total provincial labour workforce would work beyond the age of 65 if mandatory retirement was abolished.

Although this evidence related to an age level of 65, not 55, it is instructive in that it indicates that few people tend to stay beyond the

traditional CRA and those that do, usually do so for the purpose of enhancing their pension package. once they have maximized their pension eligibility, they retire.

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Contrary to the theoretical precept posed by Professor Tepperman, the evidence shows that a CRA is not critical to the organizational needs of the CAF. The evidence of Brigadier General William Stephenson, Director General, Manpower Utilization, is to this point. His responsibilities within the CAF are to forecast and maintain the personnel inventory. According to Brigadier General Stephenson, the CAF must have a 10% personnel turnover each year to provide both a trained base of people for the junior ranks and good career opportunities.

The attrition rate in the CAF f rom year to year is an integral part of personnel planning and predictability of attrition rates is thus important. Within the CAF, there is scheduled attrition and unscheduled attrition.

Those who are entitled to an immediate annuity or have completed a term of engagement - either the basic engagement or a fixed period of service - or have reached CRA come within the category of scheduled attrition.

Those who leave the CAF for the following reasons:

(a) voluntary (on request);

(b) unsuitable;

(c) misconduct/medical/death;

(d) failed training

come within the category of unscheduled attrition.

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Brigadier Stephenson stated that the unscheduled attrition for all members of the CAF totalled 90.2% of the total attrition (scheduled and unscheduled) for the five-year period, 1985 to 1990. Further, the CAF has been able to predict the unscheduled rate quite accurately using historical information. of greater significance in this case, is the

attrition rate attributable to CRA. The total average scheduled attrition rate (of which CRA attrition is a part) for the CAF for the five-year period was 9.8%.

Of this 9.8%, about 10% constitutes CRA releases, leaving an overall factor attributable to CRA of only approximately 1%. To keep it in perspective, the ten-year average between 1980 - 1990 of individuals leaving the military because they had reached their CRA was 751. That number was made up of 321 officers and 430 ORIS. In that period, the strength of the regular military was approximately 20,000 officers and 65,000 OR's.

Furthermore, a considerable number of this it would nevertheless retire at about age 55 whether or not there was a CRA of 55. On this point, Brigadier General Stephenson said it would be unlikely that a member with 30-35 years of service and a fully paid up annuity of 70% of salary would stay on much beyond that time. At that point in his or her military career, there would be little incentive to stay other than for the pure enjoyment of one's work.

Brigadier Stephenson indicated that if the CRA were abolished, it might take some time to establish the historical base in order to predict the attrition rate, but it could be done. It may be that individuals who would have left within five years of their approaching CRA for second careers will not now plan that second career and stay longer in the

CAF. However, having regard to the evidence that most people, once having achieved the maximum pension, prefer to retire and that the CAF can develop a new historical base for predicting attrition, we do not believe that the initial uncertainty of prediction is a strong enough reason in itself to maintain the current CRA policy.

Brigadier Stephenson also stated that the three-tier system of the OCDP and ORCDP allows the CAF to regulate attrition, provides certainty in forecasting and permits the CAF to maintain its strength particularly in a growth situation. Given the OCDP and ORCDP and a predictable rate of attrition, the CAF should be able to meet both its organizational needs and the career expectations of its members.

As stated earlier, the Supreme Court in Etobicoke supra speaks of an occupational requirement that is "reasonably necessary" to ensure the adequate performance of the employment. This is indeed a

criterion of necessity, not of convenience. For all of the reasons stated, we cannot conclude the evidence demonstrates that the CRA policy is reasonably necessary to the organizational needs of the CAF.

Nor does it appear that the removal of the CRA would have any serious consequences on the pension scheme. Under current pension superannuation legislation, there is a maximum limit of 35 years of pensionable service. Thus, the maximum pension that a member would receive is 70% of his or her best 6 years of service. There is a tendency for members to leave the CAF once they have maximized their pension. As Mr. David Primeau, section Head, National Defence Headquarters, responsible for pension policy issues, and other social programmes testified, one's pension could in fact

become inverted if he or she stayed in the CAF in situations where the annual pay increases did not match the inflation rate. Because the pensions are indexed to the Consumer Price Index, a member would be better off leaving the CAF early and having his/her pension grow based on the CPI than to stay in longer and simply have the pension grow by a slight increase in earnings.

Professor Tepperman cautioned that a person's employment decisions depend to a large extent on economic conditions. He stated that although in recent years, individuals (equipped with a comfortable pension package), have opted for early retirement, economic conditions could well change over the next five to ten years and cause people to stay on because the pension might be inadequate for their needs. We, however, cannot give much weight to this speculation. When assessing a BFOR, we must deal with its justification on the basis of the current situation and historical analysis. our conclusion is that the role played by a CRA to date has not been so significant that its discriminatory effect can be justified on this basis.

(d) The Safety Factor

(i) General Considerations

The other justifications put forth by the CAF in support of their mandatory age retirement policy fall under the rubric of safety concerns arising from the deteriorating effects on an individual caused by the aging process and the potential consequences in terms of a soldier's performance in combat conditions. The onus is on the CAF to show, on the

balance of probabilities, that there is no other solution to this problem than to apply a blanket exclusion of individuals upon their reaching a certain age. In Robinson v. Canadian Armed Forces, (1992) 15 C.H.R.R. D95 at pages D/118 and D/119, in the context of a BFOR allegedly based on the safety concerns with respect to epileptic members of the CAF, the Canadian Human Rights Tribunal outlined what we consider to be the inquiry that must be undertaken:

"... If, the employment presents a risk for the safety of the employee, of his fellow employees or of the public, the employer must demonstrate this by submitting detailed evidence related to the duties to be discharged and the working conditions in its business. It is possible that there will then be no other solution than to recognize the need for an occupational requirement consisting of the blanket exclusion of a group protected by the Act. To reach that conclusion, however, the employer must also prove on the basis of the balance of probabilities (1) that the group of persons for example, epileptics - excluded by its employment policy presents "a sufficient risk of employee failure" (Etobicoke, supra-, at p. 210 [D/784, para. 6896]) to warrant its general exclusion, (2) that it is impossible to assess the risk presented by each member of a protected group on an individual basis and (3) that the blanket exclusion of a category of persons is not an excessive means, that is, it is proportional to the end being sought."

(ii) The Effects of Aging on a Soldier's Performance

Few would deny that military operations are inherently risky. As stated by the Tribunal in Gauthier v. CAF (1989) 10 C.H.R.R. D/6014 at D/6040:

"The principle of operational effectiveness in time of war or national emergency is the fundamental criterion against which the CAF has developed and continually assesses its personnel policies. Operational effectiveness, or combat readiness and preparedness, determines personnel policy, and that policy by logical extension must seek to minimize the risk or hazards to life and limb that combat readiness might, or usually, entails. In short, as witnesses for the

CAF pointed out, combat is a risky business to individuals, units and, ultimately, the civilian population. The goal of operational effectiveness is, ultimately, risk management to lessen the danger to one's own armed forces and maximize the risk to those of the enemy. It follows that risk lies at the heart of the defence put forth by the CAF."

Notwithstanding the advancement of technology, modern warfare has not become entirely a "push button" experience. As witnessed in both the Falklands and Gulf Wars, it still demands physical strength, agility, speed, resilience and endurance on the part of the individual soldier. our view on board The HMCS Skeena and at Canadian Forces Base Petawawa gave us a good appreciation of the physical side of combat conditions and the difficult environments in which members of the military must live and function. A failure or lapse in this context could result in bodily injury, fatalities and the loss of the mission.

The CAF maintains a CRA, in part, because of the effects of aging on these abilities. There is ample evidence to indicate that aging happens to everyone, is progressive, accelerates at maturity, is irreversible and detrimental to performance. Starting in the late 20's or early 30's each year there is some loss of physiologic capacity. The rate of loss can be slowed down by living a

sensible lifestyle and with proper physical conditioning, but it cannot be reversed.

In addition, with aging, there is increased susceptibility to disease and illness and morbidity (i.e. one's likelihood of becoming ill and the slowness in recovery from illness.)

The position taken by the CAF is that aging causes a decrease in both anaerobic and aerobic capacity. In this sense, one has less reserve, requires longer recovery time, is more susceptible to injury and has reduced work capacity. There is also a loss of sensory capacity which affects reaction time, reflex movement and speed of movement. Aging also results in a decrease in maximum strength potential, a greater susceptibility to fatigue and less sensitivity to thermal reaction and pain tolerance. There is a decrease in motor functioning which in turn means less flexibility, loss of lean muscle tissue, decreased muscle power and decreased ability to repair old muscle or make new muscle. With aging, there is a decline in the endocrine system which makes one more susceptible to bone fracture when placed in a situation of stress.

The Commission agrees that these decrements do follow with aging, but argues that the rate varies from individual to individual and can be slowed down by maintaining a good lifestyle including physical fitness, proper dietary habits, non-smoking, control of weight etc.

Lieutenant Colonel Jack W. Stow, the Personnel Policy Analyst at National Defence, posed the problem in a memorandum he prepared in 1989 as follows:

"The Canadian Forces policy of mandatory retirement on the basis of age is founded in part on the belief that younger individuals are generally better able to meet the extraordinary physical and mental demands and stresses placed upon military personnel in times of emergency and war. This belief in turn is based on the assumption that at some point in the human life-span, health and fitness begin to decline as the body ages. Indeed a number of studies on the aging process support this assumption in a general sense, but do not furnish evidence of such precision as to indicate exactly the age at which a military member might no longer be expected to be capable of performing required military tasks. Individual differences in lifestyle, nutrition and exercise, combined with genetic and physiological variables make accurate prediction virtually impossible. Under these circumstances, the organization appears to be faced with two basic options with respect to terminating employment "on retirement"; to terminate employment at some unpredictable point when individual physiological and/or psychological evaluation reveals an inability to meet some predetermined standard, or at a fixed point (such as age 55) before which there is a reasonably high probability that all members will be capable of meeting the physiological and psychological stresses of military service, and beyond which such probability declines unacceptably."

There is no quarrel with the risk f actor in the military context arising from the aging process. We would agree that the effects of aging on people raise sufficient concerns about risk. That, then, brings us to a consideration of whether the second factor referred to in the Robinson case has been met, namely, that it is not practically possible to assess the risk presented by each member of a protected group on an individual basis.

Individual Evaluation of the Employee

The object of the CHRA, as set forth in section 2, is to guarantee to every individual, in certain vital areas such as employment, housing or access to services and public places, the right to be evaluated individually, on his or her own merits and capacities, rather than in terms of his or her membership in a group or category of persons identified by a common Personal characteristic: Ville de Brossard V. Quebec, (1988) 2 S.C.R. 279, 297-298 (Beetz, J.), 344 (Wilson, J.); Air Canada v. Carson, (1985) 1 F.C. 209, 239 (C.A.).

The logical consequence of such an objective is that the general exclusion of a group of persons from employment will only constitute a BFOR if it is not reasonably Possible to assess each employee individually by means of appropriate tests. This consideration is particularly relevant when the employer claims that most of the members of a group of employees are a saf ety risk. The problems of conducting individual evaluations may be due to various f actors, such as the lack of appropriate tests or, if such tests exist, the prohibitive costs or the f act that the administration of the tests entails a serious risk for the health or safety of the employees. In all cases, the employer has the burden of proving that individual testing is not possible, as was clearly indicated by Sopinka J. on behalf of a unanimous court in Saskatchewan Human Rights.Commission v. City of Saskatoon, [1989) 2 S.C.R. 1297 at p. 1313:

"In my opinion, these cases point the way to the proper approach with respect to individual testing. While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of requirement if he fails to deal satisfactorily with the question as to

why it was not possible to deal with employees on an individual basis by, inter alia, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably by not adopting it".

See also Central Alberta Dairy Pool v. Alberta Human Rights Commission [1990] 2 S.C.R. 489 at p. 519 (Wilson J.) and pp. 526-27 (Sopinka J.).

In City of Saskatoon. supra, the Supreme Court held that the rule of mandatory retirement at age 60 for firefighters constituted a BFOR because the Human Rights Tribunal had been convinced by the evidence led by the employer that there was a relationship between aging and the decline of capacities, and that there were no tests that could reliably measure the risk posed by a particular individual over the age of 60. Having decided that the Tribunal had not committed an error of law, Sopinka J. then held that it was not the responsibility of appeal courts to question the conclusions of fact drawn by the court of first instance.

We do not consider ourselves any more bound by the conclusions of fact reached by the Human Rights Tribunal in City of Saskatoon, supra, than that Tribunal was bound by the conclusions of fact at which the Human Rights Tribunal had arrived at Etobicoke, supra, a few years previously.

The real issue between the parties and for this Tribunal is whether there is an effective means to test individuals for the purpose of determining whether they meet the appropriate standard.

This raises two questions:

(1) What is the appropriate standard?

(2) As a reasonable alternative to a blanket age retirement rule, are there sufficient, inexpensive means for testing and ensuring that individuals, regardless of age, can meet that standard?

As to the former, we were somewhat surprised to learn from the evidence of Colonel Jack Stowe that, although the CAF professes to have as its objectives a uniform capability and preparedness among all members to fight a war should it become necessary, the CAF's levels of fitness, in fact, are only slightly above that of the general population and the trend of fitness decline within the CAF is at the same rate as in the general population. The CAF says it has to work with the population that it is given.

It seems paradoxical to us that the CAF holds high as its mainstay principle that at all times it must have a membership uniformly fit and capable of fighting a war, yet it is content that its personnel is not much fitter than the general population. How can the CAF truly fulfil its mandate but not have in place fitness and other programmes to ensure that its personnel is in fighting form? Can the absence of such programmes

justify a blanket reliance by the CAF on the concept that aging causes general decrement in physical capability and, therefore, is a bona fide reason for removing individuals from the military at a certain age? It would not be unreasonable to insist that the CAF establish appropriate criteria to ensure that its personnel is in a state of fitness well beyond the average Canadian. Its mandate requires no less. Moreover, since its members are subject to unlimited

liability, the CAF has a responsibility to its members to lessen the risk of death and injury.

This brings us to the question, whether there in fact exists a method of testing which can predict how an individual will actually perform under real wartime conditions. Dr. Robert Wiswell, a Professor of Exercise Sciences at the University of Southern California, called on behalf of the CAF, testified that, although one could test components of fitness and thereby test the ability to do specific tasks associated with a job at a given point in time, these tests tell very little about how an individual will actually perform on the job. In his opinion, fitness tests are helpful in making hiring decisions in that it can be used as a screening tool to eliminate people who have deficits. But he does not regard physical fitness testing as a valid measure of successful performance. And it certainly cannot simulate the psychological overload in combat and, therefore, cannot replicate combat conditions. He concluded that age provides the best single estimate of cellular functions across all organ systems and is, therefore, better than any testing mechanism as a measure or estimator of physiologic status.

Dr. Paul Davis, an expert in Exercise Physiology, on the other hand, was of the view that levels of fitness can be measured. There is a level of fitness that will provide a confidence index that an individual can respond to the arduous nature of combat in most or all military occupations. It is true that the effects of aging cannot be stopped or reversed, but the process can be positively affected by training. His opinion was that chronological age provides only a crude approximation of a person's capabilities. Although the aging process does impact on fitness, the impact varies depending on the individual and a

considerable variability exists between individuals both within the same age group and between different age groups. For example, a person aged 42

may be fitter than a 25-year old. In his view, to rely on chronological age as the sole predictor of functional work capacity falls short of the objectivity that can be obtained through functional testing.

According to Dr. Davis, the principal way of assessing one's physiologic capacity is by that person's V02 max level. V02 max is the gold standard for judging ability to do prolonged work. The scientific basis for this standard is the f act that oxygen is the fuel that carries out the body's work. The higher the level of the V02 max, the higher the level of work f or prolonged periods of time one can perform without becoming fatigued. Age alone appears to have very little detrimental ef fect on V02 max. One study has shown that age contributed to only 9% of the difference that was found in the V02 max of 35 year olds and 60 year olds. The great part of the variability is accounted for by lifestyle habits.

The CAF does not have a physical fitness minimum standard at the present time although it is working on developing such a standard.

There are physical fitness tests each year for every member of the CAF which involve push-ups, sit-ups, a hand grip strength test and a measure of V02 max by doing a step test, and weight and height measurements. The purpose of these tests is merely to ascertain whether a member needs to improve his fitness, but there is no link between this test and the basic fitness needed to be a soldier.

It may be that combat conditions cannot be truly simulated so as to know how a soldier will actually perform and react under such conditions. However, we accept

the evidence of Dr. Davis that it is possible through the use of physical fitness and endurance tests conducted on a regular basis to test for war readiness or onefs ability to fight as a soldier. The tests suggested by Dr. Davis are capable of predicting one's general ability to fight a war in adverse environmental conditions and under duress. There is no assurance how an individual will react psychologically to the fear and terror of war but that has nothing to do with one's age.

It would appear that the present fitness testing in the CAF is inadequate to ensure that soldiers have the requisite level of physical capability and endurance. What is needed is a new battery of tests to ensure the standard. The CAF certainly is capable of developing them. These are presently being worked on by the CAF and there is no reason to

believe that new tests cannot be devised and implemented in short order. As for costs, they would seem to be relatively low since fitness tests generally consist of self-exercise or exertion.

Nor do we think that there is much risk of physical injury arising from the implementation of testing procedures. Dr. Wiswell testified that there was a risk of injury with testing which increased with age. However, Dr. Davis pointed out that the U.S. army routinely tests on a twice per year schedule. This involves a comprehensive fitness programme including a multiple risk factor analysis of soldiers over 40 to determine who can safely do a regular programme of testing. The U.S. Navy also uses a risk factor assessment to determine who can safely participate in fitness testing. He also stated that the risk in a clinical setting was about two incidents out of every 10,000 events for

accidents and the chance of a morbid event as a result of physical activity is infinitesimally low.

Our conclusion on this issue is that fitness in all respects is very much an individual matter. The evidence is that if one follows a proper exercise programme, even with aging that person should be able to maintain the requisite standard of fitness necessary to perform the tasks of a soldier. We have concluded that a system of testing can be implemented to determine appropriate standards of strength, speed, flexibility, agility, endurance etc., all of which would be required in extreme stressful conditions.

(iv) Medical Considerations

Dr. Christopher Patterson, a specialist in geriatric medicine and Dr. Arthur Leon, a cardiologist and epidemiologist, gave expert medical evidence, Dr. Patterson on behalf of the Respondents and Dr. Leon for the Commission. Dr. Leon is a colonel in the U.S. Army Reserve and has been a medical officer in the army on active duty or in the Reserve for 32 years. Both identified a number of diseases that become more prevalent with age, in particular, coronary artery disease (CAD), stroke, cancer, osteoarthritis and peripheral vascular disease, diabetes mellitus and chronic obstructive pulmonary disease and agreed that they may impact on functional performance, morbidity and mortality. However, these diseases other than CAD and stroke, are of a progressive nature and do not result in sudden incapacitation. These diseases are easily tested for, diagnosed and can be readily monitored. Individuals with these diseases can be removed from their positions bef ore the problem becomes acute or

diminishes their performance. The real concern is with sudden incapacitation caused by CAD or stroke and the consequences

for that person, his or her colleagues and the mission as a whole.

CAD is the most common cause of death in adult males in the western world. In one study, presented in evidence, it was demonstrated that the prevalence of CAD among males aged 40 to 49 was about 5.5%. At ages 50-59 the prevalence was nearly double. The most dramatic effect of CAD is a heart attack and approximately 40% of people who suffer it will die instantly.

CAD can of ten be detected in advance but not always so.

There are risk factors which are fairly well defined which can assist in determining the statistical likelihood that an individual will have CAD.

These risk factors are male gender, increasing age, cigarette smoking, abnormal levels of lipids such as cholesterol, high blood pressure and a positive family history. Controlling these risk factors helps prevent CAD.

Age is a contributor that negatively impacts, on the risk of CAD. However, it is essentially a rather poor predictor in that everyone does not develop CAD as they age. Physiological factors can be modified. For example, cholesterol can be controlled by diet and by drugs. Body weight can be controlled. Physical exercise will raise the level of good cholesterol in the body. Smokers can give up the habit. Good diet can be developed to ensure avoidance of high fat intake, high cholesterol, excessive calories etc. In fact, the evidence is that the incidence of CAD is falling in North America. It has declined some 40% since 1960 with the increasing awareness of the risk factors and continues to decline at the rate of 3% per year.

Beyond the multi-factor analysis, both medical experts agreed there is a range of tests to detect CAD,

including, a resting ECG, an exercise ECG, thallium test and arteriography. However, Dr. Patterson was reluctant to rely on testing to predict CAD, especially the ECG tests because, in his view, they do not perform very well, in a population with a low prevalence of CAD. Further, there are

both risks and costs associated with such testing particularly with the higher order of tests.

Dr. Leon was much more positive with respect to screening tests. He testified that the ECG, especially the exercise ECG, is a very useful tool to add to the predictive value of the traditional risk factors. Physical exertion makes the heart work harder and will increase coronary blood flow three to four fold. At rest there may not be any diminution of coronary blood flow, but during exercise the requirements increase and one can detect the imbalance between supply and demand. The exercise test can also determine the functional capacity of the individual which is another predictor of coronary disease and also rhythm disturbances can be provoked.

The question is whether the multi-risk factor analysis together with the use of a resting ECG and an exercise ECG are sufficient to predict whether an individual, particularly over the age of 40, is susceptible to sudden incapacitating CAD. The Report of the Joint American College of Cardiologv American Heart Association. "Guidelines for Exercise Testing", which was submitted in evidence by Dr. Leon, points out that there is general agreement that exercise testing is justified for persons with known or suspected CAD for the purpose of determining the likelihood of CAD; to estimate prognosis; to determine functional capacity and to determine the effects of therapy. With respect to apparently healthy individuals with no risk factors, the Report states

that exercise testing is of little or no value. However, the Guidelines go on to say that it is appropriate to screen some apparently healthy individuals, namely, men over the age of 40 years who have two or more abnormal risk factors or a family history of premature CAD. They also recommend the exercise ECG to evaluate males over the age of 40 who are involved in public safety occupations such as pilots, railroad engineers, firemen, policemen and truck or bus drivers.

Counsel for the CAF has emphasized the low predictive value in terms of sensitivity of the exercise ECG, i.e. 50%. Sensitivity is the ability to detect a condition if it is present. specificity is the ability to rule out the condition if the test is negative and studies have shown that the exercise ECG has a specificity of 90%. Obviously, the ideal test would be loot specific and 100% sensitive. The important statistic is the specificity percentage because from the CAF's perspective it wants to ensure that none of its members is at risk of suffering sudden incapacitation from CAD. The exercise ECG has a high predictive value in

this regard. A normal ECG result will provide the requisite assurance that the individual is low risk. It may be that if an individual shows an abnormal or positive result in the ECG, there is only a 50/50 chance that this individual has CAD. If that is so, from a precautionary, diagnostic and treatment point of view, that individual would then have to move on to a more invasive test to determine whether in fact he or she is suffering from CAD or whether the test was a "false positive".

The evidence demonstrates that chronological age alone, is not a reliable factor for predicting risk of CAD at least until you get to the extremes of life. Factors, other than age have a profound effect on the potential for CAD. For example, the average risk of a 35 year-old having a

heart attack is 1% or 2% in six years. For a 35 year-old with low risk factors, the chance of a heart attack drops to 0.3%. By the same token, there are also men at the age of -15, because of high level of risk factors who have a 25% chance of having a heart attack. A 55 year-old male with average cholesterol, normal blood pressure, normal ECG, normal blood sugar and a non-smoker is a low risk person. The probability of his developing CAD is 9.5% in six years, higher than the average 35 year-old but considerably lower than the 35 yearold with more risk factors.

As for the risk of testing for CAD, Dr. Leon has significant experience in exercise testing and has published a number of studies relating to this question. His opinion is that the risk involved in testing is insignificant and he has never had adverse experience in carrying out the tests. It was his conclusion that if you use testing in lieu of age, you will end up with a healthier, more vigorous military force.

There was not a great deal of evidence as to the costs of testing. Dr. Patterson stated that testing can be costly when referring to CAD. Dr. Leon's evidence was that the costs of testing for risk factors such as cholesterol and blood pressure were low and he believed that the ECG testing costs were relatively modest.

Stroke is a sudden neurological deficit resulting from a temporary or permanent interruption of the blood supply to an area of the brain. How a stroke affects physical performance depends very much on how much brain tissue is damaged and the part of the brain affected.

Both experts agreed that strokes were relatively uncommon until later in life. According to Dr. Patterson, strokes tended to occur after the age of 50 and Dr. Leon testified that the probability of a 55 year-old man having a stroke is about 1% in 8-10 years. Most stroke deaths occurred after the age of 75 and only 13% of deaths were persons under 65.

The important consideration for stroke, as both doctors stated, is that the biggest risk factor, high blood pressure, can be tested for and treated either by drugs or lifestyle modification. Other risk factors are smoking, high cholesterol and diabetes. Although, there may be no test that can predict if and when a person may suffer a stroke, the risk factors (especially high blood pressure) can indicate who is a more likely candidate.

In any case, both experts stated that there has been a significant reduction in the incidence of strokes in North America because of preventative measures and accordingly, the prospects of sudden incapacitation are less worrisome.

From all that we have heard, we are of the view that, through risk factor assessment and testing, it is possible to predict or at least rule out the likelihood of an individual having a CAD event or suffering a stroke, although not necessarily in all cases. Those persons who have some likelihood of suffering CAD or stroke can be dealt with by the military without a blanket resort to age.

As to the methodology of testing, it is best left to the experts to devise the appropriate model. However,

it would appear from the evidence that a step by step approach along the following lines is possible.

A programme could be developed which continues from the time of enlistment until retirement which ensures the fighting capability of the force and would remove any need to rely upon the criterion of age. There should be high enlistment standards to recruit only those individuals who can meet basic physical requirements as established by the CAF. Annual testing for all members for the various risk factors such as blood sugar, cholesterol and blood pressure should be undertaken. EGGs should be administered to all members who have demonstrated two or more risk factors.

Regular testing programmes for physical stamina, strength, and aerobic capacity (VO2 max) should be developed for all members.

With respect to those over the age of 40, there should be a sequential screening process to identify those who may be susceptible to health problems. The first step is to screen for those risk factors at the periodic or annual physical examination. If there is no indication of any of the risk factors, there would be no exercise test performed. A standard such as anyone identified as having a 5% probability of a heart attack in six years will be required to undergo an exercise ECG could be utilized. If that proves positive, it would be reconfirmed by a thallium exercise test and if that test is positive as well, there is a significant possibility of severe CAD. That person would then have to be given a restricted medical rating or released.

(v) The Doctrine of Unlimited Liability: Inconsistencies in the CAF's own Organization

In addition to the Regular Force, the CAF maintains a Reserve upon which the CAF can draw in times of

emergency. There is the Primary Reserve made up of part-time soldiers, sailors and airmen who maintain a constant state of readiness through regular training on a weekly basis and engage in periodic exercises with Regular Force units and formations. They may be called out to participate in the event of an emergency or war. There is also the Supplementary Reserve. It is comprised of the Supplementary Ready Reserve and the Supplementary Holding Reserve. The former is made up of former members of the Canadian forces who have military skills that could be utilized in time of emergency or war. These personnel have volunteered to report once per year to confirm their availability and fitness. They may be called upon to volunteer in time of mobilization for war. The Supplementary Holding Reserve is made up of former members of the CAF who have volunteered to have their names listed as willing to be called out in time of war.

It is interesting that some members of the Reserve (including some of the Complainants who joined the Reserve after retiring from the Regular Force) may be well beyond the CRA and yet would be subject to unlimited liability. It is difficult to understand how the CAF can justify putting these people into combat situations and at the same time insist that a CRA of 55 is a BFOR - for the Regular Force.

In addition, the CAF maintains personnel with medical conditions who may make them ineligible to participate in war. The number of members of the CAF with a medical category of 03 or higher in 1989 was 3,115. The designation of 03 means that the individual has a moderate medical or psychological disability which prevents him or her from doing heavy physical work or operating under stress for sustained periods. That person, however, can do most tasks in

moderation. This category describes a level of medical fitness that seems incompatible with the rigours of service in times of emergency and war.

Out of a total force of approximately 85,000 the CAF is quite able to accommodate over 3,000 individuals who are incapable of fighting a war.

This is contrary to their assertion that every one of its members must be ready to face unlimited liability at any time. we are not suggesting that those who reach a CRA of 55 should be similarly accommodated. We are saying that if the CAF is to be true to its principle that all of its military personnel should be in a state of war readiness, then it should not pick and choose its application.

(vi) Is Unlimited Liability For All CAP Members Necessary?

Alternatively, if the CAF can accommodate those individuals who are not fit for battle, then it may be that a general policy of mandatory retirement of all 55 year olds goes farther than is necessary for the CAF to achieve its objective of maintaining a capable corps of fighting personnel.

As stated in Robinson v. CAF supra, even if the employer succeeds in proving that it is impossible to evaluate individually the risk presented by each employee, it must complete the final stage in its proof by showing that its rule of general exclusion is proportionate to its various objectives (safety, efficiency, team spirit, adequate opportunities for promotion, etc.). If such a rule is too general, it may exceed the limits of what is necessary and constitute an excessive means of attaining legitimate objectives, as Beetz, J. noted in Ville de Brossard, supra, at p. 312:

"In the case at bar, I believe that this treasonable necessity' can be examined on the basis of the following two questions:

(1) I... I;

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question".

Beetz J. then made the decision that the antinepotism policy of the Ville de Brossard went further than necessary by excluding every candidate who applied for a job with the municipality and who was related to an employee even if in certain cases, there was no possibility of favouritism.

Reinterpreting this criterion, Wilson J. stated the following on behalf of the majority in Central Alberta Dairy Pool, supra, at p. 518:

"The second branch of the Brossard test addresses the availability of alternatives to the employer's rule. In my opinion, this is not designed to be a discrete test for determining the existence of a BFOQ but rather a f actor that must be taken into account in determining whether the rule is 'reasonably necessary' under the first branch. The fact that this Court had not explicitly drawn attention to it before may help explain its being singled out in Brossard. I believe that the proposition it stands for is uncontroversial. If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be bona fide".

As we have seen, the other reasonable solution may be the administration of individual tests when this is

possible. But this supposes that all the positions in the undertaking are equivalent and require the same capacities. if, however, it were claimed that the discriminatory requirement of the employer was useless for certain jobs, the general exclusion based on the age of the employees holding these jobs might constitute an excessive means of attaining the objectives aimed at by the employment policy. In the absence of convincing proof showing that there is no way of distinguishing between the various positions in the

undertaking and that they all require optimal physical capacities, one must conclude that the rule is not reasonably necessary and consequently justified.

Just as the CAF can accommodate medically limited individuals, and assign them to positions which do not carry high risks (i.e. non-combat roles), it would seem that the CAF can similarly attain its objectives without using a rule of forced retirement of all its employees at an age as low as the age in question here. Thus, the blanket policy of retirement maintained by the CAF, applicable to everyone regardless of their specific trade, appears to be excessive and disproportionate and cannot, for that reason as well, qualify as a BFOR.

(V) COMPENSATION

(a) Specific Damages: Governing Principles

In terms of damages, we have applied the following principles which emerge from the evidence and the Federal Court of Appeal decision in Attorney-General of Canada v. Morgan (Nov. 4, 1991) and which we feel are appropriate to the circumstances before us:

As to the period of compensation, the criterion which is implicit in the CHRA is that damages awarded have to flow from the discriminatory practice. There must be a clear requirement of causal connection between the wages awarded and the discrimination. Apart from Captain Martin who is still serving in the CAF, the Complainants were all forced to retire at ages varying between 44 and 55. Some of them testified that they would have preferred to stay on as long as they could (Lemieux, Robicheau, McCullough) and others until age 55 to 65 (Grossek, Slavik, Kilmartin, Blanchet, Lavigne) if they had been permitted to do so. Nevertheless, given the contingencies in life, it cannot be said with any degree of confidence that one's intention spanning a period of time of 10 to 16 years would in fact reach fruition. Counsel for the Respondents argued that the period of loss cannot be open-ended and suggested for each complainant a period of two years after that individual's release date. The Commission counsel, on the other hand, posed three different scenarios for the period of loss ranging from a period up to

(a) the date of the hearing of this Tribunal, May 1, 1990;

(b) the date when the Complainants reach age 60; and

(c) the date when the Complainants reach age 65.

We feel that a standard period of two years from the date of release ("valuation date") is a more reasonable measure of assessing loss, given the variety of times between each Complainant's release date and the date of commencement of the hearing. Moreover, this period is more causally connected to the discriminatory practice in question. it strikes the correct balance, considering on the one hand the time needed to retrain and re-integrate into civilian employment and on the other hand, the unforeseen contingencies which might cause the complainants to leave the CAF at ages prior to 60 and 65. Thus there will be an order that each of the Complainants be compensated for his net loss as of the valuation date as specifically set out hereafter.

2. The monetary awards shall bear simple interest at the Bank of Canada prime rate which shall run from the date that the loss is calculated (i.e. after the aforesaid two-year period). This is the rate that an individual would receive if he were to invest money, rather than a borrowing rate on funds advanced by way of loan. There is no evidence that any of the Complainants were forced to borrow money as a result of their release from the CAF. If the parties cannot agree on the actual calculations of interest due, the matter can be brought back to the Tribunal.

Except for his position on mitigation in respect of certain Complainants (namely, Messrs. Slavik, McIssac, Kilmartin, Robicheau and McCullough) we have accepted the analysis of Mr. Michael Cohen,

the actuary called by the Respondents who provided a breakdown of damages for each Complainant on the basis of the two-year period referred to above. The methodology that he employed was to accumulate losses to the valuation date by finding the difference between

(a) actual income, consisting of pension income and income that the Complainant actually earned after his release from the CAF; and

(b) income he would have received from the CAF had he in fact remained in the CAF.

More particularly, he first determined the present value of the individual's net wealth had he remained in the CAF for an extra two years. Included in this net amount are the following:

(a) Salary - the actuarial present value of the salary that the Complainant would have earned based on a future projection of the relevant salary scale to the valuation date;

(b) Severance Pay - the future value of the severance pay;

(c) Value of Pension - the value that the pension would have had if the individual had served up to the valuation date.

From the total of these amounts is deducted the present value of the actual amounts that the complainant received during the two-year period which include

(a) any mitigating income,

(b) the actual pension income accumulated with interest;

(c) the severance pay that was in fact paid two years prior to the valuation date; and

(d) the value of the pension that the person is receiving from the valuation date onwards.

When those amounts are deducted, one can determine the net loss that the individual suffered for the two-year period as the result of being released prematurely by the CAF.

(i) CAPTAIN MARTIN

In a sense, Captain Martin has not as yet been affected by the mandatory retirement age policy of the CAF in that he will not reach his CRA 55 until the year 2002. Captain Martin, however, has alleged that he has been prejudiced because of the way he was treated when he had reached his retirement age under the old terms of service. Under that regime, his retirement age was 20 years of service or age 40 which meant that his retirement date was December 6, 1987. When he reached -that date, he was given an extension for two years, transferred to CFB Wainrwright with no opportunity to relocate and was denied opportunities for promotion. Later, on January 26, 1989, as a result of the

lowering of the base rank, Captain Martin was offered conversion to IPS which he accepted. He claims that he was adversely affected by the old terms of service which affected his ability to obtain a higher salary and therefore pension. He claims that if he had been promoted to Major there would be a difference of about $400.00 per month in salary and he believes he has suffered that detriment.

As Marceau J. stated in Attorney General of Canada v. Morgan supra at p. 4: 'To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. " He went on to say that he would accept proof of a serious possibility of its having been lost. In the same judgment, MacGuigan J. stated that a probability of actual loss of position had to be established.

Under either test, there is no basis in the evidence for concluding that there was a serious possibility, let alone a probability that Captain Martin would successfully have completed the competition to become Major had he not been temporarily retired. He was unable to do so even after he made the transition to IPS and there is insufficient evidence before the Tribunal to conclude that his inability to secure the promotion resulted from his being side-tracked during the three-year extension period.

Accordingly, we cannot conclude that the discriminatory practice of the CAF has caused him specific losses or hardship for which he should be compensated. In any event, in argument, Mr. Duval conceded that no claims were being advanced for specific damages for Captain Martin even though in his testimony he made reference to an alleged financial loss.

MASTER WARRANT OFFICER GROSSEK

M.W.O. Grossek was forced to retire on August 20, 1985 at the age of 55. He was hospitalized for a period of 28 days prior to his release and as a result of the time spent in hospital and accumulated leave, he was in receipt of military pay and not formally released until April 2, 1986. From November 1985 to the time of the hearing, as a civilian, M.W.O. Grossek was employed as a ski instructor for two years then as sports coordinator for Canadian Forces Europe from which he earned income. His net loss as of April 2, 1988 was $18,470 based on the following breakdown:

(a) Remains in the Canadian Forces Until April 2, 1988:

Present Value of:

Salary	$ 82,238
Severance Pay	23,639
Pension	357,381
Total:	$ 463,258

(b) Left the Canadian Forces on April 2, 1986:

Present Value as of April 2, 1988:

Mitigating Income	$ 68,862
Pension Income	35,588
Severance Pay	24,804
Future Pension	315,534
Total:	$ 444,788

(c) Loss as of April 2, 1988

a) minus b) 18,470

(iii) COLONEL SLAVIK

Colonel Slavik retired on July 13, 1987 at the age of 53. His release date was actually March 16, 1988 due to accumulated benefits. He was in receipt of his usual military pay until that date.

Colonel Slavik was considered for promotion in 1984, 1985 and 1986 but did not rank high enough to be promoted. At the time of his

retirement, Colonel Slavik was a Senior Medical Officer in the CAF. He had spent the latter 15 years of his career in a medical administrative role.

Since leaving the CAF, Colonel Slavik has found no employment. He has looked in medical journals for administrative positions only as he did not feel confident about his clinical skills.

We disagree with Mr. Cohen's inclusion of an attributed mitigatory income to Mr. Slavik based on average salaries of those persons in the 1980 Canadian census shown to be employed in hospital administration. The Respondent has not satisfied us that Mr. Slavik has failed to take appropriate steps to mitigate his loss, given his efforts to find suitable employment, his experience in the CAF, and the opportunities for equivalent employment at his age in civilian life.

We have calculated Mr. Slavik's loss as of March 16, 1990 to be $216,197 on the following basis:

(a) Remains in the Canadian Forces Until March 1990

Present Value:

Salary	$ 222,438
Severance Pay	67,680
Pension	1,010,827
Total:	$ 1,300,945

(b) Left the Canadian Forces on March 16, 1988

Present Value as of March 16, 1990:

Pension Income	$ 102,301
Severance Pay	58,775
Future Pension	923,672
Total:	$1,084,748

(c) Loss as of March 16, 1990

a) minus b) $ 216,197

(iv) MAJOR KILMARTIN

In 1968 Major Kilmartin had reached the rank of Captain and opted to have his retirement age governed by Table A of Q.R.&.0. 15.17. In 1979, he was promoted to Major for which the retirement age under Q.R.& 0. 15.17 was 47 years. He retired on July 29, 1987 at the age of 47 at which time he had been working as a Linguistics Officer. His actual release date was October 13, 1987 as a result of accumulated leave.

After his employment with the CAF, he was self - employed as a farmer, owned a gun shop and had a contract (Class C service) with the CAF. He continued Class C service until June 1989 when he formed a consulting company which presently employs him. As well, Major Kilmartin has been a commanding officer of a Reserve batallion throughout. His earnings to October 13, 1989 amounted to $28,119.85. His net loss as of October 13, 1989 (i.e. two years after his release date) is $105,765.15 calculated as follows:

(a) Remains in the Canadian Forces Until Oct. 13, 1989

Present Value:

Salary	$ 124,261
Severance Pay	29,872
Pension	491,929
Total:	$ 646,062

(b) Left the Canadian Forces on October 13, 1987

Present Value as of October 13, 1989:

Mitigating Income	$ 28,119.85
Pension Income	54,261.00
Severance Pay	30,241.00
Future Pension	427,675.00
Total:	$ 540,296.85

(c) Loss as of October 13, 1989

a) minus b) $105,765.15

(v) SERGEANT McISAAC

In 1968 Sergeant McIsaac opted to continue to be governed by his old terms of service Q.R.& 0. 15.31, Table C. He accordingly retired on August 17, 1987 at age 50. His release date was November 24, 1987. Sergeant McIsaac has been unemployed since his retirement from the CAF. He had been an Aircraft Engine Technician in the CAF. Work in the civilian aircraft industry, however, was not available in the locale in which he resided after his retirement. Sergeant McIsaac testified that even if he sought this kind of work in a centre such as Toronto where the industry is based he would have considerable difficulty in qualifying for the necessary Department of Transport licensing since he would have to write examinations on subjects that were not taught to him in the military. He did apply for employment with both the federal and provincial governments, Manpower, and with various local service stations but met with no success. Counsel for the respondents did not cross-examine Sergeant McIsaac on these mitigating efforts. His net loss as of November 24, 1989 was $71,934.00 calculated as follows:

(a) Remains in the Canadian Forces Until Nov. 24, 1989

Present Value:

Salary	$ 78,990
Severance Pay	16,283
Pension	278,843
Total:	$ 374,116

(b) Left the Canadian Forces on Nov. 24, 1987

Present Value as of Nov. 24, 1989:

Pension Income	$ 35,183
Severance Pay	15,833
Future Pension	251,166
Total:	$ 302,182

(c) Loss as of Nov. 24, 1989

a) minus b) $ 71,934

(vi) SERGEANT LEMIEUX

In 1968 Sergeant Lemieux was offered conversion to the new terms of service but he elected to continue to be governed by Q.R.& 0. 15.31 Table C. This required him to retire in July 1987 at age 50. He received three extensions of service to October 3, 1988 and retired on October 4, 1988. His release date was April 8, 1989 due to accumulated leave.

Since retirement he had worked at several jobs including service with the Reserve. He has worked full time with the Corp of Commissioners since January 31, 1989. His net loss for the two-year period ending April 8, 1991 is $5,932.00 as follows:

(a) Remains in the Canadian Forces Until April 8, 1991

Present Value:

Salary	$ 81,595
Severance Pay	22,855
Pension	391,340
Total:	$ 495,790

(b) Left the Canadian Forces on April 8, 1989

Present Value as of April 8, 1989:

Mitigating Income	$ 54,016
Pension Income	43,459
Severance Pay	25,225
Future Pension	367,158
Total:	$ 489,858

(c) Loss as of April 8, 1991

a) minus b) $ 5,932.00

(vii) CORPORAL BLANCHET

In 1968 Corporal Blanchet opted to be governed by the new terms of service under Q.R.& 0. 15.31 Table A. As a corporal that policy required him to retire at age 44 in September

1986. In making this choice, he elected an earlier retirement age. He testified he did this because at the time he was not interested in staying in the CAF.

He received an extension of service to August 23, 1987 and retired on August 24, 1987. His release date was December 15, 1987 as a result of accumulated leave. He has not worked since his retirement. He stated that he had adequate finances and did not need to work.

Mr. Blanchet has not earned income since his release. However, he has made no attempt to mitigate his loss since he testified that he had adequate resources of his own which did not require him to obtain other employment. It is appropriate in these circumstances to allow a factor for

mitigation and the Tribunal has attributed one-half of the average weekly earnings at the industrial aggregate level in Canada as published by Statistics Canada to Mr. Blanchet. It translates into the sum of $27,226.00 (as of December 15, 1989). This amount should be deducted from the salary that Mr. Blanchet would have otherwise earned and his net loss, therefore, is $4,978.00 based on the following calculation:

(a) Remains in the Canadian Forces Until Dec. 15, 1989

Present Value:

Salary	$ 66,038
Severance Pay	17,470
Pension	201,638
Total:	$ 285,146

(b) Left the Canadian Forces on Dec. 15, 1987

Present Value as of Dec. 15, 1989

Mitigating Income	$ 27,226
Pension Income	29,448
Severance Pay	17,225
Future Pension	206,269
Total:	$ 280,168

(c) Loss as of Dec. 15, 1989

a) minus b) $4,978

(viii) SERGEANT ROBICHEAU

In 1968 Sergeant Robichaud elected to continue to be governed by Q.R.& 0. 15.31 Table C. As a sergeant, his retirement age under that table was 50 years of age. He retired on May 13, 1988 but with accumulated leave was released on May 24, 1989. At the time of his retirement he was a Financial Clerk.

Since his retirement he has been a member of the Reserve and has been working as a real estate agent. We have calculated his net loss from date of release to May 24, 1991 to be $75,820.00 as follows:

(a) Remains in the Canadian Forces Until May 24, 1991

Present Value:

Salary	$ 81,271
Severance Pay	22,855
Pension	345,623
Total:	$ 449,747

(b) Left the Canadian Forces on may 24, 1989

Present Value as of May 24, 1991:

Mitigating Income	$ 6,119
Pension Income	38,299
Severance Pay	21,548
Future Pension	307,963
Total:	$ 373,929

(c) Loss as of May 24, 1991

a) minus b) $ 75,820

(ix) MASTER WARRANT OFFICER LAVIGNE

In 1968, M.W.O. Lavigne opted to remain governed by Q.R.& 0. 15.31 Table C because it allowed him to remain in the CAF longer. His retirement date was August 18, 1987 at age 52 based on the table. His release date was December 8, 1987 due to accumulated leave.

Since retirement he has had various jobs. In particular, he has been and remains a member of the Reserve, a Commissioner (since September 1987) and a product distributor. His income since his release from the CAF until December 8, 1989 has totalled $35,062.00. His net loss as of that latter date was $28,448.00 calculated as follows:

(a) Remains in the Canadian Forces Until Dec. 8, 1989

Present Value:

Salary	$ 91,473
Severance Pay	26,005
Pension	367,990
Total:	$ 485,468

(b) Left the Canadian Forces on Dec. 8. 1987

Present Value as of Dec. 8, 1989:

Mitigating Income	$ 35,062
Pension Income	50,922
Severance Pay	27,304
Future Pension	343,732
Total:	$ 457,020

(c) Loss as of December 8, 1989

a) minus b) 28,448

(X) CORPORAL McCULLOUGH

Corporal McCullough had been enroled in the CAF from May 1962 to 1969. He then re-enroled on July 2, 1971 as a Private in the Infantry. Upon re-enrolment, his retirement age

was governed by Table A of Q.R.& 0. 15.31 and he had to retire at the earlier age of 44 or 25 years of service. He was given a six-month extension of service and permitted to retire on August 27, 1986. His actual release date was October 8, 1986 due to accumulated leave.

Corporal McCullough has had assorted unskilled jobs such as civilian driver for the military and security guard since his retirement and his income as of October 8, 1988 totalled $10,286.00. His net loss as of that date was $52,390.00 calculated as follows:

(a) Remains in the Canadian Forces Until Oct. 8, 1988

Present Value:

Salary	$ 61,449
Severance Pay	9,643
Pension	183,141
Total:	$ 254,233

(b) Left the Canadian Forces on Oct. 8, 1986

Present Value as of Oct. 8, 1988:

Mitigating Income	$ 10,286
Pension Income	23,742
Severance Pay	9,332
Future Pension	158,483
Total:	$ 201,843

(c) Loss as of Oct. 8, 1988

a) minus b) $ 52,390

(b) Hurt Feelings

As for hurt feelings, we agree with the submission of Respondents' counsel that this is not an appropriate case for an award of damages under this head for the following reasons:

(a) in most cases, the CAF made every effort to accommodate the particular circumstances of the

Complainants by short extensions of the date of retirement;

(b) in each case, the Complainant did receive a generous pension and severance pay; and

(c) each Complainant was offered assistance in converting to civilian life through the Second Careers Assistance Network programme.

DATED this day of June, 1992.

LEADER

J. GRANT SINCLAIR