T.D. 2/92
Decision rendered on February 17, 1992

THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C. 33 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CANADIAN PARAPLEGIC ASSOCIATION

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ELECTIONS CANADA - THE OFFICE OF
THE CHIEF ELECTORAL OFFICER OF CANADA
RETURNING OFFICER - WINNIPEG-NORTH CENTRE
RETURNING OFFICER WINNIPEG-ST. JAMES
RETURNING OFFICER WINNIPEG-FORT GARRY
RETURNING OFFICER BRANDON-SOURIS

Respondents

- and -

PEOPLE IN EQUAL PARTICIPATION INC.

Interested Party

DECISION OF THE TRIBUNAL

APPEARANCES:

René Duval
Counsel for the Canadian Human Rights Commission

E.W. Olson, Q.C. and V. Rachlis
Counsel for the Respondents

Campbell Wright and John Sinclair
Counsel for the Interested Party

DATES AND LOCATION
OF HEARING:

November 2, 1988 (Pre-Hearing)
October 23-24, 1990
Winnipeg, Manitoba

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INTRODUCTION

In Canada, it is a fundamental right in our democratic way of life that each person has the right to vote. This principle is enshrined in section 3 of the Constitution Act. As well, it is a well-established human right that persons who have a disability will not be denied access to services, facilities or accommodation customarily available to the general

public and will not be differentiated adversely with respect to such services, facilities or accommodation unless there is a bona fide justification for such denial or differentiation. In September of 1984 there was a general election in Canada. The complaints which are before me are made by persons who, it is admitted, suffer from a disability and who allege that because of the absence of level access to the polls, in one instance a person was denied access to the polls and in seven instances, their access to the polls was sufficiently interfered with that their rights have been breached. The Respondents in the complaints are, the Returning Officers for four Manitoba constituencies and Elections Canada - the Office of the Chief Electoral Officer of Canada.

The issues to be decided by this tribunal have been summarized by Counsel for the Respondents as follows:

1. Does this Tribunal have the jurisdiction to deal with Complaint No. P04310? (the general complaint)

Because of the date of the events in question, references to the relevant statutes will be to them as they stood prior to the 1985 Statute revision.

2. Were any of the Respondents' conduct at issue in the complaints such that discriminatory practices on the basis of disability occurred?

3. In the event that discrimination on the grounds of disability occurred, was there a bona fide justification for such discrimination?

4. If this Tribunal makes a finding that a Returning Officer committed a breach of the CHRA but finds that the conduct of Elections Canada was such that no breach of the CHRA occurred, can the Chief Electoral Officer be found vicariously liable?

5. In the event that any discrimination occurred in 1984, if this Tribunal finds such breaches have been cured, ought a remedy to be granted?

Evidence was adduced in this matter before me in Winnipeg on October 23 and October 24, 1990. At the conclusion of argument, counsel for the parties agreed that written arguments

should be submitted. The last of the arguments was received on September 18, 1991. The providing of arguments was delayed pending the hearing of a motion brought by counsel for the Respondents to adduce new evidence. My ruling on that motion comprises Schedule 'A' to this decision. I have attached as well as Schedule 'B', the reasons which I gave for adding as a party, People in Equal Participation Inc.

Fifteen witnesses were called at the hearing. Counsel for the Human Rights Commission called as witnesses Jim Derksen, Marianne Bossen, Karen Bauhs, Lucy DeLuca, Don Ament, Keith Russell, John Lane and Linda Chodak. Counsel for the Respondents called as witnesses Phil Cels, Joan Belisle, Elgin Rutledge, Anne McDonald, Darlene Gray, Kathleen Patterson and Andree Lortie.

THE COMPLAINTS

There are nine complaints before me. Eight of them have been made by persons who were enumerated and attended at the location of the poll with the intention of voting. There is one additional complaint, general in form, in which the Manitoba Division of the Canadian Paraplegic Association states that it,

"has been advised by some of its members that the polls established for the general federal election of September 4, 1984 are not accessible to mobility-impaired individuals. The Manitoba Division of the Canadian Paraplegic Association, on behalf of its members, has reasonable grounds to believe that an unknown number of mobility-impaired residents of Manitoba are being discriminated against because a significant number of polls and in some cases even advance polls established for the general federal election of September 4, 1984, are not accessible to mobility-impaired individuals, in violation of section 5 of the Canadian Human Rights Act." (PO4310)

As I intend at this point to review the complaints made by each of the Complainants, I set out in a schedule a summary of the personal complaints.

H.R.C. Complaint Number/Respondent	Location of Poll in question	Nature of Poll	Consitutency	Returning Officer
P04570 Jim Derksen	Ft. Rouge School 120 Mayfair	Poll	Winnipeg/ Fort Garry	K. Patterson
PO4568 Lucy Deluca	Ft. Rouge School 120 Mayfair	Advance Poll	Winnipeg/ Fort Garry	K. Patterson
PO4272 John Lane	Ft. Rouge School 120 Mayfair	Advance Poll	Winnipeg/ Fort Garry	K. Patterson
PO4571 Karen Bauhs	Holy Rosary Church, 510 River	Poll	Winnipeg/ Fort Garry	K. Patterson
PO4573 Murray Chodak	Earl Oxford Jr. High School	Poll	Brandon/ Souris	Phil Cels
PO4574 Keith Russell	St. David's Church, Oak Lake	Poll	Brandon/ Souris	Phil Cels
PO4569 Marianne Bossen	St. Margaret's Anglican Church	Poll	Winnipeg/ St. James	Joan Belisle
	Westminster United Church	Advance Poll		
PO4567 Don Ament	Grain Exchange Curling Club	Poll	Winnipeg/ Centre-North	Anne McDonald

EVIDENCE OF THE COMPLAINANTS

Jim Derksen (Winnipeg/Fort Garry - K. Patterson)

Jim Derksen has a disability which requires him to use a wheelchair for mobility. On September 4, 1984, he drove his van to his polling station which was located at Fort Rouge School, 120 Mayfair Avenue, Winnipeg. His van is equipped with a wheelchair elevator. He noticed that the door marked for the poll had some stairs. He looked around without success to the other side of

the building in order to find an entrance which was more accessible. He exited from his van, sat near the steps and waited until someone should pass by. When someone passed by, he asked the person to go inside the building and find some people who might assist him up the stairs. The person went into the building and returned with two other men. The three of them lifted Mr. Derksen up the stairs, he went into the polling booth, voted and then was assisted down the stairs by the same three persons. Mr. Derksen said that he felt very annoyed about having to be carried into the polling station. He felt aggrieved by it. He said that he does not like being carried up and down stairs. He related several instances when persons who have carried him up and down the stairs have been injured. He said that he prefers to live a very independent lifestyle and he said that he resents having to ask people for help and to depend on their goodwill for access "for something that I consider to be part of my birthright as a Canadian." (transcript volume 1, page 8)

In cross-examination, Mr. Derksen stated that in prior elections, he had availed himself of the opportunity to vote in the advance poll to ensure that he would vote in a place which has level access. On this occasion, he was enumerated to vote at Fort Rouge School. He made no inquiry as to whether or not

the poll had level access "because I assumed with the Charter of Rights and Freedom and so on that we would have made enough progress to have level access." (transcript volume 1, page 12)

Lucy DeLuca (Winnipeg/Fort Garry - K. Patterson)

Lucy Deluca is a wheelchair-reliant paraplegic. She resides at 606-230 Roslyn Road in Winnipeg. She stated that on August 27, 1984 she voted in the advance poll. It was located at Fort Rouge School at 120 Mayfair Avenue. She went with some other persons who also use wheelchairs. She has been using a wheelchair for 41 years. She stated, "when we got there we noticed that there were about 4 or 5 stairs that we would have to get up to get into the school building to exercise our right to vote." (transcript volume 1, page 43) She got into the building with assistance. The bus driver who took her tried to find someone to help her. The caretaker of the building and an elderly gentleman who had accompanied her, carried her up the stairs. She voted and then they carried her down the stairs. She was very upset about

the situation and concerned, because the gentleman who assisted her was elderly. She chose not to vote at the regular poll because her regular poll was located at Holy Rosary Church and she knew that the voting was scheduled to take place in the basement, two flights of stairs below ground level.

In cross-examination she stated that she attended Fort Rouge School with a view to voting because she had been told that it would have level access. She had contacted the Returning Officer and the Returning Officer had told her that Fort Rouge School would have level access. Based on this information, she arranged for the persons who accompanied her to come to vote with her at the advance poll and they all came to the polling station by means of the Handi Transit van. She also stated that there were other schools in the area which had level access but was not asked for and did not give examples.

John Lane (Winnipeg/Fort Garry - K. Patterson)

John Lane is a wheelchair-reliant quadriplegic. He serves as Executive Director of the Canadian Paraplegic Association, Manitoba Division. He is also a national board member of the National Association. He voted in the advance poll. He did not vote in the regular poll at Holy Rosary Church because it was inaccessible. When he learned this, he telephoned the Returning Officer and confirmed that the Church was inaccessible. He inquired as to alternatives which were open to him and he was told that there was an accessible advance poll at Fort Rouge School on Mayfair Street. He queried the person who provided that information because he suspected that Fort Rouge School was not accessible, but she insisted that it was and he accepted her word on it. He assumed that a ramp had recently been built at the school. Consequently

he attended at Fort Rouge School in order to vote in the advance poll. On arriving there, he noticed that one had to ascend a set of stairs, three or four in number, in order to get into the building. He found that there was no way to signal persons inside the building and request assistance. He waited. Eventually, "somebody poked their head out and saw me there, and two

people came out. I didn't want them to lift me in to be honest with you, because they were scrutineers which are well meaning volunteers, and one of them was well on in age, and the other was not young. They insisted and I instructed them appropriately how to lift me, but it was with some nervousness on both our parts." (transcript volume 1, page 67)

So he voted after being carried into the building and then he was carried out of the building. When asked to express his feelings in the matter, he stated that he was annoyed and frustrated because he had been assured that the building was accessible. He was annoyed to start with that the regular poll was inaccessible.

In addition to relating to us the problems which he encountered while attempting to vote, Mr. Lane related information about steps which he and his association had taken over a lengthy period of time to alleviate the problems encountered by physically disabled persons who wish to vote. Back in 1980 when the Special Parliamentary Committee for the Disabled and Handicapped conducted hearings across Canada, he took part in a presentation which was made to the Committee, outlining the problems which have been encountered while voting. Such concerns were noted in the report of the Committee which was published in 1981. The year 1981 was

the International Year of Disabled Persons and Mr. Lane assumed that by September of 1984, procedures relating to level access would have been greatly improved. When he encountered his personal problem at the advance poll, he inquired around his twelve-person office and found that about half the people there, who knew about their polls, were able to confirm that their polls were not accessible. He telephoned Board Members and received the same kind of information. Based on this information, he contacted the Human Rights Commission prior to election day and asked what can be done. 'Time was short so there didn't appear to be much except to file a complaint on behalf of Manitobans, which we did shortly after the election, I believe." (volume 1, page 70)

When asked what relief he seeks in this proceeding, he stated as follows:

1. A finding that Elections Canada is legally and publicly accountable for reasonably accommodating the needs of

disabled persons in elections. A clear ruling that level access is a right which must be protected and that Elections Canada must carry it out.

He qualified the latter point by stating,

. . . we do not expect that every single poll will be accessible, because we understand that there are very real problems in certain instances, and that what we are looking for is reason. So what we expect is that first of all, that a serious effort will be made

to do everything short of undue hardship to attain wheelchair accessible polls on election day because we feel that people have a right to vote on the election day and benefit from the full campaign in their own poll." (transcript volume 1, page 73)

2. Endorsement of a number of the recommendations contained in Bill C-79 respecting multiple polling sites, a requirement that all advance polls, all Returning Offices where people vote and all multiple polling sites, be accessible.

3. A requirement that Elections Canada account for the case when they cannot provide access. Any elector should be able to find out, and the information should be published at least three days prior to the final advance poll, whether these polls are accessible or not.

4. A requirement that there be proper signage to indicate where the access is and appropriate parking at each poll.

In cross-examination, Mr. Lane stated that changes in procedures were made by Elections Canada after the 1984 election.

As a result, "The 1988 election was remarkably better. Not just in Manitoba, elsewhere. It wasn't perfect by any means, but it was better enough that it elicited comment from a number of sources." (Transcript Volume 1, page 90)

He went on to state that "... with the matter before the Human Rights Commission, and actively pursued by the press, he (the

Chief Electoral Officer) produced an accessible election." (Transcript Volume 1, page 90)

Karen Bauhs (Winnipeg/Fort Garry - K. Patterson)

Karen Bauhs is mobility-restricted and wheelchair reliant. She stated that she has been using a wheelchair for seven years. On September 4, 1984, she voted at Holy Rosary Church on River Avenue in Winnipeg, but she encountered the following problem. She went to the church in order to vote and found that the polls were in the basement. She was required to descend two flights of stairs in order to reach the polling station. She was unable to descend the stairs without assistance, so she went back home, and arranged for her roommate to come with her. Her roommate helped her walk down the stairs, she voted and then her roommate helped her walk back up the stairs. When asked how she felt about not being able to vote without assistance, she stated, "I was really angry. It was totally unexpected that I wouldn't be able to get to the poll and I was just very upset and angry." (transcript volume 1, page 37) She had only been in a wheelchair for about a year and it had not occurred to her that she might not be able to vote without assistance.

In cross-examination, Ms. Bauhs stated that she was residing at 504 - 246 Roslyn Road at the time, about three blocks from Holy Rosary Church. She stated that Holy Rosary Church has

a level entrance. It has a foyer near the entrance, but it is too small to serve as a poll. She stated that she is aware of other mobility-restricted persons who attended Holy Rosary Church and encountered problems in voting. She said that when she went there, there were about five people standing around waiting for assistance.

Murray Chodak (Brandon/Souris - Phil Cels)

Murray Chodak is a wheelchair-reliant quadriplegic. His wife, Linda Chodak gave evidence before us that they live in Brandon, Manitoba. On their way to work on September 4, 1984,

they stopped at their polling station which was located at Earl Oxford School in Brandon. Their experience from other elections had been that polling is done in the library on the main floor in Earl Oxford School. They entered the building and observed signs on the wall indicating that the polling station was upstairs on the second floor and that the only way to the second floor was up two flights of stairs. Mrs. Chodak said that she personally went up to the polling station. There were to two persons present. She asked why the polling station is located there as it is usually down in the library. She was simply told that it is there. She told the people that her husband is in a wheelchair and he can't possibly get up the stairs. The Deputy Returning Officer replied,

... you should have gone to the advanced poll, and I said the polling station is usually in the library

and we know we can get into Earl Oxford School, so we didn't bother with the advanced poll.

Now at the time, I don't recall whether I asked her to bring the polling station down. She didn't offer to. (Transcript Volume 1, page 118)

As a result, both Mr. and Mrs. Chodak left the building without voting.

Keith Russell (Brandon/Souris - Phil Cels)

Keith Russell is a wheelchair-reliant quadriplegic. He voted on September 4, 1984, at his polling station at St. David's United Church near Oak Lake, Manitoba. When he and his wife arrived at the polling station, he noticed that the polling booth was contained in the basement of the building. In order for him to go into the polling station, he would have been required to

descend several cement steps. His wife went down and voted and he

and his wife decided that he would not vote. He stated,

"Luckily, one of the polling clerks asked my wife if I was

outside. She said I was, and they gave my wife a ballot

which she carried up to me, which I marked on the dashboard of my truck and handed back to her, and she carried it back." (transcript volume 1, pages 53-54)

He stated that he felt that he was being treated differently and that the situation was not handled very professionally. He noted that his wife could have carried the ballot halfway up the stairs, marked it by herself and taken it down and had it placed in the ballot box. Mr. Russell is a farmer. The election took place during harvest time in 1984. He was working 16 hour days at the

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and when asked why he had not voted in the advance poll, he stated that he was very busy at the time and "I really didn't see why I should have to go to a lot of work to find out where I could vote when it is supposed to be my right anyway to vote the same day as everyone else." (transcript volume 1, pages 54-55)

Marianne Bossen (Winnipeg/St. James - Joan Belisle)Marianne Bossen is a wheelchair-reliant paraplegic. She was enumerated to vote at St. Margaret's Anglican Church in Winnipeg, a church which she knew did not have level access. She knew as well there would be an advance poll within her district at Westminster United Church, a building which she knew has a ramp which goes up to the main floor. She telephoned the office of the Church in order to ask where the balloting would take place and she was told that the balloting would take place in the basement.

She asked whether or not the Church has an elevator from the main floor to the basement and the answer was no. She then telephoned the office of the Returning Officer, stated her problem and was asked what arrangements could be made to permit her to vote. Eventually, she was provided with information as to the procedure under section 43(7.1) of the Canada Elections Act for an incapacitated elector to obtain a transfer certificate in order to facilitate voting in an advance poll. Another telephone call permitted her to learn that the transfer certificate would permit her to vote at Harstone United Church on August 26, 1984, which

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has

level access. Ms. Bossen uses Handi Transit. She made a booking for Handi Transit several days ahead and voted at the advance poll at Harstone United Church, making use of her transfer certificate. When she left the poll, she provided service to one of the political parties as a scrutineer. She said that the inability to vote at her normal polling station and the resulting trouble and expense to which she was put, gets her very irritated.

In cross-examination, Ms. Bossen stated that St. Margaret's Anglican Church was just around the corner from her home. Westminster United Church is a few blocks away, but was also an easy distance from her home. It was the need to go to and

the distance of Harstone Memorial United Church, which necessitated her use of the Handi Transit. When asked whether or not she is aware of any public building in 1984 in her immediate area that was available for a polling station that had level access, she replied "I don't think there was any, as far as I know." (transcript volume 1, page 35)

Don Ament (Winnipeg/North Centre - Anne McDonald)

Don Ament is a wheelchair-reliant quadriplegic. He voted on September 4, 1984 at his polling station in the Grain Exchange Curling Club on Garry Street in Winnipeg. When he arrived at the polling station, he noticed that there were three or four steps out front which he would have to ascend in order to get into the

entranceway in order to vote. When a lady walked by, he asked her if she would alert the officials that he was outside and that he wished to vote. The lady did so and as a result, an election official came out to the top of the steps, observed Mr. Ament,returned to the building and came out with a ballot box and a voting slip. Consequently, Mr. Ament voted outside the building in the parking lot. This procedure caused him to be frustrated and angry. He had not been aware that the building lacked level access prior to attending to vote.

I have indicated that evidence was adduced on behalf of

the Repondents. Such evidence was directed to the defence of bona fide justification. Evidence called on behalf of the Respondents did not touch on the issue of whether or not there has been a breach of section 5 of the Human Rights Act. Accordingly, I defer summarizing the evidence which was adduced on behalf of the Respondents until later in this decision.

DID ANY DISCRIMINATORY PRACTICES OCCUR?

Section 5 of the Canadian Human Rights Act provides as follows:

Discriminatory Practices

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

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b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

In considering Section 5, the following further sections should be considered:

PURPOSE OF ACT

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within

the legislative authority of Parliament,

to the principle that every individual should have

an equal opportunity with other individuals to make

for himself or herself the life that he or she is able

and wishes to have, consistent with his or her duties

and obligations as a member of society, without being

hindered in or prevented from doing so by discriminatory

practices based on race, national or ethnic origin, colour,

religion, age, sex, marital status, family status, disability

or conviction for an offence for which a pardon has been

granted.

PROSCRIBED DISCRIMINATION

General3(1) For all purposes of this Act, race, national or ethnic

origin, colour, religion, age, sex, marital status, family

status, disability and conviction for which a pardon has been

granted are prohibited grounds of discrimination."

Complaint number P04573 (Murray Chodak) alleges a breach of

section 5(a). The remaining personal complaints and the general

complaint allege a breach of section 5(b).

Counsel for the parties made submissions as to the meaning

of the word 'deny' as used in section 5(a). In

ordinary usage

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the

word 'deny' can import a knowing denial or in the alternative, an event which tends to deprive without the knowledge of a person. It has been authoritatively stated that intent or malice is not a pre-requisite for a finding of a breach of section 5 of the Act. The principles of construction which are to be applied have been reviewed by the Supreme Court of Canada in Action Travail des Femmes v Canadian National Railway Company (1987) 1 S.C.R. 1114, at 1132 to 1138.

Considering the purpose of the Human Rights Act, I give the word 'deny' a relatively broad interpretation. I find that Mr. Chodak was denied access to the poll at Earl Oxford Junior High School, as the poll was established in a place which did not have level access. The fact of the denial and the resulting problem were drawn to the attention of the Deputy Returning Officer, who refused to make any effort to assist Mr. Chodak. As a result, Mr. Chodak was deprived of his right to vote.

As stated, the remaining personal complaints and general complaint centre on allegations based on section 5(b) of the Human Rights Act. It is clear that in the cases of the Complainants Derksen, Deluca, Lane, Bauhs, Russell and Ament, the failure to provide level access to their respective polling stations left them in a different position than all other voters. The

difference was negative in that it caused each of them a

difficulty in

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to vote, which was not faced by the remaining

voters.

The question which I have to decide is whether that different

treatment and resulting difficulty comprise an adverse

differentiation -in relation to such individuals within the

meaning of section 5(b) of the Act. The answer to this question

in turn involves a consideration of the nature of the effect on

the Complainants, because it cannot be every case of difference in

treatment which will bring a Respondent in breach of section 5(b).

There are very few cases which assist in determiningthe answer to this question because the large majority of Human

Rights cases arise from employment situations and very few cases

have been decided on an allegation of discrimination in provision

of services, facilities or accommodation. In the case of Re

Saskatchewan Human Rights Commission et al and Canadian Odeon

Theatres Limited (1985) 18 D.L.R. 4th, 93 the Complainant bought a

ticket to and entered a theatre but was required to sit in his

wheelchair at the front of the theatre. He filed a complaint

under the Saskatchewan Human Rights Code, alleging discrimination

with respect to services or facilities offered to the public on

the basis of physical handicap. An adjudicator found in his favour. The decision was set aside on appeal but was restored on further appeal to the Saskatchewan Court of Appeal. The majority judgment was delivered by Vancise, J.A. At page 113, His Lordship stated,

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- 20 -The question to be determined in this case is whether the physical arrangements for the viewing of a movie which are available to all members of the public but which have the practical effect or consequence of discriminating against one or more members of the public because of a prohibited ground, i.e., physical disability, is discriminiation."

At page 115, His Lordship stated,

"The treatment of a person differently from others may or may not amount to discrimination just as treating people equally is not determinative of the issue. If the effect of the treatment has adverse consequences which are incompatible with the objects of the legislation by restricting or excluding a right of full and equal recognition and exercise of those rights it will be discriminatory: see also Re Rocca Group Ltd. and Muise (1979), 102 D.L.R. (3D) 529, 22 Nfld. & P.E.I.R. 1; Post Office v Union of Post Office Workers,

[1974] 1 W.L.R. 89.

Discrimination in a human rights context is exclusion, restriction or preference of treatment based on one of a number of protected characteristics the result of which is the prevention or impairment of the exercise of human rights and freedoms guaranteed in the Code.

In order to determine whether Huck was discriminated against in this case, it is necessary to apply the principles I have set out. Before embarking on that, I must of necessity identify the specific act or acts of which he complains as being discriminatory or which resulted in discrimination. It is apparent from an examination of the complaint filed, and the evidence, that the specific acts complained of as constituting discrimination are: First, the requirement that he agree to be transferred to a regular aisle seat or agree to view the movie from the area immediately in front of the first row of seats before they would sell him a ticket; and, secondly, the failure to provide him with a choice of a place from which to view the movie comparable to that offered to other members of the public. The issue in this case iswhether that conduct of the respondent towards Huck, a physically reliant person, results in treatment which is restrictive, detrimental or prejudicial to him. If it does, it is discriminatory and contrary to the provision of s.

12(1)(b).

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J. found that the Legislature did not intend that the particular needs of the physically disabled must be catered to by persons who provide services to the public. He found that all s. 12(1)(b) requires is that the physically disabled be offered the same facilities as are offered to the public, no more or no less. In so doing, he concluded that if the Legislature had intended anything more they would have said so. With the greatest respect, I do not agree that that is the proper interpretation to be given to s. 12(1). The Code must be given a liberal interpretation to insure that its objects as set out in s. 3 are achieved. The promotion of inherent dignity and equal inalienable rights could not possibly be achieved if the Code was interpreted in the manner suggested by Halvorson J.

I agree with the statements made by the board of inquiry that in order to find whether Mr. Huck was discriminated against, it was necessary to determine 'if the service or facility offered [Huck] varied in any significant manner from the service or facility offered by the respondent to the general public'. The service offered Mr. Huck if he wished to remain in his wheelchair, was a specified place from which to view the movie. He had no choice

but to view the movie from in front of the first row of seats and from no other place. The offer made to other members of the public, not suffering from physical disability, was unrestricted as to where they could view the movie. They were able, on a first-come first-serve basis, to sit in any seat or place of their choice. The failure to provide Mr. Huck with a choice of places from which to view the movie is prejudicial treatment because of the complainant's disability and handicap. It makes little sense to provide access ramps and bathroom facilities for the physically handicapped and not to make provision for them to view the movie itself.

On the facts of this case, I am of the opinion that the respondent, by requiring Huck to agree to transfer to a regular aisle seat, or to view the movie from an area in front of the first row of seats before selling him a ticket, and, failing to provide him with a choice of a place from which to view the movie comparable

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that offered to other members of the public, is exclusion and restriction of treatment based on physical disability.

It is discrimination as contemplated by s. 12(1)(b) of the Code. It is no defence that the acts complained of were not

intended to be discriminatory, the result of the respondent'saction is discrimination."

I find that with respect to each of the above-mentioned cases, the difference in treatment resulting from the absence of level access comprised an adverse differentiation within the meaning of section 5(b). I find that in each such instance, the embarrassment caused, the risk of injury caused or the inconvenience caused, resulted in a significant negative effect which, considering the importance of the right to vote, and the objects of the Human Rights Act, comprised a breach of section 5(b) of the Statute.

I find as well that the absence of level access at St. Margaret's Anglican Church and Westminster United Church comprise an adverse differentiation within the meaning of section 5(b) in the case of Marianne Bossen, notwithstanding the fact that she did not attend to vote at either such location. The effort which she was required to make in order to obtain the information and make arrangements to attend at a polling station with level access, was so different from the effort required of non-disabled voters that, considering the importance of the right which was in issue, this section has been breached. Had the information as to where she could vote been made more readily available to her, I might have reached a different conclusion on this one complaint.

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GENERAL

COMPLAINT (PO4310)

Counsel for the Respondents submits that the general complaint which is set out at page 3 of this decision should be dismissed "on the basis that the complaint is beyond the jurisdiction of this Tribunal." (page 38 of his written Argument)

Counsel for the Respondents refers to section 33(b)(ii) of the Human Rights Act which states,

"Subject to Section 32, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(b) The complaint

(ii) Is beyond the jurisdiction of the Commission."

and subsection 5(c) of section 32 of the Human Rights Act which states,

"5) No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice

(a) Occurred in Canada and the victim of the practice was at the time of such act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to

return to Canada;(b) Occurred outside Canada and the victim of the practice was at the time of such act or omission a Canadian citizen or an individual admitted to Canada for permanent residence;

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c) Occurred in Canada and was a discriminatory practice within the meaning of Section 8, 10, 12, or 13 in respect of which no particular individual is identifiable as the victim."

He submits that "The clear framework of the legislation is that there is not jurisdiction for a complaint where there is no particular identifiable victim."

Counsel for the Human Rights Commission submits that the combined effect of subsections 5(a) and 5(b) of section 32 of the Act "is that a case is made out under section 5 of the Act provided that the victim of the alleged discriminatory practice is identifiable. The Act does not require that the victim be identified by his or her name."

I choose to dismiss this complaint, not for lack of jurisdiction but because the evidence does not support the complaint. The evidence is insufficient in a number of ways. I am content to refer to the following. The evidence which has been

adduced refers to three groups of persons.:

(a) Eight persons have been identified in the personal complaints. If the general complaint is intended to duplicate the other eight complaints, it would not be appropriate to permit the same matters to be the subject of more than one complaint.

(b) Counsel for the Human Rights Commission sought to support this complaint on the following basis

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- 25 -"

The Tribunal has referred to the testimony of Mr. Lane, volume 1 of the Official Record, page 69. This portion of Mr. Lane's testimony establishes that employees of the Canadian Paraplegic Association and members of its Board and members of the Association have found that their poll was not accessible."

The most that can be taken from this portion of Mr. Lane's evidence is that he received from these persons a report that their polls were inaccessible. I find that there is no evidence to establish that the polls for which the unnamed persons were enumerated, were in fact inaccessible.

(c) Lucy Deluca stated in her evidence that she attended at Fort Rouge School in order to vote in the company of other personswho shared with her the Handi Transit van. These unidentified

persons encountered the same difficulties as Ms. Deluca. These persons were not called as witnesses and the evidence, inter alia, does not establish that such persons were enumerated or qualified to vote there.

If Counsel for the Human Rights Commission is correct in his position that the Act does not require that the victim be identified by his or her name, a point on which I need not rule, the case would surely be rare where all of the elements of the Statute can be proved without calling the person as a witness and thereby identifying the person by name.

WAS THERE A BONA FIDE JUSTIFICATION?

Having found that the Complainants in each of the

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above-

mentioned personal complaints have established a prima facie case against the Respondent Returning Officers, I turn to consideration of section 14(g) of the Act which provides as follows:

"14. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation."

Counsel for the parties have agreed that once a prima facie breach of section 5 has been proved, the onus shifts to the Respondents to show that there is a bona fide justification for the denial or differentiation. There is considerable authority as to the meaning of the words "bona fide occupational requirement" as used in section 14(a), for example, the case of the Ontario Human Rights Commission and BruceDunlop and Harold E. Hall and Vincent Gray v. The Borough of Etobicoke [1982] 1 S.C.R. 202. In that case, a fireman had his employment terminated at age 60 pursuant to the provisions of a collective agreement. A complaint alleging discrimination was made under the Ontario Human Rights Code and the Court was called on to decide whether or not the retirement provision, which was prima facie discriminatory, could be saved as a "bona fide occupational qualification and requirement" within

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the meaning of the Ontario Statute. The Judgment of the Supreme Court of Canada provided a two-part test which an employer must

meet in order to justify a particular limitation as a bona fide occupational requirement or qualification. The test has a subjective and objective element. Under the subjective aspect of the test, the Respondent must show that the limitation was imposed in the honest belief that it was in the interest of adequate performance of the work. Under the objective element of the test, the Respondent must show that the limitation was reasonably necessary to assure the efficient and economical performance of the job. In addition, in a case involving an allegation of adverse effect discrimination, there are authorities which hold that if an employer refuses to make reasonable accommodation for the needs of an employee, without having to incur undue hardship, the practise will not be justified. See for example, the case of Central Alberta Dairy Pool v. Alberta (Human Rights Commission) L1990] 6 W.W.R. 193.

Counsel for both parties in the instant case agree that the test under section 14(g) of the Federal Statute is similar to the test under section 14(a). They agree as well that no Canadian case has yet decided how the concept of bona fide justification is to be applied in the context of an allegation of denial of services on the ground of disability. Counsel for the Respondent asked me to apply a test similar to that established in the Ontario Court of Appeal and Re Zurich Insurance and Ontario Human

Rights

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- 28 -Commission

(1987) 59 O.R. 2d, 325; affirmed 70 O.R. 2d, 639. This case was not an employment situation. In the case, a single, twenty year old male complained of discrimination under the Ontario Statute on the basis of age, sex and marital status in the premium set for his motorvehicle liabilty insurance. The Court held that the provision was justifiable since it was reasonable and bona fide. However, counsel for the Human Rights Commission points out that the Ontario statutory defence used the phrase "reasonable and bona fide grounds" whereas section 14(g) of the federal act speaks of bona fide justification.

Counsel for the Human Rights Commission, on the other hand, referred me on this point, to the case of Attorney General of Canada v Mark Rosin and Canadian Human Rights Commission [1991] 1 F.C. 391. At page 408 to 409 of the reasons, Linden, J.A. stated,

"It is clear that acts done in apparent violation of Section 5 may be justified pursuant to Section 15(g) and conduct contrary to Sections 7 and 10 may be excused pursuant to Section 15(a). The standards set out in these two provisions are very similar. It has recently been made clear by the

Supreme Court of Canada that there is no difference between a bona fide occupational requirement and a bona fide occupational qualification. 'They are equivalent a-nd coextensive terms.' (See Alberta Human Rights Commission v. Central Alberta Dairy Pool (Supreme Court of Canda, No. 20850, September 13, 1990 at p. 13, per Wilson J.) Similarly, it might be concluded that the two phrases - 'bona fide occupational requirement' (as in s. 15(a)) and 'bona fide justification' (as in s. 15(g)) convey the same-meaning, except that the former is applicable to employment situations, whereas the latter is used in other contexts. The choice of these different words used to justify prima facie discrimination, therefore, are matters of style rather than of substance. I shall refer henceforth to both of the above phrases as B.F.O.R.

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- 29 -The law of B.F.O.R. has been clarified to some extent by the Supreme Court in the recent decision of Alberta Human Rights Commission v. Central Alberta Dairy Pool (supra). Madame Justice Wilson, writing for the majority (4-3) held that, in cases of direct discrimination (which, it was agreed, was the situation in this case), the employer must justify the discriminatory rule as a whole. It is not

necessary, as it is in cases of indirect discrimination, to take into account any measures adopted to accommodate any individuals involved. In cases of direct discrimination, the rule stands or falls in its entirety, since it applies to all members of the group equally. In assessing the validity of such a rule, the tribunal must decide whether it was 'reasonably necessary' to ensure the efficient performance of the job without endangering the safety of the employee, fellow employees and the public. The onus is on the employer to establish that the rule or standard is a B.F.O.R. It is not enough to rely on assumptions and so-called common sense; to provide the need for the discriminatory rule convincing evidence and, if necessary, expert evidence is required to establish this on the balance of probabilities. Without that requirement, the protection afforded by human rights legislation would be hollow indeed. Hence, it is necessary, in order to justify prima facie direct discrimination to demonstrate that it was done in good faith and that it was 'reasonably necessary' to do so, which is both a subjective and an objective test. (See Central Alberta Dairy Pool, supra; Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202 per McIntyre J. See also Special Report to Parliament on the Effects of the Bhinder Decision on the

Canadian Human Rights Commission (1986).

Based on this decision, counsel for the Human Rights Commission submits that before the Respondents can rebut the burden which was shifted to them, they must show that the denials or differentiations were bona fide and reasonably necessary.

It is difficult to transpose the test which has been carefully crafted by our Courts for employment situations so as to suit the mould of the case of denial or differentiation in

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- 30 -providing

of services. The issue is, have the Respondentssatisfied me on a balance of probabilities that the denial of access was bona fide justified? In deciding this issue, I have attempted to apply the subjective test and the objective test developed in Etobicoke. Under the subjective test, the Respondents would have to show that the denial of access took place in the honest belief that it was imposed in the interest of adequate conduct of the election. Under the objective test which has been developed under section 14(a), the Respondents would have to show that the denial of access was reasonably necessary to assure the efficient and economical conduct of the election.

However, it seems to me that it is not appropriate to focus too much attention on economic factors when considering whether or not denial of access to a non-business-related facility is bona fide

justified. Also, a high standard of care will be required because of the importance of the right which has been prima facie infringed.

Counsel for the Respondents has attempted to prove that the denial or differentiation in each of these cases was bona fide and justified because it was impossible for the Returning Officers in each of the constituencies in question to provide level access. Impossibility would satisfy the standard of reasonableness.

However in the event the Respondents have failed to prove that providing of level access was impossible, I must go on to consider whether or not they have established that the denial was reasonably necessary

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- 31 -and

bona f ide, notwithstanding the fact that they have not established the impossibility of fullfilling the task. I therefore review the evidence which was adduced on behalf of the Respondents.

Kathleen Patterson (Complaints of Derksen, Deluca, Lane and Bauhs)

Kathleen Patterson served as Returning Officer for the constituency of Winnipeg/Fort Garry. When first appointed in 1977, she was sent to Ottawa for three days of in-depth training. In order to locate buildings in the area which might be used for polling stations, she stated that she used information available

from prior elections, telephoned churches, schools, community clubs and drove the area herself. The driving was mainly in the Fort Garry area because the streets were complicated. "It was just a nightmare really to try and establish boundary lines ..." (transcript volume 2, page 43) She said that one of the first things she had to do was set up polling divisions. When asked what instructions she received about the importance of level access, she stated,

"It was emphasized by Elections Canada, that it should receive emphasis, but it wasn't always possible. . . . Well, you had to consider the accessibility for all the electorate within the boundary lines of the advance polls. And that you tried to get it in the centre so that it was accessible to everybody. We had to consider all the electorate."

(transcript volume 2 pages 44 to 45)In 1977, Ms. Patterson made enquiries of a person in the federal

Department of Public Works who came down and looked at some of the buildings in the area and she concluded, based on his advice that ramps could not be installed as it would have been extremely

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dangerous

to do so. She identified Exhibit R-10 Notice of Advance Poll which was published by her showing that all eight advance polls were level access. As such, it showed that Fort Rouge

School had level access. She was asked what enquiries she made at the time that she established Fort Rouge School as an advance poll and she replied,

"Well, traditionally Fort Rouge School had always been used as a polling station and as a place for advance polls. All these schools that were advance polls, from one to five, were all in Winnipeg School Division No.1, so I phoned Mrs. Griffin at Winnipeg School Division No. 1 who was in charge of renting out schools, and I asked her for permission to use these schools, and I also asked her if they were level access. So, according to her they were level access and so I established them as advance polls." (transcript volume 2, page 51)

Ms. Patterson subsequently found out that Fort Rouge School did not have level access. She was next asked about the Holy Rosary Church, where one of the regular polling stations was located. She stated in an earlier election, she went to Holy Rosary Church and spoke to the pastor and found out that the church did not have level access. She said,

"I was strapped for space in that area, and when I went to see him in 1984 I went to see if he had or if they had installed an elevator in that church because in the previous elections I didn't use St. Ignatius Church for the simple

reason was that they had a lot of steps going down, but I had more scope there, but they had installed an elevator and an outside ramp and also an elevator in the interior and so I thought that perhaps Holy Rosary Church had done the same, but they hadn't."

(transcript volume 2, page 52)

She estimated that there are a dozen steps within the church down to the auditorium where the poll was held. She said that she did

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not

have any options. She checked them out. She had enquired at 55 Nassau and was not allowed to use that building for a poll if non-residents were to make use of it. One Evergreen had enough electors to constitute a poll, so a poll was established in the lobby for the purpose of the residents of that building.

Although the information published indicated more, out of eight advance polls, six had level access and 35 out of 42other polling stations had level access.

In cross-examination, Ms. Patterson stated that once she realized that Fort Rouge School was not accessible, she did not look into the possibility of having a temporary ramp installed.

She looked for an alternative site to Holy Rosary Church. She found that St. Luke's Church had level access on the outside, but a long flight of stairs on the inside, down into the auditorium.

She acknowledged that there is a senior citizens' home across the street from 55 Nassau and it has level access. She was unable to recall whether or not she looked into the possibility of using the building as a polling station in 1984 election. She recalled receiving telephone calls from persons to enquire whether or not the advance poll at Fort Rouge School was accessible or not and that before she found out the true state of affairs, she informed people that the school was accessible.

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- 34 -Phil

Cels (Complaints of Chodak and Russell)

Phil Cels gave evidence that he served as Returning Officer for the constituency of Brandon/Souris in the September 1984 election. He was assisted in that work by an Election Clerk by the name of Terry Penten, who passed away in 1985. He stated that following his appointment in 1981, he participated in a training program. He was asked about what procedure he followed in establishing polling stations.

"I do remember that in general, my role is to find polling locations that were accessible of the greatest numbers, the bulk of the population, so that they could readily vote. Part of what my consideration at the time would be traditional spots where people voted. I remember relying

upon people who were in the communities outside of Brandon to give me advice as to traditional spots as to where people voted, to give me advice as to available spots in public buildings where people could vote. So certainly available public buildings, accessible to the polling subdivision were our primary considerations. I don't remember specifically if I insisted on level access, but I think that would have been part of general consideration at least." (transcript volume 1, page 130)

Mr. Cels was asked how St. David's Church came to be selected for a poll and he replied, "I really do not have much specific information other than to assume that it was chosen because of past voting habits." (page 135) When asked about the selection of Earl Oxford School, he stated that the school had been used as polling station on prior occasions, and on such occasions, the school made available the library on the main floor of the building. On this occasion, arrangements were made by another person, who has since passed away and Mr. Cels was unable to provide any information as to how or why the upstairs came to be used or why

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change was permitted to happen. He said that he had a conversation with the caretaker of the school several years after

the election but was unable to obtain any useful information to explain the reason for the change. Mr. Cels speculated to an extent about what may have happened, but his evidence of speculation was of no assistance to me in making my findings. Mr. Cels also stated that he did not give any instructions to Deputy Returning Officers as to what to do in case persons using wheelchairs showed up to vote at non-level access polls, although he did know that there were polls which were non-level access. In the Brandon/Souris constituency, eight of nine advance polls had level access, as did 166 out of 175 polling stations on election day.

Elgin Rutledge

Elgin Rutledge is the secretary/treasurer of the Rural Municipality of Woodsworth and has so served for the past 18 years. He is familiar with the geography of the area and public buildings located within the Municipality. He is familiar with St. David's Church. He stated that in 1984 there were no public buildings in the area of St. David's Church, nor any other churches. The nearest level access building of a public location to St. David's Church was located in Oak Lake, in a different constituency than Keith Russell had resided in.

Joan Belisle (Complaint of Bossen)

Joan Belisle served as Returning Officer for the

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- 36 -constituency

of Winnipeg/St. James, in the September 1984

election.

She was first appointed to the position in 1976 following which she received a four-day training course in Ottawa. She stated that an early priority after the election is called, is to establish the location of advance polls and polling stations. Her practice was to drive around the area to see where there would be level access, suitable for polling stations for polling day, as well as advance polls. She said, "I guess my priority was level access as well as . . . I didn't want the electorate crossing over busy thoroughfares like Sargent Avenue, Ellice Avenue, Portage Avenue, so I contained my polling stations as much as possible so the electorate didn't have to cross the main thoroughfares." (transcript volume 1, page 158) She said that the volume of seniors in her constituency played a very large role in selection of polling stations.

When asked as to her recollection of the availability of level access at the Westminster United Church she stated, "Well, the Westminster United Church, what I recall had a ramp. So you were able to get to the Church, and we have used it in the past, but they obviously put us in the basement at this particularelection." (transcript volume 1, page 163) When asked whether or

not other level access buildings were available to serve as polling divisions instead of Westminster United Church, she spoke of one new building which she had asked to use, but had been refused,

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but

apart from that "I don't recall if there was any. That was the problem at the time." She acknowledged that St. Margaret's Church did not have level access and that she knew that fact at the time. When asked whether or not there was an alternative to St. Margaret's Church, she replied ". . . in the older areas back in 1984 where now everything is level access, and that particular time it was very very difficult finding things level access." (transcript volume 1, page 164)

In cross-examination, Ms. Belisle stated that Westminster United Church had a ramp leading into the building. The problem was inside. "What I recall I believe they were doing some renovations in the church at the time and it is my understanding that they put the advance poll what I recall in the basement of the church and down a few stairs." (transcript page 169)

She acknowledged that she made no effort to install a temporary ramp to the basement. "At that particular time that wasn't part of what we could do with the Election Act at that time."

(transcript page 169). She did not check with the Chief Electoral Officer's office to see if there were funds available in the budget to make places level accessed. On the subject of level access, she stated further,

"If we could get level access at any place, that is what we took. All I am saying is that in 1984, in my area which is an old established area, there is very few places at that time that have level access. We couldn't, you know, pull level accesses out of the air, because the election was called. I did what I possibly could to get level accesses." (transcript volume 1, page 173)

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- 38 -Ms. Belisle was also questioned on the subject of whether or not it was possible to install ramps to increase the number of buildings with level access. She stated,

"I guess in some cases there could be. I don't know whether there would be the provisions for it at that particular time. I did, and I provided what I possibly could do under the circumstances." (transcript volume 1, page 174)

As to premises for advance polls, she stated that although the statute only required that one advance poll have level access, she tried to get as many as possible with level access. She has

observed that since then many churches have installed ramps to permit their congregants to have better access.

Three or four out of six advance polls had level accessand 95 out of 160 other polling stations had level access.

Anne McDonald (Complaint of Ament)

Anne McDonald served as Returning Officer for the constituency of Winnipeg/North Centre. She was first appointed in 1979 and was sent to Ottawa for a week-long training. In establishing locations for polling, she spoke of the persons who assisted her. She said that her daughter, Darlene Gray did a lot of the running around because she had the car.

In 1984, she stated,

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- 39 -"

We tried to find everything we possibly could, for level access and that. But being an old part of the City it's just hard to get into a lot of these buildings. So I don't know, I thought we did pretty well (transcript volume 2 page 16)

She stated that she had received instructions to obtain as many level access polling stations "as we possibly could". (transcript volume 2, page 19) Ms. McDonald said that she preferred to use the Plaza By the Riverside for a polling station as had been done before, but management refused to permit non-residents to come into the building, so Ms. McDonald had to find another location.

She said that the Fort Rouge Curling Club "was the only thing that we could possibly get that wasn't too far from everything." (transcript volume 2, page 20) She acknowledged that the Grain Exchange Curling Club building had no level access and that she knew that.

Ms. McDonald arranged a Returning Office with level access. Six out of six advance polls had level access and 100 out of 126 other polling stations had level access.

In cross-examination she stated that the problem with the building was that once inside the door, there "was a couple of steps to go up." (transcript volume 2, page 21) She isn't sure of the number of steps. When she realized that the building was not accessible because of those steps, she did not look into the possibility of installing a temporary ramp "because we are not allowed to..... we didn't have any allowance to build ramps. .

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'84 I believe I wasn't allowed to build a ramp."

(transcript volume 2, page 22) When pressed further as to whether or not she had checked with the Chief Electoral Office to see if money was available, she stated "I can't recall whether I did or not, sir." (transcript volume 2, page 23)

Darlene Gray

Darlene Gray is the daughter of Anne McDonald and she assisted her mother in fullfilling the duties of ReturningOfficer. She personally received training from Joan Belisle. Ms. Gray, following her mother's appointment, drove around the constituency familiarizing herself with it. She was accompanied by her mother. She had the benefit of the proclamation from the previous election stating where the polling stations had been. She stated that in her instructions, "It was stressed that where possible would we please use polls where either ramp or no stairs are . . . and we did try our level best to secure polls of that nature when we could." (transcript volume 2, page 29) She said that she took into account other factors,

"such as the proximity to the electorate's residences. You don't want them going too far away from home. Major thoroughfares. The type of building itself, preferably public buildings. The condition of the building itself; you wouldn't want them going into dilapidated buildings. There are many factors. I hope I have named just about all of them." (transcript volume 2, page 29)

She said that once she drove the area, she would endeavour to get hold of either building management or the public agency responsible

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for

the administration of a particular building. Prior to an election you can only make a tentative arrangement with management. "You cannot finalize anything until the election is called. You may find a place that is ideal and then find that when the election is called, it is not available." (transcript volume 2 page 30) She confirmed that the building known as the Plaza By the Riverside was not available for use in the election. She stated, "Well, I was very concerned because it meant that we had lost a poll that was level access and a scramble was on to find another place to put the poll." (transcript volume 2, page 35) She stated that she made an enquiry about the availability of the C.N.R. Station but she could not get permission for that. There was also another senior's home in the area with level access but it was not available. There was also a church that she used to use, but it did not have level access. The Grain Exchange Curling Club was selected "because of its proximity to the polls that we wanted there." (transcript volume 2, page 36) She was aware that there were steps.

In cross-examination, Ms. Gray was asked if she had made any effort to make the building temporarily accessible to wheelchairs and she replied "we didn't have any means by making temporary access." (transcript volume 2, page 38) "Well, we were not authorized to build ramps or ask building management to build ramps."

(transcript volume 2, page 39) When asked whether or not she looked

into the possibility of having a temporary portable ramp installed

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- 42 -there,

she replied, "No, we weren't allowed in those days to do

things like that. . . . Elections Canada did not provide for rampsto be created, rented or built." She did not check with the Chief

Electoral Office but stated, "to my knowledge we were not."

(transcript volume 2, page 39)

Andree Lortie

Andree Lortie serves as the Assistant Director of

Operational Planning and International Services group with

Elections Canada and has held that position since July 1990.

Prior to that she served as Executive Assistant to the Chief

Electoral Officer for 14 years. Between 1981 and 1990 she has

been involved with Elections Canada with respect to special

projects. She stated that she has been involved in the

development of guidelines of instructions to Returning Officers.

As such she has dealt with special categories of electors

including visually impaired, hearing impaired, homeless, illiterate

and persons with physical disabilities. Elections Canada on

occasion retains outside consultants to advise on matters.

She stated that in 1984:

"We had an intensive information program, and one of

ads was specifically dealing with advance polling and all the . . . the information was to the effect that how you could get around to vote for advance polls and there was a number of the Returning Officers if you needed any special information, and that you could

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vote

at the advance or at his office if you could not make it for an ordinary poll, or that you could also obtain a transfer certificate. (transcript volume 2, page 75)

There was also reference to incapacity or disability in the ad.

As to instructions given to Returning Officers dealing with the issue of level access she stated,

"A. For 1984 at least the Returning Officers were instructed by memo that the criteria in the selection of their polls was definitely level access, to make a special effort to have them at all advance polls, and to try as hard as they could to get the level access but as long as it was not unduly inconveniencing other electors.

Q. Is that advance or also at regular polls that you are speaking of?

A. Both.

Q. Both?

A. Yes. The emphasis was definitely more on the advance.

Q. We have seen what the provisions of the Elections Act

are with respect to advance polls, and that is at least oneadvance poll has level access. How did the statutory

requirement that at least one advance poll have level access,

how did that compare with the instructions that were being

given by the electoral officer to the Returning Officers?

A. The results compared favourably. The instructions were

definitely stronger than the legislation.

Q. To your knowledge were Returning Officers, at least in

Manitoba, if not elsewhere in Canada, exceeding the statutory

-- and I speak of statutory referring only to the Canada

Elections Act requirement -- with respect to advance polls?

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- 44 -A

We definitely did, because if my memory serves me right, in

some of the areas in Manitoba anyways out of 119 advance

polls we had 100 that had level access."

The actual instructions provided to Returning Officers are

contained in Exhibit R-12, tab 1, as follows:

"When possible locate advance P.S.'s at a place that will

provide ease of access to any elector who is confined to a

wheelchair or otherwise incapacitated or who is of advanced

age. At least one advance P.S. with level access must be established in each urban municipality of the E.D.

The main consideration governing the selection of P.S.'s is accessibility. Whenever possible, a P.S. should be centrally located in a school or other public building, such as a community centre, church hall, recreation hall, or the like. In consideration of those electors who are infirm or handicapped, R.O.'s must make every effort to locate P.S.'s on the ground floor, in buildings that are served by elevators or provided with special ramps."

She stated that these were the instructions which were sent to Returning Officers prior to the 1984 election and it is part of the manual of instructions for the whole period of the election.

Ms. Lortie identified one of the several notice of advance poll which were filed in evidence before me (Exhibit R-10). She stated that the procedure of inserting stickers indicating which polls were level access changed for the 1988 election. The policy change made it mandatory for every advance poll to have level access. As a result, the form has a picture of a wheelchair printed on

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it

opposite the location of each advance poll as opposed to the

former procedure of having a sticker inserted opposite the location of each advance poll. Ms. Lortie pointed out that in addition to having the opportunity to vote at a regular poll, an advance poll or by virtue of a transfer certificate, voters can vote in the Returning Officer's office from day 21 onward, exceptfor advance poll days, Sundays and election day. She is aware of instances where electors have shown up at a polling station on polling day and find that there is no level access. If the elector has required level access to get in, a box has been brought out to the curb or the door, or the person has been assisted into the polling station.

Ms. Lortie told us about the Parliamentary Committee which conducted hearings in about 1981 across the country and a report called The Obstacles Report was published. That report dealt with the subject of accessibility and made the following recommendation:

"That the question of accessibility of polling stations, voting booths and the offices of Returning Officers and Deputy Returning Officers be referred to the Standing Committee on privileges and elections."

Ms. Lortie stated that the Chief Electoral Officer has made recommendations for improvements in procedures in his reports to Parliament for 1983, 1984 and 1988, and from then on he has asked for continuous efforts to improve on the services.

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The

1983 Statutory Report, Exhibit R-14, recommended as follows:

"I, therefore, recommend that the Canada Elections Act be amended to provide that the office which every Returning Officer must open as soon as a Writ of Election is issued be established at the place in the electoral district which would be the most convenient for the majority of the electors to be served, and located in commercial premises with direct or elevator access. Provisions could be made for exceptional cases, which would have to be approved in advance by the Chief Electoral Officer."

The 1984 Statutory Report, Exhibit R-15, recommended as follows:

"45 - Voting by Incapacitated Electors

As suggested by the Special Committee on the Disabled and the Handicapped and in order to better serve incapacitated electors, it is proposed that, in some cases, the Deputy Returning Officer be allowed to take the ballot box outside of the polling station.

Recommendation

That, when a polling station does not provide level access, the Deputy Returning Officer and the Poll Clerk should be

authorized to take the ballot box and the necessary documents

to the entrance of the polling station or even outside, in

order to permit an incapacitated elector to cast his vote."

In the meantime, the September 19, 1984 election took place.

Subsequently Bill C-79 was introduced to Parliament, and ifenacted, it would have made the following changes:

- Amend section 4(1) to provide that Elections Canada is

responsible for ensuring that the provisions of the Act are

complied with.

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- 47 -Amend

section 9(1) to require a Returning Officer's office to

have level access.

Amend section 33(1) to provide that polling stations,

wherever possible, provide level access and that if level

access can not be provided the Returning Officer shall on

request by an elector, give the reason why level access is

not available.

Add section 33(6.1) to require that every central polling

place have level access.

Amend section 33(9) to provide that whenever possible a

polling station provide level access to electors.

Add section 33(10) to create mobile polling stations for

elderly or incapacitated persons.

However, Bill C-79 died on the Order Paper when the 1988 election was called. That did not stop the Chief Electoral Officer from taking administrative action. His office engaged in consultations with Barrier Free Design Centre in Toronto in an attempt to design barrier-free election facilities. As a result Tab 2 of Exhibit R-12 was issued to Returning Officers. It was under these instructions that what Mr. Lane called 'an accessible election', was conducted.

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- 48 -Ms. Lortie identified and discussed in her evidence the following additional documents:

- Revised instructions to Returning Officers as to accessibility to polling stations, which were distributed to Returning Officers in 1988 (Exhibit R-12, Tab 2)
- Guidelines developed by Elections Canada in conjunction with the Barrier-Free Design Centre of Toronto in 1988 (Exhibit R-12, Tab 3)
- Memorandum to all Returning Officers dated July 29, 1988 re: accessibility to polling stations (Exhibit R-12, Tab 4)
- Memorandum to all Returning Officers dated September 29, 1988 re: level access at the polls (Exhibit R-12, Tab 5)
- Schedule of number of level access polls in relation to

number of polls established in the 1988 general election(Exhibit R-12, Tab 6)

- Report of the Chief Electoral Officer of Canada dated 1989

(Exhibit R-12, Tab 7)

- Memorandum to the Returning Officer for the constituency of

York North, dated October 12, 1990 re: level access election

facilities (Exhibit R-12, Tab 8)

- Policy statement adopted in principle by management committee

(Exhibit R-12, Tab 9)

These documents show that in the 1988 general election, 92 percent

of polling stations had level access. Manitoba's average was 96

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- 49 -percent.

The revised procedure which produced this "accessible

election" may be summarized as follows:

1. All Returning Officers' offices must have level access;

2. All advance polling stations must have level access;

3. All central polling places must provide level access.

Ordinary polling stations, not in a central polling place, must

as far as possible be located in premises that offer level access,

unless it would be physically impossible to do so, or where

the majority of the electors who are to vote in such premises

would be inconvenienced.

4. In all cases where Returning Officers would be unable to

locate a polling station in level access premises, they must be prepared to provide to any elector, on request, the reasons for the absence of level access.

5. Revisal offices must be located in level access premises.

6. Where parking facilities are available, one parking space must be reserved for the disabled.

7. Rented premises could be modified by constructing ramps on

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- 50 -a

temporary basis, provided that the ramps met certain specifications.

8. Returning Officers were required to prepare and submit to Elections Canada a report in an approved format as to the accessibility of the polls.

Ms. Lortie stated that Elections Canada received no requests from Returning Officers for permission to erect a ramp in the 1984 election.Elections Canada is now gathering information as to buildings which are available throughout the country with level access. She stated,

"All our efforts have been towards doing better all the time and to obtain the ultimate up to the point where the only way that a polling station would not have level access is if the poll cannot otherwise be held. Over and above that the C.E.O. was consulted

not too long ago about his policy, what he intended to do and he has stated then that he would welcome or that he would have no problem with this stringent policy if it was legislated and if it was actually incorporated into the Canada Elections Act either through an omnibus bill or through amendments to this legislation." (transcript volume 2, pages 101 to 102)

In cross-examination Counsel for the Human Rights Commission referred to the March 1988 instructions (Exhibit R-12, tab 2) and said,

... So, I read that as a trade off, in a way. In other words, that if there is to be inconvenience to

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- 51 -the

majority of the electors then if there is no level access building available the poll will be nonetheless located in it because that would result in inconvenience to electors; is that it?

A. Well, I think we have to give a degree to the inconvenience.

Q. Yes?

A. If it means moving a whole community fifty miles away to another community this is definitely inconvenience to the majority and it has a degree of inconvenience, as opposed to just being more convenient

because it is down across the street or in the park where

they have always voted before."

(transcript volume 2, page 112-113)

At page 114, he asked,

"Q. Yes, the question is has your office ever looked into the

possibility of renting stair tracks?

A. We did not in 1988 but we do with our new policy where

we want them all to be level access. We indicate that there

could be lifts, tractors, etcetera, whichever way they could

be used to provide the level access over and above ramps.

Q. And then no matter the number of stairs, with that type

of device?

A. As long as it is safe and physically possible.

Q. But that is much more flexible than erecting

temporary ramps; is it not? I mean there are manycases where one could not erect a temporary ramp but

that access could be given using one of those devices?

A. Correct."

At page 119 the following questions and answers took place:

"Q. So in other words, until 1988, until the chief electoral

officer came out strongly about level access, there was that

phenomenon of tradition of locating polls?

A. There was, definitely.

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Q.

I see. You referred us to Section 33 of the Act, its page 99. It is the understanding within your office that when Section 33 speaks of convenient access, it has nothing to do with level access, it has to do with the fact that the thing should be conveniently located for the majority of the voters; is that it?

A. That is the way that it had been interpreted. Convenience, now access. Access mainly has been extended to meaning level access in the orientation we have taken."

In re-examination Ms. Lortie was asked whether or not mechanical devices other than ramps were readily available in 1984 and she replied that she does not know.

I admitted into evidence as Exhibits R-16 and R-17 the Report of the Canadian Human Rights Commission, published in 1990, entitled "Unequal access - An accessibility survey of selected federal offices" and an Executive Summary of the Report. The Report tells us that public buildings occupied by federal agencies in the Winnipeg area scored between 45.92 percent and 75.51 percent for wheelchair accessibility. Four federal agencies achieved the following scores on mobility-wheelchair: Employment and Immigration 71.88 percent, Canadian Human Rights Commission 45.92 percent, Health and Welfare Canada 67.23 percent, and Public

Service Canada 75.51 percent.

After a careful review of all the evidence which has been submitted on behalf of the Respondents, I find that it has not been established on a balance of probabilities that it was impossible to provide level access to Mr. Lane, Ms. Deluca, Ms.

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or Mr. Derksen in Winnipeg/Fort Garry, or to Mr. Chodak in Brandon/ Souris. Mrs. Patterson failed to satisfy me that she ruled out the possibility of the poll being established at the senior citizens' home on Roslyn Road as an alternative to Holy Rosary Church. She failed to personally inspect Fort Rouge School.Once she found out that Fort Rouge School did not have level access, she made no effort to notify disabled voters, either by newspaper or by a telephone call to the Canadian Paraplegic Association or by arranging for a person to be in attendance at the entrance to Fort Rouge School, to provide an explanation to voters to whom she or her staff had provided incorrect information. Nor did she make any enquiries as to whether or not a temporary ramp could be installed and if so, whether or not funds are available to cover the cost. In making this finding, I do not mean to be overly critical of her efforts. She impressed me as a competent Returning Officer whose days of service during

the 1984 election were occupied and well spent. However, at stake here is an important human right and if more assistance is required to permit a Returning Officer to carry out her full responsibility and if expense has to be incurred, the Chief Electoral Officer should make available the assistance and the funds. In these circumstances, I find too that the Respondent has not satisfied me that the denial was reasonably necessary, notwithstanding the fact that an enquiry was made at the Winnipeg School Division and incorrect information provided.

In connection with the complaint with respect to Mr. Chodak, the Respondent Cels has failed to explain why he or his

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did not require the polling station at Brandon/Souris to be held on the main floor, as had been done in prior elections. The Respondent has therefore failed to satisfy me that provision of this important right was impossible or in the alternative that the denial was reasonably necessary. That situation was aggravated when Mr. and Mrs. Chodak attended to vote, with the reasonable expectation that Mr. Chodak would have access to the poll, only to find a Deputy Returning Officer or Clerk who refused to do anything to try to remedy the situation and blamed the Chodaks for failing to make other arrangements for themselves.

In the cases of the complaints of Mr. Russell, Mr. Ament and Ms. Bossen, I find that the Respondents have satisfied the onus of showing that the denial was reasonably necessary and I dismiss the complaints on the ground that the absence of level access was bona fide justified.

(a) Complaint of Keith Russell

The evidence of Elgin Rutledge satisfies me that it was not possible to provide a polling station with level access instead of using St. David's Church.

(b) Complaint of Don Ament

The evidence of Mrs. McDonald and Ms. Gray satisfy me that it was not possible to find a level access polling station instead of the Grain Exchange Curling Club.

(c) Complaint of Marianne Bossen

The evidence of Ms. Belisle and Ms. Bossen satisfy me that>-

it was not possible to find either a polling station with level access to replace St. Margaret's Anglican Church or an advance poll to replace Westminster United Church.

LIABILITY OF THE CHIEF ELECTORAL OFFICER

Is the Chief Electoral Officer liable for breaches of the Act made by the Returning Officers for Winnipeg/Fort Garry and for Brandon/Souris? A consideration of this question involves a

review of the following provisions of the Elections Act:

114(1) The Chief Electoral Officer shall

(a) exercise general direction and supervision over the administrative conduct of elections and enforce on the part of all election officers fairness, impartiality and compliance with the provisions of this Act;

(b) issue to election officers such instructions as from time to time he may deem necessary to ensure effective execution of the provisions of this Act; and

(c) execute and perform all other powers and duties assigned to him by this Act.

(2) Where, during the course of an election, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions, extend the time for doing any act, increase the number of election officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation.

7(1) The Governor in Council may appoint a Returning Officer

for any new electoral district and a new Returning Officer

for any electoral district in which the office of Returning

Officer becomes vacant, within the meaning of subsection (2).

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- 56 -(

2) The office of a Returning Officer is not vacant unless

he dies, or, with prior permission of the Chief Electoral

Officer, resigns, or unless he is removed from office for

cause within the meaning of subsection (3).

(3) The Governor in Council may remove from office, as for

cause, any Returning Officer who(a) has attained the age of sixty-five years;

(b) ceases to reside in the electoral district for

which he is appointed;

(c) is incapable, by reason of illness, physical or

mental infirmity or otherwise, of satisfactorily

performing his duties under this Act;

(d) has failed to discharge competently his duties, or any

of his duties, under this Act;

(e) has, at any time after his appointment, been guilty of

politically partisan conduct, whether or not in the course of

the performance of his duties under this Act; or

(f) has failed to complete the revision of the boundaries of

the polling divisions in his electoral district as instructed

by the Chief Electoral Officer pursuant to subsection 10(1)."

Counsel for the Respondents has asked me to dismiss the complaint against the Chief Electoral Officer on the basis that he is neither employer of the Returning Officers nor responsible in any way for such breaches as occurred.

Counsel for the Human Rights Commission asked me to make a finding against the Chief Electoral Officer. He does not allege that the Chief Electoral Officer is the employer of the Returning Officers but says that he need not establish a master/servant

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- 57 -relationship.

In his written submission, he stated, "It has been settled since long that employer/employee relationships for the purpose of human rights legislation are not to be determined by using the law of master/servant." He referred to the cases of Cormier v. Human Rights Commission (Alta.) and Ed Block Trenching Ltd.- (1986) 56 A.R. 351 as well as Canadian Pacific Limited v. Canadian Human Rights Commission and Gilles Fontaine [1991] F.C. 571, 578 and - Attorney General of Canada v Mark Rosin and Canadian Human Rights Commission [1991] 1 F.C. 391 (Federal Court of Appeal), and Robichaud v Canada [1987] 2 S.C.R. 84, 95.

After giving careful consideration to the following

matters (1) the extended nature of the scope of responsibility indicated by the above case law; (2) the purpose of the Human Rights Act; and (3) the statutory responsibility of the Chief Electoral Officer to provide instruction to the Returning Officers, I find the Respondent, Elections Canada, responsible for the breaches of the Act which I have found against the Respondent Returning Officers. Further, I find that the instructions given by Elections Canada to the Returning Officers in Exhibit R-6 were inadequate and permitted the Returning Officers to believe that a lesser standard was required of them than I have found to be the case. My finding in this regard is reinforced by the fact that the more pointed instructions which were issued in 1988, Exhibit R-12, Tab 2 resulted in an 'accessible election'. I have not taken subsequent events>-

into account in determining whether or not there was a prima facie breach of section 5 of the Act. However, I consider it proper to take into account subsequent events in determining whether or not the Respondents have established a bona fide justification, whether or not Elections Canada has a responsibility for such breaches as have been found and in deciding what remedy should be applied.

REMEDIES

I have indicated the remedies which are sought by Mr. Lane on behalf of the Canadian Paraplegic Association. Counsel for the Human Rights Commission has asked me to make the following Orders:

1. all Returning Officers' offices and all advance polls have level access;

2. all polling stations be accessible to wheelchairs except in cases where pursuant to subsection 53(4) of the Canadian Human Rights Act this would result in undue hardship;

3. there be proper signs to indicate where the access is;

4. there be appropriate parking;

5. a list of all the accessible polls be available for public consultation in the office of the returning Officers;

6. this list be published in newspapers in sufficient time before election day to ensure that people who cannot vote at their regular poll because of lack of level access can either vote in the advanced polls or make an application for a transfer certificate;

7. after any election the Chief Electoral Officer shall make a yearly report to the Commission on the progress made in securing accessible polls. This obligation to report shall cease three (3) years from the date of the Tribunal's decision;

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copies of the said reports be provided to the Canadian Paraplegic Association;

9. enumeration slips indicate where people can inquire about the accessibility of polls;

10. the Chief Electoral Officer provides the Canadian Paraplegic Assocation with a letter of apology.Counsel for the Respondents submits that I ought not give consideration to points 5, 6 and 9 on the basis that no evidence was adduced by the Human Rights Commission in support of them and as a result Counsel for the Respondents in leading the evidence of Ms. Lortie had no reason to ask questions touching on these points. As a result, he urged, this Tribunal is deprived of an opportunity to receive Ms. Lortie's evidence on these points. I subsequently offered Counsel for the Respondents an opportunity to remedy the matter, if he felt that some further evidence is required. He chose to respond to the matter by making further written submission, maintaining the position that he was deprived of an opportunity to call evidence on the point. He made no motion to reopen the case and call further evidence and I am satisfied that the issues have been fully dealt with before me and that I am in a position to make a determination on the points.

ORDERS

The strong positive actions taken by Elections Canada after 1984 persuade me that no apology is required except for the

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- 60 -case

of Mr. Chodak. I find that the breach of section 5 made by the Returning Officer and, in turn, contributed to by the inadequate instructions given by Elections Canada, taken with the behaviour of the Deputy Returning Officer or Clerk at the poll, is so unacceptable that an order to provide a written apology to Mr. Chodak is appropriate.

I make the following declarations:

1. that the Respondent Returning Officer for Winnipeg/Fort Garry and the Respondent Elections Canada committed a breach of section 5 of the Human Rights Act with respect to the Complainants John Lane, Lucy Deluca, Karen Bauhs and Jim Derksen. (Complaint Nos. P04272, P04568, P04571 and P04570).

2. that the Respondent Returning Officer for Brandon/Souris and the Respondent Elections Canada committed a breach of section 5 of the Human Rights Act with respect to the Complainant Murray Chodak. (Complaint No. P04573).

3. that the Respondent Elections Canada and the Respondent Returning Officer for Brandon/Souris provide Murray Chodak with a written apology within thirty days of delivery of this

award, and I so order.

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- 61 -4.

that the right to equal treatment of physically-disabled voters in Canada includes the right of each person to the following:(a) to level access to the offices of all Returning Officers and all advance polls;

(b) to level access to all other polling stations unless such requirement would preclude the establishment of a poll in an area.

(c) to be notified at least 26 days before election day in the event that a polling station in any area is not to be provided with level access;

(d) to be informed by the Returning Officer for the constituency, on request, the reason why any polling station which does not have level access, does not.

(e) to signs indicating where level access to a Polling Station is located, appropriate parking and signs indicating the location of parking for the disabled voter.

Counsel for the parties have canvassed what procedures might be appropriate and practicable in order to identify for

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disabled

voters in advance of a polling day the polls which do not have level access in order to satisfy requirement (c). The possibilities which were canvassed were newspaper identification of polls which are accessible, newspaper identification of polls which are inaccessible, identification of polls which are inaccessible on the enumeration slips issued for such polling areas or identification of such polls on the "Notice of Enumeration" card which follows enumeration and is mailed to every enumerated elector 26 days before election day. Counsel for the Respondents submits that the latter procedure is the most practical option of those proposed. The evidence which has been adduced and the submissions made satisfy me that it is possible to effectively communicate to all voters in any area in which a poll does not have level access, facts of the absence of such level access at least 26 days before election day, leaving persons adversely affected an opportunity to make alternate arrangements. I leave it to the Chief Electoral Officer to decide how to communicate the information to the persons who are affected. In view of the steps which Elections Canada has taken since 1984 to improve accessibility of polling stations, I do not think it is necessary to make an Order spelling out exactly how the elections must be conducted. That is more the function of

Parliament and of Elections Canada and further, with changes in

technology, the procedures for complying with the statutory

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- 63 -requirements

will undoubtedly change. This case was argued in

terms of level access and ramps. In time, it may be feasible toinstall elevators, escalators or other lifting devices which may

provide a better solution than ramps.

For reasons set out at pages 54 and 55 of this Decision,

I dismiss Complaint Nos. P04574 (Keith Russell), P04567 (Don

Ament), P04569 (Marianne Bossen).

For reasons set out at pages 24 and 25 of this Decision,

I dismiss the general complaint (PO4310).

I wish to express my appreciation to counsel for all

parties for the helpful, thorough and carefully considered

submissions which have been made. They have made my task

considerably easier.

December 18, 1991

THE CANADIAN HUMAN RIGHTS ACT

(S.C. 1976-77, C. 33 as amended)

HUMAN RIGHTS TRIBUNAL

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- 64 -SCHEDULE

A

BEFORE:

PERRY W. SCHULMAN, Q.C.

BETWEEN:

CANADIAN PARAPLEGIC ASSOCIATION

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ELECTIONS CANADA - THE OFFICE OF

THE CHIEF ELECTORAL OFFICER OF CANADA

RETURNING OFFICER - WINNIPEG-NORTH CENTRE

RETURNING OFFICER - WINNIPEG-ST. JAMES

RETURNING OFFICER - WINNIPEG-FORT GARRY

RETURNING OFFICER - BRANDON-SOURIS,

Respondents

- and -

PEOPLE IN EQUAL PARTICIPATION INC.Interested Party

On October 23 and October 24, 1990 a hearing took place in the above matter before me in Winnipeg. During the course of the hearing, witnesses were called by counsel for the Canadian Human Rights Commission and by counsel for the Respondents. At the conclusion of the evidence, counsel for the parties asked me to

receive written submissions. Counsel for the Commission asked that he be given until December lst to file the first submission. Subsequently he asked that he be given until December 21st, and after that, he asked that he be given until January 25, 1991. On February 4th, counsel for the Commission advised the Tribunal officer that the parties have agreed that submissions need not be filed until an issue has been resolved which has been raised by counsel for the Respondents.

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- 65 -On

February 13, 1991 counsel for the Respondents wrote to the Tribunal Officer requesting leave to re-open the Respondents' case "for the purposes of putting into evidence certain documents which have come into existence subsequent to the hearing." By letter dated February 26th counsel for the Comission objected to such leave being granted. On March 6, 1991, counsel for People in Equal Participation Inc. (P.E.P.), (who is not the same counsel who appeared for P.E.P. at the hearing) advised that his client does not oppose the Respondents' Motion.

In order to hear the Motion the parties expressed a preference to argue the Motion by telephone conference call. Several attempts were made to convene a call Involving all counsel and the adjudicator. Because of difficulties In scheduling, I

received the submission of counsel. for the Respondents and for

P.E.P. by telephone and I subsequently received written

submissions from counsel for each of the parties. The last of

these submissions was received from counsel for the Comission on

May 3, 1991.

The Complaints

In issue here relate to access by handicapped persons to polling stations.

Counsel for the Respondents seeks leave to re-open the case "for the purposes

only of admitting into evidence the following documents,:

1. The study "Unequal Access: An Accessibility Survey of

Selected Federal Officers", published by the Canadian Human

Rights Commission and released in December, 1990.

2. Executive Summry of the above survey.

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- 66 -3

Winnipeg Free Press article "Human Rights Office

Inaccessible", December 24, 1990.

4. Winnipeg Free Press letter to the editor "Office accessDavid Hosking, Regional Director, CHRC", January 239 1991."

Counsel for the Respondents referred to Sopinka and Lederman, "The

Law of Evidence in Civil Cases" st page 541, where the author

states:

"There &re three stages after the evidence has been completed

during which an application to adduce fresh evidence can be

made:

(1) After the evidence has been completed but before reasons for judgment have been delivered;

(2) After reasons for judgment have been delivered but before Judgment has been entered;

(3) After judgment has been entered.

With respect to stages (1) and (2) there is no difference. In the test to be applied. The trial judge has a wide discretion to permit further evidence to be adduced, either for his own satisfaction or where the interest of justice requires it."

Counsel for the Respondent continued:

"The test is most stringent after judment has been entered. Using either test, however, the evidence which is the subject of this application could not have been obtained with reasonable diligence for use at trial, will probably have an important influence on the result of the cast In one material respect and presumably is to be believed in light of the author.

He urges that the proffered evidence is relevant to the issue which arises from Section 14(g) of the Canadian_Human Rights Act (now Section 15(g) of the 1985 Statute) Which creates a defence of "bona fide justification for that denial or differentiation.' He

urged,

"In the instant case, our submission as to bona fide

justification will ultimately be that level access facilities

were not available in the constituencies involved . . . and

that converting existing facilities was not feasible at the

time. . . .

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- 67 -The

argument will ultimately cow down to what was reasonable

in the circumstances. . . .what was reasonable is not an

arbitrary standard sat by the Tribunal, but must be one

established by the evidence."

He suggests that "the study showing the standard of performance by

federal bodies in the Winnipeg area (and elsewhere) would be

useful evidence In establishing that standard."

Counsel for P.E.P. consents to the cess being re-openedfor the purpose of receiving the evidence which has been proposed.

Counsel for the Comission objects to the admission of

the proposed evidence on the ground that such evidence is not

relevant and bears no relation to th* Complaint. He said,

"Moreover, I still fail to see how the Respondent could claim

that the study in question is relevant to its Cass since it

was not available at the time the Respondent canvassed for

buildings.'

I have reviewed the authorities which are referred to by Sopinka and Lederman and subsequent casts in which they have been considered. It seems to me that before a Court will normally give leave to re-open a case and adduce further evidences the evidence must not only be relevant to an issue in the case but also of considerable importance to the determination of an issue in the case. Sopinka and Lederman point outs, however, at page 543 that Courts do not apply with full vigour the tests relating to granting leave to adduce fresh evidence in "sunmary statutory

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- 68 -proceedings

such est for instance, affiliation proceedings in which there is an element of public interest." There is an element of public interest involved in this case. The Federal Court of Appeal in Reasons for Judgment delivered February 20, 1990 has pointed out the importance of the issue in this case. "the right of all Canadians to exercise their democratic franchise."

Based on the submissions which I have received. I would say that the documents numbered one and two of the evidence which it is proposed to adduce are of marginal relevance to the issue in the case, but because of the importance of the issue to the public generally, I would relax the standard otherwise applicable and resolve any doubts on the point in favour of the

Respondants. Documents 3 and 4 do not appear to be relevant and I reject them. I therefore grant leave to the Respondents to tender in evidence as Exhibits R16 and R17 documents 1 and 2 referred to in the application for leave.

There are two items of business left to be determined.

Counsel for the Commission and counsel for P.E.P. must make a decision as to whether or not to adduce evidence In response to the above-mentioned documents. In the event that they choose not to call any evidence, I wish to set a final date for filing of written submission by counsel for the Commission and date for filing of replies. I have a concern about the time which has elapsed since the conclusion of the hearing. I give counsel for the

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- 69 -Comission

seven (7) days in which to respond to these Points. In the some time frame I expect counsel for P.E.P. to advise whether or not he wishes to Call any evidence. If for any reason I do notreceive a response within seven (7) days it would be my intention to establish time limits without further notice.

DATED this 15th day of May, A.D. 1991.

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- 70 -SCHEDULE

B

THE CANADIAN HUMAN RIGHTS ACT

(S.C. 1976-77, C. 33 as amended)

HUMAN RIGHTS TRIBUNAL

BEFORE:

PERRY W. SCHULMAN, Q.C.

BETWEEN:

CANADIAN PARAPLEGIC ASSOCIATION,

Complainant

- and -

ELECTIONS CANADA - THE OFFICE OF

THE CHIEF ELECTORAL OFFICER OF CANADA

RETURNING OFFICER - WINNIPEG-NORTH CENTRE

RETURNING OFFICER - WINNIPEG-ST. JAMES

RETURNING OFFICER - WINNIPEG-FORT GARRY

RETURNING OFFICER - BRANDON-SOURIS,

Respondents

This matter is set for hearing before me October 23, 1990 to October 26, 1990. THERESA DUCHARME has applied on behalf of the People in Equal Participation Inc. for standing at the hearing. The correspondence which has been received from the Applicant has been forwarded to each of the parties for their comment. Counsel for the Respondents has indicated that he has no objection to the Application being granted. The Executive

Director of the Canadian Paraplegic Association takes strong exception to the application being granted. Counsel for the Human Rights Commission stated that he has no submission to make on the application.

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- 71 -The application is made under section 50 of the Canadian Human Rights Act. The statute empowers me in my discretion to give notice to "any other interested party" in addition to the Complainant and the person against whom the complaint is made and directs me to give to all parties to whom the notice has been given le a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it." I am unaware of any other case in whichsuch an application has been considered by a Tribunal except in a situation where it has been sought to add a party for the purpose of trying to make him liable to an order of the Tribunal or to give the employee whose employer is a Respondent, an opportunity to defend the allegation as it relates to his conduct.

The Applicant seeks full standing in order to appear by counsel, call evidence, cross-examine witnesses and make submissions. It appears that the applicant has a membership of 150 persons, a number of whom are disabled and others of whom are not disabled. It appears that the objective of the applicant is

to "integrate and educate all persons in the acceptance of multicultural and multi-religious integration." We were informed that the main purpose of the applicant in participating in the proceedings is to oppose the complaint and to "protect and promote the right of all citizens regardless of disability whether

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- 72 -illiterate,

blind, mentally handicapped, quadriplegic, hearing impaired, housebound or elderly, to vote on the day of the election."

In considering whether or not to grant the application I have taken into account the considerations stated by the Ontario Divisional Court in the case of Re Royal Commission on the Northern Environment, (1983) 144 D.L.R. 3rd 416, at 418-419. This judgment was recently applied by the Commissioners of the Inquiry in the Public Inquiry into the Administration of Justice and Aboriginal People while granting standing in the Helen Betty Osborne case to the Indigenous Women's Collective of Manitoba, Inc. and jointly to the Norway House Indian Band, the Swampy Cree Tribal Council and Mrs. Justine Osborne.

I find that the Applicant has sufficient interest in the subject matter of the complaint to be accorded standing in the circumstances in this case and I so order. I wish to draw the

attention of the Applicant, however, to the specific wording of the complaints and indicate that inquiry will be limited to the matters recited in the complaints.

DATED this 8th day of May, A.D. 1990.