T. D. 7/ 89 Decision rendered April 21, 1989

THE CANADIAN HUMAN RIGHTS ACT R. S. C. 1985, CHAPTER H- 6, AS AMENDED

HUMAN RIGHTS TRIBUNAL

BETWEEN:

MARK ROSIN Complainant and

CANADIAN FORCES Respondent

TRIBUNAL: EMANUEL (MANNY) SONNENSCHEIN, Q. C.

DECISION OF TRIBUNAL

APPEARANCES:
René Duval Counsel for the Canadian Human Rights Commission
Bruce Russell and Major S. Gouin Counsel for the Respondent

DATES AND PLACE OF HEARING: January 9 to 14, 1989 Saskatoon, Saskatchewan

> CANADIAN HUMAN RIGHTS ACT. R. S. C. 1985 CHAPTER H- 6 as amended

HUMAN RIGHTS TRIBUNAL

BETWEEN MARK ROSIN, COMPLAINANT and DEPARTMENT OF NATIONAL DEFENCE changed to CANADIAN FORCES, RESPONDENT

DECISION: Before Emanuel (Manny) Sonnenschein, Q. C.

APPEARANCES: René Duval - Counsel for the Canadian Human Rights Commission, Bruce Russell and Major S. Gouin - Counsel for the Respondent

DATES AND PLACES OF HEARINGS: January 9th, 1989 to January 14th, 1989 at the Ramada Renaissance, Saskatoon, Saskatchewan

APPOINTMENT: This Tribunal was appointed pursuant to subsection 39(1.1) of the Canadian Human Rights Act. The Tribunal was to inquire into the complaint of Mark Rosin dated December 4th, 1984, as amended on May 15th, 1987 against the Department of National Defence, now called Canadian Forces, alleging discrimination in the provision of services and employment on the ground of disability as set out therein.

WHAT IS THE PURPOSE OF THIS HEARING? Is it to find out the rights of one individual or cadet? Is it to find out the rights of all individuals, cadets or otherwise? Is it to find out the rights and duties of the Canadian Forces to protect those within their protection for training in relation

to parachuting? Is it to find out whether it is a bona fide occupational requirement to have two eyes in order to parachute with the Canadian Forces?

We suspect all this and more must be considered (i. e. the general rights tend to develop from the smaller rights).

PURPOSE: The understanding of what is the purpose of "Human Rights Legislation" is often confused. Some feel it is to harass them. Not so!! However, this Tribunal is certain that Human Rights Legislation has, on at least rare occasions, appeared to be used to harass. This Tribunal believes that neither the Complainant nor the Respondent should feel that this is the case herein.

It is not disputed that Mark Rosin, the Complainant, was an exemplary qualified Cadet. Unfortunately, he lost one eye at age seven. Fortunately, he has adapted quickly and well, as has been pointed out by Dr. Chisholm, himself and his father, and is unchallenged in that regard. He has been selected to attend many courses as a Cadet and has achieved much in life which many would envy. In the facts in question herein, he was selected as one of three students, after having passed rigorous selection tests. Mr. Bellavance, a former Head of the Edmonton Parachuting course confirmed that he was aware of the "monocularity". We heard "testimony" that Bruce Spence, who apparently was the regional senior Officer in charge of Cadets had some knowledge of same Mark Rosin advises that he made his Officer in charge on the first part of the course aware of his deficiency and this Tribunal believes

> - 2 him in that regard. The Officer could not remember and we suspect time and other factors, including perhaps an unconscious desire not to have one's superiors aware that he overlooked certain regulations which most of them didn't even know. There was no serious suggestion that these people, the Rosins, their family doctor, or any other individual was involved in a "conspiracy of silence" to hide this condition. If this were so, we believe

there would be no issue before the Tribunal. We believe the people who were aware of the deficiency were knowledgeable people and felt that Mark Rosin would not be harmed in any way, nor would he harm anyone else. Some of these people were people having knowledge of flying, parachuting and the alleged "dangerous risks". They would surely not wish to put Mark Rosin or other individuals "at risk". None of these people nor the Rosin family had the "impression of a risk". With respect, they do not decide this issue at this time. Surely Mr. Rosin was not intending to put himself at risk, nor is his family encouraging him to do so nor to put others at risk.

Obviously, on the Tribunal's shoulders and conscience must this decision remain "if it comes within the ambit of the Tribunal's authority".

In an uncritical manner, we must suggest that on several occasions, Mr. Russell, counsel for the Respondent, was invited to interpret or explain his understanding of "impression" type of testimony. He could have explained this in detail and it related directly to the ETOBICOKE CASE, (1982) 1 SCR 202, which is a case which cuts to the heart of the Complainant's position.

The Respondent's case appears to be based upon the perception that once it establishes that parachuting is dangerous and any extra factor of danger becomes "a risk" that may be all it needs to establish. This may be a simplistic view, but nevertheless, it appears to be at the heart of the "testimony" by many of the witnesses of the key Respondent witnesses in cross- examination.

Perhaps before going into the testimony too greatly, we should cite certain very relevant sections of the Canadian Human Rights Act. It is crucial to note the purpose of the Act. We realize that people who deal with these matters can read and they realize that the Act is remedial in nature but we would suggest and would underline some crucial words that the purpose of the Act is defined in Section 2 as follows:

"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, disability or conviction for an offence for which a pardon has been granted."

Section 5 gives an indication as to what a discriminatory practice is as follows:

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

> - 3 Section 7 describes in employment as follows:

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

In Section 10 we have discriminatory policy or practice defined as follows: "10. It is a discriminatory practice for an employer, employee organization or organization of employers (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

The duties of the Tribunal are set out in Section 50(1) as follows: "50.(1) A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it."

There are wide powers in terms of the evidence of the Tribunal as set out in Section 50(2):

"50.(2) In relation to a hearing under this Part, a Tribunal may (a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint; (b) administer oaths; and (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not that evidence or information is or would be admissible in a court of law."

The major limitation in relation to evidence is as set out in Section 50(3): "50.(3) Notwithstanding paragraph (2)(c), a tribunal may not admit or accept as evidence anything that would be inadmissible in a court by reason of any under the law of evidence."

Section 53 defines the manner in which a complaint may be dismissed or an order made and we will deal with this later.

> - 4 We have underlined certain words which we feel counsel and future counsel who appear before this Tribunal or a similar Tribunal should be aware of. They are no doubt aware, but we suspect they sometimes overlook the remedial

nature of the Legislation to what is a discriminatory practice in their zest to uphold the rights of their "complainant" or "respondent". Counsel often tend to think that they are appearing before a court of law and on at least one occasion one very zealous counsel referred to the Tribunal as "Your Lordship" and the Tribunal was respected by calling it "Your Honour". "Your Honour" and accolades were inappropriate but not corrected as they appear to be mere slips of the tongue.

Counsel appears to have neglected to understand that the Tribunal has the right to regard or disregard any evidence as noted in Section 50(2) providing it does not come in within the limitations of something inadmissible in court by reason of any privilege. This Tribunal is directed to give a full and ample opportunity to present the cases of the parties and this, we suggest, is not necessarily restricted by the ordinary rules of testimony and evidence, although they ought to be considered and given their due effect. We suggested that until the matter is closed, additional evidence can be garnered and we have attempted to be even- handed with the parties, often hearing objections or arguments which might appear extraneous or repeating matters which we had suggested to counsel to deal with otherwise and in accordance with the mandate allowing extra evidence to be submitted within a reasonable time frame.

EXPERT EVIDENCE: We feel that there has been much confusion as to what expert evidence is and what the effect of it should be. While it is realized that our civil courts including the Supreme Court have dealt with this, it was felt that with so much so called "expert" evidence being presented there should be a clear understanding of the role of an expert. In a recent case dealt with in the Saskatchewan Court of Appeal, known as the Rieger Case or Rieger v. Burgess (1988) 66 Saskatchewan Reports 1, at page 27, paragraph 85 there was a question as to the admissibility of testimony allegedly beyond the expertise of the expert and this was dealt with. Further, on page 27 paragraph 87 the Court noted:

"An expert is called to testify to provide information to enable the Court or a jury to understand technical and scientific issues raised in the litigation. They are also called upon to provide opinions and conclusions in areas where the courts or jury are unable to make necessary inferences from the technical facts presented."

and at paragraph 88 stated: "The role of the expert is circumscribed by his area of expertise. It is essential that the witness be shown to possess the necessary qualifications and skills in the area or field in which his opinion is sought. Those qualifications and skills can be based on or derived from academic study or practical experience. In Rice v. Sockett (1912), 27 O. L. R. 410, an expert was described as:

'The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus

had much experience in the use of fire arms, may be well qualified to testify as to the appearance which a gun recently fired would present as a highly- educationed and skilled gunsmith. '"

At page 89 there is further stated: "The exclusion of expert testimony was discussed in R. v. Fisher, (1961) O. W. N. 94, affd. (1961) S. C. R. 535, by Aylesworth, J. A., at pp. 94- 95:

"It is trite to say that a witness may not give his opinion upon matters calling for special skill or knowledge unless he is an expert in such matters nor will an expert witness be allowed to give his opinion upon matters not within his particular field. Finally, opinion evidence may not be given upon a subject- matter within what may be described as the common stock of knowledge. Subject to these rules, the basic reasoning which runs through the authorities here and in England, seems to be that expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it. When the latter is the situation, the intended opinion evidence is superfluous and its admission would only involve an unnecessary addition to the testimony placed before the jury."

At page 28 paragraph 90, the Court goes on to state: "Therefore, the subject- matter of the opinion must be sufficiently within the expert's field and the opinion must be of assistance to the trier of fact."

The Court goes on to state: "To justify the admission of expert testimony two elements must co-exist:

(1) The subject- matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge,

(2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

That statement was adopted by the Supreme Court of Canada in Kelliher v. Smith (1931) S. C. R. 672, at p. 684."

The Court further noted the Supreme Court of Canada in Preeper v. R..(1888) 15 S. C. R. 401, where Ritchie, C. J., states:

"... that the question as to competency is a preliminary question for the judge. The expert should be cross- examined as to his capacity or qualification, or evidence should be offered to establish the witness's incompetency, by counsel opposing the admission of the opinion evidence. The trial judge must form his opinion of the witness's capacity to testify as an expert on the basis of the evidence before him. The ruling, though a question of fact, is subject to review on appeal."

It might be noted that in Preeper v. R., the Supreme Court of Canada considered the opinion of a medical expert as to the distance from the murdered man at which the gunshot must have been fired and noted at page 416

that, > - 6 "... it is no doubt in general terms true that, facts only should be

stated to the jury and inferences to be drawn from those facts should be left to them ..."

This is a general statement of the common law "opinion rule" which basically requires a witness to testify as to what he has seen and heard. The inferences or conclusions to be drawn from the witnesses perception of events is for the trier of the fact to determine. The use of expert evidence, however, operates as an exception to this rule.

In the Rieger Case (supra), on page 28, in dealing with the procedure to be used in challenging the competency of an expert to testify, the Court stated:

"If opposing counsel wishes to challenge the admission of the expert's testimony, he should do so immediately after the expert has stated his qualifications and prior to his testifying on the matter in issue. If such a challenge is raised, the issue becomes a preliminary question for the judge alone to determine, and opposing counsel can cross- examine the witness as to his qualifications. However, if no objection is raised before the expert testifies on substantive matters, then any cross- examination as to his qualifications goes only to the weight, not to the admissibility of his testimony. This should be distinguished from the situation where an expert gives evidence outside the field in respect of which he is qualified. In that instance, it is immaterial that no challenge was made at the time that he was qualified. Failure by counsel to object to the expert's qualifications at an early stage is only a bar to a subsequent objection so long as the witness stays within his purported area of expertise."

And at page 31 the Court stated: "As a starting point we note that psychiatric opinion evidence based on hearsay has long been a problem for the courts and lawyers alike. Expert witnesses may testify to their opinion on matters involving their expertise and may base their opinion on

hearsay. As Dickson, J., stated in R. v. Abbey (1982), 43 N. R. 30; 138 D. L. R. (3d) 202, at p. 217 (S. C. C.), in dealing with expert psychiatric opinion evidence:

"An expert witness, like any other witness, may testify as to the veracity of facts of which he has first- hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second- hand evidence. This is especially true of the opinions of psychiatrists."

He then continued: "As stated by Fauteux, J., in Wilband v. The Queen, (1967)... S. C. R. 14 at p. 21 ...:

'The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second- hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the

truth of the information but evidence of the opinion formed on the basis of that information. '"

This Tribunal does not suggest nor desire that each and every word of a so- called "expert" should be forcibly within the four corners of his expertise. It is

> - 7 realized that Tribunals should be such as to be somewhat more flexible than other entities such as the courts. It is realized that evidence should, by its nature be such that courts would accept or deny it as evidence. However, Tribunals often may have as their goal the view that any member of the public may apply and appear before them and deal with them without lawyers. It is suggested where there are lawyers, a good practice to expedite matters is for counsel to give notice of the name of the expert to be called with perhaps a sheet indicating a person's background such as would be presented to the trier of fact, and a brief outline of what the party intending to call the "expert" intends to elicit from that party by way of expert evidence. It should also be noted that if the expert is intended to discuss observations, these might be outlined. Similarly, it would be useful for opposing counsel to suggest any material articles which such counsel intends to put to the expert, or perhaps textbooks which might be referred. If there are pages or articles which are intended to be presented, enough copies should be made so that one may be presented to the Chairman, one copy to be filed, another for opposing counsel, and another for the complainant. It is not objectionable in many jurisdictions for an article or case to be presented if the party presenting same were to "high- light" or mark for all these parties the area in which it is desired to draw their attention. Often this will allow parties to deal with them more effectively and find them quickly.

Hopefully, this dissertation will be useful for further Tribunals. THE FAILURE TO OBJECT: It might be noted that during the course of this hearing, counsel was asked why he objected to certain aspects of a matter tendered and we were advised that if he did not object he could not raise the matter on appeal.

We suggested that that was a misapprehension of the law and note that in the Rieger Case (Supra) at page 25, the court indicated in paragraph 75:

"... evidence having been improperly admitted, though no objection to its admission had been made at trial, a miscarriage of justice had occurred."

The court also indicated as cited in that same paragraph that: "In Mann v. Balaban (1970) S. C. R. 74; 8 D. L. R. (3d) 548, the most recent civil jury appeal facing the Supreme Court of Canada with this problem, the court ignored most of the previous judicial authorities (including decisions of the Supreme Court itself) and responded quite differently. Although appellant's counsel had not objected at the trial, the Supreme Court considered the appellant's challenge to the trial judge's jury instructions, found error, applied the usual reading of 'substantial wrong or miscarriage ... ', and granted appellant's request for a new trial. Then, because appellant had first raised the objection in the Court of Appeal, the Supreme Court deliberately deprived the appellant

of legal costs for the first trial." The Court went on to say:

"But, even if counsel's timely objection to specific conduct at the trial is not a condition precedent to the party's successful appeal on that ground, counsel's silence may have its impact in another way. In deciding whether the error at trial caused 'substantial wrong or miscarriage ... ', appellate courts will take into consideration the fact that counsel failed to object on the spot. If appellant's counsel at the trial recognized so little harm to his client in the particular conduct that he raised no objection at the time the appellate court is less likely to be convinced that the error affected the outcome of the trial."

> - 8 Again, it is hoped that these items of law will be beneficial for future Tribunals.

RELATIONSHIP BETWEEN COMPLAINANT AND RESPONDENT Referring to the case more clearly we would suggest that firstly, there is no question that we had evidence indicating payment and a relationship of Rosin to the Canadian Forces. This was admitted by the witness, Mitchell, whose basic testimony was as to how they were paid.

There was also no question that Mr. Rosin used the facilities of the Canadian Forces Base in Edmonton. The connection between the Canadian Forces and the Cadets are strong and unequivocal and seemed to be open to anyone who qualifies just the same as a lottery or membership in many organizations.

However, let us first look to Section 2 of the Human Rights Act as it was viewed by the Supreme Court of Canada in the recent decision of Robichaud v. Canada Treasury Board, (1987) 2 S. C. R. 84 which deals with sexual harassment by a non- military person in the course of providing services for the Respondent. It was submitted that "it was not questioned that sexual harassment in the course of employment" as it was not in the course of employment. Obviously, the Supervisor was not employed to conduct himself in that fashion, yet it was certainly attributed to the employer at page 89.

On page 89 in the Robichaud case, La Forest, J, in referring to the "Ontario Human Rights and O'Malley v. Simpson Sears (1985) 2 S. C. R. 536 indicated

"the act must be so interpreted so as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion, but in a manner befitting the special nature of the Legislation, which he described as "not quite constitutional";".

La Forest, J. further states at page 90: "... the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects."

He further states that:

" It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre, J. puts the same thought in these words in O'Malley (1985) 2 S. C. R. 536 at p. 547:

'The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. '"

La Forest, J. later continues: "... the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence ... an intention to discriminate is

> - 9 not a necessary element of the discrimination generally forbidden in Canadian human rights legislation (at p. 547). This legislation creates what are "essentially civil remedies" (p. 549). McIntyre J. there explains that to require intention is to make the Act unworkable. He has this to say at p. 549, "to take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtual unsuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards could create ... injustice and discrimination by unequal treatment of those who are unequal ..."

We suggest that the terms employment, facilities and other terms are intended to be used in "such fair, large and liberal interpretation as will best ensure the attainment of" the objects of this Legislation wherever practical.

Although the Statute does not specifically call upon the Canadian Forces to pay salaries and indeed it may well be that the term salaries is unnecessary as many times salaries are paid by implication. A salary or employment can be due to the use to attain the objectives and certainly one of the objectives of the Canadian Forces appears to be in recruiting cadets and people who may join the Forces in the future. It may well be that in a tight situation of a war, the Forces will encourage one- eyed individuals or people with very limited vision to learn to parachute as this may be necessary to conduct a war. This, however, is not what we ought to consider as it is not our concern nor in the ambit of this Tribunal to decide whether the Forces may do something in

the future other than not discriminate in an inappropriate or improper manner which we must decide upon whether it has done or not done same here.

We first find that this is the use of a public facility, being a facility used by members of the public who qualify herein by reason of their abilities or their attainments, and is covered by the sections herein.

IS IT DISCRIMINATION OR A BONA FIDE OCCUPATIONAL REQUIREMENT? Next, we must determine whether it is in the nature of discrimination.

We had urged upon us by Mr. Russell that there is a comparison between Mr. Rosin and Andre Seguin and George Tuskovich in the complaint against the R. C. M. P. The Decision of Kevin W. Hope was in Andre Seguin and George Tuskovich v. Royal Canadian Mounted Police which decision was rendered January 4th, 1989. At page 31 on the third last paragraph Chairman Hope found "the risk to the public is real and substantial and he further went on to state that it must be weighed against the R. C. M. P. 's ability to screen applicants individually for job performance. In view of the fact that sight is important in the R. C. M. P. in protecting the public and we see no question and there is no issue there, we suggest this was a bona fide occupational requirement which is obvious on the facts.

In the Mahon case (re. Canadian Pacific Limited and Canadian Human Rights Commission et al (1987) 40 D. L. R. (4th) 586) in the case of an insulin- dependent diabetic who was susceptible to hypoglycemic reactions, although a stable diabetic was a danger to others and himself in this type of occupation and Pratte, J. stated on page 589

"there is always a possibility, however, that even a stable diabetic, will, on occasion, experience mild hypoglycemic reactions: there is a possibility that a stable diabetic may experience sudden, severe neuroglycopenic reaction."

> - 10 On this and other cases we invited Mr. Russell to draw the conclusion that if there is even a remote possibility of an extra danger, risk or harm, then this was a bona fide occupational restriction and not discrimination within the Act. Mr. Russell, in fairness, was reluctant to draw such a conclusion.

In the case of Little v. St. John Shipbuilding (1980) 1 C. H. R. R. D/ 1 (N. B. Board of Inquiry), Mr. Charles Little was the complainant alleging he was discriminated against by the St. John Shipbuilding and Dry Dock Co. Ltd. The Respondent, in respect of employment, because of age, contrary to the particular Act, had the matter of bona fide occupational qualifications dealt with. Mr. Little being a crane operator. In that instance on page 5 under paragraph number 37, there was a question submitted, underlined and obviously important to that Tribunal which stated

"Is it possible to measure an individual's functional or biological age sufficiently accurately to reasonably predict whether he is capable of meeting the minimum standards of any particular job?"

The case further goes on at paragraph 40 to deal with whether medical tests were practical to give statistical data and further there is a question of relevancy of same dealt with in paragraph 41.

Although Mr. Russell urged that this case meant certain things and Mr. Duval indicated it meant certain other things, the one thing this Tribunal finds is that there is expert evidence from both Complainant and Respondent in the facts that both their experts stated there was no manner in which they could, with certainty, measure certain aspects of this individual 's specific depth perception and the testing system was inadequate. Both sides urged the testimony of the experts as agreeing with their perception of the facts or the law or both. We will deal with that later. We note that at paragraph 41 in the Little Case, (supra), there was a clear statement:

"In making the policy decision that age is not to be a factor in the

employment policy of employers, the Legislature may have coincidentally made a decision that society must be prepared to accept an added risk which may attend the prohibition of any discrimination on the basis of age. The exemptions provided for in subsection 3(5) must be used sparingly and only upon the objective determination of the Human Rights Commission such an exemption should exist."

We note that this sets forth an objective determination. Of assistance and as urged by Mr. Russell, we have looked at the case of Bhinder et al vs. Canadian National Railway Company (1985) 23 D. L. R. (4th) 481 which was a Supreme Court Report which dealt with a Sikh who brought a complaint of religious discrimination being required to wear a safety helmet which was found to be a bona fide occupational requirement by the Supreme Court of Canada. Obviously, something which might be interpreted was the question as to whether any risk was important as Mr. Bhinder had said that his particular turban- type headgear would protect as much as a hard hat, or almost as much. McIntyre, J. at page 497 stated:

"... found that Bhinder, if exempted from the Rule, would face a greater liklihood of injury - though only slightly greater - than if he complied."

In other words, it was stating that the rule would be justified, even if there was only a small amount of risk. We believe that the key to this decision is whether the rule is justified or not in terms of safety, even though there is only a slight risk.

> - 11 Mr. Russell had a great deal of reluctance and only when pressed, seemed to indicate the rule was even if there seemed to be only a slight risk, would this rule be triggered, that it was a bona fide occupational qualification and requirement and accordingly acceptable.

It should be noted again that at page 499 McIntyre, J. noted: "... I am satisfied that the word 'requirement' used in S. 14(1), although it may be less encompassing than the word 'qualification', clearly covers the hard hat rule adopted by C. N. I am therefore of the opinion that the Etobicoke test is applicable in the case at bar."

He further goes on to state: "... it was a bona fide occupational requirement. It was agreed that C. N. adopted the rule for genuine business reasons with no intent to offend the principles of the Act. The Tribunal found that the rule was useful, that it was reasonable in that it promoted safety by reducing the risk of injury and, specifically that the risk faced by Bhinder in wearing a turban rather than a hard hat was increased, although by a very small amount. The only conclusion that can be drawn from the reasons for decision is that, but for its special application to Bhinder, the hard hat rule was found to be a bona fide occupational requirement. Indeed, it would be difficult on the facts to reach any other conclusion."

Very strongly dealing with matters on the other side of the fence, we must

look at the Ontario Human Rights Commission and Bruce Dunlop, and Harold E. Hall and Vincent Gray (Respondents) Appellants v. The Borough of Etobicoke (Appellant) Respondent (1982) 1 S. C. R. 202 which is frequently referred to as the Etobicoke case and is cited in many other cases to define the law.

McIntyre, J., at page 208 is quite helpful and states as follows: SUBJECTIVE AND OBJECTIVE TESTS:

"Once a complainant has established ... a prima facie case of discrimination, in this case proof of mandatory retirement at age 60 as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon him, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities."

"Two questions must be considered by the Court. Firstly, what is a bona fide occupational qualification and requirement within Section 4(6) of the Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? ... I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a bona fide occupational qualification and requirement the limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives that could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned in that it is

> - 12 reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." (Our emphasis.)

On page 209 McIntyre, J. noted that the aging process has uncertainties and an employer has two alternatives. Namely, to establish a retirement age at age 65 or over for certain types of employment, affecting public safety such as airline pilots, police, etc. consider that the risk of

unpredictable human failure involved in continuing all employees to age 65 may be such that an arbitrary retirement age may be justified for application to all employees. In that case, fortunately, there was not evidence and the Supreme Court felt that the test was whether the "court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employer failure than those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large," and this was noted at page 210.

McIntyre, J. at page 210 goes on to note "The employer argued that firefighting was a dangerous occupation which

required physical strength, stamina and alertness beyond most other occupations. It contended that there were such dangers and hazards that young and fit men were required, and that the adequate performance of all members of a firefighting unit was essential to preserve public safety and that of the employees themselves. The arbitrary retirement age was therefore justified as a reasonable measure to assure the maintenance of adequate fire protection in the municipality and, at the same time, to avoid the dangers which could result from keeping all members employed until age sixty- five."

"In dealing with the evidence, Professor Dunlop remarked that it was largely 'impressionistic'. He considered that something more was required to discharge the burden of proof and noted the insufficiency of general assertions and expressions of witnesses, some with long experience in firefighting, to the effect that firefighting was a 'young man's game'. He remarked upon the absence of any scientific evidence to support the employer's position and concluded against the employer, saying:

While these are sound reasons for allowing a firefighter to retire at the age of 60, they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe ..."

On page 212, McIntyre, J. went on to state: "It would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty- five under the provisions of s. 4(6) of the Code. In the final analysis the board of inquiry, subject always to the rights of appeal under s. 14d of the Code, must be the judge of such matters ... Many factors would be involved and it would seem to be essential that the evidence should cover the detailed nature of the duties to be performed, the conditions existing in the work place, and the effect of such conditions upon employees, particularly upon those at or near the retirement age sought to be supported ... Where a limitation upon continued employment must depend for its validity on proof of a danger to public safety by the continuation in employment of people over a certain age, it would appear to be necessary in order to discharge the burden of proof resting upon the employer to adduce evidence upon this subject."

> - 13 McIntyre, J. further goes on: "I am by no means entirely certain what may be characterized as 'scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this, statistical and

medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is 'a young man's game'. My review of the evidence leads me to agree with the board of inquiry. While the evidence given and the views expressed were, I am sure, honestly advanced, they were, in my view, properly described as 'impressionistic' and were of insufficient weight. The question of sufficiency and the

nature of evidence in such matters has been discussed in various cases..."

This Tribunal asked on several occasions of Mr. Russell what he thought the term impressionistic meant and was not satisfied with his answers. We must now deal specifically with what the "alleged expert evidence" was and what the rule of law is.

We have previously dealt with the question of "what is expert evidence" and "what are experts to be entitled to testify". The other question is "what must other counsel do and what must its effect be in this forum?" By that, we must look at what is the effect of the so- called expert being asked a question out of his expertise area. An absurd example of this might be asking a gynaecologist to testify on psychiatric aspects of a case. In the matter in front of us, we heard qualified ophthalmologists asked what effect certain things had on their visual acuity without any questions leading up to show what their knowledge of this area specifically might be. We believe they attempted to give honest answers to these types of questions. Fortunately, nothing substantial turns upon their answers. An expert should tell why and how he comes to his conclusion. All too often those questions are not asked. The mere fact that an expert does not dwell upon the basis of his opinion and is not questioned on it does not make the answers binding, although certainly these can be persuasive.

A question which troubled the Tribunal was when Dr. Green expressed an opinion as to the hazards of a person with vision in only one eye parachuting and what its risks were. He gave an estimate as to five ways in which it could be hazardous. In fairness, he advised that he had never parachuted and his experience with parachuting was nil. With due respect, although we would have preferred counsel to have asked him and pressed him on these matters, we think his hypothesis was something advised by someone and which he accepted in good faith.

It is noted that his conclusions on some of these details differed with that of Captain Vida. However, Captain Vida knows virtually nothing as to the effects of a monocular or one- eyed parachutist.

Dealing with Captain Vida's testimony we would say, without reservation, that he has done a lot of parachuting and is a well- qualified parachutist. He, however, draws some conclusions based on his "impressions". As a person in charge of training people to parachute, he must have long ago come to the conclusion that it is "dangerous" to step out into the air. We can agree with him that it is dangerous and we must, however, temper this view with the fact that it is also dangerous to drive a car or ride in a car or walk across busy intersections at a time when the hazards appear. He gave his views on that, and we might note that

> - 14 this witness as the other expert evidence witnesses were tendered with a view that they could speak to risk and brought absolutely no statistics or basis upon which they could testify on same. This Tribunal was astounded that counsel for the Respondent pressed the point home that this man knew all about risk and implied that he could speak to this and we had to listen to him, as though his was the last word, even though the man was questioned and in all honesty, acknowledged that he had no statistical analysis abilities, had done none of the things which risk management people ordinarily do and had no substantial training in the risk management field as such. It is

emphasized that this man has responsibilities in the area of safety, but does not have certain specialized training and although a very engaging and bright gentleman it appeared to the Tribunal that he had persuaded himself to certain things more than having training in the appropriate area of analysis required to analyse the particular risk. When we actually saw some statistics, perhaps we were looking for something quite different, but the statistics indicated that t his was far less hazardous an occupation that he would have led us to believe by the "anecdotes" and stories of risk. We suggest that if a witness is being tendered to give evidence of some expertise, he must have some ability to analyse it in a meaningful and important way. We must admit that this man was an expert at describing what steps are involved in parachuting. We are uncertain as to whether he might have left out one or two things that happen, such as signaling the height of the plane or the like, but he certainly was graphic in his descriptions and had the Tribunal almost feeling that it was in the place with him, getting ready to parachute. Lastly, he could not be qualified in terms of risk management, although he obviously had done some review of materials but did not understand risks and statistics adequately. This is where Mr. Duval did cross- examine him in terms of his credentials.

Many judges in our courts find that uncontradicted evidence which one is qualified to testify upon must be accepted and persuasive. In this forum, the Tribunal feels that for the most part the experts of the Respondent were not as qualified as to explain the risks in an adequate fashion. They explained their "impression" and in accordance with the Etobicoke Case we must say this was "impression" and does not persuade this Tribunal.

This Tribunal does not wish to be obliged to state that Mr. Bellavance was telling the truth and others are lying. Certainly Mr. Bellavance had the least motivation to mislead the Tribunal. He is a person who has parachuted, has been in charge of the parachute range in Edmonton and he knows somewhat of the abilities of the Complainant. In fact, his evidence is that he knew that the Complainant had a missing eye. Albeit, he obviously was not addressing it to himself that this Cadet did not meet the then existing medical qualifications. We suggest that without Warrant Officer MacNeil having exposed the situation, the Complainant might have gone on, completed the course, got his wings and we would not have had the matter before us. We also wish to note that Officers Johnson and Bewick indicated their sympathy and certainly we can read into their testimony that they might have had no idea that there was any problem with monocularity. Their view of where this young man stood in the course was at variance with that which Warrant Officer MacNeil would lead us to believe. We indicated our suspiciousness of Warrant Officer MacNeil's testimony very early. We do not believe that Mark Rosin was ever classified as being fifth in his group. However, it is irrelevant to our decision whether he was weak, strong or superb. We suspect that there may have been some personality clash. Nevertheless, he did not

establish anything greatly in this matter other than that he found a problem and a rule and urged somebody else to have the Complainant returned to the unit i. e. R. T. U. Officers Bewick and Johnson never seriously considered this a problem until it was drawn to their attention and had to confirm with other people that this indeed was the rule.

> - 15 The impression of Mr. Bellavance seems to have been that he saw other people, in other forces, an American and a Scandinavian parachutist as well we believe as an Israeli parachutist. It is interesting to note that the person with far more parachute jumps, namely Captain Vida, had no knowledge of

one- eyed parachutists. It is also interesting to note that counsel for the Respondent suggested that the observations of Mr. Bellavance as to other people parachuting with monocularity were anecdotes and things which were obviously anecdotal rather than real observations from the witnesses called by the Respondent were the true, straight goods.

Mr. Bellavance was not cross- examined as to those observations which he made with his own "two eyes" and as to other parachutists shutting their eyes and jumping.

We also have evidence from Captain Vida in which he implied that binocular parachutists know exactly when they are 200 feet from the ground and they lower their equipment at exactly that level. These were not his exact words, but we see no basis upon which this suggestion might exist. Each parachutist makes an estimate of when to lower the gear. Obviously it works as there was only a very tiny amount of accidents according to the statistics of Captain Vida relating to men who were carried off the field last year due to accidents.

The suggestion was put forward that even a super human being with one eye would not be able to adjust. With respect, we suggest that this is an exaggeration. While we do not suggest this individual, the Complainant, is a super man, he certainly has a great deal of adaptability, which is unquestioned, and has adapted to many situations and has good vision. We did not have a valid comparison to the lowest standard of the accepted visual acuity and other similar visual acceptability. Particularly, we had people being allowed to take and pass the course who would be legally blind without corrective lenses. The people who take the Geritol Course and the people at the lower end of the scale which is acceptable according to the medical evidence of Dr. Jacques Roy and Dr. Green.

There is clear evidence in front of us that this Complainant adjusted well and was extremely capable and had extreme good visual perception. Also, the evidence brought forth by the Respondent seemed to equate visual acuity, depth perception and general good eyesight with two eyes and seemed to take a view that "two eyes are better than one". While we might agree with that maxim, we would suggest that one extremely good eye will no doubt see more than two extremely weak eyes. We suggest that the Respondent started from the position of believing it was right in its initial assessment and built around that viewpoint rather than asking the question as to "why it might not be right". Ingrained in the military of necessity is the requirement for an orderly manner of doing things and the perception that the higher rule must be, in almost all cases, correct. This usually works, in this case it may not. It is suggested that there are many monocular, capable people, who in time of war, will be beneficial to aid in keeping the peace and

they should not be restricted and can provide an enhanced view and inspiration to people who otherwise might be perceived as more fortunate.

ARTICLE RELATING TO MONOCULARITY The Tribunal had placed in evidence an article from the American Journal of Ophthalmology (R- 3) which purported to discuss the dilemma of the monocular driver. Dr. Chisholm, a Saskatoon Ophthalmologist who has done considerable teaching and writing in addition to his own work in the Ophthalmology field, had described the article as being an editorial type. We suspect that counsel misconceived the explanation and felt that this was a learned research article. We asked for and received copies of references in the said article and examined them carefully to see how they might apply to the matter at hand. An article referred to in that

> - 16 article which dealt with and was called "Landing Performance by Low- Time Private Pilots After the Sudden Loss of Binocular Vision - Cyclops II" made some interesting observations, namely that:

"No decrease in performance was observed during landings with vision restricted to one eye, in fact, performance improved."

The authors being connected with NASA Flight Research Center and Medical or Research Groups went on to state:

"... some highly experienced and valuable men, have been denied medical certification for flight solely on the basis of impaired binocular vision. Scientific justification for this practice is now in serious doubt."

In an article by one of the authors headed "Significance of Visual Problems in Pennsylvania Drivers" we had some suggestion that:

"In general, slightly decreased visual acuity did not correlate with three identified types of inappropriate driving."

The author also stated in one of his seeming conclusions that: "It also appears that one- eyed or monocular drivers also engender greater risks of driving failure from the impaired side."

Since that particular paper dealt with driving, which is different from parachuting and did not correlate in any way with parachuting, we believe it is easily distinguishable on that basis and also it appears to have a very small control group. The thrust of the article relates to visual acuity, including seemingly people with levels below 20/ 30 which is a category that the Respondent accepts readily for parachuting. The same author in an article headed "Ophthalmology in Driving" concluded:

"... that one- eyed patients have greater intersectional accident experience on the side without vision.... From a practical point of view, a form field of at least 140 degrees is needed. People with one eye can get 140 degrees without too much trouble, but they have to turn their heads frequently to compensate."

The article later states: "Parallax and depth perception are needed to park or back into a garage, but there is no evidence that tests, as we commonly use them for depth perception in the near range, have bearing on motor vehicle accidents or depth perception at driving distances."

The Tribunal notes that the various articles fail to have significance in persuading it that there is an increased risk in the case of a one- eyed parachutist. The first reason is because driving and parachuting are vastly different. Secondly, even the, article indicates that in at least some instances, monocularity appears to be beneficial, i. e. pilot landings. Thirdly, that vision itself is a factor in automobile and other accidents and in vision there are numerous components, such as depth perception, general visual acuity, peripheral vision and the like. It appears that there is confusion as to what the requirements are and what is "weak" vision and what

is top vision but monocular with 20/ 20 plus vision. Fourthly, we observe that some of the tests in the articles indicate that pilot landing performance judged on the basis of misses about the pre-selected spot on the runway was not degraded by loss of binocular vision, but rather improved and it was found that one- eyed pilots could precisely perform the spot- landing task and suffered no impairment of function

> - 17 whatever, even after the sudden loss of stereopsis. It is important to note, however that the authors in that instance, stressed that the question of restricted peripheral vision on the blind side in a one- eyed pilot had not been adequately studied. We also perceived that the question of depth perception does not appear to be seriously affected by monocularity.

The Chairman has reviewed his notes and the Transcript carefully and observes that the Military witnesses, expert and otherwise, who testified relating to potential dangers, seems to have, at least partially, misconceived their evidence or understanding relating to "vision" and its effect on "monocularity" and "binocularity". It must be conceded that there is no question that the approximate "visual range" of a monocular person with equal level of vision has approximately 20% less vision than a binocular person with similar visual ability.

However, a person with one eye and 20/ 20 plus vision and the seeming adaptability of Mark Rosin would have better visual abilities than many individuals taking the geriatric or geritol course. He could compensate for depth perception and other types of visual acuity. We also accept the evidence unqualifiedly that in a new environment such as parachuting in the dark or light, he would not have full visual acuity as he would have on the ground. This obviously applies to a binocular or two- eyed parachutist and we saw nothing which clearly differentiated that position.

We find, in accordance with the Etobicoke Case (supra), that the evidence of the witnesses for the Respondent is "impressionistic" in nature as to potential additional risks. Accordingly, we found no evidence as to a "bona fide occupational requirement" which would justify the position of the Respondent. We also find that this amounts to discrimination against the Complainant, Mark Rosin, and other potential monocular parachutists.

ORDER: We are making an order under Sections 53(2) and (3) that: 1. The Complainant be placed in a program which is similar to that which he

had taken, preferably the Cadet Course, at the next available time, or a similar course which would be suitable to him and the Respondent and he is to be given the opportunity to take either the full course or the partial course and we further order that any rules which would restrict a person merely by having monocular vision be rewritten so as to eliminate the situation from reoccurring and in particular the visual, geographical and occupational rules that would prevent a person with one eye from taking a parachute course be modified or suspended forthwith.

2. Although the Complainant has not specifically indicated that he wishes any compensation, the Tribunal awards the Complainant for loss and hurt feelings pursuant to Section 53(3) b the amount of $1,500.00.

3. There will be a calculation of interest under the "Interest Act" which interest will be calculated from a date thirty (30) days from the date of this Judgment.

4. It is also ordered that all expenses relating to transportation, food, uniform and other requirements will be paid for by the Respondent as well as the fact that the Tribunal orders that the Respondent is not to, in its manner of placing the Complainant in the parachutist course, delete in any way, shape or form, the number of persons who would ordinarily come from the geographical area from where the Complainant came, nor from any other area and the Complainant is to

> - 18 be given a fair and reasonable opportunity to meet all tests and not receive any further discrimination.

COMMENTS: Legislative amendments for Military reviews may be necessary in the future. It is very unseemly that there is not procedural guidelines to facilitate more prompt dealings with a resolution of the facts or disputes of this nature. The time taken appears to be unacceptable in the modern world.

We wish to thank counsel for their capable submissions and also the considerations expended by the Clerk of the Court under most awkward circumstances, as well as the Court Reporter.

Dated at Saskatoon, Saskatchewan this 22nd day of March, A. D. 1989. EMANUEL (MANNY) SONNENSCHEIN, Q. C. Chairman of Tribunal