DECISION RENDERED ON SEPTEMBER 22, 1981
T.D. 9/81.

THE CANADIAN HUMAN RIGHTS ACT,
S.C. 1977, c. 33, as amended.

IN THE MATTER OF: The complaint made by Mr. K.S. Bhinder, of Toronto, Complainant, alleging that the Respondent, Canadian National Railways, discriminated against him in employment because of his religion.

A HEARING BEFORE: A Human Rights Tribunal appointed by Mr. Fairweather, Chief Commissioner of the Canadian Human Rights Commission, being appointed pursuant to subsection 39(1) of the Canadian Human Rights Act, and consisting of Peter Cumming and Mary Eberts of Toronto, Ontario, and Joan Wallace of Delta, British Columbia.

APPEARANCES: Mr. Russell Juriansz, Counsel for the Canadian Human Rights Commission.
Ms. Janet Bradley, Counsel for the Complainant.
Messrs. Larry L. Band and John Cashin, Counsel for Canadian National Railways.

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DECISION

INTRODUCTION

The Complainant before this Human Rights Tribunal, Mr. K.S. Bhinder, alleged in his complaint (Exhibit no. C-2) that the Respondent, the Canadian National Railways, (hereafter the "C.N.R." or "C.N.") had engaged in a discriminatory practice by requiring that the Complainant comply with its corporate policy that all persons in its Toronto coach yard wear hard hats, thereby discriminating against him. Mr. Bhinder, being a Sikh, for religious reasons cannot wear anything on his head other than a turban. Specifically, the Complainant alleged a breach of sections 7 and 10 of the Canadian Human Rights Act (hereafter called the "Act") which read:

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.

...

10. It is a discriminatory practice for an employer or an employee organization

(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.

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2.
Section 3 of the Act reads:
3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.

Mr. Bhinder was born in India in 1942, the son of a captain in the British army. He was trained as an electrician in England, and emigrated from England to Canada in 1974. He is married with three children. Mr. Bhinder commenced working for Canadian National Railways about April 8, 1974, and worked there until December 5, 1978. During the four and one-half years there he worked as a maintenance electrician on the turbo train at the Toronto coach yard.

Mr. Bhinder is obviously very industrious. He would work at the C.N.R. from 11:00 P.M. to 7:00 A.M. and then as a maintenance electrician with Inglis Appliances from 7:30 A.M. to 3:30 P.M. (Transcript, p. 296).

The Respondent adopted a policy as of November 30, 1978, that the entire Toronto coach yard should be a hard hat area. (See Exhibit no. C-12, Transcript, p. 279).

By memo dated November 30, 1978, (Exhibit no. C-12) addressed to all employees in the Toronto coach yard, effective December 1, 1978, the Toronto coach yard became a hard hat area "in the interest of all employee’s (sic) safety ... with no exceptions being allowed." (Exhibit no. C-12).

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3.
Prior to that time, only one location within the yard, the "Rip" track (See Exhibit no. R-1, picture no. 32, Transcript, pp. 288, 289, 351, 372, 421), was an area in which employees were required, or at least recommended, to wear hard hats. (Transcript, p. 286). The Rip track area, where wheels are replaced, is located far away from the turbo train area. (Transcript, p. 288). However, Mr. Bhinder did work on the Rip track area on four or five occasions, and without wearing a hard hat. (Transcript, p. 290).

In response to the new hard hat policy of C.N. of November 30, 1978, Mr. Bhinder advised the C.N.R, that he could not wear a hard hat because he is a Sikh, and must wear a turban for religious reasons (Transcript, p. 282). By formal letter (Exhibit no. C-12) to Mr. Bhinder of December 5, 1978, the C.N.R. took the position there would not be an exception to its hard hat policy, and that he was "required to wear a safety hat" issued to him, and if he did not, he would not be permitted to work as of December 6,

1978.
Mr. Bhinder's employment was terminated December 5, 1978. He testified that his union was indifferent to his plight (Transcript, p. 283), and that the C.N.R. made no attempt to find him a position of employment elsewhere within the railway. (Transcript, p. 300). However, he said that in any event he would not have accepted any job with the C.N.R., other than that of electrician. (Transcript, p. 328).

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4.
Mr. B.hinder earned some $14,500 a year with the C.N.R. (Exhibit Nos. C-19, C-20).

Mr. Bhinder did try to find a job in replacement of the one given up with the C.N.R., however, has not been successful, probably because his employment with Inglis occupies him during the daytime and he must find an employer who can use his services at night. (Transcript, pp. 321,323).

On December 21, 1978, in response to the intervention of the Canadian Human Rights Commission on Mr. Bhinder's behalf, the Respondent took the position that the wearing of hard hats in the Toronto coach yard is a bona fide occupational requirement, as,

"... work is carried out under equipment, [which] necessitates that hard hats be worn to protect workers in the event that they straighten up under equipment or are hit from above by falling objects."

(Exhibit No. C-14).

Preliminary Point
At the very commencement of the hearing, counsel for the Complainant requested that the Sri Guru Singh Sabha organization be added as a party, given the obvious interest of the general Sikh community in the issue before the Tribunal. Section 40 of the Act provides:

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40. (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..."

Given that the addition of this organization was not necessary to the introduction of evidence by the Complainant, as admitted by Complainant's counsel (Transcript, p.7), the Tribunal in its discretion did not allow the organization to be added as a party to the proceeding.

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6.
Issues
The Respondent's position was first, that there was no discrimination and second, that if there was discrimination, then it was not unlawful on the basis that the requirement of a hard hat was a bona fide occupational qualification. Paragraph 14(a) of the Act reads:

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;

Third, the Respondent took the position that the requirement to wear a safety hat is a question that falls exclusively within the jurisdiction of the Canadian Transport Commission (C.T.C.) under the Railway Act R.S.C. 1970, R-2. That is, the Respondent argues that since safety regulations may be enacted by the C.T.C., this Tribunal has no jurisdiction to pass judgment upon the C.N.'s safety policy.

Fourth, the Respondent argued that its hard hat policy is both sanctioned and necessary under the Canada Labour Code and the regulations thereunder, and as such, the Tribunal does not have jurisdiction. Fifth, the Respondent argued that its hard hat policy is required by the Canada Labour Code and the regulations thereunder, and as such the hard hat policy is necessarily a bona fide occupational requirement.

Finally, the Respondent argued that to exempt the Complainant from its hard hat policy would result in an additional cost to the Respondent under the Workmen's Compensation Act R.S.O. 1970, c. 505, as amended, and, therefore, for that reason, its hard hat policy is a bona fide occupational requirement.

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7.
Sikhism as a Religion
Professor Uday Singh, a professor of mathematics at Laurentian University, Sudbury, testified. He is a Sikh, and was called as an expert witness to testify as to the tenets of the Sikh religion. (Transcript, pp. 15 - 63).

Sikhism is one of the three main religions of the Indian subcontinent, the other two being Hinduism and Islam. Professor Singh testified that Sikhism originated in the 15th century in reaction to the tyranny and oppression of Islamic rulers in India. Initially a militant reaction to tyrannical Muslim rule in the face of a generally passive Hindu India, Sikhism was soon established as a vibrant, monotheistic religion. As a social revolution, Sikhs rejected the Hindu caste system and were strong exponents of

charity as a foremost virtue. Given its militant beginnings, general Sikh values have included being abstemious, working very hard, identifying with the necessity of rigorous self-discipline, and being renowned soldiers.

Today, there are about 15 million Sikhs, 10 million of whom reside in the Punjab region of northwestern India. It is estimated that there are 50,000 Sikhs in southern Ontario (Transcript, p.32), virtually all of whom have come to Canada in the last twenty years. (Transcript,p. 33).

The holy book for Sikhism is the Holy Granth, compiled in 1604, by the fifth Guru, or spiritual leader. Each succeeding Guru is believed

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to be God Himself in human form. A tenet of the religion is that Sikhs must in personal dress and appearance comply with five requirements, (sometimes called the "five K's") being:

- Kesh, the hair cannot be cut.
- Kirpan, a sword that was originally three feet long, but which has been reduced to about nine inches today.

- Kachh, or shorts, which must be worn under the pants.
- Kara, or bracelet, which was originally a larger type of shield designed to fend off blows.

- Khanga, the comb which is worn in the hair at all times.

Historically, these were principal symbols for inculcating bravery and preserving cultural identity amongst Sikhs, in the face of severe religious oppression. The turban is an inseparable part of a Sikh's dress to keep his hair in good form and properly covered. This requirement is set forth in the Sikh holy book. (Transcript, p.51). The commandment to Sikhs to wear turbans has been religious law since April 13, 1699, being ordained by the tenth Guru, Siri Guru Gobind Singh. (Transcript, p. 31).

As Prof. Singh testified:
Q. Okay. Can a Sikh, as a matter of religious principle, wear anything over or under the turban?

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9.
A. Neither under nor over, nor in substitution for the turban. The turban is it. Nothing else.
(Transcript, p. 29)

...

A. Well, the one who doesn't wear it, is not a Sikh any longer. (Transcript, p. 32).

A Guide to the Sikh Way of Life (Rehat Maryada), (Exhibit No. C-3) published May, 1971, by the Sikh Cultural Society, London, has the following passages:

II. Living According to the Gurus' Teachings
A Sikh should live and work according to the principles of Sikhism, and should he guided by the following:

...
(t) Any clothing may be worn by a Sikh provided it includes a turban (for males) and shorts or similar garment.

Professor Singh quoted from A Guide to the Sikh Way of Life:

"If a Sikh were to take off his turban, and in place of it were to put any type of a hat or a cap, either hard or soft, on top of his head, in place of a turban [what it says is that] he will die the death of a leper, seven times in a cycle of birth and death. Again and again be born, be dead as a leper, again seven times, should be discard his turban and put a hat on." (Transcript p. 30).

...
"Those undergoing baptism should have the five K's..."

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10.
" ... and the head must be covered."
...
"The baptized Sikhs are not to associate with apostate Sikhs who do not keep the five K's including the hair and the turban."
(Transcript, pp. 41, 42).

He also translated from Punjabi in another book, in English called "The Commandments". (Exhibit no. C-4)

"The undoables for the Sikh are the following..."
And one of them is (READS IN PUNJABI) -- to wear a cap or a hat. This is one of the undoables. He can't do that.

...
"Both times you make your turban afresh..."
"... then keep it there 24 hours..." (Transcript, pp. 46,47)

Joseph Davey Cunningham's A History of the Sikhs, 1 edited by Professor H.L.O. Garrett, (Exhibit No. C-5) quotes extracts of statements by the Guru Gobind, including,

"A Sikh who puts a cap ... on his head, shall die seven deaths of dropsy." (p. 343).

An excerpt from a letter by Sir Reginald Savory, a Lieutenant General in the British Army, published in a British newspaper August 30, 1973, (Exhibit no. C-7) is illustrative of both the intensity of belief

1. S. Chand & Co. Put. Ltd., New Delhi, 1972.

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in the requirement to wear the turban, and also that in other times and places more tolerance was shown.

"I served with the Sikhs, for 25 years, and I know something of them. In the Old Indian Army there was never so much as a hint that Sikhs, in the interest of uniformity on parade, should discard their turbans and shave their beards. This would have been to invite mutiny. So strong were their convictions as to turbans that even in battle they disdained the protection of the steel helmet." (Transcript, p. 51).

A good discussion of Sikhism is given in a recent decision by an Ontario Board of Inquiry, Professor Frederick H. Zemans, Pritam Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre. 1

Mr. Bhinder's hair is approximately three feet long, with his turban consisting of cloth some five and a quarter yards long and a yard wide. (Transcript, p. 286).

The complainant, Mr. K.S. Bhinder, is a practising Sikh, who holds his religious convictions with sincerity. As a Sikh he wears a turban. This is an essential symbol of the Sikh faith. Mr. Band, counsel for the Respondent, readily stated that Canadian National Railways acknowledges and accepts the religious beliefs of the Sikhs in general, and Mr. Band did not cross-examine the Sikh witnesses as to

June, 1981, at pp. 2, 3, 5, 6, 11, 12.

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12.

these requirements of their faith. The Tribunal finds as a fact that the Complainant, as a practising Sikh, is required to wear a turban. He cannot cut his hair because of his religion. The Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended, uses

the word "creed", (see, for example, section 4) whereas section 3 of the federal Act refers to "religion" as a prohibited ground of discrimination. In Ishar Singh v. Security Investigation Services Protection Company, a decision of an Ontario Human Rights Tribunal (May, 1977), a consideration of the meaning of "creed" was given, which is useful to quote.

"What is meant by "creed"? This noun is derived from the Latin "credo" meaning "I believe". The Oxford English Dictionary [Oxford University Press, Amen House, London E.C.4. Reprinted 1961.] defines "creed":

...
... An accepted or professed system of religious belief: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula."

Webster's New International Dictionary [Second Edition, unabridged, 1935. Copyright, 1934 by B.&C. Merriam Co. Publishers, Springfield, Massachussetts, U.S.A.] says that "creed" means:

... Any formula or confession of religious faith; a system of religious belief, especially as expressed or expressible in a definite statement; sometimes, a summary of principles or set of opinions professed or adhered to in science or politics, or the like; as his hopeful creed."

Clearly, Sikhism is a "creed", ["Creed" is defined in the same way in R. v. OLRB, ex parte Trenton Construction Workers Association, Local 52, [1963] 2 O.R. 376 at 389.] applying this definitional criteria. The essence of Sikhism is a declaration of religious belief.

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13.
Just as clearly, Sikhism is a "religion" within the meaning of section 3 of the Canadian Human Rights Act, and "religion" is a prohibited ground of discrimination.

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14.

The Evidence
Norton Brown, assistant mechanical officer at the Toronto, or Spadina (as it is sometimes called), coach yard of the Canadian National Railways, testified. The coach yard is located near Spadina Avenue, near downtown Toronto as shown in an aerial photograph. (Exhibit no. R-1). Conventional trains, with standard passenger coaches are marshalled in this yard. At the suggestion of, and with the agreement of all counsel, the Tribunal took a view of the yard late at night when the Turbo was in the yard.

There is a roundhouse, where engines are worked on, holding tracks, and repair tracks and pits. No. 5 repair track is used to service and repair the Turbo train. There is a pit between the rails cut out of the ground along this track so that as the train passes overhead three or four men can stand in the pit and "a rolling inspection can be done to the undercarriage". (Transcript, p. 78). The pit is about 3 to 4 feet wide, 20 to 25 feet long, and 5 1/2 feet deep, with a descending stairway giving access. A number of photographs were filed simply to show the general nature of the relationship between the coachyard as a working-place and the men who work there. (Transcript, p. 91, Exhibit no. R-2: Exhibit Nos. R-3 and R-4 included further photographs showing the pit area and repair tracks).

The work on the Turbo train is performed between 11:00 p.m. and 7:00 a.m. There are usually an electrician, a car man, and a machinist in the pit. An electrician, such as Mr. Bhinder, checks the electrical connections and parts.

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15.
Mr. Bhinder said he spent two to three hours in the "pit" each night, with a flashlight, checking the entire electrical system on the undercarriage of the turbo train.

Mr. Bhinder testified that his duties inside the turbo train included checking doors, the radio, telephone and P.A. system, the control panel where the engineer sits, gauges and lights, the horn, heating and air-conditioning system, microwave lamps, reading lights in the coaches and repairing damaged light sockets, and the "gyro" lights in the engine. His duties of checking and making minor repairs on the outside of the train included checking the "indent" lights, the "mag pick-ups" on each wheel of the coaches, and the gravity of the batteries.

Peter Rosemond, a maintenance electrician with the C.N.R. with respect to turbo trains over the same period of time that Mr. Bhinder was so employed, agreed with Mr. Bhinder’s description of his job. (Transcript p.372).

Exhibit No. C-15 is a synopsis of a Turbo train electrician’s duties, compiled by Mr. R.E. Barratt, general foreman for the Toronto coach yard. This description accords with Mr. Bhinder’s view as to his duties, although there is obvious disagreement between Mr. Barratt and Mr. Bhinder as to the degree of risk and danger in carrying out such duties.

The electrician would also check the panel on the dome car, which contains the master relay panel for the train, (Transcript, pp.84-86), electrical connections in the dome car (Transcript, pp. 87,88), air

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16.
conditioning filters and connections (Transcript, p. 87). Exhibit

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No. R-5 contained a group of pictures showing various components of the turbo train where the electrician would have to work.

Mr. Bhinder testified that in the four and one-half years he was on the job nothing ever fell into the pit (Transcript, pp. 274, 275) and that there was no danger of the bay or panel doors falling. (Transcript, p.277).

Joseph Bonelli of Washington, D.C., testified. Mr. Bonelli is employed as director of rules of safety with Amtrack corporation, the U.S. national passenger service railroad corporation. (Transcript, p. 94). He has an extensive background of 40 years in railway operations, is a past president of the American Association of Railroad Superintendents, and has visited many major coach yards across the United States (Transcript, p. 95) including turbo facilities, with a view to their safety requirements.

Mr. Bonelli testified that there are dangers in working in coachyards which require the wearing of hard hats.

Q. Now, are there certain dangers involved in working at these coach yards?

A. Well, there certainly is. We have sometimes several levels of people working at the same time, overhead cranes, vehicles that move about. Oh, there are dangers. Yes, sir, there are.

Q. In the turbo facilities that you've indicated, that the railway you work for had, you indicated there were pits. Did trains go over the pits and men work in the pits while the trains are travelling over?

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17.
A. That is the purpose of the pit, to enable the men to be stationed permanently while the train moves over, so that they can inspect the undercarriages and what have you.

Q. And the electrical inspections take place in respect to those circumstances?

A. Yes. Yes there are. Yes there are.
Q. And the people performing the electrical services, are they electricians?

A. Yes they are.
Q. And do they wear hard hats while in the pits doing their inspections?

A. Yes they do. It is compulsory.
Q. Why are hard hats issued to electricians while working in the pits?

A. Hard hats are issued to all employees working in our coach yard because of the inherent dangers.

Q. Well, how do the hard hats relate to the dangers?
A. Sir?
Q. How do the hard hats relate to the dangers? In what way do they affect the dangers?

A. Oh, there is so much overhead work to be done, that you just can't take the chance that nothing is going to fall and in the pits in particular, as the train is moving over, there could be some --a part of the undercarriage that is dangling became loose, or they have picked up something along the way that could fall while the person is underneath it. (Transcript, pp. 98-100)

He had visited the Toronto coach yard and testified it was identical in set-up and function to Amtrack coach yards. (Transcript, pp. 101,103).

Mr. Bonelli expressed the opinion that hard hats should be mandatory in the coach yard.

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18.
Q. Now, in your opinion, as a man involved in railway work, and in safety for quite a number of years, do you consider that the coach yard is an area that requires the wearing of a hard hat for safety purposes?

A. In a coach yard, whether it be on this side of the border or below the border, should have all of its employees wearing hard hats. We have so indicated in our rules that it ils mandatory that you must do so.

Q. In regard to this particular coach yard?
A. Yes.
Q. The Spadina coach yard? Is that your opinion?
A. Yes it is.
Q. Well what is the purpose--what purpose would it serve in a work place that you have seen in the Exhibits R-1 to R-4 -- would the hard hats--the wearing of hard hats?

A. They could very well avoid a serious injury. I think we are all aware that a blow to the head is considered extremely serious and we should take no chances whatsoever. There are so many dangers that can result from a blow to a head. (Transcript, pp 107, 108)

A. ... My general observation is that you have many

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overhead facilities that would cause--that, in itself, whether an employee would get under a car or not, the overhead facilities that they would warrant the wearing of a hard hat. I saw many cranes overhead. I saw posts and poles. I don't know whether you recall them, a 480 voltage on them or you have high power electrical current coming through them that could house ice that could melt and fall on a man's head. I had noticed people with electric carts or some form of energy vehicles that were moving back and forth throughout the yards. I had noticed platforms that people could drop, inadvertantly (sic) drop something out of--about the walkway that an employee in the coach yard could be struck. The pits I saw were in an area that absolutely warrants the wearing of a hard hat, even some of your inside shops--I profess that all should be worn--but even some of your inside shops I consider dangerous enough that it must be worn at all times because of the overhead facilities in those particular shops.

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19.
Q. Well, based again on your experience and what you have seen in the Spadina coach yard, which is the place where Mr. Bhinder works, I would ask you to answer this question: is the work place where Mr. Bhinder works and the work done there by Mr. Bhinder, dangerous? Does it involve the risk of head injury at all?

A. It certainly is.
Q. Is it reasonably practical to eliminate this employment danger of injury to the head or to control that danger within, say--can we eliminate what he has to do?

A. No. I think what you are asking--can you avoid a hazard? We, as safety people are required just to do just that. When we develop a hazard, we go out and find a hazard, the first thing that we should do is attempt to engineer the hazard out of that particular assignment. I don't know how you are going to invest and inspect the underneath portions and eliminate the entire hazard. So what you do in that event is you attempt to give the employee enough safe, protective equipment to avoid the hazard and avoid the injury.

Q. Are you saying, then, that the hazards which are created by dangers are not practicably eliminatable by engineering? There has to be some other method?

A. That is correct, as long as you are going to operate a train it must be inspected. I guess I can say I can engineer the hazard out of--stop running your trains--and I think that is a little bit ridiculous.

Q. Well I am emphasizing the "practicable", "reasonably practicable". There is no way that can be done?

A. I say there is no way. That was my purpose for looking to see if I could come up with some suggestion of the way you could do it, not having been able to do so myself in our own country.

Q. Would the wearing of a safety hat by Mr. Bhinder or by an employee doing Mr. Bhinder's work at the work place prevent injury or significantly lessen the severity of a head injury?

A. Yes it would.
Q. Do you consider the work place and the type of work done, it is reasonably necessary for the employee, in order to ensure his own safety and the safety of others, to wear a hard hat?

A. Yes I do.
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20.
Q. Do you consider it, from a practical point of view, considering the realities of the work-a-day life and circumstances involved at the coach yard, that it is reasonably necessary to wear a hard hat for safety purposes?

A. Yes. If I may elaborate on that?
Q. Yes?
A. I am sure I feel that your company as well as ours is not as much interested in our well being as they are in the employees' well being. This is why we insist, and I am sure that you people should insist that protective equipment be worn, and in this case a hard hat. You are interested, as well as we are, in their well being. (Transcript, pp 109 - 112)

His only exception would be for coach cleaners, while working inside passenger cars. (Transcript, pp. 120, 121)

Mr. Bonelli stated that the U.S. regulatory regime requires that the employee be provided "with protective equipment where necessary", and that it is the employer railways' view that

this can only be achieved through a hard hat requirement. (Transcript, p. 124)

In Mr. Bonelli's view, the protection needed is from moving trains, falling and protruding objects.

The Chairperson: So, the hard hat you are saying, adds protection as moving trains...

The Witness: Moving trains, something falling, something protruding, something falling off a cart going by; a brake shoe for example, could be moved from one end

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of the track to the other, and for some reason, has worked its way onto the edge of the cart at just about the time he passes that man. The brake shoe could easily fall off and roll off, down into the pit.

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21.
So, I mean, it's just the overall protection that you just don't know what is going to happen, and if we knew exactly what was going to happen we could probably safeguard against that one particular item and nothing else, but we do not know. (Transcript, p. 128)

John A. Fletcher is a self-employed consultant in "safety and total loss control" (Transcript, p. 131) with an extensive background in industrial safety procedures. He has authored three books on the subject, and received considerable recognition and honours for his work in safety.

Q. I see. Could you describe from a safety prevention and your expertise as a consultant in that field, whether you considered it necessary for purposes of safety and protection of the head for hard hats to be worn in the Coach Yard?

A. Having looked at not just the operations of the Turbo, but throughout the entire Coach Yard as we went through, there was no doubt in my mind that the entire area should be classified as hard hat area. (Transcript, p. 136)

He testified that dangers in the Toronto coach yard included the bay door covers held up by rods [on the dome cars] falling, bumps from mobile equipment, hanging icicles that one could bump into, bumping one's head moving into and out of the pit, and the potential problem of a turban catching or snagging on metal mesh or otherwise. (Transcript, pp 141 - 146). Moreover, as electrical power is transmitted when the electrician is testing, the hard hat, being insulated, gives some further protection. (Transcript, p. 147)

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22.
Mr. Bhinder himself is safety conscious. He testified he always wears safety glasses, and even before the C.N.R. required them (Transcript, pp. 278,279). Moreover, he saw merit in the general hard hat policy of November 30, 1978. His complaint is not against the merits of the policy, but rather, because he thinks it should not apply to him because he already has sufficient protection through his turban (Transcript, pp. 287, 329-347), and because he just cannot wear a hard hat due to his religious beliefs.

Mr. Gordon C. Wilson, a labour affairs and employment safety officer with the Canada Department of Labour, testified. His duties include the monitoring of the implementation of Part IV

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of the Canada Labour Code at various federal enterprises, including the Canadian National Railway's Toronto coach yard. He inspected the Toronto coach yard (see Exhibit Nos. R-2, Transcript, pp. 541-567), including the Turbo track repair facility and its pit, and the Rip track area, on November 28 and on December 4, 1979. He expressed an opinion on the necessity of a hard hat requirement for the coach yard.

Q. On two occasions. And dealing solely now with the question of the hard hat, the safety hat, I would ask if, based on your observations, your experience, you consider that the work place and the work done therein, particularly at the Turbo track facilities, the repair pit, and at the Rip track repair facilities; whether those areas are areas where Section 3 of the regulations conditions have been met requiring the wearing of a hard hat.

A. Yes they are. (Transcript, p. 550)
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23.
Mr. William Thomas Mathers, director of accident prevention for C.N., testified. His extensive work record with C.N. was filed as Exhibit No. R-21. It is his responsibility to identify dangers in the workplace for C.N.'s 75,000 employees, and to prevent accidents. He developed the document (Exhibit No. C-11) requiring hard hats to be used generally in the Toronto coach yard. He referred to several issues of the C.N.'s publication, "Keeping Track", (Exhibit No. R-22) which cited examples of employees in coach yards being spared serious injury due to protective hard hats, although none of the examples related to maintenance electricians. (Transcript, pp. 674 to 678). It seems there were a few minor head injuries to electricians in 1974, although there were none in 1977 and 1978 (Transcript, pp. 721-723). Moreover, the general statistics do indicate a reduction in head injuries throughout C.N.'s operations with the introduction of the hard hat policy, although the statistics do not relate specifically to the Toronto coach yard (Transcript, pp. 680, 712; Exhibit No. R-25; (C-26).

James Neuman, a professor of mechanical engineering at the University of Ottawa, testified. He is an expert in hard hat protection, having done extensive research, given lectures internationally, published widely, and been a consultant to governments on the subject. (Transcript, pp. 424 - 426). His curriculum vitae was filed as Exhibit No. C-22. In his expert opinion, the C.N.R.'s hard hat policy was "quite reasonable" in the interest of safety.

Dr. Neuman has also done a study for the Construction Safety Association of Ontario evaluating the protective capabilities of Sikh headwear

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24.

(Exhibit No. C-23). His laboratory study included an impact test, with the dropping of steel weights at different sites on the head of a dummy (wearing a wig and turban, and alternatively wearing a safety helmet) and a measurement of the force transmitted to the head. (Transcript, pp. 431 - 433).

The stated conclusion of the report of this study, An Evaluation Of The Protective Capabilities of Sikh Headwear (Exhibit No. C-23) is as follows.

5. CONCLUSIONS
1. The conventional Sikh turban does not conform to the impact requirements of CSA Z94.1 (the Standard for the Industrial Protective Headwear.)

2. The turban offers its maximum protection where the fabric is heavily bunched at the front and back of the head. This region accounts for only a small portion of the head.

3. The regions of least protection provided by the turban are the crown and side, with the exception of the hair knot location.

4. At rear impact locations, the Sikh turban affords more protection than a certified industrial safety cap.

Dr. Neuman gave his own conclusions as well, in his testimony:

A. The conclusions are: that under none of the test conditions that we have examined is the turban capable of meeting impact requirements of the current CSA standard. Now, that's the first thing.

Having said that, everything else that I say now is in relation to that comment: that the performance of the turban is different at different locations. It appears to be best where the material clearly is very heavily bunched or overlaid, such as at the front or at the rear.

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25.
By and large, the safety cap performs better than the turban, certainly on the crown, and on the crown it is capable of meeting the requirements of the standard. At locations other than the crown, the safety cap is not capable of meeting the requirements of the standard, but by and large performs better than the turban, except at the rear.

At the rear, for low impact energies, the turban appears to work better than the hard hat.

Q. Would you guess it might be the same at the front?

A. It would depend upon the hard hat.
Q. I see. And, at higher energies, I take it, the turban, when struck from the rear, does not meet the standard, but does it still perform better than the hard hat?

A. To the extent we have conducted these tests, up to drop heights of 80 centimetres, which is something less than three feet, the turban always works better than the hard hat.

Q. When struck from the rear?
A. When struck from the rear.
(Transcript, pp. 435, 436).
It may be, due to the nature of the maintenance electrician's work, as Dr. Neuman admitted, that a turban actually offers more protection than a hard hat, as the turban offers more protection to the front and rear, and cannot fall off. (Transcript, pp. 449-451). Indeed, in respect of the rear of the head, the turban's performance is about 100% superior to the hard hat. (Transcript, pp. 463, 466). However, the hard hat meets the C.S.A. standard, and the turban does not with respect to blows to the crown of the head, and this point was not disputed by Commission counsel. (Transcript, pp. 471, 472, 508).

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26.
Moreover, Dr. Neuman also was of the opinion that the turban might perhaps present a disadvantage, as compared to the hard hat, with respect to any sharp protruding objects, when the wearer has to put his head inside the confines of a panel.

(Pictures 36, 37, 38 and 39 on Exhibit No. R-4, Transcript, at pp. 484 - 487, 507).

However, Dr. Neuman had observed the Toronto coach yard, and the pit in particular, and was of the opinion that there were dangers (Transcript, pp. 492-494, 496, 499) such that (for the C.N.R. to comply with section 3 of the Canada Protective Clothing and Equipment Regulations), the C.N.R. should require its employees to wear hard hats. (Transcript, pp. 498, 499). In Dr. Neuman's opinion the wearing of a hard hat by Mr. Bhinder "would significantly lessen both the severity of and the probability of a head injury...". (Transcript, p. 499).

A. It would significantly lessen both the severity of and the probability of a head injury, in my view.

Q. In order for Mr. Bhinder to ensure his own safety in the work place and considering the work performed by him, is it reasonable and necessary for him to wear a C.S.A. approved safety hat?

A. From the standpoint of his own personal safety

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it is reasonable that he should.
(Transcript, p. 499).
Q. Okay. Will the wearing of a turban by an employee doing Mr. Bhinder's work at his work place be as effective a head protection in its overall performance as a C.S.A. approved safety hat in preventing or significantly lessening the severity of a head injury?

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27.
A. I do not believe so.
Q. Does the wearing of a turban by Mr. Bhinder in his work place and in the light of the work performed by him constitute the taking of all reasonable and necessary precautions to ensure his own safety and the safety of his fellow employees?

A. I do not believe so.
Q. Considering the work place of Mr. Bhinder -- and the work done by him -- does the requirement of the C.S.A. hat -- I am sorry, is the requirement by C.N. that its employees, including Mr. Bhinder, wear C.S.A. approved safety hats in working in, at, about or under Turbo trains and at repair tracks at Spadina coach yard, based upon the practical realities of the work-a-day world life?

A. Yes, I believe it is reasonable.
Q. In other words, is the requirement to wear such hats supported in fact and reason from a safety point of view?

A. It appears to be, yes.
(Transcript, p. 500).
The C.N.'s "Head Protection Policy" (Exhibit No. C-11) required hard hats in designated areas (which was to include the Toronto coach yard), with the safety hats to "conform to the Canada Department of Labour 'Canada Protective Clothing and Equipment Regulations'" (Exhibit No. C.11), enacted pursuant to the Canada Labour Code. These Regulations will be discussed at length infra; however, section 3 provides that where it will prevent or reduce the severity of an injury, the employer shall require of each employee the wearing of protective equipment in the manner prescribed by the Regulations. Thus, the C.N., of the view it was within section 3 of the Regulations and therefore should require of its employees in the Toronto coach yard the wearing

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28.

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of safety hats, felt it was then obliged to have them wear safety hats that complied with the recommendations of Canadian Standards Association standard 294.1-1966, as stipulated by section 9 of the Regulations.

The Canadian Standards Association's publication in respect of "Industrial Protective Headwear" (Exhibit No. C-9) deals with safety hats with (by CSA Standard 294.1-1966) very detailed requirements.

Data was introduced from the C.N.'s Monthly Summary of Personal Injuries for the years 1974 through 1978 indicating head injuries to employees. While the data is somewhat unclear (and perhaps there are minor discrepancies within all the data filed) as to which employees were or were not wearing a hard hat, and as to the severity of the injuries, the following is a summary as to the apparent skull injuries to electricians, all of which appear to have been lacerations or bruises with minimal time off resulting. (However, an additional Exhibit, (Exhibit No. C-26), indicated an electrician at Valemont, B.C., lost five days of work due to a skull injury occasioned by a vehicle accident). There appears to have been one skull injury to an electrician in the Toronto coach yard (in 1974).

The C.N.'s Summary of Personal Injuries (Exhibit No. C-27) for 1974 suggests some seven minor head injuries to electricians for that year, being one in January (Pt. Charles, Quebec), three in March (Central Station and Montreal, Québec, and one in the Toronto coach yard), one in June (Québec), one in September (Neebing, Ontario), and one in December (H.Q. Building, Québec).

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29.
The C.N.'s Summary of Personal Injuries (Exhibit No. C-28) for 1975 suggests there were some eight minor head injuries

for that year to electricians, being one in January (Transcona, Manitoba), one in March (Transcona), two in January (Pt. Charles, Québec), one in March (Montreal), one in June and one in August both at Pt. Charles, Québec) and one in October (Moncton, N.B.).

The C.N.'s Summary of Personal Injuries (Exhibit No. C-29) for 1976 indicates that for that year there were some seven minor head injuries, being one in February (Port Mann, B.C.), one in March (Symington yard, Manitoba), one in April (Transcona, Manitoba), one in May (Moncton, N.B.), one in July (Moncton, N.B., to an apprentice), one in September (Montreal, Québec), and one in November (Calder, Alberta).

The C.N.'s Summary of Personal Injuries (Exhibit No. 30) for 1977 in Canada suggests there were four minor skull injuries to electricians that year, being two in January (Saskatoon, Saskatchewan, and Pt. Charles, Quebec), one in September (Winnipeg, Manitoba), and one in October (Transcona, Manitoba).

The C.N.'s Summary of Personal Injuries (Exhibit No. C-31) with respect to skull injuries for 1978 in Canada suggests there were two minor head injuries to electricians, in April

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(Transcona, Manitoba) and in May (Moncton, New Brunswick). Considering the C.N.'s statistical data, there were some 426 injuries to all occupations at the Toronto coach yard for 1974-1979 (Exhibit

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30.
No. C-18). Of these, only a single situation involved more than one person, and it did not involve an electrician (but rather a carman) nor did it involve a head injury. (See Exhibit No. C-18).

A further exhibit suggested that no electrician received a head injury at the Toronto coach yard during 1974-1979 (Exhibit C-18), although there were 20 head injuries to all occupations over this period of time. Thus, it would seem that at most there was one minor head injury to an electrician, in 1974. (Exhibit No. C-27).

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31.
Findings of Fact with Respect to the Evidence
The evidence is clear that the Respondent dismissed the Complainant from employment because Mr. Bhinder insisted that he would have to retain his turban. This evidence is undisputed, and indeed, the record is clear that the Respondent was at all times open and truthful about its employment policy. The Respondent dismissed the Complainant from employment as a maintenance electrician because he could continue such employment only on the basis of wearing a hard hat, which was impossible from the Complainant's point of view, given his religious beliefs.

The Tribunal finds further on the evidence (and as expressly stated by Commission's counsel) that in adopting this position, the C.N.R., and its employees involved in the instant situation, bore no ill will toward Sikhs or the Sikh faith. There was no intention to insult, or to act with malice against the Complainant. The C.N.R.'s employment policy that employees must wear a safety hat (which, in effect of course, precludes a turban and long hair) was adopted simply to facilitate the carrying on of its business. The C.N. believes that such requirements of its yard employees will afford greater safety to its employees. Accordingly, the Tribunal finds that the C.N.R., and its employees in question, did not have the intention, or motive, to discriminate toward the Complainant because of his religion.

However, the effect of the Railway's employment policy was to deny the Complainant continuing employment, because the Complainant would not compromise his sincerely held religous beliefs to conform with the Railway's employment policy.

The Tribunal finds that C.N.'s employment policy and rules,

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consciously pursued, have the effect of denying a practising Sikh, and specifically the Complainant, employment in the Toronto coach yard because of his religion. The establishment and pursuing of the Respondent's policy deprives or tends to deprive Mr. Bhinder (and all practising Sikhs) of an employment opportunity because of his religion. Religion is a prohibited ground of discrimination by section 3 of the Act. Is the Respondent in breach of sections 7 and/or 10 of the Act given this factual situation?

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33.

Jurisdiction

A threshold issue must be dealt with before proceeding to a consideration of the merits of Mr. Bhinder's complaint.

Counsel for the C.N.R. has submitted that this Tribunal has no jurisdiction to hear the Complaint because of the absolute independence afforded to the company and the Canadian Transport Commission 1 to make orders and regulations with respect to, amongst other things, employees' safety. Were this tribunal to find, for instance, that the Respondent's safety requirement does not constitute a bona fide occupational qualification, the Respondent argues that the Tribunal would he substituting its judgment for that of the company and/or the Canadian Transport Commission.

Rule 33 of the "CN Safety Rules" booklet (Exhibit No. R-18) provides the following:

Safety headwear must be worn:
... (b) when there is danger of falling or flying objects;
... (f) when instructed by a foreman or supervisor.

The "CN Safety Rules" booklet was given to Mr, Bhinder at the time that his employment commenced, April 9, 1974 (Transcript, p. 515). Mr. Bhinder's application for employment with the C.N.R. (Exhibit No. R-14) stipulated that he:

"... shall be subject to the applicable by-laws, rules and regulations of the company in force from time to time."
(Transcript, p. 516).

1 Section 24 of the National Transportation Act, R.S.C. 1970, c. N-17, provides that the Commission shall establish various committees, including a "railway transport committee". Committees may exercise any of the Commission's powers and duties. A committee's orders, rules or directions have effect "as though they were made or issued by the Commission": s.24(3).

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34.

According to section 230 of the Railway Act, R.S.C. 1970, c. R-2. the company, (ie. Canadian National Railways in this case), may make by-laws, rules or regulations respecting:

(g) the employment and conduct of the officers and employees of the company; and

(h) the due management of the affairs of the company.
Thus, the inclusion of Rule 33 in the "CN Safety Rule Book" was certainly within the broad regulatory powers of the company under section 230 of the Railway Act. The Canadian Transport Commission has even broader regulatory powers and indeed, the orders and regulations made by the company apply subject to the orders and regulations of the Commission (section 230 Railway Act).

Subsection 227(1) of the Railway Act extends to the Commission the power to make regulations touching specified aspects of railway operations (Paragraphs 227(1)(a) to (k)). Further, paragraph 227(1)(1) gives the Commission the power to make regulations:

(1) generally providing for the protection of property, and the protection, safety, accommodation and comfort of the public and of the employees of the company, in the running and operating of trains and the speed thereof, or the use of engines, by the company on or in connection with the railway.

Other powers of the Commission include directing inspections where there is a possibility that the railway is dangerous to the public (section 223) and directing inquiries into matters "likely to cause or prevent accidents ..." (subsection 226(1)).

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35.
Further powers are granted to the Commission under the National Transportation Act R.S.C. 1970 c. N-17. In particular, counsel for C.N. pointed to sections of that Act which give the Commission jurisdiction to hold bearings and make orders with respect to the obligations of persons and companies under the Railway Act (subsection 45(2) and section 48)). In determining questions of fact, the Commission is not bound by the findings of any other court in which the determination of those same facts was undertaken. Rather, such a determination would be merely prima facie evidence of any fact (subsection 56(1)).

It is clear from the provisions of both the Railway Act and the National Transportation Act that the Commission and the company have very broad powers to make regulations over a variety of aspects of railway operations, including employees' safety. The Respondent's submission is that these powers are so broad that this Tribunal cannot pass judgment on any matter within the competence of the Canadian Transport Commission. It is argued that as employee safety policies or regulations may be enacted by the company and the Commission, for this Tribunal to decide whether or

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not those policies or regulations are valid, would be to substitute its judgment for that properly and exclusively exercised by the company or the Commission.

It must be noted that here the hard hat requirement was imposed by the company, Canadian National Railways, under its regulatory power (section 230, Railway Act), not by the Commission under its superior regulatory jurisdiction (section 230, subsection 227(1), Railway Act). However, this in

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36.
itself does not defeat the argument as advanced by the Respondent. The contention is that any matter within the jurisdiction of the Commission is beyond the reach of this Tribunal and even the courts.

In support of this submission, the Respondent cited the following cases.

In Grand Trunk Railway v. Joseph McKay (1903), 34 S.C.R. 81, an action was brought by the plaintiff against the railway company for its alleged negligence in passing through a town at an unsafe speed. The result was a collision with the plaintiff's horse and buggy at a level crossing. The Supreme Court (Girouard,

J. dissenting) reversed the decision of the lower court by holding that the jury, which had found that Grand Trunk had been negligent, could not, in effect, impose a speed limit on the railway since that matter was within the exclusive jurisdiction of the Railway Committee. Thus, no greater duty of care could be required of the railway than had been provided under the orders and regulations of the Railway Committee (now the Canadian Transport Commission).

Grand Trunk Railway v. Ernest Perrault (1905), 36 S.C.R. 671 involved a farmer's entitlement to a level crossing on his property under section 198 of the Railway Act. The Board of Railway Commissioners had the power to provide for such a crossing "wherever in any case the Board deems it necessary ...". The Supreme Court, following the reasoning in McKay, held that the plaintiff could only be granted such a crossing where the Board had so deemed, and he could not exercise any legal entitlement to a crossing. Thus, the determination as to whether a crossing was "necessary" was solely that of the Commissioners.

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37.
In Cossitt v C.P.R. (1949), 63 C.R.T.C. 330 (Ont. C.A.) the plaintiff stumbled while descending from a train. She brought an action in negligence against the railway for not supplying proper equipment to ensure safe descent from its trains. At trial, the jury found that the defendant had indeed been negligent. However, the Ontario Court of Appeal reversed that finding. It stated that since the provision of safety equipment was within the competence of the Board of Transport Commissioners, no greater duty of care to provide for the safety of the railway's passengers could be imposed by the Courts. The Board had the exclusive jurisdiction

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to determine what were the safety obligations of the railway. All these cases and the sections of the Railway Act cited by the Respondent show that the Canadian Transport Commission (or its predecessor regulatory agency) has been extended a good deal of independence and a broad jurisdiction. However, there is nothing to suggest that the jurisdiction of the Commission is immune from all federal legislation other than the Railway Act. What is involved here is a determination not as to whether a Commission's safety regulation is sound or sufficient, but rather, the company's (and the Commission's) obligations to act according to the Canadian Human Rights Act.

The Canadian Human Rights Act was enacted:
to extend the present laws in Canada to give effect,
within the purview of matters coming within the
legislative authority of the Parliament of Canada...

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38.
to a series of fundamental principles of personal freedom (s.2). Canadian National Railways is a federal undertaking and as such, is clearly subject to the legislative jurisdiction of the federal

Parliament (s. 92(1)(a), 91(29), B.N.A. Act). Thus it would seem that if the legislative intention was to make the Canadian Human Rights Act applicable to "matters coming within the legislative authority of the Parliament of Canada...", this must, of course, include the Respondent.

The independence afforded the Canadian Transport Commission to make regulations governing railway operations does not make such regulations immune from other limiting legislation. For example, even though the Commission has the power to enact safety regulations generally (para. 227(1)(1) Railway Act), and in particular, regulations with respect to the coupling of cars (para. 227(1)(c)), there is no doubt that if by those regulations it showed "wanton or reckless disregard for the lives or safety of other persons", the Commission would have committed an offence under subsection 202(1) of the Criminal Code. That is, the independence of the Commission cannot be such as to give it immunity from other valid federal legislation.

The Commission’s capacity to limit the company’s civil liability as manifested in the cases referred to above, seems to the Tribunal to be a different situation from the one under consideration here. Though the Commission may be able to establish the duty of care owed by the company to the public, in other respects it is bound to comply with applicable federal statutes, such as the Canadian Human Rights Act, which, in fact,

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39.
are specifically aimed at matters within federal legislative competence.

In cases more recent than the ones cited by the respondent, even the Commission’s competence to establish the extent of a company’s duty of care has been questioned. In Sdraulig v. Canadian Pacific Railway Co. (1968), 1 O.R. 377, Schroeder, J.A. expressed the issue as follows:

The position taken by the respondent is that as to precautions to be taken by a railway company at a level crossing the jurisdiction of the Board of Transport Commissioners is exclusive and that, subject to some extraordinary and exceptional circumstances, it is not open to a Judge or Jury to prescribe that additional care or further warnings be given by a railway company than is required by the provisions of the Railway Act or any order or regulation of the Board enacted pursuant to the statutory powers conferred upon it. That is undoubtedly the general rule as recognized in G.T.R. v. McKay... but it is not an inflexible rule which is to be rigorously applied under any and all circumstances... (p. 385).

The Court of Appeal found that even though the company had complied with the safety regulations as enacted by the

Commission, there was still evidence on which a jury could find that the company had been negligent.

In Paskivski et al. v. Canadian Pacific Ltd. et al. (1975), 5 N.R. 1, [1976] 1 S.C.R. 687, the Supreme Court found that the exclusive

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40.
jurisdiction of the Commission does not apply under exceptional circumstances. However, Dickson, J. expressed some reservations about the persistence of the Commission's independence, even in terms of its determination of a company's common law liability:

The McKay case was decided over seventy years ago, when Canada was, to quote Sedgewick, J., in that case, "a young and only partially developed territory." Davies, J., in the same case expressed concern that railway development not be impeded. The past seventy years have wrought many changes within Canada and today one might perhaps be inclined to question the relevance and validity of a rule of law which limits the common law duty of care of a railway to the special case or the exceptional case, particularly if those words are to receive a strict or narrow construction. It may well be that the interests of a young and undeveloped nation are best served by a minimum of impediment to industrial growth and economic expansion but in a more developed and populous nation this attitude of laissez faire may have to yield to accommodate the legitimate concern of society for other vital interests such as the safety and welfare of children. (p.15 N.R., p. 708 S.C.R.).

Laskin, C.J.C. expressed even greater concern on the matter:
... I am unable to appreciate why railway companies, in

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the conduct of their transportation operations, are today entitled to the benefit of a special rule, more favourable to them, by which their common law liability is to be gauged. When all allowances are made for the force and legal effect of the rules and regulations of the regulatory agency, the Canadian Transport Commission, to which railway companies are subject, and when the question of their liability turns on the common law of negligence, as is the case here, they cannot claim to be judged by any different standards than those that apply to other persons or entities charged with liability for negligence. (p. 16 N.R., p. 689 S.C.R.)

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41.
Thus, even if the principle in McKay was applicable to the proceedings, there is obiter to the effect that that principle should no longer be invoked. Further, the Respondent cannot assert

that the independence of the Canadian Transport Commission, in its safety regulatory function, gives rise to a complete statutory immunity for the company. The Canadian Human Rights Act is intended to apply to the Respondent and, in fact, does apply. In the past the Commission has been given much independence from the Courts (McKay), but it is doubtful now whether that independence can be justified (Paskivski). This Tribunal then, has jurisdiction to hear the issue before it. The Commission's jurisdiction over safety regulations (and it is a moot point - unnecessary to a decision with respect to the issue faced by this Tribunal - as to how far the Commission's jurisdiction extends in displacing the common law of negligence) does not impede the proceeding before this Tribunal. The C.N.R. is subject to the Canadian Human Rights Act.

As an alternative challenge to the jurisdiction of this Tribunal, the Respondent contends that the competence to enact safety regulations is shared by the Canadian Transport Commission, and the Minister of Labour under the Canada Labour Code R.S.C. 1970 c. L-1.

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42.
Subsection 81(2) of the Canada Labour Code 1 provides:
Every person operating or carrying on a federal work, undertaking or business shall adopt and carry out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury in the operation or carrying on of the federal work, undertaking or business. [Emphasis added].

There is no doubt that this section gives the C.N.R. the power, and indeed, imposes upon it the obligation to ensure that the working conditions of its employees are safe. However, as was stated above with respect to C.N.'s preliminary objection to this Tribunal's jurisdiction, such an empowering provision cannot be relied upon in isolation from other applicable statutes.

The Canada Labour Code, Part IV (Safety of employees) is intended to, and does, apply to Canadian National Railways as it is a federal undertaking (subsection 80(1)). Likewise does the Canadian Human Rights Act apply to C.N., according to section 2 of that Act. Both statutes can be given a reasonable, meaningful interpretation without the necessity of finding one is in conflict with, or paramount over the other. The Canada Labour Code obliges the Respondent to exercise reasonable procedures to protect its employees' safety. The Canadian Human Rights Act obliges the Respondent to act in accordance with certain specified principles of personal freedom in its treatment of its employees and the public. This may well require C.N. to

1. Part IV of the Canada Labour Code was made applicable to railways by the Governor General in Council May 18, 1978: P.C.

1978-1666, pursuant to subsection 80(2) of the Canada Labour Code.

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43.
balance its obligations in determining what is the proper policy for its employees. It cannot assert though, that the statutory obligation to provide for employee safety is superior to the obligation to conform with the Canadian Human Rights Act. Nor does that provision in the Canada Labour Code defeat the jurisdiction of this Tribunal to hear and decide the issue before it.

If the two statutes need to be reconciled, this may turn on a finding of this Tribunal as to whether the respondent's safety policy or regulation was "reasonable" and hence within its mandate under subsection 81(2) of the Canada Labour Code. A safety regulation which is discriminatory in its impact on the respondent's employees, may well be unreasonable and hence not sanctioned by the Canada Labour Code.

In support of its argument, the Respondent cited the B.C. case of Insurance Corporation of British Columbia v. Robert Heerspink [1980] 1.L.R. 1-1208. There, one of the statutory conditions under the Insurance Act S.B.C. 1960, c. 197 provided that the insurer could terminate without cause the insurance contract upon notice to the insured. The Insurance Corporation of B.C. cancelled Mr. Heerspink's insurance contract when it learned that he had been charged with trafficking in marijuana. Section 3 of the B.C. Human Rights Code provides:

3. (1) No person shall
...
(b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,

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44.

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unless reasonable cause exists for such denial or discrimination.

Mr. Heerspink's complaint alleged that he had been denied service "customarily available to the public" without "reasonable cause". In determining whether the Human Rights Code could restrict a statutory Condition (5(1)) expressly contained in the Insurance Act, Mr. Justice Munroe stated:

There is a long line of authority to the effect that where there are general words in a later act (such as the Code) capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation (such as the Insurance Act), you are not to hold that earlier and special legislation

indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so: The Corporation of the City of Vancouver v. William Bailey (1895), 25 S.C.R. 62; Regina v. Faulkner et al. (1958), 24 W.W.R. 524; Seward v. Vera Cruz (1884-85), 10 A.C. 59.

I am of the opinion that the Insurance Act Statutory Condition 5 takes precedence over the Human Rights Code s.3, because the former is particular and specific legislation while the latter is of a more general nature and does not purport specifically to alter the provisions of said statutory condition. (pp. 8-9)

The Respondent argued that since the Canada Labour Code predates the Canadian Human Rights Act, and the Code deals specifically with employee safety, the Human Rights Act cannot operate to limit those provisions in the Code. On its face, the issue seems analogous to that dealt with in the Heerspink case. However, that decision is distinguishable for the following reasons.

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45.
First, the Insurance Act in the Heerspink case contained a specific statutory condition providing for the cancellation of a contract of insurance. Here, the Canada Labour Code in s.81(2) provides that "Every person... shall adopt reasonable procedures and techniques" for the protection of employees' safety. That is, the Canada Labour Code creates an obligation on C.N. to provide safe procedures; it does not specify the procedures to be carried out. Thus, it cannot be said that the Canada Labour Code is specific, as was the Insurance Act in Heerspink.

Secondly, it cannot be said that the regulation under consideration here predates the enactment of the Canadian Human Rights Act. Although the obliging section of the Canada Labour Code predates the Human Rights Act, the hard hat regulation imposed by C.N. was passed after the enactment of the Act.

Thus, the situation here is distinguishable from that being contemplated in Heerspink. Rather than dealing with the

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effect of a general statute (B.C. Human Rights Code) on a prior, specific statute (Insurance Act), we have here a statute providing generally for the protection of human rights (Canadian Human Rights Act) and a prior statute providing generally, inter alia, for the safety of employees at federal undertakings (Canada Labour Code). What falls to be decided here is not even the effect of the later general statute on the prior general statute, but the effect of the later general statute on an even later specific policy (enacted pursuant to the prior general statute).

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46.
Thirdly, the Heerspink decision cited to us by counsel for the C.N.R. was a decision on the merits of the claim. It did not decide that a Board of Inquiry could not take jurisdiction over the matter. Rather, it held that once jurisdiction was taken, the Insurance Corporation of B.C. had a valid defence.

The jurisdictional issue had been dealt with in a previous decision of the B.C. Court of Appeal: [1978] 6 W.W.R. 702, 91 D.L.R. (3d) 520. Robertson, J.A. dealt with the issue as follows:

The gist of the appellant's [I.C.B.C.'s] principal argument is stated thus in its factum:

"At the commencement of the hearing before the Board of Inquiry, the Appellant contended that the Board had no jurisdiction to hear the complaint because the cancellation of the Respondent Heerspink's policy was authorized by Fire Statutory Condition 5 set out in section 208(2) of the Insurance Act, R.S.B.C. 1960 Chap. 197, and was not within the purview of section 3 of the Human Rights Code."

In essence this means that the appellant had an ironclad answer to Mr. Heerspink's complaint, that the complainant is thus bound to lose before the board, and therefore that the board has no jurisdiction to hear the complaint. To me this is a novel submission, and I cannot accept it. (p. 710)

Thus, the Respondent here cannot cite Heerspink in support of its contention that the Tribunal has no jurisdiction to hear the matter before it. However, it is a separate question whether the provisions of the Canada Labour Code afford C.N. a statutory defence under the circumstances. That matter will be considered below.

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47.
Furthermore, the decision in Heerspink at the B.C. Supreme Court has been reversed on appeal to the B.C. Court of Appeal: [1981] I.L.R. 1-1368. There, the Court found that there was no repugnancy between the statutes in question. As such, they should be read together.

Thus, we are of the opinion that even if we were bound by the decision in Heerspink cited to us by the Respondent, that decision would be inapplicable to these proceedings as the relationship of the statutes in this case differs significantly from that considered in Heerspink.

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48.
Thus, the Tribunal finds that the Respondent, Canadian National Railways, is obliged to conform to the Canadian Human Rights Act notwithstanding its concurrent obligation to provide for its employees' safety. This Tribunal has jurisdiction to hear and decide the Complaint before it. In doing so, it is not usurping the powers of the Canadian Transport Commission or the Minister of Labour or his designate to enact or enforce safety regulations. Rather, it is, under the specific circumstances before it, determining whether a safety policy or regulation of the Respondent operates in violation of the principles of the Canadian Human Rights Act.

The Contractual Provisions of the Employment Contract
As has been mentioned, the "C.N. Safety Rules" booklet, effective September 1, 1972, was entered as an exhibit. (Exhibit No. R-18). Mr. Bhinder's application (Exhibit No. R-13) stipulates that if he is employed, a condition of employment is that his employment:

"... shall be subject to the applicable by-laws, rules and regulations of the company in force from time to time."
(Transcript, p. 516)

Mr. Bhinder received a copy of the safety book at the time of his assumption of employment with the C.N.R., April 9, 1974, (Transcript,

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49.
p. 515; Exhibit No. R-14). These rules state, as Mr. Mathers, C.N.'s safety director, testified:

A. Rule 33 of C.N.'s Safety Rules, C.N. '73, 55 (E), Effective September 1, '72, 33 states:

"Safety headwear must be worn:
a) When working around derailments,
b) When there is danger of falling or flying objects,

c) When working on bridges or elevated structures,

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d) When working on pole lines,
e) When working in excavations,
f) When instructed by foreman or supervisor."
Given this evidence, another argument that might be raised is that the Complainant was contractually bound to wear a hard hat. The short answer to any such argument is, of course, that the Complainant is only bound by his contract of employment to the extent that it is a lawful contract. If a condition of such

contract violates the Canadian Human Rights Act, he is not bound by such condition. The essential issue remains irrespective of the conditions in Mr. Bhinder's employment contract. That is, is the Respondent in breach of sections 7 and/or 10 of the Act given its employment policy with respect to hard hats and its application to Mr. Bhinder, a Sikh?

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50.
The Merits

1. The Legal Position of the Parties
Having found that this Tribunal has the jurisdiction to hear and decide Mr. Bhinder's Complaint against the Respondent Canadian National Railway it remains to set out the merits of the Complaint. The legal position of the parties in these circumstances is basically as follows.

The Complainant must show a prima facie case of discrimination as a result of the Respondent's employment policies or requirements. Mr. Bhinder's complaint was brought pursuant to section 7 of the Canadian Human Rights Act:

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.

Section 3 of the Act specifies the grounds of discrimination to be proscribed:

3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.

It is the Complainant who must satisfy the onus of showing that the Respondent engaged in a discriminatory practice, i.e. refused to employ or continue to employ the Complainant because of the Complainant's religion, a prohibited ground of

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discrimination under section 3 of the Human
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51.
Rights Act. Precisely what constitutes a prima facie case will be discussed in detail below.

Once a prima facie case of discrimination has been brought against a respondent, the onus then shifts to that party.

Paragraph 14(a) of the Act provides the Respondent with an opportunity to show that its employment policies or regulations, which had a discriminatory effect on the Complainant, were job related and that their absence would impose undue hardship on the Respondent's business.

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.

The jurisprudence surrounding the interpretation of what may amount to a "bona fide occupational requirement" will be discussed at length below. It need only be said at this point that the existence of such a requirement will render what may otherwise have been a "discriminatory practice" under section 7 of the Act, a non-discriminatory practice. A bona fide occupational requirement does not, however, go to show that discrimination has not in fact taken place. Rather, it takes what would otherwise be a "discriminatory practice" out of the sphere of prohibited discrimination under the Act. That is, if an employer can show that the discrimination suffered by an employee was founded on a bona fide occupational requirement, then the exercise of the employer's policy will not be a "discriminatory practice" as defined under the Act. Thus, in a sense, certain acts of discrimination may be

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justifiable according to whether or not they constitute a bona fide occupational requirement.

Here, if it is found that Mr. Bhinder was indeed discriminated against on the basis of his religion, then the C.N.R. argues that the basis for that discrimination was a bona fide occupational requirement, through the enforcement of a safety regulation. If the C.N.R. can show the existence of a bona fide occupational requirement within the meaning of para. 14(2) of the Act, then its act of dismissing Mr. Bhinder will not have been a "discriminatory practice" for the purposes of the Act, notwithstanding that the cause for the dismissal may not have been Mr. Bhinder's fault.

2. A Prima Facie Case of Discrimination

Fundamental to the concept of discrimination is the existence of a preference or distinction based on an individual's characteristics, but not related to an individual's merits. The Canadian Human Rights Act lists in section 3 (supra) the specific characteristics according to which discrimination is prohibited. As such, the Canadian Human Rights Act serves to protect certain classes of citizens who historically have been particularly vulnerable to adverse discrimination. The protection of these

groups in society is seen to be necessary in order to further advance the principles outlined in section 2 of the Act.

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53.
2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:
(a) 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 or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap.

Thus, it is only on very particular grounds that discrimination is prohibited by the Act, and even discrimination on those bases is deemed not to be a "discriminatory practice" if it is carried out pursuant to a bona fide occupational requirement under s. 14(a).

In a discussion of what constitutes "discrimination", the following was said by Lord Reid in the House of Lords decision in Post Office v. Crouch [1974] 1 W.L.R. 89, 1 All E.R. 229:

Discrimination implies a comparison. Here I think that the meaning could be either that by reason of the discrimination the worker is worse off in some way than he would have been if there had been no discrimination against him, or that by reason of the discrimination he is worse off than someone else in a comparable position against whom there has been no discrimination. It may not make much difference which meaning is taken but I prefer the latter as the more natural meaning of the word, and as the most appropriate in the present case.

(1 All E.R. at p. 238).
In a U.S. decision, the following was said of the meaning of the words "discriminate" and "discrimination". Mr. Justice Burton was

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referring to the general ordinances of the City of Dayton, Ohio:
Evidently, the enactors of the ordinance did not intend to exclude the accepted meaning of these terms.

"Discriminate" means to make a distinction in favour of or against the person or thing on the basis of the group, class or category to which the person belongs, rather than according to actual merit. "Discrimination" means the act of making a distinction in favour of or against a person or thing based on the group, class or category to which that person or thing belongs, rather than on individual merit.

(Courtner v. The National Cash Registry Co. 262 N.E. 2nd 586, (1970)).

Thus, discrimination presumes a distinction between persons on a basis not related to merit. A "discriminatory practice" in refusing to continue to employ, for the purposes of the Canadian Human Rights Act, occurs when the basis of the practice is one of the prohibited grounds listed in section 3.

3. The Issue of Absence of Intent to Discriminate

Discrimination may occur even though a respondent had no intention to discriminate. The case of Re Attorney-General for Alberta and Gares et al (1976), 67 D.L.R. 635 (Alta. S.C.), is often cited for that proposition. There, the court was considering a situation where male orderlies were paid a greater salary than female nursing aides. The two groups of employees were represented by separate bargaining units and so their salaries were negotiated separately.

Thus, there was no question of the employer hospital having intentionally discriminated against the female employees. This did not preclude a finding that discrimination had indeed occurred. Mr. Justice D.C. McDonald stated of the submission made by counsel for the respondent hospital:

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55.
He also submits that compensation ought to be directed only when the employer wilfully or consciously discriminated between the sexes. Here, he says, the employer did not have the sexual distinction in mind when it negotiated first a collective agreement with the male group, then with the female group, then again with the male group and so on. However, in my opinion relief in the form of compensation for lost wages should ordinarily be granted to a complainant whose complaint as to unequal pay has been found to be justified, even in the absence of present or past intent to discriminate on the ground of sex. It is the discriminatory result which is

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prohibited and not a discriminatory intent. (p. 695).

In a British Columbia case, a Board of Inquiry likewise found that a violation of the B.C. Human Rights Code could take place even though there had been no intention to discriminate adversely against a particular group: B.C. Human Rights Commission

v. The College of Physicians and Surgeons (May 27, 1976), per Professor Leon Getz. The respondent College had a policy of requiring doctors who were not Canadian citizens to practice in underdoctored areas of the province for the first three years of their practice. The purpose of the policy was to reduce the congestion of doctors practicing in urban areas and to provide health services to areas of the province which were in need. The Board stated:

We have no doubt that the principal motivation of the College in adopting the policy under review was a wholly laudable one.

...
To acknowledge, as we do, that the College has acted with a high public purpose, does not however affect the fact that the result of its policy is to discriminate against non-Canadian doctors on grounds quite unrelated to their qualification for the practice of medicine, and in our view this, quite apart from any question of motive, constitutes a form of discrimination without reasonable cause that is prohibited by the Code. (p. 8).

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56.
The Chairman of this Tribunal has had to consider previously the legal issue of whether intent is a necessary element of a finding of discrimination: Ishar Singh v. Security and Investigation Services Ltd., Ontario Board of Inquiry decision, (May 31, 1977); Ann Colfer v. Ottawa Board of Commissioners of Police, Ontario Board of Inquiry decision, (January 12, 1979).

In neither case did the respondent intend to act in a discriminatory fashion toward the complainant. Nevertheless, it was found that as a discriminatory result had occurred in both cases, the complaints had indeed been established. The two cases involved seemingly neutral employment requirements with which the complainants could not conform.

In the Singh case, the Complainant could not comply with the respondent security company's requirement that employees be clean-shaven and wear a cap since, like Mr. Bhinder in this case, he was a member of the Sikh faith, and thus bound to wear a turban and to never shave his beard. As such, Mr. Singh was not considered a candidate for a position with the respondent company; he had been discriminated against because of his religion.

In the Colfer case, the Complainant had not been considered a candidate for the position of police constable with the City of Ottawa since she was unable to meet the respondent's requirement that applicants be 5'10" tall and weigh 160 lbs. That

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requirement had the effect of precluding virtually all female persons from employment as police officers. Thus, the height and

weight standards had a discriminatory effect on the Complainant because of her sex.

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57.
The issue as to whether intent is an element of discrimination consistently arises in those cases where an apparently neutral specification results in adverse consequences for a member of a class of persons protected under human rights legislation. In such cases, it will be rare that the requirement is enacted to maliciously or purposely exclude persons on a prohibited ground. However, to protect against such an eventuality, it is necessary that complaints be found to be valid, notwithstanding that respondents have not acted with intent. Malicious intent is difficult or impossible to prove where an apparently neutral specification results in adverse consequences. If proof of intent were required, a most confounding subversion of the principles enshrined in human rights statutes might well occur. As well, from a policy standpoint, human rights legislation is directed against discriminatory effects, results or practices in society, and although motive is a relevant issue in a discrimination case, motive is not a necessary prerequisite to a finding of discrimination in breach of the legislation.

Though the issue of intent has arisen in these cases involving blanket employment requirements, the general proposition is, obviously, that no matter what the mental state or degree of advertance of the respondent is, a discriminatory result alone may constitute a violation of the Human Rights Act.

This is recognized in the Act itself. Subsection 41(3) provides:

41. (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly,

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the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

The general provision regarding Tribunal orders is subsection 41(2):

41. (2) If, at the conclusion of the inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, ... it may make

an order against the person found to be engaging or to have engaged in the discriminatory practice ...

Comparing these two provisions, it seems that in a case where a respondent has acted in a discriminatory fashion "wilfully" (or "recklessly"), a Tribunal may make a special award (s. 41(3)), but in the usual case, a Tribunal may make a number of orders without the necessity of finding that a respondent acted "wilfully" (s. 41(2)). Thus, to the extent that "wilfullness" may be equated with "intention", a Tribunal need not find that a respondent discriminated with intent before it can find that a claim is substantiated and make orders accordingly. If such intent is found to be present, a special order may ensue under s. 41(3).

To summarize the discussion to this point, it has been noted that the very essence of discrimination is a distinction or selection made between persons based on characteristics not related to a person's merit. Prohibited discrimination may occur when the basis of the distinction is a ground listed under section 3 of the Act. It is not necessary to show that the discrimination took place with the intent of the respondent.

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59.
The burden is on a complainant to show a prima facie case of discrimination. From the foregoing, it is necessary that a complainant in an employment situation demonstrate that the employer refused to employ or to continue to employ the complainant because of an unfavourable distinction made between candidates or employees the basis of which was a prohibited ground under the Act. The complainant need not show that the employer discriminated intentionally.

In the instant case then, the onus is on the Complainant, Mr. Bhinder, to show that the Respondent, Canadian National Railways, refused to employ him because of his religion, a characteristic which distinguished Mr. Bhinder from his fellow employees, and a prohibited ground under section 3 of the Act. There is no need to show that C.N.'s action was deliberate, and in this case it was not deliberate, as the action which resulted in Mr. Bhinder's dismissal was the implementation of a general safety requirement which merely had an inadvertent effect on him.

The Respondent here contends that it is impossible for the Complainant to discharge his onus, since the policy which resulted in Mr. Bhinder's dismissal was a neutral one that applied equally to all employees. As such, no distinction was made between employees on the basis of religion and so, it is argued, the Complainant cannot satisfy the onus upon him of showing that he was dismissed because of such a distinction.

We have already mentioned the Singh and Colfer decisions on the matter

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of intent. It was pointed out that in both of those cases, an employment requirement had been enacted by the employer which, in effect, caused the complainants not to be considered as candidates. In neither of those cases was the employment requirement aimed at making distinctions between persons on the basis of a prohibited ground. Rather, the requirements had been enacted with a view to the recruitment of ideal candidates for the respective positions.

The problem was in fact with the employers' concept of the 'ideal' candidate. One of the aims of human rights legislation must be the laying to rest of certain presumptions and prejudices when it comes to making such value judgments as to what is the 'ideal' employee. Without embarking on a discussion of what is a bona fide occupational requirement, it need only be said that in both the Singh and Colfer cases, the requirement was not, in fact, justifiable in the circumstances. It was found that what appeared to be neutral job requirements, applying equally to all persons, had an effect that in reality made a distinction between persons on a prohibited ground. In the Singh case, Sikh applicants were treated more harshly in that they had either to foresake their religious practices or seek alternative employment. Much more was required of the Sikh applicant for employment because he had to forsake his religion to gain employment. In that sense, a distinction had been made between applicants on the basis of their religion.

Similarly, in the Colfer case, female applicants were expected to overcome certain sex-related biological constraints, height and weight, if they were to be considered candidates for the position of police constables.

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61.
The height and weight standards had a significantly disproportionate effect upon female applicants as compared to male applicants. Effectively, the height and weight standards of the respondent Police Commission ensured that females could not become constables. Thus, a distinction was made between applicants on the basis of sex, since, based on national size and weight averages, females were placed in a disadvantaged position as compared to males.

Other Boards of Inquiry have come to similar conclusions about the effect of seemingly neutral employment requirements.

In the British Columbia case, Jean Tharp v. Lornex Mining Corp. Ltd. (1975), the respondent company had denied accommodation to the complainant, while male employees had been given housing as an incident of employment. She was finally given accommodation, in fact the same accommodation as was given males. Washroom

facilities had to be shared with male employees. The Board (Rod Germaine) stated:

The position of Lornex from the outset was that it could not be discriminating against Jean Tharp because it was offering her precisely the same accommodation that it offered every other employee at the campsite. In other words, it was contended that there can be no

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discrimination where everyone receives identical treatment. We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination. We would add only that the circumstances of this complaint graphically illustrate the truth of this important notion. (p. 13).

In another British Columbia case, a Board found that the size requirements of an employer discriminated against women: Janice Lynn Foster v. B.C. Forest Products Ltd. (April 17, 1979), upheld on appeal to the B.C. Supreme Court: [1980] 2 W.W.R. 289. The Board, (Professor James MacPherson), stated:

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62.
I think that it is discrimination on the basis of sex contrary to the B.C. Code if an unreasonable employment standard, although neutral on its face, has the effect of excluding a large percentage of women applicants who would, but for the unreasonable standard, be qualified for the job. (p. 28).

In a recent Ontario decision, a Board of Inquiry had to consider whether a job requirement that employees work Saturdays was discriminatory against a person whose religious beliefs required observance of a Saturday Sabbath: Theresa O'Malley v. Simpson-Sears Ltd. 1

This case will be discussed further below with respect to the presence of a bona fide occupational requirement. On the matter of a neutral employment requirement, the Board, (Edward J. Ratushny) correctly, in our view, stated as follows:

At first glance, a condition of employment requiring all employees to work on a certain day of the week would not appear to discriminate since, on its face, such a condition treats all employees equally.

However, to look no further would permit the imposition of general conditions of employment which would have the practical result of precluding all employees of a particular minority group. (p. 26).

It appears to have been consistently held that an employment requirement equally applied to all employees or candidates may well result in unequal, discriminatory treatment of certain persons. The essence of the issue, once it is clear that intent is not an element to be considered and that a seemingly neutral employment condition does not prevent a finding that discrimination has indeed occurred, is that only the result need be looked to. Indeed, the legal issue has been reduced on the matter of intent to the following, as stated by McDonald, J. in the Gares case, supra:

1. (1980) 2 C.H.R.R. D 267.

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63.
It is the discriminatory result which is prohibited and not discriminatory intent.

With respect to neutral employment requirements, this Tribunal would say that it is an unequal, discriminatory result which is prohibited.

For Mr. Bhinder to satisfy the onus on him, he must show that as a result of the C.N.'s hard hat policy, he was given different treatment as compared to other employees because of his religion. The C.N.R.'s regulation required all coach yard employees to wear hard hats. For almost all its' employees this requirement would not impose any hardship. However, for Mr. Bhinder, the regulation resulted in a choice between compromising his religious integrity and losing his job. In fact, there was no choice at all, since the practices of his religion transcended the exigencies of his employment.

In this sense, more was expected of Mr. Bhinder than was expected of other employees. The hard hat policy has a differential impact upon employees according to their religious beliefs. Members of the Sikh faith, like Mr. Bhinder, cannot comply with the regulation, and so cannot be employed by the C.N.R. Thus, an unfavourable distinction is being made between employees on the basis of religion as a result of the requirements. This case, then, is no different from those cases, such as Singh and Colfer, where conditions of employment had an adverse impact upon certain groups of employees.

The belief in the fundamental equality of all persons as expressed in the Canadian Human Rights Act is fundamental to the fabric of Canadian society.

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64.
Every statement about the nature of racial discrimination is based, more or less explicitly, upon an idea of the equality of human beings, which has advanced to its present form only relatively recently. The origins of

this idea of human equality may be traced to the traditional Judaeo-Christian belief in Fatherhood of God and hence in the brotherhood of men, each with equal humanity and significance.

...
This perception of the fundamental equality of men, despite the manifold differences between individuals, lies at the heart of liberal and democratic thought in the West. 1

A society which espouses such a philosophy must also learn to be flexible in its practices to ensure that its stated philosophy becomes more than simply words. Canada, as a society,

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encourages every person to practice the faith of his or her choice. To truly respect and value different faiths is also to respect the different codes of dress dictated by many of those faiths. As was stated by the Board of Inquiry in Singh:

We cannot profess to encourage religious freedom, yet, at the same time, refuse employment to persons who are exercising their relgious freedom simply because they are exercising that freedom. If we allow Sikhs to worship as they wish because we respect their right to have religious beliefs which differ from those held by the majority of people in our society, and yet place Sikhs in a disadvantageous position by not employing them simply because their beliefs require them to have beards and wear turbans, we are being hypocritical. 2

As well, to do so is to deny Sikhs equal opportunity by a discriminatory practice based on religion contrary to the purpose of the Act.

1. A. Lester and G. Bindman, Race and Law, p. 73-4, Penguin, Eng., 1972.

2. Singh v. Security and Investigation Services Limited, (May 31, 1977) at p. 19.

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65.
2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) 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 or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap;

In effect, the Respondent has differentiated adversely in relation to Mr. Bhinder because of his religion, and thus has engaged in a discriminatory practice as defined in section 7 of the Act. In effect, the Respondent has refused to continue to employ Mr. Bhinder because of his religion, and has thus engaged in a discriminatory practice within the meaning of paragraph 7(a) of the Act. As well, in effect, the Respondent as an employer has established and pursued a policy or practice (ie. its hard hat regulation) that deprives or tends to deprive Mr. Bhinder in particular, and Sikhs in general, of employment opportunities because of his religion, and has thus engaged in a discriminatory

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practice within the meaning of paragraph 10(a) of the Act. A "discriminatory practice" within section 7 or section 10 is embraced by Part Ill of the Act (section 31).

Thus, even though the C.N.R. bears no ill will towards the Sikh religion, its refusal to continue the employment of Mr. Bhinder because of

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66.
Sikh dress practices has the effect of denying Mr. Bhinder his right to practice the religion of his choice. Discrimination in fact exists even though the C.N. did not intend to discriminate:

"To put this more bluntly, human rights legislation is a recognition that it is not only bigots who discriminate, but fine ’upright, gentlemenly’ members of society as well. It is not so much out of hatred as out of discomfort or inconvenience, or out of the fear of loss of business, that most people discriminate. As far as possible, these people should be given an opportunity to re-assess their attitudes, and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others, than their own loss of comfort or convenience. However, if persuasion and conciliation fails, then the law must be upheld, and the law requires equality of access and equality of opportunity. This is the ’iron hand in the velvet glove’. 2

Therefore, this Tribunal finds that Mr. Bhinder was discriminated against on the basis of his religion by his dismissal pursuant to the Respondent’s hard hat policy, or regulation. He

has satisfied the onus of showing a prima facie case of discrimination.

It remains now to determine whether the Respondent has shown that the hard hat policy or regulation constituted a bona fide occupational requirement. It is clear from the wording of paragraph 14(a) of the Act that the onus is upon the Respondent as the employer to establish that its hard hat policy constituted a bona fide occupational requirement of Mr. Bhinder.

1. W.S. Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada", [1968] Can. B. Rev. 565 at 572-73.

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67.
4. Bona Fide Occupational Requirement

A. Generally

As was said above, in describing the legal position of the parties in a case such as this, para. 14(a) of the Canadian Human Rights Act provides for an exception to the general prohibition against discriminatory practices:

14(a) 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. [Emphasis added].

Acts which would normally have been found to be discriminatory practices will not be objectionable if the basis for the act is a bona fide occupational requirement. In this case, for example, we have already found that Mr. Bhinder was discriminated against by the Respondent by being dismissed because of his religion. He has satisfied the onus on him to present a prima facie case of discrimination. The burden of proof now shifts to the Respondent to show that the dismissal of Mr. Bhinder was justified in the circumstances. The language of paragraph 14(a) ("... is established by an employer ...") is clear in placing the onus of proof upon the employer to bring itself within the exception.

The employer in such cases properly bears the burden of showing that the discriminatory act was carried out in good faith according to the necessity of its business. The employer is aware of the demands to be placed on employees and the realities of its business. If the employee were required to show that the employer’s requirement was not a bona fide occupational requirement, the difficulties of proving that negative proposition would ensure that few complaints would

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68.
be brought by employees and even fewer would be successful. It is generally recognized that human rights legislation is remedial and intended to be liberally interpreted to achieve the intended policy of the legislator. 1 The converse is also true. That is, that exceptions under such statutes are to be narrowly construed. The policy of the Act is not to be compromised or abridged unless by express language of the legislation. Thus, not only does a respondent bear the burden of showing that an employment condition qualifies as a bona fide occupational requirement, as an exception to the general prohibition against discriminatory practices, the definition of that exception will be narrowly interpreted.

A good deal of jurisprudence now surrounds the concept of a bona fide occupational requirement. There have been cases in almost every province dealing with the issue. Most of these cases involve discrimination on the basis of age or sex, but there are also cases where physical handicap or religion was the basis of the discrimination.

Each particular type of employment, of course, has its own requirement. Thus, what is a bona fide occupational requirement has to be determined on a case-by-case basis. What can be gleaned from previous cases, though, is a categorization of jobs

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or circumstances where an employer has argued that its action was carried out as a bona fide occupational requirement. These cases will be canvassed below.

To give a general idea of what is meant by the concept of a "bona fide occupational requirement" the following excerpt from a Manitoba age discrimination case is helpful:

1. See generally Bailey and Carson et al v. Minister of National Revenue, (1980) 1 C.H.R.R. D206-D209.

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69.
In my view the words of subsection (6) of section 6 of the Act [Manitoba Human Rights Act, S.M. 1974, c. 65] are quite straightforward. The exception to the prohibition against discrimination on the basis of age which is contained in the words "reasonable occupational qualification and requirement for the position or employment" can refer only to two circumstances. The first is that case where the individual by virtue of his age alone does not have the physical, mental or technical capacity to carry out his duties as an employee. It would be incumbent upon an employer who sought to set up this exception as a defence to demonstrate by convincing evidence that one can infer in the particular circumstances that age alone would render an employee physically, mentally or technically incapable of

performing his duties. No such evidence was presented at this hearing. The second case in which the exception might be set up as a defence would be where it can be shown that the public or other persons might be adversely affected or harmed because the very age of the employee might make it obvious he could not as safely perform his duties as would someone younger in age. This might be the case in certain types of hazardous employment where the safety of the employee himself was in question or in employment where the lives of the public were at stake and some special skill was required, for example, airline pilots or operators of motor vehicles. Once again, however, substantial evidence would have to be adduced by the employer to demonstrate the incapacity or reduced capacity occasioned by the age of the employee. (Peter Derkson v. Flyer Industries Ltd., Man. Bd. of Inquiry, per: Prof. Jack R. London (June 2, 1977)).

Although that case dealt specifically with discrimination on the basis of age, the categories that Prof. London referred to will apply to almost all employment circumstances. At the root of the concept, then, is a determination as to the ability of an employee to perform his or her duties. Under normal circumstances, a characteristic of a person that renders him incapable of performing the duties of a particular employment, will be a proper basis for the exclusion of that person

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by the employer, even though the characteristic is a prohibited ground under the Human Rights Act. The burden is on the employer to give evidence of such inability. When the job is one where any reduced capacity of an employee places the public or other employees in greater jeopardy, the burden of proof on the employer to show evidence of the employee's inability will be lighter. More of this will be discussed below.

It is clear that the narrow interpretation given to the exception is based on a desire to maintain the vulnerable principles of human rights by not yielding to potentially crippling defences. For example, in the Nova Scotia case of Donald Berry v. The Manor Inn 1 (Aug. 19, 1980), the employee was dismissed as a lounge waiter because of his sex. The Board (W. Bruce Gillis) refused to acknowledge that since customers preferred female employees, Mr. Berry had been dismissed because of a bona fide occupational qualification:

To say that the preference of an employer's customers or clients to have either males or females serving them, which preference results in economic differences for the employer, is a bona fide occupational qualification based on sex, would he tantamount to creating a community standard test to determine whether discrimination exists.

It would be a minor extension of this principle to hold that if most customers in a restaurant held prejudices against Blacks or Jews or Scotsmen, the proprietor would be legally entitled to refuse employment to Blacks or Jews or Scotsmen. The long history of human rights struggles on this continent and elsewhere can leave no doubt that such an argument is totally without merit.

I cannot believe that in passing the Human Rights Act, the Nova Scotia legislators ever intended that the rights and freedoms so clearly proclaimed in the Preamble and the body of the legislation could be so freely circumvented. The standards are set by the Act, and were intended to be universally applicable throughout the province, regardless of group or community sentiment. (pp. 5-6)

1. (1980), 1. C.H.R.R. D152.
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71.
The definition of what is a bona fide occupational requirement, of course, must be determined on a case-by-case basis according to the demands of particular jobs. However, attempts at arriving at generalized definitions have at times been undertaken. One in particular has been invoked in many decisions in several jurisdictions. It was articulated by Prof. R.S. MacKay in the Ontario case of Jay C. Cosgrove v. The Corporation of the City of North Bay (May 21, 1976)

The case involved the mandatory retirement at age 60 of

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the complainant, a Fire Prevention Chief with the respondent City of North Bay. Professor MacKay determined that the complainant had been discriminated against on the basis of age. He then proceeded:

The issue, simply stated, is whether a mandatory retirement age of sixty, regardless of a particular individual’s ability, capacity or competency, is a bona fide occupational qualification and requirement for the position or employment of a fireman within the meaning of sec. 4(g) of the Human Rights Code.

"Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularily (sic) define the expression in one or several of the following terms viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable.

...
However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide" for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However, if it requires

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such a limitation as a condition of employment or continuing employment, I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by sec. 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life."

That last, often-quoted phrase is credited to Mr. John A. O'Neill, counsel for the City of North Bay, as coined in his summation.

Thus, a bona fide occupational requirement implies both a subjective and objective element. Subjectively, the requirement cannot have been enacted, for example, to escape mandatory compliance with human rights legislation. Similarly, in the United States, "bona fide" has been interpreted to mean that an employer's policies may not operate as a subterfuge to evade, for example, the

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Age Discrimination in Employment Act of 1967 29 U.S.C.A. s. 621 et seq.: Hodgson v. Greyhound Bus Lines Inc. (1974) 499 F. 2d. 859. Objectively, there must be some rational basis for the requirement. Compliance with the requirement must make some appreciable difference in the calibre of employees that an employer recruits. The type and sufficiency of the evidence justifying the requirement will depend on the implications that flow from the hiring of potentially less capable employees. More of this will be discussed below when the occasions on which the exemption was considered are examined.

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73.
Here, the Respondent, Canadian National Railways, contends that its safety regulation, the requirement to wear a hard hat, is a bona fide occupational requirement for employment at C.N. Respondent argues that Mr. Bhinder's dismissal, even though indirectly due to his religious convictions, was pursuant to such

a requirement. If so, it is argued, then his dismissal would not have been a "discriminatory practice" on the part of Canadian National for the purposes of sections 7 and/or 10 of the Canadian Human Rights Act.

This being a novel case, we feel it is necessary to canvass Canadian cases in which an interpretation of "bona fide occupational requirement" has been undertaken. To the extent that such interpretations are relevant, they will be applied to the situation at hand.

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74.
B. Where the Ability of the Employee is Questioned.
The Canadian jurisprudence on this aspect of a bona fide occupational requirement can be traced to the U.S. decision of Weeks v. Southern Bell Telephone and Telegraph 408 F. 2d. 228, (1969). There, the female complainant had applied for a position with the respondent company. The company refused to hire her since the job was "strenuous", and so could not, it was argued, be performed by a woman. The job required that the employee be capable of lifting 30 lbs. The court found that the company, by simply calling the job "strenuous", had not discharged its onus of showing that its failure to hire the complainant was justifiable according to a bona fide occupational qualification. The respondent was obliged to show that substantially all women would be unable to perform the duties of the job. Southern Bell was unable to show that substantially all females were incapable of lifting 30 lbs. Hence, its preference for males was unjustified.

The decision in Weeks was applied by an Ontario Board of Inquiry (S.N. Lederman) in Betty Ann Shack v. London Driv - Ur Self Ltd. (June 7, 1974). The complainant had been denied employment with the respondent because of her sex. The position in question involved some driving and the preparing for rental of heavy trucks. It was assumed that women would be incapable of such tasks. However, the complainant had experience in such employment

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and, in fact, was able to demonstrate to the Board her capacity to do those very tasks. Thus, in the result, the Board found that the respondent was not

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entitled to the exception of a bona fide occupational qualification provided under subsection 4(6) of the Ontario Human Rights Code R.S.O. 1970, c.318. Indeed, Professor Lederman was of the view that women were as capable of performing the duties of the job, as men.

In a case involving discrimination against a male, an Ontario Board of Inquiry found that an historical trend of women filling positions as personnel managers did not justify a continuation of that tradition: Kerry Segrave v. Zeller’s Ltd.

(Nov. 8, 1975). Professor (now Mr. Justice) Horace Krever found that the complainant had not been considered for such a position because it had always been filled by women. The respondent though, was unable to show that its female employees would not place a male in their confidence, since a male had never before been hired in that position. As such, it had not established sex as a bona fide occupational qualification:

The exception in s.4(6) applies only when discrimination based on sex affects the Respondent's business as a commercial enterprise and the primary function of the business or the enterprise would be undermined by not hiring members of one sex exclusively. (p.13)

In William Boyd v. Mar - Su Interior Decorators Ltd. (April 21, 1978), an Ontario Board of Inquiry found that the respondent had not hired the complainant because of his sex. In the respondent's experience,

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male employees had not been as capable as females in hanging drapes with the required sensitivity to detail. The Board (Professor R.S. MacKay), held that this was merely a stereotype. The respondent had no way of predicting the complainant's ability to perform the job. To that extent, the respondent had not shown that its preference for male employees constituted a bona fide occupational qualification.

We have already referred to the Colfer case where the height and weight requirements of the Ottawa Board of Commissioners of Police had a discriminatory effect upon women. Much evidence was heard in that case as to the merits of maintaining a minimum standard for police constables of 5'10" and 160 lbs. In essence, the evidence was directed to the question of whether women, less than 5'10" and 160 lbs., would be as capable as persons (mostly men) who met that standard in performing the duties of a police officer. The standards employed had the effect of excluding virtually all women from being considered as police constables.

The Board of Inquiry found that some minimum standard was necessary since the position required a certain amount of physical strength, and height and weight bears some correlation to physical strength. However, the respondent had not established that its sexually discriminatory standard was justifiable. Its height and weight standard was not, therefore, a bona fide occupational requirement. Women, who met a height and weight standard based on the national averages for females, could be as capable police constables as men, who met a standard based on the national average for males.

In the Ontario case of Sheila Robertson v. Metropolitan Investigation Security Ltd. (Aug. 10, 1979) the employer did not

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77.
discriminate against women generally since it hired roughly as many females as males. Women, though, were placed in different types of positions than were men, i.e. such as meter maids, parking booth attendants, and guards in homes for the aged. The Board of Inquiry found that the complainant had been discriminated against on the basis of sex when she applied for a job as a security guard and was not considered because that particular job was generally held by men in the respondent's business. The respondent was unable to show that women were less capable than men in positions as security guards. As such, the exclusion of the complainant had not been shown to be based on a bona fide occupational qualification.

Where an applicant for a position as a fork-lift driver felt that her application was not taken seriously because of her sex, a B.C. Board of Inquiry found that a violation of the B.C. Human Rights Code R.S.B.C. 1979, c.186 had occurred: Diane Borko v. Nelson and Atco Lumber (Apr. 30, 1976). However, on appeal to the B.C. Supreme Court the Board's decision was reversed: (1976), 1 B.C.L.R. 212. Toy, J. held that the complainant was not considered for the job not because of her sex, but because she had no experience. The respondent's failure to consider her then, was based on a bona fide occupational qualification that applicants have experience in driving a fork-lift truck. No general exclusion against women was in place, nor did the respondent feel that men were generally better qualified. All applicants had really been treated alike.

In Heather Hawkes v. Brown's Ornamental Iron Works (Dec. 12, 1977),

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an Ontario Board of Inquiry (Professor D.A. Soberman) found that the complainant had been denied employment as a welder because of her age. Professor Soberman found that the respondent had assumed that Mrs. Hawkes could not perform the duties of the job because she was 51 years old. In actual fact, she had undertaken training in the welding trade in order to obtain a marketable skill. On the matter of a bona fide occupational requirement, the Board stated:

Under s.4(6) there is an exemption from the

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application of section 4(1) where, "any discrimination... for a position or employment based on age... is a bona fide occupational qualification and requirement..." To make this provision applicable it is necessary for a respondent to establish a job classification and description, supported by substantial grounds for a bona fide belief in the validity of the qualification. There is now a significant number of decisions on this matter, and it seems clearly established that the subsection may only be used to justify discrimination based on age when

the respondent has satisfied the Board that there are sound reasons for the qualification. (p.17)

Professor Soberman went on to find that no "sound reasons" for the qualification of youthful age had been brought forward. The complaint was successful.

Where a disabled person applied for a job on the B.C. ferry service and was denied employment, a B.C. Board of Inquiry found that reasonable cause did exist for the denial: David R. Jefferson v. B.C. Ferries Service (Sept. 29, 1976). The complainant had an artificial hand and foot, but had a good deal of experience working on ships for

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the Department of National Defence. The Board found though, that there were many other well-qualified applicants without physical handicaps who may have been more able to fill the position. The burden of proof on the employer to show reasonable cause for the preference was made somewhat lighter by the fact that the respondent expressed concern for the safety of its passengers. If the complainant had been hired and in an emergency could not perform as well as an employee without a physical handicap, there could be safety implications for the passengers.

In Foreman, et al v. VIA Rail Canada Inc. (1980), 1 C.H.R.R. D. 111, three complainants were denied employment with the respondent because their eyesight did not meet the standard set by VIA Rail. The Board (Frank D. Jones, Q.C.) found that some minimum standard of vision was necessary for the job of waiter or waitress. However, after hearing medical evidence, the Board held that VIA Rail had contravened the Canadian Human Rights Act. Its eyesight requirement was not a bona fide occupational requirement because it was too strict for the job in question. The respondent was not able to show that persons with vision inferior to that required would be less capable of performing the duties of a waiter or waitress.

In Severien Parent v. Department of National Defence (1980), 1 C.H.R.R. D121, the complainant had been denied employment as a driver for the respondent. The complainant was an epileptic and had no training or skill or ability to carry out other work. He was experienced as a driver, but his disability prevented him from driving

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vehicles carrying heavy loads or passengers. The respondent's classification scheme for drivers did not include a category with driving tasks that the respondent could carry out.

The Board (Andre Lacroix) went on to find that D.N.D.'s classification system was "justifiable on the whole, and commensurate with a reasonable operating system for the objectives of the employer..." (p. D123). Thus, although the classification scheme resulted in discrimination against the complainant on the basis of physical handicap, the respondent was permitted to maintain its system and not, in effect, create a new classification for the complainant. It was a bona fide occupational requirement that applicants be able to meet the qualifications for the classes of drivers that D.N.D. hires.

In all of these cases, respondents attempted to justify a discriminatory act by contending that complainants, because of an individual characteristic, were less able to perform the duties of the job in question than other applicants. The burden is on the employer to lead evidence to show that indeed its requirements are rationally based and not founded upon unwarranted assumptions or stereotypes.

In the situation at hand it is clear from all the evidence that Mr. Bhinder is able to perform his job satisfactorily. Indeed he has done so for several years. If Mr. Bhinder continues to work without wearing a hard hat there is no evidence that he will be less able to carry out his duties than other employees. If that were so, the C.N.R.

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could defend its dismissal of Mr. Bhinder as based on a bona fide occupational requirement of wearing a hard hat.

It is foreseeable though, and we mention this as a statement in passing, that in another factual situation, such a safety requirement could influence the relative abilities of employees to carry out their jobs. For example, in a job that was more hazardous than the one that Mr. Bhinder filled, employees may well be incapable of adquately performing their duties if they are in constant fear of injury. Or, if in the present situation Mr. Bhinder's job became, because of some new procedure, significantly more dangerous, and C.N. then passed the hard hat regulation, it may be that Mr. Bhinder would be unable to continue his job properly, he being in constant fear of injury.

These factual situations are mentioned merely to point out that there may well be circumstances where safety regulations have some relation to the ability of employees to satisfy job requirements. The employer may then be justified in dismissing employees who must refuse compliance for religious reasons, or perhaps be obliged to accommodate them in alternative employment. In any case, that is not a concern before this Tribunal as there is no evidence that if Mr. Bhinder continues to perform his duties as he has done in the past, there will be any impairment of his

ability to do so because he must refuse to don a hard hat due to his sincerely held religious convictions as a Sikh.

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82.
C. Where the safety of others is affected.
A great deal of jurisprudence on the matter of bona fide occupational requirements has arisen out of cases where the employer's concern is for the safety of fellow employees or the public as a whole. Where it can be shown that there are safety implications for persons other than the employee himself, the burden of proof on the employer to justify an employment requirement will be considerably less. Boards of Inquiry have been willing to defer to the judgment of employers when there seems to be a necessity to do the utmost to maintain safe employment practices for the benefit of fellow employees or the public as a whole.

Again, on this matter, United States' cases have influenced Canadian Boards of Inquiry: for eg. Hodgson v. Greyhound Bus Lines Inc. 499 F. 2d. 859, (1974). There, the employer refused to hire bus drivers who were older than 35 yrs. Considering the nature of the job, Swygert C.J. stated:

...[A] public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of inter-city bus driver for the paramount goal of a bus driver is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely... Greyhound need only demonstrate, however, a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice. (p. 863)

The Court was reluctant to impose any greater burden of proof on the employer for that:

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... would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to produce statistical evidence pertaining to the capabilities of newly-hired applicants forty to sixty-five years of age. (p. 865)

This reasoning demonstrates the basis for treating jobs of a potentially hazardous nature as a special type. This does not mean though, that speculation or intuition on the part of an employer as to the possible consequences of employing persons who do not meet certain criteria, or the enactment of capricious

employment regulations, should be permitted within these special industries. In Aaron v. David 414 F. Supp. 453, (1976), the Court expressed the issues as follows:

It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition, a stereotyping, i.e., without any empirical justification. (p. 461)

The same would be true, presumably, no matter what the occupational requirement was, so long as it effectively resulted in discrimination on a prohibited ground. In the case before this Tribunal, for example, the requirement that the employer, Canadian National Railways, is effectively enforcing is that its employees be of a religion that permits the wearing of a hard hat; in particular, that its employees be other than

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84.
of the Sikh faith.
The maintenance of such a requirement, if there were safety inplications for the public or other employees, could certainly be justified depending on the degree of danger and the difficulty of providing an alternative solution i.e. removing the danger, or otherwise accommodating the employee.

Where age is the requirement, as in these cases, the respondent must show that actual ability is impossible or impractical to test. Thus, even though the burden of proof on employers is lighter in hazardous jobs, it is clear that the exception of a bona fide occupational qualification should still be strictly construed and hence, discriminatory acts should still be carefully scrutinized.

In the recent Ontario case of Ronald O'Brien v. Ontario Hydro (June 22, 1981) the Board had to consider the exemption in subsection 4(6) of the Ontario Human Rights Code R.S.O. 1970, c. 318 for a "bona fide occupational qualification and requirement for the position or employment". The case involved the failure to consider the complainant for a position with Ontario Hydro as an apprentice electrician because he was 40 years of age. The Board canvassed the Canadian age decisions, many of which involved mandatory retirement schemes in hazardous jobs such as firefighters and police officers. The Tribunal will not in detail repeat what

was stated there. Rather, we will briefly mention the Canadian position on bona fide occupational requirements in respect of such employment and make mention of other cases that turned on a

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prohibited ground other than age. The applicability
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of these cases to the present circumstances will be discussed. The Ontario Board of Inquiry decision in Jay Cosgrove v. City of North Bay (May 21, 1976) has already been mentioned above in introducing the concept of a bona fide occupational qualification. The definition of "bona fide" articulated by Professor MacKay in that case has been cited in many subsequent cases. The case is also significant for the fact that it was the first in which the application of the exception was made to a hazardous job, a Fire Prevention Officer with the respondent City.

The job though, was really dangerous only as far as Mr. Cosgrove's own safety was concerned. His job was to inspect premises after fires were extinguished to determine their source. There was no evidence led that showed that Mr. Cosgrove's reduced capacity after age 60, if any, could cause others to be placed in greater danger. The case turned on the opinions of other officers as to the rigors of the job:

Without exception these gentlemen agreed that the job of a Fire Prevention Officer is a hazardous one, imposing considerable physical and mental stress, albeit perhaps not as much as fire fighting itself. Further they testified that although there was no concrete or explicit medical findings available as proof it was their collective opinion based on years of experience and observation that firemen deteriorate or slow down in performance, and are less capable of coping with the exigencies and urgencies of their employment as they approach or pass the age of sixty. They conceded that the foregoing observation is a general rule and that particular individuals might well be able to perform their duties past the age of sixty just as there would be instances of younger men being unable to do so. All in all, however, they felt that age

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60 was an appropriate "rounding-off" figure to define the safe limits of employment in the interests of the individual himself and of his fellow workers who rely upon him to measure up and pull his weight. (pp. 809)

Thus, the Board was willing to accede to the opinions of experienced Fire Chiefs in holding that the age requirement was bona fide. The implications for fellow workers were not safety related per se, but rather, were more related to the interdependence of workers while on duty. This decision was upheld

at the Ontario Divisional Court: Re Ontario Human Rights Commission and the City of North Bay, unreported, (Sept. 12, 1977), and at the Ontario Court of Appeal: (1977), 17 O.R. (2d) 712.

In a decision handed down the same day as the Board's decision in Cosgrove, another Ontario Board considered precisely the same issues: Thomas Hadley v. City of Mississauga (May 21, 1976). The complainant was the Shift Captain at a Fire Station in the respondent City. The case is similar to Cosgrove, but the result was the opposite. The respondent adduced no evidence to show that firefighters were less capable after their 60th birthday. As such, it had failed to discharge its onus of showing that the forced retirement of the complainant was justified.

The Board (Prof. S.N. Lederman) referred to the U.S. decision of Hadley v. Greyhound, but differed with the Court's approach there, preferring that cases be decided individually rather than deferring to

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arbitrary age limitations an any occasion. Prof. Lederman did concede though, that the Hadley decision could be of merit when the safety of the public was at stake and "it is virtually impossible or impractical to evaluate persons on an individual basis." (p.11).

In another Ontario firefighter case, a Board of Inquiry (Prof. Bruce Dunlop) followed the Hadley decision and found that a complainant had been unjustly retired at age 60: Hall and Gray v. I.A.F.F. and Etobicoke Fire Dept. (July 21, 1977). The Board found that the respondent had led insufficient evidence to constitute a bona fide occupational qualification of age less than 60 yrs. The evidence heard by the Board was similar to, but less extensive than, the evidence heard in the Cosgrove case. Prof. Dunlop refused to permit the respondent to justify the forced retirement of the complainant on the basis of the mere impressions of a Deputy Chief of the Fire Department that firefighters were less capable after age 60. This decision though, was overturned by the Ontario Divisional Court: (1980), 26 O.R. (2d) 308, (aff'd at Ontario Court of Appeal, leave to appeal granted to Supreme Court of Canada).

O'Leary, J., of the Divisional Court was prepared to accept as sufficient evidence to constitute a bona fide occupational requirement what the Board of Inquiry was not. The Board had stated that empirical evidence must be brought forward. O'Leary, J. thought that to require such evidence would be to go beyond the definition of bona fide set down by Prof. MacKay in the Cosgrove case:

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"...[I]n requiring a scientific conclusion that there was a significant increase in the risk to individual firefighters, their colleagues or to the

public at large in allowing firefighters to work beyond the age of 60, he was requiring the employer to do far more than to show that the age limitation was supported in fact and reason based on the practical reality of the work-a-day world. (p.316)

In a case involving similar issues, a Tribunal appointed under the Canadian Human Rights Act held that an employer could require that its new employees be less than age 40: Canadian Human Rights Commission v. Voyageur Colonial Ltd. 1 .

The respondent led evidence to the effect that new recruits were placed in the most stressful jobs, and as such, employees under age 40 would be most able to bear that stress. The Tribunal (R.D. Abbott) cited the Cosgrove definition of bona fide and the Hodgson case in the U.S., in finding that the occupational requirement was justifiable in order to best ensure passengers' safety.

To summarize these age discrimination cases, one could say that the cases generally turn on the degree of potential hazard involved in the job, and the possibility of assessing candidates on an alternative basis, i.e. their actual ability rather than a shorthand presumption based on age. The burden is on the respondent to show evidence of the hazard, the implications for others, and the difficulty of adopting an alternative procedure to a discriminatory employment policy. Boards of Inquiry have varied in the quantum of proof that will be sufficient in such cases.

1. (1980) 1 C.H.R.R. D 239.
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89.
There are cases that have been decided on a basis other than age, namely, physical handicap. In David Jefferson v. B.C. Ferries Service (Sept. 29, 1976) the complainant was not hired by the respondent because of his physical handicap. The Board of Inquiry was influenced by the fact that passengers may have been in greater danger if the complainant had been hired. The complainant had an artificial hand and foot. There was no evidence though, that the complainant was less able than others in performing the tasks of the job. The employer's concern for the passengers' safety seemed to be of some moment and inclined the Board to accept the employer's judgment as being reasonable.

In the case of Foreman v. Via Rail, supra the complainants' impaired vision seemed only to be of significance in terms of their capacity to perform the duties of waiting on passengers. The Board of Inquiry did mention that passengers could be injured if waiters with poor vision spilled coffee on them or were unable properly to assist them in descending from trains. These potential misfortunes appear to have been mentioned only in passing and not given a great deal of weight. In the result, the vision requirement of the respondent was held not to be a bona fide occupational qualification.

Thus, hazardous jobs, to the extent that others may be put in danger or otherwise imposed upon, are treated as special instances of the bona fide occupational requirement exception. The weight of the burden on employers to establish the merit of a discriminatory employment qualification, will vary according to the degree of danger involved and the

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necessity of the requirement.
In the case at hand, there is no evidence that other employees or the public will be affected if Mr. Bhinder were to continue working without a hard hat.

Dr. James Neuman, an expert witness for the Respondent, had visited the Toronto coach yard, and could not imagine any plausible situation where a worker injured due to not wearing a hard hat would place fellow workers in danger. (Transcript, p. 446).

It is foreseeable though, in situations other than the one before this Tribunal, that failure to comply with safety regulations could have that result. The safety of one employee might be directly dependent upon the safety procedures followed by another. As well, an employee who is at greater risk of injury in the workplace may be a liability to his or her fellow workers if they have to cover for or care for that employee, if injured. In fact, that may well have been the situation that Professor MacKay had in mind in the Cosgrove case. There, the strain on the complainant himself may have resulted in a burden on other employees. However, in the case before this Tribunal, it is our opinion, based on the evidence, that neither other employees nor the public will be adversely affected if Mr. Bhinder were to continue working without a hard hat.

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91.
D. The Safety of the Complainant Alone
1. Generally
This aspect of a bona fide occupational qualification was also dealt with in the U.S. case of Weeks v. Southern Bell, supra. There, the employer had refused to hire the complainant because of her sex. Not only did the respondent feel that the applicant could not execute the "strenuous" tasks that would be demanded of her, it thought that she would be placed in greater danger than would males. The job demanded that employees work late hours alone. The employer was unwilling to place a woman in such a position.

The court held that the employer’s motivation was based on a stereotype that women are less able than men to handle themselves in such situations, and therefore, require the protection of, or as the case may be, substitution by males in the workplace. In the absence of any real evidence of greater danger

in the job for women, the employer's occupational requirement was unwarranted.

The thrust of the decision is that employers need not make such requirements on their employees' behalf. Rather, it should be left to the individual's own judgment whether he or she wishes to accept the possible dangers inherent in the job. Of

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course, this goes against the general evidentiary basis of the exception of the bona fide occupational requirement. As was stated above as to the legal position of the parties, the employer properly bears the burden of showing that an employment requirement is justifiable. The employer

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best knows the demands that are to be placed on employees and the business context as a whole. But this recognized superior position of the employer in such matters does not mean that employees cannot decide for themselves whether to take on certain employment risks. Nor does it permit the enactment of requirements, albeit in the supposed interests of employees' safety, that are in themselves unjustifiable on any empirical basis. That is the basis of the Weeks decision and it has been held to apply in Canada.

In Betty-Ann Shack v. London Driv-Ur-Self Ltd. (June 7, 1974), the complainant had applied for a position as a rental clerk. Aside from the physical demands of the job, it was also necessary that the incumbent work late hours alone. The Board, (Prof. S.N. Lederman), found that the physical requirements of the position could be performed equally well by females as by males. The employer had unfairly failed to consider the complainant for the position.

On the matter of the employer's concern for women working alone late at night, Prof. Lederman expressly followed the Weeks decision. That concern was based purely on a stereotype and not on any real evidence that women might experience greater danger.

In the case of Sheila Robertson v. Metropolitan Investigation Security Ltd. (Aug. 10, 1979) the Board of Inquiry had to consider a situation like that in Shack. The complainant had not been considered for a position as a security guard with the respondent company. It was not that the employer did not hire women. In fact it hired roughly as many women as men.

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There were particular jobs though, that the employer simply would not place women in. There was no evidence that women were less capable in those positions that males normally held. It was just that the employer felt certain situations to be more dangerous than others, and as such, were unsuitable for women. It was the respondent's very sincerely held belief that women needed

more protection than males. The employer's conscience simply could not be put at ease if women were placed in the more hazardous positions. Despite those well-intentioned concerns, there was no evidence before the Board to indicate that the employer's categorization of jobs, based on gender, was justified. The respondent's motivation was based simply upon a stereotype of femininity and the proper place for women in employment.

The case before this Tribunal now differs from those previous cases. Here the employer, Canadian National Railways, has

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shown that the Complainant will be in greater danger if he does not conform with the hard hat policy. There is no doubt that Mr. Bhinder's turban is inferior to a hard hat in its capacity to protect against impact and electrical shock. The employer's policy is not based on a stereotype or unjustified prejudice. There is a real increase in risk if Mr. Bhinder does not wear his hard hat, even though that increase in risk may be very small.

There is the other proposition that comes out of those previous cases, though. That is, that even where there may he some increase in risk of harm to an employee if the occupational requirement is not met, to the greatest extent possible, the decision whether

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or not to bear those risks should be left with the individual, when the requirement discriminates against that person. This is consistent with the general mandate of human rights legislation; that decisions affecting individuals should be made on an individual basis and not according to characteristics which tend to exclude persons en masse.

Equally, this is consistent with the narrow construction of exceptions to prohibited discrimination. Where there is evidence that an employment requirement is discriminatory, all reasonable effort should be made to accommodate the person or persons discriminated against.

In this case, Mr. Bhinder is well aware of the demands of his job. Though the burden is on the employer to show that an occupational qualification is bona fide as that party is most capable of discharging that onus, the employee's knowledge of the job should not be discounted. Mr. Bhinder is aware of the risk that he takes in not wearing a hard hat. It is no different from the risk that he and his fellow workers have always accepted in their employment as maintenance electricians. Mr. Bhinder's position is that he can safely and properly carry out the duties of his job even if he continues to go without a hard hat. Some deference ought to be paid to his individual choice given that the alternative may be his dismissal on a prohibited ground. This, of course, presumes the absence of any undue hardship on the employer. That matter will be discussed below.

To recognize that some weight ought to be given to an individual's

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95.
judgment when he or she is aware of the demands of the job, does not mean that the treatment of persons in an employment situation should depend on whether they are candidates for employment or employees already working in the Respondent's business. The Canadian Human Rights Act presumes the equal protection of candidates and employees when it provides:

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s. 7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ and individual,

...
on a prohibited ground of discrimination.
[emphasis added.]

Thus, although the burden is on the employer to show the bona fide of its employment policy, the willingness of candidates or employees to accept the rigors and risks of the position must be considered, even if the employer shows that the employment policy is enacted to protect employees and that the policy will indeed have that effect. The candidate's or the employee's appreciation of those demands of employment, and their willingness to accept them, must also be considered. Again, this will only apply where there is no undue hardship on the employer in accommodating the employee's choice, and no other bona fide basis exists for the employment requirement.

A situation not unlike that before this Tribunal was considered in Re Aclo Compounders Inc. and United Steelworkers (1980), 25 L.A.C. (2d) 209. The grievor was dismissed by his employer for not complying with the employer's safety regulation of wearing a hard hat. He was a member of the Sikh faith so he could not comply for religious reasons.

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96.
The Arbitrator (J.D. O'Shea, Q.C.) in the case found that the grievor had not been wrongfully dismissed. The jurisprudence leading him to that conclusion differs from that which must be considered by this Tribunal. For instance, the Arbitrator found that the hard hat regulation was not discriminatory:

Although the union argued that the rule discriminated against the grievor because of bis creed, I cannot accept that argument. Such an allegation would be similar to an argument that a practising Roman Catholic who was employed as a meat taster in a food plant, was being

discriminated against (at least prior to "Vatican II") because the company required him to perform his duties on Fridays.

There are obviously some jobs which individuals, because of their religious beliefs are not able to perform. Without intending to be facetious, a Sikh obviously could not be employed as a male fashion model for a hat manufacturer. A Sikh would also encounter real problems working as a scuba diver or a deep sea diver for a marine salvage company since the wearing of a turban would be incompatible with such work.

...

To argue that the hard hat rule discriminates against the grievor because of his creed, tends to "put the cart before the horse". When considered objectively, there is nothing wrong with the hard hat rule in this technological age since it is designed solely for the protection of the company's employees. If there is any discrimination in this matter, it is that the Sikh religion is very selective concerning head coverings. The Sikh religion, accordingly, discriminates against the wearing of hard hats in favour of turbans. (pp. 219-220).

This Tribunal, on the other hand, might well have found that the hard hat policy in the Aclo case was discriminatory. With respect to the several examples cited by the Arbitrator, it

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97.
would be for the employer in such cases to show the necessity of the employment requirement. In a human rights case, the employer would have to show more than that there was "nothing wrong with the hard hat rule".

Thus, it is questionable whether the result of the Aclo case would have been the same had the matter been considered by a Board of Inquiry or Human Rights Tribunal. In fact, in that case a complaint against the employer had been made to the Ontario Human Rights Commission. The Commission however, decided that it lacked jurisdiction to pursue the complaint because of a conflict between the Ontario Human Rights Code, R.S.O. 1970, c. 318, and the Industrial Safety Act, 1971 (Ont.), c. 43 [repealed and superseded by the Occupational Health and Safety Act, S.O. 1978, c. 83]. This Tribunal then, must decide the case before it without the benefit of a written judgment by an Ontario Board of Inquiry either on the jurisdictional question or on the merits of the Aclo decision.

This Tribunal finds that under the circumstances the Respondent must show more than that its hard hat policy will reduce the risk of injury for its individual employees alone. It cannot

substitute its judgment for that of individual employees who are well aware of the demands of the job, including the safety risks involved, when the employment policy discriminates against them on a prohibited ground.

As was stated above, if there were safety implications for other employees or the public at large, or the Complainant's ability to perform the

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98.
job was impaired, the safety policy may well have been bona fide. There is no evidence in this case of any of those factors.

Where the safety of the complainant alone is concerned, as it is here, we think that the burden of proof on the respondent should be weightier if the employee is in a position to evaluate

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the risks of the job in an informed way and has been discriminated against on a prohibited ground. The Respondent must show that to accommodate the employee would cause it same undue hardship. That aspect of a bona fide occupational requirement will be considered below.

2. The Statutory Obligation
First, there is argument advanced by the respondent that is most appropriately dealt with in this section.

Canadian National Railways argues that the Canada Labour Code imposes upon it a duty to provide for the safety of its employees. As such, it is submitted, any safety policy pursued by the C.N.R. in satisfaction of that obligation ought to be recognized ipso facto by this Tribunal as a bona fide occupational requirement. Subsection 81(2) of the Code provides:

81. (2) Every person operating or carrying on a federal work, undertaking or business shall adopt and carry out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury in the operating or carrying on of the federal work, undertaking or business.

There is no doubt that this section imposes an obligation on the Respondent to enact regulations providing for its employees' safety.

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99.
We must consider however, the effect of the parallel obligation on the Respondent to comply with the Canadian Human Rights Act.

This is the precise situation that was faced in the Heerspink decision (unreported, December 3, 1979) at the B.C.

Supreme Court, cited to us by Counsel for the Respondent. Following on the finding by the B.C. Court of Appeal that a Board of Inquiry had jurisdiction to hear the complaint before it (91 D.L. R. (3d) 520), that hearing on the merits proceeded. Likewise, this Tribunal has found that it has the jurisdiction to hear this complaint and we must now consider, again, the relationship of the Canadian Human Rights Act and the Canada Labour Code in determining the merits of Mr. Bhinder's Complaint.

This may be done in quick order though, since the same reasoning applies here as was advanced under the jurisdictional section, supra. That is, the finding in the Heerspink case that the B.C. Human Rights Code, S.B.C. 1973, s. 119 could not restrict the meaning of the B.C. Insurance Act S.B.C. 1960, c. 197, is inapplicable to this case. The relationship between the Canadian Human Rights Act and the Canada Labour Code is not analogous to the relationship of the statutes in Heerspink.

Further, the more recent decision in Heerspink at the B.C. Court of Appeal [1980] 1.L.R. 1-1368. holds that two apparently conflicting statutes should be read together if

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possible, without giving one superiority over the other. A meaningful reconciliation of both statutes before this Tribunal may turn upon a

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100.
determination of whether the Respondent's hard hat policy is "reasonable". A policy which discriminates against employees on the basis of religion may well be unreasonable. The Canada Labour Code, subsection 81(2), only requires that "reasonable" procedures be carried out.

The Canada Labour Code also imposes a duty on employees. Section 82 provides:

82. Every person employed upon or in connection with the operation of any federal work, undertaking or business shall, in the course of his employment,

(a) take all reasonable and necessary precautions to ensure his own safety and the safety of his fellow employees; and

(b) at all appropriate times use such devices and wear such articles of clothing or equipment as are intended for his protection and furnished to him by his employer, or required pursuant to this Part to be used or worn by him.

Paragraph 82(a) obliges employees to take "reasonable" precautions. Again, what is "reasonable" may be interpreted by

this Tribunal. Paragraph 82(b) does not refer to the "reasonableness" of the furnishing of clothing or equipment by an employer. However, since employers may only carry out "reasonable" procedures per subsection 81(2), it would follow that only "reasonable" demands may he imposed on employees under paragraph 82(b).

Thus, this Tribunal may engage in a determination, to some extent, of the "reasonableness" of the Respondent's hard hat policy. To do so would be to give both the Canadian Human Rights Act and

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101.
the Canada Labour Code meaningful interpretations. The Respondent cannot rely an its statutory obligation to enact safety regulations as a defence. The statutory obligation on the Respondent does not, ipso facto, make its hard hat policy a bona fide occupational requirement. 1

It is appropriate at this point to consider certain regulations under the Canada Labour Code, as they were referred to in evidence and argument. At the outset, it is emphasized that the regulations must, of course, be consistent with the legislation, the Canada Labour Code, under which the regulations are enacted,

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and in interpreting such legislation (as we have discussed at length), the governing criterion is "reasonable" procedures.

1. Though it does not, of course, affect the case before this Tribunal, it is to be noted that the Canadian Charter of Rights and Freedoms (Part 1, Schedule B of the proposed Constitution Act, 1981) presently before Parliament, and under consideration before the Supreme Court of Canada, contains in paragraph 2(2),

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
and in section 27, it is provided that,
27. This Charter shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians.

If and when these constitutional provisions come into force, the position of a complainant such as Mr. Bhinder in law would, of course, be considerably strengthened.

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102.
The Canada Protective Clothing Regulations and Canada Electrical

Safety Regulations, Enacted Pursuant to Part IV of the Canada Labour Code.

The Canada Protective Clothing and Equipment Regulations 1 under Part IV of the Canada Labour Code, provide:

3. Where
(a) it is not reasonably practicable to eliminate an employment danger or to control the danger within safe limits, and

(b) the wearing or use by an employee of personal protective equipment will prevent an injury or significantly lessen the severity of an injury,

every employer shall ensure that each employee who is exposed to that danger wears or uses that equipment in the manner prescribed by these Regulations.

...
9. (1) Where, in order to comply with section 3, an employer requires an employee to wear a safety hat, that safety hat shall comply with the recommendations of Canadian Standards Association standard Z94.1-1966, as amended from time to time, or with a standard acceptable to the Division Chief.

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(2) Where, in order to comply with section 3, an employer requires an employee to wear a form of head protection other than a safety hat, that other form of head protection shall comply with good industrial safety practice or with a standard acceptable to the Division Chief.

In the opinion of the Tribunal, considering all the evidence, if the C.N. were to require of Mr. Bhinder that he wear only his turban as a form of head protection in the Toronto coach yard, then the turban would comply with "good industrial safety practice", given the small degree of risks of head injury in the Toronto coach yard. In our view, the turban itself, in this factual situation meets the test of being a "reasonable ... precaution" (section 82 of Canada Labour Code) and results in a "control [of] the danger within safe limits" (paragraph (3)(a) of the above Regulations).

1. Established by P.C. 1972-665.
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103.
In our view, through subsection 9(1) of the Regulations the C.N. can, in order for it to comply with section 3 of the Regulations, require its employees generally to wear a safety hard hat (that complies with the recommendations of the Canadian Standards Association), while at the same time, through subsection 9(2) comply with section 3 in respect of any Sikh employees such as

Mr. Bhinder in the Toronto coach yard by allowing the turban as the form of head protection. In our view, the turban does comply with "good industrial safety practice" within the Toronto coach yard.

(In our view also, "a standard acceptable to the Division Chief" (the Chief, Accident Prevention Division, Accident Prevention and Compensation Branch, Department of Labour) within either subsection 9(1) or 9(2) in respect of Sikhs working in the Toronto coach yard, should be simply the turban, given the only slight increase in risk through wearing a turban rather than a hard hat.)

Sections 17 and 18 of the Canada Electrical Safety Regulations, which apply to "any federal work, undertaking or business" (section 3 of the Regulations) (see Exhibit No. R-20) read as follows:

17. No employer shall permit an employee to work, and no employee shall work, on an electrical facility

(a) that has not more than two hundred and fifty volts between any two conductors, or between any conductor and ground, where there is a possibility of a dangerous electric shock, or

(b) that has more than two hundred and fifty volts but not more than five thousand two hundred volts between any two conductors, or not more than three thousand volts between any conductor and ground,

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unless that employee uses such insulated protective clothing and equipment as is necessary, in accordance

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104.
with good electrical safety practice, or as required by a safety officer, to protect him from injury during the performance of the work.

18. No employer shall permit an employee to work, and no employee shall work, on an electrical facility that, in accordance with good electrical safety practice, requires protective headwear to be worn unless he is wearing protective headwear that complies with the Class B requirements of the Canadian Standards Association Standard Z94.1-1966, as amended from time to time.

Mr. Thomas A. Beaton, Ontario Regional Director for the federal Department of Labour, and a chemical and metallurgical engineer, testified. He is one of the civil servants responsible for the administration of the safety regulations enacted pursuant to Part IV of the Canada Labour Code. He was requested to consider giving an exemption to the C.N.R. from the Protective Clothing

regulations, allowing Mr. Bhinder to wear a turban rather than a hard hat. (Transcript, pp. 624, 628). It seems that this request was from the Canadian Human Rights Commission, and not the C.N.R. although the evidence is unclear in this regard. (See Exhibit, No. R-10).

The Director of the Canadian Human Rights Commission for the Ontario Region did relate the facts of Mr. Bhinder's situation to an officer at Canada Labour and "asked whether it was possible to have an exemption under their Clothing Regulations "but was told it "was impossible". (See Exhibit No. R-11). In a letter of February 14, 1979, (Exhibit No. R-10) to the Canadian Human Rights Commission from Mr. Beaton, Regional Director for the Respondent, Great Lakes Region, it was asserted first, that hard hats have reduced injuries under federal jurisdiction, and second, that an exemption to Mr. Bhinder could not be given because:

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105.
Workers seldom perform their assigned duties in isolation and if one is injured he may well precipitate a situation which places others in danger such as; maintenance personnel depend upon each other in installing, moving and adjusting, etc. Failure of one partner to respond, due to head injury, could endanger another.

No exemption can be allowed because of the aforestated reason and all other ramifications related to protective equipment and wear. Reference is made to the whole of the regulation.

It is noted that the only specific reason for not giving

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an exemption is due to the danger other workers might be put in, if Mr. Bhinder suffered a head injury. However, on all the evidence before this Tribunal, and we so find, if Mr. Bhinder were to suffer a head injury (which in itself is very improbable, but is possible) through not wearing a hard hat, that there would be no appreciable or perceived significant risk occasioned to fellow workers through such event. We suppose there is a remote possibility, but we think it so insignificant that it should not be a consideration by the employer, or this Tribunal.

Mr. Beaton did not agree to an exemption as in his opinion, the turban could not meet the Canadian Standards Association standard with respect to energy absorption in mechanical impact situations, in contrast to the hard hat, and could not meet the requirements of the Canada Electrical Safety Regulations (Exhibit No. R-20), in contrast to the hard hat which complies with the Class B requirements of the Canadian Standards Association. Further although he felt that he had discretion with respect to the standard re mechanical impact, he considered he had no power to allow a substitution of the turban for the hard hat in respect of the electrical regulations.

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106.
Moreover, Mr. Beaton felt that if he were to extend an exemption, it would have to be extended to electricians as a group, rather than Mr. Bhinder as an individual, due to the terms of the pertinent collective agreement that the C.N.R. has with the union. (Transcript, pp. 624 to 627). Finally, Mr. Beaton felt constrained in exercising any discretion he might have given that the occupation of maintenance electrician seemed to him to be a "substantially hazardous occupation" as two C.N.R. maintenance electricians had been electrocuted (where, and under what circumstances, was not related).

However, it would seem that maintenance electricians with the C.N.R. work in a great many different jobs, and with respect to those (such as Mr. Bhinder) maintaining the turbo train, to the extent there is danger of electrocution, it is mainly to the hands rather than to the head, yet no protective equipment is required for the hands. (Transcript, pp. 646 to 652, 663). Mr. Beaton approached the question of an exemption from the standpoint of the occupation rather than with respect to a specific location. (Transcript, p. 650). Although it was an implicit suggestion in some of the Respondent's evidence that there was a danger of electrocution to maintenance electricians on the turbo train, there was no concrete evidence presented in this regard. Leaving aside the question of discrimination, on the evidence before this Tribunal we are of the view, and so find, that the Respondent did not establish on the facts that the nature of the maintenance electrician's work on the turbo train brought the situation within the ambit of the Canada Electrical Safety Regulations.

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107.
E. The Employer's Duty to Accommodate Employees - Religion as a

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Special Case?
As will be seen, employers have a general duty to accommodate their employees' religion. In terms of the bona fide occupational requirement exception, this means that the mere fact that an employees' religion causes same imposition on an employer does not automatically justify discrimination on that basis. The employer must show that the accommodation of the employees' religious beliefs or practices would cause it undue hardship.

This Tribunal hesitates to treat "religion", a prohibited ground of discrimination, as giving rise to unique legal protection. It is our opinion that "religion" is not a special case of discrimination. Rather, the employer's duty to accommodate an employee's religion flows from the strict construction of the bona fide occupational qualification exception to human rights legislation.

In reality, this means that there are certain arguments that employers may advance in defence of an employment policy or

regulation that Boards of Inquiry or Tribunals simply will not accept as being bona fide. This is true no matter what prohibited ground of discrimination is involved. For example, if an employer discriminated against an applicant for employment because of his race, the employer would have to show more than that its other employees would not be willing to work with that applicant, or that its other employees would object to a given employee being exempted from an employment policy for religious reasons, while they continue to be obliged to work within that employment policy. Nor would it be sufficient for the employer to show that it would lose customers if the applicant were hired. These reasons for an employer's discriminatory act would not give rise to

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108.
a finding that the discrimination was justified by a bona fide occupational requirement.

Thus, the accommodation of an individual in the workplace is the natural product of a narrow interpretation of exceptions to prohibited discrimination. The accommodation of employees really means that certain impositions on employers will not be accepted as bona fide if to grant an exception in the circumstances would be to give effect to principles at cross purposes with those of human rights legislation. This will be discussed further below.

There may be situations though, where an employee's religion affects his or her ability to perform the duties of a job.

In Bonnie Gore v. Ottawa Separate School Board (December 7, 1971) an Ontario Board of Inquiry (Professor Walter Tarnopolsky) considered whether allegiance to the Catholic Church could be a "reasonable occupational qualification" under section 4(6) of the Ontario Human Rights Code R.S.O. 1970, c. 73. The complainant had applied for a clerical position with the respondent School Board, but was not considered for the job because she was not a Catholic.

The Board held that the complainant could perform the

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duties of the job regardless of her religious convictions. The respondent had argued that a "Catholic atmosphere" in its schools could only be maintained if all of its employees were Catholic. Further, it argued, even a secretary would

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109.
have to be able to answer parents' concerns about their children's religious education. Thus, it would be necessary to have a knowledge of Catholic religious practices.

Professor Tarnopolsky found that the religious atmosphere in the schools would not be diluted if a secretary did not adhere to the Catholic faith. He also found that the complainant could easily learn as much as she would have to know about Catholicism in

order to competently carry out the duties of her job. In the result, the Board found that the respondent's occupational qualification of religion was not "reasonable".

In a B.C. case, a Board of Inquiry found that a requirement that Catholic teachers in a Catholic high school conform to the beliefs of the Catholic Church was reasonable: Margaret Caldwell v. St. Thomas Aquinas High School (July 6, 1979). The complainant was a Catholic teacher at the respondent school. When she announced her plans to marry a divorced man, her contract of employment was not renewed. The respondent admitted that had she been a Protestant, her contract would have been renewed. Thus, as an example to the Catholic students in the school, the school authorities demanded that its Catholic teachers observe the tenets of the Catholic faith.

The Board held that no breach of the B.C. Human Rights Code S.B.C. 1973, c. 119, had occurred. It considered that Catholic schools were in a special position and could demand that their Catholic teachers follow the Catholic faith.

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110.
However, on appeal to the B.C. Supreme Court, Mr. Justice Toy held that the religion and marital status of the complainant could not be a bona fide occupational qualification. The appeal was allowed. 1

The more usual situation in which "religion" as a prohibited ground of discrimination is considered, is where an employee's religious beliefs interfere with the demands of employment. That is, not where the ability of the employee is questioned, but merely where the employee's freedom to comply with all of the conditions of employment is restricted, because of conflicting religious obligations.

As was mentioned above, in such circumstances, the employer must make an effort to accommodate the employee's religious practices, short of any undue hardship it might suffer. This duty to accommodate an employee is not unique to situations of discrimination on the basis of religion.

For example, in Donald Berry v. The Manor Inn, supra, a Nova Scotia Board of Inquiry (W. Bruce Gillis) seemed to place a general duty of accommodation on employers. There, the complainant had been dismissed from employment with the respondent as a lounge waiter because of his sex.

It was the respondent's contention that since its customers preferred female employees, sex was a bona fide occupational qualification. If customers preferred females, it was submitted, the employer would suffer economic consequences if it hired males. The Board stated:

1. (1980), 1 C.H.R.R. D145.
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111.
To say that the preference of an employer's customers or clients to have either males or females serving them, which preference results in economic differences for the employer, is a bona fide occupational qualification based on sex, would be tantamount to creating a "community standard" test to determine whether discrimination exists. It would be a minor extension of this principle to hold that if most customers in a restaurant hold prejudices against Blacks or Jews or Scotsmen, the proprietor would be legally entitled to refuse employment to Blacks or Jews or Scotsmen. The long history of human rights struggles on this continent and elsewhere can leave no doubt that such an argument is totally without merit. (p. 5).

In effect, the Board was saying that it is the employer's duty to accommodate to an employee's sex, race, religion, or national origin. The fact that economic consequences fall on the employer is not in itself sufficient to fall within the exception of a bona fide occupational qualification. Although it was not stated in the Berry case, the employer would have to show undue hardship before an employment requirement would fall within the exception.

Thus, to some extent, human rights legislation makes employers agents of public policy. Wherever possible, (ie. in the absence of undue hardship), employers are required to operate their businesses in satisfaction of the principles of human rights legislation.

In the Ontario case of Sheila Robertson v. Metropolitan Investigation Ltd. (August 10, 1979), the Chairman of this Tribunal expressed the issue in the following way:

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112.
If one falls back upon the philosophy expressed in the Ontario Human Rights Code it follows that the onus should

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fall upon the employer to demonstrate that he is unable to reasonably accommodate to a prospective employee's gender without undue hardship on the conduct of his business, once a prima facie case has been established of discrimination through the application of the employer's employment regulations. (p. 43)

This "duty to accommodate" has arisen most frequently in cases where an employee's religious practices interfere with the demands of employment. These cases will now be considered.

In Clarence Williams v. Newfoundland Department of Transportation and Communications (December 17, 1974), the complainant was a member of the World Wide Church of God. His religious practices included observance of the Sabbath from sundown Friday evening until sundown Saturday evening. This practice meant that the complainant could not work Saturdays as was required by his employer during the winter. The employee worked clearing snow from highways.

The complainant was dismissed from his employment because of his inability to work Saturdays. The employer was not willing to rearrange the work schedule, even though the complainant had made arrangements with a co-worker to take his Saturday shifts. He even offered to work the odd Saturday should an emergency arise.

The Commissioner (Gertrude C. Keough) in delivering her judgment stated:

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113.
The Commission was dismayed by the total lack of flexability (sic) demonstrated by officials of the Department of Transportation and Communications in coping with this matter. (p. 6).

In the result, the Commission ordered that the complainant be reinstated in his former position. His flexibility and willingness to cooperate seemed to weigh heavily in his favour. Conversely, the inflexibility of the respondent and its lack of willingness to make any accommodation for the employee’s beliefs was unreasonable in the circumstances.

In another Newfoundland case, similar issues had to be decided: Caleb Norman Anthony v. Dominion Distributors (1962) Ltd. (April 19, 1977). Again, the complainant was a member of the World Wide Church of God and observed the Sabbath from sundown on Friday to sundown on Saturday. The employer had accommodated the employee’s practice during 1975-1976, but refused to do so during 1976-1977. The employee had even offered to work overtime during his lunch hours or take a reduction in pay in return for the benefit of having his Friday evenings off. There was no evidence that the respondent would suffer any inconvenience because of the employee’s request.

However, the Commission decided that the respondent had not contravened the Newfoundland Human Rights Code R.S. Nfld. 1970, c. 262. As similar as this case was to the Williams case, supra,

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the latter was not referred to by the Commission. There were facts though, that make the Anthony case distinguishable from Williams. In the former, there was some evidence that the complainant

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114.
had taken advantage of the accommodation the employer had afforded him. He had left work much earlier than sundown an Friday evenings. Also, on the day that the complainant walked off the job, he left without notice to the employer.

Thus, there was some question about the bona fides of the complainant's request for time off. Also, the Commission interpreted the employee's behaviour as consistent with his having voluntarily resigned, not with his having been dismissed because of his religious beliefs.

That case, then, introduces new factors into the determination of the extent of the duty to accommodate the employee's religious beliefs. If it appears that the employee is taking advantage of the accommodation, beyond what is necessary to fulfill his or her religious commitments, the employer may be justified in withdrawing that accommodation. Further, if the employee's behaviour is inconsistent with a desire to retain the employment, the employer cannot be said to have dismissed the employee on religious grounds.

In the Ontario case of Ishar Singh v. Security and Investigation Services Ltd. (May 31, 1977), the employer's duty to accommodate its employees' religious beliefs was upheld by the Board of Inquiry. There, the employer was found to have discriminated against a Sikh by requiring employees to be clean-shaven and wear a cap. It was the employer's argument that its employment requirement was a bona fide occupational qualification since its customers, so it believed, preferred security guards to be dressed

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115.
in that fashion. Also, security guards should be easily identifiable and dress consistently with the public image of a security guard, it was submitted.

The Board did not consider the basis of the employment requirement to be bona fide:

On the evidence given to the Inquiry, I have no doubt Security can reasonably accommodate a Sikh's religious observance or practice through his having a beard and wearing a turban without undue hardship on the conduct of Security's business. Indeed, I do not believe any hardship whatsoever is imposed upon Security by it having a Sikh employee who has a beard and wears a turban. Nor can the possibility that any of Security's clients might

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prefer not to have a Sikh as a security guard avail Security. (p.34)

Thus, similarly to the Berry decision, supra, the Board did not accept the respondent's argument that it was bound to satisfy the preferences of the public and of its clients in selecting employees. That, in itself, was insufficient to discharge the burden of showing that the policy was a bona fide occupational qualification.

The Board in Singh referred to a U.S. decision and approved of the approach adopted there: Re Canada Valve Ltd. and International Molders and Allied Workers Union, Local 279 CCH EEOC Decisions (1973) P. 6180:

The method of analysis used by this case is useful. First, one decides whether the employee's request is important and valid; i.e. not trivial or arbitrary. Second, one determines the extent of the inconvenience that would be caused to the

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116.
employer if the request were granted. Finally, the inconvenience to the employer and the importance of the request from the standpoint of the employee must be balanced. (Singh, p.30)

This approach takes account of the factors that we have already mentioned with respect to the Williams and Anthony cases, supra.

In a Manitoba case, Frank Froese v. Pine Creek School Division No. 30 (Dec. 28, 1978), the complainant was a school principal who was a member of the World Wide Church of God. His beliefs required that he observe certain holy days throughout the year. Sometimes the complainant would require as many as 12 days off per year. The complainant had been granted this time off for the previous 11 years. The Board of the respondent School Division then changed its policy, and permitted the complainant only two consecutive days of leave. The Board's reasons for doing so included:

(a) Problems with substitutes;
(b) Problems with finding someone to do the administrative work;

(c) Deterioration of staff morale;
(d) Concern among parents. (p.17)

The complainant then resigned his position as principal, but continued on as a teacher. He reduced the number of days' absence that he would require (from 11 to 9) and again asked for permission for

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117.
leave. This request was denied. Nevertheless, the complainant took the necessary leave without authorization. The matter was then submitted to the Manitoba Human Rights Commission.

A Board of Adjudication (Marshall E. Rothstein) was appointed to consider the complaint, and after reviewing the case law on the issue of the employer's duty to accommodate employees' religious practices, stated:

I conclude that an employer's obligation under Section 6(1) (Manitoba Human Rights Act C.C.S.M. C. H175) is to reasonably accommodate the religious observance requirements of an employee where such accommodation can be made without undue hardship on the employer's business. To require an employer to bear more than a de minimus cost can be an undue hardship. The degree or extent of the accommodation required and the measurement of the hardship to the employer must be determined on the facts of each case. (p.41)

In an accompanying footnote, the Board continued:
It should be remembered that in addition to the reasonable accommodation - undue hardship test, an employer's obligation under section 6(1) to reasonably accommodate the religious observance requirements of an employee may, in an appropriate case, be outweighed by another overriding requirement of the public interest.

Thus, if an employer suffers more than a minimal financial loss through accommodating an employee's beliefs, the requirement that employees be other than of that particular faith may be bona fide. However, there may be overriding policy reasons for not

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118.
recognizing that basis for an occupational requirement. This is no different from the argument in both Berry and Singh that certain financial implications of accommodating employees' religion, race, sex, or whatever, will not be sufficient to justify the exclusion of employees on a prohibited ground. For example, in Berry, no inquiry was made into the actual costs to the employer of hiring a male rather than a female. The costs may have been greater than de minimis. The Board simply did not acknowledge that argument as forming the basis of a bona fide occupational requirement. To do so would have been to undermine the vulnerable principles of human rights legislation.

Returning to the Froese case, the Board also required that employees must attempt to accommodate their employers. In that case, the complainant left daily plans, lessons, assignments, etc. to be used in his absence. He would test his students on his return to be sure that they had covered the appropriate material in

his absence. In other words, the complainant made every effort to minimize the effect of his absence on his students.

This requirement is similar to that in Williams that employees must be willing to cooperate and be flexible in their requests.

In the result, the Board found that the complainant had done everything possible, short of compromising his religious beliefs,

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119.
to accommodate his employer. No inconvenience was suffered by the employer as a result of the complainant's absence, nor was there any detrimental effect on the students. No cost was suffered by the employer since the complainant took his leave without pay. The respondent therefore had violated the Manitoba Human Rights Act in denying leave to the complainant for religious purposes. The employee's religious beliefs had not been reasonably accommodated.

In a recent Ontario decision, a Board of Inquiry found that an employer would suffer undue hardship if the employee's religious beliefs were accommodated: Theresa O'Malley v. Simpson-Sears Ltd., supra. The complainant became a member of the Seventh Day Adventist Church which observes its Sabbath from Friday sunset to Saturday sunset. The employee worked as a sales clerk in the respondent store. The personnel manager offered her a part-time position since she could no longer work Saturdays. This however, meant that she would lose a number of employment benefits and have her salary reduced by half.

The Board (Edward J. Ratushny) felt that the employer was obliged to accommodate the religious beliefs of its employees, but was reluctant to impose a specific standard of accommodation without legislation. He went on to find that the employer had acted reasonably in the circumstances. To accommodate the employee would have caused problems among other employees who would also want Saturdays off.

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120.
Also, to keep the complainant on full-time staff would have required that a new employee classification be created. The Board stated:

The Commission has not satisfied its onus of establishing that the respondent acted unreasonably in the steps which it took to accommodate the complainant after learning that the general condition of employment was incompatible with her religious observance. (p.17)

This Tribunal however, does not accept the legal principle that the above statement implies. It is our

understanding that the burden of proof is on the respondent to show that its employment requirement is bona fide. Part of that burden may be the adduction of evidence showing that the accommodation of an employee's religion would cause the employer undue hardship. At

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no time though, does the burden shift to the employee to show that the employer's policy was unreasonable. This would be inconsistent with the basic legal position of the parties in a human right case.

In the case before this Tribunal, there is little evidence that any hardship will fall on Canadian National Railways if it accommodates Mr. Bhinder's religious beliefs, at least from a practical point of view. There are no administrative difficulties foreseeable if Mr. Bhinder were to continue working without a hard hat.

This case then, is distinguishable from those cases where an employee's religious beliefs conflicted with the practical conditions of employment, such as hours (Williams; Anthony, O'Malley), leaves of absence (Froese), or appearance (Singh).

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121.
Where the safety of employees is the basis for an employment requirement, an employer may argue that if its employees are injured, it may suffer undue hardship in the form of a shortage of manpower. Or, for example, if Mr. Bhinder were a highly specialized expert, or had a unique skill, the respondent may have suffered an undue hardship if Mr. Bhinder failed to comply with the safety policy and thereby subjected himself to greater risk of injury.

There is no evidence here that there is any shortage of maintenance electricians. Nor is there any evidence that Mr. Bhinder is a unique or specialized employee, at least to the extent that the Respondent would suffer an undue hardship if Mr. Bhinder were absent because of an injury caused by failure to comply with the hard hat policy.

The Respondent here argues that it would suffer an undue hardship in that the integrity of its safety policy would be compromised if an exemption were granted to Mr. Bhinder. Only one fellow worker of Mr. Bhinder's testified at the hearing. Peter Rosemond stated that if Mr. Bhinder were exempted from the hard hat policy, he himself would still wear his hard hat. (Transcript, p. 381).

Counsel for Canadian National cited to us the case of Lukens Steel Company 29 L.A.C. 733 where a labour arbitrator refused to discipline employees for not complying with safety rules when the rule was not applied uniformly. However, that case did not contemplate the situation where an exemption was

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122.
granted to an individual employee for religious reasons. Rather, that case dealt with the application of a safety rule in a non-uniform way for no reason. That is, the rule in itself was not reasonable. As such, employees could not be disciplined for non-compliance. Here, on the other hand, there would be a bona fide religious basis for the non-uniform application of the safety

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policy. Canadian National could still enforce its hard hat regulation against its employees, unless they had a similar reason for not complying. The religious freedom of those employees, as protected by the Canadian Human Rights Act, is not being compromised.

Thus, there is no real basis for the Respondent's concern that its safety policy will be jeopardized by giving Mr. Bhinder an exemption from it. The fact that certain employees may feel unfairly treated does not strike us as being a sound basis for the enforcement of a discriminatory employment policy.

Before preceeding to a discussion of the cost implications of the accommodation of Mr. Bhinder's religious practices, we should like to briefly discuss the extent of Mr. Bhinder's willingness to accommodate his employer. An employee's flexibility in such cases has been held to be of some significance (Williams; Froese).

Unfortunately, in this case, there is little room for compromise on Mr. Bhinder's part. There is no way that he can wear a hard hat over or under his turban. Any adulteration of the strict obligation to wear the turban in the prescribed manner would be tantamount to removal of the turban.

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123.
Mr. Bhinder testified that he would be unwilling to accept employment other than as a maintenance electrician (Transcript p.328). We do not consider this attitude to be exemplary of an unwillingness to accommodate the employer. The employee, in these circumstances, should not have to accept employment other than within his or her trade. In any event, Mr. Bhinder testified that he would be willing to relocate in a position that did not require the wearing of a hard hat (Transcript p.300). However, the Respondent maintained that there were no alternate positions as a maintenance electrician that did not require the wearing of a hard hat.

Thus, we consider that Mr. Bhinder was willing to be as flexible as possible in the accommodation of his employer. In the circumstances, however, there was little room for flexibility without compromising his religious principles. He would not be expected to be so accommodating as to give up his religious integrity (Froese).

On the matter of costs to the employer, the only forseeable costs might arise if Mr. Bhinder were injured as a result of not wearing a hard hat. Otherwise, there would be no cost to the Respondent in accommodating Mr. Bhinder's religious practices.

However, the cost of any injury to an employee are administered in Ontario by the Ontario Workmen's Compensation Board pursuant to the provisions of the Workmen's Compensation Act R.S.O. 1970 c.505, as amended. The precise cost implications for employers if one of its employees is injured will be discussed fully below.

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124.
First, the jurisprudence in the United States on the matter of an employer's duty to accommodate an employee's religion will be considered.

The United States
In 1972, an amendment was made to Title VII of the Civil Rights Act of 1964 42 U.S.C.A. s.2000e et seq. that made explicit the employer's duty to accommodate an employee's religious beliefs. Section 701(j) of the Act defines "religion" as:

all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Although the Canadian Human Rights Act exception is in the language of "bona fide occupational requirement" rather than "unless an employer demonstrates that he is unable to reasonably accommodate ... without undue hardship on the conduct of the employer's business", in the opinion of the Tribunal, and as determined in the jurisprudence as discussed above 1 , the intent and effect of the exception is the same, notwithstanding the difference in language between the statutes of the two jurisdictions.

1. See, for example, Robertson supra p. 112, Singh, supra p. 115, Froese, supra p. 117, and the discussion generally at pages 67 to 73 and 107 to 124; but for dicta to the contrary see O'Malley supra p. 120, and Pritam Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre (Prof. Frederick H. Zemans as an Ontario Board of Inquiry, June, 1981).

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125.
Thus, in the U.S., where the accommodation of an employee's religion would have no effect on employee morale

generally, and would impose no economic burden on the employer, the employer was found to have unreasonably failed to accommodate its employee: Reid v. Memphis Publishing Co. 369 F. Supp. 684, (1973).

In a case where the employer made no effort to accommodate an employee's belief and such accommodation would have been easily made by transferring the employee to another position, it was found that the employer had failed to show that it would have had to bear an undue hardship: Schaffield v. Northrop Worldwide Aircraft Services, Inc. 373 F. Supp. 937, (1974).

As was stated in Kettell v. Johnson and Johnson, 337 F. Supp. 892:

"[I]nconvenience is not 'undue hardship'." (p. 895)
In a case involving a Sikh complainant, an employer dismissed the employee for his refusal to wear a cap and badge while driving the employer's taxi-cab. In a decision of the Equal Employment Opportunities Commission, the employer was found to have unreasonably dismissed the employee. A reasonable accommodation of the employee's religious practice of wearing a turban would have been to allow the employee to wear the badge pinned to his turban: EEOC Decision No. 76-37, CCH EEOC Decisions p. 6678.

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126.
In Draper v. United States Pipe and Foundry Co. 527 F. 2d 515, (1976), the employer offered to accommodate an employee's observance of a Saturday Sabbath by placing him in another position. The position though, would have meant a large pay reduction if the employee had accepted it. Also, his skills as an electrician would have been wasted. The Court (U.S.C.A.) held that the employer must first attempt to accommodate the employee in his present position.

In the result, an accommodation was found to be feasible by a simple shift adjustment. It was held that the employer must show more than that an accommodation is "bothersome to administer or disruptive of the operating routine." (p. 520)

An employer cannot speculate that it may suffer some hardship in the future in justification of its failure to accommodate an employee: Brown v. General Motors Corporation 20 E.P.D. P. 30, 048, (1979). At the time of the complaint, the employer could easily accommodate the employee's observance of Sabbath on Saturdays. The Court regarded the employer's submission that it might suffer economic hardship in the future as an insufficient basis on which to dismiss the employee.

Similarly, the dismissal of a teacher's aide was found to be unreasonable where the employer merely speculated that an adverse effect would be felt by students if the employee were allowed to observe the holy days of the World Wide Church of God: Edwards v. School Board of the City of Norton, Va. 483 F. Supp.

620, (1980). The employer must enter concrete evidence of such an effect.

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127.
As in Canada, the willingness of an employee to be flexible in his or her requests is an important factor to consider.

In Dewey v. Reynolds Metals Co. 429 F. 2d 324, (1970), the employer had permitted the employee to observe a Sunday Sabbath so long as he found replacements for his Sunday overtime shifts. The employee refused, and was subsequently dismissed. The employer

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was found to have reasonably accommodated the employee's religious practice since the collective agreement in force required employees to work overtime on Sundays.

There is an obligation on an employee to "attempt to accommodate his beliefs himself": Chrysler Corp. v. Mann 561 F. 2d 1282, (1977), at p. 1285. There, the employee observed holy days not during excused absences permitted under the collective agreement, but rather, during unexcused absences from work. The employee could have ameliorated the affect of his absence on his employer by using his free days for observing holy days. As it was, the employer was found not to have unreasonably dismissed the employee.

In Trans World Airlines v. Hardison 97 S.Ct. 2264, (1977), the U.S. Supreme Court laid down the basic principles on the matter of an employer's duty to accommodate its employees' religious practices. There, the employer was a maintenance mechanic who was needed on weekends to ensure the good repair of the employer's aircraft. The employee's religious beliefs, however, prohibited him from working on Saturdays.

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128.
The Court (per: Mr. Justice White) held that accommodating the employee would impose a hardship on T.W.A. It could not ask a more senior employee to take Hardison's shift as that would violate the seniority system in place.

Neither was the employer obliged to pay overtime to another employee to replace Hardison. An employer need not pay more than de minimis costs in accommodating an employee's religion. Thus, the employer was justified in dismissing the employee.

Where the accommodation of an employee's religious practices would violate the collective agreement in force and otherwise cause labour-management problems, an employer was found not to have acted unreasonably in dismissing the employee: Schweizer Aircraft Corp. v. State Division of Human Rights 18 E.P.D. P. 8867, (1978).

In Guthrie v. Warren E. Burger 25 E.P.D. P. 31, 506, (1980), the employer had accommodated the employee's religious beliefs by allowing him Saturdays off. The employer was found not to be obliged to allow the employee to work an Sundays, though. That would require that the employer hire a supervisor to work on Sundays also. To do so would be to impose more than a de minimis cost on the employer, and as such, would represent an undue hardship on it. The employer was found to have reasonably accommodated the employee's religion.

Thus, the interpretation of employers' obligations to their employees in the U.S. is similar to that accepted by Boards of Inquiry

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129.

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in Canada. Employers have a duty to accommodate employees' religious practices but there is also a burden on employees to be flexible and cooperative in their requests (Dewey; Mann). The accommodation needn't extend to the violation of a collective agreement (Schweizer) or a seniority system (Hardison). Nor should an employer be obliged to pay more than de minimis costs (Hardison; Guthrie).

With respect to safety regulations however, the approach in the United States has been to grant official exemptions for certain religious groups. Employers and safety officials must accommodate employees' religious beliefs even when the safety of those employees is involved.

The Occupational Safety and Health Act 1 (referred to as O.S.H.A.) provides in section 5 thereof:

5. Duties of employers and employees
(a) Each employer-
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likly to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

1. Pub.L. 91-596. See 1970 U.S. Code Cong. and Adm. News, p. 5177.

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130.
Standards, including the wearing of hard hats in carpentry trades and construction for safety purposes are promulgated under section 6 by the Secretary of Labor. However, under regulation 29 C.F.R. s.1905, any person may petition the Assistant Secretary of Labor for a variance or other relief to be granted.

A memorandum of February 4, 1975, issued by an Associate Assistant Secretary of Labor (Exhibit No. C-25) pursuant to these provisions in O.H.S.A., states in part:

Similarly, the Sikh Dharma Brotherhood, with Western Hemisphere headquarters at 1620 Preuss Road, Los Angeles, California, has petitioned for an exemption [while working in carpentry trades and construction] from the "hard hat" requirement on the basis of free exercise of religion. The Sikh Dharma Brotherhood has the following

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as a part of its creed:
"The man shall tie his hair in a Rishi knot on the crown of his head to be covered by a cotton cloth known as a turban whenever in public. He will be obliged to keep a dastar (small turban) when he is without his turban."

The Old Order Amish and the Sikh Dharma Brotherhood are both granted an exemption from wearing hard hats. The granting of the above exemption is based on the provisions in the United States Constitution relating to the free exercise of religion, and the policy expressed in Section 20(a)(5) of the Williams-Steiger Occupational Safety and Health Act of 1970 respecting religious freedom.

Citations shall not be issued for failure of members of the Old Order Amish or the Sikh Dharma Brotherhood to wear hard hats. Employers of members of these groups shall not be required to provide protective head equipment for their use as long as such employees have informed their employers and members of their religious objection to the wearing of hard hats. [The words in brackets have been added by this Tribunal.]

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131.
Similar exemptions have been given at the state level, for example, by the Michigan Department of Labor. (See Exhibit No. C-25.)

2. The United Kingdom
In the United Kingdom, an amendment was made to the Road Traffic Act of 1972 exempting Sikhs from the requirement that

crash-helmets be worn while riding a motorcycle. The Motor Cycle Crash-Helmets (Religious Exemption) Act of 1976 provides:

A requirement imposed by regulations under this section (whenever made) shall not apply to any follower of the Sikh religion while he is wearing a turban.

F. Workers' Compensation as an Employer Cost

We are faced with a consideration of the purposes and impact of the Ontario Workmen's Compensation regime in order to determine whether the Respondent would incur any costs such as would constitute an undue hardship, if Mr. Bhinder suffered an injury because of his failure to wear a hard hat. The general proposition is that the imposition of more than a de minimis cost on an employer constitutes undue hardship.

Thus, the duty to accommodate an employee's religion does not extend so far as to require the payment of more than minimal costs (Froese). However, there may be circumstances where public

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policy overrides the cost implications for employers (Berry; Singh; Froese).

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132.

The major thrust of the Workmen's Compensation Act is that both employers and employees have relinquished certain adversary rights in return for administrative facility, certainty of compensation, collective liability, and limited liability. Mr. G.W.T. Reed, Q.C., describes the scheme as follows:

The no-fault concept of compensation for all those injured at work was a compromise between industry and labour. Workers gave up the right to sue employers for the full span of damages where an employer could be proved negligent. In return all disabled workers would receive compensation limited to a proportion of actual earnings.

Employers gave up their right not to pay anything at all if the worker was personally at fault or where the injury was due to contributory negligence, the risks of common employment or a voluntary assumption of risk. In return, their liability was limited to a predetermined range of benefits and they were free of interminable and sometimes expensive damage actions. Under the original scheme, compensation was at 55% of earnings after a 7-day waiting period and the workman paid his own medical and rehabilitation costs. Today, compensation is at 75% of earnings and all medical and rehabilitation costs are covered.

(Workmen's Compensation in Ontario L.S.U.C. Special Lectures, 1976. pp.95-135, at p.98)

In the general situation where an employee is injured then, the circumstances of the injury are not inquired into whatsoever. The purpose of the Act is to make compensation automatic when an employee is injured, but to make the compensation paid fixed at a level lower than the actual loss suffered by an employee. Thus, in effect a no-fault, all-risk insurance scheme was created.

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133.
Most employers are obliged to pay into a general Accident Fund (Section 4). Compensation to employees whose employers pay into the Fund, in turn, is paid out of the Fund (Subsection 82(1)). The amounts paid into the Fund by employers is determined according to the hazards of each particular class of industry (Subsection 100(1)) ie. according to the rate of injury and amount of compensation likely to be paid to employees in the particular class of industry.

If employees working for employers who pay into the Fund, become subject to a greater risk of injury, can there be said to be

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any cost implications for their employers?
As was said above, employers' contributions to the Accident Fund are assessed on the basis of the accident rates and the probable amount of compensation to be paid to injured employees within discrete classes of industries. In the situation before this Tribunal, there is no doubt that the employee in question, Mr. Bhinder, will be subjected to a greater likelihood of injury if he does not comply with Canadian National Railway's hard hat policy. In general then, if an exemption were made for Mr. Bhinder, and thus, presumably for all Sikhs, C.N.'s accident rate, and the amount of compensation payable to its employees would no doubt increase. Thus, if Canadian National were one of those industries that paid into the Accident Fund, its premiums payable into the Fund would increase. (The particular situation of C.N. will be considered below).

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134.
However, the basis for the increased risk that we are considering in this case, is one of religious belief that requires non-observance of a safety policy. We are not concerned with an increased risk that is confined to a particular class of industry. The implications of an exemption made for Mr. Bhinder are that all Sikhs would he exempt from hard hat regulations in all industries to which the Canadian Human Rights Act applies, all else being equal; ie. there being no other basis for a bona fide occupation requirement in those other cases. The effect may be an increase in the overall accident rate in the affected industries. In the province of Ontario then, the increased burden on the Accident Fund would be absorbed across all industries. The actual impact on an individual employer would be very small.

Thus, there would indeed be cost implications for employers if their employees were granted exemptions from justifiable (from a safety standpoint), employment requirements. Can these cost implications be said to constitute an undue hardship on employers? To answer that question, we must return to the general principles of the Workmen's Compensation Act.

The essence of the Act is that employees have given up their entitlement to full compensation when injured due to an employer's negligence. In return for that concession, employees have agreed to accept limited compensation, so long as it is always paid. It generally does not matter what the circumstances of the injury are. Employers have given up their immunity from paying any compensation under certain circumstances, in return for limited and collective liability.

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135.
From the above, it follows that for what one party to the compensation scheme gives up, that party receives what the other party has agreed to give up. In other words, if employees, in return for giving up their rights of action against employers, did not receive automatic compensation when injured, then the purposes

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of the Act would be defeated. Here, if a risk is created because employees cannot comply with safety policies due to sincerely held religious beliefs, and the safety policy is not otherwise justifiable as a bona fide occupational requirement, employers cannot be heard to say that an undue hardship is imposed upon them because their contributions to the Accident Fund are increased. It is their obligation under the Workmen's Compensation Act to pay, through the Fund, compensation in all cases, no matter what the circumstances of the injury are. The only exception is where the employee is guilty of "serious and wilful misconduct". 1

In any event, the collective liability aspect of the Act means, in this situation, that overall increases in the amount of compensation payable to employees would be absorbed by industry as a whole. Thus, the cost implications for a particular employer would be negligible. In other words, the cost consequences would be de minimis for individual employers and as such, insufficient to justify a finding that the accommodation of an employee's religious beliefs imposed an undue hardship on that employer.

All of the above represents the usual position of employers under the Workmen's Compensation Act. However the employer in this case, Canadian National Railways, is treated somewhat differently under the Act.

1. Section 3, infra, p. 139.
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136.
There are two Schedules of employers in the Regulations under the Act (Regulation 834, R.R.O. 1970). Schedule 1 contains

the classes of employers who make contributions to the Accident Fund. Schedule 2 employers, on the other hand, make no contributions to the Fund. Rather, they pay compensation directly to injured employees. Mr. G.W.T. Reed, Q.C. explains this distinction:

Rather than each employer being individually liable to compensate his own workers, the new scheme separated the employer's liability to pay from the employee's entitlement to collect. All employers except those in Schedule 2 would contribute to the accident fund under section 4 and their employees would claim against the fund, not against individual employers. Whether or not the employer had in fact made his contribution to the fund did not influence his worker's right to collect benefits.

The only exceptions to the accident fund concept are the employers in Schedule 2, usually emanations of the Crown such as provincial or municipal governments or federally licensed entities such as the railroads and shipping lines. Under section 5 such employers are individually liable to pay all the prescribed benefits and they are subject to a variety of measures to ensure certainty of payment to the worker as awarded by the Board. Schedule 2 employers maintain deposits with the Board from which

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compensation payments are paid by the Board on the basis of the Board's adjudication of claims and the Schedule 2 employer is required to maintain his deposits at a level determined by the Board.

A Schedule 1 employee has no right of action against his own employer or fellow employee, nor against any other employer or employee in Schedule 1 because of the principle of collective liability under the accident fund. A Schedule 2 employee has no right of action against his own employer who is individually liable to pay the compensation under the Act.

(op cit, pp.99-100)
Canadian National Railways is a Schedule 2 employer.
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137.
This means that if any of its employees are injured, it pays compensation directly to the employees. As Mr. Reed mentioned, the money actually comes out of the employer's deposit with the Board. However, in essence, a Schedule 2 employer, is a self-insurer for the purposes of workers' compensation.

Nothing turns on the fact that an employer falls within Schedule 2 as opposed to Schedule 1. The employee's entitlement to compensation is not affected. For example, the general entitlement section (Section 3) makes no reference to Schedules.

The Respondent submits that the fact that it is a Schedule 2 employer should be considered in determining whether it would suffer any undue hardship by accommodating the Complainant's religious beliefs. If the employee's risk of injury is increased, the likelihood of receiving compensation likewise increases. As a matter of course, the employer's liability to pay compensation will also increase as a result. Since the employer pays the compensation directly to employees, the cost implications if an employee's susceptibility to injury increases could be quite significant.

Here, Canadian National, if an exemption from the hard hat policy is made for Mr. Bhinder, could be burdened directly with the cost of any compensation flowing to Mr. Bhinder. These costs quantitatively would therefore not be de minimis. They could be quite substantial if Mr. Bhinder were to suffer a head injury as a result of not wearing a hard hat. However, from the standpoint of the Schedule 2 employer, given the fact of its size (and

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138.
also the fact it is often an emanation of the Crown, and thus indirectly owned by the general public) means, arguably, that the costs are still de minimis to the particular employer. This is certainly true of the Respondent, certainly one of the largest single employers and enterprises in the country. It is only

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because of the relative size of Schedule 2 employers, that the self-insurance scheme for workers' compensation inherent to those employers, is feasible.

Moreover, the Schedule applicable to the employer does not affect the basic thrust of the Ontario Workmen's Compensation regime. As was stated above, each party has forfeited an equal (presumably) set of rights in return for some benefit flowing from the other party. Employers cannot argue that they suffer an undue hardship by being required to pay compensation no matter what the circumstances of an injury are if the risk is one that is an incident of employment. Here, the safety policy is not otherwise justifiable as a bona fide occupational requirement as it affects Mr. Bhinder. The ensuing risk of injury, then, cannot be removed without offending Mr. Bhinder's religious freedom. To that extent, the risk must be recognized as one that is inherent in the workplace. Employers cannot argue that their liability to cover such risks imposes an undue hardship on them. The whole object of workers' compensation is that liability for all such risks is borne by employers. If employers could so argue, employees would be equally entitled to argue that where an employer is negligent and an injury results, employees suffer an undue hardship in being denied full compensation.

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139.
Schedule 2 employers are "usually emanations of the Crown

such as provincial or municipal governments or federally licensed entities such as the railroads and shipping lines." (G.W.T. Reed, Q.C., op. cit. pp. 99-100). One possible reason for the inclusion of these employers in Schedule 2 may be the creation of an incentive in those industries to ensure the safety of its employees. If an employer pays the costs of injured workers directly, then that employer will be encouraged to make the workplace as safe as possible in order to prevent subsequent injury and the payment of additional compensation.

If this is the reason for the existence of the differential treatment of Schedule 2 employers, there will be no subversion of that motive if exemptions are granted to employees, such as Mr. Bhinder, who cannot comply with safety policies. For the most part, the hard hat policy is a sound one that will undoubtedly better ensure employees' safety and reduce, on the whole, Canadian National Railways' compensation liability. Thus, the general incentive to make the workplace as safe as possible will be unaffected if Mr. Bhinder and others in his position are granted exemptions from safety regulations.

Section 3 of the Workmen's Compensation Act provides:
3. (1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to an employee, his employer is liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except where the injury,

(a) does not disable the employee beyond the day of

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accident from earning full wages at the work at which he was employed; or

(b) is attributable solely to the serious and wilful misconduct of the employee unless the injury results in death or serious disablement.

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140.
If the Respondent's hard hat policy was lawful vis-à-vis Mr. Bhinder, the exception in paragraph 3(1)(b) would mean that if Mr. Bhinder had continued in his employment in violation of the Respondent's safety policy, he would have effectively waived his entitlement to compensation, unless he had been killed or seriously disabled. It is impossible, though, for employees to contract out of compensation (Section 16). Thus, even if Mr. Bhinder had wished to stay in the position, contractually waiving his entitlement to compensation, if injured, and thereby removing any question of undue hardship on the Respondent, he would have been unable to do so. However, if an employee wilfully disobeyed a safety policy that was a bona fide occupational requirement, the employee would not be entitled to compensation by reason of paragraph 3(1)(b) of the legislation.

In any event, it is our finding that indeed the Respondent has been unable to show that it will suffer undue hardship by accommodating the Complainant's religious practice of wearing a turban, in lieu of a hard hat. If the Respondent were a Schedule 1 employer under the Workmen's Compensation Act, it would be more clear that no undue hardship results from such an accommodation. However, it is our opinion that the Respondent should be treated no differently than a Schedule 1 employer would have been. The fact that it is a Schedule 2 employer is merely an administrative particular. No substantive rights under the Workmen's Compensation Act are affected by the Schedule of an injured employee's employer. Neither should there be any human rights consequences because of that fact.

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141.

We view the Workmen's Compensation Act as a trade-off of rights and obligations. Employers gain the right to pay limited liability in return for the obligation to pay compensation in all cases. Employees gain the right to automatic compensation in return for the obligation to accept only limited compensation. In this case, employers will be obliged to cover the additional risk and ensuing liability created by Sikhs whose religion prohibits compliance with hard hat requirements, where there is no basis for a bona fide occupational requirement; that is, where the employee's ability is not questioned, the safety of the public or other employees is not jeopardized and there is no undue hardship placed on the employer either practically or economically. The ensuing risk of increased liability is a legitimate one that employers are obliged, because of the comprehensive nature of workers' compensation, to accept.

In effect, what we are saying is that the cost implications for the employer in this case are immaterial to a determination of whether an undue hardship is suffered in accommodating the employees' religious beliefs. Likewise, the cost implications are immaterial to our determination of whether a bona fide occupational requirement exists. We are not saying that no real cost will be incurred by C.N. Rather, our view is that the employer's liability as determined under the Workmen's Compensation Act cannot in any sense be a "hardship" let alone an "undue hardship". That Act is designed to set up a regime to compensate employees, albeit to a limited extent, for the risks of employment. Included in those risks is the risk that because of an employee's religious convictions, the employee may suffer an injury that other employees would have been protected against.

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142.

If our finding that there is no undue hardship placed on the Respondent in this case had been otherwise, we would have been prepared, under the circumstances, to recognize that the public policy at stake here overrides any hardship that the employer may have suffered. The Respondent's hard hat policy is a very sweeping one that touched the Complainant in a remote, but very adverse way

because of his religion. It seems that this is the type of employment policy that the Canadian Human Rights Act is aimed at. Where possible, flexibility and accommodation of individuals' needs must be built into conditions of employment, especially, as in this case, where the impact on the Canadian National is slight, and the risk of injury that Mr. Bhinder will be subjected to is equally small.

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143.
5. The General Limitation on Religious Freedom
There is one final argument advanced by counsel for Canadian National Railways, that we must consider.

The Respondent submits that there is a general limitation on an individual's right to religious freedom. Section 2 of the Canadian Human Rights Act provides that an individual has the right to make the type of life he or she wants "... consistent with his or her duties and obligations as a member of society...". Here, C.N. argues that Mr. Bhinder has a duty and obligation to comply with its hard hat policy if he wishes to work at C.N.

We do not think that the phrase in Section 2 of the Act should be given the meaning that the Respondent urges us to give it. In our view, this phrase takes into account that there is an outer limit to individual freedom. In particular, an underlying premise to freedom in our society is that such freedom cannot interfere with the similar right to freedom of other individuals. Parliament may enact legislation to circumscribe individual freedom 1 , and the Canadian Human Rights Act itself contemplates a limitation through the "bona fide occupational requirement" exception of paragraph 14(a). However, we do not interpret the

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phrase in question in section 2 to mean that religious freedom must give way whenever any concurrent, conflicting obligation whatsoever arises. It will still be for Tribunals to determine whether that coincident obligation is reasonable.

1. Subject, of course, to any overriding limitation in the Constitution. In this regard, the proposed Canadian Charter of Rights and Freedoms (Part 1, Schedule B of the porposed Constitution Act, 1981) will, of course, have great significance if and when it is enacted.

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144.
Thus, the phrase in Section 2 of the Act foresees the determination of whether, for example, a bona fide occupational requirement exists. If so, it will be the individual's obligation to comply with that requirement. Individuals have no obligation to compromise their religious beliefs unless there is a justification for doing so.

The qualifying phrase referred to, perhaps, also contemplates a situation where there may be a directly conflicting legislative obligation. The Respondent cited to us the following cases where just such a situation was considered.

In Re International Society for Krishna Consciousness and City of Edmonton et al. (1978), 94 D.L.R. (3d) 562, a religious organization engaged in the solicitation of funds without authorization as required by the Public Contributions Act R.S.A. 1970, c. 292. The organization argued that the provisions of that Act infringed its religious freedom and hence, ought to be rendered inoperative.

Cavanagh, J., after considering various definitions of "freedom of religion" stated:

All of those definitions of freedom of religion recognize that there is such a freedom but that the action of practising one's religion cannot be carried to the point of disobedience of the law. (p. 563).

Similarly, in the Supreme Court case of Robertson and Rosetanni

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145.
v. The queen [1963] S.C.R. 651, the appellants argued that the Lord's Day Act R.S.C. 1952, c. 171, infringed their freedom of religion. They engaged in the operation of a bowling alley and wished to remain open on Sundays.

The Court, Cartwright J. dissenting, held that the effect of the Lord's Day Act was purely secular. It does not infringe on a persons choice to observe a Sabbath other than on Sundays. It merely requires that business activities do not proceed on Sundays.

Thus, from these two cases, it would appear that where religious practice conflicts with valid legislation, the legislation will be allowed to stand and the practice must be confined to the extent of the conflict.

We are not faced in this case with a direct conflict between religious practice and valid legislation. The Canada Labour Code merely provides that employers enact "reasonable" regulations for employees' safety and employees take "reasonable" precautions for their own safety. (Sections 81, 82). Whether the employer's policy is discriminatory in its impact may go to a determination of the reasonableness of that policy. Only where a policy is found not to be discriminatory would a conflict arise between religious practice and the Canada Labour Code, if the policy is otherwise reasonable.

We shall now briefly summarize the principal issues, findings of fact, and conclusions in respect of this case.

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146.
SUMMARY AND CONCLUSION
1. Sikhism is a "religion" within the meaning of section 3 of the Canadian Human Rights Act, and "religion" is a prohibited ground of discrimination. The wearing of a turban by a male Sikh is an essential tenet of Sikhism.

2. The Respondent dismissed the Complainant from its employment because it would allow him to continue such employment only on the basis of wearing a hard hat, which was impossible from the Complainant’s point of view, given his religious beliefs.

3. The Respondent did not have the intention, or motive, to discriminate against the Complainant because of his religion. However, the Respondent’s employment policy (ie. hard hat regulation) has the effect (known to the Respondent) of denying a practising Sikh, and specifically the Complainant, employment with the Respondent because of the Complainant’s religion. Members of the Sikh faith, like Mr. Bhinder, cannot comply with the hard hat regulation, and so cannot be employed by the C.N.R. Thus, an unfavourable distinction is being made between employees on the basis of religion as a result of the hard hat requirements. Discrimination may occur even though an employer has no intention to discriminate.

4. To give effect to the hard hat regulation is to deny Sikhs equal opportunity by a discriminatory practice based on religion contrary to section 2 of the Canadian Human Rights Act.

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147.
5. The jurisdiction of the Tribunal was challenged on two bases. First, as the Respondent and the Canadian Transport Commission have the competence under the Railway Act to make orders

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and regulations with respect to employees’ safety, it was argued that such power can be exercised independently of, and with immunity from, the Canadian Human Rights Act. However, this Tribunal finds that the Canadian Human Rights Act is intended to apply to the Respondent, does apply, and such application is not displaced by the Railway Act.

6. Second, the Respondent argues that the safety regulations enacted under the Canada Labour Code require a hard hat policy of the Respondent, do not allow an exception for Sikhs, and that such obligations upon the Respondent supercede any requirements of the Canadian Human Rights Act. This Tribunal is of the view that it retains its jurisdiction to deal with the Complainant, notwithstanding the Canada Labour Code.

7. The fact that an employee such as the Complainant may have contracted to abide by the Respondent's safety regulations does not assist the Respondent. An employee is not bound by a condition of a contract if that condition violates the Canadian Human Rights Act.

8. Discrimination presumes a distinction between persons on a basis not related to merit. The Complainant established a prima facie case of discrimination as a result of the Respondent's employment safety policy or hard hat regulation. The Respondent has engaged in a discriminatory practice within the meaning of paragraphs 7(a) and 10(a) of the Act.

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148.
9. Once a prima facie case of discrimination has been established, the onus of proof shifts to the employer to bring itself within the exception of para. 14(a) of the Act, showing that the employment policy or regulation of the employer is based upon a bona fide occupational requirement.

10. Human rights legislation is remedial and intended to be liberally interpreted to achieve the intended policy of the legislator, and exceptions are to be narrowly construed. The policy of the Act is not to be abridged unless by express language of the legislation.

11. At the root of the concept of "bona fide occupational requirement" is a determination as to the ability of an employee to perform his or her duties. That is, the requirement is related to merit. A characteristic of a person that renders him or her incapable of performing the duties of a particular employment will be a proper basis for the exclusion of that person by the employee, even though the characteristic is a prohibited ground under the Act. The burden is on the employer to lead evidence to show that indeed its requirements are rationally based and not founded upon unwarranted assumptions or stereotypes.

12. A bona fide occupational requirement implies both a subjective and objective element.

13. The Complainant in this case is able to perform satisfactorily his job with the Respondent without wearing a hard

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hat. This is not a case where a safety regulation has some relation to the ability of employees to satisfy job requirements.

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149.
14. Where it can be shown that there are safety implications for persons other than the employee himself, the burden of proof on the employer to justify an employment requirement will be considerably less. If the employer can demonstrate a minimal increase in risk of harm to other persons,

because of the absence of its safety regulations, it will have met its burden of establishing the safety regulation as a bona fide occupational requirement. In the case at hand, if there were safety implications for the public or other employees, C.N.’s hard hat requirement could be justified (assuming the danger could not be otherwise removed). To meet the burden of proof in this regard, the employer need only show that its safety requirement "was supported in fact and reason based on the practical reality of the work-a-day world" 1 . In the case at hand, there is no evidence that other employees or the public will be affected if Mr. Bhinder were to continue working without a hard hat.

15. The Respondent in this case has shown that the Complainant will be in greater danger if he does not conform with the hard hat policy. There is a real increase in risk to Mr. Bhinder (albeit not to the public or other employees) if he does not wear his hard hat, even though that increase in risk is not relatively significant from a quantifiable standpoint.

16. As the intent of human rights legislation is that decisions affecting individuals should be made on the basis of individual merit, and not according to characteristics which tend to exclude persons (such as Sikhs)

1. Cosgrove, supra p. 87.

as a group, it follows that even where there may be some increase in risk of harm to an employee if the safety requirement is not met, the decision whether or not to bear the risk should be left with the individual, when the requirement discriminates against the individual.

17. Mr. Bhinder’s position, clearly based upon adequate knowledge of the risk, is that he can properly carry out the duties of his job even if he continues to go without a hard hat, with sufficient safety to himself that he is fully prepared to accept the risk. His acceptance of that risk will not adversely affect his carrying out his employment duties.

18. Assuming no other bona fide basis (the protection of the public or other employees) exists for the safety requirement, undue hardship to the employer resulting from the absence of the safety requirement will in itself mean that the safety requirement

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is a bona fide occupational requirement.

19. However, the Respondent must show more than simply that its hard hat policy will reduce the risk of injury for its individual employees, such as Mr. Bhinder. It cannot substitute its judgment for that of individual employees who are well aware of the demands of the job, including the safety risks involved, when the employment policy discriminates against them on a prohibited ground. An employee such as Mr. Bhinder who sincerely professes a religion the tenets of which (the wearing of long hair and a

turban) came into conflict with the employer’s safety (hard hat) requirement, has the

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151.
protection of the Canadian Human Rights Act.
20. There is an inherent costs/benefit assessment in Parliament’s espousal of individual freedoms as set forth in the Act (section 2 in particular) and the protection extended by the Act to all individuals in Canada. In the view of this Tribunal, the added possible direct cost to Mr. Bhinder and possible indirect cost to society, through his assumption of greater risk through not wearing a hard hat, is a cost exceeded by the obvious benefit through religious freedom as sanctified, protected, and enhanced by the Act.

21. Employees who do not have conflict between a safety requirement and their religious convictions, are not being discriminated against in having to comply with such safety requirement. Given their different factual situation, legally (whether by their employment contract, or the statutory provisions of the Railway Act, or the Canada Labour Code) they are compelled to comply with the employer’s safety requirement. However, all Canadians are in the same position with respect to the protection afforded by the law in giving effect to their right to religious freedom. It is simply due to the myriad of factual situations occasioned by the variety of religions that an individual such as Mr. Bhinder necessarily cannot as a fact comply with a safety requirement and the statutory provisions of the Act came into play to protect him.

22. The freedoms protected and enhanced by the Canadian Human Rights Act are so fundamental to the fabric of Canada that Parliament has

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152.
stated clearly that the benefit of protection to any particular individual, such as a practicing Sikh, is to the corresponding benefit of all Canadians, from the standpoint of the enhancement to the religious freedom of all other individual Canadians, also from the benefit to Canadian society collectively gained through its religious and cultural diversity and pluralism, and from the fostering of every individual’s equal opportunity to achieve self-fulfillment.

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23. A further argument of the Respondent is that any safety policy pursued by the Respondent in satisfaction of its obligations under the Canada Labour Code, and the regulations in force under that statute, must necessarily always be a policy that is a bona fide occupational requirement.

24. The Canada Labour Code (s. 81(2)) requires that "reasonable" safety procedures be undertaken by the employer in the

operation of its business. Similarly, employees must take "reasonable" precautions (s. 82(b)). In the view of this Tribunal, the Canadian Human Rights Act and the Canada Labour Code are to be interpreted as not being in conflict.

25. In our view, a safety policy that is in conflict with the Canadian Human Rights Act would not be a "reasonable" procedure within the meaning of the Canada Labour Code. A safety policy must comply with the requirements of both the Canadian Human Rights Act and the Canada Labour Code, to be lawful.

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153.
26. On the evidence, this Tribunal is of the view first, that Mr. Bhinder’s turban could be considered to meet the requirements of the Canada Labour Cade’s Protective Clothing Regulations, and second, that the situation of the maintenance electrician on the turbo train does not fall within the Canada Labour Code’s Canada Electrical Safety Regulations. However, these findings are unnecessary given the law, as interpreted by this Tribunal, that is, that any safety policy must not be contrary to the Canadian Human Rights Act. The regulations under the Canada Labour Code must be construed as being consistent with the enabling legislation under which they are enacted, and the Canada Labour Code requires only "reasonable" safety procedures. In our view, "reasonable" safety procedures means those that are otherwise lawful, that is, they must not be in violation of the provisions of the Canadian Human Rights Act.

27. The employer’s duty to accommodate an employee’s religion flows from the strict construction of the bona fide occupational requirement exception in the Act (and human rights legislation generally).

28. An employer does not bring itself within the exception by showing that its employees or customers favour the discrimination. The essential question is whether an employee’s religion affects his or her ability to perform the duties of the job.

29. The Canadian Human Rights Act, in effect, makes the employer an agent of the public policy expressed by the legislation, imposing upon the employer the obligation to accommodate the employee’s religious beliefs

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unless the employer brings itself within the "bona fide occupational requirement" exception. As we have said, the exception will be operative if the employer’s requirement is for the safety of the employee’s fellow workers or the public, or if there would otherwise be undue hardship upon the employer.

30. Can the Respondent reasonably accommodate the employee’s religious observance, or is there an undue hardship upon it to do so? The factor of the importance of the employee’s religious freedom (to the employee, and indirectly, to society) must be balanced with the factor of the degree of inconvenience to the employer.

31. Moreover, although employers have a duty to accommodate employees’ religious practices, there is also a burden on employees to be flexible and cooperative in their request.

32. If an employer suffers more than a de minimis financial loss through accommodating an employee’s beliefs, the employer’s requirement may constitute a bona fide occupational requirement.

33. However, even where there is a situation of more than de minimis financial loss to the employer, it may be in the given situation that the policy of the Act overrides and results in not recognizing that basis as a bona fide occupational requirement.

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155.
34. In the case before this Tribunal, there is no real evidence, and we so find, that any hardship will fall on Canadian National Railways if it accommodates Mr. Bhinder’s religious beliefs.

35. Mr. Bhinder will be subjected to a greater likelihood of injury (although the increase in risk is only slight in a quantitative sense) if he does not comply with Canadian National Railway’s hard hat policy.

36. The implications of an exemption made for Mr. Bhinder is that all Sikhs are exempt from hard hat regulations in all industries to which the Canadian Human Rights Act applies, all else being equal; ie. there being no other basis for a bona fide occupational requirement in those other cases. So far as Schedule 1 employers under the Ontario Workmen’s Compensation Act are concerned, the effect may be an increase in the overall accident rate in the affected industries for the purpose of workers’ compensation. However, the increased burden on the accident fund of the workers’ compensation scheme in Ontario would be absorbed across all industries and the consequential impact upon an individual employer would be very small, that is, the cost consequences are de minimis. Therefore, the cost consequences are insufficient to justify a finding that the accommodation of an employee’s religious beliefs impose an undue hardship on Schedule 1 employers.

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37. The Respondent is a Schedule 2 employer under the

Workmens Compensation Act, that is, it pays compensation directly to its injured employees, and as such, if an employee's risk of injury is increased, the likelihood of receiving compensation correspondingly increases, and as a result, the employer's liability to pay compensation consequentially increases. Thus, the potential costs to the Respondent, if Mr. Bhinder is granted an exemption from the hard hat policy, are not de minimis in a quantitative sense. However, in our view, given the size and nature of schedule 2 employers, such costs are de minimis to such employers. Specifically, the potential additional costs to the Respondent of an exemption from its hard hat policy in favour of the Complainant, and Sikhs generally, is de minimis.

39. Moreover, even if the added cost is not de minimis, given that the Respondent's hard hat policy is not otherwise justifiable as a bona fide occupational requirement as it affects Mr. Bhinder, the risk is one that is an incident of his employment. The added risk in not wearing a hard hat, cannot be removed without offending Mr. Bhinder's religious freedom, and therefore, in our view, that risk must be recognized as one that is inherent to his employment: This is a risk of the kind contemplated by the Ontario Workmen's Compensation scheme. The purpose thereof is that liability for all such risks should be borne by employers. Thus, it is not an undue hardship for the employer to be liable for such risks, and the fact that there may be an added cost (that is not de minimis) through workers' compensation, does not render the hard hat requirement a bona fide

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occupational requirement.
40. In our view, the Schedule applicable to the employer does not affect the basic thrust and purpose of the workers' compensation regime, which is to provide no-fault partial compensation for injuries due to risks inherent to the workplace. The fact that the Respondent is a Schedule 2 employer is merely an administrative matter. No substantive rights under the Workmen's Compensation Act are affected by the Schedule of an injured employee's employer. Neither should there be any human rights consequences because of that fact.

41. An employer, such as the Respondent, is obliged to cover the additional risk and liability created by Sikhs whose religion prohibits compliance with hard hat requirements, where there is no basis for a bona fide occupational requirement; that is, where the employee's ability is not questioned, the safety of the public or other employees is not jeopardized and there is no undue hardship placed on the employer either practically or economically. The ensuing risk of increased liability is a legitimate one that employers are obliged, because of the comprehensiveness of workers' compensation, to accept. An employer's liability as determined under the Workmen's Compensation Act is not an undue hardship, and a discriminatory safety policy to minimize that liability is not a bona fide occupational

requirement.
42. Even if the Respondent could argue real and
significant

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hardship from a factual standpoint in respect of its increased cost under the worker's compensation scheme consequential to exempting Mr. Bhinder from its hard hat requirement, in our opinion, the public policy inherent to the Canadian Human Rights Act is such that it should, and does, override such hardship. In short, the Respondent cannot, in our view, argue in any situation that its additional cost under workers' compensation renders an otherwise discriminatory safety policy a bona fide occupational requirement.

43. The Respondent has engaged in a discriminatory practice in pursuing its hard hat policy and not exempting the Complainant, Mr. Bhinder, from its application, in contravention of paragraphs 7(a) and 10(a) of the Canadian Human Rights Act. The Respondent has not established that its hard hat policy is a bona fide occupational requirement within the meaning of paragraph 14(a) of the Act with respect to the Complainant.

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159.
DECISION
For the reasons given, the Complainant is successful, and the Respondent is found to be contravention of sections 7 and 10 of the Canadian Human Rights Act.

In our opinion, considering all the circumstances of this case, the Complainant should receive $14,500. as special damages, representing approximately one year's lost salary. The Complainant has suffered a loss of employment income due solely to the Respondent's discriminatory employment policy, but the Complainant also has a duty to mitigate. He was only able to mitigate to an insignificant extent his damages as of the date of the hearing, undoubtedly because he had to seek alternative employment as a maintenance electrician at night, given that he had another job, with Inglis, during the daytime. The Respondent's liability for the Complainant's loss of salary must be limited to a reasonable period of time, and in our opinion, one year is appropriate. Considering all the circumstances in this case, we do not think there should be an award of general damages.

ORDER
1. The Respondent, the Canadian National Railways, is ordered to give the Complainant, Mr. K.S. Bhinder, the opportunity of continuing his employment as a maintenance electrician with the Respondent, and provided Mr. Bhinder delivers to the Respondent in writing, within thirty (30) days of the date of this Order, notice that he wishes to be reinstated and

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160.
continue his employment with the Respondent, he shall be so reinstated within seven (7) days of delivery of such notice.

2. The Respondent is ordered to exempt the Complainant, Mr. K.S. Bhinder, from the application of its hard hat policy and regulation in its Toronto coach yard.

3. Upon Mr. Bhinder being reinstated to his employment, the Respondent shall extend to Mr. Bhinder the same seniority for all purposes, including with respect to tenure of position and rate of pay, as if he had not been absent since December 5, 1978, but rather had continued to work as a maintenance electrician to the present.

4. The Respondent shall pay to the Complainant fourteen thousand five hundred ($14,500.) dollars within thirty (30) days of the date of this Order, as special damages in compensation for his loss of salary.

Dated at Toronto this 31st day of August, 1981.

Peter Cumming,
Chairperson,
Human Rights Tribunal

Mary Eberts,
Member,
Human Rights Tribunal

Joan Wallace,
Member,
Human Rights Tribunal