

T.D. 1/90
Decision rendered on January 22, 1990

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JOHN BELYEA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

STATISTICS CANADA

Respondent

TRIBUNAL: JOHN McLAREN
AMIN GHALI
MURRAY KULAK

DECISION OF THE TRIBUNAL

APPEARANCES:

JAMES HENDRY, Esq. Counsel for the Canadian
Human Rights Commission.

ROBERT WATT, Esq. Counsel for J. Belyea

BARBARA RITZEN Counsel for Statistics Canada

DATES OF HEARING: May 15, 16, 17, 1989

LOCATION OF HEARING: Calgary, Alberta

A. THE COMPLAINT

The complaint in this case is brought by Mr. John Belyea of Calgary against Statistics Canada, alleging discrimination against him on the grounds of disability in a matter related to employment. The complaint form was dated August 14, 1986 and was subsequently amended on September 4, 1986. Both complaint forms refer exclusively to epilepsy as the basis for the discriminatory action. Mr. Hendry for the Human Rights Commission with the consent of Statistics Canada sought to amend the complaint further by adding allergy and a hernia condition as disabilities on the basis of which Mr. Belyea had also suffered discrimination. The tribunal agreed to this amendment.

Mr. Belyea's complaint is founded on an alleged breach of s. 7(a) of the Canadian Human Rights Act, S.C. 1976-77, c.33 (as amended)

7. It is a discriminatory practice, directly or indirectly.
(a) to refuse to employ or continue to employ any individual

.....
on a prohibited ground of discrimination.

Among the "prohibited grounds of discrimination mentioned in s. 3 of the Act is "disability". It is Mr. Belyea's claim that Statistics Canada discriminated against him by refusing to employ him as a Census Representative in May and June 1986, during the federal census of that year, because he suffered from epilepsy, an allergy and a hernia condition. Statistics Canada for its part denies that the reason for Mr. Belyea not getting the job was related to his disability, but to his lack of a car. Even if this could be described as discrimination, which is not conceded, the requirement of a car for the work of a census representative was a bona fide occupational requirement under s. 14(a) of the Canadian Human Rights Act.

B. THE FACTS

In February, 1986 John Belyea was enrolled as a part time, mature student at the University of Calgary. He was informed by an officer of Centre 70 (run by Employment and Immigration Canada) that Statistics Canada was looking for census representatives to assist with the administration of the federal census that spring.

Mr. Belyea filled out and signed an application form which he sent in to Centre 70. In filling out the form he responded to Question 7 which asked about disabilities by inserting that he could not engage in heavy lifting and

suffered from allergy and epilepsy (both under control with medication).

In his evidence Mr. Belyea explained that his doctor had advised him not to lift heavy loads because of his hernia condition, which he interpreted as meaning loads from 50 to 100 lbs.

He further explained that the allergy from which he suffered was sinus related and responsive to medication. It only became a significant problem in damp, humid conditions.

On his epileptic condition Mr. Belyea testified that after a period of deterioration in the early 1980s, during which he had been subject to more frequent seizures, the latter had been brought under increasing control by medication by early 1986. As the type of epilepsy from which he suffers has an "aura effect" he is forewarned of the onset of an attack and is able to take his medication in timely fashion. He had not had a seizure for over a year when he made application for the job. However, his doctor had advised against him driving until the gap between seizures was more substantial. He was in fact holding a valid driving license at the time.

John Belyea considered the prospect of the federal census job attractive. It had no set hours, as far as he could tell, which would give him some flexibility if temporarily he was not feeling too well. Moreover, it was an outside job, and he had done census work before. He testified that he had worked on the municipal census in the previous two years, as well as since, and had no trouble in completing his canvass area of 330 homes in the two weeks prescribed including call backs. This job, he estimated, had taken him between twenty four and thirty six hours. He had also done some canvassing work for a marketing firm. Finally, it was an employment opportunity of which his doctor approved, promising reasonable hours and exercise. During cross examination Mr. Belyea indicated that his doctor had suggested that he limit himself to part time employment of from sixteen to twenty four hours a week. He also testified that he had worked in concentrated bursts, giving as an illustration his work during a provincial election as an advanced poll clerk when he had logged eleven hours on each of three consecutive days.

The nature of work on the federal census and the demands made on the census representatives was described to the tribunal in the evidence of Mr. Gerry Demers who is Assistant Director of the Prairie Region of Statistics Canada. He has held that position since 1976. Some of his points were elaborated upon by Mrs. Beth Yetman, who was Census Area Manager for part of the City of Calgary during the 1986 census. Mrs. Yetman had previous experience as a

census representative in West Vancouver in 1971 and as a census area manager in Calgary in 1981.

Mr. Demers characterized a census as "a basic inventory taking of the entire population of a country". Canada, he felt, is a leader in the field because of the fact that the census is taken every five years. According to Mr. Demers the federal census is a demanding operation, because of the short time frame in which it has to be carried through. Although the census has a small permanent staff, the five year censuses require the addition of thousands of temporary staff, all of whom have to be trained, organized and supervised. The temporary staff are hired in sequence, starting with the District and then the Area Managers who are responsible for a region of a province (e.g. southern Alberta and Calgary) and areas within that region respectively. Each Area Manager is responsible for appointing his or her census Commissioners who supervise the census at the more local level. It is the latter who hire, train and supervise the Census Representatives who are the "foot soldiers" of the enterprise. It is the representatives who deliver the census forms to each house in the localities for which they are responsible, answer enquiries from householders or residents, edit completed forms which are returned by mail and then conduct a follow up of those who have not completed the forms properly, or who have failed to respond at all.

In 1986 the census commissioners were hired in mid-March and received training for their jobs. They were informed that they were responsible for interviewing candidates and hiring the census representatives to cover their general localities. In that year Statistics Canada had received direction from the federal government to give preference in hiring to full time students as part of the latter's incentive program for summer employment (the impression given was that it was actually youths who should be hired as opposed to those who were in full time education). This requirement was communicated to the commissioners. It was expected that the commissioners would conduct interviews with and administer an examination to candidates in April.

Representatives were hired by mid-May. Thereafter, said Mr. Demers, the pace of events quickened. By May 16 the representatives were expected to have completed a home exercise which was sent in to the commissioner. On May 22 they received a half day of instruction on their responsibilities. Between May 26 and May 31 they had to complete the "drop off" of census forms to all households in their localities. Mr. Demers testified that the number of residences to be covered would have varied from four hundred to four hundred and fifty in an "easy residential area" to perhaps one hundred in a more

difficult city core area. He explained that there are two forms which are administered,

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one, the shorter, to the majority of the population, the other, the longer, to every fifth household. A special form is also administered to residents who own agricultural property (sometimes the principal place of residence of such people is in cities). The representatives are expected to keep details of each delivery in a log book, to try and make contact with occupants, to explain the purpose of the form and to answer any questions which may be posed. During the period of the drop off each representative is required to devote two half days to training on collectives (i.e. multi-residential buildings such as hotels, motels or hospitals) and on editing the forms. Mr. Demers also noted that, while six days is set aside for drop off, it is considered desirable that representatives aim to complete the process in a shorter period of time, to offset the effect of contingencies which, he said, seem to get in the way of timely completion (e.g. illness, other obligations etc.). He estimated that a representative working assiduously could expect to do twelve or fifteen drop offs in an hour. The ideal would be to finish this process in three to four days which would mean at least one hundred houses a day, or nine hours of sustained work.

In 1986 Census Day was June 3. That was the day when those who had received forms were required to self-enumerate themselves and mail in the completed forms to Statistics Canada. Mr. Demers indicated that there is usually a seventy five per cent mail back rate. Each census representative is required to register each mail back in his or her log book. From June 9 or so representatives were required to engage in call back: to have occupants who had not done so to complete the forms, and where necessary, to amend forms which had been incorrectly completed. It was considered desirable that this task be completed within two weeks. Mr. Demers indicated that it was difficult to put an average figure on how long this would take, but pointed to it as a frustrating and time consuming process as it would often require multiple call backs before personal contact could actually be made with the laggards. Mr. Demers was not able to give an average figure for the amount of time that call back would take. Mrs. Yetman testified that she had asked one of the representatives, a highly efficient person whom she knew, to log her hours during the 1986 census. This individual had done the complete job in thirty seven hours. This, she felt was exceptional, and remembered other representatives talking in terms of fifty two hours.

In explaining the qualities required of a census representative Mr. Demers stressed effective communication, good judgement, conscientiousness and energy. He did not ascribe particular significance to experience in similar

types of employment. It is a rule that a representative shall not work in his or her own immediate locality for reasons of confidentiality. In the brochure introduced into

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evidence by Mr. Hendry for the Commission (Exhibit HR-3) entitled "Census Representative The Job For You" on page 2 reference was made to the "qualities" for the job which candidates must possess. Included were the words:

Have full-time use of a car and valid driver's license in rural areas and in some urban areas.

Mr. Demers was of the view that a car is essential to the job of census representative if that individual is to complete the job satisfactorily in the tight time frame. He interpreted the reference to the need of car "in some urban areas" as meaning suburban areas, conceding that a car might be a liability in a more compact downtown area with a concentration of apartment blocks. The value of a car he saw as enabling the representative to get to and from the beat quickly in order to use the hours available for both drop off and call back efficiently. He indicated that the car was of greatest value during the call back period when frequent returns to the area had to be made at odd times. Mrs. Yetman stressed in her evidence that a car is essential in carrying out the functions of census representative, taking into account the need for pick-up of supplies, drop off, travel to training sessions and the sometimes multiple callbacks.

Mr. Demers asserted that Statistics Canada had no policy against hiring epileptics. He did, however, admit that in the training of census officials there was no specific reference to the requirements of the Canadian Human Rights Act. Moreover, he did not know whether they were specifically advised against discriminating on "prohibited grounds".

On April 14, 1986 Mr. Belyea received a call from Mrs. Margaret Barclay, the Census Commissioner for the general area of Calgary in which Mr. Belyea lived. It was Mrs. Barclay's task to administer the census in that part of south-west Calgary, to hire and train census representatives, provide them with their supplies and to ensure that they did their work effectively and efficiently within the time scale established by Statistics Canada.

In our view it is important that attention be paid to the context of this initial communication and the personalities of the two people involved. Mrs. Barclay was phoning because she had received John Belyeals application and was anxious to determine whether he would be satisfactory for the job.

Margaret Barclay is an individual who strikes one as enthusiastic, energetic, warm-hearted and somewhat effusive. She speaks quickly, even excitably. She was well aware that the satisfactory completion of the hiring process was important to the success of the census in her area. Accordingly, she had to be assured that the individuals were capable of doing the job demanded of them during the tight

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time frames established by Statistics Canada. By contrast John Belyea is a cautious, deliberate individual who measures situations carefully, especially as they relate to his own capacity to carry out assignments. He tends to ask questions the answers to which will provide him with a clear basis for making a decision. His answers to questions are reflective and he does not commit himself to a position unless he is satisfied that he can do so confidently having weighed the pros and cons. In the initial phone conversation John Belyea wanted to know whether there were any difficulties with him doing the job in a way which took account of his disabilities, as a prelude to him deciding whether he was capable of doing it. To some extent there were different agendas in this conversation which seem to have stood in the way of a full understanding by each of the other's position. The problems were no doubt accentuated by the fact that Mrs. Barclay as someone new to census work did not have all the answers to John Belyea's questions at her finger tips.

John Belyea was anxious to canvass the question of whether he would be able to do the job in light of his ailments. There is conflicting evidence about the discussion of his epileptic condition. His recollection was that when he raised the issue with Mrs. Barclay, she dealt with it in what he considered to be an offensive manner. First of all, he said, she asked "when was my last fit" and then "how often"? She followed those questions with the comment "that they (Statistics Canada) don't want a person to 'knock on door and faint on doorstep'" (Transcript p.74). So upset was he with what he considered to be ignorant stereotyping, that he interrupted the call which he had taken on his landlady's phone and indicated that he was going to take it on his own phone. In the meantime he provided himself with a pad and pencil to make notes. Margaret Barclay's recollection was different. She was willing to concede on the basis of the notes which she made soon after the conversation that she had made a comment in the context of the discussion on epilepsy that "public appearances" were important to Statistics Canada. However, she added that Mr. Belyea's epileptic condition was of no concern to her.

The Tribunal is satisfied that Mrs. Barclay did make an insensitive remark about epilepsy as a possible embarrassment to Statistics Canada. Moreover, we are of the view that Mr. Belyea was justifiably annoyed at it. We

consider below whether this comment is relevant to the claim that Statistics Canada through Mrs. Barclay discriminated against him on grounds of his disability.

Both John Belyea and Margaret Barclay recalled that he had told her that because of the current state of his epilepsy he was not able to drive a car. His recollection was that she told him that without a car he would not be chosen in

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competition with candidates with cars, and that, even if there were not enough people with cars, his disabilities would militate against his selection. The tribunal discounts this statement. It does not jibe well with other evidence which he gave which demonstrates that Mrs. Barclay was ready to discuss particular areas which he could service by bus and on foot. Mrs. Barclay did make it clear to him that he could not cover the area in which he lived as that was against the policy established by Statistics Canada. Among several possibilities canvassed were coverage of the area comprising C.F.B. Calgary (Currie Barracks) just north of where he lived and an area beyond that which was served by the number 7 bus route which passed close to his residence, although he balked at covering part of that area which was detached from the main part and not easily accessible by bus. Assuming that he might not be able to carry a full load of documents at one time, he raised the possibility of having a storage point from which he could replenish the stock of forms to be delivered. A drug store in the latter area was mentioned as a possible base. Mrs. Barclay agreed to look into the matter. If Mrs. Barclay expressed some doubts about John Belyea's ability to do the job, they were, we believe as much a result of his expressed concerns, as of hers.

Discussion also took place on the allergies. John Belyea told Margaret Barclay that these were well under control, and that there would be no particular problem during the time period when the census had to be carried out. Mrs. Barclay was left with the impression that there might be some down time if weather conditions happened to be unfavourable.

John Belyea's hernia condition was considered in the context of his concern to know what might be expected of him in terms of the weights he would be expected to carry. Mrs. Barclay mentioned that there would be two "apple box" size cartons of the supplies which each representative would need and which would have to be picked up from her house. He testified that he indicated to her that this would be no problem as he would be able to enlist the services of a friend to make the pick up. There was some uncertainty as to what he could expect in the way of weight demands in terms of the material

he would have to drop-off at residences. Mrs. Barclay had no idea of what the exact weight of a full bag would be (it is now clear that it is 11.5 pounds). All she could say was that the bag was the size of a flight bag. John Belyea's evidence was that he saw no problem with handling this. Mrs. Barclay's recollection was that the issue of Mr. Belyea's ability to handle the supplies boxes was not canvassed during this conversation and that she was left with distinct impression that he entertained reservations about his ability to manage the weight.

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The evidence of John Belyea and Margaret Barclay is at odds over what he said were the number of hours which he could work each day. His recollection is that he suggested to her that he could work at three hours at a stretch, then needed a rest, but could resume after an hour long break which he would spend at home. Mrs. Barclay was adamant that he had indicated to her that he could only work for three hours a day and that this was on the orders of his doctor. It was her understanding (assuming an average figure of three hundred and fifty houses per area and six days allocated for drop-off) that a minimum of six hours and 60 houses a day would be required to cover the drop-off segment of the representatives' work. Accordingly, she had concluded that Mr. Belyea would probably not be able to do the work. It was this that prompted her to suggest, as John Belyea remembers her doing, that there might be a statistical job associated with the census which he could do. She undertook to make inquiries through her supervisor, Mrs. Yetman. Mrs. Barclay's evidence on this matter was not very coherent. Although she distinctly remembers Mr. Belyea stating that he could do no more than three hours a day, she also suggested to him two days later that if he took time out to rest what might be an eight hour job per day could easily become a sixteen hour job. This suggests that John Belyea did in fact indicate that he might be able to do a pattern of three hour work periods linked by one hour rest periods, although the comment may well have been tentative (a "may be"), as some of his statements seem to have been. Both Mrs. Barclay and Mrs. Yetman recall him suggesting that possibility at the interview which they held with him on May 5, 1986.

The April 14 telephone conversation ended with John Belyea feeling that he was being discouraged from pursuing the job of representative, because of his epilepsy and probably also because of his other disabilities. Margaret Barclay for her part was inclined to believe that he should be employed in some capacity by the census, was worried about his lack of a car and his own limited assessment of his capacities and the implications of both factors for employing him as a census representative. Any other reservations that she had related to the slow responses which he seemed to give to questions, which made her wonder about his communications abilities in the position of census

representative. Although for the reasons suggested above these individuals were not entirely on the same wavelength and were not fully hearing each other, which goes a long way to explaining the apparent conflicts in evidence, our reading of the evidence is that at this early stage the door had not been shut by Mrs. Barclay to Mr. Belyea's employment as a census employee, even a census representative. Given her lack of familiarity with her job, a natural propensity to try and help and a desire not to entirely prejudge the situation before further consultation, we find it difficult to conclude that she had

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removed John Belyea, even mentally, from the list of candidates she had contacted.

Mrs. Barclay gave evidence that after this first conversation with Mr. Belyea, she contacted her supervisor, Mrs. Beth Yetman, the Census Area Manager for a third of the City of Calgary during the 1986 census. Margaret Barclay indicated that she told Mrs. Yetman about her discussions with John Belyea and his concerns about whether he would be able to handle the job, given his disability, in particular the handling of loads. She also related to her supervisor that he would only be able to work three hours a day. When she mentioned the lack of a car, she testified that Beth Yetman had stopped her, and said that that matter concluded the issue in her mind. It was impossible, the supervisor had said, to do the job of census representative without a car. Even if it was, there was no question, given security considerations, of Belyea using a stop off point to store material. She also informed Mrs. Barclay that the C.F.B. area was being handled by relatives of service personnel, and that the statistical job was not available.

Mrs. Barclay phoned Mr. Belyea a second time on April 16 and told him that she could not hire him. According to his evidence she informed him that the statistical job was one which was impossible to do without a car, as it involved travelling to various points in the city. On the census representative position her line, according to his evidence, was that she could not take the risk of hiring him, because of the time and energy which needed to go into carrying out the functions within the time limits set by Statistics Canada for the census. Her testimony was not markedly different. She indicated that she had told him that his apparent inability to carry weights and the fact that he could only work three hours a day had counted against him. She had added, she said, that he would need either extra time or help from her to complete the job. Mrs. Barclay testified that it was on this occasion that Mr. Belyea had mentioned that he could enlist the services of a friend to allow him to collect the two boxes of supplies. Both individuals remember Margaret Barclay suggesting that, given Mr. Belyea's

lack of car, he would take sixteen instead of the eight hours which she said was the norm. He also recollected her suggesting that in order to finish the drop-off phase of the work in time he would have to cover approximately one hundred houses per day. He was, he related, told that the federal government was more interested in seeing youths hired than students. Both Mr. Belyea and Mrs. Barclay are agreed that she told him that, although she did not expect to hire him, he was free to take the examination for census representatives which would be held on April 18.

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The evidence of the two people conflicts to some extent on how the issue of John Belyea's epilepsy was handled. He suggests that he asked Margaret Barclay point blank whether he was being discriminated against because of his epilepsy, at which point she ended the call by telling him that he could take the exam. His opinion was that she was actively discouraging him from proceeding further. Mrs. Barclay's evidence was that Mr. Belyea on hearing that he would not be hired, indicated that he felt that he had been discriminated against and intended to take the matter to the Canadian Human Rights Commission. This, she said, caused her great anxiety because she could not see how she had done anything wrong. As far as she was concerned he was not being hired because of his lack of a car and his own doubts about his ability to carry out the job.

Mr. Belyea wrote the examination on April 18. He gave evidence, substantiated by evidence for Statistics Canada, that thirty eight people wrote. Of those who scored over the informal passing grade of 60% the range was from 63% to 100%. John Belyea scored 90%. Both he and Margaret Barclay remember a conversation after the examination. It was his recollection that she tried to discourage him, although he could not recall her reasons. Mr. Belyea called Mrs. Barclay on April 21 or 22 and was told by her that he had passed the test. They both recalled that he suggested to her that he might be able to get a car, but would have to check with his doctor.

An interview was arranged between Mr. Belyea and both Mrs. Barclay and Mrs. Yetman, the census area manager, for May 5th. Mrs. Yetman testified that after John Belyea had indicated to Mrs. Barclay in the second phone call of April 16 that he meant to take the matter to the Canadian Human Rights Commission, both Mrs. Barclay and Mrs. Yetman had been advised by the latter's immediate supervisor, Mr. Terry Hunt, the Census District Manager, that the candidate should be allowed to take the exam and that he should be interviewed. As Margaret Barclay had expressed unease about doing this alone, it had been agreed that both she and Mrs. Yetman would interview him. John Belyea recalls that Mrs. Yetman who conducted the interview stressed the need for a car to do the job effectively and efficiently. She had also made

it clear that it was not possible to establish a drop box. He indicated that when he sought to get further information on the weight he would be expected to carry the figure thirty pounds was mentioned.

The evidence of Mrs. Yetman and Mrs. Barclay on what transpired at the interview was substantially in accord. Mrs. Yetman recalled that she attempted to take Mr. Belyea through the census form to ask him how he would answer questions which might be raised. She found that he seemed to be incapable of giving a direct answer, being more likely to

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raise another question. Discussion took place on his disabilities. John Belyea had indicated that he could not drive, because of doctors orders. He did mention that a Statistics Canada poster about the job of census representative which he had looked at at the University of Calgary had had reference to the need for a car crossed out. His allergy was only a problem in damp, humid conditions. Mrs. Yetman testified that the day of the interview was such a day, and that she was of the view that he was suffering as a result. Indeed, she said, he had indicated that the day in question would be a difficult one for him to work. On the issue of hours of work she remembers him stressing initially that he would have to limit himself to three hours a day. When he was asked whether he might return after a break, his response was another "maybe", but that he could not guarantee it.

In her evidence Mrs. Yetman indicated that she had explained that an absolute minimum of houses to be covered in a day during drop off would be sixty, which assuming three hundred and fifty residences in the area would consume the whole six days. It was her recollection that Mr. Belyea was not sure he could do even that. Mr. Watt, appearing for Mr. Belyea asked Mrs. Yetman to explain the apparent discrepancy between her recollection of what the complainant said about hours of work and the terms of the letter which Statistics Canada had written to the Commission responding to the complaint (Exhibit HR-8). In the latter Mr. Fellegi, the Chief Statistician of Canada, had said in relation to Mr. Belyea

He also informed us that he could only work for three consecutive hours, but that after a one hour rest he was ready for another three hour period.

Mrs Yetman indicated that Mr. Fellegi had been mistaken. Her recollection, she said, was clear. On the issue of the weight of the census bag, she doubted that she had suggested to John Belyea that the weight was thirty pounds. She admitted that she had signed a statement after an interview with the investigator for the Commission which contained that figure, but

suggested that she had been mistaken, the result of confusion between the supply boxes and the census bags.

Both Mrs. Yetman and Mrs. Barclay indicated that the interview persuaded them that Mr. Belyea was not someone they should hire for the job of census representative. He was without the use of car which they, and especially Mrs. Yetman, considered to be essential to the job. Moreover, there was nothing in what he had said in the interview which left them confident that he would be able to meet the demands of the job if he was to try and do it without a car.

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Subsequently John Belyea phoned both Mrs. Yetman and Mrs. Barclay about his status and was told to await a letter. On May 21 he received a form letter, dated May 15 (Exhibit HR- 6), which advised him "on the basis of the examination and place of residence of candidates, all positions for the office of Census Representatives [had] been filled".

C. THE LAW AND ITS APPLICATION

Section 7(a) of the Canadian Human Rights Act makes it a discriminatory practice "directly or indirectly . . . to refuse to employ or continue to employ an individual . . . on a prohibited ground of discrimination". Among the prohibited grounds of discrimination in s. 3(1) of the Act is "disability".

"Discriminatory practice" and "discrimination" are nowhere defined in the statute. Human rights jurisprudence in Canada has recognized a fundamental distinction between "direct discrimination" and "adverse impact discrimination". In *O'Malley v. Simpson Sears Ltd.* (1985] 2 S.C.R. 536 McIntyre J. characterized "direct discrimination" as "a practice or rule which on its face discriminates on a prohibited ground" (at p. 551), and "adverse impact discrimination" as "a rule or standard which is on the face of it neutral, which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees" (at p. 551). The common thread is that the practice or rule in question results in a person being subject to adverse treatment because of the "group, class or category" to which that person belongs, rather than because of his or her individual merit (see *Insurance Corporation of British Columbia v. Heerspink* [1978] 6 W.W.R. 702 (B.C.C.A.) at p. 708).

The Supreme Court of Canada has made it clear that human rights legislation must be interpreted in a liberal, purposive manner. In the unanimous decision of the Court in *Action Travail des Femmes v. Canadian National*

Railway (1987), 76 N.R. 161 (S.C.C.) Dickson C.J. asserted that the purpose of human rights legislation is "to give rise . . . to individual rights of vital importance". Although recognizing that in construing the provisions of such legislation word must be given their plain meaning, the chief justice stressed that it is important that "full recognition and effect" be given to the rights in question. He warned against searching "for ways and means to minimize these rights and to enfeeble their proper impact" (p. 162).

In the present case Mr. Hendry for the Commission argued that the complaint related to "adverse impact discrimination". He did not attempt to suggest that Statistics Canada had consciously discriminated against Mr. Belyea because of his disabilities and in particular his epileptic condition. Rather, he asserted, the conduct of the

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employees of Statistics Canada in dealing with Mr. Belyea's application for employment as a census representative had an adverse impact on him because of his disabilities. More especially, Mr. Hendry argued, the evidence supported the contention that those employees had stressed the need for a car knowing of his inability to drive because of epilepsy and had raised objections to his doing the job by bus and foot, because of the view which they entertained that his allergy and hernia would prevent him completing satisfactorily the tasks demanded of him. He went on to argue that, a prima facie case of adverse impact discrimination having been made, the respondent had failed to demonstrate that the requirement of a car for the job of census representative was a bona fide occupational requirement under s.14(a).

Ms. Ritzen for Statistics Canada argued that the Commission had not made out a case of discrimination. The reason that Mr. Belyea had not succeeded in his job application was that he did not have a car. All of the other complications in the case flowed from that reality. She went on to suggest that the argument that he did not have a car was because of his epilepsy was not correct, because he would have been granted a license by the motor vehicle authorities in Alberta had he applied at that time. Indeed, the fact was that he had a subsisting valid license at the time of his application for the job. No evidence had been adduced as to why Mr. Belyea's doctor had advised him against driving. Assuming that the tribunal was to find that a prima facie case of discrimination had been made out, Ms. Ritzen argued that the requirement of a car for a census representative was a bona fide occupational requirement under s. 14(a) of the Canadian Human Rights Act.

The burden of proof in establishing a prima facie case of adverse effect discrimination is on the complainant. This was clearly established by McIntyre J. in *O'Malley v. Simpson Sears Ltd.* (1985] 2 S.C.R. 536. Justice

McIntyre defined a prima facie case as "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (at p. 558). There is also strong authority in several recent tribunal decisions that the correct burden of proof in discrimination cases is the civil one, i.e. a preponderance of evidence on a balance of probabilities (see *Balbir Basi v. C.N.R.* (1988), 9 C.H.R.R. D/5029; *Corrigan v. Pacific Western Airlines* (1988), 9 C.H.R.R. D/4993).

Having reviewed the evidence in detail the tribunal finds that Mr. Belyea has failed to make out a prima facie case of adverse impact discrimination in this complaint. The Statistics Canada brochure which was introduced into

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evidence, "Census Representative - The Job for You?" (Exhibit HR-4) makes it clear on page 2 that full time use of a car and a valid driver's license was a requirement in "some urban areas". We consider it entirely reasonable for Statistics Canada to establish that requirement and to exercise its discretion based on experience in determining in what urban contexts a car is required. The requirement is clearly not discriminatory on the face of it. Nor is it, in our opinion, discriminatory by virtue of adverse impact. It is surely within the capacity of any employer to decide that a particular job is one which requires an ability to drive and use a vehicle. Were it not so a wide range of organizations, institutions and business would be seriously incommoded in their operations. The necessary effect of such a requirement is that some people will be excluded from consideration for a job in which an ability to drive is deemed to be essential or at least important. However, it is not only individuals who are disabled from driving who will be adversely affected but anyone who for any reason does not have a vehicle available and /or is not in a position to drive one. This could well include those who cannot pass the test, or who for economic reasons do not have access to a vehicle. Individuals with disabilities are not being singled out consciously or unconsciously for special treatment in the case of an employment condition of this type. It is thus different from the situation in *Ontario Human Rights Commission v. Etobicoke* [1982] 1 S.C.R. 202 in which the age requirement for firemen only operated against those who had reached the maximum age, and that in *O'Malley v. Simpson Sears Ltd.* [1985] 2 S.C.R. 536 in which the requirement of working on Saturdays would effectively only impact negatively on those whose religious beliefs caused them to treat that day as a day of rest. An employment practice can only be classified as discriminatory which singles out an individual or group of individuals for adverse treatment because they exhibit one or more of the characteristics mentioned in s. 3(1) of the Canadian Human Rights Act. That such an individual or group is indirectly adversely affected by a reasonable job

requirement that excludes a broader range of people is not sufficient to warrant a finding that a prima facie case of discrimination has been made out, unless, of course, an intention to discriminate can otherwise be found.

It is possible that what appears to be a non-discriminatory job requirement is used in a particular case as a means of denying access to an individual because he or she exhibits one of the characteristics mentioned in s. 3(1). It may well be discriminatory if what is an ostensibly reasonable job requirement is being used to deny an individual or a group of individuals employment which they are capable of carrying out satisfactorily. An example would be the use of an educational requirement which is used to deny a member of a minority racial or ethnic group employment or advancement

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when that person has the clear capacity to do the job in question effectively. In this present complaint the major argument of the Commission on behalf of Mr. Belyea is that, notwithstanding the claim of Statistics Canada that it was merely applying a neutral and reasonable job requirement "the complainant was denied the job because he was disabled by virtue of his epilepsy, and no attempt was made at reasonable accommodation of him because of his other disabilities, the allergy and hernia condition.

We recognize that Mr. Belyea had some cause for concern at his treatment. As we have indicated in our review of the evidence, we have found as a fact that Mrs. Barclay made an insensitive remark about epilepsy during her conversation with him on April 14, 1986. That was uncalled for and John Belyea was justifiably offended and annoyed. Indeed, it points up the importance of federal agencies, such as Statistics Canada, including in their training processes material relating to adverse stereotyping and the avoidance of discrimination. Having said that, however, it is important that this comment be viewed in context. The fact that it was made is not dispositive of the issue of whether Mr. Belyea was discriminated against because he suffers from epilepsy. There must be a causal relationship between the statement and the action of the individual who makes it or of the institution under whose authority it is made. As we have suggested in our examination of the evidence relating to the phone conversation of April 14, 1989 between Mrs. Barclay and Mr. Belyea, we have concluded that Mrs. Barclay far from removing the candidate from consideration went out of her way to be accommodating. She not only made a suggestion as to another census job he might be eligible for, but also was willing to see whether arrangements could be made in terms of location, transportation and storage so that it would be possible for him to do the job of census representative without a car. It is true that there were differences of recollection over what was said about the hours of work which Mr. Belyea could manage, and that Mrs. Barclay was vague

about the weight of the census bag. We do not see any of this as supportive of the proposition that Mr. Belyea was the victim of discrimination in relation to employment on the grounds of epilepsy at that point in time. If there were misunderstandings, as there seem to have been, they were the result of the dynamics of the conversation: on the one hand Mrs. Barclay's desire to get the job done but at the same time to accommodate John Belyea if she could; on the other the understandably tentative and quizzical stance of the candidate.

What transpired thereafter did not, in our opinion, change things. The evidence is clear that Mrs. Yetman considered that a car was essential to the carrying out of the job of census representative. She said so clearly to Margaret Barclay during the phone call which they had after the

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latter's first conversation with Mr. Belyea. We do not see any evidence which would suggest that this opinion was being used as a shroud for a conclusion reached on other grounds, i.e. John Belyea's disabilities. Mrs. Yetman was an experienced census worker. She was perfectly well aware of the pressures to get the job done during the tight time frame established by Statistics Canada. It was her reasonable judgement that Mrs. Barclay should not hire candidates who did not have a car available. No doubt the other problems which Mrs. Barclay raised in relation to Mr. Belyea's position would have confirmed her in her view. We do not see them as in any way determinative.

The evidence relating to the second conversation between Mr. Belyea and Mrs. Barclay on April 16 is somewhat garbled. There is no doubt that the latter told the former that he could not be considered for either the statistical job or the position of census representative. Moreover, while the evidence mentions the lack of a car specifically in the context of the statistical job, the assumption on the part of both Margaret Barclay and John Belyea seems to have been that this was also the major impediment in the case of the job of census representative. That Mr. Belyea thought so is, we feel, born out by the fact that in a conversation with Mrs. Barclay on April 21 or 22, he raised the possibility of his getting a car and his doctor's permission to drive it. The references made in the evidence of Mrs. Barclay about the April 16 call to the candidate's anticipated inability to do the job in timely fashion were, we believe, reflective of her attempt to explain why she felt he would not be able to do the job, given her understanding of the concerns which had been raised in part by him during the first conversation. They related not to his epileptic condition but to his hernia and particularly his inability to carry certain loads and to work for prolonged stretches of time. It is true, as we have suggested in our analysis of the

evidence, that Mrs. Barclay misread what Mr. Belyea was saying about the number and pattern of hours he could work during the first two conversations. Moreover, she seems to have been in some confusion about the true nature of the weights he was capable of lifting. In that sense she was working under mistaken assumptions. However, we do not see them as relevant, because the decision that John Belyea was not a suitable candidate for the job of census candidate was reached because he did not drive a car. This we have found was a reasonable condition for Statistics Canada to have applied.

Even if we were to accept that Statistics Canada had some latitude here as to whether they could hire census representatives without cars, our reading of the evidence on the demands of the job and the pattern of work which Mr. Belyea was suggesting would leave legitimate doubt in the mind of a census commissioner about his ability to get

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through the job satisfactorily without complications, i.e. the need to apply other human resources to help him finish in time. While Mr. Belyea had experience with the municipal census and had acquitted himself well in that role, it is clear from his evidence that that was a job which was somewhat simpler in its demands, and required a less intense time commitment. The pattern which he suggested of three hours on the job and one off is a modest variation only if one assumes that there is no time between work on the job and the rest period. Because Mr. Belyea needed to rest at home, it would be necessary to allow for bus time, including time needed to get to and from the stop, waiting time and the period actually travelling. It does not seem fanciful to suggest that this could amount to double the time off for rest purposes, especially as Mr. Belyea would not be complete master of his time in moving to and from his house. The result would be that a day of nine hours of drop off could well run to thirteen hours. Given the fact that there was also time needed during that period for training sessions concern about job completion in the case of Mr. Belyea during the drop-off period might well have been legitimate.

Nothing that happened after April 16 altered the situation. True Mr. Belyea passed the exam convincingly, but the basic problem of the lack of a car was not resolved. Although Mr. Belyea was optimistic that he might be able to get hold of and drive a car, those hopes were dashed by his doctor's refusal to consent. It is our reading of the evidence of the May 5 interview with Mrs. Yetman and Mrs. Barclay that, if there was any doubt in Mr. Belyea's mind as to why he was not being offered a job as a census representative, those doubts would have been cleared up at that meeting. He was told that the reason that he was not being hired was that he did not have a car available to drive. We attach no significance to Mr. Belyea's report that in

the poster which he had viewed at the University of Calgary the need for a car had been crossed out. There is no evidence that Statistics Canada had done or ordered anyone to do that. No reference was made at the May 5 meeting to his epilepsy, except insofar as he mentioned it as the reason for his not driving. Again, any confusion there might have been over weights to be carried and the pattern and hours of work was irrelevant to the issue of his lack of a car. Moreover, if this had been an area in which discretion might have been exercised in favour of a non-driving candidate, the answers of Mr. Belyea about his ability to work after three hours plus a rest, and difficulty in working on damp, humid days because of his allergy would have added to the already legitimate doubts about his capacity to carry through the assignment of census representative without complication.

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D. CONCLUSION

We have found that the complainant, John Belyea, and the Canadian Human Rights Commission have not made out a prima facie case of discrimination against the respondent, Statistics Canada. Therefore the action brought under s. 7(a) of the Canadian Human Rights Act fails and the complaint is dismissed. Accordingly, it is not necessary for us to consider the issue of whether the respondent has satisfied the terms of s. 14(a) that the use of a car was a bona fide occupational requirement. From what we have said above we would have had difficulty in not characterizing it as such.

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Dated at Victoria, British Columbia, this
1st day of December, 1989.

John P.S. McLaren, Chairman

Amin Ghali

Murray Kulak