T.D. 2/94
Decision rendered on January 25, 1994

CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JEAN-MARC BOIVIN

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

CANADIAN ARMED FORCES

Respondent

TRIBUNAL DECISION

TRIBUNAL: Norman Bossé - Chairman
Aimée Poulin-Lauzon
Alain Roy

APPEARANCES: François Lumbu, Counsel for the Canadian Human Rights Commission

Johanne Levasseur and Major Randall Smith, Counsel for the Respondent

DATES AND PLACES
OF THE HEARING: May 3, 4, 6 and 7, 1993
May 17, 18, 20 and 21, 1993
Montreal, Quebec

TRANSLATION

THE COMPLAINT

On November 14, 1988, a complaint was filed under section 7 of the Canadian Human Rights Act, S.C. 1976-1977, chapter 33, as amended (hereinafter referred to as the Act) by Jean-Marc Boivin (hereinafter referred to as the Complainant).

The Complainant alleges the following:

[TRANSLATION]

> The Canadian Armed Forces are acting in a discriminatory manner and contrary to section 7 of the Canadian Human Rights Act by refusing to continue to employ me because I dislocated my right knee during a military exercise on April 25, 1988. As a result of that accident, I was urged to sign an application for release from the Armed Forces. I was in fact released on May 11, 1988.
>
> Since July 1988, I have been completely recovered from this knee injury. I consider myself fit to perform the work of an administrative clerk, which I had elected when I enrolled in the army on February 23, 1988.

THE FACTS

Having applied to enrol on July 15, 1987, the Complainant was enrolled in the Canadian army on February 23, 1988. It should be noted that in the medical examination report for the purpose of his enrolment (exhibit I-25) he had stated that he had previously suffered dislocation of both knees.

Training began on March 7, 1988 at the Collège Militaire de St-Jean, but was interrupted by a knee injury on April 25, 1988, consisting of a dislocation of the right patella.

At the medical examination on April 26, 1988 (exhibit C-1, tab 3), at which a recurrent dislocation of the right patella was observed,

release for medical reasons was recommended by the army's doctors, and as a result the Complainant was released on May 11, 1988.

After being released, if we refer to exhibit C-1, tab 4, the Complainant sent a letter to Perrin Beatty, Minister of National Defence, on June 7, 1986, relating the following:

[TRANSLATION]

> I met with a doctor at the Maisonneuve hospital, a knee specialist, according to him, I could return to the army without problems after I healed. He took off my cast immediately and I had physiotherapy. I have no problems.
>
> The army doctor told me to come back to the base after I healed, but in Montreal they want me to start everything over again, which would be long and pointless, in my opinion.
>
> I would like to be considered to be on sick leave and not to have resigned or been dismissed. I would like to continue to serve in the army. I believe that I am competent. I liked the group and the discipline. I was preparing for a career in administration. I find it regrettable that the running accident is not being taken into consideration. At unemployment, I am considered to have had an accident on the job; at the army, on recurrence from an accident. I dislocated my patella before, a long time ago, when I was a child. When I was hired, I was perfectly fit. I provided a medical statement as to my past and present health status. The army was aware of my earlier accident. In passing, I would say that I am in perfect health.

EVIDENCE OF THE COMMISSION AND THE COMPLAINANT

The evidence of the Commission and the Complainant rests to a large extent on the report by Dr. Godin, dated March 22, 1990, and introduced as exhibit C-4. After reviewing the chronology of the Complainant's medical history, Dr. Godin stated the following opinion:

[TRANSLATION]

This is a 24-year old patient who presents a history of external dislocation of both patellae.

The recent event in April 1988 responded well to conservative treatment and since that time the patient is entirely asymptomatic and is engaging in normal work and normal activities.

However, this patient is still a candidate for other episodes of dislocation of the patella which might occur during intense physical exercise.

It would, however, be useful to complete the investigation with axial tomographies of both patellae in extension, because such an examination would show any misalignment that does not appear on standard

radiographs. If this examination showed anomalies suggesting misalignment of the patellae, a tendon transfer would be indicated in the event of another episode of dislocation of the patella.

In addition, there is the problem of the intra-articular osseous fragment in the left knee which could be removed by arthroscopy without leaving any permanent sequelae.

If, in the event of another dislocation episode, and if the tomography showed some degree of misalignment, the tendon transfer surgery is minor surgery which produces very good results and does not cause permanent sequelae in a majority of cases.

The following is the information we obtain from examining Mr. Boivin's file, and from a physical examination.

In reply to the questions:

1. Mr. Boivin does suffer from recurrent dislocation of the patella. However, there has been only one

recurrence, involving the right patella, and there has been only one episode of dislocation of the left patella.

2. Mr. Boivin is fit to hold the position of administrative clerk in the Canadian Armed Forces.

3. Mr. Boivin must be considered to be a candidate who is fit for doing military training work, considering that his examination is normal at present, other than for the presence of the varus and recurvatum which are structural anomalies of little clinical significance, if there are no other episodes of dislocation of the patella. This remains a possibility, considering that the patient is asymptomatic at present and has been since April 1988.

I have reviewed the documents in the orthopaedic literature concerning dislocations of the patella. These are the "classical" documents of the orthopaedic literature, which confirm that this problem may be found in a patient who has the habitus of Mr. Boivin, and I believe that the most significant predisposing factor in Mr. Boivin is the recurvatum. I believe that his present condition suggests that there is a history of dislocation that has been treated medically and that has not caused any permanent sequelae, in

view of the present examination and the functional condition of the patient. I believe that in the event of a recurrence this patient could be improved permanently by a tendon realignment and that the intra-articular fragment could be removed by arthroscopy without leaving permanent sequelae.

The Complainant also testified himself as part of his evidence; his testimony before the Tribunal was very frank both on examination-in-chief and on cross-examination. The Complainant explained to the Tribunal that he very much wanted to be a member of the Canadian Armed Forces as an administrative clerk, and also told the Tribunal his view of the military training and the misfortune he had had of injuring his knee, which misfortune he attributes to the fact that his boots were too small. He described his great distress when faced with the attitude of the

army's doctors or military personnel during his stay in the military hospital, particularly Drs. Moreau and Lorion, who gave him to understand that because of his recurrent dislocation he would be released from the army. He then summarized everything he had done to obtain a medical report confirming that he was fit for service and finally his approach to the Minister of Defence and his complaint to the Human Rights Commission.

He has never given up his physical activities, such as walking, badminton, baseball and so on, and he has had no problems with his knees since 1988.

EVIDENCE OF THE ARMY

The army's evidence rested primarily on the medical testimony of Drs. Serge Gagnon and Smallman.

Dr. Serge Gagnon explained the medical standards that apply in the Canadian Armed Forces and the reasons why the Complainant was given a medical release: the Complainant's medical standards did not meet the minimal medical standards established by form A-MD-154-000/FP-000, both in terms of the geographic factor (factor G) and in terms of the occupational or functional factor (factor O), as a result of his injury on April 25, 1988. As Dr. Gagnon explained, the Complainant's classification went from G2 O2 to G4 O3 and, as is set out on pages 7-18 and 7-19, the standards in the case of a recurrent dislocation read as follows:

Lower extremities:

(3) knee - any internal derangement of the knee joint or symptomatic instability of the knee until surgically corrected to restore adequate function (G4 O3). (Respondent's book of documents, Volume IV, tab 20, page 7-18)

Miscellaneous:

(3) old unreduced or recurring dislocations of major joints or instability of a major joint (G3-4 O3-4). (Respondent's book of documents, Volume IV, tab 20, page 7-19)

In his testimony, Dr. Gagnon explained why the medical standards were adopted, and described what limitations affect an individual classified G4 O3.

[TRANSLATION]

A. Well I did it in two steps: I gave him a G rating and then an O rating. First, I asked myself what locations Mr. Boivin, because of his medical problem which had become apparent in the training course and because of the limitations that I think, that applied to him at that point, what places I thought he could not ... he would not be able to work in. And I thought, and I still think, that he was unfit to work at sea on a boat where the motion of the boat almost always causes knee problems in people who have already had knee problems, and that he was unsuitable for working in the field because of what I mentioned earlier, that is, the irregular surfaces on which they are required to run or march and carry fairly heavy things on their shoulders.

I thought that his recurrent dislocation, because he had previously had episodes, I saw in his file that there had been episodes before, it wasn't just the episode that had happened in Saint-Jean, a recurrent dislocation of the patella required me to say that there were very certainly some sort of anomalies in his knee that made him more likely than the other recruits to have a dislocation. As a result, there was a risk, in my opinion, that these anomalies would cause other complications if he were ever authorized to work in the field or on a boat. Not necessarily that this would cause another dislocation, but knee problems, pain or fluid collecting, water on the knee.

So since I thought that he was unfit to work in the field, in view of the definitions we saw earlier, in the field and at sea, I attributed the ... I recommended that he be category G4.

Second, I asked myself what duties he would not be fit to perform because of his knee problem, and as I said earlier, people who have problems like these, it

> is important that they be given control over the type of activities they are going to do. So I thought that limiting physical exercise to his own pace applied, which is by definition O3. So I gave him categories, codes G4, O3.
>
> Q. Had any other doctors before you recommended a medical category, doctors who were working for you?
>
> A. Yes, Drs. Moreau and Laurion ... in fact, I approved the categories that had been attributed by Dr. Laurion and Dr. Moreau. (transcript, Volume 6, pages 904 to 906)

In order to understand clearly the assessment of the factors and categories that is done in a medical examination, Dr. Gagnon gave us the following explanation:

> We are going to deal particularly with the categories ... the medical factors G and O because these are the only ones that are a problem in this case. What I want to say here is that it is very important to understand that factors G and O, geographic and occupational are really distinct from each other and that when the military doctors attribute a G rating and an O rating, they do it in two steps, based on two groups of very specific criteria.
>
> In order to attribute category for factor G, the military doctor asks himself or herself in what places, in what locations the individual, with a particular medical problem and a particular employment restriction, will not be able to work; and based on the doctor's response, he or she will say that an individual should be given a G1 or G2 or G3 or up to a G6, there are six possible numbers.
>
> Q. Right away, Mr. Gagnon, can you tell us what is the best rating? Is it 1 or 6?
>
> A. The best rating is G1. I will give you the details in a moment of what each of the ratings

corresponds to. I just wanted to emphasize the fact that it was very different because it is important that there be no confusion on this point.

Second, after the doctor has attributed a geographic rating of 1, 2, 3, 4, 5 or 6, he or she asks himself or herself what are ... what the nature of the duties is, what type of duties this individual,

because of his medical problem and the limitations he has, will not be able to carry out. And here the doctor will give the rating - depending on his or her answer - the doctor will give a rating from 01 to 06; 01 being the best and 06 the worst.

When the doctor evaluates the geographic factor G, the three criteria he or she will use are climate, the nature of the housing available and living conditions and the availability of medical services.

Q. Excuse me, Mr. Gagnon, for interrupting you again, is that what is found at page 2-2 of the document?

A. Yes. So the three criteria are listed there, and based on one or two or three of these criteria a G1 to a G6 will be attributed to the individual. G1 and G2, there is no big difference; essentially, these are people whose physical condition will permit them to perform duties in any location where they may be required to serve in the Canadian Forces.

G3 will be attributed to a member who has a medical problem that requires attention about every three months, and these people with ... who are given a G3 do not necessarily need the services of a doctor. They can occupy a position without restriction in the field, what we call in the field or at sea; this criterion is very important because it occurs again in G4.

Q. Is this what we find at page 2-3 of the document?

A. Yes, in fact, you have a more detailed description of the situations in which a G1, G2, G3 or G4 can be attributed. And G4, essentially, in practical terms, people who have a medical problem which, in the doctor's opinion, cannot be attended to in the field or at sea, must be given a G4. This is the nuance between G3 and G4.

A G5 is attributed to a member who has a medical problem that is so serious that he or she needs to have ... to be able to see a clinical specialist quickly. It is generally agreed that this means in a few hours, one, two or three hours. And a G6 is attributed to a member who has a medical problem that is so serious that he or she is unsuitable for work in any place, any location where there are military positions for him or her.

If we now move on to factor O, occupational factors, as I said a moment ago, the criterion here is what is the nature of the work that he or she can or cannot perform, in fact. So O1 or O2, the nuance is very small, essentially it is attributed to members who have a medical problem ... who have no medical problems or a medical problem that is almost ... very unimportant.

O3, which is attributed to a member who suffers a minor medical or psychological ailment that prevents him or her from performing demanding work or working under stress for long periods. So that individual will receive an O3.

I can also tell you that in practice one of the criteria that is in current use by military doctors is that when we feel that an individual presents a problem and should do physical exercise at his or her own pace, that is, we should never tell the individual: do this. And he or she should have the opportunity to say: excuse me, my medical problem, I can't ... I refuse to do it. When we write something like that, the commander has to comply with the individual's request. The individual has been

considered to have the right to determine what efforts he or she can make or cannot make. (transcript, volume 6, pages 883 to 887)

Q. What does that mean, doctor, if he or she meets the medical standards?

A. "This member can be considered for reenrolment at a later date if he meets the medical standards."

What that means is, if at some point after being released the individual returns and the medical rating that had been awarded to him, that was attributed to him when he was released, no longer applies because, or his clinical condition has improved or he has had an operation that has enabled him to recover normal function, and accordingly, G2, O2 can now be attributed to him, what this document says, is: we are not sending you away forever, we are not releasing you forever. We are telling you: you can come back if the cause of your release disappears by itself or as a result of treatment.

Q. And to your personal knowledge has he corrected this situation?

A. No, no. The question was raised by Dr. Smallman, was addressed by Dr. Smallman, and he believes that the surgery that could theoretically be a treatment is not recommendable in his case.

As a result, his medical problem, which is a recurrent dislocation of the patella, would still justify a G3 or G4, O3, which is not acceptable for the enrolment standard, which is G2, O2. (transcript, Volume 6, pages 931-932)

To complete his explanation of the reasons for the medical release, Dr. Gagnon explained standards 5E(42), which were applied to the Complainant as a result of the fact that he had started his military service less than three months before. The standards are as follows:

Irregular enrolments or transfers

29. Compulsory release of members who were irregularly enrolled or transferred may be effected under item 1(d) or 5(e), as applicable. In addition to the reasons detailed in the special instructions in the table to QR&O 15.01, release under item 5(e) shall be applied to those members who were enrolled with a medical category that subsequently is found to have been unsatisfactory or who, as a result of an undisclosed medical condition existing prior to enrolment, became unfit during the first three months of paid service and could not be successfully employed by reallocation. Members released under either item are not entitled to the medical benefits prescribed in QR&O 15.05. (exhibit I-23, Respondent's book of documents, Volume IV, tab 22, CFAO 15-2, Annex A)

After reviewing the Complainant's medical records, including the report by Dr. Godin, Dr. Smallman arrived at the following conclusion (exhibit C-3):

" HISTORY AND PHYSICAL EXAMINATION

This 26 year old patient states that he was enrolled in the Forces in early March 1988, started his recruit training, injured his knee on 26 April during an obstacle course and subsequently was released from the Forces on 11 May.

The injuries occurred during an obstacle course, as mentioned. He simply slipped as he was going up an obstacle. His knee cap went out of place and required reduction by a physician. He was seen in follow-up at

the Base and subsequently was released from the Forces on 11 May.

He was seen in the MIR a number of times in March with blisters on his feet. These were treated appropriately from 23 March to 30 March. Subsequently on 20 April he had problems with his feet and finally

on 25 April he dislocated his knee and this was reduced by Dr. Moreau with the patient under sedation.

Earlier in May the patient was evaluated for anxiety and problems with adaptation. He also seemed to be having problems with coordination. He was noted to be well motivated with respect to staying in the Forces. His release medical was performed on or about 4 May 1988. He was released, by his statement, on 11 May with a category of G4 O3 with a diagnosis of luxation recidivant rotule.

He had injured his knees previously at the age of 11. He dislocated or subluxed the left first and then six months later the right. He returned to a full activity profile as a child and has been active in many sports over the years including volleyball, baseball, walking, bicycling and cross-country skiing. He has never been a runner, it does not interest him and he has not, therefore, gone through a rigorous training program of the type that would be necessary for him to succeed in recruit training for the Canadian Armed Forces.

Subsequent to his release from the Forces he has been a physically active individual involved in the above mentioned sports but, by his admission, no real knee symptoms. He has, however, not attempted any further training of the type that is necessary for the recruit phase of the Canadian Armed Forces.

On physical examination he is a tall, slender man with slight pectus excavatum. His right shoulder is higher than the left and he is of an ectomorphic habitus. He has long slender fingers. He does not seem to be hyperextensible, however, at the CMP joints of the fingers: they come up only to 90 degrees. His thumb can only be brought to within 2" of the forearm. His shoulders are not subluxable. His elbows have slight hyperextensibility. As he stands, however, he has 5 degrees of varus bilaterally at the knees and a recurvatum, when pushed, of 15 degrees bilaterally. His patellae measure 6 cm x 5 cm, are of normal height and of normal ratio between the length of the patella

and that of the infra patellar tendon. His quads circumferences are equal. His Q angle is 8 degrees bilaterally with the knees in extension and 10 degrees exterior with the knees in 30 degrees of flexion. His left leg measures 1 cm longer than the right. It really is not possible to completely evaluate his knees and hips with respect to torsion because he simply can not relax. When he lies in flexion, however, you can achieve 45 degrees of internal and external rotation of the lower extremity. At 90 degrees of flexion of the knees the feet move through an arc from 60 degrees to 0 degrees suggesting a tibial torsion. This combination of angles suggests that he has increased femoral anteversion and compensatory tibial torsion. There is no patellar pain or apprehension and subluxation test is negative. At 30 degrees of flexion the patellae can be moved between 1/4 to 1/2 of the width of the patella medially and laterally suggesting no abnormalities of laxity or the peripatellar tissues. There is minimal crepitus and no pain. The knees are stable other than the noted hyperextensibility.

CURRENT RADIOGRAPHIC FINDINGS

The patient, as a result of the examination on 25 March 1993, underwent special radiographs in order to document the physical findings with respect to his lower limbs. As a scoliosis had been noted on clinic exam this was confirmed radiographically. The degree of curvature was not felt to be clinically significant.

The radiographic examination and the CT scan showed significant anormalities. The standing varus of 5 degrees bilaterally was confirmed on three foot standing films; the normal tibiofemoral angle is 7 degrees of valgus.

The CT scan confirmed the marked rotational abnormalities of this person's limbs from hips to feet. The femur is abnormally curved to the front

with an angle of 30 degrees on either side versus a normal angle with a range from 7-21 degrees. At the level of the tibia there is extorsion of 50 degrees on the right and 45 degrees on the left versus a normal range of 24 degrees to 41 degrees. In addition, an osseous body is present either in the left knee or attached to the juxta articular soft tissues.

In addition, there are abnormalities of the morphology of the patient's knee caps in which case there is an undergrowth of the inner aspect of the patella in the resting position with the knees in neutral, that is to say in no flexion and no extension. The knee caps on both sides sublux to the side. In addition, there is a very shallow sulcus or groove in which the patella tracks during flexion and extension. This lack of a bony groove to provide osseous stability for the tracking of the patella also makes subluxation or dislocation likely.

SUMMARY

The patient is a well motivated individual who by virtue of personal drive has maintained the adequate physical fitness and essentially normal function in his day to day life of his lower extremities. This is despite the fact that they are remarkably at risk from dislocation on an ongoing basis by virtue of several factors which have been elucidated by the consultants Dr. Pyper and Dr. Godin as well as myself.

..., factors that make this man likely to dislocate his knee cap include: rotational abnormalities of the femur and tibia, varus abnormality of the knees; recurvatum of the knees; and an abnormally high location of the patella which takes it out of the normal bony groove which supports the knee cap through flexion and extension; the groove itself that is present to support this man's patella is almost nonexistent; his muscle development is less than normal in terms of the vastus medialis, this further diminishes the ability of this muscle to oppose the

subluxation forces and; finally, the soft tissues that support the knee cap are lax and one can easily sublux his knee cap in its position of rest with the knee at full extension.

Dr. Godin eludes to the fact that simple operations can make this man function normally. I submit that in order for this man to function normally he would need realignment of his patellofemoral mechanism through a tibia transposition, release of the lateral tissues, tightening of the medial tissues with advancement of vastus medialis, arthroscopy to remove the loose body and repair any cartilage damage that is present and, finally, bilateral high tibial osteotomies to eliminate his tendency to recurvatum and varus.

As this man functions, at this time, normally in his normal day to day life there is no indication to proceed with these procedures. However, this constellation of abnormalities is such that the probability of tissue breakdown when subjected to the extreme forces of recruit training, is very high. There would likely be permanent damage to his knees under such circumstances and there may well be, already, significant tissue breakdown.

One is always torn between what is right for the patient in terms of his physical wellbeing versus what the patient wants as a result of psychologically driven factors. In this case, while the patient's extreme motivation to become a member of the Armed Forces is noted and admirable, in my opinion the likelihood of him sustaining permanent damage to his knees as a result of the activities that would be involved in recruit training is very high. In addition, he would be required to perform in support of the combat arms clerical. Activities in support of an infantry unit mean that a soldier must be, in general, able to physically do stressful activities. He must be able to keep up with the infantryman, although, quite clearly, not to the duration or intensity of these highly fit men and women. For this

reason, I would not consider him fit for enrollment in the Armed Forces."

The first of the other witnesses that the Canadian Armed Forces called was Major Bibeau, who explained the structure of the Forces, how they are organized, their roles and their missions.

Next, Captain Durand, Deputy Commander in Chief of the Recruit School at the St-Jean military base, explained recruit training, the goal of this training and its role in meeting the objectives of the Canadian Armed Forces. Thus, he explained that it was the basic training of all members of the Armed Forces.

Finally, we heard Captain Michel Morency, who is in charge of administrative clerk career managers. Captain Morency explained the work of an administrative clerk, especially the work of a military administrative clerk.

The purpose of this testimony was to show the Tribunal that the requirements of the armed forces in respect of their military personnel are bona fide occupational requirements. The Canadian Armed Forces play a precise role which is critical in terms of a policy clearly defined by the government. According to this evidence, the army trains soldiers for a precise purpose, so that they will be able to play a precise role in precise circumstances: wars, crisis or national emergencies. In effect,

from one day to the next, an unforeseen event may occur at any time which will radically alter a soldier's living and working conditions. For example, a conflict erupts, and everyone is needed. There is no time for the problems of one soldier or another. The army must be capable of carrying out its mission immediately.

THE LAW

Canadian Human Rights Act:

SECTION 3:

"3.(1) [Proscribed grounds of discrimination] For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon

has been granted are prohibited grounds of discrimination.

(2) [Idem] Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex."

SECTION 7:

"7. [Employment] 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 15(a):

"15. [Exceptions] 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;"

SECTION 25:

"25. [Definitions] In this Act,

["disability" "déficience"] "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

CONCLUSION

It appears to the Tribunal that the applicant and the Commission have established prima facie evidence that Jean-Marc Boivin was

released from the army because of a physical disability, more specifically a "recurrent dislocation" due to a malformation of the knees.

On the other hand, the Respondent, the Canadian Armed Forces, contends that the release of Mr. Boivin is consistent with section 15 of the Canadian Human Rights Act.

The Respondent contends that Mr. Boivin's physical condition following the fall that occurred on April 25, which fall caused a "recurrent dislocation" of the knees, did not meet a normal occupational requirement of the Armed Forces for becoming a soldier. The applicant's physical condition changed from G2 O2 to G4 O3. The army's doctors then had to apply the medical standard set out in form A-MD-154-000/FP000, so that Mr. Boivin, who was a recruit and had not completed his training period or a three-month period of military service, became subject to section 15-2, Annex A, which provides that a member in this situation must be released.

The question that the Tribunal must consider is as follows: has the Respondent succeeded in proving that the physical condition required of Mr. Boivin by the Canadian army was a "bona fide occupational requirement"?

The decision in Etobicoke, [1982] 1 S.C.R. at 208, explains what tests a "BFOQ" must meet in order to comply with section 15 of the Canadian Human Rights Act:

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

Two questions must be considered by the Court. Firstly, what is a bona fide occupational qualification and requirement within s. 4(6) of the

> Code and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify? In my opinion, there is no significant difference in the approaches taken by Professors Dunlop and McKay in this matter and I do not find any serious objection to their characterization of the subjective element of the test to be applied in answering the first question. To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."

As may be seen, these tests are both subjective and objective. In the case at bar, it is apparent from the evidence as to the subjective test that the army acted honestly, in good faith, and with the sincerely held belief that the restriction was imposed in order to ensure that the army's mandate could be efficiently carried out, by having soldiers in good physical condition capable of immediately obeying and acting in any situation involving the security of Canada.

With respect to the objective test, were the medical requirements demanded of Jean-Marc Boivin reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public?

In answering this question, the Tribunal will clearly rely particularly on the medical report by Dr. Smallman, which explains the personal danger that military training would present for the Complainant. Having considered both the explanations and the tomography on the condition of Jean-Marc Boivin's knees, the Tribunal believes that if he were to engage in the occupation of soldier this would be a danger particularly to himself, and would accordingly endanger his fellow employees and the general public at the same time.

The Tribunal believes that the occupational requirements of the Canadian army for the position of soldier are consistent with the requirements explained in Bhinder, [1985] 2 S.C.R. at 580:

> "With respect, I do not think it is open to us under the statute to give the words bona fide a meaning which would have the effect of nullifying a provision which says that an employer will not be guilty of a discriminatory practice if the requirement he attaches to the job is a genuine requirement of that job. The purpose of s. 14(a) seems to me to be to make the requirement of the job prevail over the requirement of the employee. It negates any duty to accommodate by stating that it is not a discriminatory practice. I agree with McIntyre J. that discrimination is per se victim related but the occupational requirement is job related. This is, I believe, why s. 14(a) provides that a genuine occupational requirement is not a discriminatory practice as opposed to making it a defence to a charge of discrimination which would enable the employer to establish that he had discharged his duty to accommodate the particular complainant up to the point of undue hardship.
>
> The legislature, in my view, by narrowing the scope of what constitutes discrimination has permitted genuine job-related requirements to stand even if they have the effect of disqualifying some persons for those jobs. This was a policy choice it was free to make under the Act and, in my opinion, it has done so in a way which creates no conflict with the avowed purpose of the Act referred to by the Chief Justice. Section 2(a) of the Act makes it quite clear that what will not be tolerated under the Act are "discriminatory practices". The legislature has specifically provided in s. 14(a) that the attachment of a bona fide occupational requirement to a job is not a discriminatory practice. I do not believe it is open to the courts to query its wisdom in this regard."

In addition to the requirements set out in Etobicoke and Bhinder, the courts have imposed additional conditions. In order for an occupational qualification to be bona fide, as held in Alberta Dairy, [1990] 2 S.C.R. at 527 and 528, a duty to accommodate and, as held in Saskatchewan, [1989] 2 S.C.R. 1312 at 1314, a duty to carry out individual *
testings.

*
Sentence incomplete? - Tr.

The Duty to Accommodate:

As my colleague puts it in her reasons at p. 518:

"If a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be bona fide."

How then is Bhinder to be applied in light of the refinements found in Brossard and Saskatoon Fire Fighters? By virtue of O'Malley, there is a duty to accommodate in religious discrimination cases by reason of the general intent and spirit of the Code. In a case such as O'Malley, in which a duty to accommodate arises but the statute contains no BFOQ, the employer can discharge the duty only by showing that all reasonable efforts have been made to accommodate individual employees short of creating undue hardship for the employer. This does not change because of the addition of a statutory defence of BFOQ. The addition of the defence is relevant to the discharge of the duty but not to its existence.

Where a statutory BFOQ provision is present, its language cannot be avoided. With respect, McIntyre J. was right in Bhinder in saying that once that defence is made out there is no basis for an individual examination of the circumstances of each employee. The question, however, is how the BFOQ is established having regard to the duty to accommodate. I have referred above to the principle that in general a prerequisite to a successful BFOQ defence is a showing

that there was no reasonable alternative to a rule that does not take into account the individual circumstances of those to whom it applies. An employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer. What is reasonable in these terms is a question of fact. If the employer fails to provide an explanation as to why individual accommodation cannot be accomplished without undue hardship, this will ordinarily result in a finding that the duty to accommodate has not been discharged and that the BFOQ has not been established. In Roosma v. Ford Motor Co. (1988), 9 C.H.R.R. D/4743, a Board of Inquiry chaired by Professor P.P. Mercer (now Dean of the University of Western Ontario Law School) dealt with the Ontario Human Rights Code,

1981, S.O. 1981, c. 53 which deals separately with direct and adverse effect discrimination and makes the BFOQ applicable to both. The relationship between the BFOQ and the duty to accommodate in the case of adverse effect discrimination was aptly expressed as follows at p. D/4747: ...

Individualized Testing

The argument that individualized testing is a prerequisite to a successful defence under s. 16(7) and the Regulations is essentially the argument that the employer must justify the impugned requirement on an individual basis. In Bhinder v. Canadian National Railway Co., supra, at p. 589, McIntyre J. said:

> To conclude then that an otherwise established bona fide occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement to each

individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of s. 14(a). In my view, it was error in law for the Tribunal, having found that the bona fide occupational requirement existed, to exempt the appellant from its scope. (page 1312)

In my opinion, these cases point the way to the proper approach with respect to individual testing. While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis by, inter alia, individual testing. If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it. (pages 1313 and 1314)

The safe and efficient performance of a fire fighter's duties is imperative especially where a situation exists involving danger to the life of a member of the community or to a fellow fire fighter. It is my opinion that there is no

reliable testing procedure that will accurately determine how an individual will react or be able to cope with an emergency situation. (page 1314)

With respect to these two conditions, we believe that the Respondent has once again met its burden of proof as well as the spirit of the case law.

On the question of individualized testing, we believe that the Respondent's doctors had sufficient information to apply the occupational standards or requirements. First, we would recall that the Complainant had had to provide his medical records because he had dislocated both of his knees before he enrolled. Second, the army had a psychiatric report from Dr. Bruno Roy concerning the Complainant's

performance in training and his difficulties in completing it (Exhibit I-1, medical records):

[TRANSLATION]

> Patient presented himself here today, sent by Dr. Moreau because he has some problems adapting to his recruit course. In fact he has had to be retrained, that is, put in another platoon to begin his training over, starting last week. The patient says that he had a shock when he arrived at the Recruit School, he developed a lot of anxiety and that made him more awkward than usual, telling me he had previously had a few small problems with coordination.

As well, as a result of the fall and the radiography, the doctors were able to determine the condition of the Complainant's knees.

On the question of the duty to accommodate, we believe that this must be assessed in the specific context of the army. Mr. Boivin was a recruit in his training period. As a result of this recurrent dislocation, it became apparent that he could no longer meet the army's requirements without excessive constraints.

Because the condition of the Complainant's knees leaves no doubt as to his future limitations in terms of the requirements, it is clear that accommodation, in this case, would occur at the price of inefficiency. Although Mr. Boivin believes that he is capable of being an administrative clerk, the army's physical requirements are based not on the particular occupation of a member, but on the army first, as a service to the nation, in all its activities. The bona fides of these physical requirements is based much more on activities in the field, without regard for occupation, and there is nothing discriminatory about that. While it may appear a simple matter to accommodate one, two or an indefinite number of individuals who fall below the standards, the question arises of how far the Armed Forces should go without compromising their efficiency.

In a judgment rendered on April 25, 1991, in Robert St. Thomas, the Honourable Mr. Justice Isaac of the Federal Court of Appeal stated:

> "In my view, examination of this issue must take account of a contextual element to which, the Tribunal

> did not give sufficient consideration. It is that we are here considering the case of a soldier. As a member of the Canadian Forces, the Respondent, St. Thomas, was first and foremost a soldier. As such he was expected to live and work under conditions unknown in civilian life and to be able to function, on short-notice, in conditions of extreme physical and emotional stress and in locations where medical facilities for the treatment of his condition might not be available or, if available, might not be adequate. This, it seems to me, is the context in which the conduct of the Canadian Forces in this case should be evaluated."

In addition, we believe that Parliament has allowed the exception set out in section 15(a) of the Human Rights Act precisely so that this sort of situation could be avoided, and it must be interpreted in such a way as to allow it its full meaning and not to make it ineffective.

ACCORDINGLY, and for all these reasons, the complaint is dismissed.

Done at Rivière-du-Loup,
this 17th day of November, 1993

NORMAN BOSSÉ

AIMÉE POULIN-LAUZON

ALAIN ROY