T.D. 5/90
Decision rendered on March 29, 1990

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

Alain Rivard

Complainant

and

Canadian Human Rights Commission

Commission

and

Department of National Defence

Respondent

DECISION

BEFORE: Niquette Delage

APPEARANCES: René Duval Counsel for the
Canadian Human
Rights Commission

Alain Prefontaine and
Major Gouin-Boudreau Counsel
for the Department of
National Defence

DATES AND PLACES
OF HEARINGS: Montreal, Quebec, September 6 to 7, 1989
Ottawa, Ontario, October 30, 1989

TRANSLATION
FROM FRENCH
1: Appointment of Human Rights Tribunal

This Tribunal supersedes the Human Rights Tribunal appointed on December 20, 1988.

In accordance with subsection 49(1.1) of the Canadian Human Rights Act, I hereby appoint a Human Rights Tribunal composed of Niquette Delage, of the city of Montreal, in the province of Quebec, to inquire into the complaint against the Canadian Armed Forces filed by Alain Rivard on October 14, 1986 - as amended on July 10, 1987 - and to determine whether the acts described in the complaint constitute discrimination on grounds of disability under paragraph 7(a) of the Canadian Human Rights Act.
Done at Toronto, on September 5, 1989. Sidney N. Lederman. Q.C.

2: The complaint

On October 14, 1986, Mr. Alain Rivard filed a complaint with the Canadian Human Rights Commission. The complaint was subsequently amended on July 10, 1987.
The complaint submitted was that:

"[translation] I was not considered for positions as an administrative clerk because of a physical disability (a problem with my knee), in contravention of section 7(a) of the Canadian Human Rights Act. After being reclassified (G3O3) by Army doctors because of the problem with my knee, I asked to be considered for positions as an administrative clerk, for which I was eligible given my medical category, and the duties of which I was capable of performing despite the problem with my knee. In September 1985, the Army released me. I have since learned that, between September 1985 and April 1986, thirteen training courses were offered for clerk positions to persons who had been accepted for these positions." (HRC-1)

It should be noted that Mr. Rivard is not represented before the Tribunal, and that, on his behalf, counsel for the Canadian Human Rights Commission (hereinafter referred to as the Commission) stated at the outset that "[translation] Mr. Rivard has nothing to add". (Transcript, Vol 1, p. 4)

3: The facts

Alain Rivard served as a crewman (p. 36) in the militia - specifically in the Sherbrooke Hussards, an armoured unit attached to the 12e Régiment blindé du Canada (12 RBC) - for six years, before joining the Canadian

Armed Forces as a soldier in August 1980. He was put in the G2O2 medical category. He became a crewman in the 12 RBC, billeted at Valcartier, where he arrived on September 14, 1980 (p. 37). He served as a driver and gunner and outfitted vehicles such as the Lynx and Cougar (pp. 41-48).

In April 1984, Mr. Rivard suffered an accident on the Termoli range in Valcartier. He was about to climb up a ladder onto the roof of a quarter-ton truck, but the ladder came loose and struck him on the left leg as soon as he put his foot on it.

According to Mr. Rivard, the result was that "[translation] the lower leg was bleeding where it was scraped; the ladder also left a mark, but above that it was not bleeding at all" (Transcript, Vol 1, p. 78). Mr. Rivard was looked at by a doctor who was on the firing range at the time; the doctor gave him some medicine. At the end of the day, he went to see the doctor again; the doctor had him evacuated and told him to see a doctor in the morning (p. 79). The following morning, Mr. Rivard went to the hospital where, "[translation] they took X-rays of the leg; these showed that a blood clot was beginning to form inside, and the leg was beginning to turn red" (pp. 79-80). A little later in his testimony, Mr. Rivard said:

[translation]
"A: It was bothering me during the night; I slept very badly. Around four the next morning, I noticed that it was bleeding inside; it was turning red. I waited until 6:30 that morning and then went to the base.
Q: You didn't apply compresses or anything?
A: No, I kept the leg up in the air.
Q: And you reported for sick parade?
A: I reported for sick parade the morning after the accident, and they took X-rays and all that.
Q: Were the doctors there GPs or specialists?
A: They were GPs, Madam.
Q: And after the X-rays had been taken, what happened then?
A: Once the X-rays had been taken, there was the bandage that had been put over the scrape; they changed it and gave me pills to make the swelling in the leg go down, and then they sent me back to my unit; they told me to go back to my unit, do only light work, and keep the leg elevated.
Q: And what about the knee?
A: The knee was hurting. I told them it was hurting, but they said that they had to wait until the swelling went down to see what was wrong because . . . by the end of the week, the leg had turned blue

from knee to the ankle, the foot, it was completely blue." (Transcript, Vol I, pp. 80-81)

During the next fifteen days, Mr. Rivard, who was on light duties because of his injured leg, went back to the doctors several times. They noted that the leg was swollen from the knee to the ankle. They treated Mr. Rivard, who was given a week's sick leave. When he went back to his unit, Mr. Rivard performed light duties. His leg was getting better. He was able to walk, but there was a bump on the side of his leg. Mr. Rivard was assigned to administrative work. He got married during the summer, and was then transferred to Gagetown, where he rejoined his unit. He says that his leg was still swollen, but he was able to do normal work for a week (pp. 16, 18). He went to see a civilian doctor assigned to the base; the doctor gave him a week's sick leave and prescribed physiotherapy, after diagnosing a hematoma inside the leg (p. 17).

Mr. Rivard then went to a military doctor and underwent physiotherapy; he went to Dr. Menzies, a surgeon, and the decision was made to remove the hematoma. The operation was performed in August 1984 (pp. 19-20). Mr. Rivard was away from Gagetown during his convalescence, which was added to his annual leave; he then returned to his garrisoned unit and worked part-time, since there is less work to do when a unit is garrisoned than when it is in the field. Mr. Rivard again complained of pain, and the doctor he saw in September sent him to consult Doctors Menzies and Philips, who were surgeons and specialists. He was placed, at least temporarily, in medical category G4O4 (p. 22). An arthrogram was performed, and then an arthroscopy, which is an X-ray of the inside of the knee that is then examined with a magnifying glass (p. 24). These revealed nothing. The physiotherapy continued, and Mr. Rivard tried to resume his normal activities in his regiment (pp. 24, 96). At one point, Mr. Rivard complained of pain when he had to jump down three or four feet from a Lynx.

In January 1985, the Career Medical Review Board determined that Mr. Rivard's medical category was G3O3 "with restrictions" (pp. 25, 97). The restrictions were that he was not to run, to walk for longer than an hour, to stand for prolonged periods, or to jump. Because of the situation, Mr. Rivard met with a career manager in January 1985. The document identifying the nature of Mr. Rivard's problem is dated January 17, 1985. Dr. Scott Cameron's report reads, "This man has chondromalacia patella." The record of Cpl. Rivard's medical examination dated January 29, 1985, also states, in the section entitled "Medical observations/conclusions based on the examination,"*

* unofficial translation - TR.

that "Chondromalacia patellae has been unresponsive to restricted duties and medical management. Reviewed by Dr. Phillips who recommends permanent category with restrictions as below" (p. 97).

It was in February 1985 that he asked to become an administrative clerk, since he could no longer be a crewman. He said that he had no choice; he knew the requirements (p. 28). He did not ask about the necessary courses. He wanted a trade that would allow him to stay in the army (p. 29). He later talked with the clerk in his unit and learned that training (courses) was offered at the St-Jean d'Iberville base (p. 30), 11 courses in all (p. 33). He "[translation] knew what was happening" (p. 99). Between February 1985 and September 1985, he worked as a carpenter's assistant (p. 99) from 7:00 am to 4:00 pm (p. 100). He took his annual leave during the summer of 1985, and after he returned, in September 1985, he asked if there was any news about his application for an occupational transfer (p. 32).

The response he received in November 1985 was negative (pp. 32, 101-102). His application for occupational transfer was turned down for medical reasons. The official documents indicate that he was declared unfit for his trade (pp. 33, 102).

The army therefore had to release him for medical reasons.

[translation]
"MR. DUVAL
Q: Now, Mr. Rivard, you said that your application for occupational transfer was turned down and that you were told it was because of a medical problem. Were you told what medical problem?

A: No, they didn't tell me anything. They told me that it had been turned down, period. And with the release dates on the letter, and I left with that.
Q: But were you told why you were not allowed to change trades? That is my question.

A: Maybe because of the restrictions with the G3O3 medical category.

Q: Why do you say "maybe"?

A: Because I'm not sure. They never told me.

Q: They never told you?

A: No.

Q: They refused to allow it?

A: Yes.

Q: With respect to your release though, you were told why you were being released?

A: Yes, I was released for medical reasons, because of my G3O3 rating.

DUVAL: I have no further questions." (pp. 34-35)

Mr. Rivard decided to leave the army immediately, on December 6, 1985, although he could have stayed until July 1986 (p. 102).

On February 3, 1988, Mr. Rivard - at the request of the Canadian Human Rights Commission (p. 55) - saw Dr. Roger Morcos, an orthopedist, who performed an arthroscopy and determined, without seeing the army medical file (p. 56), that Mr. Rivard was suffering from chondromalacia patella. The medical certificate that he gave Mr. Rivard indicated that Mr. Rivard should take up a sedentary occupation (p. 58). At the time Mr. Rivard appeared before the Human Rights Tribunal, he was driving a delivery truck (p. 8).

4: The evidence

Mr. Rivard chose a military career. He knew what to expect. He knew that world, because he had been a militiaman for six years. He took the required medical exams and was placed in the G2O2 medical category. Without wishing to repeat the long explanations given in some of the testimony on the medical rating, the Tribunal deems it appropriate to summarize in particular the testimony of Doctors Smallman and Bélanger, an orthopedist and GP respectively; Major Bibeau also provided some useful information (pp. 138, 153, 174-176, 437-439).

It is primarily to the testimony of Dr. Bélanger, a colonel in the Canadian Armed Forces, that the Tribunal owes the following explanation. There is, in the army, a rating system known as the Medical standards for the Canadian Forces, which classifies an individual's ability to serve in the Armed Forces, and more specifically, to serve in certain professional military groups (CFAO-34-30, Tab 2, paragraph 3 of Colonel Belanger's Record Book, and Transcript, Vol 3, p. 541). "[translation] GO system, which is based on the factors "G" and "O", that is, the geographical and occupational factors; the system has six ratings" (p. 542).

This system establishes a soldier's fitness in relation to his or her intended trade within the army. The six codes are:

V for visual acuity
CV for colour vision

H for hearing acuity
G for geographical factor
O for occupational factor
A for air factor.

There are also six numerical ratings, from 1 to 6, with 1 being the best and 6 the worst. The same is true for both the G factor and the O factor.
The G factor is composed of three sub-factors:

1) climatic sensitivity to climate
2) environmenta) accommodations and living conditions
b) working conditions
3) medical care a) frequency of need
b) extent of care.

What about administrative clerks and their duties in light of the preceding?

"[translation] A: The work administrative clerks are required to do is not as arduous as that expected of combat troops, so they can suffer from minor complaints that may require them to ask to be deployed in fewer more restricted locations [dans moins d'endroits plus restreints] than (tank) crewmen," Dr. Belanger explained.

"[translation] First of all, the administrative clerk may serve in the three elements - Navy, Air Force or Army - interchangeably. The crewman, I beg your pardon, crewperson, is only employed in the Army, the land army, although he can be stationed in a garrison, either with the Militia, as an instructor, or in one of the schools, or in Gagetown. But the administrative clerk is likely to be sent anywhere, but the crewperson . . . is nevertheless expected [mais on s'attend quand même de la personne d'equipage] . . . He must, however, be able to do, in moderation, the same work as any other soldier: dig a trench, camouflage a vehicle, work in the Tropics or the Arctic, carry out his duties in the field, in rough, rugged terrain, or be able to work on board a Navy vessel that is rolling and pitching.

The administrative clerk's work also requires a certain amount of physical effort, even in garrison, to carry out tasks that might seem routine enough.

Q: For example?

A: For example, the clerk at the counter will work four hours, sometimes without stopping, standing behind the counter, that happens often. The clerk is a bit of a "gofer", you know, "go for this, go for that". They perform certain tasks, if I may say so, Madam Chairperson, that seem mundane; when you are standing in front of a filing cabinet, it is easy to look at the files on the third or fourth level, but when you need the files on the first level, it is not so easy to look for the documents, and it is hard on the knees - as we all know. So when you have to look for documents a number of times during the day, even that requires you to be in good physical condition.

Q: And by the first level, you mean the lowest drawer in the filing cabinet, and by the fourth level, the highest?

A: Exactly. The highest and the lowest. Carting boxes - like the one you have here - around from one floor to another, going to the mail unit with packages, moving your typewriter, getting it into a five-ton truck, and hauling it up and down a small stepladder, without help; it requires a fair bit of physical effort.

From the point of view of mental stress, well there are always emergencies: "I need this right away", "I want this message to go out yesterday, or sooner"; the larger the office, sometimes, the more panic there is; the boss is not always easily identifiable; in places here at headquarters, there are so many bosses that, in practical terms, there is no boss, because everyone is a boss, because there is a whole hierarchy of bosses, from the sergeant all the way up to the lieutenant-colonel; there is an enormous number of people in between. So administrative clerks need to be very fit, especially at the beginning, that is, as a private or corporal; when you begin in that trade, you start at the bottom and do most of the physical labour."

Still within a medical context, the Tribunal noted testimony to the effect that, in 1984-85, the Army had only one orthopedist; the military doctors assigned to the various bases across Canada were GPs who had received enough basic training in orthopedics to allow them to treat soldiers who required this kind of care.

Mr. Rivard was seen on sixty occasions by doctors, and on three occasions by surgeons, between April 1984 - the date of his accident - and January 1985 - the point at which he learned that he had become incapable of fulfilling his duties as a crewman.

First and foremost, a soldier

All the testimony presented to the Tribunal by the respondent stated that the first commitment of any individual who enlists in the army is to become a soldier. At all times, the individual - whether serving as a crewman, gunner, administrative clerk, cook, or anything else - is and remains a soldier. He takes up a military career for one reason: to defend his country against enemy attack. But what about the militia?

The militia is composed of individuals engaged in military activities on a part-time basis, usually on the weekend. From the moment Mr. Rivard gave up civilian life to join the army and take up a soldier's life, he went, according to the Tribunal's understanding, from being part-time in the militia to full-time in the army.

A soldier is first and foremost a soldier, and if a state of war exists, he must be able to perform the duties of a soldier for which he was trained. It follows, therefore, that an individual who occupies, for example, an administrative position within the army cannot forget his main vocation, even if his daily functions do not require him to carry a gun in the same way as a soldier in the field. The latter regularly engages in target practice and various activities that simulate the conditions that he would be faced with in an armed conflict. That is to say that an individual, man or woman, is not recruited into the army primarily as an office clerk, but as a soldier, and that individual is always called on to bear arms when necessary. Having been trained as a soldier, the individual will not be found unprepared; he can function as a soldier and assist his comrades in arms.

We also learned from the testimony that individuals assigned to "non-military" tasks - such as administrative tasks - are expected to return to military service so that they do not become sluggish in their sedentary tasks. The Tribunal understands this logic, since it arises from the commitment made by army recruits: they begin as soldiers, and they remain soldiers for all practical purposes until death or release.

"[translation] A soldier first and foremost" is a watchword that first appears on page 77 of the first volume of the transcript. It appears again on pages 165, 175, 202, 209, 253, 333 and 567, among others. Each of the six witnesses called before the Tribunal by counsel for the Canadian Armed Forces recited this creed, which is hardly surprising.

The recruiting campaigns leave no doubt that it is the military life that is being offered, not a career as a cook, a carpenter and so forth. The Tribunal also noted that the members of the Canadian Armed Forces have been rushed overseas as part of peace-keeping operations (p. 136), in Cyprus (p. 140) and elsewhere; Mr. Rivard was stationed in Cyprus from April to October 1983, where he worked with administrative clerks (pp.

62-69, 137, 143). Mr. Rivard asked questions of the administrative clerk assigned to his unit in Cyprus. He said, in response to questions from the counsel for the respondent, that he knew that administrative clerks were called on to serve in combat units, on ships, with UN forces overseas, and in units stationed on bases (pp. 62-63). Canadian troops go everywhere - to Syria, Israel and Namibia, for example (p. 146).

Moreover, the Tribunal noted that although a soldier may spend his entire career in one spot, this is not generally the case. Quite the opposite. Soldiers are sent to different bases in Canada, including bases in Northern Canada. Mr. Rivard, for example, was stationed in Valcartier and then in Gagetown. Moreover, members of the Canadian Armed Forces can find themselves on ships, since Canada now has a land, sea and air army (1971 White Paper on Defence, Canadian Government report on defence, Canadian defence policy, Transcript, Vol 1, p. 135).

The medical problem

It was a problem with his knee that led to Mr. Rivard's release, because he could no longer perform his duties.

At the time of his accident, his knee did not hurt. The pain started later (p. 79). The Tribunal found the first mention of this problem with the knee in a document dated September 4, 1984, under tab 12 in Dr. Smallman's record book, entitled External Consultation Report:* "today, Cpl. Rivard also relates another problem and that is of his left knee locking on extension when he is running" (Transcript, Vol 2, pp. 422-423).

None of the documents before this date consulted by the Tribunal mention the left knee. It is always the left leg. There is a mention of "a full knee and ankle ROM" on June 25, 1984 (tab 6). Commenting on the entry for October 9, 1984 - under tab 2 (Transcript, Vol 2, p. 432)

* unofficial translation - TR.
- "L knee full ROM", Dr. Smallman explained that ROM (range of motion) means that "[translation] the knee has a good range, the movement is complete." The meaning of ROM does not become clear until page 432. Dr. Smallman added that "he mentioned a locked joint and the pain in his leg" (p. 79). Under cross-examination by counsel for the Commission, he had the following to say, on pages 473, 474 and 475:

[translation]

"MR. DUVAL

Q: Let us suppose, for example, that an individual comes to consult you nine times with pain in the knee and an apparent hematoma and edema.

A: No, I do not think that what you are saying is right.

Q: What I am saying is not right?

A: No. Most of the visits you are referring to were for local treatment of that abrasion. During the first four or five visits, the abrasion and local treatment were discussed. The edema was noticed during this period, and so on.

Q: Doctor, is is not true that there is a note on the edema on April 28, 1984.

A: Yes.

Q: And that each time, I mean at each visit, it says that the patient complained of pain in the knee. The pain was still there. It did not disappear.

A: No, that is not true. There was the edema, there was the abrasion of the leg, but it was not noted . . . in most of the examinations it was not a problem with the knee that was noted.

Q: Doctor, at one point surgery was performed to drain the knee and remove a rather large hematoma that was sent to pathology; we saw the analysis earlier. Are you saying that a person could have a hematoma of that size in the knee and not be in pain? Is that your testimony?

A: The hematoma was not in the knee; it was in the tissue of the calf.

Q: The hematoma was in the tissue of the calf.

A: Yes. It was not in the knee. I do not think it was considered a problem with the knee, from what I see here. During the treatment of this injury, the patient began to have problems with his knee, and most of the initial treatment was to solve this problem, the hematoma that was there.

It has already been noted that the edema is not a real problem and that this is something that often happens, almost always after an injury to the leg."

Mr. Rivard himself stated that X-rays of the leg were taken at the hospital the morning after his accident. It was observed that the leg was reddened. Was he told to apply wet compresses to the leg? No (pp. 79-80). The Tribunal noted that Mr. Rivard first spoke of a redness that appeared at the hospital (p. 80). By the time of his examination, it had become obvious. Then later on in his testimony, he said that the redness appeared while he was at home (p. 80).

He said that after a week the leg had turned blue (p. 81). The doctors who examined him recommended that he keep the leg raised and perform only light work. He explained that this work was performed in an area accessible by a staircase with two flights of stairs, which he took in the morning, and then at noon when he went to lunch and returned, and again when he left work in the afternoon (p. 87).

Mr. Rivard, under the doctors' care, was placed on sick leave for a week, because - as he told us - his knee was acting up and the swelling in the leg was more pronounced (pp. 8, 84). He said that it got better during the week of rest, however (p. 84). Mr. Rivard used a cane to get around (pp. 83, 118-119). He also moved around with crutches (p. 118).

Mr. Rivard did not see a specialist or a civilian doctor at this point (p. 80). He could have consulted a civilian doctor, off-base on his own time, but he would have had to pay for the visit out of his own pocket; once he became a soldier, he was no longer eligible for the Assurance-santé du Québec card, since the Army provides free medical care. He took medication for two weeks to try to bring the swelling in his leg down (pp. 85-86).

He was operated on for the first time to remove the hematoma that had formed (p. 94).

After he was transferred to Gagetown, he said that he was not satisfied with the treatment he was following at that point; he had another examination because his knee was hurting again (p. 91). His leg was still swollen, although less so. According to Mr. Rivard, the pain in his knee persisted and physiotherapy was once again prescribed (p. 95). Eventually, they operated upon him: an arthroscopy was performed, and then an arthrogram (Transcript, Vol 2, pp. 433-434) (Transcript, Vols 1 and 2, pp. 91, 435).

Mr. Rivard resumed his normal activities; but he noticed that exercising caused him pain (pp. 96-97).

When Mr. Rivard learned in November 1985 that he could not become an administrative clerk - since he could not do the work - he decided to leave

the army on December 6, 1985, because he did not want to perform "duties" until July 1985.

[translation]

"TRIBUNAL

Q: What are duties?

A: On base, it could be to look after the barracks, you spend the night watching to make sure there are no problems in the barracks or the building, things like that. You might do that seven or eight times . . . you might get it seven or eight times in one month, although you usually get it once or twice a month. So you have an overload of work because you are leaving. So I decided to go as soon as possible. It served no purpose to stay there, it did not benefit me." (Transcript, Vol 1, pp. 102-103)

Did he appeal the army's decision to release him (p. 103 ff)?No. He did not lodge a grievance. Could he have? Certainly. Under section 29* of the National Defence Act respecting redress of grievances (Transcript, Vol 1, pp. 103, 120). Mr. Rivard said that he was not aware of this recourse (Transcript, Vol 1, pp. 104-105). Had he read the document that explicitly mentioned the possibility of appeal? No. This was apparently the document that announced his release (Transcript, Vol 1, pp. 119-120). Earlier in his testimony, Mr. Rivard said that he had never seen the document entitled "National Defence Headquarters, Career Medical Review Board, November 7, 1985, Career Disposition" that counsel for the Commission showed him (Transcript, Vol 1, p. 10).
Later in his testimony, Mr. Rivard responded to counsel for the Commission:

"[translation] A: No. They didn't tell me anything. They told me that it had been turned down, period. And with the release dates on the letter, and I left with that (emphasis added)." (Transcript, Vol 1, p. 34)

The Tribunal was not able to examine the release document, that is, the letter to which Mr. Rivard referred. Did this document contain information bearing on an appeal of the decision? Counsel for the respondent alleged such a reference in the document announcing Mr. Rivard's release (Transcript, Vol 1, p. 120).

As it was unable to clear up this point during the hearings, the Tribunal must conclude that Mr. Rivard gave up; this individual who made a conscious choice of a military career seems to have chosen, consciously or

not, to make no effort to obtain some explanation, still less to have his case reviewed (pp. 106-107).

French reads "article 27" - TR.

This decision had a profound effect upon him, as counsel for the Commission pointed out when he said, "[translation] It is very important because this is an area, Madam, in which we are dealing with people's careers." (Transcript, Vol 2, p. 482). This remark was in response to an objection from counsel for the respondent that counsel for the Commission was overstepping the bounds of cross-examination by implying that the decision to release Mr. Rivard might have been hasty. The Tribunal agrees with counsel for the Commission about the need to take one's time before deciding. And, in its humble opinion, Mr. Rivard should have asked some questions so that his departure from the army would have been less bitter and less hasty. After all, he could have stayed until July 1986. He chose to leave one month after the announcement of his release - that is, on December 6, 1985 - and there is no indication that between November 7, 1985 and December 6, 1985, he made any move at all to reverse the process.

[translation]

"Mr. Prefontaine

Q: Earlier you responded to a question from Mr. Duval, saying that no one had told you why you were being released.

A: I was simply told that I was "unfit" to be an administrative clerk. I did not try to find out more.
Q: Do you know what that means?

A: Well "unfit", in good French, means that you are not suitable.

Q: You knew that it was because of your medical category?

A; They said it was because of the G3O3. I did not understand that, because an administrative clerk can have a G3O3 rating. Maybe it was because of the restrictions, but even then I did not understand it." (Transcript, Vol 1, pp. 73-74)

The Tribunal also took note of the document dated November 7, 1985, under tab 5 in Captain Davis's record book. The front of this document contains no mention of the possibility of appeal. There might be some mention on the back, but it is impossible to tell.

According to the information on pages 110 and 112 of Volume 1 of the Transcript, Mr. Rivard was familiar with the description of duties for the position of administrative clerk (p. 110), and knew that one requirement was being able to take part in operations (p. 112), just as he knew he had to be able to return to a combat unit (p. 113) once he was back on his feet, which he did, moreover (pp. 96-97).

Counsel for the Commission drew the Tribunal's attention to the fact that from September 1985 to April 1986, thirteen training courses for administrative clerks were offered and two-hundred and sixty clerks were trained (p. 122).

In their statement, the Canadian Armed Forces described the role that the army plays in Canada and abroad, its structure, its medical requirements, the need to carry out all the duties listed in the general specification (Transcript, Vol 1, p. 116), because of the needs both here and abroad, since Canada participates on a continuing basis in peace-keeping operations in various countries.

During the 1980s, the army had a personnel shortage (p. 177). Furthermore, some positions were not open to women. Because of the shortage and the absence of women in certain off-base positions - on ships for example -some members of the armed forces had to be on duty more often than they should have; a rotation system was required, on the theory that "a change is as good as a rest", if we may put it that way. The nature of the duties to be performed, and the locations where they were performed, justified such rotation which did not, however, take place.
As for Mr. Rivard's duties as a crewman, with a G2O2 rating, the Tribunal noted at least twenty-two activities listed in Captain Davis's testimony, beginning on page 272 of Volume 2 of the Transcript.

The evidence shows that Mr. Rivard could not resume his duties as a crewman. He had to take up another trade, and, in light of his new and permanent medical rating of G3O3, he had to - in consultation with the career manager - look at appropriate positions. He was interested in a position as an administrative clerk.

[translation]
"Mr. Prefontaine

Q: Let us start at the beginning; you said that you consulted a small booklet that described the duties of an administrative clerk.

A: Yes.

Q: You only consulted one?

A: Several.

Q: Several?

A: Yes.

Q: You probably know that in the Armed Forces there are three types of brochure that apply to each member of the Forces; first there is a general specification that describes the duties of a member of the Armed Forces as such?

A: Uh-huh.

Q: Which is the same for everybody.

A: Yes.

Q: You also have specifications . . .

A: Excuse me a minute. I don't mind your questions, but I should tell you what I had at Gagetown when I went there. There was a big book with a description of the trade inside and medical ratings at the bottom; that is what I saw.

Description of the trade, that is all I saw.

Q: So you did not see the first brochure, the general specification that applies to everyone?

A: No.

Q: And you didn't see the brochure that is specific to the element in which you perform your trade, the Army or Navy, for example.

A: No.

Q: You did not look at those specifications?

A: I could not look at them; they gave me the book when I went in; there was a little room with books on the hundred or so trades in the army.

Q: So the only thing you saw was the specific tasks for the position of administrative clerk?

A: I looked at everything." (Transcript, Vol 1, pp. 116-118)

When he got his answer, he could see that, given the restrictions that accompanied his medical rating, the conclusion was as follows: "on medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy." (p. 334 and HRC-2)

What is to be understood by "unfit to perform his duties in his present trade"? Mr. Rivard could not return to his armoured regiment as a crewman because he could not perform the required duties or take part in the prescribed activities. So from the point of view of his present trade, the question is settled.

As for the rest of the statement, the Tribunal understands that Mr. Rivard, with a new medical rating that in principle allowed him access to another trade, was told that a position as an administrative clerk was not open to him. And the reason? Because - and this was the evidence offered by the Canadian Armed Forces - even if the G3O3 rating could open doors for him, the fact that there were specific restrictions accompanying that rating made it impossible. Moreover, in 1985, new directives - which first appeared in a notice dated October 24, 1984, that was in effect until December 30, 1985, and then extended indefinitely by a second notice dated December 30, 1985 - made the position of administrative clerk inaccessible to soldiers with problems such as Mr. Rivard's.

What did this notice say?

October 24,
1984

REMUSTER TO ADM CLK 831

RESTRICTION

Refs: A. CFAO 11-12
B. ADM CLK 831 - TRADE REVIEW 1983

1.Remuster referrals to ADM CLK 831, for all remuster types at ref A, must be fit for field and/or sea duty for remuster selection purposes. This proviso will be effective until 31 Dec 85.

2.Ref B identified specific remuster problems in the ADM CLK trade ratio of fit to unfit males, and the direction at para one to this memorandum is a consequence of the trade review disclosure. The subject shall be further addressed in the 1984 trade review.

J E P Lalonde
Col
DPCAOR
2-1106

December 30,
1985

REMUSTER RESTRICTION INTO

AMD CLK 831

Refs: A. 5077-1 (DPCAOR) 24 Oct 84
B. Minutes of the Annual Adm Clk Trade Review 1151-1 (PCOR/CLK/PM) dated 5 Jul 85

1.The reference A proviso requiring that remuster selections for Adm Clk 831 be fit for field and/or sea duty is hereby extended indefinitely. This direction satisfies the reference B recommendation to alleviate the trade problem associated with medically unfit personnel in trade.

R G Hurley
Col
DPCAOR
992-1106

What do these two directives mean? Captain Verville explains.

[translation]

"Mr. Prefontaine:
Q: And what does this directive tell us?

A: The directive instructs us to refuse any application for a remuster to the trade of administrative clerk if the individual in unfit for field or sea duty, peace-keeping activities, and so on, until December 31, 1985.

Q: Did the Armed Forces follow up on the problem? Under tab 4, we saw that a trade review had been carried out in '83 and that a recommendation had been made which led to the order that you have just described to us. Did the Armed Forces subsequently follow up on this matter?

A: The upshot was . . . If you turn to tab 6, you will find essentially the same annual report that we have just seen . . .

Q: For which year?

A: For 1984, which is the following year, and right on the very first page, which is a brief summary of the report, it says in paragraph 1a that the problem of male personnel unfit for field and sea duty still exists.

Q: So what is the result of that?

A: The result of that is, I think under tab 7 there is a memorandum, drafted by the same authorities that drafted the first one, to the effect that the restriction that had been imposed would remain in effect indefinitely.

Q: So this restriction that requires individuals to be fit for field or sea duty before they can transfer from another trade to that of administrative clerk was extended indefinitely.

A: Precisely." (Transcript, Vol 2, pp. 390-391)

There is no doubt that, under the circumstances, Mr. Rivard could not become an administrative clerk, given the requirement that administrative clerks must, without exception, be fit to serve not only on land, but also at sea. On land, administrative clerks must, among other things, serve at a counter, and they can spend long periods standing. The restriction that the doctors imposed upon Mr. Rivard in this regard - to mention but this one - prevented him from performing this particular duty.

Moreover, it is quite clear that he could not possibly serve at sea. Besides, administrative clerks must perform the various tasks described on page 374 of Volume 2 of the Transcript. They are part of the defence force of the base to which they are assigned (Transcript, Vol 1, p. 181). This means that, at any moment, they can be called on to march or perform guard duty (p. 182 ff).

Soldiers are supposed to be mobile, since the army may need them in any number of places, including Alert, the Middle East, Cyprus and Germany. Soldiers are also required to assist civilians in certain circumstances (p. 147), a duty which requires them to move about, to stand still, even to run, and who knows what else. Is it necessary to recall that administrative clerks are first and foremost soldiers, and that they are never exempt from these various duties of which they are informed at the very beginning of their service? Because of the restrictions imposed on

Mr. Rivard, the fact that he could not take part in these kinds of activities created another obstacle to his becoming an administrative clerk.

This is therefore a case in which there is no doubt as to what the problem is. And what was the army's solution?. Since Mr. Rivard could no longer be a soldier, the only answer was to release him.

Counsel for the Commission tried to show that Mr. Rivard would not have had to leave the army if he had received appropriate care. Counsel for the Forces objected to that conclusion, and the Tribunal agrees.

Why? Because the problems with the knee appeared only gradually. Mr. Rivard was given immediate treatment on the firing range when the accident occurred. In the days, weeks and months that followed, Mr. Rivard received medical treatment. Surgery was performed when the attending physicians deemed it necessary.

The diagnosis was chondromalacia patella. All the questions asked by the two attorneys and by the Tribunal itself convince us that the Canadian Armed Forces gave Mr. Rivard the care he had a right to expect. Moreover, Mr. Rivard himself said:

[translation]

"Q: Do you have any reason to believe that you were mistreated?

A: I was not mistreated." (Transcript, Vol 1, p. 59)

The decisions that the doctors made in response to the problems that Mr. Rivard brought to them are written down, as are their observations, recommendations, comments and prescriptions. The evidence shows that these health-care professionals acted in accordance with the facts.

As for the X-rays, the complainant's uncontested testimony is that the first X-rays were taken the morning after the accident. Counsel for the Commission stated that the first X-rays were taken on June 28, 1984, three months after the accident; this, he says, represents a failure on the part of the doctors whom Mr. Rivard consulted. Read attentively, Dr. Smallman's responses (p. 467 ff) reveal the following: the wound was not identified as a torsion of the knee, contrary to what counsel for the Commission maintains. The conclusion was that it appeared to be "[translation] a contusion, a blow, an abrasion of the leg." That is what the orthopedist said in response to counsel's statement. The question of X-rays as such was raised by counsel for the Commission on page 468. Doctor Smallman made

no categoric statements about the absence of X-rays between April and June 1984. On page 473, he qualified the statement made by counsel for the Commission:

[translation]

"Q: Do you agree with me, Doctor, that if someone hurts their knee on April 24, 1984, then waiting until June 28, 1984, to take an X-ray is a bit much?

A: As I said, it depends on what you see during the examination.

Q: Let us suppose, for example, that an individual comes to consult you nine times with pain in the knee and an apparent hematoma and edema.

A: No, I do not think what you are saying is right.

Q: What I am saying is not right?

A: No. Most of the visits you are referring to were for local treatment of that abrasion. During the first four or five visits, the abrasion and local treatment were discussed. The edema was noticed during this period, and so on.

Q: Doctor, is is not true that there is a note on the edema on April 28, 1984.

A: Yes.

Q: And that each time, I mean at each visit, it says that the patient complained of pain in the knee. The pain was still there. It did not disappear.

A: No, that is not true. There was the edema, there was the abrasion of the leg, but it was not noted . . . in most of the examinations it was not a problem with the knee that was noted.

Q: Doctor, at one point surgery was performed to drain the knee and remove a rather large hematoma that was sent to pathology; we saw the analysis earlier. Are you saying that a person could have a hematoma of that size in the knee and not be in pain? Is that your testimony?

A: The hematoma was not in the knee; it was in the tissue of the calf.

Q: The hematoma was in the tissue of the calf.

A: Yes. It was not in the knee. I do not think it was considered a problem with the knee, from what I see here. During the treatment of this injury, the patient began to have problems with his knee, and most of the initial treatment was to solve this problem, the hematoma that was there.

It has already been noted that the edema is not a real problem and that this is something that often happens, almost always after an injury to the leg.

Q: But throughout this period, he was walking with crutches, was he not, and sometimes using a cane?
A: I am not sure about that, because there is one note that indicates crutches and another that indicates a cane, and it is not clear whether he was walking during this period.

Q: On 30-4-84, there is a note: "[translation] must continue to use cane (pain)". Is that correct?

A: Yes.

Q: In any case, on April 30, 1984, it is six days after the accident, and here is someone who has been treated since the outset for scrapes and who is still walking with a cane because it is painful.

A: Uh-huh.

Q: Don't you think that it is time to take an X-ray, doctor? Honestly now, between you and me." (Transcript, Vol 1, p. 473)

The Tribunal cannot draw the conclusion that counsel for the Commission would like us to, because the Tribunal feels that we must accept the evaluations made by Mr. Rivard's various doctors and weigh the medical judgments and decisions made with full knowledge of the facts.

Were the doctors equal to the situation? The Tribunal feels that this is not the place to answer that question. Another tribunal will have to deal with the question raised by counsel for the Commission. The alleged "incompetence" of the health-care professionals that counsel for the Commission introduced is not at issue here.

The Tribunal did, however, take note of certain factors that could have made Mr. Rivard's life more difficult and complicated his recovery, in

particular, the fact that he put on weight because of a lack of exercise, since his leg forced him - again according to the evidence submitted - to perform more sedentary tasks (Transcript, Vol 1, p. 119 and Vol 2 p. 454).

The Tribunal also took careful note of the following remarks by the doctors as to Mr. Rivard's status (pp. 119-120).

[translation]

"Mr. Prefontaine

Q: And when, after the operation, it was realized that the pain in your knee was not disappearing, you told the chairperson that they said there was a specific problem; it was thought that removing the hematoma would solve the problem, but it did not and there was something else. So they kept looking. The operations you described were performed. Is it not true that the doctor that treated you told you of the effect that your weight could have on your knee? In fact, he told you you were a bit too big, a little overweight?

A: Yes, I lost weight. You can see in my medical file that I slimmed down to 165 pounds or 160 pounds while I was at Gagetown. I lost weight and yet it still hurt.

Q: I understand, but there was a problem initially with your weight?

A: Yes, but I lost weight. I weighed 160 pounds . . . 165 pounds I think when I was released." (Transcript, Vol 1, pp. 119-120, cross-examination by the respondent)

The question of weight is brought up again during Dr. Smallman's testimony:

[translation]

"A: And then he suggested that he should be seen and follow the base system in order to lose weight.
Q: And I understand that, in Doctor Menzies opinion, Corporal Rivard's weight could be a source of difficulty for his knee?

A: Yes.

Q: So, it could contribute?

A: Yes, exactly. (Transcript, Vol 2, p. 454, direct examination of Dr. Smallman by counsel for the respondent, document dated December 19, 1984 and signed by Dr. Menzies)

Something else the Tribunal noted was Dr. Menzies' comment:

"These problems are undoubtedly going to take a long time to resolve themselves and I am really seriously at this point questioning whether or not there is not some secondary gain involved in his prolonged recovery course."

An enigmatic remark if ever there was one. The Tribunal therefore sought clarification, and it was established that Mr. Rivard had problems besides the medical ones, which complicated the situation (Transcript, Vol 2, p. 451):

[translation]

"Chairperson:

Q: What does that mean?

Mr. Duval: Could you tell me where we are? I'm sorry.

Chairperson: That last sentence, not quite the last sentence.

Witness: It is just that, whenever you see a problem that is not going well, you ask yourself whether there is something else that is part of the problem. It could be all sorts of things, things that we call psycho-social, problems at home, with children, willpower problems, things like that can all be part of the problem.

Chairperson: They are a factor.

Witness: Exactly.

Chairperson: And affect the solution to the problem.

Witness: Exactly." (Transcript, Vol 2, pp. 451-452, direct examination of Dr. Smallman by counsel for the respondent, Document 28 produced by the respondent for Dr. Smallman's testimony)

Mr. Rivard's medical rating was the subject of numerous questions and answers, as can be seen. What the Tribunal gathered was that beginning on October 24, 1984, all new army recruits with a G3O3 rating had to be fit

for field and sea duty. Mr. Rivard asked to become an administrative clerk in January 1985, because that was when he was told of his G3O3 rating with restrictions (Transcript, Vol 1, pp. 23-24, 26).

Should Mr. Rivard be treated the same as a new recruit who is told in January 1985 (after receiving his G3O3 rating with restrictions and being, in principle, eligible for a position as an administrative clerk) "you must be fit for field and sea duty, or else you cannot be an administrative clerk"?

Or, since Mr. Rivard already had a trade, should he be allowed to stay in it? Let us look at the exchange beginning on page 605 of Volume 3 of the

Transcript:
[translation]

"Mr. Duval:

Q: Briefly reviewing all these trades, Colonel, am I mistaken in thinking that there is no category lower than G3O3, that is to say, that when you look at the list of trades, the G and the O categories for each of these trades are never lower than G3O3?

A: Right.

Q: Should I conclude from that, Colonel, that an enlisted man with a medical rating below G3O3 would cease to be employable in any of these trades.

A: No, that would be an invalid conclusion.

Q: That would be an invalid conclusion?

A: Yes. Someone with a G4 or an O4 could not take up a trade, but someone who was already in the trade could continue to work in that trade following a ruling by the Career Review Board.

Q: Perhaps I misunderstood the document; I thought that it talked about a minimum category for each of the trades.

A: Yes.

Q: But is it a minimum for the purpose of enlistment or throughout a career?

A: A minimum during the initial assignment to the trade.

Q: Okay. So someone who is working in one of these trades, let us take the case we were discussing earlier of an administrative clerk, okay?

A: Yes.

Q: It is known to be G3O3.

A: Yes.

Q: Is that to say that someone who was an administrative clerk and one day, for some reason, has a medical condition that means his rating is reduced to, let us say, G4O4, that this person might remain an administrative clerk?

A: Yes.

Q: He might?

A: He might.
Q: So it is when someone initially enters a trade that they are required to have the minimum listed here, G3O3.

A: That's it.

Q: But if someone is an administrative clerk, and his medical rating falls to G4O4, you are telling us that he can stay in the trade? That means, then, that since he is G4O4, he will be no different from anyone else, he can no longer go to sea, he cannot serve in the field, there are a number of postings to which he cannot be assigned?

A: Correct.

Q; I understand. If you would, Colonel, take two of the documents you have already examined with my colleague, documents Nine and Ten; one describes a temporary policy, and the other, as you explained, describes a permanent policy. Is it correct to say that the result of this is that individuals who were clerks, who were G3O3 with restrictions, who were, for some time, kept in their trade because of this new policy, will no longer be; is that right?

A: No.

Q: No?

A: This policy states that for initial entry into the trade of Administrative Clerk 831, the individual must be fit for field and sea duty.

Q: Okay. That is to say that before that, it was not required. Until document Nine was issued.

A: Right."

The Tribunal feels that Mr. Rivard is not eligible for the position of administrative clerk for two reasons:

1. his medical rating of G3O3 with restrictions prevents it, and
2. the new requirement imposed on administrative clerks since October 24, 1984 - to be fit for field and sea duty - prevents it.

By informing Mr. Rivard that his release had been recommended by the Career Medical Review Board, did the Canadian Armed Forces contravene section 7(a) of the Canadian Human Rights Act, as the complaint claims? Or has it successfully convinced the Tribunal that it can invoke section 15(a) of the Act in its decision to release Mr. Rivard, in that there is a bona fide occupational requirement that he cannot fulfil?

It was explained to the Tribunal on page 154 of Volume 1 of the Transcript why it was important to carry out all the duties that fall to a soldier wherever he works; there was also a description of the consequences of non-participation by a soldier who is not "operational" (pp. 155 ff).

An administrative clerk has very specific duties to carry out, as described, among others, on pages 160-161, 163, 166-170, and on pages 179 and 181.

Besides the clerical work that makes up combat support services, an administrative clerk is called upon to perform other tasks, including combat service support, which means acting as a soldier:
1. using firearms when the organization to which he belongs, or his own life, is threatened.

2. responding physically to the conditions presented by the situation (Transcript, Vol 1, p. 165, Major Bibeau's testimony).

Throughout the testimony offered before this Tribunal, people have spoken of the particular context in which the Canadian army operates and have stressed the difference between civilian and military life.

Although it is true that, in principle, Mr. Rivard's G3O3 rating should allow him to fulfil the duties of an administrative clerk, the G303 rating with restrictions means that this is no longer the case. Why? Because the army trains soldiers for a very specific purpose, and that is where the difficulties arise, because from one day to the next, a wholly unexpected event can occur that completely alters a soldier's living and working conditions. A conflict breaks out, and everybody is needed. That is no time to dwell on the problems of soldier X or soldier Y. The call to arms is sounded and, because he has made a commitment, the soldier must respond.

Although it is true that the two great wars in this century did not touch Canada's shores, and that the chances of an armed conflict in Canada itself are almost or completely nil, the fact remains that countries create and maintain peace-time armies as a sort of insurance policy "just in case". Recent events in the world testify to this widespread approach. Governments are not taking chances. So this approach is not unique to Canada, and the presence of an army is the result of political decisions, decisions that the people live with and that entail consequences, that goes without saying. And since the Canadian Army exists, the various roles that it plays are fact, not fiction.

Having said that, can the Canadian Armed Forces be asked to forget the main objective of its recruiting campaigns: the training of soldiers capable of carrying out a specific role in specific circumstances such as war, crisis or national emergency (p. 134)? Can it be asked, as counsel for the Commission has suggested, to accommodate a soldier who can no longer be one? Can it be asked to tailor its assessments and decisions to Mr. Rivard's specific circumstances? Should it ignore the discontent of the soldiers who, because of a shortage of personnel, must continue to perform duties of which they should have been relieved at times established by the military authorities in order to ensure the best possible performance? Can the Armed Forces be asked to reduce this reaction to "simple, unreasonable bitterness", as counsel for the Commission maintains, and, as a result, to overlook the drop in morale observed among the military, where 11.4% of soldiers proved unfit for 22.7% of the positions on vessels and in the field, and the 872 women in the Armed Forces at that time could not be transferred to field or sea duty?

That, however, is what the Tribunal is being asked to do, by rejecting the arguments presented by the Canadian Armed Forces. Indeed, these arguments would then be completely irrelevant, because the conclusion to be drawn from Mr. Rivard's experiences would be self-evident: he was not treated properly, and as a result became a soldier deprived of the life that he had chosen.

In his cross-examination of Dr. Smallman, counsel for the Commission tried to bring the doctor around to his point of view, and at one point counsel for the respondent objected, asking that we not stray from the issue raised by Mr. Rivard's complaint: can the Canadian Armed Forces establish a bona fide occupational requirement as a justification for his release?

Counsel for the respondent said he was objecting to the form and style of the cross-examination, because he felt it was getting away from the fundamental issue.

Counsel for the Commission responded by citing a case that he said established a principle with respect to bona fide occupational requirements concerning the nature of the medical evidence that can be produced in support of such a defence (Transcript, Vol 2 p. 481).

Counsel for the Commission then cited - unfortunately in a way that the Tribunal could not understand - a text taken from the respondent's statement of the case, and not of course available to the Tribunal. The quotation appears on page 481 of Volume 2 of the Transcript, and comes from the case of David C. Rodger v. Canadian Railways, reported in the Canadian Human Rights Reporter, Vol 6, Decision 465.

Subject to a later decision concerning the said quotation, the Tribunal, pressed by counsel for the Commission, noted that the quotation, which it asked to reread, did not at the time an immediate reply was demanded of it appear relevant. Having said that, the Tribunal had an opportunity, after the hearing, to research the Rodger case and to carefully read the quotation, which states:

> "Although society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped. Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adapted the circumstances of each individual case." (Paragraph 23674, David C. Rodger v. Canadian National Railways, Vol. 6, Decision 465, Canadian Human Rights Report).

The Tribunal is of the opinion, now that it can express one with full knowledge of the case, that the guideline established by Sidney Lederman, who presided in the Rodger case, certainly has its place in any assessment the Tribunal must make of the evidence presented to it.

The Tribunal never contemplated preventing counsel for the Commission from arguing his case, which was an attempt to show that there had been "hasty assumptions" (p. 483), that the Canadian Armed Forces "jumped the gun", as the saying goes, with the result that Mr. Rivard was deprived of a continued career in the army.

The Tribunal feels that the rule laid down by Mr. Lederman leaves a good deal of latitude, and the introduction of what counsel for the Commission called a collateral question, when he began a series of questions that counsel for the respondent considered irrelevant, poses no problem; in fact, it posed no problem during the hearing itself, since counsel for the Commission had all the time he needed to develop his cross-examination in the direction he desired, with the aim - as he himself said on page 490 - of "[translation] testing the procedure used to reach the conclusion that we all know today, to exclude the possibility that a decision was made somewhat summarily in this particular case."

The Tribunal understands perfectly what counsel for the Commission was doing. But should we or can we endorse it? So that we do not conclude too hastily that the Canadian Armed Forces took proper care in its dealings with Mr. Rivard, let us reflect a little more. Faced with explanations from various sources, the Tribunal will now rule on the question of the bona fide occupational requirement that is at the heart of this matter.

At the time that the decision to release Mr. Rivard was made, the Career Medical Review Board based its position on the information in Mr. Rivard's file. It does not appear that it applied a different procedure in this case. The evidence in no way indicated that the Board departed from its customary objectivity. Did it ask itself the questions that counsel for the Commission raised? Apparently not. Should it have? That remains to be seen. One thing is certain, the Board examined Mr. Rivard's file, and detected nothing unusual in it, according to the evidence before us: everything they needed to know was in it, and faced with the medical notes that sealed Mr. Rivard's fate, the Board reached a decision.

It is clear that Mr. Rivard could not fulfil the duties of an administrative clerk. He could not remain standing for over an hour, although administrative clerks are required to serve soldiers at a counter, which involves constant standing. Nor was that all. The military duties still had to be carried out. Here again, Mr. Rivard's condition did not allow him to perform the tasks; moreover, he was unfit for sea or field duty. What other conclusion is possible than that he should be released?

No one can deny that Mr. Rivard was disappointed; because of a medical problem, his chosen career was flying out the window. His rating had been

lowered; he went from G2O2 to G3O3, and there were restrictions on that rating. It was these restrictions that changed the course of his life; that must be acknowledged. We will come back to that. What we cannot forget, however, what we must always keep in mind, is that we are talking about the Canadian Army, with its structures, its demands, and its objectives, which call for unusual decisions.

Case law

To support his argument, counsel for the Commission began by citing the Etobicoke case (Ontario Human Rights Commission and Bruce Dunlop and Harold E. Hall and Vincent Gray v. the Borough of Etobicoke, [1982] 1 SCR) which explains, among other things, the reversal of the onus of proof: the complainant need only demonstrate that he/she was employed and that the employer ceased to employ him/her; it is up to the employer to show that the ground for dismissal of the employee was justified. Thus, Mr. Rivard established that he had been in the army since 1980, and that he was released in 1985 on medical grounds. His employer, arguing that his position involved a bona fide occupational requirement, must convince the Tribunal that it could reach no other conclusion than to release Mr. Rivard.

Having said that, counsel for the Commission then stated that the Canadian Armed Forces could not successfully invoke the argument of a bona fide occupational requirement because, in this case - as in that of young Laurin, who was refused a position by the town of Brossard because her mother was already an employee - the army went too far. The Court did not, of course, contest the legitimacy of the Brossard by-law intended to prevent nepotism. It ruled, however, that in this particular case, Brossard did not have to apply the by-law to Laurin with full rigour, because no possible conflict of interest existed (Commission des droits de la personne du Québec v. Town of Brossard and Line Laurin, [1988] 2 SCR, at p. 279).

According to counsel for the Commission, this case introduced the concept of "proportionality": the effect of the application of the by-law in Laurin's case was disproportionate to the effect sought by the municipality, which wanted to avoid any possibility of nepotism. The ruling also specified, counsel for the Commission maintained, that in order to be justified, a bona fide occupational requirement must relate to the execution of the task; on this topic, the section beginning on page 618 of Volume 3 of the Transcript proves very interesting. The Laurin and Etobicoke cases are thus concerned with the same issue.

The O'Malley case (Ontario Human Rights Commission and Theresa O'Malley (Vincent) v. Simpsons-Sears Limited, with the Canadian Human

Rights Commission, Saskatchewan Human Rights Commission, Manitoba Human Rights Commission, Alberta Human Rights Commission, Canadian Association for the Mentally Retarded, Coalition of Provincial Organizations of the Handicapped and Canadian Jewish Congress as intervenors, [1985] 2 SCR, at p. 536), which counsel for the Commission then cited, describes the Human Rights Act as "legislation . . . of a special nature . . . more than the ordinary." (McIntyre, J, at p. 547) Counsel for the Commission referred to other, similar decisions: Craton v. Winnipeg School Teachers' Association, Travail des femmes and Robichaud v. Treasury Board.

Elsewhere in the O'Malley case, Mr. Justice McIntyre added that because of their special nature, human rights acts had to be interpreted broadly and liberally in order to eliminate the problems they were created to solve. Armed with this quotation, counsel for the Commission asked the Tribunal to be generous.

He then cited the Singh case (Harbhajan Singh v. Employment and Immigration Canada et al, [1985] 1 SCR) and the statement by Madam Justice Bertha Wilson of the Supreme Court of Canada rejecting the utilitarian argument of the Attorney General of Canada that finding in favour of those seeking refugee status, for whom "paper hearings" had eliminated the possibility of making themselves heard, would mean 50,000 new cases created overnight:

"Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so." (Wilson J., at p. 218, 3rd paragraph).

The claim of counsel for the Commission was that the Canadian Armed Forces made an administrative decision when it determined that

Mr. Rivard could not fulfil the duties of an administrative clerk within the army, given his new medical rating with restrictions.

It was a small step from there to maintaining that the Canadian Armed Forces had not been discharged of the onus of proof and that the decision to release Mr. Rivard was wholly unjustified in relation to the requirements established by the courts at whatever level; counsel for the Commission took that step, further adducing the disproportionate nature of the measure taken by the army to solve the problem that existed. In this regard, he referred us once more to the Laurin case. Were there no other ways of resolving Mr. Rivard's problem? On page 629 of Volume 3 of the Transcript, counsel for the Commission mentioned that the argument of proportionality that had been used successfully in the Laurin case had not been used since, and he asked the Tribunal to consider it in the case of

Mr. Rivard, whose release from the army was "extreme", to use his term (p. 629).

He then dealt with the restrictions attached to the Mr. Rivard's G3O3 medical rating, which was the reason for his release. "[translation] You should ask yourself whether the restrictions were justified, and whether these restrictions did not impose too great a burden on the members of the armed forces afflicted with this condition." (p. 631)

Counsel for the Commission applied the "test" of proportionality to one of the considerations used by the army when it decided to suspend the remuster of soldiers like Mr. Rivard. In principle, he could consider it; but because of the restrictions accompanying his new medical rating, he had become unfit for that trade, and remustering was impossible. That was the reason for the decision to release him from the army, a decision which counsel for the Commission said was an attempt to solve the problem of the bitterness of Mr. Rivard's co-workers.

Starting with that premise, counsel for the Commission then cited the cases of Barbara Joyce Hajla, Géraldine Letendre, Iberto Imberto and Ingrid Andersen, in which all arguments of bona fide occupational requirements related to the position were rejected because they were based on the "perceptions" and "reactions" of employees, customers and others. To bolster his argument, counsel for the Commission also cited the Berry case, Procureur général du Québec v. Service de Taxi Nord-Est (1978) Inc, and the Varma decision.

(Barbara Joyce Hajla v. Mike Nestoras, carrying on business as Welland Plaza Restaurant, Canadian Human Rights Reporter, Volume 8, Decision 613, April 1987;

Géraldine C. Letendre v. The Royal Canadian Legion, South Burnaby Branch, No 83, Canadian Human Rights Reporter, Volume 10, Decision 887, June 1989;
Mr. Iberto Imberto v. Vic and Tony Coiffure and Vince and Tony Ruscica, Canadian Human Rights Reporter, Volume 2, Decision 87, May 20, 1981;
Ingrid Andersen v. Mario Blanchet, Daniel Blanchet and Tero Painting and Decorating Division, Canadian Human Rights Reporter, Volume 8,

Decision 611, April 1987;
Donald J Berry against the Manor Inn, Canadian Human Rights Reporter, Volume 1, Decision 30, September 20, 1980;

Procureur général du Québec v. Service de Taxis Nord-Est (1978) Inc., Canadian Human Rights Reporter, Volume 7, Decision 491, January 1986;
Gitanjali Varma v. G.B. Allright Enterprises Inc. doing business as

Allright Inn, Canadian Human Rights Reporter, Volume 9, Decision 822, November 1988)

He likened the reasons put forward by the respondents in these cases to those of the Canadian Armed Forces, which he claimed based its decision on the "bitterness of the soldiers" (pp. 636-637) and on their discontent that counsel for the Commission described as "unreasonable" (p. 649) because it was "disproportionate". "[translation] Do you think that the discontent of the others (soldiers) is legitimate when 700 of the 3,049 positions are like that? Positions that those with restrictions cannot occupy? . . . The documents show that it is this discontent that is being catered to. But discontent that is unreasonable and unrational is nothing more than prejudice and cannot, in my view, serve as a defence." (p. 649).

In summary, counsel for the Commission asked the Tribunal to reject all the respondent's arguments because they did not stand up to analysis and were inconsistent with the rules laid down by the courts in the cases that have been presented before this Tribunal.

What did counsel for the respondent have to say?

In his attempt to explain the Canadian Armed Forces' point of view, counsel for the respondent cited a number of cases that would allow the Tribunal to decide the issue at hand in his favour: has the respondent proved that Cpl. Rivard's release was due to a bona fide occupational requirement and that the restriction was imposed in good faith in order to ensure the proper performance of the work that Mr. Rivard had to accomplish in a reasonably diligent, effective and economic fashion?

The elements involved in this lengthy question were all brought out in the various decisions that were made while the case law relating to human rights was being developed. The first case cited was thus the Etobicoke case (Ontario Human Rights Commission and Bruce Dunlop and Harold E. Hall and Vincent Gray v. the Borough of Etobicoke, [1982] 1 SCR), which formed the background to which counsel for the respondent gradually added other elements in the course of the argument.

What then was the bona fide occupational requirement? Being able to do the job. Not just any job, however. The job of being a soldier. The medical examination required by the army determines the recruit's trade. A G2O2 rating allows a recruit to be a crewman, among other things. A G3O3 rating allows a recruit to be an administrative clerk; but a G3O3 rating with restrictions does not allow a recruit to be an administrative clerk. That is the army's decision. Why? Because the restrictions imposed on Mr. Rivard made it impossible for him to carry out the tasks required of an

administrative clerk, and even more importantly, those required of a soldier, the two being inseparable.

Moreover, since the restrictions meant that Mr. Rivard could not perform his work without exposing himself, his co-workers and the public at large to danger, the army decided that it had no choice but to release Mr. Rivard. There was, counsel for the respondent maintains, a real increase in the risk to his own safety, that of his fellow workers and that of the public at large (Transcript, Volume 3, p. 663). And the Canadian Armed Forces constantly sought to demonstrate that the risk was real, regardless of the actual probability of something going wrong.

A number of the decisions cited involve the Canadian Armed Forces, and all testify to the special circumstances in which the Armed Forces operates; it is a separate world with no real equivalent in civilian life. Counsel for the respondent's often-repeated warning leaves no doubt as to the importance that he attaches to the distinction between civilian and military life.

In order to convince the Tribunal of this, counsel for the respondent cited section 33.1 of the National Defence Act (Chapter N-5, RSC, 1985). "[translation] This text is the source of the concept of what is called the unlimited responsibility of soldiers to serve, which distinguishes them - and this will be one of my basic arguments - from those who occupy civilian positions that may be comparable in terms of the day-to-day work; there are many comparisons that might be made, but there is a difference between the secretary who can put away her things and go home at five o'clock and the administrative clerk who, by the very nature of his job, is subject to that unlimited responsibility described in the following passage:

"The regular force, all units and other elements thereof and all officers and men thereof are at all times liable to perform any lawful duty."

An occupation with, as counsel for the respondent put it, "unlimited responsibility" (Transcript, Volume 3, pp. 655-656).

In response to the argument of counsel for the Commission, who cited the Etobicoke case, counsel for the respondent quoted the following:

"In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement

in the interests of safety of the employee, his fellow employees and the public at large." (The Ontario Human Rights Commission and Bruce Dunlop and Harold E. Hall and Vincent Gray v. the Borough of Etobicoke, [1982] 1 SCR, McIntyre J., at p. 210, quoted on page 657 of Volume 3 of the Transcript)

Counsel for the respondent therefore concluded that Mr. Rivard's release was in the interests of the safety of the employee, his fellow employees and the public at large; with the criterion of safety thus established, counsel cited the decisions that form the basis of any defence invoking a bona fide occupational requirement.

It was the increased danger to which the individual was exposing himself that the Tribunal had to consider in its decision in the Bhinder case, where the problem was that CNP imposed a bona fide occupational requirement to wear a hard hat in the workshop on its employees, while the complainant's religion did not allow him to remove his turban. The Court said that it would be difficult "on the facts" to reach any other conclusion that that "the hard hat rule was found to be a bona fide occupational requirement." (K.S. Bhinder v. CN [1985] 2 SCR, McIntyre J., at p. 588, 1st paragraph)

In the Mahon case, which counsel for the respondent cited next, the concept of the danger to the security of the individual and the public at large appeared again. 'The effect of those decisions [Bhinder and Etobicoke], in my view, is that, a fortiori, a job-related requirement that, according to the evidence, is reasonably necessary to eliminate a real risk of a serious damage to the public at large must be said to be a bona fide occupational requirement." (Canadian Pacific Ltd v. Canadian Human Rights Commission, Peter Cumming and Wayne Mahon [1988] 1 FC, Pratte J., at p. 221, 3rd paragraph).
". . . the evidence . . . must be sufficient to show that the risk is real and not based on mere speculation. In other words, the "sufficiency" contemplated refers to the reality of the risk not its degree." (CP Ltd. v. CHRC et al, [1988] 1 FC, Marceau J., at p. 224, 3rd paragraph).

Counsel for the respondent used these passages from the decision of the Federal Court of Appeal in the Mahon case as justification for avoiding a statistical approach. "[translation] The important thing is that the risk is real and not, as Justice Marceau put it, 'based on mere speculation'." (Op cit, Transcript, Vol 3, pp. 663-664). To bolster his argument about a statistical approach, which he considered irrelevant and thus not worth considering, counsel for the respondent cited the case of Little v. St John Shipbuilding and Drydock Co. (CHRR, Vol 1, Decision 1, January 1980), which specifically rejects such an approach. The quote is from paragraph 40, p. D/5, entitled "Where medical tests are not appropriate, is statistical data required to prove a bona fide occupation

qualification ought to exist?" The Tribunal will limit itself to reproducing the quotation provided by counsel for the respondent:

"These statistics, however, often only become available after the failures in the performance of the jobs have occurred. To experiment with such failures in order to gather statistical data is not permissible, of course, in jobs which endanger public safety and it, therefore, is impossible to make such statistical data always essential to justify the existence of a bona fide occupation qualification."

The conclusion to be drawn is inescapable: An occupational requirement cannot be based on X number of cases that would justify the imposition of such a requirement. That is the same argument that the Tribunal chairperson, John I. Laskin, accepted in the case of David Galbraith v. Canadian Armed Forces, T.D. 13/89, August 23, 1989.

> "Mr. de Pencier referred me to the case of Little v. Saint John Shipbuilding, (1980) 1 C.H.R.R. D/1 p. 24 in support of the proposition that one need not experiment with the likelihood of failure in order to gather statistical data in jobs which endanger public safety and that accordingly, statistical data is not always essential to justify the existence of a bona fide occupational requirement. I accept that position."

The Gaetz and Galbraith cases also present elements of interest, because they involve complaints against the Canadian Armed Forces, in the one case, by an insulin-dependent diabetic who was released from the army and, in the other, by an individual who was rejected by the militia because he had had a resection of the intestine.

Here again the concept of safety - a preoccupation of the Canadian Armed Forces - was mentioned, along with another concept that counsel for the respondent called "criticality". Why? Because there is a tendency, on the complainant's side, to think and to argue that the role of a militiaman is less "critical" than that of a soldier, because the reservist is a "weekend" soldier.

The Tribunal had this to say:

> "The fact is that, once members of the Militia are placed on active duty, they must be capable of fulfilling their assigned duties. An individual's ability to do so will impact not only upon his own safety, and by virtue of the fact that teamwork and mutual reliance are critical, upon the safety of his

team members, but also upon the safety of Canadians and the defence of Canada. In light of these considerations, it is not unreasonable for the Canadian Armed Forces to insist upon strict enrolment standards for new recruits into the Reserve Militia. (See Seguin v. R.C.M.P. 1989 Canadian Human Rights Tribunal; unreported where similar reasoning was employed.)"

(David Galbraith v. Canadian Armed Forces, HRT, T.D. 13/89, August 23, 1989, John I. Laskin, p. 43, 1st paragraph)

Counsel for the respondent argued that the Seguin decision (Andre Seguin, George Tuscovich v. Royal Canadian Mounted Police, CHRR, 4/1/89) confirms the concept of "criticality". Seguin and Tuskovich, who both had a vision problem, filed a complaint because the Royal Canadian Mounted Police "refused to them the opportunity to apply for the position of Special Constable Static Guard, with the RCMP, because their uncorrected visual acuity did not meet the RCMP minimum standards."

Because of the various tasks that the Special Constable Static Guards are called upon to perform, the RCMP successfully used the defence of a bona fide occupational requirement, and the Tribunal took into account the special circumstances in which the RCMP operates.

Called upon to make a decision on the subjective test - the Tribunal recalls that it was the Etobicoke case that spoke of the objective and the subjective test to be applied - the Tribunal concluded that the RCMP had acted in good faith when establishing the visual standards. "I fully accept that these standards are maintained by the RCMP solely for the bona fide purpose of ensuring safety and protection of the public" (Op cit, Seguin, Tuscovich, p. 26, 2nd paragraph). As for the objective test to be applied, the Tribunal had this to say, after having established that the issue was the following: "Is the minimum uncorrected visual acuity standard of the RCMP related in an objective sense to the performance of the duties of a static guard? Is this standard reasonably necessary to assure performance of such duties without endangering the safety of the public? . . . Or, without the minimum uncorrected visual acuity standards, would there be an increased risk to the public?" (Op cit, Seguin, Tuscovich, p. 26, 4th paragraph)

"I find that the RCMP's standards are justified. . . . First, the risk to the public is real and substantial. The role of static guards is a critical one. It is vital that the function be carried out competently and without compromise." (p. 31)

These quotations are along the same lines as the one mentioned by counsel for the respondent, and once again they point out an undeniable fact. The world of the military and of police forces such as the Royal Canadian Mounted Police is a special world. What counsel for the respondent has brought out is the critical nature of their actions, since in both cases public safety is involved, and the fact that it is not the number of times that an administrative clerk is called on to perform purely military duties, but the fact that he is called upon to do so and must be fit to do so (Transcript, Vol 3, pp. 670-671).

Counsel for the respondent cited a self-evident rule from the Loveday case, because he feels that, given the problems with his knee and the restrictions imposed upon him, it applies to Mr. Rivard equally well. "No employee has the right to risk serious injury to himself, and no employer should be required to employ someone whose physical condition subjects him to the risk of more than trivial injury." (Manitoba Human Rights Commission and A. Rey Loveday v. Bake Manufacturing Ltd., CHRR, Vol 7, Decision 498)

The Tribunal's decision was based on the fact that Mr. Loveday's employer decided to let him go because his back had been injured and he occupied a position that required him to lift heavy loads. Did it have to accommodate him? No. The circumstances were such that this was not a possibility. And even if the employee assumed full responsibility for any further injury to his back, the employer could not keep him in its employ; and it successfully defended the dismissal by arguing the existence of a bona fide occupational requirement.

The final case cited by counsel for the respondent was David C. Rodger v. Canadian National Railways (CHRR, Vol 6, Decision 465). Mr. Rodger suffered a seizure. His responsibilities as a railway employee placed him in situations involving definite risk, since he had to work close to trains, climb up into and down from them, and so on.

The citation presented to the Tribunal bears on one criterion in particular that has already been examined. As counsel for the respondent argued, "[translation] Inasmuch as the risk is real, and the increase in the risk is real, there is no need to quantify it." (Transcript, Vol 3, p. 677)

The decision

Having heard the evidence, listened to the arguments of both parties and read the case law cited by the two attorneys, the Tribunal concludes that:

1. The Canadian Armed Forces acted in good faith.

2. The Canadian Armed Forces established a bona fide occupational requirement with respect to Mr. Rivard's occupation.

3. The Canadian Armed Forces was not required to accommodate Mr. Rivard, in light of theforegoing conclusions.

4. The Canadian Armed Forces did not have to tailor its decision to the problem posed by Mr. Rivard's medical restrictions.

5. The Canadian Armed forces plays a specific and critical role with respect to a clearly defined policy of the political authority. Its situation is therefore not comparable to others that have been cited before this Tribunal in an attempt to convince it that the decision to release Mr. Rivard was not justified and that the defence put forward could not succeed.

The Tribunal rules that there was no infraction of paragraph 7(a) of the Canadian Human Rights Act.

The Tribunal also rules that the respondent has demonstrated that Mr. Rivard's release did not constitute discrimination under paragraph 15(a) of the Canadian Human Rights Act (RSC 1985, H-6), since the Tribunal accepts the soundness of its argument that a bona fide occupational requirement exists.

In light of its decision, the Tribunal need not discuss compensation or related matters.

(signed)
Niquette Delage