T.D. 12/91
Decision rendered on August 2, 1991

CANADIAN HUMAN RIGHTS ACT
(R.S.C. 1985 chap. H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

JULIA HUSBAND

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

commission

- and -

CANADIAN ARMED FORCES

Respondent

TRIBUNAL: Richard I. Hornung, Q.C.
Holly C. Beard, Q.C.
Norma G. McLeod

DECISION OF THE TRIBUNAL

APPEARANCES BY:

Rend Duval,
counsel for the Commission

Joseph de Pencier,
counsel for the Respondent

DATES AND PLACE
OF THE HEARING:

January 31, February 1 and
May 16 and 17, 1991
Winnipeg, Manitoba

MAJORITY DECISION BY:

Holly C. Beard, Q.C.
(with Norma McLeod concurring)

DISSENTING
OPINION BY: Richard Hornung, Q.C.

REASONS

1. THE ISSUE

At issue in this matter is whether certain provisions of the Medical Standards for entry into the Canadian Armed Forces are (hereinafter referred to the "CAF") constitute a bona fide occupational requirement within the provisions of Section 15(a) of "The Canadian Human Rights Act", R.S.C., 1985, c.H-6 (as amended), hereinafter referred to as the "CHR Act".

2. THE EVIDENCE

(i) the complainant

The complainant, Julia Husband, graduated with a Bachelor of Music from the University of Brandon in 1981 and since that time has been variously employed as a music teacher, both privately and in the public school system, as a performing musician and giving music clinics in the public schools on a free-lance basis. Ms. Husband made an initial contact with a recruiting officer from the CAF in 1981, and since then has been perusing a position with the music branch of the CAF with a moderate degree of diligence. In the spring of 1986, she was advised that there would be a direct entry position for a clarinet player coming available, so she auditioned on that instrument. In early June, 1986 she received confirmation that her audition was acceptable and she was qualified to fill that position.

Ms. Husband was then referred to the Recruiting Centre to apply for entry to the CAF, and was ultimately advised that she failed to qualify because her eyesight was too poor to meet the minimum entry standard.

Ms. Husband, in her complaint, alleges that the CAF has discriminated against her because of her visual disability in violation of Sections 7 and 10 of the CHR Act.

Ms. Husband proceeded to give evidence that she had always been able to fulfill her various musical occupations satisfactorily with the use of corrective lenses, and that the use of the lenses had never inhibited or hampered her ability to function in either a professional or personal capacity, although she confirmed that she did require the use of corrective lenses to read music and to drive an automobile. (Evidence, Vol. 1, P. 30, 31)

From her responses in cross-examination, it became clear that Ms. Husband had done very little research into the "military" aspects of being a musician in the CAF, but rather had focused on her musical aptitude. The evidence also indicated that Ms. Husband has had little involvement in sports or other physically demanding activities and in particular had little experience in any out of door activities which would even remotely familiarize her with the more physically demanding aspects of being in the military. (Evidence, Vol. 1, P. 40-45, 47-52)

(ii) the respondent

The respondent called six witnesses, all of whom were qualified as experts in their various fields, who gave the following evidence:

1. Lieutenant-Colonel Tattersall:

Lcol. Tattersall, a regular member of the CAF since 1958, is currently Section Head in the Directorate of Force Structure at National Defence Headquarters in Ottawa. He was acknowledged by all parties to be an expert on the role of the CAF, how the CAF is organized to fulfill that role and the mandate given to it by the Government of Canada.

2. Captain Macknie:

Capt. Macknie also enrolled in the CAF in 1958 and currently holds the position of Staff Officer and Director of Military Occupational Structures. He was admitted by all parties to be an expert on the occupations and occupational structures within the CAF and gave evidence on

how jobs and tasks are assigned and defined within the military.

3. Captain Veilleux:

Capt. Veilleux joined the CAF in 1954 and is currently the Standard Officer at the Recruit School in St. Jean, Quebec. His duty is to ensure that the training standards set out in the Course Training Standard are maintained and observed by the instructor and achieved by the candidates (ie recruits). We heard extensive evidence from Captain Veilleux detailing the rigors of basic training for non commissioned members of the CAF.

4. Commander Morrison:

Cmdr. Morrison, who joined the CAF in 1952, currently holds the position of Supervisor of Music, in effect the most senior musician in the CAF. Both parties acknowledged him to be an expert in the area of musicians and bands in the Canadian Armed Forces.

5. Major Kearns:

Major Kearns, who has been a member of the CAF since 1965, qualified as an ophthalmologist in 1983 and currently holds the position of Head of Ophthalmology

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at the National Defence Medical Centre. In addition to providing regular ophthalmological care to members of the CAF and any other entitled individuals, he also provides advice on the various aspects of medical or surgical problems of the eye upon the employment of members of the CAF or in individuals who wish to become members of the CAF. Both parties recognized and acknowledged Major Kearns to be an expert on ophthalmology particularly as it is applied to employment in the CAF and the military environment.

Major Kearns gave extensive evidence as to the mechanics of vision and how the eye works, visual disabilities known as myopia and hyperopia and in particular the nature of the complainant's visual disability, being myopia. He discussed the mechanics of the use of corrective lenses to improve the eyesight of a person with myopia, some of the shortcomings or distortions to the eyesight resulting from the use of

corrective lenses and some of the problems associated with the use of various types of corrective lenses or procedures.

Major Kearns also gave a brief introduction to a document entitled "Medical Standards for the Canadian Forces" and then reviewed in more detail that portion of the standards related to visual acuity. He discussed the minimum standard of visual acuity for a person entering the CAF which is referred to as V-4 and how that related that to a person's eyesight as determined by the use of the Snellen Chart and related that to refractive error.

Major Kearns provided us with a set of glasses which, when worn by a person with "normal" visual acuity would alter that acuity to approximate the uncorrected visual acuity of the complainant. While not decisive on the matters at issue, the glasses were of assistance to understand the degree of the complainant's visual disability, especially when used in poor light or at night.

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6. Dr. Wilkinson:

Dr. Wilkinson, who is not a member of the CAF, has been a medical doctor since the late 1950's and has been an ophthalmologist since 1972.

He has developed a particular interest in the field of ophthalmology that he called "occupational ophthalmology" which, while it has not been recognized as an area of special expertise within ophthalmology in Canada, has been so recognized in Europe and in the United States. Dr. Wilkinson is a member of the Occupational Ophthalmology Association of America, an offshoot of the American Academy of Ophthalmology. Both parties acknowledge that Dr. Wilkinson is an expert in the field of occupational ophthalmology.

Dr. Wilkinson was provided with documentation related to the general military occupation and the medical standard for entry to the CAF. He was asked to provide his expert opinion on the matters at issue by responding to the following questions:

1. Is the medical standard of the CAF for visual acuity appropriate in light of the job requirements for non commissioned members whether or not they are musicians?

Response: The standards should be higher or more restrictive.

2. What are the risks and consequences of losing, obscuring, dislodgment or other problems with glasses or contact lenses for an individual who does not meet the CAF medical standard for visual acuity?

Response: The risks are quite considerable, and the result of losing glasses or contact lenses in somebody with such poor vision (as the complainant) without correction would be quite severe.

3. Was the CAF justified from an occupational ophthalmological point of view in denying admission to Julia Husband?

Response: Yes.

(Evidence, Vol. 4, P. 512-515)

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III. LEGISLATION

The relevant legislation in this matter is the "Canadian Human Rights Act", R.S.C., 1985, c.H-6 (as amended) and in particular the following Sections:

Section 2. 'The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

Section 3.(1) '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."

Section 7. "It is a discriminatory practice, directly or indirectly,

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

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

Section 10. "It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

Section 15. "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 occupation requirement."

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IV. CASE LAW

The respondent in this case has admitted that the standard for visual acuity which an applicant to the CAF must meet in order to become a recruit and to enter basic training is, prima facie, a discriminatory practice, being discrimination based on the prohibited ground of disability. (Evidence, Vol. I, P. 55 & 56). It relies, however, on the defence that its entry level visual standard is a bona fide occupational requirement within the meaning of Section 15(a) of the CHR Act and therefore does not constitute a discriminatory practice.

The term "bona fide occupational requirement" was defined by the Supreme Court of Canada in the case of the Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. (202). McIntyre, J. speaking for the Court, defined bona fide occupational requirement/qualification as follows (P. 208):

"To be a bona fide 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."

The two tests referred to in this quotation have been defined as the "subjective" test and the "objective" test.

Mr. Justice McIntyre then proceeded to further define the objection portion of this test by considering its application to a particular occupation as follows

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(P. 209-210):

"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 a 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."

This particular phrase was reviewed by the Federal Court of Appeal in the case of Canadian Pacific Limited v. Mahon, [1988]

1 F.C. (209) (C.A.). Marceau, J. quoted the above phrase and then said (P. 224):

"When I read the phrase in context, however, I understand it as being related to the evidence which must show that the risk is real and not based on mere speculation. In other words, the "sufficiently" contemplated refers to the reality of the risk and not its degree."

Pratt, J., who arrived at the same conclusion as Marceau, J., said (P. 221):

"... 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."

This interpretation of the Etobicoke decision in Mahon was followed in the Human Rights Tribunal decision of Seguin & Tuskovich v. RCMP, T. D. 1/ 8 9 (Jan. 4, 1989).

Very recently the Supreme Court of Canada has again reviewed its several previous decisions on the interpretation and enforcement of the CHR Act in the case of Alta. Human Rights Commission v. Central Alberta Dairy Pool, Sept. 13, 1990,

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S.C.C. Wilson, J., speaking for the majority, specifically stated that the decision was intended to clarify some inconsistencies in previous decisions from the Supreme Court of Canada related to the CHR Act, and also to provide some direction in interpreting and applying the legislation.

At page 26 of the decision, Wilson, J., states as follows:

"Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as Mclntyre, J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or does not. By their very

nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified on their general application. That is why the rule must be struck down if the employer fails to to establish the B.F.O.Q."

I would therefore summarize the relevant law as follows:

1. To be a B.F.O.R., the rule must meet both a subjective and objective tests set out in Etobicoke;

2. To meet the objective test, the evidence must show that there is sufficient risk of failure by an employee who fails to comply with the standard to warrant that standard in the interests of the safety of that employee, his fellow employees and the public at large;

3. "Sufficient risk of failure" means that the risk of failure is real and not based on mere speculation. "Sufficiency" relates to the reality of the risk and not its degree.

4. Accommodation is not a component of the B.F.O.R. test, and once a B.F.O.R. is proven the employer has no duty to accommodate.

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V. APPLICATION TO THE CASE AT BAR

(i) Nature of Occupation

Before being able to consider whether the respondent has established a BFOR, one must establish the nature of the relevant occupation which, in this case, is very much at issue. The complainant's position is that the occupation is one of a musician in the Canadian Armed Forces, and that the visual standard must relate to the occupation of the musician.

The respondent takes a very different position and states that the occupation is that of being a regular member of the Canadian Armed Forces for which it has set certain enrolment standards applicable to all recruits. While all recruits enter a trade or profession, that trade or

profession is secondary to the primary military occupation and doesn't relieve the recruit from meeting the minimum entry standards.

Lcol. Tattersall, who was qualified as the expert on the role and organization of the CAF, defined the role of the military as follows (Evidence, Vol. 1, P. 79):

Q. "Colonel, aside from particular roles we have seen for the Canadian Armed Forces, what is the purpose of having an Armed Force at all?"

A."Well, the basic purpose of the Armed Forces is, if there is any threat to Canada or Canadian interests who are allies, is to engage and defeat the enemy in battle."

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Q. "And what preparedness does that require?"

A. "Well, the preparedness is why we have regular forces and reserve forces at all times. They are constantly training for war. That is their primary mission. They are training for war time roles, but as a result of this training and the organization and discipline that they accrue in doing so, they can be used for a lot of other things in peace, and some of which I described earlier as well."

Q. "Now, Colonel, are all members of the regular forces under the same obligations .... "

A. "Yes."

Q. ".. duties and liabilities?"

A. "Yes, sir."

Lcol. Tattersall read excerpts from 'The National Defence Act", R.S.C., N-5 which set out the legal duties of regular members of the CAF:

33(1) 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.

34(1) Where the Governor in Council has declared that a disaster exists or is imminent that is, or is likely to be, so serious as to be of national concern, the regular force or any unit or other element thereof or any officer or man thereof is liable to perform such services in respect of the disaster, existing or imminent, as the Minister may authorize, and the performance of those services shall be deemed to be military duty."

Lcol. Tattersall further described the duty of the Armed Forces as follows (Evidence, Vol. 1, P. 72-73);

"I think the best way to describe that is the people that have studied our profession have called it - have classified it as being unique because of its unrestricted obligation. We cannot refuse to do any duty whether we want to or not. Even if we know that we might get killed doing it and that the probability is very high, we cannot refuse, and you would see later in

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the National Defence Act that the penalties for not doing so are as severe as going to get killed in the first place, because your own country could put you to death for cowardice or mutiny or whatever. We - it's fine for me to sit here or tell my boss, well, I am an artillery officer, and that's what I should be doing, but I cannot refuse any legal order that he gives me to do. I may be able to complain about it afterwards in the military system, but I cannot refuse to perform any lawful duty and that really goes to the guts of our profession in the sense that, in most civilian occupations, are limited by the terms of reference of their employment, and if you see those terms of reference, then they can simply refuse to do that job or that task or that work. We can't, and we can't at any time of day or during any day of the year because the obligation goes on and on twenty-four hours a day, seven days a week, three hundred and sixty-five days a year as long as you wear the uniform.

The paragraph 34(l) there goes on further to say that --- to describe how the government may direct, under disaster situations, the regular force or elements of it or personnel can be directed to exercise whatever we are told to do, so that we don't even have a choice in peace time in terms of what we do.

So, it is that underlying obligation - unlimited obligation that we bear at all times that really separates our profession, profession of military life, from most other ones in the sense that the penalty for refusing to do something that is lawful is probably as severe as the worst consequences of doing it in the first place."

This theme of the "profession of military life" was repeated by several of the respondent's military experts:

"All personnel in the Canadian Forces must be - to use the vernacular - soldiers first and tradesmen secondly." (Cap. Macknie, Evidence, Vol. 1, P. 99)

"Well, we in the military people with very traditional occupations get employed in some very non-traditional ways. Nobody is just an occupation. I am not just an ophthalmologist. I have other training. I have had other experiences and other forms of employment.

Nobody is just, musician. Many of the tasks that we ask people to do are very demanding from a visual point of view." (Major Kearns, Evidence, Vol. 3, P. 422)

Finally, we heard evidence from Lcol. Tattersall that there are three different classifications of people employed to perform the role of CAF, being regular members,

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reserves and civilians, and Lcol. Tattersall described the difference as follows (Evidence, Vol. 1, P. 8 7):

Q . "What are the fundamental distinctions between uniform members, on one hand, and civilian departmental employees on the other?"

A. "Civilian members are not sent into battle. It is only uniform members that serve in what we call operational combat units, but civilian members are not - they are used in Canadian installations, but they would never be sent as part of a combat unit into battle. That's the primary distinction."

We heard a great deal of evidence, principally from Capt. Macknie, regarding the dual track nature of a career in the military. He described in some detail how training alternates between periods of military training, starting with ten weeks of basic training, and training in a particular trade or occupation. It would normally take forty-eight months for a non skilled person entering the music trade to attain the level of musician (Evidence, Vol. 1, P. 123,). Cmdr. Morrison gave evidence that a person who had acquired the necessary musical skills prior to being accepted into the military could complete the military training and be recognized as a musician in as little as a year, although it would ordinarily take somewhat longer than that, but substantially less than forty-eight months. (Evidence, Vol. 2, P. 266-268, 296)

This theme of the dual occupations of regular members in the CAF, consisting of military and non military occupations, is evident in the document entitled "The Military Occupational Structure" which sets the specifications for the various occupations.

A document entitled "The General Specification Other Ranks" defines the basic military occupation and the military skills which must be achieved by all NCM's (Non Commissioned Members) in addition to the duties and skills related to a particular trade or occupation.

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"The General Specification Other Ranks"
Forward

Introduction

1. The nature of the military profession requires personnel, as they progress in rank, to expand their capabilities to meet the greater demands and broader responsibilities of higher rank. Professional development of all members in the Canadian Forces must, therefore, provide this development.

2. Members of the military are called upon to perform a variety of tasks which, although unique to the military, are common to all members. To carry out these tasks effectively, many of which involve duties and responsibilities outside their trade, members of the force must have a level of general service knowledge and skin commensurate with their rank. This general service knowledge and skill contemplates and reinforces the special knowledge and skill acquired through trades training. This

combination of general service and trade knowledge and skill enables members to perform effectively at all levels and in all areas of the CAF.

3. This specification identifies the common duties and tasks performed by all Other Ranks and associated knowledge and skill required by the tasks. It must be emphasized that this specification does not identify the requirements of a single trade nor does it identify those requirements which, by their nature, are restricted to one environment.

PART 11
Section 1

The General Specification

Scope

1. This specification identifies those responsibilities which Other Ranks are required to discharge. The knowledge and skill contained in this specification are the minimum required for entry into each Rank level. The standards are complementary to those acquired through trades training; and therefore this specification must be read in conjunction with the applicable trade and trade specialty specifications contained in A-PD-123-002 and A-PD-123-004.

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2. The general responsibilities of Other Ranks are outlined in the Queen's Regulations and Orders, Cap. 5, art 5.01. Other Ranks of the Canadian Forces are responsible for performing a variety of tasks peculiar to the military, and to nonmilitary activities. These tasks involve the use of basic military skills and the application of a knowledge of military procedures to effect assistance to other organizations as determine by higher authority. (Exhibit R-3 (Respondent's documents - Capt. Macknie) Tab 11, P. 1, 4)

In the trade specification related to musician, the functions of the musician trade are stated to include (Exhibit R-3 (Respondent's documents - Capt. Macknie) Tab 9, P. 1):

"2.e. NBC Defence

Performs NBC Defence duties as required.

f.General Military Requirements.

Performs a variety of duties and activities common to the military environment."

(Note: NBC means Nuclear, Biological and Chemical)

We heard a great deal of evidence, particularly in cross-examination, about the daily role of a musician in the CAF - and, as would be expected, musicians spend a great deal of time playing music, planning and setting up for concerts, travelling, etc. - matters related to being a musician. We heard evidence of the expectations related to the military role to be played by band members both in peace time and during past hostilities. We heard evidence regarding the role that bands at the present time are playing related to military exercises such as base defence force and which bands participate regularly in these exercises and which do not (Evidence, Vol. 2, P. 246-251), with the bottom line being that each Base Commander decides whether

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the band members under his/her command will or will not participate. (Evidence, Vol. 2, P. 239, 315)

There is another point regarding the military duty of musicians that bears pointing out. Cmdr. Morrison referred to excerpts from a book entitled "The Harps of War" by W. Ray Stephens, which is a book containing the memoirs of a military bandsman prior to and during World War II. Mr. Stephens indicates that in the beginning of World War II the military did away with its full time bands and those members were integrated into the regular fighting forces. Cmdr. Morrison indicates that later on in the war the bands were reformed, however it appears that there was a period of time during which the bands men were not employed as bands men but as regular troops. (Evidence, Vol. II, P. 235; Exhibit R-6) Respondent's documents - Cmdr . G.L. Morrison), Tab 3, P. 5).

It is true that many individual members of the CAF, both in the musician trade and in many other trades, may perform satisfactorily in the day to day duties related to his/her trade or occupation, perhaps spending an entire career without ever facing the military crisis for which he/she has been hired and trained. Nevertheless, the military role of the CAF is

a critical one. It is vital that the function be carried out competently if and when required - failure to perform adequately under those circumstances would have serious effects, and the risk of failure is not one that is justified or acceptable.

It is tempting, in a country like Canada which is relatively free of internal

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unrest and, until recently, had not been at war for many years, to minimize the importance of the military role of the CAF and the risk of danger to its m ambers in carrying out that role. Talk of war, hostilities and fighting can seem overdramatized, and possibly even farfetched. However, between the hearing of the evidence in this matter and the writing of this decision we have had two very striking examples of the continued need to retain the military and to maintain its members at a level of preparedness where they can be deployed on a moments notice. The first example of the use of the military related to the civil unrest at Kahnawake and Kahnisatake and the second example was on the use of our armed forces is the Persian Gulf war.

Based on all of the evidence, I am satisfied that the primary role of all regular members of the CAF is to protect the interests of Canada, Canadians and Canadian Allies with physical force, if necessary. While other roles may be assumed by various members of the CAF when our country is not at war, the primary obligation and purpose of the CAF is to maintain that war time preparedness. It is therefore my opinion that the defence of BFOR as it relates to the occupation which is the subject matter of this complaint, must be related to the military aspects of being a regular member of the Armed Forces as well as the occupation of being a musician in the CAF.

(ii)Current Standard

The medical standard of visual acuity for enrolment to the CAF is V-4 which is described in the "Table of Visual Standards" which forms part of a document entitled "Medical Standards for the Canadian Forces" (Exhibit R-10 (Respondent's documents - Major John Kearns) Tab 5). The standards state that a recruit will have his/her visual acuity rated as V-4 as long as the refractive error does not exceed + or -7.00 dioptres

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measured for each eye without the use of corrective lenses.

Major Kearns described the various visual standards as follows (Evidence, Vol. 3, P. 402-404):

"In order to determine an individual's correct visual category, we need two sets of information. We need to know what their vision is in each eye without their glasses on or without correction and what their vision is in each eye with their optical correction.

They have been divided into six categories. I explain them to people in fairly common terms in that a person with V-1 vision, has perfectly normal vision as far as being able to read the chart is concerned and doesn't require correction under normal circumstances to enhance his vision. They have normal vision.

V-2 is an individual who has reasonable vision without their correction, such as they could probably meet the minimum driving standards should they not have their glasses with them, but with correction achieves normal vision.

The V-3 category, which is a rather broad category, actually those individuals who don't meet either V-1 or V-2 standards and who have rather poor unaided vision -- uncorrected vision, but good corrected vision. But their unaided vision is to such a level that they are going to be restricted in carrying out many of the common military duties without their glasses on. They will not be able to drive a vehicle. They will not be able to correctly handle weapons without their glasses on.

- it is a person who cannot function in the every day sense without their glasses on, a V-3.

V-4 are those individuals who had -- it actually encompasses two groups and that leads to some confusion. But for our purposes here, the aspect of V-4 that we are talking about are individuals whose uncorrected acuity does not meet the 20/400 standard so that we can't accurately measure their level of vision and whose refractive error does not exceed + or -7.00 dioptres.

The V-5 category is reserved for certain members who cannot qualify for one of the higher categories, but who in the opinion

of an ophthalmologist can still perform their duties satisfactorily with the vision that they have.

V-6 is a category that is assigned to applicants to the Armed Forces who do not meet the V-4 standard or to serving members whose level of vision has fallen below a level that we think is -- with their ability to perform their military tasks."

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The V-4 entry level standard is a lower standard than is required for some occupations within the military (ie a pilot), and the reason for this was provided by Major Kearns (Evidence, Vol. 3, P. 408):

"A standard for recruitment has been set such that the people who enter the front door will be able to fill the majority of military tasks that may be required during the course of their career. They will also meet the standard that is required to successfully and safely undergo the rigors of training, particularly basic training."

Both Major Kearns and Dr. Wilkinson explained the functional limitations placed on a person with refractive error exceeding -7.00 dioptres. This level of refractive error would result in the person who is applying for entry into the Armed Forces to be classified a V-6 and thereby be refused entry:

"Now, this vision is worse than the legally blind 20/200, 6/60 line. In my opinion it - the kinds of level of vision that she would certainly be able to make out significant changes in colour, light and dark such as the direction of windows, movement would be easier to detect than detail. This is something that we are not terribly aware of. But, for instance, if somebody stood very still twenty feet away, she could well not realize that somebody is there. If they moved, she would immediately know that there was somebody there.

Identifying who somebody is would probably be possible at about two or three feet. And for those reasons, I would say that she would certainly be unable to use a weapon." (Evidence, Vol.4., P. 527, 528)

"She would probably have trouble finding the glasses even if she dropped them, not on the floor, but if she was in the bush or in the water or something, it would be hard to find. Finding a contact lens would be quite difficult." So my conclusion was that looking at the information that I was given about the kinds of activities that she would be expected to carry out, that with her glasses on she would be able to carry these out. If on the other hand she lost her glasses, it would be disastrous." (Evidence, Vol. 4, P. 529)

"And I came to the conclusion that there there were basically three levels of ability with someone who loses their glasses.

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The first is the ability to carry out most activities, despite the fact that you have lost your glasses, though there may be some restrictions of a few. --then there is an area where the individual is left with a vision somewhere between 20/40 and 20/200, where gradually they are less able to carry on their job, but are still able to look after themselves. -

I would say that if somebody was left with 20/200, they would not really want to be able to continue with that job, but they could get themselves out of it. Whereas if the vision is poorer than 20/200, they're getting into a level where they can't tell which direction they are going in. So other officer has to be taken out of the group to get them back out of the way. So that is more costly to the unit because it has occupied two people rather than one person.

So you have got three stages. There is a stage where the individual is able to continue being productive. Then you have the stage where the person is not productive, but is able to look after themselves. And finally you have the stage where they are not only not productive and unable to look after themselves, but become a liability. Somebody has got to get them out of the situation." (Evidence, Vol. 4, P. 532-533)

"People with bad vision are often quite unaware of the clues they are missing. - in a situation of danger, in a fire or entering an enemy occupied territory or anything like that, you will need to use all sorts of little clues, movement, subtle differences and

colour. In those situations are impossible to quantify, but obviously the better your vision, the more effectively you can carry those out and the more safely." (Evidence, Vol. 4, P. 574)

I am satisfied that the CAF must set some type of minimum standard for visual acuity for its members - obviously one cannot function as a soldier if one is blind; because visual acuity declines over an continuum, from "normal" vision to blindness, the standard chosen, within a range, is necessarily going to be somewhat arbitrary in the same way as a highway speed limit is somewhat arbitrary within a particular safety range. Nonetheless, I find that it is necessary for the CAF to have a minimum standard for visual acuity for recruits.

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The CAF has chosen the minimum visual standard for visual acuity for recruits to be a refractive error not exceeding + or -7.00 dioptres, which is someone whose visual acuity without correction does not meet the 20/400 standard (and would therefore be considered legally blind without correctile lenses) but whose visual acuity can be corrected so that the corrected vision in the better eye is no worse than 20/30. 1 find this standard to be very generous in favor of admitting people to the CAF who are really borderline in terms of ability to function without correction - ie they may not be able to function without the use of their corrective lenses in terms of performing the job, but they can probably look after themselves in terms of leaving an area of conflict with little or no assistance.

I therefore find that the level of unaided visual acuity chosen by the CAF as its minimum entry standard is reasonable and necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees, and the general public.

(iii) Corrective Lenses

It was acknowledged that with corrective lenses the complainant's vision and 20/30 (R) and 20/25 (L) was good, (Evidence Vol. 3, P. 416) and the evidence showed that she had worn contact lenses successfully for several years. The major issue then was whether there was a risk of the complainant (or any other recruit) losing her corrective lenses or being required to remove or take off the lenses or stop her activities to clean or otherwise adjust the lenses, and was this risk significant enough to

require the Armed Forces to set the enrolment standard for visual acuity in relationship

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to the uncorrected standard of visual acuity rather than the corrected standard.

Both Major Kearns and Dr. Wilkinson talked about the risks associated with the use of corrective lenses, which were described as follows:

(i) Glasses:

"Anybody who is wearing glasses can certainly identify with most of the problems that glasses create. They are a nuisance in many activities, sports especially. They fall off your face. They are subject to damage from whatever sort of abuse we subject ourselves to. They fog up in the rain. They mist. They frost over when you pass from a warm to a cold area. They become dirty. They become scratched.

In the military occupations, one of the main disadvantages of glasses is that we have some equipment that is compromised to some extent by the wearing of glasses. This is protective, mostly protective equipment. Although some of it is operational equipment.

But sticking mainly to protective equipment, in particular the use of the respirator or gas mask as most people refer to, a traditional pair of spectacles compromises the seal at the side of the face. The whole principle of a respirator is to protect you from anything that may be in the environment around you." (Evidence, Vol. 3, P. 368,369)

"We employ people -- we ask people to do many physical activities in which glasses become a very distinct nuisance. Loss of glasses, mainly dislodgement, not complete loss, but having them knocked off your face is not an uncommon experience. In jumping out of the back of vehicles or traipsing through the woods or handling some of the equipment that people are expected to handle, often in very poor lighting conditions, such as during the dark, or at dusk or dawn." (Evidence, Vol. 3, P. 370)

(ii) Military Glasses:

"We have addressed that within the military by designing a pair of spectacles to be used with the respirator. They are of moderately sturdy construction, are closer to the face and have a thin nylon strap which conforms to the side of our head over the temples, and then has a ring, a D ring that fits around the ear in an attempt to give people good vision, but also minimize the compromise of the seal of the respirator.

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These are not particularly comfortable glasses for a variety of reasons. The majority of people do not wear them unless they absolutely have to. Most people don't like having rings stuck around their ear for the entire time. It become uncomfortable.

In my experience, personal and otherwise, I find that many people for the sake of being exposed to gas warfare training, tend not to wear their glasses because they know that they are only going to be in the respirator for a short while, and they are quite happy to sort of have poor vision for fifteen minutes, rather than put on the nuisance of these glasses." (Evidence, Vol. 3, P. 369)

(iii) Contact Lenses:

Q. "Now, you spoke of one of the problems is the hygiene of the lenses. I guess you meant cleaning the lenses and all those solutions that people use? "

A. "In the environment in which people are living and which in a field is dust and dirt, living with the ground at times, living in a hole in the ground, these are far from ideal situations in which to wear contact lenses." (Evidence, Vol. 3, P. 456)

"- but there are often medical conditions where it is inappropriate to wear your contact lenses. These may be temporary or they may be permanent." (Evidence, Vol. 3, P.457)

"The problem with contact lenses is that if your eyes become irritated before you put the mask on, then when you have got the

mask on and your eyes are irritated with the contact lenses in, you are considerably worse off than if you are somebody who had got them in clean." (Evidence, Vol. 4, P. 553).

"Well, within the industrial situation, there are specific risks and there are fairly general risks. The general public is not exposed to intense heat, dry atmosphere, flying particles, intense dust and in unusual situations. These things to most people occur only in the industrial situation. But the principles behind the problems relate to those situations, I think, you can also look at that as being relevant if you are out in the desert or something of that sort and dealing with dust." (Evidence, Vol. 4, P. 581, 582)

Capt. Veilleux described the rigors of basic training camp and pointed at some of the activities that could cause risk of loss of corrective lenses, and how reasonable eyesight is required to function.

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It is true that corrective lenses can often compensate for poor visual acuity, and the three types of corrective lenses - glasses, contact lenses and military glasses - can each assist a person with poor visual acuity in different circumstances. If the member of the CAF had easy access to all three types of corrective lenses, and had the time to use one or the other as the circumstances dictated and to change the type of lenses in use as the circumstances changed, then there may be no serious risk in accepting members to the Armed Forces who have poor unaided visual acuity if that visual acuity can be brought up to an acceptable standard with the use of corrective lenses. The fact is, however, that the different types of correction are useful in different circumstances, that some types of correction are particularly poor in certain circumstances and that it is very likely that members who rely on corrective lenses will, from time to time, find themselves in circumstances where their corrective lenses are not appropriate for use in the situation in which the member finds himself or herself.

The recent conflict in the Persian Gulf War provides a real example of these difficulties. I would think that a person performing either a military or an occupational role in the desert on a windy day would not want to be wearing contact lenses as there would be a very high risk of getting dust or dirt behind the lenses, however, contact lenses would be the most suitable type of correction to be used with a gas mask if

the gas mask was going to be worn over a long period of time, as the normal glasses compromise the seal of the gas mask and the military glasses are uncomfortable to wear for long periods of time. Unfortunately, a soldier is unlikely to have sufficient time to take off glasses and insert contact lenses before putting on his/her gas mask and other protective clothing when the siren sounds to don the masks. Thus, one can see that in the situation that occurred recently in the Persian Gulf War, a recruit who required the use of corrective lenses to be able to function would probably have been ineffective in the circumstances of operating in the desert and requiring the use of gas masks and protective clothing.

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One must therefore question whether a member of the military would always have immediate access to the appropriate type of corrective lens (or would it be in the bottom of a knapsack or back at the barracks or camp?) and would that recruit or member of the military have time to change corrective lenses in an emergency.

I am satisfied that the types of activities which must be performed by members of the military carry with them a reasonable risk of the loss, breakage or other problems associated with the use of corrective lenses such that it is reasonable and necessary to set an enrolment standard for visual acuity related to uncorrected vision.

(iv) Individual Testing:

There has been discussions in several cases of the use of individual testing rather than setting a standard which is discriminatory, and the complainant, in argument, refers to the respondent failing to establish that it was not practical to test the complainant's vocational abilities rather than disqualifying her through the application of a common enrolment standard.

The issue of individual testing arose in the cases dealing with age discrimination - ie Etobicoke, Citv of Saskatoon v. Saskatchewan Human Rights Commission [1990] 1 W.W.R. 41 (S.C.C.), Air Canada v. Carson, [1985] 1 F.C. 209 (C.A). In dealing with age discrimination, an employer is arguing that some - but not necessarily all - people attaining the age in question cannot function adequately and on that basis all people of that age must be excluded from employment. The employees, in turn, have argued that, because all persons at that age are not disabled, they should be entitled to individual

testing so that only those who are actually disabled are refused work. In this situation, there is a reason to require individual testing for the disability, to determine whether a given employee is actually disabled. In the case at bar the complainant was individually tested for her disability and her uncorrected eyesight was determined to be lower than the acceptable standard - in fact P-Is. Husband's uncorrected eyesight would place her in the category being considered "legally blind". Ms. Husband also had her vocational abilities tested on an individual basis and her musical skills were deemed to be acceptable. (Evidence, Vol. 1, P. 29; Vol. 2, P. 269)

The testing of the complainant's ability to function in a military environment, given her disability, is an issue which causes some difficulty. Obviously, she could not function in a military environment without corrective lenses. In fact, she could not function well in a musical environment without her corrective lenses as she has acknowledged that she requires her corrective lenses to read music. The question of whether or not she actually loses her corrective lenses in a particular situation and is thereby unable to function is as much or more a matter of luck than of ability, and it is not something that can be tested effectively.

While basic training tries to train recruits in basic military skills, it is probably not a very good testing procedure to measure how an individual will perform in a real emergency, or in a war time situation. I agree with the comments made by John Laskin in the decision he gave in the case of Galbraith v. The Canadian Armed Forces (June 26, 1989) where he stated a page 44:

"It is for this same reason, that the hazards and stresses of military life cannot be replicated, that I am satisfied that the Canadian Armed Forces has justified its blanket exclusion for individuals having received less than a G2 02 medical

rating as a result of having had a gastric or bowel resection. I am somewhat skeptical of the argument that in view of the number

of potential recruits considered every year, individual assessment would be impractical. I am of the view that such assessment would be inappropriate because of the difficulty, if not the impossibility, of replicating field conditions. While it is true that these conditions are replicated as best they can in peace time exercises, even in that case there is in my opinion, significant difference. How one will cope in a time of war will be determined only in a time of war. Dr. Ross's suggestion of a means by which individuals such as Mr. Galbraith could be tested would not, in my view, be adequate or accurate."

I am therefore satisfied that having the complainant complete basic training as a "testing procedure" would not be an effective method of testing to see whether her particular disability affects her ability to perf orm the military occupation efficiently and economically without endangering herself, her fellow employees and the general public.

(v) Waiver of Standard:

The medical standards for the Canadian Forces contains a paragraph entitled "Waiver of the Common Enrolment Standard" which reads as follows (Exhibit R-10 (Respondent's documents - Major John Kearns) Tab 5, P. 4):

"Certainly applicants for the Canadian Forces may possess special qualifications, such as experience and skill in a trade or professional qualifications, which make their enrolment desirable. Under such circumstances administrative authority may waive the common enrolment standard and the medical category shown at an Annex D will apply for the employment for which they are being considered."

Major Kearns indicated that he was not aware of a waiver ever having been given. (Evidence, Vol. 3, P. 431). He stated that he had tested one recruit, a lawyer, who was V-6, but he didn't know whether she was accepted. (Evidence, Vol. 3, P. 433,

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439-441) There was no evidence which suggested that if, and under what circumstances, the section has been used, if at all, so I am not prepared to find that, because the CAF has the latitude to waive the standard, it must abolish the standard. While the CAF may (and we don't know this for

sure) have been able to waive the visual acuity standard to enrol the complainant, to do so would, in my opinion, be accommodating her which it is not legally bound to do if the uncorrected visual acuity standard constitutes a BFOR.

(vi) V-5 Standard:

The specifications for a musician state the following (Exhibit R-3 (Respondent's documents - Capt. Macknie) Tab 9, P. 2)

"It is emphasized that the medical standards shown above are for initial assignment of personnel to the trade. Experienced personnel who have had their medical category lowered will be considered for retention on their merit by a career Medical Review Board in accordance with CFAO 34-26."

This provision raised the question of whether V-4 was a necessary standard for recruits when regular members whose eyesight fell below that level could be retained. It was acknowledged that if the complainant's eyesight had been somewhat better and she had been assessed a V-4, thereby qualifying for entry to the CAF, and her eyesight had subsequently deteriorated to its current level, she would, in all likelihood, be given a V-5 rating and retained in the Armed Forces. (Evidence, Vol. 3, P. 49).

The reason for this apparent anomaly was explained by Major Kearns as follows, (Evidence, Vol. 3, P. 410):

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"Well, with respect to the visual standards, it is not uncommon for some change to occur in the category during the course of a serviceman's career. The majority of recruits join the Armed Forces in their late teenage years. This is still a fairly dynamic stage in the development of refractive errors.

The majority of refractive errors in myopics especially, occur in - before the age of twenty-five is a general rule. When you do have an arbitrary cutoff point, -7.00, lets say or 20/400 or whatever, you can recruit - people who just meet that standard at a certain stage are not going to meet it if there is any further change. It is just normal changes that happen as a result of aging, even as a teenager.

So many of these individuals are going to progress over into the very next category. This is a very common phenomenon.

But the same thing can happen at any other category where there are arbitrary cut-off points. There are many borderline cases. We generally with a borderline case, we generally give them the benefit of the doubt and give them the lower category. It does not take very much change for them to have - not be able to - not fall into the borderline group, up to clearly in a lower group."

I accept the reasoning of the CAF on this issue. I think that it has struck a reasonable balance between setting an enrolment standard at which its recruits can at least look after themselves, even if they can't perform their military functions, without using corrective lenses, while also accommodating the human reality that almost all members will see their eyesight deteriorate during their years of military service.

Counsel for the Commission pointed out in his questioning of both Major Kearns and Dr. Wilkinson, that someone whose refractive error is -7.00 dioptres (slightly better than the complainant) would be accepted into the CAF, and yet without corrective lenses could not perform any military functions significantly better than the complainant (Evidence, Vol. 3, P. 451; Evidence, Vol. 4, P. 567)

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The fact is that vision deteriorates over an continuum - there is not an exact cut-off point above which vision is acceptable and below which vision is unacceptable. No matter what level CAF chooses as its standard, there will always be some people just below the standard whose vision was not significantly worse than those just above the standard who could argue that they should not have been excluded because they could function, for all practical purposes, as well as those immediately above the standard.

This does not mean, however, that there should not be a standard. The reality is that you have to be able to at least look after yourself if you do lose your corrective lenses, so that while you may no longer contribute to the military cause, you do not become a liability.

Again, I find that the standard chosen by the CAF is a reasonable compromise to allow the largest number of potential recruits to qualify for entry to the CAF and at the same time maintain a minimum level of ability

to function so as not to unnecessarily endanger the safety of the member, his or her co-workers and the public.

VI. CONCLUSION

There was never any question raised as to whether the respondent was acting in good faith in establishing the existing medical standards related to visual acuity for entry to the CAF. Based on the evidence, I find that the respondent, at all times, acted honestly and in good faith and in the sincerely held belief that the limitation was opposed in the interests of the adequate performance of the work involved with all reasonable dispatch and encomony, and not for ulterior or extraneous reasons aimed at obj ectives which could defeat the Code - ie they have met the "subjective test" set out in Etobicoke.

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The major issue in this case related to whether the existing medical standards related to visual acuity for entry to the CAF also met the "objective test" set out in Etobicoke. In considering all of the evidence, I have spent many hours reading and rereading the four volumes of evidence, the several volumes of exhibits and the precedent cases to understand the role and purpose of the Armed Forces, the expectations of recruits, the occupational and military duties of a musician and how they fit into the CAF. After careful consideration, I have come to the following conclusions:

1. An uncorrected visual acuity standard for entry to the CAF is necessary.

2. There would be increased risk to the individual member and his/ her co-workers and the public without that standard.

3. There is a clear connection between the standard of uncorrected visual acuity imposed by the CAF and the ability of the recruit to look after himself in the performance of his/her job without undue risk to himself, his/her co-workers and the public.

4. The standard of uncorrected visual acuity selected for entry to the CAF is reasonable.

I therefore also find the minimum standard for visual acuity for entry to the CAF is reasonably necessary to assure the efficient and economical

performance of the job without endangering the employee, his fellow employees or the general public - ie they have also met the "objective test" set out in Etobicoke.

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I therefore find that the respondent has established that its entry level standard for visual acuity for members to the CAF, while constituting discrimination based on disability, is a bona fide occupational requirement and is therefore not a discriminatory practice within the CHR Act.

Dated the day of May, 1991.

Holly C. Beard - Q.C.

Norma G. McLeod

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

HUMAN RIGHTS TRIBUNAL

BEFORE:

Richard I. Hornung, Q.C.
Holly C. Beard
Norma G. McLeod

BETWEEN:

JULIA HUSBAND

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL DEFENCE

Respondent

DISSENT

RICHARD I. HORNUNG, Q.C.

I.

Julia Husband alleges that the Canadian Armed Forces (CAF) discriminated against her, contrary to Sections 7 and 10 of the Canadian Human Rights Act R.S.C. 1985 c. H-6, by denying her entry to the Forces because of her visual disability. In response, the respondent submits that its standards for visual acuity constitute a bona fide occupational requirement as envisaged by Section 15(a) of the Act.

Ms. Husband is an extremely talented musician. She meets the CAF's musical qualifications on 4 instruments: clarinet, flute, bassoon and baritone saxophone. Since 1981 she has been applying and auditioning to become a musician with the CAF. However, on each occasion prior to 1986, there were no positions

open.

In April 1986, she applied to fill a direct-entry position in the CAF to play the clarinet.

She essentially fills a specific designated position. There is a limited requirement for direct-entry musicians. They must possess an acknowledged skill and are enrolled directly in a 3-year, as opposed to a 5-year, music program. These candidates are judged initially on their musical ability and then, on recommendation, they are made a recruitment offer. Once recruited, however, the CAF requires that they pass through basic training, as all other recruits.

Ms. Husband met all of the musical qualifications for the direct-entry position. However, after undergoing medical examinations, she was instructed in September of 1986 that she failed to physically qualify for the CAF because of her eyesight. Notwithstanding that she had previous medical examinations, this was the first occasion on which her eyesight qualification was raised.

A "direct-entry" position is one in which the candidate

Essentially, Ms. Husband's problem is that her corrected vision indicates a refraction of -8.38 and -8.00 diopters. The maximum refraction permitted by the Canadian Armed Forces for entry as a musician is + or - 7 diopters.

This is referred to in the CAF's medical standards as "V4".

The following excerpt from Ex. R-3 (Tab 9) lists the special requirements for musicians:

"SPECIAL REQUIREMENTS
5.b. Medical Standards.
Medical standards for the Canadian Forces are governed by A-MD-154-OOO/FP-000. The minimum

medical standards for initial assignment to the Musician trade are included below for information only:

V CV H G 0 A
4 3 3 3 3 5

Note: It is emphasized that the medical standards shown above are for initial assignment of personnel to the trade. Experienced personnel who have had their medical category lowered will be considered for retention on their merit by a Career Medical Review Board in accordance with CFAO 34-26.

C. Prior Qualifications. Must have ability and aptitude for music."

An explanation for this requirement is contained in Ex. R-10 (Tab 5) p. 3-1:

"CHAPTER 3 INTERPRETATION OF THE MEDICAL STANDARDS

1. A certain standard is required of recruits so that they may be eligible for the widest selection of trades. To take the highest common denominator would be too restrictive and to take the lowest common denominator would be to accept too many recruits with employment limitations. As it is the aim to keep the medical standards of the Canadian Forces high and it is inevitable that the

category of many serving personnel will be lowered during their career, it is required that we demand a high medical standard of our recruits. For these reasons a minimal medical category for enrolment in the Canadian Forces shall be:

v cv H G 0 A
4 3 2 2 2 5

It is the declared policy of the CAF that the standards, described in the exhibits above, must be met by all recruits unless waived.' Every member must meet these minimum physical standards and pass basic training, regardless of the position for which they enlist or are recruited. According to the CAF, although Julia Husband could well function as a musician, her visual disability is such that she would be unable to pass basic training or subsequently become appropriately involved in military exercises should the same become necessary.

iii.

The relevant Sections of the Canadian Human Rights Act are as follows:

"3. (1) 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.

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

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

(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

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

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

15. 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;"

iv.

The law of bona fide occupational requirement (BFOR) has been settled by the Supreme Court of Canada in a series of cases beginning with its decision in

Ontario Human Rights Commission v. Etobicoke (1982) 1. S.C.R. 202, where the Court stated at 208:

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

Following the conclusion of the complainant's case, it was conceded by counsel for the respondent that a prima facie case of discrimination had been made out pursuant to Sections 7 and 10 of the Act; and that the burden lay on the CAF to establish, on a balance of probabilities, the existence of a bona fide occupational requirement.

To discharge its burden, the employer must meet both the subjective and the objective test as set out in Etobicoke at p. 208:

"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 interest 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.

The answer to the second question will depend, in this as in all cases, upon a consideration of the evidence and of the nature of the employment concerned .....

The subjective element concerns itself with the sincerity of the belief of the employer that the requirement is imposed for the adequate performance of the job. I have no difficulty concluding that the CAF imposed its medical standards honestly, in good faith and in the sincerely held belief that the limitation is in the interest of the adequate performance of its members.

However, the Canadian Armed Forces must still meet the objective aspect of the test. To do this it must establish that, apart from its honestly held subjective belief, the occupational requirement in question is reasonably necessary to ensure the efficient and economical performance of the job.

Generally, a BFOR applies to all members of a particular group and is a requirement of general application concerning the safety of all employees. By its very nature, therefore, it is not susceptible to individual application. In K.S. Bhinder v. C.N. Rail (1985) 2 S.C.R. 561, Mr. Justice McIntyre observed at p. 588: "The words of the Statute speak of an 'occupational requirement'. This must refer to a requirement for the

occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application."

However, recent jurisprudence indicates that, while individual application of a BFOR is precluded, an employer may nevertheless fail to establish a BFOR defence if it is unable to provide an acceptable explanation as to why it was not possible to deal with employees on an individual basis. In City of Saskatoon v. Saskatchewan Human Rights Commission (1990) 1 WWR 481, Sopinka J.

states at p. 493:

"...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."

In Alberta Human Rights Commission v. Central Alberta Dairy Pool and Canadian Human Rights Commission (1990) S.C.C. File No. 20850, Sopinka J. elaborates on this view in his concurring decision, at p. 7:

"While Bhinder precludes an individual application of the BFOQ, subsequent jurisprudence in this Court makes it clear that an employer may fail to establish a BFOQ defence if he is unable to provide an acceptable explanation as to why it was not possible to deal with employees on an individual basis. In Brossard (Town) v. Quebec (1988) 2 S.C.R. 279, Beetz J. specified the following as the second of two criteria for the establishment of a BFOQ:

(2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the

rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question. [At p. 312.1'"

An employer may therefore fail to establish the reasonableness of a BFOR if it does not satisfy the Tribunal that accommodation of individual employees either was not possible or would result in an undue hardship on it.

In my view, the employer need not establish that each employee cannot be individually accommodated on the specific facts of each case. To require it to do so would render the BFOR defence meaningless. Instead, I interpret the

decision of the Supreme Court in City of Saskatoon and Alberta Dairy Pool , to mean that an employer must show that it could not, without an impractical hardship, accommodate all individuals who might apply for the position and who possess the disability in question. It may well be that any single specific individual could be accommodated on a one-time basis, especially in an organization as large as the CAF. However, that cannot be the test. The test must be whether or not the employer could reasonably accommodate, without undue hardship, any number of similarly afflicted individuals in similar circumstances, who could not meet the physical BFOR.

In the instant case, the CAF would meet this obligation by satisfying the Tribunal that it could not practically accommodate direct-entry musician recruits, with V4 eyesight, on a general basis, without undue hardship to its operation. The failure by the employer to establish this would be one of the considerations which the Board weighed in determining whether or not the BFOR imposed was in fact reasonable under the circumstances.

V.

The respondent argued that notwithstanding the fact that Ms. Husband could perform as a musician after she became a member, she would nevertheless have to pass the rigors of basic training, as would any other entry recruit. It submits that with an eyesight disability of V4, Ms. Husband would in fact pose a threat to

herself, her fellow employees and, because of the nature of the CAF's obligations, the public. According to the CAF, Ms. Husband, because of her visual disability, would be unable to pass the minimum requirements of basic training in two areas:

9 a) an inability to efficiently carry out the gas mask exercise because of impediments imposed by her glasses;

2) a risk that her glasses may fall off during an exercise or training, rendering her essentially unable to see and thereby posing a threat to herself and her fellow members.

The hypothesis on which the respondent's concerns were based belie the realities of the evidence. Ms. Husband uses contact lenses which the evidence disclosed could be worn effectively in training, without apparent problems, particularly in the gas mask exercise. The chance of losing both lenses is very small. In addition, a large number of the CAF members wear special glasses which the CAF distributes to its members for use in exercises.

These glasses are designed to be effective during the rigors of training and to be specifically used without hindering the gas mask exercise. Considering the above, the concern about Ms. Husband's inability to navigate if her glasses fell off in exercises appears to be overstated and fails to take into consideration the number of members who utilize glasses and would be similarly effected.

The respondent argued forcefully that the BFOR regarding physical standards is absolutely necessary in that all members of the CAF are subject to be called into battle if required. In support thereof it cited Section 33(l) of the National Defence Act R.S.S. c. N-4, which states:

"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.....

By extension, this would require that all members of the CAF be essentially "battle ready" at all times. On this basis, the physical occupational

requirements demanded by the CAF of its recruits, must be universally applicable. Such a universal application of the BFOR would have the unreasonable consequence of causing serving members to be removed regardless of their skill and expertise because they fail to meet the basic minimum physical requirements. The CAF has laudably and logically accommodated serving members who fall below the minimum standards and ensured that their expertise will not be lost.

In addition, the respondent has a specific policy relating to "Waiver of the Common Enrolment Standard" as referred to in Ex. R-10:

"Waiver of the Common Enrolment Standard

2. Certain applicants for the Canadian Forces may possess special qualifications, such as experience and skill in a trade or professional qualifications, which make their enrolment desirable. Under such circumstances administrative authority may waive the common enrolment standard and the medical category shown at Annex D will apply for the employment for which they are being considered."

The evidence disclosed that the CAF has waived the common enrolment standard for other individuals in order to ensure their continued service. No adequate explanation was given, in my view, for refusing a waiver in the instant case.

I am prepared to concede that employers must be granted a measure of deference when establishing occupational requirements. After all, they frequently have a large investment at risk and no one is in a better position to determine the occupational requirements of a position than those charged with the responsibility of managing the business affairs in a proper and efficient manner. However, that management prerogative is now limited by the Canadian Human Rights Act which requires that an employer must establish that an occupational requirement that discriminates in a manner prohibited by the Act, is actually necessary for an employee to be able to fulfill and discharge the duties of the position.

In my opinion, the BFOR in question here is based on historical attitudes and traditions embedded deeply in military thinking. It is not bona fide within the meaning of Section 15(a) of the Act because it bears no relationship to the true qualifications needed by musicians in the modern Canadian Armed Forces. In my view, the CAF does not realistically intend to require its musicians to

perform the duties which are used to justify the occupational requirements in issue. There is simply no rational basis for requiring musicians to meet the occupational requirements upon which the CAF is relying to deny Ms. Husband employment in the CAF band.

Finally, the CAF has an apparent "testing procedure" in place by way of its basic training regimen. The "accommodation" test set forth earlier provides the CAF with an opportunity to set its basic standards without visiting an undue discriminatory hardship on those who cannot meet it and without compelling the CAF to rigidly enforce those standards or abandon them. No evidence was led to suggest that the CAF attempted to accommodate Ms. Husband by including her in the basic training process or that such accommodation could not take place without undue hardship.

In all, it is therefore my view that the imposition of the V4 standard to Ms. Husband, in the circumstances of the present case, is not reasonably necessary to ensure the efficient and economic performance of her duties as a musician.

Accordingly, for the reasons above, I determine that the bona fide occupational requirement of V4 visual acuity for Ms. Husband is not a reasonable occupational requirement under the circumstances.

I must therefore, with respect, accordingly dissent from the decision of the majority.