

T. D. 1/ 89 Decision Rendered January 4, 1989

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

ANDRE SEGUIN, GEORGE TUSKOVICH Complainants -and

ROYAL CANADIAN MOUNTED POLICE Respondent

DECISION BEFORE:

KEVIN W. HOPE

APPEARANCES:

GEORGE HUNTER AND CAROL BROWN Counsel for the Complainants and the Canadian Human Rights Commission

DONALD RENNIE AND ALAIN PREFONTAINE Counsel for the Respondent

DATES AND PLACES OF HEARINGS: September 19 to 23, 1988

October 25 to 27, 1988 in Ottawa Ontario

> DECISION

This Tribunal was appointed pursuant to subsection 39(1-1) of the Canadian Human Rights Act (CHRA) to inquire into the complaints of Sylvain Lafontaine dated May 21, 1985, Andre Seguin dated June 6, 1985 and two complaints of George Tuskovich both dated June 21, 1985 pursuant to sections 7, 8 and 10 of the CHRA against the Royal Canadian Mounted Police (RCMP). The hearing was held in Ottawa September 19th to 23rd, 1988 and October 25th to

27th, 1988. Mr. Lafontaine failed to appear before the Tribunal to establish a prima facie case of discrimination and accordingly his complaint was dismissed on September 20th, 1988.

Prima facie cases were admitted by the Respondent with respect to the other two Complainants, both of whom appeared before the Tribunal to give evidence.

THE FACTS Mr. Seguin and Mr. Tuskovich were refused 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's minimum standards. Both complained that they had been discriminated against on the basis of physical disability contrary to the CHRA.

The RCMP's minimum visual acuity standards without visual aids (correction) for Special Constable static guards and regular members are as follows:

(a) 20/ 60 in each eye; or (b) 20/ 40 in one eye and 20/ 100 in the other. Mr. Seguin's uncorrected visual acuity standards were 20/ 80 in the right eye and 20/ 200 in the left eye. Mr. Tuskovich's visual acuity standards were 20/ 400 in each eye without correction. Both had corrected vision of 20/ 20 in each eye.

Mr. Seguin testified that he has completed a 2 year diploma course in law administration and was in excellent health at the time he approached the RCMP. His marks were excellent. He was involved in boxing and worked as a private security guard and customs officer while attending college. Since he was rejected by the RCMP, he has been enrolled in University taking Criminology and Philosophy courses. He testified that his ambition has always been to enter the RCMP and I have no doubt that if not for his visual acuity, he would have been an excellent candidate for admission. He was angered and embarrassed when refused by the RCMP.

> 2 Mr. Tuskovich has a teacher's certificate and a Bachelor of Arts degree. He worked as a teacher and then in the life insurance industry for many years before becoming a private security guard. He had minimal training but was familiar with the use of a handgun in his position as a private security guard. When refused by the RCMP, Mr. Tuskovich was angry and disappointed. He has since returned to the life insurance business.

Both Mr. Seguin and Mr. Tuskovich are aware that there were more applicants than positions available and that adequate uncorrected visual acuity would not necessarily have ensured entrance to the RCMP Special Constable Program.

Following the evidence of the Complainants, the Respondent began its case asserting that its minimum uncorrected visual acuity standards constitute a Bona Fide Occupational Requirement (B. F. O. R.) pursuant to

subsection 14 (a) of the CHRA which reads: "14. It is not a discriminatory practice if: (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."

Mr. Moffatt Deputy Commissioner Moffatt testified for the Respondent. He's responsible for administration within the RCMP, including personnel, and he reports directly to the Commissioner who is the chief law enforcement officer in the Country. He's had extensive involvement in many departments within the RCMP during a career spanning 37 years. His experience includes training and setting standards for new RCMP recruits.

Mr. Moffatt testified that there are 4 categories of RCMP employees: (1) regular members; (2) special constable members; (3) civilian members; and (4) public service employees;

Until recently, Special Constables were categorized with regular members however because of administrative problems, a new category was created. The 3rd and 4th categories represent

employees hired to perform scientific, technical and administrative functions not requiring peace officer status.

> 3 The Complainants in question, had they been admitted to the RCMP, would have been Special Constable members. They along with regular members are peace officers and normally perform their functions in uniform.

Special Constables and regular members are required to swear an oath of allegiance and are subject to service anywhere in Canada according to the exigencies of the Force. Both categories are expected to carry out all duties that are the responsibility of peace officers anywhere in Canada. While Special Constables are less frequently transferred across the country, they are subject to the same "unlimited liability of service" as regular members and may be called upon to fill any peace officer role within the RCMP as circumstances dictate.

Mr. Moffatt also testified that many Special Constables are being promoted to regular member status, such promotions being based primarily upon performance. Once promoted, a Special Constable is given additional training and then deployed as a regular member.

He indicated that RCMP static guards, although assigned to other duties may be called upon to assist in a peace officer role for demonstrations on Parliament Hill, on airport security because of a particular threat and on VIP security. It is not uncommon for Special Constables to be pulled into duties other than the ones they usually perform.

Special Constables are now most commonly assigned to airport security, VIP protection, Parliament Hill and embassy protection. With an increase in terrorist activities they are the first line of defence in these positions.

Mr. Moffatt reviewed the history of the RCMP's eyesight standards. Originally the RCMP did not have its own health services department and relied upon the military in setting its standards. In 1966, the standards were reviewed by the RCMP and then again in 1982 when a Director of Health Services was in place. During the latter review, the Director of Health Services conducted a thorough study of the standards maintained by other police forces in Canada and found that the RCMP's standards were less stringent than most. It was also found that the RCMP's standards fell within the standards recommended by the Canadian Ophthalmological Society in a study performed for the Canadian Association of Chiefs of Police, an organization to which the RCMP belongs.

Specific scientific or medical studies were not conducted by the RCMP to determine minimum visual acuity standards for either static guards or regular members. The RCMP relied primarily upon military information originally and then American studies and those of the Canadian Ophthalmological Association in later years.

> 4 Mr. Moffatt also gave evidence of 13 complaints to the Canadian Human Rights Commission between 1979 and 1988, each involving individuals who were refused by the RCMP for failure to meet its visual acuity standards. In all cases the Commission had accepted the RCMP's position that the standards (the same ones in question here) were a Bona Fide

Occupational Requirement. None were taken by the Commission to a hearing for adjudication. This evidence was presented by the Respondent not to show what the standards should be or that they are an occupational requirement, but rather that the Respondent was bona fide in continuing to apply its standards to the present Complainants. Documentation detailing these past complaints and the Commission's disposition of them were filed as exhibits.

Evidence was also introduced regarding the Canadian General Standards Board's standards adopted for uninformed security guards in Canada (published by the Board in 1987). These standards provide at page 3, subsection 3.2.3:

"Visual Acuity - Eyesight shall be equal to or better than 20/ 60 in both eyes without glasses/ lenses..."

This document was sent to the Canadian Human Rights Commission to review for any possible contravention of the CHRA. On February 13, 1988 the Commission replied to the Canadian General Standards Board by letter of Mr. R. G. L. Fairweather. He made no mention of the visual acuity standard outlined above. As Mr. Moffatt testified, this uncorrected visual acuity standard was more stringent than that of the RCMP (which also permits 20/ 40 in one eye and 20/ 100 in the other).

Mr. Moffatt testified that the RCMP maintains a "medical profile" containing standards that are required for various positions within the Force. These constitute a guide for those responsible to staffing various positions and can be waived where circumstances dictate but are intended to apply only to existing members where experience, knowledge and ability are also considered in assigning members to various positions. This "profile" is not intended to apply to new recruits entering the RCMP and Mr. Moffatt testified that to his knowledge the RCMP's visual acuity standards have never been waived with respect to new recruits for static guard duty.

Existing members of the RCMP are required to undergo regular medical examinations which include visual acuity testing. If an individual fails to meet the standards, there is a medical board review procedure in place to make recommendations to the Commanding Officer of the appropriate division. At this point a decision is made whether the member can be reassigned to a suitable position failing which he or she may be discharged from the RCMP.

> 5 Mr. Moffatt acknowledged that the RCMP's standards become more flexible once an individual becomes an experienced officer. The organization is somewhat paternalistic and is hesitant to dismiss one of its members for failure to meet medical standards upon re-examination unless absolutely necessary.

Mr. Moffatt testified that an RCMP officer, in the performance of his or her duties, faces the risk of physical injury and death. Both the public and fellow members depend upon them and dangerous situations are often unpredictable.

Regarding the specific issue in question, Mr. Moffatt recalled an incident in Virden, Manitoba where an RCMP Constable lost his glasses during a shooting. Without glasses the member was

able to return fire wounding one of the assailants, assist another member who had been shot, and then give chase before his police car gave out because of bullet holes.

During cross-examination Mr. Moffatt qualified his evidence regarding the visual acuity standards imposed upon Special Constables. Some are hired for specific duties other than those of a peace officer. For example, RCMP band members and mechanics may be hired as Special Constables but are not required to meet the same visual acuity standards as Special Constable static guards or airport security guards who are hired as peace officers and must meet the standards required of regular members.

The Commission, in cross-examination also introduced a letter from a Dr. Liddy who reviewed the RCMP's visual requirements in 1979. The letter dated May 23, 1979 indicated that the RCMP standards are reasonable (upon entrance), however "this does not imply that trained personnel would be jeopardized if their visual acuity dropped below those standards". Mr. Moffatt acknowledged that factors such as experience and knowledge must be considered regarding existing members. He did not however, indicate that the visual standards imposed have or should be waived with respect to new or existing members of the Force. His testimony in this regard was consistent with his earlier discussion of the procedures in place to deal with those who eventually fail to meet medical standards..

Mr. Murray The Respondent next called Assistant Commissioner Murray to give evidence. He is the Director of Protective Policing across Canada, the protective branch of the RCMP.

Mr. Murray described how his department assesses threat levels and assigns personnel to protect various positions such as the Prime Minister, Parliament Hill, the Supreme Court of Canada, designated airports as well as foreign embassies and dignitaries. Special Constables

are used extensively in these protective postings. > 6

Mr. Murray testified that embassy and foreign diplomat protection was upgraded following terrorist attacks on Turkish diplomats and on the Turkish Embassy where a commercial static guard was shot and killed in 1982. Since then, commercial guards have been replaced by RCMP Special Constables wherever there is determined to be a real threat of attack.

There are presently 96 posts protected by approximately 750- 800 RCMP Special Constables. A further 400 are deployed to Airports in Canada. The environment in which static guards operate varies considerably from those stationed in armoured huts, to foot patrol, to airports and Parliament Hill.

Special Constable static guards are armed with standard RCMP revolvers and with sub-machine guns at high risk locations.

Special Constables and regular members involved in protective services are briefed together before each shift and those on static guard duty are usually rotated from one post to another every 2 hours to break the monotony. Security personnel are treated as a pool by the RCMP and a Special Constable's duties may change from time to time as circumstances dictate.

A static guard's first function is the "eyes and ears" of the RCMP. Mr. Murray testified that vision is important as static guards are responsible to observe and sound the alarm in the event of attack. He indicated that terrorists generally "storm" a position as they did in the Turkish Embassy incident. They may use stun grenades, smoke grenades, tear gas and diversionary tactics-- whatever necessary to achieve their objective. The static guard's second duty is to be the first line of defence in the event of an attack.

Mr. Murray testified that police officers face the possibility of being assaulted during an incident and that glasses can be knocked off. He stated that the same possibility applies to static guards performing foot patrol and other duties.

In 1986 the RCMP reviewed the protective services provided in 6 other countries including the U. S. and the U. K. All 6 used fully trained police as opposed to Special Constables. There is now a movement in Canada toward the use of full members for protective services and static guards are being promoted to regular member status. High tech surveillance equipment is also being employed in Canada to improve upon security methods in light of the terrorist incidents which have recently occurred.

During cross- examination Mr. Murray testified that static guards often work alone and must be vigilant and able to withstand boredom.

> 7 Characteristics such as vigilance are not specifically screened when hiring static guards although they are reinforced during training. The RCMP look for Special Constables who meet the same standards as regular members so that they are able to perform their functions properly and with a view toward moving Special Constables to full member status.

Mr. Murray testified that a person with inferior uncorrected visual acuity would not be hired even if he or she could otherwise perform satisfactorily. He indicated that one must be able to perform even if they have lost their glasses.

Mr. Murray confirmed Mr. Moffatt's evidence that an existing member who fails to meet medical standards will not necessarily be put out on the street. Although he was not aware of particular instances, he indicated that job performance becomes relevant and that a Constable may be relocated to duties where he or she can safely perform. Fleet managers and other administrative positions are examples.

Mr. McCaulay Mr. McCauley is an Assistant Commissioner presently responsible for training of all members of the RCMP. He outlined in detail the training required of new recruits in Regina, Saskatchewan.

Regular members are given a 26 week course covering a variety of topics for general duty police work. Training of Special Constables includes fewer topics and is tailored for the specialized needs of their specific functions. They are also given a limited amount of general training. Their course is shorter than that of the regular members. Wherever the courses overlap, Special Constables are required to attain the same level of competence as regular members.

Since static guards are the "eyes and ears" of the Force as well as the first line of defence in the event of attack, they are given training in explosives, gas, protective vests, machine guns and terrorist tactics. The RCMP also have a "modified training" program for upgrading Special Constables to perform additional duties or to become regular members.

Mr. McCauley testified that Special Constable static guards are given more fire arm training than regular members. They are required to requalify for firearm use every 3 months. Special Constables are also given extensive training in self- defence techniques.

Mr. McCauley indicated that it is impossible to define the duties of a Special Constable on a limited basis. Once a person is made a peace officer and put in uniform, the public perceives him or her to be a police officer and it is next to impossible to ensure that he or she will perform only limited duties.

> 8 Mr. McCauley related a recent incident in Alberta, where a Special Constable on airport patrol took action when he came across a stolen car. He was shot and killed.

The Respondent entered two brief video tapes as exhibits. One, prepared specifically for this hearing, depicts various self- defence techniques concentrating on attacks to the eyes of the assailant. The other is a general film shown to prospective recruits regarding the training which they will undergo.

The Respondent introduced the tapes not to establish the validity of the RCMP's visual standards, but to demonstrate the risk addressed by

maintaining an uncorrected visual acuity standard. More particularly, the risk of dislodgement of corrective eyewear resulting from physical confrontation.

The Commission objected to this evidence on the basis that it focused on only one aspect of RCMP training and that it may be inflammatory.

The videos were viewed by this Tribunal, however they were of little use to me and were accordingly given minimal weight in arriving at my decision.

During cross- examination Mr. McCauley testified that to his knowledge RCMP static guards have never fired a machine gun or service revolver in the performance of their duties. He also testified that he is not personally aware of incidents involving static guards where glasses or contact lenses have been dislodged or fogged up on the job. He was not aware of any studies specifically performed by or on behalf of the RCMP in this regard. Mr. McCauley's area of responsibility is training and not operations of the Force.

Mr. McCauley also testified that eyeglasses are not worn during self- defence training and that protective eyewear is used only during firearms training.

The testimony of each of the three RCMP officers was given in a concise, professional and courteous manner. All three impressed me as being very credible and I have no cause to doubt any of the testimony they gave.

The Respondent filed with the Tribunal several Affidavits sworn by RCMP officers who were posted to various countries in the Western World. Each dealt with information received from police authorities in the respective foreign jurisdictions as to who performed their protective services, whether they imposed minimum uncorrected visual acuity standards, and what their standards were.

> 9 The Commission objected to the introduction of this evidence on the basis that it was hearsay and not subjected to cross-examination. Upon direction from this Tribunal, cross-examination was later conducted by the Commission's Counsel by telephone of each deponent in the country to which he was posted. The transcripts were later filed with the Tribunal.

Briefly, the Affidavits showed that all of the police forces involved in protective services (for example, the Secret Service in the U. S.) imposed minimum visual acuity standards. Upon cross-examination, it was shown that this information was obtained through enquiries made by the various RCMP officers @and not their personal knowledge. None of the deponents knew how the particular standards had been established by the various police forces.

I wish to point out that this material was received not as evidence of what the RCMP's visual acuity standards should be, but rather as evidence that other police forces throughout the Western World also consider it necessary to impose minimum uncorrected visual- acuity standards for police officers performing functions similar to those of RCMP static guards.

Dr. MacInnis

The Respondent called Dr. MacInnis, an ophthalmologist residing in Ottawa, as its first medical witness to give an expert opinion on the validity of the RCMP's uncorrected visual acuity standards as an occupational requirement. He has extensive training in his specialty and now teaches at the University of Ottawa and at several other Universities as a guest lecturer. He has done a great deal of research and clinical work, belongs to numerous professional associations and boards, and has appeared before the Canadian Transport Board regarding visual standards for railways. Dr. MacInnis is a leading Canadian authority in industrial vision and his expertise was not challenged by the Commission. Indeed the Commission had previously retained Dr. MacInnis to provide professional opinions regarding RCMP visual acuity standards when investigating earlier complaints.

In Dr. MacInnis's opinion, expressed in a written brief as well as in testimony, the RCMP's visual acuity standard falls within a reasonable range and constitutes a valid occupational requirement.

Dr. MacInnis testified as to the meaning of the Snellen measure of central visual acuity and discussed other aspects of vision including peripheral vision, colour vision and dynamic visual

acuity. He indicated that Snellen acuity measured by the RCMP, is the internationally standard test used in industrial and clinical medicine.

> 10 He described the various irregularities or "refractive errors" and the forms of correction available, namely glasses, contact lenses and surgery. Dr. MacInnis did not feel that any of these were appropriate for police officers and that a minimum uncorrected standard of visual acuity is therefore necessary. He indicated that he was familiar with the training and duties of RCMP static guards and testified in detail as to their responsibilities. He stated that the duties of Special Constable static guards are similar to those of members on general police duty, the major distinction being the frequency with which they are called upon to perform those duties.

First dealing with glasses, Dr. MacInnis testified that they have a propensity in circumstances of violence to be dislodged leaving the enforcement officer subject to his or her uncorrected visual acuity.

Reference was made to a study by Good and Augsberger, two optometrists from Ohio (a copy was filed with the written opinion of Dr. MacInnis), who examined police uncorrected visual acuity standards. The study involved two sets of tests:

- (a) the incidence of dislodgement (the need for an uncorrected standard); and
- (b) determination of what the uncorrected standard should be. Their survey of 292 officers indicated that 52 per cent had lost their glasses while performing their duties and 67 per cent had to remove their glasses because of rain, snow or fog.

Based on this information, Dr. MacInnis believes that a minimum uncorrected standard of visual acuity is necessary for police officers, including those doing static guard duty.

Regarding contact lens use, Dr. MacInnis testified that they too are inappropriate for police officers in the absence of satisfactory levels of uncorrected visual acuity. His opinion is based upon the risk of dislodgement, discontinuance of use and temporary "down time" due to climatic conditions, dust and other irritants.

Good and Augsberger's study of 108 police officers who wore contact lenses indicated that 46 per cent had sufficient irritation to necessitate their removal during duty, 9.6 per cent had lost a lens while on duty, and 32.9 per cent were unable to wear them while on duty because of irritation.

Dr. MacInnis referred also to studies of the general population which indicate that 40 per cent of contact lens wearers eventually discontinue their use. Again Dr. MacInnis testified that contact lenses are

> 11 acceptable for police officer use only if they have a minimum level of visual acuity without them.

Dr. MacInnis also testified as to the weaknesses of surgical correction. Visual acuity becomes variable following surgery, surgery results in increased glare and leaves the eye more vulnerable to injury.

In short, Dr. MacInnis felt that none of the available means of correction would justify the RCMP to abandon or relax their minimum uncorrected visual acuity standard. He then went on to give evidence as to whether the RCMP's specific standards are reasonable.

Dr. MacInnis referred to the second part of the Good and Augsberger study involving an experiment to determine the degree of threat of an assailant. They found that the majority of police firearm discharges surveyed had occurred at approximately 20 feet. They then tested 50 people by presenting 2 targets at 20 feet, one with a firearm and one without. They blurred each subject's vision to various levels and tested performance. Assuming a 50 per cent correct response would be attained by guessing, they established a 75 per cent correct response level as acceptable. This was found to occur with vision just below 20/40. In other words, below that level of visual acuity, the rate of failure to identify "friend or foe" was unacceptably high.

Based on this and his professional experience, Dr. MacInnis testified that levels of 20/40 to 20/60 (the RCMP's combined uncorrected standard) maintain a degree of safety to the public, the police officer and his co-workers. He pointed out that by squinting one can temporarily improve their visual acuity somewhat but that below the level of 20/60 a person handling a firearm would constitute a real danger.

Dr. MacInnis concluded that RCMP standards for uncorrected visual acuity are "reasonable" to enable one to perform tasks involving public safety, but that an "ideal" standard may not be scientifically obtainable. For this reason the actual standard set is somewhat arbitrary and it is a question of reasonableness based upon available scientific information.

With regard to other forms of testing visual performance, Dr. MacInnis testified that they do not afford the degree of standardization needed and

that their reliability is therefore suspect. Dr. MacInnis acknowledged during cross-examination that protective eyewear may provide some degree of safety, however he did not indicate any connection to the question of dislodgement or that their use would affect his opinion as to the need for uncorrected standards.

He also agreed that someone with a 20/20 Snellen standard of visual acuity might conceivably be unable to perform his or her duties

> 12 because of other visual deficiencies. For this reason aspects such as proper colour and peripheral vision may also be occupational requirements. While Dr. MacInnis felt that RCMP standards may be lacking regarding other aspects of visual performance, this does not affect the need for and reasonableness of the RCMP's uncorrected visual acuity standards.

Dr. Sheedy Dr. Sheedy who resides in California was called by the Respondent as an expert witness in the field of optometry. He holds a Ph. D. in physiological optics - the scientific study

of vision. His areas of specialization are binocular vision and occupational vision. He has done extensive research, clinical work and teaching in occupational vision. He has numerous publications to his credit and has made several court appearances as an expert witness including one involving a challenge of uncorrected visual standards for police in Columbus, Ohio. He has been involved in establishing visual standards of police officers in the U. S.

Dr. Sheedy's qualifications as an expert to give opinion evidence on the matters in question were not challenged by the Commission. He is clearly a leading expert in the field of occupational vision for police.

In Dr. Sheedy's opinion the RCMP's uncorrected visual acuity standards are a reasonable and valid occupational requirement.

He discussed the visual process in detail and then testified that one's ability to see clearly at a distance deteriorates with age.

Snellen testing is widely used to measure visual acuity because of tradition and because it is internationally standardized. Dr. Sheedy recommended Snellen acuity testing for environmental vision because it is the measure for which we are best able to establish criterion levels of performance.

Dr. Sheedy described various types of refractive errors and available methods of correction including glasses, contact lenses and surgery.

Dr. Sheedy testified that in his opinion it is reasonable to compare Special Constable static guards to general duty police officers for the purpose of visual standards as an occupational requirement. He indicated that in approaching the topic he specifically looked at static guards to examine their visual needs and concluded that they are very similar to the general police requirements with which he has had previous experience. He confirmed that observation is a primary factor in the training and performance of static guard duties.

> 13 I am satisfied that Dr. Sheedy had thoroughly studied the function and duties of RCMP static guards before testifying. He was familiar with the RCMP visual standards, the job description of static guards, the training that they undergo and the locations and conditions under which they perform.

Dr. Sheedy reviewed various studies and experiments that he and others had performed with respect to police visual acuity standards. He concluded that approximately 20/40 visual acuity is necessary to properly identify targets in a typical critical situation.

He indicated that an uncorrected standard of visual acuity is a valid occupational requirement because a police officer, whether a static guard or otherwise, cannot be debilitated and unable to perform if his or her glasses are knocked off or affected by climatic conditions. He identified the risk that static guards might be debilitated at precisely the moment they are required to perform. While a crisis will be encountered only rarely, it is important that the static guard be able to perform at that moment. In his opinion the infrequency of occurrences when a static guard must

perform does not mean that the ability to perform is any less important and for this reason minimum levels of uncorrected visual acuity are essential.

Dr. Sheedy testified as to the difficulties with contact lenses as a means of correction. Dislodgings, discontinuance of use and the affect of particulate matter such as smoke were referred to. He also confirmed that surgical correction was not acceptable for the same reasons given by Dr. MacInnis.

Dr. Sheedy supported his opinions with data from various studies he and others performed in the U. S.

Dr. Sheedy testified that he recommends a minimum 20/40 standard of uncorrected visual acuity for static guards. This is the standard accepted for police officers by the American Optometric Association. He feels that the 20/60 uncorrected standard maintained by the RCMP (based on combined vision of both eyes) is more relaxed than he would advise.

Dr. Sheedy confirmed that other forms of visual performance including peripheral and colour vision are also essential to the performance of RCMP static guard duties.

In summary, Dr. Sheedy feels that the RCMP's uncorrected visual acuity standards are a valid occupational requirement, but that in fact their visual standards generally should be more stringent.

Under cross-examination Dr. Sheedy testified that he had considered two essential factors: frequency of occurrence and criticality of performance. He feels that if performance is critical enough, frequency of

> 14 occurrence becomes unimportant. For this reason and based upon his study of the static guard duties, he concluded that the visual requirements of static guards and regular police officers are essentially the same. While

Dr. Sheedy had not performed research regarding RCMP static guards specifically, in his view those dealing with regular police are relevant to static guards and are an appropriate basis for his opinion.

Regarding the possibility of an experienced static guard falling below the minimum visual acuity standards, Dr. Sheedy testified that these should be reviewed by a knowledgeable committee on a case by case basis. He acknowledged that some degree of flexibility may then be appropriate if other strengths can be shown to compensate for the physical limitation and thereby minimize risk.

In an earlier report written by Dr. Sheedy and adopted by the American Optometric Association, he had indicated that where a person is a good contact lens wearer, a police department may consider waiving the uncorrected visual acuity standard. Since more data is now available on contact lens use and the difficulties that are encountered by police officers wearing them, his opinion has changed and he does not now recommend waiver of the standards for contact lens

wearers. In fact, regardless of uncorrected standards there are difficulties with contact lens use relating to the possibility of dislodgement or particulate matter entering the eye. Even a contact lens wearer with sufficient uncorrected vision could be temporarily disabled. This suggests that perhaps contact lens use should be prohibited altogether by the RCMP, and not that uncorrected visual acuity standards should be relaxed or waived.

Dr. Cupples Dr. Cupples, called by the Commission to give expert evidence, is an Associate Professor of Ophthalmology at Georgetown University and an Associate Professor of Surgery at the Uniformed Services University of Health Sciences, Washington, D. C. (the medical school for the U. S. military). He attained his residency in Ophthalmology at the Naval Hospital in San Diego, California during the Vietnam War and treated a great number of ocular casualties resulting from the war effort. Dr. Cupples, having spent 21 years in the U. S. military, was involved in setting visual standards for naval aviators and submarine operators. He has numerous publications to his credit dealing primarily with ocular trauma and not visual acuity standards.

He was admitted without objection by the Respondent as an expert witness to provide an opinion regarding the validity of the RCMP uncorrected visual acuity standards as an occupational requirement for static guards.

> 15 Dr. Cupples first testified that the duties of RCMP static guards are very similar to the duties of U. S. Marine Corps personnel who are assigned as static guards to the various American embassies around the world. He testified that U. S. Marines are subject to a much more relaxed uncorrected visual acuity standard, namely 20/ 400. The U. S. Marines permit glasses to be worn, but not contact lenses.

Upon cross- examination Dr. Cupples acknowledged that under the Vienna convention the "host country" is primarily responsible for the defense of foreign embassies and that the role of Marine Corps personnel in Canada is restricted to inside protection of the U. S. embassy. As we saw in the foreign Affidavits filed by the RCMP it is the Secret Service and not the

Marine Corps which protect foreign embassies in the U. S.. Dr. Cupples was unsure of the exact role of Marine Corps personnel and I must accept the RCMP's evidence in this regard. Therefore when comparing the duties of RCMP static guards and their uncorrected visual acuity standards, I find that the Secret Service in the U. S. and not U. S. Marines are equivalent to our RCMP Special Constable static guards.

Dr. Cupples described how he would go about recommending an appropriate visual acuity standard to the RCMP for the static guards. He set out a three pronged approach:

- (a) analyse all aspects of the job to define the visual tasks required;
- (b) conduct experimentation to define the minimum ocular standards required to perform the tasks;
- (c) receive feedback once the standards are implemented so changes can be made where necessary.

He emphasized the analysis of job tasks so that standards would not be set so low as to create a danger, or so high as to be unnecessarily discriminatory. The second step, experimentation is also important because preconceived notions of what the standards should be may be wrong.

In creating visual standards Dr. Cupples would also consider other visual factors such as peripheral vision. A person with good visual acuity might be unfit to perform because of other deficiencies. Dr. Cupples acknowledged that the RCMP's visual standards do encompass factors other than visual acuity but in his opinion the standards used for testing other forms of visual performance are not adequately defined. While Dr. Cupples' opinion may be correct, the other standards of visual performance are not in issue here and therefore the adequacy of other testing does not bear on the issue of whether the RCMP's uncorrected visual acuity standards are a bona fide occupational requirement.

Dr. Cupples indicated that the Snellen measure may not be the best method of testing visual acuity. He stated that it is simple and

> 16 inexpensive to apply but does not take into consideration other factors concerning visual perception. However under cross-examination, Dr. Cupples acknowledged that the U. S. Military continues to rely upon the Snellen acuity test, that he knows of no other police force which has abandoned it, and that an agency using the Snellen test to measure visual acuity is not acting unreasonably.

Based on his experience with the U. S. Marine Corps, Dr. Cupples' opinion is that glasses are an appropriate form of correction for static guards. He does not recommend contact lens use unless one has access to good ophthalmological care which would not be a problem in Ottawa.

My observation regarding contact lens use, based on all of the evidence heard, is that contact lenses could only be accepted if glasses were also accepted for correction because of the risk of irritation and discontinuance of use. In these instances, the contact lens wearer must rely upon glasses as a back-up to contact lenses. Therefore the important question is whether the

use of glasses renders the level of uncorrected visual acuity unimportant. The U. S. Military has obviously answered this question in the affirmative as Dr. Cupples has testified that they accept recruits with glasses and with very low levels of uncorrected visual acuity.

Dr. Cupples stated that he is not aware of any difficulties encountered in the U. S. Military with dislodgement of glasses. No studies or research data were offered with respect to dislodgement in the U. S. Military. Because of the similar duties of static guards and regular police officers (as opposed to U. S. Marines) I must prefer the evidence of the Respondent in this connection. During cross-examination Dr. Cupples did agree that the loss of glasses is not fanciful or conjectural, but can occur.

Dr. Cupples stated that protective eyewear is presently being studied for military application and may be advisable for use by law enforcement organizations.

Dr. Cupples also testified that he had been consulted by the FBI and the Texas Rangers regarding the visual standards and in both cases he had recommended standards similar to those used in the U. S. Military.

Based upon his assumption that the duties of Marine Corps personnel assigned to embassy guard duty are very similar to those of RCMP static guards, Dr. Cupples felt that the latter could perform their duties in a safe and efficient manner with less stringent uncorrected visual acuity standards-- the same standards as applied by the U. S. Military.

Dr. Cupples stated that there should be a process in place whereby standards could be waived to see how an otherwise well- qualified individual who fails to meet one particular standard actually performs.

> 17 He testified that it is assumed that Marines will be able to function with a 20/ 400 uncorrected standard if their glasses are lost. He agreed that under these conditions marksmanship standards could not be met. Dr. Cupples was unaware whether Marines were required to undergo "shoot- don't- shoot" scenarios with uncorrected vision. He acknowledged that he did not have expertise in the duties of police officers and whether identification of licence plates and facial features would be crucial to the execution of their duties. He agreed that Marines are not peace officers.

Dr. Cupples testified that there are anti- fog materials that can be used to prevent fogging of glasses but acknowledged that rain drops may adversely affect glasses to the point where one is better off without them.

Dr. Cupples agreed that a minimum visual acuity standard is an occupational requirement for police duties and that the question is "where to draw the line". In doing so one must consider the risk involved. To assess the risk one must define the particular tasks that will be required of the group in question. Dr. Cupples agreed that there may not be a right or wrong standard, but rather a "range of acceptability".

Dr. Cupples expressed concerns regarding the experimental methods used by Dr. Sheedy and others relied upon by the Respondent. He pointed out that Dr. Sheedy used himself as the subject in one of his experiments rather than a random sample of police officers. In the dislodgement studies, the research should have gone one step further and asked whether the dislodgements had

impaired the ability to function. When asked whether the U. S. Marines have developed their ocular standards using well- designed experimentation as he recommends, he acknowledged that they haven't. He was not aware of any police force in the Western World that has engaged in such experimentation. He stated that Dr. Sheedy's work is "getting toward the right track" but doesn't go far enough. The result of more experimentation may be a lower standard, a higher standard or even the same standard. Without conducting experimentation which he advocates, he cannot say what the RCMP's standards should be and can only compare them with those of the U. S. Military. Dr. Cupples does not feel that the RCMP's visual acuity standards are necessarily wrong, but rather that the experimentation employed to establish them (as well as those of the U. S. Military and other police agencies) is inadequate.

Dr. Webster Dr. Webster was called by the Commission as an expert witness with respect to experimental design. He is a Professor of Psychiatry, Psychology and Criminology at the University of Toronto and is the Head of the Department of Psychology at the Clarke Institute of Psychiatry in Toronto. Dr. Webster is trained as an experimental psychologist and

> 18 spends approximately one-third of his time doing research. His expertise in experimental design was not challenged by the Respondent. He has done research with respect to the process of visual perception although vision per se (Ophthalmology or Optometry) is not within his field of expertise.

He had reviewed the job description and training manual with respect to RCMP static guards, but had no study or information on what the job entails. He indicated that before setting standards, one must first do an analysis of the tasks required. To his knowledge, no studies have been done to determine what static guards actually do, the risk factors involved, and the visual discriminations required. He also questioned the pertinence of the Snellen standard. He indicated that there may be other factors which should be considered and when establishing standards of any kind, one must do so in the context of the nature of the job itself.

Dr. Webster stated that whether visual or auditory standards are met can depend upon environmental and psychological factors. A mistake is often made by focussing on a factor which is easy to measure while ignoring other factors which may be equally relevant, and there is danger in relying upon "traditional" testing procedures.

Dr. Webster described the steps which he would recommend in setting standards for screening purposes. First, he would do a detailed task analysis by actually observing individuals on the job. Secondly, he would assemble a battery of tests devised to screen out those who are unable to perform the tasks in the "real life world". He felt that these tests would be easy to design. For example if the ability to work under stress is required, he would design an experiment to "stress" the individual and then measure performance. Dr. Webster emphasized that task analysis ensures that people are hired who are already good at performing the tasks required on the job.

He also advocated, as a practical approach, hiring individuals who are below the current standards on a trial basis to see how they "work

out"-- loosening the standards as an experimental test. Dr. Webster testified that Snellen acuity looks at the sensory aspect of vision and not at the entire perceptual process. It is important not only to detect something, but also to interpret and respond to it. The advantage of Snellen testing in his opinion is ease of application, but its simplicity is offset by the limited nature of data it yields. He referred to a recent study done in the U. S. regarding the effects of aging on drivers. It apparently recommends that Snellen visual acuity should be buttressed with other "task relevant" factors.

Dr. Webster acknowledged that visual acuity is an important part of "visual perception", the entire process from stimulus to response. He also agreed that while a battery of tests is better than one test, it is not unreasonable to measure visual acuity.

> 19 He did not dispute the need for a minimum uncorrected visual acuity standard. He was unable to specify what that standard should be or what tests would be required to establish it. His evidence focused primarily on the procedures to be followed in doing so.

He indicated that while he does not know of any police force in North America which had abandoned Snellen acuity testing, the time will come when Snellen methods are replaced. While Snellen testing is not perfect, other tests being developed may also prove to be imperfect. That there is no settled opinion as to which visual tests ought to be applied and one cannot say that Snellen is necessarily an unsuitable test. Dr. Webster also agreed that Snellen visual acuity is not the only test used in the RCMP's screening process.

In short, Dr. Webster did not challenge the need for or reasonableness of the RCMP's uncorrected visual acuity standards. He testified that other factors should also be tested and that thorough task analysis is essential in the process of setting standards.

THE LAW (a) What tests are to be applied in determining whether a s. 14 B. F. O. R. is established (given that a Prima Facie case of discrimination is admitted)?

(b) What type and degree of evidence is required to satisfy the tests? (a) TESTS

The principal authority in this area of the law is the decision of McIntyre, J. in Ontario Human Rights Commission et al v. Borough of Etobicoke, [1982] 1 S. C. R. 202.

A two pronged test was adopted. The first, a subjective test, deals with the Bona Fide question. The second, an objective test, relates to the necessity of the occupational requirement. (Page 208)

To satisfy the subjective (Bona Fide) test, an occupational requirement such as the RCMP's minimum visual acuity standards:

"... 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

> 20 aimed at objectives which could defeat the purposes of the Code." (Page 208).

To satisfy the second (objective) test, the proponent of an occupational requirement must show:

"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." (Page 208).

This two pronged test and in particular, the second (objective) test has been subjected to various interpretations in the jurisprudence that has followed. I will deal with these as counsel for the Parties have advocated different positions (interpretations of the Etobicoke objective test).

First, counsel for the Commission suggests that the approach taken by MacGuigan, J. in *Re Air Canada and Carson* (1985) 18 D. L. R. (4th) 72 (F. C. A.), should be followed. Mr. Justice MacGuigan, gave a thorough analysis of the various authorities on this subject, including a line of American authorities and reconciled them with the Etobicoke decision. He suggests that where cases involve a "public risk", that risk must be weighed against alternatives available to the employer to screen on an individual basis rather than a class basis. He assumes that some level of risk to the public is acceptable and it becomes a question of determining what level of risk is acceptable.

At page 88 MacGuigan interprets the words of McIntyre in Etobicoke to adopt the "acceptable risk" approach:

"Nevertheless his own posing of the issue in terms of whether there is "sufficient risk of employee failure" indicates a recognition of a certain degree of risk that sits better with the notion of "acceptable" than with that of "minimal"."

At page 90 he identifies the "balancing" or weighing of risk required and then reconciles the American approach with the second prong of the Etobicoke B. F. O. R. test as follows:

"Etobicoke identified the two inversely proportional factors of the degree of risk and the availability of alternatives as determinative of a B. F. O. R., objectively considered, leaving the balancing to be arrived at in relation to all the circumstances.

> 21 ... The second prong is for the employer to show that it has reasonable cause for believing that all or substantially all persons within the class would be unable to perform the duties of the position safely and effectively, or that it would be impossible or impracticable to safeguard public safety through individualized testing..."

At page 93 Mr. MacGuigan, concluded by relating his interpretation of the objective prong of the test to the purpose of the CHRA set out in section 2 thereof as follows:

"... Parliament has made a fundamental decision to give preference to individual opportunity over competing social values. The preference is not absolute. Indeed, it is limited in the present context by an employer's right to establish a bona fide occupational requirement. But the courts must be zealous to ensure that Parliament's primary intention that people should for the most part be judged on their own merits rather than on group characteristics is not eroded by overly generous exceptions. This necessitates a narrow interpretation of the exceptions."

In brief, this decision stands for the proposition that merely establishing that failure to adhere to limitations set by an employer would create a risk to the public is not enough to establish a B. F.

O. R. defence. One must go further to weigh that risk and determine whether it is "acceptable" in the circumstances, according to the criteria set out above.

A more recent decision of the Federal Court of Appeal in *Canadian Pacific Limited v. Mahon et al* [1988] 1 F. C. 209 puts forward a different interpretation of the objective test. Pratte, J. accepted the Tribunal's finding of fact that Mr. Mahon, a stable diabetic, faced a real but unlikely possibility of failure on the job as a trackman, but that the risk to himself, his co-workers and the public was not farfetched or fanciful. (Page 214).

The Tribunal had gone on to measure or weigh the acceptability of this risk in a fashion consistent with the Carson decision. In particular, the Tribunal is quoted at page 219 as follows:

"The mere presence of some safety risk cannot result in the denial of an employment position to a disabled applicant. Every human activity involves some risks. ... it cannot be asserted that a slight increase in risk through employing a disabled person should be considered unacceptable by an employer."

> 22 And at page 220: "Society must accept some added risks in exchange for the benefits conferred upon the disabled..."

The Court held that the Tribunal had erred. It relied upon *Bhinder et al v. C. N. R. et al* [1985] 2 S. C. R. 561 to interpret and reinforce the Etobicoke decision as follows (Pratte J., at p. 221):

"The effect of those decisions, 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 serious damage to the public at large must be said to be a bona fide occupational requirement.

The decision under attack, it seems to me, is based on the generous idea that the employers and the public have the duty to accept and assume some risks of damage in order to enable disabled persons to find work. In my view, the law does not impose such a duty on anyone." (emphasis added).

Marceau, J. in agreement, at page 223: "Parliament may one day call upon the public to sacrifice some of its physical safety in order to give disabled persons the same work opportunities as if they were not disabled. But I do not think that such a policy can be read into the law as it now stands."

At page 224 he interprets the phrase "sufficient risk" from the Etobicoke decision as follows:

"When I read the phrase in context, however, I understand it as being related to the evidence which 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." (emphasis added)

In short, the Mahon decision conflicts with the earlier decision in Carson in that an employer establishing a B. F. O. R., must now show only that failure to meet its standards would result in a

real risk to the employee or to the public; that there is no "acceptable" level of risk which would defeat a B. F. O. R. defence.

The Commission has urged that the Mahon decision is wrong and that I should follow the Carson interpretation of the objective test. Mr. Hunter suggested that the Court in Mahon had erred in its application of

> 23 the Bhinder decision, it being a case where public safety was not the issue. In that decision, the risk resulting from failure to wear a hard hat was a risk to the employee himself and not to others. He argued that it dealt primarily with issues of intent and the duty to accommodate an employee.

Perhaps cases dealing with public safety and with safety of the individual cannot be distinguished. Referring to the original objective test set out in Etobicoke at page 208, we see that Justice McIntyre speaks of "... performance of the job without endangering the employee, his fellow employees and the general public." (emphasis added). The distinction was not made in the original test itself.

Even if I agreed with Mr. Hunter, I am bound by the law as it now stands. I must therefore follow the objective test as most recently interpreted in the Mahon decision. Failure to do so would amount to following the exact reasoning of the Tribunal whose decision was overturned by the Federal Court of Appeal in Mahon.

(b) EVIDENCE REQUIRED In cases such as this the employer must prove a B. F. O. R. of "... according to the ordinary civil standard of proof, that is upon a balance of probabilities." (Etobicoke, p. 208).

There is no fixed rule as to the nature and sufficiency of the evidence required to justify a B. F. O. R. Mr. Justice McIntyre states (Etobicoke, P. 212):

"It would be unwise to lay down any fixed rule covering the nature and sufficiency of the evidence required ... In the final analysis the board of inquiry, subject always to the rights of appeal... must be the judge of such matters.

He goes on to suggest that evidence of the nature of the duties to be performed is essential and should be related to the type of limitation imposed by the employer.

Scientific evidence is to be preferred over impressionistic evidence. At page 212, Etobicoke, Mr. McIntyre states:

"I am by no means entirely certain what may be characterized as "scientific evidence". I am far from saying that in all cases some "scientific evidence" will be necessary. It seems to me however that in cases such as this, statistical and material evidence based upon observation and research... if not in all cases absolutely necessary, will certainly be more persuasive..."

> 24 While scientific evidence is preferred, there may be practical difficulties in obtaining hard statistics or imperical data where questions of public safety are involved. This issue was dealt with by the Board of Inquiry in Little v. Saint John Ship Building and Drydock Co. Ltd. (1980), 1 C. H. R. R. 1 at page 5:

"These statistics, however, often only become available after 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 occupational qualification."

While this practical limitation on an employer's ability to provide data cannot be an excuse to furnish no scientific evidence, it must be kept in and when considering whether adequate scientific evidence has been put forward to establish a B. F. O. R. defence.

APPLICATION OF THE LAW Since a prima facie case was admitted by the Respondent regarding Andre Seguin and George Tuskovich, the onus shifts to the Respondent to attempt to establish, upon balance of probabilities, a bona fide occupational requirement pursuant to section 14(a) of the CHRA.

a) SUBJECTIVE TEST The evidence shows that the RCMP's uncorrected visual acuity standards, although reviewed and revised from time to time, have been in place for many years. The RCMP recently conducted a study of other Canadian Police Force's uncorrected visual acuity standards to determine whether theirs were

reasonable. It revealed that the RCMP's standards were within the range of these standards and in fact were lower than many. While this does not go to the issue of what the standards should be, it does impact on the bona fides question.

There is evidence of 13 prior complaints brought against the RCMP regarding its visual acuity standards. These were investigated by the Commission but none were adjudicated. While the findings of the Commission do not influence the outcome of the complaints before this Tribunal in terms of the objective test, they do indicate that the RCMP has continued to apply its visual acuity standards in the belief that they were acceptable to the Commission.

> 25 The fact that many of the prior complaints dealt with applicants for regular member status rather than that of static guard, is of no consequence as the RCMP believed that the standards should be the same for both groups because of similarities in their functions and "unlimited liability" (meaning the RCMP's requirement that all members may be called upon to serve in all capacities within the RCMP).

Two of the prior complaints dealt with unique situations which were outlined briefly:

1) a former member of the RCMP failed the uncorrected visual acuity standards when applying to re- enter the RCMP.

2) an applicant commenced training with the RCMP and was dismissed when it was discovered that he had not met the uncorrected visual acuity standards.

In both cases the RCMP refused to waive its standards, indicating that they are taken seriously and applied in an even-handed fashion.

There was no evidence of exceptions made or waivers granted by the RCMP with regard to the uncorrected visual acuity standards applied to new recruits for the position of static guard. Physical deterioration being a natural process with age, it was shown that the RCMP has an administrative process in place to deal with existing members who fail physical re-examinations. We heard from Mr. Moffatt that the RCMP is a paternalistic organization and that an effort is made to relocate such members within the organization rather than dismiss them. Each case is dealt with on its own merits and numerous factors may be considered.

I find this to be a practical and reasonable approach to be taken. It cannot properly be compared to pre-hire waivers of entrance standards and does not reflect on the Bona Fides of the RCMP in this regard.

It seems logical that the natural deterioration of physical capabilities with age supports the RCMP's position of jealously maintaining its high entrance standards for recruits. Certainly more difficulties with aging would likely occur if entrance standards were waived.

The foreign affidavits filed with the Tribunal show the uncorrected visual acuity standards applied by other police agencies for static guards in various other countries. They prove that other police agencies feel that an uncorrected visual acuity standard is necessary for the performance of static

guard duties, supporting the Bona Fides of the RCMP in applying their standards.

> 26 While these affidavits contain hearsay evidence, I have no reason to doubt the accuracy of the information deposed to. In any event, their exclusion would not have affected my decision.

In conclusion I have found no evidence whatever of mala fides bad faith, or ulterior motives in the RCMP's application of its uncorrected visual acuity standards. I fully accept that these standards are maintained by the RCMP solely for the bona fide purpose of ensuring safety and protecting the public.

Therefore the subjective test of bona fides has been satisfied by the Respondent.

b) OBJECTIVE TEST 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?

Perhaps the question is better stated when reversed: Without the minimum uncorrected visual acuity standards would there be an increased risk to the public?

After hearing and reviewing all of the evidence I have concluded that there would be an increase in the risk to the public and that the risk is real, not merely speculative or fanciful.

First, it was the position of the Commission and its expert witnesses that little or no "task analysis" was performed with regard to the function and duties of static guards. It was asserted that without proper task analysis, the necessary connection or link between the standards imposed and the performance of static guard duties could not be made.

I agree that "task analysis" is necessary. One must know what duties are to be performed when assessing whether the standards are reasonably necessary for performance of those duties.

I disagree however with the Commission's contention that this was not done. The evidence of the Respondent went into great detail regarding the recruitment, training and function of static guards. There is ample evidence that the RCMP's expert witnesses were well equipped with a thorough understanding of the duties and day to day routine of a static guard. I do not feel that the opinions of these experts can be disregarded for lack of "task analysis".

The Commission asserts that no effort was made to distinguish the functions of regular members and static guards (Special Constables).

> 27

Again the evidence does not bear this out. The Respondent's witnesses were well aware of the duties and responsibilities of static guards, compared them to those of regular members and gave their opinions accordingly.

The parameters of the static guards' functions are not as narrow as the Commission has suggested. We have seen that RCMP recruits including Special Constables assume "unlimited liability" and can be moved from one roll into another if and when required to do so. In other words the roll of a Special Constable static guard is not entirely specialized. Further, there was evidence of a trend in the RCMP to upgrade Special Constables to full members, thereby blurring the distinction between them for screening purposes. Even within the duties of static guards, we have seen that an individual is moved from post to post frequently to alleviate boredom and that the responsibilities can range from airport security to embassy patrol, to a stationary post in an armoured hut. None of this evidence was challenged. All of it points to a broad range of duties requiring many skills not substantially different from those of regular members.

The principal distinction between the routine of static guards and that of regular members is the frequency with which they encounter dangerous situations. We have seen that RCMP static guards have never fired a weapon in anger. This I would suggest does not change the "function" or "duties" for which a static guard must be prepared and capable of carrying out. We heard evidence of a static guard at Calgary's airport who was shot and killed while chasing a stolen car. The fact that static guards may face life threatening situations is not merely speculative or fanciful.

They are not only the "eyes and ears" of the RCMP, they are the first line of defence in the event of attack. Static guards are trained to react to extreme situations which we hope will rarely occur. This does not mean that their ability to react and perform is any less important than that of regular members who are more frequently called upon to put their "skills" to use.

Because of the infrequency of drastic occurrences, gathering hard data is difficult and studies dealing with regular police officers must be relied upon. This does not mean that the evidence of the Respondent is necessarily "impressionistic" or "unscientific". On the contrary, the Respondent's expert witnesses relied upon data from various studies which in their opinions were applicable to the function of RCMP static guards. The expertise of the Respondent's expert witnesses was unchallenged, both recognized as leading authorities in their respective fields.

The Commission's Witnesses gave evidence to undermine the validity of the Respondent's expert opinions by questioning the experimental research performed and relied upon by them. While the

> 28 methods employed in such experimentation and research could perhaps be improved upon, it cannot be said that they have no relevance or validity. Nor that their evidence is unscientific or impressionistic. No evidence was offered to show that the uncorrected visual acuity standards employed by the RCMP were wrong. It was acknowledged by both Dr. Cupples and Dr. Webster that even if superior and more thorough experimentation were

conducted the results might be exactly the same. Furthermore, it was acknowledged by Dr. Cupples that he knew of no other police force (or the U. S. Marines) who had employed the superior type of experimentation which he advocated.

Evidence was also introduced by the Commission to question the use of Snellen acuity standards as a proper measure of visual performance as it relates to the duties of a static guard. It was suggested and I accept that Snellen testing measures only one component of visual performance. Others such as depth perception, contrast perception and peripheral vision are not reflected in the test but may be equally important. It was agreed however by all of the expert witnesses that central visual acuity remains an important factor which could not be ignored even if better testing were done with regard to this and other "types" of vision. All agreed that uncorrected visual acuity is an occupational requirement, even if only one of many. No other organization was shown to have abandoned the Snellen form of testing.

It was shown that other forms of vision are tested by the RCMP along with Snellen acuity, however the RCMP's standards in this regard were said to be lacking in specificity. This appears to be a general problem and not one that only the RCMP faces with its procedures in testing visual performance. Evidence showed that there is a reluctance generally to give up Snellen acuity testing because other methods of testing visual performance are difficult to standardize. Without standardization, unreliable testing could result in unfairness to the applicants and increased risk to the public. While there are advancements being made in the field of testing or screening for visual performance, we are not yet to the stage where the traditional form of testing performed by the RCMP and others should be abandoned.

The Commission asserted in final argument that the RCMP's visual acuity standards were set prior to adequate job analysis, and that such standards cannot be reviewed and justified ex post facto. That as a result the objective test cannot be met. First, the evidence shows that originally the standards were set based upon military information and that they have been reviewed and revised since. There is nothing to indicate that they were set without any reference to the job to be performed. Secondly, I do not accept that standards such as these cannot properly be justified by scientific means after the fact. To read the objective test in such a way would lead to the absurd result that standards set without proper study could be struck down despite subsequent scientific proof that they are in fact reasonable standards. The objective test requires that a link or connection

> 29 be established between the RCMP's minimum uncorrected visual acuity standards and the safe performance of the job. It does not go so far as to say when the studies or scientific analysis must be conducted to confirm this connection.

Corrective methods including spectacles, contact lenses and surgery were suggested as alternatives to justify relaxing the uncorrected standards. We have seen however from expert testimony based on scientific research that each has its difficulties:

a) Surgery - the results over time are unpredictable; increased glare may result; there is an increased risk of injury to the eye as a result of trauma. The unacceptable nature of surgery as a form or

correction for police officers was acknowledged by Commission witness, Dr. Cupples.

b) Contact Lenses - studies have shown that they may become dislodged and eyes are irritated by smoke or dust; there is a significant and unpredictable discontinuance of use factor resulting in the return to use of glasses. Dr. Cupples expressed concerns regarding contact lens use and does not recommend them for U. S. Military.

c) Glasses - may be dislodged by physical contact; may become ineffective as a result of climatic conditions such as rain and fogging.

Studies have shown that problems are in fact experienced by police officers with both contact lenses and glasses. While it may be said that static guards face critical situations less often than regular police, it is exactly when a crisis arises that dislodgement or exposure to substances such as tear gas or smoke may occur. Any distinction on the basis of frequency of occurrence is therefore not accepted.

We heard evidence of a police officer in Manitoba who lost his glasses at the scene of a shooting. With uncorrected vision he was able to perform his duties effectively. Had he inadequate uncorrected visual acuity, one must assume that he would have been debilitated, endangering himself and others around him. This proves that the risk of dislodgement is a real risk and not merely hypothetical or fanciful. It also proves the need for minimum uncorrected standards to assure safe performance of police duties if dislodgement occurs. While this particular incident

involved a regular police officer, I am satisfied that it is equally applicable to static guards who may one day be faced with a similar incident at a guarded position.

Evidence was introduced with regard to the use of safety glasses, the argument being that the use of glasses with certain safety characteristics could be an advantage to static guards, perhaps

> 30 outweighing the disadvantages outlined above. While studies are being conducted on this question, there was no evidence to show that any police agencies have put them into general use. Certainly there is no indication that a police force would change its uncorrected visual acuity standards even if a policy of using safety glasses were adopted.

With regard to RCMP static guards, the use of safety glasses would not change the underlying problems associated with glasses -- dislodgement, rain, fogging, etc. An officer who loses the use of his/ her glasses, whether safety glasses or regular glasses, must be capable of functioning without them.

It must be emphasized that the role of RCMP static guards is an important one. While their day to day routine may not reflect it, they must be prepared to deal effectively with terrorist attacks. Terrorists plan their assaults and will use any means necessary to achieve their goals. For this reason static guards are given extra training in the use of weapons. While use of deadly force is going to be rare, it is the criticality of their function, not frequency that must be considered when assessing the need for visual standards. We have seen that terrorist attacks in Canada have become a real risk, not a mere hypothetical or speculative one. Air India and the Turkish Embassy incidents bear witness to this.

The specific standards of minimum uncorrected visual acuity must fall within a reasonable range such that it can be said upon balance of probabilities, that substandard static guards, in the performance of their duties, would constitute an increased risk to the public. It has been demonstrated by expert evidence which I accept, that the RCMP's standards fall within this range. The Commission's witness, Dr. Cupples, agreed that there may be no perfect standard and he could not dispute the RCMP's actual standards or suggest more appropriate standards.

Dr. Cupples compared the U. S. Marine Corps force to RCMP static guards. The U. S. Marine Corp has a very relaxed standard for uncorrected visual acuity, but more rigorous visual testing otherwise. If RCMP recruits should be scrutinized more carefully for other forms of visual performance this does not undermine the RCMP's uncorrected visual acuity standard. If, for example, the RCMP did not screen recruits for hearing deficiencies, this would in no way affect the question of whether its uncorrected visual acuity standards constitute a bona fide occupational requirement. This applies equally to other forms of visual performance. They are unrelated to the need for uncorrected visual acuity which is the issue here.

With regard to the more relaxed standards of the U. S. Marines for central visual acuity, we saw that the function of U. S. Marines is quite different from that of RCMP static guards and that the comparable police agency (those that guard foreign embassies in the U. S.) is the U. S. Secret Service. This police agency maintains standards for uncorrected visual

> 31 acuity similar to those of the RCMP and not those of the U. S. Marines. U. S. Marine standards are largely irrelevant.

In short, the evidence leaves no doubt in my mind that: a) uncorrected visual acuity standards for RCMP static guards are

necessary and that an increased risk would occur without them; b) there is a clear connection or relationship between the standards

in question and the ability of static guards to perform their ultimate (if not day to day) function safely and without risk to the people and property they protect; and

c) the particular standards of uncorrected acuity imposed by the RCMP for this purpose are reasonable and consistent with the connection outlined in b) above.

I have concluded therefore that the objective test as outlined by McIntyre, J. in Etobicoke has been met.

Even if I were wrong in following the more restrictive interpretation of the Etobicoke objective test as set out in the Mahon decision, my conclusion would be no different. When I weigh the "sufficiency of risk" as suggested by the earlier decision of Carson against alternatives available to the RCMP to treat applicants individually rather than as a group for screening purposes, 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. The results of substandard performance in the rare but certain eventuality of a terrorist attack on a guarded position could be a tragic learning experience. The risk of a substandard performance is not one that I feel is justified or acceptable in Canada.

This real and substantial risk must be weighed (according to Carson) against the RCMP's ability to screen applicants individually for job performance.

Again the function of RCMP static guards is peculiar in that they may perform satisfactorily in their day to day duties, perhaps spending an entire career without ever facing a crisis for which they have been hired and trained. "Follow up" statistics of job performance for static guards as suggested by Dr. Cupples and Dr. Webster could be misleading. Moreover, the risks involved in such experimentation would be unacceptable. Testing by simulation would not necessarily assure accurate or objectively standardized results. I am not satisfied that testing by simulation to screen

> 32 individually would protect the public as well as the type of testing now employed by the RCMP.

Screening individuals who failed the minimum visual acuity standards for other types of visual performances is fraught with difficulties as outlined earlier. Furthermore, there would be no way to assure that superior performance on other visual tests would compensate for substandard Snellen performance and we would again be faced with a "wait and see" approach with regard to actual performance in crisis situations.

In short, I find that the alternatives available to the employer here are unsatisfactory. The risk is not just real but substantial. I have therefore concluded that even if the Carson interpretation of the objective test were adopted, the test has been met by the Respondent.

In conclusion, the Respondent has established upon balance of probability, with scientific evidence, that the uncorrected visual acuity standards it imposes with regard to static guards are a Bona Fide Occupational Requirement within the meaning of s. 14(a) of the CHRA.

I have been asked to comment on two additional matters: a) Costs; and b) Procedures. a) COSTS

While I feel that the Commission's case was a weak one, I have no jurisdiction to order Costs. The absence of such jurisdiction I must assume, was intended and not accidental. Rather than attempt to circumvent the intention of the legislators, I will leave it to them to make legislative amendments if they see fit to do so.

b) PROCEDURES It was argued by the Respondent that the Commission was able to split its case by briefly introducing a prima facie case and then waiting to

hear the Respondent's evidence on the B. F. O. R. defence before responding. It was suggested that the Commission should be limited to rebuttal evidence following the Respondent's defence.

Counsel for the Commission asserted that without discovery procedures, it is impossible to know in advance what the Respondent's case will be. I agree with this, but the argument cuts both ways. Neither party has the benefit of discovery and I can sympathize with a Respondent who is forced to defend against a case which is largely unknown to it.

> 33 Again, legislative amendments rather than my directions may be necessary. It strikes me as ironic that legislation lacking in procedural guidelines to facilitate the expeditious and informal resolution of disputes can in fact lead to uncertainty, delays and constant procedural wrangling.

I wish to thank counsel for their capable presentation and submissions. The Complaints of Andre Seguin and George Tuskovich are dismissed. DATED at Lloydminster, Sask./ Alta., this 16th day of December, 1988.

KEVIN W. HOPE - Chairperson