TRANSLATION FROM FRENCH

TD 11/ 89 Decision rendered on July 28, 1989

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT SC 1976- 77, c 33, as amended; AND IN THE MATTER of a hearing before a Human Rights Tribunal appointed under Section 39(1.1) of the Canadian Human Rights Act.

BETWEEN:

RUSSELL THIFFAULT Complainant and QUÉBECAIR- AIR QUÉBEC Respondent and THE CANADIAN HUMAN RIGHTS COMMISSION

Commission Tribunal Maurice Bernatchez

DECISION OF TRIBUNAL

APPEARANCES

Anne Trotier Counsel for the Canadian Human Rights Commission

Luc Huppe Counsel for the Respondent

Dates and place of hearing February 27 and 28, 1989 Quebec City >

2 APPOINTMENT OF THE TRIBUNAL

On October 5, 1988, the President of the Human Rights Tribunal Panel* appointed the present Tribunal to inquire into the complaint filed by Mr Russell Thiffault on September 11, 1986. The notice of appointment of the Tribunal was entered as exhibit T- 1.

The complaint concerns an allegation of discrimination on a prohibited ground on the part of the respondent, Québecair- Air- Québec, a supplier of services, on June 20, 1986. Said discrimination allegedly deprived the complainant, Russell Thiffault, of a service provided by the respondent, in contravention of the provisions of the Canadian Human Rights Act (SC 1976- 77, chapter 33 and amendments) and specifically sections 3 and 5(a) of the Act.

The complaint, entered as exhibit C- 1, reads as follows: [Translation] Québec- Air, in contravention of section 5(a) of the Canadian Human Rights Act, refused to let me board its Orly- Montreal flight number 459 [sic - 549?], claiming that I was intoxicated because I was being supported by a guide, while, in fact, this person was assisting me because of my disability (blindness).

During boarding, I was forced to leave the plane under the pretext that I was intoxicated. The stewardess would not change her point of view even after her error was pointed out to her. I

suffered a great deal materially and in respect of feelings and self- respect as a result of this discriminatory practice.

The complaint hearing was held in Quebec City on February 28 and 29, 1989.

THE FACTS The facts which led Mr Russell Thiffault to file his complaint are quite simple and straightforward.

The complainant alleges that the respondent, Québecair- Air- Québec, refused to allow him to board (provision of service) its Orly- Montreal flight number 549 on June 20, 1986. These facts are not contested.

However, the points on which the parties do not agree - and the Tribunal was called on to examine contradictory evidence on this matter are the real reasons which led the respondent to act as it did, namely, to refuse

* Tr: French should read "Comité du tribunal des droits de la personne". > 3 to allow the complainant, Russell Thiffault, to board its Orly- Montreal return flight.

The complainant, for his part, claims that the respondent refused him access to its Orly- Montreal flight on June 20, 1986, under the pretext that he was intoxicated, since he was being supported by a guide during boarding. However, the complainant maintains that he required the services

of this guide, Mr Vaira, because of his physical disability, namely blindness. According to the complainant, this constituted a discriminatory practice under sections 3 and 5(a) of the CHRA.

The respondent, Québecair- Air- Québec, for its part, claims that the complainant was not permitted to board its Orly- Montreal flight on June 20, 1986, not because of a discriminatory practice prohibited by the CHRA but because of his rude behaviour during boarding. According to the respondent, such conduct justified its employee's refusal to allow the complainant to board the flight.

THE EVIDENCE The Tribunal heard the testimony of various witnesses called to the bar. The evidence revealed that the complainant, Russell Thiffault, is blind and has held a card from the Canadian National Institute for the Blind (CNIB) attesting thereto since 1950 or 1952. Mr Thiffault's vision gradually deteriorated resulting in complete blindness in 1980 as a result of retinitis pigmentosa. The complainant was thus totally blind at the time of the events of June 20, 1986.

The respondent, Québecair- Air- Québec, does not dispute the complainant's state of blindness at the time of the hearing.

The evidence disclosed that the complainant is a self- employed specialized motor mechanic and also teaches mechanics. He is also called on by various organizations such as the Régie de l'assurance automobile du Québec to teach disabled persons and unskilled youth.

The complainant has travelled a great deal both domestically and internationally. He states that he has made forty- five return trips overseas, thus ninety boardings. He is always accompanied by a guide when travelling outside the country.

According to the complainant's testimony regarding the events of June 20, 1986, he arrived at the airport between 9: 30 and 10: 00 am, since his flight was scheduled to depart around 11: 30 am. He went to the ticket counter of the respondent, Québecair- Air- Québec, accompanied by his brother, Clarence Thiffault, and his guide, Mr Vaira. According to the complainant's version, it was at that time that he informed the ticket agent that he was visually impaired and that his brother, Clarence Thiffault, presented the tickets and passports to obtain their boarding passes.

> 4 The ticket agent reportedly then offered the complainant boarding assistance, which he turned down because of the presence of his guide, Mr Vaira.

Still according to Russell Thiffault's version, the complainant, accompanied by his guide, Mr Vaira, then headed toward the gate to board the plane.

During boarding, the complainant, still accompanied and supported by his guide, who, in the complainant's own words, was making "jokes" about the state of the plane, reportedly "hit [his] foot on the step into the airplane, on the edge of the plane, and nearly stumbled" (complainant's

testimony, page 13 of the transcript). However, he continued on into the plane with his guide, while his brother presented the boarding passes to the flight attendant, and all three took their assigned seats.

A few minutes later, one of the respondent's employees allegedly informed the complainant that he would have to leave the aircraft. The complainant asked for an explanation but the only response he was given was that he would be informed outside.

The complainant and his guide thus deplaned. Once outside, the respondent's employee reportedly informed the complainant that he would not be allowed on the flight because he was intoxicated.

The complainant's guide then reportedly informed the respondent's employee that the complainant was not drunk but merely blind.

Following a brief discussion, the employee went back inside the aircraft, to return a few minutes later, informing the complainant and his guide that they could reboard.

The complainant and his guide again proceeded to take their seats on the plane; once past the entrance, the complainant heard his guide "shouting his mouth off" at the flight attendant. The complainant then supposedly turned around and said to his guide "come on, shut up; we'll settle the matter once we get to Montreal" (page 15 of the transcript).

The complainant and his guide finally took their places in the same seats that had been assigned to them when they initially boarded.

A few minutes later, the same employee who had asked the complainant to leave the aircraft the first time, returned and requested again that he leave the plane. The complainant deplaned and he was told outside that he would not be allowed on the flight.

> 5 Then the complainant's guide, Mr Vaira, joined him. Following a discussion of the matter, the respondent gave them an accommodation coupon. The complainant asked to be put in touch with the Canadian Embassy.

During cross- examination, the complainant essentially repeated the testimony given during the examination- in- chief, specifically, that he had informed the ticket agent at the counter of the respondent, QuébecairAir- Québec, and, after he was refused permission to board the first time, the respondent's employee, Jacques Ostyn, of his visual impairment.

Also during cross- examination, the complainant stated that he had not spoken to the respondent's purser, except when she had reportedly asked him for an apology for what she claims he said to her. The complainant maintains that he had been speaking to his guide at the time in question and not to the purser, explaining that his guide was Italian and had difficulty understanding and "he had to be put in his place" (page 27 of the transcript).

The second witness heard was the complainant's brother, Mr Clarence Thiffault, who essentially corroborated the complainant's

statements. This witness confirmed that the complainant had informed the respondent's ticket agent of his visual handicap; the agent had then offered the complainant boarding assistance, which Mr Thiffault declined because he had a guide.

Later during questioning, Clarence Thiffault, who had been following close behind the complainant and his guide, confirmed that near the entrance to the plane the complainant's guide was making comments regarding the general condition of the plane and that the complainant nearly tripped on entering the aircraft.

Then, still according to this witness, the complainant, his guide and he took their seats in the plane. A few minutes later, someone came to inform them that the complainant would have to leave the aircraft. The complainant, with the help of his guide, complied; the witness, Clarence Thiffault, reportedly joined them outside a few minutes later. The complainant and his guide were engaged in a discussion with two of the respondent's employees. The subject of that conversation was the complainant's "state of intoxication" (page 44 of the transcript).

After a brief conversation, one of the respondent's employees went back inside the plane, to return a few minutes later. The complainant and his companions were then allowed to reboard.

> 6 The witness, Clarence Thiffault, corroborates that his brother, the complainant, and his guide reboarded the plane and that while doing so the guide levelled reproaches at the flight attendant regarding the events that had just occurred. It was at that time that the complainant reportedly said to his guide "shut up, and we'll settle the matter once we get to Montreal".

Clarence Thiffault's testimony indicates that he firmly believes that these words were directed at the complainant's guide for the reasons given at page 46 of the transcript, and the Tribunal quotes:

[Translation] Now, he couldn't have been speaking to the stewardess because, to my knowledge, she didn't speak to us. Thus, he couldn't reply to someone who didn't speak. He was talking to Eugène because Eugène had been speaking.

Still according to this witness, they (the complainant, the guide and Clarence Thiffault) again took the seats that had initially been assigned to them.

Subsequently, one of the respondent's employees, the one who had approached them the first time, came back requesting that the complainant, Russell Thiffault, leave the aircraft.

Clarence Thiffault stated that he had wanted to leave the plane with the complainant but that he had remained on board at his brother's request.

Clarence Thiffault ended his testimony by stating that neither the guide, the complainant nor he had consumed any alcoholic beverages the

morning of June 20, 1986. Ms Sylvie Pare was heard as the last witness for the complainant. This witness is a flight attendant and purser for the company Inter- Canadien. During the events of June 20, 1986, she was in the employ of the respondent, Québecair- Air- Québec, and was acting as flight attendant on the flight in question.

After briefly outlining the duties of a flight attendant and purser, this witness related what she knew of the events concerning the complainant.

First, she remembered that the complainant was blind and that she had been so informed by the complainant himself during the Mirabel- Paris flight on June 10, 1986.

> 7 From her testimony, it appears that on June 20, 1986, during the events in question, the witness recognized the complainant. She states at page 59 of the transcript:

[Translation] Q - At any time, did you become involved in what was happening? Were you informed that there was a problem on board?

A - When I saw the gentleman coming and going, I recognized him. Q - You recognized him? A - I knew more or less what was going on. Q - You were told this by other flight attendants? A - I had been told in the cabin that there was a passenger who was drunk and who had not been allowed to board.

On her own initiative, Ms Pare went to see the purser, Ms Denise Allard, to inform her of the complainant's blindness.

However, it seems that this information was given to the purser after the complainant had reportedly insulted her. Ms Paré made the following statements at page 60 of the transcript:

[Translation] Q - But what was your impression?

A - Well, she told me that he had insulted her and since he had been rude and she thought he was intoxicated, for the safety of the passengers and crew she preferred not to let him board.

(Emphasis added.) Following this witness's testimony, the Commission stated that it had presented all its evidence.

In its defence, the respondent called Ms Rachel Fournier to the stand

as its first witness. The testimony of this witness essentially revealed that she was an instructor with Inter- Canadien, the same company as the respondent, Québecair- Air- Québec. As instructor, her duties are to give training courses to flight attendant candidates as well as refresher courses, which are held annually for all flight attendants and pursers. These training and refresher courses are set out in a written manual for flight attendants, which is to be in their possession at all times.

> 8 An extract from this manual, entitled "Procedures for passengers with special needs", was tabled as exhibit I- 1.

This extract specifically outlines the various procedures to be followed for visually impaired passengers.

It should be noted that, according to this extract, there are no quantitative restrictions regarding visually disabled passengers, and no escort is required. Ms Fournier outlined the pre- boarding procedure for certain passengers and specifically disabled passengers requiring assistance.

In brief, the ticket agent draws up a list of persons requiring boarding assistance so that these passengers can board the aircraft before the other passengers in order to receive special instructions. This pre- boarding procedure is obviously justified for safety reasons.

Ms Fournier stated that in her sixteen years of experience she had never encountered a blind passenger who was not first identified through the pre- boarding procedure.

A document entitled "Aeronautics Act - Air Regulations, amendment" was then filed as exhibit I- 2. This document deals with intoxicated passengers. The regulations require the carrier to refuse to allow any person to board an aircraft if it has reasonable grounds to believe that the passenger is intoxicated.

It should be noted immediately that nowhere in these regulations or in the instructions contained in the flight attendant's manual is there a definition of "reasonable grounds".

According to Ms Fournier’s testimony as a whole, there are no objective criteria in either the flight attendant’s manual or the training courses for identifying persons who give "reasonable grounds" to believe that they are intoxicated. On the contrary, according to her testimony, such criteria are essentially subjective.

Finally, Ms Denise Allard was called as the second and last witness for the respondent, Québecair- Air- Québec. Her testimony revealed that she was acting as purser on the respondent’s flight on June 20, 1986. This witness has extensive experience as a flight attendant and purser, having started employment with the respondent in 1967.

She remembered the complainant, Russell Thiffault, because while was acting as purser on the Mirabel- Orly flight, she had had to issue the complainant a warning at the request of the flight attendant because he was

being noisy. > 9

She also remembered the events of June 20, 1986, on the return Orly- Montreal flight, when she was again acting as purser.

According to her testimony, prior to passenger boarding she reportedly received, as purser, information from one of the respondent’s ground attendants, Jacques Ostyn, that there was a noisy passenger in the waiting area and that she should check on this passenger on boarding.

According to Ms Allard’s testimony, she received this information when two thirds of the passengers had already been seated on board.

A few minutes later, she saw a person in the corridor approaching the aircraft who, in her words, "was staggering". When he arrived near the entrance to the plane she therefore asked him to wait and to return to the waiting area so that she could finish the boarding procedure.

Still according to Ms Allard, this person, identified as the complainant, appeared again for boarding. It was at that time, while she was requesting his seat number, that the complainant allegedly told her to "shut up".

In her testimony, Ms Allard stated that at that time she was unaware that the complainant was blind.

Ms Allard thus completed the boarding procedure and then went into the cabin to determine where the complainant was sitting. Subsequently, she consulted the flight captain, Mr Yvon Lecavalier, relating the events in question to him. She decided that, under the circumstances, as the person responsible for the passengers’ safety and comfort, she should not allow the complainant on board.

According to Ms Allard’s testimony, the flight captain, Mr Lecavalier, fully supported her decision; Ms Allard therefore contacted the ground attendant, Mr Jacques Ostyn, to have the complainant removed from the plane.

Then, still according to Ms Allard's testimony, she told Mr Thiffault that for safety reasons she could not envisage a seven- and- ahalf- hour flight that would be a continuation of the situation she had just experienced with the complainant.

To this effect, the Tribunal refers the reader to Ms Allard's testimony, pages 118 and 119 of the transcript.

> 10 When asked by counsel for the respondent to explain the "real" reason for her decision not to allow the complainant on board, Ms Allard states at page 120 of the transcript:

[Translation] A - Because this man was very rude to me. That is the only reason why

I refused to allow him on board. It should be noted that Ms Allard does not recall having received information from the flight attendant, Ms Sylvie Pare, that Mr Thiffault was blind.

The flight report of June 20 was also produced during Ms Allard's testimony as exhibit I- 4. This report states as follows:

[Translation] I refused to allow a passenger on board because he told me to shut up. I told him I was sorry but I could not allow him to remain on board and he got off with a friend. The passenger in question was Mr Russell Thiffault. He told me that he was blind; I rather doubt it, but I cannot be sure. I also think he had a little too much to drink.

When asked to explain why she doubted the complainant's blindness, Ms Allard replied at page 126 of the transcript:

[Translation] . . . We were shown how passengers were to board and the procedure to follow. Since he did not have a white cane, I personally did not believe he was blind.

Ms Allard states that she never received any information from the respondent's ground attendants, either through the pre- boarding procedure or otherwise, identifying the complainant as visually impaired.

In brief, from the testimony of the purser, Ms Allard, it appears that the complainant, Russell Thiffault, was denied access to the respondent's flight of June 20, 1986, because he was rude and had insulted her. This is the only reason why the complainant was not allowed to board. This testimony also indicates that the complainant, during the events of June 20, 1986, was seated only once in the aircraft, contrary to the complainant's version and that of his brother, Clarence Thiffault.

Denise Allard was the last witness heard by the Tribunal. > 11 PARTIES' ARGUMENTS

In her arguments, counsel for the Commission concluded that, according to the evidence presented, the respondent, through its employees, discriminated against the complainant Russell Thiffault by refusing to allow him to board its flight of June 20, 1986, on a prohibited ground of discrimination, namely the complainant's blindness.

Counsel for the Commission submitted that the case at bar raised three questions of law (pages 177 and 178 of the transcript):

[Translation] 1.- "What is the obligation of a company providing services with respect to the disabled persons it is serving; and conversely, what are the rights of these disabled persons during provision of a service?"

2.- "What is the obligation of disabled persons to identify themselves as such to ensure that they are treated fairly?"

3.- "To what extent does the victim's conduct justify a discriminatory practice?"

For its part, the respondent, Québecair- Air- Québec, claims that it and/ or its employees did not engage in a discriminatory practice, since the refusal of service to the complainant was justified by his unco- operativeness and rudeness, and had no relation to his blindness.

As a secondary line of defence, counsel for the respondent invoked the defence provided for under section 15(g) of the CHRA, which reads as follows:

Section 15 It is not a discriminatory practice if ... (g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities, or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is a bona fide justification for that denial or differentiation.

This is the defence that may be used to support a practice which normally would be deemed discriminatory, that is, a defence based on bona fide justification or a reasonable excuse for a practice which otherwise would be discriminatory.

> 12 Another argument raised by counsel for the respondent is a defence based on section 53(2)(b), which reads as follows:

Section 53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

In other words, the respondent is using as a defence its claim that since the complainant, Russell Thiffault, was able to take his flight the day after the events of June 20, 1986, the respondent thus provided him with the service and, as it were, rectified the discrimination of which the complainant was allegedly a victim, if any such discrimination occurred.

The Tribunal immediately dismisses this defence, since if there was discrimination, the fact that the complainant was able to take his flight the following day in no way justifies or "rectifies" the alleged discriminatory practice engaged in on June 20, 1986.

As the last grounds for the defence of the respondent, Québecair- Air- Québec, its counsel invoked section 65, subsection 2, of the CHRA, which reads as follows:

Section 65(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

QUESTIONS OF LAW First, before examining the various submissions of each of the parties, the Tribunal should deal with the objection of counsel for the Commission regarding the production of exhibit I- 5, entitled "Telex from Jacques Ostyn dated June 20".

> 13 As I previously pointed out during the hearing, this document is inadmissible as evidence, since it presents the version of Mr Jacques Ostyn, who could not be cross- examined by the opposing party. This is, in fact, illegal evidence constituting hearsay.

However, by virtue of section 50, paragraph (2)(c) of the CHRA, which reads as follows:

50 (2) In relation to a hearing under this Part, a Tribunal may (c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not that evidence or information is or would be admissible in a court of law.

The production of exhibit I- 5 was allowed under advisement. However, on reading this section, I have come to the conclusion that exhibit I- 5 is not covered by section 50(2)(c), since it does not meet the conditions set out therein, namely that it be "by affidavit".

Moreover, I feel that section 50(2)(c) of the Act is intended to cover documents such as a copy of an authentic document which does not bear the mention "true copy", or a "standard" form used by organizations, such as tax declarations or standard leases issued by the Régie du logement.

However, that is not all. On perusal of this document, it is evident that it is in fact hearsay. For all these reasons, exhibit I- 5 is considered inadmissible as evidence and the Tribunal shall therefore totally disregard it for the purposes of this decision.

THE EVIDENCE The evidence as a whole reveals a number of contradictory points. According to the complainant's version, corroborated by his brother, the

witness Clarence Thiffault, the complainant boarded the aircraft twice on June 20, 1986. However, the only [sic] witness heard for the respondent, Ms Denise Allard, claims that the complainant boarded the plane only once, namely after he was refused access to said aircraft the first time.

To assist the Tribunal in deciding which of the two versions is the more credible and plausible, we shall, in the spirit of the Tribunal, start with a fact that is not contested by either party, namely that the complainant attempted twice to take his seat on board the respondent's flight number 549 on June 20, 1986.

Why was the complainant not permitted to board said flight on his first attempt?

> 14 The response to this question is the same from both parties, namely that the complainant appeared to be intoxicated.

According to Ms Allard, the complainant "was staggering" on approaching the aircraft. Ms Allard's testimony regarding this point is at page 114 of the transcript, and I quote:

[Translation] Q - Can you tell me what happened next?

A - I then continued with the boarding procedure, and when I saw Mr Thiffault coming down the corridor - because in Paris there is a corridor which leads directly to the plane door . . .

Q - If I understand correctly, passengers are not required to climb any stairs?

A - That is absolutely correct, sir. In Paris, it is not necessary to climb any stairs. I then saw this passenger who, I would say, was staggering . . . I don't know how I could explain it. I asked him to wait a moment. At that point, I asked Mr Jacques Ostyn if he would attend to this passenger, as I wanted to finish the boarding procedure.

Further on, at page 130 of the transcript: [Translation] Q - Can you tell us why you had him stopped at that time?

A - Because I told him that the passenger was not walking straight and I felt that I needed to ensure he was fit to travel.

And again later, at pages 133 and 134 of the transcript, the following statements were made:

Q - Now, in the discussions you had with Mr Ostyn, did you mention to him at any time that you suspected that Mr Thiffault was intoxicated?

A - Yes, I told him because I could assume from the way Mr Thiffault was walking that he had been drinking.

For his part, the complainant, at pages 13 of of the transcript,

states that while attempting to board the plane for the first time, the guide who was accompanying him was making "jokes" about the state of the aircraft and it was at that time that he tripped or hit his foot against the door of the plane. After he had taken his seat on board, one of the respondent's employees requested that he leave the aircraft under the pretext, given once outside, that he was intoxicated.

> 15 If it is true that the complainant’s apparent state of intoxication was the real reason for refusing to allow him to board the aircraft, why did Ms Allard not make any checks to this effect during this first attempt?

A minimal verification would have been to inquire immediately about the complainant’s apparent state of intoxication. Counsel for the respondent justifies this decision by stating that they were attempting to board other passengers and this would have delayed the boarding procedure.

However, from the evidence and specifically from page 113 of the transcript, it is clear that about two thirds of the boarding procedure had been completed according to testimony from Ms Allard, the respondent’s employee and purser on the flight in question.

The evidence reveals the following: [Translation] Q - Where were you at that time?

A - I was at the boarding area near the door where the passengers were entering; I was welcoming them on board.

Q - Had some of the passengers already started to board? A - Yes, I would say that the boarding had been about two- thirds completed.

What is more, Ms Allard states that she does not remember (page 152 of the transcript) when the complainant attempted to board the second time whether he was accompanied by Mr Jacques Ostyn, the respondent’s employee who, according to the evidence of both parties, was given the "task" of attending to the complainant when he was initially not permitted to board (page 145 of the transcript).

Why was Jacques Ostyn not there? The most probable response is that Jacques Ostyn, after checking on the complainant, was satisfied that he was not intoxicated. This would confirm the complainant’s version at page 14 of the transcript:

[Translation] A - I deplaned and then my guide followed me. We moved out into the corridor. When I asked the flight attendant why we were not allowed to fly, he informed me that I was not permitted on the flight because I was intoxicated and was therefore not allowed on board.

> 16

I told him it was news to me and, at that point, my guide told him I wasn’t drunk, that he was making an error and that I was merely blind. The flight attendant immediately understood. He asked a few questions; I do not remember what they were. He then said he would go speak to the stewardess and explain that it had been a mistake . . .

At page 44 of the transcript, the complainant’s brother, Russell [sic - Clarence?] Thiffault, states:

[Translation] Q - Continue.

A - I continued to straighten out my papers a little and then Russell left the aircraft; I don't know what I was doing; I didn't leave right away, but when I left a few minutes later maybe . . . I don't know, two, three minutes later . . . a conversation was taking place outside the airplane.

Q - Could you tell us who was having the conversation? A - There was a man, a Frenchman; I believe he was a Frenchman, and a stewardess, a person . . . a flight attendant who was there as well . . . I don't know which one; then there was the guide and Russell, my brother, and the subject being debated was that he was intoxicated and that the stewardess did not like it.

We were just flabbergasted . . . intoxicated! None of us was drunk. We said, listen, this is nonsense, foolishness; what's this whole thing about being drunk?

Then, one of them left . . . I don't remember whether it was the stewardess who went to speak to the other stewardess or whether it was the guy; perhaps it was the guy who went to speak to the other stewardess who had remained inside.

Then they returned and asked us to wait until the other passengers had been seated and then they would come to see us. We waited and then someone came to see us; I think it was the stewardess and the guy who asked us to reboard. They told us that we could board again.

If, however, Jacques Ostyn was in fact present during this second attempt to board, why didn't he or Ms Allard speak to each other to clarify the lack of grounds for the first refusal, namely the complainant's state of intoxication?

> 17 From all the testimony given in favour of the complainant, it seems that he was blind and had not consumed any alcoholic beverages at the time of the events of June 20, 1986. The complainant and his brother, Russell [sic - Clarence?] Thiffault, stated that they had boarded the plane twice. These two witnesses also maintain that they left the aircraft when initially asked to do so (Clarence Thiffault leaving a few minutes after his brother, page 144 of the transcript).

The complainant's version is essentially corroborated by that of his brother Russell [sic - Clarence?] Thiffault.

However, there are a few inaccuracies and a few questions raised by Ms Allard's testimony. According to her testimony, she remembers the complainant not only because of the events of June 20, 1986, but also because she had to ask this same passenger to "lower his voice" during the flight from Mirabel to Orly on June 10, 1986.

However, she does not remember that Sylvie Pare, one of the respondent's flight attendants on board the flight of June 20, 1986, reportedly informed her that she knew the complainant and that he was blind.

Moreover, Ms Allard made the following statement at page 113: [Translation] A - Yes. During boarding, Jacques Ostyn who is, who is now and was at that time our ground attendant, came to see me and said, Denise, there is a noisy passenger in the waiting area; I would like you to check him during boarding or . . . I don't remember the exact words . . . something to that effect.

Q - Where were you at that time? A - I was at the boarding area near the door where the passengers were entering; I was welcoming them on board.

However, if Ms Allard was at the door of the plane, and the "noisy" person was in the waiting area, how could she identify the complainant as being this noisy person to be checked when he approached the boarding area a few minutes later?

Why did Jacques Ostyn not check the passenger himself? Why did Ms Allard delay this "check" when Jacques Ostyn had asked her to carry it out?

Once again, it is important to bear in mind that on this first occasion the boarding procedure was two- thirds complete.

> 18 There are no answers to any of these questions anywhere in Ms Allard’s testimony.

The Tribunal therefore concludes that the complainant, Russell Thiffault, by reason of the actions taken by the employees of the respondent, Québecair- Air- Québec, was, as of his first attempt to board, prima facie, a victim of discrimination in contravention of sections 3 and 5 of the Canadian Human Rights Act.

As the complainant has established "prima facie" that he was a victim of discrimination, there are grounds to apply the principle established in the Supreme Court decision in the matter of the Ontario Human Rights Commission et al v The Borough of Etobicoke [1982] 1 SCR 202 and more specifically at page 208, where McIntyre J wrote as follows:

Once a complainant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory

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

(Emphasis added.) I therefore conclude that the complainant, according to the evidence, was from his first attempt to board the respondent’s flight number 549 of June 20, 1986, discriminated against by the respondent, Québecair- Air- Québec. This conclusion immediately dismisses the first defence invoked by counsel for the respondent to the effect that the respondent’s refusal to allow the complainant, Russell Thiffault, to take his seat on board flight number 549 of June 20, 1986, was based on the argument or insulting remarks made by the complainant which, according to Ms Allard - whether she is right or wrong - were intended for her.

Since the employees of the respondent, Québecair- Air- Québec, were incapable of imagining or understanding that the complainant’s "staggering" could be explained other than by a state of

intoxication, I take as my own the comments of the Tribunal in Isabel Alexander v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Labour and Consumer Services, Liquor Distributions Branch, January 26, 1989, and more specifically at page 7 of this decision:

> 19 The Respondent's Manager thought that the Complainant was intoxicated, refused to allow her to purchase liquor, asked her to leave the store and when she refused, he summoned the police. Haldeman was unable to accept that there could be an alternative explanation in the case of the Complainant until he spoke to the Complainant's lawyer. I find that if the Complainant had not been a person with a disability, she would not have been treated in this way.

(Emphasis added.) In the matter before us, Ms Allard did not find any justification for the complainant's "staggering" other than the conclusion that he was intoxicated and therefore refused him access to the plane when he tried to board the first time.

She made no attempts whatsoever to find out or ask someone else why he was staggering. In fact, she did not even approach the complainant to smell his breath (page 134 of the transcript); she took no steps to ensure that the complainant was not intoxicated by discussing the matter with him or his guide. She did not identify the complainant as the "noisy" person whom Jacques Ostyn had informed her about during boarding and who was, it seems, in the waiting area.

Although the boarding procedure was two- thirds complete when the complainant attempted to board the first time, Ms Allard did not carry on any conversation whatsoever with the complainant to confirm her initial suspicions, namely that he was intoxicated.

It seems to me that diagnosing a person as being intoxicated merely because he "was staggering" is arbitrary, uncertain, unjustified and unreasonable.

I therefore conclude that the complainant would have been treated differently if he were not blind - a condition which could explain his "staggering".

Of course, a blind person can also be intoxicated. Hence, it seems all the more essential to make sure by further checking one's impression of intoxication without systematically interrupting the boarding procedure under way.

ADVERSE EFFECT DISCRIMINATION It is obvious from the evidence heard, that the respondent, through its employees Ms Denise Allard and Mr Jacques Ostyn, did not consciously and deliberately "discriminate" against the complainant.

> 22 The precedents, in a number of instances, and particularly in the decision of the Ontario Human Rights Commission and Theresa O'Malley v Simpsons- Sears Limited [1985] 2 SCR 536, establishes the principle that with respect to human rights there is no need to determine intent. To this effect, McIntyre J wrote as follows at pages 549 and 550:

The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination

of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.

In the matter before us, the complainant was discriminated against by the respondent for two reasons:

1. The complainant was a victim of discrimination through a lack of judgment, circumspection and caution, and because of the absence of any criteria to conclude or determine that "staggering" constituted a state of intoxication.

2. The complainant was a victim of discrimination because he did not fit the stereotype, and had none of the "clichés" attached to blind persons such as a white cane or guide dog.

The respondent's employees, Jacques Ostyn and Denise Allard, sought no explanation for the complainant's staggering other than intoxication.

As was the case with the witness Haldeman in Alexander, supra, the respondent's employees were unable to accept that there could be an alternative explanation for the complainant's behaviour when he was initially refused permission to board.

That is to say, therefore, that the absence in the complainant's case of any apparent signs of blindness such as a white cane or guide dog, combined with his "staggering", resulted in his being categorized as an intoxicated person.

It is interesting to read the following passage on this subject from Ms Allard's testimony at page 116 of the transcript:

A - Personally, no, because he . . . he had difficulty walking; he was not walking straight. He did not have a white cane. There was nothing which led me to believe that this man was blind. I saw no real, obvious signs that would have indicated he was blind.

> 21 Clearly, as I mentioned earlier, in the case at bar, there was no "direct" discrimination but rather adverse effect discrimination.

The complainant's "staggering" together with the absence of any apparent signs of blindness could have been one indication of a state of intoxication, but the respondent limited itself to this observation. However, in this case, the "staggering" could be explained by the complainant's visual impairment and the absence of any apparent signs of blindness by the fact that he was being assisted by his guide, Mr Vaira.

Under such circumstances, there are grounds to apply the theory of adverse effect discrimination as ruled by the Supreme Court in a number of cases, including O'Malley, supra, and more specifically at page 551, where McIntyre J wrote as follows:

An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

In the present case, if Ms Allard had taken the trouble to briefly check the complainant’s "staggering" at the time he boarded, when two thirds of the boarding procedure had been completed, she would have quickly observed, or it would at least have been quickly explained to her, that this initial sign of "intoxication" (the complainant’s staggering) was caused by his blindness.

The Tribunal also examined with interest the matter of Kellerman v Al’s Restaurant and Tavern Limited and Georges Zarafonitis reported in CHRR, volume 8, decision 623, May 1987, in which the owner of the restaurant, Mr Zarafonitis, made the following statement at paragraph 31092:

. . . I just look over, you know the way he look, I thought he was drunk . . .

Ms Allard, on seeing the complainant "staggering" as he was approaching the aircraft, similarly concluded that he was not fit to travel and that he was intoxicated. At that time, she did nothing to check her suspicions. Such conduct was negligent and resulted in the complainant being a victim of discrimination from the time of his initial attempt to board the aircraft.

> 22

SHOULD THE COMPLAINANT HAVE INFORMED THE RESPONDENT OF HIS DISABILITY? Before concluding definitively that the complainant was a victim of discrimination, it may be asked whether he should have informed the respondent of his disability.

On this point, the complainant and his brother categorically state that the complainant identified himself as being blind at the ticket counter of the respondent, Québecair- Air- Québec, on June 20, 1986. This evidence was nowhere contradicted by the respondent. This premise gives rise to three possible alternatives:

1.- That the respondent’s ticket agent did not take note of this fact, either forgetting it or because the complainant declined the assistance offered to him by this agent because he had a guide;

2.- Or that the "junior" flight attendant did not take the pre- boarding list, which according to the testimony of both Ms Fournier and Ms Allard is unlikely, as the purser always receives the pre-boarding list before departure;

3.- Or that Ms Allard, the purser, received the pre- boarding list and did not note that the complainant was entered on the list as being blind or, quite simply, that the complainant’s name was not registered at all because of an omission on the part of the ticket agent.

However, regardless of the hypothesis adopted, it is clear from the complainant’s testimony, which was not contradicted and even corroborated by his brother, that he had informed the

respondent that he was blind. I therefore conclude that the complainant cannot be blamed for these errors or omissions on the part of the respondent's employees.

What is more, the Tribunal reviewed Parisian v Hermes Restaurant Ltd, reported in CHRR, volume 9, decision 741, June 1988. In this decision, the Manitoba Court of Appeal, under the authority of the Manitoba Human Rights Act, concluded that disabled persons did not have to prove their disability beforehand in order to avail themselves of statutory protection.

In other words, this is tantamount to saying that failure to inform others of one's disability cannot constitute a valid defence for the discriminating party. I subscribe to this principle. How can the respondent argue in its defence that the complainant's supposed failure to identify himself as having a disability prior to boarding constitutes a valid defence for the discriminatory practice of which it is being accused?

The fundamental and essential goal of the Canadian Human Rights Act is to systematically eliminate all discrimination, whether intentional or not. It is an "almost constitutional" right not to be discriminated against. This "almost constitutional" right need not be proven or justified; it simply exists.

> 23 In the Supreme Court decision Robichaud v Her Majesty the Queen [1987] 2 SCR 84, Laforest J wrote at page 90:

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti- social behaviour, it

follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence.

And further on, at page 92, Laforest J continues: Any doubt that might exist on the point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the "almost constitutional" nature of the rights protected.

(Emphasis added.) This "almost constitutional" right to non- discrimination would not be protected if I decided that the complainant had an obligation to identify himself as a disabled person, while the respondent reportedly concluded merely from the complainant's "staggering" that he was intoxicated without inquiring whether this initial suspicion of intoxication was correct.

Requiring disabled persons to inform others of their disability in order to avail themselves of this "almost constitutional" right to non- discrimination would constitute, in my opinion, a negation of the principle of equal treatment for disabled persons, and this would be fundamentally contrary to the aim of the Canadian Human Rights Act.

For all these reasons, it is my opinion that the complainant was discriminated against by the respondent, Québecair- Air- Québec, on the grounds of his disability, since the respondent refused to allow the complainant to board its flight number 549 of June 20, 1986.

Since I have come to the conclusion that the complainant was a victim of discrimination, by virtue of the Etobicoke decision [1982], 1 SCR 202, the burden of proof has now been shifted to the respondent, QuébecairAir- Québec, as the organization providing the service.

It is thus up to the respondent to prove one of the exceptions set out in the CHRA as a defence for a practice that would otherwise be deemed discriminatory.

> 24 Counsel for the respondent, Québecair- Air- Québec, thus invoked the defence set out in section 15(g) of the Act.

DEFENCE OF REASONABLE EXCUSE/ BONA FIDE JUSTIFICATION The respondent submitted as its defence section 15, subsection (g), of the Act, which reads as follows:

Section 15 It is not a discriminatory practice if . . .

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

This is essentially the defence of reasonable excuse. Counsel for the respondent claimed that for security reasons, the respondent's decision and specifically Ms Allard's decision were justified. According to this claim, the fact that the complainant made rude comments which Ms Allard, rightly or wrongly, assumed to be addressed to her, justified the decision to refuse the complainant access to his flight.

In the matter of this defence, I shall consider the following three factors:

1.- Exhibits I- 2 and I- 3, namely two provisions of the Aeronautics Act which are aimed more specifically at persons impaired by alcohol or drugs;

2.- Exhibit I- 1 which is an extract from the flight attendant's manual outlining provisions for persons with special needs.

3.- The complainant's conduct. As for the first factor, namely exhibit I- 2, it should immediately be noted that these Air Regulations did not exist at the time of the events of June 20, 1986, since they did not come into effect until August 11, 1988.

Exhibit I- 3 is the legal provision which existed at the time of the events of June 20, 1986, and dealt with alcoholic beverages. It should be noted that this exhibit and more specifically section 823 deals solely with the consumption of alcoholic beverages on board an aircraft and does not

> 25 deal at all with events outside the aircraft. Nevertheless, I am inclined to accept refusal to allow an intoxicated passenger on board for security reasons as a bona fide justification. I share the opinion of counsel for the respondent that a carrier such as the respondent must take the necessary steps to refuse undesirable passengers either because of their intoxication or for some other reason prior to departure, as it is obvious that a person cannot be removed from the aircraft during flight.

However laudable and justifiable the reason for exhibits I- 2 and I- 3, they do not justify the discrimination of which the complainant was a victim.

As I mentioned earlier, the complainant was a victim of discrimination as of the initial refusal, which was based on his "apparent" intoxication. A conclusion as to a state of intoxication founded on a single criteria, namely "staggering", is neither justified nor justifiable. The respondent is not being reproached for wishing to comply with the regulations set out in exhibits I- 2 and I- 3, but rather for the absence of criteria other than the complainant's "staggering" on which to base the conclusion that he was intoxicated, and the fact that no additional investigation was conducted to support such a conclusion. Even exhibit I- 2, which has been in effect since August 11, 1988, makes no mention of the signs that may constitute

reasonable grounds to believe that a person is impaired by alcohol or drugs. In other words, what are these criteria and signs? In the present case, the only indication was the complainant's "staggering" on his approach to the aircraft. Such a decision, based on this one factor alone, is arbitrary, uncertain and unjustifiable in my opinion. In short, the cause of the discrimination is the absence of a minimum of investigation on the part of the respondent during the complainant's first attempt to board, combined with a single indicator of an intoxicated person, namely "staggering", which caused the confusion as to the complainant's actual state. Even the briefest and most elementary investigation would have revealed that the complainant was not intoxicated during his first attempt to board the plane and the subsequent events would never have occurred.

SAFETY ASPECT The respondent filed as exhibit I- 1 an extract from the flight attendant's manual dealing with provisions for passengers with special needs. The respondent also called on its behalf Ms Rachel Fournier, an instructor at Inter- Canadien whose duties include providing training courses for new flight attendants and annual refresher courses for flight attendants and pursers. Ms Fournier, in her testimony, described and explained the various instructions set out in exhibit I- 1 with respect to visually impaired passengers. She also described the pre- boarding procedure, which is set out in exhibit I- 1 and is essentially designed to facilitate identification of passengers with special needs so that these persons can board the aircraft first in order to be given special safety instructions.

> 26 From the testimony of Ms Fournier and Ms Allard, it is apparent that the respondent is highly concerned about its passengers' safety. The pre- boarding procedure, the pre- departure instructions to be given to passengers "with special needs" and the statutory provisions set out in exhibits I- 1 to I- 3 make this clear. The Tribunal is fully aware that such safety measures are indispensable and essential for the safety and comfort of passengers. The respondent made a special point of the fact that safety measures must be implemented to the extent possible prior to

departure of the plane, since once in flight, it is obvious that, as counsel for the respondent pointed out (at page 226 of the transcript):

[Translation] An airplane is not like a movie theatre; when there are troublemakers or annoying customers in a movie theatre, it is very easy to throw them out and thus solve the problem.

It is important, Mr Chairman, that you remember that an airplane is an enclosed area, flying at very great heights, and any incidents or accidents that occur can be very tragic for everyone. These safety requirements are real.

Moreover, these safety precautions are the responsibility of the purser, who in the case of the flight of June 20, 1986, was Ms Allard.

Despite the fact that such safety measures are essential and necessary, they should not be used as a pretext, excuse or bona fide justification for engaging in a discriminatory practice.

Even if we accept Ms Allard's version that she was not aware of the complainant's blindness until after his final removal from the aircraft and after he had made rude comments to her, the safety aspect cannot be used as a valid excuse for the initial discrimination of which the complainant was a victim as of his first attempt to board.

COMPLAINANT'S CONDUCT As I have mentioned numerous times, the discriminatory act of which the complainant was a victim was committed as of his first attempt to board the aircraft. During his second attempt to take his seat on the plane, the rude comments made by the complainant and which, according to Ms Allard's version - whether right or wrong - were directed at her, in no way change the discriminatory practice previously engaged in.

Moreover, in Alexander, supra, the evidence revealed that the complainant had sworn at and insulted Mr Haldeman, and the Tribunal nevertheless concluded that the respondent had engaged in a discriminatory practice.

> 27 I therefore conclude that the complainant's behaviour is in no way relevant in deciding the present case and that, moreover, such conduct would not represent a bona fide justification (passenger safety) for refusing to allow the complainant to board the plane.

DEFENCE BASED ON SECTION 65(2) OF THE ACT In its oral arguments, counsel for the respondent maintained that if the Tribunal concluded that the respondent had engaged in a discriminatory practice, the respondent could avail itself of the defence under section 65(2) of the CHRA, which reads as follows:

An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

This last argument submitted by the respondent cannot be upheld in view of Robichaud v The Queen, supra. In this decision, Laforest J wrote as follows at page 95:

Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory.

(Emphasis added.) Moreover, it is clear from the evidence that Ms Allard, the respondent's employee, was not the only person responsible for the discriminatory practice engaged in with respect to the complainant. The

ticket agent also failed to inform the purser of the presence of the complainant who, we remember, informed the ticket agent of his visual handicap. The complainant's brother, Russell [sic - Clarence?] Thiffault corroborated this testimony. Nowhere does the respondent contradict this evidence. What is more, the respondent's employee, Jacques Ostyn, informed Ms Allard during the boarding period that there was a noisy person in the waiting area and that Ms Allard should check him out. However, there is no proof whatsoever - quite the contrary - that Jacques Ostyn had identified the complainant as that noisy person.

I conclude for all the above- mentioned reasons that the respondent, Québecair- Air- Québec, cannot avail itself of the provisions of section 65(2) of the Act to avoid its liability as employer.

> 28 CONCLUSION

For all the reasons contained in this decision, I hereby: CONCLUDE THAT the complainant's complaint of September 11, 1986, and tabled as exhibit C- 1, is substantiated;

CONSEQUENTLY, declare that the respondent, Québecair- Air- Québec, in refusing to allow the complainant to board flight 549 of June 20, 1986, for reasons of intoxication when in fact the complainant was visually disabled, engaged in a prohibited discriminatory practice in contravention of sections 3 and 5 of the Canadian Human Rights Act;

ORDER the respondent to reimburse the complainant the sum of $100.00 which he was required to pay for an additional day's use of his guide's services.

AS for psychological damages which may be awarded by the Tribunal under the provisions of section 53(3) and considering the decision Butterhill v Via Rail Canada Inc (RTD 1- 80), August 18, 1980, also considering that the complainant suffered frustration and disillusionment as a result of the discriminatory treatment received and also considering that the respondent's employees acted arbitrarily, to say the least, during the complainant's first attempt to board, the Tribunal hereby concludes that the sum of $1,000.00 should be paid to the complainant for sufferings in respect of feelings or self- respect in accordance with section 53(3) of the Act and consequently, ORDERS the respondent to pay the complainant said sum of $1,000.00.

I consider that the other orders requested by counsel for the Commission which are, in effect, orders of a preventive and corrective nature, are not justified. I am of the opinion that the case before us is an exception in the sense that the respondent has pre- boarding procedures and measures as well as instructions for passengers with special needs which are designed to eliminate the problems experienced by the complainant and intended to provide equal treatment to persons liable to be the victims of discrimination as set out in the Canadian Human Rights Act. It is true that the complainant, despite the existence of such procedures, was the victim of discrimination. However, I feel that these measures are sufficient and that if the complainant was a victim of discrimination it was due to a combination of circumstances and consequently an isolated incident. Moreover, the preventive and corrective orders which the

Commission had requested seem excessively vague and general, particularly since according to the testimony of Ms Allard and Ms Fournier (page 74 of the transcript), who both have a great deal of flight experience, such a situation, to the best of their knowledge, has never before occurred. For the same reasons, there is likewise no reason to order Québecair

> 29 Air- Québec to provide the complainant with a letter of apology for the events of June 20, 1986. Moreover, a letter of apology might be deemed unconstitutional and contrary to the Charter of Human Rights and Freedoms as set out in the decision National Bank of Canada v Retail Clerks' International Union [1984] 1 SCR 269.

Dated at QUEBEC CITY, this 5th day of June 1989 [signed] MAURICE BERNATCHEZ
Tribunal Chairman