

T. D. 15/ 89 Decision rendered on November 24, 1989

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT, S. C. 1976- 77, c. 33, as amended;

AND IN THE MATTER of a Hearing before a Human Rights Tribunal appointed under Section 39 of the Canadian Human Rights Act.

BETWEEN:

JOEL OLIVER COMPLAINANT - and

DEPARTMENT OF THE ENVIRONMENT (PARKS CANADA) RESPONDENT

TRIBUNAL: HUGH L. FRASER Chairman

DECISION OF TRIBUNAL

APPEARANCES

CHARLES T. HACKLAND Counsel for the Complainant

YVONNE MILOSEVIC Counsel for the Respondent

RENE DUVAL Counsel for the Canadian Human Rights Commission

DATES AND PLACE January 23, 24, 25, and OF HEARING: February 2, 1989 Ottawa, Ontario
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THE EVIDENCE

The Complainant, Joel Oliver, is thirty- two years old and is a member of the Bar of Ontario. He resides in Ottawa. In 1978 Mr. Oliver graduated from the University of Waterloo with an Honours B. A. in History.

In early 1978 he applied to Parks Canada, which is part of the Department of Environment, for a job as an Interpretive Guide at the Woodside National Historic Park located in Kitchener, Ontario. The application was for summer employment which would run from May 1978 to September 1978. Mr. Oliver testified that an Interpretive Guide employs the skills of research, verbal communication, animation, which involves wearing a period costume, and describes to the general public the contents of a particular historical site; explaining the significance of the historical objects on the site and their

relationship to Canadian history and its development. The Complainant was successful in obtaining the position as an Interpretive Guide at Woodside House for the summer of 1978 and along with three female guides made up the compliment of Interpretive Guides at the site. Mr. Oliver testified that prior to his hiring by Parks Canada, women had been primarily employed to fill the positions as Interpretive Guides as they were required to perform a number of domestic activities as part of the animation requirement.

- 1 > At Woodside House Mr. Oliver was issued both a Parks Canada uniform and a period costume. The period costume would normally be worn whenever advance notice was received that a group would be visiting the site. The Complainant's job also involved artifact conservation, greeting the public and ensuring that they understood the basic themes of the house that they were visiting, answering any questions that visitors might have and explaining the historical importance of each of the rooms in the house. Mr. Oliver was required to wear his period costume which represented that of a "gentleman" of the era. He was also given a "hired hand's" costume so that he could dress as a hired hand and carry wood into the kitchen and replenish the stock in the woodbox. When wearing his gentleman's costume he would go into the parlor and play period songs on the piano. He would also spend time in the library and could be found sitting at a desk writing as visitors entered the room. Mr. Oliver was also required to do research as part of his summer employment and from time to time would be engaged in various research projects.

In the summer of 1979 Mr. Oliver returned to Woodside House as a summer Interpretive Guide. He did not return to school in the fall of that year and instead remained at Woodside taking on the responsibilities of a supervisory guide. He was employed at Woodside National Historic Park until September 1980 at which point he returned to the University of Waterloo to commence his Masters studies in History. He then returned to Woodside in May of 1981 and was employed there until March of 1982, again as a term employee with a title of Supervisor of Interpretive Guides.

- 2 > On April 1, 1982 the Complainant assumed the duties of Administrative Clerk again at Woodside National Historic Park and he retained that position until June 1982. From July 1982 until March 1983 the Complainant was employed at Bellevue House National Historic Park in Kingston, Ontario as the Acting Interpretation Visitors Service Officer. This was a nine month position which became available when the incumbent went on French language training.

After his term at Bellevue House was completed Mr. Oliver attempted to obtain employment elsewhere with Parks Canada. He entered as many competitions as he believed he was qualified for and also applied to Queens University Law School. He was accepted as a Law student at Queens and commenced classes in September of 1983. He later applied through Canada Employment for a summer position for the summer of 1984 as an Interpretive Guide at Bellevue House.

The Complainant's evidence was that he called in advance and was told that Canada Employment was screening applications for the position. While

delivering his application he spoke to a Mr. Miller who was gathering the applications for transfer to Bellevue House for screening. The Complainant testified that when he indicated to Mr. Miller that he wanted to apply for a position at Bellevue House Mr. Miller replied, "you don't wear a dress do you?" and laughed. Mr. Miller then reviewed the Statement of Qualifications and indicated that he would forward the application to Bellevue House. Neither the job description for Interpretive Guide or the Statement of Qualifications for Interpretive Guides makes any reference to the sex of the applicants.

- 3 > On January 23rd, 1984 Mr. Oliver was sent a letter by Mr. Miller, the Employment Counsellor for the Canada Employment Center, advising him that his application for employment as an Interpretive Guide at Bellevue House was returned, having been screened out. A copy of a letter of explanation from E. R. Friel, Area Superintendent for Parks Canada was also sent to Mr. Oliver. The critical paragraph reads as follows:

"The nature of the guide positions at Bellevue House, particularly insofar as major interpretive activities like role playing and animation are concerned, is such that only females can be considered as appropriate for this competition. I indicated this requirement to you in my letter but note that you have referred a male applicant, Joel Oliver, for an interview. I must inform you that I am obliged to screen Mr. Oliver out of this competition on the grounds that, being male, he would be unable to fulfill the interpretive duties of a Bellevue House Guide as required within the limits of our interpretive program."

In that same letter Mr. Friel suggested to Mr. Miller that there may be other positions at Bellevue House for which Mr. Oliver or any other male could apply, such as Interpretive Visitor Services Attendants or Gardener Interpreters. The Complainant, in his Evidence, indicated that the Interpretive Visitor Services Attendants were people who stand in the parking lots to direct buses on where to park and to escort Visitors safely across the street and direct them to the historical site after they have

- 4 > disembarked. Employees in these categories were paid at a lower rate than the Interpretive Guide. After learning that he would not be employed at Bellevue House for the summer of 1984 the Complainant registered with Canada Manpower and on approximately May 12th was able to secure employment at a Woodworking Museum outside of Kingston. The salary that he earned at the Woodworking Museum was less than his earnings would have been at Bellevue House which paid an hourly rate of \$10.65.

It was quite common for summer students to be rehired at historic sites for subsequent summers assuming that their employer's have been satisfied with their work. The Complainant therefore anticipated that he would have obtained further summer employment at the Bellevue House were it not for the criteria established for the positions as Interpretive Guides which required females only. Mr. Oliver did not obtain employment for the summer of 1985 and instead studied acting at Queens University and took part in a musical with the Kingston Summer Theatre.

On February 28th, 1984 Mr. Oliver filed his complaint with the Canadian Human Rights Commission. Mr. Oliver's complaint was dismissed at one point by the C. H. R. C.. He then retained a lawyer who pursued the matter in the Federal Court of Appeal, the result being a consent order under Section 28 of the Federal Court Act quashing the decision of the Canadian Human Rights Commission with the understanding that the Commission would recommend the appointment of a Tribunal.

- 5 > It has been the Complainant's position that he had all the qualifications to satisfy the requirements of the position for which he applied in 1984. He testified that he had performed all of the requirements for similar positions at different sites. He had previously worked at Bellevue House, was familiar with that site, he knew the interpretive themes that were used at the site and

was fully satisfied that he could perform all of the functions involved with the position as well as any other applicant, male or female.

The Complainant testified that the program at Bellevue House could have been altered to accommodate the presence of a male. He stated that he could have worn a period costume appropriate to a male at that time. He could have played the role of a male guest, a male caller, a colleague of John A. MacDonald's, a client of John A. MacDonald's or a visitor to the MacDonald household or perhaps a physician visiting the MacDonald household. It was the Complainant's view that the limitations on the animation program at Bellevue House were site imposed and that there was no reason why males could not have been embraced in that program as easily as females were.

The Respondent, Parks Canada, relied on the defence of Bona Fide Occupational Requirement and called three witnesses to lead evidence justifying the limitation of the Interpretive Guide summer positions at Bellevue House to females only. Mr. John Coleman who was Chief of Visitor Activities with Parks Canada, a position which was formally known as

- 6 > Interpretive Visitors Services Officer, testified that the principal significance of Bellevue House was its occupation at one time by John A. MacDonald.

Bellevue House was restored to the 1848 to 1849 period, although none of MacDonald's original furniture is found in the house. Mr. Coleman advised the Tribunal that the Historic Sites and Monuments Board decided in 1979 to restore Bellevue House based on two themes revolving around John A. MacDonald and Bellevue House itself as a structure along with several subthemes flowing from each theme. The subthemes around the MacDonald story dealt with MacDonald's political history with emphasis on the Kingston period; MacDonald's personal history, with emphasis on the Kingston period; and MacDonald's life with his wife Isabella and family at Bellevue. The Bellevue themes were the architectural expressions of the Italianate Villa, the history of the house from its construction which was in approximately 1839 to the late 1840's; and housekeeping at Bellevue House during the 1840's.

Mr. Coleman went on to highlight the objectives which were established for Bellevue House National Historic Park. The most relevant objectives were:

"aim for a high standard of all aspects of preservation, restoration, operation and maintenance, as befits a memorial to Canada's first Prime Minister and continue an animation program of limited scope (i. e. guides and period costumes), provided that Sir John A. MacDonald and his family are not represented in person. Craft

- 7 > demonstrations will continue to be restricted to only those that reflect

the social life of the occupants of Bellevue House during the late 1840's".

The primary interpretive message for Bellevue House centered around the domestic life within that house. Mr. Coleman testified that accuracy in conveying this message was absolutely essential. In developing the interpretation program for Bellevue House research was undertaken

by Parks Canada employees including researching information gathered by scholars and various academics. Information was also provided by means of a number of reports that had been prepared by Parks Canada staff prior to the restoration and opening of the House.

The Tribunal heard that life in Bellevue House in the 1848 to 1849 period was rather simple as a result of the illness that plagued MacDonald's wife during that period. She was, in fact, an invalid who only occasionally left her bed or left her room. Research available to the Parks Canada employees indicates that MacDonald had servants at the home but the research does not indicate how many there were or exactly what they did and of most significance, the research does not indicate the sex of these servants. MacDonald's letters indicated that there were various visitors to the home including physicians and his wife's brother who, along with other family members, visited Isabella MacDonald in her sick bed. Mr. Coleman testified that in his view MacDonald could not have afforded a male servant because they were paid a higher wage and that he did not have the kind of establishment that required a male servant.

- 8 > Mr. Coleman also added that the techniques selected to be performed by the summer Interpretive Guides included costume, presentation of dialogues, presentation of music, handcraft demonstrations and cooking demonstrations, along with the guiding role of dealing directly with the public as interpreters. He stated that guides are expected to be able to perform in every one of those roles. They were hired to be able to demonstrate cooking, to be able to do handcrafts, to be able to perform simple roles in a dialogue and the scheduling was arranged so that each guide was able to perform every part of the program. The dialogues were brief, five or six minute dramatic presentations. They were written for two or three people to take part and the dialogues were in fact written by Mr. Coleman. It was Mr. Coleman's evidence that females had to be hired as Interpretive Guides at Bellevue House because females and only females could fulfill all of the parts of the Personal Services Program. Limited resources meant that everyone was required to do everything. The full compliment would include one supervisory guide and five Interpretive Guides.

The other witnesses testified that there is little hard historical evidence

available to determine the number of servants employed in the MacDonald household, the sex of those servants, the number of visitors that the MacDonald household would have received or the particular arrangements that John A. MacDonald might have made for his ill wife during his absence.

- 9 > THE LAW The Complainant is relying on Sections 7(a), 8(b)(ii), 10(a) and 10(b) of the Canadian Human Rights Act. Those Sections read as follows:

7. It is a discriminatory practice, directly or indirectly a) to refuse to employ or continue to employ any individual, on a

prohibited ground of discrimination. 8. It is a discriminatory practice (b) in connection with employment or

prospective employment, (ii) to make any written or oral inquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

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

a) to establish or pursue a policy or practice, or b) to enter into an agreement affecting recruitment, referral, hiring,

promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

- 10 > The "prohibited ground of discrimination" in this case is of course sex. Section 4 of the Canadian Human Rights Act provides that "anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an Order as provided in Sections 41 and 42".

The Respondent takes the position that it has not engaged in any of the acts defined by Sections 7, 8 and 10 of the Canadian Human Rights Act. In the alternative it relies on Section 14 (a) of the Act which reads as follows:

14(a). "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."

The Respondent asked that the complaints be dismissed under Section 41 (1). The initial burden in these cases rests with the Complainant. He is required to show on a balance of probabilities that the Respondent has been guilty of committing one or more of the acts defined by Sections 7, 8 and 10. If the Complainant is successful in discharging the initial burden the Tribunal must then decide whether or not the acts of discrimination are justified under

Section 14 (a) as products of a bona fide occupational requirement (hereinafter "BFOR").

- 11 > The test to be used in applying the BFOR defense as set out in Section 14 (a) of the C. H. R. A. was enunciated by Mr. Justice McIntyre in Ontario Human Rights Commission v. The Borough of Etobicoke (1982), 3 C. H. R. R. D/ 781 and this test has been applied consistently in Human Rights cases. The oft quoted statement of Mr. Justice MacIntyre appears as follows at D/ 783.

"To be a bona fide Occupational Qualification and Requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code. In addition it must be

related in an objective sense to 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."

There are two components to the test; one is subjective and the other is objective. The wording of the subjective and objective components of the BFOR test in the Etobicoke case reflects the nature of employment that was at issue in that case; namely, firefighting. Counsel for the Respondent accurately pointed out to the Tribunal that concerns of safety are not present in the Oliver case and in many other cases where the BFOR defense

- 12 > is invoked. In *Caldwell v. Stuart and the Catholic schools of Vancouver, Archdiocese* (1984), 6 C. H. R. R. D/ 2643 the court considered whether the firing of a Catholic teacher from a Catholic school because she had married a divorced man in a civil ceremony was a contravention of the employment discrimination provision of the British Columbia Human Rights Code (since replaced by the Human Rights Act S. B. C. 1984, c. 22). The Respondents invoked the BFOR defense to the teacher's claim and the court dealt with that defense on the basis of the Etobicoke test. As the following passage indicates the court recognized that the test would have to be revised to reflect the different nature of the employment at issue in the Caldwell case.

"The test employed in the Etobicoke case has two branches. The first is subjective; is the questioned requirement imposed honestly, in good faith and in the sincerely held belief that it is imposed in the interests of the adequate performance of the work involved and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code? It is at once clear that it is met, for at no time in these proceedings has it been suggested that the motives of the school authorities were not honest and in good faith or that the requirement of religious conformance was not imposed solely to promote the objects of the school. No ulterior motive has been shown or even suggested. In addressing the second branch of the test, however, it was argued that the

- 13 > requirement of religious conformance was not reasonably necessary to

assure the efficient performance of the teaching function in any objective sense. Considerations of economy and safety are not involved. However, the essence of the test remains applicable and may be phrased in this way, "is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objectives of the church in operating a Catholic school with its distinct characteristics for the purpose of providing a Catholic education to its students?"

The Supreme Court held that the objective component of the test was also met and dismissed the teacher's complaint.

Counsel for the Respondent directed the Tribunal to the decision in *Stanley et al v. Royal Canadian Mounted Police* a decision of a Canadian Human Rights Tribunal rendered in April 1987. The Tribunal agrees with the Respondent's Counsel that Chairman Elliot's analysis of the

Etobicoke test is particularly useful for this Tribunal. Chairman Elliot in the Stanley case stated that "the essence of the Etobicoke test", to use McIntyre J's term, seems to me to be as follows:

- 14 > In order to establish BFOR the employer must show both;

a) that the impugned requirement is imposed honestly, in good faith and in the sincerely held belief that it is imposed for the protection or furtherance of interests which the employer can rationally seek to protect or further, given the nature of the employment in question, and not for ulterior or extraneous reasons, aimed at objectives which could defeat the purpose of the legislation, and

b) that the impugned requirement, objectively viewed, is reasonably necessary to protect or further interests which the Respondent can rationally seek to protect or further, given the nature of the employment in question.

PRIMA FACIE DISCRIMINATION The Complainant is obligated to make out a Prima facie case of discrimination. The Complainant is relying on Sections 7 (a), 8 (b)(ii), 10 (a) and 10 (b) of the Canadian Human Rights Act which Sections have been reproduced earlier. It is my finding that the Complainant has satisfied his obligation and has provided the Tribunal with evidence of Prima facie discrimination on the part of the Respondent based on the Respondent's violation of Sections 7 (a), 8 (b)(ii), 10 (a) and 10 (b) of the Canadian

- 15 > Human Rights Act. The complainant appeared to be a most highly qualified candidate for the position of Interpretive Guide at Bellevue House. His

application was screened out on the basis that Interpretive Guide positions were to be staffed by members of the female sex only and the Complainant was advised of that criteria after he had submitted his application.

Witnesses for the Respondent indicated that there were other applicants for the position of Interpretive Guide at Bellevue House and that it was not a certainty that the Complainant would have been successful in obtaining the position had he not been screened out. While the Tribunal acknowledges that the Complainant was not the only applicant for this position, the evidence clearly indicates that his qualifications were outstanding, he had been previously employed at Bellevue House in another capacity, he had been employed at another Historical site as an Interpretive Guide and he had received outstanding assessments of his performance in previous positions. The combination of his experience and educational qualifications lead me to believe that the Complainant would have been successful in obtaining the position that he was seeking were it not for the "females only" requirement. Having reached this conclusion the Tribunal must then deal with the BFOR defense raised by the Respondent.

BFOR DEFENSE The first question that must be asked is whether the bona fide occupational requirement imposed by the Respondent was imposed honestly, in good faith and in a sincerely held belief that such requirement was imposed in the

- 16 > interest of the adequate performance of the work involved and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the code.

The Respondent has identified two interests that they believe justified the requirement or limitation imposed on the Complainant. The first is an interest in historical accuracy or authenticity, the second is an interest in effective and efficient operations including complete flexibility in the assignment of duties to the guides. The Tribunal agrees with Counsel for the Respondent that the aim of re-creating or representing history as accurately and as authentically as possible is a legitimate interest. John Coleman in his evidence stated that "Accuracy is absolutely essential. It's why we are there as professional people". A great deal of research is undertaken to ensure that Parks Canada can restore and preserve their historical sites in as accurate and authentic a manner as possible. The witnesses were most convincing on that point. The Tribunal is also satisfied that the Respondent had an additional interest in running an efficient and effective operation which was subject to certain economic constraints. Such an operation required a certain amount of flexibility on the part of the employees. The Tribunal finds therefore that the Respondent has met the first element of the test outlined in Etobicoke in that Parks Canada imposed the impugned requirement in the honest belief that the requirement was necessary to ensure historical accuracy and that there were no ulterior or extraneous reasons or motives behind the imposition of such requirements.

- 17 > The Tribunal differs, however, with the Respondent's argument that the

impugned requirement objectively viewed is reasonably necessary to maintain and preserve historical accuracy.

The Respondent introduced a letter written by Gordon Fairweather at the time that he was Chief Commissioner of the Canadian Human Rights Commission. In this letter dated February 21, 1979 Mr. Fairweather writes to a Mr. P. A. Thomson, Atlantic Regional Director for Parks Canada, Historic Properties, in Halifax, Nova Scotia in response to Mr. Thomson's request for advice on the question of whether or not competitions for military animators (soldiers) at the Fortress of Louisbourg should be restricted to males only. There were five related job titles that were staffed through the Louisbourg summer recruitment program. Twenty- six military animators (soldiers), twenty- three civilian animators (various roles), three native animators (MicMac roles) fourteen guides and thirteen receptionists. The question regarding the restricting of position to males only on the grounds of authenticity was raised only with respect to the first group, to that of the military animators. In his letter to Mr. Thomson, Mr. Fairweather states:

"The Commission considers that in the specific case of Louisbourg the authenticity requirement for animators is both appropriate and necessary. Although the question you pose related only to the military animator, positions we would consider the authenticity requirement equally reasonable for the other twenty- six animator positions wherein specific 'roles' are played. The need

- 18 > for authenticity would in our view justify the selection of candidates

to fill these positions on the basis of characteristics that would otherwise be proscribed by the Canadian Human Rights Act (and, for that matter, by the Public Service Employment Act). Some of the roles animated are apparently those of women who lived at the fortress, and these would no doubt require women to portray them authentically. In addition, it would seem that specific racial characteristics are considered essential to the authentic portrayal of at least some of the animated roles".

In referring to Section 14 (a) of the Canadian Human Rights Act Fairweather adds that:

"The bona fide defense requires no previous approval or exception to be provided by the Commission administering the Act and would prevent sufficient defense given the facts you have provided us on the Louisbourg situation, to rebut an allegation of discrimination on grounds of sex that might arise in your recruitment of animators. Although the Commission could, under Section 22 of the Act, pass a guideline excepting these positions from the general proscriptions against sex discrimination, such a guideline would appear to us unnecessary 'overkill' on

- 19 > the facts, and indeed might cause the public to question the strength of

the authenticity argument which would otherwise appear obvious". In the next paragraph he adds:

"You might wish to consider, in this regard, whether it is in the interest of the public image of Parks Canada as an 'equal opportunity employer' to continue to advertise separately for 'military' and 'civilian' animators when a single poster for these two positions would allow you to select applicants of both sexes for the fifty- nine positions on the basis of merit, based on the essential requirement that the candidates be suited to portray the specified roles authentically. In other words, we would advise you that advertising for animators at Louisbourg would probably best be handled as a theatre company would handle a 'casting call'".

Counsel for the Respondent, although agreeing that Mr. Fairweather was confining himself to the specific situation at Louisbourg, suggested that it would not be wrong to infer from Mr. Fairweather's letter an acknowledgement in general terms of the legitimacy and rationality of sex requirements imposed in the interest of historical authenticity.

- 20 > The Tribunal agrees entirely with the position taken on the Louisbourg site in light of the fact that specific information was known about the composition of the individuals located at that site and the need for authenticity therefore dictated that the "roles" be played by individuals of the correct sex.

The requirement for historical accuracy in the portrayal of Bellevue House during the period of 1848 to 1849 is just as critical for that site as it is for Louisbourg. There is however, one significant point which greatly influenced my decision on this Tribunal and that is the absence of absolute historical data on the actual composition of John A. MacDonald's household during the period in which he resided at Bellevue House. Christina Bates, the historian who testified on behalf of the Respondents, indicated that of all the personal letters of John A. MacDonald

available to historians there are only five letters which actually relate to the period during which he resided at Bellevue House.

Ms. Bates evidence indicated that MacDonald's wife was quite ill during the period in question and would not have received a great deal of visitors other than family members, one of whom was Mrs. MacDonald's brother, who came to stay for three weeks. It is known that John A. MacDonald was away from the home from nine to six each day and that at least more than one doctor visited the home periodically to look after Isabella MacDonald. History does not record how many servants MacDonald employed although in one of his letters he does refer to the fact that his wife "is kept busy managing servants" suggesting that there were certainly more than one. Most critically, we do not know whether the MacDonald household employed

- 21 > any male servants at this time. What is known is that prior to this period MacDonald had employed a male servant at another home. The research historian surmised that MacDonald would not have had a male servant at Bellevue House due to his poor financial circumstances since male servants were paid at a higher wage than female servants. Bates also testified that the reason she came up with the idea of the servants being all females was

based on comparative information which suggested that in professional households in Upper Canada during that period, nine out of ten servants were females.

On the basis of the information that we do have, which is that Isabella MacDonald was quite ill, her husband was away from home a considerable period of time, he had in the past employed male servants and was known to live beyond his means, one could also surmise that John A. MacDonald could quite likely have employed a male servant while he was at Bellevue House. In any event, no purpose is served by further speculation. The key point is, as Christina Bates testified, there is scant historical evidence available.

John Coleman, Chief of Visitor Activities for Parks Canada, testified on behalf of the Respondent. His evidence was most valuable in helping the Tribunal to understand the importance of the themes and objectives behind the portrayal of Bellevue House. Mr. Coleman advised the Tribunal that the message for the House was the domestic living arrangements of the MacDonalds during the period 1848 to 1849. He stated that:

- 22 > "We know there had to have been servants there, unfortunately the

research doesn't tell us who they were or what they did. You have to operate on the supposition that there was at least one servant, perhaps two servants, because it is a fairly large house and it wasn't easy to look after an invalid. Initially we do know that there was a nurse. When the nurse left we don't know but it seems a reasonable supposition that there was a cook and that the other would have been a maid. We know that there were visitors to the house. The MacDonald letters tell us this. We know the doctor came. We know that Isabella's brother visited. We know that members of the family visited Isabella in her sick bed".

When asked what sex the servants would have belonged to, Mr. Coleman indicated, "likely female". He based this assumption on the fact men servants cost more and that MacDonald could not have afforded a male servant and didn't really require one.

Mr. Coleman explained to the Tribunal that there are three dialogues currently in use at Bellevue House and in part they are used to demonstrate the room. There is a dialogue in the kitchen which conveys information about various artifacts in the room. A dialogue in the guest room focuses on bedmaking and there is a dialogue in the drawing room. Although Parks Canada policy forbids the portraying of MacDonald and his family, the MacDonalds are brought into the dialogues by reference. For example, the

- 23 > motivation for the dialogue in the drawing room, according to Mr. Coleman, was the hiring of a new maid by the cook. This dialogue also provided the opportunity to discuss Isabella's illness as well as individual pieces of furniture.

Mr. Coleman also testified that in May of 1983 he was asked to present a list of all the dialogues that had been in use at Bellevue House since approximately 1975. His evidence indicated that since 1986 the dialogues

have been rewritten, largely due to the fact that he did not like the previous dialogues, finding them to be juvenile and unrealistic. Mr. Coleman added that he could not imagine a situation taking place such as that portrayed in the initial dialogue. He admitted that he did not study the dialogues from a point of historical accuracy but when re-writing the dialogues his principal goal was to achieve historical accuracy while improving the dramatic presentation.

It was Mr. Coleman's decision to hire females to interpret the summer program and when asked why he decided to hire females only he indicated that females were the ones who could fulfill all of the parts of the Personal Services Program as it occurs in the summer season. He testified that he could not play with resources, they were limited, and everyone had to be able to do everything including the cleaning of the House and artifacts before the House was actually opened to the public; undertaking inventories of the artifacts at the beginning and at the end of each season; undertaking projects which involved historical research on certain subjects; as well as the other functions involved in the interpretation and role playing.

- 24 > Interpretive Guides were required to work a five day week, eight hours a day, while visitors toured the site the guides were required to be undertaking some type of craft project so that they would be able to discuss the craft if the public had any questions. This is part of the demonstration aspect of the program which continues throughout the day. When asked whether every guide was expected to rotate through every position Mr. Coleman indicated "yes, in order to make the job as interesting as possible for the students being hired the duties should be as varied as possible".

Although the BFOR guidelines that were in effect at the time of the Complainant's application are no longer in existence, the Tribunal has found it useful as Complainant's Counsel has done to closely examine the requirements of the position in light of the BFOR defense. The Tribunal finds that the Complainant met all of the essential qualifications for the position including the

ability to actively participate in an interpretive program. There are many aspects to the position of Interpretive Guide and animation is just one part of the job, albeit an important one.

The Complainant's testimony indicated that he had served as a male Interpretive Guide at Woodside House, another Parks Canada historical site without any difficulties or without any indication of a derogation of the principles of historical accuracy. The Tribunal accepts the Complainant's evidence that as an Interpretive Guide he could have been involved in dialogues representing a gentleman in period costume without violating the existing themes of the House. It is a known fact that John A. MacDonald had visitors and the Complainant could have played the role of a visitor to

- 25 > the home, he could have played the role of a doctor. It is a well known historical fact that Isabella MacDonald was treated by several doctors. The Tribunal accepts the Complainant's evidence that historical accuracy could still be respected in a presentation of an Interpretive Guide as a male servant. The evidence indicated that ten percent of the servants were male servants and although the preponderance of servants were female history also

reveals that John A. MacDonald at one time did employ a male servant prior to his moving into Bellevue House. The Tribunal cannot accept the Respondent's argument that historical accuracy dictates the absence of any males in the MacDonald household scene when by their own admission the evidence in support of such an argument is scant at best.

The Tribunal finds that it is not necessary for Parks Canada to alter the established themes for Bellevue House in order to accommodate the presence of a male Interpretive Guide. Mr. Coleman testified that he rewrote the dialogues in accordance with the themes. Four additional dialogues were created. It seems to the Tribunal to be quite conceivable for dialogue to be created which would have allowed a male Interpretive Guide to play a role consistent with the historical knowledge that we have of the MacDonald years and the existing themes which were established for Bellevue House.

The Tribunal is of the opinion that a man of Mr. Coleman's talent could have created a dialogue which for example incorporated the presence of a doctor visiting the MacDonald home. Mr. Coleman in his testimony indicated that it was important that the entire story be told, as much as possible, through a dialogue and one can envision a dialogue in which the doctor discusses the activity of the household with any members of the household

- 26 > who might happen to greet him or discuss with him the condition of Isabella MacDonald. With regard to the requirement to demonstrate a craft, a doctor would be able to demonstrate the medical equipment available for use in the 1848 to 1849 period as well as the homemade remedies that may have been prepared for Mrs. MacDonald with the assistance of the servants of the household.

Much was made by the Respondent of the need to rotate the guides in order to have them play various roles and to keep the job interesting and to provide for various shifts. With due respect, the Tribunal does not find this a compelling reason not to employ a male guide. The evidence indicated that guides were required to perform a number of duties during the day and the

animation presentations were given primarily on the weekend. The Tribunal does not suggest that a male Interpretive Guide should have been accommodated to the point of playing a traditionally domestic role always played by a female, historical accuracy would dictate against such portrayal. However, the Respondent was not able to explain why, if Mr. Oliver had been hired for the position, he could not have incorporated a male role into the animation on the days when he was at work and why the male role could not have been omitted from any animations presented on the days when Mr. Oliver was not at work. In view of the fact that the doctor was not a member of the household or an everyday visitor there seems to be no reason why the doctor's role had to be a part of each animation presented to the public. The same can be said for the role of Isabella MacDonald's brother. History indicates that he did spend at least

- 27 > three weeks at the MacDonald household and the Tribunal sees no reason why a dialogue could not have been created which employed the role of Isabella MacDonald's brother.

The Tribunal finds, therefore, that the Respondent has not satisfied the objective requirements of the Etobicoke test which were further clarified in Caldwell and in Stanley in that they have not satisfied the Tribunal that the impugned requirement of hiring only female Interpretive Guides for Bellevue House is reasonably necessary to protect the interest of historical accuracy, economy and flexibility. The Tribunal accepts therefore, the primary argument of the Complainant's Counsel, that it is possible to integrate a male into the existing theme of the domestic lifestyle of the MacDonalds in the late 1840's.

REMEDY A. COMPENSATION FOR LOSS OF INCOME:

Mr. Oliver, in his testimony, indicated that for the summer of 1984, had he been successful in obtaining employment as an Interpretive Guide at Bellevue House he would have earned \$10.65 per hour excluding time and a half or double time which Parks Canada pays for holidays. He calculated the earnings lost on the basis of seventeen weeks of employment at forty hours per week at a basic rate of \$10.65 per hour and deducted the amount he was able to earn in his alternate employment at MacLachlan Woodworking

- 28 > Museum. His net loss for 1984 was \$3,834.96. The Tribunal satisfied

that had Mr. Oliver obtained employment in the summer of 1984 he would most likely have been re-hired for the summer of 1985. The Complainant is therefore awarded the sum of \$11,076.96 representing his loss of income for the years 1984 and 1985.

The Tribunal found the Complainant to be a sincere and credible witness who gave every indication of being a hardworking individual who through no fault of his own was unable to obtain employment for the summer of 1985. The Tribunal would therefore not discount the estimated probable earnings submitted by Mr. Oliver for 1985.

The Tribunal so orders that a compensatory award in the amount of \$11,076.96 be paid to the Complainant for lost wages.

B. COMPENSATION FOR THE EFFECT UPON THE COMPLAINANT Section 41 (3) of the Canadian Human Rights Act reads as follows: "In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or b) the victim of a discriminatory practice has suffered in respect of feelings or self- respect as a result of the

- 29 > practice, the Tribunal may order the person to pay such compensation

to the victim, not exceeding \$5,000.00, as the Tribunal may determine.;

There was no allegation of bad faith made by the Complainant or the Complainant's Counsel and the Tribunal is satisfied that the Respondent was not wilful or reckless in engaging in the discriminatory practice. However, the Complainant and his Counsel did argue that he should receive an award based on his hurt feelings and loss of self- respect. The Tribunal agrees with Respondent's Counsel that the unfortunate handling of this case by the Canadian Human Rights Commission may have exacerbated any feelings of frustration and hurt experienced by Mr. Oliver. Notwithstanding that fact, the Tribunal believes that although the Complainant certainly did not agree with the policy of Parks Canada as evidenced by his filing of a complaint, he should not have been shocked or surprised to learn of the policy in view of his previous employment with Parks Canada and his admission of the trail blazing position that he established after obtaining employment as an Interpretive Guide at Woodside House. The Tribunal will therefore not make an award under Section 41 (3) (b) of the C. H. R. A.

- 30 > C. INTEREST

Under Section 41 (1)(c) of the Canadian Human Rights Act the Tribunal is empowered to compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice.

This Tribunal shares the opinion that the compensation described in 41 (2)(c) allows for the payment of interest to the victim of discrimination. See *Scott v. Foster Wheeler Ltd.* (1986) C. H. R. R. D/ 3193; *Cameron v. Nel- gor Castle Nursing Home* (1984) 5 C. H. R. R. D/ 2170; *Chapdelaine and Gravel v. Air Canada* (1988) 9 C. H. R. R. D/ 4449 and the recent decision of *Leon Hinds v. Canada Employment and Immigration Commission*. In the circumstances of this case the Tribunal believes that the appropriate time for the commencement of interest is February 23rd, 1984, that being the date on which the complaint was filed. Interest on the amounts awarded to the Complainant will run from that date until the date on which this decision is released at the interest rate of 10%.

D. ORDER The Tribunal orders the Respondent to cease the discriminatory practice of screening out male applicants for the position of Interpretive Guide at Bellevue House Historical Park where such screening out is performed solely on the basis of the sex of such applicants.

- 31 > E. COSTS

Mr. Hackland has argued that Mr. Oliver should be paid his legal costs by the Respondent. There is no question that it was necessary for Mr. Oliver to retain separate and independent Counsel to act for him in this matter. Mr. Hackland drew the Tribunal's attention to the case of Leon Hinds v. Canada Employment and Immigration Commission a Canadian Human Rights Tribunal decision of October 11, 1988 in which there was also

litigation in the Federal Court against the Canadian Human Rights Commission. Mr. Hackland did not specifically request his client's costs be paid, instead he phrased it as a request for expenses. Complainant's Counsel also referred to the case of Rosann Cashin v. Canadian Broadcasting Corporation 8 C. H. R. R. D/ 591 in which Sidney Lederman, Chairman of the panel stated in the last paragraph of the decision:

"Counsel for Mrs. Cashin had asked that the CBC be responsible for her costs on both the Appeal and the proceedings below, regardless of the result of the Appeal. Although we are aware that carrying forth such proceedings is financially onerous, particularly when the individual finds it necessary to retain separate Counsel, we see no basis, assuming we have the power, for making an order against the CBC when

- 32 > it has been exonerated. In any event, Chairman Ashley did not

order costs against the CBC and no cross appeal was taken on that issue."

Mr. Hackland maintained that this excerpt from the Cashin case left open the question of whether there is a right to order costs. He therefore requested that the Tribunal reimburse the Complainant for the legal expenses incurred in the preparation for and presentation of the hearing.

Counsel for the Department of the Environment argued that the Tribunal has no jurisdiction to order legal costs based on the absence of any statutory authority to do so. In the alternative, Ms. Milosevic argued that if the Tribunal found that it did have jurisdiction then costs should be awarded against the Human Rights Commission and not against the Respondent, Department of the Environment, Parks Canada. She referred the Tribunal to the Hinds case and in particular the last paragraph which reads as follows:

"Mr. Duval, on behalf of C. H. R. C. argued that there is no jurisdiction in the Tribunal to award costs in any event and, therefore, opposed it. Ms. McCann on behalf of C. E. I. C. argued that there was nothing arising out of the Respondent's conduct which warranted Mr. Hinds retaining outside Counsel. If anything, it is the conduct of the C. H. R. C. which necessitated this extra expense. We do not feel that

- 33 > C. E. I. C. is responsible here for the costs of separate Counsel

and, therefore, it is not necessary to decide whether we have the jurisdiction to make an order of costs. We would, however, as the Tribunals in Potapczyk V. McBain (1984) 5 C. H. R. R. D/ 2285 Reversed on other grounds (1985) 6 C. H. R. R. D/ 3064 (F. C. A.) and Cashin v. CBC (1986) 7 C. H. R. R. D/ 3203 Reversed (1987) 8 C. H. R. R. D/ 3699 (Review Tribunal)

Reversed F. C. A., May 13, 1988 (unreported) did, urge the C. H. R. C. to indemnify Mr. Hinds for his legal costs. Given the degree of responsibility that Ms. McTavish took of the

proceedings and her effectiveness, fairness by the C. H. R. C. would dictate no less.

The Tribunal finds as in the Hinds case that the Complainant's Counsel took the major carriage of the case and Counsel for C. H. R. C. played only a minor role throughout. The Tribunal is of the view that it was only due to Mr. Oliver's representation by his own Counsel, Mr. Hackland, that he was able to achieve the success that he has before this Tribunal. It was Mr. Hackland's representation that successfully obtained for Mr. Oliver the opportunity to appear before this Tribunal.

The actions of the C. H. R. C. served to delay and frustrate Mr. Oliver in his efforts to have his complaint addressed. This Tribunal feels very strongly that it is the C. H. R. C. and not the

- 34 > Department of the Environment (Parks Canada) that is responsible for the

cost of separate Counsel. Therefore, an order of costs should not be made against the Respondent, Department of the Environment. The Tribunal strongly urges the C. H. R. C. to give every possible consideration to reimbursing Mr. Oliver for his legal expenses.

Dated at Ottawa, Ontario this twenty- fourth day of October, 1989 Hugh L. Fraser

Chairman - 35 -