

T.D. 5/95
Decision rendered on February 21, 1995

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DALE PATRY
Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION
Commission

-and-

ROYAL CANADIAN MOUNTED POLICE
Respondent

TRIBUNAL DECISION

TRIBUNAL: Jacinthe Théberge - Chairperson

APPEARANCES BY: Odette Lalumière, Counsel for the Canadian Human
Rights Commission

Rosemarie Millar, Counsel for the Respondent

DATES AND PLACE

OF HEARING: November 25-26, 1993
January 31, 1994
February 1-2, 1994
at Ottawa, Ontario

TRANSLATION FROM FRENCH

I. INTRODUCTION:

On April 28, 1993, Jacinthe Théberge was appointed as a Tribunal pursuant to subsection 49(1.1) of the Canadian Human Rights Act to inquire into two complaints filed by Dale Patry against the Royal Canadian Mounted Police on June 18, 1987.

The complainant submits that the Royal Canadian Mounted Police ("the RCMP") discriminated against him on the basis of disability in relation to employment. He argues that in so doing the Royal Canadian Mounted Police contravened sections 7 and 10 of the Canadian Human Rights Act, R.S.C. 1985, c. H-6 ("the Act"), by refusing to employ him in the RCMP because of his hearing disability. The Respondent submits that its medical standards for hearing constitute a bona fide occupational requirement within the meaning of paragraph 15(a) of the Act.

II. ISSUE:

The issue the Tribunal must consider is whether the RCMP's medical standard for recruitment constitutes a bona fide occupational requirement within the meaning of paragraph 15(a) of the Act, whether the hearing standard is objectively related to the duties to be performed, and whether it is reasonably necessary to ensure performance of the duties without endangering the public.

III. EVIDENCE:

A. The complainant:

1. Facts:

In May 1981, the complainant, Dale Patry, applied to the RCMP for a position as a special airport constable in Calgary, Alberta.

On July 26, 1982, the RCMP informed him that hiring was restricted due to budget cuts and that he was being placed on a waiting list, and he told them that he intended to maintain his application.

In the interim, Mr. Patry got married, quit his job as a civilian driver for National Defence in Calgary, moved to Winnipeg and asked that his application be transferred there. He was on the waiting list until 1985.

In late August 1985, he moved to Quebec City and his job application file was transferred to the RCMP in Montreal; his name was still on the waiting list.

In 1986, Mr. Patry received a telephone call requesting that he undergo a medical examination, as some positions were opening up.

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He underwent hearing tests, and Dr. Denis Rhéaume told him that he met the RCMP's hearing standards and that he was forwarding his report to Sergeant Belizle.

On July 17, 1986, the RCMP informed Mr. Patry in writing that it would be unable to accept his application for employment because he did not meet their medical requirements for hearing.

He challenged the RCMP's decision and underwent a second hearing test with Dr. Caouette, a specialist of his choice, who confirmed that he did not meet the RCMP's medical standards.

Mr. Patry was extremely disappointed at having failed to qualify for employment in the RCMP. He subsequently drove a truck for the Canada Post Corporation and had no difficulty hearing the truck's radio. He therefore feels that he could have performed the duties of a special constable in an airport. However, he conceded on cross-examination that this was not a position similar to that of a peace officer.

2. Corporal Claude Bélanger

Corporal Claude Bélanger was hired by the RCMP in February 1975 as a special constable at the North Bay airport even though he had a hearing problem. However, the RCMP's present hearing standards were not yet in effect.

Corporal Bélanger's hearing problem was otosclerosis. In 1984, he had to wear a hearing aid in the left ear and, in 1986, he had to wear another in the right ear, all while he was employed as a special constable.

On his physician's recommendation, he wore hearing aids until 1992, when he underwent surgery to regain a normal level of hearing.

Between 1975 and 1992, Corporal Bélanger's duties involved protection of the public in respect of Criminal Code offences committed in airports and on Parliament Hill, as well as the protection of the diplomatic corps in Ottawa.

According to him, he had no difficulty performing his work while wearing hearing aids.

Corporal Bélanger also acknowledged that in 1992 he was promoted to corporal in Special "O" Section for surveillance duties following the first operation on his left ear, as a result of which he regained an H2 hearing level.

3. Dr. Chantal Laroche

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The Respondent recognized Dr. Laroche as an audiologist and speech therapist, as mentioned in her résumé filed in evidence.

Before writing her expert report, Dr. Laroche studied the audiograms performed for Mr. Patry together with a list of the duties of special constables and regular constables to determine the validity of the H2 hearing standard requirement for performance of such work.

She acknowledges that one of the first tests performed in audiology for determining a person's hearing level is the audiogram, which makes it possible to draw a graph of the softest sounds a person is capable of hearing.

According to Dr. Laroche's expert report, Mr. Patry's hearing capacity is as follows:

- audiogram normal in the right ear;
- sensorineural hearing loss of 2 to 8 kHz in the left ear;
- speech intelligibility in a quiet environment excellent in the right ear and good in the left ear.

However, according to Dr. Laroche, it was necessary for the purpose of determining Mr. Patry's fitness to hold a position as an RCMP special constable to obtain further information on speech intelligibility in a noisy environment and localization ability in a

quiet and a noisy environment, as mentioned on page 422 of the transcript:

[TRANSLATION]

I would say, and we realized that the audiogram gives us information on the ability to detect pure sounds in a quiet environment but does not make it possible to predict an individual's hearing capacity in performing tasks other than detection in a quiet environment, that is, an individual's hearing may be judged to be normal, but if we do not test his or her perception of the same sounds in a noisy environment, perception of speech in a noisy environment or localization ability in a quiet or a noisy environment, if we do not conduct those tests it is impossible to predict on the basis of the audiogram alone whether or not the individual will be able to perform the tasks he or she is to be asked to perform.

According to Dr. Laroche, the audiogram is insufficient for determining an individual's ability to perform hearing tasks. However, she concedes that the equipment that exists for comparing the results of a particular individual with other individuals holding the position are not yet available in clinics.

Nor, Dr. Laroche adds, did the tests on Mr. Patry enable her to determine whether or not he needed a hearing aid to perform this work.

B. The Respondent:

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The RCMP called seven witnesses, including three experts in various specialties related to hearing and the process by which their medical standards were set. Their respective evidence can be summarized as follows:

1. Sergeant Roland Phaneuf

Sergeant Roland Phaneuf became a member of the RCMP in 1975. He currently works as a staffing officer and handles all the personnel records of RCMP officers in Division "A", of which Mr. Bélanger is a member.

In his evidence, Sergeant Phaneuf testified that promotions requested by Corporal Bélanger were always assessed in light of his

hearing problem, which was at level H-4, and it was only in 1992, after the surgery that improved his hearing problems, that he was promoted to Special "O" Section. The purpose of this evidence was to show that the RCMP has always applied the hearing standards even to permanent employees, not just to new recruits.

2. Dr. Jeremy Brown:

Dr. Jeremy Brown has held the position of Director of Health Services at the RCMP since April 1992 and is also an assistant professor of medicine at the University of Ottawa.

Since obtaining his M.D. from McGill University, Dr. Brown has always been interested in medical research and has published a number of articles on occupational health policies.

He then explained the functioning of the RCMP health service, which consists of a number of individuals responsible for applying health policies, including physicians, psychologists and an occupational health and safety supervisor. The service establishes health standards for all the RCMP's regions in order to attain the following four objectives as described on page 242 of the transcript:

The first is the safety to [sic] the public. We must ensure that our police officers do not suffer from a disability or disease that could result in serious risks to the safety of the public.

Next is the safety of the individual himself. We do not want to put our police officers in a situation where because of their own disabilities or medical conditions they are unsafe in their workplace.

Thirdly, we have to be concerned about the safety of the co-worker. We don't want to have a police officer in a position where because of disease or disability he may threaten, inadvertently of course, the safety of another police officer.

And finally, the safety of the individual, the co-worker, the public, on their ability to do the job [sic].

Thus, health standards are established for specific conditions, such as those related to vision, hearing and diabetes, and the directives permit the RCMP's health services to determine whether individuals are capable of performing the kind of work for which they are applying, or in the case of employees, whether they should not be transferred.

RCMP employees have been required to undergo medical examinations every two years since 1992; before that, the requirement was every four years. However, because of the loud noise in airports, police constables working there are required to undergo a medical examination every year.

When permanent employees experience health problems, an attempt is made to accommodate them because the persons concerned are trained and experienced officers. The standards are the same for permanent employees as for job applicants.

Dr. Brown explained that new health standards for RCMP constables came into effect in 1992 and confirmed that the actual standards are lower than the ones in effect in 1987 when Mr. Patry made his request, which he did not meet either. The RCMP's health service was established in 1977, and it was at that time that specific health standards were adopted for RCMP members (p. 267 of the transcript):

Q. There was a directorate that adopted specific standards in 1982.

A. The standards were published in 1979, but the doctors weren't there until 1982.

Q. Would you tell us what were the standards at the time.

A. At that time perfect hearing was not required, but at that time it was required that the hearing loss be no more than 30 decibels in the frequencies from 500 to 3,000 cycles in both ears.

Even though the hearing standards were reduced in 1987, Mr. Patry did not qualify because his hearing loss in the left ear did not meet the established H2 criterion, which required that the hearing loss be no more than 50 decibels in the frequencies from 500 to 3,000 cycles in both ears. According to the various audiograms, Mr. Patry had a

loss of 55 decibels in the left ear in the frequencies from 500 to 3,000 cycles (p. 333 of the transcript):

A. Those little squares represent the hearing loss at the different frequencies. At 2000 we see a hearing loss of 50 dbs, at 3000 we see a hearing loss of more than 50 dbs. It is not permitted to have a hearing loss of more than 30 dbs at 2000, and it is not permitted to have a hearing loss of more than 50 dbs at 3000. So he does not meet the standard on two counts.

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The position for which Mr. Patry had applied was as a special constable in an airport, or GS-LES-SE-3, and the medical profile for the position was V2, CV2, H2, G2, O2. His results were as follows (p. 285 of the transcript):

A. [...] In the middle we have the applicant. His vision is 2. That's acceptable.
Colour Vision is 1. That's better than acceptable.
Hearing is level 3. That is below the H2 standard.
That's moderately impaired rather than mildly impaired.
G1, he doesn't need any specialists.
G2 means that he can do, except for the hearing problem, physical things required of a police officer.

Q. And I understand that medical profile was put in his file and he was refused as a special constable in an airport.

A. Yes, on the grounds of inadequate hearing for that particular position.

Q. And I understand that this document was signed on July 15, 1986.

A. That's what it says, yes.

Regarding Corporal Bélanger, Dr. Brown concludes on the basis of his medical record that he met the criteria when he was recruited in 1974, and the RCMP agreed to accommodate him between 1977 and 1992, permitting him to perform other duties (supervisory in his case) wearing hearing aids because he was a model employee with extensive experience.

In Dr. Brown's opinion, the H2 hearing standard discussed above is necessary to ensure that the duties of a regular RCMP constable are performed safely.

3. Sergeant Ian McDavid Cooper

Sergeant Cooper has been an RCMP employee since July 9, 1956, and is currently responsible for the classification of positions at the RCMP. His section's main purpose is to evaluate positions in the RCMP and classify them on the basis of the required standards.

Sergeant Cooper was called to testify that the position for which Mr. Patry applied in 1986, that of a special constable in an airport, LES-SE-03, was abolished on July 1, 1988, and that regular constables have handled airport surveillance and security since then.

4. Douglas Simpson:

Mr. Simpson has been working for the RCMP for over 35 years and is at present the officer in charge of the Canadian Police Information Centre (CPIC). He holds an administrative position because he has a hearing problem and must wear a hearing aid in his left ear.

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Mr. Simpson testified that he has difficulty hearing conversations in a group. He even missed a fire alarm while asleep in a hotel. Nor can he identify the direction from which a noise comes.

According to Mr. Simpson, he has no serious problems with his hearing aid, although it did accidentally slip out of his ear once. However, he said that he does not wear it during physical activities, because of the effect of perspiration, or in cold winter weather. He confirmed that he would not work wearing his hearing aid if requested to perform operational duties.

5. Dr. James McGinnis:

Dr. McGinnis has a degree in psychology from the University of Waterloo, and he joined the RCMP in 1978; he has conducted human resources research and participated in the development of RCMP programs.

Since January 1991, Dr. McGinnis is the officer in charge of the RCMP's Research Branch for both civilian and regular members. His

team consists of four doctors specialized in industrial psychology. The parties agreed to the witness' status as an expert in organizational psychology.

Dr. McGinnis' testimony dealt primarily with the functional job analysis. He gave a detailed explanation of the procedure for establishing the standards required for each position (see Table 3 of the Respondent's Book of Expert Evidence), and more specifically those related to the tasks performed by general duty constables (pp. 509-10 of the transcript):

Job analysis is considered a fundamental building block of any human resource management program. You have to know what people do and the knowledge, skills and abilities that they require in order to decide the kind of people you need to recruit, about their cognitive and physical and emotional abilities. You have to know what people do in a series of jobs in order to engage in career planning. So it was intended to be a general purpose document that would serve the RCMP in a number of ways.

We were aware that vision and hearing are issues and those were salient issues as we undertook this job analysis that we wanted to ensure we gathered appropriate information about.

Dr. McGinnis then discussed the description of the tasks to be performed by a special constable in an airport by comparing the tasks set out at Tab 9 of the Respondent's Book of Exhibits, and on pages 16, 17 and 18 in particular, with his functional job analysis of the tasks performed by a regular constable (document filed at Tab 3 of the Respondent's Book of Expert Evidence). He compared about twenty tasks capable of justifying the hearing standards requirement (p. 571 of the transcript):

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Now, we could spend a couple of days developing about 1,000-item list of all the possible things that police officers have to be able to hear.

We have a phrase in here in one of these tasks that reads, "Approaching suspicious circumstances warily, being alert for possible attack", and there are any number of possible indications of that. It could be a footstep, it

could be a leaf, it could be a twig, it could be a gun, it could be a knife. There are thousands of possible different sounds that any police officer could possibly perceive in many of these circumstances, and I think we have done a reasonable job of listing what many of those are and what the realities of many of those are and I am sure there are many other possible ones that are not included here, but I think it becomes the job of the audiologist to determine what level of hearing is reasonably required in order to be able to perceive these sorts of sounds.

6. The engineer Neil Standen:

Neil Standen is an engineer employed by the Morrison Hershfield Company as a specialist in acoustics. He received a B.Sc. from the University of British Columbia in 1962 and a M.Eng. from McGill University in 1964.

He worked at Transport Canada as Director of the engineering service responsible for evaluating the noise created by aircraft and its effect on people. He later became an engineer in private practice and specialized in acoustics and the effect of building architecture on the ability to hear sounds both inside and outside. The parties accordingly recognized the witness' status as an expert in the field of acoustics.

The RCMP retained Mr. Standen in 1991 to establish whether the H2 hearing criterion was related to and necessary for the tasks performed by a regular constable as described in the document produced by Dr. McGinnis at Tab 3 of the Respondent's Book of Expert Evidence.

Mr. Standen explained to the Tribunal the methodology employed to verify the standards for hearing in a noisy environment on the basis of three scenarios representative of the tasks performed by regular RCMP constables:

- (a) radio communication in a patrol car while the siren is in operation;
- (b) the possibility of hearing a portable radio in the presence of crowd noise; and
- (c) traffic noise and population noise.

These scenarios gave an indication of the perception of sounds in a noisy environment and made it possible to determine that the H2 hearing standard was justified (p. 616 of the transcript):

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Q. So these are your conclusions concerning the three scenarios. So you say that the method of testing and the H2 is not inappropriate for the task that you studied.

A. The results of our studies indicated that one could apply the H2 criteria to a quantitative description of the tasks and show that the H2 criteria was related to the performance of those tasks.

It also showed that the H2 criteria did not exclude a large percentage of the RCMP applicants, that it in fact excluded less than 10 per cent of the applicants. As such, we would consider it to be not a very stiff or a very severe criteria.

Q. So H2 is not too restrictive according to your study.

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7. Dr. David Ronald Schramm:

Dr. Schramm is an otolaryngologist, and he graduated from the University of Toronto in 1983. He continued his studies in Illinois and obtained a specialization in otology and neurology in respect of aural malfunction. He has done extensive research and sits on the board of the Canadian Society of Aerospace Medicine. His principal duties are to evaluate airplane pilots and determine whether they have hearing problems that would bar them from flying.

Dr. Schramm was retained by the RCMP in 1993 to obtain his opinion on Mr. Patry's case, and his report can be found at Tab 7 of the Respondent's Book of Expert Evidence. His opinion was based on the following (p. 655 of the transcript):

My opinion was based on the RCMP H2 Hearing Standards; Mr. Patry's audiograms; the RCMP General Duty Constable Integrated Task Bank; the Special Duty Constable - Airport

Task Analysis that Dr. McGinnis referred to; the Morrison Hershfield Report; medical opinions that accompanied Mr. Patry's audiograms; and personal observation of patrol work, that is, constable patrol work both on highway patrol as well as airport patrol.

Dr. Schramm conducted the experiment of going on patrol with a special constable in an airport to evaluate the required H2 hearing criterion and gain a better understanding of Mr. Patry's audiograms. According to him, he concluded from an analysis of the four individual audiograms that Mr. Patry has normal hearing in his right ear but does not meet the H2 hearing standard in his left ear in any of the audiograms (p. 671 of the transcript):

Q. What can you say concerning Mr. Patry's unilateral loss?

A. As we stated, he has a unilateral high frequency sensorineural hearing loss. That is, there is a nerve deafness or a nerve hearing loss involving the high pitches only and it's only in the one ear. This could cause him to miss the content of soft conversation that is spoken on the side of his hearing loss; that is, soft conversation on the left.

He may well have difficulty understanding conversation on that side in the presence of background noise as well. He would also potentially have difficulty in the ability to localize high-pitched sounds. Low-pitched sounds where his hearing is normal, since both ears are normal in that frequency, he should be able to localize adequately. The high-pitched sounds -- that is, above 1500 Hertz -- where he has a hearing loss, he may have difficulty localizing sounds in that situation.

After this, Dr. Schramm's testimony consisted of an analysis of the H2 hearing criterion based on the job analysis conducted by Dr. McGinnis, and an evaluation of Mr. Patry's ability to perform the work

of a special constable, for which he had applied, safely (p. 706 of the transcript):

Q. Maybe you can tell us how many tasks you calculated that required the H2 standard. Have you made that calculation?

A. Yes, I did.

Q. There are 21 tasks, I think.

A. There are 21 tasks in total. I believe in 14 of the 21 tasks the H2 standard is reasonably necessary to efficiently perform the task.

Q. Dr. Schramm, to answer my question, you were saying that the hearing abilities that were needed in most of the tasks that required the H2 were the ability to perceive soft sound, understand speech in the presence of background noise and localized sound.

After reviewing the required hearing standards on the basis of the tasks of a regular RCMP constable, Dr. Schramm explained in detail that, and gave reasons why, it was neither safe nor recommended to wear hearing aids in performing such work.

He then explained the difference of circumstances between Corporal Bélanger's hearing loss, which could be remedied by an operation, and that of Mr. Patry, in which the auditory nerve was dead, as the wearing of a hearing aid did not have the same consequences in both cases (p. 715 of the transcript):

Q. Is there a difference for the hearing aid, if a person having a conductive problem wears a hearing aid in relation with somebody having the same problem as Mr. Patry with a hearing aid?

A. Generally, somebody wearing a hearing aid with a conductive hearing loss fares better. In general terms, people with a conductive hearing loss do better with a hearing aid than a person with a nerve deafness or a sensorineural hearing loss. That is, again, in general terms.

Dr. Schramm confirmed Dr. Laroche's opinion that further hearing tests could be performed but that, unfortunately, even today, the specific tests for determining the ability to understand speech in a noisy environment and auditory localization ability have not been

standardized to enable us to conduct such evaluations (p. 721 of the transcript):

Q. According to your opinion, would you say that using only an audiogram to measure the hearing acuity of a person who is applying for a job at the RCMP is an adequate way to measure what has to be measured?

A. I think the audiogram provides us with a lot of basic information. We can make, as I said, some inferences on job-related hearing capacity by using the audiogram. The audiogram would seem to be a reasonable way in which to

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determine if somebody has adequate hearing in general to be able to perform the tasks involved.

Following his analysis of the H2 criterion required as a hearing standard for performing at least 14 of the 21 tasks of a regular RCMP constable, Dr. Schramm concluded that it would be dangerous for public safety and that of the individual to hire a person who failed to meet this criterion of employment.

Under cross-examination, his answer to the question by counsel for the Human Rights Commission whether it would not be less discriminatory to have applicants undergo other tests to determine their hearing capacity, was that the effect of doing so would be to eliminate a larger number of applicants (cross-examination, at pp. 746-47):

Q. [TRANSLATION] Do you think that an audiogram alone can predict whether an individual is capable of performing the 21 tasks safely? Can this be determined on the basis of an audiogram alone?

A. [IN ENGLISH] I believe presently that the audiogram is an appropriate measure in which to use to determine [sic] the hearing capacity to be able to perform the hearing-related tasks. I am not aware of other standardized methods with standards both in English and francophone standards as well which are available to be used to measure this hearing capacity for performance of these tasks.

Q. [TRANSLATION] You say that it is in your opinion the most appropriate. Do you also say that it is in your opinion the only one that can be used?

A. [IN ENGLISH] I believe presently that the audiogram is the most appropriate standard or test that is used for this sort of work or any other hearing-related task. This is what is used in other hearing-related or most other hearing-related occupations to determine whether hearing would be adequate to be able to perform the tasks. Certainly this is what has been done in other police agencies and in other occupations outside of police or law enforcement to determine if somebody is adequate to be able to perform the various tasks.

There are other tests that were talked about in Dr. Laroche's testimony, but as we heard, there are no standards that were completed for both English and French.

IV. THE ACT:

The relevant statutory provisions are found in the Canadian Human Rights Act, as amended, and in the following sections in particular: Section 2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal

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opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Subsection 3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

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

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

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

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

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

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

Section 15. It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement...

V. AUTHORITIES

The burden is on the complainant and the Human Rights Commission to present prima facie proof of discrimination. However, section 15(a) of the CHRA permits the Respondent, the RCMP in this case, to raise as a defence the argument that its minimum H2 medical standard for uncorrected hearing for the recruitment of regular constables does not constitute a discriminatory practice based on the prohibited ground of discrimination of disability, but constitutes a bona fide occupational requirement (BFOR) and is accordingly not a discriminatory practice.

The burden is on the Respondent to establish this defence on the basis of the ordinary civil standard of proof, namely the balance of probabilities.

A review of the authorities is necessary to understand the various constituent elements of the bona fide occupational requirement (BFOR) defence.

According to the leading case on this subject, Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, sufficient proof requires that two tests be satisfied: a subjective test and an objective test.

The subjective test is defined on page 208:

To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the 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.

The objective test is then defined, again on page 208:

In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

Since then, a number of judicial decisions have clarified the definition of the objective test, which McIntyre J. explained by discussing its application to a specific occupation on pages 209-10: In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large.

The Federal Court of Appeal studied this declaration and considered whether the evidence adduced justified the conclusion in *Canadian Pacific Ltd. v. Canada*, [1988] 1 F.C. 209, in which Marceau J. made the following comment on page 224:

When I read the phrase in context, however, I understand it as being related to the evidence which must be sufficient to show that the risk is real and not based on mere

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speculation. In other words, the "sufficiency" contemplated refers to the reality of the risk and not its degree.

For the rule or requirement to be found to be justified, it must be proven that it is related to a real risk, and Sopinka J. made the following clarification concerning this test in *Saskatchewan (H.R.C.) v. Saskatoon*, [1989] 2 S.C.R. 1297 at 1309:

This test obliges the employer to show that the requirement, although it cannot necessarily be justified with respect to each individual, is reasonably justified in general application.... In the limited circumstances in which this defence applies, it is not individual characteristics that are determinative but general characteristics reasonably applied.

The Supreme Court of Canada reviewed the decisions related to interpretation and application of the CHRA in discrimination matters in *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489. On page 514, Wilson J. clarified and gave direction to the application of the CHRA:

Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why

the rule must be struck down if the employer fails to establish the BFOQ [bona fide occupational qualification].

It is clear from the existing case law that, where a rule or standard directly discriminates against a group, there is no duty of individual accommodation toward members of the group. In *Attorney General of Canada v. James Robinson and C.H.R.C. (F.C.A., 1994)*, Robertson J.A. said the following on p. 12:

Under current law, it is accepted that there is no duty to accommodate in cases of direct discrimination: see *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536; and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489. Only in cases of indirect or adverse effect discrimination does the duty to accommodate arise and even then that duty is subject to the caveat that accommodation must not impose an undue hardship on the employer. Directly discriminatory rules, if they are to be sustained at all, must apply to the entire group at which they are directed. Neither party has challenged the Tribunal's finding that the

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"seizure free" policy is directly discriminatory. Accordingly, there can be no duty to accommodate per se. The only manner in which the complainant could have been granted an alternate position within the Forces is through the CAF's self-imposed medical waiver system.

However a BFOR must be analysed on the basis of the occupation, not the person, as McIntyre J. asserted in *Bhinder v. CN*, [1985] 2 S.C.R. 561 at 588-89:

The words of the Statute speak of an "occupational requirement". This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application... To apply a bona fide occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an

occupational requirement and to render meaningless the clear provisions of s. [15(a)].

The fact that the tests are administered to everybody may nevertheless be a consideration in ruling on the existence of a BFOR. As a result, the onus is on employers with occupational requirements to adduce evidence necessary to contest a request for individual assessment, as Robertson J.A. held in *Robinson* (F.C.A, 1994), at 17-18:

In my view, the jurisprudence clearly demonstrates that the less homogenous a group of persons excluded by an occupational requirement, the more difficult it will be for an employer to establish a BFOR. The onus is on the employer to demonstrate, on a balance of probabilities, why a blanket policy of exclusion is reasonably necessary in circumstances where not all persons within the excluded group pose the same risk of unpredictable employee failure. In other words, the employer must establish that individual testing is not a practical or reasonable alternative in the circumstances. When the excluded group is a relatively homogenous one (i.e. all persons diagnosed with complex/partial epilepsy) then the issue is unlikely to dwell on whether individual testing is a reasonable alternative to the rule, but whether persons within this group present a sufficient risk of employee failure to warrant their exclusion through a BFOR. Thus, only employers who draft employment requirements in broad terms are properly called upon to adduce evidence necessary to contest a request for "individual assessment".

In summary, the following tests emerge from an analysis of the extensive case law on this subject:

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- To qualify as a bona fide occupational requirement, a rule must satisfy the objective and subjective tests laid down in *Etobicoke*.
- According to the objective test, the evidence must show that an employee who does not meet the standard poses a sufficient risk of employee failure to warrant the standard in the interests of the employee, his or her fellow employees and the general public.

- "Sufficient risk of employee failure" means a real risk that is not based on mere speculation. "Sufficiency" refers to the reality of the risk and not its degree.
- Accommodation is not an element of the bona fide occupational requirement. When a BFOR is established, the employer is under no duty to accommodate.

Employers who draft occupational requirements are called upon to adduce evidence necessary to contest a request for "individual assessment". If there is a practical solution other than adoption of a discriminatory rule, the employer could be found to have acted unreasonably.

VI. APPLICATION TO THE CASE AT BAR:

The Respondent admitted that the policy in question is prima facie a discriminatory practice inconsistent with the CHRA and that as such it constitutes direct discrimination against the group of persons with hearing disabilities. As a result, the burden is on the RCMP to prove, on a balance of probabilities, the existence of a bona fide occupational requirement within the meaning of section 15(a) CHRA.

According to the evidence, the RCMP's medical standards for uncorrected hearing have been in effect for a number of years and were even reduced in 1987. Counsel for the Human Rights Commission conceded that the RCMP's medical standards for hearing for the hiring of new recruits had been established for the bona fide purpose of ensuring public safety and protection. This means that the Respondent has satisfied the subjective test, that of good faith.

Moving on to the objective test, it must be asked if the H2 medical standard for uncorrected hearing is related in an objective sense to the performance of the duties of a special constable and if it is reasonably necessary to ensure performance of those duties without endangering the employee, his or her fellow employees and the general public.

For this, it is necessary to analyse the circumstances of each case, and more specifically: the nature of the occupation; the standards in effect; the procedure by which the standards were

established; an analysis of the duties to be performed; hearing aids; and the performance of individual tests.

1. Nature of the occupation:

In the case at bar, Mr. Patry applied in 1981 for employment as a special constable in an airport, or LES-SE-03. It is therefore necessary to identify the duties to be performed to determine whether the required medical standards are reasonably necessary to ensure their performance.

In his testimony, Mr. Cooper, the sergeant in charge of staffing at the RCMP, described the duties of a special constable in an airport, that is, an LES-SE-03, as follows (p. 351 of the transcript):

Q. I would like you to read the description.

A. Very well. I'm reading bench-mark 6, Level 3, Security Guard from the Law Enforcement Support Security and Enforcement:

"Summary: Under close guidance of an International Airport Detachment Supervisor, performs security duties, conducts less complex investigations; assists senior investigators in the investigation of major and serious crime; investigates motor vehicle and accidental injury accidents; performs traffic and crowd control duties and performs related duties.

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Duties: 40% of the duties: Performs security duties on Ministry of Transport property at an International Airport to guard against unauthorized entry, sabotage, theft, fire and wilful damage:

- by patrolling Airport property, on foot or by police vehicle, to detect breaches of security; checking suspicious persons or vehicles, recording names of persons, licence numbers, etc., and questioning and/or detaining any persons(s) as warranted;
- by ensuring persons and vehicles located in "restricted" areas are so authorized;

- by checking the interior and exterior of Ministry of Transport buildings to detect breaches of security, fires, damage to property;

- by conducting regular and preventive patrols of areas containing installations of highly sensitive navigational aids, e.g., radar, communication systems, landing aids, etc., to protect against damage and sabotage.

Duty (2), 15%: Conducts less complex investigations of the Criminal Code and various federal and provincial statutes:

- by investigating factual and alleged contraventions of the Criminal Code such as common assaults, disturbances, minor thefts, etc., and contraventions of such federal and provincial statutes as the Customs, Immigration, Aeronautics, Liquor, Motor Vehicle, Highway Traffic Acts and respective regulations;

- by examining scenes of crime; seizing exhibits; interviewing complainants, witnesses and suspects; taking statements; assessing available evidence and initiating prosecution if felt warranted; effecting arrests; serving summonses, subpoenas and executing warrants; searching persons, vehicles, and premises and conducting surveillance of suspected persons, vehicles and properties;

- by preparing documents and relative evidence for court presentation; attending and presenting evidence in Magistrate's, County, and Supreme Courts.

Duty (3), 5%: Assists senior investigators in the investigation and enforcement of the law, such as hijackings, bomb scares, major thefts, plane crashes, etc., and in the performance of general and diversified police duties.

Duty (4), 10%: Investigates accidental injuries and motor vehicle accidents:

- by interviewing drivers and witnesses; taking measurements and statements; assessing available

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evidence and determining the causes of accidents; detecting violations and initiating prosecution as required;

- by investigating personal injuries and property damage sustained accidentally by means other than motor vehicle on Ministry of Transport property; rendering first-aid; recording physical conditions and name(s) of person(s) and witnesses; taking statements; taking photographs, preparing and submitting reports as required.

Duty (5), 15%: Performs traffic and crowd control duties to ensure the safe movement and continual free flow of pedestrian and vehicular traffic:

- by directing pedestrian and vehicular traffic in public areas, using hand signals, flashlights and wands;
- by controlling crowds within Airport boundaries during V.I.P. visits and Trans-Atlantic departures and arrivals;
- by escorting and protecting V.I.P.s on Ministry of Transport property.

Duty (6), 5%: Enforces the Airport Vehicle Control and Government Concession Operations Regulations:

- by patrolling on foot or by police vehicle to prevent, detect and issue tickets for violations of the Airport Vehicle Control Regulations, e.g., parking tickets and moving violations;
- by checking vendors and other persons operating on Ministry of Transport property to ensure they are complying with Government Concession Operations Regulations.

Duty (7), 10%: Performs related duties such as:

- answering queries and assisting the general public with complaints of a diversified nature;
- performing minor office and clerical duties such as completing occurrence reports, processing traffic tickets, answering telephone, etc.;
- performing other duties demanded of a peace officer, such as assisting with the escorting of prisoners and mental patients on M.O.T. property; handling domestic disputes; searching for lost or missing persons; assisting in the escort of valuables in possession of Ministry of Transport personnel on Ministry of Transport property; clearing aircraft taxi strip and runways of wildlife; operating radar speedometer, fingerprinting M.O.T. employees for internal purposes; manning road blocks, etc."

The percentage on those total a hundred, which is a complete job.

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In 1988, the RCMP's "special constable" category was incorporated into the "regular constable" category. The duties of regular constables are similar in nature to those described in the above list. In my opinion, the establishment of hearing standards is not based on guesswork or speculation, but is done to avoid a real risk to the public, as special and regular constables are today, so to speak, not only the "eyes" but also the "ears" of the RCMP.

2. Standards in effect:

The medical standard for uncorrected hearing for recruitment in the RCMP is H2. It is described in the "Table of Hearing Standards" in the document filed by the RCMP (Exhibit I-1, Tab 1). According to these standards, which were established in 1986, a recruit's hearing loss may not be more than 30 decibels in both ears between 500 and 3,000 cycles per second.

It should be noted that the H2 hearing standard was changed in 1987; it is described in Exhibit I-1, Tab 2, as a loss of not more than 50 decibels in one ear at 3,000 kHz.

Dr. Brown described the various medical requirements for a regular constable, and more specifically those for hearing, as follows on pages 254-55 of the transcript:

A. For general duty constables there is a medical profile, which is divided into the following factors: "V", for vision; "CV", for colour vision; "H", for hearing; "G", for geographic, and that implies the availability of health care for the member; and "O", for occupational. Finally there's the "F" factor for fitness -- physical fitness, occupational fitness.

The categories are broken down according to ability. If we use hearing, which is the matter at hand here, the H1 category is somebody with normal, perfect hearing. The H2 category is a group of individuals who have mild hearing impairment. The H3 category is moderate hearing impairment, and the H4 category is severe hearing impairment.

And so we have the same thing for vision. We have V1 through V5, depending on the degree of impairment, V1 being perfect vision.

Geographic is the requirement for health care. For example, if somebody has heart disease, then we may make a geographic requirement that the member be posted where there's cardiologists. If somebody has perhaps another problem we would post them where an appropriate physician or specialist is available.

The "O" factor is occupational. It's very often determined by the risks of sudden incapacity. For example, an individual who has epilepsy that's not well controlled, we would put them in a position that was more clerical and we would not have them driving a police car, for example.

The "F" factor is determined by fitness and occupational fitness using that Pair Test, which is a specific test of occupationally related tasks.

The RCMP's Book of Exhibits [I-1, Tab 4] contains the medical profile required for a special constable (LES-SE-03), who is required to meet the following standards: V2 for vision; CV2 for colour vision; H2 for hearing; G3 for geographic posting; O2 for the occupational factor; and F2 for physical fitness.

In this case, Mr. Patry underwent a number of hearing tests, and the RCMP let him undergo other tests with a physician of his choice after he had been denied employment in the RCMP; all the audiograms adduced in evidence showed that the complainant did not meet the H2 hearing standard because he had a hearing loss of over 55 decibels in the left ear at 3,000 kHz [I-1, Tabs 5, 6, 7 and 8]. As a result, Mr. Patry's medical profile found in the Book of Exhibits [I-1, Tab 4] can be summarized as follows: V2, CV2, H3, G2, O2, F2. He did not meet the standards in effect.

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3. Job analysis:

A "job analysis" must be carried out to identify the duties to be performed in order to determine whether the required standards are reasonably necessary to ensure performance of the duties. Without such an analysis, it would be difficult, if not impossible, to establish the necessary relationship between the standard and performance of the duties.

Dr. McGinnis explained to the Tribunal how he had analysed the tasks to be performed by a "special or regular constable" in the RCMP today by considering, first, what the person is paid to do, second, what knowledge is required to attain those objectives and, finally, what skills and reasonable standards are required to perform those tasks. This job analysis is carried out with all the groups, and he described more specifically, on page 516 of the transcript, the methodology used to establish the necessary requirements for the work of an RCMP "special constable".

Q. But you said that before -- you were explaining in general what was a Functional Job Analysis. Can you tell us exactly what you did with this group of general duty constables, the kind of research you did and --

A. I thought I had already covered that. I will go over it again. I brought together in about six different groups RCMP constables. Occasionally there were a couple of

corporals recently promoted who had previously been doing general duty work. I took them through the classic Functional Job Analysis methodology. I had them list the outputs that they were responsible for. I had them list the knowledge that they required. We write all of this down on flip charts and pace the room with it so they can see everything that we are putting down. There is nothing hidden here. We try to get a lot of consensus on what it is that is going into this job analysis.

So I got their outputs. I got a list of the knowledge that they required, a list of the skills and abilities that they required. With each group, we went through all of the tasks that they have to perform and attempted to gather some information about the performance standards for which they strived.

Q. And you did that with each and every group?

A. Yes, with the airport, the highway patrol and the group of people that police Native populations as well as with the final group at headquarters. We spent a single day with those people.

Dr. McGinnis then discussed more specifically how the standards for uncorrected hearing are related to the tasks to be performed and showed those standards to be a reasonable and valid occupational requirement (see pp. 521-22 of the transcript):

Q. For example, I read "Hearing Acuity". The first line at page 17 under "Hearing Acuity" is:

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"(on patrol on foot or in vehicle) hear gunshots, loud noises, screams, alarms and be able to tell direction from which noise came"

There is no level of hearing.

A. Well, no. The fact is that all of these noises and hearing ability exist on a continuum and obviously the greater acuity that any individual constable has, the greater an asset it is going to be. The question is, of course, where one draws the line in terms of a reasonable

standard of hearing acuity, but these are examples of the kinds of things that we would expect constables to be able to hear while, in this case, on patrol, on foot or in vehicle.

Basically, when one key element of a constable's job is to perceive what is going on in his or her environment and these sorts of noises are indications -- this first line here -- of issues or occurrences that ought to be perceived in order to go find out what is happening and intervene if necessary or, if not, that is fine too, but one has to be able to hear these things in order to ever recognize that there is something suspicious or dangerous going on that may require intervention.

Q. But I understand that it was part of your work to proceed with a level of noise or a level of hearing. Your job was to describe the acuity that was needed more than to find a level. Is it that?

A. I think that is correct. Now some of these things are obviously louder than others. There is mention here of shouted whispers. That is obviously not going to be as loud as a gun shot and there is quite a range of things here.

4. Establishment of standards:

Once all aspects of the job have been analysed to identify the hearing dimension of the tasks to be performed, a variety of experiments must be conducted to define the minimum hearing standards necessary to perform the duties, and then to verify the application of those standards.

The job analysis is necessary to ensure that the standards are strict enough not to create dangerous situations, but not so inflexible as to be discriminatory. The standards must also be tested to avoid errors.

To verify the hearing standards established for a regular RCMP constable, a firm of acoustical engineers was hired to verify the hearing criteria in relation to the tasks to be performed, and Dr. Schramm, an otolaryngologist, also verified the application of the standards in question.

The engineer, Mr. Standen, explained to the Tribunal that three scenarios were chosen to verify the hearing standard required to

perform the job: (1) the ability to understand a radio message in a patrol car while the siren is in operation and motor noise can be heard; (2) the ability to understand a radio message in a noisy crowd; and (3) the ability to understand a whispered conversation inside a building where there is noise outside.

The method employed to verify these three scenarios is explained on pages 582 et seq. of the transcript:

Q. I understand that for each scenario you translated into quantitative description instead of qualitative description.

A. That's correct.

Q. But once you did that, what did you do exactly? What did you analyze? What did you compare with?

A. In order to relate the ability to comprehend speech in the scenarios that are described by these three scenarios, we had to have a technique whereby we could take the knowledge of the applicant's hearing capabilities which was simply an audiological test. So we had available to us approximately 400 audiological tests from RCMP candidates in which their test scores -- basically their audiogram -- was available to us as the initial data, the initial starting point of the RCMP applicant's capabilities, hearing capabilities.

We then had to relate that through techniques that are used in the acoustics industry to the ability to understand speech in a noisy background. The procedure for comparing those two or for extrapolating from the audiological record to the ability to understand speech in a noisy background was the main function or the main part of this analysis.

The noisy background was the noise that was represented by these three scenarios. The signal in each case that we were trying to represent was, in the first place, radio messages or the first two cases radio messages and, in the third case, conversation from inside a room. So it was basically the sound of a human voice, either over the

radio or coming from inside a room, that was the signal that the constable was trying to hear and the noise that was confusing that signal was the scenario background or the noise background in each of the three scenarios.

In order to assess his ability to understand the signal in the presence of that noise, we had to go back to his audiogram or the individual audiograms.

The description of the methodology employed in respect of the scenario enables us to identify the relationship to the H2 standard for uncorrected hearing, as set out on page 608 of the transcript:

Q. I am not sure if I understand the relation with the H2.

A. It was the same process again. We just simply allowed the constable -- again, we said, "With the radio at

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its normal volume, quiet background, how many of the constables or how many of the applicants in the presence of the background noise of the crowd could still hear the communication over the radio?" Then we increased the volume and said "Now with that increase in the signal level, how many of the applicants could now understand the communication at the 90 per cent level based on their audiograms?" Then we increased the level again and then how many more people could understand it because we were now including more people whose thresholds were higher on the basis of their audiograms.

Finally, when we had increased the level that corresponded to an adjustment in the audiological record to the H2 category, it turned out that over 90 per cent of the applicants would then be able to hear the radio in the presence of the background noise.

So, again, the H2 criteria is only eliminating less than 10 per cent of the applicants. More than 90 per cent of the applicants would be able to perform the task, this particular task and the task with the siren, if they met the H2 criteria.

In short, the engineering firm answered the question whether the H2 hearing standard required by the RCMP for recruitment of special or regular constables was too restrictive or too lax as follows (p. 287 of the transcript):

The replies were the acoustical engineers felt that our standard was a little too lax. In fact it's more lax than almost any other police force. They felt we were a little too lax, but we didn't think it was necessary to tighten it up. They felt very specifically that the probability was very low that an applicant who was unable to meet the standards as required by the H2 level defined by the audiogram would be able to do the tasks in the task analysis in a manner that would ensure the safety of the public, the safety of the individual, the safety of the co-workers.

The Respondent also asked Dr. Schramm, an otolaryngologist, to verify the application of the H2 hearing standard in relation to the tasks performed by a regular constable.

The exercise conducted by Dr. Schramm consisted of observing, verifying and simulating about ten of the twenty-one tasks requiring a minimum hearing standard of H2.

Each of the tasks analysed was described at the hearing, and he explained why he considered the H2 hearing criterion to be reasonably necessary to ensure performance of the duties of a regular constable in a manner that is safe for the public. The procedure he followed is described on pages 678-79 of the transcript:

Q. Dr. Schramm, bearing in mind the kind of hearing ability that that task requires in relation with the H2

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standard of the RCMP, can you say if the H2 minimum standard is reasonably necessary to ensure the efficient performance of the task 2.1 in a way that is safe for the constable, fellow constables and the public?

A. Yes, I believe that for task 2.1 the H2 standard is reasonably necessary.

Q. Why would you say that? Can you explain on what you base your opinion?

A. Again, on observation of that task or reading the content of the task in the task analysis, it would seem appropriate that in order to adequately carry out that task, patrolling an assigned zone, one would have to listen for soft sounds, one would have to understand speech in the presence of background noise, and one would also be able to localize sound. So those three factors would be necessary to efficiently perform this task.

Q. Would Mr. Patry by reason of his hearing loss be able to efficiently perform all aspects of that task?

A. I believe not, for the reasons that I previously mentioned. The decrease in the hearing on the left side would have -- there potentially could be difficulty in understanding whispers, speech and noise on the left and localizing soft to medium intensity high-pitched sounds.

I am satisfied that the Respondent (the RCMP) is obliged to establish minimum hearing standards for recruits; otherwise, the risks would be dangerously high. It was adduced in evidence that there is a direct relationship between the standards in question and the ability of "regular constables" to perform their duties safely and without endangering the people and property they are required to protect. Although the specific standards for uncorrected hearing required by the RCMP are to a certain extent arbitrary, they are reasonable and are consistent with the job to be performed.

I accordingly find that the objective test referred to by McIntyre J. in Etobicoke has been proven. I also consider the H2 standard for uncorrected hearing required by the RCMP as a minimum recruitment standard to be reasonable, as it is in my view necessary to ensure the efficient and economical performance of the job of a special constable without endangering the employee, his or her fellow employees or the general public.

5. Hearing aids:

The complainant tried to prove that hearing can be corrected by wearing "hearing aids" and that this had been authorized in the cases of Corporal Bélanger and Sergeant Phaneuf.

The basic issue is whether there is a risk that the complainant or any other recruit could lose his or her hearing aid or be forced to take it off in order to carry out his or her activities, and whether that risk is sufficient to oblige the RCMP to base the hearing

standard for recruitment on hearing without a hearing aid (uncorrected hearing) rather than on corrected hearing.

Both Dr. Brown and Dr. Schramm testified to the risks related to the use of hearing aids, and they gave the following opinions. Dr. Brown's opinion appears on page 274 of the transcript:

A. The issue of corrected and uncorrected is an issue that has come up many times. It comes up with hearing and it comes up with vision as well.

The position of the Force is best illustrated with vision I think where a level of uncorrected vision is required. That is to say we do not object to a police officer who required eyeglasses as long as if the eyeglasses get knocked off in a fight or broken or forgotten he still has sufficient vision to be able to perform the tasks of employment as general duty constable. So we test uncorrected vision. That's why we don't require perfect vision. We just require enough vision that if your glasses get knocked off you can still do your job.

The same as for hearing. These are standards for uncorrected hearing so that if an individual, for example, is using a hearing aid, if he gets in a bar fight, which our police officers do, and he gets punched and the thing stops working or he loses it or the battery goes dead, he still has sufficient hearing to do his job.

Dr. Schramm's opinion appears on pages 708-12 of the transcript:

Q. I understand also, Dr. Schramm, that questions were asked of you concerning hearing aids. I will ask you, after reviewing your notes, would a hearing aid correct hearing to the point that a person could safely perform all the tasks of a constable in an airport which are dependent on the hearing acuity?

A. No, I don't believe that a hearing aid could correct the hearing to a point where the individual could safely perform all aspects of the tasks of police work.

Q. Would you explain why?

A. There are several reasons. First, police work does involve physical confrontation. In confrontation, there is a possibility that the hearing aid does become displaced or dislodged.

Two things can happen when it becomes displaced or dislodged or partially displaced. One can be that you could have trauma to the hearing aid that it malfunctions. In other circumstances, it may happen that if the hearing aid is partially dislodged from the ear or only partially sitting in the ear, one can get a feedback noise. That is a loud high-pitched sound that comes from the hearing aid. It is possible that could distract a constable at a crucial moment.

There are some other aspects of hearing aids which should be mentioned. The hearing aid magnifies the sound

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that you are listening to, the speech, but it also magnifies the background noise, as well. For example, one may wear a hearing aid to improve their ability to understand conversation or speaking, but the background noise, dishes rattling in the background or whatever -- that is a common scenario that I hear from patients -- gets magnified as well and that becomes very distracting. So the ability to understand speech in the presence of background noise is not necessarily going to be improved by wearing a hearing aid.

Q. You talked about the fact that a hearing aid could be dislodged or displaced. I don't remember exactly the word you used. Could it be dislodged in the case of physical aggression?

A. Yes, it is certainly possible in physical aggression or confrontation that a hearing aid could, in the process of grappling or tackling, be dislodged. That may not happen every time, but it is certainly possible that that might occur.

Q. Are you able to say what could be the likelihood of displacement of a hearing aid in the case of somebody who was physically confronted?

A. I would not be able to put a percentage of a risk on it, but I could say that it is certainly possible that that could occur.

One other point to make about hearing aids: I said that the localization of sound is primarily due to the timing difference and intensity difference between the two ears and a hearing aid would not necessarily improve the localization of the sound. You have changed the sound coming into the ear in terms particularly of its intensity, so using a hearing aid would not guarantee that localization of the sound would greatly improve.

Q. Dr. Schramm, in the case of direct trauma to a hearing aid such as may occur during physical confrontation, would it continue to work?

A. It may not continue to work. It is a reasonably fragile electronic device. Certainly I see a number of patients that come into the office, when I might be seeing them for hearing loss, who tell me about the hearing aid failing without any trauma. But it is certainly possible that direct trauma could cause failure of the hearing aid.

Q. Would the hearing aid be likely to worsen the damage if the person was hit on the ear?

A. It is possible that direct trauma to the hearing aid could drive the hearing aid into the ear canal or potentially cause damage to the middle ear if it is a deep canal hearing aid. I would not be able to put a direct risk on that, but it is potentially possible to cause damage to the ear with direct trauma to the hearing aid.

Q. Could it produce noises when the hearing aid is hit?

A. Yes, it is possible. The primary example of that would be feedback noise.

Q. Feedback.

A. Yes. If the hearing aid is partially dislodged, you will get a feedback circuit and a loud noise produced from the hearing aid.

It is true that a hearing aid can compensate for poor hearing. Different hearing aids function differently, and some types are ineffective in certain circumstances; individuals who have to wear hearing aids are quite likely to be involved on occasion in situations in which the type of hearing aid they have is inadequate.

It can be seen that, in the case of Corporal Bélanger, a witness for the Complainant, the RCMP permitted him to do work of a more administrative nature because its policy is to try to accommodate its members and because it can also count on their more extensive experience. However, it was adduced in evidence that Corporal Bélanger was promoted to a Special "O" officer only after surgery enabled him to regain an H2 level for uncorrected hearing. Mr. Patry's situation is clearly different, as surgery is not an option in his case, his hearing loss is not the same as that of Corporal Bélanger, and there is no duty to accommodate recruits.

I am accordingly of the opinion that the types of activities to be carried out by an RCMP "special constable" involve a sufficient risk of loss or breakdown of hearing aids, or other problems related to wearing them, such that it is reasonable and necessary to establish a hearing standard for recruitment based on uncorrected hearing.

6. Individual tests:

The Commission also raised the question whether hearing tests based solely on the audiogram were an appropriate way to measure hearing in relation to the duties of a "special constable".

It argued that the audiogram makes it possible to measure only one element of hearing, that is, without background noise. It does not test the others, like perception of sounds and auditory localization ability in a quiet and a noisy environment, speech intelligibility in a noisy environment and binaural (with both ears) speech intelligibility, which are of equal importance.

Nevertheless, all the expert witnesses acknowledged that hearing is a significant factor that must be taken into consideration even if more sophisticated tests were performed to measure the various elements of hearing. They all recognized that the standard of hearing without a hearing aid is a bona fide occupational requirement. It was

proven that other agencies use the audiogram to establish their hearing standards.

It was also proven that the RCMP verified other aspects of hearing in parallel with the audiogram. They hesitate to dispense with the audiogram because the other methods are hard to apply and

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have not yet been standardized. Without standardization, recruits could suffer injustices and the risk to the public could rise.

Although there has been progress in the field of hearing analysis, we have unfortunately not yet reached the stage at which the tests traditionally used by the RCMP and other agencies can be set aside.

Dr. Laroche, an expert witness for the Commission, who recommended the use of other more advanced methods for determining the actual level of hearing, conceded that the tests have not been standardized even today. This was confirmed by Dr. Schramm, the otolaryngologist, on page 717 of the transcript:

Q. Also, she (Dr. Laroche) testified to the effect saying that in order to establish Mr. Patry or another applicant to occupy a position at the RCMP, it was important to obtain the following information that is missing in this case, which is the binaural speech intelligibility, the speech intelligibility in a noisy environment, and auditory localization ability in a quiet and in a noisy environment.

I was asking if I was right in saying that for the last two -- speech intelligibility in a noisy environment and auditory localization abilities in a quiet and in a noisy environment -- there was no standardized evaluation to be performed to obtain that information.

A. That is correct. There are tests that one can do to determine or test speech discrimination in noisy backgrounds. I am not aware of specific standardized tests that are used on a regular basis clinically to do that.

Q. To use that in clinic, you need standardized. Is that it?

A. One would require a standardized test for speech discrimination in a noisy background. To do that test, you would require those standards both in English and in French.

When I consider both the "sufficiency" of the risk and the alternatives available to the RCMP for dealing with applicants on an individual rather than a collective basis for selection purposes, I realize that the RCMP's standards are justified.

The risk to the public is real and substantial, and the role of regular constables is essential. Their duties must therefore be performed in a competent and uncompromising manner, because the consequences of substandard performance during an attack could be tragic. It is neither justifiable nor acceptable for the public to run such a risk. The risk is real and must be assessed on the basis of the RCMP's ability to select individual applicants on the basis of their potential performance on the job.

VIII. CONCLUSION:

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The RCMP's evidence answers two fundamental questions raised by the leading case of Etobicoke, namely whether the existing medical standard for hearing required for recruitment as a special constable in the RCMP is reasonably necessary to ensure performance of the duties in question without endangering the public, and whether it is objectively related to the task.

In my view, it can be seen from the evidence that the Respondent at all times acted honestly and in good faith with the deeply held belief that the limitation was imposed in the interests of the adequate performance of the work with all reasonable dispatch, safety and economy. As a result, the Respondent satisfied the subjective test laid down in Etobicoke.

What remains to be determined in this case is whether the medical standard for hearing for recruitment in the RCMP fits the description of the "objective test" also laid down in Etobicoke. An exhaustive review of the documentary evidence and the authorities has led me to the following conclusions:

(a) The establishment of a minimum hearing standard for recruitment in the RCMP based on uncorrected hearing is necessary, and in

this case in particular, because the H2 minimum standard is a bona fide occupational requirement of the job in view of the tasks performed by a special constable in an airport, as it makes performance of those tasks possible.

(b) The lack of such a standard would increase the risks run by the members themselves and endanger the safety of constables, their co-workers and the general public, so the risk is real.

(c) There is a real risk that is directly proportional to the various tasks to be performed by a special constable in specific circumstances. As a result, there is a clear relationship between the hearing standard for uncorrected hearing applied by the RCMP and the ability of recruits to ensure their safety in performing their duties without unnecessarily endangering themselves, their fellow employees or the public.

(d) The H2 minimum medical standard for hearing, based on uncorrected hearing, required for recruitment in the RCMP is reasonable.

(e) Since the said hearing standard is a bona fide occupational requirement, the RCMP is under no duty to accommodate.

(f) The RCMP has also proven that it performed appropriate individual tests in this case and that it acted reasonably in performing those tests.

As a result, I am satisfied with the evidence adduced by the RCMP and rule that it satisfies the defining elements of the "objective test" laid down in Etobicoke.

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I therefore find that the Respondent has established that the H2 minimum hearing standard, although constituting discrimination based on disability, is a bona fide occupational requirement pursuant to paragraph 15(a) of the CHRA and does not constitute a discriminatory practice in contravention of that Act.

Done at Aylmer, Quebec, December 9, 1994

(signed)
Jacinthe Théberge

Chairperson