

T. D. 13/ 89

Decision rendered on August 23, 1989

IN THE MATTER OF a Complaint filed under Sections 7( a) and 10 of the Canadian Human Rights Act, S. C. 1976- 77, c. 33, as amended

BETWEEN:

DAVID GALBRAITH Complainant

- and

CANADIAN ARMED FORCES Respondent

BEFORE: John I. Laskin, Chairman

DECISION OF THE TRIBUNAL

APPEARANCES:

RENÉ DUVAL, Counsel for the Canadian Human Rights Commission

JOSEPH de PENCIER. and MAJOR S. GOUIN, Counsel for the Respondent

DATES OF HEARING: September 12, 14 and 15 and October 4, 1988

REASONS

The issue in this case is whether certain provisions of the Medical Standards for the Canadian Forces constitute a bona fide occupational requirement for employment as an artilleryman in the Reserve Militia of the Canadian Armed Forces within the provisions of section 14( a) of the Canadian Human Rights Act, S. C. 1976- 77, c. 33 as amended (" the Act").

#### 1. The Complaint

The Complainant David Galbraith is 25 years old. He is a student at Seneca College and works full time at a Mac's Milk outlet. In June, 1982, Mr. Galbraith attempted to join the Reserve Militia as a member of the Artillery Regiment, 7th Toronto Regiment RCA. In responding to the questions put to him by a corporal in the Medical Department, Mr. Galbraith answered "yes" to the question "Have you had a resection of the bowel?" Thereafter, Mr. Galbraith met with an Armed Forces doctor and was advised that because of the rules for entry into the Armed Forces and his affirmative response to the aforementioned question, he might be declared unfit. The doctor requested that Mr. Galbraith obtain a note from his personal physician, but also said that in his opinion, Mr. Galbraith was medically fit and he could not see any reason why Mr. Galbraith should not be able to join the Armed Forces.

On June 24, 1982, Mr. Galbraith provided the requested note from his physician, Dr. Zane Cohen, who stated that Mr. Galbraith was able to participate fully in all activities without restriction. Mr. Galbraith acknowledged it was unlikely that Dr. Cohen had the list of duties of an artilleryman before him at the time he provided this note. Dr. Cohen apparently did not make any inquiries of Mr. Galbraith as to what a militia member in the Armed Forces could expect to be doing. Upon providing this note, Mr. Galbraith was advised that there were no openings, but it was suggested that he return in the fall.

In September, 1982, a surgeon reviewed Mr. Galbraith's file and advised him that the medical report stated that he was unfit. A doctor with the Medical Department of the Armed Forces advised Mr. Galbraith that he was unfit because of his ileostomy. Mr. Galbraith was referred to Downsview (CFB) for further information. The doctor at Downsview (CFB) confirmed what Mr. Galbraith had been told previously, that is, that he was unfit for the Artillery because he had had an ileostomy.

On December 15, 1982, Mr. Galbraith filed a complaint with the Canadian Human Rights Commission against the Department of National Defence alleging "discrimination on the basis of physical handicap (resection of the bowel - continent ileostomy) in violation of sections 7(a) and 10 of the Canadian Human Rights Act". At the commencement of the hearing, the name of the Respondent was changed on consent to the Canadian Armed Forces.

Mr. Galbraith testified that the resection of his bowel was made necessary because of a birth defect known as Hirschsprung's Disease. According to the medical evidence adduced at the hearing, Hirschsprung's Disease results in the absence of nerves in areas of the bowel wall. As a result, the movement of material in the colon may be uncoordinated or blocked. Mr. Galbraith underwent three operations, referred to as colostomies, which attempted to remove the affected portion of his large intestine and to rejoin the intestine. In July, 1981, Dr. Zane Cohen performed a continent ileostomy on Mr. Galbraith. A continent ileostomy involves the removal of the large intestine and the construction of a pouch on the inside of the small intestine. To empty the pouch, a catheter is inserted. A continent ileostomy may be distinguished from a conventional ileostomy in which a hole is made in the abdominal wall, the intestine itself is brought outside the body and the fluid is captured in a collection bag. The two procedures are physiologically identical.

The continent ileostomy appears to have had very little impact on Mr. Galbraith's day-to-day life. Mr. Galbraith testified that although dietary recommendations were made to him, he has never really followed them. He is apparently a very active young man engaging in softball, volleyball, camping, hiking and swimming, as well as being a member of the Canadian Ski Patrol System. Mr. Galbraith spent the summer of 1986 in Kenya working in a hospital for malnourished children and testified that he had suffered no physical problems during his stay there. He stated that he has never suffered from dehydration in the course of his activities and has never been advised to avoid any particular activities.

The only obvious impact of the continent ileostomy on Mr. Galbraith is his need to empty the pouch approximately twice a day. Generally, he has never been in a position where he could not do so. Mr. Galbraith carries a catheter with him and while the catheter should be rinsed out with

water, it need not be sterilized. He testified that the only problem which he has had is that once, his catheter broke.

## 2. The Position of the Respondent

The sole basis upon which the Complainant was refused entry to the Reserve Militia as an artilleryman was because he had a continent ileostomy. It is not disputed that a bowel resection or a continent ileostomy is a "disability" within the meaning of section 20 of the Act which provides:

"20. In this Act,.... 'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

The Act also provides in part as follows: "3.( 1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination." [emphasis added]

"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."

"10. It is a discriminatory practice for an employer, employee organization or organization of employers (a) to establish or pursue a policy or practice... that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

It was conceded by Mr. de Pencier on behalf of the Respondent that the Complainant had made out a prima facie case of discrimination under sections 7( a) and 10( a) of the Act. The position of the Respondent is that the refusal to employ the Complainant in the Reserve Militia was based upon a bona fide occupational requirement pursuant to section 14( a) of the Act which states:

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

The burden of proving a bona fide occupational requirement rests upon the employer and proof must be made in accordance with the civil standard, on a balance of probabilities (see Ontario Human Rights Commission v. Etobicoke, [1982] 1 S. C. R. 202 at 208).

I observe that it was no part of the Commission's or the Complainant's case that there was any obligation on the Canadian Armed Forces to accommodate Mr. Galbraith, for example, by not sending him to stressful locations or by allocating less arduous work to him. The Complainant was quite willing to be assessed on the same basis as any other potential recruit into the Armed Forces and sought no special dispensation because of his disability. The Respondent did not perform any individual testing of the Complainant to determine whether he had the ability to meet the duties and demands of an artilleryman. Witnesses for the Respondent acknowledged that Mr. Galbraith had on a day to day basis done exceptionally well with his disability. The

Respondent sought to justify its position on the basis of the application of the Medical Standards for the Canadian Forces which are contained in a Manual. The Medical Standards apply both to the Regular Forces and to the Reserve Militia. Their purpose is to establish a common method of medical examination and medical categorization of candidates for the Canadian Forces and serving members of the Canadian Forces.

The medical categories include year of birth (YOB) and six factors as follows:

V - Visual Acuity CV - Colour Vision H - Hearing G - Geographical Limitation O - Occupational Limitation A - Air Crew Standards

The two factors that are relevant to this case are G (geographical limitation) and O (occupational limitation).

As to geographical factors, the Manual provides: "6. General - In a military organization, it is essential to know where, in terms of geographical situation, a person can be expected to perform efficiently. The three main factors involved in this matter are as follows:

a. Climate - Various medical conditions preclude efficient employment in different climates. Some skin diseases do not fare well in hot moist climates, while others may be aggravated by dry cold climates. Certain peripheral vascular diseases are unfavourably influenced by cold. b.

Accommodation and Living Conditions - The environment, as well as the occupational and domiciliary accommodation, varies greatly throughout the world. It may be acceptable to permit personnel in certain trades to serve in remote areas of Canada or in foreign lands, provided they are accommodated in healthy shelters and have access to reasonable messing facilities. On the other hand, in certain trades, even in Canada, the person must be medically fit enough to live out in the open in inclement weather for extended periods, and to subsist on minimal rations. These factors must be considered in the light of disability and every effort must be made not to subject personnel to stresses that can aggravate predetermined disability.

c. Medical Care Available - In the past, accidental injury and disease have always depleted military forces to a greater degree than the direct effects of combat. This situation prevails despite careful selection of manpower to ensure that only the medically fit are sent into battle. Battles are sporadic. Preparedness for combat, however, is a continuous process, and the time so involved is constantly accompanied by exposure to disease or injury. It is axiomatic that the closer the point of conflict between combatant forces, the less the probability of fully effective medical resources being available. Casualties among the healthy can be predicted with some accuracy, and mandatory evacuation to medical facilities must be accepted. The necessity for complex medical care can be reduced by excluding those who present a high risk from serving where appropriate medical care cannot be given or evacuation is cumbersome. The above considerations have been included in the medical category under factor G and graded from 1 to 6." Within the G medical category, there are six grades as follows: "G1 - Enrolment Minimum - No Limitations - This grade will be assigned to the individual whose health is commensurate with full employment without medical support in any climatic or environmental condition. Such personnel may be transferred for continuing service to any part of the world with minimal risk

that they will become ineffective as a result of the climate, living conditions, or the unavailability of even minimal medical care.

G2 - No Climatic Limitation - No Environmental Limitation - This grade will be assigned to the individual who has a minor medical condition that does not require regular medical support and that does not preclude his employment in any climatic or environmental condition. Such personnel are fit for full employment as far as the geographical factor is concerned, except for those specific employment areas which may be designated from time to time as demanding the G1 standard.

G3 - This grade will be assigned to the individual who has a medical condition that requires more frequent medical supervision. Such personnel have a requirement to seek medical care, but not necessarily a physician's services, approximately every three months. They are considered capable of operating in the field and of eating field rations when required. Such personnel are capable of full duty at sea and are considered fit for isolated duties.

G2/ G3 Conditional - This grade will be assigned to the individual who has a single climatic or a sea environment limitation, and it shall be designated as follows:

G2E or G3E - unfit Equatorial zone (tropics) G2M or G3M - unfit Maritime environment (sea).

G4 - Climatic or Isolation Limitation - Requirement for Barrack for Equivalent Accommodation and Physician Service Readily Available - This grade will be assigned to individuals in two groups, viz:

a. any individual who is limited to employment in temperate climates or who is considered unfit for a medically- isolated posting because of a medical disability; and

b. any individual who has a medical condition that has the potential for sudden serious complications or a medical disability which is persistently mildly incapacitating. This individual usually requires barracks or home living conditions and readily available physician's services. Such personnel are considered unfit for sea and field duty, medically isolated postings and United Nations Emergency Force duty.

G5 - Restriction to Canada - Requirement for Barracks or Equivalent Accommodation and Medical Specialist Care Available - This grade will be assigned to the individual who has a recognized medical disability which does, or is likely to, require periodic medical care, but who is capable of performing essential work for a large portion of the time in a modern urban environment. Such individuals should not be sent abroad nor should they be more than one hour away from a medical centre offering specialized definitive medical care.

G6 - Medically Unfit for Military Service - This grade will be assigned to the individual who has a disease or disability readily recognized as geographically incompatible with the stress and requirements of military service."

As to occupational factors, the Manual Provides: "General - Occupation involves physical activity and physical stress, together with mental activity and mental stress. The demands on the individual vary with the occupation. Physical or mental disabilities can limit the individual's capability and performance in his occupation. The physical and mental limitations as related to occupational capability are made in the medical category under the letter O using grades from 1 to 6. The O factor is a major employment conclusion based on an analysis of all factors insofar as they relate to performance requirements."

Within the O medical category, there are also six grades as follows:

"01 - Above Average Fitness - This grade will be assigned to the individual who is free from mental or physical disabilities and trained to endure sustained hard muscular work or activity at a rapid rate under severe stress. Such personnel will excel in individual combat, front line fighting, and physically demanding functions. They may be exposed to variable physical hazards, and psychological stress and must be capable of accepting considerable physical and mental punishment. Strength and stamina are the prime requisites. A grading of 01 will only be assigned to personnel who demonstrate this high standard of fitness.

02 - Enrolment Minimum - No Limitations - This grade will be assigned to the individual who is free from medical disabilities, except those minimal conditions that do not impair his ability to perform at an acceptable level of endurance in a front- line combat environment and to do heavy physical work. Such personnel are fit for full employment except for those specific employment areas that demand above average fitness as envisaged in 01.

03 - Moderate Medical Disability - This grade will be assigned to the individual who has a moderate medical or psychological disability which prevents him from doing heavy physical work or operating under stress for sustained periods. He can, however, do most tasks in moderation.

04 - Light Duties. This grade will be assigned to individuals whose disabilities are such that they are able to perform light duties only. They are able to tolerate the degree of emotional stress related to normal duties but cannot cope with more severe and prolonged stress.

a. any individual whose physical disability is such that he is able to perform light duties only; and b. any individual with mental disability who can tolerate the emotional stresses related to routine administrative duties, but has shown evidence of an incapacity to accommodate himself to more severe and prolonged stressful demands when under pressure.

05 - Sedentary Duties - This grade will be assigned to the individual whose disability limits his performance to sedentary duty in a static unit. Such personnel although severely restricted, can do useful sedentary work if they can set their own pace. Continued employment is contingent on finding the right job in the right place for a well- trained skilful person.

06 - Medically Unfit for Military Service - This grade will be assigned to the individual who has a disease or disability, which is incompatible with the stresses of military service and because of which he is considered incapable of pursuing regularly any substantially gainful occupation."

The Manual goes on to provide: "1. A certain standard is required of recruits so that they may be eligible for the widest selection of trades. To take the highest common denominator would be too restrictive and to take the lowest common denominator would be to accept too many recruits with employment limitations. As it is the aim to keep the medical standards of the Canadian Forces high and it is inevitable that the category of many serving personnel will be lowered during their career, it is required that we demand a high medical standard of our recruits. For these reasons a minimal medical category for enrolment in the Canadian Forces shall be: (emphasis added)

V CV H G O A 4 3 2 2 2 5 > - 14 This is the common enrolment standard. Applicants for enrolment must meet at least this standard. If the trade into which they are being enrolled requires a higher standard, then they must also meet that standard.

For categories G and O, the Manual establishes an enrolment standard of G2 O2. New recruits must meet at least this standard. If the trade in which they are seeking enrolment requires a higher standard, then they must also meet that standard. The minimum enrolment standard for artillerymen for categories G and O is the common enrolment standard, that is G2 O2.

The Manual also prescribes medical conditions and physical defects which result in a category which is below enrolment standards. Under the heading "Abdomen and Gastro- intestinal System" we find the following:

"19. The causes for a restricted category are: ... p. gastric or bowel resection or gastroenterostomy; however, minimal intestinal resection, such as for intussusception in childhood, is acceptable if the candidate has remained asymptomatic (G4- 5 03- 4);"

In fact, the Complainant was given a G6 06 rating. Dr. Roy, a military physician with the Canadian Forces Medical Services interpreted this rating as the Armed Forces telling Mr. Galbraith that it would be futile for him to try to improve his medical condition in the expectation of becoming enrolled.

It is obvious that even had the Complainant been assessed a grading consistent with his disability (G4 03), he would have been rejected because he fell below the minimum enrolment standard.

The issue then is whether the minimum enrolment standard and the categorization of a bowel resection as falling below that standard constitute a bona fide occupational requirement for the artillery trade of the Reserve Militia. I put the issue that way because section 19( p) of the Manual which refers to a bowel resection is not in and of itself an occupational requirement but rather a grading resulting in a preclusion from enrolment. It is thus as Mr. de Pencier describes it at the heart of the G2 O2 occupational requirement in this case. I hasten to add that the issue is a narrow one and my decision should not be viewed as passing any judgment on other parts of the Medical Standards or even on this part as applied to other trades.

### 3. Bona Fide Occupational Requirement

The test for establishing a bona fide occupational requirement was set out by McIntyre, J. in the Etobicoke case at 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. 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."

Although the Etobicoke case involved a complaint under the old Ontario Human Rights Code where the applicable phrase was "bona fide occupational qualification and requirement" rather than simply "bona fide occupational requirement", subsequent caselaw has accepted the Etobicoke test as governing section 14(a) of the federal statute.

The first part of the Etobicoke test is subjective; that is, the employer must demonstrate on a balance of probabilities that the limitation was imposed honestly and in good faith and was not designed to defeat the purpose of the Act. The purpose of the Act is set out in section 2 which provides:

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

Mr. Duval on behalf of the Commission and the Complainant conceded that the subjective part of the Etobicoke test had been met by the Canadian Armed Forces. I confess to have been somewhat troubled by the fact there was little evidence as to the origins of the provisions of the Medical Standards as a whole and no evidence as to the original basis for the grading in paragraph 19(p), Dr. Roy testified that the Medical Standards had their origin in the Pulhheem's System, the British Army classification system. The Pulhheem's System was used as a standard in the Canadian Forces until 1967-68. Apparently, the British system was adopted to Canadian living conditions and climate as well as the Canadian experience with various diseases, Apart from this evidence, there was no indication of any attempt by the Canadian Armed Forces to validate medically or scientifically its Medical Standards. Nonetheless, I am prepared to find on the basis of the evidence that was before me that the Respondent has satisfied the subjective branch of the Etobicoke test. I note that the Tribunal in *Seguin v. R. C. M. P.* (1989, unreported) held that to read the Etobicoke test as stating that standards cannot properly be justified by scientific means after the fact would result in standards set without proper study being struck down despite scientific proof that they are in fact reasonable.

In this as in most cases, the dominant question is whether the employer has satisfied the objective branch of the Etobicoke test. The answer depends upon a consideration of the evidence and the nature of the employment concerned (Etobicoke at 209). Where an employer's concern is largely economic, it may be difficult if not impossible for an employer to meet the objective branch of the test. On the other hand,

"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 interest of safety of the employee, his fellow employees, and the public at large." (McIntyre, J. in Etobicoke at 209, emphasis added.)

The Tribunal is therefore compelled to consider whether the evidence adduced by the employer justifies the conclusion that there is "sufficient risk of employee failure" to warrant the occupational requirement that has been imposed. Exactly what these words mean has been the subject of considerable discussion in the jurisprudence. In *Air Canada v. Carson et al.*, [1985] 1 F. C. 209 (C. A.), at issue was Air Canada's policy not to hire new pilots over the age of 27. Mahoney and Stone, JJ. and MacGuigan, J. in a separate concurring judgment, held that the policy was not based on a bona fide occupational requirement. MacGuigan, J. alone addressed the question of the degree of risk which must be shown:

"There is a world of difference between 'a minimal increase in risk of harm', and 'a minimally acceptable risk of harm', because the latter implies a measure of acceptability of risk that the former does not. Matheson, J. was quite right to insist, in *Moose Jaw v. Sask. Human Rights Comm.*, [1984] 4 W. W. R. 468 (Sask. Q. B.), that the 'sufficient risk' test of Etobicoke cannot be equated with an 'intolerable risk', but the notion that the American courts endorse an 'intolerable risk' approach is erroneous.

An examination of the cases cited by McIntyre, J. thus makes it clear that he did not intend by his reference to give approval to a particular measure of risk.

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

In *Canadian Pacific Limited v. Canadian Human Rights Commission, Cumming and Mahon*, [1988] 1 F. C. 209 (C. A.), Pratte and Hugessen, JJ. specifically rejected the argument that "sufficient risk" is to be equated with "substantial risk". At 221 of the decision, Pratte, J. stated:

"The decision of the Supreme Court of Canada in Etobicoke is authority for the proposition that a requirement imposed by an employer in the interests of safety must, in order to qualify as a bona fide occupational requirement, be reasonably necessary in order to eliminate a sufficient risk of damage. In *Bhinder*, on the other hand, the Supreme Court upheld as a bona fide occupational requirement one which, if not complied with, would expose the employee to a

'greater likelihood of injury - though only slightly greater, (at page 584). The effect of those decisions, in my view, is that, a fortiori, a job-related requirement that, according to the evidence, is reasonably necessary to eliminate a real risk of serious damage to the public at large must be said to be a bona fide occupational requirement."

In a separate concurring judgment, Marceau, J. held that the phrase "sufficient risk of employee failure" meant that evidence must be adduced which is sufficient to show that the risk is real and not based on mere speculation; in his view, the "sufficiency" contemplated by McIntyre, J. referred to the reality of risk and not to its degree. Marceau, J. relied on McIntyre, J.'s decision in *Bhinder et al v. Canadian National Railway Company*, [1985] 2 S. C. R. 561 to support this interpretation.

In *Bhinder*, the issue was whether a Sikh employee could be exempted from a hardhat rule imposed by CN if the rule was in fact a bona fide occupational requirement. *Bhinder* refused to comply with the hardhat rule because his religion did not allow the wearing of headgear other than the turban. The Canadian Human Rights Tribunal found that CN had engaged in a discriminatory practice and ordered the employee reinstated. The Federal Court of Appeal set aside the decision on the basis that the work rule was not a discriminatory practice. An appeal from that decision was dismissed by the Supreme Court of Canada. In applying the *Etobicoke* test to the findings of the Tribunal, McIntyre, J., beginning at 587, stated:

"The appellant has established a prima facie case of discrimination. The onus therefore has passed to the respondent to show that the hardhat rule is bona fide occupational requirement. From a reading of the reasons for decision of the Tribunal, it appears that the test was met. Specifically, the Tribunal found that the hardhat rule was not a bona fide occupational requirement as far as it related to *Bhinder* and, in consequence, to other Sikhs. In this, they were accepting the appellant's individual case approach. It is, however, clear from the reasons and the references made by the Tribunal to the evidence that it was of the view that as far as the rule applied to non-Sikhs, it was a bona fide occupational requirement. It was agreed that CN adopted the rule for genuine business reasons with no intent to offend the principles of the Act. The Tribunal found that the rule was useful, that it was reasonable in that it promoted safety by reducing the risk of injury and, specifically, that the risk faced by *Bhinder* in wearing a turban rather than a hardhat was increased, though by a very small amount. The only conclusion that can be drawn from the reasons for decision is that, but for its special application to *Bhinder*, the hardhat rule was found to be a bona fide occupational requirement. Indeed, it would be difficult on the facts to reach any other conclusion." (emphasis added)

I note that the decision of the Canadian Human Rights Tribunal in *Rodger v. Canadian National Railways*, [1985] 6 C. H. R. R. D/ 2899 suggests that even a very low threat to public safety is sufficient to justify a disability-based restriction.

What I take from this caselaw is that the words "sufficient risk" as used in the *Etobicoke* case mean that there must be a real risk, not one which is merely theoretical or based purely on speculation. If the risk is real, then whether it is a "sufficient risk" should be determined by assessing the nature of the risk in relation to the potential harm to the prospective employee and others including the public. Where public safety is in issue, even a modest increase in risk may

establish a bona fide occupational requirement defence for the employer. In short, sufficiency will very much depend upon the activity in question, and of course, can only be measured on the basis of the evidence that is led.

While no fixed rule can be prescribed to cover the nature of the evidence required to establish a bona fide occupational requirement, evidence as to the duties to be performed and the relationship between the limitation and the safe, efficient performance of those duties is imperative. The evidence presented should address the specific tasks to be undertaken by the employee, the conditions existing in the workplace and the effect of those conditions upon employees, particularly upon those with the disability sought to be excluded. (McIntyre, J. in Etobicoke at 212)

McIntyre, J. in Etobicoke stated: "I am by no means entirely certain what may be characterized as scientific evidence'. I am far from saying that in all cases some 'scientific evidence' will be necessary. It seems to me, however, that in cases such as this, statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in fire fighting, to the effect that fire fighting is 'a young man's game'." (at 212)

In Rodger at 40 it was stated: "Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adapted to the circumstances of each individual case."

Mr. de Pencier referred me to the case of Little v. Saint John Shipbuilding, [1980] 1 C. H. R. R. D/ 1 in support of the proposition that one need not experiment with the likelihood of failure in order to gather statistical data in jobs which endanger public safety and that accordingly, statistical data is not always essential to justify the existence of a bona fide occupational requirement. I accept that proposition.

According to Mr. Duval, the Federal Court of Appeal in Carson rejected the approach taken in Little. In reviewing the basis upon which Air Canada attempted to defend its maximum hiring age policy in light of the failure of the medical evidence to suggest any noticeable increase in health impairment before age 40, MacGuigan, J. stated:

"Experience compensation is generally accepted as an off- setting benefit of aging, but the evidence on the record that the differences between the procedures of different airlines are so great that the experience has to be with the same airline is very weak. Also, longitudinal medical records are no doubt valuable in alerting medical personnel to signs of aging, but there was no evidence that they are needed for any particular number of years before age 40, or that if they were, they could not be made available by a previous employer.

Finally, while the general practice in the industry undoubtedly favours a low maximum hiring age, even the status quo cannot alone sufficiently establish a BFOR, in the absence of other proof. In sum, the evidence supporting the applicant's case is impressionistic at best, and is in my judgment close to non- existent." (at 238)

In my view, there is nothing in the language used by MacGuigan, J. to suggest that the approach adopted in Little is to be rejected. MacGuigan, J. stated only that something more than impressionistic evidence is required; he did not suggest that an employer must somehow "generate" statistical evidence. An employer, for example, could satisfy the objective branch of the Etobicoke case by expert medical opinion as to the likely impact of the disability on the requirements of the job.

In assessing the nature of the evidence led by the employer to justify its occupational requirement there is another consideration which is present in this case. This is a case of a blanket exclusion without regard to the capability of any individual with the disability in question to meet the demands of the job. Mr. de Pencier agreed that the Medical Standards relating to bowel resections was a blanket policy imposed without the benefit of individualized testing.

A blanket policy can be justified by an employer as a substitute for individual assessment, but only where individual assessment is shown to be impractical or impossible. (See for example, DeJager v. Department of National Defence (1986) 7 C. H. R. R. D/ 3508 at D/ 3517 and Rodger at 32.) In Rodger, the Tribunal held that an employer seeking to justify the absence of individual assessments must show that such assessments are inappropriate and that in general, there is known to be a sufficiently high risk of failure to warrant the imposition of a blanket restriction. At 32- 33:

"Even if CN did not assess Rodger on an individual basis, the difficulty of so doing in the absence of reliable medical information to predict recurrences may well mean that such assessments are impossible. The objective branch of the Etobicoke test requires only that the restriction be reasonably necessary to the job and this element turns on the degree of risk involved."

4. Evidence as to the Nature of the Employment The Militia specification for an artilleryman is set out in Exhibit R- 3 which is reproduced in part as follows:

#### ARTILLERYMAN SECTION 1 - SCOPE INTRODUCTION

1. This specification describes the Primary Reserve trade of Artilleryman R021 which is the only trade in the Artillery Career Field.

2. Trade Specialty Qualifications (TSQs) applicable to the Artilleryman trade are listed in A-PD- 123- 001/ AG- 001 and the related Trade Specialty Specifications (TSSs) are contained in A- PD- 123- 007/ PQ- 000.

3. The functions of the trade are categorized under the sub- headings; Operations, Maintenance, Administration/ Clerical, Instruction, Nuclear Biological Chemical Defence and General Military Requirements.

Operations 4. Performs all duties related to deploying and firing the artillery weapon delivery system and operating radio and line communication equipment.

Maintenance 5. Performs preventive maintenance on artillery equipments, radio and line communication equipment, personal and ancillary weapons, ancillary equipment and vehicles.

Administration/ Clerical 6. Duties as stated in the General Specification Other Ranks (Militia).

Instruction 7. Instructs lower levels of the trade and assists with training exercises.

Nuclear Biological Chemical Defence (NBCD) 8. Duties as stated in the General Specifications Other Ranks (Militia).

General Military Requirements 9. Duties as stated in the General Specification Other Ranks (Militia).

PROGRESSION IN CAREER FIELD/ TRADE 10. a. Progression in Career Field. The Artilleryman R021 is the only trade in the Artillery Career Field 020.

b. Progression in Trade. Progression through each rank level will be by qualification to the appropriate level of knowledge and skill set out in this specification, the General Specification Other Ranks (Militia) and by time in rank. Selection for promotion does not automatically follow the completion of trade course and time requirements. CFAO 49- 5 details the specific requirements.

c. Combat Functions. In addition to meeting the requirements defined in this specification, personnel will also be required to achieve qualification in combat functions as follows:

(a) Basic Artillery Technician, or (b) Artillery Driver Wheeled, or (c) Artillery Communicator,

(2) Qualification to Warrant Officer will include completion of a second Reserve combat function, one of which must be Basic Artillery Technician. The second combat Reserve function will be one of -

(a) Artillery Communicator, or (b) Driver Wheeled; or (c) Advanced Artillery Technician.

SPECIAL REQUIREMENTS 11. a. Security Clearance. As required by the nature of employment.

b. Medical Standards. Medical standards for the Canadian Forces are governed by A- MD- 154- 000/ FP- 000. The minimum standards for initial assignment to the Artilleryman trade are included below for information only.

V C V H G O A 3 2 3 2 2 5

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

WORKING CONDITIONS 12. a. Physical. Artillerymen carry out their duties outdoors, day and night, under all weather conditions. Long hours of standing and working in exposed positions are involved. Considerable physical exertion is present in gun position duties and a high degree of manual dexterity and coordination is necessary. Operations and training are conducted at a tempo that at times subjects the Artilleryman to extreme discomfort over long periods of time, without regular intervals of rest and sleep.

b. Special Factors. Many Artillerymen will be selected to be specialists who require a high degree of manual dexterity and coordination in operating technical instruments, and a capability of carrying out mathematical computations quickly and accurately.

c. Stresses. The high degree of accuracy required is mentally fatiguing. Mental and physical stresses are severe during operations, and above normal during live firing exercises.

d. Consequence of Errors. Errors in firing the gun, judgment errors, or errors in producing firing data, could result in injury or death to our own troops. Casualties to our own troops from enemy action could result from failure to provide the fire support.

e. Occupational Hazards. The duties of the Artilleryman may result in -

(1) death or permanent incapacitation from the effects of combat,

(2) exposure to injuries and health conditions of an incapacitating nature due to wounds in operations, training injuries and environmental diseases in certain theatres of operation,

(3) hearing loss due to environmental noise associated with artillery equipments and gun fire in training and operations,

(4) reduction in visual capacity from the ingress of damaging foreign matter, muzzle blasts effects, or use of optical instruments in training and operations,

(5) respiratory malfunction or impairment due to fumes, dust, contamination or extremes of environment in training and operations, and

(6) skin infections due to normal handling of POL, coolants, and other toxic material.

#### RELATED CIVILIAN OCCUPATIONS 13. Nil."

Oral evidence as to the duties of the Militia generally, and the Artillery in particular, and the conditions under which these duties are exercised was given on behalf of the Respondent by Lieutenant Colonel John Tattersall, Chief Warrant Officer Douglas Guttin and Major Jamie Gates.

Lieutenant Colonel Tattersall has been in the Armed Forces since 1958, has held active field commands in the artillery and is currently with the Director of Force Structure, a directorate at National Defence Headquarters. He testified that within the combat arms, the Artillery provides

indirect fire support. Lieutenant Colonel Tattersall described the Militia as being the backbone of the Armed Forces, "... provid[ing] all the augmentation and reinforcement necessary for the Regular Force to meet its roles as assigned by the Government." Even in peacetime exercises, the orientation is always towards war. The Reserve Forces, however, cannot be ordered to go anywhere unless they are placed on active duty by the Governor-in-Council, that is, a state of war exists. Lieutenant Colonel Tattersall also emphasized the importance of teamwork in fighting and the need to have total confidence in one's peers.

Beginning with the 1971 White Paper on Defence, there was a movement towards a more complete, functional integration of the Reserves and the Regular Forces. The Government envisaged that the Militia would serve to augment the Regular Forces. This was taken one step further in 1982 with the development of a new policy whereby Militia units were specifically tasked to provide sub-units to the Regular Force units. Lieutenant Colonel Tattersall testified that as a result, the same skills are required whether one is a member of the Militia or the Regular Forces. Under cross-examination he stated: "So that, [the change in policy in 1982] that put a much sterner mandate on them to make sure that they had that sub-unit all trained and ready for war at all times and ready to go."

Lieutenant Colonel Tattersall gave some evidence as to the main causes of an individual's having to seek medical attention. His evidence was that the main contributors are sickness and injury, in turn caused by fatigue.

According to Chief Warrant Officer Guttin, a career artilleryman, if a member of a gun crew is lost due to injury, illness or other incapacity, the remaining members will tire more easily because the demands on them remain the same, thereby exposing those remaining members to increased risk of injury. When a soldier is injured, it is automatically reported to the Command Post. A medical assistant is always on the gun platform to administer first-aid.

Chief Warrant Officer Guttin related some of his personal experiences on field exercises. On most exercises, there are sufficient amounts of rations and water. Food poisoning, however, appears to be commonplace. Although he stated that there were times when one would be required to go without food or water, Chief Warrant Officer Guttin acknowledged that these occasions would rarely occur.

Major Gates is a battery commander with the Headquarters Battery of the Second Canadian Royal Horse Artillery and has held a variety of operational commands in the artillery. He was involved in developing the specifications for artillerymen, both Militia and Regular Forces.

Much of Major Gates' testimony related to Nuclear Biological Chemical Warfare and its hazards. He stated that in a contaminated area, it is physically impossible to consume the required amount of liquid due to the increased sweating caused by the protective gear. To open the suit for even a very brief period of time in a contaminated area exposes a soldier to the risk of serious injury. Therefore, in order to treat injuries, the individual must be evacuated from the area.

Another potential problem caused by the protective gear is an electrolyte imbalance due to heat stress. Major Gates testified that even without the chemically protective suits, soldiers in places such as Iran and Iraq are limited to 15 minute work cycles because of the problem of heat stress. Major Gates stated that similar problems could arise in Canada during the summer months. Aside from heat stress, the other major problem related to being deployed to the tropics is the incidence of parasites. There is also a severe risk of injury to the soft organs in the stomach.

Major Gates commented on the importance of water control in the field. If a water supply is contaminated or destroyed, in an extreme case, soldiers can be limited to one canteen each of water per day. Management of water is taught: a soldier is ordered not to touch his canteen except when he is instructed to do so, and the amount drunk is observed and controlled by the section commander. Breaking the command is a chargeable offence.

5. Medical Evidence The medical evidence adduced fell into two categories: (i) evidence relating to ileostomates generally and Mr. Galbraith specifically; and (ii) evidence relating to the medical requirements of the Armed Forces.

Dr. Brian O'Brien gave testimony about the function of the gastrointestinal system, the physiological effect of an ileostomy, the effect of stresses upon an ileostomate, the incidence of intestinal disease in war conditions and, to a limited extent, the Medical Standards for the Canadian Armed Forces. Dr. O'Brien is presently teaching in internal medicine and gastroenterology at Dalhousie University's School of Medicine. He has attended the Canadian Armed Forces course on tropical medicine, has subsequently taught that course as it relates to gastroenterology and has participated as a Canadian Armed Forces representative in a cooperative program on the subject of field treatment of casualties of chemical warfare. I accept his evidence on the medical matters in issue in this case.

Dr. O'Brien first- testified as to the function of the gastrointestinal system and in particular, the role of the large and small intestines. The large and small intestines help to control the amount of electrolytes in an individual's body. For example, a deficiency of potassium will result in weakness and muscle cramps. A deficiency of sodium means the body becomes dehydrated. Because the colon's major role is to scavenge water, if an individual's colon is removed, there is a higher obligatory loss of water resulting in increased fluid intake needs on a daily basis.

Dr. O'Brien described the problem which faces a person who has had a continent ileostomy as follows:

"... that this person is more susceptible or one of the important points is that this person is more susceptible to stresses to his fluids and electrolyte homeostatic systems. The things that can happen that stress all of us includes such things as infectious disease of the bowel and an excellent example of that would be cholera."

Dr. O'Brien went on to discuss the impact of cholera, heat stress, food poisoning, and contaminated water on the ileostomate and the ileostomate's decreased ability to compensate. He testified that there is a hypothetical possibility of trauma when the reservoir is full and, should

the reservoir burst because it has not been emptied, the situation is analogous to one of, a ruptured appendix.

Dr. O'Brien stated that early fluid and electrolyte imbalances in a chemically non-contaminated environment could be treated by way of oral fluids. Anything requiring more extensive treatment, however, would necessitate intravenous therapy and access not only to a physician but to a laboratory in order to measure electrolyte levels.

In Dr. O'Brien's opinion, a gastric or bowel resection is an appropriate limitation for enrolment in the Canadian Armed Forces because an individual who has had a major bowel resection is less likely to be able to cope with the stresses required of someone in the artillery, for example, heat stress, water deprivation, exercising in unfavourable climates, and the often impossibility of emptying the intestinal reservoir. Although conceding that Mr. Galbraith has had a very successful surgical result and has done much better than many other individuals undergoing the same surgical procedure, Dr. O'Brien stated that Mr. Galbraith's body is metabolically under stress all the time, and it is only because he has been able to have unlimited and uncontrolled food and fluids and has not been placed under stress through infectious disease that he has been able to do so well. As Dr. O'Brien put it:

"From a medical point of view, he has, done very, very well, but he has not been exposed to the kinds of stresses the Canadian Forces provides."

Dr. O'Brien testified that in his view there was no difference in adaptability of the body in the case of a continent ileostomy as opposed to a conventional ileostomy. He was unable to find any scientific studies comparing the ability of ileostomates and normal individuals to go without water.

Dr. O'Brien also discussed American medical statistics relating to World War II and the Vietnam war. These statistics indicated that during World War II, disease was more significant than non-battle injuries as measured by the number of hospital admissions. Of these diseases, just under 10 per cent were diseases related to the digestive system. Dr. O'Brien advised that no comparable Canadian data exists.

The evidence given by Dr. Joseph H. Roy focussed on the Medical Standards for the Canadian Forces. He spent a considerable length of time reviewing the rating system imposed by the Medical Standards. These Standards apply both to the Reserve Militia and Regular Forces. As I have indicated, the minimum enrolment requirement for an artilleryman is G2 O2. In the words of Dr. Roy, this means that the individual is:

"... expected to be able to do just about anything or any type of classification work in the Forces ... because, as it was explained before, military work is also a team type of work and one is expected to be able to pull his own weight by doing what he has to do, and if he cannot survive, he jeopardizes the survival of the team."

Dr. Roy testified that the other reasons for requiring this minimum standard are to give men and women in the Armed Forces the chance to fulfill a normal career and to permit flexibility in the

assigning of positions. Although waivers from the common enrolment standards are possible, Dr. Roy testified that they occur very infrequently. The Canadian Armed Forces recruits between 8,000 and 12,000 individuals each year into the Regular Forces.

Dr. Roy gave evidence concerning three individuals who were serving members of the Armed Forces and who had also had continent ileostomies. He testified that in each case, the reason for the ileostomies, Crohn's disease, was diagnosed subsequent to enrolment.

When questioned as to the rationale for having very strict standards for potential recruits and a process recognizing changes in medical conditions for serving members, Dr. Roy stated that because considerable time and money have been invested in the serving member, the Armed Forces would like to retain that individual if possible. In turn, the serving member's experience may well compensate for his disability.

Dr. Ted Ross was called in reply to give medical evidence on behalf of Mr. Galbraith. Dr. Ross is a general surgeon with a special interest and expertise in colon and rectal surgery.

Dr. Ross referred to a study conducted by Dr. Nilsson which showed that patients with conventional ileostomies had less total body water reserves than a normal individual, but that patients with continent ileostomies had the same total body water reserves as normal. This same study apparently indicated that potassium losses in patients who have had continent ileostomies were no different than potassium losses for normal individuals. Unfortunately, this study was not filed with the Tribunal and therefore little if any reliance can be placed upon it.

Although conceding that he did not have any experience with the Armed Forces, based on his reading of the description of the duties of an artilleryman, it was Dr. Ross, opinion that an ileostomate would be capable of handling the duties and tasks outlined.

## 6. Conclusion

There is no doubt that in this case the Armed Forces' overriding concern is safety: the safety of the individual himself, the safety of other members of the Armed Forces, and the safety of the public. Therefore, the question is whether the Respondent has demonstrated "sufficient risk of employee failure" to justify the restriction on enrolment on which it relies.

I am satisfied that on a consideration of all the evidence adduced, the Canadian Armed Forces has shown that there is sufficient risk of employee failure and that the blanket exclusion resulting from a grading worse than G2 O2 given to an individual who has had a gastric or bowel resection is justified.

The evidence demonstrates that the duties of an artilleryman are strenuous and physically demanding. Not only is an artilleryman expected to be skilled in his trade, he is also expected to perform as a soldier. As Chief Warrant Officer Guttin stated, "you are a soldier first and tradesman second." While I am prepared to accept that in peacetime there may well be a difference in the nature of the duties performed by an artilleryman who is a member of the

Militia as opposed to an artillery man who is a member of the Regular Forces, I am also satisfied that in time of war, there is, for all practical purposes, no distinction.

I am not prepared to differentiate between artillerymen in the Militia and artillerymen in the Regular Forces for the purposes of determining what constitutes a bona fide occupational requirement. In my view, the Canadian Armed Forces' concern with safety is not diminished and is no less real because of the fact that members of the Militia train much less often than their Regular Force counterparts and can only be ordered to go somewhere if they are placed on active duty. Artillerymen in the Militia are called upon to demonstrate a broad range of skills which are not substantially different than those necessary in the Regular Forces. The fact is that, once members of the Militia are placed on active duty, they must be capable of fulfilling their assigned duties. An individual's ability to do so will impact not only upon his own safety, and by virtue of the fact that teamwork and mutual reliance are critical, upon the safety of his team members, but also upon the safety of Canadians and the defence of Canada. In light of these considerations, it is not unreasonable for the Canadian Armed Forces to insist upon strict enrolment standards for new recruits into the Reserve Militia. (See *Seguin v. R. C. M. P.* 1989 Canadian Human Rights Tribunal; unreported where similar reasoning was employed.)

Considerable evidence was adduced as to the conditions in which an artilleryman could expect to exercise his duties. I think it is fair to state that water shortages are a real possibility as is food contamination. That these conditions often result in disease was illustrated by the American medical statistics relating to World War II and the Vietnam war. The hazards of nuclear biological chemical warfare and the problems of treating an injured person in a contaminated area must also be borne in mind.

The likely effects of these conditions on an individual who has had a continent ileostomy were discussed by Drs. O'Brien, Roy and Ross. In Dr. O'Brien's opinion, a person having had a continent ileostomy starts from a lower reserve level than a normal individual, due to the stresses on the former's homeostatic systems thus making that individual more susceptible to external stresses. Although the studies relied upon by Dr. O'Brien to support his opinion used conventional ileostomates and not continent ileostomates as subjects, I accept Dr. O'Brien's testimony that physiologically, the two procedures are identical. I prefer Dr. O'Brien's testimony to that of Dr. Ross in light of the former's considerable expertise in the area. In accepting Dr. O'Brien's testimony, I also inject a note of caution: should medical knowledge advance to the point where it is evident that continent ileostomates do not begin at a lower reserve level, this issue may have to be revisited.

There is no real statistical evidence before me as to the likelihood of failure of continent ileostomies; Dr. O'Brien testified that after two years, 85 per cent of continent ileostomies have been described as successful. I am reluctant to conclude from this that 15 per cent could be described as failures. I am, however, also mindful of the decision in *Little*, that an employer need not jeopardize public safety in order to generate statistical evidence to support a bona fide occupational requirement.

I am therefore satisfied that the Canadian Armed Forces has made out a case that there is a real risk and not a purely hypothetical one that an individual having had a continent ileostomy is

subject to an increased possibility of injury in the field as a result of his medical condition and that there is "sufficient risk" of failure which would jeopardize the safety of himself and others to justify the G2 O2 classification as a bona fide occupational requirement. Mr. Galbraith has had a very successful surgical result. I adopt, however, Dr. O'Brien's view that to equate what Mr. Galbraith has been able to accomplish in civilian life with the hazards and stresses of life as an artilleryman is neither appropriate nor meaningful.

It is for this same reason, that the hazards and stresses of military life cannot be replicated, that I am satisfied that the Canadian Armed Forces has justified its blanket exclusion for individuals having received less than a G2 O2 medical rating as a result of having had a gastric or bowel resection. I am somewhat skeptical of the argument that in view of the number of potential recruits considered every year, individual assessment would be impractical. I am of the view that such assessments would be inappropriate because of the difficulty, if not the impossibility, of replicating field conditions. While it is true that these conditions are replicated as best they can be in peacetime exercises, even in that case there is in my opinion, a significant difference. How one will cope physically in a time of war will be determined only in a time of war. Dr. Ross' suggestion of a means by which individuals such as Mr. Galbraith could be tested would not, in my view, be adequate or accurate. > - 45 In support of his argument that ileostomates are capable of serving in the Canadian Armed Forces and that the G2 O2 requirement, which excludes an ileostomate, cannot be justified, Mr. Duval pointed to the fact that several individuals having had bowel resections subsequent to enrolment have been retained in the Armed Forces. Strictly speaking, the difference in treatment between an individual seeking to enrol in the Armed Forces and a serving member is not the issue before me. In any event, I accept Dr. Roy's explanation of the rationale for the difference in treatment. Moreover, only one of these individuals has been through the entire Career Medical Review Board process. Although the outcome of this process was that he was retained "without career restriction", it is important to note that this individual is employed as an "Air Frame Tech" and, according to Dr. Roy, unlike an artilleryman, would not be required to go into the field.

I find that the Canadian Armed Forces has established that an automatic exclusion from enrolment for someone having had a gastric or bowel resection which results in a medical rating of less than G2 O2 constitutes a bona fide occupational requirement pursuant to the Act. I reach this conclusion somewhat reluctantly in view of the active civilian life which Mr. Galbraith currently leads. I am satisfied, however, that one cannot equate stresses in civilian life to those in the military. I caution however, as did the Tribunal in Rodger, that because a bona fide occupational requirement was found in this case, does not mean that it will continue to be bona fide in the future. The surgical procedure of a continent ileostomy is relatively new and the medical and statistical information relating to it are only now emerging. It may well be that in the near future, new medical techniques or new scientific evidence will permit the conclusion that any increased risk to an ileostomate is so slight that a sufficient risk of employee failure cannot be made out within the meaning of the Etobicoke test.

June 26, 1989

John I. Laskin