

T. D. 14/ 88 November 8, 1988 REVISED VERSION

IN THE MATTER OF: The Canadian Human Rights Act, S. C. 1976 - 77 C. 33, as amended;

AND IN THE MATTER OF: A Hearing before a Human Rights Tribunal Appointed under S. 39 of the Canadian Human Rights Act.

BETWEEN:

DONALD DOUGLAS GAETZ Complainant

- and

CANADIAN ARMED FORCES Respondent

DECISION OF THE TRIBUNAL

HEARD BEFORE: S. Charles Facey, Q. C.

APPEARANCES: Rene Duval, Counsel for the Canadian Human Rights Commission
Brian J. Saunders, Counsel for the Respondent

Heard in Halifax, Nova Scotia, July 26, 27, 28, and in Ottawa, Ontario, September 28, 1988.

WRITTEN REASONS FOR ORAL DECISION RENDERED ON SEPTEMBER 28, 1988

> The hearing before this Tribunal results from a complaint filed by Donald Douglas Gaetz, dated February 4th, 1985, against the Department of National Defence alleging that the Respondent has engaged in a discriminatory practise on the ground of disability in a matter related to employment i. e. that he was released from the Canadian Armed Forces based on medical grounds (diabetes) and that the complaint alleges discrimination in contravention of Sections 7 & 10 of the Canadian Human Rights Act. At the opening of the hearing the name of the Respondent was changed by consent of the parties to the Canadian Armed Forces rather than Department of National Defence.

The complainant was the first witness called and testified that he is currently engaged as a stores helper with Revenue Canada Taxation and was so employed since July 7th, 1986. Prior to this

employment Mr. Gaetz was employed by the Canadian Armed Forces (Navy), having enrolled in August, 1979 and being discharged on medical grounds in August, 1985, the medical grounds being based upon the fact that he was and is an insulin- dependent diabetic.

The Complainant was first diagnosed as a diabetic in May of 1984, after a visit to his doctor suffering from fatigue, frequent urination and thirst. After blood tests were administered he was diagnosed as a diabetic and hospitalized for thirty days at Canadian Forces Base, Stadacona.

While in hospital he was placed on an I. V., instructed in the proper care and management of his disease by way of taking his injections, diet management and insulin control.

After release from hospital Mr. Gaetz resumed his duties with the Armed Forces as a supply technician and also resumed his regular life pattern, such as sports, i. e. weight lifting, racquetball and volleyball. The Complainant testified that he had encountered no difficulties in resuming his duties with the Forces prior to his discharge nor did he have any problem in pursuing his athletic endeavors.

Before he was discharged Mr. Gaetz was notified by his base personnel officer that his medical category was being downgraded to the point where he was being discharged and he subsequently filed the complaint which is the subject of this hearing.

During his testimony, Mr. Gaetz described his duties as a stores helper at Revenue Canada and compared those duties with his previous employment with the Armed Forces, concluding, that in his view, his duties in both positions were very similar on a day to day basis. He did not however, comment on direct examination as to the difference between his present position and his former one, in the sense that he did not relate to his former position vis- a- vis the military aspect.

Much of Mr. Gaetz's direct testimony was in reference to coping with his diabetes and the training he received to enable him to do so. He appeared at first to be knowledgeable about his condition and indicated he was under good control. He did, however, admit to having "a few reactions" manifested by light-headedness, sweating and shaking. When these symptoms manifested themselves, he took what he felt were appropriate measures to counteract these symptoms by ingesting something with sugar in it, usually a liquid. He has never been hospitalized because of a reaction.

In his present employment Mr. Gaetz indicated that he did not carry sugar or sweets on his person due to the easy accessibility of such in the City. He also stated that if he went camping he would ensure he would take along extra sweets or sugar. This present position often entails overtime usually with advance notice of twenty four hours in order that he might take his insulin with him.

The Complainant indicated that upon his release from the Forces he experienced disappointment and his friends indicated he was more depressing to be around. Evidence was also introduced as to the complainant's present income and that he understood the diagnosis of diabetic mellitus, and that it has not changed his life style, and if successful in his complaint is interested in rejoining the Armed Forces.

In cross examination by Mr. Saunders, the complainant indicated the nature of his daily regime and the insulin dosage to be used and admitted that he needed some advance knowledge of when he would be required to eat in order to determine what activities he could engage in. He also indicated he was aware of the need to take his injection on a routine basis, acknowledged that it was not prudent to oversleep and the importance of varying the dosage to be injected, taking into account the type of exercise and activities planned for a given day.

Gaetz also admitted that at times, his control was not as good as it would be, both prior to and after his discharge from the forces. At page 31 of the transcript he indicated that in his present employment that he would carry needles or a syringe of insulin with him in the event of overtime duties and that barring overtime, he could predict his daily schedule or routine and the amount of physical activities expended daily.

Mr. Saunders took Mr. Gaetz through his duties in the military as a supply technician and contrasted the duties of such a position with those in a similar position in civilian life, for example, with the Department of National Defence. Mr. Gaetz conceded that his position in the forces had military aspects, such as the use of firearms, fire-fighting duties and the use of heavy equipment. Life at sea and on board ships was also touched upon with emphasis upon the duties of a seaman as opposed to a supply technician and the fact that military duties could at times, supersede the routine duties of a Supply Technician, the unpredictability of such military duties and the lack of a routine lifestyle.

Mr. Gaetz further testified that after being notified that his medical category was being downgraded, he received some assistance or effort on the part of the Forces to facilitate a smooth entry back into civilian life. Gaetz testified that he was advised that he would be released on or before August 25, 1985, that he could stay on or leave earlier and that he received an honourable discharge. His complaint before the Tribunal was filed on February 4, 1985.

Upon his discharge, Mr. Gaetz commenced seeking employment and subsequently obtained his present position which he admitted was not as demanding as his former occupation and that it had a more regular life style.

Mr. Gaetz also testified that he had hypoglycemic reaction at intervals of approximately six months.

After a short re-direct examination Mr. Duval called no further witnesses for the purpose of his primary burden.

Upon the opening of the case for the Respondent Mr. Saunders by way of preliminary address indicated that the case for the Respondent was based upon Section 14 of the Human Rights Act and indicated the names of witnesses he would be calling and gave a basic outline of the testimony which the witnesses would be presenting. The first witness which Mr. Saunders indicated he would be calling was Lt. Colonel Tattersall from the Directorate of Force Structure who would be describing, in general terms, the role which the Canadian Armed Forces was called upon to fulfill, the structure devised to meet that role and to put into perspective the role of Supply Technician in the context of that structure. Mr. Saunders also indicated that Major McMenemy was employed with the Directorate of Military Occupational Structures and would testify as to the Occupational Specifications for the position of Supply Technician. Captain Martin from the Directorate of Personnel Career Other Ranks is in charge of career managers for Supply Technicians. He would be describing the role of Supply Technicians from the perspective of career managers and also outlining the conditions under which the Supply Technician would work within the context of the Armed Forces. Chief Warrant Officer Muise is a Career Manager for Supply Technicians, as well as being a Supply Technician, and would be also describing

conditions under which a Supply Technician worked. The last witness proposed to be called by Mr. Saunders was a Dr. Fisher, who was a medical Doctor and Chief of the Medical Staff of the National Defence Medical Centre and also head of the diabetic clinic there. It would be the function of Dr. Fisher to explain diabetes, the results of suffering from diabetes and to offer an opinion as to whether or not there were any risks associated with an insulin- dependent diabetic serving in the Armed Forces in so far as employment within the Armed Forces was concerned.

The testimony of Lt. Colonel Tattersall was concerned with the structure of the Armed Forces and for the most part was helpful to the Tribunal in understanding the roles and objectives of the Armed Forces not only within Canada but throughout the world. It was, however, not particularly relevant to the issue of insulin- dependent diabetics from the point of view of Mr. Gaetz or their service in the Armed Forces. The overall thrust of the testimony of Lt. Colonel Tattersall was more or less to do with the structure and grouping of the Canadian Armed Forces, both within and without Canada, and with the various component Forces of the Canadian Armed Forces with some emphasis on Canadian involvement in NORAD and other global commitments.

Perhaps the most relevant portion of Lt. Colonel Tattersall's testimony occurs at pages 95 and 96 of the Transcript of this Hearing during re- examination by Mr. Saunders wherein Lt. Colonel Tattersall indicated that the position of Supply Technician was an occupation within Canadian Armed Forces and there was also an equivalent occupation within the Department of National Defence. However Lt. Colonel Tattersall differentiated between the two by pointing out that Supply Technicians for the Department of National Defence would not be sent into combat units as would be the Supply Technicians serving in the Canadian Armed Forces.

The next witness called by Mr. Saunders was Major James McMenemy, whose background was in Industrial Psychology, and who, since 1984, had been assigned to the position with the Directorate of Military Occupational Structures whose role it is to develop and control the Military Occupational Structures; ie: to look at the occupational requirements of people who are based in various units within the Armed Forces and to develop the structure and framework under which persons so placed would work. Major McMenemy testified that the Military Occupational Structure defines a framework within the Canadian Armed Forces, recruits, trains, promotes, posts and employs all military personnel and identifies the personal skills and knowledge which are required to do various jobs and to fill various positions within the Forces. of particular interest is the statement at page 99 of the Transcript of the Hearing and subsequent pages, in which he lists three primary factors that particularly distinguish the military requirements that all military personnel must be capable of serving under a wide variety of conditions, without options, in order to meet the operational role of the Canadian Armed Forces. Page 109 - 117 of the Transcript relates the general duties of the Supply Technician and how they are arrived at as testified to by Major McMenemy. Of particular interest is a statement by Major McMenemy at page 118 of the Transcript commencing at line 15 and which reads as follows: "the ultimate role of the Military involves exposure to danger and physical fatigue and subjects the member to unusual physical and emotional stress". At page 128 and commencing at line 23 Major McMenemy, in testifying in response to the environmental working conditions answered, "The artilleryman must work outdoors in all environmental climatic conditions for extended periods without rest and shelter. The artilleryman normally works in an environment

where exposure to the extremes of weather and terrain are common. The artilleryman may also be subject to sudden and severe changes in the environment resulting from intercontinental deployment. It is necessary to work long and irregular hours during periods of training and combat." At page 129 at line 15, Major McMenemy, in response to a question from Mr. Saunders answered as follows, "Physical deterioration or impairment as a result of sustained Psychological stress, or lengthy periods of irregular rest and eating schedules." This last answer was given in relation to the previous question posed by Mr. Saunders as to the hazards that an artilleryman or someone assigned to the field unit could be subjected to. During cross-examination by Mr. Duval at page 156 of the Transcript at line 15, Major McMenemy, in response to the question by Mr. Duval, answered as follows, "When a brigade goes to the field the entire brigade, everyone who is there, is involved in combat. There are some positions that would be further from the forward edge of battle, but when the Army deploys, the entire group goes to the field and lives under, works under, combat conditions."

Question: I understand that, but a supply tech would be then doing supply tech work in those conditions you just described?

Answer: He would be doing supply tech work and military, army- type duties as well.

Question: Like what?

Answer: Like standing sentry, like digging into defensive positions, like driving vehicles wherever the things that are on the back of the vehicles are needed, that sort of thing, others as well. When the Army goes to the field, the philosophy of the Army is, if you are in the Army you are a soldier.

The rest of the cross-examination with Major McMenemy by Mr. Duval was helpful but the underlying theme throughout Major McMenemy's testimony was that, as understood by the Tribunal, Supply Technicians for the Armed Forces have a two-pronged function i. e. that is to say they are occupationally termed Supply Technicians in the terms of their everyday operational duties, secondly, and equally important, is the fact that all of the members of the Armed Forces have or, may at sometime have, an overriding obligation which would arise from the very nature of the structure of the Armed Forces which is to prepare for war and in the event of war to participate in combat or military operations.

The next witness called by Mr. Saunders was Captain Martin who testified that he first enrolled in the Forces as a Supply Technician in 1962 and so served in such capacity up to and including 1981 at which time he was commissioned from Warrant Officer to Lieutenant. Upon being commissioned in 1981, his occupation was in Logistics Specialty Supply and later Transport included. The preliminary portion of Captain Martin's testimony dealt with the Service and placement within the Forces of anyone who was a Supply Technician with the Canadian Armed Forces. In 1986 Captain Martin was transferred to the Directorate of Personnel Careers Other Ranks at National Defence Headquarters at Ottawa, which is the body that is over-all responsible for career development and management of all the non-commissioned members in the Canadian Forces and the postings, promotions, releases and other activities. In his present position, Captain Martin is responsible for three occupations, i.e. the Supply Technicians, the

Financial Clerk, and Ammunications Technicians. He indicated that his Directorate was responsible for career development for the postings in the various trades involved. At page 176 of the Transcript Mr. Saunders asked Captain Martin as to whether there were positions where Supply Technicians might not serve within the Forces and the response was, "Sir, I can't think of a place where a Supply Technician wouldn't serve in the Canadian Forces. Of f the top of my head, I can't think of a posting where he wouldn't serve. " At page 179, Captain Martin was asked by Mr. Duval whether there was any desired career progression for Supply Technicians and in response indicated that in general terms it is considered desirable for the Supply Technicians to be exposed to all phases of Supply Technician trade both on the first and second line. The first line basically being who are actually employed in combat- orientated areas, ie, ships, the combat arms area of the Service, battalions. The second lines are the basic static stations such as CFB Toronto. As to why service to both lines will be considered desirable, Captain Martin answered, " Well for experience, because everyone on the second line supports basically some first line units, and flexibility, mobility, so that in the time of an emergency or war the supply tech can be employed in a task regardless of where that war -- what environment its taking place in." Captain Martin also indicated that the consequences of an individual spending their career in a second line posting would be that they would be restricted in their potential for promotion due to the fact that they would not be able to show their flexibility to compete for promotion and therefore, their prospects for promotion would be limited and that if a group of people or individuals were to receive training in only a limited aspect such as only on second line basis, there would not be much flexibility to deploy in combat if that were the case.

At page 185 of the transcript, Captain Martin indicated that he had served with a field unit, the Third Mechanized Brigade. This brigade being a combat arms mechanized infantry battalion which was part of NATO for a combat mechanized brigade group. Their primary role was to engage the enemy and to hopefully defeat them. In expanding upon his service in the field unit, Captain Martin indicated that approximately one third of his time would be, based upon his experience, spent away from his home base, in the field, on exercises training and supporting the front line companies that are engaged in battle for annual range training. Captain Martin also testified that the purpose of such exercises is to train for war. With emphasis on the Supply Technician, it is to train and support those who are fighting the war on the front line area. Captain Martin further included that such exercise and manouvers often range in duration from three days to a week, and up to and including six weeks depending upon the type of exercise and that in the case of a six week exercise, all of that time would be spent away from home base and would be time spent in the field. Captain Martin also testified as to the living conditions when deployed in the field. He outlined the uncertainty and unpredictability of manoeuvres, the accommodations and serving of meals, etc. and indicated generally, that all of the amenities which would be available to a member of the Forces not engaged on field exercises, in his words, "Would be hard to come by on a regular basis." Captain Martin also outlined some of the responsibilities of a Supply Technician when working in the field and the rigorous conditions which could prevail in certain instances. He indicated that at times there could be periods of intense activity for sustained periods of time followed by what, to paraphrase Captain Martin, could be described as a lull in operations.

The remainder of Captain Martin's testimony dealt primarily with the duties and responsibilities of a Supply Technician in the field and the conditions under which a member of the Forces

would be required to work. He also outlined the various duties which a member of the Armed Forces, included a Supply Technician, would be required to perform over and above their occupational duties, such as sentry duty, firefighting, base defense, and crowd control.

Captain Martin also spoke of base defense force exercises, and in response to a question by Mr. Saunders at page 201 of the Transcript at line 5.

Question: "Okay, and if you are assigned to Base Defense Force, do you also have your occupational duties."

Answer: No. No., you are exempted -- when Base Defense Force is called, you are totally dedicated to Base Defense Force, and your occupational duties -- you don't even report to your normal place of duty."

At page 204 of the transcript, in response to a question contained at line 2 by Mr. Saunders:

Question: "Now, as a career manager could you guarantee an individual in the Supply Technician trade -- or occupation, excuse me, a position where he or she would be guaranteed regular hours, they would eat at regular time, and that he could gauge fairly well in advance the amount of physical activity that the jobs required?"

Answer: "I could not guarantee that to a Supply Technician, no, sir."

Captain Martin also testified that he served on the Career Medical Review Board, C. M. R. B., whose purpose is to review and make recommendation as to the disposition of a person whose medical category had fallen permanently below the minimum occupational requirements, the method by which an individual came before the Board and the disposition of a case in general.

Captain Martin also indicated that each case before a Career Medical Review Board, was dealt with on an individual basis and that there was wide discretion for a Career Medical Review Board. The Board had a wide option including retaining a member in the service with career restrictions to that rank with no further courses, until such time as his term of service has ended and also to recommending retaining the individual with absolutely no restrictions. It could also recommend an occupational transfer.

Commencing at page 212 of the Transcript, Captain Martin deals with the circumstances in which the occupational transfer might be recommended by the Career Medical Review Board and cites the example of an individual who is chronically seasick. The Forces will not send him to sea. In the event the man was a superb technician, for example, on the mechanical side he could be occupationally transferred from the Naval Engineering side of the Forces to the Air Engineering side, and that problem would have been solved in that he would not be seasick anymore. At page 213 commencing at line 10, Mr. Saunders poses the following question; Question: "No, I am talking about in general, in making an occupational transfer, would you look at the medical restrictions of the individual?"

Answer: "Yes, of course, and he has to be at a minimum to get in for - now, in some cases, the Board is very humane. You know it's a human board made up of good people, I think, and they look at the individual, find out what the restrictions are. Now, if the P S O, who gives the individual, at the time of the interview, I believe, some test, and this says whether or not you can go in, but if the individual is below all medical standards, then they can't give him an occupational transfer."

Question: "Now, once a decision is made to release a member by virtue of medical disability or medical reasons, is the individual released that day from the Forces?"

Answer: No. Once the decision has been rendered, a notification is sent to the individual and his Commanding Officer, and to, again, the administration people in NDHQ advising that the decision has been made to release. Normally the release date would be at least six months away or even further up and until the act of posting season, which may occur eight months down the road, and ..."

Question: "Why is that sir?" Answer: Well for basic compassion. You know we are not out to hurt anybody. We don't want to hurt anybody, so you give the individual as much time as possible to make the transition to civilian -- to a civilian career."

On the same page Captain Martin also indicated that the Career Medical Review Board had cases which came before it dealing with members suffering from diabetes and Captain Martin's testimony was to the effect that there were 34 such cases since 1985, and he indicated that of those 35 cases, 14 persons were released and that these were insulin- dependent diabetics requiring daily injections. Five of the remaining persons were retained to compulsory retirement age, which was going to occur 18 to 24 months down the road and such persons were retained for annuity purposes. Another 4 were retained with restrictions and in those cases the medical prognosis was that if proper dieting took place and proper regimented exercise was accomplished, then good control could be maintained by oral medication. Captain Martin also stressed that he was not certain as to whether or not any of the persons retained were insulin-dependent diabetics in the sense that they required insulin injections. In cross-examination by Mr. Duval as to the type of career restrictions imposed upon the four Members who are retained by the Forces after having their medical category downgraded by the Career Medical Review Board, commencing at line 5 on page 230. Answer: "They would be career restrictions, which means that at whatever rank level they were at at that time is where they will stay. They will not progress beyond that rank level. For illustration, we use a corporal."

Question: "Yes?"

Answer: In order to be promoted -- well, you wouldn't be promoted to master corporal if he was retained as a corporal with restrictions. He would not be sent on career courses, because there is no further development for the individual."

Question: "Yes?"

Answer: "So it's a career restriction that we are basically talking about."

Question: "And the person will be then freezing a position for the rest of his career or career with the Forces, will stay in the same position then freezing the position?"

Later on at page 231 Captain Martin testified that he was aware of Supply Technicians who worked with restrictions in the Forces and indicated the type of restrictions in question were basically geographical, i. e. those persons were unable to serve at sea, in the field, with the U. N. and whatnot.

On re-examination by Mr. Saunders, Captain Martin was asked whether those individuals in the Supply Technicians occupation that were retained with restrictions, particularly geographical restrictions, would also have occupational restrictions as well. Captain Martin's response was that they could be retained depending on what the restrictions were. At page 232 of the Transcript, Captain Martin indicated that retention with restrictions means basically that the individual can perform the basic military function duties and a very good proportion of occupational duties, and then indicated that, "... the bottom line, I suppose, on the deliberation is if the individual can serve on BDF, which is a common military duty anywhere in the Canadian Forces, if that individual could do BDF, then we will retain the individual and ..."

The next witness called on behalf of the respondent was Chief Warrant Officer Muise, who spent the bulk of his career in the Armed Forces, working in the Occupation as a Supply Technician and who is presently stationed at National Defence Headquarters in Ottawa, as the Career Manager for Supply Technicians. He had held that position for the two months prior to the hearing. Chief Warrant Officer Muise then testified as to the experience and responsibilities required by Supply Technicians. Mr. Saunders then took Chief Warrant Officer Muise through a detailed outline of the various duties of the Supply Technician within the Armed Forces. He made particular reference to the duties of the Supply Technician over and above his occupational duties as a Supply Technician in the framework of the Armed Forces and how those duties were required to fit in the military framework.

The next witness called by the respondent was Commander Cora Fisher, acknowledged by both side to be expert in diabetic knowledge and internal medicine. Commander Fisher indicated that she is presently the head of the Diabetic Clinic at the National Defence Medical Center. She had been head of the Clinic since 1984 and indicated that she was familiar with the Medical Standards set by the Canadian Armed Forces. As an aside, it was interesting to note that for a period of time Commander Fisher was stationed as a Doctor at Cornwallis and for a brief interlude of time was involved in the diagnosis and treatment of Mr. Gaetz.

At page 272 of the Transcript, Commander Fisher identified the two factors which appeared on the medical notification form with respect to Mr. Gaetz, i. e. The G factor and the O factor and indicated that the G factor is the geographical factor which can mean more than geography. It goes on to include climate and degree of isolation. Commander Fisher indicated that G4 basically means an urban centre and temperant climate. Commander Fisher indicated that the O factor is probably the most important factor of all because that factor dictates the occupational limitations of an individual. Someone for example, who is an O1 is considered capable of doing, fortunately, anything. At line 11 at page 273, Commander Fisher indicated that and I quote, "Diabetics can be either O3 or O4's. Mr. Gaetz was given an O3 to show that he was a person who

has what would be considered a moderate medical disability. He could do almost anything providing that he has some control over it." She stated further, the wording at page 17 said: "A moderate medical or psychological disability which prevents him from doing heavy physical work or operating under stress for sustained periods" and indicated that the sustained period means that it is the best occupational factor that can be given to a diabetic and that it applies to most tasks in moderation.

At page 278 of the Transcript, in referring to tab 9 of Exhibit RI, Commander Fisher indicated that; "Tab 9 is what's now considered one of the most essential pieces of information, in that we recognize diabetes as a different disease with many sub- classifications, and the fact that Mr. Gaetz had not only a large amount of glucose in his urine, but a large number of ketones, establishes that he is a Type 1 ketosis- prone diabetic". At page 279, Commander Fisher described diabetic mellitus as follows; "Diabetes mellitus is a relative or absolute lack of insulin that results in many metabolic abnormalities, but the key one is a high sugar level. And later indicated that the presence of ketones is not only a sign of diabetes but also a sign that it is one of the more severe forms of diabetes. Commander Fisher then indicated that where there is an excess of ketones and where the PH becomes more and more abnormal a diabetic can in fact go into a coma. She also indicated that most people perhaps as many as 50%, who have ketosisprone diabetes may have their initial presentation to diabetes as coma. Fortunately, this was not the case with Mr. Gaetz. Commander Fisher then proceeded to describe the treatment and control of diabetics through the use of insulin and diet. She indicated that in terms of insulin injections and eating that there are peak times. With relation to insulin doses Commander Fisher testified at page 294, in response to a question from Mr. Saunders, the question being at line 8 of the page of 294, Question: "Okay. Now once a dosage is established, is it always the same thereafter?"

Answer: "No, it is not. The dosage depends upon a multitude of factors. The simplest three of these factors are activity and eating patterns, sleeping pattern, but those are just the three simplest. In fact there are many other factors involved as well." At line 18 in response to a question by Mr. Saunders, "Can they be affected by physical activity?" Commander Fisher answers at line 19,

Answer: "Yes. One of the minor problems - 'L-- hat a diabetic faces is selecting the injection site. If he thinks he is going to be sitting at his desk all morning and injects insulin in his legs it will be absorbed more slowly then if he just had to go out and run, where he increased the circulation of blood to the injection site.

Question: "And can physical activity have any impact on when the insulin peak is achieved?"

Answer: "Yes, it can, by that method. Probably more important than changing peak time, however, is exercise has metabolic effects that actually increase the sensitivity to insulin of blood cells."

Question: "What's the repercussions of that?"

Answer: "Well, in fact, if you have unexpected exercise, you can compensate to it -- for it to some extent by eating more, but one of the reasons that you are actually prescribe exercise or prescribe physical activity for a diabetic on a regular basis is that the exercise, itself, does have some metabolic effects which make cells more sensitive to the insulin."

On the second element of the treatment i. e. diet or meals and their importance, Commander Fisher answers at line 17 at page 295

Answer: "I seem to be forever telling patients that diet is the keystone to therapy, that no matter what else they do, that the diet is extremely important." At line 15 at page 296,

Question: "And I take it, from what you said earlier in connection with insulin, is that the timing of meals is important?"

Answer: "The timing of meals is important, because after you have injected the insulin, you can't do anything about changing when you want that peak to occur."

Question: "Okay. Now if we can go again onto the third element, and that's physical activity. Again, you have covered this in part. Is this an important factor?"

Answer: "Physical activity is very important, and the timing of physical activity is very important. It's usually recommended that you try to avoid the heaviest exercise at the insulin peak times. Those are the times when you are most likely, if you are exercising at a high level, to have problems with your blood sugar going too low too rapidly. At page 297 at line 13, question by Mr. Saunders: "Now, is there any problem for a diabetic if he, in the morning planned to engage in some physical activity and it didn't take place?"

Answer: "Then if you did not do the scheduled physical activity, he might well have too high a blood sugar."

Question: "Okay, ... what if a diabetic does more physical activity than he planned in the morning when he took his injections?"

Answer: "He is at risk of having a hypoglycemic reaction. He can compensate -- if he has good control of his situation, he can compensate by taking in extra food but he is going to need extra food, because he cannot, once he is given that injection, change the amount of insulin. He can only change the amount of glucose."

Asked by Mr. Saunders, whether in the treatment that is prescribed for diabetics whether or not it is necessary to have all three elements of diabetic regime.

Commander Fisher answered, at page 298, line 5: "Yes. Being a diabetic, unfortunately isn't something that's easy. You have to do a balancing act. You have to balance your insulin, your food and your activity, and you have to be aware of that balance constantly."

When reminded by Mr. Saunders that Mr. Gaetz took two injections of insulin a day and that he measures his blood sugar every two days and being asked by Mr. Saunders whether or not that was a normal regime for a diabetic in the Doctor's experience, Commander Fisher indicated that in her experience it was not an ideal regime. Most of the time she expected the people taking two injections a day to in fact be measuring their blood sugar twice a day to adjust the dosage. At line 24 of the Transcript at page 303, Question, "Now, Mr. Gaetz indicated as well that there are times when he wasn't under good control. What does that mean in the diabetic world? "

Answer: "That would mean that -- could mean one of three things and we didn't ask him what he meant, although I have a fair idea. The three things a diabetic means, when he says he is not under good control, are, one, he may be having unpredictable highs and lows, he may mean that he is having a tendency to run too high most of the time, or he may mean that he is running too low. Usually they mean the second thing. They mean they are running on the high side, and I think that's what Mr. Gaetz meant..,

Question: "Now, Mr. Gaetz also said that he didn't carry sugar with him because of the stores available. Can you comment on that?"

Answer: "That, I guess, would be the one thing that would concern me about him for his personal safety. When diabetics don't have a lot of bad reactions, they tend to get a little blase, a little too confident, perhaps, would be the best way of putting it. The amount of warning that you get for a reaction can vary, and if your warning is short, you will have time to get the sugar, the candy, whatever it is that you have chosen to carry with you, quickly and easily, whereas you get a warning and then have to go and acquire something, your response time is lengthened"

At page 305 of the transcript at line 8, question by Mr. Saunders, Now, let's go and talk about the acute complications of insulin- dependent diabetics or diabetes, and what are the acute complications?"

Answer: "The acute complications relate to your blood sugar being either too high or too low. The more acute of the two are the too low, and the too low is the more dangerous acute complication." In relation to the condition of being too high, Commander Fisher indicated that the term given to that condition is that you are said to be hyperglycemic when your blood sugar is above the acceptable limit, and at that stage, you may and may not have symptoms. Initially you certainly wouldn't have symptoms. The first symptom would probably be an increased urine production, because one of the first metabolic things that goes wrong when you are too high is the filter, which is kidney becomes overwhelmed by the amount and can't reabsorb all of the glucose, and so it spills out in the urine, and the glucose molecule actually then pulls with it an obligatory amount of water, and with that water, certain electrolites." At line 15 at page 306.

Question: "Now, are all diabetics, who are insulin- dependent, susceptible to hyperglycemia?"

Answer: "Yes. "

Question: "That would be even diabetics who are generally under control?"

Answer: "Yes"

At page 307 at line 19, Question: "Okay. Now, if we can turn to the condition the too little glucose. What is the term used to described that?"

Answer: "The term used to described that is hypoglycemia. The critical thing about hypoglycemia is that our brains depend on glucose, and so it's, therefore, extremely serious."

At page 308 of the Transcript commencing at line 22, question by Mr. Saunders:

Question: "Okay. Now, you have indicated that, for example, increased physical activity could bring upon a reaction. What other types of things could cause a person to have too little glucose?"

Answer: "Well, not being able to get food at a -- usually at a scheduled time, not -- a meal being delayed, a meal not being available, a mistake in your insulin injection."

Commander Fisher's testimony then continued with a description of the symptoms which first occur; a person who has too little glucose and going into a hypoglycemic reaction. The first symptoms being described as adrenergic, she goes on to speak of the second set of symptoms which are described as neuroglycopenic symptoms. She indicated that these were the central nervous system or brain- related symptoms. At line 15 at page 311, questioned by Mr. Saunders;

Question: "What happens if no treatment is given at the second stage?"

Answer: "At the second stage, if no treatment is given, and the blood sugar continues to fall, the patient will eventually lose consciousness."

Question: "Now, how much time is there between the first set of warnings and the start of the second set?"

Answer: "That is extremely variable. It can be seconds or minutes. On some occasions, in fact, the diabetic can have, or at least can recognize, none of the first set of adrenergic symptoms. In fact, there are times when he may get none of them

At line 21 at page 314, Commander Fisher was asked if there was the risk that Mr. Gaetz would suffer a reaction without warning.

Answer: "Yes, affirmative because any insulin- dependent or ketotic- prone diabetic can have that problem. " When asked by Mr. Saunders, as to the treatment of hypoglycemia Commander Fisher indicated that the treatment is to provide glucose and that it depended upon the degree of reaction as to how it was done. In the simplest cases when the patient gets a warning he could inject all sugar of some form or a carbohydrate of some form. Commander Fisher indicated that traditionally orange juice with sugar stirred in it is the traditional method of oral intake of sugar but not necessarily the only one.

At page 319 Mr. Saunders questioned Commander Fisher as to whether or not she agreed with the statement contained in one of the Authorities introduced in the respondent Exhibits and that Statement reads at line 23 as follows: "It must be emphasized that hypoglycemic attacks are dangerous and if frequent portend a serious or even fatal outcome. Commander Fisher's answer was " That is very definitely accepted and very definitely real. In a hypoglycemic attack, because it involves a change in brain functions, is always dangerous, and unfortunately, even in this day and age, there are deaths not uncommonly in diabetic coma when people do not get the medical attention that they require to reverse it." Mr. Saunders then queried Commander Fisher on the question of treatment. He asked whether a person should return to work right after having taken the glucose to bring his blood sugar levels up. On page 320 at line 12 Commander Fisher answered, " He certainly isn't going to be perfectly normal immediately after taking in the glucose, and if he is hypoglycemic, taking in four ounces of orange juice and a little bit of sugar deals with the acute situation. If he is then going to continue normal activity he probably also needs to eat other things ..." At page 320 of the Transcript commencing at line 20, Mr. Saunders posed the following question:

Question: "But what if the individual is engaged in heavy physical activity? Should he return to that activity immediately after taking the glucose?"

Answer: "If he does, he will simply become hypoglycemic again, because although he has taken in enough glucose to change his blood sugar level back to normal, he hasn't taken in enough to permit him to do heavy physical activity."

Mr. Saunders then questioned Commander Fisher as to whether there were any residual effects after having taken the sugars or glucose to address the problem of the reaction.

Answered, at line 14 at page 321, Some patients, in fact, after they have had a severe hypoglycemic episode, will tell you that they really don't function well, perhaps, for the rest of the day, perhaps even into the next day, if it's been a very severe reaction."

Mr. Saunders then directed his Examination in Chief to questions as to the medical facilities that are available in units of the Canadian Armed Forces. Then at line 23 on page 321, poses the following question:

Question: "Okay, and refer to evidence that on destroyers, for example, they have a medical assistant. Now, in your opinion, Doctor, are the medical facilities available on a destroyer sufficient to address the problems that an insulin-dependent diabetic could face?"

Answer: "Unfortunately, they are not" and then Commander Fisher proceeded to explain why on page 322 at line 20, which state as follows, "Now, depending on where that destroyer is, he may be able to have access to a doctor instantly, in hours or in days, again, it's not just the doctor, because even if, by coincidence, I was aboard the destroyer -- and I have certainly looked after a lot of diabetics and have the expertise, myself, but I would not have the equipment to be able to manage it well." Mr. Saunders then directed his attention to field units, army units that are deployed in the field, and questioned Commander Fisher as to whether or not they have facilities to treat an insulin-dependent diabetic if he was to suffer the type of acute complications

that had been discussed by Doctor Fisher in her previous testimony. Commander Fisher indicated that no unit forward or field hospital would in fact have all the necessary things available and gave a recent example of the conflict in the Falkland Islands. At page 329 of the Transcript, Mr. Saunders took up the matter of foot care and questioned Commander Fisher as to importance and Commander Fisher answered at line 3, "Foot care is very important for a diabetic. The human anatomy is such that one of the most vulnerable circulations is to the foot, and so that because a diabetic's white cells may not function normally, and he may also have some skin difficulties, even a small foot problem can go out of control." Further on in her testimony, at line 15 Commander Fisher stated, "Diabetics are taught that they should keep their feet clean and dry. one of the things that sounds trivial, until you have seen the results of it, is they are taught how to cut their toenails so that they don't injure their feet while cutting their toenails." Questioned as to whether she could see any problems as far as service in the field unit in the Canadian Armed Forces were concerned in relation to foot care, Commander Fisher stated at line 25, "They are always problems in terms of the care of feet in the field.... Any combat arms soldier is taught to carry with him spare socks in his pack and to change his socks frequently. This is important for every one but for a diabetic, it's just that much more important."

Questioned as to working conditions and the relationship to diabetics, the relationship between cold weather and diabetics Commander Fisher stated on page 330 at line 20, "Yes. The diabetic has to make more adjustments to his diet and his insulin to be able to work in a cold environment than a non- diabetic.

Turning to the question of shift work and whether or not shift work constitutes a problem for a diabetic, Commander Fisher stated on page 331 at line 7, "Yes, it does. It's a problem that can be dealt with. A diabetic, providing he has good control and a good understanding of his disease, can work shift. The difficulty comes not simply in working the shift as in changing from one shift to another, so that if you work a cycle where you work days for a month, nights for a month, evenings for an month, the diabetic can adjust his diet and his insulin injections and do that without major difficulties. Certainly after the first once or twice he has done it, he can do it himself..... However, if you get to the other extreme and work a shift that, unfortunately, is not uncommon in the military, where you work two evenings, two nights, two days and then are off for two days, that kind of constant change is extremely difficult for anyone, and a diabetic is very likely to have problems with that constant a change". Questioned as to what type of problems Commander Fisher answered at line 25, "Either unexpected hypo or hyperglycemic episodes as he is readjusting his mealtime and his injection times."

Mr. Saunders then turned his attention to the question of whether or not diabetics who are insulindependent are capable of heavy physical work and Commander Fisher answered in part on page 332 at line 5, "Yes, they are, providing that they have some control over the time at which they are going to do it and also have access to an appropriate food and can stop, if necessary, during it to eat again." And further on Commander Fisher states at line 12, "A diabetic can do almost anything he wants providing he can anticipate and control, but he must be able to both anticipate and control." Questioned as to the meaning of control in this context, Commander Fisher answered, "The simple matter of being able to get food, ... The simply matter of being able to stop long enough to eat it... The ability to pace himself instead of being dictated to by someone else's pace."

At page 334 of the Transcript at line 15, Commander Fisher states, "Certainly I feel that a diabetic is unfit sea duty, unfit field duty, unfit isolation."

Commander Fisher's attention was then drawn to Tab 12 of Exhibit R8 which contains excerpts from the Physicians' Guide To Driver Examination. Dealing with the part of publication which deals with metabolic diseases Commander Fisher indicate that the publication subclassifies first and first of all says since a diabetic who is controlled by diet or oral medication can drive any motor vehicle. The Publication then goes on to talk about what is more relevant. In this case, applicants who require insulin. If they are under good control and are not subject to hyperglycemic reaction, they can drive private and light commercial vehicles. However, they are always forbidden to drive passenger vehicles or heavy commercial vehicles. At line 8 on page 340, Mr. Saunders posed the following question to Commander Fisher:

Question: "If I can just read from Tab 9 of Exhibit R- 3, that is the occupational specification for a supply Technician. It says that a Supply Technician should drive and operate the following vehicles, a standard commercial vehicle up to three tons and a standard military pattern vehicle up to five tons. A further question by Mr. Saunders at line 21 of page 340.

Question: "In your opinion, Doctor, would an insulin- dependent diabetic be given a license to operate such a military vehicle?"

Answer: "No. He would not and he would not be given a civilian license to drive the equivalent vehicle".

At page 343 of the Transcript, Doctor Fisher referred to a publication entitled "Physicians Guidelines for Employment and Placement of the Diabetic in Industry and at line 16 of the same page of the transcript indicated that these guidelines divide diabetics into four categories and relate their employment into which category they fall. Commander Fisher stated that Diabetics treated by diet alone are capable of performing any job for which they qualify. Treated with oral agents or category two any job for which they are qualified. Commander Fisher then stated at line 24 and I quote, "When you get to treatment with insulin though, they make some statements about restrictions.

Restriction (a) "Restricted from assignments where it is difficult or hazardous to stop operation in order to treat even a mild reaction or both. Diabetics who require insulin should not work where an unexpected insulin reaction might cause injury to themselves or others."

At page 344 at line 17, Commander Fisher also stated, and I quote, "They then actually talk about shift, at item C, saying, "Frequent shift changes or split shifts may be undesirable if interfering with control."

At page 345 of the transcript, Mr. Saunders asked of Commander Fisher whether or not she was present throughout the hearing and had an opportunity to hear the testimony of Mr. Gaetz and that of the respondent's witnesses and upon being answered in the affirmative, Mr. Saunders asked Commander Fisher whether or not she had formed an impression of the type of work that a Supply Technician working in the Canadian Armed Forces is required to do. Upon being

answered in the affirmative Mr. Saunders then asked Commander Fisher whether or not she had any opinion as to whether or not an insulin- dependent diabetic should work as a Supply Technician in the Canadian Armed Forces.

Commander Fisher's response is contained in line 23 of page 345 : Answer: "The difficulty comes not with his occupational activities as much as with his military duties and with the environment in which he must work. If you could guarantee that he would be in one of the very restricted jobs, then he would be capable of doing it, but he would not be capable of doing all the jobs in the supply field."

Question: "Now, would he be capable of doing Base Defence Force, for example?"

Answer: "In my opinion, an insulin- dependent diabetic is not capable of being on Base Defence Force, because there is no warning that the Base Defence Force is going to be activated, there is no preknowledge of the length of time it's going to be required, and there is no knowledge in advance of the type of physical activity that's going to be required."

Question: "And madam, in wartime conditions, in your opinion, would a diabetic be capable -- insulin- dependent diabetic be capable of fulfilling the functions of a supply technician?"

Answer: "He would be capable of -- at third - or fourth line support but not forward to that, meaning that he would not be able to perform those duties in the field or at sea or under certain deployment conditions with the Air Force."

At this stage Mr. Saunders' examination ended and cross- examination of Commander Fisher was taken by Mr. Duval. Mr. Duval cross- examined Commander Fisher at length and at various points raised some interesting questions which to a minor extent caused Commander Fisher to qualify some of her answers. However, I would stress that the qualifications are only minor in nature and would stress that despite a vigorous cross- examination by Mr. Duval which displayed he is more than knowledgeable of the conditions and consequences of the problems of being an insulin- dependent diabetic, he did not in any significant way change the main crux of the testimony of Commander Fisher.

After a brief re- examination of Commander Fisher by Mr. Saunders, Mr. Duval was given an opportunity to present rebuttal evidence and after a brief recess indicated to the Tribunal that he would not be calling reply evidence and made a motion to adjourn the Tribunal to a later date for final submissions at a time when the transcript of the case would be available. In spite of some objection on the part of Mr. Saunders, the Tribunal felt that the principals of natural justice and fairness dictated that an adjournment was in order so that Counsel would have time to properly prepare final submissions. This adjournment was granted in part, because to quote Mr. Duval on page 405 at line 13, "First of all, this has been a rather long case but a complex and a scientific one on the one hand. On the other hand, this case will settle the issue of the employability of a diabetic in the Canadian Armed Forces. So, this case is going to have tremendous consequences on the employability of a good number of people."

Upon the resumption of the Tribunal in Ottawa on September 28, 1988, final submissions were made by Counsel for the Commission and the Respondent.

Mr. Duval developed his argument on three different points. The first point was to review the evidence of Mr. Gaetz, the second was the law applicable to the type of Defense raised by the Respondent and the third point was the evidence led by the Respondent in support of the B. F. O. R. Mr. Duval rightly stated that the real issue in this matter was whether or not the D. N. D. had established a B. F. O. R. defense pursuant to Section 14 of the Act.

Mr. Duval then proceeded to review the evidence of Mr. Gaetz and raised the issue as to whether or not the decision to discharge Gaetz was well- founded or not, in essence what was the state of Mr. Gaetz' health at the time of the decision being made to grant him a medical discharge.

Mr. Duval contended that the B. F. O. R. defense is a statutory one as is provided for in Section 14(a) of the Canadian Human Rights Act and that the burden lies upon the Respondent to establish such a defense.

References made by Mr. Duval to the classic case decided by the Supreme Court, Ontario Human Rights Commission vs. Borough of Etobicoke (1982), 1 S. C. R. 202 and to the burden and degree of proof set out at page 208 of the case where it is stated:

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

Mr. Duval elaborated on the case further in relation to subjective and impressionistic evidence and again quoted MacIntyre J. at page 212

"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 firefighting, to the effect that firefighting is "a young man's game."

Mr. Duval submitted that a good deal of the evidence in this case was based upon such evidence and submitted that this type of evidence wasn't what the Supreme Court had in mind in the Etobicoke case. As to the type of evidence needed Mr. Duval referred to the most quoted excerpt in Etobicoke, found at page 208 as follows;

"To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, 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."

The first portion of the above passage establishes the so-called subjective portion of the test and the underlined portion establishes the objective test.

Mr. Duval conceded that the Respondent had met the subjective portion of the test and focused on the objective portion. Reading from the testimony of Doctor Fisher at page 345, Mr. Duval submitted that there is no question that Mr. Gaetz could perform this job as effectively and economically as everyone else and submitted that the problem that the Canadian Armed Forces had is with the risk that the Complainant endangers himself and others involved in teamwork as soldiers.

At this stage it appeared to the Tribunal that Mr. Duval had capsulized the whole issue pursuant to the Tribunal.

Mr. Duval indicated that the criteria of efficiency and economical performance were not problems for the Respondent and argued that the whole problem was the risk factor to the Complainant himself and to fellow soldiers and his employment as a military person. Counsel for the Commission indicated both the subjective and objective parts of the test in Etobicoke have been met and that the economical and efficient performance portion were not in dispute, leaving only the risk factor to be dealt with.

After quoting from MacIntyre J. at 209 in Etobicoke, Mr. Duval conceded that, "In speaking of the Armed Forces, we speak of the concern which is much more a safety one than an economical one," and submitted that in cases involving the public safety blanket exclusions may be permissible and argued that the case before the Tribunal was a case of blanket exclusion by virtue of the fact that diagnosis as a diabetic results in a downgrading of medical criteria which, in most cases, results in a person either being released from or being denied employment with the Armed Forces.

On the question of blanket exclusion, Mr. Duval quoted the case of *Air Canada vs. Carson* (1985) 6 C. H. R. R. D/ 2848 (Fed. C. A.) at page D/ 2855:

"According to the American test the first prong in the employer's burden of proof is to show that the BFOR it invokes is reasonably necessary to the essence of its business; this is the risk- safety element and could be satisfied by proving that the maximum hiring- age requirement is reasonably necessary for public safety, which is admittedly of the essence of an air carrier's business".

Mr. Duval did not dispute the fact that safety is of the essence of the business of the Armed Forces. Quoting again from Carson;

"The second prong is for the employer to show that it has reasonable cause for believing that all or substantially all persons within the class would be unable to perform the duties of the position safely and effectively....."

Mr. Duval contended that the Respondent had to discharge his burden in order for the Tribunal to rule in their favour and it was his contention that the Forces had not met this burden and that they did not establish that all or substantially all diabetics cannot be Supply Technicians in the Armed Forces. Mr. Duval then proceeded to review the evidence with the view to demonstrating that the Forces had not discharged this burden.

After an exhaustive review of Doctor Fisher's evidence Mr. Duval posed the question of whether or not the Respondent had discharged its duty to satisfy the Tribunal that it is B. F. O. R. for the Armed Forces to insist that service people not be afflicted with diabetes mellitus. It was contended by Mr. Duval that the evidence led did not produce the degree of conviction that the Supreme Court had in mind when they said that the Respondent had the burden of establishing defense on a balance of probabilities that the medical evidence called, because of the numerous qualifications that were made, because of the supporting data, which was not scientific in the sense of Etobicoke and that he contended that it was clear from Etobicoke that something more than a subjective opinion albeit an opinion professed by an expert, is needed, and that the mere fact that some evidence has been labelled as being expert evidence does not automatically entail a judgement in their favour if it shown that the scientific evidence is not scientific in the sense of Etobicoke.

Turning to question of damages Mr. Duval submitted that should the Tribunal find in favour of the Complainant that a sum of money be awarded for hurt feelings, as well as loss of salary, and, finally, that the Tribunal make an order that Mr. Gaetz be reinstated subject to his passing the non-discriminatory requirements of the Canadian Armed Forces.

In opening his final summation, Mr. Saunders prefaced his opening remarks by acknowledging that the Respondent did not dispute that the condition of diabetes, in particular the condition of being an insulin-dependent diabetic, is a disability within the meaning of the Canadian Human Rights Act. The Respondent's position with both aspects of Mr. Gaetz' complaint is that his release and the procedure of releasing insulin-dependent diabetics from the occupation of Supply Technician was based upon a bona fide occupational requirement under Section 14(a) of the Canadian Human Rights Act.

Mr. Saunders stated the issue as being "Was it a bona fide occupational requirement that persons employed as Supply Technicians by the Canadian Armed Forces should not be insulin-dependent diabetics?"

Mr. Saunders pointed out that throughout his argument Mr. Duval referred in general term to diabetics and a blanket exclusion of same, and pointed out that the present case deals solely with those insulin-dependent diabetics who wish to be in the occupation of a Supply Technician in the Canadian Armed Forces. Mr. Saunders touched briefly upon the testimony of Captain Martin with reference to the individuals released who were insulin-dependent diabetics and pointed out that four were treated by oral medication and the remainder were retained for compassionate reasons.

Mr. Saunders indicated that he would examine three points in his argument, i. e. (1) the legal principles and case law, (2) the law and facts in light of these principles and (3) the issue of damages in the event of a ruling against his position.

Mr. Saunders agreed that the onus is on the employer to establish a bona fide occupational requirement on the balance of probabilities and referred to the statement by Mr. Lederman in the Rodger's case to the effect that where there is an element of problem safety involved that the standard may be somewhat lower than the normal civil standard. Having said that, Mr. Saunders submitted that the Respondent had met the ordinary civil burden in the present case and further contended that the subjective element of the BFOR test was not an issue.

Mr. Saunders contended that Mr. Duval rightfully concentrated upon the latter aspect of the objective test, that is the question of the risk element. It was his view that the risk element would not be divorced from efficient and economic performance and stated that a medical restriction in the form of a requirement that a person not be an insulin- dependent diabetic can amount to a B. F. O. R.

Mr. Saunders argued that a medical restriction can amount to a B. F. O. R. where it reduces or eliminates a real risk to the employee, fellow employees or the public and raised the question as to what constitutes "a real risk". It was his submission that the cases show that a real risk need only be a possibility so long as that possibility exists and that it must be something more than hypothetical.

Mr. Saunders stated the obvious in that an occupational requirement exists for an occupation and is not limited to an individual. In his words, "If the requirement exists for the occupation that you not be an insulin- dependent diabetic, then that is for everyone?"

Dealing with the Etobicoke case, Mr. Saunders referred to Justice McIntyre's comment at page 209 that where public safety is involved the Courts can consider the risks of unpredictably and pointed out that in the present case, the evidence showed that there was a risk of unpredictable failure on the part of those who suffer the condition of being an insulin- dependent diabetes.

Quoting from Etobicoke at page 210 it states, "that 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.... In this case, Mr. Saunders stated that the concept of sufficient risk would be elaborated upon. Referring to Mr. Duval's comments about impressionistic evidence being given by Captain Martin and Chief Warrant Officer Muise, Mr. Saunders rebutted this and stated that their evidence was as to job requirements and pointed out that Dr. Fisher was the scientific expert.

Continuing on the concept of sufficient risk as raised in the Etobicoke case, Counsel for the Respondent then turned to the Bhinder case and the Mahon case which elaborate further upon that phrase. Mr. Saunders submitted that in effect, what the Court said in the Bhinder case was that a limitation on restriction which reduces the risk, even if it's only by a very small amount can constitute a bona fide occupational requirement, and that once a finding is made to support a

bona fide occupational requirement it is necessary to determine whether there is any consequence of discrimination which is a requirement for the occupation as a whole.

Bhinder vs. Canadian National Railway Company, (1985) 25 S. C. R. 561 involved the case of a practicing Sikh who refused to wear a hard hat because of his religion, and the Court found the requirement of wearing a hard hat was a B. F. O. R. except in so far as Mr. Bhinder was concerned as Bhinder would suffer only a slightly greater risk of injury than if he wore a hard hat and there would be no greater dangers to others, only to Mr. Bhinder.

Quoting from Bhinder at page 588, Mr. Saunders stated that the Court held that once you find the matter is a bona fide occupational requirement, it is necessary to determine whether there is any consequence of discrimination which is a requirement for the occupation as a whole. Quoting again from Bhinder, the requirement

". . must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. It is, by its nature, not susceptible to individual application."

Mr. Saunders continued with the concept of sufficient risk, albeit a very small amount and referred to the case of Mahon v. Canadian Pacific Ltd., (1988) 1 F. C. 209 (C. A.) revising (1986) (C. H. R. R. D/ 3278 (C. H. R. Trib.) and cited it as one of the leading cases on the issue of insulin-dependent diabetes. The Tribunal is familiar with that case and as Mr. Saunders pointed out, Mr. Duval was counsel on that case.

The Mahon case involved a situation where Canadian Pacific refused to hire Mr. Mahon as trackman because he was an insulin-dependent diabetic and the evidence in that case was very similar to the evidence before the Tribunal. Pratte, J. Stated at page 214 in Mahon as follows:

"A severe neuroglycopenic reaction is normally preceded by a mild reaction. That is not invariably the case. It may sometimes occur without warning."

In the next paragraph: "There is always a possibility, however, that even a stable diabetic will, on occasion, experience, mild hypoglycemic reactions; there is also a possibility that a stable diabetic may experience a sudden severe neuroglycopenic reaction."

Mr. Saunders submits that the same evidence applies in the present case and argued that the court in the Mahon case was looking at a possible risk. The Tribunal in Mahon originally held that where the risk was real though marginal, applied the Etobicoke sufficient risk concept and held the risks weren't sufficient; that when it affects society, had to take certain risks.

At the Federal Court of Appeal level the Court phrased the issue as follows at page 212:

"Was it a bona fide requirement that persons employed as trackmen by Canadian Pacific Limited should not be insulin dependent diabetics?"

Pratte, J. found error with the Tribunal and stated at page 218. That the Tribunal erred in failing to take into consideration the possibility that Mr. Mahon might not at all times have sugar with him.

Mr. Saunders referred to the evidence of Mr. Gaetz in the present case and argued, in line with the reasoning of Pratte, J. that all risks have to be taken into account, and referred to Mr. Gaetz's testimony that he did not always carry sweets with him.

At page 221 of Mahon the Court considered whether the possibility of a reaction was sufficient to constitute the sufficient risk mentioned in the Etobicoke case and further elaborated upon by Bhinder and stated:

"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 a serious damage to the public at large must be said to be a bona fide occupational requirement."

Mr. Saunders argued that in light of the above quote that once it is established that if a policy of not employing insulin-dependent diabetics is reasonably necessary to eliminate a real risk of serious damage or harm, then a defense is made out.

Quoting again from Mahon and the concurring decision of Justice Marceau and the proper approach to be taken in considering the meaning of a sufficient risk at page 226, "... is to look into the duties to be performed and the condition demanded for their proper performance", Mr. Saunders submitted that the evidence of Lieutenant-Colonel Tattersall, Major McMenemy, Captain Martin, and Chief Warrant Officer Muise contrasted the requirements against the capabilities and limitations of the class of person affected, i. e. insulin-dependent diabetics as a group, working as Supply Technicians established that the possibility of a real risk existed, and therefore, a bona fide occupational requirement was established. Mr. Saunders cited also the case of Manitoba Human Rights Commission et al v. Baker Manufacturing Ltd. (1984), 7 C. H. R. R. (Man. Q. B.) and referred to a comment at paragraph 25208 which he considered worthy of note.

"No employee has the right to risk serious injury to himself, and no employer should be required to employ someone whose physical condition subjects him to the risk of more than trivial injury."

Mr. Saunders then proceeded to apply the facts of the case to the law as he understood it to be by reviewing the evidence of the Respondent's witnesses in some detail and related the testimony as to the duties of a Supply Technician in the Canadian Armed Forces in the context of how they would be effected by a person who was an insulin-dependent diabetic.

Returning to his original question, "Was it a bona fide occupational requirement that a person employed as a Supply Technician not be an insulin-dependent diabetic", he submitted that the answer was in the affirmative.

The matter of damages was dealt with by Mr. Saunders and the Tribunal took note of his arguments. Upon conclusion of Mr. Saunders submissions, Mr. Duval exercised his right to reply.

At the conclusion of final submissions, I rendered an oral decision wherein I concluded that the Complainant had established a prima facie case and that the Respondent had rebutted that prima facie case. I based that decision upon the case law as I understand it to be, upon the provisions of the Act, and upon the evidence that was led by both sides.

In support of my initial decision, I intend to review the following points, (1) the provisions of the Canadian Human Rights Act, (2) the case law as I understand it to be, and (3) the facts of this case in light of the Act and the law.

I. Section 7 of the Canadian Human Rights Act provides as follows:

"It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ an individual; or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."

Prohibited grounds of discrimination are described in Section 3(1) of the Act and include race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted.

The ground for the Complaint in the present case alleges that the discriminatory action was based upon disability, i. e. diabetes. See Complainant's Exhibit C-1.

Section 10 of the Canadian Human Rights Act is also relevant. It provides:

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

(a) to establish or pursue a policy or practice, or that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination".

The Canadian Human Rights Act, while prohibiting discrimination as defined in Sections 7 and 10, also provides that discrimination is permissible in certain circumstances as set out in Section 14 (a) of the Act which reads as follows:

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

These then are the legislative provisions which must be applied in the present case.

II. The case law in the present matter before the Tribunal is dealt with in a number of leading cases which I propose to outline herein. I will first list the cases which appear applicable in this instance;

- (1) Ontario Human Rights Commission vs. Borough of Etobicoke (1982), 1 S. C. R. 202.
- (2) Bhinder vs. Canadian National Railway Company (1985), 25 S. C. R. 561.
- (3) Mahon vs. Canadian Pacific Ltd. 1988 1 F. C. 209 (C. A.) revising 1986 (C. H. R. R. D/ 3278 (C. H. R. Tribs).
- (4) Air Canada vs. Carson (1985) (C. H./ 2848 (Feb. C. A.).
- (5) Rodgers vs. Canadian National Railways (1985) 6 C. H. R. R. D/ 2899 (C. H. R. Trib.)
- (6) Manitoba Human Rights Commission et al vs. Baker Manufacturing Ltd. (1984), 7 C. H. R. R. (Man. Q. B.)
- (7) Nowell vs. Canadian National Railways Ltd. (1986), 8 C. H. R. R. D./ 3727 (C. H. R. Trib.)

The Case of Ontario Human Rights Commission VS. Borough of Etobicoke (supra) sets out the test for establishing whether any refusal or exclusion in relation to any employment is a bona fide occupational requirement. In speaking for the Court Mr. Justice McIntyre held:

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

At page 208 of the Etobicoke case McIntyre stated that the burden of proof is upon the employer and further stated that, "The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities."

At page 210 of Etobicoke it is stated 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. At the same page in Etobicoke reference was also made to "impressionistic" evidence as opposed to scientific evidence. In Bhinder vs. Canadian National Railway Company (1985) 25 S. C. R. 561, the Court held that the Tribunal finding that the hard hat rule was reasonable and promoted safety by reducing the risk to others and that the risk faced by Bhinder in wearing a turbarl rather than a hard hat was increased, though by a very small amount and in effect concluded that limitation or restriction which

reduces the risk, even if its only by a very small amount can qualify as a bona fide occupational requirement.

McIntyre, J. went on to state: "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 to hold the occupation. It is by its nature, not susceptible to individual application".

Mahon vs. Canadian Pacific Ltd. 1988 1 F. C. 209 (C. A.) revising 1986 (C. H. R. R. D/ 3278 (C. H. R. Trib) is perhaps the classic or at least the leading case in relation to the issue of insulindependent diabetes. In that case, Pratte, J. stated at 221;

"The decision of the Supreme Court of Canada in Etobicoke is authority for the proposition that a requirement imposed by an employer in the interest 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 a serious danger to the public at large must be said to be a bona fide occupational requirement."

Marceau, J., in looking at the meaning of sufficient risk as referred to by McIntyre, J. in the Etobicoke case, stated at 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 speculation. in other words, the "sufficiency" contemplated refers to the reality of the risk not its degree." Marceau concluded at page 226, and I am paraphrasing, that the proper approach is to "... look into the duties to be performed and the conditions demanded for their proper performance."

The case of Air Canada vs. Carson (1985) 6 C. H. R. R. D/ 2848, (Feb. C. A.) dealt with the question of blanket exclusions. At page 235, MacGuigan, J., outlined the American test in which the first prong in the employers burden of proof is to show that the B. F. O. R. it invokes is reasonably necessary to the essence of its business and the second prong which required the employer to show it has reasonable cause for believing that all or substantially all persons within a class would be unable to perform their duties safely and effectively.

In the case of Rodger vs. Canadian National Railways Ltd. (1985), 6 C. H. R. R. D/ 2899 (C. H. R. Trib.), Lederman states at paragraph 23660:

"It is clear that when there is a public safety element involved, the burden on the employer is lower than the ordinary civil standard."

At paragraph 23674, Lederman states: "Although society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped.

Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adopted to the circumstances of each individual case."

In Manitoba Human Rights Commission and Loveday vs. Banker Manufacturing Ltd. , the Court dismissed an appeal from a Board of Adjudication decision that a lack of back problems was B. F. O. R. for warehouse work. Although the requirement had to be "real and substantial" the degree of danger to the Complainant himself was a sufficient risk and stated at paragraph 25208.

"No employee has the right to risk serious injury to himself, and no employer should be required to employ someone whose physical condition subjects him to the risk of more than trivial injury."

The case Nowell vs. Canadian National Railway Ltd. (1986) 8 C. H. R. R. D/ 3727 (C. H. R. Trib) was a case involving an insulindependent diabetic and was different from the Bhinder case in that the facts in Nowell concluded that there was no individual assessment of the condition of the Complainant by Canadian National.

In applying the law as I understand it to be to the facts as I understand them to be, I am of the firm opinion that although the Complainant had established a prima facie case of discrimination under the terms of the Canadian Human Rights Act, I am also of the firm opinion that the Respondent had satisfied the burden imposed under Section 14(a) of the Act.

I also find that the burden of proof required is that stated in the Rodger case. That same burden of proof is more fully elaborated upon in the Etobicoke case.

I further find that both the subjective and objective portions of the Etobicoke test had been met by the Respondent. Mr. Duval was correct when he conceded that; "In speaking of the Armed Forces, we speak of a concern which is much more a safety one than an economical one."

The matter of blanket exclusion was properly addressed in the Air Canada vs. Carson case, and the evidence in the present case, particularly that of Captain Martin and Chief Warrant Officer Muise indicated that, although the primary factor of the Armed Forces was in relation to its military aspects, there is also an over-riding obligation upon the forces and, those who serve therein to carry out their various roles in a safe and effective manner. Safety flows not only from and to fellow members within the Forces but also to the public at large.

I am in full agreement that the present case does not deal with diabetics in general, and accept that the present case concerns only those persons who are insulindependent diabetics who wish to serve as Supply Technician in the Canadian Armed Forces.

In the circumstances of the present case I am satisfied that the medical restriction placed upon Mr. Gaetz qualified as a bona fide occupational requirement and that the " real risk factor" in this case is more than a possibility and is certainly more than a hypothetical one. I am satisfied that the present case falls well within the parameters of the Etobicoke and Bhinder cases.

With the utmost respect to Mr. Duval, I cannot accept his implied suggestion that the evidence of the Respondent's witnesses was "impressionistic". The evidence of Captain Martin and Chief Warrant Officer Muise was directly related to the job requirements of the occupation of Supply Technicians in the Armed Forces and the context in which those requirements were necessary to the proper and safe conduct of that occupation not only to the individual but to those employed with him and to some extent the public at large.

The statement by Lederman at paragraph 23674 of the Rodger case, at the last paragraph of that page, must be kept in mind. This is even more so when it is realized that the only scientific evidence in the present case was that of Commander Fisher, recognized by Counsel for both sides as a medical expert. I am satisfied that the evidence was not rebutted in any meaningful way and accept her evidence in its entirety.

I am strengthened in my finding by the comments of Pratte, J. and Marceau in Mahon vs. Canadian Pacific Ltd. (supra) that society and the employer are not obligated to take certain risks. The duties of a Supply Technician in the Armed Forces must be looked at in the context of the duties to be performed and the conditions demanded for their proper performance.

The evidence presented throughout the hearing indicated that the Complainant could even well be a risk to himself and others and the passage from the Loveday case (supra) must be borne in mind in that content.

The critical matter in the present case, and one that must not be overlooked, is that Mr. Gaetz was employed as a Supply Technician in the Canadian Armed Forces, i. e. in a military context as opposed to a similar position with the Department of National Defence, i. e. in a civilian capacity.

Commander Fisher testified as to the need for an insulin- dependent diabetic to be able to anticipate and control, to be able to work at his own pace rather than being dictated to at someone else's pace. In a military context the evidence leads to the conclusion that this cannot be achieved.

Perhaps the most telling comment in all of the testimony addressed aside from the medical evidence, is the one found at page 157 of the transcript in the testimony of Major McMenemy as follows, and I quote, "When the Army goes to the field, the philosophy of the Army is, if you are in the Army, you are a soldier."

Considering all of the above, and after careful and deliberate consideration of the law, the facts and the provisions of the Canadian Human Rights Act, I must conclude that the Complainant fails in his case.

DATED at Westville, this 3rd day of November, A. D., 1988.

(signed by) S. Charles Facey