CV 03804

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROYAL OAK MINES INC.

Appellant

- and -

STEVE PETERSEN

Respondent

REASONS FOR JUDGMENT

1 The respondent is a former employee of the appellant mining company which operates the Giant Mine in Yellowknife. In August 1991 he was one of a group of employees who were laid off for economic reasons, i.e., their positions were declared redundant. The respondent attempted to bump into two other positions at the mine pursuant to his "bumping rights" under the collective bargaining agreement. The company refused to employ him in either of those positions. The respondent made a complaint under the Fair Practices Act, R.S.N.W.T. 1988, c.F-2, alleging discrimination by the appellant, i.e., that the appellant had refused to employ him because of his disability. Subsequently the Minister of Justice of the Northwest Territories made an order pursuant to the Fair Practices Act in which he found that the appellant had discriminated against the respondent and in which he directed the appellant to pay compensation to the respondent and to take other remedial steps as specified in the order. The appellant

appeals from the Minister's decision.

2 The statute provides that the appeal from the Minister's decision be heard by a trial de novo. Accordingly, the Court heard evidence presented by both parties and reserved judgement on the appeal. These are the reasons for allowing the appeal.

FACTS:

3 An agreed statement of facts was filed on consent. In addition, the Court heard viva voce testimony of witnesses called by both parties. Where there was a conflict in testimony, the Court has made findings of credibility. Further, at the request of the parties, the Court viewed two areas at the minesite (the mill and the C-Dry) pursuant to Rule 269 of the Rules of Court.

4 The respondent commenced his employment at Giant Mine in 1984 and at various times in the period 1984-88 held the positions of labourer, flotation operator, roaster operator, crusher operator and carbon strip operator. In July 1988 he became ill and was subsequently diagnosed as having transverse myelitis, a form of paralysis caused by an inflammation of the spinal cord. The cause of this condition has not been determined. The respondent is of the view that the origin of his illness may be work-related. The Workers' Compensation Board has ruled against him in that regard; however, he says he is still pursuing an appeal of the Board's decision.

5 The respondent was off work from July 1988 to August 1990 and for much of that time was confined to a wheelchair. From an initial state of paralysis from the chest down, he made a remarkable recovery in the years 1989 and 1990. This he achieved through rehabilitation programs, physiotherapy treatments and a great deal of personal determination. When he returned to Yellowknife in mid-1990 he did not bring his wheelchair with him. He was walking with the aid of two canes, later one cane, and still later, without any cane or support.

6 In May 1990 he contacted the employer and stated that he was able to return to work. In June 1990 he was told he could return to work in the position of dryman. The dryman is a janitorial position in the "C-dry" which is the part of the above-ground operation of the mine where the underground miners dress and undress for work. The duties of the dryman consist of maintaining the miners' lamps and other equipment; cleaning out the lockers, showers, changing areas; handing out keys to lockers and washing down the floors in the "C-dry" building. The dryman position is considered to be the least onerous or physically demanding position at the minesite with the exception of clerical/secretarial positions.

7 In June 1990 the respondent was requested to submit to a medical examination before returning to work. He was examined by Dr. Bhatla. In his report to the company Dr. Bhatla stated:

> **"... On examination he can walk fairly steadily so long as he is not rushed and is not required to quickly pivot to one side. He is able to slowly walk upstairs without the use of a handrail. For walking downstairs, however, he does require handrail use. His muscle strength is adequate for him to tip-toe, but he cannot hop or jump.**
>
> **The bottom line is that I feel that Mr. Petersen may do work that involves walking around but not if it requires quick shifts of movement or heavy lifting. Obviously he cannot work underground or in the mill..." (Exhibit 3)**

8 By letter dated August 30, 1990 the respondent was formally offered the position of dryman. The letter stated, in part:

> **"... Because this is your first job since your illness and considering your remaining disability this job will be a test of your capabilities. It is my opinion and desire that you can and will meet the demands of the job. I can assure you that I will make every reasonable effort to modify the job so that no unreasonable physical demands are made upon you. However, should the requirements of the job exceed your present physical capabilities then you will have no alternative but to return to your present status..."**
>
> (Exhibit 6)

9 The respondent worked satisfactorily in the dryman position from August 30, 1990 to August 23, 1991 (the date of his lay-off). Throughout this period there were no complaints regarding his job performance. The employer made one accommodation for him, i.e., the purchase of a "pressure" washer to facilitate some of the cleaning chores; however, this is not that significant inasmuch as other drymen also used the new washer and continue to use it as standard equipment on the job. During the course of performing

his duties he was seen to move slowly and to walk with a limp. One witness testified that it was readily noticeable that he had problems with his balance. On occasion he used a cane when walking to or from the parking lot when the ground was slippery.

10 In November 1990 the appellant company purchased the Giant Mine from the previous owner. Michael Werner the general manager testified that the purchase was made in the course of the bankruptcy or receivership of the previous owner, and at the time the mine was operating at a loss. As new owner the appellant company was determined to operate the mine at a profit and consequently made some changes. Some management staff were terminated and there were lay-offs within the bargaining unit.

11 On August 23, 1991 three dryman positions were declared redundant. Because the respondent was the "junior" dryman, he received a letter notifying him of his lay-off. On the present appeal it was not disputed that the lay-off was for economic reasons only. In its lay-off letter the employer confirmed the respondent's bumping rights:

> **"... You may have sufficient seniority and experience to exercise your rights under the Collective Bargaining Agreement to relocate to another job within the company. If you wish to exercise your bumping rights you must complete the attached form and return it in person to the Human Resources Department by 4.30 p.m. on August 29, 1991 ..."** (Exhibit 8)

12 On August 28, 1991 the respondent provided written notice to the appellant that

he wished to exercise his bumping rights with respect to either of two positions in the mill --- roaster operator or flotation operator. The respondent had occupied both of these positions in earlier years prior to his illness. He was aware that the incumbents in those positions had less seniority than he did. His written notice to the employer stated that he was capable of performing either position and that he wished to be so employed "providing I am the most senior employee capable of performing the position". (Exhibit 10).

13 The appellant's management staff considered the request and determined that the respondent was not physically capable of performing either job in the mill. The general manager Michael Werner made the final decision in this regard, however he also had input and advice from Kim Cornwell (Supervisor of Human Resources), Dave Power (the respondent's supervisor at the time in C-Dry) and Gary Halverson (the supervisor in the mill at the time). The documents in the respondent's file were also examined. These documents included Dr. Bhatla's reports of June 1990 and July 1990.

14 The mill at the Giant Mine is almost fifty years old and does not appear to be modernized or automated to any significant degree. Within the mill are many major pieces of equipment, e.g. crushing plant, grinding plant, flotation machine and roaster. It is a noisy crowded place with a myriad of walkways on various levels, stairs, ladders, etc. The walking space and headroom are quite cramped in places. On the court's view of the mill, it could be seen that the "circuits" performed by the roaster operator and the flotation

operator require a significant amount of lifting, and that the operator is constantly going up or down stairs or a ladder.

15 The evidence indicates that in reaching their decision on August 28, 1991 that the respondent was not physically capable of performing either job in the mill, management staff took into consideration the following:

a) Dr. Bhatla's reports of June 1990 and July 1990,

b) management's observations of the respondent's physical abilities in the performance of the dryman position, and

c) management's knowledge of the physical requirements of the two positions in the mill.

16 Mr. Werner's testimony was that they were concerned that the respondent would be unable to safely manoeuvre in the cramped quarters, to negotiate the many stairs and ladders, to do the necessary lifting, and that he would pose a risk to himself. Further, they were concerned that he would be unable to react quickly to an equipment breakdown or other emergency and would thereby jeopardize the mill's operations.

17 While the evidence indicates that management staff discussed these matters prior to August 28 with knowledge of the respondent's seniority status and in anticipation of his exercise of bumping rights, I am satisfied that the final discussions and the actual

decision to refuse to employ him in either of the requested positions occurred on August 28. By letter of that date, Kim Cornwell advised the respondent of the company's decision:

> **"This is to advise you that the Company has reviewed your request to exercise your bumping rights. Unfortunately we are unable to grant either of your bumping requests. According to the Company's latest information, you are not capable of performing the jobs that you have indicated..."** (Exhibit 12)

18 The respondent disagreed with the company's reliance on his disability in refusing his bumping rights.

19 The respondent was in attendance at a grievance hearing (unrelated) on August 29, and following the hearing he discussed the company's reliance on his disability with Mr. Werner, in the presence of Ms. Cornwell. The respondent suggested that the company was relying on out-dated medical reports and that it should have him re-examined by a doctor. Mr. Werner agreed, and asked the respondent to provide the company with copies of any current medical reports in his possession, and also indicated that he would arrange for the respondent to be examined by Dr. McGlynn. The respondent reacted negatively to the suggestion that Dr. McGlynn be the examining doctor. Mr. Werner's reply was that as the company was going to be paying for the medical examination, it wanted it to be done by a doctor who was familiar with the mine and its operations.

20 There was conflict in the testimony as to the precise details of this conversation between the respondent and Mr. Werner on August 29, 1991. The respondent asserts that on that occasion Mr. Werner stated that the company would accept only the medical opinion of Dr. McGlynn and no other opinion. Mr. Werner denies that he made such a statement. Taking into consideration the testimony of the respondent, Mr. Werner and Ms. Cornwell, and all of the other evidence, including the contents of grievances filed by the respondent at the time and the contents of the complaint made to the fair practices officer, I am not satisfied that Mr. Werner did place any such restriction on the company's assessment of the respondent's physical abilities.

21 On August 30, 1991, Ms. Cornwell advised the respondent that an appointment had been made for him to see Dr. McGlynn on September 9, 1991.

22 On September 4, 1991, the respondent, through his union, filed four grievances under the collective bargaining agreement.

23 In grievance #2873, he complained that he had been unjustly laid off because of his involvement with union activities. This grievance was denied by the company on the basis that the lay-off was for economic reasons. (Exhibit 17)

24 Grievance #2874 states that "the grievor was denied his bumping rights under the collective agreement". (Exhibit 18)

25 Grievance #2875 states that the "company is discriminating against the grievor under Article 12.10". (Exhibit 19)

26 Article 12 of the collective bargaining agreement deals generally with seniority rights, and paragraph 12.10 reads as follows:

> **"12.10 The Company will use its best efforts to find employment for employees who are not over the normal retirement age but who have been incapacitated by age, disease or occupational accident. The employee will be given the opportunity and training to learn a new job or trade if necessary, in order to be placed somewhere within the company..."** (Exhibit 9)

27 Grievance #2964 relates to the fact that after his lay-off he was required to sign in at the gatehouse and to be escorted whenever he came onto the mine property. The grievance states "the company is discriminating against and intimidating the grievor by forcing him to sign in and be escorted whenever he comes onto company property." (Exhibit 20).

28 All of these grievances were denied at second stage and third stage grievance hearings. The collective bargaining agreement provides that, following the Grievance Procedure, the union can refer any matter to an arbitrator. (Exhibit 9, Article 10).

29 During his testimony at the trial de novo, the respondent was asked whether any

of the above grievances were taken to arbitration under the collective agreement. His reply was that he did not know. In the circumstances, taking into consideration all of the evidence, I do not find that response to be credible.

30 As will be discussed later in these reasons, it is not the role of the Court on this appeal to review the merits of decisions made during the grievance procedure or the arbitration process, or to replace the dispute resolution mechanism agreed to by the union and the company in their collective bargaining agreement.

31 In the early part of 1991 the appellant company had entered into an agreement with Dr. McGlynn to have him do all pre-employment medicals for prospective employees, annual medicals for the underground miners, etc. For this reason Dr. McGlynn had been given a tour of the mine property to familiarize him with the physical environment and the mine's operations. Just prior to September 9, 1991 Dr. McGlynn took a further tour of the mill, with a view to his scheduled examination of the respondent. On September 9, 1991 the doctor examined the respondent. In his report to the appellant company he stated:

> **"Re Steven Petersen**
>
> **This is to certify that I examined the above-named on September 9, 1991. I was asked to assess him for work which he has asked to "bump" into in the mill.**
>
> **Verbally, he told me that he has had transverse myelitis in the past which he attributes to a chemical spill but which has never been substantiated medically. He currently awaits further investigation in**

the Mayo Clinic in Rochester, Minnesota.

On my examination today, he was unsteady on his feet, and both lower limbs were hyper-reflexic with decreased power on the left side. Plantar responses were upgoing bilaterally and there was paresthesia.

> **In summary, I feel that Mr. Petersen is unfit to perform duties at either of the two jobs which he has asked to be placed in at the mill, because of his disability."** (Exhibit 16)

32 The appellant company was in possession of Dr. McGlynn's report at the time of the third stage grievance hearing re Grievance #2874 on September 18, 1991. In his written denial of the grievance, general manager Michael Werner stated:

> **"The Company had very carefully considered Mr. Petersen's bumping rights when he submitted his bumping form, including a review of the medical information currently on file. To date, the grievor has not provided the Company with any medical reports indicating changes to his physical capabilities. The company obtained the services of Dr. McGlynn to further consider its decision. Dr. McGlynn is a fully qualified physician and is knowledgeable of the working environment and physical requirements of the jobs on our property. Therefore, the Company believes it has used all due consideration in reviewing Mr. Petersen's bumping rights. The outcome of the Company's assessment is that it does not believe Mr. Petersen is physically capable of performing the duties in the mill, and the Company is not willing to jeopardize Mr. Petersen or his co-workers' health and safety by permitting him to bump into the mill. Therefore, the grievance is denied."** (Exhibit 18)

33 In his written denial of Grievance #2875, Mr. Werner states:

> **"The company believes that it has made its best efforts to determine if there are other jobs into which Mr. Petersen can be placed. However, no such jobs are available nor are there jobs available for which Mr. Petersen may train. It is important to note that regardless of Mr. Petersen's qualifications, he still has to be capable of performing the jobs. When he returned to the property he was given the opportunity to do the job of dryman that he was capable of**

> **performing and for which there was an opening at that time. That job is no longer required and there are no other jobs with a similar low level of physical demand that Mr. Petersen could fill with or without training. Therefore, the grievance is denied."** (Exhibit 19)

34 On September 12, 1991 the respondent met with the fair practices officer and verbally made a complaint against the appellant company pursuant to the Fair Practices Act. The fair practices officer reduced the complaint to writing and on September 13 sent a copy of the written complaint to the appellant. The complaint in its entirety reads:

> **"Complaint of Steve Petersen**
>
> **Mr. Petersen returned to work for your predecessor company on August 30, 1990 after suffering from a paralysis condition which occurred on July 1, 1988. His position was dryman.**
>
> **On August 23, 1991 Mr. Petersen received a notice of lay-off. He attempted to exercise his bumping rights pursuant to the collective agreement and was denied the opportunity to bump because "According to the Company's latest information, [he was] not capable of performing the jobs that [he had] indicated."**
>
> **I am advised that no assessment was performed by the company in reaching this conclusion.**
>
> **I am further advised that no attempt was made to accommodate Mr. Petersen because of his disability.**
>
> **I am also advised that Mr. Petersen's entitlement to benevolent benefits has been compromised by this action.** (Exhibit 54)

35 It will be noted that there is no mention of the employer restricting its consideration to the medical opinion of its own doctor.

THE LEGISLATION

36 Pertinent provisions of the Fair Practices Act are as follows:

> **...**
>
> **2(3) Nothing in this Act deprives an employer of the right to employ persons of any particular ... disability, ... in preference to other persons where the preference is based on a bona fide occupational qualification necessary to the normal operation of the business or enterprise of the employer.**
>
> **3(1) No employer shall refuse to employ or refuse to continue to employ a person or adversely discriminate in any term or condition of employment of any person because of the ... disability ... of that person ....**
>
> **...**
>
> **7(1) The Minister may appoint an officer to inquire into any complaint made under subsection (2).**
>
> **(2) Any person claiming to be aggrieved because of an alleged contravention of this Act may make a complaint in writing to an officer.**
>
> **(3) An officer shall give full opportunity to all parties to present evidence and make representations and shall endeavour to effect a settlement of the matters complained of.**
>
> **(4) Where a settlement of a complaint is not effected, the officer shall**
>
> **a) submit a report concerning the matter to the Minister; and**
> **b) recommend to the Minister the action that, in the opinion of the officer, should be taken with respect to the complaint.**
>
> **(5) On receipt of the report and recommendation of an officer, the**

> **Minister**
>
> **a) shall consider the report and recommendation, and**
>
> **b) may make any order the Minister sees fit, including an order for reinstatement of an employee with or without compensation for loss of employment,**
>
> **and the order shall be served on the persons affected by the order.**
>
> **8.(1) Any person affected by an order of the Minister may, at any time within 15 days after service of the order, appeal by way of originating notice of motion to a judge of the Supreme Court to vary or set aside the order.**
>
> **...**
>
> **(4) The hearing of an appeal under this section shall be by a trial de novo.**

RECOMMENDATIONS OF THE FAIR PRACTICES OFFICER AND THE MINISTER'S ORDER

37 A representative of the appellant company met with the fair practices officer on October 2, 1991 to review the complaint against the company. The company provided its written response to the complaint on January 20, 1992. A copy of the company's response was given to the respondent and he was invited by the fair practices officer to comment thereon. On January 25, 1992 the respondent provided his written comments on the company's response. In this document he raised for the first time the issue of the employer relying exclusively on the opinion of its own doctor:

> **"It was at my insistence that the company obtain an updated evaluation. The company said they would only accept a decision by**

their doctor." (Exhibit 31)

38 The fair practices officer did not provide a copy of the respondent's January 25 written submission to the appellant company at any time.

39 The fair practices officer made his written recommendations to the Minister pursuant to s.7 of the Act in March 1992. These recommendations were contained in a 33 page document in which he dealt with the respondent's complaint and two other complaints -- Rose Slade vs. Cominco Ltd., Polaris Mines and Lynne MacCurdy vs. Nanisivik Mines Ltd. In each of these other unrelated matters it was also alleged that the employer had insisted that it would only accept medical assessments performed by employer-retained medical personnel. In all three cases, the fair practices officer recommended to the Minister that the employer be ordered to "cease its requirement that all employees and prospective employees receive medical examinations from the company's choice of medical personnel." The Minister accepted this recommendation in each instance.

40 The appellant company complains of procedural unfairness inasmuch as it was unaware that the fair practices officer and the Minister were considering an allegation that the appellant company had such a requirement.

41 The evidence clearly indicates that the allegation of a "only the company doctor"

policy was not part of the initial complaint that the employer was asked to respond to. The evidence is equally clear that the employer was not given any opportunity to respond to Mr. Petersen's subsequent allegation (on January 25, 1992) to this effect. Yet the whole focus of the fair practice officer's recommendations to the Minister is based on this very allegation. Accordingly the fair practices officer did not "give full opportunity to all parties to present evidence and make representations" as required by the statute. Quite apart from statutory requirements, the officer failed in his duty to be fair. Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police (1979) 88 D.L.R. (3d) 671 (S.C.C.). The process was thus seriously flawed, and any Minister's order flowing therefrom must be set aside.

42 As indicated earlier in these reasons, I find in any event that the appellant company did not impose any such restriction in the case of this respondent, i.e., there was no stipulation that consideration would be given only to the opinion of the employer-retained doctor and to no other opinion. I am satisfied that the respondent had the opportunity to provide other medical evidence for the employer's consideration up to the date of the third stage grievance hearing, and beyond that date; yet he failed to do so.

A CONTRAVENTION OF THE FAIR PRACTICES ACT?

43 Having set aside the Minister's order, the court has considered de novo the complaint made by the respondent pursuant to the Fair Practices Act.

44 Complaints may be made pursuant to the statute by any person claiming to be aggrieved because of an alleged contravention of the Act. The wording of the respondent's written complaint (even though prepared by the fair practices officer) does not expressly indicate in what manner it is alleged that the statute was breached. By implication, one assumes that the complaint is directed at s.3 which prohibits employers from:

> a) refusing to employ;
>
> b) refusing to continue to employ; or
>
> c) adversely discriminating in any term or condition of employment of
>
> any person because of his or her disability.

45 One gleans from the written complaint, the respondent's evidence, and his counsel's trial brief and oral submissions, two separate allegations of a contravention of s.3 of the statute by the respondent's employer:

> (1) in establishing a company policy that employees/prospective employees must be physically capable of performing the job applied for; and
>
> (2) in refusing, de facto, to employ the respondent in the two positions in the mill merely because of his disability.

46 With respect to the first allegation, the evidence does indicate that the appellant company did indeed have a policy which stated that employees and prospective employees must be physically capable of performing the job applied for. It is obvious that this policy, on its face, draws a distinction on the basis of physical ability, and that this distinction operates directly to the detriment of persons with a disability. Prima facie, the policy contravenes s.3.

47 The legislation, however, does not create an absolute prohibition of all such distinctions by employers. Subsection 2(3) clearly provides an exemption from the s.3 prohibition where the distinction is based on a bona fide occupational qualification necessary to the normal operation of the employer's business.

48 In the context of the appellant company's operations at Giant Mine it can fairly and objectively be said that physical ability is a reasonable and necessary requirement or qualification for employment at the mine, at least in the mill. There is a preponderance of evidence showing that physical ability is a bona fide qualification for the two positions in question. Therefore I have no difficulty in finding that in establishing its policy the appellant company was acting within the exemption and not contrary to s.3 of the Act.

49 I note that the evidence indicates that the company policy allows for an individual and objective assessment in each case. Had it been otherwise, i.e., were the policy such as to rule out an objective assessment of the physical ability/disability of each applicant

for employment/continued employment then the drawing of the distinction would not be bona fide and would not come within the exemption.

50 In the second allegation contained within the respondent's submissions, it is suggested that the respondent was denied employment in the mill simply because of his existing "disability", i.e., that there was de facto discrimination personal to him (as opposed to a general discriminatory policy addressed in the first allegation referred to above). This allegation is not supported by the evidence presented.

51 There is ample evidence that the employer made an individualized assessment of the respondent's capabilities, by reference to the Bhatla reports, the McGlynn report, the on-site observations of co-workers, and the precise physical requirements of the two positions in the mill. The employer's assessment was not based on impressionistic views but on eye witness accounts. The respondent was viewed as an individual and not as a stereotype.

52 Thus, in the actual process of making a determination as to whether to employ the respondent in the mill, the appellant company did not discriminate. It assessed the respondent's application as it did any other application. He was denied the employment he sought because he failed to meet the bona fide qualification (physical ability) and not because of his disability.

53 In summary, it has not been shown to me that the employer contravened s.3 of the Act either in establishing its policy or in the process of denying the two positions to the respondent. Accordingly, the complaint of September 21, 1991 must be dismissed.

THE SANCTITY OF THE COLLECTIVE BARGAINING AGREEMENT

54 On the present appeal the respondent presented evidence and made submissions not only on the process used by the employer in denying his request for continued employment pursuant to his bumping rights under the collective bargaining agreement but also on the employer's decision per se. In fact, the focus of the respondent's case before this court was on the merits of his application for continued employment rather than on discriminatory policies or practices. In doing so, the respondent seeks, in effect, a judicial review of the employer's decision on the merits of the application for employment. This is not the purpose of an appeal under s.8 of the Act. It is not the purpose of the complaint process nor of the statute in general. The purpose of the complaint process and of any trial de novo under s.8 is a) to ascertain whether there has been a contravention of the Act and if so, b) to effect a settlement of the complaint, either voluntarily or by order.

55 It is not for the court (or the Minister) to supplant the grievance procedure/arbitration process in the collective bargaining agreement. In that comprehensive document the parties have agreed on the factors which will determine an

employee's selection for a job or not, including jobs sought through the exercise of bumping rights. Further the parties have agreed that in the event of any dispute or disagreement concerning the interpretation or violation of the agreement, resort will be had to a formal grievance procedure and/or reference to an arbitrator. It is not for the court to deal with an alleged violation of the collective bargaining agreement. As one example, the respondent in the present case alleges that the appellant company has violated Article 12.10 of the collective bargaining agreement (cited earlier in these reasons). As another example, the respondent questions the adequacy of the McGlynn examination. The respondent's remedy is to file a grievance and, if necessary, to refer the matter to an arbitrator. For the court to entertain a hearing of the grievance/reference would be to displace the arbitrator, contrary to the collective bargaining agreement and contrary to law. See St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219 (1986) 28 D.L.R. (4th) 1 (S.C.C.); Weber v. Ontario Hydro (1992) 11 O.R. (3d) 609 (Ont.C.A.).

56 As an example of a case similar to the present one on its facts which was properly dealt with by the grievance/grievance appeal process, see Re Government of the Province of Alberta and Alberta Union of Provincial Employees (1989) 5 L.A.C. (4th) 205.

THE ADMISSIBILITY OF THE AFFIDAVIT OF DR. DEHOUX

57 On the trial de novo, respondent's counsel sought to introduce into evidence the

affidavit of Dr. Eric Dehoux sworn December 23, 1992. Dr. Dehoux is a physician specializing in Physical Medicine and Rehabilitation and is employed at the Rehabilitation Centre in Ottawa, Ontario. He was involved in the assessment and treatment of the respondent from December 1988 to October 1992. Attached to his affidavit is a copy of his "medical-legal report" dated October 13, 1992, addressed to the respondent's former counsel. In his report he describes his observations and assessments of the respondent's condition on various dates up to and including March 15, 1990. Further, he describes his observations and assessments of the respondent's condition on one further date - October 5, 1992. It is particularly this latter assessment of Dr. Dehoux that the respondent's counsel sought to present as evidence at the trial de novo.

58 As the subject matter of the appeal before the court is the respondent's complaint that the appellant company contravened the Fair Practices Act in August and September of 1991, I fail to see the relevance of the respondent's physical condition on a date more than one year later, in October 1992. For this reason I find that the affidavit is inadmissible on the trial de novo.

COSTS

59 In its trial brief and in oral submissions the appellant company seeks costs of this appeal.

60 In considering this request I am mindful of the following:

a) the appellant's unexplained delay of 4 months in responding to the initial complaint to the fair practices officer.

b) this matter went "off track" at the stage of the officer's recommendations to the Minister and the Minister's acceptance of same.

c) costs were not sought in the originating notice of motion which named both Steve Petersen and the Minister of Justice as respondents.

d) the Minister of Justice was removed as a party respondent at his request at the commencement of the trial de novo, with no objection from the appellant.

61 In the circumstances, I decline to award costs against the respondent Steve Petersen.

SUMMARY

62 For the foregoing reasons, the appeal is allowed and the Minister's order is set aside. The complaint of the respondent made pursuant to the Fair Practices Act on September 12, 1991 is dismissed.

J. E. Richard
J.S.C.