T.D. 21/93
Decision rendered on December 8, 1993

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

RINO MICHAUD

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Roger Doyon Chairman
Marie-Claude Landry Member
Joanne Cowan-McGuigan Member

APPEARANCES: M. Donovan and Major R. Smith, Counsel for the Respondent

F. Lumbu, Counsel for the Commission

DATES AND
LOCATION OF HEARING: May 25 to 28, 1993 Edmunston, New Brunswick
July 5 to 9, 1993 Québec City, Québec

TRANSLATION FROM FRENCH

INTRODUCTION

On November 25, 1992, Keith C. Norton, President of the Human Rights Tribunal Panel, appointed this tribunal to examine the complaint filed by Mr. Rino Michaud on August 31, 1990, and amended on October 9, 1990, against the Respondent, the Canadian Armed Forces.

The notice of appointment of the Tribunal was introduced as exhibit T-1.

THE COMPLAINT

On August 31, 1990, Rino Michaud filed a complaint with the Canadian Human Rights Commission against the Respondent, the Canadian Armed Forces. This complaint was amended on October 9, 1990.

The Complainant alleges that the Respondent discriminated against him by terminating his employment because of a physical deficiency, that is, the amputation of his right leg below the knee, in contravention of the provision of section 7 of the Canadian Human Rights Act, RS (1985) c H-6.

Mr. Michaud feels that despite the loss of his leg, he can still easily fulfil the duties of his position and his dismissal was discriminatory and related solely to his physical deficiency.

The complaint, as amended on October 9, 1990, was introduced as exhibit C-2.

THE FACTS

The tribunal heard the complaint first in Edmunston, NB, from May 25 to 28, 1993, and then in Quebec City from July 5 to 9, 1993.

The Canadian Armed Forces is composed of members of the Regular Force and members of the Reserve Force, also known as the Militia, on one of the following types of services (Exhibit I-24):

1. Class "A" Reserve Service;

2. Part-time service for a minimum of sixty days at the rate of two nights a week and one weekend a month from September to June;

3. Class "B" Reserve Service: temporary full-time service for an undetermined period;

.../3

4. Class "C" Reserve Service: full-time service for a specific period in order to occupy a position in the Regular Force.

Article 9.05 of the QR&O (Exhibit I-25) stipulates that:

"A member of the Reserve Force may, with his consent [emphasis added] . . . be employed with the Regular Force . . ."

There is an exception to this rule when the Governor in Council, under the conditions set out in Article 9.01 of the QR&O, place the Canadian Armed Forces, or any component, unit or other element or unit or any officer or non-commissioned member on active service. In such cases, there is an obligation to serve.

On October 1, 1968, Rino Michaud, then 17 years old, enroled in the Canadian Armed Forces in Class A Reserve Service as an infantryman. He was part of the 1st Royal New Brunswick Regiment (RNBR), an infantry battalion composed of three companies of infantrymen. He was a member of A Company, which is stationed in Edmunston, with B and C companies stationed in Fredericton and Grand Sault, respectively.

The work of a militiaman within A Company consists primarily of two nights a week parade and training and one weekend a month, from Friday evening to Sunday, training. The hours can be increased if the budget allows. During the winter, the member of A Company take part in a military exercise during the weekend on the training ground at Baker Brook, New Brunswick, some 20 miles from Edmunston. There is also a spring exercise during which the militiamen are invited to the Gagetown military camp for a weekend of familiarization with various types of weapons and, if the budget allows, they take part in firing sessions. During the summer, the militiamen can take part in a summer military exercise lasting 9 or 10 days. The exercise for the Atlantic area of the Canadian Armed Forces are held at the military camp in Gagetown, New Brunswick, and called MILCON. It is a period of intensive military training using field exercises that lasts approximately 10 days. The participants practice military techniques, either in offensive or defensive positions, or retirement, and go out on reconnaissance patrols to spot the enemy's location and assess the situation. The exercises are held both at night and during the day. Some days are devoted to endurance competitions among the best elements of each regiment.

As indicated in exhibit C-3, the Complainant moved up through several ranks in the Reserve Force. He qualified as an infantryman on May 9, 1969, and became a corporal on June 1, 1970. He was promoted to sergeant on September 1, 1971, warrant officer on

.../4

October 1, 1973, and master warrant officer on May 2, 1984. Although he was fulfilling the duties of the company sergeant-major, he was not officially promoted until May 2, 1985. In 1980, he received the military medal for 12 years' loyal service.

The position of company sergeant-major imposed serious responsibilities on Mr. Michaud. It involves administrative duties supervising the militiamen and ensuring that all the equipment necessary for military exercises is available and in good condition. He is responsible for the drill and for maintaining good order and discipline. He is in charge of enforcing military regulations. In preparation for the winter exercise, the company sergeant-major organizes a familiarization weekend in the armoury, where the participants learn how to use the winter equipment. In the days before the winter exercise, he accompanies the company commander to the area of the exercise for a reconnaissance patrol in order to determine the site of the encampment. He must survey the perimeter of the encampment and decide where the bivouacs will be set up, which involves walking in the snow, generally on snowshoes, for 200 to 300 metres, depending on the number of participants.

During the weekend of the exercise itself, all the available company militiamen travel by truck to the training area. They must reach the camp on foot wearing snowshoes, carrying their equipment, and leaving only a single trail so that the enemy does not know the size of the force.

The distance to be covered varies from one or two hundred metres to a kilometre, depending on the company commander's directives. Once at the camp, the militiamen begin setting up the bivouacs. The company sergeant-major supervises the work, which requires a great deal of walking around the camp. The participants then head to specified locations to establish the battle position, which is in mountainous terrain in the Baker Brook training site. The distance to be covered is from two to three kilometres up to ten kilometres on occasion. The participants then begin building shelters out of snow, wood and branches to conceal themselves from the enemy. During the summer exercise, they dig trenches. The company

sergeant-major must tour the shelters to ensure that the work has been done to specifications, which means covering some distance on foot.

On the Sunday, the camp is dismantled under the supervision of the company sergeant-major. The equipment is loaded on to trucks and returned to the armoury, where the company sergeant-major assumes responsibility for checking the quantity and content and ensuring that everything is stored with the quarter-master or returned to the Gagetown base, if necessary.

During the spring exercise, which is devoted to familiarization with various types of weapons, the company sergeant-major checks the number of participants and makes provisions to transport them to Gagetown.

.../5

These are the duties performed by Rino Michaud, the company sergeant-major, until July 1984.

On July 20, 1984, not while performing his military duties, the Complainant was in a motorcycle accident; his right leg had to be amputated below the knee, and he must wear a prosthesis. Mr. Michaud must visit his doctor in Quebec City approximately twice a year to have adjustments made to the prosthesis so that it fits more comfortably (Volume 2, page 415). In addition, since the amputation, he has had to change his prosthesis every two to three years for a better one.

Because he was undergoing rehabilitation, the Complainant could not resume his duties in the militia in September 1984, and obtained a leave of absence until March 1985. In civilian life he had been a firefighter with the town of Edmunston; following his accident, he was transferred, in 1987, and became a sub-station operator for the power company of the same town. His work since that time has consisted of using a computer to monitor the operation of an electrical power plant.

When he returned to the militia, Master Warrant Officer Michaud continued to perform the duties of the company sergeant-major. None of his immediate superiors - Major Melanson, Commander of A Company, Lieutenant-Colonel Leonard, Battalion Commander, and his successor, Lieutenant-Colonel Johnson - deemed it appropriate to submit Master Warrant Officer Michaud to a medical exam, and they decided to keep him in his position as company Sergeant-Major until their superiors intervened.

The decision was made initially because A Company had no one qualified to assume the duties of the Company Sergeant Major. In addition, Mr. Michaud needed only six more years in the reserve force to get his decoration called "Rosette" given after 22 years' service. Moreover, Mr. Michaud was an excellent militiaman and they were motivated primarily by sympathy (Volume 3, pages 696-698) (Volume 5, pages 988-989).

Mr. Michaud maintains that he continued to perform the duties connected with his position as before and that he took part in all the company exercises.

In addition, in 1986, 1987 and 1988, Master Warrant Officer Michaud took part in MILCON in Gagetown, New Brunswick. He was given the duties of Sergeant-Major for administration of the camp. He had to supervise every aspect of the camp, including the food, assistance for the wounded and ill, transportation to the hospital and the night sentry. His duties kept him occupied from six in the morning until bedtime.

In 1988, the Complainant worked for two to three months on the preparation of the Freedom of the City parade, which was held in Edmunston and in which militiamen from A, B and C Companies took part. He himself marched in the parade behind his Commanding Officer,

.../6

who commended him for the work accomplished.

As company Sergeant-Major, Mr. Michaud also had to procure the equipment and men needed for A Company's participation in community volunteer activities when the Special Olympics were held in Edmunston in 1988.

Each militia company receives the support of a member of the Regular Force.

The representative of the Regular Force in A Company was Sergeant Gallant. During 1988, friction developed between Sergeant Gallant and MWO Michaud, who decided to remedy the situation himself.

Since he had only a year or so to go before he qualified for retirement and his "Rosette", Mr. Michaud, upon resuming his militia activities in September 1988, offered to give up his position as company Sergeant-Major to a colleague, Warrant Officer Couturier, who had recently qualified as a Master Warrant Officer, in order to allow him to acquire experience and also to allow younger militiamen to move up through the ranks. He then

agreed to become quarter-master, while retaining his rank of master warrant officer. The position was that of a storeman responsible for all the equipment required for the proper operation of the company.

In early January 1989, a class B quarter-master, that is, a full-time employee, was assigned to A Company, so Master Warrant Officer Michaud's services as quarter-master were no longer required. In addition, since a company could have only a single sergeant-major, a position then held by Warrant Officer Couturier, the Complainant was assigned to administrative tasks. Fearing that it might be thought that he left his position as sergeant-major in September 1988 because of the quality of his work, Mr. Michaud contacted Major Melanson, the Company Commander, in order to obtain a letter stating that he had given up his position as company sergeant-major not because of an inability to perform the duties but in order to allow someone else to acquire experience. He also maintained that he had given up his position temporarily and wished to return to it.

On March 23, 1989, Major Melanson sent him a letter, entered as exhibit C-6, which read as follows:

.../7

PROTECTED/PROTÉGÉ

511 Michaud

A COY 1 RNBR
38 Court Street
Edmunston, NB
E3V 1S3

March 23, 1989

POSTING: COMPANY SERGEANT-MAJOR

1. At the request of the aforementioned individual, this letter will be inserted in the personal file of 108 935 511 Master Warrant Office Michaud, J E R, when signed by the individual and the commander of A Company.

2. When A Coy began its regular training on 08 September 1988, we were again confronted with the dilemma of a quarter-master. It was then that MWO Michaud offered his services and his experience as quarter-master of A

Coy, at the same time giving a recently qualified warrant officer the chance to be assigned to the position of company sergeant-major.

3. The following must be very precise. The aforementioned change was not the result of MWO Michaud's performing unsatisfactorily as company sergeant-major. Nevertheless, given his medical category since his accident of July 20, 1984, it was almost impossible for him to adequately fulfil the duties of company sergeant-major, particularly in a company of infantrymen.

4. The posting of a Class B storeman to A Company on 09 January 1989, meant that MWO Michaud's services as quarter-master were no longer required. In light of the factors mentioned in paragraph 3, MWO Michaud is no longer able to fulfil his duties as company sergeant-major.

I have read this letter and agree with its contents.

May 8, 1989
Date Master Warrant Office Michaud

LP Melanson
Major
Commanding Officer

Mr. Michaud refused to sign the letter because he disagreed with its content. It was not until May 8, 1989, that he agreed to sign it, given the impossibility of having the contents changed and given that the reference to his medical category was not corroborated by any medical report to that effect.

In the meantime, on April 20, 1989, Major Melanson asked him to return the

.../8

key to the armoury and office in his possession, because his military career was finished and he was no longer to appear at the armoury (Volume 2, page 403).

On May 11, 1989, Major Melanson presented him with a notice of intended release, which he refused to accept. This notice, according to the Complainant, although signed by Major Melanson on behalf of Lieutenant-Colonel Johnson, battalion unit commander, on May 11, 1989, had been

brought to his attention before this date. He acknowledged receipt of it on May 17, 1989.

The notice of intended release, which was supposed to come into effect on May 26, 1989, and which was introduced as exhibit C-7, is recommended in accordance with item 3(b) in the table to article 15.01 of the QR&O, which reads as follows:

> ""On medical grounds, being disabled and unfit to perform his duties in his present trade or employment and not otherwise advantageously employable under existing service policy", as directed by the Commanding Officer on 20 April 1989."

The notice also stipulates that the master warrant officer must advise his commander in writing, within 14 days, of his intention to oppose the release. This same document contains, in paragraph 4, a clause expressing his intention to oppose his release, which he signed on May 18, 1989. As required by the notice of intended release, Mr. Michaud, on May 25, 1989, sent a letter to his commander, Major Melanson, expressing his opposition to the release, as evidenced by the letter introduced as exhibit C-7:

.../9

154 35th Avenue
Edmunston, NB
E3V 2V6

May 25, 1989

Major LP Melanson
A Coy, 1 RNBR
38 Court Street
Edmunston, NB
E3V 1S3

Dear Sir:

1. This is to inform you that I oppose my release from A Company of the 1 RNBR for the following reasons:

a. I feel that after 19 years of loyal service, a medical reason is not valid and that this is primarily the vengeance of a certain

individual working within the company who is urging you to act this way.

b. I would also like to point out that since my accident, I have missed only 6 months of training and have rarely missed a night of administration or special training, be it weekends, Milcon, parades, or winter exercises, to name but a few. I can guarantee you that in the past five years I have been very involved in your organization and have nothing to reproach myself for.

c. I have brought all my energies and knowledge to bear on the positions that I have occupied in the past five years. I have received nothing but praise for my past work and a few complaints from your company.

2. In closing, I would like to advise you that I oppose my release and I greatly desire to return to my position as quickly as possible, since the reasons mentioned in your letter of April 26 are not valid.

Sincerely yours,

JER Michaud
Master Warrant Officer

In contravention of the grievance procedure set out in article 19 of the Queen's Regulations and Orders (I-2), the Complainant contacted his federal MP, and on November 21, 1989, the

.../10

Associate Minister for National Defence informed Major Melanson that he did not have the authority to consider releasing a member for medical reasons and that the procedure initiated for that purpose was being suspended (Exhibit P-8).

Following this interruption in the procedure leading to his release, the Complainant was recalled to work to perform administrative duties. He was then called to submit to a medical exam performed in Gagetown on November 8, 1989, by Lieutenant Mark Smith, a medical officer.

The medical report (I-9) indicates that the medical category was changed from G2O2, the minimum rating for an infantryman, to G2O3.

Individuals who enrol in the Canadian Armed Forces must submit to an initial medical exam and to further exams every five years until the age of 40 or each time they are promoted. Master Warrant Officer Michaud took a medical exam in 1984 before being promoted to master warrant officer.

Mr. Michaud's medical category at that time was determined to be G2O2, which is the minimum level required both to enrol and to serve as an infantryman (I-23b).

Major Serge Gagnon, a medical officer in the Canadian Armed Forces and career manager at National Defence Headquarters in Ottawa, explains:

"The medicine practised in the Canadian Armed Forces is an occupational medicine, that is, in addition to making a diagnosis, in addition to undertaking treatment, the medical officer must supply the military commander concerned with information about the occupational limits of the individual in light of the medical problem.

In section 3 of exhibit I-9, entitled recommendation of the medical officer, Doctor Smith indicates that there is no geographical limitation. He mentions that Master Warrant Officer Michaud has occupational limitations. He must avoid running over long distances and any physical activity will have to be done at his own pace and to his own level of tolerance (Volume 6, pages 1266-1267).

During the physical examination, the medical officer made the following remark:

"The patient says he is capable of walking long distances and that he can walk on uneven surfaces such as are found in the fields. The patient is capable of running, but has problems with his gait; his gait is irregular when he wears his prosthesis. And he would not be able to run very fast." (Exhibit I-9)

.../11

The medical officer who performs the medical exam can only recommend a change in medical category, and Doctor Smith recommended that the 02 medical category be changed to 03. To avoid any error, this recommendation must be approved by the Area Command Surgeon and the Command Surgeon for the Mobile Command. Doctor McDonald, the Area Command Surgeon, approved

the change in Master Warrant Officer Michaud's medical category, as did Doctor Gagnon, the Senior Medical Officer for the Mobile Command, whose responsibilities included approving changes in medical categories for all militia units in Canada.

Exhibit I-26, the document entitled "Medical Categories and Career Medical Review Board - Militia, states in article 3:

"Once a serving member of the Militia . . . has been awarded a permanent medical category below the minimum standard for initial assignment to his classification or trade . . . a CMRB will be convened with the least possible delay as indicated hereunder."

The Area boards will be made up as follows:

1. Chairman: Area SSO Log & Adm [senior staff officer, logistics and administration].

2. Members: Area Surgeon (non voting member). A representative from the appropriate arm/trade and the SO2 Ops/Trg [staff officer, operations/training].

3. Secretary: A staff officer designated by the Chairman."

The Career Medical Review Board met on April 17, 1990, to assess Mr. Michaud's case; it consisted of, as Chairman, Lieutenant-Colonel Elliston, himself an infantryman and Area SSO, Log & Adm; Major Norby SO2, Trg; Captain Clark SO, Ops; Lieutenant-Colonel Reed, physiatrist and Area Surgeon; and Captain Herlt, acting as secretary.

The Career Medical Review Board had to rule on the entire situation and assess the following aspects:

a) the operational requirement;

b) the individual's specific medical problem;

The quote in the French original does not correspond exactly to the text of the Forces regulation.

.../12

c) the practical limitations of the tasks that the Canadian Armed Forces is currently called on to perform;

d) the recommendations of the staff selection officer;

e) the other available positions. (Volume 6, page 1301).

The Career Medical Review Board has four options:

1. Retain the member without limitations
2. Retain the member with some limitations
3. Transfer the member to another trade
4. Release the member.

The Career Medical Review Board decided to release MWO Michaud in accordance with item 3(b) of exhibit I-24, which reads:

"On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy."

MWO Michaud's release became final on November 8, 1990.

THE EVIDENCE

The Tribunal was very interested in the testimony of Doctor Gagnon, who explained the contents of a document entitled "Medical Standards for the Canadian Forces" (I-23). Doctor Gagnon said:

"The Canadian Armed Forces adopted a medical rating system that allows it to standardize medical exams and to offer . . . a unit commander a succinct description of the degree of employability of their personnel." (Volume 7, page 1321)

A system of codes is used, with the codes as a whole constituting the medical profile. It begins with the year of birth, followed by these six [sic] factors:

V - Visual Acuity
CV - Colour Vision
H - Hearing
G - Geographical Limitation
O - Occupational Limitation.

.../13

We should note the occupational limitation (O). It:

"involves physical and mental activity and stress." (Exhibit I-23, page 2-4)

The alphabetic code O is accompanied by a numeric rating from 1 to 6, with 1 being a superior level and 6 being medically unfit to perform duties as a

.../13

member of the Canadian Forces.

When an individual enrols, he or she is given a medical rating, and the minimum rating for the occupational limitation is 02. This is also the minimum rating for the trade of infantryman. The 02 rating is "assigned to the individual who is free from medical disabilities, except those minimal conditions that do not impair his ability to perform at an acceptable level of endurance in a front-line combat environment and to do heavy physical work. Such personnel are fit for full employment except for those specific employment areas that demand above average fitness." (Exhibit I-23, page 2-5)

The 03 rating denotes average physical aptitude. "This grade will be assigned to the individual who has a moderate medical or psychological disability which prevents him from doing heavy physical work or operating under stress for sustained periods. He can, however, do most tasks in moderation." (Exhibit I-23, page 2-5)

What are the duties of an infantryman?

The infantryman is a soldier who participates in the various phases of war - attack, defense, retirement and reconnaissance patrols. Infantrymen travel on foot, sometimes for considerable distance, carrying their equipment and personal weapon.

In his testimony, Mr. Michaud acknowledged that the trade of infantryman is very demanding:

"Q. Mr. Michaud, do you know that an infantryman must be capable of walking long distances?

A. Yes.

Q. And that he must be able to scale obstacles?

A. Yes.

Q. And of jumping out of a truck?

A. Yes.

.../14

Q. And be capable of carrying a wounded soldier?

A. Yes.

Q. Are these things that you practice during your exercises?

A. They are not things that I practice during the exercises because it is - it is not - it is not - it is in - it is part of my duty to do it. I have - I am - an infantryman. I am a Sergeant. I am a Sergeant. I was a Sergeant-Major, so it is part of my duties for these exercises. If it has to be done, I do it. I am ready to do it. I am ready to try. I am ready to prove that I am capable. And you give me the chance and I will do it.

Q. But these are things that it is reasonable to ask of the men - the men under your command?

A. Yes.

Q. And you agree that a Sergeant should lead by example?

A. Yes.

Q. Is it a principle of leadership in the army that you must not ask the men to do something that you cannot do yourself?

A. I - I have proven myself in the past and no one has ever reproached me for anything, never.

Q. That is not the question. The question is whether it is a principle of leadership that a leader be able to do the things he asks of his men?

A. Yes."

Captain Ouellette, himself an infantryman, explained what is involved:

"We, if there is ever a war, we in the infantry are the first ones forward." (Volume 4, page 716)

The testimony establishes that the trade of infantryman requires excellent physical condition, because it is very demanding.

.../15

Several witnesses heard, at the request of the Respondent, a description of what a military career consists of. Individuals who take up a military career agree to become soldiers. They are soldiers first and foremost, whatever other occupation they perform within the army. Every recruit is assigned a trade upon enrolment. One cannot therefore be in the military without having a trade. Members of the Forces must always be capable of accomplishing their primary mission, which is to be a soldier, whether they belong to the Regular Force or the Reserve Force.

Under the new Canadian Armed Forces policy called Total Force, the plan is to reduce the number of members in the Regular Force and increase the number in the Reserve Force. The evidence indicates that more and more members of the Militia are accepting overseas assignments. Yugoslavia is a notable example. Even though it requires an order by the Governor-in-Council to make service compulsory for members of the Militia, the chances of such a decree being issued seem to be increasing.

Lieutenant-Colonel Chapados responded to the Tribunal's questions:

Ms. Landry:

"Q. Do you think that with the new policies on reducing the Regular Forces and increasing the number of reservists that it is more likely the government will issue an order?"

Witness:

"A. It is very likely. If the government wants to contribute to the United Nations but cannot maintain the Regular Forces at the current level it is reducing, then the chances of an order to call up the reservists would increase, yes."

Ms. Landry:

"Q. The current government has already made commitments. Commitments have already been made with respect to NATO and the UN and all that."

Witness:

"A. That is true."

Ms. Landry:

"Q. And if those mandates are to be respected?"

.../16

Witness:

"A. If those mandates are to be respected, then the chances of an order increase, yes. But I cannot say to what extent." (Volume 7, page 1374)

On the participation of infantrymen in peace-keeping operations, Lieutenant-Colonel Chapados had this to say:

"The infantrymen are much in demand these days, and they go on the most demanding, most difficult missions at the moment. In Yugoslavia, it is the 2nd Infantry battalion that is there. They are the most difficult and dangerous missions at the moment." (Volume 7, page 1373)

The role of the company sergeant-major is described in the document entitled "The Company Sergeant-Major". His role and responsibilities are clearly described therein. They were also clearly explained by the Complainant himself and the testimony of Lieutenant-Colonel Bérubé and Sergeant-Major Couturier.

Following the amputation of his right leg, was Master Warrant Officer Michaud still capable of performing his duties as sergeant major for a company of infantrymen? Although Master Warrant Officer Michaud said he was, the evidence is very contradictory and the Tribunal recalls the testimony on this point of Major Melanson, Lieutenant Bérubé and Sergeant-Major Couturier.

Major Melanson replied as follows to the questions of the Respondent's attorney:

"Q. Have you ever forbidden Sergeant-Major Michaud to do physical work in the field?

A. No. And I don't recall having formally forbidden him to take part in operations there.

Q. He took part in your exercises then?

A. Yes.

Q. Did he do physical work to the extent that he could?

A. As much as he was able to.

Q. Yes? OK.

.../17

Q. So he did some physical work, the work of a sergeant-major, as much as he was able to, as you say. Is that correct?

A. Yes."(Volume 3, page 644)

Lieutenant Bérubé revealed, for his part, that during the first winter exercise following his amputation, in 1986, the Complainant informed him that he would not sleep in the field but would sleep in the armoury, and come back the next morning. He said:

"It's not good for my leg."
(Volume 6, page 1114)

Even when Sergeant-Major Michaud was able to do so, Lieutenant Bérubé said that:

"I never saw him sleep in the field with the rest of us after his amputation." (Volume 6, page 1118)

And added:

". . . whether in the summer or winter, he never slept in the same tent as me." (Volume 6, page 1159)

Mr. Michaud should have shared this bivouac with Lieutenant Bérubé and the company commander. Lieutenant Bérubé stated that Sergeant-Major Michaud was exempted from participating in the reconnaissance patrol on the training site in preparation for the winter exercise:

"Someone else was sent, or he sent someone else in his place. Usually, it was Warrant Officer Couturier or Gibson, or another warrant officer." (Volume 6, page 1120)

Lieutenant Bérubé also knew that the Complainant lost his prosthesis during the exercise.

"Q. Did you ever see Mr. Michaud having problems walking with his prosthesis in the snow?

A. I remember once when he lost his prosthesis, at about 100 metres from the road.

Q. Could you explain in more detail what happened on that occasion?

A. As I said earlier, the vehicles stayed on the road. We were approximately 150 metres from the bivouac, with tents arranged as usual. There was what you call a track discipline -

.../18

I don't know how to say it in French - where everyone follows, and we follow the same path all the time, in order to be sure that if, for example, the enemy comes, we will see the new tracks. So we followed that. It becomes very compacted, very hard. Rino came by that path. He had come to visit the tents. It must have been around dusk, probably 7:00 pm or around that time. When he returned, I don't know if he walked off the path and it was softer, but he stumbled, and his prosthesis came off. He sat down right there and put it back on, and continued on." (Volume 6, page 1122)

Sergeant-Major Michaud was responsible for the drill. Lieutenant Bérubé says that he took care of forming up the troops and carrying out the inspection, but left the drill lesson to another warrant officer, Couturier or Gibson[sic]. (Volume 6, page 1164)

Lieutenant Bérubé replied as follows to the question put by Ms. Landry:

Ms. Landry:

"In your opinion, could the duties of a sergeant-major continue to be carried out as Mr. Michaud had always taught you they should, considering his problem?"

Witness:

"I see the function of sergeant-major as requiring someone who is in excellent physical condition, as that person is the model for all the non-commissioned officers. All I can say is, as time went on, it became more and more difficult, because, with the concept of total force and all that, even the system of recruitment changed significantly. They were harder on us. They required more physical conditioning and so on. I think that it became harder for him to keep up. When we are on an exercise, we walk with probably 30 kilograms on our backs. It is quite difficult." (Volume 6, page 1141)

On this last point, Sergeant-Major Couturier corroborates the claims of Lieutenant Bérubé. (Volume 6, page 1206)

Furthermore, according to Master Warrant Officer Michaud, he suggested giving him his position as company sergeant-major, in order to give him some experience and to enable the younger members to rise up through the ranks. He wanted to do the less strenuous work of quarter-master.

After expanding on the responsibilities of a company sergeant-major, Mr. Couturier confirmed Lieutenant Bérubé's statement by saying that, based on his experience as company sergeant-major, Mr. Michaud was no longer able to carry out all the duties of an infantry company sergeant-major.

.../19

The parties recognized the Major Milczarek, a doctor specializing in physiatrics, as an expert witness. Major Milczarek obtained a doctorate in medicine in 1983, and has been a physiatrist since 1990. During his career, he has treated many amputees. The tribunal gives full credence to his testimony.

Dr. Milczarek had been asked to meet the Complainant at the request of the Respondent's lawyers on April 7, 1993, and to prepare a medical report by

April 13, 1993 (Exhibit I-30). In his expert opinion, Dr. Milczarek questions the Complainant's ability to serve on prolonged military operations despite his disability. For him, the following factor is the important one:

"My only concern is with respect to endurance of the residual stump under load." (Exhibit I-30).

Major Milczarek explains:

"In the case of amputees, it is not important whether the amputation is below the knee or above. The aim is to maintain the integrity of the stump because that becomes the person's foot. Even if the person has a prosthesis, it is the first living part that touches the prosthesis. Here, it is the integrity of the stump under stress that concerns me, whether that stress is caused by friction or pressure." (Volume 7, pages 1481-1482)

When it comes to military exercises, Dr. Milczarek feels that if Master Warrant Officer Michaud was required to walk a few miles or to run with a heavy load, such as a backpack, on his back for a few days or weeks, the stump would be unable to endure this stress without deterioration of the skin. Furthermore, Major Milczarek feels that, in an isolated field situation, Mr. Michaud would probably no longer be able to wear his prosthesis, and would not be able to walk long distances. He explains this position as follows:

"In the best of scenarios, where there is only a small amount of redness, it could take 12 to 24 hours to heal, if you relieve the pressure or the source of irritation that started the ulcer. In these 12 to 24 hours, the person could move about, but without a prosthesis. That is, he could use crutches, or a cane, but you do not move too quickly with those types of support."

"Q. If the person continued to wear his prosthesis, what would happen?

A. He would probably progress to the next stage, that is, the skin itself would begin to break. There would no longer be any redness, but a real break in the superficial skin, and,

.../20

if the pressure or weight continued to be applied, even a small load over a long time, the depth would increase.

The healing would then take not 12 to 24 hours but rather two to seven days, depending on the depth of the wound." (Volume 7, page 1488)

When asked to comment on the ability of an amputee such as the Complainant to walk long distances compared with people who still have both legs, the witness stated that:

"Amputees walk . . . expend more energy than non-amputees, that is, amputees will adopt a comfortable walking speed that is good for conserving their energy. They will walk on average one to one and a half steps less per second than non-amputees.

In terms of minutes, they will take 60 less steps a minute. They will thus expend more energy if they are asked to walk faster than their comfortable walking speed.

The other problem which amputees have is that they lose control over their ankle movements. They still have a knee intact, and can thus control the anterior and posterior movement of the rest of the foot on that leg, but lose control in the tiny adjustments made at the ankle.

When you are walking on flat ground, there is not much adjustment to be made by the ankles or the muscles that control the ankles and feet. But let's say you are on gravel or sand. We know that our foot begins to move from right to left and that there is a great deal of lateral movement, sometimes small lowerings. Our feet control this automatically, otherwise we would be constantly twisting our ankles. In an amputee's foot, there is no voluntary control, even if you have the feet that move a little - up, down, to the side . . . there are all kinds of foot prostheses; what happens with amputees is that the first living tissue in contact with the prosthesis takes the stress. No quick or small adjustments can be made at the knee level. There are large adjustments, rather brusque movements.

Let's say there is sudden stress on the external or lateral side of the foot. The inside of the stump will take the blow immediately. It cannot correct itself. It is for this reason that

.../21

amputees have a tendency to develop sores more quickly than someone else would develop a sore on his feet walking at the same speed. It happens much faster." (Volume 7, pages 1490-1492).

In terms of the speed attainable by an amputee compared with that attainable by a non-amputee, Dr. Milczarek explains that:

"When we talk of speed, and I am referring here to foot-racing, it is truly impossible for an amputee, let's say someone who runs . . . I'll pick a number at random . . . 10 kilometres an hour before the amputation. After the amputation, he cannot run as fast. He loses the foot's push force. Because when a runner lands on his feet, he does not land on the heel. He lands on the bottom of his foot and the foot even acts almost as a springboard. That propels him forward. Amputees lose this as well. Even if they have feet that provide some kinetic energy, and they conserve some of that energy and simulate the push . . . they cannot do that. And when an amputee runs, the same problem. The first tissue to take the impact is the stump, and the stump is not designed to take direct impacts. The part between the foot and the knee is intended to transfer the stress, not to take it directly. The foot is specially designed to take loads and shocks. Once again you have the problem of sores developing much faster in an amputee." (Volume 7, pages 1492-1493)

The preponderance of evidence clearly indicates that, following the amputation of his right leg, Master Warrant Officer Michaud was no longer able to carry out the role of infantryman or the duties of his position as company sergeant-major.

CASE LAW

To decide on this case, the Tribunal must refer to the Canadian Human Rights Act, R.S.C. 1985, c. H-6, and specifically to the following clauses:

"2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on

.../22

race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted. 1976-77, c. 33, s. 2; 1980-81-82-83, c. 143, ss. 1, 28.

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

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, on a prohibited ground of discrimination."

The case law with regard to human rights has established the principle that, in cases of discrimination, the Complainant must demonstrate before the Tribunal that prima facie he or she is a victim of a discriminatory practice. The Respondent's attorney admitted that the Complainant had fulfilled this requirement. (Volume 9, page 1639)

Once prima facie discrimination is established, the nature of the discrimination should be determined.

Called to rule upon the concept of discrimination, our courts have distinguished between direct discrimination and adverse effect discrimination.

In Ontario Human Rights Commission and Theresa O'Malley v. Simpsons-Sears Ltd, (1985) 2 SCR 536, the Supreme Court of Canada made this distinction at page 551:

"A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. (...) An employment rule honestly made for sound economic or business reasons,

.../23

equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

In Alberta Human Rights Commission v. Central Alberta Dairy Pool, (1990) 2 SCR 489, Wilson, J, clarified the concept of direct discrimination at page 513:

"As McIntyre J. notes in O'Malley, the BFOQ test in Etobicoke was formulated in the context of a case of direct discrimination on the basis of age. The essence of direct discrimination in employment is the making of a rule that generalizes about a person's ability to perform a job based on membership in a group sharing a common personal attribute such as age, sex, religion, etc. The ideal of human rights legislation is that

each person be accorded equal treatment as an individual taking into account those attributes. Thus, justification of a rule manifesting a group stereotype depends on the validity of the generalization and/or the impossibility of making individualized assessments."

Are we faced with a case of direct discrimination or adverse effect discrimination?

The Complainant, the sergeant-major of an infantry company, lost his job because of his physical disability, that is, the amputation of his right leg. The Canadian Armed Forces legitimately set up minimum medical standards so as to determine an individual's potential employability on enrolment and throughout his or her military career. Deciding to release an infantryman whose medical grade is lower than the minimum required grade because he has had a leg amputated is making a distinction upon a prohibited ground. Indeed, individuals lose their job because they are part of a group of people who have a disability preventing them from meeting the medical standards set up by the employer. This is a rule which is on its face neutral. Therefore, discrimination based on physical disability would often amount to direct discrimination.

In Ontario Human Rights Commission v. Etobicoke, (1982) 1 SCR 202, it was ruled that mandatory retirement at 60 constituted direct discrimination on the basis of age. In St. Thomas v. Canadian Armed Forces, (1991) CHRR, volume 14, decision 38, the Tribunal came to this conclusion at paragraph 17:

"In the opinion of the Tribunal, the rule which the Canadian Armed Forces had

.../24

established declaring asthmatics unfit for military service is direct discrimination."

In Attorney General of Canada v. Rosin, (1991) 1 FC 391, it was decided that refusal to hire a cadet because he is blind in one eye is direct discrimination.

Finally, in Brossard (Town) v. Quebec (Commission des droits de la personne), (1988) 2 SCR 279, it was ruled that an anti-nepotism hiring policy amounts to direct discrimination on the basis of civil status.

The Tribunal concludes that for the Canadian Armed Forces to rule that an infantryman who has had a leg amputated is no longer fit for military service is direct discrimination.

Direct discrimination having been established, section 15(a) of the Canadian Human Rights Act can be adduced. But then, the Respondent must demonstrate that Master Warrant Officer Michaud's discharge was the result of the application of a bona fide occupational requirement.

This section reads as follows:

"15. It is not a discriminatory practice if

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

In Ontario Human Rights Commission v. Etobicoke, (1982) 1 SCR 202, the Supreme Court of Canada further clarified the concept of a bona fide occupational requirement at page 208:

"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."

The bona fide occupational requirement must first meet the subjective criteria established in the Etobicoke judgment:

.../25

"It 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..."

After he had had his right leg amputated, the Complainant was classified G2O3, which is lower than the G2O2 grade required for the infantryman trade.

The O3 grade is assigned to an individual who has a moderate medical or psychological disability which prevents him from doing heavy physical work or operating under stress for sustained periods.

In the case of someone who has had a leg amputated, this grade appears to be quite justified and was never in the least disputed by the Respondent.

The evidence revealed that to be an infantryman, one has to be in a very good physical condition. An infantryman must be able to participate in all phases of war. He will be called upon to travel on foot, sometimes with snowshoes, often over uneven ground, over distances that will vary according to circumstances. The evidence as a whole demonstrates that, following the amputation of his leg, the Complainant was no longer able to accomplish the duties of an infantryman nor all those of the sergeant-major of an infantry company.

Should there be a difference in the nature of the duties performed by an infantryman who is a member of the Reserve Militia as opposed to an infantryman who is a member of the Regular Force?

In reference to Galbraith v. Canada (Canadian Armed Forces), CHRR, volume 10, par 45857, 45858, the Tribunal accepts the

position of the Human Rights Tribunal in the case of an artilleryman:

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

.../26

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

"I am not prepared to differentiate between artillerymen in the Militia and artillerymen in the Regular Forces for the purposes of determining what constitutes a bona fide occupational requirement. In my view, the Canadian Armed Forces' concern with safety is not diminished and is no less real because of the fact that members of the Militia train much less often than their Regular Force counterparts and can only be ordered to go somewhere if they are placed on active duty. Artillerymen in the Militia are called upon to demonstrate a broad range of skills which are not substantially different than those necessary in the Regular Forces. The fact is that, once members of the Militia are placed on active duty, they must be capable of fulfilling their assigned duties. An individual's ability to do so will impact not only upon his own safety, and by virtue of the fact that teamwork and mutual reliance are critical, upon the safety of his team members, but also upon the safety of Canadians and the defence of Canada. In light of these considerations, it is not unreasonable for the Canadian Armed Forces to insist upon

strict enrolment standards for new recruits into the Reserve Militia."

If the Complainant was not able to perform his duties as an infantryman, how is it that he remained a member of the Reserve Militia from March 1985 to November 1990?

It appears from the evidence that Mr. Michaud's immediate supervisors, rather than demanding that he undergo a medical examination following the amputation of his leg, preferred to turn a blind eye until the intervention of senior military authorities.

The avowed motives were the absence of qualified militiamen to perform the duties of company sergeant-major, sympathy and the desire to allow the Complainant to complete the 22 years of service necessary to obtain the "Rosette" decoration. To do so, tasks that could not be carried out by the Complainant were entrusted to other servicemen.

However, Master Warrant Officer Michaud gave up his position as company sergeant-major for that of quarter-master general. After this position was assigned to a class "B" militiaman, there was no company sergeant-major position for him to go back to any more.

The bona fide occupational requirement was no less legitimate because of this irregularity.

Thus, it must be concluded that the Respondent demonstrated the subjective criterion required by the Etobicoke judgment.

The bona fide occupational requirement must also meet the objective criterion stated in the Etobicoke judgment:

.../27

"In addition it [the limitation] 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."

Dr. Milczarek's testimony and medical expertise demonstrate that if the Complainant were asked to walk or to run a few miles with a weight on his back, the stump of his right leg could not withstand the stress, taking into account both the length of time and the weight, and there would be a bruising of the skin severe enough eventually to call for the removal of the prosthesis and his immobilization for a period of 12 to 24 hours to seven days.

Furthermore, Dr. Milczarek explained that a man who has had a leg amputated cannot walk or run as fast as one who still has both legs.

In Canadian Pacific Limited v. Canada (Canadian Human Rights Commission), 1 FC 209, Pratte, J, stated at page 21:

"The decision of the Supreme Court of Canada in Etobicoke is authority for the proposition that a requirement imposed by an employer in the interests of safety must, in order to qualify as a bona fide occupational requirement, be reasonably necessary in order to eliminate a sufficient risk of damage.

In Bhinder, on the other hand, the Supreme Court upheld as a bona fide occupational requirement one which, if not complied with, would expose the employee to a 'greater likelihood of injury - though only slightly greater'.

The effect of those decisions, in my view, is that, a fortiori, a job-related requirement that, according to the evidence, is reasonably necessary to eliminate a real risk of serious damage to the public at large must be said to be a bona fide occupational requirement."

To allow the Complainant to keep his job as an infantryman would be to expose him to a risk of injury.

Moreover, as a soldier works as part of a team, his disability can jeopardize his fellow servicemen's safety and the safety of the general public.

.../28

What about the duty to accommodate?

In Alberta Human Rights Commission v. Central Alberta Dairy Pool, (1990) 2 SCR 489, the Supreme Court came to the conclusion that the duty to accommodate was only necessary in the case of direct discrimination, as was demonstrated in this case.

At page 514 of this judgment, it reads:

"Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish the BFOQ. This is distinguishable from a rule that is neutral on its face but has an adverse effect on certain members of the group to whom it applies. In such a case the group of people who are adversely affected by it is always smaller than the group to which the rule applies. On the facts of many cases the "group" adversely affected may comprise a minority of one, namely the Complainant. In these situations the rule is upheld so that it will apply to everyone except persons on whom it has a discriminatory impact, provided the employer can accommodate them without undue hardship."

CONCLUSION

The Tribunal concludes that the Respondent has demonstrated that releasing the Complainant from the Reserve Militia after he was given a medical grade lower than G2O2 following the amputation of

his leg below the knee is a bona fide occupational requirement according to the provisions of section 15(a) of the Canadian Human Rights Act. (RS 1985, c H-6)

.../29

CONSEQUENTLY, THE TRIBUNAL:

DISMISSES the complaint made by Rino Michaud to the Canadian Human Rights Commission following his release by the Canadian Armed Forces on November 8, 1990.

SIGNED at Ville St-Georges on September 13, 1993

[signed]
Roger Doyon, Chairman

SIGNED at Cowansville, Quebec, on September 27, 1993

[signed]
Marie-Claude Landry, Member

SIGNED at East Riverside, N.B., on September 20, 1993
[signed]
Joanne Cowan McGuigan, Member