

T.D. 10/97
Decision rendered on October 24, 1997

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

LOUIS-PAUL PELLETIER AND ROBERT DORAIS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN ARMED FORCES

Respondent

TRIBUNAL DECISION

TRIBUNAL: Daniel Proulx, Chairperson
Brigitte Bédard, Member
Michel T. Giroux, Member

APPEARANCES: François Lumbu and Odette Lalumière, Counsel for the
Canadian Human Rights Commission

Raymond Piché, Nadine Perron and Major J.M. Dugas,
Counsel for the Respondent

DATES AND LOCATION

OF HEARING: May 12 to 16, 1997, in Montreal, Quebec

THE COMPLAINT

The complainants are former officers of the Canadian Forces (hereafter the Forces or the CF) who worked at Eastern Region Cadet Headquarters for several years on a contract basis. They claim that their contracts were not renewed in 1994 because the Forces thought they were too old. Each complainant filed a separate complaint with the Commission on February 21 and 22, 1994. However, the wording of the complaints is identical in both cases, and reads as follows:

The Canadian Forces has discriminated against me on the basis of my age (60 years) by refusing to renew my contract, in contravention of the section 7 of the Canadian Human Rights Act.

On August 12, 1993, at which time I was a Staff Officer II - Administration (SO II - Training in Major Dorais' case), Lieutenant-Colonel Henri Laporte informed me that he would not be renewing my contract, due to expire March 31, 1994, because he wanted a younger staff and new blood in the organization.

Given my superior performance, this decision is discriminatory. Furthermore, the reorganization in question in fact resulted in staff being added to the existing structure. Cadet Headquarters is increasing its staff by four positions, including two additional majors, compared to the previous structure.

POSITIONS OF THE PARTIES AND THE COMMISSION

The complainants did not have legal representation as such. They gave their case to the Commission's lawyers, who state that the respondent claimed a restructuring of the Eastern Region Cadet Headquarters as a reason not to keep the complainants on staff by not renewing their contracts which were due to expire, as had been done for several years. The complainants' job descriptions were redefined so as to give those positions to younger officers. This is therefore a case involving discrimination against an individual under section 7 of the CHRA. According to the Commission and the complainants, while age was perhaps not the only reason their contracts were not renewed, it was a contributing factor.

The CF's lawyers took the position that age played no role whatsoever in the decision not to offer a new contract to the complainants. On the one hand, they were the victims of Eastern Region Cadet Headquarters reorganization, which was necessary, and on the other hand, merit, meaning the ability to effectively do the work, was the only criteria for hiring new staff for the positions the complainants wanted in the new structure implemented in 1993-1994. In other words, competency was the criteria for selection, and competency is not a prohibited ground within the meaning of the Act.

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Because the settlement of this dispute depends in large part on the credibility of the witnesses, it is important to first examine the depositions made by each key witness in this matter.

WITNESSES PRESENTED BY THE COMMISSION

Major Louis-Paul Pelletier

After over 27 years' service in the Regular Force, Major Pelletier retired in 1978, at which time he became a Reservist. In 1981, he was asked to work at Cadet Headquarters as a training and summer camp coordinator under contract with a term of one year less thirty days. He was responsible for coordinating the activities of eight CIL (Cadets Instructors List) captains from three segments of the Forces: army, navy and airforce. Given the almost total lack of organization at that time in the cadet corps and summer camp preparation, Major Pelletier decided to prepare a complete information manual for both CIL officers and cadets. The manual described in detail how the cadet movement operated, including summer camp organization, and explained training standards. Major Pelletier believes that this work was important and essential to the cadet movement, a position that was not disputed by anyone in this case.

In 1992, Major Pelletier was transferred to a position as SO II - Projects, because the person in the position at that time retired. This transfer was not Lieutenant-Colonel Laporte's decision, but that of his predecessor. In May 1993, Major Pelletier was transferred again, this time by Lcol Laporte to SO II - Administration. However, the reasons for the transfer were not explained to him.

Apart from certain insinuations made by LCol Laporte that Mr. Pelletier was acting like a "tourist" at the summer camps, meaning that he was having a good time instead of actually working, Major Pelletier says that he never received any complaints about the quality of his work in

eleven years working with the Cadet Headquarters as a training, project or administration staff officer. However, Lt.-Col Laporte, who was at that time his immediate superior, called him into his office on August 10, 1993 and told him that, just like great athletes who have to quit some day, the time had come for him to "hang up his skates", because new blood was needed in the structural reorganization of Cadet HQ underway at that time. Major Pelletier also states that Mr. Laporte then said that "younger staff" was needed. There were no witnesses present at the meeting. Mr. Pelletier says that he was humiliated and disgusted by being told indirectly that he was too old to work within the cadet organization.

After sending a letter to General J.-Armand Roy, which was signed by him and Major Dorais, complaining of the favoritism shown by LCol Laporte and the discriminatory nature of his decisions, Major Pelletier met a second time with LCol Laporte in mid-February 1994. LCol Laporte lost his temper and insulted Major Pelletier, clearly insinuating that Major Pelletier was a coward and that he, on the other hand, had acted responsibly. LCol Laporte used rather crude language to express his thoughts. On that occasion, he denied that age played any role in the non-renewal of Major Pelletier's contract, and again stated that the decision had to be made to bring new blood into the organization, which needed restructuring. Major Pelletier did not believe anything he said.

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Major Pelletier also insists that LCol Laporte never offered him other actual jobs. The only job he was offered was a hypothetical position as a liaison officer, a position which did not exist at the time, and which would have required him to work with cadets during active periods, i.e. evening and weekends. Because this work seemed to him too onerous, and because the position was hypothetical, Major Pelletier refused the "offer" made by LCol Laporte. He believes in fact that he did not receive any "formal offer" from LCol Laporte.

According to Major Pelletier, LCol Laporte created an "underhanded" way to remove him from the cadet organization because he was too old. This perception, he says, was confirmed in 1993 when Mr. Laporte held numerous consultations on the restructuring without ever asking for his opinion, and again when he withdrew him from his position as SO II - Administration and replaced him with Major Hétu, an officer from the Regular Force who, by chance, retired three months later, and then finally, when he appointed the three CIL officers to the SO II positions in the new structure without holding a job competition. Major Pelletier believes that in all fairness, there should have been a job competition for the three new cadet training positions, and he should have been given an opportunity to apply for one of

the positions. He is not disputing the competency of the three majors who were selected, except one who was quickly replaced, although he believes that the three CIL officers have insufficient knowledge of CF structures. As for his own competency in cadet training, Mr. Pelletier says it was never questioned by anyone in the organization. According to Mr. Pelletier, this underhanded tactic confirms that the restructuring was unnecessary, since everything was operating very smoothly beforehand. Furthermore, the new structure implemented by LCol Laporte was inappropriate because, according to him, it made the HQ top heavy by significantly increasing the number of jobs instead of reducing them. Mr. Pelletier was therefore completely opposed to the changes and did not agree on the directions being taken.

Major Pelletier wrote in a memo to Mr. Laporte's predecessor dated April 24, 1991 (Exhibit I-3) that he intended to take final retirement in 1992. The witness stated that this was due to serious health problems. He eventually changed his mind because his health problems were gradually and subsequently resolved. He decided to reevaluate his situation each year, and health permitting, to work on a contract basis until age 65 (the mandatory age of retirement in the cadets at the time). Mr. Pelletier is therefore claiming the equivalent of four years' lost wages and moral damages for humiliation, anxiety, stress, etc.

Major Robert Dorais

Major Dorais retired in 1979 after completing twenty-six years' service with the Regular Force. However, he was hired the same year as Class C for three years as Staff Officer - Personnel and garrison commander. In 1983, he was given the position of Cadet Administration Officer at the Saint-Hubert HQ on a contract basis under annual contract with a term of one year less thirty days. He then served, on the same contract basis, as SO II - Training from 1990 to 1993, then as SO II - Projects when the new structure was implemented in the fall of 1993.

Major Dorais explained that, prior to the non-renewal of his contract, he had three meetings with LCol Laporte. The first meeting took place in early August 1993 in Mr. Laporte's office. At that time, Mr. Laporte asked him what his plans for the future were and if he was considering a change. He told him that there was a possibility that he could be made General Roy's deputy chief of staff, if he wanted. At the second meeting with Mr. Laporte, Major Dorais informed him of his decision: he was not interested in the position because of personal and family problems. However, he gave Mr. Laporte no further explanation because, he says, Mr. Laporte did not

ask any questions about the nature of the problems and showed no interest in the subject. At that time, Mr. Dorais' wife and son were seriously ill, requiring him to go to the hospital occasionally and spend time with them. Because he was not certain that the General would show as much flexibility as the cadets office where he worked with respect to his work schedule, Mr. Dorais thought that it would not be appropriate to offer his services for such a prestigious and demanding position as General Roy's deputy chief of staff. He also believed that he had too few years of service left before being required to retire at age 65 to be of interest to the general. Finally, he insists that this was not a formal offer of employment as such. LCol Laporte dangled the possibility of applying for this position, saying, in his opinion, there could be several potential candidates. In this case, the decision was not Mr. Laporte's, but would be made by General Roy himself. However, it appears that none of this was really discussed in the second meeting with Mr. Laporte, because he did not seem interested in knowing Mr. Dorais reasons for refusing to apply for the position as General Roy's deputy chief of staff.

It was during the third meeting, on August 12, 1993 in Mr. Laporte's office, that Mr. Laporte informed Mr. Dorais that his job as SO II - Training was eliminated as of October 1993, to be restructured into three new SO II positions, each related to one of the three arms of the CF. According to Major Dorais, Mr. Laporte also told him that he needed to fill the three new positions with "young officers full of piss and vinegar" and that as a result, there was no longer a place for him in the cadet organization. Mr. Laporte did not offer him any other job in the cadet organization. However, he spoke of the possibility of creating liaison officer positions later, in a staff meeting or in LCol Bernard's office. However, Mr. Dorais states that no formal offer was made to him as such and that, in any case, the position did not exist.

Unlike Mr. Pelletier, Major Dorais' performance evaluations were not impeccable from start to finish, although they appear excellent throughout his military career. In Mr. Laporte's final performance evaluation of Mr. Dorais, he states that Mr. Dorais seemed to lack motivation at work. In complete disagreement with this statement, Mr. Dorais stated that, curiously, normal procedures had not been followed for his 1993 performance evaluation. Normally, before entering a negative comment on the file, the superior always speaks to his subordinate and allows him the opportunity to improve. Negative comments are only entered on the file when the situation has not been remedied. However, neither Mr. Laporte nor Mr. Bernard, his two superiors at the time, ever said a word to him on the subject. Furthermore, Mr. Dorais says that he was never informed of this comment

before the end of March 1994, i.e. one week before his departure, when he requested his complete file from the personnel department so he could consult it for filing a complaint with the Human Rights Commission. In his opinion, the army does not subscribe to this style of management, whether for regular Class B or C staff or civil service employees.

Finally, when asked to comment on the new cadet structure implemented by LCol Laporte, Major Dorais expressed his disagreement. He had heard from Ottawa HQ that the previous structure worked very well, that the Eastern Region structure was the best in Canada. He did not see how the change could be justified, especially if it involved increasing the number of jobs by dividing his own training position into three separate jobs. The only criticisms he had heard came from Mr. Laporte, who at some weekly meetings, mentioned that some people at HQ were acting like "tourists" when they visited cadet summer camps. Because this criticism was directed at everyone, i.e. 12 staff members, Major Dorais took it as constructive criticism, telling everyone to be well-prepared before arriving at the camps.

Major Dorais thus believes that he should have been given the opportunity to apply for one of the three new SO II - Training positions, although the army segment position would have been his preference, given that he had always been a member of that arm of the Forces. Since he would have been able to stay with the cadets until age 65, if not for the premature non-renewal of his contract based on his age, he is claiming material damages equivalent to 44 months' salary and moral damages for humiliation, stress, anxiety, etc.

Lieutenant-Colonel Jean-Guy Bernard

LCol Bernard retired from the Regular Force after 30 years' service and accepted a position as assistant to the DCOS in the Eastern Region Cadet HQ in 1988. Like the complainants, he was hired on a contract basis, for terms of one year less thirty days, with Class B status. As assistant to the DCOS between 1992 and 1994, Mr. Bernard was the complainants' immediate supervisor. His immediate supervisor was LCol Laporte. His duties at the time included general coordination of training, teaching, administration, logistics and cadet office finances, as well as acting as a liaison with the local, provincial and national cadet leagues for each arm of the military (army, navy, airforce). He also liaised with the CIL Officers training school at Longue-Pointe, the RCIS. Mr. Bernard left this stressful position and took final retirement from the cadets in 1994.

When he began as DCOS with the cadets, LCol Laporte told Mr. Bernard that General Roy had mandated him to see what could be changed in the management structure, because it seemed top-heavy. His job, Mr. Bernard

believes, was to "restore order in the court." However, Mr. Bernard told him there was no need to change a winning formula, because everything was going very well in the Eastern Region HQ, which had a reputation as the most high performing in Canada. Mr. Laporte, he said, therefore insisted on devoting his time in the fall of 1992 to meeting with all officers and reviewing all positions in the organization. Mr. Laporte and Mr. Bernard

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had several discussions about Majors Dorais and Pelletier beginning in 1993. Mr. Bernard at that time indicated that their performance was excellent, despite Major Dorais' family problems and Major Pelletier's health problems.

Finally, despite Mr. Bernard's disagreement, Mr. Laporte prepared a proposal for restructuring the Cadet HQ organization. The proposal recommended eliminating, among other things, training positions that until then had been held by Mr. Dorais and Mr. Pelletier. Mr. Laporte thought that it would be preferable to eliminate their positions and reallocate resources to three positions representing the army, navy and airforce. He also believed that it would be preferable that the SO II positions for each of these segments be given to CIL officers. According to Mr. Bernard, Mr. Laporte made this decision to enhance the image of CIL officers. It would also allow him, by eliminating the former Regular Force officers, to make more room for civilian CIL officers in cadet management and show the people in the field, i.e. league members, that the cadet movement would be able to assume more responsibility. This is why, when the time came to recruit SO II for the army, navy and airforce positions, the complainants were not considered as candidates. The decision to place CIL officers in these jobs eliminated them automatically from those jobs. Placing them in any of these three new positions would also be a step down for them, according to Mr. Bernard, since they would be responsible for only one segment instead of all three. However, he firmly believes that based on their experience in the Forces, the complainants could have handled any of the SO II jobs, even though both had served with the Land Force.

When questioned by the Commission's lawyer on Lt.Col. Laporte's reasons for not renewing the complainants' contracts, Mr. Bernard replied:

R. Because they'd put in their time, they'd been with the cadet office long enough, new blood and younger people were needed, and they were at an age when they could go on to other things. (Transc., p. 441)

During cross-examination by the respondent's lawyer, Mr. Bernard then denied that age had anything to do with Mr. Laporte's decision to implement his new structure, which eliminated the two complainants:

Q. Yes, but Colonel Laporte, he wanted CIL officers there. You are not claiming that Col. Laporte dishonestly created CIL officer positions to get rid of the two complainants?

R. No, not at all.

Q. That s not it?

R. No, no.

Q. So what we know is that Colonel Laporte decided, wrong or right...that he needed CIL officers, and that's what he

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did...and he filled those jobs and there was no more room for a lot of other people, but age did not play a role, it wasn't because Mr. Dorais was 60 years old that Mr. Laporte decided that he wanted CIL officers, do you agree?

R. Yes, I agree.

(Transc., p. 509).

Then, when re-examined by the Commission's lawyer:

Q. Mr. Bernard, I would like you to clarify a point. A short while ago when I asked you why Mr. Pelletier's and Mr. Dorais' contracts were not renewed, what did you tell me?

R. Because they no longer fit in with the organization's plans.

Q. Right. Why is that?

R. Because they were too old.

Q. Is it true that you discussed that, because they were too old, with Colonel Laporte?

R. He told me that they had been with the cadet organization for 10 years, they were now 60, and it was time for them to leave.

(Transc., p. 510-511)

Cross-examined again by the respondent's lawyer, Mr. Bernard answered as follows:

Q. Does this change your testimony, you said that the only reason they (Mr. Dorais and Mr. Pelletier) were not chosen was because they were not CIL officers, that the colonel wanted to have CIL officers?

R. No sir, I don't think that changes my testimony. You asked me if we talked in his office about age and then years of service in the cadet movement, and they already had 10 years of service, plus they were 60; I also mentioned the personal problems they were both having; and then the decision was made, and it was his decision because he was the one who signed the contracts.

(Transc., p. 511-512)

Furthermore, with respect to the new structure Mr. Laporte wanted to implement, LCol Bernard agrees that Mr. Laporte sincerely believed in it,

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and that, although he did not agree with the new structure, it was an honest difference of opinion between individuals who had opposing or different management styles.

With respect to the complainants' performances during 1992, 1993 and 1994, Mr. Bernard is of the opinion that their performances were excellent despite the very serious personal problems they were facing at that time. However, he admits that Mr. Pelletier was irritable at that time, probably because of his health problems, and that he was impatient with CIL officers who were not familiar with his manuals. As a result, Major Pelletier often tended to be brusque with the CIL officers, answering them in a sarcastic tone and raising his voice. Mr. Bernard also confirms that Mr. Laporte told him that he had received complaints about that and adds that it is "possible" that Major Pelletier's unfriendly attitude created discomfort among the CIL officers at that time, who may have been afraid to deal with Mr. Pelletier.

As for Mr. Dorais, Mr. Bernard also confirms that Mr. Laporte told him that he found Mr. Dorais lacking in job motivation. Mr. Laporte knew that Mr. Dorais was having family problems that required him to be frequently absent from the office, because Mr. Bernard had spoken to him about it. However, Mr. Bernard acknowledges that Mr. Laporte dismissed his explanations because he said he had known Mr. Dorais for forty years and that according to him, Mr. Dorais had never shown much job motivation.

With respect to the selection of the three officers for the new SO II positions, Mr. Bernard says that they were the right choices in the circumstances, except in the case of Major Mathieu, that hiring him was an error and he was quickly replaced by Captain Lafond who was promoted to major. This selection was made by a three-person committee including him and Mr. Laporte. Because only CIL officers were eligible, the number of candidates was very limited. However, in this context, he believes that the best candidates were selected, but believes it would have been preferable to offer two of the three positions to the complainants, given their invaluable service to the cadet movement and the Forces over many years, all the more so because in one or two years the complainants could have properly trained the CIL officers who would take over under the new structure. Finally, he acknowledges that Mr. Laporte, as DCOS for the Eastern Region, was being pressured by the cadet leagues, which could have something to do with the reforms he wanted to implement.

WITNESSES PRESENTED BY THE RESPONDENT

Lieutenant-Colonel Henri Laporte

Lt.-Colonel Laporte retired from the Regular Force in 1984, after 30 years' service as a non-commissioned officer and an officer. He then continued to work in the Forces as a reservist from 1986 to 1991 in various positions. He was serving as a reservist when he accepted General Roy's 1992 invitation to act as Cadet HQ DCOS for Québec, a job which involves responsibility for all aspects of the cadet movement in the province.

Aware of certain problems in cadet management, General Roy asked him to identify the problems and report back to him. General Roy, he says, asked him to see that the movement became "well-known and well-led." His mandate was thus to restructure cadet management so as to make it more efficient. General Roy assured him that he would have all the necessary support and that he was to report to the General directly.

Mr. Laporte began his new job on September 8, 1992. He began by meeting with the outgoing DCOS, LCol Brassard, as well as with each of the HQ staff so as to be brought up to date on the each person's duties and get each staff member's views on HQ operations. Mr. Brassard then told him that there were problems with two jobs: SO II - Administration, held by Major Pelletier, because Mr. Pelletier was seriously ill and had announced his intention to retire before the end of the year; and SO II - Training, held by Major Dorais, who in his opinion had been in the job too long. The other members of the HQ told him that there was an absence of team spirit at HQ, specifically because Mr. Pelletier had no use for CIL officers.

Mr. Laporte then toured the cadet leagues and corps during the fall of 1992, and heard complaints of problems in the movement: communications with certain members of HQ were very difficult. Majors Pelletier and Dorais were named. With respect to Major Pelletier, he seemed too hard on CIL officers, and on civilians working in the movement. Mr. Laporte says that he sometimes asked his assistant LCol Bernard to tell Major Pelletier to deal more calmly with the CIL officers or with people involved in the cadet movement, but that this was no doubt useless, since Major Pelletier had a naturally "loud voice" and that he was not the type of man to change in this respect. With respect to Major Dorais, he was told that he was never there and did not return his calls. Mr. Laporte believed that his personal and family situations were reason to accommodate him and gave him half-days off, but he found it unacceptable that Mr. Dorais subsequently did not follow up on his messages, failing to return his calls.

After these consultations and during the winter of 1993, Mr. Laporte designed a plan for restructuring cadet management to make it more efficient. He met with all retired HQ staff at a retreat the following summer to discuss with each of his officers the relevance of his proposed changes. After two days of discussions, he reported that 90% of the people supported the proposed structure, and that no one had submitted a formal objection. At that time, there were no names on the jobs shown on the flowchart that had been discussed. However, regarding training, it was clear that the SO II - Training position then held by Major Dorais was being eliminated. This position involved overseeing three "sector" captains (one for each arm of the military - army, navy and airforce). It was also clear that training management was to be henceforth assigned to three majors each representing an arm of the Forces under the general direction of a lieutenant-colonel in training and logistics.

After obtaining his staff's agreement on this restructuring of HQ, Mr. Laporte discussed it again with LCol Bernard and Memess, and then met with General Roy's staff to present the plan. Mr. Laporte arrived at that

meeting with several of his own staff officers. Majors Dorais and Pelletier were part of the delegation and participated actively in the presentations.

The new structure was approved by General Roy, and the next step was to decide who would be given each position on the flowchart. However, according to Mr. Laporte, there were two restrictions. On the one hand, some jobs were identified as requiring Regular Force officers, meaning that he had to give the SO II - Administration job, up to that time held by Major Pelletier, to Major Héту, who was assigned to him from the Regular Force. He states that there was no lobbying or manipulation involved in giving the job to Major Héту. Major Héту became available for this administrative job at the time of the restructuring, and because he had the necessary qualifications, no one could oppose giving him the job of SO II - Administration. Also, he said that he preferred not to open the job to competition as such, given that summer camp preparation had to begin immediately. He decided therefore to form a limited committee composed of himself and LCol Bernard and Memess to define selection criteria and begin selecting candidates.

However, Mr. Laporte stated that CIL officers were required for the three SO II - Training jobs (army, navy and airforce) which, he insists, were not new positions, but existing positions, the category of which had been upgraded from captain (junior officer) to major (senior officer) to enhance prestige and authority. He also insists on his disagreement with the complainants' statements that the new structure added 14 new jobs to HQ, instead of reducing the number. According to him, this would have been impossible, given budget cuts, and, he adds, the financing and staffing for the structure was thoroughly before being approved.

Why did Mr. Laporte insist on giving the three SO II - Training positions to CIL officers? He was convinced that the main duty involved the three positions was summer camp preparation and developing training standards was secondary. He was therefore of the opinion that CIL officers were required, because unlike existing or former regular officers, they had concrete knowledge of and actual experience with summer camp operations. For Mr. Laporte, this was crucial to respond to complaints he had received during the fall 1992 tour from league members and cadet corps. Cadet officers had expressed their desire that the movement be led by cadets and not by existing or former regular officers. He had also been told about the lack of women in the senior ranks at Cadet HQ in Quebec, given that 50% of the cadet corps in Quebec were female.

In this context, Major Dorais (whose job was eliminated under the new structure) and Major Pelletier (whose job had to be filled by Major Héту of the Regular Force) were automatically excluded by LCol Laporte as candidates. Although their experience in the cadet movement, mainly at a theoretical level involving standards, was considerable, this was not the kind of experience being sought. What was needed were people with actual experience at summer camps and in the practical operations of the camps, i.e. CIL officers able to communicate easily with civilians.

Aware of the problem this caused for the two majors, Mr. Laporte says

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that he spoke to General Roy who, he said, told him that his deputy chief of staff was leaving and that Major Dorais could fill the position adequately, since administration is one of his known skills. With respect to Major Pelletier, General Roy told him to contact the other HQs to find out if there was a position for him. Mr. Laporte therefore spoke to Mr. Dorais about the possibility of applying for the position of the General's deputy chief of staff in August 1993, but the major refused for personal and family reasons. As for Mr. Pelletier, no HQ notified Mr. Laporte of any available positions. He tried again, despite existing budgets and although he was in no way required to create jobs as district advisors or liaison officers, custom designed for them, but both refused his offer. Such positions would have required the complainants to be available on weekends and travel in their districts to respond to the various needs of the cadet corps. Because Majors Pelletier and Dorais refused his offer, he had no choice but to tell them there was no longer a place for them in the organization and that they would have to quit when their contracts expired. However, Mr. Laporte granted them extensions of their SO II contracts, so that they could remain under contract until April 2, 1994.

With respect to the possibility raised by the complainants of Mr. Laporte considering them for one of the three SO II - Training positions, Mr. Laporte disagrees, because that would have been a step down and therefore an insult to both of them. In addition, he says, it would have created an untenable position for the complainants and for the CIL officers selected for the SO II positions. Because of the the dim view the complainants had of CIL officers, they would not have been able to treat people they considered as pseudo-officers as equals, given that those officers had received only 28 days' training. Therefore, by giving Major Dorais or Pelletier one of those positions, Mr. Laporte says that this would only have exacerbated the problems he had identified, instead of solving them.

Given the efforts he believes he made to ensure that the complainants had a job, Mr. Laporte says he was extremely shocked by the letter they sent to General Roy dated February 7, 1994, in which they openly criticized him. He says that this action, which came without warning, made him "emotional." He felt that the letter was disloyal and was shocked when he read it. He does not understand why Majors Dorais and Pelletier never came to him and asked for an explanation. According to Mr. Laporte, this is why he got upset when he met with Mr. Pelletier. He believes that complaining to the General without coming to see him first showed a lack of courage, and this is why he used the expression "yellow" and other expressions of a similar nature when speaking to Mr. Pelletier.

As to whether age played a role in the decision not to renew the complainants' contracts or consider them for one of the three SO II - Training positions (army, navy, airforce) in the new structure, Mr. Laporte replied that age did not play a role and that there are many other officers at HQ, both regular and CIL, who are older, in their fifties and sixties, and whose contracts with Cadet HQ were renewed. The only thing that counted was ability based on practical knowledge of summer camps, he said,

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and it was on that basis that he, Mr. Bernard and Mr. Memess selected Majors McClure, Ouellet and Mathieu in 1993, three CIL officers with extensive experience in this field.

As to whether he told Major Pelletier in August 1993 that he needed new blood in the organization and that it was time to hang up his skates, Mr. Laporte replied that this was true, but strictly speaking, had nothing to do with age. It was, he says, a remark he intended to be positive, since he made a comparison with a hockey player like Jean Beliveau, who had a brilliant career but who finally had to accept that he had to make room for better players.

When the Tribunal asked him if he had told Mr. Dorais in August 1993 that there was no longer a place for him in the organization because he needed "young officers full of piss and vinegar," Mr. Laporte clearly remembers using the English expression full of piss and vinegar, which means very dynamic and enthusiastic and, he insists, that is exactly what he was trying to say. He says that because a person can be dynamic at any age, he does not remember alluding to age as such. He then gave as an example Mr. Pelletier who, despite his age, is full of piss and vinegar. Whatever happened, he says, although he used the expression "young officers" his intention was to find dynamic people able to efficiently organize summer cadet camps.

Lieutenant-general Armand Roy

Mr. Roy left the Canadian Armed Forces as lieutenant-general and then became Deputy Chief of Staff for National Defense. He was more closely involved in the cadet movement between 1984 and 1987 as commander of the Cadet HQ mobile forces. In 1992 he was named commander of the Land Forces, Québec sector (known as Mobile Force, Eastern Region prior to 1990).

Mr. Roy says that complete restructuring of the land force was undertaken in 1990 when he took over management of the Quebec sector. This involved reducing the number of staff and maximizing resource use by decentralizing responsibilities. In other words, the organizational flowchart had to be "flattened" by cutting non-essential management positions and increasing the authority of those in positions which up to that point had been junior positions. In addition, the "total force" concept was initiated along with the restructuring, meaning that the land force would include the Regular Force (whose numbers were declining) and the militia, so both could serve on operational missions. This meant ensuring that a maximum number of soldiers in the Regular and Reserve Forces could be moved from management positions to be available for service in various countries where Canada acts as a UN peacekeeper.

It was in this context that Mr. Roy asked Henri Laporte to take over cadet management in the fall of 1993, given Mr. Laporte's experience and leadership, because he wanted him to undertake the restructuring required at the Cadet HQ. Mr. Roy explained the general objectives of the restructuring to Mr. Laporte and also told him that the goal was to give

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more responsibility to the CIL officers. Because of his previous cadet management experience, Mr. Roy knew that it was a legitimate ambition of CIL officers to move into senior positions at the HQ. The restructuring was initiated, he recalls, in the late 1980s by giving CIL officers, with the support of regular officers, direct command over summer camps. However, Mr. Roy believed it was time to develop CIL officers' management skills and move them into senior positions. He believed that this restructuring objective fit naturally with overall land force restructuring objectives. He explained his vision to Henri Laporte, who was already aware of it, and gave him carte blanche because he was busy at the time with operational missions with the Regular Force and the militia. He approved the restructuring plan that Mr. Laporte finally submitted to him in 1993 because it met the established objectives and did not involve any cost increases.

As to whether one of the Cadet HQ restructuring objectives was to find younger staff, Mr. Roy replied that on the contrary, younger personnel were transferred out of HQ at that time and assigned to operations as part of the "total force" concept. These younger staff were replaced by former retired officers who, given their skills and extensive experience, could make an important contribution to the cadet movement. Furthermore, this was facilitated by the fact that retirement age was 65 in the cadets, as opposed to 55 in the Regular Force. Furthermore, more participation by women was a goal, although difficult given budget restrictions.

With respect to the deputy chief of staff position in his own office in 1993-1994, Mr. Roy says that there were two, one 28 years of age and the other 56. This is a prestigious position because it is very close to the top and demands a heavy time commitment. However, age is in no way a consideration for this position because it is not physically demanding. What counts is experience, training and intelligence, the same as for important management positions, and that is why he asked Henri Laporte in 1992 to manage Cadet HQ and implement reforms, even though Mr. Laporte was 60 years of age at the time.

Major Roger Héту

Major Héту was a member of the Regular Force from 1959 to 1995. He retired in April of that year and became a reservist, while continuing in his position as SO II - Administration at Cadet HQ, a position he was transferred to in 1991 as a regular cadet major. However, due to problems setting up the new LFQA HQ at that time, General Roy asked him to take a job at his HQ. Then in 1994, the general asked him to return to Cadet HQ as a regular major in the administration position he was to originally occupy. Major Héту says however that his SO II position was always a regular major's position, such that when a regular major is transferred to Cadet HQ, that person will have seniority over him and the Forces can terminate his contract with 30 days' notice.

Major Héту then described his current duties as SO II - Administration. This is a demanding job for several reasons. He must manage personnel, as well as information systems for the HQ and the seven

cadet training centers (i.e. the summer camps) for both the Quebec City and Montreal detachments. During the year, his schedule involves long days (from 8:00 a.m. to 6:30 or 7:00 p.m.), not including weekends (three out of four weekends, he says) to conduct annual reviews, visit the cadet corps and prepare summer camp meetings and instructions. He also has to visit

the camps each summer. It takes two full days to review all technical aspects of the camps (which are fairly complex because the camps have between 250 and 850 cadets and officers) in meetings with the staff officer to provide assistance and advice on camp management.

When he made his initial summer camp visits in 1994, he remembers that he was treated as a "tourist" and a "dinosaur" because his predecessors had the habit of breezing through. No one expected to see him arrive for two days with a questionnaire and a check list in hand.

Major Héту also described how he was greeted when he arrived at Cadet HQ in March 1994. He was, he says, received negatively. He remembers in particular LCol Bernard who told him in an unfriendly way "Oh, here you are" and then took him to a building where the offices were jammed together. He then told Major Héту to choose an office and get settled. At that time, LCol Laporte was on vacation.

When asked his opinion of Mr. Laporte, Major Héту said that he had known him since 1963, thought he was a man of integrity and that he like working under him.

Major Pierre McClure

Major McClure has been a SO II - Aviation Training at Cadet HQ since the reforms implemented by LCol Laporte, i.e. since October 1993. Mr. McClure joined the cadets at the age of 13 in 1969. Five years later, he became a CIL officer and, promoted to lieutenant, attended his first camp as an officer, working as a flight theory instructor in 1975. That year, he also decided to enrol in the reserves. Subsequently, during his studies, he continued to be promoted and participate in summer camps in various positions until 1983. In 1984, he was made an SO III - Logistics on a full-time basis at the Cadet HQ. In 1989, he became a cadet advisor for the Montreal detachment, where he advised commanders of twenty squadrons, helping them to resolve disputes with civilians, particularly the leagues. The civilians are responsible for finding funding for the cadet movement, and for advertising and recruitment, while the CIL officers handle the military aspects and supervise cadet instruction with the support of the Department of National Defense and the Canadian Forces. Major McClure says that there were often conflicts over the way the movement was managed as detachment cadet advisor he often had to act as an arbitrator. Then in 1992-1993, as coordination officer for the Montreal detachment he was given responsibility for providing cadet training support. He was then selected by LCol Henri Laporte as SO II - Training, a position he holds currently at Cadet HQ.

In the fall of 1993, Major McClure accepted Henri Laporte's offer because for many years there had been complaints in the movement that the

staff was too removed from the rank and file with respect to training and there was talk of restructuring. LCol Laporte was of the same opinion: he wanted on his staff people who were familiar first-hand with the cadet movement, who came from the rank and file and had experience with squadrons, cadets, training and relations with the leagues. Mr. McClure believes that priority was always given to Cadet HQ management and that many decisions made at the top did not fit with reality in the cadet movement. Priorities had to be reordered by giving more importance to training, and because he had considerable experience in that area, he immediately accepted Mr. Laporte's offer. Although, according to him, training at Cadet HQ has improved, there is still considerable resistance and old habits to break to move away from the overwhelming concerns with administration and budgets.

In addition to his responsibility for cadet aviation training, Mr. McClure, as SO II is responsible for relations with other cadet-related organizations, i.e. detachments, camps, RCIS, NDHQ and the leagues. He also is involved in summer camp organizational details (cf. POI, Exhibit I-4, tab 21, all of which requires a heavy time commitment. Also, in addition to normal Monday to Friday hours at HQ, he often has to attend meetings with members of the cadet movement in the evening and on weekends. During the summer, he has to visit the camps several times for three or four days at a time, at least once if not twice while the camp is in session to meet the persons responsible for courses and ensure that the courses appropriately meet cadet needs and training standards. In addition, camp preparation requires coordinating with the two other SO II (army and navy). The three majors work as a team and in addition to responsibility for training specific to their arms of the Forces, have to meet the same objectives and ensure that resources are allocated equitably.

Major McClure has held his position since 1984 under annual 365-day contracts. He is entitled to two days' paid leave per month, i.e. 24 days per year which he takes at the least busy time of the year. He believes that a two-month absence every year would cause serious operational problems for the cadet movement, i.e. lack of availability and supervision.

When cross-examined on the role of liaison officer, Major McClure said that he is familiar with the position. He says that these duties are assigned to an officer or senior non-commissioned officer in the Regular Force, and involve visiting the cadet corps to ensure that the services provided by the base, particularly supplies, are available. This is normally an additional duty, but secondary to permanent duties. This senior officer also provides advice during visits, and is called on to act

a bit like "an uncle", in his words, to make sure problems are solved. The work of a liaison officer depends on his or her degree of involvement. Some visit the cadet corps up to three or four times a year, whereas others visit only once, and some never. Given the restructuring underway in the Forces, it appears however that this position is being eliminated. Restructuring is resulting in staff reductions such that there are not enough officers and non-commissioned officers to visit the camps.

Captain Valérie Lafond

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Captain Lafond joined the navy cadets in 1980 when she was 15 years of age. She became a civilian instructor and CIL officer after taking officers' courses. She then became an instructor at RCIS, training young officers in various navy specialties. She has also occupied positions as summer camp sports officer and standards officer at the HMCS Québec training center.

In 1989-1990, she was technical director of the sailing school. At that time, her only resource was HQ. She says that it was an extremely difficult year because her only contact at HQ was Mr. Amorelli who was SO III - Marine Training. However, Mr. Amorelli was never there or was so hard to get in touch with that Ms. Lafond was left on her own to organize all material for the summer courses. When asked if she had heard of Mr. Dorais, who at that time was SO II - Training, she replied that she did not know him and no one had ever mentioned him and that because there was no SO III - Navy position at the time, the resource person at HQ for the navy element was SO III Amorelli.

In late August 1993, Henri Laporte approached her about the SO III position which up to that time was held by Amorelli. Thinking that the job involved supply contract management, she refused. However, when Mr. Laporte told her that the job was training-based and that she would be assistant to an SO II - Marine Training, she accepted. At the time she thought that priority needs at HQ were in training, and that this was an area she knew well and that her experience in that area could be an asset to the staff. She was SO III - Navy until 1996. In April 1996 there was a competition for the SO II - Navy position left vacant when Major Mathieu left. Because she had had the job on an interim basis in 1995, she applied for and was given the job.

Ms. Lafond's testimony on the requirements for the SO II - Navy Training position, and the work schedule as well as attendance at summer camps, is essentially the same as Major McClure's testimony. She also

believes that it is practically impossible or at the very least unacceptable for an SO II - Training to take more than one month's vacation, or to be unavailable for a month at a time each year, given the number of clients (cadet corps, CIL officers, leagues, sailing federation, etc.) that have to be responded to, and the extent of the work to be done. Nor does she believe that it would be appropriate to appoint someone from the army or airforce for the SO II - Navy Training position because nowadays, training focuses on specialties, there are new programs, and although she has taken the necessary training in all those specialties, she has to constantly make sure she stays up to date.

Major Liliane Ouellet

Major Ouellet joined the cadets in 1975 at the age of 15 in the land element. She has been involved in the movement ever since. She worked through the ranks, moving from cadet to CIL officer, cadet corps commanders, company commander, division commander, a member of the training staff at RCIS responsible for a specialization course, training officer at RCIS, and finally SO II - Training (army) at Cadet HQ. She also has

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participated both as a cadet and officer at ten or eleven summer camps.

When asked about her relationships with Cadet HQ while she was an officer responsible for training in summer camps, Ms. Ouellet stated that she knew Major Dorais, and that he was a SO II - Training. However, she did not deal with him for two reasons. First, she had observed during a summer camp meeting that he was unable to answer her questions on the new courses being developed. Secondly, she realized when she was a training officer at RCIS in the spring of 1992 that she and Major Dorais "were not on the same wavelength," that they "didn't speak the same language" on the issue of the type of training to give young cadets. Major Ouellet stated that at that time, she had to prepare by herself the necessary cadet training materials, as she had already had to do for the summer camps.

In August 1993 Henri Laporte came to her office and asked her if she was interested in a management position on his staff. She declined his offer at that time, because she was not interested in administration and she did not feel very competent in that area. However, Mr. Laporte came to see her again at Longue-Pointe (at RCIS) to offer her a training-related position at Cadet HQ. Because training was her speciality and area of interest, and she was working on training programs and teaching materials at RCIS, she accepted his offer immediately. She did not know Henri Laporte

at the time. According to Ms. Ouellet, Mr. Laporte had been given her name by Lt.Col. Memess, her superior at RCIS and a member of the Cadet HQ.

Her description of duties involved in local and summer training, summer camp organization, cadet selection, officer promotions, relations with the detachments, camps, RCIS, NDHQ, the other regions and the leagues is the same as those of Major McClure and Captain Lafond. According to her, her knowledge of the cadet movement, her camp experience and her previous relations with the various elements of the movement made her the logical candidate for a training-related position. She believes in particular that this is useful to her in her relations with civilians, i.e. the league and parents, who are involved in the movement and essential to its development.

With respect to her availability and work hours, Major Ouellet's statement is the same as those of the other two CIL majors. Her work involves numerous evening and weekend meetings with those responsible for the cadet corps. With respect to summer camps, she has to visit each of the two camps for which she is responsible (Val-Cartier and Cap-Chat) for one week each during the summer to ensure that training standards and course plans are being followed.

Because each element requires specific technical knowledge, she does not see how an aviation officer can be a SO II - Army Training or vice versa. Given their lack of experience with summer camps, neither does she see how regular officers could effectively serve as SO II - Training. Furthermore, because of common problems that must be handled in the summer camp organization, the three SO II must work together on a regular basis.

As a result, she believes that the new structure implemented by Mr.

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Laporte is satisfactory and more effective. Appointing CIL officers for each of the three elements in the Cadet HQ means that needs can be better met and there can be closer contact with cadets.

THE LAW

The nature of discrimination

The complainants claim that their rights to non-discrimination stipulated in section 7 of the CHRA were violated. That section states that "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." Under section 3 of the CHRA, age is a prohibited ground of discrimination.

Since *H.R.C. and O'Malley v. Simpsons-Sears*, [1985] 2 R.S.C. 536, a distinction has been made between two main types of discrimination. Discrimination is said to be direct when a difference in treatment is consciously based on one of the prohibited grounds of discrimination identified in the Act, and can be overt or covert. Thus, one can try to hide the real reason for a dismissal under the guise of a cosmetic organizational restructuring.

There is also "adverse effect discrimination", also called indirect discrimination, when a decision results in discrimination, although in no way based on a prohibited ground. According to the Supreme Court of Canada in *O'Malley*, a condition of employment can be discriminatory even if adopted honestly and in good faith, i.e. for business reasons.

Furthermore, given that equality and discrimination are comparative concepts (cf.: *Andrews v. Law Society of B.C.*, [1989] 1 R.S.C. 151), in order for a distinction in treatment to be characterized as discriminatory, the employer's decision must result in unfair treatment of only certain employees based on a prohibited ground. Thus, if the employer requires in good faith that its company be open on Saturdays, although that decision has nothing to do with the employees' religion, this will necessarily have an adverse effect on employees who cannot work on Saturdays because of their religious beliefs, and on those employees only. On the other hand, if an employer decides to shut down a business because it is no longer profitable, that cannot be seen as indirect or adverse effect discrimination against women and blacks because there are female and black employees working for the company. There is no discrimination, because all employees have suffered the same adverse effect. The decision may be unfair or misguided, but it is not discriminatory because it has no individual or distinct effect on a group of employees based on a prohibited ground. Of course, this would be otherwise if in order to fire black, disabled or older employees, the employer used non-discriminatory considerations, such as budget restrictions, as a pretext for eliminating a department in the company with the largest number of those employees. Although disguised as an acceptable measure, that decision would nevertheless directly discriminate because it would be based on race,

disability and age, which are prohibited grounds under the CHRA.

In this case, after some hesitation on their part, the Commission's attorneys took the position once arguments had been heard that this was a case of direct discrimination based on age, and that this discrimination had, on the one hand, been disguised under the restructuring of training management at the Eastern Region Cadet HQ (or Quebec Sector) in which the complainants were replaced by CIL majors, and on the other hand, done openly when the decision not to renew the complainants' contracts was made.

The ground: sole cause or multiple cause?

In the case of direct discrimination, it is not necessary to establish that the prohibited ground was the sole factor or even the preponderant factor for a complaint to be accepted. To prove that section 7 of the CHRA has been contravened, it is sufficient to demonstrate that a prohibited ground, such as age, was one of the factors or one of the causes that effectively contributed to the decision to discriminate against an employee. However, if the prohibited ground in no way influenced the decision in question, the complaint must be dismissed: *Holden v. C.N.R.*, (1991) 14 C.H.R.R. D/12, p. D/15, par. 8 (C.A.F.); *C.E.I.C. v. Lang*, (1992) 18 C.H.R.R. D/223, p. D/224, par. 2 (C.A.F.). See also in Québec: *C.D.P. v. Immeubles Ni/Dia*, (1992) 19 C.H.R.R. D/97, p. D/106, par. 53; *C.D.P. v. Collège Mérici*, (1992) 20 C.H.R.R. D/195, p. D/198, par. 30.

Because cause is not relevant in the issue of indirect discrimination, the question of whether the ground was the sole cause or one of multiple causes of the employer's decision does not apply. The only issue in this case is the effect of the decision on the complainants: was an employee or group of employees automatically excluded solely because of their age or another prohibited ground? That is the question.

The burden and standard of proof

In a case of direct discrimination, the complainants must present sufficient proof of discrimination at first glance, in which case the respondent must provide a reasonable explanation for their conduct: *Ontario Human Right Commission v. Etobicoke*, [1982] 1 R.C.S. 202, p. 208; *H.R.C. and O'Malley*, cited above, p. 558.

Sufficient proof at first glance is that which pertains to the allegations made, and which, if the allegations are given credence, is complete and sufficient to justify a decision in favour of the complainants in the absence of an explanation from the respondent: *O'Malley*, cited above, p. 558.

If the respondent provides a reasonable explanation for the otherwise discriminatory behaviour, the complainant must therefore prove that the

explanation is a pretext, and that the employer's behaviour was effectively discriminatory: *Israeli v. Canadian Human Rights Commission.*, (1983) 4

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C.H.R.R. D/1616, p. D/1617 (conf. in (1984) 5 C.H.R.R. D/2147); *Basi v. C.N.*, (1988) 9 C.H.R.R. D/5029; *Wall and C.C.D.P. v. Conseil d'éducation de Kitigan Zibi, T.C.D.P.*, 11 July 1997, D.T. 6/97.

The degree of proof required in cases of direct discrimination is the preponderance of probabilities. Thus, in this case, the proof that the complainants' ages played a role in the CF's decision not to rehire them must be established on that basis. In this respect, we share the opinion of the Ontario Inquiry Tribunal which, in *Ouereshi v. Central High School of Commerce and the Board of Education of the City of Toronto*, (1991) 12 C.H.R.R. D/394 states that a finding of discrimination may be made when it can be reasonably inferred from the circumstances that age was one of the employer's reasons for making the decision not to hire a candidate or, in this case, not to renew the complainants' contracts:

... in human rights cases the presence of such a motivating factor often will be inferred from circumstantial evidence, since the discrimination is seldom practised openly. Indeed discrimination may occur in contravention of the Human Rights Code even where it is unintentional. In other words, even though those acting on behalf of the respondents may have been acting in good faith and without any ill will towards [the complainant], it is possible that a prohibited motivating factor was present in the decision not to hire him. If it is a reasonable inference from the circumstances, established by the evidence, a contravention of the Code will be established. (p. D/395) (*italics ours*)

In the case of circumstantial evidence, the preponderance of probabilities standard may be stated as follows: (UNOFFICIAL) "... discrimination may be concluded when the evidence presented in support makes this conclusion more probable than any other conclusion or assumption.": B. Vizkelety, *Proving Discrimination in Canada*, Toronto, Carswell, 1987, p. 142.

ANALYSIS

It appears from the concurring evidence given by Messrs. Pelletier, Dorais and Bernard that in the summer of 1993, Mr. Laporte announced that the complainants' contracts would not be renewed because the organization

"needed new blood", it was time for them to "hang up their skates," they had served their time at Cadet HQ, or again because younger staff was needed. With the exception of the last statement, Mr. Laporte admitted having used these expressions. His difficulty remembering whether he said that younger staff were needed is simply not credible.

Does that still mean that the decision not to renew the complainants' contracts was based, in whole or in part, on the ages of the complainants? At the very least, it establishes a presumption of discrimination, which may be refuted by a reasonable explanation which must be presented on the

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basis of the preponderance of probabilities.

After analyzing all the depositions, the Tribunal concludes that the respondent provided a reasonable explanation, that there was no pretext involved, and that in fact, age in no way played a role in the decision not to renew the complainants' contracts. However, the Tribunal's work was not facilitated by the strategy of the Commission's attorneys, who decided for all intents and purposes not to cross-examine the witnesses presented by the respondent, specifically the key witness, Henri Laporte. Nevertheless, pursuant to the Tribunal's mandate under section 50 of the CHRA, to "inquire into the complaint," the Tribunal itself questioned Mr. Laporte as well as the other witnesses presented by the respondent.

It appears from the evidence heard that there were several non-discriminatory reasons which contributed to the non-renewal of the complainants' contracts. In the first place, the non-renewal resulted from LCol Laporte's decision, a decision approved by Lt.-Gen. Roy, to enhance the prestige and responsibilities of CIL officers at Cadet HQ, to bring cadet staff and CIL officers in closer contact and to base the position of SO II - Training on the concrete organization of cadet summer camps. Mr. Laporte's testimony, which was not contradicted and is confirmed by Messrs. Roy, Bernard and McClure and Ms. Lafond and Ms. Ouellet, is that the cadet leagues and the officers in the cadet corps were complaining that HQ was out of touch with the realities of the cadet movement and that it should be managed by the rank and file.

On this issue, LCol Bernard's deposition is a determining factor. First of all, he confirmed that Mr. Laporte had told him that Messrs. Dorais and Pelletier had served their time. He also confirmed that Mr. Laporte had used words alluding to age ("new blood," "younger staff," etc.). However, he clearly acknowledged in cross-examination that Henri Laporte's decision that the three new major's training positions (army,

navy and airforce) had to be given to CIL officers had nothing to do with the ages of the complainants. He stated that was Mr. Laporte's decision in favour of CIL majors was in no way a means of getting rid of the complainants, nor because they were 60 years of age. Mr. Laporte sincerely believed, he admits, that the new SO II - Training positions had to go to CIL officers for broader political reasons, which were pushed by the cadet movement and civilians involved in the movement. The Tribunal gives considerable weight to the admissions made by LCol Bernard for the following reasons: on the one hand, he held a strategic position in this dispute because hierarchically, he was between the complainants and Mr. Laporte, and on the other hand, he showed obvious sympathy in the hearing to the complainants' cause by displaying thinly disguised hostility toward Mr. Laporte, whose treatment of Majors Dorais and Pelletier he considered unfair and whose "pro-CIL" vision he did not share.

The decision to appoint CIL officers to the three new SO II - Training jobs automatically eliminated candidates from the Regular Force, whatever their ages. That decision therefore had nothing to do with the ages of the complainants. It was likely, however, that the candidates selected would be younger than the complainants since they were to come from within the

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cadet movement. However, the reliable and concurring depositions of Messrs. Laporte, Bernard and Roy clearly show that the decision to give these jobs to CIL officers was in no way based on the ages of the complainants.

The second reason for the decision not to renew the complainants' contracts involves Mr. Dorais more specifically. His SO II - Training contract was not renewed because, under the restructuring overseen by General Roy and developed by Henri Laporte, his position was simply eliminated. Was this decided because Mr. Dorais was too old? As Henri Laporte said and as was confirmed by the complainants themselves, the restructuring was not decided on by Mr. Laporte alone. He consulted all members of his staff and even held a two-day seminar with them to obtain a consensus. Although the complainants did not agree with all aspects of the reorganization and, according to them, some officers even decided to quit following the restructuring, the complainants did not dispute the fact that most staff officers supported the reform.

It also appears from the evidence that the non-renewal of Mr. Dorais' contract was based on his performance, which Mr. Laporte found to be lacking. Mr. Bernard did not agree with Mr. Laporte on this subject. However, he admitted that Mr. Laporte had told him that Mr. Dorais lacked

dynamism and motivation at work and that, according to Mr. Laporte, this was not due to Mr. Dorais' recent family problems, but to his personality. According to Mr. Laporte, Mr. Dorais had always been like that since he joined the Forces. Mr. Laporte also said that, in various consultations he had within the cadet corps, he often heard complaints that it was difficult to contact Mr. Dorais. According to Mr. Laporte, this was not because Mr. Dorais had been given half-days off to take his wife to the hospital, but because he did not return his calls when he came back to the office. This was also confirmed by Major Ouellet. Captain Lafond said that she did not even know Major Dorais when she worked as a navy instructor and that no one at Cadet HQ had ever said anything to her about him. Henri Laporte may have been wrong in judging Mr. Dorais' performance so severely. However, the Tribunal is not responsible for making a decision on that. The Tribunal's mandate is to decide if the decision made by LCol Laporte, who was Mr. Dorais' superior, was in one way or another influenced by Mr. Dorais' age. This answer to this can only be no.

Mr. Pelletier's position as SO II - Training was not eliminated in the restructuring. He claimed that he was removed following more or less secret meetings with Major Héту during the summer of 1993 and that Major Héту's transfer to Cadet HQ was a pretext for getting rid of Mr. Pelletier. According to Mr. Pelletier, this was because Major Héту had retired from the Regular Force three months after his appointment and that the job was "by change" turned into a contract position. However, Major Héту's candid and direct deposition, which the Tribunal finds completely reliable and which confirms Henri Laporte's deposition shows that Mr. Pelletier's perceptions do not fit with reality. Instead, it appears that the SO II - Administration position was always reserved for an officer from the Regular Force and that, if a regular officer was transferred into that position, he or she would have absolute priority over a reserve officer

hired on a contract basis. Major Héту stated that his transfer to Cadet HQ had been planned since 1991 but was delayed until 1994 by General Roy, who needed him on his own staff. Finally, Major Héту corrected a serious statement made by Major Pelletier: he did not retire in May 1994, i.e. three months after he was transferred to Cadet HQ. Nor was the SO II - Administration position turned into a temporary position. Mr. Héту did not retire until April 1994, he has held this position as a reservist since then, and it is clear, he states, that if an officer from the Regular Force is transferred to this position, Major Héту must give that officer his position and the Forces can cancel his contract with thirty days' notice. The Tribunal therefore concludes that Mr. Pelletier did not lose his job

because of his age, but because of other factors outside Mr. Laporte's control.

Because Majors Dorais' and Pelletier's contracts clearly state that their employment was temporary (cf. Exhibit I-4, Tabs 5 and 6) and that, notwithstanding the stipulated terms of the contracts, both parties could cancel the contracts with 30 days' notice, specifically when their services are no longer required or performance is found to be lacking (and without notice in the event of misconduct or lack of ability), it is clear that the respondent was under no obligation to find other positions for the complainants. Legally, a fixed-term contract (of less than twelve months in the case of the complainants) does not carry an automatic right of renewal: *Eskasoni School Board v. MacIsaac*, (1986) 69 N.R. 315 (C.A.F.). The employer may decide not to renew a contract as long as that decision is not based on a prohibited ground within the meaning of the CHRA.

Therefore, Mr. Laporte was under no obligation to find other positions for the complainants. However, he did present them with certain possibilities, which they confirmed in their depositions. Mr. Laporte spoke to Mr. Dorais about the possibility of applying for the position of General Roy's chief of staff. He also offered the two complainants the possibility of working as a liaison officer between the bases and the cadet corps. However, the complainants refused to consider those possibilities because on the one hand, they were not "formal offers," and on the other hand, those jobs would require them to work evenings and weekends and would involve travel to meet with cadet officers in the field.

The Tribunal is of the opinion that those peremptory refusals seriously undermine the credibility of the complainants as to their dedication to the cadet movement, and tend to confirm Henri Laporte's opinion in this matter. Messrs. McClure and Héту, Ms. Ouellet and Ms. Lafond, the four people currently holding SO II positions, who have all given candid and credible testimony, stated that their duties, because they involved relations and constant contact with the cadet corps, required them to travel regularly on evenings and weekends to meet with those responsible for the cadet corps. Because they have civilian day jobs, are only available evenings and weekends for cadet activities. It therefore seems obvious that the complainants wanted to continue working at Cadet HQ without having to confront the realities of the cadet movement. It is not

surprising that Mr. Laporte decided not to keep them on his staff or was unable to find them jobs elsewhere. In fact, the complainants excluded

themselves by deciding on their own that the job possibilities offered to them by Henri Laporte were either idle promises or too demanding.

The complainants claimed that they should have been offered the chance to apply for one of the three new SO II - Training jobs created for each segment of the Forces (army, navy, airforce). It was known that those jobs were, from that point on, to be reserved for CIL officers, which immediately excluded them from applying. However, could they have been kept on for a few years as SO II to train the new CIL officers? This was LCol Bernard's position. However, Mr. Laporte decided not to because it would not fit with the established objectives of giving more independence and responsibility to CIL officers. On the other hand, as confirmed by LCol Bernard, the CIL officers selected by Henri Laporte with his assistance and the assistance of LCol Memess, had extensive summer camp experience, which the complainants did not at all, and which had become the main selection criterion for those jobs in an effort to better respond to cadet needs and provide them with in-the-field experience.

Finally, it appears from the evidence that it was not possible to keep Mr. Pelletier in a training position because of his obvious lack of regard for CIL officers, an attitude also shared by Mr. Bernard. They both considered them to be glorified officers, "28-day officers" who knew very little about military life and who couldn't make the grade compared to a regular or reserve officer. Furthermore, Mr. Bernard confirmed Mr. Laporte's testimony that Mr. Pelletier was very annoyed by the fact the CIL officers do not know all the details in the training manuals he had written and that he was sometimes very hard on them, responding to their questions sarcastically and in a loud voice. The Tribunal was able on its own to confirm the accuracy of that diagnosis. Mr. Pelletier is an imposing career soldier, and speaks in a very loud voice, particularly when contradicted. During the cross-examination, very properly conducted by the respondent's attorney, he showed himself to be a temperamental and authoritarian person, with whom civilian officers would have difficulty working. Moreover, Mr. Pelletier's philosophy, based on the knowledge of NDHQ and CF structures, was diametrically opposed to the new vision that Henri Laporte and Armand Roy wanted to implement, which was based on experience in the cadet movement and relations with civilians.

Mr. Dorais revealed a completely different personality. He is mild-mannered and flexible. Would he have been able to train the new CIL majors? The evidence presented suggests that this would have been doing him a favour. The CF were under no obligation to create such a position specifically designed for him, especially since Major Ouellet's reliable testimony revealed that he did not agree either with the CIL officers on the type of training to give to young cadets. The contrast between the "militaristic" vision of the complainants and the "civilian" vision of the

CIL officers with respect to management of the cadet movement is clearly evident not only through the statements made during the hearing by the various witnesses, but by their attitudes and personalities. The Tribunal found this contrast so sharp that it gives full weight to Henri Laporte's

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testimony that his reforms involved a change in culture in the cadet staff and that some would find this change difficult to accept, including the complainants and LCol Bernard.

Furthermore, no one seriously disputes the fact that the CIL officers chosen by Henri Laporte and by the committee composed of Mr. Laporte and Lt.-Cols. Bernard and Memess were competent to hold the SO II - Training positions. All had extensive experience in summer camps and the cadet movement, although one of the three had gaps and was therefore replaced by a more capable officer, Valérie Lafond. Mr. Bernard's deposition confirms the integrity of the process. Moreover, Majors Ouellet and Lafond confirm that they did not know Henri Laporte at all before he met them to offer them positions on his staff. The Tribunal therefore concludes that the allegations of favouritism made by the complainants in a letter they sent to Lt.-Gen. Roy dated February 7, 1994 (Exhibit C-2, Tab 1) was without basis and explains, although it does not justify, the LCol's strong reaction in February 1994. Furthermore, it should be noted that the insults made by Mr. Laporte to the complainants after reading this letter, which was very critical of him, had nothing to do with their ages. His remarks referred only to the complainants lack of courage under the circumstances, according to Mr. Laporte.

In closing, the Tribunal notes that in this unfortunate affair, as in many others, the employment relationship between the employer's representative, Henri Laporte in this case and the complainants deteriorated due to a lack of communication between them. Why was there no discussion between Mr. Laporte and Mr. Pelletier about Mr. Pelletier's plans to retire in late 1992 stated in his written memo dated April 24, 1991 to Henri Laporte's predecessor? Why did Mr. Laporte made negative comments on Mr. Dorais' motivation in his performance assessment without first speaking about it to Mr. Dorais? Instead of candidly discussing with them not only the basic problems with their performances but the need to look at the cadet movement in another way and make more room for cadets in cadet management, it seems that Mr. Laporte wanted to "go easy on" the complainants by telling them that they had had brilliant careers but it was now time to hang up their skates and bring new blood into the organization. Mr. Laporte is not solely to blame for this. We believe in fact that the lack of communication was caused by all the parties involved. What is

certain is that a lack of communication in the work place invariably creates mistrust and suspicion, results in motives being imputed to actions, and sometimes degenerates into accusations and bitterness and a feeling injustice that often remain. We fear that this may indeed happen in this case.

From the complainants' point of view, the situation they experienced is unjust and unacceptable. They were long-time and loyal employees of the CF. Mr. Pelletier made a significant and essential contribution to the cadet movement in the 1980s by providing instruction manuals which it sorely lacked. Once their work was completed, they were told that they were no longer needed. It is possible that this is unfair and unacceptable to the complainants. However, it still does not mean that the reason, in

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whole or in part, that their contracts were not renewed was due to the fact or the perception that they were too old to properly perform their duties. The issue of age is the only question on which the Tribunal has the authority to rule.

DECISION

For those reasons, the complaints are dismissed.

Signed this 28th day of September 1997.

Daniel PROULX

Michel GIROUX

Brigitte BÉDARD