

T.D. 10 /91
Decision rendered on July 10, 1991

CANADIAN HUMAN RIGHTS ACT
(S.C. 1976-77, c. 33, as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

RICHARD BEAULIEU

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

commission

- and -

CANADIAN ARMED FORCES

Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: ANTONIO DE MICHELE

APPEARANCES BY:

RENE DUVAL,
counsel for the Commission

DOGAN D. AKMAN,
counsel for the Respondent

Major SUZANNE GOUIN,
Department of National Defence

DATES AND PLACE FROM AUGUST 28 TO 31, 1989,
OF THE HEARING: QUEBEC.

APPOINTMENT OF THE TRIBUNAL

On October 5, 1988, the President of the Human Rights Tribunal Panel, Sidney Lederman, appointed the present Tribunal to inquire into the complaint filed by Private Richard Beaulieu on December 15, 1985, as amended, against the Department of National Defence.

The Appointment of the Tribunal was filed as Exhibit T-1.

THE COMPLAINT

Mr. Beaulieu's complaint alleges that the respondent Canadian Armed Forces, which form a part of the Department of National Defence, have engaged in a discriminatory practice based on disability in a matter related to employment in contravention of the Canadian Human Rights Act (S.C. 1976-77, c. 33, as amended) and in particular contrary to ss. 7(a) and 10 of the Act.

The text of the complaint, as filed, alleges and reads as follows:

[TRANSLATION]

I believe that the Department of National Defence, in deciding to refuse to continue to employ me as a driver in the army (position MSE-OP-935) under the pretext that as a result of a diagnosis of temporal lobe epilepsy I did not satisfy the medical requirements either for the driver's position or for any other position in the Canadian Forces, discriminated against me in contravention of ss. 7(a) and 10 of the Canadian Human Rights Act.

The complaint was signed at Neufchatel, Quebec, on December 15, 1985, and witnessed by Isabelle Rousseau.

THE FACTS

Private Richard Beaulieu, the complainant in the present case, enlisted in the Canadian Armed Forces on February 18, 1980, when he was 18 years old.

After he had passed the mandatory medical examinations, Private Beaulieu was assigned to the trade of driver MMS in the Canadian Armed Forces.

Following the customary training courses, he successfully completed level QM3 of his trade, after which he was transferred to Val Cartier. In August 1982, after a medical examination, he was admitted to hospital for observation. He was also referred to a civilian neurological sciences specialist.

After that, his medical status was downgraded and he was mainly used to run his unit's canteen.

On October 29, 1984, because his new medical classification had not been modified but remained at G4 03, which is below the prescribed minimum standard in the Canadian Armed Forces, and following a negative medical diagnosis, Private Richard Beaulieu was honourably discharged from the Canadian Armed Forces.

MEDICAL HISTORY

In 1982, Private Richard Beaulieu was referred to LCol P. Parenteau, M.D., the psychiatrist of the Val Cartier military base. In Dr. Parenteau's report, which has been reproduced in section "11982" of the respondent's brief of documents produced as Exhibit R-1, he gave a fairly detailed history of the complainant's emotional and sentimental situation at that time.

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Upon reading the said report, we see at pages 39-40 that at the time in question the complainant was "[TRANSLATION] affected by several attacks of anxiety based at several levels, one in the family related to his alcoholic father, another related to his relationship with his common-law spouse, another related to one of his brothers, who is in prison... "

In the same report, Dr. Parenteau stated that "[TRANSLATION] the patient (Richard Beaulieu) is suffering great anxiety" (at p. 40), that he "[TRANSLATION] suffers from tension headaches" (at p. 40) and that he "[TRANSLATION] sees little hope for the future" (at p. 40), but also noted that he "[TRANSLATION] is not totally in despair" (at p. 41).

In his conclusions, Dr. Parenteau noted that the patient (Richard Beaulieu) "[TRANSLATION] has limited capacity for abstraction" (at p. 43) and that "(TRANSLATION] his intellectual awareness is probably below average" (at p. 44), prescribed Etrafon for him and finished by concluding that "[TRANSLATION] with moderate help... he could recover enough to have a satisfactory life as a soldier" (at p. 44).

Private Beaulieu remained under medical supervision and was regularly attended by the Val Cartier base's medical staff. Then came an incident in which the complainant fell asleep at the

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wheel of the automobile he was driving on a highway, and the medical status of Private Beaulieu was then downgraded temporarily as a preventive security measure.

Throughout this period, Private Beaulieu was treated by several members of the Val Cartier military base's medical corps.

Thus, a report dated 9-9-82 by Major R. Messier, M.D., a medical officer of the Val Cartier military base, which is reproduced on pages 94-95 of Exhibit R-1, shows that the complainant was also treated for a "[TRANSLATION] problem of drowsiness with hypnotism". Dr. Messier also noted that "[TRANSLATION] the patient complains of a blank sensation, as if hypnotized by the highway over long distances" (at p. 95).

In a report dated 27-10-82, the same Dr. Messier noted that Private Beaulieu was a "[TRANSLATION] patient we are seeing for absences and possible narcoleptic episodes... that he may have had significant automatisms without realizing what he was doing" (Exhibit R-1, at p. 96). On page 97, Dr. Messier noted that after an X-ray examination of the patient's skull "[TRANSLATION] we noted the presence of a fairly bulky mucous cyst in the left maxillary antrum."

On 29-11-82, Dr. Messier recommended that a neurologist be consulted. Private Beaulieu was then referred to a specialized civilian clinic: the Clinique des Sciences neurologiques in Quebec. He was then seen by Dr. Michel Drolet, and later by Dr. Denis Simard, both of whom are neurologists.

Dr. Michel Drolet, after a consultation he carried out, reached the following conclusions in a letter dated December 6, 1982, which he sent to Dr. Real Messier:

[TRANSLATION]
IMPRESSION:

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Even though the electroencephalogram is normal, this might nevertheless be a case of temporal lobe partial epilepsy

RECOMMENDATIONS:

- 1- No driver's licence.
- 2- Therapeutic test with Tegretol 200 mg.

The full report is reproduced on pages 104-05 of Exhibit R-1.

Private Beaulieu then continued to be treated both by physicians on the military base and by civilian specialists.

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On April 20, 1983, Private Beaulieu was examined by Capt C. Cantin, M.D., a military physician, following night-time bouts of nausea and vomiting. He noted that the patient had consulted him after "[TRANSLATION] a rich meal causing belching"; he gave him a Fleet enema, which proved effective.

Dr. Cantin also noted in his report that the patient had "[TRANSLATION] absence seizures" and concluded by diagnosing an irritated colon.

Dr. Cantin's report is reproduced in full on pages 151-55 of Exhibit R-1.

In a letter dated June 29, 1983, sent to Dr. Messier of the Val Cartier military base, Dr. Denis Simard, a civilian neurologist, gave the respondent his professional opinion.

Dr. Simard reached the following conclusions:

[TRANSLATION]

OPINION: Mr. Beaulieu may have a slight case of temporal lobe epilepsy, especially considering that the medication appears to have prevented all his symptoms. I do not feel that with this medication the patient will now be prone to new absence

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seizures. In my opinion, his medical category can be raised. It is hard for me to say if he should be raised to G3 03 or G2 02; I leave that up to you. I feel that the prognosis here is excellent.

That report, with this opinion, is reproduced on pages 17778 of Exhibit R-1.

In a report dated June 22, 1984, signed by Lieutenant R. Fillion, the following conclusion was reached:

[TRANSLATION]

Pte Beaulieu has epilepsy. The result of his medical situation is that he can no longer be employed as a driver....
Later in the same report, Lieutenant Fillion concluded by saying:

[TRANSLATION]

Pte Beaulieu has a medical condition that prevents him from continuing his military career. He has accepted this medical decision as well as can be expected. Furthermore, he has taken steps to have his case reexamined. We recommend that he be allowed an

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additional period of 4 to 6 months before he is discharged from the CF.

This report is reproduced on pages 12 and 13 of Exhibit R-2.

Finally, the Canadian Armed Forces issued an honourable discharge certificate to Private Beaulieu on October 29, 1984.

PRELIMINARY MOTION

Before the evidence was heard, counsel for the Canadian Armed Forces presented a preliminary motion to the Tribunal under s. 40(2) of the Canadian Human Rights Act.

Counsel for the respondent requested that the Tribunal order counsel for the Commission to establish and state clearly and unambiguously what attitude and position the Commission proposed to adopt regarding this complaint.

For that purpose, counsel for the respondent asked a series of questions, all of which are reproduced at pages 22 et seq. of volume one of the stenographic transcript of the inquiry.

These eight (8) questions can be summarized as follows:

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- 1- Does the Commission take the position that the diagnosis of temporal lobe epilepsy on which Private Beaulieu's discharge was based was incorrect?
- 2- Will the Commission be taking the position that the diagnosis of temporal lobe epilepsy was reasonable or unreasonable in the light of all the medical information available when the discharge decision was made?
- 3- Does the Commission take the position that the diagnosis was reached negligently or in bad faith?
- 4- Does the Commission take the position that even if the diagnosis of temporal lobe epilepsy is demonstrated, it was, in retrospect, in error?
- 5- Are Mr. Beaulieu's medical and clinical symptoms incompatible with the reliable and safe performance by him of his duties and work both as a soldier and as a military driver of mobile support equipment?
- 6- Is the Commission of the opinion that the requirement for soldiers as a rule, and for a soldier with Mr. Beaulieu's trade, not to present a risk of automatism, loss of consciousness, loss of contact with his immediate surroundings or temporary loss of touch with reality, is a bona fide occupational requirement within the Canadian Armed Forces?
- 7- In the Commission's opinion, do the documents submitted to it during the investigation and before the Tribunal prove that Mr. Beaulieu's conduct is, in the light of his medical history, incompatible with the requirements of the occupation of soldier and military driver?
- 8- Does the Commission consider that the Armed Forces' decision to discharge Mr. Beaulieu on the basis of the opinions of a group of physicians in support of a negative condition is inconsistent with the Canadian Human Rights Act?

Counsel for the Commission began by stressing that s. 40(2) of the Act is currently being debated before the Federal Court.

Counsel for the Commission also argued that the Commission has the power to refer any complaint to a Tribunal at any time and, what is more, that the Tribunal lacks jurisdiction to review a decision by the Commission.

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After hearing the parties' arguments, the Tribunal found that the preliminary motion of counsel for the respondent could not be allowed as presented.

The Tribunal has the jurisdiction and the duty to investigate and shed light on a complaint filed with it (s. 39 of the Act).

To allow the motion of counsel for the respondent would amount neither more nor less than to reviewing the Commission's decision, over which, moreover, the Tribunal has no jurisdiction.

For these reasons, the respondent's preliminary motion is dismissed.

THE EVIDENCE

During the inquiry, the Tribunal had the pleasure of hearing several witnesses, all of whom are experts in their respective fields.

Dr. Jacques Henri Roy came to testify as an expert in military medicine. He is *inter alia* one of those who thought up and designed the Armed Forces' medical codification system. Dr. Roy explained to the Tribunal that this system was set up

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precisely to enable military personnel without medical training to assess the exact state of health of a member of the Forces by using the codification system.

Dr. Roy also explained to the Tribunal that under this system the minimum level that can be tolerated in the Armed Forces is G 3 - 0 3. Since Private Beaulieu had at the time received a level of G 4, which is higher than the minimum level that can be tolerated, he could not remain in the

Armed Forces even though the G 4 level he was given at that time was in fact given as a preventive security measure.

The same is true of the O 4 level given Private Beaulieu. Here too, the minimum permissible level is O 3.

I will spare the reader all the technical side since the notebook of medical standards applicable to the Canadian Forces was submitted to the Tribunal as Exhibit R-7.

The Tribunal has been informed that this document is regarded as the Bible of the Armed Forces with respect to military medicine.

Under cross-examination, however, the witness said that there are indeed soldiers in the Armed Forces who have a level

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higher than G 3 - O 3 and are still on duty, but that this is only true for strictly humanitarian reasons or in some cases because of early retirement.

Another expert witness who testified before the Tribunal is Lieutenant Commander Dominique Benoit, who, although attached to the navy, works with all three (3) branches of the Forces: air, land and naval.

Lieutenant Commander Benoit also testified as an expert witness because she has a Master's degree in industrial psychology.

The Tribunal was told that in the military there is a notion of interdependence between the various components, that is, an interdependence between all the soldiers of a single unit, and that all must where necessary be capable of performing the various duties within a unit.

For that purpose, each new recruit is at the time of recruitment assigned a trade. It is therefore impossible to be a serviceman without having a trade.

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Under cross-examination, the witness told the Tribunal that there are a variety of classes of military drivers in the Canadian Forces.

Warrant Officer Normand Leblanc also testified before the Tribunal.

He testified as an expert witness, as he is a career Manager exercising the trade of Mobile Support Equipment Operator in the Forces.

Warrant Officer Leblanc came to explain to the Tribunal the daily work of a soldier like Private Beaulieu along with the importance of his trade, especially in wartime or during war simulations. Warrant Officer Leblanc also explained the normal daily operations at Val Cartier to the Tribunal.

The Tribunal was also told that the base's trucks are regularly loaded with either munitions, gasoline or rations.

With respect to military strategy, Warrant Officer Leblanc told the Tribunal that all military operations are generally carried out at night and that a camp might be moved every three or four days at most. During manoeuvres, a military driver has no rest.

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Major Julien Bibeau also came to testify. Major Bibeau is a Staff Officer Operations currently assigned to Ottawa, although he has served at Val Cartier in the past.

Major Bibeau's testimony must also be regarded as that of an expert witness. Indeed, Major Bibeau enlightened the Tribunal on the role of the Canadian Forces at both the national level and the international level.

Moreover, he produced for that purpose, as Exhibit R-4, a textbook on the topic.

The words he repeated most frequently during his testimony were PROTECTION, DEFENCE and SAFETY. According to him, Private Beaulieu represented an element of risk, which meant that the issue concerned safety.

To that end, Major Bibeau told the Tribunal that a soldier must be ambivalent because life on the base (garrison) is completely different from life on operations (manoeuvres), and as such an officer of the Forces is only obligated to take a soldier back if the physician certifies to him in accordance with military standards that the soldier in question is in full health and is in full control of his faculties.

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The complainant Richard Beaulieu and his wife Isabelle Rousseau-Beaulieu also testified. For all practical purposes, they are the only non-experts who testified in this case.

Mr. Beaulieu told the Tribunal that he was for three years in the employ of the company Brique Citadelle, that his work consisted of checking bricks and that he worked an average of between forty and sixty hours per week.

He explained that this trade is physically very demanding, but that he was not complaining about it.

Unfortunately, he has been unemployed since July 7, 1989.

Mr. Beaulieu then testified about his years in the Armed Forces. He confirmed that he went to the base infirmary (sick parade) in 1982 complaining of headaches. He also confirmed that during his discussions with Dr. Messier he told the doctor that he had problems of losing touch with his surroundings and that during long trips he "dozed off".

He also testified that he was in a state of depression during the period when he was consulting Dr. Parenteau. He also confirmed that he had consulted Dr. Drolet and Dr. Simard in a civilian clinic.

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The Tribunal also learned that, in spite of the fact that his military driver's licence had been revoked following Dr. Simard's recommendations, the complainant continued to drive his civilian automobile.

The witness also stated that he had had severe headaches when he was about twelve or thirteen years old but that to the best of his knowledge he had never had absence seizures as a child.

Furthermore, aside from his problem in the Armed Forces, he was never aware of having epilepsy.

Under cross-examination, the witness said that at the time of his meeting with Dr. Parenteau he had just gone through a "bad phase" at Christmas 1981 and was depressed and negative.

When asked about the military manoeuvres at Gagetown, the witness said that he had had problems of automatism while driving his car but explained that he was under the influence of Tegretol at the time.

As for the reason for his discharge from the Armed Forces, the witness, after having read Exhibit R-1, said that in his

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opinion there had never been a certainty, and even less a diagnosis, of epilepsy.

As for Isabelle Rousseau-Beaulieu, she said that Mr. Beaulieu appeared to her to be completely normal and no more inattentive than anyone else.

She said that she felt safe with him when he drove, even over long distances.

She said that she had even advised the complainant to stop taking the drugs they had prescribed for him because their effect on the complainant seemed to be more harmful than curative.

We now reach the two testimonies the Tribunal considers crucial: that of the complainant's expert Dr. George H. Reinhardt, a neurosurgeon, and then that of Dr. Denis Simard, a neurologist, for the respondent.

However, the Tribunal regrets that neither Dr. Parenteau nor Dr. Messier could be present to testify in this case. After all, they were the ones who treated Private Beaulieu almost on a daily basis throughout the period preceding his discharge from the Armed Forces. They would surely have been in the best position to enlighten the Tribunal as to Private Beaulieu's state of health, both physical, and mental and psychological, at that time.

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Let us begin with Dr. George H. Reinhardt, the neurosurgeon, the complainant's expert witness.

Dr. Reinhardt's expert evaluation and report is reproduced on pages 249 et seq. of Exhibit R-1.

During his testimony, Dr. George H. Reinhardt said that he had met with the complainant on March 18, 1987, at the Commission's request. He also said that he had read the complainant's medical history and that his opinion is based both on the interview and on the medical examination of the complainant and consultation of his medical documents (medical file).

His mandate was clear: to establish whether or not the complainant Richard Beaulieu is an epileptic, whether or not he is capable of performing the duties of a soldier and, lastly, whether or not he is capable of handling a firearm.

Even though the complainant's military record mentions cases of headaches and of loss of touch, automatism and epilepsy, Dr. Reinhardt is categorical.

According to him, there is nothing capable of making him reach such a conclusion.

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Dr. Reinhardt hastened to add that all the cases in which reference is made to loss of touch in all the reports consulted (and produced during the inquiry) only concerned insignificant losses of touch lasting barely a few seconds and could be due to other causes, such as fatigue, depression or alcohol.

Dr. Reinhardt also pointed out to the Tribunal that the results of all the tests previously taken by the complainant, including the encephalograms, were negative, and therefore normal.

During his analysis of Mr. Beaulieu's case, Dr. Reinhardt even ordered a new encephalogram for the patient, which was carried out by Dr. Patrice Drouin on 24-3-87.

The result of this new examination is reproduced on page 253 of Exhibit R-1.

Dr. Drouin concluded his report as follows:

[TRANSLATION]

In the H.V., there are some slow abnormalities originating in the extrapyramidal structures. These abnormalities are not significant and are in particular not epileptic in nature.

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In his examination in chief, Dr. Reinhardt said that the previous attending physicians had only expressed doubts and although he respects those doubts, they were nevertheless purely and simply doubts, suspicions and possibilities.

In his opinion, there has never been a diagnosis as such. According to him, a doctor gives his opinion by way of diagnosis. In Private Beaulieu's case, even though at a given time he was labelled and classified as an epileptic, there has never been a diagnosis of epilepsy.

According to Dr. Reinhardt, that assertion was based on no specific diagnosis and was therefore gratuitous.

In his opinion, as related in his report referred to above, the complainant has never shown any premonitory indications of epilepsy, with the exception of one time he was confused when hospitalized.

In his conclusions, Dr. Reinhardt was categorical regarding the complainant Beaulieu's capacities:

[TRANSLATION]

a- as a driver: no restrictions at all

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b- handling of weapons: no restrictions at all

c- frequency of need for medical attention: no restrictions at all

d- endurance regarding changes in climate: no restrictions at all

In the conclusions of his report, Dr. Reinhardt said the following:

[TRANSLATION]

I therefore assert that Richard Beaulieu suffers from neither temporal lobe epilepsy nor absence seizures, although I respect the doubt expressed in the past by certain of my colleagues even though that doubt has never been confirmed.

In his state of health, Mr. Beaulieu is capable of working as a military driver and also of performing the work of a soldier (that is, handling of weapons, constraints resulting from combat situations, etc.); in so doing, he represents no danger either for the people around him or for himself.

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Under cross-examination, Dr. Reinhardt admitted that he was not too knowledgeable concerning soldiers' work but that, to him, it is a very demanding occupation, as too is the bricklaying trade.

When questioned on the conclusions of his report, Dr. Reinhardt explained that they were based on the fact that there had been no diagnosis of temporal lobe epilepsy, whether partial or otherwise, which means that there was no epilepsy.

As for the automatisms experienced and admitted to by the complainant Richard Beaulieu, Dr. Reinhardt testified that the daily acts of every one of us include acts or actions that might be described as "automatisms".

His conclusion in the case before us that the complainant Beaulieu did not have real and genuine "absences" or "automatisms" is based on the fact that he remembers both those absences and those automatisms.

Moreover, according to this witness, a nervous breakdown can upon examination include elements that resemble symptoms of epilepsy.

As for the frequent headaches complained of by the complainant, Dr. Reinhardt attributed them above all to

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situations of tension, and they might even have been caused by a migraine.

Even though an epilepsy patient has headaches caused by temporary cranial hypertension after an attack, Dr. Reinhardt asserted categorically that the complainant Beaulieu's headaches were of a completely different nature.

Confronted with a series of documents reproduced for the most part in Exhibit R-1, the witness remained categorical and firm regarding his diagnosis even though certain of those documents had not previously been brought to his attention.

According to him, he might have requested an observation period for the patient had he had those documents, but his diagnosis remained the same even after the said reports had been read.

Dr. Reinhardt repeated that the earlier physicians, including Dr. Drolet, spoke only of "impressions" and not of "recommendations", of "possibilities" and not of "probabilities". They made no diagnoses. On the other hand, he found the medical recommendations made at that time to

have been sound and reasonable because it was not unreasonable at the time to take safety measures, as was recommended by Dr. Vezina in his report

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dated February 3, 1983, which is reproduced on page 140 of Exhibit R-1.

However, the witness said that he disagrees with the eventual discharge of Private Beaulieu because no diagnosis justifying that decision had been made.

In fact, the witness recalled that Private Beaulieu had been treated by the Armed Forces' medical corps for almost two (2) years. That was more than enough time to get some idea of the patient's state and make a diagnosis.

We now arrive at the testimony of Dr. Denis Simard, a neurologist from Quebec's Clinique des sciences neurologiques. Dr. Simard was subpoenaed by the respondent and was the first witness to testify in rebuttal.

Dr. Simard told the Tribunal that he is an associate of Dr. Drolet, who was mentioned several times during the trial.

Dr. Simard testified that when he was treating the complainant he was unfamiliar with the reports of the other physicians who had treated the patient Beaulieu.

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In his testimony, Dr. Simard said that epilepsy is not a disease but is instead a mental symptom; an individual with epilepsy will function less well if pushed to the extreme. Moreover, an adult with epilepsy will remain an epileptic unless surgery is performed.

Confronted with Dr. Reinhardt's statement that the complainant Beaulieu is not an epileptic in spite of the various EEG tests taken by the patient (the complainant Beaulieu), Dr. Simard testified that the EEG is an unstable instrument and cannot confirm that the complainant Beaulieu was not an epileptic in 1984. On the other hand, it does not confirm that he was one either.

According to Dr. Simard, epilepsy is very close to a migraine, and the probability is that epilepsy appears in a period of stress, just like a migraine.

Dr. Simard also said that many people are close to having epilepsy without knowing it. Behavioural problems are a direct consequence of epilepsy.

Commenting on Dr. Drouin's report reproduced on page 253 of Exhibit R-1, Dr. Simard pointed out that Dr. Drouin had noted abnormalities and that the patient Beaulieu had an unstable

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brain. On the other hand, the abnormalities must be very specific and very strong.

Although Dr. Drouin had reached a negative result with respect to epilepsy, Dr. Simard testified that twenty-five per cent (25%) of epileptics have normal EEGS.

According to Dr. Simard, it is accurate to say that there was a probable diagnosis in 1982 and 1984 that Mr. Beaulieu had temporal lobe partial epilepsy.

Under cross-examination by Mr. Duval, the witness admitted that he did not know Dr. Messier of the Val Cartier military base, although his associate knew him as being very competent.

In response to the various questions he was asked, the witness said that headaches are not necessarily a symptom of epilepsy, that Etrafon is an anti-depressant drug and that Tegretol is a sleep-inducing drug.

In epilepsy cases, however, blacking out does not necessarily mean falling down.

The witness also made a distinction between an "automatism" and an "absence". According to him, an automatism is something

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done unconsciously that might be done during an absence and of which the patient has no recollection. He gave "nervous tics" as an example.

As for "absences", on the other hand, the patient usually has no recollection of them, and there is no movement.

THE LAW

The Canadian Human Rights Act is very clear with respect to any discrimination against a person or individual.

In addition, during the arguments, counsel for the parties submitted a series of cases to the Tribunal in support of their respective arguments. Section 3 of the Act sets out the various prohibited grounds of discrimination, one of which is disability.

Section 7 of the Act tells us that it is a discriminatory practice to deprive an individual of work and employment on a prohibited ground of discrimination.

Section 10 of the Act goes even further in this direction by prohibiting discriminatory policies or practices.

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In the case before us, the Tribunal must for all legal purposes decide two things:

First: did the complainant Beaulieu have epilepsy, or at least temporal lobe partial epilepsy, when he was discharged from the Canadian Armed Forces?

Second: was the complainant's discharge from the Canadian Armed Forces a prohibited and discriminatory practice within the meaning of the Act?

If the Tribunal's answer to the first question is positive, it will then be necessary, in order to answer the second, to determine whether or not the complainant's dismissal was based on a bona fide occupational requirement.

If the answer to that question is also positive, the debate is over.

If the Tribunal's answer to the first question is negative, on the other hand, it will then not even be necessary to answer the second question.

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DID THE COMPLAINANT BEAULIEU HAVE EPILEPSY, OR AT LEAST TEMPORAL LOBE

PARTIAL EPILEPSY, WHEN HE WAS DISCHARGED FROM THE CANADIAN ARMED FORCES?

This is the whole question of the present debate. According to counsel for the respondent, the diagnosis on which the complainant's dismissal was based was of PROBABLE TEMPORAL LOBE PARTIAL EPILEPSY.

The word used was probable, not possible.

That diagnosis was based on a medical file of nearly two years on the patient (the complainant) both in a military clinic and in a civilian clinic. The Armed Forces can certainly not be accused of inattentiveness or carelessness in this case.

However, on what was that diagnosis of probability based? on whom was it based? Was it on the reports of the "Sick Parade" physicians (Dr. Messier) or on Dr. Simard's diagnoses and recommendations?

Let us begin by considering Dr. Simard. He did not in any way impress the Tribunal during his testimony. He was as clear

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and specific in answering general questions as he was confused, imprecise and reluctant in answering questions about the complainant himself.

Moreover, Dr. Simard's history in this case is full of contradictions. In his letter of June 29, 1983, to Dr. Messier, Dr. Simard classified the patient (the complainant) as follows:

[TRANSLATION]

I feel that the prognosis here is excellent... As for me, I would agree to raising his medical category. (Exhibit R-1, at p. 178)

In his letter of September 25, 1985, addressed to "TO WHOM IT MAY CONCERN" which he admits to having written at the request of the complainant Richard Beaulieu, which was only two (2) lines long and which he knew full well would be placed in the complainant's medical file, he said the following:

[TRANSLATION]

I saw Richard Beaulieu again on September 25, 1985, and I feel that he is capable of returning to his work in the Canadian Armed Forces.

(Exhibit R-1, at p. 233)

In his testimony, Dr. Simard admitted to having known at the time that the complainant's trade in the Armed Forces was that of a driver.

On the other hand, he also admits that neither at that time nor at the time of the trial would he have gotten into an automobile being driven by the complainant and under the complainant's control.

Where is the logic in this? Where is Dr. Simard's rationality? The Tribunal has every right to wonder very seriously about his testimony in this case.

What is more, the answer to the second-to-last question he was asked during the examination in chief is very revealing of Dr. Simard's entire testimony. He said the following:

[TRANSLATION]

I think that a sick person... if Mr. Beaulieu was really a temporal lobe epileptic, and we are speaking of a minor case, that is the most we can say, I mean if he had it a bit, I think that he might have needed a certain type of medication....

On the other hand, we have the firm, specific and categorical testimony of another expert, a neurosurgeon, who asserts without hesitation that the patient has neither temporal lobe partial epilepsy nor epilepsy.

Moreover, there are the various medical reports by Dr. Messier, the military base's attending physician, and therefore the one who treated the complainant throughout the period in question. The Tribunal has already expressed its regret that Dr. Messier could not be subpoenaed to testify in this case.

Nevertheless, there are enough written documents and reports in the file for us to be able to draw rational conclusions from them.

Dr. Messier said the following in a report dated 15-08-84, which was reproduced on page 203 of Exhibit R-1:

[TRANSLATION]

Private Beaulieu is known to us for a difficult problem the diagnosis of which has never been Proven and the investigation of which has always proven negative. The patient... has asked for a new neurological examination. That examination was carried out on July 10, 1984, by Dr. Denis Simard, a neurologist.... Dr.

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Simard is of the opinion that with the patient's history and perfectly normal neurological examination the medical category attributed to Private Richard Beaulieu is too harsh...

This report by Dr. Messier was written barely TEN (10) WEEKS BEFORE Private Beaulieu was discharged.

In Part 4 of a medical examination report dated October 18, 1984, which was signed by Dr. J.P. Vezina, M.D., a medical officer, and which is reproduced on pages 205-06 of Exhibit R-1, Dr. Vezina wrote the following:

[TRANSLATION]

Probable epilepsy.... At the insistence of the neurologists and internists, we tried to raise his category to G 2-0 2, but this was refused.

However, Armed Forces Headquarters has not taken these reports, or others in the complainant's file, into consideration.

According to the evidence in the file, there was even an "insistence" to this effect.

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The Tribunal is aware that the respondent might require certain criteria that are not necessarily identical or comparable to those in civilian life. The Tribunal is also aware of the military's specific requirements during military manoeuvres, when soldiers are under stress.

The Tribunal is also aware that, in the specific case before us, after more than TWO (2) years of treatment, after more than two (2) years of medical attention by both military physicians and civilian medical specialists, no member of the medical profession was in a position to present a verdict, a clear diagnosis, in the complainant's file.

Furthermore, the civilian medical specialist called as a witness by the respondent during the trial, SEVEN (7) years after the complainant's medical file was opened, still speaks in the conditional about the complainant.

Under the circumstances, the Tribunal finds that Private Richard Beaulieu had neither epilepsy nor temporal lobe partial epilepsy when he was discharged on October 29, 1984.

Since the answer to this first question is negative, the Tribunal does not have to determine or rule on whether or not the complainant Beaulieu's dismissal on the basis of a diagnosis of

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probable temporary temporal lobe epilepsy was based on a bona fide occupational requirement.

Instead, since the answer to the first question is negative, the Tribunal finds that the discharge of the complainant Richard Beaulieu from the Canadian Armed Forces was a prohibited and discriminatory practice within the meaning of the Act.

THE DECISION

AFTER having heard the evidence, listened to the two parties' arguments, read the case law and deliberated, the Tribunal:

ALLOWS the complaint of the complainant Richard Beaulieu;

CANCELS the complainant's discharge from the Canadian Armed Forces, which discharge was dated October 29, 1984;

ORDERS that the complainant be reintegrated into the Canadian Armed Forces in the position of driver MSE-OP-935, which is the position he held before his unlawful dismissal;

ORDERS that the Canadian Armed Forces pay the complainant the equivalent of the salary he would have earned and the

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fringe benefits he would have received since his discharge plus interest, including any promotion within the Canadian Armed Forces, although all

income earned by the complainant since that date shall be deducted from this amount;

THE TRIBUNAL RESERVES FOR ITSELF, however, the jurisdiction to set the compensation owed to the complainant should the parties fail to reach agreement on this subject, in which case the parties shall return before the Tribunal to have an award made on this issue.

SIGNED AT MONTREAL THIS 29th DAY OF APRIL 1991

(signed)

ANTONIO DE MICHELE
Chairman of the Tribunal