

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES  
DROITS DE LA PERSONNE**

**DANIEL MAILLET**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**ATTORNEY GENERAL OF CANADA  
(REPRESENTING THE ROYAL CANADIAN MOUNTED POLICE)**

**Respondent**

**DECISION**

MEMBER: Athanasios D. Hadjis

2005 CHRT 48

2005/12/21

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## I. THE COMPLAINT

[1] In 2001, the Complainant applied to become a member of the Royal Canadian Mounted Police ("RCMP") but, according to his human rights complaint, he was refused on discriminatory grounds, namely his perceived sexual orientation and his family status (his relationship with his brother). He alleged that this refusal was a breach of s. 7 of the *Canadian Human Rights Act*. The Complainant also alleged that the RCMP conducted an inquiry in connection with his prospective employment that implied the existence of a limitation, specification or preference based on his perceived sexual orientation, in violation of s. 8 of the *Act*. In addition, the Complainant alleged that the RCMP pursued a policy or practice of determining his sexual orientation that deprived or tended to deprive him of an employment opportunity, in breach of s. 10 of the *Act*.

[2] The Complainant and the Respondent were represented by counsel at the hearing. The Canadian Human Rights Commission opted not to appear at the hearing.

## II. WHAT MUST THE COMPLAINANT PROVE TO SUBSTANTIATE HIS COMPLAINT?

[3] A complainant has the initial burden of establishing a *prima facie* case of discrimination. The Supreme Court of Canada decision in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*") provides the basic guidance for what is required to make out a *prima facie* case. The Court states that a *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.

[4] Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory. If a reasonable explanation is given, it is up to the complainant to demonstrate that the explanation is merely a pretext for discrimination (*Basi v. Canadian National Railway Company (No.1)* (1988), 9 C.H.R.R. D/5029 at para. 38474 (C.H.R.T.)).

[5] In order for the complaint to be substantiated, it is sufficient that discrimination be just one of the factors in the employer's decision (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para. 7 (F.C.A.)). The standard of proof in discrimination cases is the civil standard of the balance of probabilities.

[6] Discrimination is not a practice that one should expect to see displayed overtly. A tribunal should therefore consider all circumstances in determining if there exists what has been described as the subtle scent of discrimination. In cases involving circumstantial evidence, an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses (*Basi, supra* at paras. 38486-7; see also *Chopra v. Dept. of National Health and Welfare* (2001), 40 C.H.R.R. D/396 (C.H.R.T.)).

[7] In accordance with the principles set out above, and after having carefully considered all of the evidence and representations in this case, I have determined that the Complainant has established a *prima facie* case with respect to the s. 7 and s. 10 portions of his complaint. However, the RCMP has provided an explanation that is reasonable and not pretextual. I am therefore dismissing those portions of the complaint.

[8] The Complainant did not advance any argument with respect to the s. 8 component of the complaint during the opening statement or during final submissions. The Complainant did not direct the Tribunal to any evidence that would support or relate to the s. 8 allegation. I can only assume that the Complainant has opted not to pursue this aspect of the complaint. In any event, it would be a breach of fairness and natural justice for the Tribunal itself to try to formulate arguments in support of this aspect of the complaint and then attempt to make findings thereon. The case for the s. 8 complaint must therefore be dismissed.

### **III. THE COMPLAINANT HAS ESTABLISHED A *PRIMA FACIE* CASE WITH RESPECT TO THE SECTIONS 7 AND 10 PORTIONS OF HIS COMPLAINT**

[9] The Complainant is a native of New Brunswick. In November 1989, he graduated from the police science programme of the Atlantic Police Academy at Holland College in Charlottetown, P.E.I. In 1990, he began his police career by working as a part-time officer for the municipal forces of Shediac and Tracadie-Sheila, in New Brunswick. In June of the same year, he was hired by the police force of the city of Dieppe, New Brunswick, where he worked until 1993. He eventually re-joined the Tracadie-Sheila municipal police service, and in 1997, he moved on to the police department of the nearby city of Caraquet, on the Acadian Peninsula.

[10] In the 1990's, in furtherance of the provincial government's policy for the development and implementation of uniform policing standards across New Brunswick, numerous municipal police forces were absorbed into the RCMP by special agreement. In December 2000, the Municipality of Caraquet approved the absorption of its police force into the RCMP, to take effect on November 1, 2001.

[11] According to the absorption plan, the RCMP undertook to hire, "insofar as possible" the full time police officers of the Caraquet police department who possessed the necessary professional qualifications. In order to be hired by the RCMP, the Caraquet officers had to be interviewed and undergo medical and psychometric examinations. In addition, they had to clear a security and reliability check. In contrast to new recruits, they did not have to attend the RCMP's training facility in Regina, and were not required to pass fitness tests or write written exams.

[12] The Complainant was confident that the RCMP would hire him. The absorption had been expected for several years, so he and most of his fellow officers at Caraquet had already undergone and passed their medical examinations by the year 2000. Although he had been asked at one point to redo his psychometric test, he was not informed of any difficulties with the ultimate results. Everything was proceeding as expected by the time he filed his formal application to become a member on March 2, 2001.

[13] Numerous colleagues and supervisors from the police departments of Caraquet and the other municipalities where he had worked testified that he was a very competent police officer. He was honest, reliable, polite, good-humoured and well-liked. To this day, they would recommend him without reservation for employment with any policing organization, including the RCMP. Indeed, many of these witnesses had joined the RCMP after the absorption of their respective municipal forces and they asserted that the Complainant could perform the functions of an RCMP member without any difficulty. The RCMP's eventual refusal to hire him was as much of a surprise to them as it was to the Complainant himself.

[14] On March 14, 2001, the Complainant was interviewed in Caraquet by RCMP member, Cst. Jean-Paul St-Laurent. At the time, Cst. St-Laurent was working within the RCMP's human resources office in Fredericton, as a Recruiting and Security Coordinator. He was charged with the duty of coordinating the security and reliability screening for all RCMP applicants, whether they were new recruits, or existing police officers who were working in police departments that were being absorbed.

[15] Cst. St-Laurent's questions during the interview were varied, ranging from the Complainant's finances and hobbies to his friends and family, and the extent of his alcohol use if any. The meeting ended without the Complainant sensing any concern about his application. Cst. St-Laurent told him that in the next stage of the process, his interview answers would be verified, as part of his security and reliability screening.

[16] Several weeks later, the RCMP assigned Joseph Yves Desaulniers to conduct some of the field investigation into the security and reliability of the Caraquet officers who had applied to join the RCMP. Mr. Desaulniers was a retired RCMP member whose services were regularly retained on contract to conduct these types of enquiries. At the request of the RCMP, the Complainant had provided the names of several acquaintances and colleagues as references. Mr. Desaulniers met with many of these individuals, including Rodrigue McGraw.

[17] Mr. McGraw was an experienced officer with the Caraquet police force and had worked with the Complainant for about three years. Mr. McGraw had not passed the medical examination, which he and the other Caraquet officers had taken in advance of the absorption. In the knowledge that the RCMP would therefore not be hiring him, he had sought out and obtained employment with the provincial public service in advance of the absorption. When Mr. Desaulniers contacted him, he was already employed at his new job and was no longer working with the Complainant.

[18] Mr. Desaulniers interviewed Mr. McGraw at the latter's office in Bathurst. They had a quick conversation lasting no more than 20 minutes. Mr. McGraw testified that the initial questioning was open-ended and related to what sort of person the Complainant generally was. Mr. Desaulniers then asked if the Complainant was homosexual. Mr. McGraw was taken aback and visibly upset with this question. Mr. Desaulniers explained that the matter had come up earlier in his investigation. He was not necessarily saying that the Complainant was homosexual; he was just asking. Mr. McGraw told the investigator that he would be "surprised" if the Complainant was homosexual.

[19] Mr. McGraw claims that he was so upset with the questioning, he spoke about it to a colleague at his new workplace immediately after the meeting. He claims to have also raised the incident with Aubin Albert, who was the Chief of the Caraquet Police department at that time. Mr. Albert did not make mention of such a conversation in his testimony, however. Mr. McGraw only managed to tell the Complainant about the questioning on or about April 17, 2001.

[20] One of the Complainant's other character references who was also interviewed by Mr. Desaulniers was Denis McLaughlin. He and the Complainant had worked together in the Tracadie-Sheila police department. Mr. McLaughlin had successfully transferred into the RCMP upon the absorption of the Tracadie-Sheila police department in 1997.

[21] Mr. McLaughlin testified that he was interviewed by Mr. Desaulniers about the Complainant. He told Mr. Desaulniers that in his opinion, the Complainant could perform the duties of an RCMP officer as well as any other member. However, he also testified

that during the interview Mr. Desaulniers asked him a question regarding the Complainant's sexual orientation, although he could not recall exactly how the question was framed. Mr. McLaughlin was surprised to hear the question, and testified that his only answer was that he did not know and did not care if the Complainant was homosexual or not.

[22] On May 8, 2001, Cst. St-Laurent called the Complainant to a meeting at the RCMP's offices in Caraquet. Cst. St-Laurent told the Complainant right away that he had bad news - the Complainant's application to the RCMP was being turned down. The Complainant asked why. Cst. St-Laurent explained that his file had been reviewed by high-ranking officers back at the Fredericton headquarters, and it was determined that due to several small items, he did not "fit" the image of an RCMP officer. The Complainant asked for specific reasons. He was told that his brother, who lived in British Columbia, had a criminal record for sexual assault, which played a role in the decision. The fact that the Complainant had previously applied to the RCMP in the late 1980's and had been refused was also a factor. His declared prior usage of marijuana and hashish also played a role.

[23] During the meeting, the Complainant mentioned having heard that questions had been asked by the RCMP about whether he was a homosexual. According to the Complainant, Cst. St-Laurent replied that this subject "was never on the table".

[24] Despite Cst. St-Laurent's denial, and in light of Mr. McGraw's information about the questions posed by Mr. Desaulniers, the Complainant suspected that his perceived sexual orientation may have been a factor in the decision not to hire him. He therefore asked Mr. McGraw to sign a written statement setting out what had transpired during the latter's meeting with Mr. Desaulniers. The Complainant prepared a questionnaire in a typical question and answer format, with spaces provided for Mr. McGraw to write in his answers. Mr. McGraw filled out and signed the document on May 19, 2001.

[25] Mr. McGraw attached a separate sheet to the questionnaire, on which he had recorded his recollection of the conversation in narrative form. I have included the following excerpts from the narrative, as they were written. Mr. McGraw refers therein to Denis Albert and Serge Losier, both of whom were persons whom the Complainant had identified in his application to the RCMP as character references. Mr. Desaulniers had already interviewed both of them prior to meeting up with Mr. McGraw:

[TRANSLATION]

On or about March 28, 2001, I received a phone call from Jean Yves Desaulniers, asking me if it would be possible to meet me in person. . . . The meeting took place between eleven o'clock and noon at my office. He said to me: do you personally know Daniel Maillet of the Caraquet Police well? I replied: I think so, yes.

Q [*Mr. Desaulniers*]: What kind of guy is he [*the Complainant*]?

A [*Mr. McGraw*]: A guy who keeps to himself. He lives in a house built in the woods in Caraquet. He minds his own business, hard working and polite.

Q : What is he like at work?

A : Everybody likes him. We really enjoy teasing him. It is as if he does not feel liked if we do not tease him.

Q : Is it true that he is homosexual?

A : What . . . What are you saying? Now, where is that story coming from?

Q : Denis Albert, what does he have to do with Daniel?

A : He's a friend.

Q : Why are they called Daniel and Denise?

A : That's a joke. Denis is far too macho to be queer.

Q : He has an earring or a pin in his ear, something like that?

A : I haven't noticed. Wow, but that's a serious accusation.

Q : I am not saying that he is one. That's what I learned from my investigation. They are often together. Their Jeeps are almost the same. There is also another guy from Tracadie, over there, who is with them a lot. Is he a homo too, that one?

A : I don't know him. I cannot swear that Daniel Maillet is not homo but I would be more surprised than anyone.

Q : Why would he almost always go out in Tracadie and not in town and why with either Denis Albert or Losier from Tracadie?

A : A few years back, Daniel Maillet fell madly in love with a girl [. . .] from Tracadie. I do not remember her name. He dated her for almost two years. He still loves her even if he tries to hide it and it shows. That's why he goes over there. May be he is hoping they will get back together.

Q : Whether he is homosexual or not, it does not change anything. He only has to admit it and it's okay.

[...]

[26] The Complainant expected to get a written letter of refusal from the RCMP following his second meeting with Cst. St-Laurent, but as the weeks passed, none arrived. Aside from Mr. McGraw, who as mentioned earlier was not qualified for medical reasons, all the Complainant's fellow Caraquet police officers who had applied to join the RCMP were accepted. As the date for the handover of policing from Caraquet's force to the RCMP approached (November 1<sup>st</sup>, 2001), the Complainant decided to inform the media about what he perceived as the RCMP's discriminatory refusal to employ him. His case was reported on TV and radio, as well as in the written press.

[27] On October 31, 2001, an article was published in the local newspaper, *l'Acadie Nouvelle*. The reporter, Sylvie Paulin-Grondin, interviewed the Complainant and several others for her column, including the non-commissioned officer in charge of operations at the RCMP's Caraquet detachment, Sgt. Michel Pagé. Prior to the absorption of the municipal force, the RCMP had already been operating a detachment based in Caraquet and serving the surrounding area. Sgt. Pagé was therefore acquainted with the members of the Caraquet police department, including the Complainant, and was involved in the absorption process.

[28] To obtain this interview from Sgt. Pagé, Ms. Paulin-Grondin testified that she had left a message for him at his office. He called her back and she conducted the interview by telephone. She claims to have cited Sgt. Pagé *verbatim* in the article. Sgt. Pagé did not testify at the hearing. Sgt. Pagé was quoted as initially saying that he could not comment on the Complainant's case nor that of any other individual. He nonetheless went on to affirm that the Complainant's candidacy did not satisfy the RCMP's criteria. He added that all the applicants are treated equally - their medical condition, reputation, character, and finances are examined. However, he also made the following statement regarding candidates' sexual orientation:

[TRANSLATION]

But I can tell you that sexual orientation is not a criterion. The RCMP does not discriminate against a person who is gay, absolutely not! It could however create problems if the employer was not aware of it.

Let us say that a person is gay and the employer is not aware of it. That could be a risk in terms of security. If a member of the RCMP has a given orientation and does not want his or her employer to know about it, he or she could be exposed to blackmail, extortion, extraction of information. This is speaking in general terms and not about a particular case. But we must comply with the Charter of Rights. That is very important.

[29] After the publication of these remarks, neither Sgt. Pagé nor the RCMP contacted Ms. Paulin-Grondin to suggest that she had misunderstood or misinterpreted his statements.

[30] On the same day that the article was published, a letter was sent from the RCMP to the Complainant formally advising him that his application was being dismissed. It was signed by Staff-Sergeant Joseph Rogers, non-commissioned officer in charge of recruitment (Senior Career Manager) for "J" Division (New Brunswick). He noted that in the Complainant's case, the RCMP decided that his "evasive manner" during the interview and the fact that he provided information that was later found to be inconsistent, raised issues regarding his integrity and honesty.

[31] The following day, November 1, 2001, the Complainant wrote Staff-Sgt. Rogers back, complaining that he had never been told previously that he had been evasive during the interview nor that he had provided erroneous information. He was shocked by these new allegations and asked for more particulars. On November 22, 2001, Staff-Sgt. Rogers wrote back to the Complainant, advising him that the RCMP's decision had not changed and was final. His file had already been reviewed internally and a complete assessment had been made.

[32] On December 21, 2001, the Complainant filed the present complaint with the Canadian Human Rights Commission.

[33] In sum, the Complainant has led evidence that prior to being denied employment by the RCMP, questions were asked about his sexual orientation. Sgt. Pagé's subsequent remarks that an applicant's concealed sexual orientation would be of interest to the RCMP corroborates the Complainant's contention that his perceived sexual orientation was a factor in the RCMP's decision. In addition, the Complainant has led evidence of being told outright that his brother's criminal record was also a factor in the decision not to hire him. I am satisfied in the absence of an answer from the Respondent that if this evidence is believed, it is complete and sufficient to justify a finding of discrimination, pursuant to s. 7 of the *Act*, based on the Complainant's perceived sexual orientation and his family status. A *prima facie* case has been made out.

[34] Similarly, if the evidence is believed, a *prima facie* case has been made out regarding the s. 10 component of the complaint. Mr. Desaulniers's questions relating to the Complainant's sexual orientation - coupled with Sgt. Pagé's remarks - and the ultimate rejection of the Complainant's candidacy, suggest, in the absence of a reasonable and non-pretextual explanation, that there was a policy in place to inquire into the Complainant's sexual orientation, which may have or tended to deprive the Complainant of an employment opportunity.

#### **IV. THE RCMP'S ANSWER TO THE SECTION 7 COMPLAINT - WHY WAS THE COMPLAINANT NOT HIRED?**

[35] The RCMP claims that neither the Complainant's perceived sexual orientation nor his relationship with a family member was in any way a factor in its decision not to accept his application for employment. He was refused for numerous other reasons, principally related to what was perceived as his lack of candour and honesty during his interview with Cst. St-Laurent. I have determined this explanation to be reasonable. Moreover, the Complainant has not demonstrated that the explanation was a pretext for otherwise discriminatory conduct.

[36] The security and reliability screening interview is of high significance for the RCMP, which must ensure that a member's integrity is not in doubt. The interviewer is provided a form on which the questions to be asked to candidates are set out and the answers are recorded. The form is for the interviewers' use only - it is not shown to candidates. The form used by Cst. St-Laurent during the Complainant's interview was entered as an exhibit at the hearing.

[37] In accordance with the form's instructions, Cst. St-Laurent told the Complainant from the outset that the RCMP would conduct a field investigation afterwards to verify everything he said during the interview. He therefore advised the Complainant to be honest, forthright and complete in his answers. Any deliberate attempt to lie or omit information would remove the candidate from further consideration for employment.

[38] The RCMP claims that many of the Complainant's answers were, on subsequent verification, proven untrue or incomplete, calling into question his integrity and qualities as a police officer.

[39] Cst. St-Laurent was not impressed with the Complainant's overall performance and conduct during the interview. He described the Complainant as very quiet and reticent in providing the information being sought. Most candidates are initially nervous but they eventually open up and freely engage in a discussion with the interviewer. Such was not the case with the Complainant. He was not talkative and answers often required prompting and probing on Cst. St-Laurent's part. Questions frequently needed to be repeated in order to extract a response.

[40] There is a section at the end of the interview form where the interviewer writes his overall impression of the interviewee. Cst. St-Laurent wrote that the Complainant appeared to be very nervous, and that it was difficult to get "straight answers" to many of the questions; the Complainant could not remember or was unsure.

[41] Cst. St-Laurent testified that these concerns about the Complainant's answers, combined with several contradictions that emerged during subsequent verifications (set out below), led Cst. St-Laurent to conclude that he could not recommend the Complainant's candidacy. Cst. St-Laurent documented these findings in a memorandum dated April 25, 2001, that he submitted to Staff-Sgt. Rogers, the Senior Career Manager.

#### **A. Inconsistencies and discrepancies regarding the Complainant's use of drugs**

[42] The security and reliability interview form contains a series of questions relating to drug usage. Candidates are asked whether they have ever been exposed to or used drugs. If so, they are to explain the type of drug, the frequency of its use, the dates it was first and last used, and the circumstances or motives that gave rise to its use.

[43] The Complainant told Cst. St-Laurent that he had used cannabis and hashish. Cst. St-Laurent recorded on the form that each drug had been used twice, the circumstances being "experimentation/social". As for the dates of usage, the answer indicated is "don't know, it was long ago". The Complainant testified that Cst. St-Laurent

insisted he be more specific but the stress of this line of questioning caused him to blank out, and he was unable to give any details.

[44] Cst. St-Laurent also asked the Complainant to provide the names and addresses of his relatives, as required by the interview form. Many of his relatives live in the United States and he was consequently unable to give these particulars during the interview either. The Complainant explained that he would be able to come up with this information after the interview. Cst. St-Laurent agreed to let him send in these details by fax following the meeting.

[45] Upon returning to his office at the Caraquet municipal police station later that day, the Complainant called his mother and obtained his relatives' contact information. He then prepared a two-page hand-written letter, which he sent by fax to Cst. St-Laurent. In it he set out these details, but also added, under the heading "Section on Drugs" two paragraphs specifying the two occasions on which he had used drugs. The first is listed as winter 1994, outside of a high school entrance, before entering a dance that was being held inside. The second occasion is indicated as being in the spring or summer of 1995, outside of a club named "Cosmo", in Moncton. On each occasion, he states that he used marijuana and hashish.

[46] The Complainant explained at the hearing that he had in fact used the drugs in 1984 and 1985, not 1994 and 1995. He did not realize the error in his faxed letter until a few days before his second meeting with Cst. St-Laurent on May 8, 2001. The Complainant made no attempt to inform Cst. St-Laurent of the error prior to that meeting. He brought the mistake to Cst. St-Laurent's attention during the meeting, but Cst. St-Laurent said that it was too late; the decision not to recommend his candidacy had already been made.

[47] Cst. St-Laurent testified that he had indeed told the Complainant to fax in the addresses of the American relatives. It was understandable for the Complainant not to have readily recalled these details during the interview. However, Cst. St-Laurent was not impressed by the fact that the Complainant took this as an opportunity to complete or supplement some of his other interview answers. Cst. St-Laurent testified that the purpose of the interview is to test candidates' reliability and honesty, by verifying the accuracy of their answers. They are therefore expected to reply in full during the interview to all questions that are put to them, aside perhaps from questions requiring detailed answers, like a relative's address and phone number.

[48] Furthermore, Cst. St-Laurent was surprised to see the Complainant declare that he had used drugs so recently, at a time when he had already begun his career as a police officer. He was also taken aback by the age that the Complainant would have been at the time of the reported drug usage, so much so that he inscribed a comment on his copy of the faxed document: "30 years old". Cst. St-Laurent did not interpret this illegal drug usage as mere "experimentation" by a young person. Cst. St-Laurent testified that the RCMP will generally not turn down candidates just because they may have tried out certain less serious drugs while in high school. However, more recent usage, even as experimentation, particularly at a time when the person has already entered the policing profession, is of much greater concern. Cst. St-Laurent also wondered why the Complainant was suddenly able to remember the exact years of usage, after having had such difficulty doing so during the interview.

[49] Another of the questions asked of the Complainant during the security and reliability and screening interview was whether any police force, including the RCMP, had ever

refused him employment. The Complainant replied that he had applied to join the RCMP in the mid-1980's, but was turned down at the interview stage because he had admitted trying drugs a few years earlier.

[50] Cst. St-Laurent testified that he took all the information provided by the Complainant, at face value. The refusal for drug use in the 1980's, combined with the faxed declaration that he had used drugs in 1994 and 1995 implied more than mere experimentation.

[51] As part of the verification process, Cst. St-Laurent contacted Staff-Sgt. Jacques Ouellette, the RCMP staffing officer who had interviewed the Complainant in the mid-1980's. Staff-Sgt. Ouellette had no specific recollection of the Complainant. However, he added that for him to have rejected an application on this ground, the declared drug use must have taken place on at least three or four occasions.

[52] Cst. St-Laurent therefore became generally apprehensive with the level of discrepancies that were emerging regarding the Complainant's drug use. What began as an admission of drug usage on four occasions as a form of experimentation, which had occurred so long ago that the Complainant was unable to remember the actual circumstances, had now developed into a minimum of seven or eight occasions of usage, having taken place as recently as 1995, at a time when the Complainant was a police officer by profession.

#### **B. Inconsistencies and discrepancies regarding the Complainant's departure from the Dieppe Police Department**

[53] The Complainant's answers with respect to his employment at the Dieppe police department gave Cst. St-Laurent another cause for concern. The investigation conducted by the RCMP to verify the Complainant's interview answers revealed significant discrepancies.

[54] In advance of the security and reliability screening interview, candidates must fill out a Personnel Security Clearance Questionnaire, which includes a series of questions regarding previous employment. If candidates have ever been dismissed from a position, they are required to give the name of their supervisor and a brief explanation of the reason for the dismissal. The Complainant indicated in his questionnaire that he had been dismissed from his employment with the Dieppe police department in 1993, after three years service. He explained that he had been suspended and dismissed for "alleged errors in his work", following which he took his case to arbitration and "resigned for money".

[55] The Complainant elaborated on this incident during his interview with Cst. St-Laurent. The suspension related to an impaired driving case in which he was to testify. Unfortunately, he was ill with the flu on the day of the trial, and while waiting to take the stand, he had to step out of the courtroom to visit the restroom. It seems that the prosecutor was unable to locate the Complainant when his turn came to testify. For some reason, instead of asking for an adjournment, the Crown decided to withdraw the charges.

[56] Dieppe's Chief of Police, Terry Rouse, later notified the Complainant that he would be suspended for seven days. The Complainant filed a grievance, but some time afterwards he was fired from the police department outright. He grieved the dismissal as well. On the day of the arbitration hearing, the employer was reticent to proceed, so it offered the Complainant \$40,000 to leave the force, in final settlement of both grievances. The Complainant accepted the offer. He preferred this option over returning to a workplace where his activities would be constantly scrutinized.

[57] The Complainant testified that Rouse was well-known within New Brunswick's policing community as being very strict in his dealings with his officers. He claims that he discussed this fact with Cst. St-Laurent, who knew of the Chief's reputation and agreed that this would probably explain the events that led to the Complainant's dismissal.

[58] The Complainant had brought with him to the interview documents relating to the dismissal, and offered to show them to Cst. St-Laurent. The offer was turned down. The Complainant testified that he even offered to take a lie detector test in connection with his explanation of the Dieppe dismissal, if so requested. Cst. St-Laurent has no recollection of this offer.

[59] Following the interview, Cst. St-Laurent wrote some personal remarks on the interview form. He noted that the Complainant's dismissal from the Dieppe police department and his other employment records would have to be examined closely. He added that there may be "a performance issue" that needed to be clarified and addressed.

[60] Cst. St-Laurent asked Dale Mitton, a retired RCMP staff sergeant, to look into the Complainant's employment history with the Dieppe police department. That city's police service had by then also been absorbed into the RCMP, as part of the provincial amalgamation process. Chief Rouse, who had dismissed the Complainant, had died several years before, so Mr. Mitton met with the former Deputy Chief of Police, Alan Parker, who was now a member of the RCMP serving in Moncton. The Complainant had listed Mr. Parker in his questionnaire as one of his supervisors at Dieppe who could be contacted for additional information.

[61] Mr. Parker told Mr. Mitton that while employed with the Dieppe police department, the Complainant had been a "poor performer" and did not meet the minimum standards of a junior constable. He did not complete his work on time and he never met his diary dates. He was "slack" in doing his work. Mr. Parker also told Mr. Mitton that the Complainant was suspended and later dismissed on account of his poor performance and his failure to meet minimum requirements. Mr. Parker confirmed that the Complainant had accepted a "payout" and resigned from the force. Mr. Parker also mentioned that a former Moncton municipal police officer, Paul Desroches, had once told him that the Complainant had been seen in the Cosmo night club in Moncton, drinking to excess and hanging around "poor charactered people". He may even have been "into drugs".

[62] Mr. Mitton met Mr. Desroches to follow up on this information. Mr. Desroches recalled having received a call from a "concerned citizen" alleging that the Complainant had been seen in downtown Moncton night clubs keeping company with "ill charactered ladies", engaging in drinking and driving, and using drugs. Mr. Desroches pointed out that he was unable to confirm the accuracy of the information - the citizen had withheld his name. Mr. Desroches simply passed on the information to Mr. Parker.

[63] Neither Mr. Desroches nor Mr. Parker was a witness at the Tribunal hearing. Mr. Mitton testified and entered into evidence an investigation report that he had prepared and remitted to Cst. St-Laurent in late March 2001, in which these details about his conversations with Mr. Desroches and Mr. Parker were set out.

[64] Mr. Mitton also visited Dieppe's City Hall, as part of his investigation. He obtained copies of the minutes of the municipal council's meetings relating to the Complainant's suspension, dismissal and grievances, which he also forwarded to Cst. St-Laurent.

[65] The minutes of May 25, 1993, dealt extensively with the Complainant's suspension. Chief Rouse informed the council that the Complainant had been suspended with pay "as a result of difficulties in his work performance" since the completion of his six-month probationary period. The Chief stated that the Complainant did not meet his "work requirements", referring to three or four incidents, one of which concerned the impaired driving trial, where the Chief claimed that the Complainant "fell apart on the stand after direct questioning". The Chief added that the Complainant had "problems responding to serious calls involving physical contacts". After some follow-up questioning, the council decided to support Chief Rouse in his decision to suspend the Complainant.

[66] The minutes of the April 25, 1994, meeting of council relate to the agreement that had been negotiated with the Complainant, in settlement of his labour grievances. Some of the agreement terms are set out, including the Complainant's undertaking to withdraw his grievances and resign from the police department, in exchange for a sum of money. Chief Rouse is cited as having assured the council that the City had a "tight case", but that it would cost more in legal fees to pursue the matter rather than settle on the negotiated terms. A resolution was therefore passed approving the settlement.

[67] Mr. Mitten also obtained copies of the Complainant's employment and pay records from Dieppe City Hall. The City had provided the Complainant with two records of employment to enable him to apply for employment insurance benefits. The first was completed following his suspension and dismissal, and the second after the grievance settlement. Both forms contain a comment to the effect that the employee was not expected to return to his employment because he "failed to meet [the] minimum requirements" of the police department.

[68] One of the Complainant's supervisors at the Dieppe police department was Robert Bastarache, who had later joined the RCMP as part of the absorption. At the time of the field investigation, Mr. Bastarache was stationed at the Bouctouche detachment of the RCMP. Cst. St-Laurent asked Pierre Quinn, a retired RCMP investigator, to interview Mr. Bastarache. According to Mr. Quinn, Mr. Bastarache stated that he had heard "a lot of rumours" concerning the Complainant but that they were "just rumours". Mr. Bastarache did not want to elaborate. However, he pointed out that in supervising the Complainant, he found him lacking in experience and maturity.

[69] Mr. Bastarache confirmed to Mr. Quinn that he never saw the Complainant take any drugs, come to work with a hangover, or display any other sign of substance abuse. He concluded his conversation with Mr. Quinn by stating that although the Complainant was "proud" to wear the uniform, he "forgot [the] responsibility" that went along with it. Mr. Bastarache identified the Complainant's lack of maturity as the reason for his lack of responsibility.

[70] The results of Mr. Quinn's and Mr. Mitten's field investigations gave Cst. St-Laurent cause for concern. The information gathered suggested that the Complainant had performed poorly while working for the Dieppe police department and that he had failed to meet the minimum standards for a police officer. This in itself was a concern but Cst. St-Laurent was also troubled by the fact that the Complainant had not mentioned during the security and reliability screening interview that poor performance had been a factor in his suspension. Cst. St-Laurent began to perceive a significant discrepancy between the Complainant's description of the incidents leading to his departure from the Dieppe police department, and the picture being developed through the RCMP's investigation.

[71] Even the Complainant's conduct outside of work was being called into question. Cst. St-Laurent recognized that some of the information was based on hearsay and rumour. The reliability of the information received from the anonymous "concerned citizen" had obviously not been established. However, in his opinion, the fact that the nightspot involved, the Cosmo Club, was where the Complainant had also admitted using drugs in the past corroborated this information "to a certain extent".

**C. The Complainant's failure to disclose his brother's criminal record**

[72] As part of the security and reliability screening interview, Cst. St-Laurent was required to ask the Complainant whether a member of his immediate family or a close friend had ever been involved in any criminal activities. According to Cst. St-Laurent, the Complainant mentioned two of his character references. The Complainant testified at the hearing that both of these friends had once been caught and fined for fishing out of season, which was a statutory offence. In addition, one of these men had been involved in an altercation with a neighbour, resulting in assault charges being laid. He was later given an absolute discharge by the court.

[73] After the interview, as part of the normal verification process, Cst. St-Laurent checked if any criminal activity had been registered regarding any of the Complainant's friends or family members, or any of the individuals whom the Complainant had provided as character references. Cst. St-Laurent conducted his search on the national computerized databank that is available to all police services, known as CPIC.

[74] The search yielded a surprising result. One of the Complainant's brothers, who is about one and a half years younger than the Complainant, appeared on the Criminal Names Index (CNI), which apparently lists the names of individuals who have been charged and finger-printed in the past. The CNI report for the Complainant's brother stated that his files related to "violence, theft, sex". The report cautioned, however, that this entry did not document a criminal record. Cst. St-Laurent therefore inquired further into the database, and learned that the Complainant's brother had been convicted in 1986 of a theft under \$1,000, under the *Criminal Code*. There was also an indication that the brother had been charged with sexual assault in 1987, and assault in 1998. Both of these charges were laid in British Columbia, but they were subsequently stayed.

[75] Again, Cst. St-Laurent found himself having doubts and concerns about the Complainant's openness and honesty. Why had he not mentioned his brother when he was asked to list the names of any immediate family members who had been involved in criminal activity?

[76] The Complainant testified that at the time of the interview, he had no knowledge whatsoever of these charges and conviction. He had been estranged from his brother for many years and had little knowledge of his activities. He was aware that when his brother was a teenager and still living at home in New Brunswick, the police had questioned him one time about an alleged sexual assault. However, no charges were ever laid against him. The Complainant recalls having mentioned this latter incident to Cst. St-Laurent, but he could not affirm with certainty when he did so.

[77] Cst. St-Laurent, on the other hand, does not recall the Complainant's ever having provided information regarding any of his brother's criminal activity, including the police questioning about the sexual assault in New Brunswick. No mention thereof is recorded anywhere on the form that Cst. St-Laurent was filling out during the interview. The names of the Complainant's two friends who committed fishing offences are, however,

clearly identified in the section of the form designated for the listing of acquaintances involved in criminal activities.

[78] Cst. St-Laurent acknowledged having remarked during the May 8<sup>th</sup>, 2001, meeting that the Complainant's failure to mention his brother's criminal activity was a factor in the decision not to recommend him for admission to the RCMP. Cst. St-Laurent reminded the Complainant that he had been advised at the start of the March 14<sup>th</sup> interview about the importance of not withholding any information being sought by the investigator.

[79] Cst. St-Laurent testified that the RCMP does not have a practice of refusing candidates due to the criminal activities of their friends or relatives. Indeed, the RCMP did not dispute the Complainant's assertion that some of the police officers hired during the absorption process had close relatives with far more serious criminal records than that of the Complainant's brother. Cst. St-Laurent explained that if a friend or relative who is very close to an applicant is involved in serious criminal activity, the RCMP looks into the matter more closely to determine the extent of any influence that person may have over the applicant. However, this factor is not an automatic bar to entry.

[80] In any event, Cst. St-Laurent testified that the brother's actual criminal activity was not the issue with respect to the Complainant. The concern was that he omitted or withheld important information during the interview, just as he had done with respect to his work experience with the Dieppe police department and to some extent, his drug use. It is noteworthy that in his memorandum to Staff-Sgt. Rogers, Cst. St-Laurent does not so much emphasize that the brother was engaged in criminal activity, but rather that the Complainant had "failed to disclose" that his brother had a CNI for violence, theft, and sex. For Cst. St-Laurent, this constituted yet another discrepancy that emerged during the verification process.

**V. ARE THE RCMP'S EXPLANATIONS REGARDING THE SECTION 7 COMPLAINT REASONABLE, OR ARE THEY MERELY A PRETEXT FOR DISCRIMINATION?**

[81] I find that the Respondent's explanations with respect to the s. 7 portion of the complaint are reasonable and not pretextual.

[82] It is unfortunate that when the Complainant filed his complaint, he was not in possession of Cst. St-Laurent's April 25<sup>th</sup>, 2001, memorandum to his superior, Staff-Sgt. Rogers, explaining the reasons for which he did not recommend the Complainant as suitable for employment in the RCMP. It is evident from the memorandum that Cst. St-Laurent's decision was motivated by the discrepancies that had emerged following the verification of the Complainant's security and reliability interview answers. Staff-Sgt. Rogers testified that after reading the memorandum, he met with Cst. St-Laurent to discuss the findings. Staff-Sgt. Rogers was satisfied with Cst. St-Laurent's conclusions and endorsed them. Staff-Sgt. Rogers reiterated in his testimony the importance for a candidate to be "brutally honest" during the security and reliability screening interview. All candidates are told this.

[83] According to the RCMP, its field investigation had revealed that the Complainant had not been "brutally honest". The Complainant, however, claims that his answers during the interview were truthful, and he maintains that the information garnered subsequently by the investigators was incomplete and misleading, if not altogether wrong. For instance, the Complainant insists that his departure from the Dieppe police department was entirely voluntary, and made solely with the intention of avoiding any

further interaction with Chief Rouse, with whom he and many of his fellow officers could not get along. Several witnesses agreed with the Complainant's assessment of the Chief, and the Chief's attitude towards his staff. The Complainant also takes issue with the fact that some of the information gathered in Dieppe was based on rumour and hearsay. He denies the veracity of any of those allegations.

[84] The fact remains, however, that the information and material forwarded to Cst. St-Laurent by the two investigators assigned to this aspect of the inquiry suggested otherwise. They indicated that the Complainant had performed poorly, and that his dismissal for cause would have ultimately been proven justified before the labour arbitrator, had the city not settled the grievances in advance. As for the rumours, Cst. St-Laurent acknowledged that they were of minimal probative value, but the information was before him just the same.

[85] Cst. St-Laurent had no way of knowing that the Complainant was estranged from his brother. The fact is, however, that his research on the CPIC data bank yielded information that he would have expected the Complainant to disclose. I am satisfied that Cst. St-Laurent developed a genuine concern about the Complainant's honesty in this regard. This explanation is reasonable and there is no evidence to suggest that it was a pretext for discrimination based on the Complainant's family status.

[86] With respect to the drug use, it was on account of the Complainant's own omissions and errors that Cst. St-Laurent was led to believe that the usage extended up to 1995, when the Complainant was already a police officer by profession. This posed an obvious concern for the RCMP. The Complainant contends that the RCMP should have probed further. It should have somehow realized that the Complainant had provided the wrong dates. He argues that it did not make sense for a 30-year old man to have smoked hashish and cannabis outside a high school dance. Cst. St-Laurent should have realized this, called back the Complainant and asked for the correct date.

[87] In my view, to make such an assertion defies reason. It was the Complainant who was applying to join the RCMP, and it was his duty to ensure that the answers and information he was providing to Cst. St-Laurent were accurate and complete. He cannot blame the RCMP for taking him at his word with respect to the years of his declared drug usage. This detail was not given verbally during the interview, when a misstatement could understandably occur. Rather, it was included in a document drafted by the Complainant in his own handwriting after the interview and sent by him to the RCMP from the fax machine in his office at the Caraquet police station.

[88] The Complainant argued that some of the discrepancies do not in fact exist. He claims that all his answers were not accurately recorded by Cst. St-Laurent during the interview. For instance, he denies having stated that the amount and frequency of his alcohol use per week was at the level recorded by Cst. St-Laurent on the form. Cst. St-Laurent testified that he wrote down the answers given and that in any event, the level of alcohol use shown was acceptable and posed no obstacle to the Complainant's candidacy.

[89] The Complainant acknowledged that many of the other parts of the questionnaire accurately reflected his answers. Cst. St-Laurent's notes regarding the Dieppe police department correspond to the explanation that the Complainant testified having given during the interview. The field investigation, however, presented a different story than that told by the Complainant. Similarly, on the issue of drug use, the discrepancy was not so much between the Complainant's interview answers and the entries on the

questionnaire, but rather between his interview answers and the erroneous fax he sent later on.

[90] Finally, it makes little sense for Cst. St-Laurent to have omitted to write down the name of the Complainant's brother as an acquaintance involved in criminal activity, if the Complainant had indeed disclosed what he knew about the police questioning of his brother while he was still living at home in New Brunswick. I find it implausible that Cst. St-Laurent would have recorded the names of two friends who had illegally fished and not the name of a brother who had been questioned about a sexual assault. The Complainant argued that this and the other claimed omissions were deliberate and part of a larger organized scheme to keep him out of the RCMP. As I explain later in this decision, the evidence does not support this allegation.

[91] Complainant counsel argued strenuously that Cst. St-Laurent's entire testimony is untrustworthy because he initially testified that at the second meeting with the Complainant, the decision to refuse his transfer had not yet been made. Yet, later on in Cst. St-Laurent's cross-examination, it was revealed that his report to Staff-Sgt. Rogers had been presented and accepted by a senior management committee as of April 27, 2001, almost two weeks before the second meeting (May 8, 2001).

[92] Cst. St-Laurent explained that there was no contradiction. Senior management of the RCMP's "J" Division met on April 27, 2001. The minutes of the meeting state that Cst. St-Laurent's investigation findings and his recommendation were produced, and that the Commanding Officer "concurred with this recommendation". Cst. St-Laurent claims that the decision to reject the Complainant's transfer had not yet been formally finalized. Despite the Commanding Officer's endorsement of the recommendation, the Complainant's application could still in theory have been accepted. This scenario seems unlikely, but in my opinion, the so-called contradiction in Cst. St-Laurent's testimony, as put forth by the Complainant, has no bearing on the reliability of his evidence.

[93] Irrespective of whether the final decision had or had not already been taken when Cst. St-Laurent met with the Complainant on May 8, 2001, the documentary evidence proves that the recommendation not to accept the Complainant's candidacy was based on the discrepancies that had emerged during his reliability and security check. These discrepancies raised questions about the Complainant's honesty, integrity, and performance. The RCMP concluded that the Complainant had not been honest in his interview, as demonstrated by his failure to mention any of his brother's criminal activity, and his merely partial disclosure of information regarding his employment history with the Dieppe police department and his drug usage. The RCMP also developed some general concerns about his qualifications as a police officer, arising from the information gathered that suggested he had performed poorly during his employment at Dieppe, as well as from his subsequent apparent admission of drug use at a relatively mature age, well after he had commenced his career in law enforcement.

[94] These explanations are reasonable.

#### **A. Did the RCMP inquire into the Complainant's sexual orientation?**

[95] The Complainant contends that the RCMP's explanations are merely a pretext for the discrimination practiced against him. I have already addressed the issue as it relates to his brother. I find the RCMP's explanations reasonable and not pretextual.

[96] With respect to the Complainant's claim of discrimination based on sexual orientation, the conversation that took place between Mr. Desaulniers and Mr. McGraw is

obviously key. It is common ground between the parties that the Complainant's sexual orientation came up during their conversation. Mr. Desaulniers readily acknowledged that the topic was discussed, but he denies that the issue was raised by him in the manner set out by Mr. McGraw.

[97] Cst. St-Laurent had contacted Mr. Desaulniers by telephone in late March 2001, to ask him to conduct field investigations into all of the Caraquet police officers who were seeking entry into the RCMP, not just those of the Complainant. He met with over 100 people in the Caraquet/Tracadie-Sheila area over the course of a week, consisting mainly of the candidates' character references, neighbours, and employers. He did not manage to get around to conducting any interviews with regard to the Complainant until late on Wednesday of that week.

[98] During their initial telephone call, Cst. St-Laurent told Mr. Desaulniers that he had some concerns about the Complainant's candidacy, arising from the answers given during the security and reliability screening interview. Mr. Desaulniers recorded these concerns in his notebook, which was entered into evidence, and included the Complainant's use of drugs, as well as his possible release for cause from the Dieppe police department.

[99] Before meeting with Mr. McGraw, Mr. Desaulniers interviewed several of the Complainant's friends and work associates. They uniformly made positive comments about the Complainant, stating that he was an honest, hard-working police officer and a good person overall. One of the friends whom Mr. Desaulniers interviewed was Denis Albert, an ambulance attendant who had met the Complainant about five years earlier, when the latter was working for the Tracadie police department. According to Mr. Desaulniers's notes, Mr. Albert said that he considered the Complainant to be like an older brother. They regularly went scuba diving together, hunted small game, and went off-roading in their jeeps. Mr. Albert told Mr. Desaulniers that he believed the Complainant was a good police officer who would also do well in the RCMP.

[100] Mr. Desaulniers noticed that Mr. Albert's head was shaved bald and that he bore a tattoo on his arm. He testified that Mr. Albert left him with an "impression". In the notes that he took during the interview, Mr. Desaulniers wrote:

Bald head / tattoo

Alternative lifestyle ????

Straightforward but something ????

[101] Mr. Albert testified at the hearing that he did indeed shave his head bald at the time, and that he has a tattoo on his arm that reflects the level he has attained in the martial art of jujitsu. He also wore a pin in his ear. He felt that Mr. Desaulniers was judging him visually from top to bottom during the interview, but he acknowledged that many people used to look at him differently due to his appearance, which he described as "military". People were often reticent to speak to him as a result.

[102] Mr. Desaulniers testified that by using the term "alternative lifestyle", he meant to refer to someone who is different than others and outside societal norms - someone like Mr. Albert, who had a shaved head, wore tattoos and an ear pin. Mr. Desaulniers found Mr. Albert to be a "curious" person, but he also pointed out that his notes in this regard were personal. None of this information was passed on to Cst. St-Laurent. In Mr. Desaulniers's final report to Cst. St-Laurent, which was produced at the hearing, he simply set out the sports activities that Mr. Albert did with the Complainant, as well as

his positive recommendation. Mr. Desaulniers wrote that Mr. Albert "vouched" for the Complainant.

[103] Following the interview with Mr. Albert, Mr. Desaulniers met with Mr. McGraw. Contrary to the questionnaire that Mr. McGraw had filled out for the Complainant in which he stated that the meeting took place on March 28, 2001, Mr. Desaulniers's notebook documents the meeting as having taken place on April 6, 2001. Mr. Desaulniers testified that he followed the same methodology as in all of his interviews. He simply asked Mr. McGraw his opinion of the Complainant. Mr. McGraw said that he was an honest and good person. Mr. Desaulniers told Mr. McGraw that he had already spoken to several other character references, including the Complainant's friend, Denis Albert. Mr. Desaulniers added that Mr. Albert was not an easily forgettable person, considering his bald head, tattoos, and ear pin.

[104] At this point, according to Mr. Desaulniers, Mr. McGraw interjected, "Oh, you're talking about Denise and Daniel". Mr. Desaulniers did not understand this comment and asked what it meant. Mr. McGraw explained that certain unidentified persons, whom Mr. Desaulniers assumed were fellow Caraquet police officers, used to refer to the Complainant and Mr. Albert by that term. Mr. Desaulniers asked why. Was Denis Albert the Complainant's "chum" or boyfriend? Mr. Desaulniers recalls Mr. McGraw saying, "Oh no, he's not that kind of guy", and then going on to speak for around a minute about the Complainant's girlfriend. Mr. Desaulniers cut off Mr. McGraw and told him that he was not interested in knowing if the Complainant was gay.

[105] He then asked Mr. McGraw, as the Complainant's former supervisor, to give an opinion about the Complainant's performance on the job with the Caraquet police department. Mr. McGraw reiterated that the Complainant was a good worker who performed well. They then discussed what Mr. Desaulniers had perceived, during his own visit, as the isolated location of the Complainant's residence. Mr. McGraw stated that the Complainant lived a somewhat solitary life. This was a point that Chief Aubin had also mentioned during his interview.

[106] The questioning eventually turned to the circumstances surrounding the Complainant's departure from the Dieppe police department. Mr. McGraw knew nothing about the incident and according to Mr. Desaulniers, this question seemed to shock him more than the discussion about Mr. Albert. On another note, Mr. McGraw mentioned during the interview that the Complainant had experienced some understandable difficulty dealing with the sudden death of his father a few years earlier. That was the extent of their conversation, which lasted about 15 minutes, according to Mr. Desaulniers.

[107] Mr. Desaulniers testified that, just as he had done after all of the other interviews conducted in Caraquet, as soon as he returned to his car, he recorded a synopsis of the interview on his laptop computer. The entry with respect to Mr. McGraw was 11 lines long. There is no reference to sexual orientation. The concluding sentence is to the effect that Mr. McGraw made no derogatory remarks about the Complainant and that he vouched for him. These same notes were copied word-for-word into the report that Mr. Desaulniers later sent to Cst. St-Laurent.

[108] The Complainant's sexual orientation is not mentioned anywhere in the report, which summarizes all of Mr. Desaulniers's interviews regarding the field investigation

into the Complainant. All of the comments noted are positive, stating generally that the Complainant is both a good police officer and a good person overall.

[109] Mr. Desaulniers filed an additional document at the hearing entitled "Investigator's Comments" regarding the Complainant, which had also been typed into his computer. Mr. Desaulniers insisted in his evidence that he never sent this note to Cst. St-Laurent, nor communicated its contents to him in any other way. It was simply a note that he consigned to his file. It states that although nothing of a negative nature surfaced during the field investigation, none of the persons interviewed offered what he termed "strong support". He explained that this was his interpretation of the character references' comments, which all tended to say that the Complainant was a good and honest person, as well as a good worker. No one described the Complainant, however, in terms that Mr. Desaulniers would characterize as [TRANSLATION] "extraordinary".

[110] Mr. Desaulniers also pointed out in the note that the Complainant was a "single individual living in a somewhat isolated home/cottage in the woods". He concluded his note by stating that all of these comments were just observations being noted for "file purposes". He explained in his testimony that he had initially planned on including these observations with his report to Cst. St-Laurent, but in putting together the final version of the report, he decided that these comments were not necessary, so he did not attach them to the report. The electronic file containing the text just stayed on his computer's disk.

#### **B. Can the evidence of Mr. Desaulniers and Mr. McGraw be reconciled?**

[111] In my assessment, both Mr. McGraw and Mr. Desaulniers appeared honest and forthright in their evidence. I am mindful that Mr. McGraw is an acquaintance of the Complainant, and that, for medical reasons, he did not qualify to join the RCMP with his other Caraqueet police department colleagues. Counsel for the Respondent suggested that he may therefore be biased against the RCMP. I am equally mindful that Mr. Desaulniers is a former RCMP officer. He confirmed in his testimony that RCMP policy forbids making inquiries into an applicant's sexual orientation, and acknowledged that any future field investigation assignments that he may receive from the RCMP may be put in jeopardy if it was established that he made such an inquiry in this case.

[112] Bearing this in mind, can their evidence be reconciled? I believe it can. On the one hand, Mr. McGraw's recollection was based in large part on the questionnaire that he completed at the Complainant's request, over a month following the interview. Errors can occur with respect to one's recollection of events as time passes on. Thus, for instance, Mr. McGraw identified the date of his meeting in the questionnaire as being on March 28, 2001. I am satisfied, however, based on several documents in evidence, that the meeting occurred on April 6, 2001. On the other hand, Mr. Desaulniers recorded his recollection of the meeting on his laptop computer only minutes after the interview had ended. Those notes make no mention of any inquiry into the Complainant's sexual orientation. Of course, one would not ordinarily expect someone who has knowingly asked discriminatory questions to acknowledge such blameworthy conduct in his notes.

[113] But, in any event, I do not find a large disparity between the two men's recollections of their conversation. Both witnesses testified that the Complainant's sexual orientation was discussed. Mr. McGraw wrote in his questionnaire that Mr. Desaulniers initiated the discussion by asking whether the Complainant was homosexual, followed by an inquiry as to why people called him and his friend "Daniel and Denise". In the

sequence of events presented by Mr. McGraw, this question came quite unexpectedly and seems entirely out of context. Although Mr. Desaulniers's recollection of the sequence of events was not formally put to Mr. McGraw for his reaction, it is significant that in cross examination, Mr. McGraw admitted that his questionnaire did not constitute a *verbatim* restatement of the conversation. He acknowledged that the questions and answers may have taken place in a different order. The questionnaire was a "general" recollection of what was said during the meeting.

[114] In my view, Mr. Desaulniers's version of events makes much more sense and is consistent with the circumstances surrounding the field investigation. Mr. McGraw was the last person interviewed by Mr. Desaulniers that week. Mr. Desaulniers brought up the name of one of the persons he had just visited, Mr. Albert. Mr. McGraw then mentioned the collective nickname that had been given to the Complainant and Mr. Albert, "Daniel and Denise". Mr. Desaulniers testified that he had not heard of the term before. Indeed, none of the other character references whom he had interviewed, all of whom were called by the Complainant to testify at the hearing, stated that they had discussed this term with Mr. Desaulniers.

[115] Mr. Desaulniers acknowledges having asked in reply whether Mr. Albert was the Complainant's "chum" or boyfriend. This is a question that obviously relates to the Complainant's sexual orientation but I do not believe it to have been a calculated inquiry into this area. It is noteworthy that Mr. Desaulniers did not only interview Mr. McGraw about the Complainant, but also with respect to another male candidate from the Caraquet police department. Mr. McGraw admitted in his testimony that Mr. Desaulniers did not ask any questions regarding the other candidate's sexual orientation. I am convinced, in all of the circumstances, that Mr. McGraw's remark about the nickname "Daniel and Denise" prompted Mr. Desaulniers to ask his question in a spontaneous fashion, perhaps more out of ordinary curiosity than out of any duty on his part to inquire into the Complainant's sexual orientation for the purposes of his investigation.

[116] In the end, irrespective of the manner in which the topic came up, both witnesses concur as to Mr. Desaulniers's final comment to the effect that the Complainant's sexual orientation did not make any difference with respect to his application to join the RCMP.

[117] Most significantly, there is no evidence whatsoever to indicate or even imply that Mr. Desaulniers ever conveyed in any way information to Cst. St-Laurent about the Complainant's sexual orientation, presumed or actual. Indeed, both Mr. Desaulniers and Cst. St-Laurent testified that to this day, they have no idea what the Complainant's sexual orientation is. If anything, Mr. McGraw's reply to Mr. Desaulniers, in somewhat coarse language ("he is too macho to be a queer"), would have indicated to Mr. Desaulniers that the Complainant was not homosexual.

[118] Mr. McGraw, of course, was not the only witness to claim that he was asked about the Complainant's sexual orientation. Mr. McLaughlin testified that he was asked a question in this regard as well. Mr. Desaulniers, in his evidence, stated adamantly that he had no recollection at all of having asked any such questions to Mr. McLaughlin. He had a clear recollection of the circumstances of the interview, which was conducted in the basement of Mr. McLaughlin's home. Mr. McLaughlin's son was present during their discussions. In addition, Mr. Desaulniers took copious handwritten notes during the interview. They reflect the same information that Mr. McLaughlin said he had provided, namely that the Complainant was a good employee who did good work, and that he had

no derogatory remarks to make. The notes even accurately indicate the number of years that Mr. McLaughlin had worked as a police officer. There is no mention in them of any discussion about the Complainant's sexual orientation. As in the case of Mr. McGraw's comments, Mr. McLaughlin's positive recommendation of the Complainant's candidacy was carried over into the report that was later sent to Cst. St-Laurent.

[119] There would therefore appear to be a clear contradiction between the testimonies of Mr. Desaulniers and Mr. McLaughlin. Considering all of the circumstances, on the balance of probabilities, I do not find Mr. McLaughlin's account of the conversation persuasive. First of all, his assertion emerged for the very first time near the end of his testimony at the hearing. Parties to Tribunal hearings are required by the Tribunal's Rules of Procedure to file a Statement of Particulars in advance of the hearing setting out, amongst other things, a list of all witnesses the party intends to call, together with a summary of their anticipated testimonies, commonly called a "will-say statement".

[120] Mr. McLaughlin's will-say statement indicated only that he would be testifying that he had worked with the Complainant as a police officer, and the Complainant had the qualifications and character to be a member of the RCMP. In fact, Mr. McLaughlin's will-say statement was no different than those of at least 10 other witnesses, who all basically testified that the Complainant was an individual of good character who would make a good RCMP officer. Mr. McGraw's will-say statement, on the other hand, was quite explicit. He would be testifying that he had been questioned by Mr. Desaulniers regarding the Complainant's sexual orientation. This turned out to be an accurate representation of his testimony.

[121] The Commission's investigation report was filed in evidence at the hearing by the Complainant. Although the report elaborates extensively with regard to Mr. McGraw's assertions, there is no mention whatsoever of any similar assertions emanating from Mr. McLaughlin. In fact, the Commission investigator wrote that of the ten individuals who were interviewed by Mr. Desaulniers, and who agreed to speak to her about the case, all but Mr. McGraw stated that they were not asked about the Complainant's sexual orientation. The Commission investigator did not specify the names of all the persons to whom she had spoken, but Mr. Desaulniers's report to Cst. St-Laurent indicated that he had interviewed eight friends and work associates, as well as three neighbours. It is therefore very probable that Mr. McLaughlin was one of the ten persons she contacted.

[122] It seems that even Complainant Counsel had no knowledge of Mr. McLaughlin's allegation prior to the hearing. Complainant Counsel informed the Tribunal during final arguments that he only learned this information at the hearing. In addition, although the Complainant's human rights complaint devotes a five-line paragraph to Mr. McGraw's allegations, there is no mention at all of Mr. McLaughlin's allegations.

[123] I find it striking that this evidence, which could be considered as equally significant to the Complainant's case as Mr. McGraw's, arose for the first time at the hearing. This alone brings into question the credibility of this evidence, especially when it is juxtaposed against a credible denial by Mr. Desaulniers, which is supported by detailed contemporaneous notes and a clear recollection of the interview.

[124] In any event, as I have already stated, there is ultimately no evidence whatsoever to indicate that Mr. Desaulniers gave any indication or comment to Cst. St-Laurent about the Complainant's sexual orientation, perceived or actual, or that the matter was ever discussed between them. I have not found any evidence, even circumstantial, to suggest

otherwise. Mr. Desaulniers testified that his only verbal discussion with Cst. St-Laurent about the Complainant occurred during their initial telephone call. Afterwards, he was provided with an envelope containing photocopies of all the Caraquet applicants' questionnaires, which detailed the names of their family members, friends, and work associates who were to be contacted during the field investigation.

[125] Mr. Desaulniers testified that he spoke to Sgt. Pagé during the Caraquet field investigation, but only in regard to another candidate, not the Complainant. After completing his investigation, he simply dropped off his reports at the RCMP office in Fredericton. He had no other communication with Cst. St-Laurent regarding the Complainant until months later, when Cst. St-Laurent called to tell him that the Complainant had filed a human rights complaint. Mr. Desaulniers was even surprised to learn that the Complainant had not been hired by the RCMP. He had just assumed that the Complainant's application had been accepted.

### **C. What is the Complainant's theory for why his application was turned down?**

[126] In his final submissions, Complainant counsel presented a theory as to how and why he believes the Complainant was discriminated against in this case.

[127] The story would begin with Sgt. Pagé. His remarks in the newspaper interview revealed that he did not want homosexual RCMP members at his detachment, due to the risk that they may be subjected to blackmail by criminal elements. Sgt. Pagé made his opinion known to Cst. St-Laurent before the security and reliability check had begun. Cst. St-Laurent, as a result of Sgt. Pagé's request, then deliberately proceeded to ensure that the Complainant's security and reliability check would be so negative, Staff-Sgt. Rogers would have no choice but to reject his candidacy. Cst. St-Laurent therefore inaccurately recorded some answers on the Complainant's security and reliability screening questionnaire sheet. To the same end, Cst. St-Laurent also refused to look at the Complainant's Dieppe file that he had brought with him to the meeting.

[128] Following the meeting, in furtherance of Sgt. Pagé's request, Cst. St-Laurent deliberately did not call the Complainant back to ask him if the dates that he had provided regarding his drug use were incorrect. In addition, when briefing the field investigators assigned to look into the Complainant's Dieppe work experience, Cst. St-Laurent instructed them to seek out only negative and false information. It is argued that Cst. St-Laurent also told Mr. Desaulniers to inquire into the Complainant's sexual orientation, in furtherance always of the same objective - to keep the Complainant out of the RCMP.

[129] The allegedly false and misrepresented information gathered by the investigators enabled Cst. St-Laurent to fulfill Sgt. Pagé's request, and exclude the Complainant from entry into the RCMP.

[130] Upon consideration of the above, I have concluded that the facts do not support the Complainant's theory. There is no evidence whatsoever of Sgt. Pagé's ever speaking to Cst. St-Laurent about the Complainant. Nor, for that matter, is it apparent from the newspaper article that Sgt. Pagé objects to the admission of homosexuals into the RCMP. Sgt. Pagé was not called to testify by either party.

[131] There are some obvious logical gaps in the theory. For instance, if Sgt. Pagé already thought the Complainant to be homosexual, and wanted him to be excluded from the RCMP, why would Mr. Desaulniers be instructed to ask Mr. McGraw about his sexual orientation? And if such a question was necessary, why was the question asked of

Mr. McGraw (and allegedly Mr. McLaughlin), and not of any of the other character references interviewed (at least nine other persons)?

[132] I have already pointed out that the Complainant's assertion that Cst. St-Laurent deliberately omitted anything from the questionnaire is groundless and that it defies logic for the Complainant to lay blame for the recording of erroneous dates of his drug use on anyone but himself. Any discrepancies were not so much between Cst. St-Laurent's notes and the Complainant's alleged answers, as they were between the answers and the field investigations. I am satisfied that all of the field investigators conducted themselves in good faith. They simply reported back what they heard and their testimonies, for that matter, were all credible. They were at times buttressed by independent documentary evidence, and they often contained positive accounts. In fact, with regard to Mr. Desaulniers, the person who is alleged to have inquired into the Complainant's sexual orientation, his report back to Cst. St-Laurent was the most positive of all the field investigation reports.

[133] It is not necessary to address the Complainant's theory any further. It is not supported by the evidence, and it is therefore rejected.

[134] For all the above reasons, I find the Respondent's explanations reasonable and not a pretext for discrimination. The s. 7 portion of the complaint is therefore dismissed.

## **VI. THE RCMP'S ANSWER TO THE SECTION 10 COMPLAINT: THE ALLEGED POLICY OR PRACTICE DOES NOT EXIST**

[135] With regard to s. 10, the Complainant alleged in his complaint form that the RCMP pursued a policy or practice on a prohibited ground (his sexual orientation) that deprived or tended to deprive him of an employment opportunity. The evidence establishing a *prima facie* case with respect to this portion of the complaint consisted principally of Sgt. Pagé's remarks to the journalist and Mr. McGraw's account of what Mr. Desaulniers asked during the interview on April 6, 2001.

[136] I have already determined earlier in this decision that the exchange that took place during the interview did not exactly follow the course presented by Mr. McGraw in his evidence. I have concluded that Mr. Desaulniers's questioning was more happenstance than a planned and orchestrated inquiry, and that it was Mr. McGraw's bringing up the nickname that initiated the discussion about sexual orientation. In addition, on the evidence, no information relating to the Complainant's sexual orientation was ever transmitted by Mr. Desaulniers to Cst. St-Laurent or anyone else at the RCMP. I therefore do not find that this evidence supports the Complainant's claim that there existed a practice or policy to inquire into his sexual orientation, which deprived or tended to deprive the Complainant of any employment opportunities on a prohibited ground.

[137] The Tribunal heard evidence from Normand Goulet, an Inspector with the RCMP who is in charge of the RCMP's human resources office in Fredericton. He stated that the RCMP has no interest in knowing a candidate's sexual orientation. Field investigators are specifically instructed, in the training that they receive at the RCMP Academy in Regina, that they are not to ask questions regarding applicants' sexual orientation.

[138] The Complainant argues that if no policy exists, why did Sgt. Pagé defend this so-called non-existent policy to the journalist? In addressing this submission, it is important to take specific note of what Sgt. Pagé is reported to have said. He reiterated that an applicant's sexual orientation is not a factor in the determination of whether to admit the

person or not. However, if an RCMP member wanted to keep his sexual orientation secret, it could expose the person to blackmail or extortion. The officer's security, as well as the greater interests of the RCMP, may in that case be placed in jeopardy. Implicit in Sgt. Page's statement is the importance that the RCMP attaches to an applicant's being, as Staff-Sgt. Rogers said, "brutally honest" during the security and reliability screening interview.

[139] Therefore, if indeed a policy or practice exists, it consists of asking prospective RCMP members if they have engaged in any activities that they have hidden from public knowledge, which could render them susceptible to blackmail or extortion. In fact, there is a question to this effect in the security and reliability interview form that was used by Cst. St-Laurent during his initial interview of the Complainant.

[140] The Complainant did not advance any argument at any stage of his case, as to whether the RCMP's interest in generally ascertaining concealed information can adversely affect an applicant or class of applicants, based on their sexual orientation or another prohibited ground. The Complainant simply never made this an issue in the case.

[141] Indeed, the Complainant barely made any argument whatsoever with regard to the s. 10 portion of the complaint. It was only after direct questioning from the Tribunal that Complainant counsel articulated the s. 10 allegation to some extent. He defined the scope of the alleged discriminatory practice as being the establishment by the RCMP of a policy and practice to ask about the sexual orientation of an applicant, and specifically the Complainant (pages 1841-1842 of the Official Transcript). Complainant counsel expressly excluded from the definition any reference to a class of applicants, and he did not refer to any policy or practice requiring applicants to generally disclose to the RCMP activities that they have hidden from public view.

[142] In these circumstances, it would be inappropriate for the Tribunal to analyze whether this more general disclosure policy adversely affected an individual or a class of individuals on the basis of a prohibited ground. To do so would lead the Tribunal into an uncanvassed area that quite simply was never at issue between the parties to this case. This would be unfair to the parties and could give rise to a breach of natural justice. The Tribunal cannot deal with matters that were never placed before it, and that were not debated by the parties (see *Bergeron v. Télébec Ltée.*, 2005 FC 879 at para. 63; *Beauregard v. Canada Post*, 2005 FC 1384 at paras. 26-27).

[143] As I have already stated, I am persuaded by the Respondent's explanation that the short discussion at issue between Mr. McGraw and Mr. Desaulniers does not reveal the pursuit of a practice or a policy on the latter's part of inquiring into the Complainant's sexual orientation. The manner in which this question came up does not support the contention that it was posed in pursuit of a policy or practice, nor is there any evidence, for that matter, that the questioning deprived or tended to deprive the Complainant of an employment opportunity. As Sgt. Page's comments can at best only serve to imply the existence of a separate and significantly different policy, the legality of which has not been placed before me, there is no other evidence in this case to support the Complainant's contention.

[144] The s. 10 portion of the complaint is therefore dismissed.

## **VII. CONCLUSION - COMPLAINT DISMISSED**

[145] The Complainant testified that he is still working as a police officer for a small municipal force in New Brunswick. It is possible that the RCMP's assessment of the

Complainant was flawed or incomplete, and that had his candidacy been accepted, he would have performed his functions and duties as an RCMP member competently.

[146] Be that as it may, it is not the role of the Tribunal to adjudicate on the merits of an employer's recruitment decision, but rather to determine whether discrimination on the basis of a prohibited ground under the *Act* was a factor in that decision. I have concluded that the Complainant's sexual orientation and his family status were not factors in the decision to reject his candidacy. In addition, no policy or practice was either established or pursued that deprived or tended to deprive him of an employment opportunity. His complaint is therefore dismissed.

*"Signed by"*

Athanasios D. Hadjis

OTTAWA, Ontario

December 21, 2005

#### PARTIES OF RECORD

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