

CANADIAN HUMAN RIGHTS TRIBUNAL

Between:

Ryan Letnes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

**STATEMENT OF PARTICULARS of the
CANADIAN HUMAN RIGHTS COMMISSION**

I. OVERVIEW

1. The complainant, Corporal Ryan Letnes (“Cpl. Letnes”), is a serving regular member of the respondent, the Royal Canadian Mounted Police (the “RCMP”). Because of various medical conditions, he no longer meets the uncorrected visual acuity standards that the RCMP requires for supervisory positions that it says include operational components. As a result, Cpl. Letnes says he has been (i) reassigned at times to administrative duties that are demeaning and unfulfilling, (ii) deprived of opportunities for training and experience that would help him to compete successfully for promotions, and (iii) screened out of competitions for supervisory positions where he had otherwise been selected as the best candidate. Cpl. Letnes further alleges that he has been subjected to negative remarks showing hostility towards him and other members with disabilities, and that all this is symptomatic of a broader workplace culture that marginalizes members with disabilities, and/or pushes them prematurely towards administrative discharge.

2. As detailed in his Statement of Particulars dated March 11, 2018, Cpl. Letnes thus alleges that the RCMP has (i) treated him in an adverse differential manner for reasons relating to his disabilities, contrary to s. 7 of the *CHRA*, (ii) established or pursued policies or practices that tend to deprive him and other members with disabilities of workplace opportunities, contrary to

s. 10 of the *CHRA*, and (iii) failed to meet its burden of proving that the impugned conduct, policies and practices are based on *bona fide* occupational requirements (“BFORs”), within the meaning of s. 15 of the *CHRA*.

3. For clarity, it does not appear that Cpl. Letnes challenges the uncorrected visual acuity standards that the RCMP applies to general duty constables.¹ Instead, at the heart of his complaint is an allegation that the RCMP discriminates by applying the same or comparable standards to a wider range of supervisory positions that are not genuinely operational in nature, with the result that candidates who could safely perform in those positions, with accommodation short of undue hardship, are unnecessarily excluded.

4. The Canadian Human Rights Commission (the “Commission”) is fully participating in this matter, primarily in respect of this question regarding the correspondence between operational medical duty profiles and supervisory positions. The statement of background in these Particulars is based on documents and information received during the Commission’s investigation of this complaint, publicly-available information, and allegations made by Cpl. Letnes in his Statement of Particulars dated March 11, 2018. The Commission anticipates that Cpl. Letnes and the RCMP will likely provide additional information, along with additional documentary disclosure.

II. BACKGROUND

A. Preliminary Comment

5. Cpl. Letnes has provided a very detailed recitation of facts in his Statement of Particulars. As a party to the Tribunal inquiry, it is open to Cpl. Letnes to put these matters to the Tribunal for consideration. The Commission looks forward to working with Cpl. Letnes and the RCMP to find the most efficient ways of introducing the evidence that will be required for the Tribunal to make all necessary findings with respect to Cpl. Letnes’ human rights complaint.

¹ See, for example, the Statement of Particulars of Cpl. Letnes dated March 11, 2018 (“Cpl. Letnes Particulars”), at para. 118(e), which asks for an order that the RCMP discontinue its use of the medical profile form, except for General Duty Constables or any other frontline operational position at the rank of Constable.

6. For the purposes of these Particulars, the Commission does not propose to repeat all the factual allegations that Cpl. Letnes has already put before the Tribunal. Instead, the Commission simply highlights, below, the background information it considers most relevant to the question that is central to its participation in this case.

B. The Royal Canadian Mounted Police

7. The RCMP is organized under the *Royal Canadian Mounted Police Act*.² It is headed by a Commissioner who, under the direction of the Minister of Public Safety Canada, has the control and management of the Force. The RCMP enforces laws made by or under the authority of the Parliament of Canada, and also provides police services under policing agreements in various places.

8. The Force is divided into 15 Divisions, plus Headquarters, Ottawa. The divisions roughly approximately provincial boundaries, and are generally designated by alphabetical letters. At the times material to this proceeding, Cpl. Letnes has worked either in E Division (Alberta), or K Division (British Columbia).

9. According to the RCMP's website, the RCMP had 29,571 members and employees as of January 1, 2018.³ The regular members are organized by the rank hierarchy outlined in the table below, which also shows the number of regular members at each rank, and the number or percentage within that rank who self-identified as having a disability, all as of January 1, 2018:

	<u># of Rank Holders</u>	<u># with Disability</u>
• Commissioner	1	0
• Deputy Commissioners	5	0
• Assistant Commissioners	31	0
• Chief Superintendents	59	0
• Superintendents	189	less than 10
• Inspectors	333	less than 10
• Corps Sergeant Major	1	unknown
• Sergeants Major	7	unknown
• Staff Sergeants Major	14	unknown
• Staff Sergeants	835	16 (1.9%)
• Sergeants	1,956	55 (2.8%)

² *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10.

³ RCMP website, "Operational Structure", <<http://www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm>>.

• Corporals	3,543	75 (2.1%)
• Constables	11,691	171 (1.5%)
• Special Constables	114	less than 10 (4.4%)
• ALL RANKS	18,779	328 (1.7%) ⁴

C. RCMP – Medical Profile System

10. The RCMP uses a system of medical profiles to help manage issues relating to fitness to work, and the accommodation of disability-related needs. The system is described in the RCMP Administrative Manual, Part II, Chapter 19 (AM-II-19), which generally states that members will be assigned numeric scores in five categories: Vision (V); Colour Vision (CV); Hearing (H); Geographic Location (G); and Occupation (O). Each category is given a numerical score, with 1 being most favourable, and higher numbers being less and less favourable. RCMP Health Services Officers assign the scores to RCMP members in each of these categories.

11. The Vision score assigned as part of the medical profile includes a consideration of both: (i) corrected visual acuity (that is, the visual acuity that can be obtained if the member uses corrective visual aids, such as eyeglasses or contact lenses); and (ii) uncorrected visual acuity (that is, the visual acuity that exists without the use of corrective visual aids). If corrected or uncorrected visual acuity scores fall below certain standards during a member's career, the result can be a lowering of a member's occupation restrictions level (for example, a candidate could be lowered from O3 to O4).

12. RCMP policies also attach minimum medical duty profiles to designated positions. For example, the medical duty profile for a recruit to a front-line operational position (i.e., a general duty constable) is V2, CV2, H2, G2 and O2. The same or similar medical duty profile is also applied to other kinds of positions that are said to blend supervisory and operational tasks. Other, less exacting medical duty profiles may be attached to other kinds of supervisory, managerial or administrative positions within the RCMP.

⁴ The numbers of regular members per rank are taken from the RCMP's website: <<http://www.rcmp-grc.gc.ca/about-ausujet/organi-eng.htm>>. The numbers of regular members per rank self-identifying as having a disability are taken from an e-mail dated February 15, 2018, that Cpl. Letnes received from the RCMP's Employment Equity Section. According to the 2012 Canadian Survey on Disability, 10.1% of Canadians aged 15-64 reported have a disability: <<http://www.statcan.gc.ca/pub/89-654-x/2015001/tbl/tbl02-eng.htm>>.

13. Where illness or injury causes an existing RCMP member's medical profile to be downgraded to a point where the member no longer meets the medical duty profile associated with their position, the RCMP may impose duty limitations or restrictions. In the alternative, if the RCMP concludes that the member is permanently impeded from performing their duties, and cannot be accommodated without undue hardship, the member may be subjected to an administrative discharge.

14. RCMP policy says that for staffing purposes, medical duty profiles are to be used as guidelines only, and not as screening requirements (AM-II-19.F.2.b.1). If a member is found suitable for a position in all other respects, but does not meet the medical duty profile, the matter is to be referred to the division health committee for consideration (AM-II-19.2.F.2.2). The implication is that, following an individualized assessment that includes appropriate inputs from health professionals, the RCMP might allow a member to take up a position, despite having a medical profile that does not meet the medical duty profile for that position.

15. As described in his Statement of Particulars, Cpl. Letnes alleges that the reality is that the RCMP does not actually treat medical duty profiles as flexible guidelines when considering accommodation needs or staffing matters. Instead, he says the RCMP's practice is to treat medical duty profiles as rigid and inflexible requirements, with the result that members with disabilities tend to be deprived of employment opportunities, without a full and proper consideration of their individual circumstances, or possible accommodation measures.

D. Corporal Ryan Letnes

16. Cpl. Letnes became a regular member of the RCMP in 2000, and has been continuously employed by the RCMP since that time. At the time he joined the RCMP as a general duty constable, he met the corrected and uncorrected visual acuity standards required for that frontline operational position.

17. Cpl. Letnes has medical conditions that have caused his eyesight to worsen over time. He started wearing contact lenses in or around 2005, as a means of allowing him to continue to meet the corrected visual acuity standard required for the general duty constable position he then

occupied. Cpl. Letnes alleges that he wore contact lenses while safely performing operational duties from this time until 2014, without any difficulties relating to the dislodgement or loss of a contact lens, or particulate matter becoming lodged under a contact lens.

18. In or around the Fall of 2008, Cpl. Letnes commenced duties at the RCMP Detachment in Airdrie, Alberta (K Division), at the rank of Corporal, serving the role of Watch Commander for C Watch. In that position, Cpl. Letnes commanded operational and administrative affairs for both the municipal and rural components of C Watch.

E. February 2014: Cpl. Letnes' Medical Profile is Downgraded

19. In February 2014, the K Division Health Services Officer decided that the visual acuity score on Cpl. Letnes' medical profile was to be downgraded to V4, due to poor uncorrected vision. This meant that his occupational restrictions score would also be downgraded, to O4. As a result, Cpl. Letnes no longer met the minimum medical duty profiles for general duty constable positions, or supervisory positions the RCMP has chosen to label as including operational components. Instead, he would only be eligible for purely administrative duties.

20. At present, Cpl. Letnes says in his Statement of Particulars that he has a disability within the meaning of the *CHRA*, in that he has 20/320 uncorrected visual acuity, and suffers from: (i) irregular astigmatism; (ii) neurotrophic cornea; (iii) tear duct deficiency; and (iv) forme frust keratoconus. He has further said that his medical conditions prevent him from wearing eyeglasses to correct his vision, and that he must therefore wear contact lenses. Also as a result of his medical conditions, Cpl. Letnes says he is to minimize his usage of contacts per day (ideally no more than 10-11 hours maximum), use eye drops throughout the day while wearing his contacts, and avoid dry climates if possible.

21. Cpl. Letnes' position as C Watch Commander was associated with an operational medical duty profile. As a result, the RCMP removed Cpl. Letnes from his position after the change in his medical profile in February 2014. Cpl. Letnes surrendered his intervention options, including his firearm, and was temporarily placed in what he calls an undefined administrative role in the Airdrie Detachment. By April of 2014, he was assigned the task of

administering and investigating internal complaints, a role that nevertheless provided him with a substantial mandate that included significant engagement with the public.

F. 2015: Transfer to Surrey, B.C.

22. At some point, it appears that Cpl. Letnes requested a transfer from Airdrie Detachment (K Division) to a detachment in a more humid climate, as a form of accommodation relating to his eye conditions. In or around August of 2015, Cpl. Letnes was transferred to the RCMP detachment in Surrey, B.C. (E Division), where he assumed a corporal position in the Professional Standards Unit (the “Surrey PSU”).

23. From the time of his transfer until roughly late November of 2015, Cpl. Letnes says he safely performed unrestricted operational duties within the Surrey PSU, despite his poor uncorrected vision. He says that he carried a firearm, interviewed numerous RCMP members, and interviewed clients on and off site. However, in late November of 2015, he was told that RCMP health services had again confirmed his visual acuity score to be V4, and that he therefore could not perform operational policing duties except in case of an emergency. As a result, his firearm was again taken away, and he was told that he would be given a restrictive set of administrative duties, to be performed entirely within the Surrey detachment headquarters, without any independent interaction with members of the public.

24. Not long after this, Cpl. Letnes was told that he was being transferred from the Surrey PSU to the Surrey Detachment Services Unit (“Surrey DSU”), where he eventually remained until July of 2017. Cpl. Letnes alleges that the Surrey DSU is effectively a dumping ground, where members with medical restrictions are warehoused and assigned unrewarding clerical and administrative tasks that are outside their job descriptions as police officers. He is critical of the time he spent in the Surrey DSU, alleging that:

- he was assigned there in the hopes that it would cause him to choose to resign, or seek an administrative discharge for medical reasons;

- he was not given a sufficient amount of meaningful work, yet at the same time was reprimanded for not appearing sufficiently busy;
- the RCMP effectively ignored a formal request for accommodation that he submitted in March of 2016, in which he asked the RCMP to work with him to find substantive duties more suited to his skills and experience;
- the RCMP rejected out of hand a request to telework as a means of accommodating disability-related restrictions, which would have eliminated a lengthy commute time that could otherwise have been used to take a break from wearing his contact lenses;
- following a short medical leave in September of 2016 that was triggered by stress relating to his work environment, the RCMP unfairly questioned the validity of a note from his family physician recommending a gradual return to work, and threatened to send him against his will for an independent medical examination, in circumstances where that extraordinary step was not warranted; and
- various senior managers either encouraged him to pursue medical retirement, or made negative comments demonstrating antipathy towards the accommodation of members with medical restrictions generally, and/or Cpl. Letnes in particular.⁵

G. Applications for Promotions in 2015/16

25. It appears that in 2015 and 2016, Cpl. Letnes applied to at least nine promotional staffing actions. In seven of these processes, he was not selected. However, Cpl. Letnes says that he was chosen as the preferred candidate in two of the processes, for positions to be located in Alberta: High Prairie Detachment, District Policing Supervisor/Investigator/Analyst, Sergeant (442-37-E-705-15-16); and Meadow Lake Detachment, District Policing Supervisor/Investigator/Analyst, Sergeant (442-37-F-145-16-17) (together, the “Denied Promotions”). However, he was later refused both positions because his medical profile (including the V4 and O4 designations) fell below the operational medical duty profiles assigned to the supervisory positions. Cpl. Letnes

⁵ See, for example, the alleged comments described in paras. 72(a), 75, 76, 85 and 92 of the Cpl. Letnes Particulars.

says that the duties actually performed in those positions do not warrant an operational medical duty profile, and that he would have been able to perform the required duties wearing contact lenses, without causing additional safety risks amounting to undue hardship.

26. Notably, Cpl. Letnes indicates that Staff Sergeant Marc Maillet (RCMP, Human Rights Policy Centre) wrote an e-mail in July of 2016, suggesting that Cpl. Letnes had either been dishonest, or demonstrated a lack of knowledge, by applying for positions that were not consistent with his medical profile. It is difficult to reconcile any such critical remarks with the wording of AM-II-19, which states on its face that medical profiles are not to be used as screening requirements, and leaves open the possibility that an individualized assessment might allow a selected candidate to take up a position, despite medical restrictions.

27. In addition to his concerns about inflated medical duty profiles, Cpl. Letnes has also raised other concerns relating to the RCMP's promotional process generally. In this regard, he alleges that existing policies and procedures adversely impact members with disabilities in several ways:

- They require candidates to declare up front whether their Operational Skills Maintenance (OSM) is up to date, and if not, to declare whether this was due to disability. This is said to be problematic because (i) members with non-operational medical profiles are not offered the training required to keep up their OSM, and (ii) such members therefore have to identify themselves in early stages as persons with disabilities, providing information that decision-makers may then use to screen them out of staffing actions.
- They direct decision-makers to place significant weight on the recency of experience in relevant roles. This can put members with disabilities at a disadvantage, for example if they have been away from their substantive roles for periods of time relating to medical leaves of absence, or the performance of alternate modified duties.
- They direct supervisors to review and comment on the candidate's performance of only their current duties, and not past performance in other roles. Again, this can put members with disabilities at a disadvantage, if their current role involves the performance of

modified duties that are not meaningful or fulfilling, or commensurate with their rank and/or skills.

H. 2017 to the Present: Return to Surrey PSU

28. In or around July of 2017, Cpl. Letnes was returned to the Surrey PSU. However, he says his role was limited, as he (i) was only to work on public complaints, (ii) was limited to working in the Surrey office, and (iii) was not allowed to interview any person, even in the Surrey office, unless accompanied by another Surrey PSU member with an operational medical profile. Cpl. Letnes alleges that he was not able to perform effectively under these conditions, and that this contributed to a second medical stress leave in or around August of 2017, and a subsequent graduated return to work.

29. Cpl. Letnes says that when he did return to work in September of 2017 after his short medical leave, he discovered that the RCMP had disabled his security access card, and was told that he was no longer welcome in the PSU office, and would now have to work out of a segregated workspace in the RCMP's Ridge Meadows Detachment (also E Division). He was also informed that as a result of unofficial RCMP policy, he would not be able to permanently transfer elsewhere unless he was consistently working a minimum of 32 hours per week.

30. According to Cpl. Letnes, RCMP senior managers continued to make negative and hostile remarks towards him after his return, for example by (i) stating that he was holding the office hostage and misusing taxpayer money by refusing to work full-time hours, (ii) indicating that he should seek employment outside the RCMP, and/or (iii) trying to force him back to full-time hours, without making corresponding commitments to provide him with sufficient meaningful work to fill those hours.⁶

31. To the Commission's knowledge, as at the date of these Particulars, Cpl. Letnes continues to be employed by the RCMP in the rank of Corporal, working out of the Ridge Meadows Department, with restrictions on the manner in which he is to perform his duties. It is not clear to the Commission whether he is currently working full-time hours. The Commission

⁶ See, for example, Cpl. Letnes Particulars at para. 98.

looks forward to receiving further disclosure and information from the parties about Cpl. Letnes' current workplace status and duties.

I. Other Proceedings involving Cpl. Letnes and the RCMP

32. There appear to be a number of proceedings underway in other forums relating to various aspects of the relationship between Cpl. Letnes and the RCMP. For example, it appears there are: (i) internal grievances filed by Cpl. Letnes within the RCMP, at various levels of decision-making; (ii) internal harassment complaints filed by Cpl. Letnes within the RCMP, at various stages; (iii) RCMP Code of Conduct investigations initiated by the RCMP regarding Cpl. Letnes, at various stages; and (iv) a civil action that Cpl. Letnes filed in the B.C. Supreme Court, alleging various forms of bullying, harassment and retaliation in response to his efforts to expose and rectify perceived improper conduct by fellow RCMP members.

33. To date, the parties have not provided the Commission with a full set of information or documents relating to these other ongoing proceedings. If any party believes they have significance for this proceeding, the Commission will look forward to receiving full disclosure of the arguably relevant documents in due course.

III. ISSUES AND ANALYSIS

A. General Principles Regarding the *CHRA*

34. A complainant alleging that an employer has infringed s. 7 of the *CHRA* by discriminating on the basis of disability bears the burden of showing a *prima facie* case of discrimination. One way that a complainant can do this is by showing, on a balance of probabilities, that:

- a) the complainant has one or more characteristics protected from discrimination by the *CHRA*;
- b) the respondent has treated him in an adverse manner; and
- c) the protected characteristic was a factor in the adverse treatment.

35. A complainant alleging an infringement of s. 10 of the *CHRA* also bears the burden of showing a *prima facie* case of discrimination. One method of proving a *prima facie* case is for a complainant to show, on a balance of probabilities, that an employer has established or pursued a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities, on a prohibited ground of discrimination.

36. The threshold for establishing a *prima facie* case of discrimination is low. A *prima facie* case is one that covers the allegations made and which, if believed, is complete and sufficient to justify a decision in the complainant's favour, in the absence of an answer from the respondent. It is not necessary that discriminatory considerations be the sole reason for the decision or conduct at issue in order for a complaint to succeed. It is sufficient if a protected characteristic was a factor, even if other factors were also at play. Complainants are not required to prove that respondents intended to discriminate in order to establish a *prima facie* case.

37. If a complainant shows a *prima facie* infringement of the *CHRA*, the onus then shifts to the respondent to prove, on a balance of probabilities, that there is a wholly non-discriminatory explanation for its conduct. In the alternative, a respondent may seek to prove that an exclusionary standard was based on a *bona fide* occupational requirement (BFOR), within the meaning of ss. 15(1)(a) and 15(2) of the *CHRA*. This will generally require the respondent to provide concrete evidence that (i) its standard is rationally connected to a legitimate workplace purpose, (ii) it honestly and in good faith believed its standard was necessary to accomplish the purpose, and (iii) the standard was reasonably necessary, in the sense that taking a less exclusionary approach would have caused undue hardship, considering health, safety or cost. In assessing the third element, it must be remembered that some hardship is acceptable. It is only "undue" hardship that will satisfy the test.

38. Where a respondent argues that relaxing a workplace standard would cause undue hardship in the form of undue risk to health and safety, the Tribunal will generally be required to consider and balance a number of considerations, including:

- a) the probability that the alleged risk will actually manifest;
- b) the severity of the consequences, if the alleged risk were to manifest;

- c) the identity of those who would bear the alleged risk;
- d) the levels and kinds of risks that are already tolerated in the workplace environment; and
- e) whether all available means or measures for reducing the likelihood or severity of the alleged risk have been considered and reasonably rejected.

39. It is open to Parliament to enact legislation that modifies or clarifies the application of the BFOR test in specific workplaces. For example, in the context of complaints against the Canadian Armed Forces, s. 15(9) of the *CHRA* indicates that the BFOR analysis is subject to the principle of “universality of service,” under which “... members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.” Parliament could have amended the *CHRA* to say something similar about members of the RCMP, but has chosen not to do so.

B. The Commission’s Position

(i) Prima Facie Infringements of Sections 7 and 10 of the CHRA

40. Cpl. Letnes has raised a number of allegations in his Statement of Particulars. In its role as a representative of the public interest in this inquiry, the Commission focuses its participation on what it believes is the key question at the heart of the matter – namely, whether the RCMP could allow members who require the use of contact lenses to fill supervisory positions that are currently said to include operational components, without causing undue hardship in the form of unacceptable increased risks to health and safety.

41. The initial step in examining that question is to determine whether there exists a *prima facie* case of discrimination on the basis of disability. In this regard, the Commission asserts the following:

- a) the RCMP pursues policies and/or practices that effectively require members to meet minimum visual acuity standards before taking up or occupying supervisory positions that are deemed to be operational in nature;

- b) these policies and/or practices have a negative adverse impact on members who have disabilities that make them unable to meet those minimum visual acuity standards;
- c) Cpl. Letnes has disabilities that make him unable to meet those minimum visual acuity standards;
- d) Cpl. Letnes suffered negative impacts after his visual acuity score and medical profile were first downgraded in 2014, including when he was removed from his position as Watch C Commander in the Airdrie Detachment, subjected to significant workplace restrictions in his position with PSU Surrey, transferred to an undefined role in DSU Surrey, and refused the Denied Promotions; and
- e) all this is sufficient to establish *prima facie* infringements of both ss. 7 and 10 of the *CHRA*.

42. In addition, the Commission is troubled by Cpl. Letnes' allegation that the current RCMP promotions process requires members with disabilities to identify themselves as such at early stages, if their Operational Skills Maintenance (OSM) has lapsed for reasons relating to disability. It is difficult to see why this information could not instead be obtained after a conditional selection decision has already been made, to eliminate any potential for misuse of the information. If the Tribunal accepts that the current process operates as Cpl. Letnes describes, it may make a *prima facie* finding that this tends to deprive members with disabilities of equal access to employment opportunities, contrary to s. 10 of the *CHRA*. It could also find a *prima facie* infringement of s. 7, if it concludes that this was a factor in any decisions to deny Cpl. Letnes' applications for various promotions.

43. The Commission is also concerned by Cpl. Letnes' allegations that RCMP supervisors and managers have made remarks suggesting that he and/or other members with disabilities are a burden or drain on the Force. If the Tribunal finds that such remarks were made, they could be indicative that (i) the workplace has been poisoned for Cpl. Letnes and/or other members with disabilities, contrary to s. 7 of the *CHRA*, and/or (ii) the RCMP is unlikely to have properly

conducted the detailed individualized assessments that are required by the modern BFOR tests (described further below).

(ii) *Bona Fide Occupational Requirements*

44. The Commission anticipates the RCMP will argue that existing visual acuity standards properly reflect BFORs for the supervisory positions it has deemed operational in nature. As explained above, the RCMP will bear the burden of proving, based on concrete and specific evidence, that its approach to these visual acuity standards can be justified as a BFOR. Among other things, this would typically require the RCMP to prove that applying its standards to the supervisory positions in question is reasonably necessary to prevent undue risks to health and safety. Whether any increased risks to safety are “undue” will be fact-specific, and may vary from one supervisory position to the next, depending on a consideration of all the circumstances (including such factors as the precise nature of the duties, the size and location of the detachment in question, and so on).

45. The Commission encourages the RCMP to provide a thorough explanation of its position in this regard in its Statement of Particulars, and to disclose all the documents in its power, possession or control that are arguably relevant to its creation, application and ongoing review of these visual acuity standards. Pending its review of these materials, the Commission proceeds to make a number of observations below, regarding the importance of having the Tribunal conduct a thorough review of the RCMP’s approach to these matters.

46. The Commission starts by acknowledging the following:

- a) In 1988, the Tribunal released its decision in *Tuskovich v. RCMP*, 1989 CanLII 148 (CHRT). At issue was whether the RCMP had discriminated on the basis of disability by denying two complainants the opportunity to apply for the position of Special Constable (Static Guard), due to their failure to meet visual acuity standards. The Tribunal held that the visual acuity standards were BFORs for the Static Guard positions at issue – which were said to consist of postings at high risk locations (e.g. embassies, airports), with the

primary duties of acting as the RCMP's "eyes and ears," and first armed line of defence, in the event of a terrorist or other attack.

- b) In 1996, the Canadian Ophthalmological Society (COS) released two technical reports (the "COS 1996 Reports") that had been jointly commissioned by the RCMP and the Commission, concluding that (i) the RCMP's visual acuity standards were reasonable and fair in ensuring the safe performance of the duties of a General Duty Constable⁷, and (ii) allowing the use of contact lenses would not be a reasonable form of accommodation for General Duty Constables who do not meet the RCMP's uncorrected visual acuity standards.⁸

47. Notwithstanding *Tuskovich* and the COS 1996 Reports, there are a number of reasons to believe that a fresh look, using the current human rights law framework, might lead to different conclusions regarding the uncorrected visual standards applied to some or all of the supervisory positions that the RCMP deems operational. For example:

- a) *Tuskovich* and the COS 1996 Reports focused on whether uncorrected visual acuity standards were BFORs for front-line operational police officers – Static Guards and General Duty Constables, respectively. This case does not question the use of visual acuity standards for such positions. Instead, the current case will focus on their use with respect to supervisory positions – something that was not addressed in *Tuskovich* or the COS Reports.
- b) *Tuskovich* and the COS 1996 Reports all predate the Supreme Court of Canada's game-changing 1999 decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ("Meiorin")⁹, which created the modern legal framework

⁷ Easterbrook et al., "Vision Standards in the RCMP: Are they Reasonable and Fair?" (Technical Report: December 1996), available at <http://publications.gc.ca/collections/collection_2008/ps-sp/PS63-2-1998-1E.pdf>.

⁸ Wells et al., "To Wear or Not to Wear: A Survey on Current Contact lens Use in the Royal Canadian Mounted Police" (Technical Report: December 1996), available at <http://publications.gc.ca/collections/collection_2008/ps-sp/PS63-2-1998-2E.pdf>.

⁹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.

(outlined above) for analyzing workplace standards that are alleged to be based on BFORs.

- c) A number of human rights law decisions since 1999 have found, applying the *Meiorin* framework, that (i) strict adherence to visual or hearing acuity standards by policing or firefighting services was not reasonably necessary in order to prevent undue health and safety risks to officers and/or the public¹⁰, and (ii) it was not reasonably necessary for a police service to insist that an officer be medically cleared to perform all the possible duties of an officer, at all times.¹¹
- d) In various grievance proceedings, the RCMP's External Review Committee has found that the Force (i) ought to apologize to a member for having failed to establish that a professional standards position had properly been assigned an "operational" medical duty profile¹², (ii) imposed restrictions and discharge proceedings against an operational officer who did not meet visual acuity standards, without first having conducted the individualized analysis required under *Meiorin*¹³, and (iii) failed to establish that visual acuity standards were BFORs for a commercial crime position, and therefore ought to review the standard, and the procedures by which such standards are established, to ensure conformity with human rights law principles.¹⁴
- e) In 2017, the United Kingdom College of Policing decided to drop all uncorrected visual acuity standards for new recruits, stating in its revised "Eyesight Standards: Police

¹⁰ For some examples, see: *Zaromitidis v. Toronto Police Services Board*, 2014 HRTO 1296; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30; *Lauzon v. Ontario (Minister of Community Safety and Correctional Services)*, 2011 HRTO 1404; *Jeppesen v. Ancaster (Town)*, [2001] OHRBID No. 1

¹¹ See, for example: *Re Halifax (Regional Municipality) and Municipal Assn. of Police Personnel* (2002), 105 LAC (4th) 232.

¹² ERC Recommendations dated April 14, 2016 (G-614). The RCMP Commissioner did not order that the recommended apology be provided.

¹³ ERC Recommendation dated September 30, 2003 (G-284 and G-285). The RCMP Commissioner rejected the External Review Committee's recommendations and dismissed both grievances without addressing their merits.

¹⁴ ERC Recommendations dated January 25, 2008 (G-427). The RCMP Commissioner rendered a decision in 2010, agreeing with the recommendations. The Commission anticipates that the RCMP's disclosure in this case will include all documents relating to the reviews conducted as a result of this decision.

Recruitment” that, “Corrective Spectacles and contact lenses are acceptable for the tasks of an operational police constable.”

(iii) The Canadian Charter of Rights and Freedoms

48. In his Statement of Particulars, Cpl. Letnes alleges that the RCMP has infringed not only ss. 7 and 10 of the *CHRA*, but also s. 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).¹⁵

49. Section 50(2) of the *CHRA* gives the Tribunal a broad power to decide all questions of law or fact necessary to determining a matter under inquiry. The Tribunal thus has the power to consider the *Charter*, but only if doing so is a necessary step in the course of determining whether a respondent has engaged in a discriminatory practice under the *CHRA*.

50. In this case, it is not necessary for the Tribunal to consider the *Charter* in the course of deciding whether the RCMP has engaged in one or more discriminatory practices contrary to the *CHRA*, and if it has, what remedies should be awarded. In the circumstances, the Commission does not join Cpl. Letnes in alleging that the RCMP has infringed s. 15(1) of the *Charter*. The Tribunal should decline to consider that allegation.

(iv) The Employment Equity Act

51. In his Statement of Particulars, Cpl. Letnes alleges that the RCMP has infringed not only ss. 7 and 10 of the *CHRA*, but also ss. 2 and 5 of the *Employment Equity Act* (the “*EEA*”).¹⁶

52. Section 2 of the *EEA* sets out the purpose of that law, while s. 5 of the *EEA* describes the duty of employers to implement employment equity by taking certain steps. These provisions are undoubtedly cornerstones of the federal legislative scheme regarding employment equity. However, they do not create legal rights that can be vindicated through the adjudication of human rights complaints under Part III of the *CHRA*. Instead, the *EEA* creates a separate compliance audit system that prioritizes persuasion and the negotiation of undertakings, failing

¹⁵ Cpl. Letnes Particulars, at paras. 1 and 101.

¹⁶ Cpl. Letnes Particulars, at paras. 1 and 105-106, citing the *Employment Equity Act*, S.C. 1995, c. 44.

which (i) Commission compliance officers may issue directions to employers about non-compliance with the *EEA*, and/or (ii) the Commission or an employer may matters to the Employment Equity Review Tribunal for review, following the issuance of such directions. Nothing in the *EEA* or the *CHRA* empowers this Tribunal to receive complaints from individual members of the public, alleging that an employer has breached the *EEA*.

53. In the circumstances, the Commission does not join Cpl. Letnes in alleging, in the context of this proceeding, that the RCMP has infringed ss. 2 and/or 5 of the *EEA*. The Tribunal should decline to consider those allegations.

IV. REMEDIES SOUGHT

A. Personal Remedies for Cpl. Letnes

(i) Categories of personal remedies

54. Cpl. Letnes is a party in his own right to the Tribunal proceedings. It is for Cpl. Letnes to identify the personal remedies that he may ask the Tribunal to award. The Tribunal's remedial powers are set out in s. 53 of the *CHRA*. Among other things, it allows the Tribunal to require that a respondent:

- make available to the complainant, on the first reasonable occasion, any rights, opportunities or privileges that are being or were denied as a result of a discriminatory practice (s. 53(2)(b));
- pay compensation for any wages lost, or expenses incurred, as a result of a discriminatory practice (s. 53(2)(c));
- pay compensation of up to \$20,000 for pain and suffering experienced as a result of a discriminatory practice (s. 53(2)(e));
- pay special compensation of up to \$20,000 if the respondent engaged in a discriminatory practice in a wilful or reckless fashion (s. 53(3)); and/or
- pay interest at prescribed rates on any financial awards (s. 53(4)).

55. In granting personal remedies for an infringement of the *CHRA*, the Tribunal seeks to put the complainant in the position he would have been in, but for the discrimination. If the Tribunal here agrees, on a balance of probabilities, that Cpl. Letnes would have been promoted to a higher

ranking position but for a discriminatory practice, it will be open to the Tribunal to order that (among other things):

- the RCMP promote Cpl. Letnes to that position or its equivalent at the first reasonable occasion¹⁷; and
- the RCMP compensate Cpl. Letnes for any differences in salary, pension entitlements and benefits between what he actually earned, and what he would have earned at the higher rank, from the time he would have received the promotion, until the date when he actually receives the promotion.¹⁸

B. Public Interest Remedies

56. If the Tribunal finds an infringement, the Commission submits that the appropriate public interest remedies would generally be to order under s. 53(2)(a) of the *CHRA* that the RCMP (i) cease and desist from continuing to commit each discriminatory practice identified by the Tribunal, and (ii) take measures to redress the discriminatory practices, and/or prevent the same or similar practices from occurring in the future, in consultation with the Commission on the general purposes of the measures.

57. Without limiting the generality of this approach, the Commission asks that any order in this case require the RCMP to take the following steps, in consultation with the Commission, within six months following the release of the Tribunal's decision:

- 1) review all the medical duty profiles associated with supervisory positions that are deemed by the RCMP to include operational components, to ensure they have been assigned in conformity with the *CHRA* and the Tribunal's decision, and will not operate or be applied to exclude members who could safely perform the duties with accommodation short of undue hardship;

¹⁷ As per s. 54(a) of the *CHRA*, such an order cannot require the removal of any individuals from positions they have already accepted in good faith.

¹⁸ The Commission notes that Cpl. Letnes has stated the outcome of his calculations in this regard at para.113 of his Particulars, and looks forward to the disclosure of documents and information that will allow these calculations to be verified for the Tribunal at the hearing.

- 2) review all its standing orders, manuals, guidelines, policies, bulletins or other similar documents (together, "RCMP Policies") that discuss the assignment of medical profiles to members, the use to which medical profiles may be put, or the assignment of medical duty profiles to positions, to determine their compliance with the *CHRA* and the Tribunal's decision;
- 3) without limiting the generality of the preceding paragraph, make any amendments to RCMP Policies, or create any new ones, that are needed to ensure that:
 - a. medical profiles and medical duty profiles are treated as flexible guidelines, rather than absolute requirements;
 - b. members who cease to meet the medical duty profiles of their current positions will not be subjected to workplace restrictions, or administrative medical discharge, unless a full individualized analysis has determined that it would be impossible for them to continue their current duties without causing undue hardship;
 - c. members are aware that (i) they can compete for lateral transfers or promotional opportunities, even if their medical profiles do not correspond to the medical duty profiles associated with those other positions, and (ii) if they are selected as the preferred candidate, they will not be blocked from taking up the position unless a full individualized analysis determines that it would be impossible for them to perform the essential duties, without causing undue hardship;
- 4) ensure that any new or amended policies developed in accordance with the Tribunal's Decision (the "New or Amended RCMP Policies") are made widely available to all members within the RCMP;
- 5) provide training on the New or Amended RCMP Policies, and the obligation to accommodate disability-related needs to the point of undue hardship, to all RCMP personnel, of at least one hour's duration;

- 6) create and implement a reliable system for gathering and keeping data regarding any incidents or occasions when the use of eyeglasses or contact lenses by operational or supervisory members has caused or contributed to injuries, or other risky or unsafe circumstances;
- 7) create and implement a reliable system for gathering and keeping data regarding any incidents or occasions when supervisors in positions deemed by the RCMP to include operational components actually perform any of the following “Fit for Duty” tasks listed on the Medical Profile form 2158: “Physical confrontation/arrest of a violent offender”; “Operational driving” (as opposed to “Administrative driving”); and “Use of firearms and other offender control weapons in the context of police work”; and
- 8) send written proof to Cpl. Letnes and the Commission that all the steps described in the preceding clauses have been completed, including copies of any New or Amended Policies.

58. The Commission also asks that the Tribunal retain jurisdiction to oversee the implementation of any personal or public interest remedies that may be awarded in the Decision, and that this retained jurisdiction last until all parties confirm that the remedies have been implemented.

59. As a final comment with respect to remedies, the Commission notes that Cpl. Letnes has requested an order directing the RCMP to ensure the promotion of members with disabilities throughout all ranks, categories and business lines, based on their representation within broader Canadian society.¹⁹ Determining this request will require a consideration of s. 54.1(2) of the *CHRA*, which states that the Tribunal may not order an employer to adopt a special program or plan designed to ensure increased representation of members of designated groups in the employer’s workforce, or goals and timetables for achieving that increased representation.

¹⁹ Cpl. Letnes Particulars, at para. 119(e).

V. THE TRIBUNAL HEARING PROCESS

A. Disclosure of Documents

60. The Commission sent it lists of documents to the parties, along with electronic copies of the arguably relevant, non-privileged listed documents, under cover of a letter dated March 8, 2018. The Commission provided those lists of documents to the Tribunal on those same dates.

61. The Commission expects that Cpl. Letnes and the RCMP likely have documents in their power, possession or control that are arguably relevant to the issues raised in this case, and that the Commission has yet to see. The Commission looks forward to reviewing the documentary disclosure of the parties, and to working with the parties to address any gaps that may come to be identified. The Commission reserves the right to bring motions before the Tribunal seeking disclosure of documents, if any such gaps are identified, and the parties are not able to resolve any related disputes.

B. Witnesses

62. The Commission notes that Cpl. Letnes has already provided a list of witnesses that includes 10 supporting witnesses (including himself), and 17 RCMP management witnesses. The Commission does not currently anticipate calling any witnesses, above and beyond those already listed by Cpl. Letnes.

63. The Commission reserves its right to identify additional witnesses at a later date, for example if doing so is appropriate in response to issues that the RCMP has raised in its Particulars. Among other things, the Commission may seek to call an ophthalmologist or other expert to assist the Tribunal, if doing so is appropriate in response to positions taken or

information disclosed by the RCMP in connection with the design of the Visual Acuity Standards, or their application to the supervisory positions at issue in these proceedings.

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Brian Smith
Senior Counsel

Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, Ontario
K1A 1E1
Tel: (613) 943-9205
Fax: (613) 993-3089
brian.smith@chrc-ccdp.gc.ca