Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

SHIV CHOPRA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DEPARTMENT OF NATIONAL HEALTH AND WELFARE

Respondent

REASONS FOR DECISION

T.D. 10/01

2001/08/13

MEMBER: Athanasios D. Hadjis

TABLE OF CONTENTS

[1] This is the second decision on the merits of the Complaint in the present case. The first decision, rendered by a differently constituted tribunal, was set aside by the Federal Court of Canada and remitted to this Tribunal to be determined on the basis of the record, augmented by certain additional evidence.

I. PROCEDURAL HISTORY OF THE CASE

[2] On September 16, 1992, Dr. Shiv Chopra filed a complaint with the Canadian Human Rights Commission, in which he alleges that his employer, the Department of National Health and Welfare ("**Health Canada**" or alternatively, "**the Department**"), had discriminated against him in an adverse differential manner because of his race, colour and national or ethnic origin contrary to Section 7 of the *Canadian Human Rights Act* ("***CHRA***"), in the manner in which the management position of Director in the Bureau of Human Prescription Drugs was staffed between September 1990 and the spring of 1992. Dr. Chopra further alleges that after he raised his concerns about this staffing process, the Respondent treated him in an adverse manner, particularly regarding his performance appraisals, and that this treatment was also motivated by his race, colour and national or ethnic origin. A Canadian Human Rights Tribunal, composed of Daniel Soberman, Chair, together with members Linda Dionne and Gregory Pyc ("**the Soberman Tribunal**"), heard Dr. Chopra's case over several days in the months of September and October, 1995. In its decision dated March 8, 1996, the Soberman Tribunal dismissed his complaint.[(1)]

[3] The Commission and Dr. Chopra applied to the Federal Court of Canada, Trial Division, to review and set aside the decision of the Soberman Tribunal, pursuant to Section 18.1 of the *Federal Court Act*. By judgment dated April 6, 1998, Mr. Justice Richard ruled that the Soberman Tribunal erred when it decided to disallow the Commission and Dr. Chopra from adducing general evidence of a systemic problem of discrimination at Health Canada, as circumstantial evidence to infer that discrimination probably occurred in his particular case as well.[(2)] The Court therefore set aside the decision of the Soberman Tribunal and the matter was remitted to the "original Tribunal", to be determined on the basis of the record before it, augmented by the statistical evidence sought to be adduced by the Commission and Dr. Chopra, and by any responding material introduced by the Respondent.

[4] Since the terms of the Soberman Tribunal members had expired and had not been renewed, the Chairperson of the Canadian Human Rights Tribunal assigned herself to conduct the pre-

hearing conference and hear certain preliminary motions in the case. Once these preliminary issues had been resolved, the Chairperson assigned me to hear the new evidence. Hearings commenced on May 17, 1999.

II. PRELIMINARY AND INTERIM RULINGS

[5] The following preliminary and interim rulings were issued in this case, either by the Chairperson of the Canadian Human Rights Tribunal or myself.

A. Motion by Respondent for a Stay Pending the Disposition of Respondent's Appeal

[6] At the pre-hearing conference conducted by the Chairperson on October 7, 1998, the Respondent sought an order staying the rehearing by the Tribunal of the Complaint, pending the disposition of the Respondent's appeal to the Federal Court of Appeal of Mr. Justice Richard's order. The Chairperson dismissed the Respondent's motion, finding that the balance of convenience favoured proceeding with the hearing before the Tribunal, notwithstanding the pending appeal. On January 12, 1999, the Federal Court of Appeal dismissed the Respondent's appeal.[(3)] In its reasons delivered from the Bench, the Court stated:

> Although we do not endorse the reasons of the learned Motions Judge in their entirety, we are all of the view, nevertheless, that he made no error whether of fact, law or principle in the conclusion he reached that would justify the intervention of this Court. We would, therefore, dismiss the appeal with costs, including costs of the motion before McDonald J.A. for an order expediting the hearing of this appeal.

B. Scope of the Evidence

[7] On May 17, 1999, prior to introducing its new evidence, the Commission presented a Motion seeking advice and directions regarding the proper scope of the evidence which can be called by the parties in light of the decision of Mr. Justice Richard. Counsel for the Commission suggested that the evidence of the Respondent should be limited to the facts and issues raised by the new statistical evidence to be adduced by the Commission and that the Respondent should not be permitted to present evidence relating to the material already introduced before the Soberman Tribunal in 1995. Counsel for the Respondent, however, pointed out that his client had concluded at the close of the Commission's and the Complainant's cases before the original Tribunal, that the evidence did not establish a *prima facie* case of discrimination, even when considered as circumstantial evidence. Accordingly, the Respondent elected to not adduce any evidence at that time. The Respondent's counsel argued before me that the introduction by the Commission of new evidence could serve to collaborate and strengthen its initial evidence, such that when viewed cumulatively a *prima facie* case will have been made.

[8] I accepted the Respondent's argument and found that it would be unfair to deny the Respondent its right to assess the cases presented by the Complainant and the Commission at

their close and to make its decision at that time on whether to call evidence in response, not just to the new statistical evidence, but rather to the entirety of their cases.

C. Motion to Dismiss - Election to not Call Evidence

[9] At the close of the Commission's evidence, the Respondent declared its intention to make a motion to dismiss the Complaint on the ground that a *prima facie* case had not been established. The question then arose as to whether the Respondent would be subject to the rule requiring that a defendant or respondent elect to not call any evidence before making a motion for dismissal or non-suit.

[10] This rule is derived from the common law in matters relating to civil proceedings.[(4)] In my ruling, I concluded that in cases before the Canadian Human Rights Tribunal, respondents must also, in principle, elect to not call any evidence prior to making their motion for dismissal or non-suit. However, the application of this rule may be waived by the Commission and the complainant. Furthermore, where the appropriate circumstances warrant, a respondent may be exempted from the rule's application by the Tribunal. The most convincing argument in favour of applying the general rule in cases before this and other human rights tribunals, was set out in the Ontario Board of Inquiry decision of *Nimako* v. *C.N. Hotels*[(5)]:

> In approaching this question it is important to bear in mind that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of the defendant (or an accused) tips the scales against him or her. Having regard to the difficulties complainants face in getting access to all the information relevant to establishing discrimination, this may well be more likely to be the case in hearings under the *Human Rights Code* than in civil actions generally.

As I went on to state in my written ruling of October 7, 1999:

> I find this argument compelling particularly in the context of alleged discrimination in the workplace as in the present case. Quite often in such matters, the complainant may be the victim of discriminatory conduct by representatives of the employer which conduct he may not be able to prove directly. Dr. Chopra, in his submissions before the Tribunal, described this type of behaviour in his case as "boardroom discrimination". The complainant and the Commission in such situations must therefore frequently resort to proving their case by circumstantial evidence. Some of that circumstantial evidence may in fact be established through the testimony of some of the respondent's witnesses. It would be inappropriate therefore in a case where there may in fact have been a breach of the *Canadian Human Rights Act*, for the complainant to be denied the relief to which he is entitled because he has not been able to establish his case by this stage in the proceedings, when the tribunal has not had the benefit of hearing all of the evidence, especially when some of that evidence was not available to the Commission or the complainant.

[11] As neither the Complainant nor the Commission had waived the application of the rule, the only point to be determined was whether the circumstances of the present case warranted an exemption. I decided that neither the questions of time nor of expense justified a derogation from the basic principle and I therefore held that the Respondent could proceed with its motion to dismiss the Complaint provided it elected to not call any evidence. Counsel for the Respondent informed the Tribunal that it was not prepared to make such an election and therefore did not proceed with its motion to dismiss.

D. Reply Evidence

[12] The Commission sought to have four individuals testify, as non-expert witnesses, after the Respondent had completed its case, namely Dr. Dennis Awang, Dr. Arjit Das Gupta, Mrs. Nirmala Chopra and Ms. Franka Gopaul. The Respondent objected to their testifying principally on the ground that their anticipated testimony did not constitute proper reply evidence.

[13] Counsel for the Commission argued that the limits to reply evidence which may apply to civil and criminal proceedings, as illustrated in the Supreme Court of Canada decision of *R.* v. *Krause*[(6)], should not be extended to human rights cases, particularly in light of the Tribunal's authority to receive and accept any evidence that it sees fit, whether or not the evidence would be admissible in a court of law (Sub-section 50(3) of the *CHRA*). He also referred to the shifting of the burden of proof applicable in human rights cases whereby once the Commission establishes a *prima facie* case, the onus shifts to the employer to provide a reasonable explanation. It is then incumbent upon the Commission to demonstrate the explanation to be merely a pretext. He contended that the Commission should be allowed to present the evidence of pretext in rebuttal, and not be obliged to bring forth this proof in chief.

[14] However, in an interim ruling issued on April 13, 2000, the Canadian Human Rights Tribunal stated in *Marinaki* v. *Human Resources and Development Canada*:[(7)]

> The Canadian Human Rights Act makes it clear that the Tribunal is not bound by the strict rules of evidence. The Tribunal is, however, bound by principles of fairness. It is these principles of fairness to all of the parties which forms the scope and admissibility of reply evidence.
>
> The Respondent should not be prejudiced by the late introduction of evidence which only confirms or supports the Complainant and Commission's case. Fairness to the Respondent requires that the Complainant call her evidence or call the evidence she seeks to rely on to prove her case in the initial presentation of that case so that the Respondent can fully respond to it.
>
> The Complainant is entitled to adduce further evidence in reply to respond to new matters or defences raised by the opposing party and which the Complainant could not have reasonably anticipated.

[15] After reviewing the anticipated testimonies of the Commission's four proposed witnesses, I concluded that the evidence of three of those witnesses would not constitute proper evidence in rebuttal as it would relate to issues which the Commission could reasonably have anticipated before closing its case, even if the evidence was intended to show the Respondent's explanation to be a pretext. I ruled that the remaining witness, Ms. Gopaul, could testify, as a portion of her intended evidence may have served to contradict the testimony of one of the Respondent's witnesses, on a substantive issue in the case. Ultimately, however, the Complainant and the Commission did not call her to testify.

III. THE FINDINGS OF FACT AND LAW BY THE SOBERMAN TRIBUNAL

[16] Before proceeding with a review of the facts, it is important to address an issue arising from the unique circumstances of this case. The Soberman Tribunal heard ten witnesses over the nine days of hearings conducted between September 5, 1995 and October 11, 1995. After considering the evidence presented, the Tribunal rendered its decision in which, as one would expect, it made numerous findings of fact.

[17] The Complainant and the Commission sought judicial review from this final decision of the Soberman Tribunal. The Federal Court, however, in setting aside the decision of the Soberman Tribunal, did not directly address these findings of fact but rather concluded that the Soberman Tribunal erred in disallowing the Commission and Complainant from adducing general evidence of a systemic problem as circumstantial evidence to infer that discrimination probably occurred in Dr. Chopra's case as well. The Court therefore issued the following order:

> a) The decision of the Tribunal is set aside.
>
> b) The matter is remitted to the Tribunal or, if not available, to a differently constituted Tribunal appointed by the President of the Human Rights Tribunal Panel, to be determined on the basis of the record before this Tribunal augmented by the statistical evidence sought to be introduced by the applicants and by any responding material introduced by the respondent, and following an opportunity to make further submissions.

[18] Obviously, no difficulty would arise had the Soberman Tribunal been available to hear the new evidence for it would mean that the same individuals who heard the first set of evidence would be hearing the second set and issuing a new decision. Unfortunately, the Soberman Tribunal was not available, and in accordance with Mr. Justice Richard's order, I was assigned to issue a decision based in part on evidence which I heard in person and in part on evidence which was heard by a differently constituted Tribunal. My acquaintance of the evidence from the Soberman Tribunal is based on the written record, including the transcripts of the first set of hearings, and the findings expressed in the Soberman Tribunal's written decision of March 8, 1996.[(8)]

[19] This raises the question of whether I should ignore these findings of the Soberman Tribunal entirely and proceed to review the evidence and draw conclusions regarding the testimony of the first ten witnesses, without having seen any of them testify and based entirely on the written transcriptions of their testimonies. Conversely, am I more or less bound by the first Tribunal's findings thereby limiting my role to making determinations only with respect to the new evidence heard by me in the second round of hearings?

[20] Counsel for the Commission submitted that the direction of the Federal Court clearly allows me to make determinations based upon the record before the Soberman Tribunal augmented by the newer evidence. It was entirely within the discretion of Mr. Justice Richard to limit the jurisdiction of the newly constituted tribunal, but instead he elected to not impose any such restriction.

[21] Counsel for the Respondent took an initial position that in determining this issue, I should refrain from referring to the Mr. Justice Richard's reasons, considering the statement by the Federal Court of Appeal in its decision that it did "not endorse the reasons of the Federal Court in their entirety".[(9)] However, the Federal Court of Appeal was careful to also point out that in spite of their unspecified reservations, there was no error of fact, law or principle in Mr. Justice Richard's decision and the appeal was dismissed. In light of this conclusion by the Federal Court of Appeal and the fact that it did not identify which reasons it did not endorse, I do not see any problem in referring to the Trial Division's reasons to determine this issue.

[22] As a secondary argument, Counsel for the Respondent submitted that I must accept the findings of fact made by the first Tribunal as long as no additional evidence was received with respect to these findings. Where additional evidence was received about a particular matter, I could consider it along with the evidence heard by the first Tribunal, and in those circumstances, I could substitute my view of the facts.

[23] None of the parties was able to refer to any case in which a similar situation had arisen. However, it was acknowledged that, to a certain extent, I am in a position somewhat akin to that of a Review Tribunal, as constituted in accordance with Sections 55 and 56 of the *Canadian Human Rights Act*,[(10)] prior to their repeal in 1998, pursuant to *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts.*[(11)] Under these now repealed provisions, where a Tribunal was composed of fewer than three members, an appeal could lie from its decision or order to a Review Tribunal composed of three members. Sub-section 56(4) of the *CHRA* further provided that such appeals were heard on the basis of the record of the Tribunal whose decision was being appealed, and of the submissions of interested parties.

[24] However, the Review Tribunal could admit additional evidence or testimony if, in its opinion, it was essential in the interests of justice to do so. Thus, a Review Tribunal could find itself in a situation somewhat comparable to mine, in that it would be dealing both with evidence which it had actually heard, as well as evidence which was only available from the record of the case. The obvious difference, of course, is that the Review Tribunal's mandate was, as the name implies, to review the first Tribunal's decision. On the other hand, the Soberman Tribunal's

decision has already been set aside in the judicial review conducted by the Federal Court, and I have now been assigned to effectively replace the first Tribunal's decision with my own, but based on a record presented before that Tribunal. This distinction aside, it is helpful to examine some of the jurisprudence arising from these repealed provisions of the *CHRA*.

[25] In *Lagacé* v. *Canada (Canadian Armed Forces)*,[(12)] the Review Tribunal hearing an appeal from a decision of a one-member Tribunal considered the scope and standard of its review. Referring to a number of reported cases relating to Sections 55 and 56 of the *CHRA*, the Review Tribunal concluded that where no additional evidence is adduced at the appeal, the Review Tribunal must accord respect to the conclusions of fact reached by the first Tribunal, although the Review Tribunal will still have the duty to examine the evidence and substitute its view of the facts if there was a palpable or overriding error below.

[26] The *Lagacé* Review Tribunal, when referring to circumstances analogous to those in the present case, stated the following:[(13)]

> When additional evidence is received, the hearing is to be treated as de novo and the additional evidence is to be considered along with the evidence that was heard before the Human Rights Tribunal and the Review Tribunal should examine all the evidence and substitute its view of the facts should it see fit to do so. (...)
>
> However, it must be noted that the hearing before the Human Rights Tribunal in this case occupied some 4 days of hearing, 8 witnesses and 524 pages of transcript of evidence while the additional evidence that we considered comprised 2 affidavits with a total of 12 pages. In such circumstances, some degree of deference must still be given to the earlier Decision particularly on issues of credibility. This should be limited, however, to areas not dealt with in the additional evidence received by us which must be considered afresh along with any prior related evidence.

[27] This approach is in line with the submissions of the Respondent. In *Bader* v. *Canada (National Health & Welfare)*,[(14)] another Review Tribunal came to a similar finding, after reviewing the available case law, including a decision which Counsel for the Commission invoked during his submissions, *Canada (Attorney General)* v. *Lambie*.[(15)] The *Bader* Review Tribunal reached the following conclusion at paragraph 106:

> With regard to a principle or principles which must govern the Review Tribunal, it appears that:
>
> > a) The Review Tribunal must accord due respect for the view of the facts taken by the Human Rights Tribunal and, in particular, for the advantage of assessing credibility which it had in having seen and heard the witnesses;

b) The Review Tribunal must address the question of whether there is an error in the original Tribunal's conclusions as to the law and/or a manifest error in its assessment of the facts; and

c) If new evidence is presented to the Review Tribunal it must assess that evidence in the light of the overall evidence which necessarily includes the evidence adduced before the First Tribunal.

[28] While these findings concerning Review Tribunals were reached in a different context than that which is before me, the underlying logic is certainly applicable to the present case. It would be imprudent for the second Tribunal to begin reassessing evidence regarding which it has not received any additional testimony or proof. Undoubtedly, the first Tribunal was best positioned to reach findings with respect to the evidence which it heard, and regarding which, no additional evidence was adduced before me. On the other hand, where I have received new evidence, it is incumbent upon me to reassess the related issue.

[29] Although this Tribunal's mandate is obviously not that of a Review Tribunal, the fact that the Soberman Tribunal's decision was set aside by the Federal Court should entitle me to substitute my view with respect to issues regarding which I may not have received additional evidence, but where I find that there was a palpable or manifest error in the first Tribunal's assessment of the facts or an error in its conclusions as to the law.

[30] I will therefore deal with the facts of this case in accordance with these principles.

IV. THE FACTS

[31] In its decision, the Soberman Tribunal succinctly summarized the evidence which it heard and I find myself hard-pressed to recite those facts any differently. I will therefore be borrowing liberally from the text of the first Tribunal when reviewing the facts of this case, being mindful at all times of the principles which I have set out above with respect to the degree of deference to be shown to the findings of fact in the first instance.

A. Dr. Chopra's Professional Experience: 1957 to 1969

[32] Dr. Chopra was born in India and is of East Indian origin. He received a degree in Veterinary Science and Animal Husbandry in 1957 from Punjab University. After graduating, he worked as a surgeon in a government veterinary hospital for some months at which he was in charge of a staff of seven persons. He then moved on to a research position at the Punjab Veterinary College, an institute that produced vaccines, serums and other biological products used by veterinarians, and thereafter, obtained a post-graduate diploma in biological drugs at the Central Indian Veterinary Research Institute.

[33] In 1960, he came to Canada to study microbiology at McGill University. He completed his Masters degree in 1962 and moved on to doctoral work, completing his Ph.D. in 1964. He then spent one year as a post-doctoral research fellow at the Royal Victoria Hospital in Montreal. In 1965, Dr. Chopra moved to England where he worked for Miles Laboratories, a large pharmaceutical company. He headed the biological sciences research section which was primarily producing and testing new drugs. The section had thirteen scientists in various related disciplines and, coupled with the support staff, a total of twenty people were under his supervision.

[34] In 1969, Dr. Chopra was hired by the Respondent in the Bureau of Biologics / Division of Medicine and Pharmacology, which later was renamed the Bureau of Human Prescription Drugs / Division of Infection and Immunology. The Bureau formed part of the Health Protection Branch of Health Canada.

B. The Administrative Structure and Staffing Procedures within the Health Protection Branch

[35] At the core of Dr. Chopra's complaint is his claim that the Respondent denied him the opportunity to compete fairly for a management position. A knowledge of the administrative structure and staffing procedures at the Health Protection Branch of Health Canada is therefore helpful in understanding the facts of the Complainant's case.

[36] The description of the administrative structure, which I set out below, is based on organizational charts entered into evidence before the first Tribunal, and although they illustrate the structure as of September 1992, the same general framework has been in place for much, if not all, of the time that the Complainant was employed at Health Canada, prior to the filing of his Complaint. The summary of staffing practices in the Canadian Public Service, which is also set out below, is similarly based on evidence relating to the 1980's and early 1990's. While it is not clear to me whether these practices were followed during the first years of the Complainant's career at Health Canada in the late 1960's and the 1970's, they certainly were applicable to the period which is central to his complaint, that is, 1990 to 1992.

[37] The evidence with respect to the administrative structure of Health Canada is as follows:

- The *Branch*, (in Dr. Chopra's case, the Health Protection Branch), was headed by an *Assistant Deputy Minister*.

- It contained five *Directorates* including the *Drugs Directorate*, each headed by a *Director General* who reported to the Assistant Deputy Minister.[(16)]

- Within the Drugs Directorate were nine *Bureaus*, each headed by a *Director* who reported to the Director General. The Drugs Directorate contained both the *Bureau of Human Prescription Drugs*, where Dr. Chopra worked from 1969 to 1987, and the *Bureau of Veterinary Drugs*, where he has worked from that time until the present.

- Each Bureau in turn contained a varying number of *Divisions*, each headed by a *Chief* who reported to the Director of the Bureau. The Complainant first worked for the *Division of Infection and Immunology* within the Bureau of Human Prescription Drugs and subsequently, for the *Division of Human Safety* within the Bureau of Veterinary Drugs. Chiefs supervised varying numbers of employees.

- It appears that in some instances, *Sections* were formed in some Divisions which were led by *Section Heads*, although Division Chiefs were occasionally also referred to as Heads. Section Heads would supervise a handful of persons and according to the evidence of several witnesses, a Section Head could gain supervisory and management experience at a very basic level.

BRANCH
(Asst. Deputy Minister)
|
DIRECTORATE
(Director-General)
|
BUREAU
(Director)
|
DIVISION
(Chief or Head)
|
|
SECTIONS
(Section Heads)

[38] In principle, the basic entry-level, line management position, where a manager would supervise a number of employees who would report to him or her, would be that of Chief of a Division.

[39] Staffing in the Public Service of Canada is the responsibility of the Public Service Commission ("**PSC**"). This authority is sometimes delegated to the individual government departments but the authority is retained by the PSC for appointments to the management level. Generally speaking, management positions at Health Canada are classified as "EX" within a range of levels from EX-01 to EX-07. Until approximately 1991, there existed an additional entry level management group named SM. In that year, this classification was eliminated and persons holding SM positions were either reclassified up to EX or down to the highest level of another occupational group, such as Biologist 5 (BI-05).

[40] Many of the persons who occupied the lower level management positions, such as chiefs and section heads, were working not at an EX level but rather at the higher ranks of other occupational groups such as BI-05 or Veterinary Medicine 5 (VM-05). As a result, these levels were sometimes referred to as "EX-equivalent". Although there is some debate as to how formal the term "EX-equivalent" is, there is no question that this concept is commonly used with regard

to staffing in Health Canada. It is useful to note that these various ranks within occupational groups are linked to wage levels and thus, the higher the number of the level is, the higher the salary scale is.

[41] An important distinction between the EX group and occupational groups such as Biologists, Chemists or Economists, is that these latter classifications are based on the professional or occupational skills to which they are attached. EX employees, on the other hand, are managers who are no longer tied to any specific occupational group and they can move from one department to the next, at the EX level, without necessarily possessing a background related to that department. One witness, Ms. Erika Boukamp-Bosch, described EX employees as mobile "Renaissance" persons who are not tied to the specific content of any one department.

[42] Staffing actions within the Canadian Public Service must be made in accordance with the merit principle which in simple terms means that the best qualified person wins the job. At the EX level, the majority of appointments are made by competition. The process is initiated when a vacancy occurs due to an incumbent's departure or due to the creation of a new position by a department. The department, in consultation with a resourcing officer from the PSC will prepare a statement of qualifications, in terms of education, language, experience, knowledge, abilities and personal suitability, that are required for the position. In these discussions, the department is usually represented by the hiring manager who typically is the person to whom the appointee will be reporting.

[43] The department and the resourcing officer then decide upon the method of selection. If, as is often the case, they opt for a competition, they will also determine if it is to be limited to public servants only (closed) or made available to non-public servants as well (open). Generally speaking, whenever it appears likely that the pool of available qualified candidates within the Public Service is small, an open competition is preferred. The size of the pool also influences the decision as to the "area of selection" of a competition in terms of the occupational backgrounds for the candidates, as well as the organizations (departments) and geographic regions to which the competition will be open. Ms. Catherine Black, who is a senior resourcing officer at the PSC, with extensive experience regarding management appointments at Health Canada, testified that she has never restricted an EX competition to the Department and that usually, EX competitions are national in scope. On the other hand, depending on the nature and level of the vacant position in question, some competitions may be restricted to candidates who are already working at EX level positions, while others may be opened up to those who are one or two occupational levels below EX.

[44] These decisions regarding the process to be followed are referred to as the "staffing strategy", which must then be approved by the PSC before being implemented. Once that approval is obtained, the PSC must advertise the competition. In the 1980's and early 1990's, it was the responsibility of the Department of Public Works to ensure that the announcements were actually posted. As will be explained below, the Complainant contends that as at late as 1993, many advertisements did not get properly posted and he was therefore prevented from acquiring knowledge of some competitions.

[45] Once the closing date for the filing of applications has expired, a screening board, composed of a minimum of three persons consisting usually of the hiring manager, the PSC resourcing officer and an employee from another department who is at a higher occupational level than that of the position being filled, is convened. The duty of the board is to screen the applicants on the basis of the screening criteria, which normally consist of the language, education and experience requirements. The evidence shows that screening boards work with a screening guide the terms of which may differ from those of the original statement of qualifications. This screening is conducted on the basis of the candidates' applications and résumés, interviews of the candidates being rarely held. The applicants are screened on a pass/fail basis.

[46] In addition to the list of qualifications which is attached to the publicly posted advertisement for a position, a rating guide is prepared to be used in the evaluation of the candidates. The evidence was unclear as to who prepares this guide and when. The role of the selection board is to assess the candidates who cleared the screening process (that is, who have been "screened in"), on the basis of the remainder of the required qualifications. This is done through a combination of interviews, reference checks, tests and even simulations developed by the PSC to assess management competencies of entrants to the EX group. In Ms. Black's experience, although prior performance appraisals of candidates are consulted, these are considered to be of little assistance in assessing future performance at the higher level position.

[47] The selection board is usually composed of the same hiring officer and resourcing officer who were members of the screening board, in addition to a senior officer from another department and possibly additional individuals whose expertise is deemed helpful by the hiring manager in the assessment of the candidates. The final assessments of the selection board, which are reached by consensus, are sent on to the PSC for approval. It is rare for the PSC to reject the recommendation of the board and therefore, once approval is granted, the PSC offers the successful candidate the position. The unsuccessful candidates are also notified of the results. They, in turn, have the right to appeal the appointment to the Public Service Commission Appeal Board ("**PSCAB**"), on the grounds that the selection process was not performed in accordance with the merit principle.

[48] Obviously, many candidates may choose to apply for a competition after viewing a posted announcement or learning of the competition in some other manner. However, in the 1980's, the PSC had also developed a system called the Management Resourcing Information System ("**MRIS**"), which consisted of a computerized databank containing the education and skills of individuals in the EX group and below the EX group who were interested in obtaining EX positions. A PSC resourcing officer involved in a competition would consult the databank and identify any individuals whose education and skills appeared to match the qualifications sought in that competition. Those individuals would be contacted and asked if they would like to apply for the competition. The MRIS was phased out in 1993. Dr. Chopra gave evidence that he had registered himself in the MRIS from its inception and yet was never invited to compete in any competition through an MRIS search.

[49] Although most management positions in the public service are filled by competition, they may also be staffed without competition if a candidate is the subject of a "staffing priority", which essentially means that he or she benefits from a preferred status. The *Public Service*

Employment Act[(17)] specifies seven circumstances in which candidates shall be appointed provided they are found qualified and they fall into one of the following designated categories:

- persons returning from a leave of absence;
- members of a minister's staff;
- persons returning from a layoff;
- persons who have been declared surplus;
- persons who have been disabled;
- persons benefiting from a "spousal relocation priority" because their spouse has been moved;
- reinstatement priority to those who have been placed at a lower lever, on surplus status, in order to be appointed to a position which allows them to reach their previous higher level.

Before staffing a position, the PSC will consult the available data regarding persons who have priority status, and if one is identified, that person's name is referred to the department which will assess him or her for qualification. If qualified, the department is obliged to have that person appointed to the position.

[50] Positions can also be staffed through reclassification whereby an incumbent's job is reassessed and found to be "worth" a higher level and therefore, reclassified to that level. Then, the individual incumbent is assessed to determine whether he or she is qualified for the reclassified job. If that is the case, effectively a new position is created and filled without a competition being conducted.

[51] A department may also fill a vacant position by transferring or deploying someone from an equivalent level into that position. Thus, a department could transfer one EX-01 employee to a vacant EX-01 position, and in a similar fashion, a BI (biologist) at a certain level could be transferred to a VM (veterinary medicine) position at a certain level, provided the move did not result in an increase in salary for the individual, in which case the move would be viewed as a promotion and not a lateral transfer. The PSC does not consider this process to be in breach of the merit principle since it does not involve any promotions and the move by the incumbent to his new job frees up his old position, to be staffed, perhaps, through a wider competitive process.

[52] Finally, and of important significance to this case, there exists the mechanism known as acting appointments and assignments. Acting assignments occur when an employee is assigned duties at a higher level than his existing job, for a temporary period which does not exceed four months. In the event the acting assignment exceeds four months, it is considered to be an acting appointment which is subject to an appeal to the Public Service Commission Appeal Board by any person who feels aggrieved by the appointment. No appeal right lies in the case of an acting

assignment (that is, one which lasts less than four months). Acting assignments and appointments are made by the departments themselves without any participation from the PSC. A person can be appointed on an acting basis without any competition being conducted nor a selection board being convened, and this appears to be the usual practise. Thus, for instance, in the 1994-1995 fiscal year period, 24 of 25 acting appointments exceeding four months, at the EX level at Health Canada, were made without competition. The PSC declared in its annual report of 1992, that its policies stipulated that acting appointments should not normally be for periods longer than one year in duration, due to its concern that acting appointments may provide an unfair advantage in subsequent competitive processes.

C. Dr. Chopra's Employment History within Health Canada

(i) Bureau of Human Prescription Drugs - 1969 to 1987

[53] Dr. Chopra's original job was classified as a "Scientific Advisor 1" (SA-01), which was a senior scientific position, but without any management duties. Shortly after being hired, the position of Section Head became vacant and both the Complainant and Dr. Michael Davis, also an SA-01, competed for the post. According to Dr. Davis's testimony before the Soberman Tribunal, this position was essentially that of a Chief, as the section which he oversaw would eventually be referred to as a division, after a departmental reorganization in the early 1970s. Although Dr. Davis was selected and upgraded to the SA-02 level, Dr. Chopra was also promoted to SA-02 at the same time, with the understanding, according to him, that the section would be divided into two, such that he and Dr. Davis would respectively run each of the new sections. The split however was never implemented and Dr. Chopra did not become a Section or Division Head. Instead, he reported to Dr. Davis, his immediate supervisor.

[54] In 1971, Health Canada conducted a departmental classification revision as a result of which the Complainant's position was reclassified to Biologist 4 (BI-04). He was to continue in this position until 1975, working under Dr. Davis. Throughout this period, Dr. Chopra regularly acted as Chief during Dr. Davis' absences, which were of varying lengths of time, from a day or two to as many as five or six weeks on one occasion when Dr. Davis fell ill. During these acting assignments, Dr. Chopra would perform essentially the same duties as a Division Chief would ordinarily perform. His salary however remained unchanged.

[55] In 1972, after some discussions with Dr. Chopra, the Science Council of Canada contacted his superiors at Health Canada, requesting that he be assigned to a one-year secondment with that organization. Ultimately, the secondment did not occur, apparently because there was too much scientific work at his place of employment and there would therefore not be any "clear advantage" for his employer, which was an essential requirement for a successful secondment, according to the Council.

[56] In 1974, Dr. Carolyn Scott was appointed Director of the Bureau. According to the Complainant, Dr. Scott recommended that he be selected for the Career Assignment Program ("**CAP**"), which is run by the PSC, consisting of a five year assignment period at the end of which an employee should ordinarily have acquired the skills to be eligible to apply for EX positions. This did not materialize for reasons of which Dr. Chopra is not aware, although he did

admit that he did not make an application for entry into the program. Some of the witnesses called by the Respondent indicated that in the 1990s, an employee could not enter the CAP program unless he actually applied for it himself. These witnesses could not confirm if the same policy was in place in the 1970s.

[57] In 1975, the Treasury Board set up a committee to develop an improved accountability system for the Health Protection Branch. The Committee was called "Objectives Oriented Management" ("**OOM**"), under the direction of Dr. Albert Liston, who was the Director of the Drugs Directorate at that time. At the recommendation of Dr. Scott, Dr. Chopra was assigned as the representative of the Drugs Directorate, as were individuals from the other directorates. His task was to consult with managers at the various levels within the Directorate and have them report to him their problems and suggestions for change in the management process. He would then do an analysis and make recommendations to Dr. Liston.

[58] An important question arising from this employment is whether Dr. Chopra acquired any management experience in the process. Dr. Chopra identified his position as having been that of a "staff management consultant", while Dr. Liston testified that it was better referred to as an "OOM project facilitator". Whichever designation may be accurate, there is no doubt that the Complainant did not perform any line management duties, meaning that he did not manage or supervise a staff nor did he hold any budgetary responsibilities. On the other hand, there is also no debate about his active involvement throughout the entire OOM process, which included participation in meetings of the Executive Committee of the Drug Directorate, interactions with Directors and other managers, and the design by Dr. Chopra of a management program.

[59] Dr. Chopra's one-year secondment to the OOM project was renewed by Dr. Liston for an additional year. Dr. Liston testified that he was satisfied with the Complainant's work for the Committee. Dr. Chopra added that Dr. Liston was very satisfied at that time with the quality of his proposals, and another member of the Committee, Dr. Ian Henderson, testified that he thought the Complainant had done an excellent job and found that "everyone else" was happy with his work.

[60] In early 1977, during the second year of his employment at the OOM project, Dr. Liston sent Dr. Chopra on a six-week management in-residence training program at the Staff Development Branch, later called the Canadian Centre for Management Development, of the PSC. This "Senior Management Development Program" was designed for senior managers and was apparently also offered to people who were recognized by a senior manager as having management potential. According to Dr. Chopra's recollection, there were about twenty persons in the class, he being the only one from Health Canada. Dr. Chopra completed the program successfully. He also testified that it was understood that once a person would complete this training, he would be promoted to management level, if he was not a manager already.

[61] Later in 1977, at the expiry of the OOM project secondment, Dr. Liston asked Dr. Chopra to serve as a representative of the Drugs Directorate on another task force, the "Drug/Field Operations Directorate Interface Study". The task force was composed of Dr. Chopra and three others. The study lasted for more than a year and the project's report was remitted directly to the Assistant Deputy Minister.

[62] At about the same time, in late 1977, Dr. Scott retired as Director of the Bureau and was succeeded by Dr. Henderson. Early in 1978, Dr. Henderson asked Dr. Chopra to prepare a report on the background to and overview of the Drug Program. Dr. Chopra was about to return to his Division of Medicine and Pharmacology (as it was called at that time), from his OOM project position, and with the report, he attached a summary of his career at the Bureau, setting out the various management development elements in his work and training. He asked Dr. Henderson to examine his career and advise him as to whether he was likely to "see a change" in the near future, alluding presumably to a promotion, but according to Dr. Chopra, nothing further occurred.

[63] Several months after Dr. Chopra returned to his division, Dr. Henderson assigned him to be a *de facto* section head within his Division to deal with developments in immunology, and the Director testified that he had seriously considered setting up an official immunology section within the Division, to be headed up by Dr. Chopra, as section head. However, for structural reasons, which would require revising the classification system within the Bureau to create the position of section head, and because of a downsizing operation in the Bureau late in 1978, the proposal did not proceed.

[64] After returning to his Division, Dr. Chopra regularly acted as Division Chief, during the absences of his supervisor, Dr. Davis, as he had been doing prior to his secondment to the OOM project. It appears that these absences were never for a long duration, and at no time was Dr. Chopra assigned or appointed to an acting position which would last in excess of four months. Dr. Henderson testified that he had not heard any criticism about Dr. Chopra when acting as Chief and that he would assess his performance as good. When Dr. Chopra acted as Chief, he would sit in on management meetings as part of the management team.

[65] In 1980, with Dr. Henderson's support, Dr. Chopra applied successfully for a three-month fellowship with the World Health Organization ("**WHO**"), to study worldwide management of drug program systems, particularly, the control and standardization of allergens. Dr. Chopra visited twelve countries in eastern and western Europe, meeting with people both in industry and in regulatory bodies, and he produced a written report. Upon his return, Dr. Chopra was surprised to find that the technical area of his principal expertise, immunology, had been transferred out of his Bureau, thus affecting his work as a scientist. He also was disappointed in Dr. Liston's apparent disinterest in his WHO report. Dr. Liston claimed, in his testimony, to have no memory of these incidents other than to have a "vague recollection" that antibiotics had been transferred to the Biologics Bureau. Dr. Chopra views these incidents as a demonstration of management's lack of appreciation of quality and initiative on his part.

(ii) Annual Written Appraisals, 1979 to 1987

[66] In 1979, the government initiated a system of annual written appraisals for employees. In his first appraisal form, dated September 19, 1979, Dr. Chopra stated that his career aspirations lie in management and, after setting out his training and experience, he indicated that he looked forward to using this experience "in a much wider context than [he is] able to in his present position". The Director of the Bureau, Dr. Henderson, added in the "additional comments" section that Dr. Chopra was "somewhat frustrated by his inability to rise within the management

structure of the Health Protection Branch" while his immediate supervisor, Dr. Davis, observed that Dr. Chopra was "stimulated by additional responsibility". Dr. Chopra's subsequent appraisals reiterated his desire to be promoted to management and his frustration at its failure to happen.

[67] Commencing with the 1981 appraisal forms, a summary rating scale was set up with the following range: outstanding, superior, fully satisfactory, satisfactory and unsatisfactory. In every appraisal while at the Bureau of Prescription Drugs, until 1986, Dr. Chopra was rated "fully satisfactory", although on at least one occasion, a comment was added to indicate that this rating does not imply that "in many areas he is not of Superior calibre". Several remarks also appear from his supervisor, Dr. Davis, regarding his wide training and experience in both scientific and management aspects of the development and control of drugs, but that "due to a total lack of advancement opportunities", the full potential of Dr. Chopra was under-utilized. Dr. Davis testified that it is possible that he did issue a "superior" rating to other employees in the period leading up to 1988, but that to his recollection, that was unlikely to have occurred.

[68] In the appraisals, Dr. Davis made numerous positive observations about Dr. Chopra's demeanour and job habits as well, such as his ability to work perceptively and effectively, his lucid presentation of arguments in a "controlled tactful manner", his flexibility to suggestions and his good ability at negotiating with drug manufacturers, an important component of the Division's activities. Dr. Davis also confirmed that the Complainant managed in a "smooth and efficient manner" and acted as a "competent manager" on those occasions when he performed the duties of Chief, on an acting basis.

(iii) Factors Preceding Dr. Chopra's Move to the Bureau of Veterinary Drugs

[69] Although Dr. Chopra was the only person in the Bureau of Human Prescription Drugs to hold a veterinary degree, he did not have a license to practice in Ontario, as the regulating authority, the Ontario Veterinary Association, apparently did not recognize his foreign qualifications. As a result, he could not be classified in the Veterinary Medicine group, at the 4th level, (VM-04) and had to remain a Biologist 4 (BI-04), a classification which paid about $6,000 less in annual salary. However, in 1985, after Dr. Davis and Dr. Henderson advised the Ontario Veterinary Association of Dr. Chopra's usefulness to Health Canada, the Complainant was issued a special license which limited the exercise of his practice to his specific job.

[70] Upon obtaining this license, Dr. Chopra sought a reclassification of his position from BI-04 to VM-04. However, the Classification Division of the Personnel Policy branch denied his request, concluding that, in his current position, there was no requirement for a veterinary license. Dr. Chopra had doubts about this explanation for, to his knowledge, other Indian-trained veterinarians had been reclassified when they became licensed. The refusal to reclassify prompted Dr. Henderson, on April 29, 1987, to suggest to the Complainant that he should ask for a transfer to the Bureau of Veterinary Drugs, where the job descriptions would assure him a reclassification.

(iv) Bureau of Veterinary Drugs, 1987 to April, 1990

[71] Dr. Chopra followed Dr. Henderson's advice and when a vacancy occurred later in 1987 in the Human Safety Division within the Bureau of Veterinary Drugs at the VM-04 level, he applied for the position and was selected. Although the Complainant left his previous Bureau and was no longer working under Drs. Henderson and Davis, the Bureau to which he transferred still formed part of the Health Protection Branch of Health Canada, and consequently, Dr. Liston remained the Assistant Deputy Minister above Dr. Chopra's immediate supervisor and his Director.

[72] Shortly after Dr. Chopra commenced work at this new job, the Division Chief, Dr. R.R. MacKay, retired and his position was left vacant. For six months, it was filled on an "acting rotational basis" and Dr. Chopra acted as Chief for 5 weeks during that period. Dr. Chopra's first appraisal in his new position was completed late in 1988 by the Director of the Bureau of Veterinary Drugs, Dr. Jacques Messier. The appraisal was again favourable. The next appraisal submitted in evidence is dated May 1990, and is signed by Dr. M.S. Yong, who had been appointed the new Chief of the Division in mid 1989. His comments were also favourable, pointing out that Dr. Chopra communicated effectively and that his interpersonal skills such as discretion, tact and courtesy were easily observed.

[73] Dr. Chopra, on the other hand, took issue with his "fully satisfactory" rating, stating in his written comments that his contributions in the reduction of the "pernicious backlog of work" was in excess of his required duties and should have been reflected in the rating. Upon viewing this comment, Dr. Messier noted that he did not find the appraisal unfair and encouraged Dr. Chopra to pursue the Department Assignment Program initiative ("**DAP**") which would provide him with experience that would benefit both him and the organization. According to Dr. Chopra, Dr. Messier's comment was essentially a suggestion that no management opportunities were available in that Bureau and that Dr. Chopra should do what is necessary to be promoted to another bureau. The DAP, incidentally, was established in 1987, to place employees on assignments which would allow them to gain experience, training, new knowledge and skills. An employee was required to complete a form and apply for acceptance into the DAP. The uncontradicted evidence of the Respondent is that Dr. Chopra never applied for a DAP assignment.

[74] In late 1990, Dr. Len Ritter was named as the new Director of the Bureau of Veterinary Drugs. The Complainant and the Commission submitted that this appointment, which was made without competition, constituted a promotion of two levels. They also questioned his qualifications for the position, as he was not a medical doctor nor a veterinarian, but rather a chemist with, according to the Complainant, a limited background in drugs. The Respondent disputed this construction of the facts surrounding Dr. Ritter's appointment. Evidence was adduced demonstrating that Dr. Ritter won a competition for a SM level position in 1985 and it was from this level that he was appointed to the EX-02 position of Director of Veterinary Drugs. The Respondent transferred Dr. Ritter to this position from his prior job, but it was as an "underfill". That is, although the Director's position was classified as EX-02, Dr. Ritter retained his lower classification level of SM. This meant that there was no increase in his salary and that he was technically not promoted, according to the regulations pursuant to the *Public Service Employment Act*.[(18)] However, during her testimony, Ms Catherine Black, of the PSC, agreed

that entry into the EX group without any increase in salary can still be perceived as a promotion due to the accompanying increase in prestige.

[75] With respect to Dr. Ritter's qualifications, the Respondent pointed to his management experience at the SM level and his previous supervisory work as a section head at the BI-04 level, as justification for his appointment to the position of Director.

(v) Management Opportunities for Dr. Chopra prior to 1990

[76] The Respondent takes the position that it is an employee's duty to actively pursue promotional opportunities within the Department, particularly those leading to management positions, and that Dr. Chopra failed to take the appropriate measures to advance himself. For this purpose, a significant portion of the cross-examination of the Complainant before the Soberman Tribunal was devoted to a review of numerous competition posters for entry or low level management positions within Health Canada.

[77] The Complainant agreed that he had not applied for any of the jobs shown to him but he also asserted that he had not seen many of the posters, claiming that, particularly prior to 1993, there was a considerable problem with advertising procedures such that the bulletin boards were often incomplete. Dr. Chopra also took issue with the Respondent's implication that he could have applied for all of the positions referred to in the posters, claiming that he did not possess the expertise or experience required in most of the cases and that essentially, he would not have had any serious chance to successfully compete for those positions. One of the Respondent's witnesses, Ms. Sylvia Pollack, the Director of National Operations Coordination at Health Canada, who is responsible for human resources issues for the National Capital Region, was of the opinion that the Complainant's qualifications would have allowed him to have been at least initially screened into the competition for some of those positions. I note, however, that some of the jobs she referred to were located away from Dr. Chopra's place of residence, Ottawa, in places such as Toronto and Dartmouth, Nova Scotia, and I do not believe it is reasonable to have necessarily expected him to apply for them.

[78] Furthermore, Ms. Catherine Black, of the PSC, who was called to testify by the Respondent, explained that she encouraged people to only apply for jobs for which they believe they are qualified and that she did not recommend that they submit applications in a "blanket way" to every EX job which becomes available.

[79] As the Soberman Tribunal properly pointed out, however, Dr. Chopra did not apply for two vacancies in Ottawa of which he was aware and which were for positions for which he was undoubtedly qualified. The first was that of Chief of the Division of Infection and Immunology in the Bureau of Human Prescription Drugs. This was the position he had applied for in 1972, in competition with Dr. Davis, and its vacancy came as a result of the latter's retirement in 1987. The uncontradicted evidence of Dr. Chopra was that this position was not advertised and was still being filled on an acting basis at the time of his testimony in September of 1995. In cross-examination, Dr. Chopra did admit that he nonetheless did not inquire about the possibility of offering himself to fill the vacancy, a request which could have been addressed to the Director of the Bureau, in a manner similar to that which he used in 1990 when he pursued the position of

Director of the Bureau of Human Prescription Drugs. This position had also not been advertised at the time he first applied.

[80] The second vacancy occurred in the Division of Human Safety where Dr. Chopra had been working since 1987. The position of Chief was advertised in February 1989, a little more than a year after he had joined the Division. Dr. Chopra was aware of the vacancy which was created when Dr. MacKay retired, having himself filled in as acting Chief after the Chief's departure. Dr. Chopra stated that he refused to apply for the position because of a change in classification. Dr. MacKay, like Dr. Chopra, was a veterinarian and until Dr. MacKay retired, this position had been classified as VM-05 (as were two of the three Chiefs in the Bureau). However, after Dr. MacKay's departure, the classification was changed to BI-05, that of a biologist and not necessarily a veterinarian.

[81] As a veterinary doctor, a VM receives a higher salary than a BI at the same level, in the order of about $6,000.00. For instance, when Dr. Chopra was reclassified from a BI-04 to VM-04 in transferring to the Bureau of Veterinary Drugs, he benefited from this substantial increase in salary. Consequently, going from his VM-04 classification to a BI-05 classified Chief's position would have meant an increase in salary for Dr. Chopra of no more than $800.00. According to Dr. Chopra, it made no sense for him to take this job for it gave him no financial benefit, just additional work. He perceived no advantage in just being able to claim he was now a manager. Moreover, Dr. Chopra contends that the reclassification of the Chief's position to BI-05 from VM-05 constituted a "differential treatment" and would have meant that he was an "inferior Chief" as compared with the other Chiefs.

(vi) The Events of 1990 to 1992

[82] The following events which occurred during the 1990-1992 period are at the core of Dr. Chopra's complaint.

[83] Early September 1990: It became known informally that Dr. Gordon Johnson, the Director of the Bureau of Human Prescription Drugs, where Dr. Chopra had worked for eighteen years, until 1987, would be departing and that his position would become vacant. The classification of this position had been MD-MOF-05 for a number of years, meaning that the Director was required to be a licensed physician. However, Dr. Johnson was not a physician but a pharmacologist, and when he had been appointed years earlier, a new position of Assistant Director-Medical had been created to carry out those duties of the Director which required a medical license.

[84] September 13, 1990: Dr. Chopra, having heard about the vacancy, applied in writing to Dr. Emmanuel Somers, the Director-General of the Drugs Directorate, proposing himself as a candidate for the position. Dr. Chopra indicated in his letter that he was prepared to work in the position on a short-term assignment, and suggested that he and other candidates act for a period of time, on a rotational basis presumably, after which the most "efficient" manager would be allowed to continue.

[85] On the same day, Dr. Liston, who was the Assistant Deputy Minister of the Health Protection Branch by that time, sent a memo to the Deputy Minister, M. Catley-Carlson, recommending that Dr. Claire A. Franklin be appointed as Acting Director. He stated in the memo that the Department was:

> ... actively recruiting for an MD-MOF-5 that I expect will take up to one year to finalize, if a qualified candidate is found. During that period of time it is extremely important to provide strong leadership in the Bureau of Human Prescription Drugs. Dr. Claire A. Franklin has demonstrated strong managerial abilities combined with professional qualifications and would be interested in undertaking this position on an acting basis. I would recommend that Dr. Franklin be appointed as Acting Director, Bureau of Human Prescription Drugs, EX-2 level effective October 22, 1990, for a one-year period.
>
> ...A job description is now being prepared and will be sent to Personnel for classification action at the EX-2 level.
>
> Dr. Franklin is not bilingual at this time... [She] is, however, presently undertaking language training and I would request she be exempt from language requirements until she meets them in the near future...

[86] Dr. Franklin had already been a Chief of Division for about nine years within the Environmental Health Directorate, first as Chief of the Pesticides Division, 1981-84, and then Chief of the Environmental and Occupational Toxicology Division, 1984-90. She had substantial experience as a manager but was a physiologist, not a physician. Dr. Liston had once worked with Dr. Franklin regarding a toxicity problem in Atlantic Canada and he testified that he had found her "very helpful". The comment regarding her strong managerial abilities was based on information provided to him by Dr. Somers.

[87] As will be discussed again below, the job description or "Statement of Qualifications" to which Dr. Liston referred in his memo, was ultimately only prepared on March 25, 1991, and made effective retroactively to October 1990; it did not contain a requirement that the Director be a licensed physician. The bilingual requirement was specified as "non-imperative".

[88] September 27, 1990: Dr. Chopra wrote a letter to Dr. Liston articulating his request to be appointed to the position of Director of the Bureau of Human Prescription Drugs, as well as suggesting that Health Canada should appoint someone with "substantive experience" in the work involved, implying that the results of appointments in the past, of individuals who were not acquainted with the inherent operational difficulties of the Bureau, had been disappointing.

[89] September 28, 1990: Dr. Liston replied in writing to Dr. Chopra's letter by stating that he had discussed Dr. Chopra's interest in the position with Dr. Somers. Dr. Liston pointed out in his response that Dr. Somers had shown an interest in filling the position with "someone with a medical background".

[90] On the same day, Dr. Liston sent a memo to Deputy Minister Catley-Carlson, requesting that the appointment of Dr. Franklin be for a four-month period.

[91] October 4, 1990: Dr. Somers wrote a letter to Dr. Chopra informing him that "we have made interim arrangements for Dr. C. Franklin to act in this position".

[92] October 10, 1990: Dr. Chopra replied in writing to Dr. Somers, thanking him for the information provided and adding:

> However, at your convenience, I would very much appreciate knowing on what specific counts, in your view, did I fail to meet the desired qualifications for this position. This would assist me in better preparing myself for future consideration.

[93] Dr. Somers responded to this letter by telephone about two weeks later. According to Dr. Chopra, it was a difficult conversation in which Dr. Somers did not really provide the assistance which Dr. Chopra sought, but rather spoke in a very curt manner. Dr. Chopra recalled that Dr. Somers' initial explanation was that "some get it, some don't". Eventually, Dr. Chopra started pointing out that both he and Dr. Somers had come from England and joined Health Canada at about the same time, and Dr. Somers was now a Director, whereas Dr. Chopra had yet to be appointed to a management position. This led to his suggesting to Dr. Somers that preference in promotion had been given to British immigrants. The conversation ended quickly after that point. Dr. Somers did not give any evidence at any of the hearings, and the only proof of this conversation is based on Dr. Chopra's testimony.

[94] October 22, 1990: Dr. Chopra wrote a letter to the PSC raising the question of employment equity and whether, in filling the position of Director, Human Prescription Drugs, without competition, there had been discrimination against visible minorities. On the same day, the Deputy Minister approved Dr. Franklin's acting four-month assignment, to terminate on February 22, 1991.

[95] November 9, 1990: Health Canada responded to a request for information made by Dr. Chopra's union, the Professional Institute of the Public Service of Canada ("**PIPSC**"). Health Canada explained that Dr. Franklin had not been appointed to the position but rather assigned to act for a four-month period, without a formal competitive process. Consequently, there were no appeal rights arising from this assignment. The assignment was to be for this duration while the Respondent conducted enquiries to find a medical person to staff the position on an indeterminate basis. No qualified medical officer had been found for the four month acting assignment and Dr. Franklin was assigned to fill the acting position as she was considered better qualified than Dr. Chopra, based on her "strong management skills" and her being "more experienced".

[96] December 7, 1990: Dr. Chopra formally requested the opinion of the PSC on the issue of whether making the appointment without competition had prejudicially affected his opportunity for advancement.

[97] January-February, 1991: Health Canada created a new term EX-02 Director position for the Bureau of Human Prescription Drugs, with the same qualifications as the MD-MOF-05 position, except that it eliminated the requirement that the Director be a licensed physician. According to the Respondent, arrangements had been made for those duties requiring a licensed physician and formerly carried out by the Director, to be looked after outside the Bureau.

[98] February 23, 1991: Dr. Franklin's term as Acting Director ended, but she was immediately reassigned on an acting basis to the term EX-02 Director position referred to above, for four more months. On March 25, 1991, the Deputy Minister of Health Canada authorized the creation of this EX-02 director's position, retroactive to October 19, 1990, one day before Dr. Franklin was first assigned to act as Director. The vacant MD-MOF-05 position would continue to co-exist until September 10, 1991, when it was officially deleted.

[99] April 10, 1991: In response to Dr. Chopra's request of December 7, 1990, the PSC gave its opinion that his opportunity for advancement had been "prejudicially affected" by the acting appointment without competition of Dr. Franklin, particularly considering that both Dr. Chopra and Dr. Franklin did not have a license to practice medicine in Canada. The PSC apparently accepted that since Dr. Franklin's assignment had been renewed, after four months, it was now to be treated as an "appointment" and therefore, could be the object of an appeal, pursuant to the *Public Service Employment Act*.[(19)] After receiving the PSC's opinion, Dr. Chopra filed an appeal against the Respondent, pursuant to Section 21 of that *Act*, claiming that in making the acting appointment, Health Canada did not comply with that *Act*, by exercising "prejudicial exclusion and denial of due opportunity for advancement".

[100] June 22, 1991: Dr. Franklin was again reassigned as Acting Director, in the EX-02 term position.

[101] July 9, 1991: Dr. Chopra's appeal was heard by Helen Barkley of the Public Service Commission Appeal Board and her decision was handed down on July 19, 1991.[(20)] She concluded that according to the *Public Service Employment Act*, where the appropriate management officers consider it is in the best interests of the Public Service to make an appointment without conducting a competition, a PSCAB may not overrule the decision unless it is "so unreasonable that no reasonable person could form that opinion".[(21)] She further found, at page 12 of the decision, that:

> ... it was not unreasonable for Dr. Somers to conclude that Dr. Chopra failed to meet... [the necessary qualifications of management experience]. The appellant [Dr. Chopra] had very limited line management experience during his 20 years in the Department, and management experience acquired more than 20 years ago might well not be relevant to this position. Having made the determination that the appellant did not meet one of the qualifications for the position, there was no requirement for the Department to assess him further.

[102] However, Ms. Barkley allowed the appeal on the separate ground that the Department had not demonstrated that Dr. Franklin was fully qualified for the position of Director, namely that she did not meet the linguistic profile for the position and that she did not satisfy three of the four

components of the knowledge qualification.[(22)] Counsel for the Respondent suggested to me that this finding was reached in part because Dr. Somers failed to have Dr. Franklin testify before Ms. Barkley, being in the mistaken belief that the hearing was not intended to examine the qualifications of Dr. Franklin. However, this explanation was apparently provided in an affidavit of Dr. Somers which was filed in the Federal Court, during proceedings instituted by Dr. Chopra in December, 1991, further described below. As this is not evidence which was led before me or the Soberman Tribunal, I do not lend much weight to it.

[103] Nevertheless, and despite the protests by Dr. Chopra and the President of the PIPSC union, Ms. Iris Craig, Dr. Franklin continued to act in the position of Director for the subsequent two months. The Respondent argued, however, that Departments do not ordinarily take action after a PSCAB decision, until the PSC issues a directive. Such a directive for remedial action was issued in this case on August 22, 1991, requiring that Dr. Franklin's acting appointment cease on September 20, 1991. The PSC in a letter to Ms. Craig, later explained that these delays were due to "administrative problems.

[104] September 20, 1991: In spite of the PSC's directive, Dr. Franklin apparently continued to act in the position of Director beyond this date. The Respondent asserted that she was merely assigned to cover the duties of the position until completion of the formal selection process for the new acting appointment, and that her presence was essential as there was an ongoing strike being conducted at that time by the Public Service Alliance of Canada which was particularly disruptive at the Bureau of Human Prescription Drugs. In effect, the Respondent claimed that there was no realistic and effective alternative for the staffing of the position at that time and that in any event, a senior staffing officer of the PSC had only nine days earlier found Dr. Franklin to be fully qualified for the position of Director.

[105] This explanation is again only supported by declarations in affidavits which were filed in the same Federal Court proceedings referred to earlier. As this evidence was not heard by this Tribunal, and this in spite of the fact that one of the deponents, Ms. Gael McLean, testified before me without ever referring to those issues, I will not draw any conclusions therefrom.

[106] The fact remains that Dr. Franklin continued to act in the position of Director beyond the period specified in the Directive of the PSC.

[107] September 30, 1991: In light of her ongoing presence in the position of Director, Dr. Chopra informed the PSC that he wished to appeal her continuing appointment.

[108] October 17, 1991: Mr. Robert Cousineau, Executive Director of the PSC, responded to Dr. Chopra in writing, informing him that Dr. Franklin's appointment was terminated on September 20, and that two competitive processes would be conducted. The first one would be for a four month acting appointment and the second for an indeterminate appointment. In the meantime, Mr. Cousineau explained that Dr. Franklin retained the responsibilities of the Director's position at her "substantive level", which would mean that she remained at the classification and salary she held before moving to the Bureau of Human Prescription Drugs, yet filled the position of Director on a basis less formal than an assignment. The consequences of

this informal arrangement, according to Mr. Cousineau, were that there was no appointment or proposed appointment against which an appeal could be filed.

[109] October 25, 1991: The PSC announced an internal competition for the indeterminate appointment to the position of Director of the Bureau of Human Prescription Drugs. The language requirement was "bilingual imperative". The knowledge component was also modified in a manner which Dr. Chopra contends made the requirements less restrictive. The competition was restricted to employees occupying a position at or above the SM (Senior Management) level, that is, those who already occupied an entry level management position such as chief of a division. Dr. Chopra's classification of VM-04 was one level below SM and he was therefore not eligible to apply.

[110] October 29, 1991: Dr. Chopra responded to Mr. Cousineau's letter of October 17, 1991, by conveying his disagreement with the conclusion of the PSC to accept without objection that Dr. Franklin could continue working in effect as Director while technically maintaining her previous substantive position. He was frustrated to find that Dr. Franklin, who had already been found "not fully qualified" by the PSC, had again been "appointed", without a due consideration of his candidacy. Dr. Chopra closed his note by expressing his opinion that these actions of the Respondent represented a flagrant violation of his rights to equity and declared the following:

> Please consider this letter to be my last plea for fairness, from both the Public Service Commission and Health and Welfare Canada. Should it be ignored I shall be left no option than to initiate legal proceedings.

[111] November 25, 1991: At the suggestion of the Personnel Administration Branch of Health Canada, Dr. Liston addressed a memo to Dr. Chopra referring to the latter's interest in acquiring senior management experience. Dr. Liston recommended, based on information which he had sought out from the Personnel Administration Branch, that Dr. Chopra could benefit from the services of the Diagnostic and Career Counselling Service ("**DACS**") of the PSC. Although the service was limited to executives, Dr. Liston declared that if Dr. Chopra was interested, he was prepared to put forward Dr. Chopra's nomination thereby assuring him of entry into the program. Dr. Liston enclosed a brochure regarding the DACS and he provided the name and phone number of a person to be contacted for additional information.

[112] November 28, 1991: Dr. Chopra wrote back to Dr. Liston, thanking him for his memo and declaring that he would be pleased to give DACS "a try". Dr. Liston responded with a hand written note explaining that he had suggested this career counselling because he had himself undergone "something similar" recently and found it extremely useful.

[113] December 4, 1991: Dr. Chopra still objected to the acceptance by the PSC of Dr. Franklin's continued employment in the Director's position as well as its running of the competition for the indeterminate position to the exclusion of non-senior managers like himself. The PSC and the Respondent had not implemented any changes in spite of the intervention of Dr. Chopra's union, the PIPSC. Consequently, and in accordance with his declared intentions, on December 4, 1991, Dr. Chopra filed an application with the Federal Court seeking an order revoking Dr. Franklin's appointment.

[114] February 4, 1992: In late January 1992, Dr. Liston's secretary contacted Dr. Chopra to arrange a meeting on February 4. The two met alone and the following day, Dr. Chopra wrote down "minutes" of the meeting, which were entered into evidence. Dr. Liston testified that he was not aware of these minutes nor had he ever seen them. He did not take any notes himself nor does he recall Dr. Chopra taking any.

[115] The main discussion, according to Dr. Chopra, was about his qualifications for a management position. Dr. Liston asked him why he had not applied for a management position. Dr. Chopra replied that no competitions had been held in the Branch. The Complainant gave evidence that Dr. Liston agreed with the proposition that Dr. Chopra was qualified for employment somewhere between the EX-01 and EX-02 levels. Dr. Chopra recalled that Dr. Liston was "ostensibly convinced" that he may have been denied an equal opportunity for advancement and assured him that he would be given an opportunity to compete in the future. The Assistant Deputy Minister also assured Dr. Chopra that the court proceedings would not be held against him.

[116] Dr. Liston's recollection of the meeting differs somewhat. He testified that the Personnel Administration Branch of Health Canada asked him to inquire as to why the Complainant had not followed up on the DACS career counselling which Dr. Liston had suggested to him in his memo of November 25, 1991. This was the only intended topic of discussion and, according to Dr. Liston, it was Dr. Chopra who expanded the discussion beyond the scope of career counselling. Dr. Chopra's minutes confirm that Dr. Liston raised this matter at the opening of the meeting. Dr. Liston denies having told Dr. Chopra that he had been refused an equal opportunity to compete for the position of Director, Human Prescription Drugs. Although Dr. Liston recalls having accepted Dr. Chopra's suggestion that he could function at the EX-01 to EX-02 levels, he claims it was merely a "polite response" to an unexpected question which caught him off-guard. According to Dr. Liston, with the information which he had at that time, he was not in a position to accurately give such an assessment. Ultimately, there is no question that this meeting did occur and that a discussion regarding Dr. Chopra's advancement into management did ensue.

[117] In the Complaint, Dr. Chopra declared that he found "threatening" Dr. Liston's suggestion about the DACS career counselling as well as his assurance that the pending legal proceedings would not impact on Dr. Chopra's career. Dr. Chopra explained in his evidence that he "perceived [the comments] as a threat", in part because Dr. Liston repeated these points several times. However, he made no mention of this perceived threat in the minutes which he had recorded.

[118] February 13, 1992: In the days following the meeting with Dr. Liston, Dr. Chopra and Health Canada reached a settlement regarding his application before the Federal Court seeking the revocation of Dr. Franklin's appointment. The agreement was approved by an order of Mr. Justice Joyal on February 13, 1992, and contained the following essential terms:

- Dr. Franklin would be immediately assigned to other duties;

- Health Canada would formally request to the PSC that it conduct an entirely new competition to staff the indeterminate position of Director of the Bureau of Human Prescription Drugs;

- Dr. E. Somers would be excluded from any involvement whatsoever in the staffing and selection process of the competition.

[119] With respect to the first condition, Dr. Franklin was assigned to a new position. Dr. Chopra expressed dissatisfaction with this posting, claiming that she had been "placed directly under the Deputy Minister on a totally new program", the implication being that this was a "special position" and demonstrated favouritism towards her.

[120] March 16, 1992: Dr. Chopra filed a grievance under his collective agreement alleging contravention of its non-discrimination clause, in that from October 22, 1990 onwards, he had been "subject to discrimination, restriction, interference and harassment (abuse of authority) by reason of [his] ethnic origin".

[121] March 6-20, 1992: The PSC announced an internal competition for the position of Director of the Bureau of Human Prescription Drugs. Those eligible were employees who occupied a position at EX minus 1 level or above, thus including employees such as Dr. Chopra at the VM-04 level. The language requirement was "bilingual imperative". The knowledge component was again changed from that included in the previous statement of qualifications which had been announced on October 25, 1991. In Dr. Chopra's opinion, this change further broadened the scope of the required qualifications, thereby assisting Dr. Franklin in being screened in.

[122] A Public Service-wide MRIS search and circulation of a bulletin advertising the vacancy elicited eighteen candidates for screening purposes, including Dr. Michele Brill-Edwards, Dr. Chopra and Dr. Franklin. Dr. Brill-Edwards had been the Acting Assistant Director-Medical to the previous Director, Dr. Johnson, prior to his departure, as well as under Dr. Franklin, during her tenure as Acting Director.

[123] March 31, 1992: The Screening Board assigned to review all the candidates and determine which candidates did not satisfy the basic requirements for the position, screened out Dr. Chopra on the grounds that he did not possess the necessary management experience, namely that his experience was not "recent". Although the statement of qualifications for this competition referred only to management experience without any allusion to how current it had to be, the screening guide added the term "recent" to each of the three required types of experience. The evidence shows that of the ten individuals screened out for lack of management experience, only Dr. Chopra was excluded for lacking *recent* management experience. Some persons were screened out, however, for lack of recent experience in the other two experience categories.

[124] In keeping with the February 1992, settlement out of court, Dr. Somers did not sit on the Screening and the Selection Boards for this competition, and he was replaced by Dr. Liston. Dr. Franklin and Dr. Brill-Edwards were screened in, but subsequently, Dr. Brill-Edwards was found not to be qualified for the position, while Dr. Franklin was found to be qualified. The linguistic profile of Dr. Franklin had changed since August 1991, when she had successfully

passed French language evaluation tests, qualifying her as bilingual to the level specified in the statement of qualifications for the position.

[125] Dr. Chopra contends that the bilingual language requirement was initially waived in the first statement of qualifications, which was made effective October, 1990, in order to assist Dr. Franklin in getting the acting appointment, and that the requirement was put in place again once she had passed her language test. On the other hand, Ms. Gael McLean, who coordinates staffing at Health Canada, testified that it is very common for acting appointments to not require the more stringent language qualifications because, being temporary in nature, a greater flexibility can be exercised. Indeed, Ms. Helen Barkley of the PSCAB in her decision of July 19, 1991, indicated that the applicable rules allow for such an exemption but only for a period not exceeding four months. Dr. Franklin's appointments had exceeded this period. With respect to both of the indeterminate competitions for the position of Director - Human Prescription Drugs (October, 1991 and March, 1992), Ms. McLean claimed that it was always the intention of the Respondent to maintain the bilingual imperative requirement, which is the norm regarding EX appointments in the Public Service.

[126] In addition, the Complainant claims that the changes in the knowledge component of the qualifications for the position were also made so as to ensure that the difficulties encountered as a result of Ms. Barkley's decision of July 19, 1991, would not recur and that Dr. Franklin would be qualified and therefore, screened in.

[127] April 21, 1992: Because Dr. Franklin was the only candidate to qualify, her appointment as Director was confirmed by the PSC, and Dr. Chopra and Dr. Brill-Edwards appealed that decision to the Public Service Commission Appeal Board.

[128] July 27, 1992: Gaston Carbonneau, of the Public Service Commission Appeal Board, delivered his decision, dismissing both appeals.[(23)] His findings included the following:

- it was a management prerogative of the Department to reorganize the Bureau of Human Prescription Drugs to eliminate the need for a licensed physician either as Director or Assistant Director; it had not acted improperly in establishing the new classification and selection profile for the position of Director;

- the Screening and Selection Boards acted in good faith and without bias, and their conclusions, including the screening-in and selection of Dr. Franklin as Director, were not unreasonable;

- Dr. Chopra did not possess the necessary management experience at the time he was screened out.

[129] Dr. Chopra and Dr. Brill-Edwards applied to the Federal Court to have Mr. Carbonneau's decision set aside. On November 23, 1993, Mr. Justice Frederick E. Gibson of the Federal Court handed down his judgment, dismissing their application. He found that there was no reason to interfere with the Appeal Board's holding that the selection criteria used by the Selection Board reflected the full duties of the position, that Dr. Franklin was properly screened in and that she

was properly selected. He ruled that, generally stated, the PSCAB did not err in failing to find a breach of the principle of staffing on the basis of merit. The Court did not discuss Dr. Chopra's qualifications nor his being screened out in the selection process.[(24)]

[130] The Commission and the Complainant submit that little or no deference should be given to the outcome of that appeal process because at that time, neither Dr. Chopra nor Mr. Carbonneau were aware of the comments of Dr. Liston in the memo prepared by Shirley Cuddihy, discussed below, and what influence the opinions expressed therein may have had on Dr. Liston's decisions. Significantly, Mr. Carbonneau noted in his ruling that Dr. Liston was involved in the earlier staffing processes for this position as well as the current one and that the most recent requirements for the position were established by the hiring manager, Dr. Liston.[(25)]

[131] September 1, 1992: Pursuant to the filing by Dr. Chopra of his grievance on March 16, 1992, Deputy Minister Catley-Carson conducted a hearing on August 12, 1992, which constituted the final level of the grievance process within the Department, before moving on to the Public Service Staff Relations Board. Several people were in attendance at the hearing including Drs. Liston and Somers, as well as PIPSC representative, Danielle Auclair, and Ms. Shirley Cuddihy, Chief of Staff Relations Operations in the Human Resources Directorate at Health Canada. During this hearing, Dr. Chopra asserted that he had been denied promotion to the EX level because of racial discrimination. After the hearing, the Deputy Minister requested from the Human Resources Directorate the opinion of senior management as to why Dr. Chopra had not been promoted to the management levels, and Ms. Cuddihy was assigned to this task.

[132] Ms. Cuddihy therefore met with Dr. Liston and Dr. Somers, each separately, on August 27, 1992. Ms. Cuddihy took personal notes from the conversations with each person and incorporated them into a memo ("**Cuddihy Memo**") which she sent to her supervisor, Rod Ballantyne, by electronic mail, on September 1, 1992. The extracts of the memo which relate to these conversations are as follows:

> As promised, my notes from my conversations with Drs. Liston and Somers.
>
> Dr. Liston provided comments of both a broad nature and as well relating specifically to S. Chopra.
>
> General:
> Employees who are being considered solely for "technical" positions seem to fare better than when being considered for "management" positions. The cultural differences are minimized when we are only looking for the scientific approach. However when we start looking for the "soft skills" such as communicating, influencing, negotiating - quite often their cultural heritage has not emphasized these areas and they are at a disadvantage.
>
> Abilities to intereact [sic] with a number of stakeholders, such as industry as well as internally with peers, subordinates and superiors are important. As well we do business in the North American Way - "consensus reaching model" which to some cultures is very foreign.

> Dr. Liston has apparently had a number of discussions with Ivy Williams on the issue. There is however a bit of a paradox in highlighting what we consider needs to be changed because we run the risk of having to defend ourselves against charges of assimilation. He suggests that we need to provide minority groups with training - we need to point them in a direction of a mirror and say: because of your cultural background, you need to communicate better or adopt a less authoritarian style. It is not a color but a culture problem nor is it a Branch or even a department problem but appears to be most common in departments such as ours which are technically/scientifically oriented.
>
> Specifics relating to S. Chopra.
>
> He is authoritarian.
>
> He saw in [Shiv Chopra] a great textbook knowledge and thought he could build on the "soft skills". [Shiv Chopra] had a confrontational style the effects of which became apparent only sometime after his arrival in the staff position reporting to Dr. Liston. People avoided him after a period rather than being being [sic] challenged by him.
>
> [Shiv Chopra] is not a negotiator - he doesn't make allies easily.
>
> He has not placed himself in a position for grooming to senior management level positions.
>
> DR. SOMERS INTERVIEW
>
> There is very little concrete from my encounter with Dr. Somers. The one objective and useful piece of information relates to a theme indicated by Dr. Liston and concerns the lack of initiative displayed by [Shiv Chopra] to compete for progressively more senior positions. They provided me with a list of some 13 positions which [Shiv Chopra] could have competed for but resisted. These would be the same that Gael [McLean] would have sworn out in her testimony.

The "testimony" of Gael McLean referred to in the memo would have been related to the Federal Court proceedings in the case I have referenced as *Chopra No. 5*, before Mr. Justice Gibson.

[133] Dr. Liston does not deny having this meeting with Ms. Cuddihy, but he disputes her explanation for the purpose of the meeting. From his perspective, Ms. Cuddihy was meeting him regarding the Visible Minority Advisory Committee ("**VMAC**"). The VMAC had been created by Deputy Minister Catley-Carlson in 1991, with a mandate to provide advice regarding the recruitment, retention and promotion of visible minorities at Health Canada, in response to a concern about their under-representation at certain levels within the Department. The committee was chaired by Ms. Ivy Williams, who was a visible minority, and was also composed of representatives from each branch. Dr. Chopra had been named to the VMAC to represent the Health Protection Branch by Dr. Liston, who was himself a member of this committee.

Ms. Cuddihy was assigned to provide administrative support to the VMAC, and according to Dr. Liston, when she requested a meeting, he assumed it was in order to elicit suggestions to be possibly incorporated into the recommendations of the committee. Dr. Liston pointed to the general nature of the first portion of the memo as evidence that the discussions related to the VMAC and not the Complainant. Dr. Liston claimed that he was surprised when Ms. Cuddihy eventually shifted the focus of the discussion to Dr. Chopra. Dr. Liston also testified that at that time, he was not shown the memo nor was he aware of its existence.

[134] It is important to note here that Dr. Chopra also had no knowledge of the existence of this memo nor of its contents, when he filed the Complaint with the Commission. He only became aware of the document years later, when he obtained a copy from the Respondent, pursuant to a request under the *Access to Information Act*.[(26)] I would also note that the Adjudicator of the Public Service Staff Relations Board who eventually heard Dr. Chopra's grievance, filed March 16, 1992, ultimately ruled on March 9, 1994 that he did not have jurisdiction to consider the grievance because Sub-section 91(1) of the *Public Service Staff Relations Act*[(27)] only permits this course of action in matters in respect of which no other administrative procedure for redress is provided in or under an Act of Parliament. The Adjudicator's finding that, in the case of Dr. Chopra, the *CHRA* does provide for such redress was ultimately upheld by the trial division of the Federal Court of Canada in a decision handed down on August 31, 1995.[(28)]

[135] September 16, 1992: Dr. Chopra filed the present individual complaint with the Canadian Human Rights Commission, alleging adverse differential treatment by the Respondent based on his race, colour and national or ethnic origin, contrary to Section 7 of the *CHRA*. The particulars of the Complaint relate principally to the events from 1990 to 1992 regarding the position of Director of Human Prescription Drugs. Reference is also made to the manner in which his performance appraisals were handled during the same period, and other differential treatment.

D. Other Events of Alleged Personal Discrimination against the Complainant

[136] In the Complaint, Dr. Chopra alleges that he was treated unfairly in the manner in which his performance appraisals were prepared during this 1990 to 1992 period, and that he believes that he received this treatment because of his colour, race and national or ethnic origin. In his final arguments, Counsel for the Commission also referred to another competition in 1993, as well as an incident involving a union steward and a grievance filed against the Complainant, subsequent to the filing of the human rights complaint, as evidence of ongoing discrimination. I note that aside from the performance appraisals issue, these matters were not referred to by the Soberman Tribunal in its decision, even though all of the evidence relating thereto was presented in the first set of hearings.

(i) 1991 and 1992 Performance Appraisals

[137] Dr. Chopra's performance review and employee appraisal for the year ending March 31, 1991 was prepared in April 1991, by his supervisor, Dr. Yong. Under the heading, "Skills/Abilities/Suitability Factors", is the following description:

> As usual, Dr. Chopra proved to be a good asset to HSD [Human Safety Division]. His ability at effective communication, interpersonal skills, discretion, tact, courtesy and willingness to adapt contributed to a very good harmony and efficiency of HSD. His communications with clients, particularly industry, was commendable.

Under the next heading, "Factors Affecting Performance", the following positive comments were typed in:

> Dr. Chopra *is an energetic and resourceful worker and required little* supervision.
>
> *Dr. Chopra is willing to undertake new and challenging work*. He *possesses a considerable* management *experience which*, within the mandate of HSD, could not be *fully utilized*. Apparently, since his last appraisal, he has been trying to seek other opportunities in the Department and elsewhere. However, due to restraint and other difficulties, no substantive opportunity seems to have arisen for him. Nevertheless, it is hoped that the situation may improve in the future in which the Department could find for him a more suitable assignment, which is more fully commensurate with his qualifications and potential. [italics added]

However, in the photocopy tendered in evidence before the Soberman Tribunal, the italicized words were stroked out by pen. The words [Dr. Chopra] "works with little direct" [supervision] were penned in above the first sentence. Above the third sentence, the words [He] "has expressed interest in" [management] "but..." were penned in, replacing the previous reference to "considerable management experience". As the Soberman Tribunal pointed out, these changes were not explained in evidence, and although Dr. Chopra asserted that the handwriting was that of Dr. Ritter, the Director of the Bureau of Veterinary Drugs, neither Dr. Ritter nor any other witness was called to confirm this assertion.

[138] Dr. Chopra's performance review and employee appraisal for the following year, 1991-1992, which was prepared in April 1992, apparently went through several drafts. The first version contained the following statement:

> Dr. Chopra works with little direct supervision. While he has expressed an interest in management, *no suitable post or assignment is available for him in the Department*. [italics added]

A series of redrafts followed that were the subject of disagreement between Dr. Chopra and his superiors. Dr. Chopra gave evidence that he agreed to the above initial wording prepared by his Division Chief, Dr. Yong, but Dr. Yong said at the time that he would need to consult first with the Bureau Director, Dr. Ritter. In a second version, the italicized words above were deleted and the following words were substituted:

> ... he did not apply for an acting Chief position available in the Bureau. Neither conference attendance, nor participation in Bureau's exhibit has been requested by Dr. Chopra.

Dr. Chopra objected to this wording, and after several redrafts, in the final version it appears that the original wording was restored.

[139] Each version of the appraisal also included the following "Employee Comments" by Dr. Chopra:

> Department was asked to provide experience in a senior management position, either by acting appointment or under DAP. Although numerous positions existed and appointments were made for others, no such opportunity was provided to me. No reasons were given.

[140] Dr. Chopra submitted in his closing arguments that these actual and attempted modifications to his performance appraisal were made by the Respondent with the intention of preparing its defence to his emerging claim of discriminatory treatment.

(ii) December 1993 - Competition for the Position of Director - Bureau of Veterinary Drugs

[141] In December 1993, Dr. Chopra applied for the competition to fill the position of Director of the Bureau of Veterinary Drugs, classified at the EX-02 level. He testified that he had viewed the poster advertising this competition prior to submitting his application. His candidacy was screened out by the screening board which determined that he did not meet two of the three experience factors listed on the statement of qualifications for the position: (i) experience in managing a scientific or medical or veterinary organization with multi-faceted programs, and (ii) experience as a departmental representative with outside organizations including media and international organizations. With respect to the first criterion, his experience was not considered recent, as required by the screening guide set up by the screening board, and regarding the second qualification, it was determined that there was no evidence of his having had any experience in dealing with the media on behalf of Health Canada. Dr. Timothy Scott was found to be the only fully qualified candidate and was appointed to the position.

[142] Dr. Chopra appealed the appointment alleging that his qualifications and those of Dr. T. Scott were not adequately assessed. On November 14, 1994, Ms. Helen Barkley of the Public Service Commission Appeal Board dismissed the appeal.[(29)] In her ruling, Ms. Barkley found that Dr. Chopra's dealings with the media were as a private citizen and on social issues, not as a departmental representative, and that, in any event, "he did not have the managerial experience required for the position". She further held that she found no evidence of bias on the part of either of the screening board members, Ms. Francine Krueger of the PSC and Dr. Saul Gunner, the Director General of the Food Directorate, under which was located the Bureau of Veterinary Drugs.

(iii) Incident Involving a Union Steward

[143] Dr. Chopra contends that a defamatory remark was made against him by Dr. Gunner, in 1993, subsequent to the filing of this human rights complaint and he considers this event to constitute additional circumstantial evidence of the "boardroom racism" being practised against him. Apparently, some time after the Bureau of Veterinary Drugs was assigned to the Food

Directorate, the Director-General, Dr. Gunner, met with the PIPSC steward, Mr. D. R. Casorso, and inquired as to the existence of any "union problems" at the Bureau. During this conversation, Dr. Gunner questioned Mr. Casorso about Dr. Chopra's case. In a subsequent group meeting of several members of the union, Mr. Casorso recounted the elements of this discussion, including the reference to the Complainant. Dr. Chopra was upset that personal matters about him were not raised directly with him and consequently, filed a grievance seeking a "recognition of the inappropriateness of Dr. Gunner's conduct" toward him. Following an apology by Mr. Casorso, and as "a gesture of good faith", Dr. Chopra later withdrew his grievance.

(iv) Dr. Drennan's Complaint against Dr. Chopra

[144] On December 6, 1993, Dr. Chopra was provided with many documents relating to him, pursuant to an Access to Information request which he had filed. He discovered amongst the many papers, a memorandum which had been prepared on July 23, 1990, by Dr. W. Drennan, who also worked at the Bureau of Veterinary Drugs, and which was still present in his personal file. It was addressed to Dr. Yong, and consisted of a complaint that, on July 11, 1990, Dr. Drennan had confronted Dr. Chopra regarding the latter's having failed to proceed promptly with the issuance of a certain drug to treat poultry in Saskatchewan. Apparently, Dr. Yong concluded at the time that the complaint was unfounded and that Dr. Chopra had not acted inappropriately. He therefore did not follow up on the memorandum, but unfortunately, it remained in Dr. Chopra's file. Several months after the memorandum was sent, Dr. Yong informed Dr. Chopra of the complaint during the preparation of his 1990-91 performance appraisal, but Dr. Chopra apparently had no knowledge that the memorandum had found its way into his personal file.

[145] Upon discovering the memorandum, Dr. Chopra immediately expressed his concern to the Respondent that its presence in his file may have tarnished his reputation and that he was never informed of its existence. He consequently filed a grievance on April 28, 1994, requesting an investigation into the matter and the removal of the memorandum from all his files. The then Assistant Deputy Minister of the Health Protection Branch, Dr. Kent Foster, formed a committee to investigate the issues. The committee concluded that Dr. Chopra had not acted inappropriately regarding the matter raised in the memorandum, and also found that Dr. Yong should have properly disposed of the memorandum rather than allowing it to remain in Dr. Chopra's file. The committee did however determine that the presence of the memorandum in his file could not have detrimentally affected his career. Following the investigators' report, Dr. Foster upheld the grievance and took measures to prevent such situations from recurring.

[146] Dr. Chopra's concern with this incident, as it relates to the present human rights complaint, is that the verbal exchanges which occurred between him and Dr. Drennan, on July 11, 1990, came only two days after Dr. Chopra had written to the Chairperson of the PSC, with a copy to Deputy Minister Catley-Carlson, voicing his concerns about employment equity in the federal public service as well as his frustration in not having been approached by Health Canada or any other government organization for a management position. Furthermore, Dr. Chopra contends that the presence of the memorandum in his file had some bearing on the above mentioned handwritten changes which were made to his performance appraisals of 1991 and 1992.

V. STATISTICAL AND OTHER EXPERT EVIDENCE

[147] During the second set of hearings, five expert witnesses testified. The Commission called two expert witnesses in chief, Ms. Erika Boukamp-Bosch and Dr. Nan Weiner. Health Canada responded with the expert testimony of Dr. Shirley Mills and Ms. Judith Davidson-Palmer. Mr. Alan Sunter was called by the Commission to testify in reply. I will deal separately with the evidence of each of the two experts who testified in chief, and refer along the way to any relevant evidence arising from the other experts and from any other sources. All five of these witnesses were accepted by me as experts in various fields.

[148] Ms. Boukamp-Bosch has a Master of Arts degree from Carleton University, in anthropology (1978). From 1988 until 1999, she worked for the Canadian Human Rights Commission, initially as a Senior Analyst at the Employment Equity Branch, and, beginning in 1992, as the Chief-Statistical Analysis. These positions involved the development and analysis of employment equity data with respect to employers in the federally regulated sector, both private and public. Shortly before testifying in June 1999, she ceased working for the Commission and established a private consulting firm advising various employers regarding their compliance with the *Employment Equity Act*.[(30)] Although she does not have a formal university degree in statistics, she testified as to her extensive professional experience in the use of statistics as well as to several courses which she took while pursuing a Ph.D. in sociology. She has produced two employment equity manuals for the Commission. I ruled that she was qualified to testify as an expert in *employment equity data and the statistical analysis thereof*.

[149] Dr. Weiner studied at the University of Minnesota where she obtained a Bachelor's degree in Business Administration (1969), as well as a Master's degree and a Ph.D. in Industrial Relations (1974 & 1977). From 1990 to present, she has operated her own consulting firm, specializing in workplace equity issues, including diversity, employment equity, pay equity and harassment, and providing services in program implementation, training and research. From 1987 to 1990, she worked with the Ontario Pay Equity Commission as a job evaluation consultant. She was qualified to testify in this case as an expert in *systemic discrimination, staffing and staff development systems*.

[150] Ms. Davidson-Palmer has a Bachelor's degree from Mount Allison University, in Psychology and Sociology, and a Master's degree in Psychology from Queen's University. Since 1984, she has headed a firm providing consulting services in matters relating to human resources, including classification and compensation, pay equity, employment equity and human rights. She was also qualified to testify in this case as an expert in *systemic discrimination, staffing and staff development systems*.

[151] Dr. Mills has Bachelor's and Master's of Science degrees in Mathematics and Statistics (1969 & 1970), from the University of Manitoba. She also holds a Ph.D. in Statistics and Applied Probability from the University of Alberta (1983). She has taught at several universities and, since 1988, has been an Associate Professor in the Mathematics and Statistics Department of Carleton University. She testified as an expert in *statistics*.

[152] Mr. Sunter has a Bachelor of Science degree in Mathematics from Carleton University (1963). For most of the period between 1965 and 1981, he worked at Statistics Canada, serving both as Director of the Business Survey Methods Division as well as Senior Research Advisor. Since his departure from Statistics Canada, he has consulted in the field of statistics, for numerous agencies around the world. He testified as an expert in *statistics*.

A. The Evidence of Ms. Boukamp-Bosch

[153] Ms. Boukamp-Bosch studied employment data, principally for the 1987-1993 period, and concluded that an insufficient number of visible minorities were employed at the EX level at Health Canada during this period, when compared to the available pool of visible minority employees. She also found that an insufficient number of visible minorities were appointed to the EX level, during the same period. She based herself on data which she procured from the PSC, Health Canada and the Treasury Board Secretariat ("**TBS**"), much of which was obtained through requests under the *Access to Information Act*.[(31)] The report of Ms. Boukamp-Bosch which was entered into evidence in the present case is similar to the report which she filed in the case of *National Capital Alliance on Race Relations (NCARR)* v. *Canada (Health and Welfare)*,[(32)] in which she reached similar conclusions, and some of the data from the first report were also relied upon in the second.

[154] Dr. Mills took issue with Ms. Boukamp-Bosch's usage of data from three disparate sources (i.e., PSC, TBS and Health Canada), and in particular, her failure to compare and reconcile the three data sets. Dr. Mills claimed that as a result of this omission, Ms. Boukamp-Bosch ended up comparing " apples and oranges". Mr. Sunter, on the other hand, pointed out that the three sets of data did not so differ as to qualify as "disparate", noting they all had a common origin in terms of the groups of employees to whom the information related. Mr. Sunter observed that the differences in the data from one source to the next were marginal, and using one instead of another in Ms. Boukamp-Bosch's calculations would yield negligible differences having no bearing on the conclusions which she drew. I do not consider Ms. Boukamp-Bosch's use of varied data sources a sufficiently significant issue to dismiss her entire testimony and report outright.

[155] The data often provide information relating to visible minorities which is collected on the basis of self-identification by visible minority employees themselves. Ms. Boukamp-Bosch suggested that although there is a tendency for some visible minorities to not report themselves as such, this "under-reporting" is probably limited to non-EX levels. She did not provide a satisfactory foundation for this statement and I find no reason to conclude that EX employees under-report any differently than non-EX employees.

[156] Occasionally during Ms. Boukamp-Bosch's testimony, several errors in her calculations were raised by counsel for the Respondent and acknowledged by the witness, who thereafter, modified her report accordingly. Although one could argue that certain conclusions could be drawn from this as to the validity or quality of her entire report, I am disinclined to do so. I found the witness was accepting (albeit at times, reluctantly) of any errors brought to her attention and I see no reason to set aside her evidence because of these errors.

[157] Ms. Boukamp-Bosch reached her conclusions based on her study of the representation of visible minority members amongst the entire EX employee population at Health Canada during a specified period and their representation in the appointments made during the same period. She also relied upon her review of the occupational backgrounds of EX employees.

(i) Representation of Visible Minorities amongst the EX Population at Health Canada (Static Analysis)

[158] Ms. Boukamp-Bosch conducted this part of her study through the following series of steps.

Step 1 - The determination of the relevant occupational groups and "feeder groups"

[159] In order to determine whether a sufficient number of visible minorities are present within a designated area of employment (in this case, the senior management EX levels), Ms. Boukamp-Bosch explained that one must first ascertain from which occupational groups and at what levels, an employer may reasonably be expected to hire or promote employees to that area. These levels constitute the "feeder groups" to the EX category. Ms. Boukamp-Bosch's analysis consisted essentially of determining the percentage of visible minority employees present in the feeder groups (that is, their "representation", also referred to as their "availability for promotion" to EX) and comparing this rate with the percentage of visible minority employees who are actually employed in the EX category (that is, the actual visible minority representation at EX).

[160] Ms. Boukamp-Bosch determined the feeder groups based on a table called the "MRIS Equivalency Table", which was dated September 1, 1993. Apparently, this table was prepared by the PSC for the implementation of the same Management Resource Information System discussed earlier in this decision, and consisted of a listing of certain occupational group levels as they relate to the various EX levels. Thus, the Veterinary Medicine row on the table shows that a VM-05 employee is considered to be working at an "EX-01 equivalent level" (or "EX-equivalent"), and consequently, a person at the VM-04 level is considered to be an "EX minus one" and a VM-03, an "EX minus two". The table dates from 1993 and therefore, there is no mention of the SM level which, as explained earlier, constituted the lowest senior management rank until approximately 1991, at which time that level was eliminated. Nonetheless, any reference in this discussion to entry into the EX category should be considered to also include the SM level with respect to the relevant period.

[161] Ms. Boukamp-Bosch identified these EX equivalent, EX minus one and EX minus two level occupational groups as constituting the feeder groups to the EX category. According to her, this definition of the feeder groups conforms to the actual staffing practices of the PSC. There was evidence adduced regarding the job backgrounds of EX employees in 1994 which demonstrates how some employees acceded to that level from EX minus one occupational levels. Indeed, Dr. Chopra was able to compete in the second competition for the position of Director - Human Prescription Drugs, conducted in March 1992, precisely because he was a BI-04, which was classified as EX minus one, the level to which the competition was opened.

[162] Ms. Boukamp-Bosch selected from the MRIS equivalency table those occupational groups which were "relevant" to Health Canada, meaning presumably, those groups which are actually

employed in the Department. She made this determination based on the employment information as of March 31, 1993. Occupational groups in the Federal Public Service are organized into five categories: Scientific and Professional ("**S&P**"), Administrative and Foreign Service ("**A&FS**"), Technical, Administrative Support and Operational. The occupational groups selected by Ms. Boukamp-Bosch as feeder groups came from only two of those categories: twenty from S&P and eleven from A&FS. She then pooled the data from all three feeder levels (EX equivalent, minus one and minus two) of the total of thirty-one feeder groups which she had selected. Although there are fewer employees at the EX equivalent level than at either of the lesser tiers, this grouping meant that the employees at the lowest feeder pool level were considered to be as likely to be promoted as those at the highest level. In fact, Ms. Boukamp-Bosch gave more weight, in her calculations, to the lower levels, to take into account their larger populations.

[163] The Respondent disagreed with Ms. Boukamp-Bosch's method of determining the feeder groups for numerous reasons:

- Ms. Boukamp-Bosch defined the feeder groups based on employment data of March 31, 1993. The Respondent pointed out that the makeup of the workforce changes continuously and some occupational groups may no longer be reflected at Health Canada, or, in Ms. Boukamp-Bosch's terms, "relevant", from one day to the next. This is apparent in Ms. Boukamp-Bosch's report prepared for the *NCARR* case in which she relied on employment data from a different date in 1993, to determine the feeder groups, and came up with only seventeen relevant occupational groups from S&P, instead of twenty.

- The Respondent submitted that since EX vacancies are usually staffed on a national and interdepartmental basis, it is wrong to limit the feeder groups to only those present at Health Canada at any given time. Instead, any of the feeder groups listed in the MRIS equivalency table as eligible for an EX appointment should be considered to be an occupational group from which Health Canada may reasonably be expected to hire or promote at the EX level.

- On the other hand, when Ms. Boukamp-Bosch restricted her selections to the "relevant" occupational groups, she failed to consider the historical data with respect to appointments to the EX level. The evidence demonstrates that members from some of the feeder groups which she selected had never been appointed to the EX level at Health Canada. For instance, Ms. Boukamp-Bosch included Lawyers (LA classification) in her list of feeder groups even though there was no evidence that any lawyer had ever been promoted to EX in the Department.

- Some occupational groups were included in the relevant feeder groups even though they are unlikely, for financial reasons, to opt to become an EX, at least at the lower levels. Reference was specifically made to Medical Officers (MD-MOF) whose salary scales are so elevated that it is unlikely they would ever opt for any EX position below the EX-3 level.

- Ms. Boukamp-Bosch assumed that all appointments to the EX category should reasonably be expected to come from the ranks below EX. However, many of the staffing actions in the EX group are filled by employees who are already EX. Of the 102 appointments made between 1987 and 1993, 35 were filled by EX employees. Therefore, the Respondent submitted that her analysis should have included data from the EX category as a feeder group to itself.

- Similarly, EX competitions are sometimes open to persons from outside the Federal Public Service, yet they were not included in the feeder groups which formed part of Ms. Boukamp-Bosch's analysis. Of the sixty-five persons appointed by competition to EX positions at Health Canada, between 1987 and 1993, eight came directly from outside the Federal Public Service.

- The pooling of the data from the EX-equivalent, minus one and minus two levels ignores the reality of which groups are more likely to feed the EX category. The figures produced by Ms. Boukamp-Bosch indicate that there were few appointments to the EX category directly from the EX minus two level, and of those, the majority were to SM entry level management positions, prior to the elimination of that level, around 1991. The Respondent added that it would have been of greater assistance to have data regarding those employees who had actually presented themselves for EX competitions and study the success rate of visible minorities as compared with non-visible minorities. This *applicant flow* type of analysis was not provided by Ms. Boukamp-Bosch.

[164] The Commission's expert, Mr. Sunter, dismissed the Respondent's concerns regarding the determination of the feeder groups. He suggested that many of these alleged flaws were of little consequence with regard to the overall results demonstrating a large disparity between the percentage of visible minorities in the feeder pools and the percentage of visible minorities actually employed or promoted to the EX group during the relevant period.

Step 2 - The determination of the representation rates - Availability for promotion

[165] Ms. Boukamp-Bosch then reviewed the employee data of the feeder groups, with respect to Health Canada employees as well as those of the entire Federal Public Service, including Health Canada, and found that in 1993, the representation of visible minorities at the feeder levels was as follows:

Table 1

REPRESENTATION OF VISIBLE MINORITIES AT FEEDER LEVELS

Within Health Canada		**Entire Federal Public Service including Health Canada**	
Scientific & Professional Category	Administrative &	Scientific & Professional Category	Administrative &

		Foreign Service Category		Foreign Service Category
EX equivalent	12.5%	0.0%	8.6%	2.9%
EX minus 1 & 2	13.5%	2.8%	8.8%	3.0%
Weighted Combined Average	13.3%	2.7%	8.8%	3.0%

[166] As these figures demonstrate, there is clearly a much higher representation of visible minorities in the S&P category than in the A&FS category, both within Health Canada alone and in the Federal Public Service overall. Furthermore, there is a higher representation at the EX minus one and two levels than at the EX-equivalent level, although the gap is not as wide. It should be noted that the data regarding the S&P category are effective March 31, 1993, whereas those of the A&FS category are effective September 30, 1993. As will be discussed in greater detail below, the dates bear some significance because a substantial portion of the Department was transferred to other departments, at some point between these two dates, thereby affecting some of the figures.

Step 3 - Division of the data between S&P and A&FS categories

[167] According to Ms. Boukamp-Bosch, 75% of EX employees at Health Canada, "would be expected to be recruited" from the S&P category and 25% from the A&FS. She testified that her basis for this assumption was principally a document which had been faxed in 1994 by an employee at Health Canada, Ms. Rose Kloppenburg, to a lawyer formerly employed by the Commission, Ms. Lakshani Rami. Ms. Boukamp-Bosch later obtained a copy of this document from Ms Rami. Neither Ms. Kloppenburg nor Ms. Rami testified in the present case.

[168] The document apparently lists the occupational groups and levels of several EX employees prior to their entry into management. At the end of the list is the following statement:

> Approximately 86/115 positions are of a scientific/medical nature versus an administrative or corporate services one.

Ms. Boukamp-Bosch interpreted this remark as implying that 86 of 115 (or 74.8%) of EX employees were appointed from the Scientific and Professional category and the remainder from Administrative and Foreign Services. She drew support for this inference from the number of employees in the feeder groups in each category, as of March 31, 1993: according to her initial calculations, as stated in her report, 838 S&P employees out of a total number of 1094 employees (76.6%) were in the S&P category. After her cross-examination, she agreed that these figures should be modified down to 648 of the 904 employees in the feeder group (or 71.7%), which still yielded a difference of only about 3% from the 74.8% figure which she had derived

from the faxed document. As a result of this reduction, she accepted that a 70/30 S&P vs. A&FS distribution would also be appropriate. Ms. Boukamp-Bosch continued to maintain that the majority of appointees should be expected to have scientific backgrounds considering that the core areas of business of Health Canada were scientific.

[169] However, evidence adduced by the Respondent undermines the reliability of Ms. Boukamp-Bosch's assumption. It was never clearly established what the 86/115 figure actually represents, although Ms. Kloppenburg's supervisor, Ms. Gael McLean, suggested in her testimony that the reference in the fax to "administrative or corporate services" and "scientific/medical" concerned the nature of the EX employees' current activities at the management level. Thus, those persons whose current functions were not "corporate" in nature (such as security, finance, contracts, human resources) were referred to as "scientific/medical".

[170] While one could argue that this interpretation of the fax is an attempt, after the fact, to weaken the Commission's evidence, the Respondent presented an analysis of the 102 appointees to EX positions in the 1987 to 1993 period which indicated that the backgrounds prior to being first appointed to the EX/SM category, for 75 of the appointees, was A&FS (or 73.5%). If one is to restrict the analysis to the 65 appointments which were conducted by competition, during this period, 42 (or 64.6%) had an A&FS background. According to Ms. McLean, at Health Canada, it is only at the Health Protection Branch that there is a concentration of EX employees with a S&P background. She and other witnesses suggested that since EX positions are managerial in nature, it is more likely that an individual who has acquired certain job skills from employment in the Administrative and Foreign Services category, will be hired.

[171] Finally, it must be pointed out that prior to the departmental split which occurred in mid-1993 whereby the "welfare" component of Health and Welfare Canada was removed, the Respondent also dealt with matters which were not health-related, such as Old Age Security. This point is of particular significance with respect to Ms. Boukamp-Bosch's determination that 71.7% of the feeder groups at Health Canada were composed of employees from the S&P category, since this finding was made using A&FS data from September 30, 1993, after the split of the Department. The Respondent presented the A&FS figures for the same date as those of the S&P category (March 31, 1993) and this comparison yielded a substantially different result: 64.2% S&P employees versus 35.8% A&FS, in the feeder groups.[(33)] This result takes into account the over one hundred A&FS employees who presumably had ceased working at Health Canada by September 30, 1993, after the departmental split, and demonstrates, according to the Respondent, that it is erroneous to assume that there was a health or scientific component present throughout the Department, particularly in the period being studied by the experts, prior to 1993.

[172] As demonstrated in the earlier discussion, regarding Step 2, the rate of representation of visible minorities at the feeder groups in the A&FS category is considerably lower than in the S&P category. The determination of which ratio to use in Step 3 is therefore very significant. Ms. Boukamp-Bosch's choice of the 75% S&P / 25% A&FS split gave the following results with respect to the availability of visible minorities for promotion to EX:

Availability from within Health Canada:

0.75 x 13.3% [S&P availability] = 9.975%

0.25 x 2.7% [A&FS availability] = 0.675%

Total: 10.66 % or **10.7%**

Availability from within Federal Public Service:

0.75 x 8.8% [S&P availability] = 6.6 %

0.25 x 3.0% [A&FS availability] = 0.75%

Total: 7.35% or **7.4%**

However, if one were to utilize the 65% A&FS / 35% S&P ratio, as suggested in the Respondent's evidence, the results change substantially:

Availability from within Health Canada:

0.35 x 13.3% [S&P availability] = 4.66%

0.65 x 2.7% [A&FS availability] = 1.76%

Total: 6.42% or **6.4%**

Availability from within Federal Public Service:

0.35 x 8.8% [S&P availability] = 3.08%

0.65 x 3.0% [A&FS availability] = 1.95%

Total: 5.03% or **5.0%**

Step 4 - Availability for promotion to EX

[173] The final step involved in Ms. Boukamp-Bosch's determination of visible minority availability to EX consisted of combining the findings from feeder groups within Health Canada alone with those from the entire Federal Public Service (including Health Canada, incidentally). She elected to make these combinations in proportions varying from 80% Health Canada / 20% Federal Public Service, to a ratio of 50%/50%. Ms. Boukamp-Bosch's reasoning for calculating these varying proportions was that the feeder pool within Health Canada was, in her consideration, very large. One could therefore entertain the possibility that up to 80% of the appointments could be made from within the organization. She suggested that a smaller department with fewer persons in its feeder pools is more likely to hire from outside the organization.

[174] In addition, as indicated earlier, Ms. Boukamp-Bosch did not factor in any data regarding visible minority availability outside the Federal Public Service as, in her opinion, the level of external hiring at the EX level was too low to warrant such consideration.

[175] Ms. Boukamp-Bosch calculated the estimates of visible minority availability for promotion to EX in the following manner, based on the assumption that the visible minority representation within Health Canada is 10.7% and within the entire Federal Public Service is 7.4% (See Table 2):

Table 2

ESTIMATES OF VISIBLE MINORITY AVAILABILITY FOR PROMOTION TO EX

Distribution Health Canada/ Federal Public Service	Method of Calculation	Visible Minority Availability Estimates
50/50	(.50 x 10.7%) + (.50 x 7.4%)	9.1%
55/45	(.55 x 10.7%) + (.45 x 7.4%)	9.2%
60/40	(.60 x 10.7%) + (.40 x 7.4%)	9.4%
65/35	(.65 x 10.7%) + (.35 x 7.4%)	9.5%
70/30	(.70 x 10.7%) + (.30 x 7.4%)	9.7%
75/25	(.75 x 10.7%) + (.25 x 7.4%)	9.9%
80/20	(.80 x 10.7%) + (.20 x 7.4%)	10.0%

These calculations are therefore based on the premise that the distribution of feeder groups to EX at Health Canada should be 75% S&P and 25% A&FS, as discussed in Step 3. If these proportions were modified in the manner suggested by the Respondent (35% S&P and 65% A&FS), the data would yield an availability estimate ranging between 5.7%[(34)] and 6.1%.[(35)]

[176] In any event, the Respondent considered unjustified any distribution of the data between Health Canada and the Federal Public Service. It pointed to the evidence of Ms. Black, the PSC senior resourcing officer, that, to her knowledge, EX competitions at Health Canada were interdepartmental and national in scope and that no priority was given to candidates from Health Canada. The Respondent also argued that it is inconsistent to consider the possibility of non-Departmental employees gaining EX employment at Health Canada, while failing to study how many Health Canada employees, including visible minorities, were hired to EX positions outside Health Canada. For this reason, the Respondent suggested that the only valid internal availability figure is the one for the entire Federal Public Service, which would include the data from Health Canada.

[177] Finally, the Respondent pointed out that the data provided by Ms. Boukamp-Bosch demonstrated that over the six fiscal year periods covered (1987-88 to 1992-93), Health Canada employees constituted between 18% and 62% of EX appointments in the Department. In only

three of the six years was the Health Canada portion of the appointees in excess of 40%, although in each of those three, it was at about the 60% to 62% level. It should be noted, however, that of those EX employees working at Health Canada as of March 31, 1987, and therefore appointed before the periods being reviewed, 61% had been appointed to the EX group from within Health Canada.

Step 5 - Determining the representation of visible minority employees in the EX category

[178] Ms. Boukamp-Bosch calculated the percentage of EX employees who were members of a visible minority group, for each of the fiscal years between 1987 and 1993, and obtained the following results (See Table 3):

Table 3

PERCENTAGE OF EX EMPLOYEES WHO WERE MEMBERS OF A VISIBLE MINORITY GROUP

Fiscal year	Number of Visible Minority EX Employees	Total Number of EX Employees	Percentage of Visible Minority Representation
1987-88	4	159	2.5%
1988-89	4	162	2.5%
1989-90	4	168	2.4%
1990-91	4	173	2.3%
1991-92	3	152	2.0%
1992-93	4	148	2.7%

[179] Ms. Boukamp-Bosch observed that these percentages, which did not surpass 2.7%, were substantially lower than the visible minority availability in the feeder groups which she had calculated to be between 9.1% and 10.0%. According to her estimates, these availability figures meant that one would have expected an actual representation of visible minority employees in the EX category of between 13 to 17 persons. Instead, as the above table demonstrates, there were never more than four visible minority EX employees at Health Canada, in any of the annual periods. Based on these findings, Ms. Boukamp-Bosch concluded that visible minority employees were significantly under-represented in the EX category at Health Canada.

[180] She found this under-representation more remarkable inasmuch as a review of the data regarding the visible minority population, within the entire S&P category, showed that visible minority employees were concentrated in higher proportions at the feeder levels than their non-visible minority colleagues. For instance, in 1990-91, 41.4% of all visible minority employees in the S&P category at Health Canada, were concentrated in EX feeder group levels. Over the same period, only 30.1% of non-visible minority Health Canada employees in the same category were working at EX feeder levels. Ms. Boukamp-Bosch perceived these numbers as suggesting there were barriers to employment which prevented the movement of visible minority employees into the EX category at Health Canada.

[181] Health Canada responded that it was wrong to use 1993 visible minority availability figures (ie. 9.1% to 10.0%) to estimate the expected EX representation in each of the preceding six years. In 1987-88, when the representation of visible minorities was 2.5%, was the availability for promotion in the feeder groups as elevated as in 1993, so as to be able to conclude that they were under-represented? Mr. Sunter's answer consisted of reviewing the data and calculating the average availability in the S&P category over the six-year period. He determined that the availability, in that category solely, merely dropped from 13.3% to 12.7%. He felt this change was not significant enough to warrant a modification in Ms. Boukamp-Bosch's calculations.

[182] However, the Respondent asserted that even if the availability percentages for the 1987 to 1993 period were somehow accurate, the figures which the Commission presented, indicating the total number of EX employees in a given year, likely included individuals who were appointed prior to 1987, perhaps as many as ten years before, and there is no way of knowing what the visible minority availabilities were at that time. In other words, visible minority availability today may be 10%, but if it was 3% when many of the EX employees were appointed, there was no under-representation in the appointment process, at that time.

[183] In addition, the Respondent raised the fact that these data do not detail how many of the appointments were due to reclassifications, lateral transfers and other methods where appointments are not drawn from the feeder groups, as defined by Ms. Boukamp-Bosch.

(ii) Representation of Visible Minority Employees in EX Recruitment (Flow Analysis)

[184] Ms. Boukamp-Bosch obtained data from the PSC indicating that of the 102 appointments in the EX category between 1987 and 1993,[(36)] none was of a visible minority. Evidence later adduced by the Respondent demonstrated that two of the appointees were in fact self-identified members of a visible minority. Nonetheless, based on her 1993 availability figures (9.1% to 10.0%), Ms. Boukamp-Bosch would have expected 10 or 11 visible minority members to have been appointed.

[185] She also found that between fiscal years 1987-88 and 1989-90, approximately 60% of the persons appointed to EX positions at Health Canada came from postings within the Department, but that by 1992-93, that percentage had dropped to 18.2% while those hired from other departments made up 63.6% of all appointments. According to her, this would have had a disproportionate impact on visible minority members since their representation in the feeder groups outside Health Canada is lower than within Health Canada, particularly inside the S&P category.

[186] The Respondent contended that the recruitment analysis should have been limited to the 65 actual promotional opportunities in this period, the remainder having consisted of reclassifications, where there is already an incumbent in the position, or priority appointments and lateral transfers, where the movement creates an EX vacancy elsewhere in the system. On this basis, and using the availability figure suggested by Health Canada of 5.7% (see Step 4), one would have expected, using Ms. Boukamp-Bosch's methodology, 3.7 visible minority members to have been recruited, a difference of only 1.7 from the actual number. Health Canada submitted

that considering the small numbers involved, this difference was not "statistically significant", a notion which I discuss in some detail below.

(iii) Occupational Background of EX Employees

[187] Ms. Boukamp-Bosch sought to make certain findings based on the occupational backgrounds of persons who were employed at Health Canada in the EX/SM category, at some time during the 1987-93 period, and who formed part of the S&P ranks, prior to their EX appointment. Unfortunately, she was only able to obtain data with respect to 58 managers. She was not able to confirm if the data were representative of the entire EX group nor when each of the individuals was appointed, before or after 1987, and what the visible minority availability was at the time of their respective appointments. I find that in the absence of such evidence, no conclusions can be drawn reliably from these data.

B. The Evidence of Dr. Nan Weiner

[188] Like Ms. Boukamp-Bosch, Dr. Weiner testified before the Canadian Human Rights Tribunal in the *NCARR* case, and many portions of the report which she prepared in the present instance were derived from the one which accompanied her testimony in that case. In her evidence, she discussed systemic discrimination in general and how it interacts with interpersonal discrimination. She also explained that statistical evidence of under-representation of a certain group may serve to support the hypothesis that discrimination against that group is occurring.

[189] She noted that the under-representation of non-whites at senior managerial levels often is a function of North American society's developed images of a manager as a tall, white man, coupled with the fact that most managers do indeed match this expectation. Discrimination within promotional systems, she added, reflects the cultural norms which dictate that the power structure should continue to be predominantly white and male, and are enacted by the behaviour of individual decision makers. She referred to these norms as the "glass ceiling" which is found in many public and private sector organizations, a term originally coined to describe the "invisible barrier" to entry by women to corporate executive ranks, which has since been expanded to encompass obstacles to visible and other minorities. These barriers to advancement include the clustering of certain groups in jobs which are not "career track to the top", the application of special or different standards for performance evaluations and testing, as well as a lack of management training, career development, access to rotational job assignments and mentoring. Dr. Weiner referred to a report prepared by the Visible Minority Consultation Group to the Secretary of the Treasury Board and the Employment Equity Council of Deputy Ministers, entitled "Distortions in the Mirror: Reflections of Visible Minorities in the Public Service of Canada", dated January 22, 1993, which alluded to the presence of these barriers in the Federal Public Service of Canada.

[190] Dr. Weiner testified that many of these factors appeared in the employment history of Dr. Chopra at Health Canada. Unfortunately, in reaching these conclusions, she did not have the benefit of reviewing the transcripts from the Soberman Tribunal's hearings, but rather relied on a summary of that evidence, which Counsel for the Commission had prepared for her. The

Respondent took issue with the manner in which many of the facts had been presented in that document and noted that by the time the second set of hearings had ended, much additional evidence had been presented, rendering the content of the summary even more incomplete. More importantly, I find that much of this discussion led to inferences which the Tribunal could draw on its own, and is therefore, of limited assistance.

[191] However, Dr. Weiner had the opportunity to actually review at least one exhibit, the Cuddihy Memo, which she described as an illustration of individual discrimination supporting the organizational problem. For instance, she explained that Dr. Liston's reference to the "cultural heritage of some groups not emphasizing soft skills such as communicating, influencing, negotiating", which puts them "at a disadvantage", is consistent with a common stereotype that assumes all members of a particular group are the same, denying the possibility of variance within the group. In cross-examination, she agreed that it is not discriminatory to recognize that cultural differences do exist and should be understood and talked about in order to develop ways of working with each other. Such discussion may, in fact, serve to assist minorities in gaining promotions rather than obstruct them. However, she pointed out that the phrasing of the Cuddihy Memo did not favour such an interpretation, but rather implied that a person with a "cultural difference" would have to conform to the mainstream if that person wanted to succeed.

[192] As a specific example of a systemic barrier at work in the Federal Public Service, Dr. Weiner pointed to the use of acting appointments which may provide an unfair advantage in subsequent competitive processes. The 1992 Public Service Commission Annual Report indicated that employees who had received acting appointments were four times more likely to receive a subsequent promotion than those who had not. Although on its face, any impropriety in the use of acting appointments for staffing would apply to visible minorities and non-visible minorities alike, Dr. Weiner suggested that the informality associated with this process could result in discrimination through the tendency of hiring managers to select persons similar to themselves. The exclusion of visible minorities from acting appointments compounds the discrimination in place by denying them a role model and thereby discouraging them from seeking out acting positions for themselves, as well as by obviously preventing them from gaining managerial experience as a qualification for a subsequent promotional opportunity.

[193] In order to relate these problems concerning acting appointments to the situation at Health Canada, Dr. Weiner relied upon a survey conducted by Dr. Jeffrey Reitz, in 1995, amongst the members of Dr. Chopra's union, the PIPSC, who were employed as professionals or scientists at Health Canada. The study sought to compare visible minorities and non-visible minorities with respect to acting appointments and other career-related activities. For instance, the study found that 10.2% more whites than visible minorities had served in an acting position. Amongst the Reitz survey's other findings were that whites were more likely to be told of training opportunities, to serve on selection boards, to receive career development training and to have supervisory responsibilities.

[194] Dr. Reitz testified about this survey in the *NCARR* case, but, unfortunately, he did not appear before this Tribunal. A copy of his study was simply attached to Dr. Weiner's report as one of the appendices. Counsel for the Respondent objected to the use of the study as evidence in

this case, arguing that the denial of the opportunity to cross-examine Dr. Reitz would be unfair to his client.

[195] Numerous questions were raised during the hearing with respect to the methods used in coming up with the survey's results. The greater concerns lay in the low response rate to the survey (34.2%) without any follow up having been made, which the Commission's expert, Mr. Sunter, agreed calls for caution, as well as in the fact that it was not established whether those who did respond were representative of the entire population being surveyed.

[196] Furthermore, the Reitz study itself became the subject of a fascinating debate amongst the experts regarding the question of whether the differences in the results between whites and non-whites identified in the survey were "statistically significant". Statistical tests exist whereby the results from a survey sample can be extrapolated to apply to the entire population. These tests will yield a plus or minus range or "variance" for each result, which is a measure of the inherent variability in the sample. This variability would be demonstrated if a sample of a similar number of individuals were to be surveyed the following day and yet yield different results. The above mentioned range derived from the testing conducted by Dr. Mills was at a confidence level of at least 95% (meaning that the outcome of the testing is considered accurate 19 times out of 20). If the ranges of two different results overlap each other, the possibility exists that the figures could in fact be equal. For example, although the survey indicated that 38.6% of visible minorities and 45.7% of whites reported receiving career development training, a difference of 7.1%, when tested statistically, the "plus or minus" variances related to each of these results yield two ranges which overlap each other such that the difference between the two results effectively disappears. It therefore becomes possible that in fact the two results are equal. According to Dr. Mills, of those questions in the Reitz survey where sufficient data were available to perform the statistical testing, only two yielded statistically significant differences. Dr. Sunter suggested she was testing to an unnecessarily high level of confidence, noting that if that level was dropped to 80%, the differences between the groups would be maintained.

[197] In light of the questions concerning the reliability of Dr. Reitz' survey and the absence of his testimony in this case, I have decided to not take into consideration the evidence of Dr. Weiner which was founded thereon pertaining to the systemic issues of acting appointments and the lack of encouragement of visible minority employees, at Health Canada.

[198] In her evidence, Dr. Weiner also referred to Ms. Boukamp-Bosch's report and concluded that the figures produced therein suggested the presence of discrimination in the "promotion process". She pointed to the representation rates of visible minorities at the EX level and noted that they fell short of the 80% utilization rate which, according to both experts, is considered acceptable in the employment equity field. The "utilization rate" reflects the representation of visible minorities at the EX level, as a proportion of their availability for promotion (representation divided by availability). However, Dr. Weiner's findings were conditional on the validity of Ms. Boukamp-Bosch's methodology and calculations. For instance, Dr. Weiner was not aware that Ms. Boukamp-Bosch had included lateral transfers and reclassifications in her EX appointments data. Dr. Weiner testified that she would not have incorporated this information. She also did not question Ms. Boukamp-Bosch's approach in determining the feeder groups.

[199] Furthermore, the Respondent's expert, Ms. Davidson-Palmer, disputed the use of the 80% rule in this case, pointing out that it should only be applied where a more detailed study of actual competitions has been conducted, which would examine the actual number of visible minority applicants together with their qualifications for the positions staffed. Ms. Davidson-Palmer asserted that this "qualitative analysis" was lacking from the overall approach adopted by Ms. Boukamp-Bosch and followed by Dr. Weiner. It is only after a review of who was realistically eligible for the promotions, who actually applied and what the outcome was, that one should examine if there is an under-representation of visible minorities. Ms. Davidson-Palmer conceded, however, that concern about the possible presence of systemic discrimination is warranted where the overall approach, such as that used by Ms. Boukamp-Bosch in this case, calculates a utilization rate which is significantly lower than 80%.

VI. THE LAW

[200] In the Complaint, Dr. Chopra alleges that the Respondent is in breach of Section 7 of the *CHRA* which states the following:

> It is a discriminatory practice, directly or indirectly,
>
> a) to refuse to employ or continue to employ any individual, or
>
> b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 3 provides that race, colour and national or ethnic origin are prohibited grounds of discrimination.

[201] The burden of proof rests on the complainant to establish a *prima facie* case of discrimination.[(37)] A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.[(38)]

[202] In *Shakes* v. *Rex Pax Ltd.*,[(39)] it was held that in the case of a complaint of discrimination in an employment selection process, a *prima facie* case is made out where the following is demonstrated:

> d) that the complainant was qualified for the particular employment;
>
> e) the complainant was not hired; and
>
> f) someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

This multi-part test was modified, in *Israeli* v. *Canadian Human Rights Commission*,[(40)] to address situations where the complainant is not hired and the respondent continues to look for a suitable candidate. The *Shakes* and *Israeli* tests will not appropriately identify the elements of a *prima facie* case in every employment-related case,[(41)] and there is therefore some flexibility in choosing and applying the most suitable test.

[203] Once the *prima facie* case is established, the burden then shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. If the respondent provides such an explanation, the complainant has the eventual burden of demonstrating that the explanation provided was merely a pretext and that the true motivation behind the employer's actions was in fact discriminatory.[(42)]

[204] It is not necessary that discriminatory considerations be the sole reason for the actions in issue, in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors for the employer's decision.[(43)] The standard of proof in discrimination cases is the civil standard of the balance of probabilities.

[205] There are some obvious difficulties in proving discrimination. As the Canadian Human Rights Tribunal stated in *Basi*, at paragraph 38481:

> Discrimination is not a practice which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised.

A tribunal should therefore consider all circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination".

[206] The test which is applicable when considering circumstantial evidence was summarized by Beatrice Vizkelety in her text, *Proving Discrimination in Canada*:[(44)]

> The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard [of preponderance of the evidence], may therefore be formulated in this manner: 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.

[207] In his ruling remitting the present case back to this Tribunal, Mr. Justice Richard explained that statistical evidence of a systemic problem of discrimination may be adduced as circumstantial evidence to infer that discrimination probably occurred in a particular individual case as well.[(45)] He referred to the following passage, at page 156 of Ms Vizkelety's text:

> By contrast to evidence of specific conduct or misconduct on the part of the respondent at other times, a complainant may seek to introduce evidence pertaining to general personnel practices or to the overall composition of the employer's workforce, ... for the purposes of demonstrating that the respondent is engaging in a pattern or standard practice of discrimination. If proved, the fact

> finder will then be asked to infer from such general circumstances and other supporting evidence that discrimination probably occurred in the complainant's particular case as well.

[208] Counsel for the Commission, referring to the Ontario Board of Inquiry decision in *Blake* v. *Mimico Correctional Institute*,[(46)] submitted that statistical evidence of a pattern of discriminatory treatment of a group, such as visible minorities in the case before me, may be sufficient alone to establish a *prima facie* case of discrimination against an individual. However, the Board of Inquiry in that case also specified that this occurs only in cases where the statistical evidence effectively shows "such gross disparities" in the treatment of the groups, that the disparities are unlikely to be the result of random selection.

[209] Several decisions regarding cases alleging direct discrimination, in which circumstantial statistical evidence was led, have held that there must be additional evidence presented, linking the data to the specific acts of discrimination alleged, in order for a *prima facie* case to be made. In *Keats* v. *Newfoundland Tractor and Equipment Co.*,[(47)] the Newfoundland Board of Inquiry stated the following:

> Even if the statistical evidence here were sufficient to raise a *prima facie* case of general discriminatory practices against women by Newfoundland Tractor [the respondent], in order for Ms. Keats [the complainant] to succeed in her complaint it is necessary for her to link such general discriminatory practices to herself and the action on the part of Newfoundland Tractor which she complains of.

In support of this finding, the Board relied upon the decision of the Ontario Board of Inquiry in *Ingram* v. *Natural Footwear*,[(48)] which determined that:

> Again, presuming that the existence of a pattern of discriminatory practices was established on the evidence, it would then be necessary to take the next step of drawing a connecting link between the existence of the general practice and the particular incident in question. [...] The existence of such a [discriminatory] practice might be relevant, but would not be dispositive of the issue relating to the specific incident. By contrast, in the case of a class action [...] the establishing of the fact that the practice existed would settle the matter in favour of the Plaintiff class.

By "class action", the Board was referring to a complaint which is brought on behalf of a class, such as the complaint filed on behalf of women in *Action travail des femmes* v. *Canadian National Railway Company*.[(49)]

[210] The Canadian Human Rights Tribunal adopted a similar position, in the case of *Dhanjal* v. *Air Canada*[(50)]:

> In short, statistical evidence is useful, relevant and probative when it reveals a disparity in treatment toward members of a racial minority in the course of certain discriminatory decisions by the employer, as in hiring, promotions, dismissals,

discretionary decisions, etc. Statistical evidence must also have a direct relationship to the decision that is the subject matter of the complaint.

[211] In the context of the present case, therefore, even if the existence of systemic barriers to the promotion of visible minorities into the EX group was established, the Commission would be required to demonstrate a link between this evidence and the evidence, both direct and circumstantial, of individual discrimination in Dr. Chopra's situation, in order for a *prima facie* case to be established. However, the greater the disparity in the data between visible minorities and non-visible minorities, the less the necessity of other evidence, in order to make out a *prima facie* case.(51)

[212] Considering the above noted significance of statistical evidence in establishing a *prima facie* case of discrimination, I shall first discuss my findings regarding this evidence.

VII. ANALYSIS OF THE STATISTICAL EVIDENCE OF SYSTEMIC DISCRIMINATION.

[213] In the *Blake* decision, the Ontario Board of Inquiry conducted an extensive review of Canadian and American authorities, with respect to the use of statistical circumstantial evidence in cases of individual discrimination. The Board noted that a statistician should not be required to take into account every conceivably relevant variable and to ensure that every irrelevant variable that may possibly affect the statistical result is precluded from doing so. Moreover, demanding that human rights commissions not only hire experts to analyze data but also collect and compile it, would impose an excessive burden and expense. Consequently, such evidence may not be rebutted by mere assertions of irregularities, but rather respondents must demonstrate that these errors, omissions and weaknesses affected the statistical results in a systematic way.(52)

[214] The Commission argued that the criticisms levelled by the Respondent's witnesses against the expert evidence of Ms. Boukamp-Bosch and Dr. Weiner were of this nature, and that the alleged faults in the data, methodology and analyses performed by these witnesses had little effect on the essence of the findings that visible minorities faced systemic barriers to employment opportunities into the EX group at Health Canada, during the period reviewed, 1987 to 1993. The reply evidence of Mr. Sunter was intended to support this point and thus, much of his testimony for the Commission consisted of demonstrating that even when some of the "errors" were corrected, the results remained essentially unchanged.

[215] Nonetheless, I find that certain of the errors related to the Commission's expert evidence are serious.

A. Findings regarding Ms. Boukamp-Bosch's Evidence

(i) The Division of Data between S&P and A&FS

[216] The most important flaw in Ms. Boukamp-Bosch's evidence was her division of the data between S&P and A&FS (Step 3 of her analysis). Through what appears to have been no fault of hers, and probably as a result of a misunderstanding, Ms. Boukamp-Bosch incorrectly assumed that 75% of EX employees were appointed from jobs in the S&P category, which contains a higher visible minority population than A&FS. However, the evidence demonstrates that 65% to 75% of appointees to EX positions in the relevant period, depending on whether one looks at those selected by competition or by any method, in fact came from the Administrative & Foreign Service category.

[217] The Commission suggested that there is no reason to follow the historical pattern in conducting this statistical analysis, that in fact this history may be a function of discriminatory practices. That is, A&FS employees were preferred precisely because of the subtle forms of discrimination described by Dr. Weiner, such as the stereotyping which leads to expectations of what a manager should look or sound like. Accordingly, Ms. Boukamp-Bosch suggested that notwithstanding the previous patterns, 75% of appointments **should be expected** to be made from the S&P employee feeder pool. I am not convinced, however, that the practice of promoting from A&FS at Health Canada was associated with a discriminatory activity.

[218] The functions of EX level senior managers at Health Canada were not necessarily scientific in nature and were just as likely to be associated with administrative duties. While it may be true that those EX level positions at the Health Protection Branch were likely to contain a scientific component, the same cannot necessarily be said for the other branches. The Health Protection Branch was the only branch to have a regulatory mandate, that is, to administer specific pieces of legislation. As such, in Dr. Liston's words, this branch was the "scientific home" within the Department. Even if one were to suggest that promotions at each branch should stem from the levels below EX within that branch, the evidence shows that in the relevant six-year period (1987-93), there were only 15 EX appointments made at the Health Protection Branch, certainly limiting the opportunities for those within that branch who are only seeking EX appointments there. This would reinforce the Respondent's position that when studying the EX appointment process, the perspective must be broad in scope, extending beyond the confines of Health Canada alone. It should also not be forgotten that prior to 1993, the Department's responsibilities included matters relating to income security.

[219] Ultimately, one must accept that employment through each level in any large organization will necessitate following certain career paths. I see no reason to not accept that the qualifications for entry into the senior managerial levels may be better acquired through employment in the Administrative and Foreign Service category than in the Scientific and Professional category.

[220] Commission counsel pointed out that the Canadian Human Rights Tribunal panel in *NCARR* found that "there is a significant under-representation of visible minorities in the A&FS category in Health Canada" and that this is a "contributing factor to the very low numbers of visible minorities in senior management".[(53)] I discuss the effect of the *NCARR* decision's findings on this case below, but at this stage, it is important to state that absolutely no evidence was presented before me or the Soberman Tribunal with respect to the feeder groups to the A&FS category, the availability of visible minorities into that category and the rates of their

utilization therein. As I explain below, I can only rule on the evidence which has been presented before this Tribunal. I would also point out that the Tribunal in *NCARR* specified that a finding of under-representation at the A&FS category did not necessarily establish that there exists discrimination in Health Canada's recruitment practices for that category.[(54)]

[221] The consequences of the incorrect distribution between the S&P and A&FS categories are significant. Going from a distribution of 75/25 to 35/65 results in the availability from within Health Canada alone dropping from 10.7% to 6.4%. Availability from the entire Federal Public Service is also reduced from 7.4% to 5.0%.

[222] Step 4 of Ms. Boukamp-Bosch's analysis consisted of calculating availability at various levels of distribution between appointments from within Health Canada and from the entire Federal Public Service, in ratios ranging from 50%/50% to 80%/20%. If one were to subject the reduced availability figures mentioned in the preceding paragraph to the lowest end of this scale (50%/50%), the overall availability would be 5.7%. Even if one entertained the possibility that 60% of EX employees should have been hired from within Health Canada, which was apparently the historical pattern until 1990, the availability would still only be 5.9%. Given this historical pattern and the interdepartmental scope of EX staffing actions, I find that it would be unreasonable to expect more than about 60% of EX employees to be appointed from within the ranks of Health Canada. Nevertheless, even at the improbable ratio of 80% Health Canada/20% Federal Public Service, the overall availability would merely rise to 6.1%.[(55)]

(ii) The Determination of the Feeder Groups

[223] Ms. Boukamp-Bosch's failure to include EX employees themselves as part of the feeder group was inappropriate. The evidence showed that at least 25 of the 102 EX staffing actions in the relevant period were not entry level but rather at the rank of EX-02 or higher. It is not likely that people who do not have any management experience at their EX minus two positions, for instance, would have a realistic chance to compete successfully for the higher senior management positions, which may require the management of a workforce of one hundred or more individuals. It may be acceptable to include in the feeder group the EX minus one or two levels when assessing entry to the lowest levels of the higher group, but not so when extending the examinations to the higher EX levels.

[224] This is not to say, for instance, that individual EX minus one employees cannot possess the qualifications to be appointed to or, in other words, "feed" into an EX-02 position. The March-April 1992 competition for Director of the Bureau of Human Prescription Drugs was made open by the Department to candidates at EX minus one levels. Thus, the employer considered it possible for a candidate from that level to possess the necessary qualifications for a non-entry level EX position. It is incorrect to assume, however, that all employees at that level will have those qualifications so as to constitute a true feeder group to the higher EX levels. This problem in the analysis could have been avoided had a different form of analysis been conducted by the Commission's expert, as discussed below.

(iii) "Static" and "Applicant Flow" Analyses

[225] The Ontario Board of Inquiry in *Blake* described two of the methods of statistical analysis which may be used in discrimination cases, "static" analysis and "applicant flow" analysis. The five-step analysis conducted by Ms. Boukamp-Bosch followed the static approach. As the Board of Inquiry indicated in the following excerpt, applicant flow analysis is the preferred technique: (56)

> There are many methods of statistical analysis, some more appropriate in discrimination cases than others, but none which are flawless. The best method in cases of discrimination in hiring is the applicant flow analysis. This is the method used by the Commission in the case at hand. This involves proof of a disparity between the percentage of, for example, women among those applying for a position and percentage of women among those hired for the position. This approach is not always appropriate. One problem with this method can arise when an employer's discriminatory practices are so well known that no women bother even applying for the position.
>
> Another method is the static analysis method. This compares the percentage of women among those hired for a position with the percentage of women among qualified persons within the general population from which the employer would be expected to draw its employees. Choice of the appropriate labour pool and choice of the relevant variables is difficult. Poor choices may easily render the statistical analysis inaccurate or unreliable. Complex multiple regression analyses, which provide the ability to determine how much influence several factors such as sex, education and experience have on a variable such as promotion or salary are typically applied to these cases.
>
> (*References to external sources omitted*)

[226] As I have already indicated, I find that Ms. Boukamp-Bosch selected an inappropriate labour pool in her analysis. In addition, she did not factor in variables such as education and experience. These elements are essential when analyzing staffing actions at the highest level of an organization. The static portion of her analysis also failed to take into account an additional factor. Establishing the visible minority representation in 1988, for instance, by only viewing a snapshot of the EX population in that year means that most of the employees were appointed before that year, perhaps a decade or more. Not knowing what the visible minority availability was in the years that each of these persons was appointed does not assist in the establishment of circumstantial evidence of discrimination in the hiring process.

[227] Even the "flow" portion of Ms. Boukamp-Bosch's analysis, where she reviewed the 102 appointments between 1987 and 1993, was incomplete. The raw numbers may have indicated that a disproportionate number of non-visible minorities were promoted to the EX level during the relevant period, but were their visible minority peers equally qualified for these positions, in terms of education or experience, for instance? There is no way of knowing this from the data presented by Ms. Boukamp-Bosch. During her cross-examination, she agreed that the selection of managers is not a random draw but nonetheless, she did not seek out data on these additional

factors and in any event, she testified that she does not possess the expertise to conduct this sort of more detailed analysis.

[228] In addition, Ms. Boukamp-Bosch did not conduct any statistical testing of her findings. By comparing the percentage of visible minorities available in the feeder groups with the percentage of visible minorities employed at the EX levels, she determined that they were under-represented in that category. However, this analysis did not eliminate the possibility that the gap had occurred by chance. For this reason, as I explained during the discussion about the Reitz survey, statisticians conduct statistical testing in order to diminish the influence of chance on the results. Had such testing been performed in this case, the expected representation of visible minorities in the EX group could have been determined, within a plus or minus range, which would be accurate, for instance, 19 times out of 20. If the actual representation fell below this range, "statistically significant under-representation" would have been established.

[229] Ms. Boukamp-Bosch contended that running these tests on the figures collected in this case would have been "useless" because the numbers were "too small". The absence of statistical testing, however, implies that chance remains a factor influencing the results of her analysis. Ms. Boukamp-Bosch agreed with the proposal that small amounts of information can make it difficult to draw conclusions. I can only conclude that if the numbers are "too small", there is no logical justification for making any inference that discriminatory barriers exist against entry by visible minorities into the EX category.

[230] In addition, I agree with the finding in *Blake* that an applicant flow analysis is the more appropriate method of utilizing statistics in discrimination cases, particularly as they relate to hiring into supervisory or managerial levels. As pointed out by Beatrice Vizkelety: *Proving Discrimination in Canada*:[(57)]

> This type of evidence, usually regarded with much favour, has the advantage of describing the actual pool of candidates by contrast to the demographic data which tends to define a hypothetical pool of candidates; it also describes the pool of available candidates most closely situated to the selection process under attack, thereby heightening the reliability of the inferences which may be drawn from the disparities observed from one stage to the other.

(iv) Conclusion Regarding the Evidence of Ms. Boukamp-Bosch

[231] I find therefore that the statistical evidence put forward by the Commission through Ms. Boukamp-Bosch is of limited assistance in this case. Even if one were to set aside most of the issues I have just raised and to accept her methodology, while at the same time correcting for the distribution between the S&P and A&FS categories (5.9% availability at a 60% / 40% Health Canada / Federal Public Service ratio), the expected number of visible minority individuals to be appointed by competition to the EX category in the relevant period would have been expected to be between three and four out of the possible 65. The evidence is that at least two were appointed. Considering the effect of small numbers, as explained by Ms. Boukamp-Bosch herself, I do not find that there is any significant difference between the expected and actual results.

[232] Furthermore, even if this difference were significant, the disparity is so minor as to contribute very little to the establishment of a *prima facie* case regarding the Complainant's claim of individual discrimination.[(58)]

B. The Evidence of Dr. Weiner regarding Statistical Evidence of Discrimination

[233] My findings with respect to the evidence of Ms. Boukamp-Bosch have an obvious impact on the evidence of Dr. Weiner. Dr. Weiner's conclusion that "there is circumstantial evidence of systemic race discrimination against Dr. Chopra in his efforts to be promoted into EX positions at Health Canada", was based on statistical evidence, presumably that of Dr. Weiner and the Dr. Reitz survey, as well as on "other evidence", which apparently consists of the non-expert evidence in this case, the knowledge of which she acquired from a summary prepared by Commission counsel. She therefore did not collect any statistical data herself nor conduct any statistical analysis. I have already indicated that I am not taking into consideration her evidence as it relates to the Reitz survey findings. I have also pointed out that her conclusions based on the "other evidence" derived from the Commission's summary of the evidence are of limited assistance.

[234] After reviewing Ms. Boukamp-Bosch's report in the present case, Dr. Weiner stated that the data "clearly shows" that there is an under-representation of visible minorities in EX positions, even though there have been "over 100 jobs filled" during the relevant period and there are a "large number of visible minorities in the 'pipeline' for EX jobs". The evidence presented in this case has demonstrated that these assumptions are inaccurate and consequently, any conclusions which Dr. Weiner may have drawn therefrom may be similarly flawed.

[235] For instance, based on Ms. Boukamp-Bosch's figures, Dr. Nan Weiner calculated that only 23% to 26% of the available supply of visible minorities were working (in other words, being "utilized") in the EX group during the 1987 to 1993 period. But this finding was based on an availability figure of between 9.6% and 10.8% which itself was based on 1993 availability data even though many of the EX employees being referred to were appointed prior to 1987. In addition, as explained earlier, correcting the S&P/A&FS division means that the visible minority availability in 1993 should be in the 5.7% to 6.1% range.

[236] More importantly, it appears doubtful that the utilization rate, as applied by Dr. Weiner in this case, is the appropriate test for determining the presence of discrimination, particularly where advancement into senior management levels with specialized qualifications, is being examined. A low utilization rate may certainly be an indication that for some reasons, the designated group is not advancing. This should inspire employers, employees and other interested parties to examine the situation in greater detail and establish methods and policies for the achievement of a more complete utilization of that group. That may have been the motivation for forming the Visible Minority Advisory Committee at Health Canada in the 1990's. However, without a more detailed review of existing policies and staffing actions, one cannot be certain that systemic discrimination is the cause of under-utilization. A more in-depth study, for example, could demonstrate that too few members of that group are applying for promotions. One could inquire as to why that is the case and a further examination may show that this is linked to some discriminatory activity. But I find that mere reliance on the utilization rate

without further analysis does not assist meaningfully in the establishment of circumstantial evidence of discrimination.

[237] For all the above reasons, I have concluded that the evidence of Dr. Weiner with respect to statistical evidence of discrimination is of little assistance in this case and certainly does not itself constitute circumstantial evidence of a *prima facie* case of individual discrimination as alleged in Dr. Chopra's complaint.

C. The Effect of the *NCARR* decision

[238] On the same day that Dr. Chopra filed his complaint in this case, the National Capital Alliance on Race Relations ("**NCARR**") filed a complaint against the Department, alleging that it engaged in a discriminatory practice contrary to Section 10 of the *CHRA*, in pursuing a policy or practice that deprived or tended to deprive a class of individuals (visible minorities) of employment opportunities. This complaint was one of systemic discrimination, particularly with respect to promotion. It appears that all the parties agreed prior to the commencement of the first set of hearings in this case, that the NCARR Section 10 complaint would not be joined with Dr. Chopra's complaint, and would be dealt with by a separate tribunal.[(59)]

[239] The NCARR complaint was heard by a three member tribunal in 1995 and 1996, and its decision was issued on March 19, 1997. Dr. Chopra testified at those hearings and according to the decision, at the time of his testimony, he was chair of the Employment Equity Committee of NCARR and its immediate past president. He played a key role in bringing NCARR's complaint to the Commission.[(60)] In addition to Dr. Chopra, several other individuals who testified in the present case also apparently gave evidence at the *NCARR* hearings, including Ms. Boukamp-Bosch, Dr. Weiner, Ms. Gael McLean, Ms. Ivy Williams, Ms. Shirley Cuddihy and Ms. Sylvia Pollock. The *NCARR* decision refers to many facts which were also dealt with in this case including the circumstances surrounding Dr. Chopra's employment at Health Canada and the Cuddihy Memo.

[240] Based on the evidence before it, the *NCARR* tribunal made numerous findings regarding the Section 10 complaint, including the following at paragraph 162:

- There is a significant under-representation of visible minorities in senior management in Health Canada.

- There is a significant under-representation of visible minorities in the A&FS category in Health Canada.

- There is a high concentration of visible minorities in the feeder group in the S&P category and visible minorities are bottlenecked in the feeder group and are not progressing into senior management.

The *NCARR* tribunal went on to conclude, at paragraph 170, that the complainants in that case had made out a *prima facie* case of discrimination which the Respondent did not rebut. The tribunal ordered Health Canada to adopt and implement a "corrective measures program", one of

the objectives of which was to "redress the effects of past discrimination and ensure that Health Canada's organizational structure more accurately reflects its diverse workforce and demographics".[(61)]

[241] In his final submissions in the present case, Counsel for the Commission suggested that the Respondent should be "estopped from re-litigating" the identical issues which were before the *NCARR* tribunal, namely the question of whether there exists systemic discrimination in the promotion and advancement of visible minorities to senior management at Health Canada. Essentially, the Commission asserted that the doctrine of *res judicata* or more particularly, issue estoppel, prevents me from inquiring into this issue. In *Angle* v. *Minister of National Revenue*, [(62)] the Supreme Court of Canada, quoting from Lord Guest in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)*,[(63)] defined the requirements for issue estoppel as:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The Supreme Court of Canada's recent decision in *Danyluk v. Ainsworth Technologies Inc.*[(64)], at paragraph 62 and following, declared that, with regard to prior decisions of administrative tribunals, the fact that the three requirements are satisfied does not automatically give rise to the application of the issue estoppel doctrine.

[242] However, the test in *Carl Zeiss Stiftung* must be applied in the first place, just the same. Thus in the present case, with respect to the second condition, judicial review was not sought from the *NCARR* decision and it is therefore final. The remaining two requirements cannot be dealt with as simply.

[243] Dr. Chopra was not a party to the *NCARR* case in the formal sense. He was however a member of that organization as well as an officer and former president. Does this qualify him as a "privy" to the first proceedings? In *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.*,[(65)] the British Columbia Supreme Court pointed out that the issue of privity has not been applied strictly in Canada. In the first proceedings before the Court, a settlement had been reached and a consent order issued by the Court, by virtue of which certain transfers made by the defendants were set aside as fraudulent. Subsequently, a second creditor of the defendants sought to have the same transfers struck out as fraudulent. The Court held that the matter of the fraudulent transactions had been fully canvassed in the first action and the defendants were estopped from relitigating the matter. The Court stated that the doctrine of privity is broad enough to embrace both creditors noting that they both had the same interest in the debtor's assets, both were "damnified" by the fraudulent transactions, and all creditors were entitled to share in the results of the earlier litigation.[(66)] Similarly, Dr. Chopra had a clear interest in the *NCARR* proceedings, and in addition was present at those hearings and even gave evidence. I am satisfied that for the purposes of this discussion, he can be considered to have been "privy" to those proceedings.

[244] The final requirement is that the question to be decided in this case be the same as that which was decided in *NCARR*. Counsel for the Respondent suggested that the matters are substantially different. The *NCARR* case involved a class-based claim of systemic discrimination, in breach of Section 10 of the *CHRA*. However, this distinction does not necessarily mean that the cases did not deal with a similar issue. After all, the Commission has not alleged "cause of action' estoppel but rather issue estoppel. Thus, a finding that there is significant under-representation of visible minorities in senior management would constitute a material fact common to both proceedings, whether it was made in the context of a Section 7 or a Section 10 case.

[245] The Respondent did however note that "management" was not defined in a like manner in each case. In *NCARR*, the complainant alleged that the Respondent implemented employment policies and practices that deprived visible minorities of opportunities in "management or senior management positions". On the other hand, Ms. Boukamp-Bosch limited her evidence in the present case to the EX category alone, thereby excluding other management jobs, such as those that are at the EX-equivalent levels.

[246] On its face, this distinction is important for it means that the groups of employees which were the objects of analysis in each of the cases before the Canadian Human Rights Tribunal, were different. The peculiar aspect to this argument, of course, is that considering the evidence before me to the effect that visible minority representation at the EX-equivalent level is higher when compared with the EX category proper, the inclusion, in the evidence led before the NCARR tribunal, of the data concerning EX-equivalent level employees would have favoured, one would think, a finding that there was no under-representation of visible minorities. Yet, the NCARR tribunal reached the opposite conclusion. Thus, while the groups being studied may have differed, the impact of this distinction on the present case may, in point of fact, be minimal. Irrespective of what the actual effect may be regarding the differing questions in each case, the fact remains that the issues, that is to say the actual employee groups being studied, were distinct and, as such, the doctrine of issue estoppel should not operate.

[247] There were, however, other apparent discrepancies in the actual evidence presented in each case which raise a second and more unsettling issue in respect of the Commission's attempt to invoke issue estoppel. The *NCARR* tribunal declared that the A&FS category is the source for 25% of managers in the EX group.[(67)] The evidence in the case before me has been that the A&FS component, at least with respect to the 102 persons appointed between 1987 and 1993, is between 65% and 75%. These figures were derived from the flow data regarding these appointments which were apparently not adduced before the *NCARR* tribunal. In the present case, Ms. Boukamp-Bosch listed 20 occupational groups from the S&P category as feeder groups to EX, however, in her report presented to the *NCARR* tribunal, she selected 17. Conversely, the *NCARR* tribunal heard the *viva voce* evidence of Dr. Reitz and several other expert and non-expert witnesses, whom neither the Soberman Tribunal nor I heard.

[248] The question therefore arises as to whether the Commission should be denied the opportunity to raise the matter of issue estoppel at this stage of the case, after it has led evidence which has differed from, and possibly contradicted, the evidence which it led in the *NCARR* case. The Respondent contends that the Commission should have raised issue estoppel as a

preliminary matter at the beginning of the second set of hearings in this case. This could have been done by making a motion alleging that the statistical evidence which was lacking from the first set of hearings had already been presented to the *NCARR* tribunal and that its findings thereon decided the issue regarding this evidence. The Commission's decision to lead new evidence instead raises the spectre of two competing issues of fairness. On the one hand, is it fair to the Commission and the Complainant that the Respondent has the opportunity to relitigate the issue? On the other hand, is it fair to the Respondent for the Commission to adduce evidence in this case, and then when the Respondent successfully challenges that evidence either through cross-examination or its own evidence, for the Commission to defend itself by asking me to ignore some or all of its evidence, and rely instead on the findings of another tribunal?

[249] It is helpful to examine the method in which issue estoppel is ordinarily applied. The doctrine may be pleaded by a defendant in his defence when faced with an action which seeks to relitigate a matter which has already been adjudged. As Donald J. Lange explains in his text, *The Doctrine of Res Judicata in Canada*,[(68)] a plaintiff is entitled to invoke the principle as well, but it must be pleaded:

> [T]he plaintiff may also utilize the doctrine because *res judicata* is reciprocal. Although there is no authority on point, it is clear that, if the plaintiff relies upon *res judicata*, the plaintiff should also plead it in its statement of claim.
>
> Leave may be granted to plead *res judicata*. Where a defendant considers that it has a plea of res judicata, the proper course is to plead it as a defence with the requisite specificity and proceed to trial, or alternatively, to seek a determination of it as a preliminary issue. The plea of *res judicata* must set out fully the facts which create the plea, not simply plead the first proceeding and the order. It must distinctly plead the facts sufficient to show the question raised in the second proceeding was absolutely adjudicated upon in the first proceeding. It is a rule of evidence which must be pleaded if it is to be raised at trial. Otherwise, the party omitting to plead, when there is an opportunity to plead, waives the estoppel. However, pleading res judicata is only required where there is a traversable plea to be met.
>
> *(My emphasis. Citations omitted)*

I note that in the *Saskatoon Credit Union* case,[(69)] the plaintiff invoked its claim of *res judicata* by preliminary motion, after the defendants had filed their statement of defence in which they set out the issues they were attempting to relitigate.

[250] Other than in its final submissions, the Commission never sought an order regarding this point or sought leave to plead issue estoppel. Instead, it proceeded to lead statistical evidence, significant portions of which I have concluded cannot be supported. Although the human rights adjudication process is not as formal as proceedings before the courts, and statements of case were not required in the present case, the Commission had the opportunity to seek a ruling maintaining that I am bound by the findings in the *NCARR* decision, based on the doctrine of issue estoppel. As I indicated at the beginning of this decision, several preliminary and interim

motions were presented in this case, including one from the Commission, before any new evidence had yet been led, seeking advice and directions regarding the scope of the evidence to be called. The issue estoppel question was not raised on this occasion nor in any other preliminary or interim motion. I find therefore that even if the same question had been decided in both cases, the Commission waived its right to plead issue estoppel in this case. My finding is based on the principles of fairness, with regard to all of the parties, and in accordance with the state of the law as summarized in the preceding excerpt.

[251] I realize that to some, in spite of these findings regarding the matter of issue estoppel, it may appear as if I have been placed in the rather embarrassing position of contradicting the findings of another tribunal. However, I believe that, even if the question raised in each case were the same, it would be unacceptable and capricious of me to set aside my own findings and opinions, based on the evidence which the Commission itself put before me and to allow myself instead, to be guided by evidence which neither I nor the Soberman Tribunal heard and which differs from the evidence which was led in the present case. To some extent, my situation would resemble that in which the Commission found itself in the case of *Athwal* v. *Canadian Imperial Bank of Commerce*.[(70)] Ms. Athwal had filed with the Commission a complaint of racial discrimination. The Commission dismissed the complaint pursuant to a report from its investigator. Ms. Athwal sought judicial review of this decision before the Federal Court, arguing that the Commission was estopped from making the findings which led to the complaint being dismissed because a Board of Referees constituted under the *Employment Insurance Act*, [(71)] had previously ruled differently with regard to the same issues. Although the Federal Court's decision that there was no issue estoppel in that case was based principally on the fact that the parties to the two proceedings were different, the Court also noted, at paragraph 69, that:

> [...] it was open to him [the investigator] and to the Commission to reach the conclusion that there had been no harassment, differential treatment or forced resignation, because there was different evidence available [before them] than had been before the Board of Referees.
>
> *(My emphasis)*

[252] As an alternative argument, the Commission suggested that the *NCARR* findings should at least have some persuasive value for the determination of systemic discrimination in the present case. However, I find that there are too many differences and discrepancies in the evidence led in the two cases to be able to reliably call upon the findings of the other tribunal.

VIII. ANALYSIS OF THE FACTS

[253] The facts put in evidence in this case regarding Dr. Chopra's relationship with the Respondent extend from 1969, when he was hired, until the mid-1990's. His complaint alleges adverse differential treatment based on race, colour and national or ethnic origin, with respect to the promotion of Dr. Franklin to the position of Director of Human Prescription Drugs. Dr. Chopra goes on to mention Dr. Liston's "threatening" comments during their meeting in

February, 1992, the numerous changes to his performance appraisals in March, 1992, and finally certain comments and characterizations which were made against him by Dr. Somers and a lawyer for the Department. Dr. Chopra concludes that these acts were also committed against him because of his colour, race and national or ethnic origin.

[254] During final arguments, there was some debate between counsel as to the parameters of the inquiry in the present case since much of the evidence adduced by the Commission went beyond the matters specifically referred to in the Complaint. After carefully reviewing the submissions of all the parties, including Dr. Chopra himself, I find that there is essentially a consensus that all the evidence can be assessed by me for its value, if any, as circumstantial evidence in support of the key aspect of the Complaint, that is, the staffing of the position of Director of Bureau of Human Prescription Drugs, in the 1990 to 1992 period. This conclusion is also based on the fact that, according to Commission counsel, the remedies being sought by the Complainant would be from 1992 onwards. Similarly, in *Uzoaba* v. *Canada (Correctional Services)*,[(72)] it was found that evidence which pre-dates the period for which remedial action was being sought in the complaint may also be introduced to put the impact of the events forming the subject matter of the complaint into perspective, from the complainant's point of view. I therefore have considered the entirety of the factual evidence led in this case in performing the following analysis, without any limitation to the specific events referred to in the Complaint, provided obviously that some connection can be established to those events and the staffing of the Director's position. The analysis also proceeds in accordance with my previous conclusions regarding the application of the Soberman Tribunal's findings of fact and law.

[255] The final competition for the post of Director-Human Prescription Drugs was announced in March 1992, and was won by Dr. Franklin in April 1992. Dr. Chopra was screened out of that competition for lack of recent managerial experience. Although the test set out in the *Shakes* case refers to the situation where the complainant is not hired by an employer, it is certainly most analogous to Dr. Chopra's situation regarding the 1992 competition, where he alleges that he was not *promoted* to the EX-02 position while a non-visible minority person was.

[256] Applying the *Shakes* test to the facts of the 1992 competition, I have found that the Commission and the Complainant have failed to establish the first of the three elements required by that test for the making out of a *prima facie* case, that is, that the Complainant was qualified for the EX-02 position which was the object of that competition.

[257] I see no reason to disagree with the Soberman Tribunal's findings that the Complainant possessed little line management experience for the senior management position he was seeking. I also agree that the Department's prerequisite of management experience for the indeterminate position of Director of a Bureau was a reasonable justification to screen him out.[(73)] Dr. Chopra did not acquire any line management experience through his work at the OOM project, although it certainly did constitute important training which together with his attendance at the Senior Management Development Program, should have prepared him for a management opportunity.

[258] The problem lies in his failure to act upon those opportunities when they arose, in particular, with respect to Dr. Davis' position of Division Chief which became available in 1987, as well as the 1989 competition for Chief of the Human Safety Division. Regarding the latter

position, the reasons forwarded by the Complainant to explain his decision not to compete may have appeared valid from his subjective perspective, but objectively speaking, were unjustified and as the Soberman Tribunal commented, ultimately "unwise". The additional evidence adduced before me reaffirms this finding, adopted by the first Tribunal. I accept the evidence of Dr. Liston and Ms. McLean that the advantages of taking a more challenging job as a promotion in the sense of gaining new managerial experiences would have greatly exceeded the relatively low increase in salary, as perceived by the Complainant. The evidence of Dr. Yong, who competed for and obtained that position was that he did not feel "inferior" because of the position's classification as BI-05.

[259] However, the more important and troubling question is whether there is any evidence linking Dr. Chopra's lack of management experience to the actions or omissions of the employer and whether they are somehow associated with an adverse differential treatment based on a prohibited ground under the *CHRA*.

A. Pre-1990 Evidence

[260] In his evidence, the Complainant referred to several occasions during the 1969-87 period when he felt he was differentially treated in an adverse manner by the Respondent, including his not being made a section head in 1971, the refusal of his secondment to Science Council in 1972, the failure to make him a section head of immunology in 1978 and the initial refusal to reclassify him as a VM-4 in 1987. He also alluded to his treatment upon his return from the World Health Organization fellowship in 1980, his 1990 appraisal which he felt should have been raised from fully satisfactory to superior and the appointment of Dr. Ritter as Director of the Bureau of Veterinary Drugs. The Soberman Tribunal concluded that these incidents "did not demonstrate a *prima facie* discrimination contrary to Section 7 of the [*CHRA*]". Having had the benefit of receiving additional evidence on some of these points, I would agree that no inference of discrimination can be drawn from these events, whether considered separately or in the context of the totality of the evidence in this case.

[261] Over this same 1969 to 1987 period, the Complainant claims that he was not provided with the appropriate advice and assistance from the employer, to acquire the management experience required for a senior management position. Dr. Chopra was advised as early as 1974 to register for career advancement opportunities such as the CAP and later, the DAP. The evidence shows that the Complainant did not follow up on these recommendations.

[262] The Soberman Tribunal held that such responsibilities "cannot properly be left entirely to the employee within such a large bureaucracy" and that the Respondent's insensitivity increased Dr. Chopra's level of frustration and eventually led to his suspicions that racial discrimination played a role in his being passed over.[(74)] Nonetheless, the first Tribunal found that these findings do not demonstrate *prima facie* discrimination. However, I would add that the new evidence led before me reinforced the point that ultimately the responsibility to seek out and obtain such training and other advancement opportunities is the employee's. I therefore find that no inference of discrimination on the part of the Respondent can be drawn from these circumstances.

B. The Evidence from the 1990-92 Period

[263] All of the evidence reviewed above preceded the 1990-92 period when the position of Director-Human Prescription Drugs became available. For the reasons explained below, it can be inferred from the Respondents' actions during this period that Dr. Chopra's national or ethnic origin was a factor in the Respondent's decision-making, resulting in Dr. Chopra's lacking the requisite managerial experience when the competition to fill the vacancy was ultimately conducted in 1992.

[264] In September of 1990, when Dr. Gordon Johnson departed and the position became vacant, Dr. Chopra immediately informed his superiors, namely Drs. Somers and Liston, of his desire to fill the position, at least on a trial rotational acting basis, together with other candidates. At the same time as the Complainant was making these requests, Drs. Somers and Liston were proceeding with the staffing of the position by Dr. Franklin. What is striking about this appointment is that Dr. Franklin was not qualified for the position. Any mistaken belief on the part of the Respondent that she was qualified would have been put to rest on July 9, 1991, when the PSCAB ruled that she did not meet "the knowledge qualification for the position" nor the bilingual requirement.

[265] Although she had been found unqualified, the Respondent continued to employ her in that position, even after the PSC directive was issued ordering that she cease working on September 20, 1991. Over this entire period, of course, Dr. Chopra continued to express his objection to her ongoing employment in the position, yet at no time did the Respondent see fit to appoint him or assign him to perform these duties on an acting basis.

[266] The consequences of this failure by Health Canada to give Dr. Chopra the chance to act in this position when this opportunity arose are significant. Had he assumed these duties for all or part of the period leading up to the final competition, he would have acquired the recent management experience required to be screened into that competition. On this point, it is interesting to note that Dr. Liston had declared before the PSCAB hearing conducted by Mr. Gaston Carbonneau, regarding Dr. Chopra's appeal of the 1992 competition, that the technical experience which Dr. Franklin gained during her acting appointment to the position made it "conclusive" that she met that requirement. The Federal Court ultimately found that the PSCAB would have "continued to conclude" that Dr. Franklin would be screened in even if her technical experience acquired after the 1991 PSCAB decision declaring her unqualified, had been ignored.[(75)] Nonetheless, it is clear from both decisions that an employee gains significant experience when acting in a position for which he or she later competes.

[267] It is also evident that the Respondent demonstrated favouritism towards Dr. Franklin in the staffing of this position, particularly in the period leading up to the final competition in 1992. In fact, it is possible that her continued employment in that position was achieved through the commission of certain staffing irregularities by the Respondent. I note that due to the settlement out of court of Dr. Chopra's motion to the Federal Court regarding Dr. Franklin's continued employment in the position, this issue was never actually canvassed by any court or tribunal. The Commission also contended that the modification of the qualifications for the 1992 competition

so as to more clearly encompass Dr. Franklin's range of knowledge, constituted an additional irregularity.

[268] The commission by an employer of illegal or irregular staffing actions does not necessarily mean that such actions are linked to discrimination. In the case of *Kibale v. Transport Canada*, [(76)] the Canadian Human Rights Tribunal stated, at paragraph 24369:

> It seems very dangerous to me to establish a rule whereby if there is an irregularity or outright illegality in the administration of the staffing process of the Public Service of Canada, a Human Rights Tribunal must presume that the irregularity or illegality arises from a discriminatory practice, without other evidence linking this irregularity or illegality to a prohibited ground of discrimination. The failure or refusal of government employees to comply with the rules established to limit their discretionary power and their room to manoeuvre can be explained by a host of human flaws other than discrimination.

The Tribunal further declared, at paragraph 24371:

> The Human Rights Tribunal does not have the power to monitor and supervise the operation of the staffing process under the Public Service Employment Act and the regulations made by virtue of the Act. This authority rests with the Federal Court of Canada. [...] Although the Human Rights Tribunal found irregularities in the process, its powers are limited to stating whether or not these irregularities were motivated by a prohibited ground of discrimination.

[269] Whether or not any irregularity in the staffing process, as set out in the *Public Service Employment Act*, [(77)] actually occurred in this case, I find that it can be reasonably inferred from the opinions expressed by the Assistant Deputy Minister in the Cuddihy Memo that a link between the Respondent's actions in staffing the Director's position and a prohibited ground of discrimination has been established.

[270] Although the Cuddihy Memo is, strictly speaking, a hearsay document, Sub-section 50(4) of the *CHRA* authorizes members of the Canadian Human Rights Tribunal to accept any evidence they see fit, whether or not that evidence would be admissible in a court of law. The question of how reliably the document reflects the comments that Dr. Liston and Somers actually made to Ms. Cuddihy would, however, affect the weight to be given to this evidence. I note that the Soberman Tribunal, which had the benefit of hearing her testimony, did not make any remark with respect to the possible non-reliability of the document. In fact, the Soberman Tribunal referred extensively to the text in giving its reasons. Furthermore, in his own testimony, Dr. Liston did not deny the content of the memo but rather the "flavour" with which it was presented. He rejected the suggestion that the comments reflected stereotypical views on his part with respect to minorities. He also insisted that in his mind, the context of the discussion was the VMAC, not Dr. Chopra's then pending grievance. I note as well that Ms. Cuddihy was still employed at Health Canada as Chief of Staff Relations Operations, when she testified under subpoena before the Soberman Tribunal. There is no indication from her testimony, which occurred about three years after her meeting with Dr. Liston, that her record of the conversation

was incomplete. In fact, in cross-examination by Respondent counsel, no attempt was made to undermine the accuracy of the text but rather, the witness was merely called upon to give her interpretation of the comments expressed. For these reasons, I find that the Cuddihy Memo accurately reflects the substance of Ms. Cuddihy's conversation with Dr. Liston.

[271] The comments by Dr. Liston which Ms. Cuddihy referenced under the heading "General", referred to "cultural differences" of certain employees, their "cultural heritage" and their "cultural background". He went on to specify that the issues he was raising reflected "not a color but a culture problem". Considering the context of the conversation, including Dr. Liston's own view that the discussion pertained to the workings of the Visible Minority Advisory Committee, I conclude that his remarks are obviously related to the visible minority groups working within Health Canada who are of diverse national or ethnic origins, including persons of South Asian origin like Dr. Chopra.

[272] I find that Dr. Liston's declarations reveal an underlying assumption that persons of differing "cultures" may not be well-suited for senior management, because their '"soft skills' such as communicating, influencing, negotiating" have not been emphasized in their "cultural heritage", thereby placing them at a disadvantage. As the Commission's expert, Dr. Nan Weiner explained in her report:

> This statement is consistent with a common stereotype which assumes that all members of a particular group are the same; it denies the variance found within any racial, ethnic or national group. There is always more variation within any group (i.e., an ethnic group) than between groups. This means, for instance, that some members of every racial group are able to manage at every point along a continuum from an autocratic to participative management style.

The consequence of such opinions may be to incorrectly and possibly unknowingly influence a supervisor's opinion of who may be suitable for selection to a managerial position. Dr. Weiner referred in her testimony to the report issued by the United States Federal Glass Ceiling Commission: *Good for Business: Making Full Use of the Nation's Human Capital -- Fact Finding Report of the Federal Glass Ceiling Commission Released by the Labor Department, March 16, 1995*, [(78)] which found the following:

> Once individuals have been recruited, differing communication styles and ideas of what is appropriate and acceptable behaviour can knowingly or inadvertently create barriers to their advancement and can influence supervisors' evaluation of their performance and potential.

[273] To be clear, I am not suggesting that the Cuddihy Memo proves that Dr. Liston intended to discriminate against visible minorities or that he would intentionally favour a white person over a visible minority by reason of their colour. I do not question Dr. Liston's sincerity when he testified that he does not hold the opinion that visible minorities cannot be good managers. However, his remarks to Ms. Cuddihy that some "cultures" do not do business in the "North American Way" and that these individuals must be given training in order to communicate better or adopt a less "authoritarian style" do imply that they must somehow change if they are to be

considered for senior management. While one could interpret these statements as actually suggesting a method by which a minority member could become a manager, as was discussed in the Soberman Tribunal's decision[(79)], they also reveal a pre-disposition to perhaps subconsciously exclude from consideration a visible minority candidate because he is not as yet suitable, according to these criteria.

[274] Did Dr. Chopra fall into the category of persons whom Dr. Liston perceived must change in order to be suitable for senior management? Interestingly, the Assistant Deputy Minister said that these "cultural" minorities would have to adopt a less "authoritarian style" and learn to communicate and negotiate better. In the second portion of the Cuddihy Memo, relating specifically to Dr. Chopra, Dr. Liston found that the Complainant was "authoritarian" and "confrontational" and that he was not a negotiator. Dr. Liston testified that he had very little contact with Dr. Chopra after the end of the OOM project in 1980 and that this remark was not actually based on his own experiences with Dr. Chopra, but rather on certain "hearsay" comments reported to him a few years after the OOM project had ended, regarding problems which two bureau directors had experienced with the Complainant during the program's implementation. Dr. Liston himself was satisfied with Dr. Chopra's performance during the OOM project. None of Dr. Chopra's performance appraisals mentioned any such difficulties, often noting characteristics which were entirely to the contrary, such as his "controlled tactful manner" and good negotiating skills.

[275] Thus, although Dr. Liston's only source was a hearsay statement into which he never inquired, he still was of the opinion in 1992 that, as he explained in his testimony, Dr. Chopra's "people skills" were not as good as his "book knowledge". I can only conclude that Dr. Liston's specific comments regarding Dr. Chopra reflected his perception of him as being one of those minority employees who lacked the "soft skills" needed for management.

[276] How did this perception of Dr. Chopra affect the staffing process for the Director's position? Health Canada had a choice to make both initially when the position became open in September of 1990 as well as in July to September 1991, after the PSCAB had ruled that Dr. Franklin was unqualified for the position. On either of those occasions, the Respondent could have appointed Dr. Chopra to act in that position until the final competition would be conducted. Instead, Health Canada appointed the non-visible minority person, Dr. Franklin. The opinions expressed by Dr. Liston in the Cuddihy Memo suggest that essentially no thought was given to appointing Dr. Chopra at all, he was simply perceived as lacking the "soft skills", consistent with the Assistant Deputy Minister's general perception of certain persons with diverse cultural backgrounds. I find that this inference is more probable than other possible inferences. Applying the test articulated in the *O'Malley* case, I am satisfied that the evidence is sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent, and that the Complainant and the Commission have established a *prima facie* case of discrimination such that the burden then shifts to the Respondent to provide a reasonable explanation for its actions.

[277] The Respondent's explanation for its not selecting Dr. Chopra to act in the Director's position at any time prior to the 1992 competition is that just as was the case at the competition itself, he was not qualified for lack of management experience. This explanation appears on its face to be reasonable, particularly in light of my earlier finding that as things actually were in

1992, Dr. Chopra was indeed not qualified in terms of the managerial experience component. The question remains, however, of whether this explanation is pretextual with regard to the pre-competition period.

[278] On September 28, 1990, Dr. Liston responded to Dr. Chopra's initial expression of interest in the Director's position. Dr. Liston told the Complainant that Dr. Somers was "examining all options" with regard to the transition period, but that the Department was interested in filling the post with someone "with a medical background". On October 4, 1990, Dr. Somers also wrote to the Complainant, stating to him to "now note that we have made interim arrangements for Dr. C. Franklin to act in this position". I observe that no mention was made in either letter of Dr. Chopra's lack of management experience. More interestingly, the letters leave the impression that Dr. Chopra's candidacy was being considered until the decision was made to appoint Dr. Franklin. The evidence shows, however, that Dr. Liston requested the appointment of Dr. Franklin as early as September 13, 1990, the same day that Dr. Chopra formally requested to be considered for the post.

[279] On this point, it is worthwhile to study the answers which the Respondent provided to Dr. Chopra's union, the PIPSC, regarding this staffing process, and which were documented in a memorandum prepared by the union on November 9, 1990. In answer to the union's inquiry as to what process was used to select the Acting Director of the Bureau of Human Prescription Drugs, the Respondent apparently stated the following:

> No formal staffing process was used. As in most acting assignments, management conducted an informal evaluation of employees in the Branch and selected the person they felt was best qualified to fill the acting assignment for a period of four months. There is no "paper trail" of the selection. This acting assignment was approved by the Deputy Minister.

The Respondent also apparently said that Dr. Franklin was better qualified than Dr. Chopra, because she was "more experienced" and her appraisals "stressed her strong management skills", although this explanation was obviously provided after Dr. Franklin's appointment and Dr. Chopra's subsequent objection thereto, which had prompted the union to make this inquiry.

[280] I have also taken into consideration the PSCAB decision issued by Ms. Helen Barkley on July 19, 1991. She stated that Dr. Somers' conclusion that Dr. Chopra "did not meet the managerial component of the experience qualifications", was reached based on a "*post facto* assessment" of Dr. Chopra.

[281] I find that these circumstances surrounding the initial appointment of Dr. Franklin demonstrate clearly that Dr. Chopra was not seriously considered for the post of Director in September 1990, and that Drs. Liston and Somers had decided to select Dr. Franklin from the outset. It was only once the Complainant had begun questioning the appointment in October 1990, that the Respondent compared the two persons and declared that the Complainant was less qualified.

[282] What is most troublesome however is that while it may be true that Dr. Chopra lacked management experience at that early phase of the staffing process, as of July 19, 1991, when the PSCAB decision declared Dr. Franklin equally unqualified for failure to meet three of the four components of the knowledge qualification as well as the bilingual requirement, the Department's attitude did not change. Had the real motive for selecting Dr. Franklin been her qualifications, once that decision was handed down, the Department should have immediately removed her, to be replaced by someone who was actually qualified for the position. One can only wonder how Health Canada can invoke the Complainant's lack of qualifications when the Department itself appoints an unqualified person into the position.

[283] After considering carefully all of the evidence before me, I have concluded that the explanation put forward by the Respondent, while appearing at first to be reasonable, is in fact pretextual. I am therefore satisfied that it can be reasonably inferred that the failure to offer Dr. Chopra the opportunity to act in the post of Director-Human Prescription Drugs, particularly after the PSCAB decision of July 19, 1991, was at least in part due to the Assistant Deputy Minister's perception that Dr. Chopra was not suitable for that managerial position because of his "cultural background", that is, his national or ethnic origin. In this respect, the Respondent discriminated against Dr. Chopra and his complaint is substantiated. Although I have found the Respondent liable for not having given Dr. Chopra the opportunity to act in the Director's position and thereby acquire the recent managerial experience needed to be screened into the final competition, it is, of course, not certain that once screened in, he would have won that competition. This is an issue that must be considered in the context of quantifying the damages and does not affect my finding with respect to the liability of the Department.

[284] In coming to the conclusion that the Respondent is liable, I realize that I may be at variance with some of the findings of the Soberman Tribunal. However, I believe that my decision has been made in accordance with my authority to substitute my view where I find that there was a palpable or manifest error in the first Tribunal's assessment of the facts. In addition, much of the relevant evidence on these issues was received by me during the second set of hearings, including the expert evidence of Dr. Weiner and the testimony of Dr. Liston. I must necessarily assess this new evidence in light of the overall evidence including that of the first Tribunal.[(80)].

[285] For instance, the Soberman Tribunal surmised that Dr. Liston's description of the Complainant as "authoritarian" and "confrontational" was based on actual perceptions of him as viewed from the perspective of his conflict with the employer, and his ensuing accusations, against which senior managers like Dr. Liston would have taken offense. To the contrary, Dr. Liston testified before me that these comments were only based on hearsay remarks relating to incidents which would have occurred over a decade earlier. The first Tribunal also suggested that, due to this conflict, management may have perceived that Dr. Chopra was properly screened out because of his lack of skills in personal relations. There is no evidence before either tribunal that such skills were ever a consideration in screening out Dr. Chopra. The consistent position of the Respondent has been that he was screened out from consideration for both the acting Director's position and the final indeterminate position because he lacked the requisite managerial experience.

[286] Commission counsel respectfully submitted that the Soberman Tribunal erred in its applications of the legal tests to the evidence by setting out the issues in its decision, in the following manner:[(81)]

> First, is it reasonable to conclude that the conduct of the Department amounted to unfair treatment of Dr. Chopra? Second, if we conclude that the treatment was unfair, did it amount to discrimination prohibited by the *Act*?

Counsel for the Commission suggested that this approach resembles the following test which had been applied in the unreported case of *Kennedy* v. *Mohawk College* (1973) (Ontario Board of Inquiry) and discussed in the *Basi* decision:[(82)]

> In many instances, tribunals have taken the view that the inference of discrimination that must be drawn from the circumstantial evidence in order to support the complainant's case:
>
> > must be consistent with the allegation of discrimination and inconsistent with any other explanation. [*Kennedy* v. *Mohawk College*]

The Canadian Human Rights Tribunal in *Basi* rejected this test and adopted that set out by Beatrice Vizkelety in her text, *Proving Discrimination in Canada*,[(83)] that is, "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". While I note that the Soberman Tribunal did not exactly set out the issues in a similar manner, I do not see the necessity to compare the *Basi* test with the approach taken by the Soberman Tribunal to determine if there was an error in the first Tribunal's conclusions as to the law. I would only reiterate that I have conducted my analysis of the evidence in this case in accordance with the Vizkelety test set out in *Basi*.

C. Other Allegations of Discrimination

[287] The Soberman Tribunal made no comment in its decision about Dr. Chopra's assertion that he felt threatened by Dr. Liston's remarks during their February 1992 meeting to the effect that the appeals and Federal Court actions undertaken by Dr. Chopra would not "threaten" his career. As I noted earlier in this decision, the Complainant did not refer to his being threatened in the minutes of that meeting which he prepared thereafter. There is no additional evidence from the second set of hearings which supports this claim and I therefore find that these circumstances do not give rise to a violation of Dr. Chopra's rights under the *CHRA*. In addition, I find there was essentially no evidence adduced during either set of hearings regarding the alleged comments and characterizations made against Dr. Chopra by Dr. Somers and an unnamed lawyer acting for the Department.

[288] I also do not find that Dr. Chopra was the victim of adverse differential treatment with respect to the December 1993 competition for the position of Director - Bureau of Veterinary Drugs. Although he was screened out for lack of recent management experience, he was also

deemed to lack the second qualification of experience in dealing with outside organizations. No evidence was adduced to indicate that Dr. Chopra did in fact possess the latter qualification nor that his lacking this experience was related to discrimination by the Respondent. I am satisfied that Dr. Chopra was not qualified for the position, and that consequently, the *Shakes* test has not been met.

[289] In addition, there is no evidence to support Dr. Chopra's submission that discrimination was a factor in the 1993 incident involving a union steward nor that it was even in retaliation to the complaints which he had lodged against the Respondent. Clearly, by that time, the issues raised by Dr. Chopra and other public servants, through NCARR, had created some measure of conflict between those employees and their employers. In this context, it would not have been inappropriate for a newly appointed Director-General to inquire into these issues or to even refer to these disputes as a "problem". With regard to this matter as well, the Soberman Tribunal did not make any finding.

[290] Dr. Chopra's principal concern regarding Dr. Drennan's 1990 complaint against him is not so much that it wrongly remained in his file for another four years after it had been dismissed, but rather that the complaint itself was made only two days after he had sent letters to the PSC and the Deputy Minister regarding employment equity at Health Canada. However, other than the short span of time between the two events, there does not appear to be any evidence to link them. I note again that the Soberman Tribunal did not refer to this evidence at all in its decision. I therefore reject the suggestion that discrimination against Dr. Chopra was a factor in Dr. Drennan's complaint or that it is linked to Dr. Chopra's complaints and allegations of discrimination.

[291] There remains the allegation in Dr. Chopra's complaint that the Respondent modified his 1991 and 1992 performance appraisal reports with the intention of buttressing its defence against his claim of discriminatory treatment. I find it troubling that the deletions and insertions were considerably less flattering than the original texts, and that the new comments appear to match very closely the defences which were presented in response to his complaints, both before the PSCAB as well as before this Tribunal, namely that the Complainant lacked management experience and that he had never applied for entry-level management positions. It would appear that the 1991 changes remained in place but that the 1992 amendments were reversed after Dr. Chopra expressed his objections. Although it is conceivable that his employment record may have been adversely affected because of the changes, no evidence was adduced to indicate how. The only comment which the Soberman Tribunal provided with respect to these modifications was that it was "evident that the level of disagreement between Dr. Chopra and his superiors had elevated, and their relations had deteriorated during 1990 and 1991".

[292] Considering the similarity between the amendments and the defence which the Respondent adopted in answer to Dr. Chopra's complaints, I have concluded that no attempt would have been made by Dr. Chopra's superiors to amend his performance appraisal reports had it not been for his contemporaneous allegations and complaints against the Respondent of discriminatory behaviour. I therefore find that these actions by Dr. Chopra's superiors were taken in retaliation to those complaints. As it currently stands, Section 14.1 of the *CHRA* makes an act of retaliation itself an independent discriminatory practice.[(84)] This was not the case when Dr. Chopra filed the

Complaint nor when these incidents occurred. The Canadian Human Rights Tribunal recently held, in the case of *Nkwazi* v. *Correctional Service Canada*,[(85)] that to apply the new retaliation provision of the *CHRA* to events occurring before the section came into force and find that the retaliatory actions of a respondent constitute a discrete breach of the *CHRA* would be to attach new consequences to events that took place before the enactment. According to the Tribunal, that would be giving the legislation retrospective effect, which is not generally permissible, and is not supported by the wording of the legislation. Although such acts by a respondent cannot be considered as an independent basis for liability under the *CHRA* as it stood at that time, they may be relevant with respect to the issue of damages, provided a causal connection can be established between the retaliation and the original discriminatory practices.

[293] In Dr. Chopra's case, I am satisfied that his complaints and allegations of discriminatory behaviour on the part of the Respondent motivated his superiors to attempt to amend his performance evaluation reports. Of course, the issue of what damages he suffered as a result is a matter to be dealt with together with all of the other forms of remedy being claimed.

D. Remedy

[294] During their final arguments, the Commission, Complainant and Respondent all agreed to put off argument and possibly additional evidence, with regard to remedy, pending my decision on the liability of the Respondent. In the event that I found the Respondent liable, I would retain jurisdiction, thereby leaving it open to the parties to either agree on remedy or, in the absence of any agreement, to present evidence, if any, together with submissions on remedy.

IX. ORDER

[295] For these reasons, I declare that Dr. Chopra's rights under the *Canadian Human Rights Act* have been contravened by the Respondent. I retain jurisdiction to decide the issue of remedy. In the event that the parties do not reach an agreement as to remedy, the parties may contact the Tribunal Registry to arrange for additional hearing dates.

Athanasios D. Hadjis, Chairperson

OTTAWA, Ontario

August 13, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T492/0998

STYLE OF CAUSE: Shiv Chopra v. Department of National Health and Welfare

PLACE OF HEARING: Ottawa, Ontario

1999: May 17 - 18 2000: January 21

June 17 - 18 January 31 - February 1

July 5 - 7 March 1 - 3

September 13 - 16 April 25

October 14 - 15 June 2, 5, 19

November 15 September 18

December 1 - 2 October 31 - November 2

December 11

DECISION OF THE TRIBUNAL DATED: August 13, 2001

APPEARANCES:

Shiv Chopra On his own behalf

Peter Engelmann For the Canadian Human Rights Commission

David A. Migicovsky For the Department of National Health and Welfare

1. *Chopra* v. *Department of National Health and Welfare,* [1996] C.H.R.D. No. 3 (Q.L.) (C.H.R.T.) ("***Chopra No. 1***").

2. *Canadian Human Rights Commission* v. *Department of National Health and Welfare* (April 6, 1998), T-792-96, (1998) 146 F.T.R. 106 (F.C.T.D.).

3. *Department of National Health and Welfare* v. *Canadian Human Rights Commission* (January 12, 1998), A-312-98, (F.C.A.).

4. J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1991), at pp. 131-132.

5. (1985) 6 C.H.R.R. D/2894.

6. [1986] 2 S.C.R. 466.

7. No. T520/1599, at page 4431 of the transcript.

8. The following witnesses testified before the Soberman Tribunal: Shiv Chopra, Frances Henry, Ian Henderson, Michael Davis, Shirley Cuddihy, Ivy Williams, Zul Nanji, Jacques Messier, Man Sen Yong, Danielle Auclair. The following individuals testified before me: Erika Boukamp-Bosch, Nan Weiner, Alan Sunter, Albert Liston, Shirley Mills, Judith Davidson-Palmer, Sylvia Pollack, Gael McLean.

9. *Department of National Health and Welfare*, *supra*, note 3.

10. S.C. 1976-77, c.33.

11. S.C. 1998, c.9, s. 29.

12. (1996) 30 C.H.R.R. D/302 (C.H.R.T. Review Tribunal).

13. *Ibid*, at paragraph 307.

14. (1998) 31 C.H.R.R. D/383 (C.H.R.T. Review Tribunal).

15. (December 23, 1996), Ottawa, T-2250-95 (F.C.T.D.).

16. The organizational charts appear to indicate the existence of seven directorates at the Health Protection Branch but there was evidence adduced to the effect that the "Branch Executive Director" and the "Director - Central Services" are not considered to be directorates.

17. R.S.C. 1985, c. P-33

18. *Ibid*.

19. *Ibid*.

20. *Chopra* v. *Department of National Health and Welfare*, (July 19, 1991), 91-NHW0482 (PSCAB) ("***Chopra No. 2***").

21. *Ibid*, at page 9.

22. *Ibid,* at page 11.

23. *Chopra* v. *Department of National Health and Welfare* (July 27, 1992) 92-NHW-0641 (PSCAB) ("***Chopra No. 4"***).

24. *Chopra* v. *Department of National Health and Welfare,* (November 23, 1993) T-2143-92 (F.C.T.D.) ("***Chopra No. 5"***).

25. *Chopra No. 4*, *supra* note 25, at page 75.

26. R.S.C. 1985 c. A-1.

27. R.S.C. 1985, c. P-35.

28. *Chopra* v. *Canada (Treasury Board)* (August 31, 1995), T-813-94 (F.C.T.D.) (*"**Chopra No. 3**").

29. *Casorso* v. *Health Canada,* (November 14, 1994) 93-NHW-0513 (PSCAB).

30. S.C 1995 c. 44.

31. *Supra*, note 28.

32. [1997] C.H.R.D. No. 3 (Q.L), 28 C.H.R.R. D/179 (CHRT)

33. 362 A&FS feeder group employees + 648 S&P feeder group employees = 1010 employees in total.

34. (.50 x 6.4%) + (.50 x 5.0%) = 5.7%

35. (.80 x 6.4%) + (.20 x 5.0%) = 6.1%

36. The data received by Ms. Boukamp-Bosch from the PSC suggested there were 107 appointments during this period, but other evidence was adduced during the hearings, demonstrating that in fact there were no more than 102 appointments.

37. *Ontario Human Rights Commission* v. *Etobicoke* [1982] 1 S.C.R. 202 at 208; *O'Malley* v. *Simpsons-Sears Ltd.* [1985] S.C.R. 536 at 558.

38. *O'Malley, ibid.*

39. (1981), 3 C.H.R.R. D/1001 at paragraph 8918. (Ont. Bd. Inq.)

40. (1983), 4 C.H.R.R. D/1616 (Can.Trib.), at page 1618, aff'd (1984) 5 C.H.R.R. D/2147 (Can.Rev.Trib.)

41. *Chander* v. *Department of National Health and Welfare*, [1995] C.H.R.D. No. 16, (C.H.R.T.), at pages 11-12, aff'd [1997] F.C.J. No. 692 (F.C.T.D.); *Singh* v. *Canada (Statistics Canada)* [1998] C.H.R.D. No. 7, (C.H.R.T.) at paragraph 157, aff'd *Canada (A.G.)* v. *Singh* (April 14, 2000) T-2116-98 (F.C.T.D.).

42. *Basi* v. *Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at paragraph 38474; *Grover* v. *National Research Council of Canada* (1992) 18 C.H.R.R. D/1 (C.H.R.T.), at paragraph 152; *Chander*, *ibid*, at page 10; *Singh* (C.H.R.T.), *ibid* at paragraph 162.

43. *Singh* (C.H.R.T.), *supra*, note 41, at paragraph 166; *Holden* v. *Canadian National Railway Company* (1991) 14 C.H.R.R. D/12 (F.C.A.) at paragraph 7; *Chander* (C.H.R.T.), *supra*, note 41, at page11; *Pitawanakwat* v. *Canada (Secretary of State)* (1992) 19 C.H.R.R. D/10 (C.H.R.T.) at paragraph 85.

44. (Toronto: Carswell, 1987), at page 142.

45. *Canadian Human Rights Commission* v. *Department of National Health and Welfare*, *supra*, note 2, at paragraph 22.

46. (1984), 5 C.H.R.R., D/2417, (Ont. Bd. Inq.) at paragraph 20100.

47. [1994] N.H.R.B.I.D. No. 2, (Nfld. Bd. Inq.) (Q.L.), at paragraph 62.

48. (1980), 1 C.H.R.R. D/59, (Ont. Bd. Inq.), at paragraph 532,

49. [1987] 1 S.C.R. 1114.

50. [1996] C.H.R.D. No. 4, (C.H.R.T.) (Q.L.), at paragraph 173.

51. *Blake*, *supra*, note 46, at paragraphs 20129-20130.

52. *Ibid*, at paragraph 20113.

53. *Supra*, note 32, at paragraph 162.

54. *Ibid*, at paragraph 161.

55. 50/50 ratio: (0.50 x 6.4%) + (0.50 x 5.0%) = 5.7%
60/40 ratio: (0.60 x 6.4%) + (0.40 x 5.0%) = 5.9%
80/20 ratio: (0.80 x 6.4%) + (0.20 x 5.0%) = 6.1%

56. *Supra*, note 46, at paragraphs 20126-20127.

57. *Supra*, note 54 at page 185.

58. *Blake*, *supra*, note 46, at paragraphs 20129-20130.

59. See *Chopra No. 1*, *supra*, note 1, at paragraphs 1-4.

60. *NCARR, supra*, note 32, at paragraph 109.

61. *Ibid*, at paragraphs 191-193 at page 254

62. [1975] 2 S.C.R. 248 at page 267

63. [1967] 1 A.C. 853.

64. 2001 SCC 44

65. (1988) 47 D.L.R. (4^{th}) 431, (BCSC), at page 438.

66. *Ibid*, at page 439.

67. *NCARR, supra*, note 32, at paragraph 23.

68. (Toronto: Butterworths, 2000), at page 10.

69. *Supra*, note 64.

70. (1999), C.H.R.R. D/34 (F.C.T.D.).

71. S.C. 1996, c. 23.

72. (1994) 26 C.H.R.R. D/361 (C.H.R.T.), aff'd (1995) 26 C.H.R.R. D/428 (F.C.T.D.).

73. *Chopra No. 1*, *supra*, note 1, at paragraph 78.

74. Ibid, at paragraph 71.

75. *Chopra No. 5*, *supra*, note 26, at page 13.

76. (1985), 6 C.H.R.R. D/3033 (C.H.R.T.), aff'd by a Review Tribunal (1987), 8 C.H.R.R. D/4055, aff'd (1988), 10 C.H.R.R. D/6100 (F.C.A.), motion for leave to appeal denied (1989) 101 N.R. 238 (S.C.C.),

77. *Supra*, note 17.

78. (Washington: Bureau of National Affairs, 1995), at page S-16.

79. *Supra*, note 1, at paragraphs 88-89.

80. Bader, *supra*, note 14.

81. *Chopra No. 1*, *supra*, note 1, at paragraph 70.

82. *Supra*, note 42, at paragraphs 38483.

83. *Supra*, note 44.

84. See *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, *supra*, note 11.

85. (February 5, 2001) T.D. 1/01, (C.H.R.T.) at paragraph 233.