CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

SHIV CHOPRA

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
HEALTH CANADA

Respondent

DECISION

MEMBER: Pierre Deschamps

2008 CHRT 39
2008/09/19

I. INTRODUCTION

[1] On February 11, 2004, the Canadian Human Rights Commission referred complaint H47521 to the Canadian Human Rights Tribunal requesting, pursuant to section 49 of the *Canadian Human Rights Act*, an inquiry into the complaint.

[2] The record shows that in fact two complaint forms were referred to the Tribunal. The original complaint form, dated May 13, 1998 indicates as the date of the alleged conduct *1992 and ongoing* while the complaint form amending the complaint form signed May 13, 1998, which is dated Januray 12, 1999, indicates as the date of the alleged conduct *1993 and ongoing*.

[3] In his complaint, the Complainant, Dr. Shiv Chopra who, at all relevant times, was a drug evaluator with the Health Protection Branch at Health Canada, alleges that Health Canada discriminated against him by treating him in an adverse differential manner in the course of his employment by denying him promotional opportunities based on his race, colour and national or ethnic origin (East Indian) contrary to sections 7 and 10 of the *Canadian Human Rights Act*. The record shows that the Complainant later alleged that he had been harassed and retaliated against by Health Canada, allegations that bring into play sections 14 and 14.1 of the *Act*.

[4] The Commission was not present at the hearing. The Complainant and the Respondent were represented by Counsel.

[5] This complaint raises legal issues which go beyond a determination of discrimination in relation to sections 7 and 10 of the *Act* as well as of harassment and retaliation with respect to sections 14 and 14.1 of the *Act*.

[6] The record shows that, in 1992, the Complainant filed a complaint with the Canadian Human Rights Commission which covered events that had taken place prior to September 16, 1992. This complaint was first heard by a three member panel of this Tribunal, the Soberman Tribunal, which made findings of fact that went beyond September 16, 1992.

[7] The record shows that the decision rendered by the Soberman Tribunal was subsequently set aside by the Federal Court of Canada and another member of the Tribunal, Mr. Athanasios Hadjis, was assigned to hear new evidence. The Hadjis Tribunal made findings of fact on events that had occurred after September 16, 1992 as well as decided issues that had arisen after September 16, 1992.

[8] At the hearing, the scope of the complaint became an issue with respect to what period of time was covered by the complaint. In addition, given the findings and rulings made by the Soberman and Hadjis Tribunals, the issue of *res judicata* was raised as to which issues had been judicially decided by the previous Tribunals.

[9] Before inquiring into the substance of the complaint, i.e. the possible breach by the Respondent of sections 7 and 10 of the *Canadian Human Rights Act*, as well as sections 14 and 14.1 of the *Act*, the Tribunal will address a number of preliminary issues which may have an impact on the determination of the substantive issues.

II. PRELIMINARY ISSUES

[10] There are five preliminary issues that have to be dealt with before examining the substantive aspects of the complaint: A. the scope of the complaint, B. the findings and rulings of previous Tribunals, C. the career of Dr. Chopra at Health Canada, D. the unfair treatment of Dr. Chopra at Health Canada and E. the credibility of Dr. Chopra.

A. The scope of the complaint

[11] The record shows that, on May 13, 1998, the Complainant filed a complaint form with the Canadian Human Rights Commission bearing the number H47521. In his original complaint, the Complainant alleges that Health Canada, from 1992 and onwards, discriminated against him by treating him in an adverse differential manner throughout his employment by denying promotional opportunities based on his race, colour and national or ethnic origin contrary to section 7 of the *Canadian Human Rights Act*.

[12] On January 12, 1999, the Complainant filed a second complaint form amending the complaint form signed on May 13, 1998, bearing the number H47521. In his amended complaint, the Complainant alleges that Health Canada, from 1993 and onwards, had discriminated against him by treating him in an adverse differential manner throughout his employment by denying promotional opportunities based on his race, colour and national or ethnic origin contrary to sections 7 and 10 of the *Canadian Human Rights Act*.

[13] At the hearing, the Complainant argued that the amended complaint form did not replace the first complaint form but amended it so as to add section 10 of the *Act* as an additional ground of discrimination. According to the Complainant, the time period covered by the complaint remained the same and covered the period extending from 1992 and onwards.

[14] The Respondent argued that the second complaint in fact replaced the first one and that the time period covered by the complaint was the period extending from 1993 and onwards. The Respondent further argued that events that had taken place in 1992 had already been dealt with by previous Tribunals, the Soberman and the Hadjis Tribunals, and could not be the object of further litigation.

[15] The fact of the matter is that the two complaint forms, both the original one dated May 13, 1998 and the amended one dated January 12, 1999 were referred to the Tribunal. The issue pertaining to the reasons that lead Dr. Chopra to sign an amended complaint form with a different date in the period box thus becomes moot; so is the issue as to whether or not the amended complaint form was meant to replace the original complaint form. As stated, both the original complaint form and the amended complaint form were referred to the Tribunal.

[16] Furthermore, the record shows that the Complainant, after a long exchange between himself and Counsel for the Respondent in the course of his cross-examination, admitted that the period covered by the present complaint was the period extending from 1993 to 1999.

[17] The Tribunal thus finds that both complaint forms, the original complaint form as well as the amended one, are properly before the Tribunal and that the period of time covered by the complaint extends from 1993 to 1999.

B. The findings and rulings of previous Tribunals

[18] The record shows that many events referred to in the present proceedings were the object of findings and rulings in previous decisions of this Tribunal related to the complaint brought by the Complainant against the Respondent on September 16, 1992, i.e. the Soberman and the Hadjis Tribunals, as well as by the complaint brought by the National Capital Alliance on Race Relations (NCARR) against Health Canada. For example, the record shows that the Hadjis Tribunal allowed evidence and made findings on events which were technically outside of the scope of the 1992 complaint which covered events up to September of 1992, notably events which occurred in 1993 and 1994.

[19] Before the start of this hearing, the Respondent brought a motion asking the Tribunal to strike out certain aspects of the complaint given the findings of Mr. Hadjis in *Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20 (QL) as well as in *National Capital Alliance on Race Relations (NCARR) v. Canada (Health and Welfare*), [1997] C.H.R.D. No. 3 (QL). The Tribunal was reluctant to remove certain aspects of the complaint. However, the Tribunal considered different allegations and made a series of rulings.

[20] The Tribunal finds that it is bound by previous findings and rulings of this Tribunal, notably those made by the following members: Soberman, Sinclair, Hadjis and Groarke and that, in as much as issues have already been considered and decided upon by other members of this Tribunal, these issues cannot be relitigated. They however form part of the history of the human rights litigation between the parties. They provide the background to the current complaint. This said, providing some background or context to the present complaint does not mean relitigating issues which have already been decided upon.

[21] The Tribunal finds, after carefully reviewing the Soberman and Hadjis decisions, and given the issues that were raised in the present proceedings, that the following events need to be considered to assess their inclusion in or exclusion of the issues that the Tribunal has to rule upon: 1. the Drennan complaint, 2. the Liston comments, 3. the Gunner incident, 4. the Scott appointment.

(i) The Drennan complaint

[22] In the particulars to his amended complaint form, the Complainant states that some time in 1993 (*sic*), Dr. W.G. Drennan, Dr. M.S. Wong (*sic*), Dr. L. Ritter and an unnamed human resources officer planned to personally defame him by setting him up for a spurious charge of negligence of duty. According to the Complainant, the negligence charge was to be used in his performance appraisal and resulted in two grievances and an external investigation. The Complainant further alleges that when this was discovered, there was no impact on the perpetrators involved, nor did he receive an apology.

[23] The record shows that in his 2001 decision, Mr. Hadjis dealt with the complaint made by Dr. Drennan against Dr. Chopra in 1990. The record indicates that Dr. Chopra only learned about the existence of the complaint in 1993 pursuant to an Access to Information request which he had filed.

[24] With respect to the Drennan complaint, the record shows that on July 23, 1990, Dr. Drennan who worked at the Bureau of Veterinary Drugs, filed a complaint against Dr. Chopra about the emergency release of a drug. The complaint was documented in a memorandum addressed to Dr. Yong, Chief of the Human Safety Division, and had been put in Dr. Chopra's personal file. The complaint alleged that, on July 11, 1990, Dr. Drennan had confronted Dr. Chopra regarding the latter having failed to proceed promplty with the issuance of a certain drug to treat poultry in Saskatchewan. The records shows that, apparently, Dr. Yong concluded, at the time, that the complaint was unfounded and that Dr. Chopra had not acted inappropriately. Dr. Yong therefore did not, the record shows, 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 *(Hadjis decision, par. 144).*

[25] In his decision, Mr. Hadjis states that Dr. Chopra's concern with this incident, as it relates to the complaint he was seized with, is that the verbal exchanges which occurred between him and Dr. Drennan, in July 1990, came only two days after Dr. Chopra had written to the Chairperson of the Public Service Commission, 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 *(Hadjis decision, par. 146.)*

[26] With respect to Dr. Chopra's concerns, Mr. Hadjis ruled that other than the short span of time between the two events, there did not appear to be any evidence to link them and noted again that the Soberman Tribunal did not refer to this evidence at all in its decision and went on to reject the suggestion that discrimination against Dr. Chopra was a factor in Dr. Drennan's complaint or that it was linked to Dr. Chopra's complaints and allegations of discrimination (*Hadjis decision, par. 290*).

[27] The Tribunal finds that the issues related to the Drennan complaint have been thoroughly considered by the Hadjis Tribunal. Counsel for the Complainant acknowledged in the course of these proceedings that the complaint made by Dr. Drennan in 1990, the existence of which was discovered in December 1993, was the object of a ruling by Mr. Hadjis. Furthermore, in his ruling in *Bassude v. Health Canada*, 2005 CHRT 21, par. 11, Member Groarke made it clear that the parties were bound by Mr. Hadjis's findings.

[28] Hence, this Tribunal will not revisit the issues, findings and rulings pertaining to the Drennan complaint and make additional findings of fact, such as whether or not it was made in retaliation to Dr. Chopra's Employment Equity Report, whether or not it was an attempt on the part of Health Canada to discredit Dr. Chopra, whether or not it constituted boardroom racism as alleged by Counsel for the Complainant and what could have been the reasons for management at Health Canada for not informing Dr. Chopra of the existence of the complaint and rule on them. All the findings and non-findings made by Mr. Hadjis in his decision about the Drennan complaint are *res judicata*.

(ii) The Liston comments

[29] The record shows that the comments made by Dr. Liston about Dr. Chopra in September 1992, and which are captured in a memo written by Ms. Shirley Cuddihy, referred to as the Cuddihy memo, were considered by the Hadjis Tribunal.

[30] It stems from the Hadjis decision that, in September 1992, the Deputy Minister at Health Canada requested from the Human Resources Directorate the opinion of senior management as to why Dr. Chopra had not been promoted to management levels, and Ms. Shirley Cuddihy, Chief of Staff Relations Operations in the Human Resources Directorate, was assigned to this task.

[31] The record shows that Ms. Cuddihy met with Dr. Liston, the Assistant Deputy Minister of the Health Protection Branch at that time, and that the latter made the following comments which became part of the memo she sent to her supervisor, Mr. Rod Ballantyne:

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 but appears to be most common in departments such as ours which are technically/scienfically oriented.

Specific relating to S. Chopra

He is authoritative.

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 that 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.

[32] The record shows that the Cuddihy memo was not disclosed at the time to Dr. Chopra. Dr. Chopra was made aware of the existence of the memo and got a copy of it through a request under the *Access to Information Act*. The record shows that Mr. Hadjis dealt extensively with the comments made by Dr. Liston in 1992 and made findings of facts as well as reached certain conclusions as to the impact of the comments on Dr. Chopra's career.

[33] With respect to the Cuddihy memo, the Hadjis Tribunal found that it could be reasonably inferred from the opinions expressed by the Assistant Deputy Minister in the memo that a link between the Respondent's actions in staffing the Director's position and a prohibited ground of discrimination had been established (*Hadjis decision, par. 269*). The Hadjis Tribunal also found that the Cuddihy Memo accurately reflected the substance of Ms. Cuddihy's conversation with Dr. Liston and that Dr. Liston's declarations revealed 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 (*Hadjis decision, par. 269, 272*).

[34] The Tribunal concluded that the remarks made by Dr. Liston were 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 (*Hadjis decision, par. 271*) and 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 (*Hadjis decision, par. 275*).

[35] Hence, this Tribunal will not revisit the issues, findings and rulings pertaining to the Cuddihy memo and make additional findings of fact, such as whether or not Health Canada dealt properly with Dr. Liston, whether or not the conduct of Health Canada managers constitute boardroom racism. All the findings and non-findings made by Mr. Hadjis in his decision about the Cuddihy memo are *res judicata* and cannot be relitigated before this Tribunal. To rule otherwise would mean that parties who are not satisfied with the ruling of a Tribunal could, at their leisure, relitigate issues *ad infinitum*. This is contrary to the sound administration of justice.

(iii) The Gunner incident

[36] Even though this incident fell outside the scope of the complaint brought by Dr. Chopra in September 1992, the record shows that the Hadjis Tribunal dealt with this matter.

[37] In his 2001 decision, Mr. Hadjis dealt with the Gunner incident in the following manner:

Par. 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 boardroom racism being practiced 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. Carsorso, and inquired as to the existence of any union problems at the Bureau. During this conversation, Dr. Gunner questionned Mr. Carsorso about Dr. Chopra's case (What about Shiv Chopra?) 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.

Par. 289

In addition, there is no evidence to support Dr. Chopra'a 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 findings.

[38] The record shows that the Hadjis Tribunal dealt thoroughly with the Gunner incident and made findings that this Tribunal cannot ignore. This matter is for all intent and purposes *res judicata* and this Tribunal will not consider it any further except as part of the context to the current complaint. The Tribunal notes here that the Hadjis Tribunal found that the conduct of Dr. Gunner had not been discriminatory.

(iv) The Scott appointment

[39] Even though the appointment of Dr. Scott to the position of Director of the Bureau of Veterinary Drugs, fell outside the scope of the complaint brought by Dr. Chopra in September 1992, the record shows that this matter was considered by the Hadjis Tribunal.

[40] The following paragraphs of the Hadjis decision need to be referred to in order to determine the findings and rulings made by Mr. Hadjis in relation to the Scott appointment:

Para. 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 hearing.

Para. 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 organisations 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.

Para. 142

Dr. Chopra appealled 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. In her ruling, Ms. Barkley found that Dr. Chopra's dealing 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.

Para. 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 the 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 (the *prima facie* test) has not been met.

[41] In *Bassude v. Health Canada*, 2005 CHRT 21, Member Groarke ruled with respect to the Scott appointment that the issue had already been litigated.

[42] At the hearing, Counsel for the Complainant argued, however, that the Hadjis Tribunal did not consider what had happened after corrective measures were ordered following the successful appeal of Dr. Casorso and asked the Tribunal to address this matter. In response to this argument, the Respondent argued that the whole issue of Dr. Scott's appointment was *res judicata*, stating that the facts were basically the same in both instances (initial competition and subsequent

competition). The Complainant disputed the fact that there was *res judicata* because the issues were not the same even though the facts may be the same.

[43] The record shows that, on March 3, 2006, this Tribunal ruled on a formal objection made by the Respondent to the introduction by the Complainant of evidence on the selection process leading to the appointment of Dr. Timothy Scott to the position of Director, BVD (*Basudde v. Health Canada*), 2006 CHRT 10:

Par. 28 This said, the Tribunal cannot, however, ignore the fact that, in his decision, Mr. Hadjis did make findings of fact in connection with allegations of discrimination related to events which were outside the 1990-1992 period, namely the appointment of Dr. Scott to the position of Director, BVD.

Par. 29 In this respect, Mr. Hadjis found that Dr. Chopra was not the victim of adverse differential treatment with regard to the December 1993 competition for the position of Director, BVD. Mr. Hadjis further found that no evidence was adduced indicating that Dr. Chopra did, in fact, possess the qualification or experience in dealing with outside organizations (*Hadjis* decision, par. 288). On this basis, Mr. Hadjis concluded that Dr. Chopra was not qualified for the position and that there was no *prima facie* case of discrimination.

Par. 30 Even if these findings can be said to be only incidental to the core issue which Mr. Hadjis had to decide, i.e. the staffing of the position of Director, BVD, they still remain findings of fact made by Mr. Hadjis that I cannot ignore.

Par. 33 The Tribunal thus finds that the period covered by the complaint filed by Dr. Chopra in 1992 was that of 1990 to 1992, more precisely September 16, 1992, the date of the filing of the complaint, that additional allegations of discrimination were raised in the course of the second hearing by Mr. Hadjis of the 1992 complaint, notably allegations of discrimination in relation to the selection process of December 1993 leading to the appointment of Dr. Scott as Director, BVD, that these allegations, although incidental and not part of the scope of the complaint filed in 1992, led to certain findings of fact by Mr. Hadjis, that these findings cannot be ignored by the Tribunal but must be put in the context of the 1992 complaint and of Mr. Hadjis' analysis of the December 1993 competition.

Par. 34 In his analysis of the evidence pertaining to the 1993 competition (*Hadjis decision, para. 141-142*), Mr. Hadjis only considered the facts related to the initial competition. He did not deal with the corrective measures that were implemented after Dr. Casorso was successful in his appeal. Nor did he deal with the events that took place after the implementation of these corrective measures and with any allegation of discrimination related to events that followed the implementation of the corrective measures.

Par. 35 The Tribunal therefore finds that events which took place after the PSAB decision in November 1994 were not considered, nor decided, by Mr. Hadjis in his decision. His findings of fact are limited to the initial 1993 competition and do not cover the overall process pertaining to the staffing of the position of Director BVD.

Par. 36 On this point, the Tribunal disagrees with Respondent's assertion that the corrective measures put in place after the Carsorso decision are subsumed in the overall selection process of

a Director for the BVD, process which started in December 1993 and ended in February 1995 with the confirmation of Dr. Scott as Director, BVD.

[44] Given the Tribunal previous decision on the matter of the appointment of Dr. Scott, the Tribunal will consider as part of this complaint the events which occurred after corrective measures were ordered following Dr. Carsoso's successful appeal.

C. The career of Dr. Chopra at Health Canada

[45] Dr. Chopra is of East Indian descent. He started working at Health Canada in 1969. In 1987, he became a drug evaluator in the Human Safety Division of the Bureau of Veterinary Drugs at a VM-4 level. His employment at Health Canada was terminated in 2004.

[46] The record shows that during the period of time he worked at Health Canada, Dr. Chopra had acting positions twice, in 1988 and in 1996. Firstly, the evidence shows that Dr. Chopra acted as Chief of the Human Safety Divison, in 1988 for a period of six weeks or so, before Dr. Yong was appointed Chief, and afterwards, off and on whenever he was asked to, up to about 1992. Secondly, the evidence shows that Dr. Chopra acted as Chief, C.N.S. Division, for a period of four months at the end of 1996 and in early 1997 (October 7, 1996 to February 7, 1997) and that as Chief of C.N.S. and Endocrine Drugs Division, on occasion he acted as Director of the Bureau of Veterinany Drugs, a few days here and there.

[47] Asked if anyone within the Department expressed concerns about his performance when he acted in the position of Chief or Director, on certain occasions, Dr. Chopra testified that not at all, that no one in the Department or outside the Department complained about his acting as Director or Chief.

[48] The record shows that as early as 1979, Dr. Chopra started showing interest in being provided opportunities to acquire experience in more senior management responsibilities. His annual appraisals before joining the Bureau of Veterinary Drugs, while with the Bureau of Drugs, state that management related training programs are recommended for this employee in order to enhance his career aspirations and that he had received extensive management training.

[49] The following comments appear in his 1979 evaluation, signed by Dr. Ian Henderson: *It is obvious that this employee's interests for the future lie in the area of policy-making and management. He has been acting de facto as a Section Head for the specialty of immunology, but this has not been formalized in his job description, nor in terms of his compensation. He is somewhat frustrated by his inability to rise within the management structure of the Health Protection Branch, and is presently looking for an opportunity to enter a management career path, while attempting to maintain his expertise in the scientific discipline of immunology*.

[50] In his 1980-1981 appraisal, it is stated that Dr. Chopra has received extensive management training, while his 1981-82 appraisal states that he has gained extensive management training.

[51] In relation to his 1981-1982 appraisal, it is mentioned that this employee has received extensive training in Management skills including a Diploma in Senior Management Development from the Public Service Commission and that the full potential of this employee remains underutilized, that in spite of extensive formal training and experience in management systems and a rare insight into international regulatory control of health care products, no visible career advancement has been possible. Nevertheless, the employee has managed to contain his

frustration and continues to maintain his initiative and drive in typical professional manner. These comments are repeated in his 1982-1983 appraisal.

[52] In his 1986-87 appraisal, it is stated that when provided the opportunity, Dr. Chopra acts as a competent manager. In his 1987-1988 second to last annual appraisal before joining the Bureau of Veterinary Drugs, it is written that Dr. Chopra has wide experience in regulatory affairs and has demonstrated his ability to handle delicate situations requiring both scientific knowledge, tact and good writing skills, that he has the potential for advancement to a higher level in the service and that his aspirations should be met. In his l990 appraisal, signed by Drs. Yong and Messier, it is stated that Dr. Chopra has the potential to achieve his career aspirations (management). He is encouraged to pursue the DAP program initiative. His later appraisals are more sketchy.

[53] The record shows that, in 1991, Dr. Chopra reiterated his interest in being provided opportunities to acquire experience in more senior management to Health Canada officials, Mr. Ballantyne and Dr. Liston. The evidence shows that Dr. Chopra expressed his concern regarding, what he believed, was the denial of these opportunities. He expressed the opinion in the course of his testimony that the Department was giving opportunities (i.e. line management experience) to everybody else but him.

[54] Dr. Chopra stated time and time again in his testimony that he met all the qualifications required for a managerial position and that, in his opinion, given his past appraisals, he was better fitted that anybody else to occupy managerial positions, i.e. Chief or Director. The evidence shows that Dr. Chopra was told in that respect that he was lacking recent line management experience.

[55] It is worth noting with respect to Dr. Chopra's career progression that Mr. Hadjis made the following findings in his 2001 decision:

[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. 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.

D. The unfair treatment of Dr. Chopra

[56] In support of the allegations that the Complainant was discriminated against, Counsel for the Complainant relied on a number of situations where, he asserts, the Complainant was treated unfairly by Health Canada when compared to how Health Canada dealt with other employees. In his submissions, Counsel for the Complainant asserted that these situations should be considered

as more than the unfair treatment of Dr. Chopra compared to the treatment of other individuals, but also as retaliation or harassment under the *Canadian Human Rights Act*.

[57] Given that the Tribunal has already decided not to examine events or issues that have already been considered by previous Tribunals, the events that the Tribunal considers relevant to the present proceedings are 1. the Zohair complaint, 2. the Elanco complaint, 3. the suspension imposed on Dr. Chopra by Dr. Lachance in 1999 and 4. the exclusion of Dr. Chopra from certain projects.

[58] Except for the Elanco complaint, the Zohair complaint, Dr. Chopra's suspension and his exclusion from certain projects are not identified in the complaint forms or the additional allegations as incidents of discrimination, the Zohair complaint and Dr. Chopra's suspension having occurred after the filing of the complaints forms and the additional allegations in June 1999.

(i) The Zohair complaint

[59] The record shows that, in July 1999, Ms. Shaida Zohair, the secretary to the Chief of the Human Safety Division where Dr. Chopra was an evaluator, made a harassment complaint against Dr. Chopra. Health Canada ordered that an independent investigation be carried out. The investigator concluded that Dr. Chopra may have been guilty of arrogance, insensitivity or condescending behavior, but neither the frequency - three incidents alone over a one-year period - nor the nature - neither momentous nor grave - of the actions sufficiently constitute a pattern of behaviour that would support a definition of harassment. The evidence shows that Dr. Chopra was imposed a reprimand by the Director General of the Food Directorate and that Dr. Chopra grieved that decision. The evidence further shows that Dr. Chopra's grievance was upheld by the Assistant Deputy Minister who ordered that the letter of reprimand be removed from Dr. Chopra's file.

[60] Counsel for the Complainant stated in his oral submissions that he relied on the Zohair complaint for two specific reasons: firstly, to show how Dr. Chopra learned about the complaint - the complaint was made in July 1999 and Dr. Chopra was informed only in September 1999, - and secondly, how complaints against Dr. Chopra were dealt with compared to complaints made by Dr. Chopra.

[61] On this aspect, the evidence shows that Dr. Chopra learned about the complaint through the investigator. Nobody, it appears, within the Department had informed Dr. Chopra about the complaint. No explanation was provided. The evidence shows also that Dr. Chopra was entitled to be advised about the complaint soon after it had been filed.

[62] For the purpose of these proceedings, the Tribunal cannot derive from this event more than a finding that the Department had the complaint investigated, that a reprimand was imposed on Dr. Chopra, that the latter successfully grieved the reprimand. Given the submissions made by Counsel for the Complainant, the Tribunal will have to consider if the Zohair complaint constitutes retaliation or harassment on the part of Health Canada.

[63] More troubling however is the assertion that Dr. Chopra made in the course of his testimony when he stated that Ms. Zohair's complaint was contrived by the Department, that Ms. Zohair was motivated by the Department to have a conflict with him. This assertion remained

throughout the hearing an unproven allegation which, given its unproven nature, undermines the credibility of the Complainant in relation to some of the assertions he makes.

(ii) The Elanco complaint

[64] In the particulars to his amended complaint form, the Complainant alleges that, in early 1997, he was again slandered and defamed by Drs. G. Paterson and D. Landry, through false accusations of unacceptable behaviour towards Elanco, a pharmaceutical company, at a BVD meeting, which resulted in a counter complaint and a threat of legal action but that nothing has again be (*sic*) done about the perpetrators.

[65] The Elanco incident has to do with a letter sent by a representative of a pharmaceutical company, Dr. Dicks, who complained about a meeting attended by Dr. Chopra and BVD evaluators while Dr. Chopra was acting Chief CNS in February 1997. Dr. Chopra testified that he considered the letter an attack on his reputation. He further testified that the Department, not only was not supportive of him, but that by sending copies of the letter to different individuals within Health Canada, the Department contributed to the sullying of his reputation. The evidence shows that Dr. Chopra was told that the letter would not be used to his detriment. In fact, Dr. Chopra was never disciplined with respect to this incident.

[66] The evidence shows that, after receiving the complaint letter, the General Manager, Dr. Paterson, wrote to Elanco and stated that the matter should not be exacerbated. The decision made by Health Canada to try to defuse the situation did not sit well with Dr. Chopra who wanted the Department to sanction Dr. Dick and require from him an apology. Given the inaction of Health Canada, Dr. Chopra filed a grievance and asked for an investigation. The Department decided, after the grievance had been heard, to investigate the matter further. However, it put a stop to the investigation when Dr. Chopra indicated that he would not fully participate in the investigation.

[67] The Tribunal fails to see how issues of defamation are covered by the *Canadian Human Rights Act*. This said, the Elanco incident was the object of much discussion and debate in these proceedings. At the hearing, Dr. Chopra made a link between the Department handling of the complaint and the issue of discrimination. The lack of a proper response on the part of Health Canada to Dr. Dick's complaint would be the discriminatory act. According to Complainant's Counsel, the Department's attitude in dealing with the Elanco complaint is part and parcel of the discrimination Dr. Chopra experienced over the years at Health Canada. When Dr. Chopra's career is affected by a negative comments, he asserts, nothing or little is done about it.

[68] The Tribunal finds that the initial allegation of defamation brought against the Respondent with respect to the Elanco complaint does not fall under the purview of the *Canadian Human Rights Act*. Furthermore, the Tribunal notes that, at the time of the event, Dr. Chopra never complained of any discrimination on the part of anyone. Nevertheless, given the allegation made by the Complainant, the Tribunal will consider the Elanco complaint incident with respect to the issues of discrimination and retaliation.

(iii) The suspension imposed on Dr. Chopra by Dr. Lachance

[69] The record shows that, on March 26, 1999, Dr. Chopra attended Heritage Canada's Employment Equity Annual Meeting as a panelist. According to the summary of the proceedings put in evidence, Dr. Chopra made the comment that he had personally been involved in the fight

against racism in the Public Service for the last ten years and that during that period, he had not seen any improvement despite what delegates may have heard from other presenters at this annual meeting. Dr. Chopra stated in his testimony that he was then expressing a concern from his personal experiences following the NCARR decision as well as his deep dissatisfaction with respect to how the Department applied the NCARR order. In his view, nothing was happening.

[70] The record also shows that Dr. Chopra sent a five line abstract to the organizers of the conference in which Dr. Chopra states that the results collected since 1987 show that the effect that the Employment Equity Act and the other relevant Acts have produced is to perpetuate racism without check and that indications are that this same situation will continue well beyond Y2K.

[71] A few months after the conference, the record shows that Dr. Lachance sent a letter to Dr. Chopra, letter dated July 21, 1999. In his letter, Dr. Lachance refers to a quote taken, it appears, from an audio tape recording of the proceedings where Dr. Chopra would have said: after three years in Health Canada, you heard from our Human Resources Director General yesterday, Bob Joubert. Every word, everything I can tell you now, I wasn't there, would be a lie because there is nothing happening in HC, and we at NCARR - it must be noted here that Dr. Chopra was at one point in time a member of NCARR - are considering filing a charge of contempt of court against all three departments, Treasury Board, Public Service Commission and Health Canada.

[72] In his testimony, Dr. Chopra did not deny that he would have said that he had not seen any improvement. He however denied at first having said that Mr. Joubert was a liar, then stated that he could not deny or substantiate whether he had said this or not because he had no way of knowing. Dr. Chopra however stated that if someone from the Department stated that everything had been sorted out and that there were no further problems, this would be a lie.

[73] The evidence shows that Dr. Lachance imposed on Dr. Chopra a five-day suspension without pay in relation to this incident, that Dr. Chopra filed a grievance with the Public Service Staff Relations Board arising from this incident. The evidence shows that Dr. Chopra's grievance proceeded to adjudication, that his grievance was at first denied by the Assistant Deputy Minister, but later upheld by the Public Service Staff Relations Board. The adjudicator ordered the employer to rescind the suspension, remit to Dr. Chopra the monies related to this suspension and to remove from Dr. Chopra's file all documents relating to this suspension. Dr. Chopra testified that the Department never apologized to him for having disciplined him for having made the comments he did.

[74] In his submissions, Counsel for the Complainant stated that the issue here is how the Department deals with Dr. Chopra's concerns. Here is a situation where Dr. Chopra speaks about racism in the public service and where the Department, through Dr. Lachance, instead of sitting down with Dr. Chopra to discuss the issue, disciplines him. For Counsel for the Complainant, the message sent by the Department is that the Department will not tolerate public discussion or criticism of itself on questions of discrimination.

[75] Counsel for the Complainant further indicated to the Tribunal that it was his position that, by imposing on Dr. Chopra a five-day suspension, the Department, more specifically Dr. Lachance, was retaliating against Dr. Chopra for making certain comments in a public forum.

Counsel for the Complainant added that it was his position that the Department did not like what Dr. Chopra said about the Department and that this is why the Department slapped him with a suspension. For Complainant's Counsel, this is discrimination.

[76] Given these allegations, the Tribunal will consider if the suspension imposed by Dr. Lachance on Dr. Chopra in 1999 was a discriminatory act and constitutes retaliation in relation to the filing of a complaint.

(iv) The exclusion of Dr. Chopra from certain projects

[77] The record shows that Dr. Chopra was excluded from certain scientific reviews conducted within the Human Safety Division of the Bureau of Veterinary Drugs in 1991 (Ractopamine) and 1993 (Flumequine). Dr. Chopra stated in his testimony that it was never explained to him why he was excluded.

[78] In the course of his cross-examination with respect to these events, Dr. Chopra was asked whether or not he considered his exclusion as discrimination or retaliation on the part of Health Canada. The Tribunal finds that the answer provided by Dr. Chopra at the time was, to say the least, unclear, although Dr. Chopra did state at one point in his testimony that he did not see that as discrimination but retaliation, adding that he felt he was being targeted by Health Canada for having complained about racism. Counsel for the Complainant argued that the exclusion of Dr. Chopra from the Flumequine study is an example of some of the opportunities that were denied to Dr. Chopra for no apparent reasons.

[79] The Soberman and Hadjis Tribunals don't seem to have dealt with this matter, i.e. the exclusion of Dr. Chopra from certain projects under the auspices of the Bureau of Veterinary Drugs. In any event, his exclusion from the Ractopamine project should have been dealt with by the Soberman Tribunal which dealt with the complaint filed by Dr. Chopra in September 1992. As for the Flumequine project, it falls within the scope of this complaint. Given the nature of the allegation made by Dr. Chopra with respect to the reason of his exclusion, the Tribunal will deal with this issue within the context of an allegation of retaliation.

E. The credibility of Dr. Chopra

[80] At the outset of his submissions, Counsel for the Respondent stated that credibility was the central issue in this case and asserted that Dr. Chopra was not a credible witness given his attitude on cross-examination, his general demeanor, the use of sweeping statements, the contradictory evidence he provided, the allegations of conspiracy he made.

[81] To support these assertions, Counsel for the Respondent referred to the fact that Dr. Chopra refused to answer certain questions and was evasive in his answers, that he gave explanations which made no sense, that some of his evidence was untrue and that Dr. Chopra was not responsive and was argumentative in many instances. This was referred to by Counsel for the Complainant as a frontal attack on Dr. Chopra.

[82] In response to Respondent Counsel's frontal attack on the credibility of Dr. Chopra, Counsel for the Complainant undertook to put the attitude, comments, outbursts, general testimony of Dr. Chopra in the proper context of the questions asked.

[83] In the course of his submissions, Counsel for the Respondent referred the Tribunal to the Dhanjal case (*Dhanjal v. Air Canada*, [1996] C.H.R.D. No 4), the Martin case (*Martin v.*

Saulteaux Band Government, T.D. 07/02), the Hill case (*Hill v. Air Canada*, [2003] C.H.R.D. No. 3) and the Singh case (*Singh v. Canada (Statistics Canada*), [1998] C.H.R.D. No.7 and suggested that many of the comments made in these cases about the Complainant applied directly to Dr. Chopra. Counsel for the Respondent more specifically referred to the following passages:

Dhanjal

The complainant's attitude on the cross-examination, which was relatively brief and properly conducted by the Respondent counsel, was revealing of this personality. He is aggressive, often tried to avoid answering questions (*sic*), often argued with counsel and even went so far as to refuse to answer certain questions. More than once, the Tribunal had to call him to order and instruct him to answer questions (*sic*) that were put to him and stop arguing with counsel. The complainant even showed a lack of respect for counsel, on one occasion at least, saying his question was idiotic instead of answering it. In short, through his attitude the complainant fully accredited the thesis of Respondent counsel that Mr. Dhanjal is an irascible individual, uncooperative and a manipulator, and that it was these personality traits that were the true cause of the problems in his working relationship with Guy Goodman (*Dhanjal, par. 181*).

Martin

I was similarly unimpressed by the evidence of Julia Night. There was a marked difference in Julia Night's demeanour between her testimony in chief and in cross-examination. In chief, Ms. Night appeared quite pleasant and friendly, whereas her responses in cross-examination were often defensive, and, at times, quite aggressive. Ms. Night demonstrated a surprising degree of hostility towards Commission counsel, considering that her involvement in the matters giving rise to Ms. Martin's complaint was peripheral, and that her conduct was not in issue in this proceeding (*Martin*, par. 102).

Hill

Mr. Hill was a partial witness, whose feelings often obscured his view of the facts. He had a tendency to reduce everything to a common denominator: that denominator was that he had not been treated fairly. I nevertheless found that Mr. Hill's behaviour in the hearing room was inherently aggressive. I understand his feelings of injustice, but he was clearly inaccurate or mistaken on a number of counts and was unwilling to recognize that there was a case on the other side. (*Hill*, par. 11-12)

Singh

The Tribunal has no doubt that Mr. Singh honestly believes that he has been the victim of age discrimination as well as discrimination relating to his national or ethnic origin throughout most of his employment with Statistics Canada; indeed, his outrage at his perceived treatment at the hands of the respondent was palpable throughout his testimony. In the course of his testimony, however, Mr. Singh would often make sweeping statements where it appeared that he thought that it would advance his case. While he would usually retreat from these statements when pressed, this tendency does raise concerns as to Mr. Singh's reliability as a witness (*Singh*, par. 169).

[84] After hearing Dr. Chopra's testimony, there can be no doubt that Dr. Chopra is angry and bitter against Health Canada, that he feels that he has been treated unfairly, discriminated and retaliated against and harassed. He feels that there is some form of conspiracy that exists against him at Health Canada and that Health Canada orchestrated certain events in order to make him look bad.

[85] The Tribunal considers that, in the course of his testimony, Dr. Chopra made sweeping statements that affect his credibility or, at least, his objectivity or sense of proportion. For example, Dr. Chopra stated, in relation to the Gunner comment (*What about Shiv Chopra*), that *he believed - he did then and he does now -- that Canadians are now racist people. But there is racism in Health Canada and the Government of Canada*. As noted earlier, the comment made by Dr. Gunner was found by the Hadjis Tribunal not to be discriminatory in any way even if Dr. Chopra took offence to Dr. Gunner making it.

[86] In the course of his testimony, Dr. Chopra expressed the view that every appointment made at Health Canada since 1977 was, in his opinion, discriminatory. Dr. Chopra went as far as asserting in his testimony, as to whether or not there were interpersonal conflicts between him and his colleagues that, these, referring to the conflicts, were engineered complaints against him by management or on behalf of management.

[87] Of course, Dr. Chopra is entitled to his own opinions, for example, as to whether or not the Department, or his division, was functional, as to whether or not complaints were made against him personally or against the Department, as to whether or not he got along with people or colleagues. All this can be open to debate. As Counsel for the Complainant stated, these are views that Dr. Chopra holds, that he might be right or he might be wrong. This said, the Tribunal cannot ignore the fact that the views expressed wholehearthedly by Dr. Chopra are rooted in strong beliefs that necessarily color the views he holds with respect to Health Canada, its management, his colleagues as well as discrimination.

[88] The Tribunal also noticed that, during the course of his cross-examination, Dr. Chopra's answers more often than not went well beyond what was required to answer a question and that Dr. Chopra had a tendency to put his own spin on things. Of course, Dr. Chopra is entitled to give a full and complete answer to the questions put to him. Nevertheless, his responses were at times a long discourse about discrimination within the Department, the lack of change, etc. Time and time again, the Tribunal had to remind Dr. Chopra to answer the question put to him and that, if he wanted to provide additional relevant information, he should do it after having answered the question.

[89] The Tribunal noticed, moreover that, at times, Dr. Chopra did not hesitate to make statements that were devoid of any evidenciary basis, for example about. Dr. Alexander's (his job was to harass people), in relation to the Zohair complaint (Ms. Zhohair being motivated by the Department to have conflict with him), the Elanco complaint (Health Canada triggered the complaint), the Carsorso incident (what about Shiv Chopra, which Dr. Chopra related to Dr Liston's comments). These types of statements undermine the overall credibility of a witness and, in the case of Dr. Chopra, the Tribunal needs to be very cautious with respect to the views expressed by the latter, more specifically his perceptions as to the reasons which lead Health Canada to act the way it did.

[90] After reviewing the relevant excerpts of Dr. Chopra's testimony, the Tribunal finds that Dr. Chopra had a tendency, during his testimony, to surmise or speculate about certain events rather than say that he did not know, to boast about or exaggerate his knowledge of certain matters, such as the qualifications, background and experience of colleagues or managers. Often times, in his answers, Dr. Chopra would come up with editorial comments which were not responsive to the question asked.

[91] The Tribunal views Dr. Chopra as an opiniated person, very assertive, very sure of himself, proud, very vocal, a person who stands up for his rights, who is very committed to employment equity issues, who will not accept any form of discrimination whether blunt or subtle, who will grieve whenever he is of the view that he has not been treated fairly and that individuals have made decisions that he feels to be unreasonable, who will rarely back off even in the face of hard evidence that contradicts what he has said. The evidence also shows that, given his past experience at Health Canada and previous decisions by Human Rights Tribunals, Dr. Chopra is of the view that Health Canada officials are racists, and so are Canadians as a whole.

[92] But Dr. Chopra is also an individual who worked in a Department that was found by a Human Rights Tribunal to have acted in a discriminatory manner with respect to visible minorities (NCARR) and which was ordered to put in place corrective measures, temporary and permanent, that address discrimination issues. Furthermore, the record shows that he was personally discriminated against by Health Canada (Hadjis Tribunal) and that events occurred behind his back while he was working at Health Canada, that negative comments were made about him without him being made aware of them (the Drennan complaint, the Cuddihy memo and Dr. Liston).

[93] The Tribunal is of the view that, given the way Dr. Chopra conducted himself during his cross-examination, his credibility is an important if not crucial issue in this case, as argued by Counsel for the Respondent. This said, the Tribunal is nonetheless of the view that, given the special context in which this complaint was made, i.e after the NCARR decision and the Hadjis decision, the Tribunal needs to probe further the allegations made by Dr. Chopra in relation to sections 7, 10, 14 and 14.1 of the *Act* and look at the whole of the evidence, testimonial, documentary and circumstantial, to ascertain and determine if these articles were breached.

III. THE SUBSTANTIVE ISSUES

[94] The complaint brought by Dr. Chopra against Health Canada contains a number of allegations which are related to discrimination, retaliation, harassment. Before analysing each and everyone of these allegations, it is important to set out the provisions of the *Canadian Human Rights Act* that are relevant to the analysis of these allegations as well as the relevant legal principles.

A. The relevant provisions of the *Canadian Human Rights Act*

[95] Dr. Chopra's complaint refers to sections 7 and 10 of the *Canadian Human Rights Act* and, in as much as Dr. Chopra alleges harassment and retaliation on the part of his employer, to section 14 and 14.1 of the *Act*.

(i) Section 7

[96] In his complaint, Dr. Chopra alleges that he has been discriminated against on the basis of his ethic origin, East Indian. Section 7 of the *Act* states that *[i]t 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. The prohibited grounds of discrimination are set out in section 2 of the *Act* and are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

(ii) Section 10

[97] In his complaint, Dr. Chopra alleges systemic discrimination on the part of Health Canada and its breach of section 10 of the *Ac*t which reads: *It is a discriminatory practice for an employer, employee organization or employer organization (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination*.

(iii) Section 14

[98] Dr. Chopra alleges that some of the actions taken by Health Canada against him constitute harassement. Section 14(1)(c) of the *Act* provides that [*i]t is a discriminatory practice in matters related to employment to harass an individual on a prohibited ground of discrimination*.

(iv) Section 14.1

[99] Dr. Chopra alleges that many of the actions taken by Health Canada were retaliatory. With respect to retaliation, section 14.1 of the *Act* provides that [*i]t is a discriminatory practice for a person against whom a complaint has been filed under Part III of the Act, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim*.

(v) Section 65

[100] Section 65 of the *Act* is also worth mentioning in relation to the above mentioned sections of the *Act*. Section 65 (1) of the *Act* reads as follows: *Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization*. As for subsection (2) of the *Act*, it reads as follows: *An act or omissions shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof*.

B. The relevant legal principles

[101] At the outset, it is important to set out the legal principles applicable to the adjudication of issues related to discrimination, retaliation and harassment made by the Complainant against the Respondent.

(i) Discrimination

[102] In human rights cases, as well as in civil cases, the complainant or the plaintiff bears the burden of proof and must prove the allegations he or she makes on a balance of probabilities. HE

WHO ALLEGES MUST PROVE. (*Ontario (Human Rights Commission) v. Simpsons Sears Ltd. (O'Malley*), [1985] 2 S.C.R. 536.

[103] This said, in proceedings before Human Rights Tribunals, the complainant must establish a *prima facie* case of discrimination in order to have the burden of proof shift to the respondent who then has to provide a *reasonable explanation* which is not a mere pretext that will convince the Tribunal that, for example, the reason for not appointing a person to a position was not motivated in any way by a prohibited ground of discrimination. As stated by Mr. Justice McIntyre in *O'Malley*, a *prima facie* case 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 or, in other words, one where the evidence, if believed, and not satisfactorily explained by the respondent, will suffice for the complainant to succeed.

[104] In *Morris v. Canada (Canadian Armed Forces*), [2005], F.C.J. No. 731, the *O'Malley* test was found to be the legal test of a *prima facie* case of discrimination under the *Canadian Human Rights Act*. According to *Morris*, it is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove adverse differentiation on a prohibited ground, if believed and not satisfactorily explained by the respondent (*Morris*, par. 27).

[105] The Tribunal shares the view expressed in *Singh v. Canada (Statistics Canada)*, [1998] C.H.R.D., No. 7, at par. 197 that to support a finding that a *prima facie* case of discrimination has been established, the complainant must do more than put forward sweeping assertions. Furthermore, as stated in *Bobb*, mere allegations that a conduct was racially motivated cannot be substituted for proof of facts (*Bobb v. Alberta (Human Rights and Citizenship Commission*), [2004] A.J. No. 117, par. 76. The Tribunal further shares the view that a tribunal should be reluctant to find discrimination on the basis of a prohibited ground where there is a reasonable alternative to the theory that the complainant incurred discrimination.

[106] A belief, however strong, that someone is being discriminated against is not sufficient in law to give rise to an inference of discrimination or to establish a *prima facie* case of discrimination *(Singh v. (Statistics Canada)* [1998] C.H.R.D. No 7, par. 206). As stated in *Filgueira v. Garfield Container Transport Inc*., [2005] CHRT 32, par.40, there must be some evidence, i.e. material facts, that if believed, will make the existence of discrimination more likely than its non-existence given all the circumstances of the case.

[107] Finally, for there to be a *prima facie* case of discrimination, the mere allegation by the complainant that he was qualified or more qualified, that he was a member of a group that has historically been the target of discrimination, and that he did not get the job is insufficient to raise an inference of discrimination (*Potocnik v.Thunder Bay (City*), 1996 O.H.R.B.I.D. No 29, par. 13).

[108] Over the years, Human Rights Tribunals have recognized that *direct evidence* that discrimination was the motivating factor behind a decision or a behavior is rarely available to complainants, given that discrimination is not a practice which is usually displayed overtly. As stated in *Basi v. Canadian National Railway Company, [1988] C.H.R.D. No 2*, rarely can discrimination be proven by direct evidence.

[109] Complainants alleging discrimination must thus more often than not rely on circumstantial evidence, notably the conduct of individuals or organizations whose conduct is at issue (*Brooks v. Canada (Department of Fisheries and Oceans*), 2006 F.C.J. No. 1569, par. 27). The criteria is whether the circumstantial evidence, if believed, tends to prove the allegation of discrimination.

[110] In *Brooks*, this Tribunal stated, with respect to circumstantial evidence, that *it is not enough if circumstantial evidence is consistent with an inference of discrimination. This merely establishes the possibility of discrimination, which is not enough to prove the case. The evidence must be inconsistent with other possibilities. (Brooks*, par., 114*).*

[111] This said, as stated in *Wall v. Kitigan Zibi Education Council,* (1997) C.H.R.D. 6, the standard of proof in discrimination cases remains the ordinary civil standard of the balance of probabilities and that in cases of circumstantial evidence, the test is the following: 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 (B.Vizkelety, *Proving Discrimination in Canada*, Carwell, 1987, p. 142).

[112] Hence, in its determination as to whether or not an alleged conduct is discriminatory, the Tribunal must analyze and scrutinize carefully the conduct itself as well as the context in which it occurred, keeping in mind, as stated in *Marinaki v. Canada (Human Resources Development*), [2000] C.H.R.D No 2, that for a complaint to succeed, it is not necessary that discriminatory consideration be the sole reason for the actions in issue but that it is sufficient that the discrimination be a basis for a person's action (*Marinaki*, par. 191) and that the intent to discriminate is irrelevant to the determination of discrimination (*Nova Scotia (Human Rights Commission) v. Play it Again Sports Ltd*, [2004] N.S.J. No 403, par. 37).

[113] As for the assessment of the likelihood of a person obtaining an acting position or a permanent position, Counsel for the Complainant referred the Tribunal to the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Morgan,* [1992] 2 C.F. 401, more specifically to the opinion of Mr. Justice Marceau to argue that to establish that someone would have obtained a certain position, it is not required to prove that, without the discriminatory practice, the position would certainly have been obtained but that a mere possibility, provided it was a serious one, is sufficient to prove its reality (*Morgan*, p. 412).

(ii) Retaliation

[114] The *Canadian Human Rights Act*, as it stands, considers retaliation or threats of retaliation only in relation to a complaint having been filed and a conduct which was in response to the complaint being filed (*Witwicky v. Canadian National Railway*, [2007] C.H.R.D. No. 28). The source of the retaliation must thus be the filing of a complaint and not, for example, an event which occurred prior to the filing of the complaint. The law is clear. Section 14.1 of the Act only considers retaliation in relation to the filing of a complaint. Furthermore, as indicated by this Tribunal in *Marinaki v. Canada (Human Resources Development,* [2000] C.H.R.D. No 2, par. 224, section 14.1 of the *Act* came into force on June 30, 1998 with no retroactive effect being contemplated. To apply the new retaliation provision of the *Act* to acts occurring before the section came into force would be to attach new consequences to events that took place before the enactment. This would, according to the Tribunal, give the legislation retrospective effect, which is not generally permissible, and is not supported by the wording of the act.

[115] The record indicates that Dr. Chopra's initial complaint is dated May, 13, 1998. To be considered thus as a retaliatory act under article 14.1 of the *Act*, the event contemplated by an allegation of retaliation must have occurred after June 30, 1998. It follows that the Tribunal cannot consider as retaliation actions or events that preceded June 30, 1998, namely Dr. Chopra's alleged exclusion from the Flumequine project in 1993, the Scott appointment in 1994, the Elanco incident in 1997, the appointment of Dr. Lachance in February of 1998. The only events to which section 14.1 of the *Act* can apply are the Zohair complaint in 1999, the appointment of Dr. Butler and Alexander in 1999 to acting positions and the suspension imposed on Dr. Chopra by Dr. Lachance in August 1999.

(iii) Harassment

[116] The *Canadian Human Rights Act* does not define what constitutes harassment but the case law does. In *Hill v. Air Canada*, 2003 CHRT 9, this Tribunal stated that the gravamen of harassment lies in the creation of a hostile work environment, which violates the personal dignity of the complainant. In *Marinaki v. Canada (Human Resources Development)*, [2002] C.H.R.D. No 2, this Tribunal examined the elements that should be taken into consideration when determining if there has been harassment under section 14 of the *Act*.

[117] In *Marinaki*, the Tribunal expressed the view that victims of harassment need not prove that they suffered pecuniary losses, that for a behaviour to amount to harassment, some element of repetition or persistence is usually required, although in some situations, a single, serious incident may be sufficient to constitute harassment (*Marinaki*, par. 188-191). As stated in *Bobb v. Alberta (Human Rights and Citizenship Commission*), [2004] A.J. No 117, in certain circumstances, a single incident may be enough to create a hostile work environment. In those circumstances, the nature of a conduct should be calculated according to the inversely proportional rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated.

C. The relevant allegations

[118] Given the Tribunal's ruling with respect to the Drennan complaint, the Liston comments and the Gunner incident, these matters do not form part of the issues to be adjucated by this Tribunal with respect to the present complaint.

[119] The issues that need to be addressed in the context of the present complaint are three fold: firstly, the Tribunal will consider issues related to different appointment opportunities, namely the Scott appointment in relation to the corrective measures ordered to be put in place (1995), the appointment of Dr. Lanchance to the position of Director, BVD (1997), the self-appointment of Dr. Paterson to the position of Director, BVD (1998) and the appointments of Dr. Alexander and Butler as acting Chiefs (1999). Secondly, the Tribunal will consider events that were identified by the Complainant as potentially discriminatory or retaliatory, namely the comments made by Dr. Lachance at a BVD meeting (1998), the suspension imposed on Dr. Chopra by Dr. Lachance (1999), the Zohair complaint (1999) and the Elanco complaint (1997). Thirdly, the Tribunal will consider the allegation of systemic discrimination made by the Complainant.

[120] As previously stated, the Complainant alleges in his complaint forms, as well as in the particulars attached to one of the complaint forms and his additional allegations, that he was discriminated and retaliated against by Health Canada, that he was harassed and defamed by

Health Canada. The Tribunal will assess these allegations in relation to the following issues: discrimination, retaliation and harassment.

[121] In his Statement of particulars, Counsel for the Complainant states that, although Dr. Chopra's complaint is based on evidence of discrimination in a number of particular incidents, all of these incidents must be viewed in context and as part of a pattern which is the result of systemic racial discrimination. Accordingly, it is imperative that the incidents described in the complaint be considered as a group and in relation to each other, so that proper connections can be drawn and conclusions made regarding the impact of systemic discrimination in the workplace.

[122] In his final submissions, Counsel for the Respondent argued that for many of the allegations of discrimination made by Dr. Chopra, there is no evidenciary foundation for a finding of discrimination but only bare allegations of discrimination and racism and nothing more and nothing from which the Tribunal can draw an inference of discrimination. For Counsel for the Respondent, the allegations made by Dr. Chopra are not credible, none have been corroborated by anyone else. For Respondent's Counsel, credibility is the decisive factor in this case. Furthermore, in his view, allegations not made in a timely manner should be looked at suspiciously.

[123] In his oral submissions, Counsel for the Complainant urged the Tribunal to review the background to this case and that part of the background are the prior Tribunal decisions in NCARR and Chopra (*Hadjis decision*) and that these decisions provide the context in which this complaint rests. For Complainant's Counsel, this Tribunal cannot ignore the findings made by these Tribunals and the context in which they were made given that they are contemporaneous to some of the events related to this complaint and would have affected Dr. Chopra's career opportunities.

[124] In this respect, Counsel for the Complainant argued that it will be extremely helpful for the Tribunal to know that the Department was found to have engaged in discriminatory acts in a period immediately preceeding or contemporeaneous to the events that the Tribunal is concerned about. Counsel for the Complainant further argued that if discrimination happened in 1991, given the history of the Department, discrimination will also have happened after that year.

[125] The record shows that in the Hadjis decision, the Tribunal found that the candidate who obtained the position of Director, Human Prescription Drugs in 1991 was not qualified, that Dr. Chopra had been discriminated against with respect to this position and that, had Dr. Chopra assumed the duties of Director, Human Prescription Drugs at that time, he would have acquired the recent management experience required to be screened into the competition (*Hadjis decision*, par. 266).

[126] In the NCARR decision, the Tribunal made a series of findings, notably:

1. There is a significant under-representation of visible minorities in senior management in HC.
2. The failure of visible minorities to progress into management cannot be explained by a lack of interest or lack of technical professional skills on the part of these visible minorities.
3. A common theme in the evidence is that visible minorities in HC lack the necessary managerial experience to move into senior management positions.

4. The necessary managerial experience can be obtained through acting positions, and through exercising supervisory responsibilities and through management training programs.
5. Acting positions constituted a very large part of the total staffing action in HC during the period 1991 to 1995.

6. Acting appointments were often made without a competition and on an informal basis. As a result, potentially qualified persons are not considered for appointment or when an acting appointment is challenged, the subsequent selection process is affected by an unintended bias so that the person initially appointed is usually confirmed in the position.
7. Visible minorities proportionately were given less acting positions than non-visible minorities.
8. Visible minorities were at a disadvantage with respect to how they found out about acting positions. Non-visible minorities were more often asked by their managers to apply whereas visible minorities were required to be more proactive in finding out about opportunities for acting positions.
9. Visible minorities received less management related training than non-visible minorities.
10. Non-visible minorities were more often informed of management training opportunities by their managers whereas visible minorities had to be much more self-reliant in finding out about these opportunities.
11. There is a minority disadvantage in terms of supervising other employees. Management training and having held an acting appointment increased the likelihood of supervisory responsibility for both non-visible minorities and visible minorities. But in the case of non-visible minorities with management training or non-visible minorities who held acting positions, there was a significant increase in the likelihood of being supervisors as compared to visible minorities.
12. Visible minorities are viewed by senior management as culturally different within HC and are not considered suitable for managerial positions.

[127] The Tribunal concluded in the NCARR case that Health Canada had engaged in certain staffing practices, contrary to section 10 of the *Canadian Human Rights Act*, ordered Health Canada to adopt and implement a special corrective measures program, some measures being of a permanent nature, others of a temporary nature.

(i) Issues related to different appointment opportunities

[128] In his complaint forms, dated May 13, 1998 and January 12, 1999, as well as in his additional allegations dated June 27, 1999, the Complainant alleges that throughout his career at Health Canada he had been denied career opportunities. He cites a series of examples in support of his general allegation that he was denied career opportunities, that none of his white co-workers have been treated in a similar manner and that the reasons he has been treated in an adverse differential manner is due to his race, colour and national or ethnic origin.

[129] The Complainant further alleges that Health Canada consistently bypassed well-qualified visible minority candidates for management positions, that the general practice of the department is to recruit EX's from within Health Canada, unless there are qualified visible minority candidates interested in these positions, at which time the department recruits externally.

[130] The Tribunal will hence analyse the different appointment opportunities that the Complainant might have been denied in the period extending from 1993 to 1999 in as much as these apppointment opportunities have not been ruled upon by other Tribunals.

a) The Scott appointment (1995)

[131] In the particulars to his amended complaint form, Dr. Chopra states that there are at least two recent examples where he was denied career opportunities. The Complainant goes on to say that the first occurred in 1997 (corrected to 1993), when he met Dr. Gunner, Director General of the Food Directorate at the time, who asked him what could be done to make the situation equitable for him. Dr. Chopra responded that he would like to be considered for the position of Director, Bureau Veterinary Drugs (BVD) which was vacant. Dr. Chopra then applied for the position but was screened out. When he appealed this staffing action, his appeal was dismissed and he was told that he was not successful because he lacked management and media experience as well as international experience.

[132] The Complainant alleges in his particulars that none of this is true, that he had management experience prior to working for Health Canada and since joining the department most recently as the Acting Chief, Central Nervous System, Anti-Parasitic and Endocrine Division for a four month period in 1996. In terms of media experience, the Complainant asserts that he has extensive experience through his community work in dealing with racism and through his complaints. As to the international experience, the Complainant states that he is a fellow of the World Health Organization.

[133] The Complainant goes on to state that the successful candidate for the position of Director, BVD, was Dr. Tim Scott, that Dr. Scott is Caucasian and is from Agriculture Canada. The Complainant alleges that soon after being appointed to the position, it became evident that he lacked both the skills and the expertise for the position. The Complainant further alleges that Dr. Scott went at one point on special assignment to the Director General of the Food Directorate, Dr. George Paterson, and that the latter made himself the Acting Director, while also remaining as the Director General and maintaining Dr. Scott on special assignment to him. The Complainant then expresses the belief that this was done to prevent him from applying for the position of Director of the Bureau of Veterinary Drugs.

[134] Finally, in his complaint, the Complainant refers to the fact that the Chief position of the Central Nervous Systems, Anti-Parasitic and Endocrine Division, was eliminated in February of 1997 with an amalgamation and expresses the belief that the Chief position was abolished to prevent him and other visible minority members of the BVD from applying for it through an open competition.

[135] As stated above, the Tribunal will only look at the events that occurred after the decision was made to order corrective measures following Dr. Casorso's successful appeal and will not revisit issues dealt with and decided upon by the Hadjis Tribunal.

[136] The Complainant is of the view that the deficiencies that the Department was required to correct should have resulted in him being reconsidered for the position, in addition to Dr. Casorso, given that the decision of the Public Service Commission Appeal Board benefits every candidate and that the fact that the Complainant was not contacted by the Department should be considered retaliation.

[137] According to Counsel for the Complainant, Dr. Chopra ought to have been given the opportunity to participate in the new competition, that had he been given the opportunity to have

the benefit of the corrective measures, he would have been screened into the competition and should have been appointed to the position in issue after the corrective measures.

[138] The evidence shows that Dr. Breton, as Dr. Chopra and Dr. Casorso, were screened out from the first competition because they did not have the management experience nor did they have experience as a departmental representative with the media, two essential conditions in order to be screened into the competition. The record also indicates that Dr. Chopra and Dr. Casorso appealled the decision and that Dr. Chopra's appeal was dismissed but Dr. Casorso's appeal was allowed.

[139] The evidence also indicates that, after the successful appeal of Dr. Casorso, Dr. Scott was notified of the corrective measures to address the Appeal Board findings. The evidence shows that Dr. Chopra was not contacted after Dr. Casorso's successful appeal. In fact, the evidence indicates that, except for Dr. Carsorso, none of the canditates that had been screened out the first time were contacted. Dr. Breton, who is not a visible minority, testified that he himself was not contacted after Dr. Casorso's successful appeal.

[140] In his oral submissions, Counsel for the Respondent argued that there were no reason to contact Dr. Breton or Dr. Chopra. Dr. Chopra was complaining before the Appeal Board of bias. The record shows that before the Appeal Board, Dr. Chopra stated he had extensive experience dealing with the media in the *private sector*. The Appeal Board noted that the experience required for the position was experience as a departmental representative with outside agencies. The Board rejected the contention that Dr. Chopra's experience with the media *as a private citizen* was the same as experience as a departmental representative with the media. In the case of Dr. Chopra, recent and significant experience in the past 5 and 10 years does not appear to have been a determining factor.

[141] The record indicates that one of the corrective measures was that the temporal criteria which required that experience in managing a scientific or medical or veterinary organization with multi-faceted programs, be recent within the past ten years and significant at least five years were to be eliminated.

[142] Asked if with the elimination of the criteria, the ten year and five year requirements, he thought he would have met that experience requirement, i.e. in managing a scientific or medical or veterinary organization with multi-faceted programs, Dr. Chopra stated that he should have been given an opportunity, like Dr. Casorso to meet with the Board and explain how he would meet the qualification for which he was screened out, that he had prior experience, management training, working experience of training managers to be better managers in scientific and medical organization. In his testimony, Dr. Chopra further highlighted the fact that recent experience was not necessary because he had done the job, because he had gotten training and had the knowledge requirement, that he met the media requirement and had a very sensitive way of dealing with situations.

[143] It must be noted here that, in his 2001 ruling, Mr. Hadjis found that Dr. Chopra was not the victim of adverse differential treatment with respect to the Scott competition for the position of Director, Bureau of Veterinary Drugs. Mr. Hadjis found, in this respect, that although he was screened out for lack of recent management experience, *Dr. Chopra was also deemed to lack the second qualification of experience in dealing with outside organizations and that no evidence*

was adduced to indicate that he did in fact possess the latter qualification nor that his lacking this experience was related to discrimination by the Respondent. Mr. Hadjis concluded that he was satisfied that Dr. Chopra was not qualified for the position (*Hadjis decision, par. 2*88). In his testimony, Dr. Chopra stated that he did not agree personally with the findings of Mr. Hadjis with respect to his media experience.

[144] The Tribunal finds that, even if Dr. Chopra had been contacted after Dr. Carsorso's successful appeal, he would have still been lacking one of the essential conditions required in relation to the position of Director of the Bureau of Veterinary Drugs, given Mr. Hadjis's finding.

[145] The Tribunal thus finds that the Complainant has failed to establish a *prima facie* case of discrimination with respect to this aspect of the Scott's appointment. The mere fact that Dr. Chopra was not contacted is insufficient to establish a *prima facie* case of discrimination. The Tribunal finds that, even if the Complainant is right in saying that he should have been contacted after the corrective measures, there is no proven material facts that give credence to the allegation that the reason the Complainant was not contacted was because of his ethnic origin. The evidence shows that Dr. Breton, who is not a visible minority, was also not contacted after the corrective measures.

[146] Furthermore, the Tribunal finds that the fact that Dr. Chopra was not contacted after the successful appeal of Dr. Casorso cannot be considered retaliation on the part of Health Canada. As stated earlier, section 14.1 of the *Act* only took effect on June 30, 1998 and had no retroactive effect.

[147] Finally, the Tribunal finds that no evidence was lead with respect to the elimination of the Chief position CNS and its alleged purpose, i.e. to prevent the Complainant and other visible minority members of the Bureau of Veterinary Drugs from applying for the position through an open competition. Hence, the Tribunal will not consider this issue.

b) The Self-appointment of Dr. Paterson to the position of Director, BVD (1997)

[148] The evidence shows that, as of November 12, 1996, Dr. Scott was replaced by Dr. Landry, Chief of the Pharmaceutical Assessment Division, as Director of the Bureau of Veterinary Drugs on an acting basis. The record shows that Dr. Yong had acted for four months in that position before Dr. Landry.

[149] Dr. Chopra, who had completed a four month acting assignment as Chief CNS, in February 1997, testified that he was not given the opportunity to act in this position afterwards, Dr. Paterson, the Director General, appointing himself, according to Dr. Chopra, acting director of the Bureau. According to Dr. Chopra, Dr. Paterson cumulated the two positions, that of Director General and Acting Director, BVD, until Dr. Lachance was appointed Director in February 1998. Dr. Chopra testified that there was no competition held in order to fill the position of Director.

[150] Drs. Paterson and Lachance were not called as witnesses. This said, the issue is, in the context of the present complaint, whether or not the actions taken by the Department were discriminatory, more specifically, whether or not the decision not to fill the position of Director of the Bureau of Veterinary Drugs or to give acting appointments to other individuals, including evaluators from the Bureau, was discriminatory.

[151] It must be noted here that both Drs. Yong and Landry had been screened out of the competition for the position of Director of the Bureau of Veterinary Drugs in 1993 in relation to the Scott competition as was Dr. Chopra but were nevertheless asked to act as Director of the Bureau of Veterinary Drugs for a limited period of time. One striking difference is that both Drs. Yong and Landry were chiefs which was not the case for Dr. Chopra and had more managerial experience than Dr. Chopra who had just completed a four month acting assignement.

[152] Furthermore, given that if Dr. Chopra had become acting Director, he would have become the boss of his boss, Dr. Yong, a situation which from a purely managerial point of view, could have been problematic given that, once the acting assignment completed, Dr. Chopra would have gone back to his position of drug evaluator in the Human Safety Division.

[153] The Tribunal is of the view that the normal course of action is to appoint the person immediately below, here Drs. Yong and Landry, who were Chiefs and had several years of experience as a chief. The evidence shows that none of Dr. Chopra's colleagues, i.e. other evaluators, were asked to fill the position of Director of the Bureau of Veterinary Drugs on an acting basis. The Tribunal agrees with Respondent Counsel's statement that there is nothing wrong or unusual per se in management deciding to eliminate a layer of management for a period of time.

[154] This said, the Tribunal does not have to determine with respect to the legitimacy of Dr. Paterson cumulating two positions at the same time whether or not Health Canada was in compliance with the NCARR Order, as ruled previously by member Groarke. Furthermore, the evidence shows that at the time of the self-appointment of Dr. Paterson to the position of Director of the Bureau of Veterinary Drugs, Health Canada was being monitored for its compliance with the NCARR Order by the Commission. The evidence shows that the Commission found Health Canada to be in compliance. No evidence was tendered to suggest otherwise.

[155] The Tribunal thus finds that, given the circumstances, the decision of the Department not to ask any of the evaluator in the Human Safety Divison and the Pharmaceutical Assessment Divison, the only two divisions that existed at the time in the Bureau of Veterinary Drugs, to act as Director of the Bureau appears to have been reasonable and cannot be considered discriminatory.

[156] Hence, the Tribunal finds that the Complainant has not made with respect to the issue of the self-appointment of Dr. Paterson as Director of the Bureau of Veterinary Drugs for a period of time in 1997 a *prima facie* case of discrimination.

c) The Lachance appointment (1998)

[157] In the particulars attached to his amended complaint form, the Complainant states that a second example of him being denied career opportunities occurred on February 9, 1998 when Dr. Paterson announced that Dr. André Lachance would be deployed to fill the Director position as Dr. Scott had retired, that Dr. Lachance was also from Agriculture Canada and lacked the required training and experience in the relevant fields of veterinary science and drug regulatory work of the Bureau. The Complainant goes on to say that the National Capital Alliance on Race

Relations (NCARR) had opposed his appointment as being in violation of the Tribunal ruling in the NCARR complaint.

[158] With respect to Dr. Lachance's appointment, the Complainant filed additional allegations on June 27, 1999. In these additional allegations, the Complainant states that he maintains that Dr. Lachance, who is Caucasian, did not have the prerequisite education, such as a degree in veterinary science, to assume the position, that he raised an objection with the Director General, George Paterson, about this appointment. The Complainant goes on to state that, in response to his objection to the appointment, the Director General denied that this expertise was required.

[159] In the the particulars to his amended complaint form, the Complainant refers to the fact that there was a petition circulating concerning Dr. Lachance's culturally insensitive remark that he likes visible minorities when he was formally presented to the employees of the Bureau of Veterinary Drugs on February 9, 1998. The Complainant asserts in his particulars that, once again, that he and other visible minority candidates have been prevented from applying for a position for which they were well qualified, in favour of less qualified white candidates who have obtained the position without going through a competitive process.

[160] Drs. Paterson, Scott and Lachance were not called as witnesses. With respect to Dr. Lachance, there was a debate about him being called as a witness. The record shows that, at first, Counsel for the Respondent, wanted to file a medical report that would have established Dr. Lachance's inability to testify given his medical condition. The Tribunal never got to see the report. Counsel for the Complainant objected to the filing of the report and required that the physician having written the report be required to testify so as to be cross-examined by Complainant's Counsel. In the end, neither Dr. Lachance nor his physician were called as witness. In his final submissions, Counsel for the Complainant asked that the Tribunal make an adverse inference with respect to the fact that the Respondent did not call Dr. Lachance as a witness and declined to call his physician.

[161] The evidence shows that, in relation to Dr. Lachance's appointment, a petition was sent to the Professional Institute of the Public Service of Canada. The evidence indicates that the petitioners considered the appointment of Dr. Lachance to be one of many appointments and promotions where the merit principle had been circumvented. The petitioners were complaining about the fact that Dr. Lachance was coming from Agriculture Canada to replace Dr. Scott without competition while Dr. Scott had been appointed through a competition.

[162] In his testimony, the Complainant stated that, after the appointment of Dr. Lachance, he raised some concerns about his appointment. These dealt firstly with Dr. Lachance's qualifications and secondly with the comments he made at a meeting after his appointment. Dr. Chopra further stated that he complained to Dr. Paterson about the racially insensitive corporate culture which, despite the Canadian Human Rights Tribunal's decision in *NCARR* continued to prevail among the senior management of the Department. Dr. Chopra testified that Dr. Parterson did not talk to him about whether or not the appointment of Dr. Lachance was consistent or inconsistent with the NCARR Tribunal Order. Dr. Chopra expressed the view that Dr. Paterson was part of the problem at Health Canada.

[163] In his testimony, the Complainant reiterated his belief that Dr. Lachance lacked the required training and experience in the relevant fields of veterinary science and drug regulatory

work of the Bureau. The Complainant also expressed the belief that he and other visible minority candidates had been prevented from applying for a position for which they were well qualified in favour of less qualified white candidates who had obtained the position without going through a competitive process.

[164] Dr. Chopra testified that he was never contacted to see if he was interested in the Director's position, on an acting basis, prior to the appointment being made and expressed the view that he should have been considered.

[165] Dr. Chopra was asked, in relation to the Statement of Qualifications for the Director position, if he met the qualifications for the period 1996-1998. Dr. Chopra testified that he met the educational qualifications, as well as the experience qualifications. Having had recent management experience as the Acting Chief, for four months, of the CNS Division, from October 1996 to February 1997, he considered himself as fulfiling all qualifications with respect to experience.

[166] Dr. Chopra further stated that he also met the knowledge qualifications as well as all the training qualifications. He stated that nobody had formal training of the kind he had, referring to the Senior Management Development Program, SMDP. With respect to knowledge of management techniques, Dr. Chopra referred to his experiences outside the Department and indicated that he had full knowledge of evaluating and monitoring drug residues, thorough knowledge of existing programs and activities in 1996 to 1998 as well as the *Food and Drugs Act* and Regulations. Dr. Chopra further stated that he had enormous experience and the ability to manage both human and financial resources, in every capacity, that he met all the other features related to the abilities required for the position as well as the personal qualities.

[167] For Complainant's Counsel, this case would have been an ideal situation to promote visible minorities, to implement the principles of Employment Equity and to give a visible minority experience as a manager as opposed to swapping two other employees. For him, human rights supersede any other consideration.

[168] On the issue of Dr. Lachance's appointment to the position of Director of the Bureau of Veterinary Drugs, the Tribunal heard the testimony of Ms. Gail Mclean. Ms. Mclean was at the time Director of Executive Services at Health Canada.

[169] Ms. Mclean testified that Dr. Scott, an EX-2, wanted to retire but that he did not want to be financially penalized, given that he did not have the age or the years of service. Ms. Mclean testified that, at the time, there existed a program, the *Alternate Exchange Program*, where a person could switch job or position with someone who was about to lose his job and someone who wanted to retire. The evidence shows that, at Agriculture Canada, Dr. Lachance's position had been declared surplus. Ms. McLean testified that when the decision was made to swap Dr. Lachance and Dr. Scott, the Department did not look at the impact on visible minorities. Ms. Mclean further testified that Dr. Lachance was found to meet the requirements for the position of Director of the Bureau of Veterinary Drugs.

[170] Ms. Mclean explained that in order to be eligible for a SWAP, both candidates had to be at the same managerial level. The evidence shows that Dr. Lachance was an EX-2 at Agriculture Canada. Ms. Mclean testified that the Department had to consider a SWAP prior to initiating any

staffing activity of any other kind, whether it be a deployment or a competitive process. She testified that, at the time, there was no vacancy for the position of Director of the Bureau of Veterinary Drugs. Ms. Mclean further testified that the decision to have a SWAP had nothing to do with Dr. Chopra, that it was initiated by Dr. Scott. The Tribunal finds her evidence to be credible. Even if Dr. Paterson was not called as a witness, the evidence shows that Ms. Mclean was directly and immediately involved in the SWAP process between Drs. Landry and Scott.

[171] The evidence shows that the SWAP became effective on March 31, 1998 after Dr. Scott had left Health Canada and Dr. Lachance had accepted the offer to become Director of the Bureau of Veterinary Drugs.

[172] The Tribunal finds that, given the SWAP procedure that was used to appoint Dr. Lachance, given the testimony of Ms. Mclean as to the reasons for using this procedure, i.e. Dr. Scott desire to retire, given her testimony that the decision to have a SWAP was in no way related to Dr. Chopra, the Complainant has not made a *prima facie* case of discrimination. The context and circumstances surrounding Dr. Scott's departure from Health Canada and the arrival of Dr. Lachance do not reflect any discriminatory animus on the part of Health Canada.

[173] The Tribunal hence finds that the fact that the Department did not offer Dr. Chopra the opportunity to compete for the position of Director of the Bureau of Veterinary Drugs was not discriminatory, that the decision was made to truly accommodate Dr. Scott.

d) The Alexander appointment (1999)

[174] In his additional allegations dated June 26, 1999, the Complainant states that a meeting on June 2, 1999 with Ms. Kerrie Strachan, Human Resources Officer for the Branch (and former Human Rights Coordinator), it was announced that the Department would proceed with a four month appointment which carried no rights to appeal. The Complainant adds that Ms. Strachan announced that at the end of the four months, the position would be open and a competitive process including an exam and a Board would be held and that when she was questioned about the Tribunal Order in NCARR and its contravention, Ms. Strachan refused to discuss the issue and the meeting terminated.

[175] The Complainant goes on to state that he believes that this appointment, as well as the previous opportunities denied him in 1997 and 1998 are overtly discriminatory and in direct contravention of the Canadian Human Rights Tribunal Order in NCARR which required Health Canada to develop practices to remove systemic barriers to the advancement of visible minority employees and remedy past discrimination. For the Complainant, it is clear that he was not considered for the positions, that the Department would not rescind Dr. Alexander's appointment and that the Department had taken actions which constitute retaliation against him because of having filed his human rights complaint, in that he was qualified for these positions and had been bypassed because of the harassment complaint he had filed.

[176] In his additional allegations, dated June 26, 1999, the Complainant reiterates that in May, 1999, Dr. Lachance appointed Dr. Ian Alexander as Acting Chief of the Human Safety Division, for a period of four months. The Complainant further expresses the belief that Dr. Alexander, who is Caucasian, did not have the experience and educational background required for this position.

[177] The evidence shows that, on May 6, 1999, an announcement was made, at an all staff meeting, that Dr. Yong, the Chief of the Human Safety Division, would be on assignment for a year and that as of May, 5, 1999, Dr. Ian Alexander would be the Acting Chief of the Human Safety Division for a period of four months. The evidence shows that within the Bureau of Veterinary Drugs, Dr. Alexander was an evaluator in the Pharmaceutical Assessment Division, working under the authority of Dr. Landry whereas Dr. Chopra was an evaluator in the Human Safety Division, working under the authority of Dr. Yong. The evidence also shows that before being offered to Dr. Alexander, the acting position was offered to a visible minority i.e. Dr. Sharma, an evaluator in the Pharmaceutical Assessment Division but that the latter refused the acting assignment.

[178] The evidence shows that, with respect to the position of Chief of the Human Safety Division, Health Canada initially considered the possibility of filling this position with an employee on a Career Assignement Program (CAP), that the only qualified and available applicant was not interested in this as a CAP assignment, that a decision was made to conduct an internal competitive process for an acting appointment of approximately one year, as well as to have someone act in the position for a short period while the competitive process was conducted and that in light of some proposed changes to the organization, it had been decided that prior to posting this acting assignment, a review of the classification of the position would be conducted.

[179] In his testimony, Dr. Chopra asserted that there was no notice posted for the Acting position of Chief, that he was not made aware of the proposal to conduct a competititon for the acting appointment, that he was not invited to apply and was not considered. Dr. Chopra stated that he learned *ex post facto* of the appointment of Dr. Alexander. Dr. Chopra further testified that Dr. Alexander had not worked in the Human Safety Division, that he did not have the required qualifications for the positions and had no experience in it and that he was appointed without competition by a decision of Dr. Lachance. Dr. Chopra moreover stated in his testimony that he was the most qualified person for the job, that he had recently obtained line management experience having acted as Chief, for four months, in one of the Animal Safety Divisions. Dr. Chopra further added that the position was directly in his immediate area of work, that he was the expert in that area, that he had international experience, having a WHO fellowship.

[180] Dr. Chopra stated in his testimony that he would have been interested in acting for the Chief of Human Safety position in 1999. He further stated that he found it odd that in a memo written by K. Strachan, from Human Resources, on April 30, 2003, many years after the appointment of Dr. Alexander as acting chief of the Human Safety Division, the latter would state, with respect to the question as to why people were chosen to act as Chief of the Human Safety Division in May 1999, that Dr. Lachance was trying at the time to ensure that staff who were asked to act in the position were not intending on competing for the position when it was to be staffed permanently, so the permanent staffing would be fair. According to Dr. Chopra, you give the acting appointments and then quite frequently, 93 percent of the time, people who are acting get the job.

[181] The evidence shows that Dr. Chopra objected to the appointment of Dr. Alexander, found it to be discriminatory and in direct contravention of the NCARR Tribunal Order. A letter to this effect, dated May 31, 1999, signed by Dr. Chopra and two other evaluators, was sent to the Chief Commissioner of the Canadian Human Rights Commission. In the letter, Dr. Chopra and

his colleagues ask that the appointment of Dr. Alexander be rescinded and that visible minority members of the Human Safety Division be offered the same appointment.

[182] At the hearing, Counsel for the Respondent disputed the assertion made by Dr. Chopra that Health Canada was in contravention of the NCARR Tribunal Order and referred to the ruling previously made by member Groarke where the latter ruled that any question of compliance must be dealt with in the Federal Court. For his part, Counsel for the Complainant stated that it was not his intention to put in issue whether there was compliance or not with the NCARR Order.

[183] The record shows that in a letter dated June 8, 1999, the Chief Commissioner's Office replied that the Tribunal Order in the NCARR decision required that Health Canada develop programs and practices to remove systemic barriers that have prevented the advancement of visible minority employees and implement initiatives to remedy past discrimination and that the overall goal of the Order was to ensure that visible minority representation at Health Canada reached appropriate levels. The letter goes on to say that the Tribunal Order does not preclude the promotion of non-visible minority candidates. The letter further states that the purpose of the Commission's monitoring function under the Tribunal Order is to assess whether Health Canada is making reasonable progress toward compliance with the Permanent and Temporary Measures outlined in the Tribunal Order and that to date, the Commission's analysis have indicated that overall, such progress is being achieve.

[184] The Tribunal, given the letter sent by the Canadian Human Rights Commission to Dr. Chopra where it is clearly stated that Health Canada by appointing Dr. Alexander as acting Chief of the Human Safety Division was not contravening the Tribunal Order in NCARR, takes note of the fact that Health Canada did not contravene the NCARR Order when it appointed Dr. Alexander as Acting Chief of the Human Safety Division.

[185] Furthermore, the Tribunal finds that the Complainant has failed to make a *prima facie* case of discrimination with respect to the appointment of Dr. Alexander as acting Chief of the Human Safety Division in May 1999. The record shows that Dr. Alexander had the experience and educational background required for this position. Dr. Chopra might have perceived that he had been discriminated against but mere perceptions are not sufficient to establish a *prima facie* case of discrimination

[186] This said, the Tribunal finds worth nothing that Dr. Chopra stated in a document that Dr. Alexander was brought in to harass people in the division. This view clearly shows that, from the beginning, Dr. Chopra was ill-disposed towards Dr. Alexander. It reflects poorly on Dr. Chopra's credibility with respect to any allegation of discrimination in relation to the appointment of Dr. Alexander.

[187] As for Dr. Chopra's claim that the appointment was retaliatory, the Tribunal finds that Dr. Chopra was not clear as to what constituted retaliation with respect to the Alexander appointment. The Tribunal finds that the Complainant has not established that the appointment of Dr. Alexander in May 1999 as acting Chief of the Human Safety Division constitutes retaliation on the part of Health Canada for the filing of a human rights complaint by Dr. Chopra.

e) The Butler appointment (1999)

[188] The evidence shows that, in July 1999, Dr. Kelly Butler, Chief of the National Biorepository Centre at Health Canada, was offered a deployment to the position of Chief of the newly created Policy and Program Division. According to the evidence, a deployment is the move of an employee from one position to another with the same occupational group. The evidence shows that Dr. Chopra and other of his colleagues grieved the deployment of Dr. Butler before the Public Service Commission of Canada and that their grievance was upheld, the deployment investigator concluding on November 9, 2000 that the deployment of Dr. Butler was made in contravention of the *Public Service Employment Act*.

[189] The evidence also shows that, as of September 20, 1999 for a period of four months, up until January 17, 2000, while remaining Chief of the newly created Policy and Program Division, Dr. Butler became the Acting Chief of the Human Safety Division, an appointment made by Dr. Lachance. Dr. Butler replaced Dr. Alexander in the acting position. The evidence further shows that Dr. Butler was reappointed acting Chief of the Human Safety Division from January 17, 2000 to May 16, 2000, pending the classification of that position initiated in December 1999 and that she would be acting as Director of Bureau of Veterinary Drugs during the absence of Dr. Lachance, from January of 2000 to February of 2000.

[190] Asked why it was necessary to fill the position held by Dr. Alexander again on September 20, 1999, Dr. Chopra stated that it was because the acting term for Dr. Alexander had expired so either his term would have to be extended or someone else would have to be appointed. Dr. Chopra further stated in his testimony that Dr. Butler was from outside the Bureau, that she had never worked in the Bureau, that she had no idea or knowledge of the Human Safety Division's work and that she was an unqualified person in his opinion. Asked if he had acted in the position of Chief of Human Safety at any time, Dr. Chopra testified that he had acted in 1988 for six weeks or so, before Dr. Yong was appointed, and afterwards, off an on whenever he was asked to, up to about 1992.

[191] Asked what he thought about Dr. Butler's appointment, Dr. Chopra stated that he would disagree with her appointment because he was the most senior scientist in the Human Safety Division, but that he was never asked to act, that it was always someone from outside the division and white, first Dr. Alexander, then Dr. Butler, both, according to Dr. Chopra, unqualified to be in that division.

[192] According to Dr. Chopra, Dr. Butler was not bilingual while the position required for the person to be bilingual. Asked if, in his view, he would have been qualified to act in the Chief of Human Safety Division position, Dr. Chopra answered that if he was qualified back in 1988 and off and on appointed, then he certainly would have been qualified, even from Health Canada's point of view.

[193] Dr. Chopra testified that he was the most qualified candidate, had all the scientific qualifications, the interpersonal skills, the negotiating skills, according to his appraisals, that he was courteous and bilingual, had international experience, had been a fellow of the WHO, had management training, given by the Public Service Commission, had worked as a trainer of managers in Health Canada for three years. Dr. Chopra further noted that Dr. Lachance who had made racist remarks was appointing white people into the very job that was in his immediate neighbourhood and capacity.

[194] In relation to both the Alexander and Kelly appointments made by Dr. Lachance, Counsel for the Complainant argued that both times Dr. Chopra was denied an opportunity to act in a management position. Counsel for the Complainant also argued that it was troubling that the department would deny Dr. Chopra an opportunity to act by giving that position to Dr. Butler, when she already had another job if not two other jobs and was new to the Bureau of Veterinary Drugs. For him, the question that begs an answer is: why would you not give the acting position to Dr. Chopra in those circumstances. For Complainant's Counsel, the conduct of Health Canada management raises issues and questions about the credibility of the Department and the discrimination isssue.

[195] Counsel for the Complainant asserts that there was a position available to Dr. Chopra, that Dr. Chopra was qualified for it, that others were placed into the position repeatedly and that race was a motivating factor. Moreover, for Counsel for the Complainant, the Department did not come up with a valid explanation with respect to why Dr. Chopra was not provided with certain opportunities to act. Counsel for the Complainant furthermore asserts that all of this adds up to discrimination and underscores the fact that the findings made by the NCARR and the Hadjis Tribunals clearly established the fact that Health Canada was an organization where racial discrimination existed at the time of the events covered by this complaint.

[196] Counsel for the Respondent, for his part, argued that even if the evidence is to the effect that Dr. Chopra was not invited to apply to the acting position and that a competition was not held, that does not mean that discrimination occurred. Just as Dr. Chopra was not invited to apply for the acting position, nor were any of his colleagues from the Human Safety Division invited to apply or, in fact, anyone else regardless of whether they were visible minorities or not. Everyone was thus treated the same.

[197] Counsel for the Respondent further argued that Health Canada was not obliged to offer Dr. Chopra any acting position which came up and that the failure to offer him the position regardless of whether he was qualified or not does not mean that a *prima facie* case of discrimination has occurred. *For whatever reason*, he stated, Health Canada did not offer the position on an acting basis to any of the people in the Human Safety Division, and a *prima facie* case is not proven on this basis.

[198] The issue here is not whether or not Dr. Chopra should or would have become Chief of the Human Safety Division within the Bureau of Veterinary Drugs but whether or not he was denied an acting position because of his race or ethnic origin. Hence, it does not matter whether or not the two individuals who acted as Chief of the Human Safety Division in 1998 obtained or not the position later on. The issue is: was Dr. Chopra who for years had shown interest in accessing managerial positions and who had acted in the past as Chief of the Human Safety Division (1988) as well as Chief of the Central Nervous System, Endocrine and Antiparasitic Drugs Division (1996-1997) not offered the acting position because of his ethnic origin.

[199] The appointment of Dr. Butler as acting Chief of the Human Safety Division raises a number of questions. Dr. Butler was appointed Chief of a newly created division, the Policy and Program Division, in July 1999. Dr. Butler came from outside of the Bureau of Veterinary Drugs which is not in and of itself unusual, the record shows. This said, it would have taken her some time to adapt to her new tasks and run the division efficiently.

[200] Now, the record indicates that as early as September 1999, Dr. Butler was asked to act as Chief of the Human Safety Division for a period of four months while being Chief of the Policy and Program Division. Furthermore, the record shows that in January 2000, she was asked again to act as Chief of the Human Safety Division while remaining Chief of the Policy and Program Division and, in addition, was to act at the same time as the Director of the Bureau of Veterinary Drugs in the absence of Dr. Lachance.

[201] The Tribunal finds it odd that a person new to the Bureau would be entrusted with so many tasks at the same time. Dr. Butler was not call as a witness, nor was Dr. Lachance to provide the Tribunal with an explanation as to why she was considered to be the only person who could fill the temporary vacancies in the position of Chief of the Human Safety Division. Given that Dr. Lachance was the person making these appointments and given that Dr. Lachance was not called as a witness, the Tribunal is left without an explanation as to the logic and the basis of these different acting appointments given to one person, new to the Bureau, except for the reason provided four years after the fact by Mr. Strachan in a memo dated April 30, 2003. As mentioned earlier, in her memo, Ms. Strachan who was not called as a witness, states with respect to the question as to why people were chosen to act as Chief of the Human Safety Division in May 1999, that Dr. Lachance was trying at the time to ensure that staff who were asked to act in the position were not intending on competing for the position when it was to be staffed permanently, so the permanent staffing would be fair. The Tribunal finds it odd that such an explanation would come up four years after the fact and frankly finds the explanation hard to believe.

[202] This said, the Tribunal cannot ignore the fact that Dr. Lachance was the person making the acting appointments and that he was at odds with Dr. Chopra over many issues. In addition, the Tribunal cannot ignore the fact that Dr. Chopra had shown in a recent past that he wanted to acquire managerial experience, that he had acted as Chief of the Human Safety Division in 1988 for a period of six weeks, that he had acted as Chief of the CNS Division for a period of four months at the end of 1996 and in early 1997 and thus had recent managerial experience. Moreover, the Tribunal cannot ignore the fact that Dr. Lachance had made comments with racist overtones at a meeting of the Bureau of Veterinary Drugs in February 1998. Finally, the Tribunal cannot also ignore the fact that Health Canada had been found to have, in the past, discriminated against Dr. Chopra and that it had also been the object of a Tribunal Order in NCARR, the Tribunal having found that visible minorities were being discriminated against in relation to their access to managerial positions. These are all circumstances that the Tribunal cannot ignore in determining if the Complainant has made a *prima facie case* of discrimination.

[203] As stated earlier, a *prima facie* case 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 (*Ontario (Human Rights Commission) v. Simpsons Sears Ltd. (O'Malley*), [1985] 2 S.C.R. 536 or, in other words, one where the evidence, if believed, and not satisfactorily explained by the respondent, will suffice for the complainant to succeed.

[204] As stated in *Basi v. Canadian National Railways Company,* [1988] C.H.R.D. No 2, 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 rational explanation.* In cases such this one, as stated in *Basi*, much depends on the ability of a Tribunal to draw inferences, (which are reasonable if not in fact

compelling) from the conduct of the employer. Once these inferences are raised, the employer has an onus of explaining what his motives were, other than what they appeared to be.

[205] The Tribunal is mindful of the fact that Dr. Chopra's credibility with respect to the allegations of discrimination he has made are an issue in the present case. This said, the Tribunal must nevertheless assess if these allegations are well founded in light of the whole of the evidence, including the circumstancial evidence.

[206] The Tribunal finds that Dr. Chopra has made a prima *facie case* of discrimination with respect to the appointment of Dr. Butler as Chief of the Human Safety Division in September 1999. The Tribunal is mindful of the fact that Dr. Butler was reappointed Chief of the Human Safety Division in January 2000. The Tribunal will however make no findings with respect to this reappointment given that it falls outside the scope of this complaint.

[207] The probative elements and circumstancial evidence establishing a *prima case* of discrimination relate to the fact that Dr. Chopra had indicated that he wanted to have managerial experience, that he had twice in the past acted as Chief, that he had recent managerial experience, that he had been in the past the victim of discrimination at Health Canada because of his ethnic origin, that at the time of the event, Health Canada had recently been found by the NCARR Tribunal to have discriminated against visible minorities, that Dr. Lachance had in the past made comments of a racist nature or at least which had a racial overtone, as found by this Tribunal, that Dr. Chopra and Dr. Lachance were at odds with respect to issues of discrimination and finally, the fact that the reason provided in Ms. Strachan's memo to justify the conduct of Dr. Lachance is hard to believe. The Tribunal is of the view that these elements considered together are sufficient to establish a *prima facie* case of discrimination. The Tribunal finds that there is here a subtle scent of discrimination.

[208] Given these findings, the Respondent had the burden of providing a reasonable explanation which would not be a mere pretext that would lead a Tribunal to believe that discrimination had no part to play in the decision to appoint Dr. Butler in September 1999 as acting Chief of the Human Safety Division. The Tribunal finds that the Respondent has failed to provide such an explanation.

[209] Dr. Lachance was not called as a witness, nor was Dr. Butler. It is insufficient for Counsel for the Respondent to state that Health Canada can appoint whomsoever it wants to a position. It may well be that the decision not to appoint Dr. Chopra had nothing to do with discrimination and Dr. Chopra's ethnic background, such as the fact that Dr. Chopra did not get along with his colleagues or that he was not available. Counsel for the Respondent states that no other person from the Human Safety Division was offered the position. This in and of itself is not conclusive evidence that no discrimination was involved in the selection process. It could be that some individuals were invited to apply and turned down the invitation. Who knows? Who can say? The Respondent did not provide the Tribunal with any concrete evidence but limited itself to invoking different possibilities.

[210] Hence, the Tribunal finds that Dr. Chopra was discriminated against contrary to section 7 of the *Canadian Human Rights Act* when he was not invited to act as Chief of the Human Safety Division in September 1999.

[211] This finding does not however resolve the following issue: had Dr. Chopra been appointed acting Chief of the Human Safety Division in September 1999 would he have become later on Chief of that division.

[212] In his final submissions, Counsel for the Complainant relied on the *Morgan* decision as well as the decision of the Federal Court of Appeal in *Chopra v. (Canada) A.G.*, [2007] FCA 268 to support his argument that the proper test to apply when considering whether or not Dr. Chopra would have been appointed in the future to a Chief or Director position, is the following: there must be a connection or causal link between the position which was not obtained and the discrimination (*Morgan*, p. 432).

[213] With respect to this issue, the Tribunal cannot ignore the fact that in 2000, Dr. Chopra failed the 810 In-Basket test run with respect to the position of Chief of the Human Safety Division. The record shows that Dr. Chopra challenged the test as being discrimatory but was not successful. Thus, Dr. Chopra was not able to compete for the permanent position of Chief of the Human Safety Division.

[214] Hence, the Tribunal cannot establish a causal link between the fact that Dr. Chopra was discriminated against with respect to the position of Acting Chief of the Human Safety Division and the fact that he did not obtain the permanent position of Chief of the Human Safety Division in 2000.

(ii) Issues related to incidents potentially discriminatory

[215] In his complaint, the Complainant raises a number of events which he alleges were discriminatory. These are the Lachance comments made at a Bureau of Veterinary Drugs staff meeting, the five-day suspension he received from Dr. Lachance in relation to the Heritage Canada Conference, the Zohair complaint, the Elanco complaint and the Flumequine project. The Tribunal will deal with each of these events in turn so as to determine if they constitute discrimination, retaliation or harassment against Dr. Chopra.

a) The Lachance comments

[216] In the particulars to his complaint, the Complainant mentions that there is a petition circulating concerning Dr. Lachance's culturally insensitive remark that he likes visible minorities when he was formally presented to the employees of the Bureau of Veterinary Drugs on February 9, 1998. In his additional allegations dated June 27, 1999, the Complainant adds that he raised the issue of Dr. Lachance's comments with Dr. Paterson, the Director General, and that the latter downplayed the seriousness of the comments which he claims offended him and some colleagues from the Bureau.

[217] The evidence shows that on February 9, 1998, Dr. Lachance who had just been appointed Director of the Bureau of Veterinary Drugs, was introduced to the staff of the Bureau by the Director General, Dr. Paterson, as the future Director of the Bureau of Veterinary Drugs in replacement of Dr. Scott.

[218] According to Dr. Chopra's testimony, in the course of introducing himself, Dr. Lachance would have stated, looking at his audience, that he liked visible minorities. Dr. Chopra stated in his testimony that he found the remark upsetting, given the previous Tribunal's decision in NCARR. Dr. Chopra expressed the view that this was a racist remark.

[219] The record shows that, on February 10, 1998, Dr. Chopra sent a memorandum to Dr. Paterson in which he indicates that the statement made by Dr. Lachance was a deeply insensitive racial remark towards visible minority employees of the Bureau. Dr. Chopra further states in his memorandum that here lies a typical example of the racially insensitive corporate culture, which despite the Canadian Human Rights Tribunal decision in NCARR continues to prevail among the senior management of this department. Dr. Chopra ends his letter by requesting that the appointment of Dr. Lachance be reconsidered.

[220] Furthermore, the record shows that, in his response to Dr. Chopra's memorandum, Dr. Paterson expressed some doubt about the accuracy of the statement allegedly made by Dr. Lachance and tried to put it in the proper context, i.e. Dr. Lachance wanted to establish a good relation with his new staff. Dr. Paterson furthermore underscored the fact that Dr. Chopra's concerns regarding Dr. Lachance's comments were not shared by all of the staff of the Bureau. Indeed, the evidence shows that two persons attending the meeting dissociated themselves from the views expressed by Dr. Chopra.

[221] Dr. Chopra testified that he did not find Dr. Paterson's response a proper one. Furthermore, Dr. Chopra indicated that he felt that Dr. Paterson was taking side with Dr. Lachance and felt very frustrated about the handling of the whole matter, that this showed that there was still a culture of racism in Health Canada.

[222] In a memorandum sent to Dr. Paterson by Dr. Lachance, the latter explained, after having reviewed the memorandum sent by Dr. Chopra to Dr. Lachance, that his purpose in attending the meeting was to strike immediately a good relationship with a majority of the Bureau of Veterinary Drugs staff, that in his previous job, he had a large mix of visible minorities among the staff and that the context of the February 9, 1998 meeting led him to tell them that the audience looked like his former group of employees which had a good mix of visible minorities and that he personally enjoyed this. Finally, Dr. Lachance writes that, contrary to Dr. Chopra's insensitive statement made on February 10, 1998 about his motivation that afternoon, his remarks demonstrated a high degree of cultural sensitivity to the visible minorities in the Bureau.

[223] In the course of the hearing, the Tribunal heard evidence from Ms. Tang, a human resource advisor in the Executive Services Unit at Health Canada, about the training Dr. Lachance received in relation to diversity in the workplace after the February 9, 1998 meeting. Ms. Tang testified that Dr. Lachance first attended a workshop on December 8, 1998 on *Bias-Free Competency Selection* as well as another training course on December 9, 1998 entitled *Building Diverse Workteams*. The evidence shows that Mr. Tang had no knowledge of the content or substance of these courses and was unable to confirm whether Dr. Lachance had in fact attended either of the courses for which he was enrolled.

[224] The records shows that the Lachance matter ended up before the Standing Senate Committee on Privileges, Standing Rules and Orders where Mr. David Dodge, then Deputy Minister at Health Canada, appeared as a witness and was questioned about the Lachance comments. The record shows that Mr. David Dodge, who was not called as a witness in these proceedings, stated before the Senate Committee, on February 29, 2000, in relation to the statement made by Dr. Lachance that *he liked visible minorities* or *a visible minority person mentality permeates all these things*, that Dr. Lachance had been informed that, whatever his motives, those were inappropriate statements. The Tribunal has no reason to doubt that the

transcripts of the Senate Committee meeting in relation to the testimony of Mr. Dodge are not accurate.

[225] Given that Mr. Dodge and Dr. Paterson were not called as witnesses, the Tribunal is left with its own interpretation of the views they expressed with respect to the comments made by Dr. Lachance at the February 9, 1999 meeting. Given that Dr. Lachance was not called as a witness, the Tribunal is of the view that the Respondent could have called Dr. Paterson to explain how the Department had dealt with the statement made by Dr. Lachance over and above the documents tendered in evidence. The same can be said about Mr. Dodge.

[226] In his oral submisions, Counsel for the Complainant argued that the comments made by Dr. Lachance at the February 9, 1998 meeting were more than unwise or inappropriate; they were blatantly racist and offensive and that it does not matter if some people did not take offence. For Complainant's Counsel, they are not only discriminatory; they constitue harassment.

[227] For his part, Counsel for the Respondent argued that the Tribunal cannot infer from Dr. Lachance's comments that he was a racist and hence, that all of his future actions in relation to his position of Director of the Bureau of Veterinary Drugs should be seen as discriminatory or motivated by racism. For Respondent's Counsel, the comments were taken out of context by Dr. Chopra. As to whether or not Dr. Lachance's comments constitute harassment, Counsel for the Respondent argued that what was said does not meet the criteria of what constitute harassment under the law. A single remark does not meet the threshold of harassment.

[228] The Tribunal finds that the comments made by Dr. Lachance at the February 6, 1998 meeting to have been offensive to Dr. Chopra and, by any standard, racist, *even if some people in attendance did not find it to be so*. Even though the comments might have been made to break the ice so to speak with his new colleagues, or seen as an attempt to be friendly with the group, it nevertheless shows a lack of sensitivity on the part of Dr. Lachance for people whose skin is not white who are seen to be different from white individuals. Dr. Lachance might not have had the intention to discriminate against visible minorities. Nevertheless, the case law is clear: the intent of a person is irrelevant to the issue of determining whether or not someone has discriminated against someone else (*Nova Scotia (Human Rights Commission) v. Play it Again Sports Ltd*, [2004] N.S.J. No. 403, par. 36).

[229] The Tribunal thus finds that Dr. Chopra not only has made a *prima facie* case of discrimination in relation to Dr. Lachance's comment made at the Ferbruary 9, 1998 meeting but has adduced conclusive evidence that Dr. Lachance discriminated against him on the basis of his race or ethnic origin contrary to section 7 of the *Act*. As stated above, the intent to discriminate or not is irrelevant to the proof of discrimination. The test is, over and above the racial nature of the comment itself, whether or not the person alleging discrimination was offended by the comment (*Nova Scotia (Human Rights Commission) v. Play it Again Sports Ltd*, [2004] N.S.J. No. 403).

[230] The elements that the Tribunal finds to be conclusive in relation to the *prima facie* test are the past history of discrimination at Health Canada, the inherent racist nature of the comment - white v. non-white, the fact that Dr. Chopra was offended by the comment and made it known to the Director General, the lack of sensitivity expressed by both Dr. Lachance and Dr. Paterson to Dr. Chopra's concerns and the fact that Dr. Lachance received, after the February 1998 meeting,

training in relation diversity in the workplace. The Respondent had thus the onus of proving that Dr. Lachance's comments were in no way discriminatory. The Tribunal finds that the Respondent has failed to do so.

[231] The Tribunal finds in this respect that the exchange of correspondence between Dr. Paterson and Dr. Lachance as well as between Dr. Paterson and Dr. Chopra shows more an attempt to justify what was said rather than acknowledge that the comments might have been offensive and discriminatory. Dr. Lachance and Dr. Paterson were not called as witnesses and were thus not able to provide the Tribunal with more insight in the comments that were made at the February 9, 1998 meeting. The Tribunal finds that the Respondent has failed to provide a credibible explanation of the true nature of the comments made by Dr. Lachance and does not find their written explanations conclusive in the absence of their testimony.

[232] Here again, the Tribunal is mindful of the fact that the credibility of Dr. Chopra is at issue. This said, the evidence clearly shows that the day after the comments were made, Dr. Chopra made it known to the Director General that he had been offended by the comments. The Tribunal finds no reason to think that Dr. Chopra's concerns with respect to the comments made by Dr. Lachance were not genuine and that they were motivated by the desire to retaliate against Dr. Lachance.

[233] The Tribunal finds however that, given the context in which Dr. Lachance's comments were made, the comments although inappropriate and racist do not constitute harassment in that they do not meet the *Marinaki* and *Bobbs* criteria. The Tribunal is of the view that the comments made at the February 9, 1998 meeting constitute an isolated incident. There is here no persistence or repetition and we are not looking at a pattern of behavior. The Tribunal notes that no evidence was tendered showing that Dr. Lachance repeated these comments in another forum.

[234] This said, the Tribunal is of the opinion that, given the past history of discrimination and racial insensitivity at Health Canada, the NCARR decision notably and its findings, the Department should have acted more robustly and should have made it publicly known that it did not approve of Dr. Lachance's conduct, that it would not stand for comments of this nature in the Department.

[235] The Tribunal finds that Dr. Paterson was fairly dismissive with respect to Dr. Chopra's complaint. His first response was to shed doubt about Dr. Chopra's recollection of the event rather than take it seriously and ask that it be investigated further. Dr. Paterson should have seen in Dr. Chopra's memorandum cause for concern given the NCARR decision. The Tribunal is of the view that the Lachance matter should not have escalated the way it did and that if it had been managed properly, it would have led to an apology on the part of Dr. Lachance or at least a statement to the effect that if he had offended anyone by his remarks, he regretted it and apologized. It appears that no apology was made.

b) The five-day suspension

[236] Counsel for the Complainant argued that the five-day suspension imposed on Dr. Chopra by Dr. Lachance was in retaliation of Dr. Chopra speaking out about the existence of racist practices in the public service, especially at Health Canada, as well as discriminatory.

[237] For his part, Counsel for the Respondent argued that at the time the five-day suspension was imposed on him, Dr. Chopra did not characterize it as discriminatory but as retaliatory. In his view, there is no element of discrimination or retaliation in the decision to suspend Dr. Chopra. Counsel for the Respondent conceded however that Health Canada was wrong in its characterization of Dr. Chopra's action as a breach of his duty of loyalty to his employer in light of the decision rendered by the Public Service Staff Relations Board on March 12, 2001.

[238] The Tribunal cannot ignore the fact that the individual who suspended Dr. Chopra was Dr. Lachance, that the suspension came after Dr. Chopra had signed a petition which challenged Dr. Lachance's appointment as Director of the Bureau of Veterinary Drugs in February 1998 and after Dr. Chopra had complained to the Director General in writing about the comments made by Dr. Lachance at his first meeting with the staff of the Bureau of Veterinary Drugs on February 9, 1998 as well as after Dr. Chopra had filed on June 27, 1999 additional allegations to his original complaint which specifically refer to Dr. Lachance discriminatory conduct.

[239] The Tribunal cannot also ignore the fact that, following the comments that Dr. Landry made at the February 9, 1998 meeting, the latter, in a memorandum sent to Dr. Paterson, responded *tit for tat* to the allegation made by Dr. Chopra in his February 10, 1998 memorandum to Dr. Paterson. In his memorandum to Dr. Paterson, Dr. Chopra refers to the fact that Dr. Lachance had made an *insensitive remark* in relation to visible minorities. The evidence shows that in his own memorandum to Dr. Paterson, Dr. Lachance refers to Dr. Chopra's *insensitive statement* made on February 10, 1998 about his motivation that afternoon. The Tribunal sees Dr. Lachance's response as a clear indication that he was ready to confront Dr. Chopra and that the stage was set for future confrontations.

[240] The Tribunal finds that these different elements in addition to the fact that Dr. Lachance could have dealt with the situation differently, as mentioned by Counsel for the Complainant, and appeared to be convinced that there was no discrimination going on at Health Canada, are sufficient to establish a *prima facie* case of retaliation but insufficient to establish *a prima facie* case of discrimination. Furthermore, the Tribunal considers that Dr. Lachance must have been aware of the existence of Dr. Chopra's complaint and additional allegations made against him in June 1999.

[241] The Tribunal is mindful though of the fact that, in his letter dated August 11, 1999, Dr. Lachance writes in relation to the Heritage Canada conference that he considers Dr. Chopra as being in breach of his duty of loyalty to the Department and his conduct as willful misconduct totally unacceptable to the Department and hence has decided to suspend Dr. Chopra for a period of 5 working days.

[242] The record shows that the Respondent elected not to call Dr. Lachance as a witness. As seen previously, beyond the discussions that took place between the parties and the information they provided to the Tribunal, the Tribunal was never formally apprised of the reasons for which Dr. Lachance was not called. Should the Tribunal hence rely conclusively on the letter addressed by Dr. Lachance to Dr. Chopra on August 11, 1999 to infer that the sole reason which lead Dr. Lachance to impose on Dr. Chopra a five-day suspension was Dr. Chopra's willfull misconduct and conclude, given the context in which the decision was made, that retaliation had nothing to do with his decision without hearing Dr. Lachance or someone from Health Canada?

[243] As one knows, discrimination as well as retaliation will often times not be overt. It is often times through the direct examination of a witness that the truth comes to light. In this respect, it is worth citing Sopinka et al., The *Law of Evidence in Canada*, 1999, at par. 6.321 where the authors write: *In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it*.

[244] The Tribunal finds that the Respondent has failed, by not calling the proper witness or witnesses, to prove that retaliation was not *an* element that motivated Dr. Lachance in imposing on Dr. Chopra a five-day suspension, given the circumstances surrounding the imposition of the suspension. Hence, the Tribunal finds that, given the context, retaliation was, on a balance of probabilities, a factor that lead Dr. Lachance to impose on Dr. Chopra a the five-day suspension on August 11, 1999 in contravention of section 14.1 of the *Act*.

c) The Zohair complaint

[245] [1] In his submissions to the Tribunal, Counsel for the Complainant asserted that the way Health Canada dealt with the Zohair complaint as well as the Heritage Canada conference incident are examples of harassment on the part of Health Canada in relation to Dr. Chopra. Counsel for the Complainant underscored the fact that while Health Canada was prepared to take swift actions against the Complainant, it acted less swiftly with other Health Canda employees whose conduct, in the eyes of Dr. Chopra, was reprehensible.

[246] The Tribunal fails to see in the way Health Canada handled the Zohair complaint evidence of harassment on the part of Health Canada. The Tribunal finds that the Complainant has failed to prove that this event meets the legal criteria required to establish harassment under section 10 of the *Act*. Furthermore, the Tribunal fails to see how Health Canada's handling of the Zohair complaint can constitute retaliation on the part of Health Canada for Dr. Chopra having filed a human rights complaint. The evidence on this point is squarely non existent.

d) The Elanco complaint

[247] The Tribunal finds that there is no material fact that was tendered in evidence by Dr. Chopra establishing that the Department's conduct in relation to the Elanco complaint was discriminatory and was motivated by Dr. Chopra's ethnic origin. The Tribunal finds thus that the Complainant has failed here to establish a *prima facie* case of discrimination in relation to the Elanco complaint. Mere allegations of discrimination without any evidentiary foundation do not give rise to a *prima facie* case of discrimination.

[248] This said, given that the Elanco incident occurred in 1997, before the coming into force of section 14.1 of the *Canadian Human Rights Act*, the actions or inaction of Health Canada in relation to the Elanco incident cannot be considered as retaliation under the *Act*.

e) The exclusion from the Flumequine project

[249] The Complainant testified that his exclusion from the Flumequine project in 1993 was not direct discrimination but retaliation for having raised human rights issues within the Bureau.

[250] Given that the Flumequine project took place in 1993 well before the coming into force of section 14.1 of the *Act*, the Tribunal finds that the Complainant has not met the legal requirement for the Tribunal to make a finding of retaliation for a complaint filed by the Complainant.

(iii) The issue of systemic discrimination

[251] In his complaint form dated January 12, 1999, the Complainant alleges that none of his white co-workers have been treated in a similar manner as he has and that the reason he has been treated in an adverse differential manner is due to his race, colour and national or ethic origin. The Complainant further alleges that Health Canada consistently bypasses well-qualified visible minority candidates for management positions and that the general practice of the Department is to recruit EX's from within Health Canada, unless there are qualified visible minority candidates interested in these positions, at which time the Department recruits externally.

[252] In his Statement of particulars, the Complainant further alleges that his persistent lack of promotion at Health Canada is due, in part, to systemic racial discrimination against visible minority personnel by the senior management of Health Canada and goes on to mention the senior managers who, he believes, practice systemic racial discrimination.

[253] The Complainant further alleges in his Statement of particulars that the Department has failed to provide him with necessary training or other opportunities to upgrade his abilities and qualifications. In his way, he alleges, Health Canada consistently bypasses visible minority candidates for management positions. Finally, the Complainant states that these practices constitute and are demonstrative of systemic discrimination at Health Canada, contrary to section 10 of the *Canadian Human Rights Act*.

[254] The allegations made by the Complainant with respect to the existence of systemic discrimination at Health Canada during the period of 1993 to 1999 are wide and far reaching. As stated earlier, he who alleges must prove and it is not sufficient to make broad allegations of discrimination without proving them or hold strong beliefs that discrimination is rampant at Health Canada.

[255] Systemic discrimination in an employment context was defined in *Action Travail des Femmes v. CNR*, [1987] 1 S.C.R. 1114, at pages 1139 and 1143 as discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. Systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workes who accept stereotyped visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. The Court furthermore stated that to combat systemic discrimination, it is essential to create a climate in which both negative practice and negative attitudes can be challenged and discouraged.

[256] The Tribunal is cognizant of the fact that, in the past, Health Canada has been found to be decifient in the appointment of visible minorities to management positions. The findings of the Tribunal in NCARR and its decision clearly establish that Health Canada did not meet the requirements of the *Canadian Human Rights Act* with respect to employment opportunities for visible minorities.

[257] Furthermore, the Tribunal cannot ignore the fact that, in the past, Dr. Chopra has had many bad experiences with the Department: a complaint made against him without him being informed of its existence (Drennan), a memo being written about him without him being informed of its content (Cuddihy), his exclusions from projects in which colleagues were asked to participate without him being provided with any explanation (Flumequine project), the five-day suspension imposed on him by Dr. Lachance (Heritage Canada Conference), the reprimand he received from Dr. Le Magueur (Zohair complaint). In addition, the record shows that Dr. Chopra has witnessed many acting opportunities and positions escaping him: the Scott appointment (1993-95), the Lachance appointment (1998), the Alexander appointment (1999), the Butler appointment (1999), all tainted according to him by discrimination. All of these events have had their toll on Dr. Chopra who has come to see discrimination being rampant at Health Canada. Are all of these events affecting one person sufficient for the Tribunal to conclude that there was at Health Canada in the period of time covered by the complaint (1993-1999) a form of systemic discrimination that affected the whole organisation.

[258] The record shows that, in September 2002, the five-year period for the Canadian Human Rights Tribunal Order in NCARR was completed and that in a letter dated May 13, 2003, the Canadian Human Rights Commission found Health Canada to be in full compliance with all measures outlined in the Canadian Human Rights Tribunal Order. More specifically, the Commission states, in its letter to the Deputy Minister, Health Canada, that the analysis made by the Commission shows that during the five-year period the representation of members of visible minorities at Health Canada has increased substantially in categories and levels relevant to the Tribunal Order. The letter goes on to state that such significant progress could not have been achieved without the commitment of Health Canada's senior management. The letter further states that data on recruitment into EX Senior Management level and into feeder groups into this level show that members of visible minorities received equitable shares of these appointments and that the data show that members of visible minorities received shares of acting position in the levels set out in the Tribunal Order that were in line with expectations. In her letter, the Chief Commissioner acknowledges that Health Canada is now in full compliance with all measures included in the Tribunal Order.

[259] This Tribunal cannot ignore these facts and findings. It must be noted here that the period covered by the Tribunal Order in NCARR extends from 1997 to 2002 and covers some of the allegations of discrimination made by the Complainant.

[260] In his testimony, the Complainant disputed the fact that Health Canada was in full compliance with all the measures included in the Tribunal Order related to the NCARR decision. As stated earlier, the Complainant is entitled to his opinions. This said, allegations as strong as they may be that would contradict established and undisputed facts and findings need to be proven.

[261] The Tribunal finds that the Complainant has not, on a balance of probabilities, proven that systemic discrimination was not properly addressed by Health Canada after the Tribunal Order in NCARR and still prevailed at Health Canada during the period of time extending from 1997 to 2002.

[262] Given the lack of evidence adduced by the Complainant to contradict the Commission's findings, there is no reason for the Tribunal to conclude that systemic discrimination still exists

at Health Canada and to order it to take additional measures to address general or systemic issues of discrimination.

[263] This said, it does not follow that discrimination did not exist or could not have existed in a recent past within Health Canada and that individuals within the Department, at times, as this file shows, could not have acted in a discriminatory way. Past occurrences of discrimination may justifiably raise concerns about the continued existence of discrimination in the workplace. However, they do not in themselves prove that systemic discrimination exists. A finding or a few findings of discrimination are not sufficient per se to establish systemic discrimination in an organisation such as Health Canada.

[264] Furthermore, the Tribunal cannot ignore the fact that the Complainant's allegations that *every* manager at Health Canada practices systemic racial discrimination against visible minority personnel and that *every* appointment within the Department over the past 20 years has been discriminatory remains unsubstantiated assertions until material facts are brought to the attention of the Tribunal. Sweeping assertions such as those made by the Complainant without a proper evidenciary basis, in the end, undermine his credibility as to whether or not Health Canada has complied with the NCARR Tribunal Order and have an negative impact on the promotion of human rights.

[265] The Tribunal thus finds that the Complainant has not established, on a balance of probabilities, that Health Canada contravened section 10 of the *Act*.

IV. REMEDIES

[266] The Tribunal finds that the complaint filed by Dr. Chopra is substantiated in three aspects:

a) the comments made by Dr. Lachance on February 9, 1998 were discriminatory against Dr. Chopra as well as individuals working at the time in the Bureau of Veterinary Drugs who were non-white and were in contravention of section 7(b) of the *Act*;
b) the five-day suspension imposed on August 11, 1999 to Dr. Chopra by Dr. Lachance was the result of some form of retaliation against Dr. Chopra for having file a human rights complaint and was in contravention of section 14.1 of the *Act*;
c) Dr. Chopra was discriminated against when he was not offered an acting position in September 1999 with respect to the position of Chief of the Human Safety Division in contravention of section 7(b) of the *Act*.

[267] The Complainant asked in this oral submission that Dr. Chopra be compensated for hurt feelings related to the discrimination and retaliation he might have been the victim of. Given the conclusions reached by the Tribunal with respect to the events which the Tribunal found to be discriminatory and retaliatory, the Tribunal is of the view that an amount of 4 000$ for hurt feelings is reasonable. The Tribunal is mindful of the fact that two of the three events which the Tribunal found to be discriminatory or retaliatory occurred after June 30, 1998 when the ceiling for pain and suffering was increased to $20 000.

[268] In his final submissions, Counsel for the Complainant asked that the Complainant be compensated for any lost wages related to a discriminatory act. Given that the Tribunal has found that Dr. Chopra was discriminated against with respect to the acting position of Chief of the Human Safety Division in 1999, Dr. Chopra is entitled to be compensated for the difference

between what he would have earned as acting Chief compared to what he would have earned at the time as an evaluator.

[269] The parties indicated to the Tribunal that they would determine amongst themselves any amount related to lost wages. The Tribunal will however retain jurisdiction on the damage amount for lost wages in case the parties cannot agree.

V. ORDER

[270] For the foregoing reasons, the Tribunal declares that the Complainant's rights under the *Canadian Human Rights Act*, more specifically sections 7 and 14.1 of the *Act*, have been contravened by the Respondent and orders that:

a) the Complainant be paid the sum of $4,000 for hurt feelings;
b) the Complainant be awarded for lost wages an amount equivalent to the difference between what he would have been paid had he acted as Chief of the Human Safety Division for a four month period in September 1999 and what he would have earned as an evaluator;
c) that the interest on the above amount be paid in accordance with Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure.

"Signed by"

Pierre Deschamps

OTTAWA, Ontario
September 12, 2008

PARTIES OF RECORD

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APPEARANCES:	
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(No one appearing)	For the Canadian Human Rights Commission
David Migicovsky	For the Respondent