

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

CHANDER PRAKASH GROVER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

NATIONAL RESEARCH COUNCIL OF CANADA

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2009 CHRT 1
2009/01/06

I. Background 1

A. Complaint #1 - Remedial issues arising from the Tribunal decision 2

B. Complaints #2 and #3 3

C. Complaint #4 5

D. The investigation of Complaints #2 and #3 after the 2001 Federal Court decision 6

E. Circumstances since Complaints #2, #3 and #4 were referred to the Tribunal 9

II. Analysis 9

A. Prejudice to the fairness of the hearing caused by the delay 9

B. How has the NRC been prejudiced by delay in the present case? 10

C. Has the NRC's ability to provide an answer to the allegations been impaired? 23

D. Must the delay be "unacceptable" or "undue" to justify the dismissal of the complaint? 26

E. Is the prejudice of sufficient magnitude to impact on the hearing's fairness? 28

F. Would dismissing the complaints at this time be premature? 33

G. Would dismissing the complaints send an inappropriate message to other parties before the Tribunal? 34

III. Conclusion 35

[1] The National Research Council (NRC) has made a motion to dismiss the human rights complaints of Dr. Chander Prakash Grover. The NRC argues that the delay in the hearing of these complaints has significantly prejudiced the NRC in its ability to effectively respond to the allegations, and that the hearing of the complaints would bring the human rights system into disrepute and constitute an abuse of process.

[2] The NRC filed affidavits from nine persons in support of its motion. Dr. Grover and the Commission opted to cross-examine seven of the affiants on their affidavits over the course of a four-day hearing before me. In addition, Dr. Grover testified regarding some of the issues raised in this motion.

I. BACKGROUND

[3] Dr. Grover is a person of East Indian origin who is a research scientist in the field of modern optics. He was employed by the NRC from 1981 to 2007. Between 1987 and 1998, he filed four human rights complaints against the NRC, alleging discrimination on the basis of race, colour, and national or ethnic origin. The Canadian Human Rights Tribunal ruled on the first complaint (Complaint #1), on July 29, 1992. The Tribunal found that the complaint had been substantiated.

[4] Dr. Grover had in the meantime filed a second complaint, on December 23, 1991 (Complaint #2), and a third complaint on July 14, 1992 (Complaint #3). Complaint #2 dealt with incidents that allegedly occurred between 1987 and September 1991. Complaint #3 referred to events occurring between June 1991 and June 1992.

[5] On July 27, 1998, Dr. Grover filed his fourth complaint (Complaint #4), in which he refers to discriminatory practices that allegedly occurred from July 1992 until March 1994.

[6] On August 1, 2007, the Canadian Human Rights Commission (Commission) informed the Tribunal that it was referring select allegations from Complaints #2, #3 and #4 to the Tribunal for inquiry. It is these three complaints that the NRC is seeking to dismiss with its present motion.

[7] In order to better comprehend the circumstances giving rise to the motion, I have summarized in some detail the course that all four complaints have followed over the years. Since there was some overlap in the progress of each complaint, the following recap is occasionally presented out of chronological order.

A. Complaint #1 - Remedial issues arising from the Tribunal decision

[8] Dr. Grover had alleged in Complaint #1 that from September 1986 onwards, his directors had ignored him and denied him managerial and promotional opportunities. He also alleged that they had systematically removed his managerial and research responsibilities from him. He claimed that his race, colour and national origin were factors in this treatment.

[9] The Tribunal found that his complaint was substantiated. In its decision, the Tribunal ordered the NRC to place Dr. Grover in a "Group Leader" or "Section Head" position within the organization. Accordingly, a few weeks after the release of the Tribunal decision, the NRC appointed Dr. Grover to the position of Group Leader, Optical Components Research Group, within the NRC's Herzberg Institute of Astrophysics (HIA). Dr. Grover objected to this appointment believing that it did not accord with the Tribunal's order. He brought the matter back before the Tribunal, which in turn rendered an initial decision in his favour on February 17, 1994.

[10] Other issues regarding the implementation of the Tribunal's remedial order developed thereafter, so Mr. Grover petitioned the Tribunal for another hearing. The Tribunal reconvened in May 1996. By then, the NRC had a new president, Dr. Arthur J. Carty. Outside the hearing room, he and Dr. Grover took the opportunity to try settling the dispute. They successfully negotiated an agreement on all issues relating to Complaint #1 and the implementation of the Tribunal order. The terms of their agreement were read into the Tribunal's hearing record on May 21, 1996.

B. Complaints #2 and #3

[11] Dr. Grover filed Complaint #2 on December 23, 1991. In January 1992, the Commission wrote to the NRC seeking its position regarding the allegations in the complaint. The NRC initially sought some clarification from the Commission about the scope of the complaint but ultimately gave its reply on April 1, 1992. I have no evidence of any further activity in the Commission's investigation of this complaint until March 1994.

[12] Dr. Grover filed Complaint #3 on July 14, 1992. In August 1992, the Commission requested that the NRC respond. It appears that some of the issues raised in Complaint #3 were also the subject of a grievance that was pending before the Public Service Staff Relations Board (PSSRB) at the time. The NRC sought and obtained from the Commission an extension to file its response after the grievance was heard. In the end, the PSSRB decided, on January 7, 1994, to adjourn its hearing *sine die* pending the outcome of the Commission's investigation into Complaint #3. As a result, on February 21, 1994, the NRC provided its response to Complaint #3. Thereafter, the Commission began investigating the two complaints jointly.

[13] In March 1994, Dr. Grover and his lawyer met with a Commission investigator to provide their comments regarding the NRC's responses to both complaints. However, within a matter of weeks, Dr. Grover and the NRC had opened discussions with a view to settling these two complaints. Consequently, the Commission investigator cancelled a follow-up meeting that had been scheduled with Dr. Grover and his counsel.

[14] There is no evidence before me of any Commission activity regarding these complaints over the following 12 months. On April 7, 1995, however, the Commission contacted the NRC and informed it that a new investigator had been assigned to the complaints.

[15] The evidence shows no further activity regarding the two complaints for the following 15 months, although as I mentioned earlier the parties were still involved in their protracted dispute with respect to Complaint #1. Apparently, after Complaint #1 was settled (May 1996), Dr. Grover asked the Commission to pursue Complaints #2 and #3 anew. At the same time, he also requested the involvement of Commission counsel in discussions to settle these complaints. In a letter dated July 11, 1996, the Commission informed Dr. Grover that Commission counsel would not be involved in any settlement discussions. The Commission wrote that the best course of action, "given the age of the complaints" would be to complete the investigations. The Commission added that it was therefore seeking Dr. Grover's cooperation in bringing the investigation of the complaints to a "timely conclusion".

[16] About seven months later, on January 23, 1997, Dr. Grover provided the Commission with his rebuttal to the NRC's position in respect of Complaints #2 and #3. From January to March 1997, the Commission investigator requested a number of documents from the NRC, which the NRC promptly provided. On April 28, 1997, the investigator issued her investigation report recommending the dismissal of the complaints. The Commission invited the parties to provide their submissions on the report.

[17] The NRC filed its reply on April 30, 1997, concurring with the investigator's recommendations. The NRC noted that the allegations had been outstanding for several years and "many NRC employees and former employees have waited patiently to have the accusations made against them resolved".

[18] On July 14, 1997, Dr. Grover filed extensive submissions in respect of the investigation report's findings. He challenged the investigator's findings and argued that they contradicted the Tribunal's previous findings regarding Complaint #1. He urged the Commission to reject the investigator's recommendations and, "given the age" of the complaints, to limit the conciliation process to two months, after which the case would be referred to the Tribunal.

[19] Following up on Dr. Grover's submissions, the Commission informed the parties, on July 23, 1997, that there were areas where further investigation was required. On August 28, 1997, the NRC filed a rebuttal to Dr. Grover's submissions, urging the Commission to reject them and bring "closure" to the matter.

[20] Nevertheless, on September 16, 1997, the Commission investigator wrote to the NRC seeking responses to a number of questions. The investigator noted that her letter was further to the Commission's decision to "stand down" the complaints for further investigation.

[21] By November 1997, the Commission investigator had completed her follow-up investigation and submitted it to the parties for comment. The NRC replied within days, while Dr. Grover sought and obtained permission to file his reply by January 5, 1998. On February 27, 1998, the Commission issued its decision dismissing Complaints #2 and #3.

[22] On April 1, 1998, Dr. Grover commenced an application for judicial review of the Commission's decision. The Federal Court heard the application in March 2000 and rendered its decision on June 21, 2001. The Court allowed the application, concluding that the Commission had failed in its obligation to conduct a thorough investigation by not interviewing Dr. Jacques Vanier, an NRC manager who was "vitaly connected to the alleged discriminatory action". The matter was remitted back to the Commission to complete its investigation.

C. Complaint #4

[23] At the motion hearing, Dr. Grover testified that he contacted the Commission on March 17, 1994, in order to file a fourth complaint, regarding what were then fresh incidents of discriminatory conduct. He claims that the Commission told him that a formal complaint would not be accepted from him regarding these events until his other complaints (#1, #2 and #3) had been resolved.

[24] More than two years later, on July 5, 1996, Dr. Grover spoke to a Commission employee about formally filing Complaint #4. However, the Commission replied that it would not "entertain a new complaint" until the investigations into Complaints #2 and #3 were completed.

[25] The following year, on August 27, 1997, Dr. Grover informed the Commission that he was still engaged in negotiations with the NRC (namely, with Dr. Carty) to settle any outstanding issues. Consequently, on September 10, 1997, the Commission wrote a letter to Dr. Grover advising him that his file concerning a "potential complaint of discrimination" against the NRC (i.e. Complaint #4) had been "closed" pending the outcome of the discussions. Dr. Grover was also invited to contact the Commission in the event that the outstanding issues were not resolved to his satisfaction.

[26] The parties did not end up settling Complaints #2 and #3. On June 25, 1998, Dr. Grover met with the Commission to discuss filing Complaint #4. Following the meeting, the Commission

prepared the formal complaint, which Dr. Grover signed on July 27, 1998. It was forwarded to the NRC, which provided its written response on November 3, 1998.

[27] There are no documents in the record before me to explain what transpired in the months thereafter. However, in an affidavit signed by Lorna Jacobs, a Human Resource Generalist with the Human Resources Branch of the NRC, dated November 10, 2008, she states her belief that all submissions in respect of Complaint #4 had been filed with the Commission by January 1999. Ms. Jacobs was not cross-examined on her affidavit.

D. The investigation of Complaints #2 and #3 after the 2001 Federal Court decision

[28] As mentioned earlier, on June 21, 2001, the Federal Court found that the Commission failed in its obligation to conduct a thorough investigation by neglecting to interview Dr. Vanier, who was, between 1990 and 1993, the Director-General at the Institute of National Measurement Standards (INMS) of the NRC, where Dr. Grover was working in 1991 when he filed Complaint #2. The Court returned the matter to the Commission to be dealt with in a manner "not inconsistent" with the reasons set out in the judgment.

[29] By mid-July 2001, a Commission investigator began trying to locate Dr. Vanier in order to interview him. The NRC was initially unable to be of any assistance in finding him. Dr. Vanier had retired and left the NRC in 1994. The NRC was able to provide his last known address by late August 2001. On September 18, 2001, a credit agency hired by the Commission found Dr. Vanier's new address. The Commission investigator contacted him shortly thereafter. Dr. Vanier retained a lawyer to represent him during the investigation. There were some discussions between the Commission and Dr. Vanier's counsel regarding how the interview would be conducted, including whether NRC documents regarding Dr. Grover's employment could be released to Dr. Vanier so that he could refresh his memory. The Commission investigator finally conducted her interview of Dr. Vanier on March 18, 2002.

[30] The investigator prepared a summary of the interview, which she submitted to Dr. Vanier for comments and signature. He returned it to her on April 22, 2002. The document was then forwarded to Dr. Grover on May 9, 2002. By November 2002, Dr. Grover had apparently failed to provide his comments on the interview, prompting the investigator to call Dr. Grover's counsel and request the response "as soon as possible" so that she could "move ahead". Dr. Grover apparently replied with a request that the Commission place all of the complaints (#2, #3 and #4) in abeyance pending the outcome of litigation that he had recently initiated against the NRC before the Ontario Superior Court.

[31] On December 11, 2002, the investigator sought the NRC's position on Dr. Grover's request. The NRC had, by March 20, 2003, still failed to reply. In any event, it seems that the Commission decided not to keep the files in abeyance, and on May 26, 2003, the investigator issued her report, in which she recommended that the Commission refer all three complaints to the Tribunal. This, of course, included Complaint #4 regarding which the Commission had not formally completed its investigation or prepared a report.

[32] By July 11, 2003, both the NRC and Dr. Grover had made their submissions to the Commission regarding the investigator's recommendations. On September 16, 2003, the Commission decided to refer all three complaints (#2, #3 and #4) to the Tribunal. On October 17, 2003, the NRC applied to the Federal Court for judicial review of the Commission's decision.

The Court issued its judgment on May 14, 2004. It found that the Commission had given insufficient reasons to support its decision regarding Complaints #2 and #3, and that the referral of Complaint #4 was premature given the Commission's failure to complete its investigation into that complaint. The Court set aside the Commission's decision and ordered that the Commission complete a "thorough, neutral evaluation" before reaching a decision regarding Complaint #4. The Commission was also ordered to provide a more reasoned decision with respect to Complaints #2 and #3.

[33] I have no evidence before me of whether the Commission, in the immediately ensuing months, proceeded to complete Complaint #4's investigation or prepare a "reasoned" decision regarding the other complaints. Instead, on October 15, 2004, (i.e. five months after the Federal Court decision), Commission counsel met with NRC counsel to discuss a number of issues including the possibility of initiating an "early resolution" process that could result in the settlement of the complaints. By March 16, 2005, the Commission had held a similar discussion with Dr. Grover.

[34] It is unclear what the outcome of these initiatives was, but by November 22, 2005, the record shows that the Commission had retained the services of a lawyer in private practice to conduct a "supplementary" investigation into Complaints #2 and #3, and to complete the investigation into Complaint #4. It took some time apparently for the lawyer's contract with the Commission to be finalized, prompting the Commission to advise the parties on May 2, 2006, that the investigations were being placed "on hold for a very short period of time" until that process was completed.

[35] The record then shows that on January 3, 2007 (i.e. eight months later), the investigator contacted NRC counsel for assistance in locating a number of former NRC employees mentioned in Dr. Grover's complaints, who the investigator wanted to interview. Their whereabouts were confirmed and the investigator began interviewing them by March 12, 2007.

[36] The investigator issued the supplementary report of Complaints #2 and #3 on February 28, 2007, and her investigation report regarding Complaint #4, on March 22, 2007. On July 31, 2007, the Commission released its decision regarding all three complaints. The Commission concluded that several of the allegations should be dismissed, but it also decided to refer to the Tribunal the remaining allegations, arising from all three complaints. The Commission sent its letter of referral to the Tribunal the following day, August 1, 2007.

E. Circumstances since Complaints #2, #3 and #4 were referred to the Tribunal

[37] As part of the Tribunal's case management process, Dr. Grover was to provide his disclosure documents by February 29, 2008. He actually only did so on April 15, 2008. The NRC responded by filing a motion on June 5, 2008, to strike a number of the allegations in Dr. Grover's statement of particulars. In a ruling dated August 21, 2008, the Tribunal agreed that several paragraphs must be struck, principally because many of these issues had already been addressed in the Tribunal's decisions regarding Complaint #1.

[38] The NRC then brought the present motion on September 15, 2008.

II. ANALYSIS

[39] The NRC contends that there has been an unacceptable delay in the hearing of the three complaints, the first of which was filed 17 years ago. It argues that it is therefore significantly prejudiced in its ability to respond to the complaints, and in the alternative, that the hearing of these complaints would bring the human rights system into disrepute and constitute an abuse of process.

A. Prejudice to the fairness of the hearing caused by the delay

[40] The principles of natural justice and the duty of fairness are part of every administrative proceeding (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 102). As the Supreme Court noted in *Blencoe*, these principles include the right to a fair hearing, which, for respondents, encompasses the ability to make a full answer and defence to the allegations made against them. This entitlement finds its expression in s. 50(1) of the *Canadian Human Rights Act*, which directs Tribunal members to "give all parties ... a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations".

[41] As *Blencoe, ibid*, further states, where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of administrative proceedings and provide a remedy.

[42] Section 41(1)(e) of the *Act* provides that the Commission has the discretion not to deal with a complaint that is based on acts or omissions that occurred more than one year before receipt of the complaint (or such longer period of time as the Commission considers appropriate in the circumstances). In the present case, at least one of the complaints (#4) was formally filed with the Commission over four years after the last of the incidents alleged therein. The Commission decided to deal with this complaint. The Canadian Human Rights Tribunal does not have the jurisdiction to review this Commission decision, a power that rests exclusively with the Federal Court (*I.L.W.U. (Marine Section) Local 400 v. Oster*, [2002] 2 F.C. 430 (T.D.) at paras. 25-31). However, if the entire pre-hearing delay, from the earliest discriminatory acts until the hearing is so long that the respondent's right to a fair hearing is compromised, the Tribunal has the authority to remedy the situation (*Gagné v. Canada Post Corp.*, 2007 CHRT 18 at para.8; *Desormeaux v. Ottawa Carleton Regional Transit Commission* (2002 July 19) T701/0602 (C.H.R.T.) at para. 13).

[43] The Supreme Court pointed out in *Blencoe* at para. 101, that "delay, without more, will not warrant a stay of proceedings". The delay must be such that it would necessarily result in a hearing that lacks the essential elements of fairness. Evidence must be brought to bear demonstrating prejudice of "sufficient magnitude to impact on the fairness of the hearing" (*Blencoe* at para. 104; *Ford Motor Co. of Canada v. Ontario (Human Rights Comm.)*, 1995 CanLII 7431 (Ont. S.C.) at para. 16).

B. How has the NRC been prejudiced by delay in the present case?

[44] Complaint #2 contains a list of "ways" in which the NRC allegedly discriminated against Dr. Grover. Aside from the first clause simply claiming that he was denied salary increments since 1987, the remainder of the allegations refer to a period commencing in August 1990 and ending on September 18, 1991. Complaint #3 contains a similar list of discriminatory practices (16 in total), which are alleged to have occurred from June 1991 to the date of the complaint,

July 14, 1992. Complaint #4's list is 51 paragraphs long but some of the alleged discriminatory practices (from July 1992 to March 1994) are described over several paragraphs.

[45] In any event, as a result of the Commission's decision to refer to the Tribunal only several of the complaints' allegations, and the Tribunal's ruling in August 2008 striking out a few of those allegations as well, the number of alleged discriminatory practices at issue were significantly pared down. They are now best identified through Dr. Grover's Amended Statement of Particulars, which he filed on September 15, 2008. I describe each of the alleged discriminatory practices below and summarize the evidence of prejudice to which the NRC claims it is subject because of delay in this case.

[46] Alleged discriminatory practice #1

Dr. Grover claims that in January 1991, the NRC's Information Services Office selected him to prepare a holography display that would be included in the NRC's 75th Anniversary Exhibit. He claims that his Director General, Dr. Vanier, interfered in the process and as a result, Dr. Grover was told that his display was no longer being considered. Dr. Grover claims that Dr. Vanier took this action to damage his career and self-esteem, and that Dr. Vanier was motivated by discriminatory considerations.

[47] Dr. Vanier signed an affidavit on which he was cross-examined at the motion hearing. He states in the affidavit that he was Director General of INMS until March 5, 1993, and that he remained at the NRC thereafter as an employee fulfilling international engagements until January 4, 1994, at which time he retired. He is 73 years old today. He claims to have no independent recollection of the event nor can he elaborate on two memos prepared in February 1991, one by him and another by a colleague, Dr. Ronald Bedford, which apparently relate to the event. The cross-examination of Dr. Vanier did not yield any variation in his evidence. He does not recall the NRC ever having asked him prior to 2008 for his version of the alleged events.

[48] Dr. Bedford also signed an affidavit and was cross-examined. He was a director within INMS in 1991. He was employed by the NRC between 1955 and 1995, when he retired. He is 78 years old. He states in his affidavit that he has no recollection of the alleged incident involving the holography display nor can he elaborate on discussions that he may have had with Dr. Vanier beyond what is referenced in the two February 1991 memos. In cross-examination, he was unable to recall any additional information. He testified that no one from NRC had ever spoken to him about these allegations before his retirement in 1995 or thereafter. When the NRC contacted him in 2008 prior to the preparation of his affidavit, he viewed the matter as coming at him "out of the blue".

[49] The Commission's first investigation report regarding Complaints #2 and #3, dated April 28, 1997, dealt with the matter of the 75th Anniversary Exhibit issue. The investigator had apparently spoken at the time to Charles Reynolds, who was the NRC's Chief, Creative Services, when the exhibit was being prepared. The investigator apparently also interviewed an unnamed video coordinator as well as the "Trade show / special events coordinator" (Suzanne Auger).

[50] Mr. Reynolds signed an affidavit on which he was cross-examined at the motion hearing. He was employed by the NRC from 1988 until November 1997. According to a memo written by Dr. Grover on January 17, 1991, Mr. Reynolds and Ms. Auger had apparently met with Dr. Grover and asked him to prepare a holography display for the exhibit. Mr. Reynolds testified that

he remembered visiting Dr. Grover in his lab but that he does not recall what he and Ms. Auger may have told Dr. Grover about their interest in his holography display for the purposes of the exhibit. Mr. Reynolds states that he has no specific recollection of any interference by Dr. Vanier, as alleged by Dr. Grover. With the passage of time, Mr. Reynolds says that has no recollection of a conversation with Ms. Auger in which (according to 1997 findings of the Commission investigation) he purportedly instructed her not to approach Dr. Grover. He has a "vague" recollection of telling her not to contact any of the NRC research scientists directly "for protocol reasons". He testified that he had no independent recollection of having ever met Dr. Vanier. He accepted that a memo from February 1991 suggested that he had spoken to Dr. Vanier, but he maintained that he had no independent recollection thereof. He pointed out that he was involved in a lot of activities at the time and that basically, the events alleged regarding this exhibit were "long ago" and were not "a big deal" in his life. The NRC never contacted him about this incident over the years, and he testified that he either destroyed his records regarding the exhibit (as was his usual practice) or left them with the NRC.

[51] Dr. Vanier, Dr. Bedford and Mr. Reynolds were shown, in cross-examination, the memo that Dr. Grover had addressed to Dr. Bedford in January 1991 regarding the holography display issue. It did not trigger in them any memories of the event. No evidence was received from Ms. Auger or the unnamed video coordinator.

[52] Alleged discriminatory practice #2

In February 1991, the International Society for Optical Engineering (known as "SPIE") informed Dr. Grover that he would be receiving a prestigious fellowship award at the organization's symposium, which was to be held the following July in San Diego. He submitted a request to his direct supervisor at the time, Dr. Bedford, for funding to travel to the symposium. Dr. Bedford forwarded the request to Dr. Vanier, who allegedly denied the request for funding in June 1991. Dr. Grover claims that his travel funding was eventually approved after his union intervened. He is of the view that the initial refusal was calculated to diminish his career and reputation, and to cause him embarrassment and humiliation.

[53] Dr. Bedford states in his affidavit that he has no recollection of any discussions he may have had with Dr. Vanier about the issue, apart from the March 8, 1991, memo (attached to the affidavit), which he wrote to Dr. Grover confirming that the travel funding request had been forwarded to Dr. Vanier for approval. In his testimony, he elaborated that he recalled Dr. Grover's request, but he could not recall any of the matters referred to in a number of documents put before him at the hearing, including another memo that he wrote to Dr. Grover on June 14, 1991. Dr. Bedford recalls that Dr. Grover ultimately did attend the symposium.

[54] Dr. Vanier stated in his affidavit that he has no recollection of the conference or any conversations he may have had with Dr. Bedford regarding Dr. Grover's attendance. In his testimony, he pointed out that he was refusing many requests for travel funding from research officers at the time due to limited budgets and quotas. However, he had occasion to approve some travel requests upon reconsideration, and he has a "vague recollection" of Dr. Grover's request being one of them. But he also maintained in his testimony that he did not recall any conversations he would have had with Dr. Bedford or any union representatives regarding Dr. Grover's request. For that matter, he has no recollection of the union ever being involved. Dr. Vanier's memory was not triggered by any of the documents shown to him, none of which he recognized or recalled seeing before.

[55] Alleged discriminatory practice #3

Dr. Grover was away from work over the summer of 1991. When he returned in September, Dr. Bedford delivered a memo to him, advising him to produce a work plan, weekly time sheets, and a trip report regarding the San Diego SPIE symposium. The memo asserted that these items had been previously requested of Dr. Grover. He claims that given that he had just returned to work, the memo was unreasonable, unfair, and delivered with purpose of harassing and causing him distress.

[56] Dr. Bedford wrote in his affidavit that aside from a vague recollection of having asked Dr. Grover for a work plan, he has no specific recollection at all of the events giving rise to, nor any discussions that he may have had, concerning Dr. Grover's production of weekly time sheets and a trip report. Dr. Bedford was not questioned about this matter during his cross-examination on the affidavit.

[57] Alleged discriminatory practice #4

On June 2, 1992, Dr. Vanier wrote a memo to Dr. Grover regarding the development of the latter's project work plan. Dr. Vanier claims in the memo that attempts over the previous year to develop the plan had failed because the NRC had been unable to obtain Dr. Grover's input and agreement. Dr. Vanier therefore imposed a work plan and required that Dr. Grover report to an individual (Dr. J. Zwinkels) every two months on the progress accomplished. Dr. Grover claims that this requirement was discriminatory as white scientists were not obliged to provide such progress reports. He also alleges that Dr. Vanier instructed Dr. Zwinkels and Dr. Vanier's secretary (Angie Loucks) to deliver the memo together to Dr. Grover and read it aloud to him. These actions, according to Dr. Grover, were designed to harass him and cause him distress.

[58] Dr. Vanier states in his affidavit that he does not recall any discussions that he may have had with, or documents received from, Dr. Zwinkels, Dr. Bedford, or from NRC Human Resources regarding this issue. He defers to the content of the memo as well as the CHRC investigator's summary of her interview with him from March 2002 (which I referenced earlier in this ruling). Dr. Vanier had reviewed and commented upon the summary before signing it on April 22, 2002. According to the summary, he had asked for the bi-monthly reports because "contact" with Dr. Grover had been "broken", although he acknowledged that he did not impose a similar reporting requirement on other senior scientists. The summary also stated that he asked for the memo to be hand delivered because, on a previous occasion, Dr. Grover had said that he had not received a document. Dr. Vanier wanted to be certain of delivery this time. The summary reported that Dr. Vanier "remembers" that Dr. Grover's prior activity reports were inadequate and that he was not being cooperative in preparing a work plan.

[59] During his testimony before the Tribunal in November 2008, Dr. Vanier said that while he remembered that the event in 1992 had happened, he did not remember the details of the exact operation that took place. He no longer has any independent recollection thereof, though he assumes that when he spoke to the Commission investigator in 2002, he still had some independent recollection as reflected in her summary.

[60] Dr. Bedford, for his part, wrote in his affidavit that he did not recall any discussions with Dr. Zwinkels or Dr. Vanier about the circumstances surrounding the June 2, 1992, memo. Dr. Bedford was not questioned on this matter during his cross-examination on his affidavit.

[61] Ms. Loucks had apparently signed an affidavit on February 4, 2008, for the purposes of some other proceedings before the Federal Court. In this affidavit, she stated that she has no recollection of this event or of any discussions with Dr. Zwinkels, Dr. Vanier, or anyone else concerning the matter. Ms. Loucks' employment with the NRC ended in December 1997. Lorna Jacobs, the NRC human resources generalist referred to earlier in this ruling, spoke to Ms. Loucks on October 23, 2008. Ms. Jacobs signed an affidavit on October 30, 2008, regarding this conversation. Ms. Jacobs explained that Ms. Loucks told her she would "no longer cooperate" regarding these complaints as she had "no recollection of these alleged 1992 events". Ms. Loucks referred to her February 4th affidavit, adding that she did not feel she could add anything further to the process and that with her retirement, she had moved on with her life.

[62] Mr. Grover did not ask to cross-examine Ms. Jacobs on her affidavit.

[63] Alleged discriminatory practice #5

Dr. Grover states that although the NRC did not seek judicial review of the Tribunal's decision on the merits of Complaint #1, it never "truly accepted" the Tribunal's finding of discrimination. He cites, as an example, a September 1992 letter sent to a Member of Parliament (MP) by Dr. Pierre Perron, who served as NRC President between July 1989 and July 1994. Dr. Perron purportedly stated in the letter that the Tribunal decision came as a "great shock to the NRC since the Tribunal was able to make this finding in the absence of any evidence to this effect". Dr. Grover describes this "propaganda" as hurtful and claims it exacerbated the mental suffering he experienced relating to Complaint #1 and the NRC's treatment of him throughout the proceedings.

[64] Dr. Perron signed an affidavit, which the NRC filed in support of its motion. There is no mention of this allegation in the affidavit. However, when Dr. Perron was cross-examined on the affidavit, he recalled receiving a letter from an MP regarding Dr. Grover's case because he also remembered being presented with a letter to sign in reply. He does not recall any details about the letter that he signed. He testified that it was the general practice for the NRC's correspondence directorate to write this type of correspondence and for him to perhaps make some editorial changes before signing it as the agency's head.

[65] Dr. Perron also testified that since leaving the NRC in November 1994 no one had spoken to him about the matter until the end of 2007 when an NRC employee called and asked him to get in touch with NRC's legal counsel in the present case. He claims that the whole matter was "news" to him, having been away from the NRC since 1994. Dr. Perron is 69 years old.

[66] Alleged discriminatory practice #6

Pursuant to the Tribunal's order in the 1992 decision regarding Complaint #1, the NRC appointed Dr. Grover to a Group Leader position at the HIA. According to Dr. Grover, in order to facilitate this appointment, one of his co-workers (Dr. Ian Powell) was displaced from the same position, which Dr. Powell and his colleagues regarded as a demotion. This caused resentment towards Mr. Grover among the entire group (including Dr. Powell), and fostered negative views of him. It created a poisoned work environment for him. Dr. Grover believes that the NRC knew this would be the likely result of demoting Dr. Powell to appoint him, and did so due to discriminatory considerations.

[67] The letter advising Dr. Grover of his new post was addressed to him by Dr. Perron on September 10, 1992. Dr. Perron wrote in his affidavit that he has no recollection of any discussions held with, or directions given, to any senior management personnel that Dr. Powell was to be "demoted" or otherwise displaced by Dr. Grover. Dr. Perron added that he does not recollect ever knowing or having met Dr. Powell.

[68] In his cross-examination, Dr. Perron reiterated that he does not recall knowing or meeting Dr. Powell. He added that he does not recall being involved in deciding where Dr. Grover would be appointed, in furtherance of the Tribunal decision, nor does he recall what options may have been considered for the appointment. He does not have any recollection of the letter sent to Dr. Grover, but from the "tone" of it, Dr. Powell believes that it was not he who drafted it. As was typical of the NRC's bureaucratic process, someone else would have prepared it and presented it to him for signature. He does not recall if any friction developed between Dr. Grover and others, but if there was any, he does not remember. Dr. Perron pointed out that he has been away from the NRC for 14 years and no one had raised with him the issues regarding Dr. Grover prior to 2007.

[69] Dr. Grover's direct supervisor at his new position was Dr. Bryan Andrew. Dr. Andrew was employed by the NRC between 1965 and 1996, when he retired. The NRC filed in evidence an affidavit that he signed in October 2008, on which he was cross-examined at the motion hearing. Dr. Andrew was shown a summary of an interview that a Commission investigator had conducted with him in February 2000. Dr. Andrew had, at the time, reviewed the summary and in fact, retyped it to more accurately reflect his responses. The summary incorporates some fairly detailed answers regarding some of the issues raised in Complaint #4 (which covered the 1992 to 1994 period). In the document, Dr. Andrew states that he recalls Dr. Powell's "sense of grievance" at having to make room for Dr. Grover's arrival. Dr. Andrew sets out a number of specific observations in this regard. Dr. Andrew testified that he can remember writing the summary, and that in reading it today, he finds most of it "meaningful", although he is no longer able to remember the original circumstances related therein. He only recalls that there was friction between Dr. Grover and Dr. Powell, and the general tenor of conversations that he had with them regarding their tension. Dr. Andrew testified that he would hesitate today to say what the source of their friction was, based on his memory.

[70] Dr. Andrew was shown copies of a journal that he kept when he was an NRC employee in which he jotted notes of his telephone conversations, including some with Dr. Powell. He testified that reading these notes today is not of much assistance in helping to jog his memory as the handwriting is mostly illegible, pointing out as well that the notes would have made more sense to him at the time when he would have known their context, rather than today. Dr. Andrew does not recall being consulted by anyone at the NRC prior to its contacting him in the last year to prepare his affidavit. Since his interview with the Commission in 2000, he had heard nothing more about Dr. Grover's case.

[71] Alleged discriminatory practice #7

Dr. Grover claims that in addition to Dr. Powell, another colleague, Dr. Amanda Bewsher, was also "negatively disposed" towards him and the Tribunal ruling. Dr. Grover alleges that in the fall of 1993, these NRC employees began the practice of refusing to meet with him for any reason, unless they both could be present, adding that this practice was expressly approved by

Dr. Perron. This seriously undermined Dr. Grover's authority, position and reputation, and implicitly cast doubt on the Tribunal ruling.

[72] Ms. Jacobs described in her affidavit the attempts she made to contact Dr. Bewsher, who resigned from the NRC in 1997. Ms. Jacobs notes that in Dr. Bewsher's NRC file there was a forwarding address in Wales where she had relocated. Ms. Jacobs tried to call the telephone number on file but it had been disconnected. She then conducted an Internet search but attempts to call the one telephone number that appeared relevant were fruitless (the number was no longer in service). The directory assistance service of Wales could not provide any further information either.

[73] Apparently, Dr. Bewsher filed a harassment complaint with the NRC against Dr. Grover in 1992. The NRC's investigation report into her complaint stated that Dr. Perron advised Dr. Bewsher to always be accompanied by Dr. Powell when she met with Dr. Grover. In his affidavit, Dr. Perron states that he has absolutely no recollection of his ever advising anyone to visit Dr. Grover in the manner alleged. Dr. Perron's recent reading of the NRC report did not aid in his recollection.

[74] Dr. Vanier testified that he does not at the present time remember anyone by the name Amanda Bewsher. It was suggested to him that she may have had a different family name in 1992, and he seemed to only vaguely recollect that name.

[75] Alleged discriminatory practice #8

Dr. Grover claims that as of March 3, 1994, the name plate outside Dr. Powell's office and in the Directory at the entrance of the HIA building, continued to identify Dr. Powell as the group leader of the Optical Components Research Group, even though Dr. Grover held the position since September 1992. In addition, the name plate outside Dr. Grover's office did not describe him as group leader. Dr. Grover contends that the NRC's failure to rectify these errors served as a reminder to everyone in the group of the contentious circumstances under which he was promoted and Dr. Powell was demoted. It also served to undermine Dr. Grover's authority and status within the organization and among his co-workers.

[76] Michael Storr was employed by the NRC from 1970 until his retirement in 2005. Between 1992 and 1995, he was Manager of Operations for the HIA. His responsibilities would have included matters such as the maintenance of nameplates and the building directory. Mr. Storr stated in his affidavit that he vaguely recollected Dr. Grover having brought to his attention the concern regarding his nameplate. Mr. Storr had no recollection of Dr. Grover raising the building directory issue with him. Mr. Storr also has only a vague recollection of having rectified the nameplate outside Dr. Grover's door but he does not recall how soon it was after Dr. Grover had brought the matter to his attention. Mr. Storr reiterated these statements in his cross-examination. He pointed out that he only became aware of Dr. Grover's complaint six months ago. The matter had never been raised with him in the interim (14 years).

[77] Dr. Donald C. Morton was Dr. Grover's indirect supervisor at his new position within the HIA. Dr. Morton was employed by the NRC from 1986 to 2001 when he retired. He is 75 years old. In his affidavit, he pointed out that Dr. Grover was working in a different building from him, and it was a facility that Dr. Morton visited infrequently. He does not recall what, if any, complaint was made to him by Dr. Grover regarding nameplates and the building directory, nor

how the matter may have been resolved. This issue was not raised with Dr. Morton in his cross-examination.

[78] Alleged discriminatory practice #9

Dr. Grover claims that in March 1994, he requested funds to hire a summer student. Dr. Morton advised him that the HIA's Management Committee had rejected his request. Dr. Grover alleges, however, that similar requests by white scientists were approved. He contends that his summer student project was as "meritorious or more meritorious" than the approved projects. He alleges that the rejection was part of a pattern of systemic discrimination.

[79] Dr. Andrew addressed this issue in his affidavit. He stated that he has no recollection of this event at all, including whether the Management Committee ever held a meeting regarding summer students or whether the question had been delegated to a committee. He has no recollection of how many students were available for hire, which scientists made applications or the nature of their proposals. No questions were put to Dr. Andrew regarding this matter in his cross-examination. Dr. Morton similarly stated in his affidavit that he had no recollection of the event. His testimony did not elaborate any further on his recollection about this issue.

[80] Dr. James Hesser was Dr. Grover's direct supervisor at HIA. He is still employed by the NRC, within the HIA. He stated in his affidavit that he sat on the Management Committee with Dr. Andrew and Dr. Morton, and that the Committee's responsibilities included addressing the issue of summer student hirings. He added, however, that he has no recollection of the particular event raised by Dr. Grover in his complaint, including how many applications were made and on what basis decisions to accept or reject proposals were made.

[81] Alleged discriminatory practice #10

Dr. Grover alleges that his treatment was part of a pattern of systemic discrimination against Asian scientists, particularly East Asians and Chinese, who were regarded as less important or capable scientists. As an example, Dr. Grover cites the case of two guest workers who joined his group in 1994, one of whom was a Chinese Canadian. This latter guest worker's name was not added to the staff list until two months after the first guest worker. As another example, Dr. Grover recounts a statement made by Dr. Hesser at a management meeting held in Victoria, B.C., in September 1994. Twelve people were in attendance, including Dr. Andrew, Dr. Morton, and Dr. Grover. Dr. Hesser allegedly said that care should be taken before hiring East Indian or Chinese scientists because they "faked" their qualifications and "could not be trusted". No one in the room objected to the comments, but later that day, Dr. Hesser allegedly sent a memo to the group apologizing for the remarks, which he acknowledged "sounded terrible and were racist". Dr. Grover complains that Dr. Andrew and Dr. Morton never asked him how he felt about the incident or whether he was hurt by the comments. In addition, he claims that no action was taken by the NRC to counsel Dr. Hesser or investigate whether his views were part of a larger problem within the institution. Dr. Grover adds that at the time, none of the approximately 40 key management positions at the NRC were occupied by scientists of Asian origin.

[82] Mr. Storr discussed the matter of staff lists in his affidavit. He was ultimately responsible for maintaining such lists, but he relied on Group Leaders to provide him with notification if there were errors on the lists. He has no recollection of whether Dr. Grover, as a Group Leader, approached him regarding the list referred to in the complaint, and if so, when the list was rectified. In his cross-examination, Mr. Storr elaborated further on the process of managing staff

lists, but his evidence regarding his recollections about the specific incident alleged was not challenged.

[83] Dr. Andrew wrote in his affidavit that he had no recollection of the specific Victoria meeting mentioned in the complaint, or of who may have been present at this meeting. He also had no recollection of any comments that Dr. Hesser may have made there, or of having received any apology. He does not recall any of the other matters raised by Dr. Grover pertaining to this allegation. His recollection of the incident (or lack thereof) was not raised in his cross-examination.

[84] Dr. Morton similarly wrote in his affidavit that he had no recollection of the meeting or of the parties present. He does not recall any comments by Dr. Hesser or any subsequent apology. He also has no recollection of any discussions he may have had with anyone present at the meeting or subsequently with Dr. Grover, concerning this event. His evidence as to his recollection was not challenged in cross-examination. He confirmed that after he moved to Victoria, these meetings normally were held either in that city or by teleconference.

C. Has the NRC's ability to provide an answer to the allegations been impaired?

[85] The delay from the occurrence of the last alleged discriminatory practice (September 1994) to the date when the Commission referred the complaints to the Tribunal (August 1, 2007) is almost thirteen years. The first alleged incident of discrimination (January 1991) occurred 16.5 years prior to the referral. Since the referral, over 17 months have elapsed and by the time the scheduled hearing dates come around in March 2009, another three months will have gone by.

[86] All the affiants implicated in the complaints declared in their affidavits that they have little or no independent recollection of the 1991 to 1994 events alleged in the complaints. Those who were called to be cross-examined at the hearing maintained that that they could not recall the incidents. Most of these people retired from or ceased their relationship with the NRC between 1994 and 1997. Several of them, particularly those who served as Dr. Grover's supervisors in the period at issue, are now approaching or all well into their 70's. Some of these people are being asked to recall events and conversations that occurred as many as 18 years ago. Their failure to remember these incidents is understandable.

[87] Moreover, any recollection that they may claim to have after so many years is likely to be highly unreliable, a point that was also noted by the Ontario Court (General Division) in *Ontario (Ministry of Health) v. Ontario Human Rights Commission*, [1993]O.J. No. 1528 (Ont. Ct. (Gen. Div.)) (QL). That case dealt with incidents that had occurred seven to nine years earlier. The Court stated, at para. 23, that:

It is doubtful whether any tribunal can safely rely on the memories of witnesses as to events that happened so long ago, particularly where the significance of some of the events may depend upon nuances in speech, attitudes, or behaviour.

[88] Many of the alleged discriminatory practices in the present case relate to attitudes or behaviour that Dr. Grover described as an expression of a "negative" disposition or resentment towards him. He referred to some behaviour as harassing. Some of the alleged discriminatory practices are based on conversations, such as the one with Mr. Reynolds and Ms. Auger during

which Dr. Grover claims that he was told his holography display had been selected for NRC's 75th Anniversary Exhibit. The evidence regarding these alleged discriminatory practices would thus be dependent on the very nuances referred to by the Court in the above excerpt.

[89] One of the reasons given by several of the affiants for their failure to recall the alleged events is the innocuous or minor nature of the incidents relative to the individuals' respective life experiences overall. Mr. Reynolds said that he was doing "a lot of things" in 1991 and Dr. Grover's holography exhibit was not a "big deal" in relation to all of his activities over the years. Dr. Vanier testified that he had refused many requests for travel funding from multiple NRC scientists. He therefore has difficulty singling out any details about Dr. Grover's particular request. Dr. Perron explained that as NRC president from 1989 to 1994, he signed hundreds, if not thousands, of letters that had been prepared for him by the NRC's correspondence directorate. He was unable therefore to recall practically any details about the 1992 letters regarding Dr. Grover, referred to in the complaints. The relative trivialness of the alleged incidents, as viewed from these individuals' perspective, provides a reasonable explanation for some of their memory loss over the course of the ensuing years.

[90] Dr. Grover contends that blame for some of this memory loss should be ascribed to the NRC itself for having failed to make any efforts to preserve these witnesses' recollections. Most of them testified that the NRC had not spoken to them over the years about Dr. Grover's allegations. I am not convinced, however, that there would have been any difference in the witnesses' ability to independently recall individual events from so long ago even if the NRC had spoken to all of these witnesses at an earlier time. A Commission investigator interviewed Mr. Reynolds back in 1997, about six years after the holography exhibit incident alleged in Dr. Grover's complaint. Judging by the investigator's report, it appears that Mr. Reynolds had a better recollection of the matter at that time. Yet, the fact that he was interviewed back then did not assist him in independently remembering any details today.

[91] Similarly, Dr. Bedford and Dr. Vanier were unable to recall the incidents alleged in the complaints with the detail that they were able to provide when the Commission interviewed them in 2000 and 2002 respectively. Dr. Grover questions how it could be that their memory could have so weakened since then. But these interviews did not just occur yesterday; they took place six to eight years ago. It is not at all unreasonable for these two witnesses, who it bears repeating are in their 70's and well into their retirement, to have a significantly reduced recollection of those old events, even when compared to their recollection from six and eight years ago. Courts have ordered the dismissal of human rights complaints on the basis of delay where the gap between the incidents alleged in the complaint and the tribunal referral was similar to, or even shorter than, the time that has passed in the present case since the dates when the Commission merely interviewed Dr. Bedford and Dr. Vanier (see e.g. *Nulla Bona Holdings Ltd. v. British Columbia (Human Rights Commission)*, 2000 BCSC 502; *Ontario (Ministry of Health)*, *supra*).

[92] I am therefore satisfied that due to the witnesses' inability to recall the events alleged in the complaints, the NRC's ability to make a full answer to the allegations made against it has been impaired by the delay in this case.

D. Must the delay be "unacceptable" or "undue" to justify the dismissal of the complaint?

[93] Even if the witnesses' memory loss so prejudices the NRC that it is no longer able to fully answer the allegations made against it, will that constitute sufficient basis to dismiss the

complaints? Must the delay be of a certain gravity or duration to warrant dismissal? Dr. Grover argued that a complaint should only be dismissed in cases where the delay is found to be unacceptable. With respect to his own case, he contends that given all of the activity that was going on in all three of his complaints over the years, the delay was not unacceptable.

[94] In considering Dr. Grover's submission, it is important to keep in mind that the matter at issue here is one of natural justice and fairness. If circumstances have evolved to the point that a fair hearing can no longer be assured, the Tribunal will effectively be without jurisdiction to proceed. Thus, when one speaks about delay impairing a party's ability to make a full answer to a complaint, the emphasis is on the prejudice caused by the delay and not the nature of the delay itself. Everything will depend on the circumstances of each case. In some instances, a Tribunal may find that a delay of many years does not hinder the party's ability to respond to a complaint, while in others, a relatively shorter period of time will be found to have had the opposite effect and denied the party access to a fair hearing. For instance, in *Chan v. Ontario Power Generation Inc.*, [2000] O.H.R.B.I.D. No. 7 (Ont. Bd. Inq.) (Q.L.), 52 months had elapsed from the filing of the complaint to the referral to the Board of Inquiry. The Tribunal was not convinced that the respondent had suffered prejudice of sufficient magnitude to warrant dismissal of the complaint. In *Nulla Bona Holdings Ltd.*, *supra*, on the other hand, the BC Supreme Court found that a delay of 42 months caused both inferred and actual prejudice to the respondent's ability to present its case.

[95] The focus is placed on the actual prejudice caused by the delay. In my view, the delay need not necessarily be qualified as unacceptable or undue for a respondent to avail itself of a remedy. To be sure, both of these terms are peppered throughout most of the jurisprudence dealing with questions of delay. After all, it is hard to imagine any circumstances where an ordinary or reasonable delay would impair a party's ability to answer a complaint. These issues by nature will arise in cases of inordinate delay. But faced with a situation where a respondent is prevented from giving full answer and defence to a complaint made against it due to the passage of time, the Tribunal shall have no choice but to end the process that has now been rendered unfair, no matter how short or long the delay or the reasons for it.

[96] However, even if my understanding of the test is incorrect and that only prejudice caused by unacceptable or undue delay can be remedied, I find, in the facts of the present case, that the delay is indeed unacceptable and undue. A span of such duration, between the occurrence of the alleged events and the referral of the complaints to Tribunal, is highly inordinate. It defies all logic to propose that this delay is anything but unacceptable.

[97] Dr. Grover suggests that one should look carefully at the sources of the delay before drawing any conclusions. A part of the delay can be attributed to the judicial review process (a total of about four years - three relating to Dr. Grover's judicial review application and one arising from the NRC's). That still leaves a period of between nine and 12.5 years, depending on the complaint. Dr. Grover argues that even during this time, the situation was not one where nothing was going on. At times the parties were so focussed on Complaint #1 that the Commission slowed down or suspended its investigation into the other complaints. The Commission's first decision with regard to Complaints #2 and #3 was issued in 1998, about six years after they were filed, which is a long time but not necessarily inordinate when compared to some other complaints that come before the Tribunal (see *Cremasco*, *supra*, at 107; *Gagné*, *supra* at para 12.). Some of the delay was attributable to additional Commission investigations,

which came about as a result of Federal Court orders. However, as the NRC rightly points out, these extensions occurred because the Commission did not execute its investigations properly in the first place.

[98] Furthermore, the record shows that there are some gaps in the case's history that are not explained or justified. For instance, there is almost a three year span between the Federal Court's decision of May 14, 2004, ordering the Commission to complete its investigation of Complaint #4, and the date when the external Commission investigator contacted the parties seeking the contact information for several witnesses (January 3, 2007). There is no indication of her investigation actually commencing before then. There may have been some preliminary discussions between the parties in the fall of 2004 (though the evidence does not go so far as to indicate that they were actual settlement negotiations). But even if such talks were ongoing, the fact remains that the clock was still ticking away regarding the developing prejudice to the NRC's ability to defend itself.

[99] The causes cited for the delay do not, in my view, lessen its unacceptability.

E. Is the prejudice of sufficient magnitude to impact on the hearing's fairness?

[100] Has this unacceptable and undue delay so impaired the NRC's ability to make a full answer to the complaint that there has been an impact on the fairness of the hearing (*Blencoe, supra* at paras. 102, 104)? In my view, the answer is yes. The NRC is no longer able to fully respond to the allegations made against it due to the fact that so many of its witnesses, through the passage of time, are unable to independently recollect the incidents alleged in the complaints. This case is not like others, where evidence of prejudice to the fairness of the hearing was lacking. In *Blencoe*, at para. 103, the Supreme Court adopted the trial judge's finding regarding the respondent's claims that his witnesses' memories had been impaired with the passage of time. The lower court had found that those were vague assertions falling short of establishing an inability to prove facts necessary to respond to the complaints. Similarly, in *Gagné, supra* at paras. 12-14, there was no evidence that the memories of witnesses had "necessarily" faded. In the present case, however, eight potential witnesses actually gave evidence of their faded memories. These are individuals who the NRC would reasonably be expected to call to give evidence in answer to Dr. Grover's allegations. The prejudice claimed by the NRC (namely, its witnesses' loss of memory) is thus not just comprised of "vague assertions".

[101] It is significant that the Tribunal has heard the testimonies of most of these people, including those whose role was particularly highlighted in the complaints (e.g. Dr. Vanier, Dr. Bedford, and Dr. Perron). In *Chan, supra*, the Ontario Board of Inquiry found that only by hearing evidence from the respondent's witnesses, would it have been able to gauge the respondent's assertions about its witnesses' lack of recall about the events. In contrast, I have actually had the benefit to have heard from many of the potential witnesses for the NRC and their memory loss has indeed been established.

[102] Dr. Grover challenges the genuineness of the witnesses' declared lapses in memory, particularly with respect to Dr. Vanier and Dr. Perron, both of whom figured fairly prominently in the Tribunal's 1992 decision regarding Complaint #1. That Tribunal had said that the evidence of Dr. Vanier, along with other NRC witnesses, was "in many instances, vague, contradictory and lacking in detail". The Tribunal went on to find the evidence of those NRC witnesses "lacking in credibility". The Tribunal also characterized an "ultimatum letter" sent by Dr. Perron

to Dr. Grover as an example of NRC's humiliating and demeaning treatment towards him. Dr. Grover therefore suggests that these two witnesses in particular have compelling reasons not to want to testify again in a case involving him, for fear of being again publicly criticized in such a forum. It is pointed out that when the Commission asked to interview Dr. Vanier in 2002, he opted to retain the services of his own legal counsel, indicating at the very least that he is extremely cautious in his dealings regarding Dr. Grover. These witnesses would have an incentive, it is argued, to exaggerate their memory loss so as to avoid the potential embarrassment that could arise from a hearing into Complaints #2, #3, and #4. A similar argument could apply to the other NRC witnesses who, having seen how Dr. Vanier's and Dr. Perron's actions were addressed in the first Tribunal decision, may also be reluctant to risk similar exposure in this case.

[103] It would be an error for me, however, to make any assessment of a witness's credibility based on the 1992 Tribunal's findings. The same issue, regarding the very same witness (Dr. Vanier), was addressed by the Federal Court in the 2004 judgment that ordered the Commission to give additional reasons (Complaints #2 and #3) and complete its investigation (Complaint #4) (*Canada (Attorney General) v. Grover*, 2004 FC 204 at para. 44). The Court held that it would have been clearly wrong in law for the Commission to have thought it could not, and should not, assess Dr. Vanier's credibility because it had already been found wanting by the 1992 Tribunal. The Court relied on the Saskatchewan Court of Queen's Bench decision in *Huziak v. Andrychuk* (1977), 1 C.R. (3d) 132 (Sask. Q.B.), which stated:

The fact that a judge disbelieves a witness in one case does not necessarily mean that he will disbelieve the same witness if he appears in another case.... Each case stands alone.

[104] I found Dr. Vanier's testimony at the motion hearing credible. He did not give "blanket" denials of recollection to every question asked of him. Where he was able to recall facts, events or some other detail, he was forthcoming in his answers. He gave his responses freely, without hesitation. I have drawn similar conclusions with respect to the credibility of Dr. Perron and all of the other witnesses as well. I did not identify evasiveness, inconsistencies, or other signs of insincerity in the evidence of any of them.

[105] Dr. Vanier explained in cross-examination that he had retained the services of a lawyer in 2002, not so much because the first decision was unfavourable to him, but rather because he felt he "needed support from somebody". He testified that he still felt he had done nothing wrong, with regard to Complaint #1, so he was not appreciative of the criticism levelled at him by the Tribunal. It would not be the first time that a witness or a party was unconvinced by, and disagreed with, a Tribunal finding. He pointed out that he did not have his own legal counsel in 1992 when he testified at the hearing into Complaint #1. Friends and acquaintances unconnected to the NRC had therefore advised him to get legal counsel this time. From his perspective, seeking the support of a lawyer made sense in the circumstances.

[106] In my view, nothing can be read into the fact that he hired a lawyer. He was within his rights to seek a lawyer's advice and his concern, given the 1992 Tribunal's findings, was understandable. Besides, I find it somewhat out of place to suggest that a negative inference should effectively be drawn against someone merely for exercising his right to consult a lawyer.

[107] Dr. Vanier was asked directly whether he was simply saying that his memory was lacking just because he would prefer not to come before the hearing. His unequivocal reply that there is no connection between his desire not to be involved in this "unpleasant" matter again, and the truthfulness of his testimony was, in my view, frank and persuasive. I see no basis before me to doubt him.

[108] In sum, therefore, I am persuaded by all of the affiants' evidence regarding their memory loss and their lack of independent recollection of the events alleged in the Amended Statement of Particulars.

[109] Does it matter that evidence from several other potential NRC witnesses was not adduced? Dr. Grover pointed out that although the NRC brought forward the evidence of a number of witnesses, it did not file affidavits from Dr. Clive Willis, Ms. Auger, Dr. Zwinkels and Dr. Powell. Dr. Willis was apparently a Vice-President of the NRC in the early 1990's. His name is mentioned in the 1992 Tribunal decision regarding Complaint #1. Dr. Grover also referenced him in several of the allegations in Complaint #4. However, these allegations no longer form part of the pared down version of the complaint that is before the Tribunal now. The NRC explained that this is why an affidavit was not sought from Dr. Willis. The explanation is reasonable and I accept it.

[110] Ms. Auger, as I remarked earlier, was mentioned in the April 28, 1997, Commission investigation report. She was the "trade show / special events coordinator", who was working for Mr. Reynolds on the preparations for the NRC's 75th Anniversary Exhibit. Her name does not appear in Dr. Grover's complaints or in his Amended Statement of Particulars. Indeed, neither does Mr. Reynolds'. However, as is indicated in a memo dated February 8, 1991, from Dr. Bedford to Dr. Grover, which was filed in evidence, Mr. Reynolds was in charge of the group organizing the exhibit. Mr. Reynolds would likely therefore be best placed to answer to this allegation. In any event, I note again neither Mr. Reynolds nor Ms. Auger was mentioned in Dr. Grover's Statement of Particulars. It was reasonable for the NRC not to have filed an affidavit from Ms. Auger.

[111] Dr. Zwinkels is named in the Amended Statement of Particulars. However, Dr. Grover does not appear to aim his criticism at Dr. Zwinkels directly with respect to the allegation that Dr. Vanier had instructed Dr. Zwinkels to personally deliver a memo and read it out to Dr. Grover. Rather, the complaint seems to be directed at Dr. Vanier, for having allegedly given these instructions to Dr. Zwinkels, who then in turn simply executed them. Dr. Zwinkels' role is thus more minor than that of the others who did file affidavits.

[112] Dr. Powell, on the other hand, plays a far more prominent role in the allegations set out in Dr. Grover's Amended Statement of Particulars. As the person purportedly displaced as a result of Dr. Grover's appointment, he may have been able to shed some light on the discriminatory practices that allegedly occurred after Dr. Grover's arrival. No explanation was given for the absence of an affidavit from Dr. Powell. Finally, I note that Dr. Hesser, in his affidavit, makes no mention of the anti-Asian and anti-Chinese remarks that he allegedly made in Victoria, in September 1994. We thus have no way of knowing if he has any recollection of that meeting and of what he may have said there.

[113] With respect to Dr. Bewsher, whose current whereabouts are unknown, I agree with Dr. Grover's submission that her evidence is likely not as critical as the other NRC witnesses, given her relatively minor involvement, which only related to one allegation of discrimination. Moreover, the NRC did not demonstrate that it has as yet made its best efforts to locate her. For instance, there is no evidence of its having called upon the services of a credit agency such as the one used to locate Dr. Vanier. Dr. Bewsher may yet be located at some point.

[114] It is therefore possible that the NRC has not established that each and every potential witness is either unavailable or is no longer able to have a clear recollection of the events alleged in the complaints. However, in order for a complaint to be dismissed, a respondent need not demonstrate that it is *impossible* for it to answer every aspect of the complaint. In *Ford, supra*, at para. 16 (a decision that the Supreme Court of Canada cited with approval in *Blencoe*, at para. 102), the "impossibility" test was expressly rejected. The "proper" test, according to the Ontario Court (General Division) is whether or not, on the record, there is evidence of prejudice that is of sufficient magnitude to impact on the fairness of the hearing. In my view, this test has been met in the present case. The memories of almost all of the NRC's witnesses have demonstrably faded and in the case of at least one witness (Dr. Bewsher), it may well turn out that she is no longer available. There is thus more than sufficient evidence that the NRC is no longer able to respond to the allegations made against it, which has in turn impacted on the fairness of the hearing.

[115] Even if it were to be shown that the other witnesses from whom we have not heard any evidence had excellent recall of the events at issue in this case, there are far too many other NRC witnesses who lack any independent recollection of the events. The Tribunal's ability to now conduct a fair hearing has been compromised.

F. Would dismissing the complaints at this time be premature?

[116] According to Dr. Grover and the Commission, even if it is demonstrated that the witnesses lack any independent recall of the complaints' allegations, the Tribunal should refrain from dismissing the complaints at this stage. The Respondent has yet to serve and file its disclosure documents, pursuant to the case management schedule directed by the Tribunal in this case. It is therefore argued that the Tribunal will only be able to determine if the fairness of its process has been impaired once all the available documentary evidence is disclosed.

[117] I do not agree. To begin with, it is apparent that the parties have been dealing with the issues of this case in an adversarial manner for more than a decade and a half. Several other legal proceedings have developed with respect to the disputes between the parties including at least one labour arbitration, a civil law suit, and several judicial review applications. The Commission has conducted investigations into the complaints in several phases for the reasons described earlier. There is evidence before me that the Commission sought and obtained documentation from the NRC pursuant to these investigations. It strikes me as very probable, therefore, that in the course of these exchanges between the parties over the years, most, if not all, documents of any relevance to this dispute will have been shared. During the cross-examinations of the NRC witnesses, Dr. Grover put before them several internal NRC documents already in his possession, in an attempt to trigger their memories. Thus, it is evident that this is not a situation where a respondent has been withholding or remains in sole possession of all relevant documentation.

[118] Moreover, even if some documents were to suddenly reveal themselves through disclosure, the fact remains that the witnesses still have no independent recollection of the alleged incidents

and thus, the NRC will continue to be unable to address this hypothetical documentary evidence through its witnesses. This inability to defend itself will again come as a result of the unacceptable and undue delay in this case. The existence of any such documents will therefore not allay or diminish the impairment to the fairness of this hearing process.

G. Would dismissing the complaints send an inappropriate message to other parties before the Tribunal?

[119] Dr. Grover argues that if his complaints are dismissed due to delay, an inappropriate message will be sent to future litigants before the Tribunal. Respondents will understand that it is in their interest to slow the advance of the Commission's pre-referral process as much as possible, thereby creating an opportunity to subsequently request that the complaint be dismissed because of the prejudice caused by the resulting delay. Complainants, in turn, will be hesitant to participate in any efforts to settle the case through mediation or conciliation, for fear of adding so much time to the pre-referral period that their complaints may well be dismissed for undue delay. Such complainants may also end up questioning their respondents' true motivation for participating in settlement talks, particularly if they become prolonged.

[120] In my view, these considerations do not justify conducting a hearing that is basically unfair and in breach of natural justice. Besides, the implication in Dr. Grover's argument regarding the potential impact on settlement efforts is that there have been ongoing negotiations in the present case throughout the 13 to 16.5 years that it took for these complaints to reach the Tribunal. I have no such evidence before me. It appears that there were some discussions along the way, but nothing that would explain or justify such an inordinate period of time. A more likely source of the delay would appear to lie in a decision to just keep Complaints #2, #3, and #4 in abeyance while the dispute regarding Complaint #1 wound its way through the Tribunal and judicial process.

[121] The principles of natural justice and fairness demand that all complaints be treated with proper dispatch. As was noted in *Cremasco, supra*, at para. 84, like any litigants, a complainant and the Commission have an obligation to prosecute an action with due diligence. Moreover, the sorts of delay that settlement talks or even a respondent's dilatory "tactics" would create are not likely to ever reach the scope found in the present instance. This is a highly inordinate delay. There is no reason for other parties before the Tribunal to fear that the normal delay, engendered where parties work consistently and reasonably together towards an expeditious resolution of the complaint, will ever extend to the point that it impairs a respondent's ability to answer the allegations made against it.

III. CONCLUSION

[122] For all the above reasons, I find that the NRC has established that the delay in the hearing of these complaints has so significantly impaired its ability to provide a full answer and defence to the allegations against it, that Complaints #2, #3, and #4 should be dismissed. The NRC's motion is granted.

[123] Given these findings, I need not address the NRC's alternate submission that the hearing of these complaints would bring the human rights system into disrepute and constitute an abuse of process.

"Signed by"

OTTAWA, Ontario
January 6, 2009

PARTIES OF RECORD

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APPEARANCES:	
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Ronald M. Snyder / Sanderson Graham	For the Respondent