T.D. 4/96
Decision rendered on April 4, 1996

CANADIAN HUMAN RIGHTS ACT
(R.S.C., 1985, c. H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DALJIT S. DHANJAL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

DECISION OF TRIBUNAL

TRIBUNAL: Daniel Proulx, Chairperson
Jacinthe Théberge, Member
Marie-Claude Landry, Member

APPEARANCES: Eddie Taylor and Odette Lalumière, Counsel for the Canadian Human Rights Commission

Guy Delisle, Counsel for the Respondent

DATES AND LOCATION
OF HEARING: December 14 to 16, 1994
January 16 to 19, 1995
January 30 to February 2, 1995
March 6 to 9, 1995
April 18 to 20, 26 to 28, 1995
June 26 to 29, 1995
Montréal, Quebec

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The complainant, who was not represented by a lawyer, contends in this case that the respondent Air Canada has discriminated against him in breach of sections 7 and 14 of the Canadian Human Rights Act (hereinafter the "CHRA") by harassing him and differentiating adversely in relation to him in employment-related matters on the basis of his race and religion. He alleges that his immediate supervisor, Guy Goodman, treated him in a domineering way, insulted him by using racist or contemptuous terms to describe his religion and even struck him, but Air Canada management did nothing concrete to remedy the situation other than sending him a letter of apology. The complainant therefore believes he was for all intents and purposes forced to resign, since he could no longer put up with this poisoned work environment, and that management, instead of correcting the situation, forced him to transfer at the end of 1989 to a position with insignificant responsibilities.

The Commission supported the complainant's allegations. However, it limited its submissions to discrimination and harassment based on race. It did not claim that the complainant, Daljit S. Dhanjal had been a victim of discrimination based on his religion.

Air Canada, for its part, argues that the complainant was not treated differently from its other employees. It concedes that there were problems in the professional relationship between Mr. Dhanjal and Mr. Goodman, but it says this was attributable to a personality conflict between the two men and to the consequences of the severe cutbacks that were being implemented

in the 1980s. That, the Respondent argues, is why the complainant never accepted (1) the abandonment in 1984 of his position as electrical draftsman, which he loved and had been exercising for more than twenty years (the position was eliminated) and his assignment to another position, that of "technician, performance", which he did not like, and (2) the increase in his workload.

Given that there was but one complainant and no allegation of systemic discrimination or policy or practice within the meaning of section 10 of the CHRA, the hearing in this matter was a particularly lengthy one, extending over more than 25 days. The Tribunal heard testimony from 28 witnesses.

I. THE COMPLAINT

The complaint, written and signed by Daljit S. Dhanjal on April 10, 1990, reads as follows:

Air Canada has discriminated against me by harassing me because of my race and colour in contravention of section 14(c) of the Canadian Human Rights Act. This is contrary to section 7 of the Canadian Human Rights Act.

I have been an employee with Air Canada for 26 years as a Technician, Performance. Between 1986 and 1989, I suffered from the following discriminatory incidents because I am a Sikh and because of my colour.

From 1986 to 1989, my supervisor, Mr. Goodman, has demonstrated a domineering attitude and has periodically made discriminatory statements. In my presence, he has been making racial jokes and slurs against the Sikhs. For example, in 1986 after the Air India Airline explosion, he made the following comment: "Two Sikhs are singing in the penitentiary. One Sikh is sitting here and singing". I complained to the Director of Engineering but to no avail.

On November 2nd, 1989, my supervisor hit me because of a difference of opinion between us concerning the location of a file. Following this attack, I was forced to move to another unit of work. This transfer was to result in assigment of meaningless responsibilities from November 2nd to December 31st, 1989.

Following complaints made to the Director of Operations Engineering, to the Personnel Department, and to Air Canada Ombudsman, I eventually received only a letter of apology.

In view of these circumstances, I had to retire from Air Canada on December 31st, 1989 although I consider myself fully qualified and able to continue to work.

Air Canada didn't take appropriate measures to correct the situation. I allege that the Company is fully responsible for the harassment I had to suffer.

II. PRELIMINARY ISSUES

(a) Rules of procedure and presentation of evidence before the Tribunal

The Tribunal was confronted with an unusual situation in this case. The counsel for the Commission, Mr. Taylor, displayed an extremely fastidious approach to the technical formalities in regard to both the procedure and the presentation of evidence, frequently delaying the hearing with occasionally lengthy and tedious legalistic arguments, and giving this administrative tribunal the appearance of a court of civil, if not criminal, law.

For example, he constantly insisted that documentary evidence be presented in a precise order and in accordance with a very strict procedure, and he raised numerous objections to the way in which counsel for the Respondent proceeded in the identification of his documentary evidence.

Mr. Taylor likewise vehemently objected to the admissibility of some testimony and evidence, relying in most cases on judgments applying principles of evidence developed in criminal law.

The Tribunal wishes to note at the outset that the rules governing procedure and the presentation of evidence before administrative tribunals are quite distinct from, and in particular more flexible than, those that have developed in civil and criminal law.

For example, the Federal Court has recognized on many occasions that the Human Rights Tribunal, like any administrative tribunal, is the master of its own proceedings: Fishing Vessel Owner's Association of British Columbia v. Canada, (1985) N.R. 376, at 381 (F.C.A.); American Airlines v. Canada (Competition Tribunal), [1989] 2 F.C. 88, at 95 (F.C.A.); Canada (C.R.T.C.) v. Canada (Human Rights Tribunal) (1991), 14 CHRR D/87, par. 12.

The Federal Court of Appeal has also clearly upheld the autonomy of administrative tribunals in relation to the evidentiary considerations. For example, in Canada v. Mills (1985), 60 N.R. 4, it was unequivocal:

> Contrary to what was assumed by the Chief umpire, boards of referees, like other administrative tribunals, are not bound by the strict rules of evidence applicable in criminal or civil courts; they may, therefore, receive and accept hearsay evidence. (p. 5)

Lord Diplock of the United Kingdom Court of Appeal, has explained clearly and convincingly the reasons why the English courts have recognized the autonomy of administrative tribunals in matters of evidence, subject to the rules of natural justice. Here is what he said in Regina v. Deputy Industrial Injuries Commissioner, [1965] 1 Q.B. 456, at 488:

> For historical reasons, based on the fear that juries who might be illiterate would be incapable of differentiating between the probative values of different methods of proof, the practice of the common law courts has been to admit only what the judges then regarded as the best evidence of any disputed fact, and thereby to exclude much material which, as a matter of common sense, would assist a fact-finding tribunal to reach a correct conclusion. [...] These technical rules of evidence form no part of the rules of natural justice.

Accordingly, it is clear that the technical rules for excluding certain evidence, which were developed in particular in criminal law in the context of trial by jury, are inapplicable to an administrative tribunal such as the Human Rights Tribunal. The latter, as the Supreme Court of Canada noted in Canada v. Mossop, [1993] 1 S.C.R. 554 and U.B.C. v. Berg, [1993] 2 SCR 353, possesses superior fact-finding expertise in matters involving discrimination.

Furthermore, this principle of the inapplicability of the technical rules for the exclusion of evidence developed by the

ordinary courts has been expressly recognized by Parliament. Paragraph 50(2)(c) of the CHRA provides:

(2) In relation to a hearing under this Part, a Tribunal may

(a)
(b)
(c) receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Tribunal sees fit, whether or not that evidence or information is or would be admissible in a court of law.

Parliament has thus indicated in the clearest possible way that a Human Rights Tribunal is not bound to adhere to the rules on admissibility of evidence developed by the civil or criminal courts. The reason for this lies in the fundamental mission that has been entrusted to it: quickly and effectively finding all the facts that can flush out discrimination and repairing the harm caused to those who are the victims thereof, rather than punishing those responsible: O'Malley v. Simpsons-Sears, [1985] 2 S.C.R. 536, at 547; Robichaud v. The Queen, [1987] 2 S.C.R. 84, at 94.

Consequently, apart from the limitations imposed by the Constitution of Canada itself and the principles of fundamental justice laid down in the administrative law cases, only a statutory provision explicitly applicable to the Human Rights Tribunal, such as subsection 50(3) of the CHRA, may derogate from the principle of admissibility of evidence contained in paragraph 50(2)(c) of the CHRA. This paragraph, it may be worth recalling, is in effect "entrenched" in a quasi-constitutional statute, i.e. an act that prevails in principle over the common law and any other federal statutory or regulatory standard.

If, therefore, as is manifest, the Human Rights Tribunal has been recognized in both the case law and by Parliament as having a distinct and autonomous system for the presentation of evidence, it follows that a legalistic and formalistic attitude had no place in the proceedings of the Tribunal. In most cases the important thing is not so much the admissibility of testimony as its relevance. Parliament has made this Tribunal a quasi-judicial body of experts on assessing the credibility of evidence and that is where its investigation should focus.

For example, hearsay evidence, which is inadmissible in the courts, is admissible before this Tribunal, subject to the assessment of its probative value: Canada v. Mills, supra. Moreover, the cases have recognized that the best-evidence rule does not apply to the proceedings of an administrative tribunal: The Queen v. Deputy Industrial, supra, although, in the context of a quasi-judicial proceeding involving a lis inter partes, procedural fairness requires that such evidence be admitted only if the adverse party has an opportunity not only to rebut it but to test its probative value

through cross-examination: Cashin v. C.B.C., [1984] 2 F.C. 209 (C.A.) and Mills, supra. See also Y. Ouellette, "Aspects de la procédure et de la preuve devant les tribunaux administratifs", (1986) 16 R.D.U.S. 819-865.

With no great reluctance, therefore, we must dismiss the various technical objections based on the criminal or civil law in general, which complicate the simple, flexible and effective process that Parliament sought to institute by establishing this Tribunal. This attitude is more often than not the prerogative of the lawyers in private practice representing the respondent, who are not used to acting before an administrative tribunal and are more comfortable with the formalism and rigidity of known technical rules of evidence applied out of habit. However, in this case it was the lawyer for the Commission, whose function is solely to act before this Tribunal, who behaved as if it were a court of law. It is therefore not so easy to find some valid excuse for him.

To ensure that its hearings proceed without unnecessary or inappropriate interruption, the Tribunal has an effective tool at its disposal: when in doubt, it can simply take the objections under proviso and continue the hearing, even postponing the hearing of the submissions. To do so, it is necessary in the first place to dismiss peremptorily, as we in fact had to do, the objections to the effect that the Tribunal lacks this authority and that it is supposedly obliged to determine an issue as to the admissibility of testimony even before receiving it.

In short, the "golden rule" in regard to the admissibility of evidence could be articulated as follows: any evidence which is or is likely to be relevant and which, according to the rules of procedural fairness and fundamental justice developed in administrative law, does not unduly prejudice the opponent, is admissible by a human rights

tribunal, as is expressly allowed by paragraph 50(2)(c) of the CHRA, subject to the tribunal's final decision concerning the weight that is to be accorded such evidence in the circumstances.

Relevance and fairness are thus the two key considerations in the independent evidentiary regime of this Tribunal, which is the complete master of its own procedure. Furthermore, even if its relevance is unclear at the moment when an objection based on this ground is raised, evidence may be admitted where the Tribunal is of the opinion that the evidence is potentially relevant. In other words, when in doubt the Tribunal may decide in favour of its admissibility.

This position is justified, first, by the Tribunal's authority to examine all the facts that might help it to assess the credibility of the witnesses and derive findings of fact concerning the alleged discriminatory acts, and second, by the wording of section 50 of the CHRA, which provides that the Tribunal shall give the parties "a full and ample opportunity to appear before the Tribunal, present evidence and make representations to it".

A number of objections were raised on the basis of the inadmissibility of certain testimonies or pieces of evidence. Based on the principles set forth above, we will dispose forthwith of a number of these objections. However, as may be noted, the objections to the admissibility of some testimonies will be addressed later, during the analysis of the evidence as such.

(b) Admissibility of the evidence concerning the quality of the Commission's investigation

At the outset of the hearings, during the presentation of his opening statement, counsel for the respondent, Mr. Delisle, indicated that he intended to lead evidence showing that the investigation in this case had been conducted in an unacceptable way and that it was tainted by bias on the part of the Commission's investigator. This, he said, would explain why proceedings had needlessly been brought before this Tribunal.

Mr. Taylor, the Commission's chief counsel, objected vigorously to the presentation of such evidence. The Tribunal, he said, had no jurisdiction to make inquiries or findings of fact or award a remedy in respect of the quality of the investigation conducted by the Commission. The quality of the investigation and compliance by the

Commission investigator with the rules of natural justice are issues that can only be raised before the Federal Court at the appropriate time, he argued, citing cases in support.

We agreed with the Commission on this point in a written decision we issued on January 30, 1995, which is worth reproducing here:

The Tribunal agrees with the submission of Commission Counsel, that the Tribunal's jurisdiction is a limited one based on the authority conferred under the Canadian Human Rights Act, in particular, ss. 49, 50 and 53.

Under section 50(1), "A Tribunal shall inquire into the complaint in respect of which it was appointed. "

Section 53(1) reads as follows: "If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is not substantiated, it shall dismiss the complaint."
[ ]

Accordingly, the Tribunal finds that it does not have jurisdiction to make a finding of fact on the quality of the investigation. This is a separate issue that must be addressed in another forum. Therefore, the Tribunal will not allow the Respondent to call witnesses in order to give evidence on how the Commission has handled its investigation.

The subject matter of the inquiry is not whether the Commission has conducted its inquiry properly, fully and without bias, it is not whether the Commission complied with the rules of procedural fairness, but whether, on the merits, the complaint of discrimination is substantiated.

This being said, the Tribunal agrees with Mr. Delisle that, as long as the purpose of the examination is to help the Tribunal to decide if the complaint is or is not substantiated, the Tribunal will allow Respondent Counsel to call all the witnesses he deems appropriate, including the investigator, to give evidence on the facts that are relevant to the complaint.

Therefore, all the witnesses called by both parties will have to be examined and cross-examined by both Counsel on the merits of the complaint, not on the way the Commission conducted its

investigation, an issue which is not relevant for the purpose of this inquiry.

(c) Admissibility of the evidence of the Commission's investigator

Respondent counsel subsequently called Mr. Jacques Lapommeray, the Commission's investigator in this case. Relying on our decision of January 30, 1995, Mr. Taylor objected to this examination. He argued that any question put to the investigator would necessarily bear on the quality of his investigation and his own credibility, evidence that had been ruled inadmissible by the Tribunal.

The Tribunal initially dismissed the objection on the ground that, as it had explained in its decision of January 30, 1995, Respondent's counsel was authorized "to call all the witnesses he deems appropriate, including the investigator, to give evidence on the facts that are relevant to the complaint". This decision, by its very nature, implied that not all questions put to the investigator were necessarily related to his credibility or the quality of his investigation.

In fact, Mr. Delisle called Mr. Lapommeray for the sole purpose of enabling the Tribunal to assess the complainant's credibility, a highly relevant consideration in a complaint of harassment such as this. However, because some of Mr. Delisle's questions had to do with the witness's training and could be construed as questioning his own credibility and the quality of his investigation, the Tribunal took Mr. Taylor's repeated objections under advisement.

As Mr. Delisle had promised, these were preliminary and secondary questions. The examination essentially dealt with the

particulars of the evidence Mr. Lapommeray took from the complainant in the course of his investigation and its contradictions with the testimony the complainant gave to this Tribunal. Thus the examination dealt with Mr. Dhanjal's credibility, an issue the relevance of which is not challenged.

The whole of Mr. Lapommeray's testimony is therefore ruled to be fully admissible and relevant. Accordingly, Mr. Taylor's objections shall be upheld only in regard to a few preliminary questions that were put to this witness concerning his training, which the Tribunal will ignore in its decision.

III. THE EVIDENCE

Daljit S. Dhanjal was born in Bengal, India on March 12, 1937. He was therefore 57 years old when the hearings began and 52 years old when he left Air Canada. He did his university studies in India and then worked for the Post Office headquarters as a "mechanical draftsman" for about six years. He later worked on military airplanes for the Indian Armed Forces.

Mr. Dhanjal arrived in Canada on April 1, 1963 and, since he is of the Sikh religion, he was bearded and wore a turban. Upon his arrival, Mr. Dhanjal applied to Air Canada and on April 19, 1963 was hired as a "mechanical draftsman" in the Engineering department. However, Mr. Dhanjal is not an engineer and has no training in this field. His training and expertise are those connected with his duties as a mechanical draftsman.

In the early 1970s Mr. Dhanjal decided to remove his beard and stop wearing a turban. Between 1963 and 1985, his performance evaluations were very good. Moreover, he says that in 1982 and 1985 he won first prize in the competition for best suggestions from employees. This statement is challenged by the Respondent, however. It appears, in fact, that the awards won by Mr. Dhanjal were for the Engineering Department only, one of the smallest departments in Air Canada, and not for the corporation as a whole.

The parties acknowledge, however, that it is was only around 1985, when Guy Goodman became the complainant's immediate superior, that the problems out of which this case originates began, although the Respondent presented witnesses to show that Mr. Dhanjal, because of his difficult personality, had some problems in his professional relationships with his coworkers or superiors prior to 1985 and that these problems were simply aggravated by the contact with Guy Goodman between 1985 and 1989.

The complainant contends that he was the victim of racial and religious discrimination and harassment in relation to six

categories of conduct attributed either to his immediate supervisor or Air Canada management. These categories, which we will review in order, are: (1) the general attitude of Guy Goodman; (2) the racial and religious slurs by Guy Goodman; (3) the posting of discrininatory drawings; (4) his performance evaluations; (5) the incident of November 2, 1989; and (6) his constructive dismissal. We will discuss these six headings in order.

The Commission also presented similar fact evidence consisting, on the one hand, of the posting at Air Canada of a newspaper clipping with a discriminatory annotation during the hearing, and on the other hand, statistical evidence showing under-representation among employees of the Respondent belonging to visible minorities. We will examine this evidence from the standpoint of both admissibility and relevance.

(a) Incidents referred to by complainant

1. General attitude of Guy Goodman

According to the complainant, his immediate supervisor, who was Guy Goodman between 1984 and 1989, had an arrogant, authoritarian, colonialist and harassing attitude toward him. He criticized him continually, treating him with disdain using discriminatory language, and was always on his back, hounding him even on coffee breaks and at lunch time to ask him questions about his work. Mr. Goodman, he says, was not really competent as the manager of his division: his qualifications were not obvious and he often made errors in the lists of data that the Performance Division had to produce, errors that he was unable to admit, moreover. For example, the complainant says, Mr. Goodman had to go to Athens twice to correct a serious error he had made.

Seven witnesses were called to give their opinion on Guy Goodman's personality and his attitude toward the complainant. All of them-coworkers of the complainant and subordinates of Mr Goodman at the relevant time (Ms. Tzirtziganis, Ms. Berthiaume and Mr. Quail), Mr. Goodman's immediate superior (Gord Helm), a manager at the same level as Mr. Goodman (John Davidson)-agree on one point: Mr. Goodman had an authoritarian management style that is rarely seen in North America. He was an arrogant, overbearing boss who wanted to be in complete control.

He was also a man who had some difficulty in accepting criticism and admitting his mistakes; this, says John Quail, led to frequent bickering with his subordinates. However, Mr. Quail explained that he himself had, like the others, often been the victim of Mr. Goodman's appalling custom of running after his employees even in coffee breaks and lunch times to get an answer to his questions. This evidence was corroborated by Gilles

Ricard, a colleague in another division of the Engineering department (he retired in 1990), with whom Mr. Quail ate at noon every day. Mr. Ricard said John Quail often complained of Guy Goodman's management style, which was quite different from that of his predecessor, a Mr. Blom.

In short, the opinion was unanimous that Mr. Goodman was a difficult and arrogant boss, although he behaved that way with everyone. As a result, a number of employees, including Mr. Dhanjal, were frustrated by his management style and did not like working under his direction.

Mr. Goodman himself was asked to comment on his management style. He conceded that he was perceived as an authoritarian, arrogant and insensitive boss both by his colleagues and by his subordinates when he managed the Performance division between 1985 and 1990. He says he did not realize it at the time, but was indeed obliged to admit it when the results of his "Social Style Profile" (exhibit R-1, tab 25), compiled in October 1990 by a firm specializing in management analysis, confirmed to him that this was the perception of the other five employees (subordinates, equals and superiors) that Mr. Goodman had himself selected to fill out a questionnaire for the purpose of assessing his management style.

Finally, concerning the complainant's allegation that he had to go to Athens twice to correct an error in judgment, Mr. Goodman said he had never in his life been to Athens and had made no mistakes in that matter.

On this first category of incidents, then, the complainant is the only one to state that Mr. Goodman treated him differently from the other employees and that he was, more than the others, a victim of Mr. Goodman's arrogance and constant monitoring.

We are of the opinion that the testimony of Ms. Berthiaume, Ms. Tzirtziganis and Mr. Quail is to be preferred to that of the complainant. They were coworkers of the complainant and are credible. The testimony of Gord Helm, Guy Goodman and John Davidson is also considered credible on this point, especially since it is corroborated by three of the complainant's coworkers whose credibility was not challenged by the Commission. In view of the clear contradiction between the evidence of the complainant and that of his own witnesses, we conclude that the Commission has not made out a prima facie case concerning the existence of a generally different, contemptuous or discriminatory attitude toward Daljit S. Dhanjal on the part of Guy Goodman.

2. Racial or religious slurs by Guy Goodman

The complainant testified that Guy Goodman frequently used discriminatory remarks when addressing him throughout the years in which he was his supervisor. However, he was able to illustrate his statement with only two examples. We will discuss the first here (the second will be discussed later, in point 5 concerning the incident of November 2, 1989).

The first example of slurs is that of the phrase 'Two Singhs are singing in the penitentiary. One Singh is sitting here and singing." According to Mr. Dhanjal, Guy Goodman repeated this phrase at least three times during the summer and fall of 1986. In fact, there is clearly an error concerning the year in question. It was in fact 1985, since both the complainant and Guy Goodman link this incident to the year of the blowing up of an Air India plane. At the time, this explosion was the topic of major public discussion because of the involvement of Sikhs that the media considered to be terrorists.

On the first occasion that these words were uttered, in June 1985, the complainant's colleague Quail was present. The complainant says he did not distinctly hear the words used by Mr. Goodman and that it is John Quail who reported them to him. Mr. Quail, however, stated he had not heard the words complained of. He said Mr. Dhanjal complained because Guy Goodman had made fun of him in a disdainful way through a pun on his name. He remembers only the words "sing sing", since it made him think of a popular song. Mr. Quail stated that the complainant spoke to

him twice about this phrase, which he considered insulting, during that summer, but that he never raised the matter again subsequently. In Mr. Quail's opinion, Mr. Dhanjal was hypersensitive about issues affecting his race or religion and he tended to jump quickly to conclusions.

No other employee of the Performance division had heard of this phrase.

Mr. Goodman admits having made a pun on one occasion that year, comparing the complainant's name (he was then called Singh) to Sing Sing penitentiary. Since the formal complaint of Daljit S. Dhanjal indicates that he said "Two Sikhs are singing ", he at first completely denied having alluded directly or indirectly to Sikhs in what he called his pun. Seeing that Mr. Dhanjal was insulted, he says, he apologized immediately, even though he thought it was a rather inoffensive pun, albeit in bad taste. He says he also apologized again on several occasions subsequently because the complainant refused to let bygones be bygones and constantly returned to the matter.

According to the complainant, Mr. Goodman repeated his offending comment around October. While they were each sitting at their desk working, Guy Goodman flung the same offensive comment at him, in a way that was as gratuitous as it was unexpected. He

says he then complained to Gord Helm, Guy Goodman's superior. He says he also made an appointment with Manjit Singh and with John Longo to discuss it.

Manjit Singh was then a middle manager working not at Dorval but in downtown Montreal in the company's management. Mr. Dhanjal consulted him at the time because he was an Indian of Sikh origin and religion (with a beard and turban), and because he had some expertise in discrimination against visible minorities. Mr. Singh was, in fact, a member of a committee set up by Treasury Board to examine this issue and advise the government on how to combat discrimination toward visible minorities in the federal public service and Crown corporations.

John Longo was manager of employee communications and participation between 1985 and 1989. Reporting directly to the Vice-president, Maintenance and Engineering, his responsibility

was to bring about a change in culture in Air Canada's management style in the technical sector. The corporation had decided to move from a hierarchical mode characterized by an imposing military style of management to a more convivial mode with a participatory type of management. Mr. Longo was therefore involved in the Goodman-Dhanjal case since his duties also comprised coaching or assisting in the resolution of conflicts between supervisors and employees in the Maintenance and Engineering sector.

According to the complainant, Mr. Goodman again repeated his offending remark a month later, in November, in the presence of Gilles Ricard, a colleague from another division. He says he complained again to Gord Helm and John Longo. He even says they had a meeting together and that Mr. Longo confirmed to him at that time that Mr. Goodman's attitude was unacceptable.

Mr. Ricard, however, stated that he had never heard Guy Goodman utter racial slurs of any kind whatever. Mr. Dhanjal never mentioned to him that Guy Goodman was insulting him with discriminatory comments directed to him.

As for Gord Helm, he denies ever having met with Mr. Dhanjal to discuss discriminatory slurs made by Guy Goodman.

Mr. Manjit Singh states that it was in November 1987, not 1985 or 1986, that he met with Mr. Dhanjal for the first time. Although the issue was raised that Guy Goodman had previously insulted him verbally, it was primarily his problems of inadequate performance evaluation that the complainant discussed with him.

Mr. Longo, for his part, is certain that he was not introduced to Mr. Dhanjal for the first time until March 1988,

and that he had his first discussion with him in the following month. His testimony is supported, moreover, by a record of his meetings made on November 20, 1989 (exhibit HR-16) from his entries in his personal day planner.

Mr. Dhanjal says he also raised privately the subject of the slurs he was being subjected to with Roger Morawski, Gord Helm's superior until 1988, after a meeting held on May 5, 1986 in the

presence of Gord Helm and Guy Goodman. There was no dispute over the existence and purpose of this meeting, which was about Mr. Dhanjal's evaluation for 1985. Roger Morawski was not summoned to testify, however.

Nine witnesses who had worked with Mr. Goodman and knew him well gave their opinion about Guy Goodman's tendencies in matters of racism. Four are retired (Messrs. Helm, Hellstrom, Ricard and Davidson) and the other five (Ms. Berthiaume, Ms. Tzirtziganis, Ms. Bowes, Mr. Longo and Mr. Quail) are still employed by the Respondent although they have no regular relationship with Guy Goodman, who has been assigned to other duties in another division. Their evidence is consistent: no one has ever heard Guy Goodman make racial slurs or jokes in relation to an employee who is a member of a visible minority. Only John Quail, a coworker of the complainant between 1985 and 1989, says he heard Mr. Dhanjal complain that Mr. Goodman had insulted him, and this involves a single slur considered by Mr. Dhanjal to be racial and religious in character, during the summer of 1985.

Finally, the Commission's investigator was examined on the fact that his report mentions only a single occasion on which Guy Goodman is alleged to have uttered the words "Two Sikhs are singing ". He said he did not remember whether Mr. Dhanjal had spoken to him of other occasions when these words were uttered, but that if such had been the case, he would "probably" have reported them.

Concerning this second category of incidents, there is not much corroboration of Mr. Dhanjal's testimony. In addition to being hesitant and often confused, the complainant was contradicted by all the witnesses, including those who were called by the Commission and whose credibility is very strong, such as Messrs. Longo and Manjit Singh, concerning the dates in question, the existence of meetings or discussions, and the type of individual Guy Goodman is in matters of racism.

There is also some confusion concerning the actual wording of the alleged slur. Although, in his formal complaint and even at certain points in his evidence, Mr. Dhanjal stated that Guy Goodman had used the word "Sikh" in order to denigrate him as a Sikh, in the major part of his own testimony and in the allegations by the Commission counsel, it is the words "Singh"

and "Sing Sing" that constituted the slur. This is corroborated by John Quail, who recalls only the words "Sing Sing".

Furthermore, we note that the complainant is again the only one to state that Guy Goodman insulted him on more than one occasion during 1985 by flinging the alleged phrase at him without warning.

It is clear, therefore, that the said phrase was uttered by Guy Goodman, since the latter admitted having said it once during the summer, although, he insists, he apologized forthwith, seeing that his "pun" had hurt Mr. Dhanjal. However, the wording of this phrase is a matter of controversy. In view of the complainant's contradictions on this key point, as on many others, we do not believe him when he claims that Guy Goodman was alluding to his religion by using the word "Sikh". We are of the opinion, like counsel for the Commission, moreover, and in agreement with the evidence of John Quail and Guy Goodman, that the phrase in question was a "pun" on the Indian name "Singh" and the name of the "Sing Sing" penitentiary.

Such a statement has no clear religious connotation since, as Mr. Manjit Singh noted, not all those who are called Singh are necessarily Sikhs. This appears to be particularly relevant when the individual in question has not been bearded or worn a turban for at least fifteen years, as in the complainant's case. The remark may, however, have a racial connotation, broadly speaking.

We also find, in relation to this second category of incidents, that the complainant's evidence is not credible insofar as Guy Goodman is alleged to have later repeated on two occasions during 1985 his "Two Singhs are singing " statement. As presented, the first repetition is improbable: it is hard to see why Guy Goodman would have unexpectedly blurted out this phrase in the total absence of any interaction between him and the complainant. And the second alleged repetition is contradicted by an independent eyewitness. In all probability, the complainant did not mention these repeat offences to the Commission investigator, either, since the latter stated he did not recall it being mentioned and his investigation report says not a word about it.

We likewise find that Gord Helm was not notified in either 1985 or 1986 of the words that Mr. Dhanjal considered discriminatory. The private communication of such words to Gord Helm's superior, Roger Morawski, is not credible. Finally, we

find that Mr. Dhanjal, contrary to what he stated, never complained of such words to John Longo during 1985 or 1986. It is our opinion that Mr. Longo's testimony, supported by documentary evidence, is more credible. And it confirms that the complainant had his first discussion with John Longo only in April 1988. Nor, contrary to his own evidence, did the complainant mention it to

Manjit Singh before 1987, as this independent and credible witness confirmed.

Accordingly, the Commission has proven only one incident with a racial connotation, namely, the statement "Two Singhs are singing in the penitentiary. One Singh is sitting here and singing", uttered during the summer of 1985.

3. Posting of discriminatory drawings

The complainant told the Tribunal that two drawings intended to denigrate him from a religious or racial point of view were posted in the workplace. In 1986, someone placed a drawing of a baby chimpanzee sucking on a pacifier on his wall divider under his name, and in 1987 a cartoon from the daily newspaper The Gazette of a cyclops Sikh Indian crushing a child with his foot was posted on the bulletin board of the Engineering office and in the corridor leading to the complainant's office. It seems that at the time the media were portraying the Sikhs as cruel terrorists because of horrible crimes they had apparently committed in India.

In both cases Mr. Dhanjal says he complained to his superiors. He says he spoke about the baby chimpanzee to Gord Helm's secretary, to Guy Goodman and to Mr. Helm himself. In regard to the cyclops Sikh, he says he met with John Hellstrom, a colleague from another division of the Engineering department, and Roger Morawski's secretary, about this.

What do Mr. Dhanjal's colleagues and superiors say in answer to this? Without hesitation, they all said the same thing: they have never seen these drawings in the workplace and have never heard of them. John Quail, Guy Goodman, Gord Helm, his secretary Debrah Bowes, John Longo and John Hellstrom were specifically examined on this matter.

Moreover, since the report of the Human Rights Commission investigator (exhibit R-8) nowhere alludes to these drawings, Respondent counsel asked the investigator whether Mr. Dhanjal had mentioned them to him or shown them to him. Mr. Lapommeray answered hesitantly and somewhat ambiguously: Mr. Dhanjal had spoken to him about these cartoons but without showing them to him; he did not see them, therefore, and if his report did not mention them, he said, it was probably because they were posted prior to the alleged period of harassment, 1986-89, or because Mr. Dhanjal told him of the existence of these cartoons after he wrote his report (which he signed on March 11, 1992). Since Mr. Dhanjal stated that these documents had been posted on the premises in 1986 and 1987, it would seem then that only the second hypothesis is possible: the complainant can only have raised the matter with the Commission investigator, if indeed he

did so, after March 1992. Moreover, the formal complaint Mr. Dhanjal signed and filed with the Commission on April 10, 1990 makes no allusion, either, to the posting of discriminatory drawings in the workplace.

Counsel for the Commission argued in his submissions that Guy Goodman's testimony is not credible when he denies ever having seen the two drawings in question (exhibits HR-2 and HR-3). His argument rests on the fact that on cross-examination Guy Goodman admitted that Mr. Delisle, Air Canada's counsel, had shown them to him on December 15, 1994, when they were submitted as evidence by the complainant. This argument must be rejected. It is clear that the questions asked by Mr. Delisle essentially dealt with what Guy Goodman had been aware of in the workplace and that this is the context in which Mr. Goodman replied, during his examination in chief, that he had never seen the drawings in question. There is therefore no contradiction in this that would undermine Guy Goodman's credibility on this aspect of his testimony.

Since, on the one hand, the complainant's evidence was contradicted by all of the witnesses who testified, including witnesses whose credibility is not challenged by the Commission and who are all reliable-John Quail, Debrah Bowes, John Longo and John Hellstrom-and since, on the other hand, the complainant's allegations are not mentioned at all in the complaint he filed with the Commission or in his testimony to the Commission's

investigator, the Tribunal finds that the complainant is not credible in regard to this third category of incidents and that, accordingly, there is no prima facie case of the posting of the drawings in question in the workplace.

4. Complainant's performance evaluations

Mr. Dhanjal accuses his superior Guy Goodman of having had higher requirements in his regard, which resulted in negative performance reviews for three consecutive years, 1986, 1987 and 1988, although he had always had positive evaluations for more than twenty years at Air Canada. (The other two performance reviews of the complainant made by Guy Goodman, in 1985 and 1989, were also favourable to the complainant.) In short, he says, his performance was being evaluated according to a double standard. Mr. Dhanjal also says that in his performance review records for 1986 and 1988 he made a written notation drawing attention to Guy Goodman's discriminatory conduct, but that neither Mr. Goodman nor his superior Gord Helm did anything whatsoever to solve the problem. Mr. Dhanjal also complains that Guy Goodman never followed up on his requests for training that he made in writing in his performance review record.

In reply to these charges of unfair evaluation, Mr. Goodman says the problem he had with the complainant was first and foremost one of productivity owing to poor organization of his work, a lack of motivation, the fact that he allowed himself to be distracted by whatever was happening around him (colleagues' conversations, a new PC, personal matters, etc.), and, finally, his resistance to the change in management style he thought it was necessary to establish.

Mr. Goodman admits as well that there were often endless discussions between him and Mr. Dhanjal over how to do the work. In his view, Mr. Dhanjal had very definite opinions on this, and was quick to confront him instead of admitting his own mistakes. The complainant, he says, was unable to accept criticism, even constructive criticism he made to him to try to improve his productivity. He also tended to accuse him of racism whenever he criticized him.

Mr. Goodman admits having seen the complainant's written comments on his own attitude and discriminatory remarks in his

performance review record. He even says he told his superior, Gord Helm, that Mr. Dhanjal was calling him a racist when he criticized his work. Nevertheless, he says, they were quick to agree that there wasn't much they could do about these complaints because there was no basis to them. They simply showed, once again, the difficult and belligerent character of Mr. Dhanjal.

In regard to the complaint that he had never followed up on Mr. Dhanjal's desires for vocational training provided by the company, Mr. Goodman stated that the complainant was partly right. It was impossible, he said, to respond immediately to his requests, given the constant increase in the workload owing to successive staff reductions. And he did not allow him to take computer courses because he thought this was not necessary for his work, since at the time only John Quail needed to work with a computer in the Performance division. However, he says he did partially satisfy the complainant when this was possible, for example by allowing him in 1987 to take the "familiarization flight" courses and some management courses (called POM and INT) that he had requested.

Gord Helm, for his part, stated that the complainant's negative performance reviews between 1986 and 1988 were fully deserved. In his opinion, Guy Goodman's expectations were reasonable and the complainant was refusing to measure up. Mr. Dhanjal was, he said, a difficult employee who had trouble maintaining harmonious relations with both his superiors and his coworkers. Furthermore, he refused to accept the change instituted by Mr. Goodman in the organization of the work.

In his opinion, Mr. Goodman was a first-class manager. The problem in relations between Guy Goodman and Daljit S. Dhanjal

was caused by a personality conflict between a boss with an authoritarian style and an employee who was unable to accept authority. Mr. Helm even claimed that the complainant had been transferred into the Operations Engineering Division in 1984 because, among other things, he had some arguments with his supervisor at the time. Furthermore, his first boss in the Operations Engineering Division, Neils Blom, told them at the time that Mr. Dhanjal had difficulty maintaining a good relationship with his coworkers. This testimony is supported by documentary evidence: Mr. Blom had made a negative evaluation of

the complainant's skills in professional relationships in his performance review record file for 1983, and added the following note: "Improvement needed in thinking out position before discussion with peers." (Exhibit HR-1, tab 3).

Examined on this negative comment, Mr. Dhanjal said that Mr. Blom (who died near the end of 1983) was satisfied with his performance in general and had marked him down on his skills at working with his peers because a negative reference would give greater credibility to his evaluation. On this point, the Tribunal has no hesitation in preferring Gord Helm's version, because it is consistent with the documentary evidence and is much more probable than that of Mr. Dhanjal.

In the meetings he had with the complainant, Gord Helm said, there was never any discussion of anything other than Mr. Dhanjal's productivity problems and how to overcome them. He states categorically that Mr. Dhanjal never complained during these encounters of discriminatory statements or attitudes on the part of Guy Goodman. He also said he had no recollection of Mr. Goodman specifically discussing with him any complaints by Mr. Dhanjal about discriminatory statements.

Mr. Helm says he never saw the written complaints on this matter by the complainant in his performance review records for 1986 and 1988. His explanation of this is that they were added after the fact by Mr. Dhanjal, i.e. after he had read, approved and signed them. He did, however, comment to the Tribunal that the personal note the complainant sent him on Guy Goodman's behaviour (exhibit R-18) in March 1987 completely omitted any mention of the "discriminatory" statements by Mr. Goodman that are nevertheless referred to in his addition to his 1985 evaluation form. The only reference on that form was to the latter's "domineering" attitude and his "unacceptable" statements. Similarly, the complainant never gave him any explanation, he says, of the meaning of this epithet.

Debrah Bowes, who was Mr. Helm's secretary between 1986 and 1988, testified that Mr. Dhanjal's comments on Guy Goodman's conduct and discriminatory statements were typed by her and added after her boss had signed the performance review record for 1986.

She also testified that Mr. Dhanjal often received calls from outside, that is, personal calls during working hours.

Finally, Mr. Helm stated that John Longo, who first became involved in the Goodman-Dhanjal affair in 1988, never spoke to him about discriminatory conduct by Guy Goodman in relation to Mr. Dhanjal.

The Tribunal received evidence from several people concerning the complainant's performance. First, Georges Vann, who was his boss between 1963 and 1975 as chief draftsman, testified that Mr. Dhanjal's performance at the time, as a draftsman, was completely satisfactory if not superior.

The Tribunal heard testimony from John Davidson, a coworker in the Avionics Division, next to the Performance Division, both divisions being functionally linked. Mr. Davidson was promoted chief of this division in 1987 and retired in 1991. He said that when Mr. Dhanjal was working as a draftsman, i.e. until 1984, he did good work but was rather slow in producing the requested drawings. When he was asked to do something, he spent his time raising objections and arguing, constantly claiming that he did not need to do it. He says he observed this personally. Moreover, he commented that the complainant had a marked tendency to irritate his coworkers by telling them what to do or how they should do their work.

Mr. Dhanjal's immediate coworkers testified along the same lines. Guy Goodman, they said, was a very strict and very demanding boss. He consistently wanted to control everything. However, he made the same demands on all his subordinates. Ms. Berthiaume and Ms. Tzirtziganis both observed that their interpersonal relationships with Mr. Dhanjal were difficult, as he constantly sought to provoke reactions from whomever he was dealing with. This resulted in tense relationships with him. Ms. Berthiaume added that Mr. Dhanjal had frequent arguments not only with Guy Goodman but also with John Quail, the senior engineer in the Division. Guy Goodman corroborated this observation.

Chantal Berthiaume even mentioned that one day Mr. Dhanjal advised her to use the fact that she was a woman to get the job she was seeking at Air Canada.

In John Quail's opinion, the cause of the bumpy relations between Mr. Goodman and Mr. Dhanjal did not lie in any different demands on the latter, but rather in a conflict of personalities.

Mr. Dhanjal could not stand Mr. Goodman and his management methods with their daily monitoring of everyone's work and the lack of respect for coffee and lunch breaks. While not agreeing with Mr. Goodman's methods which, in his opinion, slowed the pace of work and decreased the Division's productivity, Mr. Quail said he had adjusted to Mr. Goodman's arrogant and overbearing

attitude. This was not the case with Mr. Dhanjal, who had never accepted Guy Goodman's style of management.

John Longo, who became involved in the Goodman-Dhanjal affair in 1988 in an attempt to resolve the conflicts between these two employees, also thinks the problem was not one of racial discrimination by a boss toward his subordinate. He has no recollection that Mr. Dhanjal raised this issue in the numerous meetings he had with him in 1988 and 1989 (at least seven in all), with the possible exception of an allusion to it in early 1988. Mr. Dhanjal did not raise the matter subsequently. Instead, he stressed the domineering attitude of his boss, his unreceptiveness and his inadequate performance evaluations: "To the best of my knowledge, racism didn't come into our interactions-Goodman, Dhanjal, myself. We talked about performance." (Transcript, p. 1570)

Mr. Longo's conclusion at that time was that it was essentially a personality conflict. Guy Goodman's "British" style-arrogant, overbearing and authoritarian-was incompatible with an individual of Indian origin such as Mr. Dhanjal, for whom this management style transposed hierarchical relationships of a colonialist type between Guy Goodman and himself.

That, in his view, was why the conflict between these two men extended even to the work ethic. The mistakes Guy Goodman occasionally committed in the various lists of data to be produced were considered by Mr. Dhanjal as a sign of incompetence and weakness. For Mr. Goodman, these were simply technical mistakes, they were inevitable, and this warranted a systematic "double-checking" of the data produced by the division. For Mr. Dhanjal, this system was unacceptable because it was based on the boss's weaknesses.

The evidence of other former colleagues of the complainant working in a neighbouring division of the Engineering department

confirmed Guy Goodman's diagnosis in his evaluations. For example, Fred Spriggs (retired since 1991) stated that, with the passage of time, the complainant had lost the initial enthusiasm he had for his work at Air Canada. He seemed to show more interest in his personal investments than in his work at the company. He gave the clear impression that he wanted to leave the company. Mr. Spriggs also expressed the opinion that Mr. Dhanjal had a difficult personality, with a tendency to provoke others through his attitude or his words.

As an illustration, he cited two incidents that had occurred during the 1970s. In the first, Mr. Dhanjal was involved in an altercation and ended up being punched in the nose by a part-time employee of Turkish or Greek origin. Although he did not witness the incident, Mr. Spriggs clearly overheard the altercation, since his office was only a few metres away. In his opinion, the

incident was inevitable, and everyone in the office knew this, given the fact that the Greek or Turkish employee had a rather irritable disposition and Mr. Dhanjal tended to provoke him. After he punched Mr. Dhanjal, the employee in question was dismissed, however.

The second incident involved a request for a promotion that Mr. Dhanjal did not obtain. He then exclaimed to Mr. Spriggs: "What have you got against Pakis?" Mr. Spriggs said he was completely flabbergasted by this accusation, which was entirely gratuitous in his opinion.

The evidence of Barry Dingwall (retired in 1993) confirmed the complainant's problems in interpersonal relationships. As the person responsible for the "passenger terminal area", he was the one who received a report from Joseph Camilleri that the complainant had to be sent back to Montreal during the 1985 service agents' strike. According to Mr. Camilleri, who was supervisor of operations where Mr. Dhanjal had been assigned at the time, in Toronto, he was so unpleasant with his coworkers and the customers, in addition to demonstrating insubordination, that there was no alternative but to send him back to Montreal. Mr. Dingwall said he had not forgotten this incident because Mr. Dhanjal was the only employee at the time whose exclusion was requested. This evidence is confirmed by the written report of Joseph Camilleri (exhibit R-1, tab 15, annex 2).

Evidence was also heard from another former employee of Air Canada, Mr. Manjit Singh, who was not directly involved in the Goodman-Dhanjal affair. Mr. Dhanjal had come to him in 1987, he said, to inform him that he was not being given due credit by his superior for his contribution to Air Canada and that he felt he was being treated as a second-class citizen by an authoritarian and arrogant superior.

The complainant spoke to him about the "Two Singhs are singing " comment, but Manjit Singh recommended to him that he not dwell on the matter and try instead to rebuild bridges to his boss through improved communications. In his opinion, there was no use in a management level employee like Mr. Dhanjal complaining about an arrogant and authoritarian boss. The only way to extricate oneself in such a situation was to "hold on to your feeling, but look for some other opportunity and move on."

Manjit Singh also pointed out that this was not the first time an employee of South Asian origin had contacted him to complain of the fact that his performance was considered unsatisfactory. He had already received three or four complaints of this kind in the past and these employees thought it was due to the fact that they were part of a visible minority. However, he conducted no formal or informal investigation in relation to them since he had no mandate to do so.

He thinks that in his personal case his contribution was recognized relatively well at Air Canada, since he was given promotions. He said that one of his subordinates had previously insulted him about his turban. He complained to his superior, who demanded a letter of apology from this employee. However, when he was himself confronted with an arrogant and authoritarian superior, he did nothing in particular, he said, because the corporate culture required that he be a good player, that he bow to the demands of his superiors, and avoid making waves.

Manjit Singh further stated that he had the impression that he could have risen higher in the company had it not been for the fact that he is a Sikh. He did not conform to the "Canadian image" that Air Canada wanted to project, he said. Furthermore, because of his religious and racial difference, he said, he had never felt himself to be a full member of a team at Air Canada:

he had a different way of thinking and was not interested in the same topics of conversation as the others.

To summarize the situation, Daljit S. Dhanjal is complaining of having been evaluated by his superior according to criteria that are different from those applied to his coworkers. All of his coworkers, whether in his division or a neighbouring one, state the contrary. They even go so far as to say that Mr. Dhanjal, through his provocative attitude and his lack of enthusiasm at work, is himself the cause of the problems he was having, thereby confirming the criticism that Guy Goodman had made of him. No one, whether former colleagues in the Performance division or Guy Goodman's superior, observed any different requirements or conduct on the part of Guy Goodman in relation to the complainant.

Only Manjit Singh offered a different perspective. Several employees of South Asian origin like Daljit S. Dhanjal had complained to him that they had been poorly evaluated in the past. He, Manjit Singh, himself had the clear impression that he could have held a more important position if he had not been a Sikh, that is, a person of colour with obvious religious accoutrements (beard and turban).

Although this latter testimony is sincere and credible, it has to do with a different factual situation and remains largely impressionistic in comparison to the evidence of the eyewitnesses who were able to observe both Daljit S. Dhanjal and Guy Goodman at close range. That is why the Tribunal can accord no real weight to this part of Mr. Manjit Singh's testimony. The complainant's situation is very different from that of Mr. Manjit Singh, since Mr. Dhanjal, very early on, around 1970, had conformed to the "Canadian image" evoked by Mr. Singh by renouncing the ostensible display of his religious beliefs.

The Tribunal's findings concerning this fourth category of incidents are therefore the following: the poor performance reviews received by the complainant in 1986, 1987 and 1988 are probably due, as Messrs. Quail, Longo and Helm explained, to the fact that Mr. Dhanjal refused to accept the overbearing and authoritarian management style of Guy Goodman and that he interpreted this management style subjectively as colonialist and

racist behaviour toward him, while in fact Guy Goodman was behaving in the same manner toward all of his subordinates.

In all probability, and in accordance with the credible evidence of Ms. Berthiaume and Ms. Tzirtziganis, and the evidence of Gord Helm, which we accept since it is based on solid documentary evidence, and in accordance with the evidence of former coworkers in other divisions of the Engineering department who are now retired-John Davidson, Fred Spriggs and Barry Dingwall-which we likewise accept, these negative evaluations were also due to the actual conduct of the complainant, who often tended to provoke his colleagues, to criticize them or even to argue with them instead of performing the duties requested of him.

Finally, the Tribunal believes Gord Helm when he says he was never informed by the complainant of discriminatory statements or conduct on the part of Guy Goodman, and that the issue during his meetings with the complainant was always his performance problems. This evidence is credible, in the Tribunal's opinion, because it fully concords with that of John Longo and Manjit Singh, who essentially testified to the same effect. John Longo further testified that he never informed Gord Helm that Mr. Dhanjal was complaining of racial slurs by Guy Goodman since, he said, this was not the case. Gord Helm's evidence is further corroborated by his then secretary, Ms. Debrah Bowes, who says the complainant actually added his accusations of discriminatory statements to his performance review record afterwards, in 1987.

In short, the Commission has not shown a prima facie case that the complainant was the victim of different requirements on the part of Guy Goodman. Nor has it established any link, tenuous as it might be, between the complainant's race or religion and his negative performance evaluations during 1986, 1987 and 1988. Finally, it has failed to establish that the complainant duly informed Guy Goodman's superiors of the problems of discrimination of which he thought he was the victim. It has, however, proved that the complainant, in 1988, mentioned to John Longo, a representative of the Respondent since he was a department chief reporting directly to the Vice-president Maintenance and Engineering, that he had been the target of racial slurs on the part of Guy Goodman.

5. The incident of November 2, 1989

Daljit S. Dhanjal told the Tribunal that on November 2, 1989 Guy Goodman, in the presence of an engineer, Chantal Berthiaume, struck him hard on the hand and called him a "Swine Paki". This happened in Mr. Goodman's office while the complainant was trying to tell him that a file he had requested was in fact on his own desk.

Mr. Dhanjal says he first went to see Gord Helm to demand a letter of apology, then went back later to see him in order to deliver his complaint in writing (exhibit HR-1, tab 13). He then contacted Manjit Singh to tell him that Guy Goodman had struck him and insulted him. He also saw John Longo and, on the latter's advice, the Air Canada ombudsman.

Guy Goodman says that he told the complainant, who was searching through his papers without permission, to go have a coffee, but he acknowledges that, faced with the complainant's "discourteous manners", he lost his temper and hit the complainant on the knuckles twice to get him to stop his rummaging. He admits he made a mistake. However, he categorically denies uttering the words "Swine Paki" or insulting the complainant. His testimony is consistent with the account of the incident that he wrote on November 2, 1989 itself, filed as exhibit R-1, tab 12.

Chantal Berthiaume was present. She confirms the physical action as related by the complainant and admitted by Guy Goodman. The latter did indeed strike the hand of the complainant, who was searching through some files located on Mr. Goodman's desk. She says, however, that she did not hear Guy Goodman insult Mr. Dhanjal or call him a "Swine Paki". She does recall hearing the complainant cry out "Don't be violent, don't be violent." She adds that, in the circumstances, Mr. Dhanjal's reaction seemed exaggerated to her. Her testimony is supported by a brief report she wrote on this incident on the day it occurred, at Gord Helm's request (exhibit HR-1, tab 10).

John Quail did not witness the scene but he was in his office a few metres from Guy Goodman's. He says he heard nothing except Mr. Dhanjal shouting: "You animal, you hit me." He did not hear Mr. Goodman calling the complainant a "Swine Paki".

Gord Helm confirms having a visit from Mr. Dhanjal on November 2, 1989. The latter, he says, simply handed him a written note (exhibit HR-1, tab 13) in which he complained of being the victim of an "unacceptable physical action" with no allusion whatever to any racial slur. Nor did Mr. Dhanjal indicate in his note what he would consider to be an appropriate remedy in the circumstances. Mr. Helm says the complainant said nothing orally about it to him, either.

Mr. Helm then summoned Guy Goodman to his office to get his version of the incident and, since he felt he was faced with a serious problem, he asked both Mr. Goodman and Chantal Berthiaume, who had witnessed the incident, to put their version of the story in writing. On the same or the following day he went to see Ches Watson, who had been his boss for about a year. Shortly afterwards, he also notified the personnel office, which was under the direction of Roger Clark.

Mr. Helm says he was surprised this incident had occurred since he thought relations between Mr. Goodman and Mr. Dhanjal were back in order after the most recent positive performance review, for 1988 (made in the spring of 1989), with the assistance of John Longo and accompanied by a strategy for remotivating Mr. Dhanjal. In his view, it was still a labour relations problem, since Mr. Dhanjal's performance was more or less satisfactory. It definitely did not involve any problem of discrimination or harassment.

John Longo confirmed that Mr. Dhanjal came to see him that same day to ask him to remedy the situation within the next 24 hours, failing which he was going to take legal proceedings. Mr. Dhanjal was very upset. Mr. Longo then consulted Roger Clark of the personnel department and they agreed to propose to Mr. Dhanjal that Mr. Goodman be asked to apologize, because this was completely unacceptable conduct on the part of a supervisor. At this point the issue was not a racial slur but the fact that Guy Goodman had struck him.

Mary-Anne Legris, whom the complainant met with twice after the incident of November 2 in her capacity as director of the employee assistance program, said Mr. Dhanjal never complained that his boss had insulted him at that time. She says she never heard the words "Swine Paki". In her view, the incident was not

so serious, but she could see that the complainant was nevertheless very angry.

Manjit Singh confirmed that he received a telephone call from Mr. Dhanjal on November 2, 1989. He also had a second telephone conversation with the complainant concerning this incident shortly thereafter. Mr. Dhanjal told him, he says, that his boss had struck him. He related this to his boss's racism. However, Manjit Singh's testimony does not state that Mr. Dhanjal complained at that time that his boss had insulted him in addition to striking him.

Roger Clark says he consulted all the witnesses to this matter a few days after the incident; this includes those whose evidence has just been summarized, as well as others such as the Air Canada Ombudsman and Ches Watson (Gord Helm's boss). He says

none of these witnesses heard Mr. Dhanjal complain of racial slurs directed toward him by Mr. Goodman during the event of November 2, 1989. He further states that he heard the term "Swine Paki" for the first time in the proceedings before this Tribunal, when
Mr. Dhanjal was giving evidence.

Finally, neither the official complaint submitted to the Commission by Mr. Dhanjal on April 10, 1990 nor the investigation report of the Commission, filed in the spring of 1992, mentions racial slurs during the incident of November 2, 1989. The Commission investigator testified that Mr. Dhanjal never mentioned to him that the words "Swine Paki" had been uttered at that time. We might add that even the note the complainant wrote and submitted to Gord Helm on the actual day of the incident contains not a hint, even a veiled one, that Guy Goodman had insulted him.

How does the complainant explain the fact that he failed to allude to Guy Goodman's slur in his note to Gord Helm? Here is his reply:

I wanted the issue to be not dragged to this court. I wanted the whole thing to be settled within the management

structure. I said, "If I get a letter of apology I will forget it." You are not understanding my issue. I have gone through an emotional problem in front of another witness and I said to myself, "Well, if I write a little thing it will be much more impressive to the other person, rather than not have a case of a big issue." I only did not mention that intentionally.

To explain these "memory lapses" and the various consequences of racism on its victims, the Commission called a sociologist, Ms. Frances Henry. She was recognized by the Tribunal as an expert witness on race relations and this status was not challenged by Respondent counsel.

Ms. Henry began with a lengthy explanation to the Tribunal of the various definitions of racism and its effects on those who are subjected to it. Then, at the urging of the Commission counsel, she directed her testimony to the phenomenon of selective memory loss which, in her opinion, may affect victims of racial harassment.

The Tribunal was not favourably impressed by the testimony of this expert witness. On both examination and cross-examination, she demonstrated a lack of impartiality, and this diminished her credibility. Moreover, Ms. Henry was often vague, hesitant and ambiguous in replying to questions from Respondent counsel.

In rebuttal, the Respondent called a psychiatrist, Dr. André Maufette. His evidence dealt solely with the phenomenon of selective memory loss and more specifically its possible causes. He expressed the opinion that it was impossible, from the studies on this question and his own clinical experience, to conclude as Ms. Henry does that racial harassment is a type of trauma likely to result in selective memory losses in a victim.

Counsel for the Commission objected to the admissibility of this evidence on the following grounds: its lack of relevance, Dr. Maufette's lack of special expertise in the area of memory losses concerning victims of racism, and the fact that, through this evidence, the Respondent was attempting to attack the credibility of the complainant, in contradiction to the case law which holds that the credibility of witnesses is a matter solely

for the trier of fact. Counsel submitted a series of criminal law judgments in support of his position, including R. v. Marquard, [1993] 4 S.C.R. 223 and R. v. Mohan (1994), 114 D.L.R. (4th) 419 (S.C.C.).

Respondent counsel, for his part, argued that Dr. Maufette's testimony was relevant since it was rebuttal evidence to the expert evidence of Ms. Henry who, in her testimony, had directly alluded to the possibility of memory loss and other psychological effects that might affect the victims of racial harassment. Dr. Maufette's evidence, said Mr. Delisle, is admissible under the existing authorities since its purpose is to enlighten the Tribunal on the types of trauma that could result in selective memory loss, i.e. human behavioural issues, and not to express an opinion on the complainant's credibility. He further argued, relying in particular on section 50 of the CHRA, that the rules governing administrative tribunals are more flexible than those governing the ordinary courts. Consequently, he said, the issue before the Tribunal was not the admissibility of the evidence but what weight was to be accorded to this kind of evidence.

Mr. Taylor's objections concerning the admissibility of Dr. Maufette's evidence are dismissed. For the reasons we have already stated (see II- PRELIMINARY ISSUES), we are in full agreement with Mr. Delisle that this Tribunal is not at all bound by the technical rules governing the exclusion of evidence developed by the courts of civil or criminal jurisdiction. We repeat, the golden rule governing the admissibility of evidence before an administrative tribunal is the relevance of the evidence, so long as it is consistent with procedural fairness and the principles of fundamental justice as enunciated in administrative law. Since there is no doubt that Dr. Maufette's evidence was relevant to understanding the phenomenon of selective memory loss and, further, that Dr. Maufette's expertise in this field is obvious, his testimony is, in our opinion, fully admissible.

The criminal law criteria are therefore of little use before this Tribunal, and technical objections based on those cases are inappropriate. In any event, the case-law support our decision to admit such evidence. In fact, here is what McLachlin J. stated, on behalf of the majority, in Marquard, supra, at p. 249:

For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.

Coming now to the real issue that must be decided, namely the weight to be given to the testimony of the expert witnesses Henry and Maufette, the Tribunal is of the opinion that the preponderance of evidence supports the Respondent in connection with the phenomenon of selective memory loss, and that it cannot give credence to the explanations of Ms. Frances Henry.

Of course, interesting as they may be in themselves, the opinions of the experts cannot however be substituted for that of the Tribunal. The issue here is one of credibility, which falls within the exclusive competence of the Tribunal. As it happens, the complainant's account of the incident in question in his testimony here, and the explanations he gave to justify his failure to mention the "Swine Paki" slur in his written and oral complaints, appear to us to be devoid of credibility.

It is inconceivable that the complainant would fail to speak to anyone prior to his appearance before the Tribunal about the fact that his boss had called him a "Swine Paki" on November 2, 1989. Such conduct cannot be reconciled with his own evidence on cross-examination, in which he said he had been hurt as much by the slur as by the fact that he was struck. Furthermore, an eyewitness who testified directly and unambiguously, and who ceased working for Guy Goodman long ago, stated categorically that she had not heard Mr. Goodman call the complainant a "Swine Paki" or slur him in some other way. Finally, the complainant's explanation that he wanted to avoid legal proceedings is in direct contradiction with the testimony of John Longo, an extremely reliable witness whose credibility was in no way questioned by the Commission.

We find, therefore, that in the course of the incident of November 2, 1989 Guy Goodman and Daljit S. Dhanjal had an argument over the location of a file, that the former struck the latter on the hand, that this incident was provoked by the fact that the complainant was trying to locate the said file by rummaging amongst the papers on his boss's desk, and that Guy Goodman at no point insulted the complainant on this occasion.

Moreover, as Mr. Dhanjal, both orally and in writing, complained only of an "unacceptable physical action" on the part of his immediate superior to all the levels of authority in Air Canada to which he took the matter, the Respondent could not possibly have drawn the conclusion that this was an incident involving an act of racial discrimination by Guy Goodman against one of his subordinates.

Finally, we should note that two letters of apology, one dated November 6 and signed by Guy Goodman, and the other dated November 7 and signed by Gord Helm, were given to the complainant about one week following the incident of November 2, 1989. In addition, a letter of reprimand was sent to Guy Goodman and his performance evaluation filed for 1989 contained the notation "unsatisfactory" in relation to his skills at managing his subordinates, because of his attitude during the incident of November 2, 1989, which was considered unacceptable by his superiors, Gord Helm and Ches Watson.

Accordingly, the Tribunal finds that the complainant and the Commission have failed to make out a prima facie case that the incident of November 2, 1989 constituted an act of racial discrimination in relation to the complainant.

6. Constructive dismissal

The complainant stated that Air Canada managers forced him to take early retirement following the incident of November 2, 1989. At certain meetings he had with Gord Helm, Ches Watson and John Longo on the day after the incident and in the following days, Messrs. Helm and Watson, he says, assured him he would be getting a letter of apology from Guy Goodman for the latter's unacceptable action but that he should agree in exchange to take early retirement. Mr. Dhanjal says he was not interested in early retirement and wanted to retire at the normal time, at age 65 or after 35 years of service (he had 26 as of 1989).

This testimony is indirectly supported by that of Manjit Singh. He said that during a telephone conversation he had with the complainant some time after the incident of November 2, 1989, the latter told him he had been offered severance pay, that he did not want to have to choose and that he had consulted a lawyer because he intended to fight it.

The Helm and Watson version differs substantially from that of the complainant on this aspect. According to them, it was Mr. Dhanjal who was demanding the severance "package" linked to early retirement. Since there was a staff reduction program under way in the fall of 1989, and it was possible to eliminate Daljit S. Dhanjal's position by redistributing his duties among the other employees in the Performance Division, since two former employees

assigned to a special project were returning to the Division, and since relations between Guy Goodman and Daljit S. Dhanjal seemed to have so deteriorated that there was no longer any point in forcing them to continue working together, Messrs. Helm and Watson made the decision to eliminate Mr. Dhanjal's position and offer him a choice between the severance package he was demanding and a reassignment.

The Respondent argues that the complainant clearly wanted to leave with the generous compensation offered by Air Canada in staff reduction operations even prior to the incident of November 2, 1989. By way of example, it introduced evidence that the complainant had applied to the office of Norm Fraser, who was responsible for the departmental benefits, around mid-October in order to get the precise computation as of December 31, 1989 of his compensation and pension income if he took early retirement. Several days later, Mr. Fraser says, he again met with Mr. Dhanjal to explain to him the details of the official data he had received from Winnipeg on his situation. The complainant denied that he was informed of this data. However, Mr. Fraser's testimony is clearly supported by documentary evidence indicating that the original of the data was delivered to Mr. Dhanjal on October 16, 1989 (exhibit R-2, tab 51). Norm Fraser conceded on cross-examination, however, that many other employees had come to see him at that time in order to obtain the same kind of computations.

The complainant's colleagues Berthiaume and Quail testified as well that Mr. Dhanjal was thinking of taking early retirement in the fall of 1989. Ms. Berthiaume says he spoke to her about it in October 1989. John Quail could not recall the precise moment when the complainant informed him of his intentions. Guy Goodman, relying on a note he had written on November 24, 1989 (exhibit R-1, tab 23), said the complainant was telling his technician colleagues that he had been offered the severance package, so

much so that Gord Helm had to get him and the complainant to come to his office to tell them that such was not the case at present. Mr. Goodman says he later heard Mr. Dhanjal complaining to another employee that "my boss is blocking me from getting the package". He says this happened prior to November 2, 1989, probably in October.

It is worth taking careful note at this point of the testimony of John Longo concerning the content of the meeting of November 3, 1989. According to him, it was Ches Watson who raised the question of the severance package, in an exploratory way, just to check out the complainant's interest in this option. In his opinion, the complainant neither accepted nor refused this offer at that time. He answered that he would examine it with his lawyer and would make his answer known later. Messrs. Helm and Watson then offered him five days off to let him calm down and do some thinking. This testimony is supported by two pieces of

documentary evidence (exhibits HR-16 and HR-17) consisting of the personal notes Mr. Longo took on the day of the meeting of November 3, 1989 and a memorandum dated November 20, 1989 recapitulating the meetings in which he had participated during 1988-89 in connection with the Goodman-Dhanjal case. So there is a clear contradiction here between, on the one hand, John Longo's evidence and, on the other, the evidence of Gord Helm and Ches Watson.

The Tribunal prefers John Longo's version to that of Messrs. Helm and Watson. Mr. Longo had a better memory, relied on written notes and, unlike them, was an independent witness. In our opinion, Messrs. Helm and Watson did indeed propose to the complainant that he accept the severance package. The complainant did not accept it forthwith at the meeting of November 3, 1989. Nevertheless, Messrs. Helm and Watson took it for granted that the complainant would accept it. They therefore told the personnel office that Mr. Dhanjal's position was abolished and that a formal compensation offer should be prepared for him. This was done during the week of November 6, 1989, while the complainant was on leave.

That notwithstanding, Messrs. Helm and Watson say they never forced the complainant to leave. They made him the same offer that had been presented to the other employees whose positions

were eliminated under the staff reduction program in the fall of 1989, namely: severance with compensation (corresponding to 12 months' salary if the employee had accumulated at least 25 years of service), or a reassignment. In fact, the complainant admitted that this was the offer that Watson made to him. Here is his testimony: "Ches Watson said to me, he said, 'I have to get rid of six people' and that's what he said, 'And in the scheme of things I have no choice but to let some people go. You have the option of staying with the company or taking the package which is going to be offered to you.'" (Transcript, pp. 372-73).

At that point, the Respondent says, Mr. Dhanjal remained entirely free to opt for reassignment, as he had in fact done in 1984 when his draftsman position was abolished. In both cases, however, it was clear that Mr. Dhanjal was not going to retain his previous duties in the Performance division. It was in this context, i.e. while awaiting his final decision in writing, which was requested by November 24, 1989 in an official standard-form letter dated November 16 and signed by Ches Watson (exhibit HR-1, tab 16), that he was temporarily placed in the Avionics division.

The complainant claims he had other meetings with Ches Watson during November concerning the severance package. In particular, he says he met with Messrs. Watson, Helm and Longo on November 17, 1989, and mentioned to Ches Watson at this meeting that he had earlier been subjected to racial slurs, which, he says, Ches Watson was unaware of. The complainant adds that Mr.

Watson then verbally gave him additional time, until December 31, 1989, in which to respond to the official offer of severance compensation from the company.

Ches Watson does not recall meeting with the complainant after the only meeting he had with Gord Helm and John Longo present on the day after November 2, 1989 or the following day. However, John Longo confirms that he met privately with Ches Watson on November 17, 1989 and told him that Daljit S. Dhanjal had said to him, during one of his initial meetings with him in 1988, that he thought he had been subjected by Guy Goodman to comments with a racial connotation.

The complainant also states that he was maliciously denied access to an information seminar provided to applicants for the

severance package on November 29 and 30, 1989. Norm Fraser replies that Mr. Dhanjal was well aware, having been notified several times, that he could not have access to this seminar before completing a form indicating that he definitely agreed to take early retirement with the package in question, which Mr. Dhanjal had not yet done. Mr. Dhanjal denies he was told he could not attend before signing the said acceptance form.

Concerning this category of incidents, as in the preceding categories, there are insurmountable contradictions between the complainant's testimony and that of the Respondent's employees (coworkers and superiors of the complainant). In contrast to the previous points, however, the Tribunal need not decide between the versions presented by the complainant and by the respondent's representatives. Whether or not the complainant was forced to resign or to accept a transfer to duties of lesser importance is not an issue that per se falls within the jurisdiction of this Tribunal. It can only become so to the degree that the alleged dismissal is based, wholly or in part, on the complainant's race, colour or religion, an issue on which the Commission has failed to make out a prima facie case.

(b) Similar fact evidence

The Commission presented two testimonies as evidence of "similar facts" to the incidents of discrimination alleged in the complaint.

1. Posting of an annotated newspaper article during the hearing

The first similar fact evidence was presented by the complainant himself. It consists of an article in the daily newspaper The Gazette of January 17, 1995 (exhibit HR-18) to which someone has added a handwritten notation, "Because he never washed that rag on his head". The article is an account of the proceedings taken by Mr. Dhanjal in this case, with the headline

and subhead: "Harassment cost me my job: ex-liner worker - Air Canada offered early retirement instead of apology, rights tribunal told." The complainant says someone cut it out and posted it on a column in the building housing Air Canada's power plant.

Someone named Ray Charron is said to have come across it and, on January 20, 1995, informed the complainant and the office of Ms. Jane MacGregor, the manager of human rights and equity programs at Air Canada and assistant to Respondent's counsel during these hearings.

Although the probative value and relevance of this evidence were not entirely clear, the Tribunal decided to receive it notwithstanding the vehement objections of Respondent counsel. As we said at the time, we thought the evidence was admissible because "it could have some relevance in this case which will have to be determined more fully in the final decision."

Mr. Taylor submitted on behalf of the Commission that the Tribunal should apply the test set out in Metha v. MacKay (1990), 47 Admin. L.R. 254 and qualified somewhat in R. v. B., [1990] 1 S.C.R. 717 for determining the admissibility of similar facts evidence. According to this test, evidence of similar facts is admissible if it has a clear relationship to the complaint and its probative value outweighs its prejudicial effect on the respondent. The clearer the relationship, says Mr. Taylor, the greater the probative value of the evidence and the more likely it is to outweigh the prejudice to the respondent. Conversely, the less clear the relationship, the lesser the probative value of the evidence and the less likely it is to outweigh the prejudice to the respondent.

Had we adopted this test of admissibility, we would have rejected the evidence in question at the hearing, since it had no clear relationship with the complaint. Mr. Taylor attempted to link this newspaper clipping with the complainant's allegations that he had been a victim of the same type of harassment through the posting of drawings in 1986 and 1987. The new clipping, he said, demonstrated a pattern of discrimination and a hostile work environment, thus establishing the clear link required by the case law.

The Tribunal rejects these arguments. The evidence that was presented concerns facts that are not contemporaneous with the relevant time (the newspaper clipping that was filed was posted more than seven years after the most recent allegation), different work places quite remote from each other (the posting occurred in a different building located 1 km from the Engineering department) and different actors (no Engineering employee was working in the power plant). Apart from the fact that it involves a newspaper clipping, the similarity in the

facts is virtually non-existent and consequently insufficient to establish any evidence of a pattern of harassment or a hostile work environment. The Tribunal therefore assigns no weight to this evidence, insofar as it was presented to establish the existence of a pattern of discrimination or a hostile work environment in Air Canada's Engineering department.

We did, however, agree to receive this evidence subject to an assessment of its probative value, because the technical criteria for exclusion of evidence developed by the civil or criminal courts, such as those in Metha v. MacKay, supra, and R. v. B., supra, are by no means binding on this Tribunal: para. 50(2)(c) CHRA and Canada v. Mills (1985), 60 N.R. 4 (F.C.A.). That, moreover, was what the Nova Scotia Court of Appeal held in Metha, in considering a provision similar to para. 50(2)(c) CHRA in British Columbia's Human Rights Code.

Nonetheless, in his final submissions in June 1995, Commission counsel argued that the newspaper clipping posted between January 17 and 20, 1995 at the Respondent's power plant was evidence that Air Canada had not taken seriously its duty of due diligence to prevent discrimination in the worplace, since it had not seriously investigated the origin of this discriminatory posting during the winter or spring of 1995.

It may indeed be that, under the tests laid down in Hinds, supra, the Respondent failed to take adequate action subsequent to the posting of the discriminatory newspaper clipping (HR-18) in January 1995. There was an investigation, but it appears to have been rather cursory. However, the facts in Hinds and those raised here are quite different, and we express no opinion on the sufficiency of the Respondent's response. This is unnecessary, since the complaint has to do with incidents of discrimination that occurred between 1986 and 1989 and the insufficiency of the Respondent's response at that time. Subsequent incidents are therefore not relevant to an assessment of the merits of the complaint that is before us. The cases are clear on this: Canada v. Beaulieu (1993), 154 N.R. 299, at 311 (F.C.A.) and Cie Minière Québec Cartier v. Québec (grievance arbitrator), [1995] 2 S.C.R. 1095, at 1100-1102.

Accordingly, we are unable to adopt the Commission's argument.

2. Statistical evidence

The Commission called Ms. Erika Boukamp-Bosch in her capacity as Chief of Statistical Analysis in the Commission's Employment Equity Directorate. Ms. Boukamp-Bosch's statistical competence was challenged by the Respondent, which called Dr. Shirley Mills, a professor of Mathematics and Statistics at

Carleton University, to challenge both Ms. Boukamp-Bosch's competence and the conclusions of her report.

According to Ms. Boukamp-Bosch, visible minorities are under-represented at Air Canada, particularly in the semi-professionals category which included Mr. Dhanjal, and this stems from the fact that Air Canada failed to take full advantage of the opportunities it had in the 1980s and 1990s to increase the number of visible minority employees. This, she said, proved the existence of systemic discrimination by the respondent against members of visible minorities since the coming into force of the Employment Equity Act, R.S.C., c. E-5.4.

The Tribunal agreed to recognize Ms. Boukamp-Bosch as an expert witness who could provide a scientific opinion in the area of statistics on employment equity. We must say, however, that we were very impressed by the clearly greater competence of Dr. Mills in statistical matters. She sought to demonstrate that Ms. Boukamp-Bosch's conclusions were based on superficial analyses and imprecise methods that could distort her conclusions.

However, it is unnecessary to decide this issue. We are of the opinion that, in this case, statistical evidence is of no probative value and in no way constitutes "similar facts".

In the first place, as Professor Cumming explained in Blake v. Mimico Correctional Institute (1984), 5 CHRR D/2417, statistical evidence cannot be considered evidence of similar facts. Such evidence is not made up of particular facts similar to those that are the subject matter of the complaint. Rather, it establishes a pattern of conduct which thereafter must be treated as circumstantial evidence from which it may be possible to draw some conclusions, depending on the circumstances:

Statistics show patterns of conduct rather than specific occurrences. Statistics represent a form of circumstantial evidence from which inferences of discriminatory conduct may be drawn. It is within the rubric of "circumstantial evidence" that statistical evidence in human rights cases should be considered. Like all circumstantial evidence, statistics are to be considered along with all surrounding facts and circumstances. (par. 20096)

This type of evidence is therefore very apposite to complaints based on section 10 CHRA dealing with discriminatory policies or practices and complaints of systemic discrimination, that is, discriminatory acts having a more general impact, as was the case in Blake or in the famous judgment A.T.F. v. C.N., [1987] 1 S.C.R. 1114.

However, as Blake indicated, statistical evidence can also be used to buttress a complaint of individual discrimination in a variety of cases. Professor Cumming provides the following list:

Statistical evidence may be used in a number of ways to buttress both complainants' and respondents' cases. Statistics may show racial or sexual disparities in decisions to hire, promote or dismiss employees. They may show disparities between the number of women employed in a particular job and the number of qualified women in the labour market. They may show that subjective and discretionary decisions by employers are being made in a discriminatory manner. They may demonstrate that tests and requirements imposed by an employer have a discriminatory impact. They may be used to show that an employer's discriminatory reason for rejecting an applicant is a mere cover-up for a discriminatory reason. (par. 20097, references omitted)

In short, statistical evidence is useful, relevant and probative when it reveals a disparity in treatment toward members of a racial minority in the course of certain discriminatory decisions by the employer, as in hiring, promotions, dismissals, discretionary decisions, etc. Statistical evidence must also have a direct relationship to the decision that is the subject matter of the complaint: Blake, par. 20103.

It stands to reason, then, that statistical evidence cannot be relevant in a case of harassment which, like this, essentially involves prima facie evidence that an employee (or group of employees) created a hostile environment in relation to another employee by reason of his race. At best, as Mr. Pentney conceded, statistical evidence may be useful in the case of a complaint such as this as a means of shedding light on the context. Combined with testimonial or other evidence it may constitute a prima facie case of discrimination. However, by itself it cannot constitute proof of harassment toward a particular employee.

This case is therefore very different from the Blake case, in which the Commission demonstrated inter alia that, all things considered, twice as many men as women were called to be interviewed by an employer and that fewer than 4 percent of the women were accepted, compared with 96 percent of the men. This was statistical evidence that had a direct relationship with the refusal to hire the female complainant, and was rightly held to establish a prima facie case of a discriminatory refusal to hire the complainant.

In contrast, even if we were to find, as in Blake, that the Respondent had shown systemic discrimination toward members of visible minorities in its hiring during the 1980s, this would by no means constitute proof that the complainant had been the

victim of harassment on the part of Guy Goodman, or that the Respondent had encouraged harassment in the workplace. The statistical evidence has no relationship to the incidents of harassment raised by the complainant. It fails to establish any pattern of harassment.

Accordingly, we express no opinion on the conclusions in Ms. Boukamp-Bosch's report, which we consider irrelevant to the complaint.

IV. CREDIBILITY OF WITNESSES

In this case the credibility of the witnesses is decisive. The Tribunal had to decide between the testimony of the complainant, on the one hand, and, on the other hand, the testimony of the 18 present or retired employees of Air Canada

who came and gave evidence, as well as the testimony of the Commission's investigator. As it happens, on all the important facts concerning the allegations of discrimination and racial harassment, the complainant's version is in contradiction with that of all the witnesses who worked alongside Messrs. Goodman and Dhanjal at the relevant time, from 1985 to 1989. Moreover, the complainant's evidence is in several respects inconsistent with what he told the Commission's investigator.

(a) The complainant

The Tribunal rejected the version presented by the complainant and found that there was only one incident with a racial connotation between Mr. Goodman and Mr. Dhanjal, namely the phrase "Two Singhs are singing in the penitentiary. One Singh is sitting here and singing", uttered during the summer of 1985 by Guy Goodman in the presence of Daljit S. Dhanjal and John Quail. The Tribunal also found that Guy Goodman apologized after observing that Mr. Dhanjal was insulted by what Mr. Goodman considered to be a joke in bad taste.

Consequently, the Tribunal is of the opinion that none of the other incidents alleged by the complainant between 1985 and 1989 had any of the following characteristics: a racial or religious connotation, a discriminatory basis or adverse consequences linked to the complainant's race or religion.

The reasons why the Tribunal has rejected Daljit S. Dhanjal's version are, inter alia, the following:

1. The complainant's testimony during his examination in chief was often hesitant and confused about key items, and the

Commission counsel then had to repeat his questions and put words in his mouth.

2. The complainant displayed an ability to take great liberty with the truth, both on minor aspects of his testimony (such as his claim that he had won the first prize in the competition for employees' best suggestions, when in fact it was the first prize for employees in Engineering, one of the smallest

units at Air Canada), and on some crucial aspects of his testimony such as his improbable charge that he had been called a "Swine Paki" by Guy Goodman during the incident of November 2, 1989.

3. The major contradictions between the complainant's testimony to the Commission's investigator and the evidence he gave the Tribunal remained without any credible explanation.

4. The complainant's attitude on the cross-examination, which was relatively brief and properly conducted by the Respondent counsel, was revealing of his personality. He was aggressive, often tried to avoid answering questions, 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 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.

Another serious fact worth noting about the complainant's attitude during his cross-examination is that when questioned about certain contradictions between his testimony to the Tribunal and the evidence he had given to the Commission's investigator, Mr. Dhanjal tried to skirt the issue on the pretext that he had to leave the hearing in order to keep an important appointment, to the evident surprise of Commission counsel, who admitted he had not been informed of this appointment. The Tribunal had to order the complainant to remain in the hearing room in order to allow Respondent counsel to conclude his cross-examination.

5. The complainant's testimony was contradicted not only by the witnesses called by the Respondent, but by those called by the Commission itself, on every particular of discrimination alleged by the complainant. Commission counsel argued that little credibility should be given to the witnesses representing Air Canada management: Messrs. Goodman, Helm, Watson, Fraser, Davidson and Clark. We are, in fact, of the opinion that the

evidence of these individuals must be analysed with great care and circumspection. However, Mr. Taylor in no way challenged the credibility of the other witnesses, and in particular Mr. Dhanjal's former coworkers. Yet their evidence failed to corroborate that of Mr. Dhanjal. On the contrary, all of them stated that Guy Goodman was equally harsh and demanding with all of his employees. Furthermore, several of these witnesses stated that Mr. Dhanjal had a difficult personality, which had led to an open conflict with his immediate superior from 1984 or 1985 on.

6. The way in which the complainant altered his 1986 performance review record shows his capacity to distort the facts: he drew the attention of his superior Gord Helm, through a note personally addressed to him, to the so-called "unacceptable" conduct and comments of Guy Goodman while, unknown to Mr. Helm, he altered his performance review record, after the fact, to characterize Mr. Goodman's conduct and comments as "discriminatory" toward him. This manoeuvre was confirmed by Mr. Helm's secretary at the time, Debrah Bowes, whose credibility was not challenged by the Commission.

The same tendency of the complainant to distort the facts is also illustrated by his alteration along the way of the words of the statement made by Guy Goodman in 1985, which he regarded as discriminatory. The complainant spoke of a slur that alluded at times to his religion ("Two Sikhs are singing"), at other times to his race ("Two Singhs are singing "). For the reasons we have already stated, it is clear that Guy Goodman never alluded to Sikhs nor to his religion in the alleged slur.

The complainant's lack of scruples was illustrated by Chantal Berthiaume. She said, in effect, that Mr. Dhanjal had recommended to her that she play on the fact that she was a woman in order to obtain the job she hoped to get at Air Canada. This evidence, combined with the virtually total absence of corroboration of his various allegations of discriminatory treatment, tends to show, as Respondent counsel argued, that Mr. Dhanjal simply used his race and religion as a means of bringing proceedings against his former employer for ulterior motives.

(b) The complainant's coworkers

On the other hand, the Tribunal accepted without reservation the evidence of the following present and retired employees of Air Canada who were called to appear: Ms. Berthiaume, Ms. Tzirtziganis, Ms. Bowes and Ms. Legris and Messrs. Manjit Singh, Vann, Quail, Longo, Spriggs, Dingwall, Hellstrom and Ricard. Our reasons are as follows:

1. All of them testified frankly and directly, without hesitation or inconsistency.

2. Their evidence was clear and consistent with what they had previously told the Commission's investigator, a few years earlier.

3. Their evidence was in agreement on all the essential points.

4. In most cases their testimony was supported by documentary evidence contemporaneous with the alleged events.

5. They were relatively independent witnesses: they were not involved directly in the Dhanjal-Goodman controversy, none was working with Guy Goodman or under his authority at the time of the hearings, and several had actually been retired for a certain number of years.

6. The Commission counsel in no way questioned the credibility of these witnesses.

They thus gave credible evidence that the Tribunal considers reliable.

(c) Air Canada management

With regard to the evidence of Air Canada management employees between 1985 and 1989-Gord Helm, Ches Watson, Norm Fraser, John Davidson and Roger Clark-the credibility of which was questioned by Commission counsel, the Tribunal finds, after balancing it with great care and analysing it with circumspection, that there is reason to prefer it to that of the complainant. Our reasons are as follows:

1. Except with respect to the events subsequent to the incident of November 2, 1989, their evidence was consistent on all important and essential points in the case.

2. Gord Helm's testimony was supported by contemporaneous documentary evidence. He was also corroborated by several other witnesses.

3. Although he was present in the hearing room for the major part of the proceedings, Mr. Clark remains a highly credible witness. The Tribunal was strongly impressed by the frank and open-minded approach of this witness. His contribution was nevertheless quite limited in this case since he was not a witness to any of the alleged events. All of the actions he took were based on the reports submitted to him by Messrs. Helm and Watson and not on his personal knowledge of the events.

4. The quick and efficient action taken by Messrs. Helm and Watson once they were advised of Guy Goodman's "physical

action" against the person of Daljit S. Dhanjal on November 2, 1989, namely, meetings as early as the day after the incident, letters of apology, a letter of reprimand to Guy Goodman and a negative evaluation in the latter's performance review record concerning his ability to manage subordinates, demonstrated the lack of substance to the allegation that Air Canada management had failed to act promptly when informed of improper conduct by a supervisor and had preferred to ignore it.

5. Concerning the events subsequent to November 2, 1989, and more specifically the offer of early retirement with compensation, the Tribunal is relatively perplexed. There are obvious contradictions between the evidence of Mr. Helm and that of Mr. Watson, both of whom also differ with the testimony of John Longo and the complainant. However, these contradictions are not fatal since, as we stated earlier, the action taken by Messrs. Helm and Watson was unrelated to the complainant's race or religion, nor was it motivated by the desire to protect Guy Goodman in the face of a discriminatory act he had committed. In other words, whether the complainant was or was not forced to leave Air Canada is of no importance to the issue that this Tribunal must decide, which is the issue of discriminatory harassment and Air Canada's obligations in the matter.

(d) Guy Goodman

The Commission argued that Guy Goodman's evidence was either inadmissible or devoid of credibility since he had failed to comply with the witness exclusion order issued on the first day of the hearing. In response, the Respondent argued that the exclusion order should not effectively prevent its counsel from preparing an adequate defence, that Guy Goodman was to all intents and purposes a party to the proceedings, and that if Mr. Delisle had erred in allowing Mr. Goodman to consult the complainant's testimony, he had not acted in bad faith. The Respondent further argued that any error on the part of its counsel had been provoked by the fact that counsel for the Commission improperly concealed relevant evidence from the defence notwithstanding his formal undertaking to disclose it prior to the commencement of the hearings.

1. Breach of the witness exclusion order

Although this witness had an opportunity to read the first 236 pages of the transcript of the complainant's testimony, and although Respondent counsel discussed with him some of the new evidence presented to the Tribunal by the complainant, the Tribunal finds that Guy Goodman's evidence is admissible. The cases cited by Commission counsel are clear authority for this

decision. For example, in Canada (C.R.T.C.) v. Canada (Human Rights Tribunal) (1991), 14 CHRR D/87, the Federal Court stated:

> Where a witness is in attendance by inadvertence despite such a ruling [to exclude witnesses], and is only called to testify after hearing the testimony of others, the court or tribunal will carefully consider what weight to give to his or her evidence. [par. 15]

The witness's testimony is still admissible, therefore. Moreover, his credibility is not automatically affected. The Tribunal must, however, review such evidence carefully, to determine what weight to give to it in the circumstances. Having reviewed Guy Goodman's testimony with care and circumspection, we are of the opinion that he proved to be a witness worthy of credit, for the following reasons:

1. The witness's replies were consistent with those he had previously given the investigator for the Commission.

2. His replies were consistently direct, coherent and never evasive or hesitant, notwithstanding a wide-ranging and often extremely aggressive cross-examination that lasted for over three days.

3. Guy Goodman's testimony was corroborated by all the other witnesses and was supported by documentary evidence contemporaneous with the events in question.

4. The witness had an irreproachable attitude before the Tribunal. He was surprisingly frank about his own shortcomings, and displayed exemplary patience during his cross-examination, which proved long and trying.

5. The witness did not breach the Tribunal's order of his own accord. He acted in complete good faith on the instructions of counsel for Air Canada.

6. Counsel for the Respondent did not act in an unacceptable way when he consulted Guy Goodman on the new evidence submitted at the hearing by the complainant. Since Mr. Goodman was, along with the complainant, the main witness in this matter, and the Commission had denied the Respondent its right to know the evidence relevant to the complaint before the hearing began, it is hard to see how Respondent counsel could have properly prepared his defence, and in particular his cross-examination, without being able to discuss this new evidence with Mr. Goodman. On the other hand, if the Commission counsel had disclosed this evidence in advance, as he should have, the Respondent counsel would not have needed to consult Mr. Goodman, nor would he have been justified in doing so, given the witness exclusion order. In normal circumstances, only an individual

assigned to advise the lawyer representing a corporation and explicitly exempted from the exclusion order should, in our opinion, be able to attend the hearing and be consulted by counsel during the inquiry.

Mr. Taylor submitted that the Respondent counsel should have asked leave of the Tribunal to discuss the new evidence with Mr.

Goodman. This would, of course, have been desirable. However, excessive formalism is not advisable before administrative tribunals in general, and before human rights tribunals in particular. The issue is whether, in reality, Mr. Delisle acted unfairly, that is, whether he voluntarily breached the integrity of the Tribunal's fact-finding process and undermined Mr. Goodman's credibility by consulting him before he testified. In the circumstances we have described, the reply to this question is clearly negative.

7. It is obvious that the conduct of Respondent counsel was questionable when he asked Mr. Goodman to consult the transcript containing the complainant's testimony. However, we are of the opinion that Mr. Delisle acted in complete good faith. The very fact that once he realized his error he asked Mr. Goodman to stop reading the transcript, and forthwith so advised the Tribunal, is alone sufficient to demonstrate his good faith.

2. Non-disclosure of relevant evidence by the Commission

Furthermore, it is our opinion that the seriousness of the error by the Respondent counsel is offset by the fact that the Commission counsel himself seriously contravened the basic rules of natural justice, the rules laid down by this Tribunal (cf. clause 13(vii) of the Guide to the Operations of the Human Rights Tribunal) and the undertakings he made to that effect at the prehearing conference, by failing to disclose to Mr. Delisle some key information prior to the outset of the trial, namely, some new incidents of alleged harassment that were not referred to by the complainant in either the investigation report or his complaint, as well as the drawings filed as exhibits HR-2 and HR-3.

The Commission argued that Mr. Delisle did not oppose the production of this new evidence at the hearing. This is not completely accurate. He did not think to oppose it on the ground of the fairness of the proceedings, but he did object by arguing their irrelevance, objections that the Tribunal of course rejected. The non-disclosure of evidence that is crucial to analysing the merits of the complaint is nevertheless an unfair manoeuvre on the part of Mr. Taylor.

The Crown's duty, in the interests of justice and equity, to disclose to the defence all relevant information in its

possession was recognized by the Supreme Court of Canada in R. v. Stinchcombe, [1991] 3 S.C.R. 326. As the Court confirmed, the technique of ambushing the defence is obsolete:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. (p. 332, emphasis added)

In Director of Investigation and Research, Competition Act v. D. & B. Cos. of Canada (1994), 176 N.R. 62, at 65, the Federal Court of Appeal doubted that the extensive duty of disclosure imposed in Stinchcombe applied in full to civil proceedings and administrative tribunals in general. However, in Human Rights Commission v. House (1993), (1994) 67 O.A.C. 72, the Ontario Divisional Court, relying on the decision of Beetz J. in Singh v. Department of Employment and Immigration, [1985] 1 S.C.R. 177, held that the requirements of fairness and natural justice vary according to the particular circumstances of each case and that they might consequently require the application of the principle of disclosure in the context of a proceeding before a human rights tribunal. This position seems to be in line with the more recent statement by Iacobucci J. in Quebec (A.G.) v. Canada (N.E.B.), [1994] 1 S.C.R. 159, at 181-82: "The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be made, and the nature of the hearing to which the affected parties are entitled."

For example, in House, which involved an allegation of racial harassment, the Divisional Court drew an analogy between a Crown attorney and the Commission counsel from the standpoint of their roles in a prosecution or proceeding, and between a

criminal trial and a proceeding before a human rights tribunal from the standpoint of the potentially extremely prejudicial consequences of such proceedings on the accused or the respondent. The following extract from this decision, which was reproduced in the Federal Court of Appeal's judgment in CIBA-Geigy Canada v. Patented Medicine Prices Review Board (1994), 170 N.R. 360, at 363, is at the heart of the Divisional Court's reasoning:

> There is no dispute in these proceedings that the allegations made by the complainants are indeed extremely serious. Any racial discrimination strikes at the very heart of a democratic pluralistic society. It is, of course, of the utmost seriousness if any such racial discrimination exists or has existed in an important public institution such as a major hospital. The consequences attendant on a negative finding by a Board of Inquiry would be most severe for the respondents as any such finding could and should seriously damage the reputation of any such individual. (p. 78)

The Divisional Court found that, at least in a case where the respondent faces allegations of racism, i.e. allegations that could have extremely serious consequences on the respondent's reputation, the extensive duty of disclosure laid down in Stinchcombe, namely, the disclosure by the prosecutor of all relevant information in his or her possession, whether inculpatory or exculpatory, whether or not he or she intends to produce it and whether it involves documents or statements by witnesses, applies to counsel for the Ontario Human Rights Commission.

It will be noted that this position was not rejected by the Federal Court of Appeal, and was even cited by it in CIBA-Geigy, supra. Furthermore, it is interesting to note that in Stinchcombe, the Supreme Court drew on the existing practice in the courts of civil jurisdiction in arriving at its conclusions in a purely criminal matter.

Moreover, this position appears to all intents and purposes to be conceded by the Commission itself. Although he communicated to us his reservations concerning the complete applicability of the Stinchcombe judgment to the Human Rights Tribunal,

Mr. Pentney, the Commission's General Counsel, nevertheless told the Tribunal: "With regard to the duty of full disclosure, trial by ambush is in no one's interest, least of all the Commission's. Commission counsel are bound to make full and timely disclosure of the evidence which is relevant and available to them, whether in the investigation file or otherwise. This extends both to evidence which tends to support the complainant and to evidence which goes against the claim." (transcript, p. 4563)

We are in complete agreement with Mr. Pentney's position, which fully reflects the modern rules of procedural fairness. In addition, it is consistent with the practice and written rules of operation of the Tribunal, which require each party, through a pre-hearing conference, to disclose all relevant evidence before the commencement of the hearing. Needless to say, if some new evidence that is relevant is brought to the knowledge of counsel for the Commission during the hearing, such evidence must be disclosed to respondent counsel at the earliest opportunity. If,

on the contrary, the Commission tries to ambush counsel for the respondent, the latter will then be justified in seeking an adjournment, if necessary, to prepare himself accordingly.

Insofar as the present case is concerned, some highly relevant documents and important information directly related to the complaint and provided to the Commission by the complainant himself were not disclosed to the defence in any way prior to the commencement of the hearings at the date agreed on (in this case November 14, 1994) at the pre-hearing conference, and in our opinion this constitutes a violation of the legal duty of disclosure of counsel for the Commission. This violation took counsel for the Respondent by surprise, made him commit some errors in the preparation of his main witness, and accordingly could have prejudiced the right of the Respondent to a fair hearing, which is recognized in both subsection 50(1) of the CHRA and paragraph 2(e) of the Canadian Bill of Rights.

Moreover, it may be worth noting that in Director of Investigation and Research, supra, to which the Commission referred us, the attitude of the director of investigation had been faultless, unlike that of Mr. Taylor in this case. For example, although he had refused to disclose a document protected by a public interest privilege, the director had duly provided

the respondent with a summary of the requested document, the list of his witnesses and a summary of what they would say three weeks before their appearance before the Competition Tribunal.

We might note as well that the Supreme Court of Canada has held that transgressions of the duty to disclose constitute, in the civil law, "a very serious breach of legal ethics": Stinchcombe, supra, p. 339. Consequently, it lies ill in the mouth of the Commission counsel to adopt an air of wounded innocence and accuse respondent counsel of bad faith and a breach of the rules of natural justice because he inadvertently allowed the witness Goodman to examine part of the complainant's testimony to this Tribunal.

Finally, we asked counsel to make submissions to us concerning the status of Guy Goodman at the hearing since, if he had the status of a party or of an interested party rather than that of a mere witness, he would of course have had the right to attend the hearing and read the transcript. Ms. Sénécal, counsel for the Respondent, failed to satisfy us that Mr. Goodman was a party to this proceeding in the strict sense of the word. As the counsel for the Commission pointed out, Guy Goodman was quite free to ask the Tribunal to be recognized as an interested party to the proceedings, in accordance with the written rules of this Tribunal (see clause 10 of the Guide to the Operation), and he did not do so. This action was brought solely against the corporation Air Canada by the Commission, as it is fully entitled to do. In our view, it was inappropriate to grant Guy Goodman the

status of an interested party at the request of the Respondent only after his counsel had breached the Tribunal's order concerning the exclusion of witnesses. Be that as it may, it did not have the effect of discrediting Guy Goodman's evidence, for the reasons we gave in the previous paragraphs.

V. THE LAW ON DISCRIMINATION AND RACIAL HARASSMENT

Since the Commission has shown prima facie case of an incident with a racial connotation and that a representative of the Respondent, John Longo, was informed thereof, it is necessary to address the following issues of law: Was the complainant the victim of discrimination or harassment based on race, and did the

employer incur some liability for the occurrence of this incident? First, we will review the state of the law on these issues.

(a) The concepts of discrimination and harassment

The complaint is based on sections 7 and 14 of the Canadian Human Rights Act, which deal respectively with the prevention of discrimination in employment and the prevention of harassment in a number of areas, including employment. These sections state:

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employment.

14.(1) It is a discriminatory practice,

(a)
(b)
(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

Discrimination has been defined by the Supreme Court of Canada in a number of decisions, and in particular in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, in which the Court had an opportunity to summarize this concept in the employment context, as follows:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or

group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to

opportunities, benefits, and advantages available to other members of society. (p. 174)

Also in 1989, the Court held in Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252, that harassment-sexual, in that case-indeed constituted a form of discrimination and could be defined as follows:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.[ ] Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being. (p. 1284)

It is important to note at this point that, unlike discrimination in which the victim must prove that he or she was adversely affected in the course of employment through a denial of promotion, an unwanted transfer, or even a dismissal, i.e., that he or she has suffered special damages, the Supreme Court indicated in Janzen that the burden or disadvantage that must be proved in harassment cases consists in the harassment itself, and that it is unnecessary to prove pecuniary losses as such:

Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity.[ ] Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour. (p. 1282)

We believe that these principles are fully applicable in a case of racial harassment.

What, then, is harassment, in concrete terms? What kind of conduct can be considered harassment? We know that it involves an abuse of authority. Although the blackmail known as "give-and-

take" (or quid pro quo) harassment in sexual matters may be of little applicability in racial matters, harassment leading to a "hostile environment" does appear fully relevant.

The "hostile work environment" is reflected in gestures, speech or conduct that is likely to offend, hurt or humiliate an employee who differs from the others by his or her race. This is an abuse of authority leading, as the Supreme Court points out in Janzen, to a "demeaning practice" that "constitutes a profound affront to the dignity of the employees forced to endure it" (p. 1284).

Racial harassment may take various forms: offensive comments, slurs, insults, assaults, caricatures, graffiti, the imposition of different duties, inadequate evaluations or damage to the victim's property. In every case, however, such conduct must include a racial dimension and have the effect of humiliating or offending the person who is the victim; that is, it violates his or her dignity and thus "detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment" (Janzen, supra, p. 1284).

Two interrelated issues flow from this: must racial harassment involve repeated acts or can it be a single offending act, and how is the seriousness of the humiliation alleged by a victim to be assessed?

Mr. Pentney, the Commission counsel, conceded to us that harassment is normally repeated conduct. However, he added, relying on the decision of an Ontario tribunal in Bell v. Flaming Steer Steak House (1980), 1 CHRR D/155, that harassment could be a single act if such act was "extreme" and consequently that proof of a pattern of harassing conduct is not necessarily required in order to establish harassment. The context is therefore very important, he stressed. This position appears to coincide with the case law and authorities.

Thus, when it takes the form of jokes in bad taste, they must be persistent and frequent to constitute harassment. An isolated racial slur, even one that is very harsh, will not by itself constitute harassment within the meaning of the Act: Pitawanakwat v. Canada (1994), 19 CHRR D/110, par. 40-41

(overturned in part on other grounds by the Federal Court in (1994) F.T.R. 11).

In Hinds v. Canada (1989), 10 CHRR D/5683, the Tribunal found that a document insulting the complainant as a Black man constituted racial harassment. However, it should be noted that not only were the annotations in this document excessively injurious on their face, but the complaint concerning this document was laid in the context of a series of prior acts of racial harassment occurring over a period of several years.

As it was rightly pointed out in C.D.P. v. Commission scolaire Deux-Montagnes (1993), 19 CHRR D/1, "[Translation] the durableness that oppressive conduct must also entail in order to

constitute harassment may therefore be established in some cases by the repetition of certain acts, in some cases by their seriousness, insofar as their effects then have some continuity". Thus, if a racial slur were accompanied by an assault, for example, this incident alone could constitute harassment, in view of the profound and lasting prejudicial effects that such extreme conduct would be likely to have on the victim. See also, in this connection, in the context of sexual harassment: Kotyk v. C.E.I.C. (1983), 4 CHRR D/1416, par. 12251.

In short, the more serious the conduct the less need there is for it to be repeated, and, conversely, the less serious it is, the greater the need to demonstrate its persistence in order to create a hostile work environment and constitute racial harassment. See, in this connection, A. Aggarwal, Sexual Harassment in the Workplace, 2nd ed., Toronto, Butterworths, 1992, p. 84; M. Drapeau, Le harcèlement sexuel au travail, Éd. Yvon Blais, 1991, p. 102.

Which brings us to the evaluation of the seriousness of unwelcome behaviour. From what standpoint should we evaluate the nature of a particular action, its intensity and its consequences on someone? Courts and commentators have pondered the issue and a consensus appears to be emerging. In order to give a human rights act an appropriately broad and generous construction, there is growing agreement that the seriousness of the impugned conduct must be perceived from the perspective of the victim.

However, to protect employers against unwarranted complaints by hypersensitive employees and avoid the opposite pitfall of tolerating offensive conduct because most people would consider it acceptable, the objective test of the "reasonable victim" seems to be the appropriate one: Stadnyk v. C.E.I.C., H.R.T., T.D. 13/93, pp. 31-32, upheld C.H.R.T.A., T.D. 8/95, p. 9 (both decisions relying on a decision by a U.S. appeals court, Ellison v. Brady, 924 F.2b 872 (1991) (9th CLR)). Similarly: Aggarwal, supra, pp. 72-73; Drapeau, supra, p. 94. See also: Ghosh v. Domglas (1993), 17 CHRR D/216, p. D/223 (Ont. Bd. of Inq.).

We are therefore of the opinion that, in the case of a complaint of racial harassment, a tribunal must strive to examine the impugned acts and conduct from the perspective of a reasonable person belonging to a racial minority, putting aside the stereotypes entertained in good faith by the majority. The tribunal must ask itself: from the standpoint of a reasonable Black person, for example, can this conduct be perceived as injurious or humiliating? We believe, therefore, that the seriousness of allegedly harassing conduct must be assessed not according to the criterion and perspective of the "reasonable person", who would necessarily be a person belonging to the racial majority, but rather according to the criterion and perspective of the "reasonable victim".

A number of factors may be weighed in assessing the "reasonableness" of the impugned conduct. In this regard, we share Mr. Pentney's opinion when he states the following, in the work he co-authored with Tarnopolsky, Discrimination and the Law (Toronto, De Boo, 1985 and cumulative supplements), at pp. 8-31 and 8-32:

the touchstone in applying this test must be the usual limits of social interaction in the circumstances....

Several factors are relevant in evaluating the limits of "reasonable" social interaction, including the nature of the conduct at issue, the workplace environment, the pattern or type of prior personal interaction between the parties, and whether an objection or complaint has been made.

Moreover, while the subjective test of the complainant's perception, according to his or her own personality and

sensitivity, is relevant and necessary, this is so only at the stage of assessing the actual harm caused to the victim and the damages that result, as was done, incidentally, in Hinds, supra. Accordingly, Swan v. C.A.F., C.H.R.T., T.D. 15/94, which the Commission drew to our attention and in which the Tribunal appears to rely solely on the subjective perception of the complainant in assessing the seriousness of injurious conduct, is not based on any authority, and appears to be an isolated decision.

Clearly, however, it not necessary that prejudice be the sole reason for the impugned conduct in order to make a finding of racial harassment. It will suffice if race is one of the factors that motivated the conduct in question: Uzoaba v. Correctional Service of Canada, C.H.R.T., T.D. 7/94, p. 86 and Holden v. Canadian National Railways (1990), 14 CHRR D/12, p. D/15 (F.C.A.).

(b) Employer's liability

The Canadian Human Rights Act explicitly recognizes, in subsection 65(1), that an employer is liable for discriminatory acts by its employee.

In Robichaud v. Canada, [1987] 2 S.C.R. 84, the Supreme Court of Canada ruled as well that an employer is liable for all discriminatory acts committed by one of its employees or officers "in the course of employment", that is, all acts "in some way related or associated with the employment" of that person (p. 95). The occurrence of the discriminatory act in the work environment will be sufficient, therefore, to attract the liability of the employer.

However, subsection 65(2) expressly provides a defence for the employer in such situations. If the employer fulfils the conditions prescribed in this subsection, it will be exculpated. Subsection 65(2) states:

An act or omission 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.

Thus the Act imposes a duty of diligence on the employer (a) to prevent the commission of acts of discrimination or harassment, and (b) subsequently to mitigate or avoid the effects of the discriminatory acts of its employee: François v. Canadien Pacifique (1985), 9 CHRR D/4724, p. D/4732. In Hinds, supra, par. 41611, a Tribunal applied this diligence principle as follows:

In considering whether an employer has "exercised all due diligence to mitigate or avoid the effect" of the act of the co-employee, one must examine the nature of the employer's response. Although the CHRA does not impose a duty on an employer to maintain a pristine working environment, there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment.[ ] To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself.[ ] To avoid liability, the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case.

It follows from this discussion, which we wholeheartedly adopt, that, in the first place, an employer will be liable only "when it knows or should know" that an employee is harassing another employee. In this regard, we believe, like Aggarwal, supra, pp. 70-73, that this is an objective test and that it must be the "reasonable victim" test that we discussed earlier. In Hinds, the employer was found liable under this test because the victim had clearly informed it of the objectively very offensive document he had received through internal mail as well as other racist actions taken against him in the past.

In Hinds, however, the Tribunal appears to have considered as well the particular personality of the complainant and used a

more subjective analytical test in assessing the employer's liability and its duty of diligence. The Tribunal stated:

> It is clear that Mr. Hinds is a sensitive individual and this kind of harassment perhaps affects him in a deeper way than other victims of discrimination. His sensitive nature and indeed the past acts of harassment and discrimination about which he expressed concern over the years should have made his superiors[ ] acutely aware of the necessity of dealing with this particular degrading act as responsibly and effectively as possible. (p. D/5697)

It should be noted, however, that this statement in Hinds is located within the part of the decision devoted to assessing the quantum of damages, and it is in this context that the tribunal sought to take into account, as it should, the subjective criterion of the victim's sensitivity. Thus, in determining whether the employer acted diligently or whether the alleged acts or words were sufficiently serious to constitute harassment, it is the objective test of the "reasonable victim" that must be applied, for the reasons set out in Stadnyk, supra, and which we discussed previously.

Hinds also indicates that the employer's reaction must be prompt and effective once it has been informed of conduct amounting to harassment, and that this reaction should bear some relationship to the seriousness of the incident itself. In short, the more serious the incident the more vigorous the employer's reaction should be, to indicate clearly to the staff that discrimination and harassment are not tolerated within the company.

However, in Hinds the Tribunal made a clear distinction between "a harmless joke to which [the employee] overreacted" and "racially derogatory innuendos repulsive and disgusting" (paras. 41619 and 41578). Only in the case of the latter, viewed from the perspective of a "reasonable victim", is the employer required to act diligently, by conducting an investigation that is appropriate in the circumstances. Indeed, as that decision (and a number of others, for that matter) reiterates, the Canadian Human Rights Act does not go so far as to require that an employer maintain an absolutely pristine work environment.

That being said, the Tribunal went a step further in Pitawanakwat v. Canada (1992), 19 CHRR D/110 (overturned in part on other grounds by the Federal Court in [1994] F.T.R. 11),

stating that the employer's duty of diligence exists once it is made aware of an act that, by reason of its intrinsically offensive, humiliating or degrading character, would be likely to degenerate into harassment if it were subsequently repeated: "Although one cannot point, in the evidence, to a clear pattern of intentional racial harassment, employers have an obligation to

their employees to create and maintain a discrimination-free work environment". (para. 76)

As was noted in Swan v. F.A.C., C.H.R.T., T.D. 15/94 and in Mohammad v. Mariposa Stores (1991), 14 CHRR D/212, this approach to interpreting the duty of diligence, by imposing on the employer a positive duty to provide a work environment free of discrimination, is justified by the firm position taken by the Supreme Court of Canada in Robichaud, supra, at p. 94:

Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy-a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective.

An official anti-discrimination and anti-harassment policy may be an appropriate way for an employer to react to a breach of the Act. However, as it was rightly said in Hinds, the existence of an anti-harassment policy by itself is not enough to release the employer from its responsibilities in connection with workplace harassment. The policy must be effective and applied in practice. See also in this connection: C.D.P. v. Commission scolaire Deux-Montagnes, supra. In both these cases, however, the Tribunal found a total absence of any reaction by the employer despite documented evidence of obvious racist conduct.

The Tribunal further noted that the employer's duty of diligence could be triggered even in the absence of specific evidence. Once the allegations are objectively serious, the employer must commence an investigation to determine the truth thereof. Otherwise, through its inaction, it risks encouraging

improper conduct within its undertaking. Hinds may be compared with Persaud v. Consumers Distributing (1991), 14 CHRR D/23, in which the tribunal ordered an employee to pay damages for racial harassment but exonerated the employer, which had taken disciplinary action as soon as it became aware of the problem.

Moreover, the employer may not escape liability just because the complainant, through his attitude, contributed to the creation of a hostile work environment. If the complainant is indeed the victim of harassing conduct, the employer will be liable if it has failed to demonstrate due diligence in eliminating such conduct. Can the complainant's own conduct become a relevant factor when fashioning the appropriate remedy? That is what the Tribunal stated in Pitawanakwat v. Canada, supra, and in Mohammad v. Mariposa Stores, supra. But a Federal Court judge rejected this

position in overturning the Tribunal decision on this specific point in Pitawanakwat, 78 F.T.R. 11, at 26, although he conceded he was not relying on any authority in doing so.

For a comment on recent trends in the cases involving employer liability for racial harassment, see I.R. Mackenzie, "Racial Harassment in the Workplace: Evolving Approaches", (1995) 3 Can. Lab. & Empl. L.J. 287-311.

VI. APPLYING THE LAW TO THIS CASE

With respect to the allegation of discrimination based on section 7 CHRA, it is clear that in the absence of any burdens, obligations or disadvantages imposed on the complainant by reason of his race, the Tribunal cannot make a finding of discrimination as it was defined by the Supreme Court of Canada in Andrews, supra. As we said earlier, the complainant has failed to demonstrate that he was the object of adverse treatment based on his race on the part of Guy Goodman or the Respondent. His testimony on this is not credible and was contradicted by a number of witnesses worthy of credit.

Can a single remark with a racial connotation, by itself, constitute racial harassment within the meaning of section 14 CHRA? The Commission itself conceded that for this to be our

finding, the act would have to be extremely serious to constitute harassment. Otherwise, harassment is characterized by its repetitive nature, or by a cluster of harassing acts that are instrumental in creating a hostile work environment.

We find, therefore, that, regardless of the objective seriousness of the phrase uttered by Guy Goodman during the summer of 1985, the complainant was not the victim of harassment, since it was an isolated incident for which, moreover, Guy Goodman apologized forthwith. Other than the testimony of the complainant, which is contradicted by many witnesses worthy of credit, there is no evidence that Guy Goodman has made any racial slurs in relation to the complainant, or other subordinates or co-workers, for that matter, while employed at Air Canada.

Insofar as the employer is concerned, we know that it can be liable for harassment committed by an employee even where the alleged conduct did not in itself amount to harassment. As indicated by the Pitawanakwat decision, supra, if such conduct was objectively offensive, humiliating or degrading, if it was reported to the employer and if, in the event of its repetition, it was likely to constitute harassing behaviour, the employer could be considered liable. This would be the case, for example, if the employer failed to act promptly and effectively to prevent a repetition of the said conduct and make it clear to its

employees that discriminatory conduct and attitudes were not tolerated within the company.

The issue, then, is the following: was the slur uttered by Guy Goodman in the summer of 1985 ("Two Singhs are singing in the penitentiary. One Singh is sitting here and singing") an inoffensive joke, albeit in bad taste, or was it rather an offensive, humiliating, even degrading racial slur?

To decide this issue, we need to place ourselves within the victim's perspective. However, it is from the objective standpoint of the "reasonable victim" that we must assess the slur in question. Could a reasonable employee of Indian origin and Sikh religion have felt genuinely humiliated or offended by the said slur?

It is extremely difficult and no doubt impossible sometimes for a Tribunal whose members are not part of a racial minority to comprehend the feelings of real humiliation of someone who is.

The job is facilitated in this case, however, since the Commission called a former employee of Air Canada, who is of the Sikh religion and Indian origin like the complainant. This was Mr. Manjit Singh who, in addition, and unlike Mr. Dhanjal, has never stopped wearing the accessories required by the Sikh religion, namely a beard and a turban. The Tribunal was extremely impressed by this witness and his calm, candid and moderate demeanour.

Now, what did Mr. Manjit Singh think of the 'Two Singhs are singing " slur made by Guy Goodman in the summer of 1985, and which Mr. Dhanjal discussed with him in 1987? Although he disapproved of such a comment, Mr. Singh did not recommend that the complainant file a complaint. On the contrary, he told him not to dwell on it, and to try to establish better communication with his superior. Yet Mr. Singh did not hesitate to lay a complaint when he himself was insulted by one of his co-workers at Air Canada. He demanded from his superior-and was given-a written apology by one of his subordinates for blurting at him, in an allusion to his beard and turban, "We don't need people like you here."

We find from Manjit Singh's testimony that, in the circumstances of this particular case, the isolated slur uttered by Guy Goodman was not sufficiently serious to trigger the employer's duty of diligence.

Using the criteria for assessing the boundaries of a "reasonable social interaction", to use Mr. Pentney's expression in Discrimination and the Law, supra, we reach the same conclusions. When we consider the nature of Guy Goodman's alleged conduct, the working environment in the Engineering department

and the Performance section, the kind of relations Guy Goodman maintained with his subordinates and with the complainant in particular, or the existence of protests on the part of Mr. Dhanjal, there is no evidence from which it can be found that a reasonable victim would have perceived the words and conduct of Guy Goodman as being discriminatory. On the contrary, the fact

that the complainant waited until 1988 before telling John Longo (while not belabouring the point) that Guy Goodman had insulted him in a discriminatory way in the past, and the fact that Guy Goodman apologized, according to his testimony, which we consider worthy of credit, immediately after he observed that the complainant found his "pun" on the name Singh was misplaced, reinforces our conviction that the "pun" in question was not a serious racial slur potentially tantamount to harassment.

Accordingly, although Mr. Dhanjal informed his employer through John Longo in 1988 that he had been subjected to discriminatory statements on the part of his supervisor three years earlier, the employer was not under any obligation to take any action as such in the circumstances. This kind of statement was not sufficiently serious to incur liability in the employer in the circumstances, or to engage its duty of diligence.

Respondent counsel, Mr. Delisle, argued strongly that the complainant was the author of his own misfortune by adopting a provocative attitude toward his coworkers when he was working at Air Canada. The Tribunal would remind the Respondent that the complainant's inappropriate attitude is irrelevant in determining whether the employee was a victim of harassment or whether the employer fulfilled its duty of diligence in eliminating discrimination in the workplace. Thus, had the complainant showed that he was the object of a serious racial slur and that the Respondent knew or ought to have known this, we would have found that the Respondent had failed in this case to fulfil its duty of diligence.

Mr. Delisle then emphasized that Air Canada had adopted an anti-discrimination policy in 1986, an official policy that had been duly communicated to all the managers in the company and subsequently to all new employees. If the complainant had successfully proved that he was the victim of a serious incident tantamount to harassment, the Tribunal would have not been satisfied by the mere existence of this policy, no matter how sound theoretically it might appear at first sight. The cases are clear on this: it is not enough to adopt an anti-discrimination policy. The employer must, in order to fulfil its duty of diligence, show that this policy is something more than a facade and that it is effectively implemented within the company.

Did Mr. Delisle prove this? He attempted to establish that Air Canada is making serious efforts to resolve conflicts between employees stemming from discrimination or other causes through an

Ombudsman who is assigned to assist employees in their discrimination complaints, an Employee Assistance Program, and the work of certain employees who are specially trained and report directly to senior management, such as John Longo in the Engineering department, whose duties specifically include helping in the resolution of workplace conflicts. The existence of all these officials and programs proves nothing. And Manjit Singh's testimony, although impressionistic and insufficient in itself, tends to show, on the contrary, that this kind of policy is not very effective in view of the corporate culture at Air Canada, which seems relatively unreceptive to employee complaints.

However, in our view it was demonstrated via the numerous, prompt and useful initiatives by John Longo that Air Canada as a corporation did take seriously the complaints of employees who felt they were the victims of unjust treatment on the part of their superior. This evidence was also supported by Manjit Singh's testimony. He stated that when he had complained personally about being insulted by a coworker in relation to his religion, his complaint was taken seriously and a letter of apology was demanded of the colleague in question. There is every indication, therefore, that had it been informed of a justified complaint by Mr. Dhanjal of discriminatory treatment or harassment, Air Canada management would probably have taken that complaint seriously and acted with diligence, in accordance with its policy prohibiting discrimination in the workplace.

VII. TRIBUNAL FINDING ON THE COMPLAINT

For these and many other reasons, the Tribunal finds, therefore, that the complainant and the Commission have failed to make out a prima facie case, on a balance of probabilities, that Daljit S. Dhanjal was a victim of discrimination or harassment based on his religion or his race.

Furthermore, we accept the explanation presented and proved by the Respondent, on a balance of probabilities, of the problems in working relations that existed between Daljit S. Dhanjal and Guy Goodman and of the negative evaluations received by Mr. Dhanjal. There was a personality conflict between these two men, prompted by Mr. Dhanjal's difficult character and aggravated by his refusal to accept the rather authoritarian demands and

management methods of his boss. This explanation was not refuted by the Commission, and consequently this is the most probable cause of the conflict in question.

Mr. Taylor was very insistent that discrimination is seldom practised openly, and that the Tribunal should seek out "the subtle scent of discrimination", to use a well known expression in the cases. We of course agree with this approach. However, what we sensed in the course of these proceedings was not the

subtle scent of discrimination but the strong aroma of manipulation and of a personal vendetta on the part of the complainant.

Finally, it is neither necessary nor appropriate, we feel, to decide the issue of whether the complainant was wrongfully dismissed in November and December 1989. Having found that Air Canada's offer of early retirement had no relationship to the complainant's race or religion, the Tribunal has no jurisdiction to rule on whether a dismissal, if dismissal it were, was per se warranted or not.

Accordingly, the complaint is dismissed.

VIII. ADDENDUM: Role of the Commission counsel during the Tribunal proceedings

Throughout the Tribunal proceedings Mr. Delisle complained that the Commission's chief counsel, Mr. Eddie Taylor, had adopted an excessively "adversarial" attitude, the converse of the role of defender of the public interest that he ought to be playing before this Tribunal. Mr. Taylor, he said, behaved in a very aggressive manner in relation to many witnesses and toward him. Mr. Taylor, through his obstruction, had even prevented him from properly conducting some of his own cross-examinations.

Clearly, the proceedings in this case were particularly lengthy and laborious. On more than one occasion both counsel exchanged accusations of bad faith and resorted to personal attacks. It would therefore be unfair to heap all responsibility for the hostility between counsel in the hearing room on the shoulders of Mr. Taylor.

Nevertheless, when he appears before the Tribunal, counsel for the Commission has a specific role to play. This role is quite different from the role of counsel for the Respondent or even from that of the complainant, who remains a party distinct from the Commission. This role, like the role of Crown counsel in criminal proceedings, as described by Sopinka J. in Stinchcombe, supra, p. 341, is that of "minister of justice", prompted first and foremost by considerations of public interest, rather than that of an "adversary". The Commission's General Counsel, Mr. Pentney, himself conceded in the course of oral arguments that a lawyer representing the Human Rights Commission has effectively been assigned this role by Parliament under section 51 CHRA.

Had he fully assumed the role of a "minister of justice" that was properly his before this Tribunal, Mr. Taylor could have helped the inquiry to proceed expeditiously in an atmosphere relatively favourable to the proper administration of justice, while pursuing his case vigorously and effectively.

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In our opinion, the following remarks by Rand J. in Boucher v. The Queen, [1955] S.C.R. 16, at 23-24, apply a fortiori to Commission counsel charged with acting in the public interest:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

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Dated this _____ day of March 1996.

Daniel Proulx, Chairperson

Jacinthe Théberge, Member

Marie-Claude Landry, Member