

T.D. 3/97
Decision rendered March 19, 1997

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

NATIONAL CAPITAL ALLIANCE ON RACE RELATIONS (NCARR)

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HER MAJESTY THE QUEEN
AS REPRESENTED BY HEALTH AND WELFARE CANADA,
THE PUBLIC SERVICE COMMISSION
AND THE TREASURY BOARD

Respondent

- and -

PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA

Interested Party

TRIBUNAL DECISION

Tribunal: J. Grant Sinclair, Q.C. Chairperson
Carol H.Y. Boxill, Member
Alvin Turner, Member

Appearances: Helen Beck and Prakash Diar, Counsel for the Canadian
Human Rights Commission
Iyavar Chetty, Counsel for the National Capital
Alliance on Race Relations
Cynthia Sams, Counsel for the Professional Institute of
the Public Service of Canada
Arnold Fradkin and H el ene Laurendeau, Counsel for Her
Majesty the Queen

Dates and Location

of Hearing: December 4 to 8, December 18-21, 1995,
January 10 to 12, January 15 to 19, February 5 to 8,
February 26 to March 1, April 15 to 19, April 22 to 26,

INDEX

	PAGE
I THE COMPLAINT	1
II THE JURISDICTIONAL ISSUE	2
III THE EVIDENCE	4
(A) Statistical Evidence of Under-Representation of Visible Minorities	4
1. Evidence of Erica Boukamp Bosch	4
(a) Definitions	4
(b) Under Representation of Visible Minorities in the EX group	6
(c) HC recruitment into EX positions	6
(d) Under-Representation of Visible Minorities in the A&FS Category	7
2. Evidence of Adele Furrie	8
(a) Indicator One	8
(b) Indicator Two	11
(c) Indicator Three	12
(d) Indicator Four	13
3. Evidence of Jeffrey Reitz - The Mail Back Survey	14
4. Evidence of Visible Minority Employees in HC	18
(a) Dr. Dennis Awang	18
(b) Ivy Williams	21
(c) Tina Walter	24
(d) Dr. Daljit Dhillon	25
(e) Dr. Ajit Das Gupta	27
(f) Dr. Shiv Chopra	30

INDEX

	PAGE
(B) Systemic Barriers in Staffing and Staffing Development Programs	34
1. Dr. Nan Weiner	34
(a) Ghettoization	36
(b) Less Encouragement of Visible Minorities	37
(c) Informal Staffing Decisions	38
(d) Perceiving Visible Minorities as Unfit for Management	39
(e) Under-Representation in the A&FS Category	42
IV THE FINDINGS	42
V CONCLUSION	45
VI JURISDICTION ON REMEDY	47
VII ORDER	52
I THE COMPLAINT	

This case arises out of a complaint ("Complaint") filed by the National Capital Alliance on Race Relations ("NCARR") with the Canadian Human Rights Commission ("CHRC") dated September 16, 1992. NCARR is a non-profit organization whose mandate is to fight discrimination and racism through political action, education and where appropriate, through legal action. NCARR has an elected board of eight directors and an executive director who is responsible for the day to day operations. NCARR is located in Ottawa.

The Complaint alleges discrimination by Health and Welfare Canada, now Health Canada ("HC"), against persons who are visible minorities employed by HC contrary to section 10 of the Canadian Human Rights Act ("CHRA"). The Complaint reads as follows:

Health and Welfare Canada discriminates against persons who are visible minorities by establishing employment policies and practices that deprive or tend to deprive persons who are visible minorities of employment opportunities in management and senior professional jobs on the basis of race, colour and ethnic origin contrary to section 10 of the Canadian Human Rights

Act. This is indicated by the extremely low number of permanent visible minority employees in senior management positions and in the Administration and Foreign Service Category. It is especially supported by the concentration of visible minority employees at lower level positions within the Science and Professional category and their failure to be promoted equitably. This lack of promotions negatively affects their eligibility for appointments to senior management positions.

The parties in this Complaint are NCARR, CHRC, the Professional Institute of the Public Service of Canada ("PIPSC"), added as an interested party, (collectively the "Complainants") and Her Majesty the Queen as represented by Health and Welfare Canada, the Public Service Commission and the Treasury Board ("Respondent").

In alleging discrimination, the Complaint focused on the Scientific and Professional category ("S&P") and the Administrative and Foreign Service Category ("A&FS"), as opposed to the other occupational categories in HC. This is because it is from these two occupational categories from which senior management in HC is drawn. The evidence is that approximately 75% of senior management are recruited from the S&P category and 25% from the A&FS category.

II THE JURISDICTIONAL ISSUE

The Respondent's initial response to the Complaint before this Tribunal was to challenge both the Tribunal's jurisdiction to hear the Complaint and the Tribunal's jurisdiction to grant the remedy sought by the Complainants.

The Respondent argued that, to the extent this Complaint involves under-representation of a designated group, it is an issue of employment equity, not one of discrimination. Matters of employment equity are

2

specifically addressed under section 11 of the Financial Administration Act, ("FAA") and section 5.1 of the Public Service Employment Act ("PSEA"). This legislation provides a complete regime for dealing with employment equity issues within the Federal Government, and this Tribunal can not and should not deal with allegations of under-representation of visible minorities in HC.

In its closing argument, the Respondent shifted its position somewhat by submitting that the Tribunal has jurisdiction to hear the Complaint, but, if, at the end of the day, the only thing left for the Tribunal to support a finding of discrimination is statistical evidence of under-representation, the Tribunal loses jurisdiction to make that finding.

On remedy, the Respondent's position was that if the Tribunal makes a finding of discrimination within its jurisdiction, it is limited to making a cease and desist order. It can not go further and order such things as a

remedial program or numerical targets or monitoring procedures because this is "employment equity country" and is forbidden territory for this Tribunal. Rather, the authority to impose this type of employment equity remedy is reserved to the Public Service Commission and the Treasury Board under the FAA and PSEA. In this respect, all this Tribunal can do is to declare that an employment equity program would be the appropriate remedy and leave it to the above agencies to devise and implement such a program.

The Respondent, in its preliminary objection, also objected to certain witnesses proposed by the Complainants giving evidence in this hearing. The reason for this objection was that to allow such evidence would result in a rehearing of the personal complaint of discrimination of the witness. We decided that this objection should be made at the time the evidence was given. The objection was made numerous times during the course of the hearing, was dealt with at the time, and no further comment is needed here.

We reserved our decision on the jurisdictional question until completion of the evidence and final arguments. It is clear that the Complainants' case is about systemic discrimination in HC staffing practices. Certainly statistical evidence of under-representation is one of the things that the Complainants relied upon to prove their case. But the Complainants have consistently taken the position that they are relying not just on numbers showing under-representation to support an inference of discrimination, but on the whole of the evidence presented and have asked the Tribunal to make its finding on that basis.

As will be seen in our following reasons, we have done just that. Even if the Respondent is correct in characterizing our jurisdiction as it did, we have exercised our jurisdiction within this framework.

In any case, we do not agree with this limitation on our jurisdiction as suggested by the Respondent. There is nothing in the CHRA and, in particular, section 40, which limits the jurisdiction of the CHRC or this Tribunal from hearing a complaint which involves a so-called employment equity issue. Section 50 of the CHRA requires the Tribunal to hold a hearing and inquire into the complaint in respect of which it was appointed.

To refuse jurisdiction to hear this Complaint would mean that the FAA and PSEA have paramountcy over the CHRA. This is not a tenable legal position as we point out later in these reasons when discussing

3

jurisdiction over remedy. Accordingly, that part of the Motion objecting to our jurisdiction to hear the Complaint is dismissed.

III THE EVIDENCE

(A) Statistical Evidence of Under-Representation of Visible Minorities

1. Evidence of Erika Boukamp Bosch

The starting point of the Complainants' case is that, as of September

30, 1993, there was one visible minority in the senior management complement out of a total of 118 (0.8%) in HC. This was the evidence of Erika Boukamp Bosch, Chief, Statistical Analysis, Employment Equity Directorate, CHRC. Ms. Bosch was qualified as an expert in statistics, with a specialty in employment systems and occupational data.

(a) Definitions

It is useful at this point to define certain terms used by Ms. Bosch and other experts who gave evidence at the hearing. These terms are:

Availability - estimates of the number of persons of a designated employment equity group qualified to work for an employer. The estimates can be based on the internal or external labour pool from which employers can reasonably be expected to recruit, and is often expressed as a percentage of the total qualified labour pool.

Designated Groups - the four groups designated under Employment Equity legislation, women, aboriginals, persons with disabilities and visible minorities.

EX Group - management category in the Federal Public Service ("FPS").

EX Equivalent - senior levels in some occupational groups in the FPS which are considered to be equivalent to senior management but are not included in the EX group.

EX minus one and EX minus two - senior levels in some occupational groups, which are one and two levels below the EX group.

Feeder Group - senior levels in some occupational groups from which the employer may reasonably be expected to promote employees into the EX group. The feeder group consists of some of the EX Equivalent levels and the EX minus one and EX minus two levels.

Occupational Category - The grouping of occupations in the Federal Public Service. The FPS has one management category, the Executive Group (EX) and five non-executive categories, Scientific and Professional (S&P), Administrative and Foreign Service (A&FS), Technical (T), Administrative Support (AS) and Operations (O).

Occupational Group - The grouping of occupations within each occupational category. For example, in the S&P category, there are a number of occupational groups, Veterinary Medicine (VM), Biological Science (BI), Scientific Research (SR), Chemistry (CHEM), etc.

4

Occupational Level - Each occupational group is divided into a number of levels, for example, Biologist 1 - 5, Chemist 1 - 5, etc.

Representation - the number or percentage of a designated group employed by an employer.

Under-Representation - representation of a designated group in an

employer's work force below availability.

Utilization (Representation) Rate - the representation of a designated group in an employer's work force as a proportion of the group's availability, ie. representation divided by availability.

(b) Under-Representation of Visible Minorities in the EX group

Ms. Bosch testified that, as of September 30, 1993, the representation of visible minorities in the EX group of HC was 1/118 or 0.8%. Availability estimates for visible minorities for EX positions varied from 8.7% to 9.2%, depending upon whether it was the availability from within HC or from the FPS as a whole. These availability estimates suggest that, as of that date, HC should employ 10 or 11 (8.7% or 9.2% x 118) visible minorities in the EX group. Because the representation was only one, Ms. Bosch concluded that visible minorities were severely under-represented in the EX group, at less than 10% of their availability.

It should be noted that Ms. Bosch did not include in her totals anyone in the EX Equivalent group as part of management. She considered the EX Equivalent, EX minus one and EX minus two in both the S&P and A&FS categories to be the feeder groups for EX. The relevance of this will become apparent when we deal with the evidence of Adele Furrie, the statistical expert called by the Respondent.

(c) HC recruitment into EX positions

Ms. Bosch attempted to explain why, in her opinion, visible minorities were under-represented in HC management. She analyzed data from HC on the occupational group and level in the S&P category from which its EX members were recruited into the EX group. The data was as at April 12th, 1994 and at that date, there were 115 in the EX group, 63 recruited from within HC, 45 from the FPS and 7 from outside the FPS. Of the 63 from within HC, 33 were from the S&P category, and it is on this group that Ms. Bosch concentrated.

Ms. Bosch compared each occupational group and level from which these managers were drawn to the availability of visible minorities in the same group. The availability estimates that she used were as at September 30, 1993.

Three different patterns emerged from Ms. Bosch's analysis. First, a majority of members of the EX group (17/33 or 52%) were recruited from three occupational groups with a fairly high representation of visible minorities in the feeder group, yet it appears that no visible minorities were recruited from this group.

Secondly, there was a very low recruitment of numbers into the EX group from occupational groups which had a very high representation of visible minorities. For example, only 3% of managers were recruited from

the BI group which has a 19% visible minority representation; and no managers from the VM group which has a 30% visible minority representation.

Thirdly, there was a very high recruitment from occupational groups with no representation of visible minorities.

(d) Under-Representation of Visible Minorities in the A&FS Category

Ms. Bosch also did an analysis of the data relating to the representation of visible minorities in the A&FS category. This information is relevant because the A&FS group is the source of 25% of the managers in this EX group. Because it is an important feeder group, if the visible minority representation is low, there will not be the critical mass to progress to the higher level positions and then to management.

Ms. Bosch concluded that visible minorities are severely under-represented in the A&FS category. In reaching her conclusion, she analyzed the representation, availability and utilization of visible minorities in all of the non-executive categories in HC in 1992. Although her focus was the A&FS non-EX category, Ms. Bosch reviewed them all to place the A&FS category in context.

The data indicates a utilization rate of 48% for the combined non-EX categories including the A&FS, and a utilization rate of 33% for the A&FS category that is, the representation of visible minorities in this category was only 33% of availability.

2. Evidence of Adele Furrie

Ms. Furrie gave expert evidence for the Respondent in response to Ms. Bosch. Ms. Furrie is now a private consultant who spent most of her professional career in the FPS mainly with Statistics Canada. Ms. Furrie was qualified as an expert to give evidence on data analysis relating to visible minorities in the workplace in HC.

Ms. Furrie's approach differed from that of Ms. Bosch. Because the Complaint alleged discrimination from on or before September 8, 1992 and was continuing, Ms. Furrie analyzed data for the five years from March 31, 1991 to March 31, 1995. Further, because the Complaint alleged certain indicators for the discrimination, Ms. Furrie tested the validity of these indicators.

(a) Indicator One

The first indicator is in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in senior management". Ms. Furrie had to calculate the number of persons in the EX group for the years that she considered. In calculating these numbers, she used a different base than Ms. Bosch. Ms. Furrie considered that management in HC should include those in the EX Group, those persons in selected EX Equivalent groups and levels in the S&P category. Her criteria for selection from the EX Equivalent was based on information obtained from HC and included comparable salary ranges to EX, significant management responsibilities, and exclusion from collective bargaining because of management responsibilities. By broadening the spectrum of positions considered, Ms. Furrie showed a higher number of persons in

senior management in HC than Ms. Bosch. To estimate the availability of visible minorities, Ms. Furrie used a similar approach to that of Ms. Bosch, except she looked at five years, not just one year.

Ms. Furrie's analysis of the data indicated that for 1991, EX/Ex Eq./SR.M. 197, VMS = 6.3%, Availability = 17 or 8.4%; 1992, EX/EX Eq./SR.M. 209, VMS = 9 or 4.3%, Availability = 18 or 9.2%; 1993, EX/EX Eq./SR.M. 216, VMS = 13 or 6%, Availability = 9.5%; 1994, EX/EX Eq./SR.M. 212, VMS = 12 or 5.7%, Availability = 19 or 9%; 1995, EX/EX Eq. 209, VMS = 10 or 4.8%, Availability = 19 or 9.1 %.

On the basis of this information, Ms. Furrie calculated the utilization rate for visible minorities in the EX group for the S&P category to be as follows: 1991 UR = 35.3% (6/17); 1992 UR = 50% (9/18); 1993 UR = 68.4% (13/19); 1994 UR = 63.2% (12/19); 1995 UR = 52.6% (10/19). This is compared to the utilization rate of 10% as found by Ms. Bosch.

Having calculated the utilization rates for the years 1991 - 1995, Ms. Furrie concluded that the data does not support the allegation in the Complaint that there is an extremely low number of visible minorities in senior management. Ms. Furrie defined "low" by reference to a text book, *The Canadian Class Structure*, by Dennis Forcese, (pp. 53 - 54), which she found in her library at home, and which was used in one of her undergraduate sociology courses. According to this text, "low income" is defined as a level of income where 70% or more is spent on non-discretionary items. The corollary is that 30% or less is available for discretionary spending. Ms. Furrie adapted and adopted this definition and used it for her cut off point to measure extremely low. Since all of the utilization rates for the years 1991 - 1995 exceeded 30%, she concluded that the allegation of extremely low was not supported by the data.

In our view, both the conclusions of Ms. Bosch and Ms. Furrie on the question of under-representation are flawed. Dealing first with Ms. Bosch, she focused primarily on 1993 to reach her conclusion that visible minorities were severely under-represented. Her choice of 1993 is unfortunate since that particular year involved a major restructuring and reorganization which involved the transfer of the Welfare portion of the Department to another Department leaving only HC.

More significantly, Ms. Bosch included only one occupational group, the EX group, in her analysis of senior management. The result is that her calculations of the representation, availability and utilization of visible minorities are understated.

Ms. Furrie, on the other hand, included nine occupational groups (including the EX Group) in her calculations for senior management, four of which, in our opinion should not have been included. To this extent, Ms. Furrie overstated the numbers and her resulting calculation of the utilization rate of visible minorities is overstated.

Danielle Auclair, a representative of PIPSC, presented comprehensive data on the eight additional groups that Ms. Furrie extracted from the EX/Equivalent group. Her evidence

demonstrated that four of these occupational levels are not excluded from collective bargaining and thus should not be included in the totals for management. She agreed, however, with Ms. Furrrie that the other four occupational levels should be included.

Having agreed to include these groups, the Complainants through Micheline Nehme, put into evidence, revised calculations showing the total population, visible minority representation, the estimated availability of visible minorities, the utilization rate and the future estimated vacancies which were calculated by tracking HC's recruitment trends over a period of five years.

The Tribunal accepts the evidence of both Danielle Auclair and Micheline Nehme. The resulting data for the utilization rate for visible minorities for the years noted are as follows: 1991 UR = 33% (5/15); 1992 UR = 27% (4/15); March 31 1993 UR = 42% (7/17); September 30 1993 UR = 20% (3/15); 1994 UR = 36% (6/16); 1995 UR = 25% (4/16). The average utilization rate for these 5 years is 33%, (excluding September 30, 1993).

Ms. Furrrie's conclusion is that, given her cutoff point of 30%, the data does not support the allegation of the extremely low number of visible minority employees in senior management. Ms. Bosch concluded that visible minorities are severely under-represented in the EX group. Of course, the validity of either of these two conclusions depends upon how under-representation is defined. In any case, we do not understand Ms. Furrrie's position to be that visible minorities are not under-represented in management, but only that their numbers are not extremely low.

There was some evidence presented to the Tribunal from Ms. Bosch and Dr. Nan Weiner, that 100% representation is the "ideal", but the "four-fifths rule" or 80% representation is generally accepted.

Applying this test, it is clear that, according to the data of Ms. Bosch or Ms. Furrrie, there is a significant under-representation of visible minorities in HC senior management.

(b) Indicator Two

Dealing now with the second indicator in the Complaint that "discrimination is indicated by the extremely low number of visible minorities in the A&FS category". Ms. Furrrie limited her analysis to non-management occupational groups and levels, namely, the EX Equivalent non-management and EX minus one and Ex minus two. The data indicates a utilization (representation) rate for visible minorities in these groups to be: March 31, 1991, UR = 53% (9/17); March 31, 1992, UR = 53% (9/17); March 31, 1993, UR = 42% (8/19); March 31, 1994, UR = 40% (8/20); March 31, 1995, UR = 40% (8/20). By comparison, Ms. Bosch determined a utilization rate in the A&FS group of 33% in 1992. Ms. Furrrie did not consider the visible minority representation to be extremely low, again using a cut off point of 30%.

If the four-fifths rule is applied, there is a significant under-representation of visible minorities in the A&FS category.

(c) Indicator Three

In the third indicator that, "discrimination is especially supported by the concentration of visible minorities at lower levels in the S&P category", Ms. Furrie defined lower level positions as those below the feeder group, i.e. below EX Equivalent/non senior management and EX minus one and EX minus two.

According to the data that she analyzed over the five year period, visible minorities consistently maintained a smaller share of the lower levels in the S&P category and again she concluded that the allegation was not supported by the data.

But it is the corollary of her finding that is much more telling. The data that Ms. Furrie presented shows that for each year, for the years 1991 to 1995, the percentage of visible minorities in the EX Equivalent/non-senior management, EX minus one and EX minus two, the feeder group, consistently exceeded the percentage of the total population of this group. For example, as at March 31, 1991, visible minorities constituted 36% of the EX Equivalent/non senior management, EX minus one and Ex minus two, (or 36% of the feeder group) compared to 27% for non visible minorities. As of March 31, 1995, visible minorities were 35% of the S&P feeder group compared to 27% for non-visible minorities. This pattern is consistent for the other 3 years and is consistent with Ms. Bosch's conclusion that there is a high concentration of visible minorities in the feeder group, but low numbers in the management group, the next progression. In other words, visible minorities in the S&P category are bottlenecked at the feeder group level.

(d) Indicator Four

With respect to the fourth indicator that "visible minorities in the S&P category are not promoted equitably which negatively affects their opportunity for appointment to senior management", Ms. Furrie analyzed three types of HC staffing actions, acting appointments, competitions and reclassifications. She did so because promotions to a higher level are usually achieved through competitions or reclassifications and acting appointments provide experience that is very useful when applying for a promotion. The data she analyzed related to acting appointments, competitions and reclassifications in the S&P category for the fiscal years, 1991 - 92 to 1994 - 95.

Acting appointments constituted the majority of the total of these staffing actions during this period, being about 65% of the total. There is no consistent pattern in the data with respect to the success of visible minorities obtaining acting appointments whether it be for less than or more than 4 months. For example, visible minorities were given a greater proportion of acting appointments of less than 4 months than non visible minorities in 2 of these years, but a lesser proportion in the other 2 years. For acting appointments of more than 4 months, visible minorities succeeded in a greater proportion than non visible minorities in one of the years, and in the remaining three years, the majority of acting appointments were given to non visible minorities.

With respect to competitions and reclassification, visible minority employees were slightly more successful in competitions and significantly more successful in reclassification.

The question the Tribunal must now address is, what is the reason for this under-representation. Is it because of certain staffing practices at HC, which, as alleged, bear adversely on the promotion opportunities of visible minority employees? That is, can the under-representation be linked to discrimination in staffing practises of HC? The remainder of the Complainants' evidence was directed to answering these questions.

3. Evidence of Jeffrey Reitz - The Mail Back Survey

Dr. Reitz has a Ph.D. in sociology from Columbia University and is a professor of sociology at the University of Toronto. He teaches graduate courses in ethnicity and social inequality and in survey research methods and data analysis. Dr. Reitz has been involved in a number of studies with respect to race relations, the immigrant labour market and he has also published various books and journal articles relating to ethnic and racial issues.

Dr. Reitz was retained by PIPSC to conduct a survey, the purpose of which was to determine whether, at HC, racial minorities in the S&P category have equal access with whites to career development opportunities. The survey was a "mail back questionnaire" sent out in late October and early November, 1995. Questionnaires were mailed to 1563 persons out of a total population of 2033 employees in the S&P category. Those who were not mailed the survey were "Rand Formula" members of PIPSC. That is, these employees are required to pay PIPSC union dues, but are not members of PIPSC and have not signed PIPSC membership cards. Because they are not PIPSC members, PIPSC does not have permanent address records for them and could not send them the questionnaire. There were 533 responses to the survey for a response rate of about 34%. Dr. Reitz considered this to be adequate although it is slightly below the norm for a mail back survey.

Dr. Reitz identified five areas of career development opportunities and the survey questions were designed for responses in these five areas, career development training, special assignments, access to acting positions, supervisory responsibility and service on selection boards.

Dr. Reitz' analysis of the responses indicated that the survey sample was representative of PIPSC members in terms of occupational groups in the S&P category. For example, Biology was 15% compared to 16% PIPSC membership; 13% in Chemistry/12% membership; 18% Scientific Regulation/17% membership; 7% Scientific Research/6% membership; 32% Nursing/36% membership and so on. The survey closely reflected the membership in terms of gender, 44.6% males/45.5% membership.

On the question of race, Dr. Reitz testified that the survey questions were designed to compare the position of whites with that of racial minority groups, i.e., to evaluate the actual experiences of different racial groups. The objective was not to find out what the membership of PIPSC thought about the impact of race in HC. Racial status was measured

using questions adapted from the 1996 Canadian Census and respondents were

asked to self identify. Whites in the sample numbered 82% of the responses. Racial minorities were 13.4% of the responses and aboriginal persons were 4.6% as compared to HC data as of October, 1994, which showed that 8.3% of the employees in the S&P category were visible minorities and 4.7% were aboriginals. About 60% of those responding worked in the Health Protection Branch and 36% in the Medical Services Branch.

The questionnaire asked respondents whether they ever had career development training and listed a number of training courses. The survey data indicated that racial minorities are less often to have had career development training experiences than whites (39% v. 46%). This racial difference for management-related training was larger for males and larger for those more senior in terms of age, length of service, educational level and supervisory responsibility.

The sample data also identified a racial difference as to how respondents became aware of a training opportunity. Whites were more often informed of these training opportunities by managers, whereas minorities were much more proactive and found out about these opportunities by using their own initiative.

The survey contained a number of questions relating to acting positions. This was considered an important area because an employee in a higher acting position gains valuable management experience and may obtain an advantage in a later competition if the position is filled on a permanent basis.

The sample results indicated that whites more often hold acting positions than racial minorities (45% v. 34%). The minority disadvantage is even more pronounced among males and among those more senior in age, experience, supervisory responsibilities and graduate education. For white males, 47% obtained acting positions compared to 27% for non-white males.

There were also racial differences regarding how employees found out about acting positions. Whites were more often asked by their managers to apply, whereas racial minorities were more self reliant in finding out about opportunities for acting positions.

The survey also measured supervisory responsibility, as this can be a qualification for career development. The survey data indicated that among whites, 42% supervise other employees compared to 32% for racial minorities. This difference was not explained by difference in age, experience or education. Further, management training and holding an acting position increased the likelihood of supervising for both whites and racial minorities. However, the advantage was much greater for whites. For whites with management training or who held acting positions, the likelihood of being supervisors increased significantly compared to racial minorities.

Respondents were also asked if they had served on a selection board. This is relevant not for assessing a career development opportunity, but

rather to assess the participation of minority groups in hiring and promotion decisions. The survey data again showed a minority disadvantage. In fact, whites were almost twice as likely to serve on selection boards as non-whites. Interestingly, this racial difference is not explained by other factors such as age or experience or education. In fact, the racial

11

gap is much greater for those who are more senior and with more qualifications. Dr. Reitz considered this was particularly significant because service on selection boards is primarily a management decision. In his view, this suggests that this management decision favours whites over non-whites for reasons that have little to do with the level of education, experience or responsibility.

Dr. Reitz agreed that the total population in the S&P category was not surveyed, but did not agree that this would affect the validity of the survey in terms of its representation. In his view, there is nothing to indicate that those persons not surveyed were different in some way or less representative of the population that was surveyed.

Dr. Reitz was also challenged with respect to the fact that there was an over-representation of visible minorities responding to the questionnaire, (13.4% v. 8.3%). It was also pointed out to him that 60% of the respondents to the survey came from the Health Protection Branch, and that 83% of non-whites who responded came from this Branch. This, plus the fact that, respondents can, with a mail back survey, consider all of the questions before answering any, raised questions about a possible bias in the responses.

While agreeing to these facts, Dr. Reitz pointed out that because the number of visible minority responses were only 13% of the total, these facts were not particularly significant. Further, the purpose of the survey was to compare whites and non-whites, and a higher response rate from one group compared to another, is not in itself a source of bias.

4. Evidence of Visible Minority Employees in HC

The Tribunal heard from a number of other witnesses, many of whom testified as to their experiences and perceptions as visible minorities seeking advancement opportunities in HC.

(a) Dr. Dennis Awang

Dr. Awang was employed at Health Canada from 1969 to 1993. Dr. Awang, a visible minority, was born in Trinidad and received his undergraduate and doctoral degrees in organic chemistry from Queen's University, Kingston, Ontario. He spent two post-doctoral years as a lecturer and research associate in the Department of Chemistry at both the University of Illinois and at the University of Michigan. He is fluent in English and in French.

Dr. Awang has published more than 70 papers in national and international scientific journals and has given numerous presentations at universities and at learned conferences. In 1990, he was the sole Canadian representative in a group from eight countries who participated in the

World Health Organization (WHO) meeting on traditional medicine and AIDS.

He was chosen for this meeting because of his expertise in medicinal chemistry and herbal botanical science. Because of his expertise, experience and frequency of invitations to national and international conferences, Dr. Awang, with all modesty, considered that he could make a reasonable claim to be the leading authority in his field in Canada.

12

Dr. Awang began his employment with HC in 1969 as an entry level Research Scientist (RS1) in the Pharmaceutical Chemistry Section of HC. When he was hired, Dr. Awang was told that he was the best candidate interviewed by HC. Yet a (white) colleague, Dr. Keith Bailey, a non visible minority from Great Britain, with similar qualifications, was hired at the same time, at a higher classification and salary. Dr. Awang discussed this differential with his superior, Dr. Cook. As a result, he received a modest increase in salary, but his classification level, which was much more important for him, was not changed.

Dr. Awang was appointed, Head, National Products Chemistry Section in 1979. At that time, he was a Research Scientist 2 having been promoted in 1974. He was the Head of this section until it was merged with another section in 1991. This was the highest level and classification that he achieved except for a brief stint in 1984, as acting Chief, Chemical Standards Division in 1984. Dr. Awang retired from HC in 1993.

During his tenure at HC, Dr. Awang had a number of unpleasant experiences with his colleague, Dr. Lodge, who was the Head of the Steroids Section. In the spring of 1984, they attended a university lecture given by a professor from the United States, who during his lecture, noted that most of the background research for his work had been done by a graduate student, a doctoral candidate of Middle Eastern origin.

On hearing that comment, Dr. Lodge said to Dr. Awang, "That guy worked like a nigger." Dr. Awang was surprised and bothered by this comment and reported it to Dr. Hughes, the then Acting Director of the Bureau of Drug Research. Dr. Hughes' response was that he did not find the term particularly bothersome and in fact, his family once had a dog named "Nigger".

Dr. Awang testified that Dr. Lodge often greeted him by "Hello darkness my old friend", and on occasion, referred to him as "Blackie".

For a period of about one year, Dr. Lodge would place stickers from South African fruits on Dr. Awang's telephone, his desk, his desk lamp and on the door of his office. This was prior to the abolition of apartheid and Dr. Awang believed that the only reasonable explanation for this behaviour was an indication of support for apartheid or white superiority.

Dr. Awang took up this matter with Dr. Hughes and Dr. Lodge. At the meeting, Dr. Lodge admitted responsibility for his conduct, but offered no explanation or apology. The meeting was effective and Dr. Lodge stopped this type of insulting conduct.

Dr. Awang testified that he had recorded the incidents in a report and forwarded it to PIPSC, but decided not to follow up and that his best course of action was to continue to perform his duties and press on.

Dr. Awang did not leave the FPS willingly, but rather because, the Natural Products Section was merged with another section and all the employees of that section, including Dr. Awang, were declared surplus effective June 1st, 1991. This happened in spite of an external evaluation which considered the Natural Products Section as dealing with a very important field and the work being conducted by Dr. Awang was highly valued.

13

When Dr. Awang learned that he was designated surplus, he wrote to the Deputy Minister requesting a meeting to discuss this matter. In his letter, he indicated that, as one of the announced goals of the Public Service Commission was to increase the number of visible minorities in the FPS, he did not understand the rationale of the lay-off of an internationally recognized black scientist. He met with the Deputy Minister and subsequently with the Director General of the Personnel Administration Branch of HC, but he was unsuccessful in having the decision changed.

Between 1991 and 1993, Dr. Awang made persistent efforts to obtain another position within HC, but his efforts were unsuccessful. During that period a permanent position for a Research Scientist became available. But according to Dr. Awang, someone else was appointed to the position without a competition and even though the person appointed did not meet the educational qualifications required by the job description. Dr. Awang brought this matter to the attention of PIPSC, who intervened on his behalf, but was not able to achieve any positive result. On another occasion, another position became available for which Dr. Awang believed he was qualified. He did not get the position and subsequently found out that the position had been downgraded and given to someone who was working as a technologist with an undergraduate degree in another section in HC.

After he received his surplus notice, Dr. Awang made repeated requests for extensions to his termination date to give him time to seek another position within his area of experience in HC. At no time did he want to retire. Dr. Awang testified that he was prepared to do laboratory work if necessary and he suggested that he would return to University to be trained in another area. However, when he made that suggestion, he was told it would take more than two years to train and was not feasible.

After exhausting all the possibilities for another permanent position, and receiving no more extensions, he left HC in August, 1993.

(b) Ivy Williams

Ivy Williams holds a double masters degree in education and psychology from Columbia University. Her main work experience has been in education, child development and child mental health. She was senior lecturer at Mico Teachers College in Jamaica and, subsequently, a lecturer in the Faculty of Education at the University of the West Indies ("UWI"). She had also

served as the director of a regional pre-school child development centre at UWI, with supervisory responsibility throughout the islands of Barbados, Jamaica and St. Vincent. Currently, Ms. Williams is the acting chief of the Mental Health Promotion Plans Unit in HC. She has held that position since April, 1995. Her classification is a PM-04, which classification she has held since 1987 when she first became a permanent employee in HC.

The relevant portions of Ms. Williams' evidence centered around two matters, first her failure to obtain the position of Chief of the Children's Mental Health Unit, the Mental Health Division of HC; and second, her position as the first chair of the Visible Minorities Advisory Committee (VMAC) in HC.

14

Ms. Williams testified that the Children's Mental Health Unit was established in approximately 1992, as a result of her initiative and the proposal which she drafted to set up this unit. Her proposal was accepted and the unit was established with initial funding of about \$6.5 M. She also drafted the job description for Chief of the unit, which job description described very closely the work that she had done in the preceding five years and she expected that she would be appointed into this position on a permanent basis. She was not appointed and it was her understanding that a person with less educational qualifications and experience for the position was appointed Acting Chief, without competition. She later found out that the person appointed had worked at the PM-04 level as a Chief of Operations overseeing a budget of about \$18 M.

Ms. Williams testified that she did not feel personally discriminated against as a visible minority when she was not appointed as Chief, nor did she file a grievance. She felt that it was "terribly unfair treatment", but she was not disposed to pursue any appeal because it was too painful for her to do so. She did make a point of discussing this matter with her immediate supervisor, and pointedly recalled that her supervisor told her "that she did not see her as a manager". Ms. Williams requested that she be sent on language training immediately which was done, and following language training she was seconded to the Public Service Commission for approximately two years and returned to the Mental Health Unit in December, 1994.

It was pointed out to Ms. Williams during her cross-examination that there was a competition for the permanent position of Chief of the Children's Mental Health Unit dated July 25, 1994. Ms. Williams responded that this was the first she had heard about a competition because she had been away on a secondment. No one had informed her about this competition, even though she had regular contact with her supervisor in the Mental Health Division. Had she known, Ms. Williams said she certainly would have applied. She also noted that the acting Chief would have had a two year advantage in experience and knowledge of the position.

It was also pointed out to Ms. Williams in cross-examination that in her 1992 Performance Appraisal indicated that financial accountability and administrative tasks were not a priority for her and the Chief of the Children's Mental Health Unit was responsible for a substantial budget. Ms. Williams' response was that she regarded these comments as a

justification for not appointing her or considering her for the acting position. In her view, the requirement for financial accountability and administrative tasks were considerably less important than the program planning and development responsibilities in the job.

Ms. Williams also spoke about the Visible Minority Advisory Committee (VMAC) which was established by HC in 1991. VMAC consisted of twelve persons and Ms. Williams was elected the first chair of the Committee. VMAC's mandate was to recommend implementation of methods that advocate and promote the recruitment, retention and promotion of visible minorities in HC, and to advise HC on work related programs and policies that are responsive to a certainly diverse population. VMAC issued its report in September 1992 entitled "Health and Welfare: Excellence through Diversity". The VMAC noted a perception among visible minorities that discriminatory behaviour exists within HC. While there was no quantitative

15

data for the perception of the discrimination, the Committee concluded that whatever their origins and accuracy, these perceptions are detrimental to the individuals involved and to those they work with. VMAC made a number of recommendations including, establishing a mechanism to actively recruit visible minorities; that steps be taken to increase the representation of visible minorities on selection boards; that mechanisms be established to ensure that visible minorities are represented fairly at all levels and in all categories within HC, and that HC recognize, use and develop the skills of visible minorities and actively promote their career development.

According to Ms. Williams, VMAC's Report was given to the Deputy Minister, but there has never been any official acknowledgment of receipt of the Report and no discussion with VMAC as to its findings or recommendations.

(c) Tina Walter

Tina Walter holds an M.A. from the University of Western Ontario and is a management trainee in the Management Training Program offered by the Public Service Commission. Ms. Walter is a visible minority and was the Chair of the VMAC in 1993. Perhaps her experience as the Chair of VMAC can best be summed up by reference to her January 12th, 1994 memorandum to Kent Foster, the Assistant Deputy Minister of the Health Protection Branch and who was the liaison between VMAC and HC. Ms. Walter wrote this memorandum at that time she was leaving the Department to join the Treasury Board.

In her memorandum, she pointed out that being a member of the VMAC had been a test in perseverance. She pointed out that with exception, senior management had not shown any commitment to the issues of employment equity for visible minorities and visible minorities themselves recognized this lack of commitment. Over the past three years of the life of VMAC there has been no real movement towards change within HC at any level. She also pointed out that VMAC was asked by the Deputy Minister to prepare a Report, the Report was produced and distributed in 1992. By 1994 nothing had been done about the Report and the manner in which the Report was managed and addressed by HC was less than adequate. She concluded that the Department

can not afford to allow employment equity for visible minorities to continue to be a low priority.

(d) Dr. Daljit Dhillon

Dr. Daljit Dhillon is a Scientific Evaluator in the Bureau of Medical Services, Environmental Health Directorate of HC. Dr. Dhillon holds a M.Sc. in Chemistry from Harcourt Technological Collegiate Institute, India and a Ph.D. (1970) in Microbiology from the University of Manitoba.

Dr. Dhillon's testimony was focused primarily on his failure to be promoted or obtain an acting position at HC.

It is his belief that it is because of racial discrimination that he was not selected for acting positions that would help advance his career. He testified that on a number of occasions, he had appealed the selection

16

of the person chosen for the acting position for which he had applied, but he conceded that he had never alleged discrimination on any of his appeals nor had he ever made any complaints to the CHRC. His explanation for this was that he thought that such course of action would cause bad feeling and cause unnecessary antagonism in the work place. It was his position that he had to work within HC and therefore, had to live with the situation.

It is not our purpose here to determine whether or not Dr. Dhillon personally suffered racial discrimination. Rather our focus is on the process of appointment to acting positions that Dr. Dhillon described in his evidence.

Dr. Dhillon's concern related to the appointment of Dr. Mary Jane Bell as acting Head of the Pre-Market Review Section. Dr. Dhillon worked as an Evaluator in this section. According to Dr. Dhillon, Dr. Bell was appointed to this position in January, 1993, but no notice of the appointment or notice of a right of appeal was posted. As a result of Dr. Dhillon's and PIPSC's intervention, a notice of appeal was posted in November, 1993 and Dr. Dhillon and five other persons, four of whom were not visible minorities, filed an appeal on the basis that there had been no competition for this acting appointment. This appeal was allowed and the appeal board ordered that a competition be held for this acting position.

This was subsequently changed to a comparative paper assessment of the candidates who applied, rather than a competition. Dr. Dhillon testified that there was no written exam, that he was not interviewed and he had no idea of how he was assessed, other than the fact that he was assessed. He was advised in March, 1994 that his qualifications had been assessed and he was found not to be qualified for the position. The assessment was done by Dr. Freeland, the chief of the Device Evaluation Division to whom the head of the Pre-Market Review Section reported. Dr. Dhillon testified that Dr. Freeland did not supervise him and he had virtually no direct contact with him.

Dr. Dhillon subsequently learned that Dr. Freeland assessed him on the basis of his performance appraisals and on the basis of consultations with

his immediate supervisor, who, in this case was Dr. Bell, the acting head of the section and the person whose acting appointment had been appealed by Dr. Dhillon. Dr. Freeland had initially appointed Dr. Bell and Dr. Bell was confirmed in the acting position, having been assessed as the best candidate by Dr. Freeland.

A competition was held for the permanent appointment of Head of Pre-Market in September, 1994. The qualifications for the position included experience in the supervision of professional or support staff and now required a degree in natural, physical or applied sciences. Previously the statement of qualifications had required a post-graduate degree in biology. Dr. Bell does not have a degree in biology, but does have a post-graduate degree in chemistry. Dr. Dhillon applied for the position and was screened out because he did not have the management experience for the position.

Dr. Dhillon appealed the permanent appointment, but he withdrew the appeal because, in his view as a union steward with PIPSC, he did not have any faith in the appeal process. His experience has been that, even when

17

an appeal is successful and corrective action is required, the same person who was in the acting position seems to get appointed to the permanent position. Dr. Bell was the successful candidate.

It should be pointed out that prior to Dr. Bell obtaining the acting position, Dr. N. Chopra, a visible minority, was the Head of the Pre-Market Review Section from 1988 to 1991. She was succeeded by Dr. Boulay who was the acting head between 1991 and 1992. Dr. Chander replaced him and was then the acting head from about September, 1992 to January, 1993. Dr. Chander and Dr. Wadera are visible minorities. Dr. Dhillon did not appeal their acting appointments.

(e) Dr. Ajit Das Gupta

Dr. Das Gupta had an interesting tale to tell. He was born in India and came to Canada in 1952 as a student. He holds a Ph.D. in Physics and did post-graduate research at Oxford University. In 1959, he became a lecturer in nuclear and radiation technology at McMaster University, and in 1960 he joined HC as a Physical Scientist in the Radiation Protection Bureau. Dr. Das Gupta was promoted rather rapidly, first to Section Head, then to Assistant Chief, then to Chief, then finally Director, of the Bureau of Medical Devices. He was appointed to this position in about 1974.

When he first joined HC, Dr. Das Gupta worked in the newly formed Radiation Protection Program which was established to deal with Canada's concerns about the potential of radioactive emissions and nuclear fallout. He was very involved in the development of the legislation dealing with this subject matter, the Radioactive and Emitting Devices Act. Because of his expertise and work in the field, he was known across Canada in his words, as "Mr. Radiation", and travelled across the country to help provinces develop radiation protection programs.

By 1982, the Bureau of Medical Devices had grown to 35 employees of various scientific backgrounds and expertise. Dr. Das Gupta believed the Bureau should become more proactive and should adopt a preventative approach by carrying out a pre-market review of products, particularly those being used for human implant. In order to accomplish this, Dr. Das Gupta requested additional resources which was approved by the Deputy Minister and the Treasury Board. However, he had to obtain approval from the Director General of the Environmental Health Directorate to actually staff these positions. This Directorate was headed by Dr. Somers who did not agree that these resources should be allocated to the Bureau of Medical Devices. As a result, Dr. Das Gupta did not get these additional staff positions and a large backlog developed in the Bureau of Medical Devices in the processing of the many applications for approval received by the Bureau.

Dr. Das Gupta testified that from about 1982 until his eventual retirement in 1993, he was engaged in a constant battle with Dr. Somers to get the necessary resources to staff positions in the Bureau. In many instances he was given staff positions that were classified much lower than was required to perform the tasks. Dr. Das Gupta offered voluntary overtime and to divert resources from other areas within the Bureau to deal

18

with the backlog, but Dr. Somers would not approve any of these actions. Eventually Dr. Das Gupta became convinced that Dr. Somers was creating these obstacles because he wanted him out of the Bureau and was attempting to show that he was an ineffectual director.

In 1985, Dr. Das Gupta attended a conference in Madrid and was invited by the Spanish Government subsequently to spend time in Spain to advise on the development of their medical device program, his program in Canada having developed an international reputation. He advised Dr. Somers of this, but Dr. Somers did not approve this and told him that he was on a program of saving resources and intended to merge the Bureau of Radiation Protection and the Medical Devices Bureau into one. Two Directors would no longer be required and Dr. Das Gupta was to lose his position as Director. Instead, he would be appointed as a Special Advisor.

Dr. Das Gupta felt that since he had been responsible for the development of the Radiation Protection Unit that he should be the Director of the combined Bureaux. Dr. Somers, however, informed him that he lacked a suitable personality for the political and other aspects that were required for this new position. In particular, he did not have the personality and was not suitable to interact with the medical profession, scientists and politicians. Dr. Das Gupta testified that this was not the first time that Dr. Somers had spoken to him about his personal unsuitability. He and Dr. Somers had had many conversations over the years and when they talked about interacting with other people, Dr. Somers told Dr. Das Gupta that individuals of his background were not quite suitable because they were "colonials". Dr. Somers told him that "good brainy guys had to come from the U.K.". Dr. Somers also told Dr. Das Gupta that there were too many Indians in the Bureau and expressed the view that Indians were technically competent, but wondered if they were good for regulatory programs.

As Director of the Bureau of Medical Devices, Dr. Das Gupta sat on selection boards, particularly for competitions where the position to be filled would be reporting directly to him. Dr. Das Gupta testified that on some of these occasions, Dr. Somers would approach him and tell him whom he, Dr. Somers, would like to see selected as well as those who should not be selected. Dr. Das Gupta recalled on one occasion, there had been a competition for a Research Scientist and one of the candidates was a scientist from India. Prior to the formation of the selection board, Dr. Somers told him that he did not want him to sit on the board, as he may very well select this candidate because he was Indian.

On another occasion, Dr. Somers upon returning from a conference from India, told Dr. Das Gupta that visiting India had been a very unpleasant experience because the people of India were so corrupt. He also stated that "I hope you don't get some of that corruption here".

The two Bureaux were amalgamated as the Radiation Protection and Medical Devices Bureau and Dr. Das Gupta was not appointed as the Director. After these events had taken place, he reviewed the options available to him which were to accept the position of a Special Advisor, take medical leave, retire, or fight. He elected to retire from HC and did so in 1993.

19

(f) Dr. Shiv Chopra

Dr. Chopra is currently chair of the Employment Equity Committee of NCARR, immediate past president of NCARR. He played a key role in bringing NCARR's complaint to the CHRC. Dr. Chopra had previously filed a complaint against HC under section 7 of the CHRA, which was heard by another Tribunal. The major portion of his evidence before this Tribunal related to his personal experiences and, in particular, his obvious frustration with his inability to rise within the management structure in HC. Dr. Chopra's individual complaint is not before this Tribunal and we have considered his evidence to the extent only for its relevance to the staffing practices at HC that have been alleged by NCARR to create barriers to the progression of visible minority employees into management.

Dr. Chopra has a B.VSc. (1957) from Punjab Veterinary College, India and a Ph.D. (1964) in Microbiology from McGill University. Prior to coming to Canada and after obtaining his B.VSc., he worked as a veterinary surgeon in charge of the State Veterinary Hospital in India, supervising a staff of six assistants. His duties in this position involved management of technical, fiscal matters and personnel. From 1958 to 1960, he was a research officer with the Biologics Production and Quality Control at the Punjab Veterinary College, and managed a staff of 30 scientific and technical personnel.

In 1965, Dr. Chopra moved to England to work for Miles Laboratories. He headed a section of a multi-disciplinary team of 13 researchers and the functions of this position involved the supervision and management of the pharmacology and toxicology program for the regulatory approvals of new drug submissions.

Dr. Chopra returned to Canada in 1969 and joined HC as a Scientific

Advisor (SA-1), in the Bureau of Human Prescription Drugs (BHPD) of the Health Protection Branch and was reclassified in 1971 to a Biologist 4 (BI-04).

Dr. Chopra worked in the BHPD from 1969 to 1987. In 1987, Dr. Chopra applied for and was selected for a position in the Human Safety Division of the Bureau of Veterinary Drug, with the classification of Veterinary Medicine 4 (VM4). He has remained in this Division and at this classification since 1987 (with the exception of some special assignments).

During his tenure with HC, Dr. Chopra has received fairly extensive management training, either through formal training courses or through his involvement on management related committees and on task forces. He has frequently acted as Chief of his Division for short periods of time and performed the regular duties of the Chief on a day to day basis.

Dr. Chopra was keenly interested in moving into management at HC and it is clear from his evidence that over the years, he experienced an increasing level of frustration due to what he characterized as senior management's insensitivity and inaction with respect to his requests, given his experience, qualifications and positive performance appraisals.

Dr. Chopra gave evidence relating to a particular staffing action at HC which he put forward as raising issues of fair treatment in the staffing

20

process. These are the events of 1990 to 1992 which involved the acting appointment of Dr. Claire Franklin to the position of Director, Human Prescription Drugs and the saga of all that happened following that appointment.

In 1990, the position of the Director of the BPD, where Dr. Chopra worked for eighteen years, became vacant. Dr. Chopra wrote in September, 1990, to Dr. Somers, the Director General, proposing himself as a candidate for the position and he also wrote to Dr. Liston, the Assistant Deputy Minister. Dr. Liston replied that Dr. Somers thought that this position should be filled by someone with a medical background. The position was described as bilingual and required the director to be a medical doctor. The previous incumbent did not have a medical degree and the duties were split between the director and assistant director who was a medical doctor.

No competition was held to fill the vacancy, and Dr. Franklin was given the acting appointment in October, 1990.

Dr. Franklin had been chief of a division in the Environmental Health Directorate for about nine years and had substantial experience as a manager. She was not a medical doctor, nor was she bilingual at the time of the appointment.

The statement of qualifications for the position was not prepared until March 25th, 1991, but was made retroactive to October, 1990. It did not require that the director be a medical doctor. Dr. Chopra objected to and appealed the acting appointment in December, 1990 to the PSC. Early in 1991, HC created an EX-02 Director position with some job qualifications

as Director, except for the requirement to be a medical doctor. The medical duties were assigned to another position. Dr. Franklin was appointed to this position on an acting basis for four months when her previous acting appointment expired and was reappointed two more times to the end of November, 1991.

The appeal heard on July 19th, 1991, was allowed, the appeal board finding that Dr. Franklin was not fully qualified for the position of Director. Notwithstanding this decision, Dr. Franklin continued to act in the position for two more months until, through intervention of Dr. Chopra and PIPSC, the PSC ordered that Dr. Franklin's acting appointment be terminated on September 20th, 1991, and that there be two competitions, one for a four month acting appointment and the other for the permanent position as director. Dr. Franklin continued in the position and continued to exercise the responsibilities of Director, but she was classified and paid at her previous classification and salary level not at an EX-02 level.

In October, 1991, a competition for the position of Director was posted, but Dr. Chopra could not apply because his classification was one level below the eligibility level set for the position. Dr. Chopra responded by an application to the Federal Court requesting that Dr. Franklin's appointment be revoked. This litigation was resolved on the basis that Dr. Franklin would be assigned to other duties, that there would be a new competition to staff the permanent position of the Director and Dr. Somers was excluded from any involvement in the selection process. On March 20th, 1992, a competition was posted for the position of Director and Dr. Chopra was eligible to apply, which he did. Dr. Chopra was screened

21

out by the screening committee for the reason that he did not possess the necessary management experience. Dr. Franklin was found to be qualified and her appointment as a permanent Director was confirmed on April 21st. At the same time, the position of Assistant Director was abolished. Both Dr. Chopra and Dr. Michele Edwards, the former assistant director, appealed the appointment of Dr. Franklin, but their appeal was dismissed on July 27th, 1992. The appeal board found that HC had not acted improperly by reclassifying the position of director to an EX-02 and dropping the requirement of a medical doctor. The board also upheld the selection of Dr. Franklin and concluded that Dr. Chopra did not possess the necessary management experience for the position.

On October 12th, 1992, a final level grievance meeting was held with the Deputy Minister of HC. Dr. Chopra presented a written statement outlining the grounds for his grievance, but nothing was resolved in favour of Dr. Chopra except that the Deputy Minister directed Shirley Cuddihy of Staff Relations to speak to Dr. Liston and Dr. Somers with respect to the reasons why Dr. Chopra was not being promoted into management.

(B) Systemic Barriers in Staffing and Staffing Development Systems in HC

1. Dr. Nan Weiner

Dr. Nan Weiner, a consultant in human resources, including staffing and organizational behaviour, gave expert evidence for the Complainants. Dr. Weiner has a Ph.D. (1977) in human resources from the University of Minnesota and over 20 years of human resources experience gained through practical experience, consulting and teaching. Dr. Weiner was qualified as an expert in staffing development and systemic discrimination.

Essentially, Dr. Weiner's evidence consisted of identifying in general terms, systemic barriers in staffing and staffing development which adversely affect the hiring and promotion of visible minorities. She then examined two specific staffing practices at HC to determine whether barriers, which are found in other employment systems, were operating in HC. Having concluded that certain barriers were present, Dr. Weiner then suggested remedies to overcome the barriers found at HC.

Dr. Weiner defined staffing as initial hires and promotion and staffing development as dealing with employees' needs to develop the skills necessary to do their current jobs and obtain the additional skills necessary for promotion.

Barriers are staffing practices which directly or indirectly disadvantage members of a particular group, and for which there is no job related rationale.

To identify the relevant barriers, Dr. Weiner relied primarily on three sources. The 1995 Glass Ceiling Report of the U.S. Federal Glass Ceiling Commission (which was concerned with the opportunities for women and minorities to advance to management and decision making positions in private sector organizations in the United States) and two reports prepared by the FPS, *Breaking Through the Visibility Ceiling: Interim Report of the Visible Minority Consultation Group on Employment Equity* (March 27, 1992);

22

and *Distortions in the Mirror: Reflections of Visible Minorities in the Public Service of Canada* (January 22, 1993), (both reports prepared for the Secretary of the Treasury Board and Council of Deputy Ministers).

The two specific staffing and staffing development practices at HC that Dr. Weiner examined were:

(1) promotion of visible minorities into senior management;
and

(2) initial hire and promotion of visible minorities in the A&FS category.

With respect to (1) above, Dr. Weiner extracted the following barriers that she considered relevant to HC and then sought to determine whether these barriers are operating in HC:

(a) ghettoization of or the clustering of visible minorities into technical and professional jobs that do not lead to management positions;

(b) staffing decisions which are ultimately based on an informal process;

(c) less encouragement for visible minorities; and

(d) perceiving visible minorities as different and "unfit for managerial positions".

(a) Ghettoization

Ghettoization, is the clustering or concentration of visible minorities in staff jobs or in highly technical or professional jobs from which they do not proceed into management positions, in other words, a "visibility trap".

Dr. Weiner considered that the possible explanations for the under-utilization of visible minorities in senior management could be lack of interest of visible minorities in management, or lack of skills of visible minorities for management. She concluded that there is no evidence that visible minorities as a group, are any less interested than non visible minorities in advancing into management. Certainly at least, the evidence of Ms. Williams, Dr. Dhillon, Dr. Chopra and Dr. Das Gupta is to the contrary. With respect to skills, Dr. Weiner stated that there is nothing to suggest visible minorities in the S&P category are any less skilled professionally or technically than other employees.

Dr. Weiner noted, however, that lack of management experience seemed to be holding back visible minorities from management positions. This was the reason given for the failure of Dr. Chopra, Dr. Dhillon and Ms. Williams to be promoted to management.

For Dr. Weiner, the requirement for managerial experience is a legitimate one and not necessarily discriminatory. However, for this requirement to operate in a non-discriminatory way, there must be an opportunity for all employees to obtain the necessary training and experience, and the assessment of this qualification must be consistently assessed for all employees.

23

Dr. Weiner referred to Dr. Reitz' survey data, which indicated a minority disadvantage in access in management training, and a minority disadvantage in obtaining supervisory responsibility and acting positions, all three of which are important methods of obtaining the requisite experience. The evidence of Ms. Furrie also confirmed the minority disadvantage of visible minorities in obtaining acting appointments. This data also showed a minority disadvantage with respect to how employees were appraised of acting appointments.

Dr. Weiner also considered the promotional patterns of visible minorities in the S&P category into the EX positions. These patterns (described in Ms. Bosch's evidence) showed that the majority of EX positions are filled from occupations in the feeder group in which there are few or no visible minorities.

Dr. Weiner also noted by reference to Dr. Chopra and Ms. Williams that managerial qualifications are not consistently assessed; their management and supervisory experience, although admittedly obtained prior to joining HC, seemed to be discounted.

Dr. Weiner concluded that the under-representation of visible minorities could not be explained by lack of interest or lack of skills on the part of visible minorities. This under-utilization and the promotional patterns are consistent with a finding that the barrier of ghettoization is operating in HC.

(b) Less Encouragement of Visible Minorities

Dr. Weiner referred to the survey response which indicated that, in the employment context, visible minorities receive less encouragement than whites. Dr. Weiner explained this is important because people tend to apply for promotions because they feel they are competent and are eager to move up the ladder. But there is always some uncertainty about one's ability to succeed at the next level and in her view, people watch for signals from their manager or from their organization that if they bid for a higher level job, that they will be given fair consideration. These signals can be encouragement to take management training programs, serving on committees or task forces or other activities that provide experience and exposure to others in the organization.

The survey data was that whites are more likely to be told about training opportunities than visible minority employees; whites are more often asked to apply for acting positions, whereas visible minorities had to be more proactive and self-sufficient in seeking management training opportunities and acting positions; and whites are very much more likely to be asked to serve on selection boards. This is important because whites are asked to take part in who gets chosen for promotion and racial minorities are not included in that decision making process.

The result is that whites are getting more of the experience and training necessary for promotion into the EX jobs.

(c) Informal Staffing Decisions

24

Staffing decisions based on an informal process can present a barrier for promotion, because, according to Dr. Weiner, the less formal the process, the less likely job qualifications will be set out in advance, will be assessed in a standard manner for all candidates and will allow for their recognition in candidates who are different from those who typically perform the job.

In reviewing this as a potential barrier, Dr. Weiner focused on acting appointments. The evidence indicated that acting appointments had become a significant part of the staffing actions of HC in recent years and many of the acting positions were filled without competition. In her opinion, the more acting positions, the more the likelihood that the selection will be more informal. The more informal, the more the unintended bias can affect the selection process.

The acting appointments of Dr. Bell and Dr. Franklin provide examples of how bias or perceived unfair treatment can enter the selection process. Dr. Bell was appointed without a competition and when on appeal it was found that Dr. Bell's appointment was made on a too informal basis, it was then made a second time by the same manager who originally appointed her, on the basis of a paper assessment of all the candidates. In this situation, it is very likely that the second decision has been influenced by the fact that the same person made the first decision.

Dr. Bell's appointment and Dr. Franklin's appointment (which was also made without a competition), were also coloured by the fact that the job qualifications were tailored to fit the pre-selected candidate or were changed after the staffing action had begun.

In Dr. Franklin's case, she remained in the position, even after she was found not to be qualified.

This informality can create barriers in that not all potentially qualified staff can seek the acting position. Further, the acting assignment provides valuable managerial experience and gives the person who is acting the appearance of being "right" for the jobs.

Dr. Reitz' survey results showed that visible minorities proportionately get less acting appointments than whites and the effect may well be that they are less likely to apply because they do not believe they have a chance to be appointed.

(d) Perceiving Visible Minorities as Unfit for Management

For Dr. Weiner, the evidence of this barrier in Health Canada is found in the September 1, 1992, memorandum from Shirley Cuddihy, then, Chief, Staff Relations, Operations to Rod Ballantyne, Director-General, Personnel Administration Branch.

This memorandum came out of the direction of the Deputy Minister following Dr. Chopra's grievance hearing. The Deputy Minister wanted information concerning the impediments to the promotion of Dr. Chopra into a management position. Ms. Cuddihy was asked to meet with senior management who knew Dr. Chopra and she met with both Dr. Liston, the

Assistant Deputy Minister for the HPB and Dr. Somers, the Director General of the Drugs Directorate.

Ms. Cuddihy prepared the memorandum based on her hand written notes taken during her interviews with these two persons. Her notes were in point form and she prepared the memorandum from these notes immediately after the meeting.

Ms. Cuddihy was very definite in her evidence that the memorandum accurately represented the ideas and thoughts which Dr. Liston and Dr. Somers expressed to her during the meeting. The Tribunal accepts her evidence that the memorandum is an accurate representation of their position.

Almost all of the memorandum deals with Dr. Liston's comments. It is his general comments that are of importance here. His comments are as follows:

General:

Employees who are being considered solely for "technical" positions seem to fare better than when being considered for "management" positions. The cultural differences are minimized when we are only looking for the scientific approach. However, when we start looking for the "soft skills" such as communicating, influencing, negotiating... quite often their cultural heritage has not emphasized these areas and they are at a disadvantage. (Exhibit HR-4)

For Dr. Weiner, the reference to "technical" positions rather than "management" and "cultural differences being minimized for the scientific approach", suggests an attitude that individuals of the same racial group as Dr. Chopra, are good at jobs involving technical matters, but are not good in management jobs. Racial differences are irrelevant to staffing for scientific jobs, but not for management positions.

The memorandum goes on:

Abilities to interact with a number of stakeholders, such as industry as well as internally with peers, subordinates and superiors are important. As well we do business in the North American way - "consensus reaching model" which to some cultures is very foreign. (Exhibit HR-4)

Dr. Weiner's comment is that this sets up a stereotype, namely, that there is only one style of management that can be successful and only one set of people can manage that way and that does not include those such as Dr. Chopra. This attitude respecting cultural differences and abilities was also reflected in the comments of Dr. Somers, who expressed the view to Dr. Das Gupta that "good brainy guys had to come from the U.K".

Dr. Weiner also highlighted Dr. Liston's comment that:

26

There is however a bit of a paradox in highlighting what we consider needs to be changed because we run the risk of having to defend ourselves against charges of assimilation. He suggests that we need to provide minority groups with training - we need to point them in a direction in a mirror and say: because of your cultural background, you need to communicate better to adopt a less authoritarian style. (Exhibit HR-4)

Dr. Weiner's translation of this is that there is an assumption that there is only one way to perform a job successfully. What this does is to

set up a "us/them" kind of dichotomy, seeing visible minorities as different and thus the need to change their ways, so that they can acquire the ability to manage.

Dr. Weiner agreed that the ideas and attitudes expressed may not be representative of management in HC. But she pointed out that Dr. Liston was the Assistant Deputy Minister and the more senior the managers, the more they contribute and set the tone for the whole department.

Other comments such as those expressed to Dr. Das Gupta by Dr. Somers that Indians are corrupt and the suggestion that he, Dr. Das Gupta, should not sit on a selection board because as a visible minority, he would be biased in favour of a visible minority candidate; and the comments of Dr. Lodge to Dr. Awang, calling him "Blackie" and "Hello darkness my old friend", are consistent, in Dr. Weiner's view, with an organizational attitude of "we/they", (even bordering on individual discrimination).

(e) Under-Representation in the A&FS Category

Finally, Dr. Weiner dealt with under-representation of visible minorities in the A&FS category. Both Ms. Bosch's and Ms. Furrie's evidence showed this to be the case. This in itself, of course, does not establish that there is discrimination in the recruitment practises for the A&FS category. During the hearing, Respondent counsel objected to the Tribunal making any finding of discrimination in HC's recruitment practices for the A&FS category arguing that this had not been identified as an issue. Counsel did agree, however, that if the Tribunal finds that one of the reasons for the under-representation of visible minorities in management is because of the under-representation of visible minorities in the A&FS category, then the Tribunal can make an order to correct this under-representation, without deciding whether HC has or has not discriminated in its recruiting practices.

IV THE FINDINGS

The Tribunal makes the following findings on the evidence:

- (1) There is a significant under-representation of visible minorities in senior management in HC.
- (2) There is a significant under-representation of visible minorities in the A&FS category in HC. This

27

is a contributing factor to the very low numbers of visible minorities in senior management.

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

- (4) The majority of members in the EX group from the S&P category

were recruited from occupational groups with a fairly high representation of visible minorities, but no visible minorities were recruited from this group; or were recruited from occupational groups with no visible minorities; and there was a very low recruitment of members into the EX group from feeder occupational groups with a very high representation of visible minorities.

(5) The failure of visible minorities to progress into management cannot be explained by a lack of interest or lack of technical or professional skills on the part of these visible minorities.

(6) A common theme in the evidence is that visible minorities in HC lack the necessary managerial experience to move into senior management positions.

(7) The necessary managerial experience can be obtained through acting positions, and through exercising supervisory responsibilities and through management training programs.

(8) Acting positions constituted a very large part of the total staffing actions in HC during the period 1991 to 1995.

(9) Acting appointments were often made without a competition and on an informal basis. As a result, potentially qualified persons are not considered for appointment or when an acting appointment is challenged, the subsequent selection process is affected by an unintended bias so that the person initially appointed is usually confirmed in the position.

(10) Visible minorities proportionately were given less acting positions than non-visible minorities.

(11) Visible minorities were at a disadvantage with respect to how they found out about acting positions. Non-visible minorities were more often asked by their managers to apply whereas visible

28

minorities were required to be more proactive in finding out about opportunities for acting positions.

(12) Visible minorities received less management related training than non-visible minorities.

(13) Non-visible minorities were more often informed of management training opportunities by their managers whereas visible minorities had to be much more self-reliant in finding out about these opportunities.

(14) There is a minority disadvantage in terms of supervising other employees. Management training and having held an acting appointment increased the likelihood of supervisory responsibility for both non-visible minorities and visible minorities. But in the case of non-visible minorities with

management training or non-visible minorities who held acting positions, there was a significant increase in the likelihood of being supervisors as compared to visible minorities.

(15) Visible minorities are viewed by senior management as culturally different within HC and are not considered suitable for managerial positions.

(16) There is a significant difference in the participation of visible minorities in hiring and promotion decisions. Non-visible minorities are almost twice as likely to serve on selection boards as non-visible minorities. The difference is even greater for those visible minorities who are more senior and have more qualifications. This suggests that management, whose responsibility it is to appoint members of the selection board, chooses members for reasons that have little to do with the level of education, experience or responsibility.

V CONCLUSION

The Complainants have taken the position from the beginning that this complaint is one of "systemic discrimination". In the case of *Action Travail des Femmes v. Canadian National Railway, et al.* [1987] 1 S.C.R. 1114, the Supreme Court of Canada in considering the meaning of systemic discrimination, referred to in the *Abella Report on Equality in Employment* which did not define systemic discrimination but set out the essentials as follows:

Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics...

It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or

29

systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This is why it is important to look at the results of a system... (pp. 1138-1139)

The Court went on to say that:

...In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of

recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of natural forces...(p. 1139)

The essential element then of systemic discrimination is that it results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.

It is clear from the evidence in this case that visible minority groups in HC are being affected in a disproportionately negative way. There is a significant under-representation of visible minorities in senior management in HC and in the A&FS category in HC. Visible minorities are bottlenecked or concentrated in the feeder group in the S&P category and are not progressing into senior management.

To paraphrase Judge Abella, this is a signal that certain employment practices that lead to this adverse impact may be discriminatory.

In the case of *Basi v. Canadian National Railway Company*, 9 C.H.R.R. D/5029 (a decision of the HRT), the Tribunal pointed out and we accept as well-established law, that the Complainants must first establish a prima facie case of discrimination and once that is done, the burden shifts to the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Further, there is virtual unanimity in the cases that the usual standard of proof in this type of case is the civil standard of a preponderance of the evidence.

The Respondent, using a rather bold strategy, chose not to call any evidence to explain the reasons for the significant under-representation of visible minorities in senior management or the reasons for the high concentration of visible minorities in the feeder group. Rather the

30

Respondent tended to rely mainly on the cross-examination of the Complainants' witnesses and make the Complainants satisfy their onus.

The Tribunal has concluded that the Complainants have made out a prima facie case of discrimination which the Respondent has not rebutted. There are a number of staffing practices of HC that have a disproportionately negative effect on visible minorities in HC which the Tribunal finds to be discriminatory.

These practises have been identified in the Tribunal's Findings, specifically Finding numbers 4, 9, 10, 11, 12, 13, 14, 15 and 16. Thus, it is the Tribunal's decision that HC has established or pursued staffing practises that are discriminatory in contravention of section 10 of the

VI JURISDICTION ON REMEDY

The Respondent challenged this Tribunal's jurisdiction to make an order in the nature of an "employment equity remedy", which we intend to do. The Respondent argued that the Tribunal's jurisdiction is limited to making an order that HC cease the discriminatory practice. This is because the authority to impose an employment equity program is vested in the PSC and the Treasury Board under the provisions of the FAA and PSEA. As we indicated earlier in our reasons, we do not agree with this argument. Section 53(2)(a) of the CHRA gives this Tribunal the jurisdiction to make a cease and desist order. In addition if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the CHRA.

The scope of this jurisdiction was considered by the Supreme Court of Canada in the Action Travail des Femmes case. In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141)

The Supreme Court also said in reference to the Order made by the Tribunal in that case:

...When confronted with such a case of "systemic discrimination", [as was the case with Canadian National Railway], it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met.

31

In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed, there is no prevention without some form of remedy... (at pages 1141 to 1142)

The Court pointed out that:

Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render

itself otiose. (at page 1142)

And at pages 1143 to 1144:

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless....

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping.....

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from a targeted group eliminates the problems of "tokenism".

In the Tribunal's opinion, an employment equity remedy is required in this case to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified.

The Respondent has argued that there is no conflict between the CHRA and the FAA and the PSEA. Rather the two regimes complement each other and therefore the paramountcy principle does not apply. In this respect, the Respondent's argument is similar to the argument made by the Respondent in the case of *The Attorney General of Canada v. Uzoaba* [1995] 2 F.C. 569.

In the Uzoaba case, as part of its order, the Tribunal required Correctional Service Canada to reinstate Dr. Uzoaba in a position which amounted to a promotion from his previous position. Counsel for the Attorney General argued that this would be contrary to the merit provisions of the PSEA and the scheme in the PSEA for promotions and that this cannot be overridden by a Human Rights Tribunal. Counsel also argued that in the

32

case of a direct conflict, the CHRA would apply, however, the conflict here was not direct. In response to this argument, the Court said:

On its face, the Tribunal's order appears to fall squarely within the jurisdiction of a Tribunal under paragraph 53(2)(b) of the Act.

The law is clear... It is not clear to me how this argument assists counsel. Indeed, counsel for Dr. Uzoaba submits there is no real conflict between the Act and the Public Service Employment Act. He says that the promotion on merit provisions of the Public Service Employment Act apply in the normal, day-to-day administration of the Public Service and the Act does

not purport to displace the Public Service Employment Act in that respect. In practical terms I agree with this submission.

However, even if the power of a Human Rights Tribunal to order promotion in the Public Service conflicts with the Public Service Employment Act, I am satisfied that the provisions of the Act must prevail. (at pp. 576-577)

The unanimity that the CHRA is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 S.C.R. 145, 158, and further articulated by the Supreme Court of Canada in *Winnipeg School Division No. 1 v. Craton* [1985] 2 S.C.R. 150, at p. 156 where the court stated:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or repealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577)

Following on this principle, the Court in the *Uzoaba* case held that:

I think this principle of paramountcy must apply in this case to enable a Human Rights Tribunal to order a promotion which it has found has been denied for reasons of discrimination, contrary to the Act. In other words, the jurisdiction of the Public Service Commission and the process respecting promotions within the Public Service must give way in those rare exceptions where promotions have been denied based on discriminatory reasons and where a Tribunal, acting within its jurisdiction under the Act, orders a promotion in order to remedy the results of discriminatory action taken by the employer. (at p. 577)

33

Although there may not be a direct or real conflict between the CHRA and the FAA and the PSEA, the effect of the Respondent's argument would be to prevent this Tribunal from exercising the whole of the jurisdiction conferred upon it under the CHRA where the Tribunal has concluded that HC has engaged in discriminatory employment practices.

To accede to the Respondent's argument therefore would be to deny the paramountcy of the CHRA over the FAA and PSEA. The law is unequivocal that the jurisdiction conferred upon this Tribunal under section 52 can only be altered or an exception created by a clear legislative pronouncement. There is no such legislative pronouncement in the FAA or the PSEA that in any way affects the jurisdiction of this Tribunal under section 52 of the

CHRA. Accordingly, we dismiss the Respondent's motion objecting to this Tribunal's jurisdiction to make an order in the nature of an employment equity remedy.

VII ORDER

The Respondents entered as an exhibit, a document entitled "Detailed Measures - Employment Equity for Visible Minorities at Health Canada". In the introduction to the Detailed Measures, it is stated that HC is committed to ensuring that no person will be denied employment opportunities or benefits for reasons unrelated to ability and that HC is committed to equitable representation and participation of visible minorities at all levels of the organization, corresponding to their availability. HC is also committed to implementing a series of measures for visible minorities intended to achieve improved representation, access to training, development, promotion and overall career advancement. This document sets out detailed measures relating to numerical targets, appointments, recruitment strategies, acting appointments, supervisory/management training and development, career counselling services, and a procedure for monitoring an enforcement.

By letter dated November 15th, 1995, to the Chief Commissioner of the CHRC, the Acting Secretary of the Treasury Board, the President of the Public Service Commission and the Deputy Minister of HC committed these agencies to the implementation of these measures.

The CHRC also presented to the Tribunal, an Outline of the Remedy that the CHRC and the Complainants were seeking. This Remedy was expanded upon in the evidence of Dr. Weiner.

There are many areas of agreement between the Detailed Measures and the Outline of Remedy. But there are two major areas of disagreement namely, the numerical targets and the number of years it will take for visible minorities to reach proportional representation in the EX group; and the enforcement and monitoring of the remedy.

Even though there is considerable overlap between the Detailed Measures and the Outline of Remedy, the parties could not finally agree on the measures to be taken to achieve equitable representation of visible minorities at HC.

34

The Tribunal, having concluded that HC engaged in certain staffing practices, contrary to section 10 of the CHRA, orders HC to adopt and implement the following special corrective measures program.

SPECIAL CORRECTIVE MEASURES PROGRAM

The objectives of the special corrective program are to:

(i) eliminate discriminatory employment barriers for visible minorities in HC;

(ii) remove discriminatory barriers to the full participation of visible minorities in the EX/Senior Management and in the A&FS categories;

(iii) ensure the maximum utilization of the knowledge, skills, and expertise of visible minorities;

(iv) redress the effects of past discrimination and ensure that HC's organizational structure more accurately reflects its diverse workforce and demographics.

PERMANENT CORRECTIVE MEASURES

(1) HC shall immediately set standards to ensure that visible minority employees are evaluated not only on experience, but also on desirable skills in determining personal suitability for positions.

(2) HC shall train all individuals selected, or who may be selected to sit on selection boards on the proper interviewing techniques needed to facilitate bias-free selection. In addition, HC will develop a list of trained employees from the visible minority group who would be made available to participate on selection boards. Where possible HC should use selection boards that are diverse in its composition.

(3) HC shall provide training to all managers and human resource specialists on strategies to recruit, promote and retain visible minorities by providing guidelines and training on bias-free selection and recruitment practices. This will also include sensitizing them to diversity and employment equity issues, including systemic barriers.

(4) HC shall conduct workshops throughout the department on the benefits of a diverse workforce and human rights legislation, with attendance of management being mandatory.

(5) HC shall set clearly defined qualifications for all EX/Senior managerial positions as well as for all A&FS positions and ensure that these criteria are known to everyone interested in moving into senior management and into the A&FS categories and to all those involved in the staffing process.

35

(6) HC shall develop in advance parts of the selection process to assess skill needed for EX/Senior Management and A&FS positions which will be used when filling acting appointments.

(7) HC shall develop a computerized inventory (Human Resource Information System) of visible minority and white employees in feeder positions who are interested in advancement into EX/Senior Management categories so that this information is available to staffing managers when acting and/or indeterminate jobs become

available.

TEMPORARY CORRECTIVE MEASURES

(1) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent EX/Senior Management category at the rate of 18% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into this category within this time frame.

(2) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities into the permanent feeder level positions of the A&FS category at the rate of 16% per year (twice the rate of availability) for five years in order to reach 80% proportional representation of this designated group into that category.

(3) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the S&P category to acting positions for four months or longer, in the EX/Senior Management category at a rate of 18% per year (twice the rate of availability) for four years to enable visible minorities to develop the requisite job qualifications needed to be screened into permanent competitions when they become available.

(4) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category to acting positions, for four months or longer, in the EX/Senior Management category at a rate of 16% per year (twice the rate of availability) for four years, to enable visible minorities to acquire the requisite job qualifications needed to be screened into permanent competitions when they become available.

(5) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities in the S&P category at the rate of 18% per year (twice the rate of availability) for four years, to acting positions, for four months or longer, in the EX minus three and EX minus four positions with supervisory /managerial responsibilities in the S&P category.

(6) Within a period of six months from the date of this order HC shall commence the appointment of visible minorities from the A&FS category, at the rate of 16% per year (twice the rate of

availability) for five years, to acting positions of four months or longer, in the Ex minus three and EX minus four positions with supervisory/managerial responsibilities.

- (7) To ensure the successful attainment of the goal of the special corrective measures within the specified time-frame, hiring managers of EX/Senior Management staff at HC shall undertake a special reporting measure. Before a final decision is made in any competition where visible minority candidates have been considered but a visible minority candidate has not been selected, the hiring manager(s) or selection board will explain to either the Deputy Minister or the Assistant Deputy Minister why the visible minority candidates were not found to be qualified.
- (8) In order to ensure that the numerical goals are attained and within the specified time-frame, HC shall state specifically in all Staffing Notices (Internal and External Recruiting Advertisements, Job Postings, Electronic Job Postings, MRIS job search, and all other Staffing communication media), for EX/Senior Management and Administrative and Foreign Service positions that HC is an "Equal Opportunity Employer" and that this particular advertisement is aimed at visible minorities.
- (9) HC shall identify visible minorities (and whites) in feeder group positions who are interested in advancement into EX/Senior Management and Administrative and Foreign Service jobs so individual career plans can be developed for these groups which highlight what employees are required to do to be viable candidates for such jobs.
- (10) HC shall develop outreach recruitment sources for visible minorities and use them when hiring into Administrative and Foreign Service jobs. Doing so, requires HC to use different media to target visible minorities who have not traditionally learned about job openings e.g., advertising in visible minority - based newspapers, and using informal networks of visible minorities in HC and other federal departments.
- (11) HC shall establish mentoring programs and shall train current Senior Management on methods of mentoring its cross-culturally diverse workforce and shall reward good mentoring.
- (12) HC shall invite visible minorities to attend the departmental "Learning for Leadership" programs and set aside 25% of the seats for visible minorities, to be assigned on a first come basis.
- (13) HC shall invite visible minorities to participate in departmental and other training courses including the Health Protection Management Development Program with 25% of program seats set aside and allocated to visible minorities on a first come basis.
- (14) HC shall invite visible minorities in the feeder group levels to participate in Canadian Centre for Management Development (CCMD)

(15) HC shall appoint a person who shall be responsible with full powers to ensure the implementation of the special temporary corrective measures and to carry out any other duties so assigned by HC to implement this order.

(16) There shall be an annual performance assessment of HC's executive/senior managers including Assistant Deputy Ministers, Director Generals, Directors and Division Chiefs regarding full compliance with this order.

(17) HC shall establish an Internal Review Committee, co-chaired by the Director General, Human Resources and Chair of the Visible Minorities Advisory Committee. Membership of the Committee shall include an equal number of departmental managerial representatives and delegates from the Advisory Committee on Visible Minorities with additional expertise to be made available on an as required basis. The Internal Review Committee shall monitor the implementation of this plan. The Committee shall meet on a quarterly basis and the Co-chairs shall meet with the Deputy Minister following these meetings to report the results directly. A report shall be made to the Departmental Executive Committee semi-annually.

(18) HC shall submit to the Canadian Human Rights Commission:

(a) Within 60 days of the introduction of the special corrective measures program the current numbers of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups; percentage representation of employees in the EX, EX Equivalent, EX minus 1, EX minus 2, EX minus 3 and EX minus 4 groups;

(b) Within 60 days of the end of each quarterly period after the implementation of the aforementioned special temporary corrective measures, and for the entire duration of the said measures, after forwarding a copy to NCARR and PIPSC for their information, a report outlining:

i) The number and percentages of visible minorities appointments to the EX/Senior Management and the Administrative and Foreign Service categories;

ii) The number and percentage of visible minorities appointments to acting positions to the EX/Senior Management and the Administrative and Foreign Service categories;

iii) The number and percentage of visible minorities chosen to sit on selection boards; training sessions

made to recruit visible minorities for the EX/Senior Management and Administrative and Foreign Service categories for indeterminate and term positions during the previous quarter;

iv) A comparison of the participation rate of visible minorities in training and development activities to that of the Department's general employee population; and the specific steps being taken to ensure that the Department's policies and practices are free of employment barriers.

39

Dated at Toronto, Ontario, this 31st day of January, 1997.

J. GRANT SINCLAIR, Q.C., Chairperson

CAROL H.Y. BOXILL, Member

ALVIN TURNER, Member