

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

GIAN S. SANGHA

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MACKENZIE VALLEY LAND AND WATER BOARD

Respondent

REASONS FOR DECISION

MEMBER: J. Grant Sinclair 2006 CHRT 9
2006/02/24

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I. THE COMPLAINT

[1] Dr. Gian S. Sangha filed a complaint dated May 6, 2002 with the Canadian Human Rights Commission. He alleges that the respondent, the Mackenzie Valley Land and Water Board (Board) discriminated against him on the grounds of race, national or ethnic origin, colour, religion and age by refusing to hire him for the Regulatory Officer (RO) position with the Board. He alleges that this refusal is contrary to s. 7 of the *Canadian Human Rights Act*.

A. The Respondent Mackenzie Valley Land and Water Board

[2] The Board is a regulatory authority established under the *Mackenzie Valley Resource Management Act*. The primary function of the Board is to process applications for land use permits and water licences in those areas of the MacKenzie Valley in the Northwest Territories where land claim agreements have not yet been concluded, i.e. in unsettled land claim areas. The Board also processes transboundary land and water applications in the Mackenzie Valley where the application transcends the boundaries of more than one settlement area.

[3] Some examples of activities that require a land use permit are the use of explosives greater than 50 kg; the use of vehicles greater than 5 tons; camp sites to be used for more than two hundred person days; fuel storage greater than two thousand liters; construction of buildings greater than one hundred square meters.

[4] Activities that require a water licence include the use of water for gas and oil exploration, mining and milling, power facilities, agriculture, conservation and recreation.

B. The Board's Advertisement for Four Regulatory Officers

[5] On August 11, 2001, the Board placed an advertisement in the Vancouver Sun for four RO positions, at a salary range of \$48,410 to \$60,770. The position required:

- (i) an undergraduate degree in science, environmental studies, ecology, resource management or a related field, with two years experience in a related environmental field;
- or

- (ii) a post secondary diploma in environmental management or a related field and three years experience;
- (iii) knowledge of environmental issues in Canada's North, especially relating to mining, and oil and gas developments;
- (iv) knowledge of the technology associated with the reduction of impacts caused by developments in a northern environment;
- (v) operating knowledge of Microsoft Office software;
- (vi) experience working in remote locations;
- (vii) ability to write technical reports;
- (viii) a Class 5 drivers licence.

[6] The RO position was for a term of three years, subject to a six month probationary period, with the possibility of a two year extension.

C. The Functions and Responsibilities of a Regulatory Officer

[7] The primary responsibility of a RO is to process land use permit and water licence applications. When the Board receives an application for a permit, it is assigned to an RO whose first task is to ensure that the application is complete. If not, the RO will contact the applicant and request further information. The RO refers to a checklist which is a step-by-step outline of the RO's duties when an application is received.

[8] Once the application is complete, the RO sends it out for review. The Board has a distribution list of reviewers, which includes First Nations communities, the relevant Federal Government departments and departments of the Government of the North West Territories. The RO must ensure that all of the reviewers get copies of the application and have an opportunity to review and provide comments back to the RO.

[9] After receiving the reviewers' comments, the RO synthesizes them into a staff report for consideration by the Board. The staff report includes the application details, comments of the reviewers and whether there is public concern or a potential harm for the environment.

[10] If no concerns have been identified, the RO will so indicate in the staff report and draft the licence or permit for the Board's approval. The Board has a standard list of conditions and the relevant conditions are put in the licence. If there are concerns identified in the staff report, it is left to the Board for its decision.

[11] ROs spend a great deal of time communicating with the applicants and the reviewers. This involves phoning, writing or emailing the applicant for more information or responding to applicants' inquiries as to the status of their application. There is a statutory time limit to review the application and issue the Board's decision. There is pressure on the RO to meet these timelines.

[12] ROs often have to contact the reviewers numerous times, coaxing them to send in their comments so that the staff report can be prepared and sent to the Board for decision within the time period.

[13] The ROs must have some, but not a lot, of knowledge of the technical issues in the application. More detailed technical expertise is available from the Senior RO or from outside consultants.

[14] It is also important that an RO have some northern experience, such as understanding of the environmental issues in the north; northern living experience and some familiarity with First Nations communities.

D. Screening the Applicants for Interview

[15] The Board received 38 applications for the four RO positions. Of the 38 applicants, two had grade 12; six had diplomas; 22 with Bachelor degrees; six with Master's degrees; and two with Ph.D.s.

[16] An Interview Committee was struck to review the applications received and decide which applicants the Board would interview. The Interview Committee consisted of Wanda Anderson, Manager of Finance and Administration; Karl Lauten, Manager of Regulatory Reviews; and Peter Lennie-Misgeld, Sr. Regulatory Officer. Each of them reviewed the applications and prepared a list of who they thought should be interviewed

[17] The Interview Committee chose 12 applicants for interviews. It screened out all of the Grade 12 applicants; 71% of those with a diploma; 60% of those with a Bachelor's degree, and all of those with a post-graduate degree, except for Dr. Sangha. This suggests that the Board used educational credentials as screening criteria, both on the low side and on the high side.

[18] Ms. Anderson did not select Dr. Sangha for an interview. She felt that, given his qualifications, he would likely become bored with the job fairly quickly. Karl Lauten did want to interview Dr. Sangha. He thought that Dr. Sangha might be a good fit for Technical Advisor, which position was vacant. But at that time, the Board had not considered filling the position. Mr. Lennie-Misgeld, who was the junior member on the Interview Committee, said that he deferred to Mr. Lauten in choosing Dr. Sangha to be interviewed.

[19] Ms. Anderson testified that the Interview Committee had discussed this possibility. But she was clear in her evidence, which was not challenged, that Dr. Sangha was interviewed only for the RO position. The Technical Advisor position was never filled and was later eliminated.

[20] Dr. Sangha testified that he was never told during the interview that he was being considered for Technical Advisor.

E. The Interview Process

[21] The interview was a structured interview in which a set of standard questions was put to each candidate interviewed. There were no questions asked by the interviewers relating to personal characteristics, such as, race, colour, national or ethnic origin, religion or age.

[22] The questions focused on the skills of the potential candidate and the knowledge that the candidate had of the Board and its processes, the experience of the candidate, together with salary expectations and a starting date.

[23] Each of the candidates was given a score by the interviewers. Interview notes were taken by all of the interviewers, which notes were filed at the hearing, except those of Mr. Lennie-Misgeld who had discarded all of his interview notes.

[24] Of the twelve people interviewed for the RO position, four were offered a job. Two of those did not accept the offer and the Board made two more offers which were accepted.

[25] Dr. Sangha was not made an offer. Ms. Anderson advised him by email on September 17, 2001 that the four RO positions had been offered to other candidates.

(i) Profile of Dr. Sangha

[26] Dr. Sangha's educational qualifications are: B.Sc., Agriculture (Punjab University, India, 1972); M.Sc., Landscape Planning (Technical University of Berlin, Germany

1983); Ph.D., Environmental Science (Technical University of Berlin, 1983); Certificate in Project Planning & Management (Technical University of Berlin, Germany 1989).

[27] He is fluent in German, Punjabi, Hindi and English. He has co-authored two books and has written a number of research papers in the environmental field.

[28] Dr. Sangha has a varied work experience. During the course of his studies in Germany, Dr. Sangha worked for the German Federal government as an environmental scientist dealing with various environmental issues.

[29] In 1990, Dr. Sangha assumed the position of Associate Professor at Punjab Agricultural University and remained in that position until 1996 when he came to Canada with his family. He taught courses in ecology and urban environment; land use and resources conservation; watershed conservation and management plan; environmental and impact assessment.

[30] When he arrived in Canada, Dr. Sangha believed that there were few opportunities for a new immigrant in a Canadian university. So he applied for jobs in the environmental sciences throughout Canada. He wanted to gain Canadian experience, which hopefully would get him a permanent position in his field.

[31] He first worked as a voluntary worker with the Langley Environmental Partners Society, in Langley, B.C. This was a community based organization whose focus was watershed restoration. He prepared a plantation scheme for wetland restoration and conservation and worked there for about five months in 1997. He was not paid and did not work full time. He did it to gain experience.

[32] For six months in 1997-1998, Dr. Sangha worked as a Senior Research Scientist with Kam Biotechnology Ltd in Surrey, B.C. Dr. Sangha worked on a waste water remediation project.

[33] In 1998-1999, Dr. Sangha worked for the Fraser Valley Regional District in Chilliwack, B.C. as an Environmental Promotion and Educational Development Assistant, basically dealing with waste management plans. He was sponsored in this position by HRDC in a program designed to provide work experience to recent immigrants.

[34] From March 1999 to June 2000, Dr. Sangha worked as a production manager for the N.A.T.S. Nursery Ltd.

[35] At this point in time, Dr. Sangha applied for university positions and was offered the position of Assistant Professor, Environmental Studies, at St. Cloud State University, Minnesota. This was a contract position from September 2000 to May 2001. When the contract ended, Dr. Sangha applied for a tenured position, but the position was not filled for budgetary reasons.

[36] When he returned from Minnesota, Dr. Sangha worked as a landscape gardener for residential properties in and around Vancouver. It was a labour-type of job; running the lawnmower, hoeing, weeding, tending the garden. He had been doing that for about a half year, when he was involved in a car accident and was quite seriously injured. He did not return to work at that job.

[37] In March 2004, he started work as a bookkeeper with the Gill Electric Company in Vancouver and continues in that position.

(ii) Profiles of the Six Candidates That Were Offered RO Positions.

(iii) Stephen Mathyk

[38] Stephen Mathyk has a Renewable Resource Management Diploma (Lethbridge Community College, 1998); Fish and Wildlife Technology Certificate (Lethbridge Community College, 1999); and a B.Sc. in Environmental Science (University of Lethbridge, 2001).

[39] He has four years experience in operating in both an independent and team environment dealing with resource management and environmental policies. His experience includes dealing with multiple user groups, including environmental activists, special interests groups, First Nations and governmental bodies. He had experience in northern issues, remediation technologies and techniques, and drafting technical reports and applying and enforcing municipal, provincial and federal legislation.

(iv) Adrian Paradis

[40] Adrian Paradis has an Environmental Monitoring and Enforcement Diploma (Lakeland College, Alberta, 1995-1997). He attended the University of Alberta from 1997 to 1999 taking courses in Land Remediation, Reclamation and Conservation.

[41] He worked as an Environmental Technologist for various companies between 1997 and 1998 and has worked as an Environmental Technician conducting Phase I, II, III, environmental site assessments. He has training in techniques of revegetation, reclamation and decommissioning techniques. He also has experience in dealing with regulatory bodies and landowners.

(v) Allen Kogiak

[42] Allen Kogiak has a diploma in Renewable Resource Technology (Aurora College, Fort Smith, NWT, 1994) and a PITS Certificate in Environmental Land Management (1997).

[43] He has considerable experience working in the North, working as a Fisheries Management Technician in Hay River, NWT (1993-1994); a field worker for the Salt River First Nations, Fort Smith, NWT, doing research, mapping, conducting scientific research and liaising with the public and governments (1994-1995); working as a research management officer for DIAND, Inuvik, NWT, which involved working with municipal, territorial and federal government officials, First Nations, Community Leaders, consultants and industry executives to exchange and obtain information on legislation requirements, prepare reports, and maintain records and files (1995-2000). He also worked with the Dogrib Rae Band, Rae, NWT as a Colomac Mines Clean up Project Coordinator (March 2001-May 2001) and as a Site Superintendent Trainee at the Colomac Mine site at Tli Cho logistic, Yellowknife, NWT.

(vi) Ethan Sawchuk

[44] Ethan Sawchuk obtained a B.Sc. in Land use and Environment studies (University of Saskatchewan, 2000). He also has an advanced Certificate in Biology. He was a Land Management Officer with the Inuvialuit Land Administration where his responsibilities were to review and process land use development applications, consult and coordinate with industry representatives, government and aboriginal community organizations, undertake inspections, and produce reports.

(vii) Latisha Heilman

[45] Latisha Heilman has a B.Sc. in Environmental Biology (University of Alberta). She is trained in GIS (Geographical Information Systems). Her experience includes working

as a field and lab assistant at the University of Alberta, in the Department of Biological Sciences. Her responsibilities included experimental design and setup, collection of data in the field, organizing and interpreting data, techniques of analysis, and providing written reports. She has no northern experience.

(viii) Andrew Hammond

[46] Andrew Hammond has a BA in Archeology/Anthropology, and Native Studies (University of Saskatchewan, 1997). He has considerable experience working in Canada's north, including working as an Environmental Technician for BHP Diamonds Inc. in Yellowknife, NWT (1997-2001). He also worked on the Community Consultation database for the Tibbit to Contwoyto Lake Winter Road Joint Venture (1997-2001).

[47] He was a Policy Analyst with the Ministry of Aboriginal Affairs of the GNWT working in Yellowknife. Some of his responsibilities included editing and revising internal guidelines used in land claim negotiations.

[48] From November 1993 to June 1994, he was a Research Policy Analyst at Aurora College in Iqaluit, NU, where he was part of a team conducting a five year corporate review of the Iqaluit campus.

[49] From 1991 to 1992, he was a Research Analyst with the Department of Health, GNWT, Yellowknife, where he reviewed and evaluated the department's health position on the northern health, research and development programs. From 1990 to 1994, he also worked as a Science Administrator with the Science Institute of NWT, Yellowknife.

F. Why the Six Candidates Were Offered a RO Position and Dr. Sangha Was Not.

[50] Both Ms. Anderson and Mr. Lennie-Misgeld testified as to how the Interview Committee selected the six candidates for an offer. Mr. Lauten did not appear at the hearing. All of the candidates interviewed were given a numerical score representing each of the interviewer's assessment of how the applicant has answered the interview questions. The maximum score was 60.

[51] Ms. Anderson rated Dr. Sangha 41/60 based on her assessment of his answers to the questions. She rated "no" on her interview notes indicating that she would not make an offer to Dr. Sangha. She noted that Dr. Sangha could be overqualified, would be easily bored and would look for another job quickly. She also noted that Dr. Sangha was more of a policy person, that he was able to answer the questions well and he came across as very smart.

[52] Ms. Anderson testified that during the interview, Dr. Sangha was not asked by any of the interviewers why he had applied for the RO position. Nor did they raise their concerns that he would find the job unchallenging or boring and would be likely to leave at the first opportunity.

[53] Ms. Anderson said that Dr. Sangha had asked for a salary of \$55,000. If he had been hired, Ms. Anderson said he would have been paid that amount.

[54] Ms. Anderson scored Stephen Mathyk 48/60. She wrote "yes" on her interview notes indicating that he should be made an offer. She felt that with his background, knowledge and his experience, he was a very good candidate. He had enforcement background and that experience would benefit the Board.

[55] Ethan Sawchuk was working for the Inuvialuit Land Administration as a Regulatory Officer. This was particularly relevant to the work of the Board. Ms. Anderson rated him 45/60. His education and his northern experience made him a very good candidate. Ms. Anderson's interview notes indicated Mr. Sawchuk had good technical knowledge

relating to land use permits. He also had good policy understanding and first hand experience.

[56] Ms. Anderson gave Allen Kogiak a score of 37/60. Mr. Kogiak was working at the Colomac mine site in the NWT which was under remediation. Ms. Anderson thought that he had good knowledge of that mine site, its problems and what needed to be done in terms of remediation. He also had northern experience and had lived in the north. She indicated in her interview notes that he should be hired.

[57] Adrian Paradis had two years education from the University of Alberta in Land Remediation, Reclamation and Conservation and had an Environmental Enforcement Diploma. He also had experience working in the oil fields of Alberta. Because there were a number of oil and gas projects coming on in the NWT, Ms. Anderson considered Mr. Paradis to be a good candidate for oil and gas issues. She indicated "yes" for hire in her notes and scored Mr. Paradis 45/60 on the interview. He did not have any northern experience.

[58] Because Allen Kogiak and Ethan Sawchuk did not accept the Board's offers, two further offers were made to Latisha Heilman and Andrew Hammond.

[59] Ms. Anderson rated Ms. Heilman 36/60 on the interview. She noted in her interview notes that Ms. Heilman had training in GIS and that land use planning was one of her main interests. She thought she would be a good candidate for the RO position because at the time there were no land use plans in place anywhere in any of the regions. It would be useful for the Board to have someone with that knowledge and training.

[60] As for Andrew Hammond, Ms. Anderson gave him a score of 36/60 on the interview. He had been working for at least three years for BHP Diamond's project in Yellowknife as an Environmental Technician. He had northern experience and had working knowledge of one of the important mine sites and how mines actually operate in the north. She also felt that it was very relevant that Mr. Hammond worked at the Ministry of Aboriginal Affairs for the GNWT as a Policy Analyst in Yellowknife, and had experience in dealing with land claim negotiations and in particular dealing with First Nations and communities.

[61] Karl Lauten, the Manager of Regulatory Operations in August/September 2001, did not give evidence at the hearing of the complaint, but his notes of the interviews were put in evidence. Mr. Lauten rated Stephen Mathyk 48/60. He rated Adrian Paradis 41/60, Allen Kogiak 50/60 and Ethan Sawchuk 47/60. He rated Latisha Heilman and Andrew Hammond 46/60 for the interviews.

[62] Interestingly, Mr. Lauten rated Dr. Sangha the highest on the interview, scoring him 52/60. He indicated that Dr. Sangha had lots of academic and work experience and made much effort to review the Board's website, the *Act* and *Regulations*. But he noted that Dr. Sangha had no northern experience.

[63] Mr. Lennie-Misgeld testified as to why he thought the six candidates that were offered jobs were the best qualified. His views on the candidates are as follows:

[64] Latisha Heilman's education and work experience were directly applicable to the work of an RO.

[65] Stephen Mathyk had enforcement experience and the Board was looking to add additional capacity in terms of environmental enforcement.

[66] Adrian Paradis had done some site assessments and also had experience in remediation of well sites. His experience would be useful to the Board for oil and gas applications.

[67] Andrew Hammond had valuable experience working in the archeological field in the north. He had also worked for one of the diamond mines so he had some directive environmental field experience. His experience working with First Nations people and in the archeological field was relevant to the responsibilities of the RO liaising and working with First Nations and Community groups. Archeological and cultural views are very important to the people of the North. It is a primary concern to them when it comes to development applications.

[68] Allen Kogiak had experience working as Resource Management Officer for DIAND. In that position, he was responsible for enforcing terms and conditions of land use permits which is one of the major functions of the Board. His experience on the enforcement side would also contribute to the Board's work. He had also worked at the Colomac mine site, an abandoned mine near Yellowknife, so he had a combination of enforcement experience as well as field experience in terms of remediation.

[69] Ethan Sawchuk at the time was working for the Inuvait Land Administration as a Land Management Officer. The role of that agency is very similar to the work of the Board so he had directly applicable work experience.

[70] As to Dr. Sangha, Mr. Lennie-Misgeld believed that he had the experience and the education. But the RO position is an entry level position in the environmental field. The work can be very repetitive and he believed that it would not sufficiently challenge Dr. Sangha's skillset. And there is little opportunity for promotion at the Board for ROs.

G. Post-Interview Procedure

[71] After the interviews were completed, the Interview Committee met and decided who would be made offers. They based their decision on the resumes, the interview notes, who they considered would be a good fit, and the knowledge and experience they could bring to the position. The interview scores were just one criterion and certainly not the deciding factor.

[72] There was unanimous agreement amongst the Interview Committee that offers should be made to Stephen Mathyk, Adrian Paradis, Allen Kogiak, and Ethan Sawchuk as the best candidates. The next two ranked candidates were Latisha Heilman and Andrew Hammond.

[73] As for Dr. Sangha, there was consensus in the Interview Committee not to offer him a position. Their view was that Dr. Sangha was overqualified for an RO. Because the position was an entry level position, they believed that he would be bored by the type of work required and was not a good fit for the position. The other candidates much better suited the job requirements.

[74] Robert Wooley, the current Executive Director of the Board, (he joined the Board in October, 2001) gave evidence at the hearing. Although Mr. Wooley was not at the Board when the new RO's were hired, he testified that he had reviewed Dr. Sangha's resume and had spoken with the members of the Interview Board. He said that he was and continues to be impressed by Dr. Sangha's academic credentials. But he did not see how those credentials would serve him well as an RO. His credentials are far greater than what is required.

[75] In forming this view, Mr. Wooley said that he relied on his experience as a senior manager for over 20 years, managing people with varying backgrounds. This experience indicates that someone with Dr. Sangha's qualifications would not be satisfied with the work environment, or with this level of job, and would not be happy for any length of time.

[76] Mr. Wooley's assessment of the work of an RO was that it is a step above tedious. The job can have its interesting moments, but for the most part, it is a lot of the same thing, pushing paper, cajoling, phoning, faxing and assembling a stack of papers for the staff report.

H. Staff Turnover

[77] Mr. Wooley testified that when he came to the Board as the Executive Director, in October 2001, there was a lot of employee turnover. He believes that it has turned around somewhat, but there is still some turnover.

[78] Mr. Wooley does not consider that to be such a bad thing. A lot of the staff are young and are career oriented. Working at the Board gives them exposure to a wide spectrum of industries and technologies. They get known by consulting groups, exploration companies and by government. Often when they have enough experience they will move to one of these organizations.

[79] Others leave the Board for other reasons, such as spousal transfers, or they get tired of living in Yellowknife, tired of the dark and the cold during the winter. Some just want to go elsewhere. Employee turnover is an issue related to being located in Canada's north. That is one of the reasons the Board prefers northern experience.

[80] According to Mr. Wooley the Board must be very careful to hire somebody with some assurance that they will stay for some time. It is expensive to bring them to the NWT. The Board pays their relocation expenses and also gives them ongoing training. A lot of money is expended, and if someone decides that the north is not where they want to be, then that money is wasted.

[81] Expenses include around \$10,000 to get someone to come to the NWT and they are also paid relocation expenses at the end of the term.

[82] Ms. Anderson testified that staff turnover at the Board was about the same as for other agencies in the north. After a certain point in time, Board staff seeks to advance their careers. At the Board the only option is to look elsewhere, and most of the staff that left, did just that. Ms. Anderson regards staff turnover at the Board as a cost of doing business in the north.

[83] On the question of turnover, there were six Regulatory Officers at the Board in October 2001. They were Elaine deBastien, Greg Smith, Janpeter Lennie-Misgeld, Darren Campbell, Emma Pike, and Lori Bruno. Lennie-Misgeld, deBastien and Pike all started in 2000. The others started later.

[84] Darren Campbell left in September 2001 for personal reasons. His wife did not like living in Yellowknife.

[85] Mr. Lennie-Misgeld moved up to Senior Regulatory Officer in August 2001.

[86] Elaine deBastien left in 2002/03. Her husband moved to Edmonton and she moved with him before her contract ended.

[87] Greg Smith left in 2004. His wife got a job at the hospital in Sudbury, and he moved with her, before his three-year term ended.

[88] Lori Bruno left for personal reasons as well. Her husband didn't like Yellowknife, so she got a job in Fort McMurray.

[89] Emma Pike went to the federal government.

[90] Andrew Hammond resigned before his term was finished because his wife, a medical doctor, got a job in Ontario.

[91] Latisha Heilman was offered an extension, after her three year term, but she declined. She wanted to travel.

[92] Adrian Paradis' and Stephen Mathyk's terms were extended for a further two years.

[93] Thus, since 2001 the Board had almost a complete turnover of ROs over the following 4-5 years. With the departure of these Regulatory Officers, the Board has hired four more Regulatory officers; two were hired about a year and a half ago, and two were hired seven months ago. They were hired through an open competition which was posted on the Board's website. But Mr. Wooley was not sure if the positions were advertised in any major papers.

I. Dr. Sangha's Reaction to Not Being Offered the Regulatory Officer Position - Pain & Suffering

[94] After the interview, Dr. Sangha returned home positive that he would be offered the job. He told his family that the interview had gone well.

[95] But when he received the email from Ms. Anderson advising that he would not be offered an RO position, he was very upset. Obtaining the position meant that he would be working within his profession and gaining some Canadian experience in the environmental field. It also meant very much economically. It was a good paying job and his family was planning to join him in Yellowknife.

[96] Dr. Sangha also testified that he became depressed over not getting the job. He consulted his family doctor who prescribed anti-depression medication. His doctor advised him that the medication could have some negative effects. For this reason, he only took them occasionally and then eventually stopped using them.

J. Dr. Sangha's Efforts to Obtain Other Employment - Mitigation

[97] Some time after his application was not accepted, Dr. Sangha started working as a landscaping gardener. He had to travel each day for one hour in the heavy traffic and was working outside in the rain and the wind. He was so tired from this work that he had no time or no energy to look for other jobs.

[98] After a while, Dr. Sangha again began to look for jobs. He sent out about 15 resumes, had two or three interviews, but received no offers. He applied for jobs in government and in the private sector. Sometimes the jobs advertised were in his specialty, sometimes not. Even if not, he would still apply.

[99] Dr. Sangha contacted St. Cloud State University to see if there was any opportunity and was told again that there was no opportunity.

[100] Since he started working at Gill Electric, he has not applied for any other jobs.

(i) Income Earned Since 2001

[101] Dr. Sangha filed a summary of his earnings and his tax returns. This shows earnings of \$62,701 from all sources.

[102] Dr. Sangha also has an arrangement with Columbia State University whose website lists him as Professor, Occupational Safety and Health. This is an online university that offers courses online.

[103] The website also shows that he has taught courses for Columbia State University, including, toxicology, waste management, pollution prevention, industrial hygiene and advanced air quality control. Dr. Sangha said that he does not teach students, but rather interacts with the students by email or by telephone.

[104] He started with Columbia State University sometime in 2003. His evidence is that this is not a full-time position, that he is not paid a regular salary, but is paid an honorarium of between \$300 and \$600 per assignment. He continues to work for Columbia State University. He says that he does so to keep in touch academically.

K. The Remedy for Dr. Sangha

[105] Dr. Sangha asks for compensation for three years at a salary of \$55,000, being his potential earnings as an RO. He also asks that the Tribunal order the Board to hire him as an RO at the next available opportunity.

[106] He also claims compensation for pain and suffering in the mid-range, given the maximum of \$20,000.

[107] The Commission seeks a policy remedy that the Board work with the Commission to ensure that this type of discrimination does not occur in the future.

[108] As to Dr. Sangha's request to be hired as an RO, Mr. Wooley testified that, future land claim settlements could result in a significant reduction in the Board's staff. With each land claim settlement, the Board's jurisdiction to issue land use permits and water licences would extend only to the remaining unsettled areas and transboundary applications.

[109] The Board staff could shrink to a five or six-person office, including the Executive Director and Office Manager to deal with budgets and two or three ROs. He therefore resists Dr. Sangha's request to be hired as an RO.

[110] On the question of whether an RO would be extended, Mr. Wooley said that it has been his policy to try to maintain a stable workforce. If an RO was a good employee and the Board was happy with their work, they could expect to be extended, usually for two more years. Unless the work of the Board is significantly reduced.

L. Using Overqualification to Screen Job Applicants

[111] The Commission and the complainant assert that decisions not to hire "overqualified" job applicants have an adverse effect on visible minority immigrants. Overqualification is an illegitimate criterion to use when applied to this particular group. It contains a number of assumptions about the group and their motivations that are not necessarily valid.

[112] The Commission and the complainant also allege that a practice or policy of not hiring the overqualified amounts to age discrimination against older workers.

M. The Expert Evidence of Dr. Jeffrey Reitz

[113] The Commission and the complainant called Dr. Jeffrey Reitz to give expert opinion evidence on their behalf. Dr. Reitz is a Professor of Sociology, the Harney Professor of Ethnic, Immigration and Pluralism Studies and Director of the Graduate Collaborative Program in Ethnic and Pluralism Studies, at the University of Toronto.

[114] He has 35 years of experience in sociological research and teaching on the general topics of race and ethnic relations, and immigration. Much of his research focuses on the employment of immigrants and visible minorities, and barriers to the employment success of minorities including discriminatory barriers. Dr. Reitz has published seven

books and monographs, as well as numerous articles, book chapters and edited books that have examined these and related topics.

[115] Dr. Reitz was qualified to give expert evidence in the area of race and ethnic relations and immigration issues as they relate to employment.

[116] The global thesis of Dr. Reitz's evidence is that not hiring overqualified job applicants has an adverse impact specifically on visible minority immigrants. Overqualified job applicants are those whose education and experience significantly exceed the requirements specified as necessary for a particular job.

[117] Dr. Reitz defines immigrants as foreign-born residents of Canada irrespective of their length of stay in Canada and whether or not they are citizens. Since the 1970's, the origins of the majority of immigrants to Canada are Asia, the Caribbean, Latin America and Africa. Immigrants to Canada from these regions are considered to be racial or visible minorities in Canada.

[118] Dr. Reitz has five supporting conclusions.

(i) Educational Levels and Experience Levels of Immigrants and Visible Minorities

[119] Conclusion One: Immigrants are, on average, more highly educated than native-born Canadians. Dr. Reitz points out that immigrants arriving in Canada since the 1970s, most of whom are considered to be visible minorities, possess high education levels and a substantial portion are qualified professionals. According to the 1996 Canadian census data, immigrants average 0.4 more years of education than native-born. And with more recent immigrants, the trend is upward so that the relative level of education of immigrants is closer to 0.6 years more.

[120] The reason for this, says Dr. Reitz, is that the largest single number of immigrants to Canada are independent or economic immigrants, who are selected on the basis of a points-based system. According to Dr. Reitz, the 1996 Canada census showed that working age immigrants arriving in the most recent five year period had an average of 14 years of education and nearly 30 % had university degrees. Among later arriving immigrants, in 2000 for example, about 45 % had university degrees.

(ii) Employment Barriers Affecting Immigrants and Visible Minorities

[121] Conclusion Two: Visible minority immigrants face barriers to employment at their level of qualification. These barriers force highly qualified visible minority immigrants to seek lower skilled jobs.

[122] Dr. Reitz' evidence is that the research identifies various types of barriers to equal opportunity for immigrants. These include discriminatory hiring practices based on race, immigrant status or origin; employers' unfamiliarity with foreign acquired education; lack of credit for non-Canadian work experience/no Canadian work experience; licensing bodies' refusal to recognize foreign acquired education/experience; and lack of social contacts useful in gaining labour market access.

[123] Dr. Reitz refers to various studies and reports which show significant numbers of immigrants report difficulties in qualification recognition. Significant numbers (20%) of visible minorities perceive discrimination in employment.

[124] Dr. Reitz also referred to comparative analyses (census and labour market surveys) of immigrants' earnings and the earnings of native-born Canadians, which reveal the following:

(a) immigrants receive a significantly smaller earnings premium both for formal education and for work experience.

(b) visible minority immigrants earn significantly less than non-visible minority immigrants.

[125] Earnings analysis provides an estimate as to how much immigrants would have earned by substituting important characteristics (work experience, education) into the earnings equations of Canadians.

[126] This analysis shows that if immigrants were given full compensation (based on the data of Canadians) for their years of education and work experience (and no origin discount), immigrant earnings would increase by \$15 billion. Further analysis suggests that \$2.4 billion (16%) of that earning deficit is due to skill underutilization.

(iii) Representation of Immigrants in Highly Skilled Occupations

[127] Conclusion Three: As a result of barriers, immigrants are under-represented in highly skilled professional or managerial jobs, the "knowledge occupations", and are over-represented in lower-skilled jobs, compared to Canadians with the same paper qualifications.

[128] Dr. Reitz's evidence is that, often the qualification of immigrants performing low-skill jobs is considerably higher compared to Canadians doing the same job.

[129] Dr. Reitz referred to studies that showed, for highly qualified individuals, immigrants are underrepresented in the "knowledge occupations". Knowledge occupations are those where a high proportion of workers have university education (e.g. science, engineering, health, education and the professions). The 1996 census showed that, in the knowledge professions there were 35% of immigrant men with a Bachelors degree compared to 59% of Canadian men with similar qualifications; 59% of male immigrants with post-graduate degrees versus 79% of male Canadians.

[130] For women, the discrepancy was even greater: 49% of post-graduate female immigrants compared to 78% female Canadians with post-graduate degrees.

[131] From 1981 to 1996, the importance of the knowledge occupations and the skill levels of immigrants have increased. Yet the difference (vis-à-vis Canadians) in income level and representation has grown as well. Immigrant representation in the knowledge occupations has fallen in absolute terms from 1981 to 1996.

[132] Dr. Reitz also pointed out that the analysis of the 1996 data also shows that for the knowledge occupations as a whole, immigrants have greater difficulty accessing managerial positions compared to professional positions.

[133] Denied work in the knowledge occupations at their skill level, and experiencing greater educational competition in lower-level work, immigrants end up often in the least skilled occupations.

[134] Recent studies (based on the 2001 census data) found that among recent immigrants with a university degree, and employed between 1999 and 2001, at least 25% have jobs requiring no more than a high school education. This is compared to 12% of Canadian university graduates in the same age group in the year 2001, an overrepresentation of visible minorities by a factor of more than 2.

[135] In the older age group, 45 to 54, the proportion of visible minority university graduates working in low education jobs was 38%. The corresponding percentage for Canadian-born in the same age group, 10%, is an overrepresentation by a factor of almost 4.

(iv) Why Immigrants Accept Work For Which They Are Overqualified.

[136] Conclusion Four: Immigrants often accept work for which they are overqualified because they are denied employment at their level of qualification.

[137] Dr Reitz's evidence is that immigrants come to Canada from countries in which economic opportunities are significantly less than in Canada. For the independent immigrant, improving economic opportunities is their prime motive for migration.

[138] Their point of comparison is not the jobs held by comparatively qualified Canadians. It is the jobs held in their country of origin by comparatively qualified persons there. This comparison favours Canada, notwithstanding the barriers in Canada to equality of employment.

[139] However, Dr. Reitz pointed out, even if they have plans to move ahead and overcome these barriers to higher levels of employment, they often may not be able to achieve this for various reasons. They can't finance the required education to move ahead or they can't afford to take time off work and jeopardize their children's educational future. In this latter respect, they may have a future orientation which puts a priority on a better life for the next generation.

(v) Are Overqualified Workers Less Satisfactory?

[140] Conclusion Five: There is no human resources principle regarding the hiring of overqualified workers.

[141] Dr. Reitz's evidence is that there is a great deal of folklore among practitioners on both sides of this question. Studies of overqualified workers support both positive and negative outcomes. The Hersch study (1995) suggests good performance, less training, more promotions, but higher turnover. Most labour force studies show that the overqualified have higher earnings than other workers within their occupations.

[142] However, Dr. Reitz says, there do not appear to be any studies specifically focusing on immigrants. His position is that turnover results from opportunities. But, for immigrants, barriers eliminate these opportunities, with the result that the turnover problem may not be so acute for visible minority immigrants.

[143] Dr. Reitz agrees that much of the statistical data that he relied upon for his analysis is self-reporting information. This would be a perception of what individuals believe their educational qualifications to be. He also agrees that there is no measurement to verify the educational equivalence of the self-reported information.

[144] Dr. Reitz was asked about Canadian job applicants and whether they would not be equally impacted by a policy to not hire the overqualified as would be a visible minority immigrant.

[145] His response was that anyone who does not get a job for which they are qualified is obviously going to be impacted. The question is who is most likely to be in that applicant pool? The evidence is that, for all of the reasons he has put forward, that person is likely a racial minority immigrant. So if you have a policy of not hiring the overqualified, that is the person who will be screened out.

N. Older Workers - Age Discrimination

[146] Dr. Reitz put the proposition that not hiring the overqualified has also been considered as a source of discrimination against older workers. Dr. Sangha is in this group. The argument is that older workers who experience job loss, but who wish to continue work, must apply for entry level employment because of lack of opportunities at their former level of employment and pay. However, because of their long experience and accomplishments, many employers are reluctant to hire them believing that they may

be bored or lack commitment to a lower level position. Employers will rely on overqualification as the basis for rejecting the older candidates.

O. The Board's Expert - Dr. Derek Chapman

[147] Dr. Chapman is an Associate Professor in Industrial and Organizational Psychology at the University of Calgary. He teaches undergraduate courses in personnel selection and organizational behaviour. At the graduate level, he teaches a Ph.D. seminar in personnel selection, a Ph.D. seminar in recruiting and an advanced course on Industrial and Organizational psychology.

[148] Dr. Chapman has a B.A. (Psychology and English, St Mary's University, 1989); and an MA /Ph.D. (Industrial and Organizational Psychology, University of Waterloo, 2000). He has published extensively in refereed journals in the area of personnel selection, recruiting, and organizational psychology. This includes research on how people choose their jobs, and what factors lead to that decision, as well as research relating to person/organization fit and employee turnover.

[149] Dr. Chapman worked for six years as a personnel selection officer in the Department of National Defence. This involved interviewing job applicants, assessing their credentials, directing structured interviews, writing reports, and doing individual assessments on individuals for approximately 120 to 140 different types of occupations.

[150] He has worked as an independent consultant for a number of organizations, assisting them in developing and validating their selection systems and recruiting operations, so that the systems operate to select the best people into the best jobs with the most appropriate fit.

[151] Dr. Chapman was qualified as an expert in the area of personnel selection, recruiting, and organizational psychology, to address whether the selection methods used by the Board to evaluate candidates for the RO position were appropriate, including the decision not to hire Dr. Sangha. And whether the practice of an employer to exclude candidates on the basis of poor job fit, including overqualification, is a common method in the human resource field.

[152] In preparing his expert testimony, Dr. Chapman reviewed all of the 38 applications received by the Board, including Dr. Sangha's. He also reviewed the job description and the job advertisement for the RO position.

P. Personnel Selection Practices, Overqualified and Job Fit

[153] Dr Chapman's overall opinion is that not selecting candidates for positions of employment on the basis of poor person/job fit, including overqualification is a widely practiced human resource selection method. There is a great deal of data that suggests that there are negative outcomes for both people who are hired into positions for which they are overqualified, as well as negative outcomes for employers such as paying higher wages, turnover effects, reduced or poor employee attitudes and lower job performance.

[154] Dr. Chapman defines "personnel selection practices" as being the procedures that organizations go through to try to hire the best fitting person for the job which they may have available. These procedures identify the knowledge, skills, and abilities that are required for a particular job and the goals of selection.

[155] Dr. Chapman does not accept the proposition that, in the case of an overqualified person, an employer should look beyond the criterion of good person/job fit and consider the personal circumstances of the candidate, i.e. what they can offer beyond their education and experience.

[156] For Dr. Chapman, no one is overqualified in relation to candidate selection. An individual becomes overqualified only when they apply for a job for which their credentials exceed the requirements of the job.

[157] Dr. Chapman prefers to use the concept of "person/job fit", meaning how well a person's skill sets mesh with the requirements of the job. In this context, overqualified refers to a poor fit between the individual and the job that they are applying for because their formal credentials exceed what is required for the job.

Q. Pre-Screening the Overqualified

[158] Dr. Chapman strongly disagreed with Dr. Reitz that there is no human resource principle regarding the hiring of overqualified workers. That there is only "folklore" on both sides of the issue.

[159] On the contrary, screening candidates on the basis of overqualification is a well established human resources principle and practice. Personnel selection is an entire field devoted to trying to match people to their jobs.

[160] It is an appropriate criterion for a number of reasons. For the most part, employers usually don't have time to sit down and talk to each person about their story and have them explain why they are applying, when it is apparent that their credentials are either far below or far above the levels that are required for the job.

[161] In support of his position, Dr. Chapman referred to a 1992 study (Bills, "The Mutability of Educational Credentials: How Employers Evaluate Highly Credentialed Job Candidates"). This study looked at the extent to which employers were willing to interview job applicants whose credentials were very high relative to what the job required.

[162] This study found that 72% of employers would not hire atypically credentialed candidates. This speaks to the prevalence of screening out applicants with these credentials at the pre-interview stage.

R. Reasons for Screening Out the Overqualified

[163] Dr. Chapman's evidence is that there are a number of consequences of hiring an individual who is a poor person/job fit, both for the organization and for the individual who is hired. A 2000 study (Kristof-Brown, "Consequences of Individual's Fit at Work") showed that there is a strong relationship between person/job fit, job satisfaction and organizational commitment. An employee who fits well to the demands of the job is much less likely to indicate an intention to want to leave that job.

[164] On the other hand, poor person/job fit leads to an early voluntary turnover. This is a very important factor for the employer. This is so says Dr. Chapman, because hiring practices that likely result in high turnover, incur a huge cost to the organization. Typically, it costs about 30% of a person's salary to hire a person. This includes advertising costs; at a higher job level, headhunting fees; costs of flying people in for interviews and the cost of the interviewers' time to interview people.

[165] There also can be high costs of training, having new employees learn the tasks associated with the job. There is always a period of time when people are not as productive as they can be because they are learning the job.

[166] Dr. Chapman testified that there are selection and recruiting practices specifically designed to reduce the likelihood of turnover. Certainly hiring on the basis of job fit is one of the best practices to avoid turnover.

[167] Dr. Chapman was asked whether sometimes an employer should consider not only an applicant's credentials, but also their personal circumstances. An applicant may be overqualified, but for personal reasons, would be more likely to perform better and more likely to stay in the job.

[168] His response was that there sometimes could be a case made for people who have something more to offer. But the labour market works in such a way that people tend to gravitate towards the highest paying jobs they can get which match their skill sets.

[169] You could make a case for someone who doesn't quite make the qualifications but brings something else to the organization. For example, the applicant has a diploma, not a degree, but has experience in remediation of oil and gas exploration, so the employer could stretch the fit criteria a bit on the low side.

[170] But Dr. Chapman would not recommend doing it on the high side. The research suggests that one of the reasons that people with good credentials end up in good jobs is because they are blocked from lower level positions as overqualified. They are forced to stay in the job market until they find a more appropriate job for their background. That results in good outcomes for those people who remain in the job market long enough.

[171] But on the facts of this case, why should the Board hire Dr. Sangha when there were 38 applicants, a number of whose credentials were more congruent with the RO job than Dr. Sangha's.

S. Other Consequences of Hiring the Overqualified

[172] Dr. Chapman identified other consequences for the employer of hiring someone who is overqualified. Employees who are hired and are a mismatch for their job often resent being there. They know that they can do more. They might be working for people who don't have the same level of skills, and yet they have to answer to these people. This can make it difficult to manage those individuals.

[173] The data also suggests that job attitudes and performance is lower for people who are overqualified compared to those who are congruent for the job. Someone who is overqualified can do the job. But their attitude is such that they do not pay much attention to the work, thinking it is not very important, and is beneath them. They are not very challenged in those positions. They are not motivated to do a good job because they don't see it as being important work or something that is sufficiently up to their skills and knowledge.

[174] Also, people with higher credentials often demand higher wages. That can result in higher costs for the employer if they are forced to hire people with credentials that are not needed for the job.

[175] The research also shows negative mental health effects on people who are hired into underemployed positions, such as increased depression, increased mental anxiety. One study (Leanna and Feldman, 1995, "Finding New Jobs after a Plant Closing") followed people who were unemployed versus underemployed. People who took jobs that didn't meet their skillset, versus those who remained unemployed and stayed in the job market had equal levels of anxiety and depression.

T. Dr. Reitz's Use of Census and Labour Force Data

[176] Dr. Chapman was critical of Dr. Reitz's reliance on Statistics Canada data. Census data is self-reporting data. It is a survey that is sent out to people with the expectation that they complete it correctly. But their response is their own understanding of the situation. There is no objective checking to see whether the credentials that are reported are, in fact,

equivalent to what people say they are. As a consequence, says Dr. Chapman, you want to be cautious in interpreting these statistics and drawing conclusions from them. He would prefer not to do so without more "on-the-ground" research to see what is really driving these relationships.

U. Barriers to Visible Minority Immigrants

[177] Dr. Chapman was very clear that he did not consider it appropriate to hire immigrants who are overqualified for a particular position of employment. He would not make a distinction between immigrants and any other group. If there are barriers faced by immigrants to equal workplace opportunity, he advocates that these barriers be addressed rather than putting someone into a position for which they are overqualified.

[178] To require employers to hire people into jobs that are incongruous with their abilities is not good skill utilization. Investing in systems that evaluate credentials or eliminating discriminatory barriers would be a much more effective way of dealing with this problem.

V. His Assessment of the Board's Interview Method

[179] Dr. Chapman testified that, broadly, there are two major types of interviews. Smaller organizations typically use "unstructured interviews". This is where someone sits down with the applicant, goes over their resume and chats with them for a while. The questions can vary from candidate to candidate, depending on what topics come up. There is no list of questions. Different people might conduct the interview differently.

[180] The second type is the "structured interview" where each candidate is asked the same job-related questions and their answers are scored. Because there are no informal conversations, every candidate is treated the same, the interview is more objective, and there is little opportunity for bias.

[181] Dr. Chapman said that there are different types of scoring methods that can be used. Each individual question may be scored; or each interviewer gives an overall score at the end of the interview; or the scores of the interviewers may not be aggregated.

[182] The scores among the interviewers may vary because of a "severity bias" or "leniency bias", when an interviewer typically scores either lower or higher than his/her colleagues. But as long as the rank order is the same, it is not a concern.

[183] Dr. Chapman said that he was pleasantly surprised that the Board used a structured interview. Very few small organizations have the resources to do so. His assessment was the questions were well chosen, were job related, and did not relate to any of the protected grounds.

W. Dr. Chapman's Assessment of Dr. Sangha

[184] Dr. Chapman did his own assessment of whether Dr. Sangha would be a good fit for the RO position. He concluded that Dr. Sangha's qualifications were incongruous with the duties of the RO position. He was a successful academic at two universities. The first job in Canada on his resume indicates that he was a senior research scientist, which is consistent with what you might expect from someone with a Ph.D.

[185] Other jobs that he stated on his resume indicate he was a manager in a nursery, so he was someone with management responsibilities. His most recent job in his area of expertise was as an assistant professor at a respected U.S. University.

[186] Given that the RO position is essentially clerical in nature, there would be very little opportunity to utilize the skills and knowledge that Dr. Sangha acquired through his many years of education.

[187] Dr. Chapman would have screened him out before the interview. To bring someone in with Dr. Sangha's background for the RO job just perpetuates underemployment in that individual.

[188] In Dr. Chapman's opinion, to hire Dr. Sangha would have negative organizational outcomes with respect to lower performance on the job due to being bored, being unchallenged, as well as being a high turnover risk. Based on the information that he saw, Dr. Chapman was very surprised that Dr. Sangha was brought in for an interview.

[189] Dr. Chapman also has some concerns relating to Dr. Sangha's employment history as it relates to turnover. He has a pattern of short-term employment, four different jobs over four years. This is normally indicative of a person being unhappy with their jobs and moving from place to place.

[190] Dr. Chapman believes that although the Board agreed to interview Dr. Sangha, even though he was obviously overqualified, the Board, in the end, made the right decision not to hire Dr. Sangha.

X. Has the Complainant Established a *Prima Facie* Case?

[191] In a case before this Tribunal, the onus is on the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which if believed, is complete and sufficient for a decision in favor of the complainant, in the absence of an explanation from the respondent.

[192] A *prima facie* case is one which covers the allegations made, and which if believed, is complete and sufficient for a decision in favor of the complainant, in the absence of an explanation from the respondent. (*Ontario (HRC) v. Etobicoke*, [1982] I.S.C.R. 202; *Ontario (HRC) and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R., 563)

[193] In *Lincoln v. Bay Ferries Ltd.*, 2004 F.C.A. 204, the Federal Court of Appeal provided further guidance as to the approach to be taken by the Tribunal. The Court said that, the Tribunal should not take into account the Respondent's answer before deciding whether the complainant has established a *prima facie* case.

[194] To establish a *prima facie* case on the facts of this case, I find that the complainant must show:

- (a) that the complainant possessed the basic qualifications for the job;
- (b) that the complainant is a visible minority immigrant;
- (c) that the complainant is overqualified vis-à-vis the job in question;
- (d) that overqualified status was one of the reasons why the complainant was not hired; and
- (e) that there is a correlation between visible minority immigrant status and overqualified status.

[195] Clearly, the complainant satisfies (a), (b) and (c). As to (d), the Board concedes that one of the reasons why Dr. Sangha was not hired for the RO position was because he was deemed to be overqualified.

[196] Thus it remains to be determined whether the complainant can satisfy (e).

Y. The *Prima Facie* Case for the Complainant

[197] Dr. Reitz's testimony indicated that most immigrants to Canada in recent decades have been highly educated members of a visible minority. However, his statistics indicate that, despite comparable education levels to native-born Canadians, immigrants are under-represented in the "knowledge occupations".

[198] Moreover, studies indicate that immigrants earn substantially less than native-born Canadians having equivalent qualifications (education and work experience). A significant portion of this earnings deficit is attributable to the fact that many immigrants are not fully utilizing their acquired skills.

[199] Dr. Reitz argues that there is a correlation between under-representation of immigrants in jobs at their highest level of qualification, and over representation in jobs where their qualifications exceed what is required. Because visible minority immigrants are disproportionately excluded from the higher rungs of the job market due to barriers to employment at this level, they seek employment at lower echelons where their qualifications exceed the job requirements.

[200] Hence, the experience of applying for a job for which one is overqualified, or working in such a job, is disproportionately an immigrant experience. While many native-born Canadians may find themselves seeking or performing work for which they are overqualified, they are less prone to be in this situation because the native-born do not face the same widespread exclusion from jobs that utilize the full extent of their qualifications.

[201] When an employer, such as the Board, adopts a rule against the hiring of overqualified candidates, it may appear to be "neutral" in that it applies equally to all overqualified candidates (immigrant and native-born). And yet it has a discriminatory effect upon overqualified immigrant candidates: it imposes, because of some special characteristic of the group, penalties or restrictive conditions not imposed on other members of the work force.

[202] What penalties or restrictive conditions? Simply this: to the degree that native-born candidates who are rejected on the basis of over-qualification have the option of seeking work more suited to their resumes, this option is largely foreclosed for immigrants. They have already been excluded from suitable jobs and can reasonably expect this exclusion to continue indefinitely into the future. Thus, a policy or practice against the hiring of overqualified candidates affects them differently from others to whom it may also apply.

[203] The evidence of Dr. Reitz establishes that there is a correlation between visible minority immigrant status and overqualified status. For this reason, I have concluded that the complainant has established a *prima facie* case that he was rejected on a prohibited ground of discrimination.

Z. Has the Board Answered the *Prima Facie* Case?

[204] In answering this question, reference is first made to the decision of the Federal Court of Appeal in *Holden v. CNR* (1990), 14 C.H.R.R. D/12; 112 N.R. 395 (F.C.A.). In this case, the complainant alleged that he had been discriminated against because of his age, by being forced to take early retirement. In dealing with the complaint, the Review Tribunal ruled that discrimination must be the basis for the imputed decision. The Federal Court of Appeal disagreed. It concluded that if discrimination is only one factor among other non-discriminatory factors, that is enough to find a contravention of the Act.

[205] The Board conceded that the complainant's overqualified status played a significant role in its decision not to hire him. Thus for the Board to refute the *prima facie* case, it must refute the correlation between overqualified status and visible minority immigrant status.

[206] Dr. Chapman was critical of Dr. Reitz's reliance on census and labour survey data because it is self-reporting information, being the perception or belief of those reporting.

He pointed out that there is no objective checking to see whether the reported credentials are valid or equivalences. Dr. Chapman would be cautious in interpreting these statistics and drawing conclusions from them.

[207] Dr. Chapman's critique is general. It does not nearly address the specific alleged deficiencies in Dr. Reitz's analysis. It was incumbent on the Board to prove: that Dr. Reitz' data on skill underutilization are inaccurate or no longer accurate; that visible minority immigrants do not make up a disproportionately large component of the overqualified population; that therefore they are no more likely to find themselves applying for a job for which they are overqualified than the native-born; and that on this basis there is no reason to believe that when an employer establishes a rule against hiring the overqualified, this rule has a greater impact on the visible minority immigrant candidate.

[208] The Board did not do so. I find that the Board has not provided a sufficient answer to the complainant's *prima facie* case. Accordingly, I conclude that Dr. Sangha's complaint of discrimination under s. 7 of the *Act* is substantiated. Having found liability on the ground of national or ethnic origin, I do not need to decide whether Dr. Sangha was discriminated against on the basis of age.

AA. What is the Appropriate Remedy?

[209] The Commission asks that the respondent cease the practice of screening out visible minority immigrant candidates on the basis that they are overqualified for a particular job. The Commission and Dr. Sangha ask that he be hired for the next available RO job. They also request compensation for lost wages for a period of three years, being the three year term between September 2001 and September 2004, at \$55,000/year, grossed up for taxes. Lost wages should also take into account any loss of pension and other benefits associated with the position. Any income that Dr. Sangha earned during that period of time should be deducted from this award.

[210] Dr. Sangha and the Commission also ask for \$10,000 for pain and suffering plus interest on this amount at the Bank of Canada prime rate from the date of the complaint to the date of the payment.

[211] Finally, the Commission asks for an order that the Board take measures in consultation with the Commission, to redress the discriminatory practice, or to prevent the same or similar practice from occurring in the future.

II. THE AWARD

[212] My assessment of the facts of this case and the witnesses from the Board suggests that it is unlikely that the Board would apply this practice in the future. The witnesses from the Board were open and forthcoming about how they were very affected by the allegations of discrimination, and in my view they have been very sensitized to issues facing visible minority immigrant job applicants. For this reason, I do not order that the Board take measures in consultation with the Commission to redress the discriminatory practice or to prevent it from occurring in the future.

[213] I do order that, where a visible minority immigrant has been chosen for an interview for a position with the Board, that the Board cease using any policy or practice that would automatically disqualify such candidate for the reason that they are overqualified for the job. On the basis that they are overqualified for the job.

[214] In this respect, the Board should not rely upon impressionistic markers that the overqualified are ill-suited for the job because they will become bored/unmotivated or

cause morale problems or quit prematurely. It is incumbent on the Board to make some inquiry into the candidate's motives for applying for the job, in order to obtain a more accurate prognosis of the candidate's behaviour if hired.

[215] Turning now to the question of reinstatement and compensation for lost wages, in deciding this claim, I am guided by the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401.

[216] *Morgan* dealt with the issue of how to evaluate the compensation for loss of a job opportunity where there is a finding of discrimination by the Tribunal. The relevant part of the discussion is found in the reasons of Marceau J.A. In his reasons, Marceau J.A. says that the complainant is not required to prove that, but for the discrimination they would have certainly obtained the position. To establish damage does not require a probability. Rather, the test for loss of job is a "mere possibility" so long as it is a "serious one". Of course, the uncertainty about whether a job could be denied is relevant to an assessment of the compensation. (p. 412)

[217] For Dr. Sangha to succeed in his claim to reinstatement and for lost wages, he must cross the threshold of showing that there was not just a mere possibility of acquiring the job but a serious one. In my opinion, Dr. Sangha does not meet this threshold.

[218] This is where the reasons put forward by the Board other than over-qualification became relevant. The Board's position is that the other candidates chosen for the RO position were more qualified, their qualifications were more congruent for the RO position, than those of Dr. Sangha. I agree. The evidence of the qualifications of the other candidates, as shown on their resumes, and the evidence of Ms. Anderson and Mr. Lennie-Misgeld clearly demonstrate this. I need not repeat this evidence. It is set out in great detail earlier in this decision.

[219] For these reasons, I cannot endorse Dr. Sangha's request for reinstatement and compensation for lost wages.

[220] As to Dr. Sangha's claim for pain and suffering, the evidence is that Dr. Sangha felt very positive when he returned home after the interview that he would be offered the position. When he was advised otherwise, he testified that he was very upset. He had been chosen to be interviewed when his qualifications were well known to the Board, yet he was rejected for the job in large part because he was over-qualified.

[221] He became very depressed about not getting the job. He consulted his family doctor who prescribed anti-depressant medication which he took for some period of time. But he stopped taking it because his doctor advised that it could have some negative effects. He also said that he could not look for jobs because of his depression and because of his disappointment at not getting the RO job.

[222] In closing argument, Dr. Sangha pointed out that one of the reasons he came to Canada was to provide a better life for himself, his family and his children. He has encountered many obstacles to getting a job in his profession even though he is highly credentialed from a well recognized Western European university. Like many new professional immigrants to Canada, he said he was considered overqualified by most of the employers that he applied to. He has not been able to provide a good quality of life for his family that is commensurate with his qualifications.

[223] Taking this into account, he decided that he would accept a position that was within his area of expertise although it may not utilize all his skills. The job paid relatively well and would give him Canadian experience.

[224] In deciding an amount for pain and suffering, it must be taken into account that the maximum amount of \$20,000 is reserved for the most egregious of cases. This is not the situation here. The pain and suffering resulting in this case does not just stem from the actions of the Board. It also stems from the refusal of other potential employers to hire him at his skill level, and discriminatory barriers that affect visible minority immigrants.

[225] Having considered all of the relevant facts in this case, I award Dr. Sangha the sum of \$9,500 for pain and suffering.

[226] I also award interest to be calculated in accordance with R. 9(12) of the Tribunal *Rules of Procedure*. Interest should run from September 17, 2001, to the date of payment of the \$9,500. The total of this amount plus interest shall not exceed \$20,000.

[227] Finally, Dr. Sangha estimated his out of pocket costs to be \$200. The Board shall reimburse him for these costs.

"signed by"
J. Grant Sinclair

OTTAWA Ontario

February

24,

2006

PARTIES OF RECORD

TRIBUNAL FILE:	T949/6904
STYLE OF CAUSE:	Gian S. Sangha v. Mackenzie Valley Land and Water Board
DATE AND PLACE OF HEARING:	May 9 to 13, 2005 Yellowknife, Northwest Territories
DECISION OF THE TRIBUNAL DATED:	February 24, 2006
APPEARANCES:	
Dr. Gian S. Sangha	On his own behalf
Daniel Pagowski	On behalf of the Canadian Human Rights Commission
Heather Treacy	On behalf of the Respondent

Jennifer Bayly-Atkin	
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