

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

**CRIS BASUDDE**

**- and -  
SHIV CHOPRA**

**Complainants**

**- and -  
CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -  
HEALTH CANADA**

**Respondent**

**RULING**

MEMBER: Pierre Deschamps 2006 CHRT 10  
2006/03/03

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[1] This is a ruling on Respondent's objection to the introduction by the Complainant of evidence on the selection process leading to the appointment of Dr. Timothy Scott to the position of Director, BVD

**I. INTRODUCTION**

[2] The Respondent, Health Canada, hereafter HC, objects to evidence being tendered by the Complainant in the present proceedings concerning the appointment, in 1995, of Dr. Timothy Scott as Director of the Bureau of Veterinary Drugs, hereafter BVD. Respondent argues that anything pertaining to the selection process for the BVD Director position has already been decided in a previous decision of this Tribunal.

[3] In addition, the Respondent argues that any issue revolving around Dr. Scott's appointment should have been raised in the course of the hearings regarding Dr. Chopra's 1992 complaint.

[4] In support of its position, the Respondent relies on the doctrine of *res judicata*, *issue estoppel* and abuse of process.

[5] For his part, the Complainant argues that the events he wants to introduce in evidence were not the object of any decision by this Tribunal. These events pertain to what took place after corrective measures were implemented at the end of 1994 with respect to the selection process pertaining to the position of Director, BVD.

[6] In order to rule on Respondent's objection, there is a need for the Tribunal to describe the facts that have led to Respondent's objection.

## **II. BACKGROUND**

[7] On September 16, 1992, Dr. Chopra filed a complaint with the Canadian Human Rights Commission. His complaint was later referred to the Tribunal. It was first heard by a three member panel (Soberman Panel) which dismissed Dr. Chopra's complaint.

[8] The record shows that, after a judicial review, Dr. Chopra's 1992 complaint was the object of a second hearing by this Tribunal. Tribunal Member Hadjis was assigned to hear the case on the basis of the record, augmented by certain additional evidence.

[9] In his 1992 complaint, Dr. Chopra alleged that he had been treated unfairly in the manner in which his performance appraisals were prepared during the 1990 to 1992 period and that he received this treatment because of his color, race and national or ethnic origin. More specifically, Dr. Chopra complained that he had been discriminated against in the selection process leading to the appointment of Dr. Claire Franklin as Director, Bureau of Human Prescription Drugs, hereafter BHPD.

[10] In the course of the hearing presided by Mr. Hadjis, Counsel for the Commission referred to events that occurred outside the 1990-1992 period. One of these events was the appointment, in December 1993, of Dr. Timothy Scott to the position of Director, BVD. This evidence was tendered, it appears from Mr. Hadjis' decision, as evidence of ongoing discrimination at HC (*Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20, para. 136, hereafter the Hadjis decision).

[11] Even though this event was not part of the initial facts set out in Dr. Chopra's 1992 complaint, Mr. Hadjis went on to deal with the December 1993 competition that led to the appointment of Dr. Scott (Hadjis decision, para. 141 and following). The following facts were considered by Mr. Hadjis.

[12] In December 1993, a competition was held within HC for the position of Director, BVD. Dr. Chopra applied for the position and was screened out. Another individual, Dr. Casorso, who had also applied for the position, was not chosen.

[13] Dr. Chopra as well as Dr. Casorso appealed the appointment of Dr. Scott as Director, BVD, to the Public Service Commission Appeal Board, hereafter the PSCAB. Dr. Chopra's appeal was dismissed while Dr. Casorso's appeal was allowed on the basis that

the Screening Board had not properly considered his candidacy in relation to the experience requirements that were established by the Department for this position.

[14] Following the PSCAB decision, HC took corrective measures to address the Appeal Board's finding in the Casorso matter in respect of the selection process for the position of Director, BVD.

[15] The criteria which required recent experience in managing a scientific or medical or veterinary organization with multifaceted programs was eliminated. Furthermore, HC ordered that candidates who had been screened out on the basis that they did not have experience as a departmental representative with outside organizations or management experience should be reassessed.

[16] Thus a new competition was held and at the end of the process and, on February 28, 1995, Dr. Scott was confirmed as Director, BVD effective March 13, 1995.

### **III. ARGUMENTS**

[17] Counsel for the Complainant argues that, after the implementation of the corrective measures following Dr. Casorso's successful appeal, Dr. Chopra was not considered for the position of Director, BVD and was, in fact, completely ignored. According to Counsel for the Complainant, this lends support to Dr. Chopra's claim of discrimination.

[18] Counsel for the Complainant further argues that the events that occurred after the corrective measures were implemented are events that were not addressed by Mr. Hadjis in his decision and, thus, should be part of the issues to be decided by the Tribunal in the present proceedings. Counsel for the Complainant, however, conceded that the findings of Mr. Hadjis in relation to the 1993 competition for the position of Director, BVD should stand.

[19] Counsel for the Respondent argues, on the contrary, that Mr. Hadjis' decision covers every aspect of the 1993 competition which led to the appointment of Dr. Scott to the position of Director, BVD. He relies on the doctrine of *res judicata*, *issue estoppel* and abuse of process to support his argument that evidence concerning the appointment of Dr. Scott should not be heard by this Tribunal.

[20] Counsel for the Respondent further argues that Dr. Chopra could have complained about the fact that he was not considered in the second competition for the position of Director, BVD, in the course of the hearings of his 1992 complaint.

[21] Firstly, Counsel for the Respondent underscores the fact that Dr. Chopra's 1992 complaint was heard by the Soberman Panel in September and October 1995, well after Dr. Scott's appointment to the position of Director, BVD in February 1995. Secondly, Counsel for the Respondent submits that the issue should have been fully litigated before the Hadjis Tribunal when it heard Dr. Chopra's 1992 complaint in 1999 and 2000.

[22] Counsel for the Respondent argues that, to permit or authorize the litigation of this issue - i.e. Dr. Chopra not being considered in the second competition for the position of Director, BVD, would constitute an abuse of process.

### **IV. ANALYSIS**

[23] The first hearing of Dr. Chopra's 1992 complaint by the Soberman Panel took place in September and October of 1995. Respondent argues that any discrimination issue in relation to Dr. Scott's appointment should have been dealt with at that time.

[24] This view ignores the fact that Dr. Chopra's 1992 complaint purported to cover events that occurred in the 1990 to 1992 period, more specifically those related to the staffing of the position of Director, BHPD between September 1990 and the spring of

1992 (Hadjis decision, para. 2). It is only in the course of the Hadjis hearing, which went from May 17, 1999 to December 11, 2000, that the competition pertaining to the staffing of the position of Director, BVD in December 1993 was raised as an additional fact to be considered by Mr. Hadjis.

[25] It is worth noting here that, in his decision, Mr. Hadjis refers to the fact that during final arguments in the re-hearing of Dr. Chopra's 1992 complaint, there was some debate between counsel as to the parameters of the inquiry into the 1992 complaint since much of the evidence adduced by the Commission at the re-hearing went beyond the matters specifically referred to in the complaint (Hadjis decision, para. 254).

[26] After having carefully reviewed the submissions of all the parties, including Dr. Chopra himself, Mr. Hadjis concluded that all the evidence could be assessed by him for its value as circumstantial evidence in support of the key aspect of the complaint, that is the staffing of the position of Director of BHPD, in the 1990 to 1992 period (Hadjis decision, para. 254). Earlier in his decision, Mr. Hadjis identified as the events at the core of Dr. Chopra's complaint those which occurred during the 1990 to 1992 period (Hadjis decision, para. 82).

[27] It therefore appears that what was at the heart of Dr. Chopra's 1992 complaint was the staffing of the position of Director, BHPD and that the additional evidence adduced was circumstantial evidence in support of the key aspect of the Complaint, i.e. the staffing of the position of Director, BHPD. The 1993 competition thus appears not to have been fundamental to the Hadjis proceedings (see *Joss v. Canada (Treasury Board)*, [1999] F.C.J. No 1819 (QL) (T.D.)).

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

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

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

[31] In a preliminary decision related to the present proceedings, Tribunal Member Dr. Groarke expressed the view that the alleged failure to appoint Dr. Chopra to the position of Director, BVD in 1993 had already been litigated. On this point, Dr. Groarke indicated in his ruling that the Hadjis Tribunal received evidence relating to the events that took place between 1992 and 1994 and expressed the view that this evidence, presented by the Commission on behalf of Dr. Chopra, clearly formed part of Dr. Chopra's case.

[32] As true as these statements may be, I cannot infer from Dr. Groarke's ruling that the events that occurred after the PSCAB decision on the Casorso appeal form part of Mr. Hadjis decision.

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

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

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

[36] On this point, the Tribunal disagrees with Respondent's assertion that the corrective measures put in place after the Casorso decision are subsumed in the overall selection process of a Director for the BVD, process which started in December 1993 and ended in February 1995 with the confirmation of Dr. Scott as Director, BVD.

## V. THE LAW

[37] Applying to these findings the law on *res judicata* and *issue estoppel* (see *Angle v. Canada (Minister of National Revenue)*, [1975], 2 S.C.R. 248, QL, page 4), the Tribunal concludes:

that the first criterion set out by Lord Guest in *Carl Zeiss Stiftung*, as cited in *Angle*, has not been met, i.e. that the same question raised in the present proceeding has already been decided by a previous tribunal;  
that issues related to allegations of discrimination arising after the PSCAB decision of November 1994 were not addressed by the Hadjis tribunal;  
that it cannot be inferred that these issues are subsumed in the findings of Mr. Hadjis on the initial competition pertaining to the selection of a Director, BVD;  
that there is no abuse of process on the part of the Complainant.

[38] Even if I had come to a different conclusion, i.e. that the three pre-conditions for *issue estoppel* to apply had been met, I would have refused, using my judicial discretion (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (QL), p. 13), to apply *issue estoppel* given the fact that the 1993 competition and the subsequent competition pertaining to the appointment of the Director, BVD were not at the core of the 1992 complaint filed by Dr. Chopra and that the 1993 competition was introduced into evidence, as stated by Mr. Hadjis in his decision, in support of the key aspect of the 1992

complaint, that is, the staffing of the position of Director, BHPD in the 1990 to 1992 period (Hadjis decision, para. 254).

## VI. RULING

[39] Hence, Respondent's objection to the introduction of evidence by the Complainant on the appointment of Dr. Scott as Director, BVD is dismissed. The Complainant is allowed to adduce evidence pertaining to events that took place after corrective measures were implemented following the Casorso decision rendered by the PSCAB in November 1994.

"Signed by"

Pierre Deschamps

OTTAWA Ontario  
March 3, 2006

## PARTIES OF RECORD

TRIBUNAL FILE:	T901/2104
STYLE OF CAUSE:	Cris Basudde and Shiv Chopra v. Health Canada
RULING OF THE TRIBUNAL DATED:	March 3, 2006
APPEARANCES:	
Kavid Yazbeck	On behalf of the Complainants
No one appearing	On behalf of the Canadian Human Rights Commission
David Migicovsky	On behalf of the Respondent