T.D. 6/94
Decision rendered on March 18, 1994

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CHANDER P. GROVER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

NATIONAL RESEARCH COUNCIL CANADA

Respondent

DECISION OF THE TRIBUNAL RELATED TO DAMAGES

TRIBUNAL: CARL E. FLECK, Q.C. - Chairman
RUTH S. GOLDHAR - Member
KATHLEEN M. JORDAN - Member

APPEARANCES: Peter C. Engelmann, Counsel for Canadian Human Rights Commission
Alain Préfontaine, Department of Justice, Counsel for Respondent
Cynthia Sams, Counsel for Complainant

DATES AND LOCATION OF HEARING: July 6-9, 1993
July 29-30, 1993
Ottawa, Ontario

Reference: T.D. 12/92
August 21, 1992

The following decision arises out of a hearing reconvened at the request of all parties to deal with the question of implementation of this Tribunal's decision rendered on August 21st, 1992. Problems with implementation of the decision were first brought to the Tribunal's attention in October of 1992 through a series of letters forwarded on to the Tribunal by counsel for the parties involved. One of those issues was the problem in deciding what was an appropriate position for the Complainant, Dr. C. Grover as set out on p. 85 of the said decision. There are two specific references to the question of an appropriate position in our decision which when read together are set out as follows:

At p. 85:

"d) Career promotion. It has been urged upon us, that an appropriate remedy be a directed appointment of Dr. Grover by the Respondent to a position commensurate with his scientific capabilities. The Tribunal is satisfied that Dr. Grover had, and still possesses the necessary qualifications for administrative leadership, organization and management ability to have achieved at least, a normal promotion to a section head or group leader. We are fortified in this opinion, by the evidence of Mr. Major, when he recited the administrative capabilities of Dr. Grover while temporary director of N.O.I.

It is obvious from Mr. Major's evidence that Dr. Grover was responsible for planning of N.O.I. as well as selecting personnel. This was a substantial undertaking on Dr. Grover's part on behalf of N.O.I. Under the circumstances, we are of the opinion that, at a very minimum, the position of the section head or group leader be made available to Dr. Grover at

the earliest possible opportunity. We are fully appreciative of the fact that the Respondent has a new promotion policy but the discrimination of Dr. Grover which interfered with his career opportunity commenced far earlier. If the question of appointment to an appropriate position meets with resistance by the Respondent in its implementation, this Tribunal will retain jurisdiction to hear further evidence in this regard."

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"d) The Complainant will be appointed, at the earliest possible opportunity, to a position of section head or group leader. In the event that this Order with respect to promotion is resisted by the Respondent, the Tribunal shall retain jurisdiction to hear further evidence in this regard."

It is vital for an understanding of this matter to appreciate that the substantial portion of the first hearing related to the discriminatory treatment of the Complainant, particularly in the area of peer promotion to the upper management level of N.R.C. As set out on p. 86 of our decision of August 21st, 1992, this Tribunal was fully aware that the Respondent N.R.C. was undergoing a substantial restructuring including promotional policy. The Tribunal accordingly retained jurisdiction to hear further evidence to assist with implementation in the event that difficulties arose with this aspect of the decision. It is important to understand the background of how the Tribunal came to reconvene this hearing which took place over the days of July 6th, 7th, 8th, 9th, 29th and 30th, 1993.

The further and important issue raised by the Respondent relates to the question of the jurisdiction of the Tribunal to reconvene despite the Tribunal having retained jurisdiction with respect to implementation of an appropriate appointment for the Complainant as well as a calculation of his appropriate years of relevant experience (hereinafter referred to as Y.R.E.) The Respondent in the proceeding took the position at the opening of the reconvened hearing on July 6th, 1993 that the Tribunal was "functus officio" and accordingly was without jurisdiction to conduct the hearing with respect to implementation of the remedies. The Tribunal ruled on this preliminary motion in favour of the Complainant and thereafter embarked upon the hearing of further evidence as it related to the question of an appropriate appointment for the Complainant arising out of the remedies as herein set out.

ISSUES

1. Does the Tribunal have jurisdiction to reconvene the hearing or is it as a Tribunal functus officio following their decision delivered August 21st, 1992?

2. What is an appropriate position for the Complainant having regard to the further evidence and submissions as considered by the Tribunal at this hearing?

1. Was the Tribunal functus officio and therefore without jurisdiction for their hearing?

It is important to an understanding of the entire question of jurisdiction to review how this Tribunal came to reconvene to hear further

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evidence. Much of the following background is as set out in our preliminary reasons for ruling on the application in addition to

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some expanded reference materials intended to fully deal with this question of jurisdiction and functus officio. Following the Tribunal's decision on August 21st, 1992 same was received and entered as a matter of record in the Registry of the Federal Court of Canada (Trial Division) pursuant to s. 57 of the Canadian Human Rights Act (hereinafter referred to as the "C.H.R.A."). This registration took place August 24th, 1992. S. 57 of the C.H.R.A. states as follows:

"57. Any order of a Tribunal under subsection 53(2) or (3) or any order of a Review Tribunal under subsection 56(5) may, for the purpose of enforcement, be made an order of the Federal Court by following the usual practice and procedure or, in lieu thereof, by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy, and thereupon that order becomes an order of the Court."

Of significance it is to be noted that none of the parties to the proceeding, particularly the Respondent, appealed the decision to a Review Tribunal pursuant to s. 55 of the C.H.R.A. nor applied for judicial review to the Federal Court as to any aspect of the Tribunal's decision. As previously indicated, on October 9th, 1992 we received a letter from Mr. David Bennett, counsel for the Complainant advising of certain difficulties he had in the implementation of the decision. He outlined the following issues remained unresolved:

A. The appropriate position for Dr. Grover at N.R.C.;

B. Calculation of Y.R.E. and salary adjustment; and,

C. Costs of the proceeding.

This letter was followed by letter under date of October 16th, 1992 from Mr. Saunders on behalf of N.R.C. again directed to the Tribunal outlining his position with respect to the points raised by Mr.

Bennett, namely appropriate position for Dr. Grover at N.R.C., calculation of Y.R.E. and salary adjustment and costs. He concludes his letter with the following at p. 2:

"We understand from Mr. Bennett's letter that he wishes to have the above three points raised before the Tribunal. As indicated above, the NRC's position is that the Tribunal retains jurisdiction on the issue of promotion and Y.R.E. adjustments only."

Counsel for all parties then arranged a telephone conference call to the Chairman of the Tribunal following the aforesaid exchange of letters. At that time the Chairman was advised that all parties wished to avail themselves of further assistance from the Tribunal with respect to implementation of certain of the outstanding issues. The Chairman was advised at that time that certain of the remedies had been implemented, namely payment of damages for hurt feelings, correction of the personnel file, the required written apologies as well as contact with the Human Rights Commission in order to facilitate the cease and desist order regarding discriminatory conduct. In addition, the hurt feelings award carried with it a calculation for interest which had also been paid by the Respondent.

During the telephone conference the Chairman requested and subsequently received written briefs from counsel for all parties as to the

issues outstanding. Following the receipt of written submissions, the Tribunal met with counsel for all parties with their clients on November 27th, 1992. After discussion with counsel, it was agreed that for the purposes of effecting implementation they might better be facilitated by meeting informally and reviewing various points in the submissions. On that initial meeting with the Tribunal facilitating negotiations, the parties resolved satisfactorily two of the three remaining issues regarding remedies, namely:

A. The question of costs was settled and payment was directed by the Respondent to the Complainant;

B. The parties could not agree upon an arbitrator and the Tribunal arranged directly for the appointment of an arbitrator, Mr. Langille on consent of all parties.

At the outset of the informal meeting on November 27th, the Chairman quite clearly pointed out to all counsel that the Tribunal was not

prepared to participate in this process if any of the parties were going to challenge jurisdiction and raise the issue of functus. All counsel present including Mr. Bennett for Dr. Grover, Mr. Saunders for NRC and Mr. Engelmann for C.H.R.C. assured the Tribunal that they were only interested in getting all of the issues resolved and completing the implementation of the order. Further meetings were held informally in an attempt to resolve the last outstanding issue, namely the appointment of Dr. Grover to an appropriate position. The Tribunal was impressed with the industry displayed by all parties, apparently expressing a common interest and goal to resolve the last and final issue. At no time during this process was it ever suggested by the Respondent, or indeed any of the parties that if this informal process was not resolved to their liking that they would fall back onto a position the Tribunal was without jurisdiction to reconvene as they were functus officio.

The parties were unable to resolve the last outstanding issue and accordingly, the parties agreed that the Tribunal would reconvene a formal hearing to allow all parties to call evidence and make further submissions.

Needless to say, at the opening of the hearing dated July 6th, 1993 the Tribunal was concerned to see the Respondent move to stay the proceedings for the reason that the Tribunal did not have jurisdiction by reason of the fact they were functus officio. The Tribunal was accordingly required to rule upon this application and as indicated much of these reasons relating to the question of jurisdiction were provided at that time.

It appears to this Tribunal that the conduct of the Respondent if it is not estopped from now asserting this position should at the very least be considered as a question of bad faith on its part. Certainly its conduct is questionable in view of the following:

A. It never sought any formal remedy to question the jurisdiction of the Tribunal nor any aspect of its decision at any time;

B. At no time did it move through the Federal Court or any court of competent jurisdiction to stay or review the proceedings of this Tribunal following its participation in the process starting in November 1992. Indeed, it actively participated and sought the guidance from the Tribunal in the implementation of its order.

Is it now open for the Respondent in view of its conduct as

described herein to raise the issue of functus? We think not. The Respondent concedes that this Tribunal had the authority to make the order that it did of August 21st, 1992 pursuant to s. 53(2)(b) of the C.H.R.A. which reads as follows:

"That the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice."

The Respondent takes the position, however, that the Tribunal does not have the authority to retain jurisdiction to hear further evidence if this issue cannot be resolved, despite the fact that the parties embarked upon this process on consent as outlined herein commencing November 27th, 1992. The Respondent contends that the position of the Tribunal as it participated in this process was merely that of a conciliator. As set out in Mr. Saunders' letter and his subsequent submissions to the Tribunal when we met on November 27th, 1992, it necessarily follows that the Respondent contemplated retention of jurisdiction by the Tribunal for the hearing of this particular issue and that such would necessarily call for the hearing of further evidence and submissions.

The Respondent further takes the position that the Tribunal is revisiting its decision in an attempt to fashion a different remedy for the Complainant than was contemplated in the decision of August 21st, 1992. To put it in the words of the Respondent, by hearing further evidence "we are giving the Complainant a second bite of the apple." We cannot see the logic in this position. As requested in October, 1992 on consent of all parties we formulated a process to assist in the implementation of the order. We did not at any time nor was it ever suggested by any of the parties through their counsel that a different remedy was being afforded to the Complainant or alternatively that we were in some way attempting to vary or change our decision.

At the request of the parties, what we did was to deal directly with the method of implementation and to clarify same in order to arrive at an appropriate appointment for Dr. Grover to a position within the Respondent NRC.

This Tribunal in view of the process herein described, feels compelled to review the entire question of jurisdiction and the argument of functus officio in detail.

The legal term functus officio as set out in Black's Law Dictionary, reads as follows:

"...Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority."

We believe that the wording of this definition is particularly important having regard to the decision of Chandler v Alta. Assoc. of Architects (1989) 2 S.C.R. 848. This decision was urged upon us by the Respondent as the authority for the point this Tribunal is now functus officio. With great respect, we do not see how the Chandler case is of assistance in supporting the Respondent's position. At p. 862 of that decision, the following language we believe supports the authority for retaining jurisdiction to resolve the implementation. Justice Sopinka at p. 862 recites the following excerpts:

"To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect of the decisions of

administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.....

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling status to dispose, it ought to be allowed to complete its statutory task....."

The Chandler decision was followed by the Ontario Divisional Court decision Re Canada Post Corp. and Canadian Union of Postal Workers et al, 84 D.L.R. (4th), 574. In this case, an arbitrator had provided an award but did not explicitly deal with certain of the language in his decision. The decision of the arbitrator was filed with the Federal Court pursuant to s. 662(2) of the Canada Labour Code. Counsel for Canada Post took the position that the arbitrator was functus officio at that point.

In the award of the arbitrator appeared the following language:

"For the purpose of implementation, I shall remain seized."

Justice O'Driscoll recited the language of Sopinka J. in the Chandler decision as authority for their view that the arbitrator remained seised for the purpose of implementing his award and accordingly dismissed the application of Canada Post Corporation which sought to quash the award of the arbitrator for lack of jurisdiction.

In the case of P.S.A.C. v Canada Treasury Board (1991) 50 Admin. Law Reports, 249, the question of jurisdiction of a Human Rights Tribunal was dealt with in detail. In that case, a Human Rights Tribunal had approved a consent order to an agreement amongst the parties settling a complaint. In one part of the settlement agreement, the Tribunal was to evaluate certain positions. Subsequently, the Complainant asked the Tribunal to reconvene to deal with certain of those matters. The Treasury Board objected to the Tribunal's jurisdiction complaining that such matters were outside the complaint and the Tribunal was functus officio. It was ruled that the Tribunal was not functus officio as they had reserved jurisdiction and that such reservation had not involved the power to reconsider, withdraw or change the original decision.

The case of Re Canada Post Corp. and Canadian Union of Postal Workers, (Policy grievance 88-02), 21 L.A.C. 4th at p. 413 is particularly analogous and on point to the issues raised in this case. In the Canada Post case a trade union had filed the arbitration award in the Federal Court pursuant to s. 159 of the Canada Labour Code which bears similar language to s. 57 of the C.H.R.A. (supra). The arbitrator went on to discuss by reconvening he was simply completing a task for which he had remained seised. At p. 418, the following language appears:

"To the contrary, as I understand the purpose of the trade union's request to reconvene, it is with a view that I complete the task for which I remain seised. That is to say the parties apparently have encountered difficulty in the implementation of my order. The trade union has accordingly asked me to finish my mandate in order to achieve a final and binding settlement."

And then again at p. 419:

"In short, I am of a view that in accordance with arbitral practice, my jurisdiction has not been spent in the sense that this board is functus officio for any reasons cited in the jurisprudence contained in the employer's memorandum of law."

The arbitrator then went on to reject the idea that simply because the judgment was registered pursuant to s. 159 of the Canada Labour Code, this did not supplant jurisdiction of the arbitrator to complete the mandate of the Board, and at p. 521 he states the following:

"As hitherto indicated, I have concluded that the "administrative" act of filing an arbitral award in the Federal Court under the Code at the same time a party initiates proceedings before the properly seised arbitrator to finalize a settlement ought not to be seen to prejudice that party's entitlement to the full realization of the award. For all the foregoing reasons, the employer's submissions with respect to my jurisdiction received with the implementation of my direction at Edmonston, N.B. are rejected."

The Canada Post decision therefore dealt specifically with the points raised in this case namely an implementation once an award is registered with the Federal Court and held that a Board can continue to reconvene to clarify or assist with the implementation of an award when it remains seised of such question.

Further decisions supportive of the reasoning and conclusions of the Canada Post case are the following:

Re Northern Telecom and C.A.W. Local 1915, 4 L.A.C. (4th) 11

Re Seneca College of Applied Arts & Technology and Ontario Public Services Employees Union, 21 L.A.C. (3d) 171

Re Metropolitan Authority of the County of Halifax and Halifax Civic Workers Union Local 108, 33 L.A.C. (3d) 333

Re Canada Post Corp. and C.U.P.W., 28 L.A.C. (4th) 228

Re Lake Ontario Steel Co. and United Steel Workers Local 6571, 24 L.A.C. (4th) 355

Re Consumers Gas Co. and International Chemical Workers' Union, Local 161, 6 L.A.C. (2d) 61

United Electrical Radio and Machine Workers of America, Local 514 in re Amalgamated Electric Corporation (Continuation of Arbitration)

Re McDonnell Douglas Canada Ltd. and Canadian Automobile Workers, Local 673, 29 L.A.C. (4th), 284

Re Wellington County Board of Education and Ontario Secondary School Teachers' Federation, 21 L.A.C. (4th) 124

Re Dunkley Lumber Co. Ltd. and International Woodworkers of America, Local I-424, 17 L.A.C. (3d) 192

Re Pacific Coach Lines Ltd. and Western Transportation Union, Local 1, 10 L.A.C. (3d) 153

Re Newfoundland Farm Products Corporation and Newfoundland Association of Public Employees, 7 L.A.C. (3d) 186

This Tribunal has been made aware that the Respondent proceeded with an application for judicial review to the Federal Court. The question then arises as to our jurisdiction under these circumstances as to provide for clarification of the decision of August 21st, 1992. This very point was considered and dealt with in the case of Re Insurance Corp. of British Columbia and Office & Technical Employees Union, Local 378, 15 L.A.C. (4th) 116. At p. 121, the Arbitrator, Mr. H.A. Hope, Q.C. states the following:

"Here the application of those principles is complicated to some extent by the fact that an appeal has been launched by the employer. However, the union relied on the reasoning in the decision of the former Labour Relations Board in Cominco Ltd. and U.S.W.A., Loc. 480 (1983), 4 C..R.B.R. (N.S.) 45 (Moore), as supporting by necessary implication the principle that a pending appeal does not restrict or otherwise affect the jurisdiction of an arbitrator to provide necessary clarification of an award."

The facts of the Re Insurance Corp. case insofar as the sequence of events and the issues involved is essentially on all fours with this situation. Arbitrator Hope proceeded to clarify the job classification of the griever who had been dismissed. He went on to find that he had jurisdiction despite the pending appeal and specifically for the reasons that he was providing clarification of the classification which both parties had been unable to resolve.

The decision of Re Westminster Mills Limited and Anderson, 21 W.W.R. 417 dealt with the question of exhausting statutory power of a Crown Official and specifically dealt with the effect of s. 28 (now s. 31) ss. 2 of the Interpretation Act, S.C. Vol. 8, c. 1-21. Section 31(2) reads as follows:

"Where power is given to a person, officer, functionary to do or enforce the doing of any act or thing all such powers as are necessary to enable the person, officer or functionary to do or enforce the act or thing are deemed also to be given."

There are numerous C.H.R.A. decisions wherein the order providing remedies to a successful Complainant include the retaining of jurisdiction to facilitate implementation. It is our understanding that these decisions on the question of retaining jurisdiction have not been challenged at any higher Review Court level and they include the following:

Basi v C.N.R., 9 C.H.R.R., p. D/5029
Butterill et al v Via Rail, 1980 (Decision 44) p. D/233 C.H.R.R.
Cashin v Canadian Broadcasting Corporation, 12 C.H.R.R. p. D/2222
Morrell v Canada Employment and Immigration Commission, 6 C.H.R.R., p D/3021

Various human rights codes and statutes throughout Canada reveal that only a few make any direct reference to the matter of a hearing tribunal or board of inquiry remaining seised of a continuing nature in the event a decision has been given in favour of a Complainant. In Ontario, the Ontario Human Rights Code s. 40, ss. 4 provides that on a finding that a right is infringed upon the ground of harassment, the Board shall remain seised of the matter and if there is a complaint of a continuation or repetition of the infringement of the right, the Commission may request the Board to reconvene.

Under the Saskatchewan Human Rights Code, s. 47 provides for a board of inquiry to have a continuing jurisdiction over a programme undertaken to eliminate disadvantaged individuals after a finding of discrimination. This ongoing jurisdiction is found in s. 47(2)(a) & (b) providing for a board of inquiry to make inquiries concerning the ongoing programme and to vary the programme. The Manitoba Human Rights Code under s. 47(1) provides that where an adjudicator implements an affirmative action programme or other special programme, the adjudicator has a continuing jurisdiction to supervise or order the variation of the programme until he is of the opinion that there has been full compliance with the order.

The balance of provincial human rights legislature and the C.H.R.A. all provide for general remedial action to be taken but are silent with respect to the specifics of jurisdiction to either reconvene or maintain ongoing supervision. It is our finding however that the decision

in Robichaud provides that human rights legislation by its nature is to be remedial as opposed to punitive. The general powers therefore under s. 53 require therefore in our opinion as Justice Sopinka calls for in the Chandler case the power of a Tribunal to "carry out its task". In other words, programmes and workplace job placements ordered through the general remedial section often by their necessity require not only implementation but ongoing supervision. We are of the opinion that it necessarily follows by implication that a Tribunal under these circumstances will be within its power to retain jurisdiction over the subject matter.

Important to our conclusions in this regard as it relates to having appropriate jurisdiction was the fact that this Tribunal was invited by the parties to reconvene in order to facilitate implementation and to hear further evidence in order to clarify the remedy as it relates to an appropriateness of position for Dr. Grover. We have not been called upon to change the decision or to implement a different remedy than that which we originally provided in our decision of August 21st, 1992 nor have we

proposed to do so in this decision. It became readily apparent at the hearing of further evidence that NRC's terminology in designating management positions was and continues to be less than satisfactory in some areas of the organization. Often the language appears confusing and misleading when interpreted in the context of the monetary authority designated for various positions.

This Tribunal is satisfied that upon review of the various principles and authorities outlined herein that its jurisdiction does extend to clarify the appropriateness of the position to which Dr. Grover has been and is to be appointed.

2. Was Dr. Grover appointed to an appropriate position as called for by the decision of August 21st, 1992?

The Tribunal is of the opinion that Dr. Grover has not been appointed to an appropriate position. An appropriate position in this instance is in our view characterized by three essential components:

1. The expectations, duties and responsibilities of the position are commensurate with Dr. Grover's scientific management and research capabilities.

2. The location of the designated position on the salary scale and NRC guideline curve is in keeping with an appropriate career

progression in terms of where Dr. Grover would be in 1994 had not the discrimination taken place.

3. That the NRC signing authority is consistent with the position title used.

At the time of our decision in August of 1992, the question of an appropriate position for Dr. Grover remained a difficult question. The difficulty arose from the evidence of the initial hearing wherein evidence was led by the Respondent that the entire employment infrastructure of NRC as well as the promotional policy was being revised. Much of the difficulty in this matter has arisen because of the structural changes of NRC for the period from

1986 to the present and accordingly the question of appropriateness of position.

It should be noted that the Respondent NRC immediately following the decision of August 21st, 1992 moved quickly to satisfy several of the remedies called for, namely:

A. Letters of apology to the Optical Society and a formal apology published in the NRC newsletter;

B. Entered into negotiations with the Commission to review its Human Rights programme and policy;

C. Paid the sum of $5,000.00, with interest as ordered.
In addition, as previously outlined herein with the assistance of this Tribunal, the two other issues, namely costs and the appointment of an arbitrator to deal with the Y.R.E. and promotion were resolved. Costs as agreed upon were paid forthwith by the Respondent to the Complainant and Mr. Langille was appointed arbitrator. When the Tribunal reconvened in July of 1993 the sole issue remaining therefore was to clarify the appropriateness of a position for Dr. Grover.

Dr. Grover was called to again testify as to the events following our decision of August 21st, 1992. Introduced into evidence was Exhibit C-16, a letter from Dr. Perron to Dr. Grover under date of September 10th, 1992. This letter was delivered to Dr. Grover by Dr. Robertson. There were no discussions of its contents with Dr. Grover, prior to its receipt nor were there any negotiations or discussions relative to its content at any time prior to September 10th, 1992.

Dr. Willis testifying for NRC explained the reason for the lack of discussion and unilateral action of NRC with respect to this appointment. He indicated that NRC felt compelled to move quickly in view of the Tribunal's decision to effect the appointment and therefore little time was left for discussions with Dr. Grover.

The letter of September 10th appoints Dr. Grover to the position of "group head" of the Optical Components Research Group. Its location is at the Herzberg Institute of Astrophysics (HIA). The letter proposes that Dr. Grover will be the head of the group and reports to Dr. Brian Andrew, director of HIA's radio astronomy and spectstrosophy programme. The letter generally indicates that Dr. Grover will head up this group to perform research development to meet the needs of HIA in the field of optics. It goes on to set out the components of the optical components laboratory (OCL) and provides an organizational chart. It should be noted that the main priority of this group is the optical design and testing headed up by Dr. Powell.

Dr. Grover testified that prior to receiving Dr. Perron's letter of September 10th (Exhibit C-16) he had no communication with Dr. Perron or anybody acting on his behalf with respect to the content of the letter with regards to what would be "an appropriate position". It was Dr. Grover's opinion that the group as proposed in the Perron letter was created by rearranging minor service activities and that the major component of the activity had been previously directed by the Optical Engineering Head, Dr. Powell.

Dr. Grover testified that this group in September 1992 was located at the Institute for National Measurement Standards (I.N.M.S.). This group had been transferred to I.N.M.S. in the latter part of 1991 and had been called at that time Optical Engineering. This group as it existed at I.N.M.S. known as Optical Engineering was specifically a service activity. The service activity would call for production of optical components and fabrication or design in the area of optical glass blowing.

In addition to the glass blowing service, there were two additional areas of service, namely in the area of camera calibration and sensitometry. Dr. Grover outlined the difference between a service activity and a research activity, the former consisting mainly of technicians with Dr. Powell as a scientist at the head of it. The optical design including calibration of aerial survey cameras referred to in the letter of September 10th is essentially what Dr. Grover was talking about as being a service activity and not research.

With respect to the mandate of H.I.A., Dr. Grover testified that his main area of activity would be with respect to optical astronomy, radio astronomy and spectroscopy and solterrestrial physics. He testified that optical astronomy was the study of stars and other heavenly bodies. Its relationship to optics is that these bodies emit light but this is not in any area of his expertise. In addition, they use large optical telescopes.

Further, Dr. Grover testified that he could not see himself fitting into the mandate of HIA and optical astronomy because his expertise is not that of correlating with astronomers. He testified that he had reviewed a number of the reports of the H.I.A. and could not identify any of the work as relating to his area of expertise nor could he relate to any

of their activities.

With respect to Dr. Perron's letter, Dr. Grover could not see that any research activity had been identified for himself. All that was identified with the optical components' research group were service oriented activities. He has no expertise or capabilities in glass blowing.

Dr. Grover gave some history of the background of the sensitometry project which had always been part of INMS. When the Division of Physics was broken up into several activities, the sensitometry area went with INMS and Dr. Powell's group Optical Engineering became a service activity. When the attempted firing of Grover occurred in 1990, the sensitometry project was given to somebody else without expertise in that field and when Grover was reinstated in May of 1991, sensitometry was never given back to him as part of his research. Dr. Grover discussed this fact with Dr. Andrew, Director of HIA in an attempt to ascertain why sensitometry did not remain with INMS. The annual report of INMS (Exhibit C-18) showed that the science affairs office had restricted his activities and optical engineering was transferred to INMS as it fit within the mandate of that institute.

Dr. Grover's point was that the group he has now been appointed to is simply the same group that had relevance with the mandate of INMS and this was considered to be the most appropriate place for it.

The Tribunal asked Dr. Grover to provide a historical review of the placement of optical engineering. Dr. Grover testified that in 1987 it was in the laboratory for general physics and in 1988 its name was changed to laboratory photonics since at that time the division of physics grouped all activities in the field of optics into laboratory photonics. Indeed,

included in the group with photonics at that time was an activity called high energy physics and that was transferred to HIA in 1988 and subsequently transferred back out to Carleton University.

Important to an understanding of the question of appropriateness is to examine and compare the progress of Dr. Grover's peers over the period of time immediately preceding and subsequent to the commencement of discrimination in this case. Dr. Grover testified that he was a director of the Institute of Optics, a division of NRC and subsequently an interim scientific director of NOI and had been offered the position of scientific director on a permanent basis. He compared that to Dr. Vanier who was an acting assistant director of the Institute of Optics in 1984 and became the acting director of the Institute of Optics and a section head in 1984.

Subsequently, he became a director general in 1990. Further Dr. Dawson who was a section head in 1984 went on to become a director general in 1990.

Dr. Robertson and Dr. Bedford, both section heads in 1985 when Dr. Grover was an acting director, maintained their positions as section heads even under the new infrastructure. We now understand from the testimony of Dr. Willis that despite the change in nomenclature of the term section head in other institutes, the term remains section head within the Institute for National Measurements Standards.

The results of Dr. Vanier's insistence upon maintaining the term section head within the INMS only adds further confusion to NRC's entire promotion infrastructure. The classification "section head" as it applies to INMS is equivalent to director at other institutes.

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Dr. Grover testified as to his discussions with Dr. Andrew at HIA concerning his research in electro-optics, opto-electronics systems and holography. Dr. Andrew advised Dr. Grover that that type of research as Dr. Grover described it to him could not be pursued at HIA. Dr. Grover concluded that Dr. Andrew's idea of his activities as an astrophysicist in their operations was a resource person. Dr. Grover was adamant that this package as proposed in

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Dr. Perron's letter of September 10th, 1992 does not contain any type of research in his area of expertise.

Dr. Grover described that an appropriate position for him would be a "section head" which existed in the division of physics and which is a position now held by Dr. Bedford and Dr. Robertson at INMS and reporting directly to a director general. In essence, as far as an appointment to an appropriate position had he been asked by anyone prior to the decision outlined in the letter of September 10th, 1992 it would have been to the first available position of "section head" or Director within INMS, ITT or IMS. In other words, within the activities of those institutes he testified that an appropriate position would be that of a section head presently held by Dr. Bedford or Dr. Robertson. If we can understand what that means now in terms of where he would have been in 1986 with appropriate career progression and with changes in the infrastructure of NRC it would necessarily today lead him to the position of a director or section head as described at INMS. At INMS the section head positions are presently held by Dr. E. So, Dr. Robertson and Dr. Bedford.

It should be noted that with respect to a position similar to that presently held by Dr. Bedford and Dr. Robertson and Dr. So that there is a research component with their activities as described in the NRC annual report for that institute.

The Respondent called evidence with respect to NRC's understanding of an appropriate position. Dr. Willis was asked by the Tribunal why Dr. Grover was excluded from the decision process resulting in his appointment to HIA and his response was that it was NRC's management responsibility to implement the order of the Tribunal. He further testified that the NRC management felt that the order of the Tribunal required an appointment to a position at the earliest possible opportunity and that such an appointment had to be made regardless of consultation. In other words, expediency and promptness were the reasons given essentially for its quick response by letter of September 10th, 1992.

The Tribunal learned that the position Dr. Grover was appointed to by
Dr. Perron's letter was not on the organizational charts of NRC at the time of the decision. The Tribunal now understands that the rationale of NRC was that they would appoint Dr. Grover to a position similar to that which he aspired to in 1986 as opposed to fitting him into an appropriate position in today's infrastructure keeping in mind the fact that he had failed to be promoted or reviewed for promotion since 1986. Indeed, the interference with his normal promotion progress was at the core of the matter of discrimination outlined in our decision of August 21st, 1992.

It is this Tribunal's finding that NRC in its rush to complete the Tribunal's decision did not consider for a moment that in 1984 Dr. Grover, Dr. Bedford, Dr. Robertson and indeed Dr. Vanier held positions of

comparable authority. Dr. Grover was the acting director of NOI and subsequently Drs. Robertson and Bedford were appointed to section heads in the Department of Physics. Dr. Vanier starting as an assistant director in 1984 eventually became a director general until his unfortunate illness of recent years. Further it should be noted that Dr. Grover's position as an acting director following the death of Dr. Wyszcecki would be the

equivalent at that time of a section head and accordingly the remedy with respect to an appropriate appointment of a section head position is not to have him relegated to a position of lesser stature than that which he would have progressed through had not the discrimination taken place.

This Tribunal was as indicated in our decision fully aware of the promotional and infrastructure changes regarding titles going on at NRC during 1990. It appears that the
confusion with respect to classification of management titles continues.

Dr. Willis testified in Volume 32, p. 5862:

"THE WITNESS: With due respect to everybody, I understand the confusion some of these titles. What we have ordered -- and it is still not fully implemented -- is to be very clear on what positions are.

There is a directive from the Management Committee that the MG positions that report to a Director General are called Directors. So what are currently called section head positions in the Institute for Microstructural Sciences should be called Director positions -

THE CHAIRMAN: I quite agree.

THE WITNESS: -- to avoid this confusion.

Dr. Vanier, when I told him to do this or urged him to do this, was very resistant and said, "For a transition period, until the institute are comfortable with this, I would like to retain section head." I guess --

THE CHAIRMAN: I understand the same problem you had when we talked about promotion reviews.

THE WITNESS: Yes.

THE CHAIRMAN: Many scientists felt this was an intrusion and something that was not appropriate for them to have discussion of their promotional capabilities. So for some people it was done and some people it was not done, and I understand that was a transitional matter, too.

THE WITNESS: We have lots of transitional matters and --

MS. SAMS: Q. Is it fair to say that the NRC is in transition?

THE CHAIRMAN: As many other things in life, Ms. Sams.

THE WITNESS: I don't want to get involved in the number of positions there, but there was a Director and there was Associate Director and Assistant Director positions and then there were section head positions.

THE CHAIRMAN: Now this is what --

THE WITNESS: This is in the Division of Physics prior to --

THE CHAIRMAN: Pre-1990.

THE WITNESS: Pre-1990.

THE CHAIRMAN: All right.

THE WITNESS: They would be called today -- this would be a Director General position.

THE CHAIRMAN: Yes, MG-4.

THE WITNESS: MG-4. And these we have ordered to be -- we have asked the institute to call them Directors, but, as I have said, there is a tendency to call them section heads. Those are equivalent today and they were equivalent in those days to MG-2, MG-3 level positions.

MEMBER JORDAN: But they are being called Directors, too, are they not?

THE WITNESS: In other institutes they are. In most institutes, they are called Directors.

MEMBER JORDAN: All right.

THE WITNESS: In Herzberg Institute, they are called Directors.

MEMBER JORDAN: Right.

THE WITNESS: And that is why I want to be very specific.

MEMBER JORDAN: So they are in the equivalent.

THE WITNESS: It is really one or two areas and unfortunately the Institute for National Measurement Standards is one such institute where they have stuck with this again, as I have said, for an interim period under some duress.

The Institute for National Measurement Standards -- we have a Director General position. We have three section head positions which should be called Directors, but they are called section heads and I have explained that. Then under that we have the groups.

THE CHAIRMAN: But the section heads are MG-2s.

THE WITNESS: These are MG-2s and equivalent to what took place there. That is an MG-4 and, again, is equivalent to what took place there.

These positions down here were Research Officer groups and they still are Research Officers today."

Dr. Willis in response to the Tribunal at p. 5936 quickly conceded that if Dr. Grover was to be left in INMS as appointed section head he would in fact be director. The following exchange between the Tribunal and Dr. Willis really lies at the essence of the problem in implementation of Dr. Grover to an appropriate

position, at p. 5939:

"THE WITNESS: As I have already said, the retention of the title "section head" which was an interim period because of a certain feeling that Dr. Vanier had will be rectified so that we don't end up perpetuating the confusion that is--

THE CHAIRMAN: All right. We could take that one step further. If and when you change it, are you then going to have to change your

signing authority because it will not be in a pattern with the tables at C-22?

THE WITNESS: We will certainly make sure --- and we have, I believe, already undertaken to do that -- that there is a consistency of signing authority with all of the titles that we use within the National Research Council.

This is, as you have so correctly pointed out, one of the transitions that we have been struggling with over the past several years is of making the NRC a managed organization as opposed to a collegial organization which has led to much of the concerns that have been brought before this Tribunal. We recognize that and there are still certain slownesses in the organization.

We recognize it. We don't condone it and we will move forward as quickly as we possibly can to clarify it."

With respect to how management structure operated at INMS, the following response was given by Dr. Willis at p. 5946:

"Q. You said last night that at INMS there is no opportunity, if I understood you correctly, for the group leaders to attend Management Committee meetings such as the Science Program Committee that is at the HIA. Is that a correct understanding?

A. My understanding of the way in which Dr. Vanier operated the Institute for National Measurement Standards is that he had a Management Committee with himself and the three Directors, if I can clarify our perpetual cultural problem.

He also held meetings periodically with the group leaders. I, as part of my instructions to him, ordered him to put in place some sort of scientific committee and I do not know whether that actually was put in place. It certainly will be put in place in the relatively near future and I do not know how they propose to constitute it."

The Tribunal gathers from these various exchanges with Dr. Willis that the streamlining of the infrastructure of certainly INMS and indeed perhaps the balance of NRC management structure is still undergoing an organizational process and that there still appears to be considerable work to be done to bring the overall organization into a uniform management structure. In the context of this transition, we had originally been asked to appoint Dr. Grover to an appropriate position as part of his remedies.

Dr. Willis endeavoured to assure us of the research component involved with the appointment of Dr. Grover to HIA. His evidence on the question of the extent of research activity, particularly within the

optical laboratory now headed by Dr. Powell is in stark contrast to the evidence he gave to this Tribunal on March 22nd, 1991 Vol. 22, p. 4010:

"BY MR. SAUNDERS:

Q. You talked about the Laboratory of Basic Standards and the Division of Physics, and also I believe, the Laboratory of Microstructural Sciences. What happened to the Photonics Laboratory which was in the Division of Physics?

A. That...that got phased out into little pieces. It basically went away, it ... if you like, it's still a fall out from the Optics Institute decision back in '84. The laser component, the glass laser facility and the short pulse laser component were an element of the Stacey Institute for Molecular Sciences. The laser project component, that's working with Lumonics and the like, was built into an office in the Science Affairs Office, it was a project office with one or two staff attached to it. The Thin Films component went to Microstructural Sciences because when you're building chips, essentially you're building thin optical layers, therefore there's a complementarity of technology. The optics components service, which is a service laboratory that is still residual at NRC and it's still used by everybody, including the Optics Institute , went into the Science Affairs Office.

Q. When you speak of that, that's Dr. Powell's responsibility?

A. Dr. Powell is part of that responsibility.

Q. You referred to evidence that Dr. Powell one time had a group which became a section, he had the Optical Components Laboratory report to him. Do you know what his responsibilities are now?

A. Dr. Powell has...is part of the Science Affairs Office. He has responsibility for himself and one technician. The Optical Components Laboratory, which is they make things, is headed up by its own head and Dr. Powell supports that activity by providing advice on the geometry of optics but is not responsible for that activity.

Q. And when you use the terms, service group, what do you mean by that, sir?

A. It's dominantly...a service group is a group that works to provide others service. The specifications are defined outside and you produce something, in this case an optical component according to needs of others. It's not dominantly a research activity, although there is some research in Dr. Powell's activities. He...he's partly there and he's partly doing some development in collaboration with others in other areas of NRC. You can't have everything tied in to one element of untidiness. You try to minimize untidiness in an organizational structure but you don't throw out competence necessarily because things don't fit nicely, tidily into organizational structure with the right number of boxes, so this is an element of flexibility that we've retained.

The Respondent called Dr. Bryan Andrew, presently director of the Radioastronomy and Spectroscopy within HIA. He has held that position for the past three years. He testified that he familiarized himself with Dr. Grover's expertise in the field of physical optics and non-linear optics through reading his research papers. As well, he visited the optical components research group's laboratories and visited NOI in Quebec City in an effort to familiarize himself with Dr. Grover's work.

Dr. Andrew was asked what a section head or group head meant in HIA. He testified that they tend not to use the title "section head" at HIA. He said they had a director general with three directors, of whom he was one that would have probably been thought of as a section head in other institutes. Again, there were four group heads.

He went on to explain the history of HIA insofar as titles were concerned. He indicated that several years ago HIA had five sections, with each section having a section head to report to an assistant director and a director. He said a few years back when NRC was re-organized it resulted in some section heads becoming group heads, others becoming directors and the assistant director who was Dr. Andrew at the time became a director and then the director became a director general. He further described the HIA management committee consisting of three directors and the director general with their responsibilities consisting of programme planning and priorities, budget allocation, administrative policies and procedures, training and human resources planning, communications planning, safety and security and institute reports. In addition, there is a science programme committee consisting of the director general, four directors plus four

group heads and the head of central services and administration. This group essentially determines what scientific programmes should be undertaken and which should be dropped.

He was questioned with respect to the designation of a section head and was uncertain whether a section head in today's context would be the same as a section head four or five years ago.
With respect to the September 10th letter, Dr. Andrew agreed that it did not contain a research project for Dr. Grover but that Dr. Grover would have to define his own research project. The problem, however, is that Dr. Grover would have to tailor his research project in the context of astronomy which Dr. Andrew concedes is the primary objective of HIA. He did suggest that HIA could tolerate some minor excursions in other relevant areas, namely astronomy.

Dr. Andrew was adamant that prior to September 10th, 1992 the date of Dr. Perron's proposal letter, he had not been consulted with respect to the matter of transfer of Dr. Grover in Dr. Powell's group.

He had no prior consultations with Dr. Grover nor were there any bilateral meetings between the Complainant and management of the Respondent prior to September 10th to even discuss how the placement of Dr. Grover would be integrated with HIA. This management approach of non-consultation appears to be the hallmark particularly of Dr. Perron's style. Certainly it is the view of this Tribunal that had appropriate consultation and discussion been entered into prior to the September 10th letter as between the parties to this matter, this aspect of the hearing to clarify the situation may well have been avoided.

CONCLUSION:

The Tribunal finds that after hearing further evidence with respect to the sole remaining remedy outstanding there still appears to be within the NRC promotional structure at management level continuing

confusion particularly as to the management designations involved in this case.

We feel therefore that additional clarification is necessary in order to finalize the remedy relating to "appropriate position" for Dr. Grover within the NRC management organization.

We direct therefore that the appropriate position for Dr. Grover be the equivalent position presently held by Dr. Robertson and Dr. Bedford, namely a "section head" at I.N.M.S. By way of further clarification, we understand that the appointment to a "section head" would in any other of the institutes be the position which would presently be the equivalent of a

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"Director". Having regard to Dr. Grover's expertise in the optics field the most appropriate placement in the position of section head or director would be that position within either of the Institute for Microstructural Sciences, the Institute for Information Technology or as previously indicated the Institute for National Measurement Standards.

We further direct that the responsibility of reinstating and reintegrating Dr. Grover into the NRC community be placed squarely upon the shoulders of those individuals who have the power, the position, the prestige and resources to change the climate (of discrimination) at NRC in order to ensure and to effect this process. It was clear from the testimony of Dr. Willis that senior management of NRC has the discretionary power and management prerogative to accommodate this direction while meeting the needs of NRC (see Vol. 32, p. 6025, l. 20 to p. 6037, l. 15).

Upon review of the evidence again, we find that the proposal as set out in the letter of September 10th, 1992 is totally inappropriate when considered against the background of Dr. Grover's stated expertise and the lack of a meaningful research programme and the fact of there being no promotion opportunity for Dr. Grover since 1986.

The Tribunal shall continue to remain seised of this matter in order to be available in the event any further clarification is required with the appointment of Dr. Grover to an appropriate position.

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Dated this 17th day of February, 1994.

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CARL E. FLECK, Q.C., Chairman

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RUTH S. GOLDHAR, Member

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KATHLEEN M. JORDAN, Member