

Files: 160-2-45
161-2-744
166-2-26174
and 26307



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

BRIAN R. LUNDIN

Grievor/Complainant

and

**TREASURY BOARD
(Statistics Canada)**

and

I.P. FELLEGI

Employer/Respondents

Before: Muriel Korngold Wexler, Deputy Chairperson

For the Grievor: Himself

For the Employer/Respondents: Lubomyr Chabursky, Counsel

Heard at Ottawa, Ontario,
March 2, 3, 9, 10 and 24, 1995 and June 6, 7 and 8, 1995.

DECISION

Mr. Brian Robert Lundin is a mathematician who, up until September 30, 1994, had been employed at Statistics Canada as an MA-03, in the Business Survey Methods Division (B.S.M.D.). On August 22, 1994, Ms. B. Nanjamma Chinnappa, the then Director of the B.S.M.D., wrote him the following letter (Exhibit 1):

My letter to you of April 29, 1994 and its attachment (dated April 12, 1994) addressed the problems with your work performance over the past eight and a half (8 1/2) year period, as well as the efforts your supervisors had made to help you achieve a satisfactory level of performance.

In that same letter I also discussed the procedures for assessing your document entitled "Analysis of Change in Tax Revenue over a Two-year Period". On August 15, 1994 I advised you by memorandum that the two (2) independent reviewers who evaluated your assignment found it unsatisfactory, as did I in my own review.

I have concluded now that the level of performance you have achieved over the period indicated above fails to meet the requirements of a methodologist and that in spite of numerous discussions with you on all relevant aspects of your performance, training opportunities and career development assignments, there has been no improvement.

Therefore, pursuant to Subsection 11(2)(g) of the Financial Administration Act, I am authorized by the Chief Statistician of Canada to terminate your employment. As of the close of the office on September 30, 1994 you will cease to be an employee of Statistics Canada.

Should you disagree with this decision you may file a grievance within twenty-five (25) working days of receipt of this letter.

As a result, on September 16, 1994, Mr. Lundin presented a grievance whereby he wrote: "I am aggrieved by the discharge dated August 22, 1994", and requested to be reinstated with full pay and benefits retroactive to his date of "discharge" (Board file 166-2-26174). This grievance was referred to adjudication on November 9, 1994. In addition, on January 26, 1995, he referred to adjudication a second grievance he had presented on September 13, 1994, whereby he indicated that he had been aggrieved by the documents on his personnel file and he asked for the removal of such "inappropriate" documents (Board file 166-2-26307). This second grievance, not

signed by the bargaining agent, was referred to adjudication on January 26, 1995, again without the support of the bargaining agent, the Professional Institute of the Public Service of Canada (PIPSC). The PIPSC is the certified bargaining agent for the mathematics group bargaining unit.

In addition, Mr. Lundin presented two complaints; the first one alleges a violation of subsection 133(1) of the *Canada Labour Code (CLC)* and the second one, under section 23 of the *Public Service Staff Relations Act (PSSRA)*, indicates it was filed under "Treasury Board Manual, Personnel Management Component, Occupational Safety and Health Volume, Chapter 2-19 Refusal to Work Directive". These two complaints allege that Statistics Canada and Mr. I.P. Fellegi, Chief Statistician of Canada, have failed to respect the prohibitions in subsection 8(2) of the *PSSRA* because they had terminated his employment (Board files 160-2-45 and 161-2-744). Mr. Lundin submitted that the respondents had taken action against him, namely the termination of his employment, on the grounds that in 1992 he "refused to work" when he brought to the attention of his employer the dangers to his health and safety caused by renovations at his workplace and he had asked for an alternative work location.

These four cases were set down for hearing and were heard March 2, 3, 9, 10 and 24 and June 6, 7 and 8, 1995. Mr. Lundin represented himself and the employer was represented by counsel, Mr. Lubomyr Chabursky. The parties agreed to consolidate all four cases and asked me to render only one decision. The evidence presented was common to all four matters in dispute.

Mr. Lundin was not represented by his bargaining agent, the PIPSC, nor by counsel. He insisted in refusing the representation of his bargaining agent. On the second day of hearing, Ms. Joan Van Den Bergh, a representative of the PIPSC, was present part of the day. Mr. Lundin clearly indicated that he did not wish to be represented and Ms. Van Den Bergh did not return.

The reference to adjudication with respect to Board file 166-2-26307 concerns all unsatisfactory performance review and appraisal reports that Mr. Lundin read and received a copy of but refused to sign on the grounds that these documents were on a different format. These documents are entitled "Performance Review and Feedback". They refer to the training taken by Mr. Lundin during a certain period of time, his

assignments and his performance assessment. These documents were placed on his personnel file and were used extensively as evidence by the employer in its attempt to demonstrate that Mr. Lundin's performance as a mathematician at level 3 was unsatisfactory and that he was incompetent. The employer alleges that this unsatisfactory performance at the MA-03 level covers the period January 1, 1989, until his release on September 30, 1994.

I will dispose of the grievance pertaining to the personnel file first because the outcome of the grievance concerning the termination of employment on grounds of incompetence is hinged in part on these documents.

The grievance and reference to adjudication have not been signed by the PIPSC, the certified bargaining agent. Mr. Lundin did not even write on the forms the name of his bargaining agent. Moreover, he repeatedly and clearly indicated to the Board and to this adjudicator that he did not wish to be represented by the PIPSC.

In a letter dated February 17, 1995, Mr. Chabursky objected to the jurisdiction of an adjudicator to hear and decide this grievance on the grounds that it falls outside the ambit of section 92 of the *PSSRA*. This objection was reiterated during the hearing of these four matters.

On March 3, 1995, Mr. Lundin argued that the employer could not rely on the documents entitled "Performance Review and Feedback" because they were in violation of Article 41 of the Master Agreement between the Treasury Board and the PIPSC (Exhibit 32).

Mr. Lundin acknowledged that he saw, read and received a copy of all these documents and did not object to their form and content until September 13, 1994, when he presented his grievance.

Mr. Lundin submitted that he was alleging a violation of Article 41 of the Master Agreement. Article 41 reads as follows:

ARTICLE 41
EMPLOYEE PERFORMANCE REVIEW
AND EMPLOYEE FILES

41.01 *For the purpose of this Article,*

- (a) *a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed his assigned tasks during a specified period in the past;*
- (b) *formal assessment and/or appraisals of employee performance shall be recorded on a form prescribed by the Employer for this purpose.*

41.02

- (a) *When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to sign the assessment form in question upon its completion to indicate that its contents have been read. An employee's signature on his assessment form shall be considered to be an indication only that its contents have been read and shall not indicate his concurrence with the statements contained on the form.*

A copy of the employee's assessment form shall be provided to him at the time the assessment is signed by the employee.

- (b) *The Employer's representative(s) who assesses an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is evaluated.*

41.03 *When an employee disagrees with the assessment and/or appraisal of his work he shall have the right to present written counter arguments to the manager(s) or committee(s) responsible for the assessment and/or appraisal decision.*

41.04 *Upon written request of an employee, the personnel file of that employee shall be made available once per year for his examination in the presence of an authorized representative of the Employer.*

41.05 When a report pertaining to an employee's performance or conduct is placed on that employee's personnel file, the employee concerned shall be given an opportunity to sign the report in question to indicate that its contents have been read.

Mr. Lundin could present a grievance under section 91 of the PSSRA. Section 91 reads as follows:

91.(1) Where any employee feels aggrieved

(a) by the interpretation or application, in respect of the employee, of

- (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
- (ii) a provision of a collective agreement or an arbitral award, or*

(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

*(2) An employee is not entitled to present any grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award **unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies**, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 113.*

However, he could not present a grievance relating to the interpretation or application of a provision of the Master Agreement without the PIPSC's approval and representation. It is clear from the reading of the grievance and file that the PIPSC did not approve this grievance and did not represent Mr. Lundin during the grievance

procedure. Moreover, Mr. Lundin could not refer this grievance to adjudication under section 92 of the *PSSRA*. Section 92 reads as follows:

92.(1) Where an employee has presented a grievance up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

*(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), **the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.** (Emphasis added)*

.....

This grievance does not fall under subsection 92(1)(b). Mr. Lundin alleges that it falls under subsection 92(1)(a); therefore, he was legally required to obtain the PIPSC's approval and willingness to represent him at adjudication.

For these reasons, this grievance is hereby dismissed for want of jurisdiction.

In light of the importance of the question of the admissibility of these documents, I have nevertheless examined them in light of Article 41 of the PIPSC Master Agreement. These documents are without a doubt a formal assessment and appraisal of Mr. Lundin's performance during a period of two years. The use of the forms to which Mr. Lundin now objects started in July, 1992 (Exhibits 31, 33, 34, 41, 42, 44, 47, 49, 51, 52 and 55). In addition, there are a number of other documents in memorandum form reviewing his performance and advising him that the employer (supervisors and, in particular, Ms. Chinnappa) was not satisfied with his performance (for example, Exhibits 58, 64 and 67).

The employer is the one who prescribes the form on which the assessments will be recorded. In the case of Mr. Lundin, the employer prescribed the form entitled "Performance Review and Feedback". The purpose of these assessments is clear. Mr. Lundin was given an opportunity to sign them; this is not in dispute. Moreover, he was given a copy of these documents. Mr. Lundin did not object to their form and content until September 13, 1994, and he never presented written counter-arguments. Mr. Lundin had the right to examine his personnel file. The uncontested evidence demonstrated that he did not do so until after his employment was terminated. The argument that the documents to which Mr. Lundin objects and alleges to be inadmissible in evidence on the grounds that they are in violation of Article 41 of the Master Agreement has no merit. I therefore find that the employer did not violate Article 41 of the Master Agreement.

Having disposed of Board file 166-2-26307 and having decided that I have no jurisdiction to entertain this grievance, I will now deal with the three remaining matters.

The Evidence

These matters were heard over a period of eight days. The employer called the following witnesses: B. Nanjamma Chinnappa, John Kovar, Peter Hoyt, Hugh Finlay, Gordon Deecker, Joel Yan, Simon Cheung, Michael (Mike) Miller, John Armstrong, Kadaba P. Srinath and Jean-Louis Tambay. Mr. Lundin testified on his own behalf. The parties submitted 89 exhibits, including the two extensive mathematical and

statistical studies assigned to Mr. Lundin which resulted in the termination of his employment. These two studies could be considered evidence of the culminating incident for the employer.

The facts are not in dispute and Mr. Lundin did not contest the contents of the employer's performance reports for the three last years of his employment. However, he disagrees with the employer's assessment of the two studies referred to above.

Ms. B. Nanjamma Chinnappa has been the Senior Advisor to the Methodology and Informatics field of Statistics Canada since late November, 1994. Prior to that date, she was the Director of the B.S.M.D. since March, 1987. Ms. Chinnappa is the author of the letter of termination dated August 22, 1994 (Exhibit 1).

Ms. Chinnappa described in detail Mr. Lundin's career with Statistics Canada. Mr. Lundin obtained a Masters of Science (Statistics) from the University of Manitoba in 1975, and a four-year mathematics degree from the University of Waterloo in 1973. Prior to joining Statistics Canada in September 1985, Mr. Lundin was a consultant in statistics and computers in Winnipeg, Regina and Saskatoon for a period of four and one-half years (February, 1980 to August, 1985). In addition, from July, 1976 to January, 1980, he had been employed as a statistical methodologist with the Department of Communications in Ottawa.

Mr. Lundin commenced his employment with the B.S.M.D. on September 23, 1985 as a mathematician-statistician at level 1 (MA-STA-01). This is the entry level for a mathematician-statistician and the work is closely supervised by a senior MA-STA-04. At that first level, the employee is given very specific tasks with clear guidelines. The employee learns on the job and may be sent on course. The working level of a MA-STA is at level 3. Level 3 is the functional mathematician-statistician. To be promoted to level 3, the MA-STA must learn on the job and prove to the employer that he/she is capable of taking on small tasks. When this is demonstrated, the employee is promoted to the MA-STA-02 level through a performance review called the "PEER Review". The B.S.M.D. has such a PEER Review comprised of the Director, Assistant Directors and Chiefs. They meet once every four months and review the performance of all employees at the MA-STA-01 and MA-STA-02 levels. The supervisor of the employee seeking promotion writes down the tasks the employee worked on during the four-month period and what was expected

of this employee, how he/she performed, the general assessment and a recommendation as to whether or not the employee is ready for promotion to the next level. The Chief of the section presents the “case” to the committee; the performance is then discussed, questions are asked and a decision is rendered on whether or not to approve the promotion. A decision could also be made as to whether further training is required and what type of training is recommended. The same process is followed for promotion from MA-STA-02 to MA-STA-03. At the MA-STA-02 level, the employer expects more independence and less supervision. The MA-STA should be able to plan and execute small tasks. What the employer wants to see is whether the employee is able to perform at the next level. Mr. Lundin was promoted to the MA-STA-02 level effective January 1, 1987 (Exhibit 4).

The job description of the MA-STA-03 (Methodologist) position (Exhibit 3) occupied by Mr. Lundin at the time of the termination of his employment reveals that the employee is expected to function as a methodologist with very little supervision. The employee provides methodology, mathematical and statistical services for its data collection of people as well as analysis.

On September 15, 1987, the PEER Review wrote (Exhibit 5) that Mr. Lundin was:

...continuing to progress although not at as fast a rate as anticipated. He has made several attempts to document the Unit Value Interval methodology and he still has difficulty explaining that methodology concisely and grammatically. It is felt that a course in report writing could benefit him greatly. Brian shows a keen interest in broadening his knowledge of survey methodology and EDP. He has a good knowledge of computer systems and is a competent programmer. It is felt that he would be a good candidate for an assignment with ISD. He needs a change from International Trade. With concerted effort on his part he could be ready for promotion in the next year or so.

Thus, Mr. Lundin had difficulties and the employer felt that a change in tasks would help him. The “Performance Review and Appraisal Report” (PRAR) for the period January to October, 1987 (Exhibit 6) indicates that Mr. Lundin had difficulties with a document he had to write; the document underwent many revisions. After three months, he produced a lengthy, poorly written manuscript which lacked flow, was poorly organized, repeated itself, was confusing to read and showed poor

grammar and spelling. Mr. Lundin decided, against the recommendation of his supervisor, to pass the document on to the clients. The document was rejected as unacceptable. According to this PRAR, Mr. Lundin demonstrated that his writing skills were poor and that he had a hard time synthesizing the major elements of his work in a comprehensive oral presentation. He tended to zero-in on a specific problem while overlooking the global objectives of the project. Mr. Lundin seemed to require excessive explanations and did not appear to understand some of the clients' concerns and dwelled much on extraneous matters. His performance was assessed as unsatisfactory (Exhibit 6). This PRAR was signed by two supervisors, Messrs. John Kovar and Peter Hoyt. Mr. Lundin disagreed with this appraisal but he did not comment in writing as was his right to do.

Statistics Canada has a program called Corporate Assignment by which employees are allowed to work in a different division. They can move from one division to another if they so request and if they want a change. The employee places his name on the roster and divisions send their needs to the Corporate Assignments Division. This Division acts as a broker. The salary and terms and conditions of employment of the employee are not affected; they continue to fall under their home division. The home division remains responsible for the employee. Thus, if the move does not work out, the employee can simply return to his home division. In 1987, Mr. Lundin asked to be moved and placed his name on the roster. Hence, for the period October 19, 1987 to April 19, 1988, Mr. Lundin was assigned to the Informatics Services and Development Division (Exhibit 7). This assignment was extended on April 26, 1988 to terminate on March 31, 1989 (Exhibit 8). His supervisor was Dr. Gordon Deecker. The description of his assignment was as follows (Exhibit 7):

- 1. Participate in study on Data Quality with methodologists from Geocartographics Subdivision. Data under consideration will be all geographic digital data files held by the Geography Division.*
- 2. Participate in developing improved interactive software systems to support operations staff in Geography Division.*
- 3. Participate in Geography Systems Evaluation and testing project, especially in pilot studies, as a methodologist/analyst/programmer.*

On May 16, 1988, Dr. Deecker signed a PRAR covering the period October, 1987 to April, 1988. Dr. Deecker commented that the report produced by Mr. Lundin was “not fully satisfactory because of weak organization and coherence”. Dr. Deecker found that Mr. Lundin “showed that he had all the necessary skills of a junior programmer at a fully satisfactory level” (Exhibit 9). However, Mr. Lundin did not want to be a programmer and he insisted that his career orientation was as a MA-STA.

On May 16, 1988, the PEER Review denied Mr. Lundin’s promotion from a MA-STA-02 to MA-STA-03. The committee wrote that Mr. Lundin’s detailed report was unsatisfactory because of his inability to synthesize the information, to focus on the essentials for the reader and to write with clarity. He had the same shortcomings with his oral presentation (Exhibit 10). He required fairly close supervision. Mr. Lundin had shown that he had good computer-related skills but he had not performed satisfactorily as a MA-STA.

Mr. Joel Yan, Geocartographics Division, became Mr. Lundin’s supervisor during the period April 20, 1988 to March 31, 1989 (Exhibit 11). The “Assignment Agreement” indicates that the assignment was one that was suitable for a MA-STA-03 (underfill). On June 2, 1988, Mr. Jocelyn Tourigny, Chief of the International Trade and Prices Section, B.S.M.D., had a meeting with Mr. Lundin. Mr. Lundin had asked to return to the B.S.M.D. and he expressed his wish to work in that section. He did not want to remain in the Informatics Services and Development Division, Geocartographics Division. The purpose of this meeting was to discuss his career objectives (Exhibit 12). Mr. Lundin wanted to be a good methodologist. He did not see any future for himself in the Geocartographics Division.

On July 20, 1988, Mr. Lundin asked Ms. Chinnappa why he had not been promoted to the MA-STA-03 level since he had been a MA-STA-02 for more than 18 months (Exhibit 13). Ms. Chinnappa testified that she stated to Mr. Lundin that he was not ready for promotion even though on an average such a promotion does occur between 12 and 18 months as a MA-STA-02.

On September 14, 1988, the PEER Review Committee reviewed Mr. Lundin’s performance. They found that Mr. Lundin had shown signs of improvement.

However, he did need improvement in his “written communication, his ability to synthesize information, to focus on a client’s needs and to limit the scope and tailor his recommendations to client needs. In general, he should be able to work on a more independent basis without the need for close supervision” (Exhibit 14). His promotion was denied at that time and the Committee indicated that his progress would be reviewed at the meeting of January 10, 1989. Finally, on January 17, 1989, Mr. Lundin was promoted to a MA-STA-03, effective January 1, 1989 (Exhibit 15). Ms. Chinnappa declared that she had discussed Mr. Lundin’s situation with Mr. Yan and Dr. Deecker. They felt that since there were signs of improvement, perhaps if Mr. Lundin was to be promoted in January, 1989, he would perform better. By then, he had been an MA-STA-02 for 24 months. In Ms. Chinnappa’s experience, this was one of the longest cases for promotion.

Dr. Gordon Deecker wrote the PRAR for the period March, 1989, to March, 1990. At the time, Mr. Lundin was still working in the Geocartographics Division. Mr. Lundin performed well as a programmer and he had shown good mathematical analysis skills. He demonstrated that he had improved his knowledge of GIS technology. He also improved his writing and interpersonal skills. He increased his ability to work in a team environment. He had an excellent command of statistics (Exhibit 16). This was a very positive PRAR. Then, problems arose when the Director requested that the B.S.M.D. review a paper that Mr. Lundin had written for the Geocartographics (now called Geography) Division (Exhibit 17). On February 8, 1991, Ms. P. Tallon, A/Chief, Methodology, Geography Division, sent Mr. Lundin’s paper to Ms. Chinnappa for review.

Ms. Chinnappa gave Mr. Lundin’s paper to two senior mathematician-statisticians (Chiefs of Sections). She did not tell them who had written the paper and Mr. Lundin could not know who reviewed it. Both reviewers found the paper very confusing and difficult to review. It would have required substantial revisions to make it clear. The reviewers detailed the difficulties of the paper, its vagueness, the sections did not seem well-connected and the mathematical solution was not meaningful. Ms. Chinnappa communicated these comments to Ms. Tallon on March 11, 1991 (Exhibit 18).

In March, 1991, Dr. Deecker wrote the PRAR for the period March, 1990 to March, 1991. By this time, the form for the PRAR had been changed and this appraisal was on the new form. Dr. Deecker's notes reflecting the discussion he had with Mr. Lundin on March 1, 1991, concerning his performance are attached to the PRAR (Exhibit 19). Mr. Lundin did not sign the PRAR nor did he attach his comments. Dr. Deecker indicated that Mr. Lundin's "career orientation was discussed and it was decided that while he was a reasonably-acceptable programmer, he did not want to make a career of it. His only ambition was to be a methodologist". Dr. Deecker identified several points that needed improvement (Exhibit 19):

1. *Greater effort was still required to perform as a team player.*
2. *Too often he tries to produce the "CADILLAC" when a "sub-compact" is requested.*
3. *At times he tries to seek out the "common good" at the corporate level rather than focusing on the client's needs.*

During the discussion of March 1, 1991, Mr. Lundin expressed orally that he did not agree with these points. Ms. Chinnappa testified that Mr. Lundin's performance was inconsistent. He seemed to understand what was asked of him and made intelligent comments but when he did the work, he did not focus on the problem and what was required. He seemed to have the knowledge but could not apply it. He was unable to perform and be a team player. He would not consult with colleagues, nor seek advice from his supervisor. The B.S.M.D. and Statistics Canada have a collegiate atmosphere; employees consult each other. Mr. Lundin did not do so even though he worked very hard.

From April 1, 1991 to March 31, 1992, Mr. Lundin was assigned to the Business Register Division under Mr. André Monty, the Director. When the assignment ended at the Geography Division, Mr. Lundin asked for another assignment. He wanted to return to his home division where he could use his skills in methodology and informatics. In addition, he informed Ms. Chinnappa that he had allergies to environmental pollutants. He even indicated that he would have liked to work in a smaller city with cleaner air, such as Winnipeg or Halifax. However, there was no

move available to those locations. Then, Ms. Chinnappa learned that the Business Register Division was looking for a methods analyst so she suggested this assignment. This assignment was extended to September 30, 1992 (Exhibits 20 and 21).

On June 25, 1992, Mr. Hugh Finlay, Chief, Business Register Division, wrote a memorandum to Ms. Chinnappa concerning Mr. Lundin's performance (Exhibit 22). Mr. Finlay wrote:

.....

Mr. Lundin over the year has had considerable difficulty in carrying out the role assigned to him as leader of the size coding system development. The nature of these difficulties have (sic) been as follows:

-difficulty in organizing, planning, and scheduling the overall development

-difficulty in providing effective leadership to a group of interdisciplinary personnel

-difficulty in communicating ideas to co-workers in an understandable manner

These difficulties were sufficiently severe so as to require a significant reduction in the scope of activities assigned to Mr. Lundin. I, myself, was forced to take charge of the project as the leader of the development effort.

Mr. Lundin himself has pointed out his difficulties and has attributed them to reactions to chemicals being used in the building renovation (see attached memo, Lundin to Priest, et. al.). As a follow-up, I have initiated contact with personnel (see attached memo, Finlay to Verner), and Mr. Lundin is now in the process of being evaluated by Health and Welfare.

Ms Chinnappa declared that she was surprised that Mr. Lundin's assignment was being terminated. Mr. Lundin had a right to return to his home division and this is what was done since no other chief of the division was prepared to take Mr. Lundin. When Mr. Lundin worked at the Business Register Division, his office was located at the Jean Talon building. The home division (B.S.M.D.) was located at the R.H. Coats building. The Jean Talon building was undergoing renovations at the time; carpets were being replaced and painting was taking place. Thus, the employer allowed

Mr. Lundin to work at his home division during the Jean Talon building renovations. Mr. Lundin indicated that he had problems with pollutants. On April 21, 1992, Mr. Lundin wrote to Mr. Gordon Priest and Ms. Marta Kanigan, Co-chairpersons of the Committee on Occupational Safety and Health, the following memorandum (Exhibit 23):

**HAZARDOUS OCCURRENCES: PAINT, CARPET, GLUE,
AND RELATED CHEMICAL FUMES**

I believe the paint, carpet, glue, and related chemicals being used in the STATSCAN building renovations are hazardous to human health. On a number of occasions, I have had adverse reactions to the fumes released by the paint, carpet, glue, etc. Should the fumes and hazardous chemicals persist, I may be forced to seek official recognition of the problem by Labour Canada and/or obtain workman's compensation for medical reasons.

A detailed list of problems, locations, etc. is attached. I believe that exposure to high concentrations of the fumes could cause death. I believe that long term exposure could cause Parkinson's Disease, Alzheimer's Disease, neurological damage, and/or chemical poisoning. My own very recent medical examination may indicate that the fumes are causing pituitary and thyroid problems.

The R.H. Coats, Jean Talon and Main buildings are located at Tunney's Pasture. All three buildings were undergoing renovations. The Jean Talon building underwent renovations sometime from March to May, 1991, and from March to April, 1992. At the R.H. Coats building, the renovations started in March, 1991, and went on from floor to floor: from March to May, 1991, floor 15; from August to December, 1991, floor 11; from March to April, 1992, floors 2, 5 and 6. The first floor, northeast section, of the Main Building, was renovated from March 15 to April 10, 1992.

On April 23, 1992, Mr. Priest replied to Mr. Lundin as follows (Exhibit 24):

Your Memo of 21 April, 1992

Thank you for your memo of the above noted date concerning paint, carpet, glue and other related fumes.

Your memo is not clear concerning the action you would like from the Committee. The Committee has been discussing the matter in general terms, but if you want your situation discussed specifically, we would need authority from you. Please advise.

In the meantime, I would suggest you discuss the matter with the nursing staff and with your Director.

Mr. Finlay felt that Mr. Lundin's health should be evaluated in case his poor work performance was caused by health problems. Mr. Lundin agreed to the assessment (Exhibit 25). On April 28, 1992, and May 11, 1992, it was confirmed that an assessment was requested (Exhibits 25 and 27). On August 7, 1992, Dr. E. Callary, wrote the following (Exhibit 29):

Further to your letter to Dr. Mohanna of May 11, 1992, we have examined Mr. Lundin at our clinic. We also have sought the input of his family physician. We are of the opinion that Mr. Lundin has a particular health problem. He should be given a work station where he is not exposed to fumes from paint or carpet glues. However, let me stress that the above does not indicate in any way that, if properly used, these products are environmental hazards to your employees.

We declare Mr. Lundin Class "B", fit with limitations, the limitations being as described above.

In the meantime, on May 7, 1992, Mr. Ivan P. Fellegi, Chief Statistician of Canada, wrote Mr. Lundin the following memorandum (Exhibit 26):

.....

I understand Gordon Priest has written to you asking whether you wish to have the details of your particular case discussed at a committee meeting or whether you are content to have the Co-chairs use the information you have provided to simply steer the discussions and thereby ensure that your interests are served in a general way.

In the meantime, I know the Committee has discussed the issue of paint and adhesive fumes at its meeting of April 27, 1992. From the meeting, I expect some improvements in providing advance warning of such work

and in providing for alternate work sites for those who are hypersensitive to the materials used.

You may wish to contact Marta Kanigan and Gordon Priest for detailed feedback on the discussion at that meeting.

In the meantime, I trust that you have consulted with the nursing staff and your Director regarding an alternate work site.

On May 19, 1992, Mr. Lundin wrote again to Mr. Priest (Exhibit 28):

**PROBLEMS WITH PAINT, CARPET, AND RELATED FUMES
IN STATSCAN BUILDINGS**

This memo summarizes B. Lundin's situation relative to problems with paint, carpet and related fumes in the Jean Talon and R.H. Coats Buildings. This is a follow-up to my memo of April 21, 1992 which is now on your file 6T/865-53/C62.

1) *Paint and Carpet Fume Hazards Still Exist*

I believe the problems with paint, carpet, and related fumes still exist. I believe that the short term effects may have decreased, but the medium and long term health hazards still exist. These hazards could cause Parkinson's disease, Alzheimer's disease, brain and nerve damage, arthritic type reactions, allergic reactions, and possibly, death.

As of May 13, 1992, my face becomes numb after 30 minutes on the 8th floor of the Jean Talon Building. All my muscles become stiff, and I have co-ordination problems after 2 hours. I believe this is caused by paint and related fumes. Similarly, my face becomes numb and I have speech problems after 15 minutes on the 5th floor of the R.H. Coats Building. I believe carpets were laid there about 4 months ago.

2) *HEALTH and WELFARE Check*

Business Register and Personnel Divisions are asking Health and Welfare, Canada, to access B. Lundin's health problems. Dates and procedures have not been finalized. However, I will pass on pertinent information as it becomes available.

3) Memos from I. Fellegi and Gordon E. Priest

Attached are copies of memos from I. Fellegi and from Gordon E. Priest. Both memos suggest that B. Lundin do some follow-up work. This is being done as mentioned in 2). However, before taking any action specifically related to B. Lundin, I suggest we wait for the Health and Welfare results.

4) AIR QUALITY

From mid-April through mid-May, I have noticed that the air quality, relative to my health problems, has improved; however, the improvement has not been consistent. Some days the air quality is as high as 9 out of 10. Other days, the air quality is as low as 4 out of 10.

Recommendation

ENSURE THE ADEQUATE FRESH (OUTSIDE) AIR IS ADDED TO THE STATSCAN BUILDING TO MAINTAIN A HIGH AIR QUALITY

Mr. Lundin was found to be capable of performing his duties as long as he was not exposed to pollutants. Ms. Chinnappa decided to discuss this situation with Mr. Lundin since he was returning to his home division after a three-year absence. Ms. Chinnappa told Mr. Lundin that she was disappointed with his poor performance. Ms. Chinnappa reiterated his shortcomings, such as the fact that he could not focus on instructions and problems. In addition, his writing skills had not improved and he could not apply theoretical knowledge to his projects. Mr. Lundin replied that quite often his supervisors did not know the whole problem. He saw the whole forest whereas his supervisors only saw a tree. Ms. Chinnappa responded that maybe for some time he should focus on the tree and then bring to the attention of the supervisor that the problem was larger. Ms. Chinnappa decided to try Mr. Lundin at the home division on various projects. She wanted to find out where he performed best. Ms. Chinnappa told him that he would be placed on different projects with different supervisors for a period of time. Ms. Chinnappa had noticed that there seemed to be a gap between Mr. Lundin's understanding of instructions and their application. Thus, she asked the supervisors to hold regular meetings with Mr. Lundin and produce monthly reports on the tasks assigned to him and his performance. This would provide Mr. Lundin with adequate and direct feedback.

Ms. Chinnappa added that she was going to meet the supervisor and Mr. Lundin once or twice a month to review the report on his performance. Mr. Lundin did not object to this process. Ms. Chinnappa's objective was for Mr. Lundin to demonstrate his abilities as a MA-STA-03. Ms. Chinnappa added that the employer would accommodate his health needs.

The first supervisor assigned to start this process was Mr. Simon Cheung, Chief, Research and Special Services. Ms. Chinnappa and her assistant directors decided to assign Mr. Lundin to three different Chiefs. Mr. Cheung was the first one. He is very well organized, systematic, and gives clear directions. Thus, Ms. Chinnappa thought that Mr. Lundin's first assignment would be very precise, with clear directions and close supervision. Mr. Cheung fitted this bill. The project was to evaluate a software package called "CASES". On July 6, 1992, a meeting was held with Mr. Lundin to explain the project, what was expected of him, and the process (Exhibit 30).

On September 10, 1992, Ms. Chinnappa held a meeting to discuss Mr. Lundin's performance during the period July 6 to 31, 1992. Mr. Cheung had written his appraisal on a form entitled "Performance Review and Feedback". Mr. Cheung commented as follows (Exhibit 31):

...With respect to personal suitability as a methodologist, Mr. Lundin has demonstrated clearly his intelligent and analytical thinking. He is conscientious of what he says and always take (sic) effort and time to articulate his thoughts. Moreover, he is quite serious with his work and he takes massive notes in all the weekly meetings. However, Mr. Lundin should consider improvements to his skills related to the following observations by his supervisor:

a) Mr. Lundin should develop a habit to verify his understanding and interpretation of events. In all the meetings so far, Mr. Lundin seldom took the initiative to verify his understanding of the suggestions or instructions of his supervisor. As the result, his recording of the meeting minutes often required corrections.

b) Mr. Lundin tended to be selective in the information he retained. The effect of this is most evident in his written

communication which often lacked context and ignored secondary but important ideas.

c) In his verbal communication, Mr. Lundin showed a tendency to focus completely on and deal with a single issue at a time. He should try to consider relevant issues in a more balanced fashion before forming strong opinions.

Ms. Chinnappa discussed this appraisal with Mr. Lundin. He refused to sign it and Ms. Chinnappa gave him a copy. At no time did Mr. Lundin object to the form used in the appraisal until he presented his grievance on September 13, 1994. This form became the employer's official appraisal form for the purpose of evaluating Mr. Lundin's performance as of July, 1992.

Ms. Chinnappa had informed Mr. Lundin that monthly meetings would be held to discuss his performance. She suggested to the supervisors that they use this form because it was the one regularly used for evaluations. This form was accessible via the employer's computers.

Mr. Cheung produced a second appraisal on November 20, 1992, to cover the period August 1 to October 31, 1992, which was discussed with Mr. Lundin on November 23, 1992. Mr. Cheung wrote (Exhibit 33):

Overall, Mr. Lundin has shown a lot of interest in this project, especially the diverse aspects of CATI systems and activities of survey data collection and capture. To date, however, the stated milestones have not been achieved. Mr. Lundin had weekly discussions with his supervisor regarding his various views and ideas of the project. These discussions helped focus gradually his thoughts around the objectives and scope of the project. Mr. Lundin would have liked the evaluation of a system be (sic) more encompassing than the current restriction to the examination of "management statistics" by a CATI system. He had to be guided on a number of occasions in identifying the feasible targets for the project. He also needed close guidance in balancing his efforts and focus on various project tasks.

So far, Mr. Lundin has attempted with occasional success in communicating his ideas on the project. His oral and written presentation of ideas tended to be fragmented and loosely related. He needs to be more aware of the importance of delineating the content of his ideas and of focusing on the

issues. Mr. Lundin should continue to develop his awareness and skills of verifying his communication with colleagues.

Again, Mr. Lundin refused to sign the appraisal and Ms. Chinnappa gave him a copy.

Mr. Cheung wrote a third appraisal on March 3, 1993, covering the period November 1 to December 31, 1992. Mr. Cheung wrote (Exhibit 34):

.....

Throughout the project, Mr Lundin had the tendency to over-emphasize those project elements which are of interest to him. He needed considerable guidance to re-balance his concentration and priorities. He demonstrated insufficient knowledge of survey methodology on the subjects of survey data collection and capture. In the course of the project, he was not able to acquire more in-depth knowledge on these subjects by researching statistical literature and survey documentation, or by consulting his more knowledgeable colleagues. As a result, the project progressed slowly and his output was reduced to one of much less importance.

Mr. Lundin often had difficulties in communicating his ideas on the project effectively. He had difficulties in focusing on pertinent issues and presenting them in a coherent way. At times, the same project decisions had to be repeatedly discussed, agreed and recorded at several meetings. In spite of the many notes that Mr. Lundin took at each meeting, there were considerable errors or omissions in the meeting minutes that he prepared. Mr. Lundin's project report reflects the need for him to improve his writing skills as previously recommended by his writing consultant.

Overall, Mr. Lundin did not demonstrate the methodological knowledge and skills, and the communication skills required for methodological research projects.

This appraisal was discussed with Mr. Lundin on March 9, 1993. Again, Mr. Lundin refused to sign it and he was given a copy.

Mr. Lundin made no comments on any of the three appraisals noted above. Mr. Cheung recommended that Mr. Lundin be sent to a writing consultant to improve

his skills. Thus, he was sent to an in-house writing consultant. In addition, Mr. Cheung wrote (Exhibit 35):

.....

Mr. Lundin has shown very little knowledge of survey methodologies regarding survey data collection and capture. He has shown little initiative and abilities to acquire such knowledge by researching statistical literature and survey documentation, or by consulting his colleagues who are more knowledgeable on these subjects.

Mr. Lundin often had a wide range of thoughts about the project. Unfortunately, he had difficulty in consolidating these ideas in a focused and thematic fashion. The same phenomenon has also been observed in his project documentations.

On the whole, Mr. Lundin was quite interested in his work, especially when he was free to choose the direction. However, he has demonstrated so far that his methodological knowledge and skills, as well as oral and written communication skills are at a level below that expected of his incumbent position.

At the hearing of these four matters, Mr. Lundin insisted that this document (Exhibit 35) be introduced into evidence.

Ms. Chinnappa asked Mr. Lundin and two other employees who had reactions to the renovations and the air in the building, to discuss what could be done about it. So Mr. Lundin wrote to J. Tremblay, Director, Administrative Support Services Division, for information (Exhibit 36). The employer accommodated the employees affected. Other offices were found for them to work in; they were allowed to work at home and they could leave the workplace as often as they needed to get fresh air. Mr. Lundin did not contest the employer's response to his concerns and the accommodation, per se.

On November 27, 1992, Ms. Chinnappa wrote to Dr. Callary requesting that he again examine and provide a thorough physical and psychological assessment of Mr. Lundin (Exhibit 37). On March 31, 1993, Dr. Callary replied confirming the first assessment (Exhibit 40):

.....

I have discussed the examination results with the examining physician, Dr. Carré. Apart from our first recommendations (see letter to Ms. Ross of August 17, 1992), Mr. Lundin has no other work limitations. We would propose that you deal with those work-related problems which are unrelated to his complaints concerning carpeting and painting, in an administrative manner.

In the meantime, on February 9, 1993, J. Tremblay replied to Mr. Lundin (Exhibit 38). On March 2, 1993, Mr. Lundin wrote to Ms. Chinnappa requesting an alternative work arrangement. It was agreed that Mr. Lundin would work at home using a government issued laptop computer (Exhibit 39). He suggested working three days at home. An agreement was signed in this regard (Exhibit 43).

The second project assigned to Mr. Lundin concerned research that had already been done by another employee. Mr. Lundin was asked to chose a method to detect and handle "outliers". He had to apply this method to two of the data variables in the project. The supervisor was Mr. Michael (Mike) Miller. Mr. Miller wrote an appraisal which was discussed with Ms. Chinnappa and Mr. Lundin on March 18, 1993. Mr. Lundin refused to sign it. A copy was given to him and he made no comments. This appraisal reviewed his performance for the period January 4 to February 26, 1993 (Exhibit 41). Mr. Miller wrote that:

Brian's work has not progressed as quickly as I expected. Unfortunately I am unable to give a firm reason why. I believe that Brian has reviewed everything that should have been reviewed, and, he has demonstrated a good understanding of the topics in our conversations, but he just has not performed these tasks as quickly as I expected. This leads me to believe that possibly his hyper-sensitivity to certain pollutants, in the Coats building, is interfering with his production as well as his health. Over the review period, several renovations have been undertaken in the Coats building which may be affecting his health. Brian's memo of March 2, 1993 (attached) outlines these problems. At Brian's request, he is working at home to see if his health will benefit. Both Nanjamma and myself have agreed to this arrangement.

On May 18, 1993, Mr. Miller wrote an appraisal for the period March 1 to April 30, 1993 (Exhibit 42). This appraisal was also discussed with Mr. Lundin on May 19, 1993. He refused to sign it and provided no comments. He was given a copy. Mr. Miller indicated that:

Brian has not performed at the MA-3 level in my opinion. Even though in discussions he demonstrates a good understanding of the theory and what is desired, there seems to be a breakdown between this point and the actual implementation and production of written outputs. Even though he takes a lot of notes, he does not seem to follow them. I have tried to direct him with suggestions and warnings but they are often overlooked. For example I warned him many times that he should review the data files prior to running regressions, in case records existed which should be questioned and deleted from the analysis. This was not done at the optimum point and therefore some analyses have included data which should have been deleted.

To offset some of these problems and to complete this project, I have documented what I require from this analysis from Brian. This is something I would not normally do with a MA-3. I have also met with him to set up deadlines to complete specific parts of the analysis and the overall analysis. It has become clear that Brian should be supervised a little closer than other MA-3's. This should be continued until Brian demonstrates he can function at this level (MA-3) on his own. I shall be in a better position to evaluate his work at the next review.

Brian is continuing to have problems with the air in the Coats Tower. To offset this problem he has been working at home at least once a week. This problem, allergic reactions, more than likely is affecting his performance. I generally believe that Brian is trying very hard to perform his duties.

Mr. Miller found some improvement during his review of May 1 to July 9, 1993, signed on August 16, 1993. Mr. Miller wrote that this report was his best effort to date. Mr. Miller was satisfied with it. In addition, Mr. Lundin's health had also improved. However, Mr. Miller added (Exhibit 44):

I still feel that Brian is not producing at the MA-3 level. I feel his main problem is a lack of proper planning. His eagerness to attack this project probably hurt how the project was organized, which led to some of the problems documented previously. Possibly concentration is a factor here. His

performance definitely improved in the latter part of the project. Probably a result of the better environment on the floor.

On October 21, 1993, Mr. David Dolson, Mr. Miller's Chief and supervisor, read Mr. Lundin's report and provided his comments. Mr. Dolson wrote (Exhibit 45):

...Unfortunately, the research as summarized in the report could not be used by the SEPH redesign project. The analysis was done using an incorrect variable, time was wasted on an inappropriate outlier detection method, and the analysis was not in sufficient depth. The report is too long and too difficult to read, no recommendations are given, and the conclusions are too vague to be helpful. The quantity and quality of work reported in this paper are unsatisfactory and a disappointment given the six months of effort on the project...

Mr. John Armstrong was next responsible for Mr. Lundin. Mr. Armstrong was in charge of the next project, a pure research project. On November 3, 1993, Mr. Armstrong met with Mr. Lundin to discuss this project. The objective was to obtain sampling variance estimates for year-to-year changes in tax estimates. Mr. Lundin had to derive explicit formulas for the sampling variance of year-to-year changes in NIP tax estimates obtained from the two-phase sample and program these formulas. Mr. Armstrong asked that the work on the project be completed by December 31, 1993 (Exhibit 46).

On November 8, 1993, Ms. Chinnappa and Messrs. Lundin and Armstrong discussed his performance. Mr. Armstrong wrote (Exhibit 47):

During our discussions at meetings held to review progress on the project, Mr. Lundin has given the impression that he has a reasonable understanding of the tax sampling design and the methodology required to produce variance estimates for year-to-year changes. His comments on related work that has been done by others also leave a similar impression.

However, Mr. Lundin has not been able to translate his apparent understanding of the relevant methodology into precise and/or usable outputs. The document that he produced concerning the variance formula contained many errors as well as a great deal of extraneous material. It did not provide a clearly defined and adequately detailed

formula. Rather than addressing the comments on this document that were provided to him or responding to repeated requests for clarification, Mr. Lundin produced additional written material related to a decomposition of the sampling variance. Although the decomposition idea is interesting, the related documents develop the idea in a unnecessarily repetitive manner and, more importantly, lack sufficient detail to enable the reader to verify whether or not it is appropriate for the two-phase sample.

Mr. Lundin's performance during the review period was unsatisfactory relative to the standards for MA-03. His performance would be improved if he focused more clearly on project objectives. In addition, he should accept related work done by others as a starting point rather than developing his own ideas independently of previous work. He should pay more attention to comments received from his supervisor, seeking clarification if necessary. Finally, more attention to relevant details is required.

Mr. Lundin made no comment and refused to sign this appraisal.

On November 9, 1993, Mr. Armstrong wrote a memorandum to Ms. Chinnappa concerning Mr. Lundin's performance (Exhibit 48):

.....

Supervising Mr. Lundin has proved to be a time consuming and frustrating experience. The reviews of Mr. Lundin's performance that I have written provide detailed comments.

Based on my experiences, I believe that great caution should be exercised in assigning Mr. Lundin to senior methodologists. I do not believe that any supervisor at the MA-05 level should be expected to extract useful output from Mr. Lundin. So far, I have found this task impossible.

In addition to the time that I have spent supervising Mr. Lundin, other methodologists working on tax have spent time related to his involvement in the project. For example, since Business Register Division (BRD) asked for minimal contact with Mr. Lundin, liaison required to identify files for his project was handled by H el ene St-Jean. Although I have charged the time that I have spent supervising Mr. Lundin to administration (PRACAS 7201), it is clear that the impact of Mr. Lundin's involvement on methodology support received by BRD has been both tangible and negative.

I am willing to continue supervising Mr. Lundin until the end of his current assignment in January, provided that management recognizes and supports the need for thorough monthly evaluation and documentation of Mr. Lundin's performance. I will, of course, discharge this duty as well as my other supervisory responsibilities vis-à-vis Mr. Lundin in an objective manner. If I am asked to supervise Mr. Lundin under any other circumstances, I will refuse.

Mr. Lundin requested that this memorandum be produced into evidence.

Ms. Chinnappa testified that this memorandum was unsolicited. She had not asked Mr. Armstrong to assess Mr. Lundin and write this document. This was the first time that Ms. Chinnappa realized that maybe the employer could not find a suitable assignment for Mr. Lundin. She felt that maybe "they" had failed in that regard. Ms. Chinnappa informed Mr. Armstrong to continue supervising Mr. Lundin and provide the requested feedback and support and to continue with the monthly meetings and discussions.

On November 19, 1993, Mr. Armstrong wrote to Mr. Lundin providing his comments (Exhibit 49) on a report prepared by Mr. Lundin. Mr. Armstrong indicated that:

The overall quality of your report is very poor, even after allowances have been made for the fact that it is a draft. Although the report contains some discussion related to an interesting idea (partitioning of the sampling variance for estimates of year-to-year changes), it is too long, poorly organized and difficult to read. Mathematical and statistical terms are frequently used incorrectly. Concepts are introduced and discussed vaguely without providing adequate detail for a reader to determine whether or not they are relevant to the problem at hand. A precise variance formula containing adequate detail for programming in SAS or programming in PLI by personnel not familiar with all the details of the two-phase tax sample is not provided. In addition the report contains many grammatical and typographical errors. In its present form, the report contains nothing that can be used to improve the methodological support currently offered to the tax estimates program of Business Register Division.

In writing the report, you have ignored previous work on related problems as well as repeated suggestions that I have

provided concerning the directions that you should take developing your ideas. For example,I mentioned my doubts concerning the applicability of this approach under simple random sampling to you on more than one occasion. Yet the idea appears in your report with no caveats concerning its use. In addition, sufficient detail to enable the reader to determine whether or not it can be applied to the two-phase tax sample is not provided....

Mr. Lundin did not follow the directions given by Mr. Armstrong.

Then, on November 26, 1993, Mr. Kadaba P. Srinath, Chief of the section and Mr. Armstrong's supervisor, commented on Mr. Lundin's report. Mr. Srinath found the report unclear, difficult to understand, full of repetitions and incomplete (Exhibit 50).

On December 10, 1993, Ms. Chinnappa and Mr. Armstrong discussed with Mr. Lundin the latter's performance for the period November 1 to 30, 1993. Mr. Armstrong wrote (Exhibit 51):

...the overall quality of the report was very poor, even after allowances were made for the fact that it was a draft. It was too long, poorly organized and difficult to read. Mathematical and statistical terms were frequently used incorrectly. Concepts were introduced and discussed vaguely without providing the reader enough information to determine if they were relevant to the variance estimation problem. The report did not include a variance formula that could be used in phase (iii) of the project.

During discussions of methodological issues, Mr. Lundin often presents his views in an assertive manner. However, a review of Mr. Lundin's report, as well as detailed discussions with him concerning related issues, suggests that he does not clearly understand important methodological and statistical concepts including, for example, sampling variance and conditional variance. At the same time, Mr. Lundin rarely seeks clarifications on technical matters. During the preparation of his report, Mr. Lundin apparently ignored some very relevant references that were made available to him in July and August. He also ignored repeated suggestions from his supervisor concerning the directions that he should take in the development of his ideas.

Mr. Lundin's work on the assignment that he was given on November 3 has not progressed to a point where it is possible to make specific comments. Relative to the standards of MA-03, Mr. Lundin's performance during the review period on activities related to his report on phase (ii) was unsatisfactory. In order to improve his performance, Mr. Lundin should accept related work done by others as a starting point rather than developing his own ideas independently of previous work. He should pay more attention to comments received from his supervisor, seeking clarification if necessary. In addition, significant improvements in Mr. Lundin's knowledge of methodology, as well as his writing skills, are required.

Mr. Lundin had a different view of technical solutions than the views suggested by Messrs. Armstrong and Srinath. Mr. Lundin made no comment on the content of the appraisal, he refused to sign it and he was provided with a copy.

On January 21, 1994, Ms. Chinnappa and Mr. Armstrong reviewed with Mr. Lundin his performance during the period December 1, 1993 to January 14, 1994. Mr. Armstrong wrote (Exhibit 52):

Mr. Lundin's reaction to the specific assignment given to him on November 3 was poor. Although the written description of the assignment (as well as all project materials that had been presented to him) clearly indicated that formulas for the sampling variance should correspond to the two-phase sample design, Mr. Lundin began working on variance formulas for one-phase sampling. The need for a two-phase variance formula was clarified in an informal discussion on December 10. Subsequently, Mr. Lundin proceeded to complicate the problem unnecessarily, beginning efforts to derive variance formulas for a variety of sets of assumptions. It was disappointing to note that Mr. Lundin had not abandoned this inefficient approach, despite the fact that its unproductive consequences had been pointed out to him on a number of occasions.....Notwithstanding this extension of the deadline, the quantity of relevant output available at the end of the review period fell short of the quantity required for satisfactory performance.

Although Mr. Lundin is sincere and works diligently, his performance during the review period was unsatisfactory relative to the standards of MA-03. In order to attain a satisfactory level of performance, Mr. Lundin must abandon

his habit of needlessly complicating tasks that he is assigned and focus more clearly on objectives. In addition, significant improvements in his methodological knowledge and communication skills are required.

Again, Mr. Lundin made no comment, refused to sign the appraisal and received a copy of it. Ms. Chinnappa decided to bring a senior methodologist of another division to assess Mr. Lundin's report. Mr. Lundin was asked to document his approach as clearly as possible showing the theoretical solution which could be more than one estimate of change for a two-phase design with a Bernoulli sampling in both phases in each of the two years with the design described in the paper published by Messrs. Armstrong, Block and Srinath (Exhibit 79). The document had to be ready by the end of February, 1994. This document was then to be assessed by Messrs. Armstrong, Srinath and the third senior methodologist.

Ms. Chinnappa also decided to review with Mr. Lundin his overall performance and his long-term career prospects (Exhibit 52). Thus, on April 12, 1994, Ms. Chinnappa asked Mr. Jean-Louis Tambay, Social Survey Methods Division (S.S.M.D.), who had worked as a senior methodologist at the B.S.M.D., to review Mr. Lundin's report. Mr. Tambay was completely removed from the B.S.M.D. Ms. Chinnappa asked for his comments by April 30, 1994 (Exhibit 53).

On February 7, 1994, Mr. Armstrong provided to Mr. Lundin his comments on the report. He found it of very poor quality and vague. Mr. Armstrong was not satisfied with his work. In addition, Mr. Armstrong provided an example of calculations of a variance estimate for change using a method described by Leslie Kish (Exhibit 54).

Then, on April 12, 1994, Ms. Chinnappa and Mr. Armstrong discussed with Mr. Lundin his performance during the period January 17 to April 8, 1994. Mr. Armstrong wrote that (Exhibit 55):

Mr. Lundin was unable to complete the documentation of his approach by the end of February. By the end of March he had completed a partial draft that was given limited circulation for comments. The partial draft includes five of the seven modules that Mr. Lundin had planned to write and

is over 120 pages in length. It is far too long, repetitive, poorly written and difficult to read. Unnecessary complications are introduced in an attempt to generalize the problem. The discussion, from both a linguistic and a mathematical perspective, is extremely vague. For example,.....

The partial draft includes many concepts that had appeared in some of Mr. Lundin's earlier work and been questioned or criticized by his supervisor and others. It does not contain an explicit formula for the sampling variance of estimates of year-to-year change based on the two-phase tax sample, nor does it contain a framework that could be used to develop such a formula. Mr. Lundin's documentation relies heavily on the idea of division of the population into "mutually exclusive subsets". Mr. Lundin was verbally warned about problems with the use of this idea in October and its use was questioned in a set of written comments dated November 19.....Mr. Lundin has been unable to use his approach in the case of simple random sampling and has produced no evidence to change his supervisor's view that variance estimates for the two-phase tax sample cannot be calculated using "mutually exclusive subsets". Mr. Lundin's work has not contributed to project phases (ii), (iii) and (iv).

Mr. Lundin's performance during the review period was unsatisfactory relative to the standards of MA-03. In order to attain a satisfactory level of performance, Mr. Lundin must learn how to focus on project objectives and work under the direction of his supervisor. In addition, significant improvements in both his communication skills and his methodological knowledge are required.

Mr. Lundin made no comments regarding this appraisal, refused to sign it and received a copy.

Finally, on April 12, 1994, Ms. Chinnappa discussed with Mr. Lundin, in the presence of Messrs. D. Binder, Armstrong and Srinath, his poor work performance. She pointed out that he had been assigned to three projects under three different supervisors. His performance was assessed unsatisfactory at the MA-STA-03 level. His major problems were identified as (Exhibit 56):

- a lack of focus in addressing problems*
- inability to take direction from supervisors*
- poor communication skills, both oral and written*
- confused understanding of statistical theory*

and - inability to apply statistical knowledge to problems.

On the other hand, it was recognized that he was sincere, hard-working and had satisfactory programming skills, Brian, however, believed that he was performing well, despite the negative assessment and feedback given to him by his supervisors....

Ms. Chinnappa added that:

..the Division had tried and failed to find Brian an assignment where he could demonstrate his ability to perform as a methodologist. He had disagreed with the direction given by all three supervisors. Brian was asked if he could suggest any other area where he could perform better. His answer was that his document relating to his current assignment would speak for itself.

He was advised that this document would be given to an independent reviewer in SSMD and an assessment of it would be sought by the end of April. Three scenarios could result:

- a) If the reviewer found Brian's approach to solving the problem sound, Brian will continue with the assignment.*
- b) If he finds that the approach is not clear but that it has ideas worth pursuing and suggests that the document should be revised to clarify and develop these ideas, Brian will be given a month to revise it and demonstrate that he can take direction and explain his statistical ideas clearly.*
- c) If the reviewer criticizes the concepts and approach in the document and finds there is no merit in it (as was assessed by his current supervisor and chief), Brian will be told that he cannot work as a methodologist.*

As of that date, Mr. Lundin was to report to Ms. Chinnappa directly since Mr. Armstrong had become so frustrated with Mr. Lundin. He was to report to Mr. Srinath for administrative matters. Mr. Lundin agreed to this. Ms. Chinnappa was going to take time to review Mr. Lundin's performance and decide from there what to do next. Mr. Lundin wanted to continue to work on that same project.

On April 29, 1994, Mr. Tambay wrote his comments on Mr. Lundin's document (Exhibit 57). He indicated that:

The report presents a scheme for estimating variance of changes in tax estimates. I found it to be very badly written for a number of reasons. Firstly, it gave very little background on the sample design and inadequate references for readers (reference to Lundin and Armstrong, with no first names, dates or article titles, were used). Secondly, the style was neither clear nor concise, with a lot of jumping back and forth, repetition, unexplained terms or ambiguous statements (such as.....). Thirdly, statistical terminology and notation was unnecessarily complicated, making it very difficult to follow.....

For the above reasons, I could not evaluate easily the statistical merits of the report. The author seems to understand statistical concepts such as Bernoulli/Poisson sampling and conditional estimation, but he fails to present them coherently. He also seemed to raise as issues evident points such as the statement "economic variation can be introduced in the analysis of change", or the well-known use of zero values for units not in existence.

In conclusion, this report cannot be disseminated. If necessary, it should be rewritten from scratch rather than revised. In a rewrite, the basics of statistical notation and terminology should be reviewed and used.

Mr. Lundin was provided with a copy of Mr. Tambay's review. These comments confirmed Mr. Armstrong's opinion. On that same day, April 29, 1994, Ms. Chinnappa wrote the following memorandum to Mr. Lundin (Exhibit 58):

.....

I have since then reflected on the level of your performance and the quality of your output over the past eight and a half years:

- *You will recall that in October 1987 your performance in Business Survey Methods Division was evaluated as "unsatisfactory". At that time you were informed of your strengths and weaknesses and how you could improve your performance.*
- *A career assignment with Geography Division followed, starting in October '87. Although your initial performance there was assessed as "fully satisfactory", it became uneven later and deteriorated since March '90. Your assignment there ended in March '91.*

- *Your second career assignment was with Business Register Division, from April 1991 to September 1992. Your supervisor was not satisfied with your output and your assignment there was terminated prematurely in July 1992. Your supervisor documented his comments and clearly communicated them to you.*
- *The attached summary of our meeting of April 12, 1994 describes your performance on three different projects since your return to BSMD in July 1992. In the feedback discussion that followed each project, it was made known to you that you had failed to attain a satisfactory level of performance, despite the fact that each project manager worked in close cooperation with you, giving you the relevant instructions, documentation and working tools and informing you of what was expected of you.*

I now realize that I must be more specific regarding the outcome of the assessment of your document by the independent reviewer. If the approach in your document is sound you will continue working with STC. However, if the reviewer determines that the document is not satisfactory you will be given three (3) months to rework it. If there is no marked improvement, I will have no option but to take the necessary steps to terminate your employment with Statistics Canada.

I have reached this conclusion because the comments and observations by both your past and current supervisors show that, collectively, we have made concerted efforts to help you achieve a level of performance that corresponds to the standards and expectations of an employee at your group and level. These efforts included career development assignments and training courses intended to help you improve specific performance problems. However, to date you have not demonstrated that you are capable of performing at that level, or indeed at lower level in the MA group.

Ms. Chinnappa testified that sometimes at the meetings she wondered if Mr. Lundin understood what she was saying. On April 12, 1994, she told Mr. Lundin that his situation was serious and, if his performance was found unsatisfactory, he could no longer work as a methodologist. Mr. Armstrong had pointed out to her that Mr. Lundin may not have understood the instructions so she wrote Exhibit 58.

Ms. Chinnappa explained that it was very difficult for her to reach the decision to terminate Mr. Lundin's employment if the review found Mr. Lundin's performance unsatisfactory. She wanted to make him understand that the situation was serious and to react accordingly. She invited him to discuss the contents of this memorandum with her and advised him that he could bring a union representative.

On May 5, 1994, Ms. Chinnappa wrote to Mr. Lundin requesting that he use the next three months to rewrite the document so as to enable the reader to have a clear grasp of the statistical methods recommended. She advised him to concentrate his efforts over the next three months (up to the end of July, 1994) in rewriting this document to prove that he could perform as a methodologist (Exhibit 59).

On May 16, 1994, Ms. Chinnappa clarified, at Mr. Lundin's request, what was expected from him. She wrote (Exhibit 60):

I suggested that you should initially write a brief 2 or 3 page summary of your method with an illustration of how it works using a simple example as suggested by John Armstrong, to help us understand your approach. (Please see John's performance review and feedback for the period January 7 - April 8, 1994, for details.) I also clarified, as I did at our brief conversation a week or so ago, that you should assume that the 'reader' is a methodologist.

I confirmed that you are required to produce the re-written document by the end of July 1994. I will get it assessed soon after, to judge your ability to perform as a methodologist.

On July 25, 1994, Ms. Chinnappa advised Mr. Lundin that she was giving the document to two reviewers, Messrs. Tambay and Srinath. They were to evaluate whether (Exhibit 61):

- *the document is clear and gives a methodologist a good understanding of the statistical methods you are recommending, and*
- *if so, whether the approach you are recommending is sound.*

...I have asked the reviewers to give their comments to me in writing by the 5th of August, at which time I will arrange a meeting with you to discuss the comments.

Meanwhile, you agreed to review the document to be sure that you have satisfactorily addressed the problem described in paragraph 2 and convey any corrections to me by the end of the month. You told us that you have already extended the approach to a 2-phase sample design in both years and that you will be updating the document to reflect it.

Mr. Lundin agreed to the above.

On July 27, 1994, Mr. Tambay provided his assessment (Exhibit 62). Mr. Tambay wrote:

As requested I have reviewed a numerical example and a two-page summary of an approach for the analysis of change in tax revenue. You have asked for comments on two points: whether the documents are clear and give methodologists a good understanding of statistical methods recommended, and if so, whether the recommended approach is good.

The summary was badly written and difficult to follow. Many sentences were ambiguous and unclear, often because of poor grammar. Examples are sentence 3, paragraph 1; s. 2, para. 3; s. 2, para. 4; s. 1, para. 6; s. 2 & 3, para. 8. I could get a notion of the various components of the strategy, but could not understand how they fit together. References to "other populations" were confusing.

The example could be followed mainly because the design used was so simple. However, its presentation was needlessly complicated and I often relied on the tables to understand the text. For so simple a design, a much shorter explanation could have sufficed.

*The estimator given the example is inefficient. Statistical literature, and common sense, recommend using the known population size to adjust for the randomness in the sample size. For example, see Särndal, Swensson and Wretman, **Model Assisted Survey Sampling**, pages 62-65.*

On August 4, 1994, Mr. Srinath provided similar comments on Mr. Lundin's work. He found the report confusing and vague. There were no clear explanations and the notation used was messy and confusing (Exhibit 63).

Thus, on August 9, 1994, Ms. Chinnappa provided Mr. Lundin with these two reviews and informed him that she had asked Messrs. Srinath and Tambay to review

the detailed description of his approach (Part C) of his document (Exhibit 64). That same day, Mr. Tambay commented that the report was badly written and excessively redundant and the methodology was fallacious. He wrote (Exhibit 65):

I had expected the detailed document to cover situations more complicated than the example that I had previously reviewed and which, you recall, I found to be very simple. Instead, the document covers the same simple situation, but with different aspects repeated and reworded an astounding number of times so as to take over 130 pages. This is ten to fifteen times too long.

The proposed estimator, as previously stated, is inefficient....

To summarize, the report is badly written and excessively redundant, and the methodology is fallacious.

On August 11, 1994, Mr. Srinath indicated that the report was unsatisfactory; the explanations were too long (134 pages) though the case considered was simple. The notation was confusing (Exhibit 66).

On August 15, 1994, Ms. Chinnappa wrote the following memorandum to Mr. Lundin (Exhibit 67):

Please find attached copies of the reviews of your detailed document conducted by Jean-Louis Tambay and K.P. Srinath. Their comments can be summarized as follows:

- a) Your document does not demonstrate a satisfactory understanding of statistical concepts.*
- b) Your document is very repetitive and confusing. Hence your approach will not be clear to a methodologist reading it.*
- c) Your estimate of change between two years for the simplified problem of a single-phase Bernoulli sample in each year is inefficient. (The original problem given to you was for a two-phase sample.)*
- d) You have not derived the formula for the variance of the estimate, nor the estimate of that variance.*

I have also reviewed your document and concur with their reviews. Please see my comments in the attached note.

Based on these reviews I have come to the conclusion that your performance on this assignment is unsatisfactory.

I wish to meet with you, D. Binder and a Personnel representative on the 22nd of August at 10:00 a.m., to discuss your future employment. Please feel free to invite your Union representative to the meeting.

If you wish to discuss the attached reviews before then please feel free to see me.

Ms. Chinnappa also found the document unsatisfactory and she provided various reproaches in a document attached to the memorandum to Mr. Lundin of August 15, 1994. This led to the August 22, 1994 termination letter. Ms. Chinnappa testified that she had hoped all along that when Mr. Lundin returned to the B.S.M.D. they would help him perform at his level. Messrs. Cheung, Miller and Armstrong felt they could help him perform at his level. For Ms. Chinnappa the fact that they could not get Mr. Lundin to perform at the MA-STA-03 level was a deep disappointment.

Throughout his career, Mr. Lundin, never refused to work or report for work. He never refused to work on the basis of an occupational hazard; quite the opposite, he wanted to work. Despite his problem with the pollutants, his attendance was good. He never involved a safety officer.

In cross-examination, Ms. Chinnappa recognized an Employee Performance Review form (Exhibit 68) This is a relatively new form which allows for attachments. She added that the appraisals given to Mr. Lundin since 1992 do not indicate that a copy was being placed on his personnel file.

Ms. Chinnappa declared that the contents of all the B.S.M.D. Performance Review and Feedback forms are true and Mr. Lundin never disagreed with them. He made no comments to any of them. Ms. Chinnappa testified that these documents were just a convenient form to communicate to Mr. Lundin the evaluation of his work. They are a valid assessments of his performance and they were placed on his personnel file. At any rate, Mr. Lundin did not object to these forms.

Ms. Chinnappa declared that when the last project and problem were given to Mr. Lundin, there were no restrictions placed on how to handle them. His job as a MA-STA-03 was to find a good, valid and efficient estimate.

Mr. Armstrong had given enough direction to Mr. Lundin to solve the project. The documents which are the result of this project are Exhibits 72 and 73. Exhibit 73 seems to indicate that Mr. Lundin did have an estimate of variance. He does provide a formulation but, according to Ms. Chinnappa, it is not the actual formula. He shows how one can derive the formula but he does not give the exact formula which is what was asked of him. Mr. Lundin's formula is very confusing. He was expected to explain his method so that a methodologist could understand it. The employer expected him to provide a solution to the problem. Mr. Lundin should have used Mr. Srinath's formula. The formula already existed; all he had to do was to use it. The formula in existence is the standard found in textbooks. The formula he came up with did not answer the question. The employer would have accepted a different method or formula as long as he explained it and it worked. Exhibit 73 was not acceptable.

Mr. John Kovar was the Systems Director up until February 13, 1995. In 1986, he was a Senior Methodologist Unit Head, MS-STA-05. He wrote part of the PRAR for the period January to October, 1987 (Exhibit 6). Mr. Kovar supervised Mr. Lundin from mid-1986 to March 31, 1987. Mr. Kovar left this position in April, 1987 and Mr. Peter Hoyt became Mr. Lundin's supervisor. In 1987, Mr. Hoyt was Senior Methodologist, MA-STA-05, at the Prices Division and when Mr. Kovar left his position, Mr. Hoyt took it over at the International Trade Division. Mr. Hoyt wrote section 2 of the PRAR for the period January to October, 1987 (Exhibit 6). This PRAR was Mr. Lundin's first appraisal following his promotion to MA-STA-02.

Mr. Kovar testified that his major concern in writing the PRAR was to identify what Mr. Lundin was working on at the time. Mr. Kovar pointed out his shortcomings and this became a tedious process for both Messrs. Kovar and Lundin. Their clients had rejected Mr. Lundin's document. Mr. Kovar explained to Mr. Lundin the standards of performance expected. They had regular meetings and Mr. Kovar detailed what was

expected of a MA-STA-02. Mr. Lundin's oral and written communications were a problem.

Mr. Kovar suggested that Mr. Lundin take a number of courses. Some were at the university level because Mr. Lundin seemed confused about some concepts. Mr. Kovar also suggested that he attend a number of seminars and a writing course. Mr. Lundin did take the writing course and other courses as they became available.

Mr. Kovar found that Mr. Lundin was unable to work without substantial supervision. He had to meet with Mr. Lundin and discuss his work with him more than what was normal for a methodologist at that level (MA-STA-02). Mr. Lundin exhibited an inability to take or implement instructions. He would zero-in on a detail and he was unable to look at the whole problem. Moreover, Mr. Lundin was not a team player. He would discuss details which were not pertinent to the problem and this frustrated the efforts of the team. He could not cooperate.

Furthermore, he was unable to write coherent and comprehensive reports. His sentence structure lacked grammar; there were errors and the document read poorly (poor English). He had problems with the structure of paragraphs. He would have many ideas in one paragraph and these same ideas would be repeated all along. Thus, this made his document repetitive, circular and confusing. The document was too lengthy for its intended purpose.

Mr. Lundin focused too much on small parts and details. Mr. Kovar added that Mr. Lundin gave this unsatisfactory document to the clients against his recommendation. Mr. Kovar explained that the PRAR gave a satisfactory rating (Exhibit 6) as an encouragement and to allow Mr. Lundin time to grow in the job. Mr. Lundin refused to sign the PRAR.

Mr. Hoyt took over from Mr. Kovar and explained on various occasions to Mr. Lundin what was expected of him. Mr. Lundin was to produce a clear and concise report, one that could be understood. It was not complicated to understand what Mr. Lundin had to do. The report had to be comprehensible. They met on an ongoing basis, very often, at which time Mr. Lundin showed Mr. Hoyt his drafts.

Mr. Hoyt echoed Mr. Kovar's views. Mr. Lundin was unable to work without close supervision. He should have been able to write a document describing his ideas without supervision. Mr. Lundin could not demonstrate an ability to undertake a short project as a methodologist on work he had done himself. He could not describe his work. Thus, it was impossible for him to undertake to explain what another methodologist had done. Mr. Lundin often asked questions that did not need to be asked.

Mr. Hoyt declared that he reviewed Mr. Lundin's written work and found many grammatical and spelling errors. Moreover, Mr. Hoyt could not understand what he had done; he used incorrect terms. Mr. Hoyt had even asked Mr. Lundin to explain orally his work but Mr. Hoyt found this even more confusing. Thus, when Mr. Lundin tried to explain his work the document kept getting longer. Finally, the document was 100 pages. Mr. Lundin wanted to give this document to the client and Mr. Hoyt objected. Then, Mr. Lundin wanted to involve Mr. Jocelyn Tourigny, Mr. Hoyt's supervisor, in his desire to release the document. However, Mr. Tourigny agreed with Mr. Hoyt.

Finally, Mr. Hoyt asked a summer student to assist Mr. Lundin. This student had no experience in statistics or computers but her English was good. Hence, she was asked to edit Mr. Lundin's document to remove the repetitions and to make it more readable and understandable. She cut the document to 40 pages and it was later reduced even further. By then, Mr. Lundin had left this project to work at the Geocartographics Division under Mr. Joel Yan and Dr. Gordon Deecker (from October, 1987 to March, 1991). When Mr. Lundin left in October, 1987, the document was given to another senior methodologist who reworked it and reduced it even further to 10 pages.

Mr. Hoyt found that Mr. Lundin was unable to limit his work and address the client's needs. The client had made it clear that he was not going to give the section any further work until this document was finished. The client found Mr. Lundin's presence disruptive. However, Mr. Hoyt did not tell Mr. Lundin about this. Mr. Hoyt

added that Mr. Lundin was unable to focus on the problem at hand. Mr. Lundin's explanations were irrelevant and went "all over the map".

Mr. Lundin's task was to write and document a particular methodology. However, he wrote instead about all the methodology he had done that was somehow related or similar. This was unnecessary because his client and readers were able to see the "generalization". Thus, it was not necessary to go into all these explanations.

Mr. Hoyt recognized that, at the time, Mr. Lundin was a MA-STA-02 underfilling a MA-STA-03 position. At the time, the employer used widely the underfilling of positions which two years later was found to be illegal by the Federal Court. As an underfill, Mr. Lundin was expected to receive guidance. Mr. Hoyt provided this guidance but the document kept getting longer. Mr. Hoyt kept telling him that it was too long but it kept getting longer instead. So, according to Mr. Hoyt, there must have been a communication problem. Mr. Lundin had to convey the information and Mr. Hoyt had to understand it.

Mr. Hoyt testified that Mr. Lundin asked to discuss Exhibit 6 sometime after they had already met and discussed it in the presence of Mr. Joel Yan. They met again, and Mr. Lundin told Mr. Hoyt that he felt that his performance was fully satisfactory. Mr. Hoyt disagreed. However, Mr. Lundin did not want to discuss the contents of the PRAR (Exhibit 6) and the reasons why his performance was unsatisfactory. He again refused to sign it. Mr. Hoyt, who was a union steward, told him that he had a right to present a grievance but Mr. Lundin did not grieve it. Then later Mr. Hoyt wrote to Mr. Lundin that Exhibit 6 was being placed on his personnel file. In Mr. Hoyt's view, Mr. Lundin had no desire to discuss his performance. Mr. Hoyt declared that he was trying to help Mr. Lundin by delaying Exhibit 6.

Mr. Lundin introduced into evidence a memorandum dated December 12, 1988 written by Mr. Hoyt in response to one from Mr. Lundin dated November 24, 1988. Mr. Lundin had requested that the PRAR be adjusted to the fully satisfactory level. Mr. Lundin pointed out during cross-examination of Mr. Hoyt that he had been assessed twice fully satisfactory, once as a MA-STA-01 and the second time when he was assigned to Geocartographics where he worked as a MA-STA-02 or as a CS-01

(Computer Systems). Mr. Hoyt reiterated that during the period January to October, 1987, he had failed to meet some of the fundamental requirements of his position at the MA-STA-02 level (Exhibit 76). Mr. Lundin never gave an indication to Mr. Hoyt that he wanted to work as a programmer (Computer Systems or CS).

Dr. Gordon Deecker explained that the Geocartographics and Geography Divisions merged on January 17, 1990. From 1987 to 1991, Dr. Deecker occupied a number of positions. His substantive position was as a CS-04 (Computer Systems), Head of the Geocartographics Centre. He was responsible for about 50 employees (programmers, etc.). It is a speciality computer centre. At one point, Dr. Deecker was Acting Chief of Methodology (ES-06), Chief of Research and Development, and at the time of the merger in January, 1990, Dr. Deecker was assigned greater responsibilities on an acting basis.

Dr. Deecker signed the PRAR for Mr. Lundin covering the period March, 1989 to March, 1990 (Exhibit 16). At the time, the Geocartographics Division had a number of MA-STA positions. Mr. Lundin's duties involved some methodological analysis and their implementation. He also had to write computer programs to implement this methodological analysis. Dr. Deecker testified that he had frequent contacts with Mr. Lundin to discuss his work, how he was performing in the group and with his project leader. Dr. Deecker was very much a coach in this situation. In his discussions with Mr. Lundin, it was agreed that this assignment was suitable for a MA-STA-03 (Exhibit 11). When Mr. Lundin first looked for an assignment (CAD) in 1987, Dr. Deecker's understanding was that he had qualified on a promotion selection board for a CS-02 (Computer Systems) position. Thus, the purpose of this assignment (CAD) was to assess whether Mr. Lundin was suitable for this position and, in particular, if this position, which was essentially program analyst work, was suitable for both Mr. Lundin and the Geocartographics Division.

Mr. Lundin requested a second assignment when the first one ended and he wished it to be more methodological. However, the MA-STA-02 position in Geocartographics had a fair amount of programming.

The Geocartographics Division had a certain amount of tasks to accomplish and they were underfunded. In 1979, this group was comprised of six people but by 1990, it had grown to 45-50 employees. In 1990, the work required an awareness of statistics and analysis. There were some eight to 10 CS employees (where little skills in mathematics were required) and some 15 SI positions. These were technical users of the software and the remaining employees were classified MA-STA and ES with skills in a variety of areas.

Dr. Deecker testified further that in his view Mr. Lundin came to his division to consider other opportunities, such as a computer programmer, in light of his PRAR signed by Mr. C. Kiernowski (a CS) who reported to Dr. Deecker (Exhibit 9). Dr. Deecker had been a member of the review team concerning this PRAR. They offered Mr. Lundin encouragement and training in computer programs and analysis. Dr. Deecker authorized Mr. Lundin to take a course in Spatial Information Systems (computers and geography) at Carleton University. In addition, there was also on-the-job training. Dr. Deecker coached Mr. Lundin, communicated regularly and frequently with him and indicated where improvement was required.

Dr. Deecker described the course attended by Mr. Lundin at Carleton University. Mr. Lundin was there as a student. Dr. Deecker and another professor were the lecturers. At a presentation Mr. Lundin made to the students at that course, he said that "he was miles ahead in his work than his team players". This demonstrated to Dr. Deecker that Mr. Lundin needed some improvement in his role as a team player. He had substantive problems even though there had been some improvement. At the hearing, Mr. Lundin could not recall this remark.

Dr. Deecker declared that Mr. Lundin was unable to work without supervision. He compared Mr. Lundin's work to two other MA-STA-02's also working in the group at the time (Messrs. Ron Cunningham and Peter Shot). By comparison, Mr. Lundin had problems. Mr. Lundin thought that the work assigned to him was a symptom of a much larger problem that he should tackle for the good of Statistics Canada. Dr. Deecker continued coaching Mr. Lundin to focus on his assignment but the Geocartographics Division was a full cost recovery centre and the expenditure of

funds was a serious concern. When a two-week project turned into a six-week one, they were short of funds.

Dr. Deecker confirmed the declarations of Ms. Chinnappa and Messrs. Kovar and Hoyt with respect to Mr. Lundin's poor writing skills. Dr. Deecker found his writing generally confusing and requiring frequent editing. There was no substantive order to the documents prepared. (A memorandum to P. Tallon dated March 11, 1991 filed as Exhibit 18 is one of the two documents referred to by Dr. Deecker in his testimony.) Dr. Deecker confirmed also that he asked Ms. Chinnappa for a blind review of Mr. Lundin's report because the Division wanted to ensure that both the statistics and the methodological terms used were the correct ones. Mr. Lundin had pretended that they were correct. Dr. Deecker found that Ms. Chinnappa's comments in reply to this blind review were typical reproaches and problems already identified by the Division of Mr. Lundin's writings. Dr. Deecker added that even Mr. Lundin's minutes of meetings were not focused and did not reflect what had been discussed. Mr. Lundin had been assigned the responsibility for taking minutes while he was on a team. This new responsibility was removed from him however because his minutes did not reflect the discussions.

Mr. Joel Yan supervised Mr. Lundin from April, 1988 to March, 1989. Mr. Yan was the Chief of Methodology, Consultation Section, Geocartographics Division. Mr. Yan was the Chair of the review committee concerning Mr. Lundin's PRAR for the period October, 1987 to April, 1988 (Exhibit 9). At the time, Mr. Yan was the Manager of the Quality Assurance Project. Mr. Lundin's report was not fully satisfactory (duty 2). There is a directive requiring that every document issued by Statistics Canada have a statement on the quality, methodology and concepts. Mr. Lundin was asked to produce a report. However, what he produced was not coherent, was difficult to read and was weakly organized. Thus, someone else had to rewrite it. Mr. Lundin had good informatics and computer skills. During this period, the nature of his work was a mix of methodology (the quality assurance) with a heavier emphasis on computer application (this part he did reasonably well).

Mr. Lundin wanted to enlarge the scope of his assignment but the work was progressing slowly and the client was not satisfied with the results. Mr. Lundin's

report was not clear and had extensive quotes. He was expected to use general and accepted theory but he chose to develop his own which did not make the report understandable. He placed himself on a pedestal as a methodologist, which created problems. There were two different occasions when he made comments in this regard. Mr. Yan related to an incident at work where a consultant made a presentation to the managers and Mr. Lundin commented that he himself was well above them (including Mr. Yan) in the understanding of the development of solutions to problems. Mr. Lundin, however, was not at the level expected. He could not work without close supervision; he could not lead a small project team. Moreover, his writing skills were lacking.

Mr. Yan wrote a PRAR for the period September, 1988 to February, 1989 (Exhibit 77). At the time, Mr. Yan was not aware that Mr. Lundin had classified as a MA-STA-03 as of January, 1989. In Mr. Yan's view, this PRAR (Exhibit 77) was the main reason Mr. Lundin finally became a MA-STA-03. In this PRAR, Mr. Yan rated Mr. Lundin's performance at the fully satisfactory level and recommended that he take a technical writing skills course. Mr. Lundin refused to sign this PRAR as well. Mr. Yan explained the reason for this fully satisfactory rating. At the time, Mr. Yan ran a MA-STA-03 competition and Mr. Lundin applied. He was found qualified on knowledge but was disqualified on personal suitability. Mr. Yan had made reference checks and found the low ratings on the previous PRAR's. Thus, when Mr. Yan wrote the 1989 PRAR, he considered the fact that Mr. Lundin wanted very badly to be a MA-STA-03. Mr. Yan knew that Mr. Lundin had not been promoted to the MA-STA-03 level and that he had tried very hard. So when Mr. Yan saw that there had been some improvement in his performance, he decided to emphasize and exaggerate the positive. Thus, he rated him fully satisfactory and supported his desire to be at the MA-STA-03 level. In reality, Mr. Lundin's report was unsatisfactory and had to be reviewed.

Mr. Yan had asked Mr. Lundin to implement the universal standard but he decided not to. The Division wanted Mr. Lundin to implement something. Mr. Lundin went on to develop his own software that no one has ever been able to use. He did not use other people's accepted theories (e.g. E.M.R.) and went on to use his own theory but with poor results. Mr. Lundin received a lot of on-the-job training and went on a

three-day technical report writing course. In September, 1988, Mr. Yan rated Mr. Lundin's performance as unsatisfactory (Exhibit 14). According to Mr. Yan, in 1989 Mr. Lundin had not improved enough to be promoted to the MA-STA-03 level. However, Mr. Yan's purpose in writing Exhibit 77 was to foster at the time a continued improvement. Mr. Lundin was working very hard and Mr. Yan wanted to recognize that there had been some improvement.

Mr. Yan described the poor quality of a report of Mr. Lundin. Mr. Lundin had interviewed the project manager in preparation for this report. However, the final product was not coherent nor usable. He was supposed to take into account the input from his teammates but not necessarily quote them. Mr. Yan was surprised to find these quotes in the document. Mr. Lundin had in his possession a policy which gave the general context and provided specifics on the product. This document was aimed at outside clients. Thus, someone else had to rewrite it.

Mr. Yan had identified definitions and standards. These were general models. Thus, Mr. Yan asked Mr. Lundin to interview the production managers for a geography file and to use his own knowledge and research information. Mr. Lundin had to obtain the complete history of the file and interview all those who had worked on it. That file was about five years old. He was not to quote these people. With this information, Mr. Lundin was to write a report on quality assurance suitable for a client (20 to 30 customers had already purchased this file). Mr. Yan told Mr. Lundin that the report had to be understandable for the audience internal to Statistics Canada as well as for the outside audience. Mr. Yan had the impression that Mr. Lundin did not have an in-depth knowledge of geography. Mr. Lundin made two or three revisions to the report but it remained unsatisfactory. He kept making minor deletions but he did not want to make major ones. The person who rewrote the report did not have a background in geography but she had strong writing skills. Her focus was to make the document coherent and easy to read.

Mr. Yan explained that two of the three tasks originally assigned to Mr. Lundin in 1987 (Exhibit 7) involved Computer Systems (CS) work; only the first task involved methodology. The second assignment (CAD) focused on methodology and was paid

by the Business Records Division because Mr. Lundin did not want to be a CS and wanted to work as a methodologist.

In 1991, Mr. Hugh Finlay was the Chief, Methods and Quality Assurance Section (MA-STA-05) and Mr. Lundin's supervisor. One of Mr. Finlay's principal responsibilities was to coordinate new methods of work and conduct the implementation of the Quality Assurance Survey Program. Mr. Lundin came to his section on an assignment (CAD) so Mr. Finlay wanted to provide Mr. Lundin with different experiences, and in particular as a project manager. He was to manage the development of a set of systems designed to estimate the size of businesses using administrative data. In conjunction with this task, there was methodology work to be performed even though this was not his principal duty.

Mr. Lundin's assignment concerned work of the ES-04 type. Mr. Finlay explained to Mr. Lundin what was expected of him. Mr. Finlay knew that Mr. Lundin was new at the task of leading a project team so he was given explanations and directions. They met frequently and Mr. Finlay checked periodically with Mr. Lundin.

Mr. Finlay found that Mr. Lundin had a lot of trouble drawing the group together and making himself understood. His disjointed minutes and the feedback Mr. Finlay received from the members of the team demonstrated this. The members of the group (Systems Development side) threatened to pull out of the project. Mr. Finlay declared that he provided Mr. Lundin with a series of directions but they did not materialize. Mr. Lundin had a problem keeping the group intact. It got to the point where Mr. Finlay had to take over the management of the project.

The communications between Messrs. Finlay and Lundin were verbal. Mr. Finlay pointed out what went wrong and Mr. Lundin explained the reasons why. Later on, Messrs. Finlay and Lundin had problems agreeing on what the document should look like. Mr. Finlay felt that he was the supervisor so Mr. Lundin should have followed his instructions in this regard.

When Mr. Lundin failed as a project leader, Mr. Finlay changed his role as the resource person. He was to work cooperatively as a team player. He was to test

systems as they were developed. Mr. Lundin had problems focusing on real issues; he could not concentrate on relevant issues. Towards the end of the project, June 1992, Mr. Finlay asked Mr. Lundin to finalize the project and write the report. The document produced was elaborate. Mr. Finlay was not concerned with the size of the document but with its content. Mr. Finlay found the content lacking and someone else had to rewrite it.

Mr. Finlay testified that in the fall of 1991, renovations were started at the building where they worked. In early spring, 1992, Mr. Lundin told Mr. Finlay that the renovations were affecting his thought processes, his breathing, muscular coordination and his performance. He even had symptoms almost like panic attacks. This is the reason why Mr. Finlay asked for a health evaluation of Mr. Lundin. Mr. Finlay explained that because of this, he could not say what Mr. Lundin's problem was except that there was a problem with his performance. His problem seemed related to health issues. Mr. Finlay added that from 1991 to 1992, the renovations were ongoing throughout the whole complex of Statistics Canada which comprised three buildings.

The employer and Mr. Finlay accommodated Mr. Lundin. He took walks outdoors every hour, he was relocated to work elsewhere (the cafeteria) and during May and June, he worked outdoors on a picnic bench. The complex was crowded so it was difficult to find a space for him where there were no renovations. Moreover, he was a member of a team and he had to work with the group. He had to meet and contacts had to be maintained so it was not viable for him to work off-site. In June, 1992, Mr. Finlay left on an assignment and at that time Mr. Lundin returned to his home division. (His CAD had been extended to September but was curtailed to June, 1992 when Mr. Finlay left the Division.)

At no time did Mr. Lundin ever refuse or abandon his work. He never invoked the *Canada Labour Code*. He never told his employer or union representative that he refused to work. The employer did not dispute Mr. Lundin's condition and accommodated it during the renovations in question. Moreover, Mr. Lundin did not request the intervention of a safety officer or notify a safety officer of his situation.

Thus, in July, 1992, Mr. Simon Cheung became Mr. Lundin's supervisor for a period of six months (July to December, 1992). At the time, Mr. Cheung was the Chief, Research and Development Section. Mr. Cheung reviewed Exhibits 30 to 35 (his evaluations) and declared that he told Mr. Lundin about the standard of performance expected of him. They had a number of meetings and Mr. Cheung, from the start, gave Mr. Lundin the standards of performance and rules of methodology, including documents. Mr. Cheung provided him with a job description, a document on the career development of methodologists at Statistics Canada, on the work of methodologists and the progress reports of other methodologists to show him how they operate. Mr. Cheung invited him to discuss any matter with him and he tried to be very specific with his instructions. They had weekly meetings to discuss the progress of the project and they also had discussions in between meetings. Mr. Cheung provided on-going support (Exhibit 30). They also had bi-weekly section meetings which gave Mr. Lundin the opportunity to discuss matters. In addition, the section held monthly and quarterly meetings.

Mr. Cheung testified that he gave Mr. Lundin as many training opportunities as available. At the first meeting, Mr. Cheung told Mr. Lundin that training would be made available and he provided examples of where they would be, such as a series of seminars and symposiums taking place at Statistics Canada. Mr. Cheung always authorized his attendance. Mr. Cheung suggested to Mr. Lundin that he identify the training opportunities and time was granted for this training.

Mr. Cheung testified that Mr. Lundin produced various documents entitled "Management Statistics" but these documents talked about the form of management statistics instead of the substance. This was very disappointing to Mr. Cheung because he produced these after many long discussions on what he was to do (Exhibit 33).

Mr. Cheung echoed the testimony of all previous supervisors (including Mr. Yan) on most of the reproaches. Mr. Cheung confirmed that Mr. Lundin was unable to work without substantial supervision. Mr. Lundin did not acquire sufficient and cohesive understanding of the project assigned to him. In addition, he was not able to identify the relative importance of the tasks concerning the project.

Mr. Lundin had a tendency to take impulsive decisions. Mr. Cheung found that he paid little concern and attention to work plans, milestones, deadlines and schedules regarding the project.

Concerning the implementation of instructions, Mr. Cheung had to make sure that Mr. Lundin understood the instructions. In many instances, Mr. Lundin did not show whether or not he understood the instructions. It came to a point where Mr. Cheung had to insist that Mr. Lundin rephrase what had been said and to write it down. After a few corrections, Mr. Lundin finally understood what Mr. Cheung meant but then he did not carry out the instructions. Mr. Cheung had to insist that Mr. Lundin carry out the instructions so as to get results.

Mr. Cheung mentioned also that Mr. Lundin's writing skills were not acceptable. They were not up to the standards of a professional. Most of his writings were in point form, lacked context, and were very fragmented and incoherent. Usually his writing had a lack of flow of ideas. Mr. Cheung pointed out these shortcomings to him but the situation persisted.

Mr. Cheung described also Mr. Lundin's inability to focus on problems at hand. Mr. Cheung explained that the first month was a transitional month for Mr. Lundin. So, at the end of the first month (July) and before starting his new work on the project, Mr. Cheung gave Mr. Lundin a written description of its objectives. It was a general description because it was the beginning of the project. Mr. Cheung also had Mr. Lundin record that description in the minutes of the meeting. Then, by mid-October, Mr. Cheung asked Mr. Lundin to describe the general objectives of the project and he was unable to. Near the end of the assignment (December, 1992), Mr. Lundin was still not dealing with the objectives of the project and what Mr. Cheung had asked him to produce for the project. He had instead worked on something he thought was interesting to him; this was after long and extensive discussions with Mr. Lundin on what the project was to achieve.

Mr. Cheung testified that he communicated his views to Mr. Lundin through their very frequent meetings and, in particular, at the weekly meetings. They discussed what had been said at the previous meeting, the progress he had made since

then, and they identified what progress was expected by the next meeting. All these discussions were recorded by Mr. Lundin and his notes were updated when he presented his draft. In addition, at any time outside this weekly meeting, Mr. Lundin would bring up matters and ask for clarification on any point of the discussion. Mr. Cheung has an open door policy with all the methodologists. Mr. Lundin was given more flexibility and higher priority than the other methodologists working for Mr. Cheung. Mr. Cheung spent more time supervising Mr. Lundin than his other MA-STA-03 employees. Mr. Cheung was supervising Mr. Lundin directly whereas normally a section chief does not supervise directly employees at the MA-STA-03 level; these are usually supervised by a senior methodologist.

Ms. Chinnappa had instructed Mr. Cheung to have frequent reviews of Mr. Lundin's performance so Mr. Cheung held monthly performance reviews with him. One of the main reasons for this was to make sure management (Ms. Chinnappa and Mr. Cheung) provided frequent and regular feedback to Mr. Lundin. Mr. Lundin did not specifically react to the bi-monthly reviews. He attended these reviews but provided no comments. Mr. Cheung testified that Mr. Lundin remarked that he did not think that it was necessary to have such frequent reviews. He gave Mr. Cheung the impression that this was something Ms. Chinnappa had decided to do and, since she was the Director, she could do whatever she wanted. However, on his part, Mr. Lundin did not wish to participate in this process.

When Mr. Cheung prepared his reviews, he first gave Mr. Lundin a draft for discussion and his comments. Mr. Cheung explained to Mr. Lundin that he wanted to make sure that his remarks on his performance were accurate. However, at each of these meetings, Mr. Lundin made no comments nor would he acknowledge receipt of the draft even though he was given a copy and he had read it. Mr. Cheung asked Mr. Lundin whether he wanted to provide his comments. Mr. Cheung would emphasize his remarks of Mr. Lundin's performance. Mr. Cheung wanted Mr. Lundin's comments on his remarks. However, Mr. Lundin would reply every time that he was not interested in these reviews and that he did not want to be involved. Since Mr. Lundin refused to sign the reviews, Mr. Cheung asked Ms. Chinnappa to be involved and she would then hold a meeting with Messrs. Lundin and Cheung, at

which time, Mr. Lundin confirmed his reluctance to participate in these reviews. Ms. Chinnappa would note this on the reviews.

At the start of the assignment in July, 1992, Mr. Lundin informed Mr. Cheung about the problem with the air quality in the Jean Talon building which was not their work site at the time. Mr. Lundin worked for Mr. Cheung. They worked at the R.H. Coats building (two buildings away). Mr. Cheung told him to keep him informed every time he felt that he had reactions to the renovations. Thus, Mr. Cheung relied on Mr. Lundin to report whenever he was affected. In early September, 1992, Mr. Lundin reported for the first time to Mr. Cheung that he had noticed some "reactions" but he could not specifically tell him what was the cause. Mr. Lundin suspected fumes from new carpets that had been installed one floor below theirs. Mr. Lundin added that this was not a problem because he had noticed additional fresh air circulating on the floor. Moreover, he could refresh himself by taking a break outside the building. Then, at a meeting on October 26, 1992, Mr. Lundin reported that he had increased reactions and he attributed these to the painting going on on many floors above them.

There was a systematic painting schedule of the building at the time. They had started painting from the top floor and they were working downwards. They had started at the time on the 25th floor. Messrs. Cheung and Lundin were working on the 11th floor. Mr. Lundin explained that the condition was tolerable to him but, then in the second or third week of November, 1992, the painting had progressed down and Mr. Lundin felt that his condition was worsening. He, therefore, requested that Mr. Cheung inquire about alternative work sites for him. The employer took immediate action in this regard and Mr. Lundin does not contest this fact. Mr. Cheung asked Mr. Lundin to check out three other places in Statistics Canada to see which one was acceptable to him. The choices corresponded to his preferences. Mr. Lundin decided to work in Room 3000, a different site in the same building. He worked there with a number of other employees who had at the time the same concerns as Mr. Lundin.

After a couple of days working at this alternative site, Mr. Lundin requested to have one or several windows opened so as to allow fresh air to come in at all times.

This request was acceded to and the arrangement was made. Mr. Lundin told Mr. Cheung that this arrangement was workable for him. However, on November 30, 1992, Mr. Lundin reported that it was no longer acceptable to him and asked Mr. Cheung to check for other sites. Mr. Cheung authorized him to work at home. Mr. Lundin, however, preferred to work in the building and it was only as a last resort that he wanted to work at home, so Mr. Cheung checked for other sites.

On November 27, 1992, the painting started on their floor. Thus, from November 30 to the end of December, 1992, Mr. Lundin worked at home. They continued their weekly meetings. At first, they met at the Holland Cross building (across the street from their workplace). Subsequently, they met in the cafeteria of the Jean Talon building which was a location Mr. Lundin repeatedly told Mr. Cheung was acceptable to him.

During the month of December, 1992, there were a couple of occasions when Mr. Lundin decided to come to the office for short periods of time (to do printing, etc.). Mr. Cheung always offered options so that Mr. Lundin did not need to come in (such as to pick up the diskette from his home or do his printing). It was optional for Mr. Lundin to decide whether or not to come into the building. When Mr. Lundin chose to come in, he reported to Mr. Cheung that the air quality on their office floor gave him strong reactions.

Mr. Lundin only reported his health concerns after the bi-monthly reports had started. He never brought up this health concern as an issue. It was not raised except at one of the early meetings in Ms. Chippanna's office when they were trying to understand and find out why Mr. Lundin did not want to participate in their reviews. At that meeting, Ms. Chippanna asked Mr. Lundin whether his non-participation was related to his health concerns. Mr. Lundin did not reply and made no comment to this question. Thus, they concluded that the meeting and review of his performance were not related to his health concerns. His health was not a factor in the appraisals and reviews of his performance.

Mr. Michael (Mike) Miller supervised Mr. Lundin from January to mid-July, 1993. At the time, Mr. Miller was a Senior Methodologist (MA-STA-05) at the

Labour, Prices and International Trade Section. This section was responsible for surveys of employment, payrolls and hours, prices and international trade surveys. Mr. Miller was responsible for price surveys (C.P.I.) and for international trade (import - export). Mr. Miller had three or four employees working for him on these projects. Mr. Miller assigned these employees to the projects, monitored their performance and assisted them.

Mr. Miller declared that he provided Mr. Lundin with instructions and explanations about the project. He detailed to Mr. Lundin what was expected of him on the project but he did not deem it necessary to go into detail on what a methodologist is expected to do in general. Mr. Miller supplied Mr. Lundin with several documents, references and the ground work. In addition, Mr. Miller offered him several approaches they could consider. However, Mr. Lundin was given a free hand for him to look at other approaches to the project he might consider. Ms. Chippanna requested that Mr. Miller supervise Mr. Lundin. Mr. Miller explained that he tends to give a free hand to his employees and he compared his managerial style to Mr. Cheung's. Mr. Miller tends to provide less supervision to his MA-STA-03 employees. He has an open door policy and his employees are free to discuss their projects with him at any time.

The project in question is described in Exhibit 46. The objective of the project was to obtain sampling variance estimates for year-to-year changes in tax estimates. Mr. Miller declared that at the beginning of the project, they met once a week to discuss it. At this early stage, Mr. Lundin was to familiarize himself with the project. Mr. Lundin could work at home and he did so three days a week. Then, Messrs. Lundin and Miller discussed his work every two months. In the beginning, Messrs. Lundin and Miller took minutes of their meetings and "talked quite a bit". Mr. Miller testified that they had a lot of communication. Later on in the project, Mr. Lundin worked at home and then later (March), he was at home only once a week (Thursdays). They would review what he had written and Mr. Miller provided comments on his work and what was expected of him.

Mr. Miller added that Ms. Barbara Armstrong, another senior methodologist, was available to assist Mr. Lundin on his project. Messrs. Miller and Lundin visited

Ms. Armstrong often to obtain details for the project. Ms. Armstrong had also made one of her methodologists, Mr. James Crow, available to Mr. Lundin to discuss the contents of files with him.

Mr. Lundin also had courses available to him. He could take Statistics Canada courses or attend courses at the university or elsewhere. Statistics Canada provides an outline of courses available to its employees and such courses are recommended when the need arises. Mr. Lundin chose not to request courses during the six-month period he worked for Mr. Miller. Mr. Lundin did not apply for courses but he did attend seminars; divisional seminars and other seminars. These seminars are part of the training. It was Mr. Lundin's choice to accept or not this training.

Mr. Miller testified that when he would meet Mr. Lundin, he had the impression that he understood the instructions but then they did not materialize. Thus, Mr. Miller had to start every meeting by warning him of problems, such as to review the data before doing his analysis. However, when they reached the analysis stage and reviewed it, Mr. Miller realized that there were data problems. In addition, Mr. Lundin missed deadlines. Mr. Miller found that Mr. Lundin was not working at the MA-STA-03 level. Mr. Miller assumed that Mr. Lundin had the knowledge to do the work but there was "a space". This project could be assigned to a MA-STA-01 or a MA-STA-03. However, a MA-STA-03 to whom such a project would have been assigned would have had several other projects in addition to this one.

Minutes were taken at the meetings held to discuss Mr. Lundin's project. In addition, Mr. Miller wrote an appraisal of Mr. Lundin's work performance on the project. Mr. Lundin was given a draft of the appraisal for his comments but he chose not to make any. Then, they both met with Ms. Chippanna and, again, Mr. Lundin made no comments on the appraisal and criticisms of his performance. In between meetings, Messrs. Miller and Lundin saw each other very frequently and discussed the work.

The renovations during Mr. Miller's period of supervision occurred in January, 1993 and Mr. Lundin was accommodated. Mr. Miller was quite flexible in this regard and Mr. Lundin was free to work at home. By March, 1993, Mr. Lundin

decided to be at home only one day a week (Thursdays). Mr. Miller explained that the work Mr. Lundin was assigned could be done at home. For example, for the writing of the report it was up to Mr. Lundin to decide when to stay home; he had complete flexibility.

Mr. John Armstrong supervised Mr. Lundin from mid-July, 1993 to April, 1994. At the time, Mr. Armstrong worked as a Senior Methodologist, Infrastructure Section, and Mr. Kadaba P. Srinath was the Chief of that section. Mr. Lundin came to work for Mr. Armstrong on a specific project. Mr. Armstrong described to him the outputs required in general terms and also in some detail. Mr. Lundin was provided with documentation and, in particular, with outputs on similar projects produced by another MA-STA-03. Mr. Lundin also received computer programs written by other MA-STA-03 methodologists working on projects related to Mr. Lundin's. Mr. Armstrong focused on the project and gave Mr. Lundin examples of outputs of similar projects.

Messrs. Armstrong and Lundin had a couple of fairly extensive meetings in July and August, 1993. Mr. Armstrong's general approach is informal and he talks to his employees a couple of times a week. In August and September, 1993, Mr. Armstrong kept in close touch with Mr. Lundin's progress on his project and they discussed specific issues as they came up. They had bi-monthly meetings at the request of Ms. Chippanna in order to provide feedback and to help Mr. Lundin improve his performance.

During the period Mr. Lundin worked for Mr. Armstrong, he did not take any courses. In March and April, 1993, Mr. Armstrong spoke to Mr. Lundin about the training available and indicated to him that there were lists of courses available. Mr. Armstrong asked Mr. Lundin if there were any courses he was interested in taking.

Mr. Armstrong explained that Mr. Lundin had considerable difficulty understanding the objectives of the project and the output required. He also found it difficult to implement instructions. Mr. Armstrong's directions were routinely ignored by Mr. Lundin. Mr. Lundin appeared to become interested in a certain incidental or derivative aspect of the project and ignored the rest. The project's

problem was a complicated one and Mr. Lundin was to make a simplified assumption so as to arrive at the solution. In addition, Mr. Lundin would introduce unnecessary complications. Mr. Lundin's ideas were incompatible with a productive output on the project. He would ask questions concerning a problem for which he had already been told verbally and in writing that he should not concern himself with. Mr. Lundin had difficulty following instructions and he could not focus on what was required. He produced no useful output. He worked on the technical aspects that he had been told by Mr. Armstrong were not necessary. The report produced by Mr. Lundin was useless. Mr. Armstrong explained that in an attempt to get Mr. Lundin to focus on the project and the problem, he kept simplifying the problem to the point that it was no longer relevant but could nevertheless be used as a start and he could build on it. Mr. Armstrong had not been able to persuade Mr. Lundin orally or in writing that there was a problem with his approach. Thus, the purpose of Mr. Lundin working on this oversimplified problem was to make him realize that there was a problem with his approach. Mr. Lundin had great difficulty in applying statistical concepts and he had poor writing skills. His report was long and repetitive, difficult to read and sloppy from the grammatical, mathematical and statistical point of view. These shortcomings were communicated to Mr. Lundin during their informal discussions and at their formal meetings.

In late March or April, Mr. Armstrong asked Mr. Lundin how he was doing and the latter answered that he was doing well and producing great work. Consequently, Mr. Armstrong asked him how he reconciled these remarks to the former poor reviews and Mr. Lundin replied that "it was an honest difference of opinion". Mr. Lundin did not react to Mr. Armstrong's criticisms and poor reviews.

Mr. Armstrong declared that he did understand Mr. Lundin's mathematical aspects and ideas but it could be possible that what the latter was saying was not expressed clearly in mathematical terms. However, expressing it clearly is essential for a MA-STA-03. Mr. Armstrong expected Mr. Lundin to know the methodology to be used for the project. He would have known this from the documentation, the computer programs provided to him by Mr. Armstrong and other papers describing the survey.

During cross-examination, Mr. Lundin questioned Mr. Armstrong at length on the mathematical and statistical formulas he (Mr. Lundin) had produced in his report entitled "Change in Annual Tax Estimates" dated July 21, 1994 (Exhibit 73). They had a thorough discussion on this matter and, in particular, on the report produced by Mr. Lundin (Exhibit 73). The discussion was very technical and all along Mr. Armstrong maintained his original opinion and assessments of Mr. Lundin's performance. Mr. Armstrong confirmed the opinion of other employer witnesses regarding Mr. Lundin's shortcomings and poor performance.

Exhibit 46 are the minutes of a meeting held on November 3, 1993, between Messrs. Armstrong and Lundin. They described the project and Mr. Armstrong informed Mr. Lundin that he had to produce the variance formula of year-to-year changes in NIP tax estimates obtained from the two-phase sample. Mr. Armstrong also provided a sample and standard statistics formula. If Mr. Lundin knew the sample design, he could collect data and information from one sample and provide estimates. Moreover, if he had a Bernoulli sample scheme and a single sample, he could collect data from one sample and estimate total variances on similar items. He needed an estimator. Mr. Armstrong referred to the text of Leslie Kish, Survey Sampling, 1965, where it is indicated that the formula could be used to calculate variance for a problem such as the one assigned to Mr. Lundin.

Mr. Armstrong explained that Mr. Lundin's greatest difficulty in understanding the concept of variance was his difficulty and confusion with population variance and sample variance. This is the reason why Mr. Lundin placed so much emphasis in the definition of population in the context of the discussion of variance. Population variance is a fixed quantity and the use of the word variance in that sense is different from what is understood in statistics where variance describes the random sampling. Mr. Armstrong added that the questions asked by Mr. Lundin in cross-examination were evidence of his confusion in this regard.

Mr. Armstrong commented further that when there is an honest difference of opinion between an employee and his supervisor, the employee has to follow the directions of the supervisor. In Mr. Lundin's case, he proceeded on his own route, pursuing his own ideas. During the whole period of this project, Mr. Lundin only

pursued his own ideas. He should have instead spent 1% of his project time trying to convince his supervisor of his different method and the remaining 99% of the time following instructions.

There was no renovation work done during the period Mr. Armstrong supervised Mr. Lundin. When Mr. Armstrong started supervising Mr. Lundin, the latter was still working at home one day a week and this arrangement continued throughout this period of supervision. Mr. Armstrong informed Mr. Lundin that more work at home would be authorized if he so required. There were no operational reasons for him not to be authorized to work at home.

Mr. Kadaba P. Srinath was, at the time in question, Chief of the Methodology Section with 10 to 12 methodologists reporting to him. He reviewed Mr. Lundin's two reports. On November 26, 1993 (Exhibit 50), Mr. Srinath reviewed the first version of Mr. Lundin's report of November 11, 1993 entitled "Change in Annual Tax Estimates" (Exhibit 72, Version "A"). Then, on August 4, 1994 (Exhibit 63), he reviewed the second version produced on July 21, 1994 by Mr. Lundin (Exhibit 73, Version "B"). And on August 11, 1994, Mr. Srinath reviewed Part C of Mr. Lundin's report (Exhibit 73).

Mr. Srinath testified that he found Mr. Lundin's reports hard to understand; Mr. Lundin had difficulty explaining his ideas. The documents were too long and his notations very confusing and "messy". There were no definitions provided and the objectives were not clearly stated. In addition, Mr. Lundin had not followed the usual order and thus the reports were difficult to read. There was no clear definition of the problem.

Mr. Srinath explained that writing clearly is important for a MA-STA-03 because what is written must be understood by methodologists and by non-statisticians (experts in other disciplines, such as economists and sociologists). The methodologist (MA-STA-03) must use technical language but he also has to be able to communicate in non-technical language.

Mr. Srinath testified that when one speaks to Mr. Lundin, the first impression one gets is that he understands. However, when one later reads his documents, it is

clear that there is a problem with his "understanding" of basic concepts. Moreover, Mr. Lundin is reluctant to take advice because he feels that he is right. He has difficulty accepting or investigating other options and approaches. Mr. Srinath saw these as his limitations.

Mr. Srinath commented that Part C of Mr. Lundin's report (Exhibit 73) did not add anything; it was not necessary. Mr. Srinath testified that his opinion of Mr. Lundin's performance did not change regardless of how one looked and considered Part C of the report. It makes no difference whether Part C is a detailed explanation of Part B (the example, or if it is an extension of the example). Part C adds nothing; it is not a generalized procedure to cover all costs. According to Mr. Srinath, the report does not give a generalized procedure.

In cross-examination, Mr. Srinath identified two letters dated March 13, 1995 to Mr. Lundin from Ms. Stasia Reynolds, Human Resources Advisor, Statistics Canada, concerning the results of two competitions for two positions at the MA-STA-04 level [Senior Methodologist - Survey Statistician/Consultant and Senior Methodologist - Researcher (Exhibit 78)]. On August 24, 1994, Mr. Lundin had applied for these two competitions. He successfully passed the written test. (His employment had been terminated before he took the written test on October 18, 1994). Part of the knowledge factor was being established through the written test. However, Mr. Lundin was unsuccessful passing the oral interview where the other part of knowledge was tested.

Mr. Lundin questioned at length Mr. Srinath on the technical aspects of Exhibit 73 and the various meanings of change, the Bernoulli variance formula, whether to put a zero for non-existent values, the fact that the value of revenue changes from one year to the next, etc. Mr. Srinath commented that Mr. Lundin did not understand the meaning of "conditioning" and that was the problem. For estimation of change, one does do conditioning but one does not condition for variance of change. Mr. Lundin did not define his terms and therefore he was difficult to understand. Mr. Srinath gave examples of the non-defined terminology (e.g., "conditioning", "ongoing", "the illustration indicates"..., "conditional estimation of conditional change...", "tricks", "variance", "probability of a birth" (birth is a birth), etc.).

Mr. Srinath commented further that pages 33 to 79 of Exhibit 73 contain definitions that only Mr. Lundin could understand. Mr. Srinath went through that section several times and he did not comprehend it. He questioned why Mr. Lundin would go through such a complicated approach to solve a simple problem. He used an unorthodox method. Mr. Srinath has no problem if a methodologist brings new approaches, techniques and methods but the methodologist has to explain them. Mr. Lundin did not find simple solutions as requested (Exhibits 72 and 73). He did not understand the repeated sampling notion. He should have applied the textbook formula to all sorts of samples to see what the variance meant. Mr. Lundin, however, applied it only to one sample and did not ask himself about all other possible samples.

Mr. Jean-Louis Tambay has been the senior methodologist (MA-STA-05) at the Social Survey Methods Division in charge of the project on the national population health survey. Ms. Chinnappa asked Mr. Tambay to review Mr. Lundin's reports (Exhibits 72 and 73). On April 29, 1994, Mr. Tambay wrote his review on the first version of Mr. Lundin's report (Exhibits 57 and 72). In this review, Mr. Tambay dealt with the five modules. Then, on July 27, 1994, Mr. Tambay reviewed Parts A and B of the second version of the report (Exhibits 62 and 73). Finally, on August 9, 1994, Mr. Tambay reviewed Part C of the second version of the report (Exhibits 65 and 73).

Mr. Tambay declared that he found Mr. Lundin's writing style unclear and incomprehensible. He "jumped all over the place" and it was hard to follow what Mr. Lundin was trying to say. Mr. Tambay echoed the other witnesses in that clear writing is very important for a MA-STA-03. A reader should be able to understand and follow the writer's ideas. Mr. Tambay added that in his view Mr. Lundin has some understanding of statistics but he seemed not to make good use of this knowledge. He did not apply it the proper way. Even if Mr. Tambay was assessing Part C of Exhibit 73 as a detailed example of Part B, he would not change his opinion. Part C is more of the same. Mr. Tambay explained that the first version (Exhibit 72) was supposed to address a two-year, two-phase design tax sample. Mr. Lundin was to find an estimator of change for a two-phase design with Bernoulli sampling in both phases in each of the two years. When Exhibit 72 proved unsatisfactory, Mr. Lundin was

asked to rewrite it and provide in Part A (Exhibit 73) a simple example for a one-phase. However, Mr. Lundin instead rewrote the entire document as a one-phase.

In cross-examination, Mr. Lundin had an extensive technical discussion with Mr. Tambay concerning Exhibits 72 and 73 and whether he had come up with a response to Mr. Armstrong's assignment of January 31, 1994. Mr. Tambay maintained all along during this exchange his opinion that the reports were unsatisfactory.

Mr. Tambay agrees with Mr. Carl Erik Särndal's views as expressed in the book "Model Assisted Survey Sampling" by Särndal, Bengt Swensson and Jan Wretman (Exhibit 80). Mr. Särndal is a statistician and a university professor in Montreal and is also a consultant for Statistics Canada. In this book, Mr. Särndal analyzes an estimator (page 42) and refers to a 1952 Horvitz and Thompson estimator and their formula (page 43). In addition, Mr. Särndal addresses the Bernoulli sampling and finds it to be an extremely simple design (page 62).

Mr. Tambay concluded that Exhibit 73 was very confusing and lacked explanations and definitions. Mr. Tambay understood Mr. Lundin's formula (Exhibit 73, page 47) because he is familiar with the topic and he could see where Mr. Lundin was going. However, what Mr. Lundin did was set out something in a complicated way (Exhibit 73, page 127). He introduced needless complications which he then tried to dispose of right after. Mr. Lundin's approach or the estimator was not efficient and this is stated in Mr. Särndal's book. In conclusion, Mr. Lundin's solution was not efficient. Mr. Tambay was asked to evaluate Mr. Lundin's methodology and assess whether his proposed solution resolved the problem and whether this solution was efficient, sound and clear (Exhibit 61). Mr. Tambay concluded that it was not. Ms. Chinnappa's instructions gave a simple example (Exhibits 60 and 61) and this same simple example is provided in all of the instructions given to Mr. Lundin during the period as of January, 1994. Mr. Lundin had to address the same problem in Exhibits 72 and 73. Exhibit 46 gives the original instructions to Mr. Lundin of November 3, 1993: "(i) derive explicit formulas for the sampling variance of year-to-year changes in NIP tax estimates obtained from the two-phase sample, and (ii) program these formulas in SAS and use them to compute variance estimates for changes in tax estimates between tax year 1990 and tax year 1991". Then Exhibit 54 explains that he is to use Mr. Armstrong's variance estimate for change.

Mr. Armstrong had calculated a variance estimate for change using a method described by Leslie Kish (*Sampling Theory*, pages 457 to 462) for a simple example. Mr. Armstrong asked Mr. Lundin to use the same examples and calculate the variance estimate using mutually exclusive subsets. Part B of Exhibit 73 was to do this. Part A was supposed to be the example and Part B was supposed to be a two-page summary. Part C was to be a rewrite of Exhibit 72. However, Mr. Lundin instead used Part C as explanations for Part B.

At this point, Mr. Lundin explained that it was not his impression that the CADs he took were because of his poor performance. The purpose of a CAD is to gain experience; it is part of ongoing training and learning. He detailed his education and work experience. He described that he suffers from allergies and testified that between March, 1992 and September, 1994, he could not perform at his level because of these allergies. He added that he is also sensitive to gases and fumes. During the period March to June, 1992, Mr. Lundin worked anywhere that was suitable (away from paint, etc.). He added that he was nevertheless exposed to carpets, paint and furniture at the R.H. Coats, Main and Jean Talon buildings. From July 1, 1992 to September, 1994, he was assigned to work on the 11th floor of the R.H. Coats building. However, from September to December, 1992, he worked predominantly at home. Then, he went back full-time in January and February, 1993. He returned to the office because the renovations had decreased substantially. Ms. Chinnappa agreed with Mr. Lundin's request of March, 1993, to work two days a week at home. Later, he chose to work only one day at home and this arrangement continued until his dismissal. Mr. Lundin did not request sick leave because of the renovations during the whole period in question (1992 to 1994). Mr. Lundin recognized that he was accommodated by the employer when he requested to be allowed to work elsewhere and to work at home.

Mr. Lundin declared that all the documentation given to him by the employer, except the PRAR on a form such as Exhibit 68, is in "bath faith". According to Mr. Lundin, all the other performance appraisals and reviews, except those on the PRAR form, are invalid.

Mr. Lundin insisted that the bi-monthly performance reviews were invalid and he did not know "where they would go". They were not "official documents" for him;

he did not know their purpose. The employer chose to use this form for these reviews. In his view, the form the employer used was "for the MA-StA underfill process". He declared that had he known the purpose of these reviews, he would have challenged them under the collective agreement (clause 41.01 of the PIPSC Master Agreement). Mr. Lundin declared that he did not check his personnel file before August 17, 1994. Thus, he did not know that all these documents had been placed on his personnel file. He added that he had "no reason to suspect that anything was going on [his] personnel file". Mr. Lundin declared further that it was only at the meeting of August 22, 1994, and when Ms. Chinnappa talked about his "future employment" (Exhibit 67), that he realized "personnel" was involved. Mr. Lundin admitted, however, that each time Ms. Chinnappa asked him to sign these performance reviews "it rang a bell but it was not obvious to [him] that these were appraisals". He recognized receiving a copy of these appraisals but he insisted that their purpose was not stated. He did not consult his bargaining agent (the PIPSC) nor anyone else about this matter because their purpose was not stated. He did read his collective agreement but because these performance reviews were not on the "official form", in his view the employer had to advise him that they were being placed on his personnel file. Mr. Lundin pointed out a form entitled "Business/Social Survey Methods Division, Promotion Review meeting" and the guidelines (Exhibit 69) concerning this promotion where, at page 3, it is stated: "The final documentation,...will be forwarded to Personnel".

Mr. Lundin testified that he could not have done a better job; that he satisfied Ms. Chinnappa's request and instructions of April and May, 1994. He came up with a feasible solution which solved the problem that he was given. He did his best with the information he had. He did not use the "average estimator" because of the Horvitz and Thompson estimator. Mr. Lundin added that he provided the numeral example and methodology. In his view, the assignment did not ask that he solve a simple problem but rather to take the example and describe the methodology. In Mr. Lundin's opinion, "Messrs. Armstrong and Srinath took the large problem whereas Mr. Tambay took the small problem". Mr. Lundin added that he never took "a birth and death course" at Statistics Canada; he relied on his past experience outside the Public Service to do his assignment. He declared that "the reviewers have a Statistics

Canada mentality; they look at one side of the coin whereas with [his] experience [he has] the ability to merge sets of data".

Mr. Lundin was adamant that his analysis, as evidenced in Exhibit 72 and 73, is correct and he disagrees with Messrs. Srinath and Tambay's assessments. Mr. Lundin stands by his report even with Ms. Chinnappa's warning of April 29, 1994 (Exhibit 58) that if the report was not satisfactory he had three months to rework it. Then, if it was again unsatisfactory, his employment would be terminated. He firmly maintained that Exhibits 72 and 73 are correct. Even if Mr. Lundin had received an earlier warning (e.g. January, 1993), he still would have written it the same way and produced the same report (Exhibit 72). Mr. Lundin produced his report (Exhibit 73) in response to his performance review of April 29, 1994 (Exhibit 58) which, in his view, asked that he explain the methodology. Mr. Lundin interpreted a memorandum confirming a discussion between himself and Ms. Chinappa (Exhibit 60) as a different set of instructions.

Mr. Lundin explained that had he received an earlier warning that his employment was in jeopardy (Exhibit 58), and with the same set of instructions, he would not have changed the methodology but would have included much more detailed explanations. He would have expanded considerably (module 5, page 13 of Exhibits 72 and 73). Mr. Lundin saw this expansion as an improvement. He would have increased the formula and provided more information. Mr. Lundin explained that he did this in Exhibit 73 for a smaller problem. He added that he would not have changed his statistical approach. Mr. Lundin recognized that when he worked on Exhibit 73 he knew that his employment was in jeopardy.

Additional Evidence Relating to the Complaints

(Board files 160-2-45 and 161-2-744)

Mr. Lundin declared that his memorandum to Mr. André Monty of March 16, 1992 indicating that he had allergies to paint and similar types of fumes and his request that alternative arrangements be made (Exhibit 70), started the process which ended in his dismissal. The fumes had become intolerable for him so he asked to work elsewhere. Messrs. Monty, Finlay and Lundin agreed that same day that Mr. Lundin should be the one to find other work locations. Mr. Lundin did so and

he went to work elsewhere with the permission of the employer. Mr. Lundin declared that this memorandum of March 16, 1992 (Exhibit 70) constitutes his refusal to work under the *CLC*. The employer did not ask Mr. Lundin to return to his original work location.

When the situation with the fumes deteriorated further on April 6 and 21, 1992, Mr. Lundin worked in different places to avoid the fumes. On April 21, 1992, Mr. Lundin wrote to the Committee on Occupational Safety and Health (COSH) (Exhibit 23) informing them of the situation. In this memorandum, he does not refuse to work; it is of an informational nature. He wrote that he "may be forced to seek official recognition of the problem by Labour Canada and/or obtain Workman's Compensation for medical reasons". But, it is only on September 1, 1994, that Mr. Lundin submitted such a claim to the Workers' Compensation Board (Exhibit 86). Mr. Lundin did not pursue the matter with the COSH and he has no knowledge of what action, if any, the COSH took in this matter. When Mr. Priest responded to the memorandum of April 23, 1992 (Exhibit 23), Mr. Lundin spoke to Mr. Priest and told him that he could use the information contained in Exhibit 23 so as to warn other employees. Mr. Lundin had already arranged with his employer to work elsewhere. Mr. Lundin declared that the purpose of Exhibit 23 was to warn other employees that the renovations were causing a dangerous situation. Mr. Lundin wanted the employer to accommodate the other employees also. He added that he was trying to be a "good guy". Mr. Lundin testified that there was a pregnant employee who had already informed the COSH about the situation. Mr. Lundin never spoke to Mr. Fellegi (Exhibit 26). At the Labour Management Consultation meeting of June 25, 1992, the air quality problem was confirmed and the employer acknowledged that it would allow employees to work at alternative locations (Exhibit 71).

Mr. Lundin remarked that in October, 1992, he worked 90% of the time at home and Mr. Cheung was not upset (Exhibit 89). Mr. Lundin testified that none of the supervisors were upset with his work arrangements. He could not name anyone who was upset with him because he brought up the health issue and wrote to the COSH and management (Mr. Fellegi). Mr. Lundin recognized that management had been reasonable with him in this regard. He was accommodated since April, 1992. Even though he was accommodated and he worked elsewhere and, even at home, Mr. Lundin was still of the opinion that there was a danger to his health. He declared

that he was the one who chose to work only one day a week at home. He did not want anything more from his employer. Mr. Lundin testified that had he asked to work more days at home, this would have been granted forthwith. Mr. Lundin did not make such a request. Mr. Lundin did not seek official recognition of the health problem by Labour Canada and he did not ask for the intervention of a Safety Officer.

Mr. Lundin declared that he did not know whether it was Ms. Chinnappa who wanted to get rid of him or if she was told to by someone else. Mr. Lundin could not name the person or persons who wanted to get rid of him. However, he added that Ms. Chinnappa was the "culprit". Mr. Lundin described that on August 10, 1994, he saw that her position was on a competition board. On August 15, 1994, Ms. Chinnappa informed Mr. Lundin that she wanted to meet him to advise him of his dismissal (Exhibit 67). On August 22, 1994, the MA-STA-04 competitions were posted (Exhibit 78) with a closing date of September 30, 1994. His letter of dismissal is dated August 22, 1994 and he left his employment on September 30, 1994. Ms. Chinnappa went to her new position in December, 1994.

Arguments

The following arguments concern Board file 166-2-26174, the termination of employment on grounds of incompetence. Mr. Chabursky submitted written arguments in point form which he read and which I have reproduced hereunder.

Introduction

1. *On August 22nd, 1994, Mr. Lundin was released from employment by Statistics Canada for cause pursuant to section 11(2)(g) of the Financial Administration Act.*
2. *This case is about whether the Employer was justified in terminating Mr. Lundin's employment for cause.*
3. *I will proceed in five steps.*
4. *First, I will review the test to be applied in deciding whether or not the employer was justified in terminating Mr. Lundin.*
5. *Second, I will review the evidence of supervisors relating to Mr. Lundin's performance.*

6. *Third, I will review the final stage of Mr. Lundin's employment dealing with his reports E-72 and E-73, and the apparent misunderstanding that arose.*
7. *Fourth I will deal with the sufficiency of warning given, and whether that is a ground for reinstatement in this case.*
8. *Fifthly, I will address Mr. Lundin's medical condition and the Employer's action to accommodate Mr. Lundin.*

Part I: The Test:

9. *The test to be applied in cases involving section 11(2)(g) of the Financial Administration Act has been enunciated by Board Member Barry Turner in the case of Michael Stitt (166-2-25981, February 27th, 1995).*
10. *Based on that decision, the Employer should prove the following:*
 - 1) *That the Employer was up front and fair with Mr. Lundin by informing him of his failings in advance and in a regular fashion over some period of time.*
 - 2) *That the Employer provided Mr. Lundin with sufficient opportunity to improve his performance by providing opportunities to work on different assignments and for different supervisors.*
11. *This test captures the often quoted passage from Brown and Beatty's text, Canadian Labour Arbitration, where in chapter 7:3510 the following is written:*

Generally, it has been said that to substantiate a non-disciplinary termination in such circumstances, the employer must establish the level of job performance it required, that such a standard was communicated to the employee, that it gave suitable instruction and supervision to enable the employee to meet the standard, that the employee was incapable of meeting the standard of that job or other positions presumably within her competence, and that it warned the employee that failure to meet the standard would result in her dismissal.

12. *It is respectfully submitted that the Employer has met the duty or proof in this case, and that it made its decision to terminate Mr. Lundin in good faith based on reasonable grounds for the conclusion that Mr. Lundin was incapable of meeting the performance requirements of his position.*

Part 2: Mr. Lundin's Performance:

13. *Mr. Lundin occupied the position of an MA-STA-03 at Statistics Canada.*
14. *His work history and supervisors are summarized in Exhibit E-74.*

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15. *That work history will help to situate the evidence heard during these proceedings.*
16. *Mr. Lundin's failings in performance can be summarized by the following seven propositions:*
- 1) *Inability to work without substantial supervision,*
 - 2) *Inability to take instructions from supervisors,*
 - 3) *Inability to work cooperatively as a team player,*
 - 4) *Inability to produce clear, coherent and understandable written reports,*
 - 5) *Inability to limit his work to address the specific client needs,*
 - 6) *Inability to focus on the problem at hand, and*
 - 7) *Inability to apply statistical concepts correctly.*
17. *These failings were evident to a greater or lesser extent throughout Mr. Lundin's employment.*
18. *It will be demonstrated that Mr. Lundin's failure to perform adequately preceded before and persisted after the period during which renovations were undertaken.*

Standard of Performance:

19. *According to uncontradicted evidence, every supervisor informed Mr. Lundin of the standard of performance required of him.*
20. *In particular, Mr. Lundin was informed of the description of duties at all levels of classification.*
21. *He was told consistently that he should follow instructions of his supervisor and write clearly.*

Training:

22. *According to uncontradicted evidence, Mr. Lundin was offered training throughout his employment in statistics, methodology, and writing skills.*
23. *The supervisors informed him that the Employer would cover the costs of such training.*

History of Performance:

24. *I will now turn to review the history of Mr. Lundin's performance.*

Kovar

25. *Mr. John Kovar supervised Mr. Lundin for the first part of 1987, in the Business Survey Methods Division (home division).*
26. *Mr. Kovar testified that during that time, he had to provide more supervision to Mr. Lundin than is usually expected of an MA-STA-02.*
27. *Mr. Kovar testified that Mr. Lundin had a tendency of focusing on and discussing details that were not relevant to the problem and assignment at hand.*
28. *Mr. Kovar testified that Mr. Lundin's written work was very poor. In particular, it was: circular, repetitious, confusing and full of grammatical and spelling mistakes.*
29. *In general, Mr. Kovar said that Mr. Lundin lacked the ability to focus and synthesize information.*
30. *Mr. Kovar's testimony is reflected in Exhibit 6.*
1) *page 1(a): writing skills*
2) *page 1(a) and page 2(b): lack of focus*
31. *Mr. Kovar testified that he nevertheless gave Mr. Lundin a satisfactory rating in order to encourage him to improve.*

Mr. Hoyt:

32. *Mr. Hoyt supervised Mr. Lundin in the home division (BSMD) from April to October 1987.*
33. *Mr. Hoyt testified about Mr. Lundin's lack of focus.*
34. *Mr. Hoyt testified that Mr. Lundin had poor writing skills, despite ample feedback on assignments.*
35. *Those opinions are borne out by Mr. Hoyt's comments on Mr. Lundin's performance appraisal for that period.*
36. *Mr. Hoyt gave Mr. Lundin an unsatisfactory rating.*
37. *Mr. Hoyt testified that he delayed releasing the performance appraisal until after Mr. Lundin got his next performance appraisal in May of 1988. He did so in order to offer Mr. Lundin an opportunity to have at least one positive performance appraisal subsequent to the negative one.*
38. *Nevertheless, Mr. Lundin refused to sign the appraisal report, and Mr. Lundin did not want to discuss it.*
39. *Mr. Hoyt's comments and opinions also appear on the first page of Exhibit 10, the Peer Review of May 1988.*

Geocartographics:

40. In October 1987, Mr. Lundin went on a CAD: "Career Assignment" to the Geocartographics Division.

41. Mrs. Chinnappa testified that while on CAD, an employee such as Mr. Lundin would continue to be paid as an MA-STA-03, but could be asked by the host division to perform work of a different nature.

42. In fact, the CAD assignments are designed to allow employees to try work of a different nature, not to perform the same type of work to which they are assigned in the home division.

43. Accordingly, the host division could provide their performance appraisal on the work actually performed, rather than on the work associated with the original position in the home division.

44. That testimony was confirmed by other witnesses, including Joel Yan and Hugh Finlay.

45. Mr. Lundin's first performance appraisal covered the period October 1987 to April 1988.

46. The comments on the first page related to two tasks.

47. Mr. Lundin's performance on the first task, relating to producing a report was unsatisfactory.

48. However, with reference to computer work at the junior programmer level, Mr. Lundin was evaluated at the fully satisfactory level.

49. During cross-examination of several witnesses, Mr. Lundin contended that the fully satisfactory evaluation related to his performance as an MA-STA-02.

50. However, Mr. Deecker and Mr. Yan testified that the satisfactory rating related to his duties as a computer programmer, not as a statistician methodologist.

51. That testimony is buttressed by the comments in Mr. Lundin's Peer Review, E-10, page 2, point (iii).

Joel Yan:

52. Mr. Yan appraised Mr. Lundin as part of the Peer Review process in September 1988: Exhibit E-14.

53. The comments at the bottom of the second page confirm that there were problems in performance, despite the satisfactory rating:

- 1) too slow
- 2) not focused
- 3) needed smaller tasks, more supervision

- 4) *reports not fully satisfactory*
- 5) *poor writing skills*
- 6) *not listening to supervisors instructions*
- 7) *NOT satisfactory at the MA-STA-03 level.*

54. *Exhibit E-77, covering the period September 1988 to February 1989, shows that there was improvement in Mr. Lundin's performance.*

55. *Mr. Yan testified that he decided to emphasize the positive.*

56. *Mr. Yan suggested that Mr. Lundin be given his long overdue promotion to the MA-STA-03 level to encourage him to continue improving his performance.*

Gordon Deecker:

57. *Mr. Lundin was promoted to MA-STA-03 level in January 1989.*

58. *Mr. Deecker supervised Mr. Lundin in the Geocartographics Division from March 1989 to March 1990.*

59. *Mr. Deecker testified that Mr. Lundin performed considerable computer programming work. (X-exm)*

60. *Mr. Deecker testified that Mr. Lundin required considerable supervision. Even though he was an MA-STA-03, he required more supervision than is usually accorded to MA-STA-02 employees.*

61. *Mr. Deecker testified that Mr. Lundin was not a team player. Mr. Lundin claimed to be miles ahead of others he worked with.*

62. *Mr. Deecker did not provide an overall assessment of Mr. Lundin's performance for the period March 1989 to March 1990: Exhibit 16.*

63. *The evaluation praised Mr. Lundin's mathematical skills.*

64. *Mr. Deecker continued to supervise Mr. Lundin for another year. The performance appraisal for the period March 1990 to March 1991 is Exhibit E-19.*

65. *The comments indicate that Mr. Lundin was having difficulty performing at a satisfactory level.*

66. *A double-blind peer review of a paper Mr. Lundin wrote confirmed that he had poor writing skills. Exhibit 18.*

- 1) *vague*
- 2) *confusing*
- 3) *not well connected*
- 4) *lack of focus*

Hugh Finlay

[Jean Talon Building]

67. *In April 1991, Mr. Lundin completed his CAD in the Geocartographics Division.*

68. *From there, he went on another CAD to a different host division: the Business Register Division.*

69. *There he was supervised by Mr. Hugh Finlay from April 1991 to June 1992.*

70. *Mr. Finlay testified that he spoke with Mr. Lundin on a weekly basis to ensure that Mr. Lundin understood what was expected of him.*

71. *Initially, Mr. Finlay put Mr. Lundin in charge of a multi-disciplinary group.*

72. *However, it became clear that Mr. Lundin did not possess the skills required to coordinate the group and keep it intact.*

73. *To prevent the group from disintegrating, Mr. Finlay took over the coordinating role from Mr. Lundin.*

74. *Mr. Finlay also testified about Mr. Lundin's poor writing skills:*

- 1) *lack of focus,*
- 2) *lack of content,*
- 3) *someone else had to re-write the report.*

75. *During this time period, renovations were started in the facilities of Statistics Canada.*

76. *Mr. Lundin raised his health concerns.*

77. *In March 1992, Mr. Lundin requested alternative working arrangements (E-70).*

78. *Mr. Finlay testified about the steps taken to accommodate Mr. Lundin's health concerns:*

- 1) *allowed to take walks every hour*
- 2) *allowed to work in the cafeteria and other parts of the Statistics Canada complex.*

79. *In response to the contention that Mr. Lundin refused to work on account of the renovations, Mr. Finlay testified that Mr. Lundin had never refused to work.*

80. *At no time did Mr. Lundin ask for a report by a Safety Officer under the Canada Labour Code.*

81. *At the end of Mr. Lundin's employment in the Business Register Division, Mr. Finlay wrote a memo to Mrs. Chinnappa outlining the failings in Mr. Lundin's performance (E-22):*

- 1) *difficulty in organizing, planning and scheduling,*

- 2) *difficulty in providing leadership, and,*
- 3) *difficulty in communicating ideas in an understandable manner.*

Return to the Home Division

82. *At the end of June 1992, Mr. Lundin returned to his home division, the Business Systems Methodology Division.*

83. *Mrs. Chinnappa decided to assign Mr. Lundin to three different supervisors with three different assignments in an attempt to find Mr. Lundin work in which he could improve his performance.*

84. *Also, Ms. Chinnappa asked the supervisors to give Mr. Lundin a written performance appraisal on a bi-monthly basis, in an attempt to help Mr. Lundin improve his performance.*

85. *Mrs. Chinnappa testified that she met with Mr. Lundin and discussed this with him, explaining why he would be working with three different supervisors.*

86. *She also testified that she told Mr. Lundin that they would review the bi-monthly reviews together.*

87. *Mr. Lundin yesterday said that he did not know what the purpose of these documents were.*

88. *And yet, the title on each document makes it clear that they constituted performance reviews and feedback.*

89. *Moreover, during cross-examination by Mr. Lundin, Mrs. Chinnappa testified that she told Mr. Lundin that these documents were performance reviews.*

(Mr. Lundin never objected to these forms until after the termination of his employment.)

90. *Mr. Lundin's perception or impression of reality is very different from reality.*

Simon Cheung

91. *The first assignment was with Simon Cheung, Chief of the Research and Development Section.*

92. *Mr. Cheung held weekly meetings with Mr. Lundin, during which he provided extensive detail on the work required of him.*

93. *The weekly meetings were designed to give Mr. Lundin regular feedback on his duties and performance.*

94. *Mr. Cheung wrote four Performance Reviews covering the 6 month period from July 1992 to December 1992.*

- 1) E-31
- 2) E-33
- 3) E-34
- 4) E-35

95. *The comments about Mr. Lundin's performance are amply documented in those reviews, and have not been challenged in cross-examination.*

96. *For each performance review, Mr. Cheung offered Mr. Lundin an opportunity to discuss and to add his comments to the performance review.*

97. *For each performance review, Mrs. Chinnappa met with Mr. Lundin and also offered an opportunity to discuss and to add his comments to the performance review.*

98. *However, on each occasion, Mr. Lundin refused to discuss or even sign the performance reviews to acknowledge receiving them.*

99. *Mr. Lundin simply did not acknowledge the process of supervisory review and feedback. He did not want to have any part in it.*

100. *Mr. Cheung gave extensive testimony about Mr. Lundin's performance.*

101. *Mr. Cheung testified about Mr. Lundin's inability to work without substantial supervision*

- 1) *he was not able to acquire sufficient and coherent understanding of the project on his own,*
- 2) *he was not able to identify relative importance of tasks in a project,*
- 3) *he had a tendency to take impulsive decisions,*
- 4) *he had little concern for work plans and schedules regarding the project.*

102. *Mr. Cheung testified about Mr. Lundin's inability to take and implement instructions:*

- 1) *on many instances he showed that he did not understand the instructions,*
- 2) *Mr. Cheung had Mr. Lundin write down instructions, so that Mr. Cheung could verify whether the instructions were understood. Yet even after correcting those written instructions, Mr. Lundin would not carry out those instructions.*

103. *Mr. Cheung testified that Mr. Lundin's writing skills were unacceptably poor:*

- 1) *lack of context*
- 2) *fragmented*
- 3) *incoherent*

104. *These problems persisted event after Mr. Cheung pointed them out.*

105. *Mr. Cheung testified about Mr. Lundin's inability to focus. For example, Mr. Cheung asked Mr. Lundin to record the objectives of the project in the minutes of their weekly meetings. Yet, in September, Mr. Lundin was still not able to describe the general objectives of the project.*

106. Even by December, Mr. Lundin was not dealing with the objective of the project. Rather, he worked on something else of interest to him, despite a long and extended discussion with him. Mr. Cheung testified that this was very disappointing.

107. Mr. Cheung testified Mr. Lundin commented on the air quality in the Jean Talon Building. However, he never brought up those concerns in reference to his performance.

108. As the renovations came nearer to the floor on which Mr. Lundin worked, Mr. Lundin reported a worsening in his condition.

109. Upon Mr. Lundin's request for alternate working arrangements, Mr. Cheung took immediate action:

- 1) he was moved to room 3000 of the Main Building, and had the windows opened. [The renovations were at their peak during this period.]
- 2) At the end of November, he was sent home to work. He worked at home until the end of December. [Ninety percent (90%) of the time.]
- 3) The weekly meetings were held across the street at a cafe, or in the cafeteria.
- 4) Mr. Lundin did come in to work from time to time to print his work. Mr. Cheung offered him alternate arrangements so that Mr. Lundin would not have to come in to work.

Mike Miller:

110. From January 1993 to July 1993, Mr. Lundin was supervised by Mr. Miller.

111. Mr. Miller wrote three performance reviews covering the six month period:

- 1) E-41
- 2) E-42
- 3) E-44

112. At first, Mr. Miller met Mr. Lundin weekly to ensure that he understood what was expected of him. Since, their offices were proximate to each other, they spoke often.

113. Mr. Miller testified that Mr. Lundin gave an impression that he understood the directions given to him, but that those directions were not implemented. As a result, Mr. Miller had to meet with Mr. Lundin more often.

114. Mr. Miller testified that Mr. Lundin often missed deadlines, even though they were flexible.

115. Mr. Miller testified that Mr. Lundin was not working at the MA-STA-03 level. Rather he was working at the level of an MA-STA-01. An MA-STA-03 would be expected to handle three projects, not just one.

116. As with Mr. Cheung, Mr. Lundin did not want to participate in or acknowledge the bi-monthly performance reviews.

117. Mr. Miller was very accommodating in terms of work arrangements:

- 1) At first, Mr. Lundin worked at home 3 days per week,

- 2) later, Mr. Lundin worked at home 1 day per week,
- 3) Mr. Lundin had the option of working at home as much as he would like.

[Mr. Lundin testified that by then the renovations had decreased considerably].

118. Mr. Lundin was never forced to work at the Coats building or any other location of Statistics Canada.

John Armstrong

119. John Armstrong supervised Mr. Lundin from August 1993 to April 1994.

120. Mr. Armstrong wrote many memos and performance reviews concerning Mr. Lundin's performance:

- 1) E-46
- 2) E-47 (irrelevant questions)
- 3) E-48
- 4) E-49 (does not take instructions)
- 5) E-51
- 6) E-52
- 7) E-54
- 8) E-55

121. Mr. Armstrong also gave extensive testimony about Mr. Lundin's performance.

122. Mr. Armstrong clearly described what was required of Mr. Lundin. He had extensive meetings with Mr. Lundin about the project: Estimation of variance in a two-phase sample.

123. Nevertheless, Mr. Lundin had considerable difficulty understanding the objectives of the project, and the required outputs.

124. Mr. Armstrong testified that Mr. Lundin had a hard time taking instructions and implementing them in his work:

- 1) E-51, point 5, 2nd par
- 2) E-52, point 5

125. Mr. Armstrong testified that it was difficult to understand Mr. Lundin's work, not because it was mathematically complex, but rather because of the poor writing skills:

- 1) very difficult to read,
- 2) repetitive,
- 3) sloppy grammar,
- 4) lack of definitions,
- 5) unorthodox and sloppy notation,
- 6) sloppy mathematics and statics.

126. Mr. Armstrong emphasized that the ability to express oneself clearly and in a way that is comprehensible to others is ESSENTIAL for an MA-STA-03.

[Communicating in writing is crucial. See Mr. Tambay's testimony.]

127. *Mr. Armstrong testified that while Mr. Lundin had knowledge of statistics, he lacked the ability to understand problems and to apply statistical concepts correctly.*

128. *Mr. Armstrong did not agree that there was simply an honest difference of opinion regarding statistical concepts.*

129. *In Mr. Armstrong's opinion, Mr. Lundin was confused about certain statistical concepts, and that therefore his analysis was faulty.*

[Mr. Srinath confirms this.]

130. *During re-examination, Mr. Armstrong testified that even in the face of an "honest difference of opinion", an MA-STA-03 should proceed according to the instructions and directions of his or her supervisor.*

131. *More specifically, Mr. Armstrong testified that where there is a difference of opinion between an MA-STA-03 and his or her supervisor, then only a small percentage of time should be spent trying to resolve that problem.*

[Because this is not an academic exercise; there is a project to do.]

132. *In Mr. Lundin's case, 100% of the time was spent on trying to resolve this problem of Mr. Lundin's disagreement with the supervisor's directions.*

133. *Contrary to Mr. Armstrong's directions, given many times verbally and in writing, Mr. Lundin insisted on pursuing questions and issues that were unnecessary, irrelevant, or misguided.*

134. *As a result, in Mr. Armstrong's opinion, Mr. Lundin did not produce any useful output at all. Rather, Mr. Lundin worked on irrelevant and inappropriate aspects of the problem.*

135. *Mr. Armstrong testified and his testimony was not contradicted, that there were no renovations on the 11th floor or any adjacent floors.*

136. *Nevertheless, Mr. Lundin was permitted to work at home one day per week.*

137. *Also, Mr. Armstrong testified that he told Mr. Lundin that he could work at home more often if he wished.*

K.P. Srinath:

138. *Mr. Srinath did not supervise Mr. Lundin directly.*

139. *Mr. Srinath was Chief of [the] Methodology Section, and Mr. Armstrong reported to him.*

140. *Mr. Srinath reviewed Mr. Lundin's written reports, E-72 and E-73. Mr. Srinath provided his comments in E-50, E-63, and E-66.*

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141. Mr. Srinath testified that Mr. Lundin had poor writing skills:
- 1) hard to understand the documents,
 - 2) especially when it came to explaining basic statistical concepts,
 - 3) confusing and messy notation,
 - 4) did not follow the usual order,
 - 5) objectives were not clearly stated,
 - 6) definitions were not provided.
142. Mr. Srinath testified that it is essential that an MA-STA-03 write clearly so that other statisticians could assess the validity of a statistical methodology.
143. Mr. Srinath testified that clarity in writing is also important so that non-statisticians and clients could comprehend the written analysis.
144. Mr. Srinath also testified that at the outset it appeared that Mr. Lundin understood statistical concepts, but that his written reports revealed that he did not understand certain basic concepts of statistics.
145. Mr. Srinath testified that Mr. Lundin was reluctant to take advice from his supervisor.
146. Mr. Lundin was convinced that he was right. Therefore, it was difficult to persuade him. While he was willing to listen, he was not willing to carry out other options.
147. Mr. Srinath gave an example of the limit of Mr. Lundin's statistical methodological abilities:
- 1) does not have an understanding of the concept of "conditioning".
 - 2) does not understand the concept of variance.
 - 3) very unorthodox and non-standard notation.
 - 4) provided over-complicated versions of simple formulae, where solutions were asked for.

Jean-Louis Tambay:

148. Mr. Tambay reviewed Mr. Lundin's two reports: E-72/73.
149. Mr. Tambay testified that the writing was very poor:
- 1) difficult to understand
 - 2) disjointed; jumping all over the place
 - 3) hard to follow
150. Mr. Tambay testified that it was crucial that an MA-STA-03 write clearly, because all work is based on written communication.
151. Mr. Tambay testified that Mr. Lundin seemed to have some notion of statistics. But that he did not apply it in a proper way.
152. Mr. Tambay testified that Mr. Lundin's solution was inappropriate for either the original problem or the simple example.

Summary of Performance Problems:

153. *The testimony of Mr. Lundin's supervisors demonstrates that Mr. Lundin was consistently performing below required standards.*

Did not follow directions:

154. *The ability and willingness to follow instructions and directions of supervisors is an essential performance requirement of an MA-STA-03.*

155. *An MA-STA-03 that does not follow instructions and directions on a project does not produce any useful output.*

156. *In my submission, the testimony of the supervisors and their written opinions demonstrate that Mr. Lundin had difficulty following directions and instructions of his supervisors.*

157. *In part, this could be attributed to a lack of understanding by Mr. Lundin, which was pervasive despite substantial supervision and frequent direction both oral and written.*

158. *However, more importantly, Mr. Lundin's failings to follow instructions can be attributed to his unqualified belief that where there is a disagreement or difference of opinion, that he is correct and the supervisor is wrong.*

159. *Mr. Lundin insisted on disagreeing with his supervisors and pursuing his own work and objectives.*

160. *Calling his disagreement an "honest difference of opinion" does not change the fact that Mr. Lundin refused to be guided by directions of his supervisors where he had his own opinion.*

161. *Mr. Lundin referred to Statistics Canada as a research setting.*

162. *But that is inaccurate. The Business Surveys Methods Division is not a think tank or an academic institution where equals ponder interesting questions and then debate and discuss their varying points of view.*

163. *The BSMD provides service to real clients on real problems. BSMD must give real output that will be useful to those clients.*

164. *Therefore, there is no time for equals with so-called "honest differences of opinions" to engage in dialogue, and Mr. Lundin was not an equal to his supervisors.*

165. *Mr. Lundin was required to contribute specific components to specific projects for real output.*

166. *For him to be useful, he must submit to being guided by his superiors when they tell him that a particular statistical approach is wrong or misguided, or when they tell him that something he is working at is irrelevant and not helpful to the project.*

167. *One day, if Mr. Lundin makes his mark through independent publications and receives recognition, then he can engage in academic discourse.*

168. *By analogy, as a junior lawyer working with a senior lawyer on a large file for a client, I would be expected to follow directions of my principal.*

169. *Of course, my principal would welcome and expect discussion or critical thinking. But in case of a disagreement, my supervisor's direction must be followed, otherwise I am a hinderance, and not of any assistance.*

170. *That is not to say that I would be prevented from developing my ideas on my own, outside of work-time. I could even seek recognition of my ideas through the publication of an article on the topic.*

171. *Similarly, the requirement that Mr. Lundin submit to directions and instructions of his supervisors on a particular project, does not mean that he is prevented from pursuing his interests on his own time.*

172. *Indeed, it is open to Mr. Lundin to publish his theory in academic journals or at conferences to seek recognition from the broad community of statisticians.*

173. *But at work, Mr. Lundin must be willing to be supervised, and to follow directions of his superiors.*

174. *Instead, he holds tenaciously to his points of view, to the point that the supervisor cannot get any useful output from him.*

175. *He ignores criticism and comments relating to his analysis, even though those comments come from statisticians that are more senior and experienced than himself.*

176. *In so doing, Mr. Lundin rendered himself "unsupervisable".*

177. *Yesterday, Mr. Lundin said that he will not do something that is criminal or unethical, even if directed to do so by his supervisors. He gave two examples.*

178. *To be clear, there is no issue of criminality or ethics in this case, or in any of the directions and instructions given to him by his supervisors. Even Mr. Lundin described the disagreements as "honest differences of opinion", not as a matter of ethical behaviour and conduct.*

179. *Yesterday when Mr. Lundin was testifying, he exhibited this intransigent attitude. He asked, "If I am convinced that I am correct and my supervisors still disagree, what am I to do?"*

180. *The correct answer to that question has never occurred to Mr. Lundin: the correct answer is follow the directions of your supervisor so that you can contribute meaningfully to the project at hand and serve the client.*

181. *Unfortunately, Mr. Lundin is not capable of recognizing that he may be incorrect.*

182. *Mr. Lundin is not capable of recognizing when he should listen to others.*

183. *I dare say, that this contention has been amply demonstrated in the course of this hearing itself.*

184. *It is evident from his conduct of this case.*

185. *It is evident from the exchanges he had with four senior statisticians during testimony.*

186. *Mr. Lundin's incapability to submit to the directions and supervision of his superiors is also plainly evident from his choice to completely ignore the bi-monthly performance review process instituted by Mrs. Chinnappa, in the last two years of work.*

[There is no culpable action on his part.]

187. *This incapability to follow instructions and submit to supervision is the greatest impediment to his ability to perform at a satisfactory level.*

188. *The question to be answered is as follows: "Is an employer obliged to continue to employ a person who is so convinced that he is always correct, that he insists that the supervisors are mistaken and will never accept their directions, instructions and comments?"*

[This incapacity and "attitude" are not brought on by a health problem. This is not a result of fumes or an allergic reaction.]

Lack of Focus:

189. *The ability to focus on the problem at hand, and the ability to perform proper and relevant analysis is an essential performance requirement of an MA-STA-03.*

190. *Mr. Cheung, Mr. Miller, and Mr. Armstrong all testified that Mr. Lundin went off on tangents, and pursued questions that were either irrelevant or inappropriate.*

191. *Mr. Lundin was not able to understand and focus on the needs of the clients that his Division was serving.*

192. *Part of the problem was an inability to apply and implement knowledge of statistics to a real-life methodological problem.*

193. *In a minute, I will discuss the final assignment on which Mr. Lundin failed to perform satisfactorily.*

194. *But, at this moment I would like to point out that four senior statisticians testified on a specific problem that Mr. Lundin did not apply statistics correctly.*

195. *The Chairperson has had an opportunity to witness how Mr. Lundin tried to persuade four senior statisticians that his approach had merit:*

- 1) *Mrs. Chinnappa*

- 2) *Mr. Armstrong*
- 3) *Mr. Srinath*
- 4) *Mr. Tambay*

196. *None of these senior statisticians agreed with Mr. Lundin's approach.*

[Mr. Lundin had problems with basic statistical concepts.]

197. *These statistical discussions are beyond our understanding. They are esoteric and sophisticated.*

198. *But clearly, all of them steadfastly maintained that Mr. Lundin was incorrect in his statistical approach.*

199. *The chair has to chose whether to believe the four senior statisticians, or whether to believe Mr. Lundin.*

200. *In order to side with Mr. Lundin, the Chair would have to find that the four senior statisticians are either not credible witnesses, or incorrect in their opinions of statistics.*

201. *In my respectful submission, that would be an extraordinary finding.*

202. *That would be an extraordinary finding, because the only evidence contradicting their opinion, is Mr. Lundin's opinion itself.*

203. *There is no independent evidence [to] support Mr. Lundin's position on statistics.*

204. *At one point, the chairperson stated that Mr. Lundin's performance could have been affected as a result of being "bounced around" several divisions, requiring that Mr. Lundin acquire competence in a number of areas.*

205. *The CAD assignments were granted on Mr. Lundin's request. Therefore, that can hardly be characterized as being "bounced around" by the employer.*

206. *The three assignments in the last two years of employment were all in the Business Surveys Methods Division.*

207. *Therefore, the work was similar in nature.*

208. *Moreover, in each case, Mr. Lundin worked only on one project.*

209. *The Chair heard testimony that usually an MA-STA-03 handles three projects simultaneously.*

Poor Writing Skills

210. *Good writing skills are absolutely an essential performance requirement of an MA-STA-03.*

211. *There was ample evidence that without good writing skills, an MA-STA-03 cannot produce any useful output.*

212. *In Mr. Lundin's case, even statisticians could not understand his written work.*

213. *All supervisors testified that Mr. Lundin's writing skills were very poor.*

214. *Mr. Lundin's writing skills did not improve, despite training opportunities that were offered to him.*

Part 3: Anatomy of the Final Assignment:

The Original Problem:

215. *In September 1993, Mr. Lundin was given the following assignment:*

- 1) *Obtain sampling variance estimates in annual tax estimates.*
- 2) *Two-phase sample, simple random sampling.*

216. *That assignment was further clarified in E-46: simplifying assumptions were given to provide more guidance.*

217. *I will refer to E-46 as the original problem.*

[This is the original problem given to Mr. Lundin - meeting of November 3, 1993 with Mr. Armstrong.]

218. *E-49 (Nov. 19th) is Mr. Armstrong's review of some preliminary work of Mr. Lundin entitled "Annual Tax Estimate Change - Development of Variance Formulae" (dated November 9th) NOT IN EVIDENCE.*

219. *That document strongly criticized Mr. Lundin for lack of clarify and unwillingness to follow directions.*

220. *E-50 (Nov. 26th) is Mr. Srinath's comments. To the same effect.*

221. *Performance Reviews E-51 and E-52 were unsatisfactory.*

222. *E-52 (Jan. 21st) [Mrs.] Chinnappa asked Mr. Lundin to document his alternate approach to solving the original problem.*

223. *E-54 (Feb. 7th, 1994): In response to a draft. Mr. Armstrong wrote that there was little improvement over Mr. Lundin's work submitted in November '93. Mr. Lundin ignored the comments and suggestions made by Mr. Armstrong and Mr. Srinath in E-49/50.*

The Simple Example:

224. *In E-54 (Feb. 7th), Mr. Armstrong asked Mr. Lundin to demonstrate his methodology using a simple example:*

- 1) *one phase, one stratum*

- 2) *simple random sampling*

225. *At first, there was no response.*

226. *Moreover, the example was simplified beyond usefulness for the project. It was designed merely to give Mr. Lundin another chance to explain the position to which he held so tenaciously.*

[Exhibit 73 is the response to this Exhibit.]

The First Report on the Original Problem:

227. *Mr. Lundin submitted E-72 (March 23rd) "Change in Annual Tax Estimates".*

228. *This report responded to the problem as simplified in E-52.*

229. *E-55 (April 12th), poor performance review. Strong criticism of E-72:*

- 1) *poorly written, vague,*
- 2) *includes concepts that were criticized earlier,*
- 3) *mistakes in statistical concepts.*

230. *E-56 (April 12th) summarized a meeting with [Mrs.] Chinnappa, indicating performance problems:*

- 1) *a lack of focus in addressing problems,*
- 2) *inability to take direction from supervisors,*
- 3) *poor communication skills, both oral and written,*
- 4) *confused understanding of statistical theory,*
- 5) *inability to apply statistical knowledge to problems.*

231. *At the meeting, it was indicated that Mr. Lundin's report, E-72, would be submitted to Mr. Srinath and Mr. Tambay for review.*

232. *If the independent reviewers found no merit in his concepts and approach, he would be told that he could not work as a methodologist.*

233. *E-57 (April 29th): Mr. Tambay's comments on E-72: totally unsatisfactory: "should be rewritten from scratch rather than revised".*

234. *E-58 (April 29th): Mrs. Chinnappa made it clear that he would be terminated if there was no improvement in his performance based on a revision of E-72.*

Instructions to Revise First Report:

235. *E-59 (May 5th): Mrs. Chinnappa told Mr. Lundin to revise E-72 "to enable the reader to have a clear grasp of the statistical methods you are recommending".*

[The instruction was that he "re-write the document to deal with the original problem".]

236. *E-60 (May 16th): Mrs. Chinnappa confirmed that Mr. Lundin was required "to produce a re-written document". In other words, it was very clear that he was to re-write the original report E-72 so as to answer the problem (E-52) using the comments of Mr. Armstrong, Srinath, and Tambay as guides for improvement.*

[There was no suggestion that it be a different document.]

237. *Mrs. Chinnappa also suggested that he write:*

- 1) *a brief 2 or 3 page summary,*
- 2) *provide an illustration using the simple example (given to him by Mr. Armstrong in E-54).*

[There is nothing confusing about these directions.]

238. *Mr. Lundin produced E-73 in three parts:*

- 1) *summary (part a),*
- 2) *illustration using simple example (part b),*
- 3) *detailed description (part c).*

[However, Mr. Lundin claims that because of Exhibit E-60 he had to produce a simple example. His perception of the reality is quite different from the one of a reasonable person.]

The Misunderstanding on those Instructions:

239. *There is a controversy over what should have been in part c.*

240. *Mr. Lundin claims that by way of E-60, Mrs. Chinnappa instructed him to focus exclusively on the simple example given in E-54. Therefore, his PART C was a detailed description of the simple example.*

241. *No reasonable reading of E-60 will bear out that interpretation.*

242. *All instructions with respect to E-73, including E-60 made it clear that E-73 was to be a revision of E-72 the report dealing with the problem.*

243. *It was clear throughout that E-72 did not deal with the simple example.*

244. *The instructions in E-60 were very clear:*

- 1) *revise E-72*
- 2) *add a summary and illustration of the simple example.*

245. *The fact that Mr. Lundin misconstrued E-60 to mean that the next report should only deal with the simplified example, and ignore the original problem dealt with in E-72, demonstrates how poorly he understands simple instructions and directions from his supervisors.*

[He has a comprehension problem.]

Review of the Second Report, Parts A and B:

246. On July 21st, Mr. Lundin submitted his second draft report, E-73.
247. E-61 (July 25th), Mrs. Chinnappa submitted parts A and B to the two reviewers.
248. E-62 (July 27th), Mr. Tambay's criticism of parts A and B.
249. E-63 (August 4th), Mr. Srinath's criticism of parts A and B.

Review of the Second Report, Part C:

250. E-64 (August 9th), Mrs. Chinnappa told Mr. Lundin that the reviewers would assess Part C.
251. E-65 (August 9th), Mr. Tambay provided his comments on Part C: *Unsatisfactory*.
252. Mr. Tambay testified that he realized the Part C was a detailed description of the simple example, rather than a revision of the First Report.
253. Mr. Tambay testified that he assessed Part C on the basis that it was a detailed description of the simple example, rather than on the basis of the original instructions.
254. Therefore, Mr. Lundin's misunderstanding of Mrs. Chinnappa's instructions would not change Mr. Tambay's opinion about the report.
255. Moreover, Mr. Tambay's criticisms and conclusions are applicable regardless of which interpretation of the instructions are taken as a standard against which to assess performance:
- 1) the report was badly written,
 - 2) the report was excessively redundant,
 - 3) the methodology was fallacious.
256. E-66 (August 11th), Mr. Srinath provided comments on the Second Report.
257. Mr. Srinath also recognized that part C was a detailed description of the simple example.
258. Mr. Srinath testified that he evaluated part C on that basis.
259. Therefore, Mr. Lundin's misunderstanding of the instructions would not affect his evaluation.
260. Mr. Srinath concluded in the following terms:
- 1) the report was too long,
 - 2) the notation was confusing,
 - 3) the report did not provide adequate explanation,
 - 4) some concepts in the report do not make sense,
 - 5) the solution is not efficient.

261. *As a result of Mr. Lundin's unsatisfactory performance in this final project, his employment was terminated.*

Summary Regarding the Final Reports:

262. *Mr. Lundin's First and Second Reports E-72/73 exemplified the various failings in performance:*

- 1) *the writing was poor,*
- 2) *he refused to listen to directions and instructions of his supervisors,*
- 3) *he was confused about simple instructions,*
- 4) *he insisted on pursuing his interests rather than focusing on the problem at hand,*
- 5) *he failed to properly implement his knowledge of statistics.*

263. *Those failings have been evident throughout Mr. Lundin's employment.*

264. *Most notably, those failings had been present consistently throughout the last two years of employment, when he was called upon to perform work of a statistician methodologist.*

265. *His termination, therefore, is not as a result of an isolated incident.*

266. *Rather, the termination follows many years of unsatisfactory performance, despite strong efforts on behalf of the Employer to help Mr. Lundin improve his performance.*

Part 4: Sufficiency of Warning

267. *The Chairperson has raised concerns about the period of warning: Was 3 months warning enough?*

268. *The main reason for requiring that the employer warn an employee before termination for incompetence is to afford the employee an opportunity to demonstrate their competence.*

269. *In my respectful submission, additional time would not have made a difference in this case.*

270. *Mr. Lundin was at the time and continues to be convinced that his approach to the problem given him by Mr. Armstrong was correct.*

[Mr. Lundin testified that even with an earlier warning, his statistical approach would have been the same.]

271. *Therefore had the warning been given in January, or even in November, Mr. Lundin would have produced the same two reports.*

[Mr. Lundin said that had he received an earlier warning, he would have provided more details and information and this is what he was criticized for by Messrs. Tambay and Srinath.]

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272. *The poor writing would not have improved.*
273. *The incorrect application of statistics would not have been avoided.*
274. *Given Mr. Lundin's incorrect application of statistics, no amount of warning would have resulted in an improvement of his performance.*
275. *Therefore, any amount of warning would have made no difference to the unsatisfactory rating that Mr. Lundin received.*
276. *Moreover, Mr. Lundin's poor performance arose directly out of his refusal to submit to the comments and criticisms of his superiors.*
277. *That attitude would not have been affected by an additional amount of warning time.*
278. *Even today, more than a full year after the warning, Mr. Lundin continues to insist on his correctness, and continues to refuse the comments of his superiors regarding statistics.*
279. *Therefore, in my respectful submission, even with more advanced warning, the outcome would have been the same.*
- [The formula would have been the same; his approach would have remained the same; the criticisms would still apply. His reports were too long, too verbose and confusing.]
280. *In this case, given the nature of failings in Mr. Lundin's performance, reinstatement is clearly inappropriate and unwarranted.*
281. *Even in the face of a hearing on his termination, a full year after the warning, Mr. Lundin continues to exhibit the attitude and failings in performance that were the cause of his unsatisfactory performance.*
282. *With respect to his writing skills; when asked yesterday by the chair whether he could write the report more clearly, he said he could.*
283. *BUT he maintained that his supervisors cannot understand his theory because it may be too complicated for them.*
284. *In my submission, that does not demonstrate a willingness to admit that there was anything wrong in his performance, with respect to writing skills or the contents of the reports.*
285. *To the contrary, he continues to maintain that he is correct in his analysis, and that the senior statisticians are wrong in their criticisms and comments.*
286. *If Mr. Lundin is not willing to admit that there was something wrong with his performance, relating to his writing abilities or statistical approach, then what assurance*

does the Chairperson have that upon his return to work he will improve those failings in his performance?

287. Would it not instead increase his resolve to demonstrate to his superiors that he is correct in his approach?

288. Would we all not be back to this hearing a year from now?

Part 5: Health Concerns:

289. Mr. Lundin has testified that some of his failings in performance were a result of his health concerns regarding exposure to fumes from renovations.

290. No casual link has been established between the failings in performance and the health concerns.

[No medical evidence was submitted to demonstrate this.]

291. We have heard no medical evidence to demonstrate that the poor writing skills, the refusal to follow directions of superiors, and the incorrect application of statistics were as a result of allergic reactions.

292. To the contrary, Mr. Lundin has maintained that his performance was in fact satisfactory and up to standards required of an MA-STA-03.

293. Also, in the period of the greatest activity of renovation near Mr. Lundin's floor, namely September 1992 to December 1992, Mr. Lundin worked at home 90% of the time. Therefore, there could not have been any effect.

294. Mr. Lundin testified that afterwards, the level of renovations were reduced substantially, and yet the poor performance persisted.

295. In any case, the Employer cannot be blamed for poor performance in connection with any health concerns, because the Employer had taken considerable steps to accommodate Mr. Lundin's health concerns.

296. In particular, the Employer allowed Mr. Lundin to work in alternate locations and at home to prevent exposure of Mr. Lundin to any effects of renovations.

297. Finally, Mr. Lundin had ample opportunity to raise his health concerns to explain his poor performance during the many performance reviews, or during the grievance process.

298. He has never done so.

Conclusion:

299. The testimony given by all the supervisors supported the testimony given at the outset by Mrs. Chinnappa, the Director of the Business Survey Methods Division.

300. Mrs. Chinnappa's testimony is indicative of the Employer's attitude towards Mr. Lundin.

301. This is not an Employer that was bent on getting rid of Mr. Lundin.

302. To the contrary, as Mrs. Chinnappa demonstrated by her deportment during her testimony, this is an Employer that cared about Mr. Lundin.

303. This is an Employer that accommodated Mr. Lundin in any way that was possible.

304. This is an Employer that desperately tried to find suitable work for Mr. Lundin to enable him to improve his performance.

305. This is an Employer that took much time to counsel Mr. Lundin and provide feedback to him to assist him in improving his performance.

306. The efforts of the Employer can be summarized by the following:

- 1) provision of training,
- 2) allowing Mr. Lundin to try assignments in different sections and with various supervisors,
- 3) substantial commitment of supervision,
- 4) flexibility in work arrangements, and,
- 5) substantial feedback on performance.

307. Unfortunately, Mr. Lundin's performance did not improve, despite the Employer's best efforts to help him.

308. Another similar test is provided by Stephen Krashinsky and Jeffrey Sack in their book **Discharge and Discipline**, 2nd edition, at page 149. They state that an employer can discharge an employee for incompetence if the following seven [criteria] are met:

- 1) the employer communicated reasonable standards of performance to the employee,
- 2) that suitable instruction and supervision were given,
- 3) that the employee was given an opportunity, with assistance, to meet the standards required,
- 4) that the employee was incapable of meeting the requisite standards,
- 5) that reasonable efforts were made to find alternative work for the employee,
- 6) that formal notice was given that the employee's job was in jeopardy.

309. The employer has complied with each one of these criteria.

310. Based on the evidence, it is respectfully submitted that the Employer was up front and fair with Mr. Lundin by informing him of his failings in advance and in a regular fashion over some period of time.

311. Moreover, it is submitted that the Employer provided Mr. Lundin with sufficient opportunity to improve his performance by providing opportunities to work on different assignments and for different supervisors.

312. Hence, the Employer has met the test set out in **Stitt**, and that it made its decision to terminate Mr. Lundin in good faith based on reasonable grounds that Mr. Lundin was incapable of meeting the performance requirements of his position.

Mr. Lundin argued that the performance reviews on which the employer relied to terminate his employment are invalid under Article 41 of the Master Agreement. Mr. Lundin added that he has never been shown a performance related document that was placed on his personnel file. He was not told that these reviews were performance assessments and he should have been told this. Therefore, these reviews are not related to performance. Mr. Lundin added that had these "review forms" indicated that they were going to be placed on his personnel file, he would have reacted differently. He would have challenged them because he saw in them threats, discrimination and harassment. Mr. Lundin pointed out that he had no idea what their purpose was. He recognized that all these assessments were, all along, on his personnel file.

Mr. Lundin submitted that when he returned to the BSMD on July 1, 1992, and since the employer had asked for a health evaluation, a "process" was developed as of that date. The evidence is the fact that the employer used a form, "Performance Review and Feedback" (Exhibit 33), which could no longer apply to him because this form is used for promotions (e.g., Exhibit 69). Mr. Lundin referred also to Exhibit 69 where it is indicated that the documentation would be forwarded to Personnel. Thus, his view of the documentation influenced Mr. Lundin's actions. Mr. Lundin called the reviews "counterfeits".

Mr. Lundin reviewed all the documents submitted in evidence and named those he felt related to "health" (Exhibits 22, 23, 24, 25, 26, 27, 28, 30, 31, 33, 35, 36, 41 and 48).

Mr. Lundin argued that the assessment of "satisfactory" or "unsatisfactory" is a violation of "Statistics Canada standards" because the new PRAR form (Exhibit 68) does not provide specifically for such an assessment.

Mr. Lundin submitted that he had demonstrated a continuous improvement because he had been promoted to the MA-STA-03 level in 1989. Therefore, there had been improvement from 1985 to 1989. In March, 1989, his performance had been

rated fully satisfactory by Mr. Joel Yan (Exhibit 77). Mr. Lundin insisted that the CAD to the Geocartographics Division for the period April 20, 1988 to March 31, 1989, concerned work at the MA-STA-03 level (Exhibit 11) under the direction of Mr. Yan. Mr. Lundin referred also to Dr. Deecker's PRAR of March, 1989 to March, 1990 (Exhibit 16) where it is said that "he has shown good mathematical analysis skills and had improved in his knowledge of GIS technology, writing skills and interpersonal relationship skills. In addition, he had an excellent command of statistics".

Mr. Lundin argued that basically this PRAR of March, 1990 is his last appraisal. He considered that between March, 1990 and January 1, 1993, there were no "official" PRAR forms. Thus, there are no negative comments concerning his performance from 1987 to 1994. Mr. Lundin added that he was not sure what the memorandum of April 29, 1994 from Ms. Chinnappa meant (Exhibit 58). In this memorandum, Ms. Chinnappa informed him that if there was no marked improvement in his performance she would have no option but to take the necessary steps to terminate his employment. Mr. Lundin questioned the validity of this document. It is not a "standard statistics form" and there is no indication on it that it would be placed on his personnel file. Moreover, there is no place on this document for him to sign. However, Mr. Lundin recognized also that Ms. Chinnappa had a right to give him such a document but she should have written in it that it would go on his personnel file, otherwise, it is not a performance related form. Mr. Lundin admitted that this document could be considered a "threat" to his future employment.

Mr. Lundin reviewed his employment and various CADs. He disputed the statement of Messrs. Yan and Deecker in their PRAR of May, 1988 that during the period October, 1987 to April, 1988 Mr. Lundin worked as a junior programmer (CS) (Exhibit 9). Mr. Lundin insisted that he had worked as a MA-STA and he blames this PRAR of 1988 for the delay in his promotion to the MA-STA-03 level. He received the unsatisfactory PEER review of May 16, 1988 covering the period January, 1987 to May 15, 1988 (Exhibit 10) and therefore he was not promoted. Mr. Lundin believes that on the basis of the PRAR for the period January 1, 1987 to October, 1987, which was submitted on May 24, 1988 (Exhibit 6), one year later, and the PEER review of May 16, 1988 (Exhibit 10), the employer used the unsatisfactory assessment of these two documents for the rest of his six years of employment. Mr. Lundin also believes that he was finally promoted to the MA-STA-03 level in 1989 because he had

presented a grievance in 1988 and he referred to the second level reply denying his grievance (Exhibit 75). (Mr. Lundin did not submit any evidence in this regard and, in particular, as to whether he was promoted because of his grievance). Mr. Lundin added that when the employer started with the performance assessments as of July, 1990, he was "cautious as to what they were". He submitted that he did not know that he could present grievances concerning these reviews. Thus, he decided "not to sign these reviews and simply ignore them".

Mr. Lundin reviewed his work under the direction of Mr. Finlay. He argued that he refused to work where renovations were taking place. In his view, his employment was terminated because he complained about the renovations and pollutants. He submitted that "this was a set-up"; the employer wanted to get rid of him because of his complaints. He added that several other employees had also complained but they are still employed. The employer chose him because he sent a copy of his memorandum to Mr. Priest of April 21, 1992, to Mr. Fellegi and Mr. Fellegi replied (Exhibits 23 and 26). In support of this argument, Mr. Lundin referred to the minutes of the meeting of July 6, 1992 with Mr. Cheung (Exhibit 30). Mr. Lundin feels that he was discriminated against because of his sensitivity to paint.

Mr. Lundin also reviewed the period January to June, 1993 when he worked for Mr. Michael (Mike) Miller. Mr. Lundin insisted that the work had been done according to Mr. Miller's instructions. Mr. Lundin read Mr. Dave Dolson's appraisal of October 21, 1993 of his performance (Exhibit 45). According to Mr. Lundin, it was Mr. Miller who came up with the variable. (No corroborating evidence, however, was adduced in this respect). Mr. Lundin explained that the equations found in Exhibit 46 "worked in that situation". Exhibit 46 are minutes of the meeting of November 3, 1993 between Messrs. Armstrong and Lundin where Mr. Armstrong provides calculations. However, according to Mr. Lundin, "there were later changes in the population" so the equations did not work any longer.

Mr. Lundin referred also to the highly technical discussion during his cross-examination of Mr. Armstrong. Mr. Lundin insisted that Exhibits 46 and 52 concern two different questions and designs. According to Mr. Lundin, Exhibit 52 asks that he base his report on Messrs. Armstrong, Block and Srinath's paper (Exhibit 79). Mr. Lundin then produced Exhibit 72 on the basis of Exhibits 52, and 73

as a result of Exhibit 60. In his view, the instructions he received after January, 1994 did not include the "simple random sample". For Mr. Lundin, Exhibit 60 indicates that he was to use Mr. Armstrong's example of Exhibit 54 (one-phase sample over two years). Thus, according to Mr. Lundin, when Mr. Tambay evaluated the problem, he thought Mr. Lundin was solving the problem with a simple textbook technique. However, Mr. Lundin's instructions were to use Messrs. Armstrong, Block and Srinath's paper (Exhibit 79). Exhibit 79 provided a more complicated situation and Mr. Lundin feels he did develop the methodology for it. Then, he was instructed to rewrite the document. Mr. Lundin saw confusion in the situation and in the assessments by the reviewers because of these different sets of instructions. Mr. Lundin explained that the instructions were that he had to come up with a solution (Exhibit 52). Therefore, he was doing research with a "think tank" understanding (Exhibits 72 and 73). Mr. Lundin is confident that his methodology works. The problem was extremely complicated and he did define the notations. Mr. Lundin admitted that he was confused about the instructions and pointed out that so was Mr. Tambay. Furthermore, the reviewers were not open to discussions. According to Mr. Lundin, Mr. Srinath's formula (Exhibit 66) does not work and Mr. Tambay said that the Horvitz and Thompson estimator is not as efficient. On the other hand, Ms. Chinnappa said the concept of "conditioning" was vague.

Mr. Lundin referred also to his requests to Ms. Chinnappa for documents (Exhibits 83 and 84) and that any information she provided to him orally is invalid under Article 41 of the Master Agreement. Mr. Lundin referred also to the MA-STA-04 competitions. In his view, he was prejudiced because his employment had been terminated. Mr. Lundin added that had he been given more time (six months) as of April 29, 1994, he would have put together a team to assist him with his notations.

Mr. Chabursky replied that Mr. Lundin had 11 months to do the project (Exhibits 72 and 73). He had every opportunity to put a team together but he did not do so. Mr. Lundin ignored instructions and suggestions from Mr. Armstrong. Why would he then have listened and followed these instructions had he been given another six months? He received plenty of warnings and instructions: November 8, 1993 (Exhibit 47); November 19, 1993 (Exhibit 49); December 16, 1993 (Exhibit 51); January 21, 1994 (Exhibit 52); February 7, 1994 (Exhibit 54) and April 12, 1994 (Exhibit 55). Mr. Lundin was not supposed to work in a "think tank"

fashion. The evidence demonstrates (Mr. Armstrong's testimony) that he was serving a specific client (Exhibits 47, 51, 52 and 55). Mr. Lundin has a tendency to concentrate on only one part of a project. Messrs. Deecker, Yan and Cheung demonstrated this (Exhibits 14, 19, 33 and 34).

Mr. Lundin has a serious problem. He ignores suggestions and does not follow instructions. A further warning period would not have helped him overcome this problem. Moreover, Messrs. Srinath and Tambay did review Mr. Lundin's reports based on the Bernoulli sampling (Exhibits 57, 63, 65 and 67).

Arguments on the two Complaints
(Board files 161-2-744 and 160-2-45)

Mr. Lundin submitted that he has no knowledge as to what occurred after he sent his memorandum of April 21, 1992 to Mr. Priest (Exhibit 23). The employer may have fulfilled the obligation under subsection 128(7) of the *CLC*.

Mr. Lundin continued to work. During mid-April to June, 1992, the situation with the renovations aggravated so Mr. Finlay felt that Mr. Lundin's health should be evaluated (Exhibits 22 and 25) and the CAD was terminated. Thus, Mr. Lundin returned to the BSMD, his home division, located at the R.H. Coats Building as of July, 1992. At the time, the health evaluation requested by Mr. Finlay was still pending. Ms. Chinnappa had received Mr. Finlay's remarks of June 25, 1992, indicating that Mr. Lundin felt that his performance difficulties were attributed to his reaction to chemicals being used in the renovations (Exhibit 22) and Mr. Lundin's memorandum to Mr. Priest of April 21, 1992 (Exhibit 23). Shortly thereafter, Mr. Lundin was placed on "performance review". According to Mr. Lundin, this process did not apply to him because he was already a MA-STA-03 (Exhibit 69). This process resulted in the termination of his employment (Exhibit 1).

Mr. Lundin argued that the performance reviews as of 1989 were invalid. Therefore, since June, 1987, he has only received one unsatisfactory appraisal (Exhibit 6) because it was written on an "official" form. The other appraisals cannot be considered because they were not "official". Even the unsatisfactory PRAR of January to October, 1987, from Mr. Hoyt (Exhibit 6) is questionable because it was signed on July 28, 1988, after Mr. Lundin had received a fully satisfactory appraisal

from Mr. Yan (Exhibit 9) signed on May 16, 1988. Mr. Lundin ignored the PEER of May 16, 1988, because the form was invalid and the PRAR is dated one year later. Mr. Lundin argued that Exhibit 77 was a valid appraisal form. It is fully satisfactory and covers the period February, 1988 to February, 1989. Mr. Lundin submitted that, at the time, he worked as a MA-STA-03 and was paid as such. (Mr. Yan and the employer dispute this allegation). Mr. Lundin asked that I also consider Dr. Deecker's PRAR (Exhibit 16) and ignore all other appraisals.

Mr. Lundin stated that Messrs. Finlay and Monty were "good guys". There were circumstances beyond Mr. Lundin's and their control (such as the renovations). They granted Mr. Lundin the alternative work locations. He has "no problem with Mr. Finlay's actions". However, the knowledge of Mr. Lundin's memorandum to Mr. Priest of April 21, 1992 (Exhibit 23) led to the termination of Mr. Lundin's employment. The review process was invalid and in the assessments "the supervisors" talked about "health matters". Mr. Lundin gave the examples of Exhibits 30 and 89 as "health-related aspects being discussed" with Mr. Cheung. Mr. Lundin submitted that he did not understand the process and that all these assessments (as of July, 1992) were performance reviews. In his mind, he understood that it was a process for which he could be demoted. (No evidence was submitted in this regard). He added that these reviews could have been health assessments. He found this even more confusing because these forms had no place for the signature of a medical officer. Concerning Mr. Miller's appraisal of March 18, 1993 (Exhibit 41) for the period January and February, 1993, Mr. Lundin remarked that he is not sure whether this document is a health evaluation, a performance evaluation, or some form of the B.S.M.D. related to promotion. Mr. Lundin considers that his employment was terminated because he provided information to Messrs. Priest and Monty and others as per paragraph 147(a)(ii) of the *CLC*.

Mr. Chabursky presented written arguments in point form with respect to the complaint under section 133 of the *CLC*. I have reproduced these arguments hereunder.

Introduction:

1. *This case concerns a complaint brought by Mr. Lundin pursuant to section 133 of the Canada Labour Code Part II (the Code).*
2. *Mr. Lundin alleges that the Employer, Statistics Canada, and more specifically Mrs. Chinnappa, former Director of the Business Survey Methods Division, violated section 149 of the Code by terminating his employment on September 30th, 1994, in response to his alleged refusal to work on March 16th, 1992.*
3. *There are two main issues in this case:*
 - 1) *Was there a refusal to work pursuant to section 128 of the Code, or a continuation of a refusal to work pursuant to section 129 of the Code?*
 - 2) *Was Mr. Lundin terminated in response to his alleged refusal to work?*
4. *This case does not constitute an inquiry pursuant to section 130 of the Code to determine whether the Employer violated standards of health and safety.*

Facts:

5. *On March 16th, 1992, Mr. Lundin wrote to Mr. A. Monty requesting an alternative work arrangement to prevent exposure to renovation fumes (Exhibit E-70).*
6. *The Employer immediately complied and accommodated Mr. Lundin's request, offering him the opportunity to work away from the renovations to prevent exposure to fumes.*
7. *According to the evidence, Mr. Lundin worked in various locations in the buildings of Statistics Canada, and at home until his termination in August 1994.*
8. *At no time was Mr. Lundin forced by the Employer to work at a location that exposed him to fumes from renovations.*
9. *Mr. Lundin testified that he had a good arrangement with the Employer, and that he did not want anything more from the Employer in terms of accommodation of his health concerns regarding exposure to fumes.*
10. *The facts relating to the assessments of Mr. Lundin's performance from July 1992 to August 1994, and the circumstances of his termination in August 1994 are in evidence in the case related to his termination, 166-2-26174.*

Refusal to Work:

11. *According to subsection 133(3), a complaint may only be considered pursuant to section 133 of Code if the complainant has complied with either subsection 128(6) or subsection 129(1).*

12. *Mr. Lundin alleges that his letter to Mr. Monty, E-70, constitutes a refusal to work pursuant to section 128 of the Code.*

13. *It is respectfully submitted that a refusal to work occurs only when an employee without the prior permission or concurrence of the employer refuses to perform assigned work as a result of fear for personal safety and health.*

14. *Mr. Hugh Finlay, Mr. Lundin's supervisor at that time testified that Mr. Lundin never refused to work.*

15. *There is no evidence that Mr. Lundin refused to perform his work.*

16. *A request to work in a different location does not constitute a refusal.*

[The CLC provides protection to the employee so that the employee can refuse and not just to cover a request for some action or to provide information.]

17. *In this case, no disagreement arose between the employee and the employer with respect to Mr. Lundin's health concerns, requiring Mr. Lundin to refuse work.*

18. *To the contrary, Mr. Lundin was immediately accommodated.*

19. *Mr. Lundin is barred from complaining pursuant to section 133 of the Code, because he did not invoke Part II of the Code at the time of his alleged refusal to work.*

20. *In three previous cases, the Public Service Staff Relations Board ruled that in order for a complaint to succeed pursuant to section 133 (formerly section 104) of the Code, the employee must immediately inform the employer that he or she was invoking his or her rights and was refusing to work under Part II (formerly Part IV) of the Code*

*Marc Paquet v. Treasury Board, 160-2-25,
December 1st, 1987, (J.M. Cantin)*

*Alfred Koller v. Treasury Board, 160-2-27,
March 28th, 1988, (I. Deans)*

*Vincent Bonfa v. Treasury Board, 160-2-32,
May 25th, 1989, (J. Galipeault)*

21. *The Canada Labour Relations Board also ruled that a complaint pursuant to section 133(3) was barred when an employee waited five days after an incident before seeking the protection of the Code.*

Murray v. Voyageur Colonial Ltd. (1991), 85 di 18 (Can.L.R.B.)

22. *According to Exhibit 23, dated in April, 1992, after the alleged refusal to work, Mr. Lundin stated that at some time in the future he may have to formally seek protection under Part II of the Code.*

23. That clearly indicates that in March, 1992, Mr. Lundin did not invoke Part II of the Code, and did not inform the Employer that he was doing so as required by subsections 128(6) or 129(1).

24. Mr. Lundin testified that he never did formally invoke or seek protection under Part II of the Code.

25. It is therefore respectfully submitted that Mr. Lundin never invoked his right to refuse to work pursuant to section 128 of the Code, Part II.

26. Not having complied with subsection 128(6) of the Code, Mr. Lundin cannot succeed in a complaint pursuant to section 133.

27. Mr. Lundin never informed a Safety Officer of this matter as required by subsection 129(1) in cases of a continuation of refusal to work.

Allegation against Mrs. Chinnappa:

28. Mr. Lundin alleged that Mrs. Chinnappa terminated him because he raised concerns about his health.

29. More specifically, Mr. Lundin alleged that in July, 1992, Mrs. Chinnappa instituted the process of bi-monthly performance assessment in order to terminate his employment in August, 1994.

[The negative assessments started much before 1992. In this regard, see Exhibits 14, 18, 19 and 22.]

30. That allegation implies that in July, 1992, Mrs. Chinnappa had already decided to terminate Mr. Lundin's employment, and that she designed the assessment process as a mechanism to substantiate that decision.

31. Mr. Lundin has presented no credible evidence to support that contention.

32. To the contrary, Mrs. Chinnappa testified that she sincerely tried to find an arrangement in which Mr. Lundin could improve his performance.

33. Mrs. Chinnappa testified that the assessments were designed to provide Mr. Lundin feedback so that he could improve his performance.

[Mrs. Chinnappa testified that she sat with Mr. Lundin in July, 1992 to explain the purpose of these assessments.]

34. Mrs. Chinnappa testified that only in spring of 1994 did she realize that Mr. Lundin's performance was not improving and that it appeared that he could not continue to work as an MA-STA-03 for Statistics Canada.

35. Mrs. Chinnappa also testified that she was reluctant to terminate Mr. Lundin, but had no choice after exhausting all possible avenues to help Mr. Lundin improve his performance.

36. *Mr. Lundin's deep suspicions of the Employer have caused him to interpret facts in a way that is beyond any standard of reasonableness.*

[There is also the reference to the pregnant employee and others who also raised this matter and their employment was not terminated.]

37. *Such thinking reinforces the inappropriateness of his reinstatement in any case.*

38. *It is respectfully submitted that there is no proof of Mr. Lundin's allegations and therefore that there is no merit in his complaint.*

39. *It is respectfully submitted that the complaint should therefore be dismissed.*

With respect to Board file 160-2-45, Mr. Lundin argued that in the case of his complaint under section 133 of the *Canada Labour Code (CLC)* he had refused to work pursuant to section 128 of the *CLC*. In support of this argument, Mr. Lundin read his memorandum of March 16, 1992 to Mr. André Monty (Exhibit 70):

ALLERGIES TO PAINT AND FUMES

I am severely allergic to paint and similar types of fumes. Normally, this does not have an influence on my work or working conditions. However, on Monday, March 16, 1992, I discovered that parts of the 8th floor, Jean Talon Building, have been freshly painted. This paint is causing problems with my coordination and speech.

I am requesting alternative arrangements be made so that I can continue my work. I could try the library for awhile (sic) and pick up my phone messages as required in BRD.

Mr. Lundin added that an arrangement was made and he worked under such an arrangement until September, 1994. He expressed the view that he also satisfied the requirements under subsection 128(6) of the *CLC*.

Concerning his second complaint, Board file 161-2-744, Mr. Lundin submitted that he was trying to exercise his rights according to all the provisions of his collective agreement. The employer, by intimidation or threat, wanted and did remove Mr. Lundin as a member of the Mathematics bargaining unit. The employer also violated subsection 8(2)(c) and section 57 of the *PSSRA* when it refused to implement

Article 41 of the Master Agreement. Mr. Lundin had a right under clause 41.05 and the employer violated paragraph 8(2)(c)(ii) of the *PSSRA*. Mr. Lundin reviewed the evidence as it related to this argument.

In regard to the complaint under section 23 of the *PSSRA*, Mr. Chabursky said that pursuant to Article 41 of the Master Agreement, it is the employer who prescribes the form to be used. Ms. Chinnappa did so and the form she prescribed was the one used to review Mr. Lundin's performance. Moreover, Article 41, and in particular clause 41.05, make no mention that the employee shall be informed that a report is being placed on the employee's personnel file. The evidence demonstrates that the employer tried to assist Mr. Lundin and there was no intimidation executed because he raised health concerns. The right of union membership and belonging to a bargaining unit is not for life. Such a pretention is ludicrous and inappropriate. The employer has the right to dismiss an employee for cause. Mr. Chabursky concluded that Mr. Lundin has amply demonstrated that reinstatement in his case is inappropriate. Even during the hearing of these cases, Mr. Lundin demonstrated the employer's allegations that he has difficulty understanding instructions and suggestions.

Determination

File 166-2-26174: Termination of employment on grounds of unsatisfactory performance

The employer has the burden of proof in cases of termination of employment. The evidence submitted by the employer in support of its allegations has been extensive. The employer detailed the performance of Mr. Lundin during his whole period of employment with Statistics Canada. The written documentation was supported by viva-voce evidence.

The evidence submitted by the employer supported its allegation that the work performed by Mr. Lundin, and this since 1987, was not satisfactory. His work was assessed fully satisfactory when he worked for Mr. Yan in Geocartography during the period of September, 1988 to March, 1989 as a Junior Programmer (CS). However, Mr. Yan still considered his report incoherent, unusable and unsatisfactory. Someone

had to rewrite it. Mr. Lundin refused to recognize that he worked as a Junior Programmer when he was finally promoted retroactively to January 1, 1989. The employer's evidence has convinced me that I should prefer Mr. Yan's version as to what kind of work Mr. Lundin performed when he was assessed fully satisfactory.

Moreover, Mr. Lundin's performance was consistently unsatisfactory from April, 1990 to his dismissal in September, 1994. The employer documented in great detail this poor performance and I need not repeat it here. I have summarized this evidence in detail earlier in this decision.

In March, 1991, Dr. Deecker requested that Mr. Lundin's report as a methodologist be reviewed. This review indicated that it was unsatisfactory. The reproaches are the same throughout Mr. Lundin's tenure at Statistics Canada. All the witnesses (except Mr. Lundin) agree that Mr. Lundin produced unsatisfactory reports. His reports were incoherent, incomprehensible, confusing, difficult to read, too long, repetitive and weakly organized. He used poor grammar. He did not define terms and refused to follow instructions. He seemed to have a problem understanding what the employer required him to do. He was not a team player and did not ask for advice. I find that he demonstrated this last shortcoming in the handling of his grievances and complaints. He argued that he did not know that he could present grievances against the PRAR's and appraisals. He could have asked the PIPSC or someone else for advice or even read the Master Agreement in this regard. In addition, he refused the PIPSC's assistance during the hearing of these matters. However, he did present a grievance when he was refused a promotion to MA-STA-03, so he knew that the grievance procedure was available to him. The evidence demonstrated that Mr. Lundin is not one to listen to other people's advice. When he was asked during this hearing, what he would do differently if he had more time or another chance to rewrite Exhibits 72 and 73, he replied that he could not have done a better job. He would still write the same methodology (which the employer found unsatisfactory) but he would expand the report considerably. He would increase the formula and provide more information. This reply is significant in light of the comments and reviews of these two reports (Exhibits 72 and 73) by Messrs. Armstrong, Tambay, Srinath and Ms. Chinnappa. They all echoed the same criticisms, the poor writing skills. The reports were difficult to read, confusing, too

long and repetitive. He could not express his thoughts clearly. Even though all witnesses explained these problems with his work and reports, Mr. Lundin maintained his views that his work was fully satisfactory and that he would not change the reports except by expanding them further. This is exactly what the employer did not want. They wanted something clear, concise, well written and very understandable.

Mr. Lundin never contested the content of any of the PRAR's and appraisals. He only objected to the form. Thus, the content, comments and criticisms are uncontested. These documents and the oral testimony in support from all the witnesses called by Mr. Chabursky confirm Mr. Lundin's poor performance.

Mr. Lundin never raised his health concerns and allergies to the building renovations as a possible ground for poor performance. Moreover, even if he had done so, there is no merit in such an excuse because Mr. Lundin worked 90% of the time elsewhere than where the renovations were taking place and later on three days a week and then only one day a week. This accommodation continued until the termination of his employment. There is simply no compelling evidence that the renovations had affected his performance. On the contrary, I find that the renovations had no effect on his performance because he had not worked in proximity to the renovations. He decided where to work and when to come to the permanent location of his office.

Even at the hearing, Mr. Lundin did not challenge the remarks about the poor writing skills and incoherence of his reports. He zeroed in on the mathematical formulas and the methodology. The witnesses maintained their positions regarding the poor assessments of his work and Mr. Lundin did not provide any other evidence than his own declaration to support his view that his methodology was correct.

The employer tried to assist Mr. Lundin to overcome his poor performance. He was sent on CAD's and courses. He attended seminars and symposiums. He received on the job training and he was closely supervised. However, nothing helped. Mr. Lundin continued having the same problems and he did not recognize his shortcomings. He felt that he knew better than his supervisors which was the appropriate methodology for the problem he was asked to resolve. Mr. Lundin was a

hard worker but he was unable to understand what his supervisor was requesting. Mr. Yan testified that Mr. Lundin refused to make major deletions to his report. Mr. Finlay declared that he provided Mr. Lundin with a series of directions but they were not acted upon. Mr. Lundin refused to respect his supervisor's (Mr. Finlay) instructions as to what his report should look like. Mr. Lundin could not concentrate on relevant matters. Neither could he follow Mr. Cheung's instructions. Mr. Lundin chose to work on something other than what Mr. Cheung had asked him to do. He could not focus on what was required. Mr. Armstrong echoed these remarks.

Mr. Lundin saw his supervisors' criticisms as "honest differences of opinion". This was demonstrated during his cross-examination of the witnesses. However, the problems with his performance were much more than that and he failed to recognize them. This failure resulted in his attitude to ignore the employer's unsatisfactory appraisals of his work. Mr. Lundin believed that the appraisals from July, 1992, starting with Mr. Cheung's, could not be considered as valid comment on his performance or that they were without consequence. He simply refused to acknowledge them and the end result was his dismissal. This is the "Ostrich Syndrome". He believed that by ignoring these appraisals, "they would go away". He simply put his head in the sand and continued working as he always did. But these appraisals are performance reviews. The form clearly indicates that. They explain the work he had to do, the objectives, the project and how he had performed. They were official documents and each was discussed twice with him. First by his immediate supervisor alone, then in the presence of Ms. Chinnappa. Surely, he must have realized the seriousness of the situation and that receiving poor performance reviews may result in a demotion or the termination of his employment. Any reasonable person would reach such a conclusion. Any reasonable person would also have contested these poor appraisals if there was a legitimate reason to do so.

I find that the employer and, in particular, Ms. Chinnappa demonstrated great patience and sympathy towards Mr. Lundin. They provided training, CAD's, various supervisors, different types of work and projects, different people to review his work and every opportunity for Mr. Lundin to improve his performance and/or prove that he could perform at the MA-STA-03 level. Mr. Lundin wanted to work as a methodologist and he refused to continue to work in Geocartography as a Junior

Programmer (CS). Unfortunately, Mr. Lundin could not perform as a MA-STA-03. The employer has amply demonstrated this. Nothing more could be expected from this employer in the circumstances of this case. The employer did everything possible to try to improve Mr. Lundin's poor performance and advise him that he had to improve. Mr. Lundin chose to ignore the employer's instructions and advice, and recognize that he had to do something about his poor performance.

For all the above reasons, Mr. Lundin's grievance concerning the termination of his employment is hereby dismissed.

Determination with respect to the complaint under section 133 of the Canada Labour Code, Part II (CLC) (Board file 160-2-45)

Mr. Lundin submitted that his memorandum to Mr. André Monty of March 16, 1992, constituted a refusal to work pursuant to section 128 of the *CLC*. The relevant subsections of section 128 read:

128(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place.

128(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(a) a member of the safety and health committee, if any, established for the work place affected; or

(b) the safety and health representative, if any, appointed for the work place affected.

128(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

128(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that

(a) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or

(b) a condition continues to exist in the place that constitutes a danger to the employee,

the employee may continue to refuse to use or operate the machine or thing or to work in that place.

The evidence adduced by the employer as well as the statements of Mr. Lundin, demonstrated that the employer accommodated Mr. Lundin's health concerns. At no time did the employer contest Mr. Lundin's health condition or his request to work elsewhere. He was allowed to work wherever he chose. It was Mr. Lundin who chose the various work locations at Tunney's Pasture and to work at home three days a week and later only one day a week. The employer never asked him to work at his office during the renovations.

Mr. Finlay testified as to the accommodations concerning Mr. Lundin's health concerns during his CAD in his section (fall 1991 to June, 1992). Mr. Lundin took walks outdoors every hour, he was relocated to the cafeteria and elsewhere on-site. Then, Mr. Lundin worked for Mr. Cheung from July to December, 1992. During this period, Mr. Lundin was asked to keep Mr. Cheung informed about the air quality

problem at the R.H. Coats building where he worked and Mr. Cheung relied on Mr. Lundin to report whenever he was affected by the renovations. When he did so in September, October and November, 1992, the employer took immediate action. Mr. Lundin chose to work in room 3000, a different site in the same building. He worked there with a number of other employees who had the same health concerns. Every request of Mr. Lundin was acceded to by Mr. Cheung (such as other work sites, opening windows, etc.). Finally, as of November 30, 1992, Mr. Lundin was authorized to work at home. However, it was Mr. Lundin who preferred to work in the building under renovation. Mr. Lundin was also allowed to use the cafeteria of the Jean Talon building for meetings with Mr. Cheung. Mr. Cheung offered to Mr. Lundin options (such as to pick up his diskettes from his home or do his printing) for him not to be obligated to come to the office. The evidence has also demonstrated that during the whole period of the renovations (Messrs. Finlay, Cheung and Miller) Mr. Lundin never brought up the health issue. He never suggested that his performance was affected by the renovations and the allergies.

During Mr. Miller's supervision (January to July, 1993), Mr. Lundin was again accommodated. He worked at home but by March, 1993, Mr. Lundin decided to work at home only one day a week. Mr. Miller testified that Mr. Lundin's work could be done at home. Mr. Lundin was granted much discretion and flexibility as to where he wanted to work. From mid-July, 1993 to September, 1994, when Mr. Armstrong became his supervisor, there were no longer any renovations. However, Mr. Lundin was still working one day a week at home. The employer continued with this arrangement even though it was no longer necessary. In addition, Mr. Armstrong advised Mr. Lundin that the employer would authorize him to work more days at home if he so wished. There were no operational reasons for him not to be authorized to work at home.

This evidence leads me to the conclusion that the employer acted in good faith. The employer demonstrated great patience and flexibility. The employer gave Mr. Lundin much discretion to choose his work location. At no time did Mr. Lundin refuse to work. On the contrary, when he advised his employer that he had allergies, he was authorized to choose where he wanted to work. Mr. Lundin never advised his employer in clear and unambiguous terms that he refused to work pursuant to section

128 of the *CLC*. Moreover, Mr. Lundin testified that none of his supervisors were upset with the work arrangements or because he had raised health concerns. He recognized that the employer had acted reasonably in this regard. Mr. Lundin recognized that had he asked to work more days at home, this would have been granted forthwith.

Mr. Lundin did inform the employer and Mr. Priest on April 21, 1992, that the renovations gave him strong health reactions and if the fumes and hazardous chemicals persisted, he may have been forced "to seek official recognition of the problem by Labour Canada and/or obtain workman's compensation for medical reasons" (Exhibit 23). On April 23, 1992, Mr. Priest replied that his memorandum was not clear concerning what action he wanted from the committee on Occupational Safety and Health, and to please advise if he wanted his situation to be discussed specifically (Exhibit 24). In addition, Mr. Fellegi, on behalf of the employer, asked Mr. Lundin the same question, that is what did he expect and want to be done in this regard (Exhibit 26). On May 19, 1992, Mr. Lundin wrote again to Mr. Priest detailing his personal health situation with respect to the renovations and requested: "Ensure the adequate fresh (outside) air is added to the STATSCAN building to maintain a high air quality".

Mr. Lundin testified that his memoranda to Mr. Priest (and Mr. Fellegi) were of an informational nature. He claims it is the memorandum to Mr. Monty of March 16, 1992 (Exhibit 70) which started the process ending in his dismissal and which constitutes his refusal to work under the *CLC*.

Mr. Lundin declared also that it was only on September 1, 1994 (Exhibit 86) that he submitted a claim to the Workers' Compensation Board and he never pursued the matter with the COSH. Moreover, he had no knowledge as to what action, if any, the COSH took with respect to his memoranda. His lack of interest in this regard is understandable since Mr. Lundin had already arranged with the employer to work elsewhere. Mr. Lundin explained that his memoranda to Mr. Priest were for the purpose of warning other employees concerning the renovations and health hazards.

Mr. Lundin testified that at no time did he seek "official recognition by Labour Canada" and he never asked for the intervention of a Safety Officer. As a matter of fact, he did not request any further action from his employer. In addition, Mr. Lundin continued to work without interruption because of his allergies throughout the whole period of the renovations.

Mr. Lundin alleges that his employment was terminated because he had provided information to Messrs. Monty and Priest concerning the renovations (paragraph 147(a)(ii) of the *CLC*). Mr. Lundin relies on paragraph 147(a)(ii) of the *CLC*:

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees,

The employer submitted considerable and very convincing evidence in support of its allegation that the work produced by Mr. Lundin during almost his entire period of employment as a MA-STA with Statistics Canada was unsatisfactory. The only fully satisfactory work he produced was when he worked for Mr. Yan in Geocartography during the period September, 1988 to March, 1989, but the evidence was to the effect that this work was of a Junior Programmer (Computer Systems work). Moreover, Mr. Yan confirmed that Mr. Lundin's report was incoherent and difficult to read. The report was not fully satisfactory. Mr. Yan recommended that Mr. Lundin take a technical writing skills course.

Therefore, the uncontradicted evidence proved that Mr. Lundin's performance was not satisfactory. Mr. Lundin did not submit any evidence in support of his claim that the employer terminated his employment because of his memoranda to

Messrs. Monty and Priest or his requests for alternative work locations. However, the employer did prove that the reason for the dismissal was his unsatisfactory work performance since 1987.

Furthermore, section 133 refers to section 128 of the *CLC*. The relevant subsections of section 133 read:

133. (1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.

(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.

On the evidence and circumstances of this case, it is apparent that Mr. Lundin did not comply with subsection 128(6). He never mentioned a refusal to work and he never refused to work. Mr. Lundin admitted this fact. In his memorandum (Exhibit 70) to Mr. Monty he simply requested alternative arrangements and the employer promptly complied. Furthermore, Mr. Lundin indicated in this memorandum that he could try the library for a while. This indicates a clear intention that he wished to continue working albeit in another location. In light of the fact that the employer had concerns with his work performance and to avoid any misunderstanding, Mr. Lundin should have expressed clearly to his employer a refusal to work under section 128 of the *CLC*. Mr. Priest asked Mr. Lundin for clarification but Mr. Lundin did not clearly indicate what action he wanted taken on his behalf and that he refused to work pursuant to section 128 of the *CLC*. The employer, with justification, did not view Mr. Lundin's memoranda as a refusal to work under the

CLC or that he intended to invoke section 128 of the *CLC*. He should have mentioned it clearly. The memorandum to Mr. Monty makes no mention of the words "refusal to work" and/or the *CLC*. The jurisprudence is consistent in finding that the complainant must inform his employer that he is invoking the *CLC* and his right to refuse to work under section 128 of the *CLC* (Bonfa (supra), Koller (supra) and Paquet (supra)).

In Murray (supra), Mr. Michael Eayrs, member of the Canada Labour Relations Board, wrote that:

A complaint may not be brought to the Board, however, if the employee has not followed the afore-described procedures of notifying the employer and engaging in the ensuing investigation, and the notification of the circumstances to a safety officer if necessary.

In Sheila Green [(1992), 90 di 186; CLRB no. 983], the Canada Labour Relations Board decided that employees must make it reasonably clear that safety concerns form the basis of their refusal to work. In that case, Ms. Green refused to work but she provided no specific concerns. In Don Koski (1992), 88 di 191; CLRB no. 950 it was stated that an employee need not mention the *CLC* but he has to say that he refuses to work and that an objective condition of work is the cause for his refusal.

It is worthy to note the Canada Labour Relations Board decision in the case of Greg Horrill / Seller [CLRБ no. 1120, rendered on May 18, 1995]. In that case, the complainant alleged that he was dismissed contrary to paragraph 147(a)(iii) of the *CLC* because he exercised his right to refuse to work. The complainant never mentioned that he was tired at the time of his refusal nor did he subsequently contact a safety officer. The Canada Labour Relations Board refers to previous decisions where it decided that the employer has to be made aware that the employee is refusing to work for safety reasons. Mr. Seller communicated to his employer his refusal to drive and the reasons related to safety considerations (he needed to stop for rest). Moreover, Mr. Seller did call Labour Canada the next day. Thus, the Canada Labour Relations Board found that Mr. Seller had complied with sections 128 (and 129) of the *CLC*.

Contrary to Mr. Seller's case, Mr. Lundin did not say to his employer that he refused to work and he never contacted Labour Canada.

In conclusion, the complaint under section 133 of the *CLC* is hereby dismissed. The evidence demonstrated that the dismissal of Mr. Lundin did not result because he raised safety concerns. His employment was terminated on the grounds that his work performance was unsatisfactory.

Determination with respect to the Section 23 Complaint - Board file 161-2-744

Mr. Lundin argued that he was trying to exercise his rights under the PIPSC Master Agreement. In his view, the employer violated section 8 of the *Act* when he terminated his employment because he was removed as a member of the Mathematics bargaining unit. This argument has no merit. The employer has the authority and the right to terminate the employment of one of his employees. Removal of an employee as a member of a bargaining unit is a necessary consequence of dismissal. Mr. Lundin's employment was terminated on grounds of incompetence. His work performance was unsatisfactory. The employer has such an authority pursuant to subsection 11(2) of the *Financial Administration Act*:

11 (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

An employee is not guaranteed a job in the Public Service for life and this is particularly true when his work performance is unsatisfactory. The fact that he is

hired into the Public Service does not give him a right to stay there for life regardless of his performance. The employer has the right to terminate his employment for just cause. This is what occurred in the case of Mr. Lundin.

Mr. Lundin's second argument with respect to this complaint under section 23 was that he was protected under section 57 of the *Act* because the employer refused to implement article 41 of the Master Agreement. Sections 91 and 92 of the *Act* provide that Mr. Lundin had a right to present a grievance and refer such a grievance to adjudication. Section 23 has no application in this case. Mr. Lundin did in fact present a grievance even though he insisted in not having the support of and not being represented by his bargaining agent (PIPSC). Section 57 has no application in this case.

Section 57 provides:

57. (1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required by the employer, be implemented by the parties,

(a) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and

(b) where no period for implementation is specified in the collective agreement, within ninety days after the date of its execution or such longer period as the parties may agree to or as the Board, on application by either party, may set.

(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment,

(a) the alteration or elimination or the establishment of which would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation; or

(b) that has been or may be established pursuant to any Act specified in Schedule II.

Subsection 23(1)(a) reads:

23. (1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

(a) to observe any prohibition contained in section 8, 9 or 10;

Section 8(2)(c) reads:

8. (2) Subject to subsection (3), no person shall

(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or

(ii) to refrain from exercising any other right under this Act.

Section 57 refers to the time within which a collective agreement is to be implemented and that which would require legislative intervention cannot be provided therein. Whatever rights Mr. Lundin had under article 41 and, in particular, under clause 41.05 had to be raised under sections 91 and 92 of the Act. Sections 57 and 8(2)(c) are not applicable.

For these reasons, the complaint under section 23 is also dismissed.

Muriel Korngold Wexler
Deputy Chairperson

OTTAWA, January 19, 1996.