

Human Rights Commission

Province of Newfoundland and Labrador

Report for 2003

INTRODUCTION:

2003 proved to be a challenging year for the Human Rights Commission. Two long-time staff retired while a third accepted a promotion in the Department of Labour. The number of complaints received by the Commission increased as did the number of Boards of Inquiry scheduled. The Commission also received clarification of a number of issues of interest about our procedures from the Courts.

What follows is a more detailed commentary about the work of the Commission in 2003. While challenges persist, the Commission members and staff continue to work hard to ensure a human rights regime which is flexible, fair and as efficient as possible.

THE COMMISSION AND STAFF:

As of December 31, 2003 the members of the Human Rights Commission were:

Joan Myles	-	Chair
Gilbert Thomas	-	Vice-Chair
Roland King	-	Commissioner
Winston Green	-	Commissioner
Shirley Barr	-	Commissioner

The members of the Commission staff were:

Barry Fleming	-	Legal Counsel/Executive Director (Acting)
Sean Murray	-	Human Rights Specialist
Colleen Murphy	-	Secretary
Jocelyn Walsh	-	Secretary

STAFF CHANGES:

The Commission experienced a number of staffing changes in 2003. Gladys Vivian, the Commission's Executive Director retired in January with over 20 years of service in that role. Gladys' experience, professionalism and interpersonal skills have helped the Commission mature and develop during a period of rapidly changing human rights concepts. Her skill and good humour will be greatly missed. The Commission's Legal Counsel has assumed the Executive Director's responsibilities on an acting basis.

In February, Jeff Cutler left the Commission to assume a position in the Ontario Attorney General's Office. While technically not an employee of the Commission, Jeff had spent 21 months working with the Executive Director and the Legal Counsel as part of the Graduate Recruit Program. During that time Jeff was able to complete his articles and became a member of the Law Society of Newfoundland and Labrador.

George Flaherty, one of our Human Rights Specialists, left the Commission in September 2003 to obtain a management position with the Department of Labour. George started his employment with the Commission in 1995 and has been working towards completing his M.B.A. during the past few years. Congratulations to George on his new position. Sean Murray was recalled to the position of Human Rights Specialist in November 2003. Sean will fill the vacancy caused by George's departure.

In December, Patricia Corbett, retired from her position of Human Rights Specialist. We thank Pat for her many years of service. Best wishes to Pat for the future.

STATISTICS:

The following chart outlines the number and grounds of complaints received by the Human Rights Commission in 2003.

<i>SECTION</i>	<i>GROUND</i> S	<i>NUMBER</i>
6	Marital Status	12
9	Sexual Harassment	6
9	Physical Disability	54
9	Mental Disability	16
9	Sex	9
6	Sexual Orientation	6
9	Race	4
6	Political Opinion	1
9	Age	4
9	Sex/Pregnancy	3
6	National/Social Origin	2
	<i>TOTAL</i>	117

The Commission closed 88 files in 2003. They were closed in the following manner:

	<u>Number</u>	<u>Percentage</u>
Dismissed	65	73%
Referred to Boards of Inquiry	15	17%
Settled	<u>8</u>	<u>10%</u>
	88	100%

SCHEDULED BOARDS OF INQUIRY:

Thirteen Boards of Inquiry were scheduled to proceed in 2003:

1. *Bailey et al v. Fogo Island Co-operative Society*

Thirty-three women from Fogo Island filed complaints with the Commission alleging that their employer, the Fogo Island Co-operative Society, discriminated against them on the basis of their marital status when they were denied employment as fish plant workers because their husbands, who were fishermen, would not agree to sell their catch to the Co-op. A Board of Inquiry had previously upheld their complaint. The Board was reconvened throughout 2002 and January 2003 to determine the monetary and general damages payable to each complainant. A decision is pending.

2. *Robert Peach v. College of the North Atlantic*

Mr. Peach alleged that he was denied adequate accommodation of his learning disability while enrolled as a student at the College of the North Atlantic. The Board commenced in February 2003 and after three days of evidence the parties agreed to a settlement without an acknowledgement of liability on the part of the College. The parties agreed that the terms of the settlement should remain confidential.

3. *Haby et al v. Workplace Health, Safety and Compensation Commission and The Department of Labour.*

Three women filed complaints with the Human Rights Commission alleging that they were discriminated against on the basis of their marital status. An amendment to the *Workplace Health, Safety and Compensation Act* provided retroactive benefits to spouses who lost their spouses and remarried after April 1, 1985. The three complainants had remarried before April 1, 1985 and thus were not entitled to the benefits permitted by the amendment. The Board was held on February 17th - 19th, 2003. A decision was released in June, 2003 and is outlined in the next section.

4. *George Smith v. PCL Industrial Constructors Inc.*

Mr. Smith alleged that he was discriminated against on the basis of a disability when he was laid off as a welder at the Bull Arm construction site a few days after his return to work after recuperating from a back injury. His employer argued that Mr. Smith was part of a large lay off and his disability was not a factor in the decision to terminate his employment. The Board was held on July 6th - 8th, 2003 and a decision is pending.

5. ***Evely et al v. N.A.P.E. and the Health and Community Services Corporation of St. John's***

Sixteen licenced practical nurses filed complaints with the Commission alleging that the staffing policy agreed upon by their employer and union discriminated against them on the basis of sex. That policy had shifts designated as "male" and "person" positions. While male LPN's could avail of both types of work, females were only eligible for "person" shifts. Subsequent to filing the complaints, the union and employer changed the staffing policy so as to be neutral with regard to gender. A hearing was scheduled in September 2003 to address the specific remedy for each complaint. Extensive negotiations were undertaken at the time but ultimately failed, thereby causing the hearing to be adjourned to 2004.

6. ***Sean Ryan v. City of St. John's***

Mr. Ryan alleges that the City of St. John's discriminated against him on the basis of a physical disability when he was dismissed as a labourer on December 1, 1998. Mr. Ryan has a bipolar disorder. He also filed a grievance which went to arbitration. The arbitration panel ruled that he was discriminated against because of his disability and ordered that he be reinstated and paid lost wages. The arbitration panel did not award damages for the violations of his human rights and the issue before the Board of Inquiry is whether Mr. Ryan is entitled to same, and if so, to which extent. The hearing commenced on October 6th, 2003 but was subsequently adjourned until dates in 2004.

7. ***Marie Colbourne v. N.A.P.E. and the Department of Justice***

Ms. Colbourne's human rights complaint alleges that her employer, the Department of Justice, failed to pay her at a level comparable with a male co-worker during her career as a Correctional Officer II. She alleged that her union condoned the pay differential. The Department of Justice has acknowledged the pay differential and was prepared to consent to an Order that would reimburse Ms. Colbourne for her lost wages and award her general damages. N.A.P.E. had objected to the terms of the Consent Order on the grounds that it would unduly reconfigure the structure of the bargaining unit. The hearing was scheduled to commence on October 14th. All parties entered extensive negotiations prior to and at the commencement of the proceeding which resulted in a modification of the Consent Order that was satisfactory to all parties and subsequently executed by the Board of Inquiry.

Six other Boards of Inquiry were scheduled during 2004. They covered the following issues:

- 1 - sexual harassment
- 1 - discrimination in employment on the basis of sex
- 3 - discrimination in employment on the basis of disability
- 1 - quantum of damages for an age discrimination complaint

In each case, the complaints were settled within a day or two of the scheduled Board of Inquiry and with the focused attention of all parties. In each case a satisfactory settlement was reached and subsequently approved by the Commission.

No admissions of liability were made by the Respondents. In each case, the parties agreed, with the Commission's consent, to keep the terms and conditions of the settlement confidential.

BOARD OF INQUIRY AND SUPREME COURT DECISIONS:

1. **Spurrell v. Newfoundland (Human Rights Commission) (2003) 222 Nfld. & P.E.I.R. 290 (N.L.S.C.T.D.)**

Ms. Spurrell filed a complaint with the Human Rights Commission alleging that she was sexually harassed by officials of her employer, the Health Care Corporation of St. John's. The Commission investigated Ms. Spurrell's complaint and subsequently dismissed same. The reason given Ms. Spurrell by the Commission for dismissing her complaint was that there was no reasonable basis in the evidence to proceed to a Board of Inquiry. Ms. Spurrell applied to Court pursuant to section 21 (4) of the Human Rights Code for an order referring her complaint to a Board of Inquiry.

The Court dismissed Ms. Spurrell's complaint. In doing so, the Court confirmed that the standard of review on a section 21 (4) application is reasonableness. The Court held that deference will be shown to decisions of the Commission by a reviewing Court as long as the decision is reasonable. Further, the nature of the reasons communicated to Ms. Spurrell were sufficient having regard to the nature of the screening function performed by the Commission when deciding whether to forward complaints to a Board of Inquiry.

2. **Human Rights Commission v. Jean Grant et al (2003) 224 Nfld. & P.E.I.R. 235 (N.L.S.C.C.A.)**

The Human Rights Commission had dismissed Ms. Grant's complaint of discrimination against her employer, the St. John's Regional Health and Community Services Board. Ms. Grant applied to the Supreme Court, Trial Division for an order referring her complaint to a Board of Inquiry. A Judge of the Trial Division ruled that the Commission erred in considering facts which were more appropriate for a determination of whether Ms. Grant's collective agreement rights were violated and further in considering the defence of accommodations to the point of undue hardship when deciding whether to forward her complaint to a Board of Inquiry.

The Commission appealed the ruling to the Court of Appeal. The Court allowed the appeal. It found that facts which might be relevant to a breach of a collective agreement can also be relevant in analysing a human rights complaint. The Court also held that the Commission can consider the evidence which supports a defence to discrimination when screening complaints to determine which ones should proceed to a Board of Inquiry.

3. ***Stringer v. Newfoundland (Human Rights Commission) (2003) 223 Nfld. P.E.I.R. 350 (N.L.S.C.T.D.)***

Mr. Stringer filed a complaint with the Human Rights Commission alleging that he was discriminated against on the basis of a physical disability when he sought employment with the Knights of Columbus. Mr. Stringer alleged that officials of the Knights of Columbus refused to consider his candidacy for a summer project when he attended an interview because he was deaf. The Commission investigated his complaint and dismissed same on the basis that there was no reasonable basis in the evidence to warrant forwarding the complaint to a Board of Inquiry. He applied pursuant to section 21 (4) for an order referring the complaint to a Board of Inquiry.

The Court granted Mr. Stringer's application in part. It held that the Commission overlooked crucial evidence when it failed to interview Mr. Stringer's interpreter when he attended the interview. The Court remitted the matter back to the Commission to consider the complaint having regard to that evidence.

4. ***Human Rights Commission v. Health Care Corporation of St. John's (2003) 46 C.H.R.R. D63 (N.L.S.C.C.A.)***

Carol Evans filed a complaint with the Human Rights Commission alleging that she was discriminated against on the basis of a physical disability when she was denied the position of head porter by her employer, the Health Care Corporation of St. John's. As Ms. Evans was the more senior qualified candidate for the position she anticipated that the job was hers. She was informed that she was not successful in getting the position because of her excessive use of sick leave. Ms. Evans had used all her eligible sick leave over her 24 year career. She had suffered a series of unrelated health problems ranging from a whiplash to a number of breast surgeries. She testified at the Board of Inquiry that she was not currently disabled. The Board of Inquiry ruled that as Ms. Evans did not consider herself disabled and her employer did not perceive her to be disabled, her complaint should be dismissed. The Commission appealed the decision to the Supreme Court Trial Division which upheld

the Board's decision. On a further appeal to the Court of Appeal, the Court confirmed the Board's ruling.

The Court of Appeal found that a person can be discriminated against on the basis of a past disability. On the facts of Ms. Evans' case, a complaint on the basis of disability could not be supported on the basis of a series of unrelated short-term ailments in the face of a declaration by the complainant that she was not disabled and a finding of fact by the Board of Inquiry that the employer did not perceive Ms. Evans to be disabled.

5. **Haby v. Newfoundland (Workplace Health, Safety and Compensation Commission) (2003) 46 C.H.R.R. D/387 (N.L.B. of I.)**

Three women filed complaints with the Human Rights Commission alleging that they were discriminated against on the basis of their marital status. An amendment to the Workplace Health, Safety and Compensation Act provided retroactive benefits to spouses who lost their partners and remarried after April 1, 1985. The three complainants had remarried before April 1, 1985 and thus were not entitled to the benefits interpreted by the amendment. The Board was held on February 17th - 19th, 2003.

In June 2003 the Board of Inquiry ruled that it lacked the jurisdiction to declare provincial legislation discriminatory and inoperative. It did not rule on the merits of the complaints. The Commission appealed the ruling. The appeal was heard in November 2003 and a decision is pending.

6. **Gardias v. Atlantic Construction Training Centre Inc. (2003) (N.L.B. of I.)**

Ms. Gardias filed a complaint with the Human Rights Commission alleging that she was sexually harassed while a student at the Atlantic Construction Training Centre Inc. She alleged that she was subjected to displays of pornography, sexist language and that her concerns on issues of interest were suppressed by instructors. The Commission forwarded the complaint to a Board of Inquiry. The Board was convened in January and February 2002. In September 2003 the Board released its decision finding that the facts did not support Ms. Gardias' allegations.

7. **Critch v. Department of Justice (2003) (N.L.B. of I.)**

Ms. Critch alleged that she was discriminated against, and harassed, on the basis of a physical disability by her employer, the Department of Justice. Ms. Critch suffered from a chronic back condition and a “collapsed ear”. Pursuant to her employer’s sick leave policy, Ms. Critch was interviewed by her supervisor and told to do better with respect to her sick leave use. She was subsequently asked to have her physician complete a detailed medical form. Ms. Critch argued that the disciplinary nature of the sick leave policy was discriminatory. The Commission forwarded her complaint to a Board of Inquiry. A hearing was held in March 2002 and a decision was released in September 2003.

The Board of Inquiry ruled that the Department of Justice, by applying its sick leave policy to Ms. Critch, discriminated against and harassed her. The Board ruled that the mechanical nature of the sick leave policy violated the flexibility required of employers when attempting to accommodate disabled employees. Specifically, the policy targeted the top 20% of sick leave users for interviews with supervisors irrespective of the nature of the disability or the individual circumstances of the particular employee. Additionally, the policy’s ultimate measure was termination of employment. The Board found this aspect of the policy placed a burden upon disabled employees not experienced by the fully abled.

8. ***Department of Justice v. Critch (2003) (N.L.S.C.T.D.)***

The Department of Justice appealed a Board of Inquiry decision which ruled that its sick leave policy discriminated against Ms. Critch on the basis of a disability. The Department appealed on issues of law alone but if it wished to appeal on issues of fact it had to seek leave (or permission) of the Court. It applied to extend the time to seek leave to appeal on issues of fact. The Court held that it did not have the jurisdiction, or legal ability, to extend the time limits prescribed in the Human Rights Code for filing an appeal.

SECTION 21 (4) APPLICATIONS:

Section 21 (4) of the Human Rights Code permits a complainant to apply to the Supreme Court Trial Division for an order referring a complaint to a Board of Inquiry when the Commission has dismissed same. A number of these applications were made in 2003 and have yet to be concluded. They are:

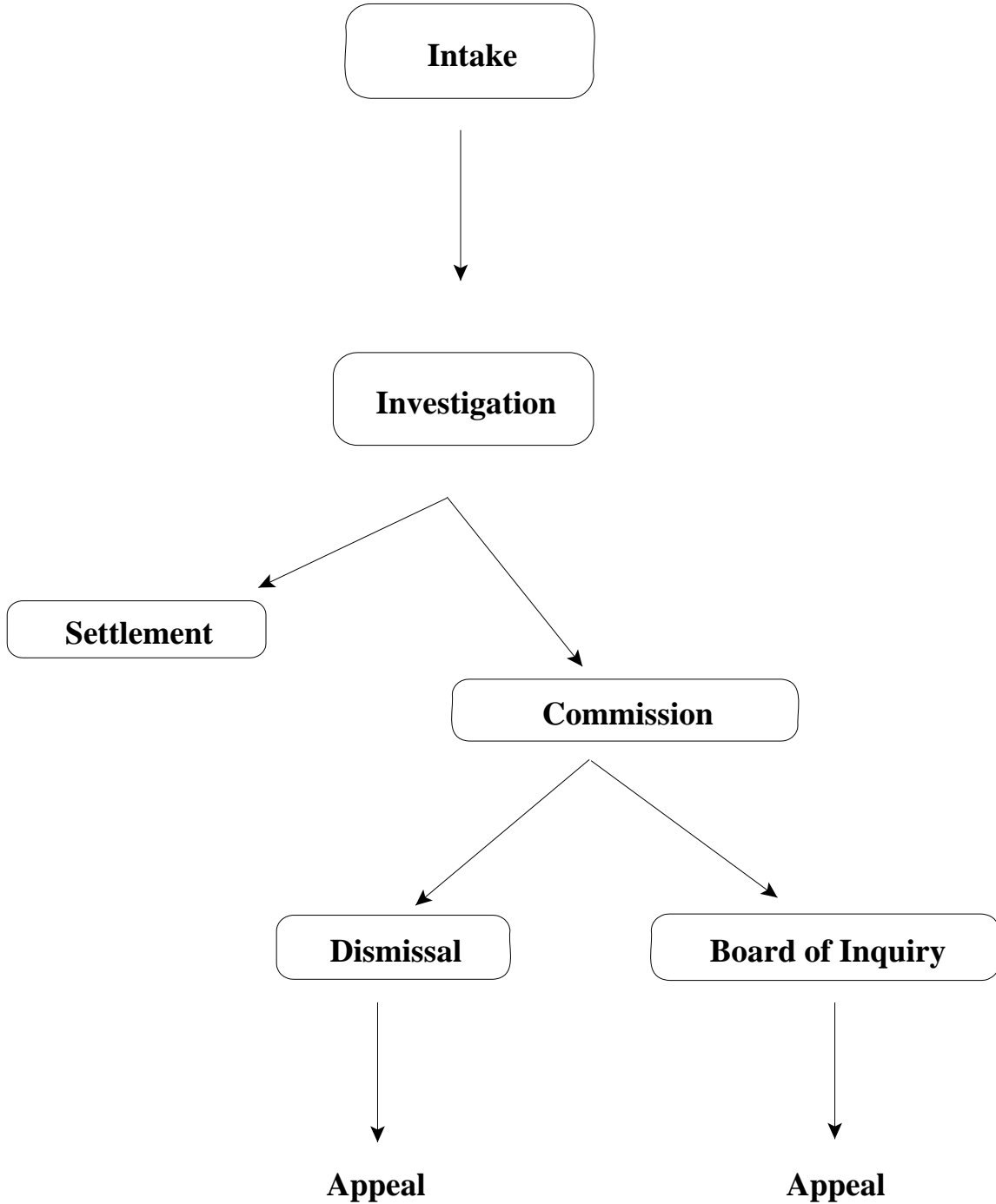
- 1) Melina Maynard v. Infotel Publications
- 2) Maxine Stevens v. Workplace Health, Safety and Compensation Commission
- 3) Dawn Wadden v. Convergys
- 4) Sean Buckingham v. The Department of Health
- 5) Carl Sampson v. Health Care Corporation of St. John's
- 6) Gerard Coady v. Memorial University of Newfoundland *et al*

FUNCTIONS OF THE COMMISSION

The Commission shall:

- ▶ forward the principle that every person is equal in dignity and rights;
- ▶ promote compliance with the legislation by investigating and resolving complaints of unlawful discrimination and harassment;
- ▶ develop and distribute information and conduct educational programs designed to eliminate discriminatory practices;
- ▶ advise and help government departments and agencies on activities concerning human rights;
- ▶ co-operate and help individuals, organizations or groups with human rights matters;
- ▶ advise government on suggestions and recommendations made by individuals, organizations, or groups concerning human rights.

THE COMPLAINT PROCEDURE



Throughout the complaint process the Commission tries to effect settlement between the parties. If settlement is not achieved, the complaint follows the outlined process.

THE COMPLAINT PROCESS

Investigating The Complaint

The Commission will accept for investigation complaints made *within six months* of the event giving rise to the complaint where it appears there may be a violation of the Human Rights Code. The Commission will notify the respondent of the complaint prior to commencing an investigation. The Commission is mandated to endeavour to effect a settlement and provides for this to occur at any stage in the investigation process. Where a settlement is not reached, the Executive Director will report on the case to the Commissioners who will determine whether or not to refer the matter to a Board of Inquiry. Settlements must also be approved by Commissioners, and where a settlement is reached, the Commission will notify the parties that no further action will be taken unless the terms of the settlement are not complied with.

Once the Commissioners order a complaint to a Board of Inquiry, the Executive Director will notify the Chief Adjudicator of the Adjudication Panel of this decision. A copy of the file will be sent to the parties. When the Commission dismisses a complaint, the parties may apply to the Supreme Court within 30 days for an order that the Commission refer the complaint to a Board of Inquiry.

Board Of Inquiry

The Human Rights Code provides for the appointment by Lieutenant Governor In Council of an Adjudication Panel which is separate and apart from the Human Rights Commission. The Adjudication Panel is mandated to hear complaints referred by the Commission to a Board of Inquiry and to issue a written decision on the matter.

A Board of Inquiry is a formal public hearing where the complainant and the respondent present their arguments before an Adjudicator. The Human Rights Commission shall have carriage of the complaint, but either party may be represented by legal counsel. The Adjudicator, after hearing all the evidence from the parties and witnesses, will determine if there has been a contravention of the Human Rights Code. If there is a finding of contravention, the Adjudicator will order the respondent to cease the contravention, make available denied opportunities or privileges, and may, when appropriate, order compensation. The Adjudicator's decision is legally binding on the parties but is subject to appeal to the Trial Division of the Supreme Court.

***CONTACTING THE
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