Canadian Human Rights
TRIBUNAL

Canadian Human Rights TRIBUNAL

ANNUAL REPORT 2000

Canada

Canadian Human Rights Tribunal

THE CANADIAN HUMAN RIGHTS TRIBUNAL IS A QUASI-JUDICIAL BODY THAT HEARS COMPLAINTS OF DISCRIMINATION REFERRED TO IT BY THE CANADIAN HUMAN RIGHTS COMMISSION AND DETERMINES WHETHER THE ACTIVITIES COMPLAINED OF VIOLATE THE *CANADIAN HUMAN RIGHTS ACT* (CHRA). THE PURPOSE OF THE ACT IS TO PROTECT INDIVIDUALS FROM DISCRIMINATION AND TO PROMOTE EQUALITY OF OPPORTUNITY.

The Tribunal has a statutory mandate to apply the CHRA based on the evidence presented and on current case law. Created by Parliament in 1977, the Tribunal is the only entity that may legally decide whether a person has contravened the statute.

The Act applies to federal government departments and agencies, Crown corporations, chartered banks, airlines, telecommunications and broadcasting organizations, and shipping and inter-provincial trucking companies. Complaints may relate to discrimination in employment or in the provision of goods, services, facilities and accommodation that are customarily available to the general public. The CHRA prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual orientation, disability or conviction for which a pardon has been granted. Complaints of discrimination based on sex include allegations of wage disparity between men and women performing work of equal value in the same establishment.

In 1996 the Tribunal's responsibilities were expanded to include the adjudication of complaints under the *Employment Equity Act*, which applies to employers with more than 100 employees. Employment Equity Review Tribunals are assembled as needed from the pool of adjudicators that make up the Canadian Human Rights Tribunal.

Canadian Human Rights
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March 31, 2001

The Honourable Daniel Hays, Speaker
The Senate
Ottawa, Ontario
K1A 0A4

Dear Mr. Speaker:

I have the honour to present to you the 2000 Annual Report of the Canadian Human Rights Tribunal in accordance with subsection 61(3) of the *Canadian Human Rights Act*.

Yours sincerely,

Anne L. Mactavish
Chairperson

Canadian Human Rights
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March 31, 2001

The Honourable Peter Milliken, Speaker
House of Commons
Ottawa, Ontario
K1A 0A6

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I have the honour to present to you the 2000 Annual Report of the Canadian Human Rights Tribunal in accordance with subsection 61(3) of the *Canadian Human Rights Act*.

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Message from the Chairperson

This has been a year marked by a number of significant developments for the Canadian Human Rights Tribunal. On the positive side, the attention paid to the training of members of the Tribunal, as well as the experience gained by members as a result of the smaller size of the Tribunal, has begun to produce measurable results. Over the last 12 months, the Tribunal process has become faster and more efficient. At the same time, there has been a significant increase in the number of Tribunal decisions upheld by the Federal Court of Canada.

Not all of the developments of the last year have been positive. In November, Madam Justice Tremblay-Lamer of the Trial Division of the Federal Court found that certain provisions of the *Canadian Human Rights Act*, as they relate to the Canadian Human Rights Tribunal, were insufficient to provide the Tribunal with the necessary degree of institutional independence. This brought a halt not only to the pay equity dispute involving Bell Canada and its employees, but also to a number of other hearings. The courts have frequently noted that there is a compelling public interest in having complaints of discrimination dealt with in a timely fashion. Unfortunately, given the current state of affairs, the Canadian Human Rights Tribunal will be unable to provide such a level of service in the foreseeable future.

This is the third time that the Canadian Human Rights Tribunal has been found to lack the institutional independence necessary to provide Canadians involved in the human rights process with fair and impartial hearings,[1] and the second such decision in less than three years. Three different statutory schemes have now been found to provide inadequate guarantees of institutional independence. These deficiencies can only serve to undermine the credibility of the Canadian Human Rights Tribunal, and to bring the administration of the human rights process at the federal level into disrepute. Canadians are entitled to have human rights complaints in which they may be involved dealt with by an institutionally fair and impartial Tribunal. The only way to ensure that objective is met quickly, and with certainty, is through legislative action.

Anne Mactavish

[1] See *MacBain v. C.H.R.C.*, [1985] 1 F.C. 856, *Bell Canada v. Communications, Energy and Paperworkers Union of Canada et al.*, [1998] 3 F.C. 244 (F.C.T.D.) (per McGillis J.), and the decision of Tremblay-Lamer J. in *Bell Canada v. CTEA, Femmes Action and Canadian Human Rights Commission*, Docket T-890-99, November 2, 2000.

Refining the human rights delivery process

An unsettling year

[R]ights never securely legitimize the status quo; they actually make grievance legitimate, and in so doing compel societies to continue their partial, inadequate, and therefore unending process of reform. This idea that society is forever incomplete, forever in search of a justice that remains beyond its grasp, is characteristic of modern societies everywhere.

Michael Ignatieff
The Rights Revolution

The year 2000 Massey Lectures were dedicated to an examination of human rights in Canada, including their impact on Canadian society and Canadian politics. The evolution of human rights discourse and human rights protection mechanisms has parallelled the growing complexity and sophistication of Canadian society, and has probably generated at least as much uncertainty as it has resolved.

The recent history of the Tribunal is a case in point. The last 15 years have seen numerous challenges to the Tribunal's jurisdiction and institutional independence, challenges that occasionally ground the entire human rights enforcement process to a halt. A string of legislative amendments between 1985 and 1998, along with a major restructuring of the Tribunal in 1998, were intended to resolve the shortcomings identified by the courts. Since 1998 the Tribunal has significantly improved its case planning and management processes, its rules of procedure and practice, and its professional development program for members.

These labours began bearing fruit in 2000 as the Tribunal found itself managing an unexpectedly heavy caseload. Apart from its increased speed and efficiency, the Tribunal has also enjoyed the growing deference of the judicial system as the proportion of Tribunal rulings set aside by the courts has declined.

It was therefore disappointing when, in November 2000, the Federal Court once more called the Tribunal's institutional independence into question, finding that the *Canadian Human Rights Act* (CHRA) remained flawed after almost two decades of fine-tuning. Numerous hearings were suspended in the wake of the ruling, pending an appeal of the Trial Division's decision. For the first time in its 22-year history, the Tribunal began accumulating a case backlog as it awaited the ruling of the Federal Court of Appeal, expected in 2001.

Meanwhile, other aspects of the Tribunal's work were also put on hold, this time at the Tribunal's own instigation. In the spring of 2000, the Tribunal temporarily suspended its four-year experiment with alternative dispute resolution. Although a review of the Tribunal's mediation process in 1998 found that participants were

generally pleased with both the process and the outcome of mediated settlements, further analysis has raised questions as to whether the use of mediation subverts the intent of the CHRA. The Tribunal remains concerned that confidential settlements, however much they may satisfy the needs of individual complainants and respondents, may not adequately address the educational component of human rights legislation. The Tribunal's mediation services remain on hold pending the outcome of an evaluation and policy review in this area.

Adding to the prospect of continued uncertainty, a panel of human rights experts, appointed by the Minister of Justice in 1999 to review Canada's human rights system, issued its report in June 2000. Under the leadership of the Honourable Gérard La Forest, the panel recommended sweeping changes to the federal human rights enforcement apparatus, with the objective of speeding up access to human rights remedies. In the proposed "direct access model" complainants would bypass the Canadian Human Rights Commission and take their claims directly to the Tribunal. The Tribunal would become responsible for the processing of complaints, as well as for their adjudication, with significant implications for the Tribunal's workload and operations.

Thus, as the millennium drew to an end, the Canadian Human Rights Tribunal found itself moving into a new era of uncertainty, uncertainty about the legitimacy of its status, the magnitude of its impending backlog, and the future of the human rights adjudication process in Canada.

Clearly, the entire field of human rights remains a work in progress — in principle and practice, conception and delivery, intent and result — and the Tribunal is becoming fairly adept at living with the resulting uncertainty. In the following pages we chronicle our progress in this unsettling year.

> The evolution of human rights discourse and human rights protection mechanisms has parallelled the growing complexity and sophistication of Canadian society.

New allegations of institutional bias

On November 3, 2000, the Federal Court ruled that two sections of the CHRA compromised the Tribunal's institutional independence and impartiality. Ruling on an application for judicial review of an interim decision of the Tribunal, the Court found that the Tribunal was precluded from making an independent judgment in any class of cases in which it was bound by interpretive guidelines issued by the Canadian Human Rights Commission. In the opinion of Justice Tremblay-Lamer, the fact that the Commission has the power to issue such guidelines gives it a special status that no other party appearing before the Tribunal enjoys and means that one party to the proceedings can "put improper pressure on the Tribunal as to the outcome of the decision in a class of cases." She found that the Tribunal's decision-making power was

"unquestionably fettered" by the Commission's power to issue binding guidelines on the interpretation of the CHRA. The problem, according to the court, stemmed from the provisions of the Act conferring such power on the Commission.

The Court also found that a second provision of the Act compromised the institutional independence of the Tribunal. Under subsection 48.2(2), the Tribunal Chairperson has the power to extend the term of appointment of a Tribunal member whose term expires during the course of a hearing over which he or she is presiding. "The principle of institutional independence requires that a tribunal is structured to ensure that the members are independent," said Justice Tremblay-Lamer. "In the case at bar, the ability of a member to continue the case will depend on the discretion of the Chairperson. The difficulty is not necessarily in the manner in which the discretion is exercised but rather in the existence of the discretion itself. … In my opinion, given the high level of independence required, only an objective guarantee of security of tenure will give the necessary protection and afford the member the quietude needed to render a decision free of constraint," she said. "There exists no objective guarantee that the prospect of continuance of the tribunal member's duties after expiry of his or her appointment would not be adversely affected by any decisions, past or present, made by that member."

The principle of institutional independence requires that a tribunal is structured to ensure that the members are independent.

Finding that the two flawed provisions of the CHRA compromised the institutional independence and impartiality of the Tribunal, the Court ordered that further proceedings in the pay equity complaint against Bell Canada be suspended until the problems created by the two offending sections of the Act had been corrected.

The impact of this decision has been considerable. Immediately, another pay equity case, *Public Service Alliance of Canada* v. *Canada Post*, adjourned its proceedings, and since that time nearly every new case involving a private sector respondent has been adjourned indefinitely. Given the present state of the law, only cases against government departments or agencies are exempt from the effects of the Federal Court's ruling.

An appeal of the Trial Division's decision has been filed by the unions involved in the *Bell Canada* case but will not be heard until early spring 2001. The Tribunal believes that legislative amendment is the preferable course of action, as this appeal may not resolve the issue, and additional appeals may be initiated, further delaying the work of the Tribunal.

Since 60 percent of the 100 new cases expected to be referred to the Tribunal in 2001 will involve private sector employers, the Federal Court decision will have the effect of creating a case backlog for the first time in the Tribunal's history. Once the issue is resolved, the Tribunal will propose that highly experienced former

members be appointed as temporary members to hear and decide these cases under the temporary members' provisions of the Act. Depending on the number of cases in the backlog and the availability of resources, the Tribunal expects that all postponed cases can be heard and decided within 12 to 18 months.

The mediation debate continues

In the spring of 2000, the Tribunal suspended its mediation services. These services had become increasingly popular since the launch of the Tribunal's alternative dispute resolution project in 1996. Yet despite the numerous advantages of mediated settlements over litigated ones, the Tribunal has become concerned that the increased speed, reduced cost and greater individual satisfaction that characterize mediated settlements may be more than offset by the lost opportunities for public education. The fact that the outcome of mediated settlements is confidential means that part of the intent of the CHRA is subverted.

One of the important objectives of the CHRA is to eliminate discriminatory practices by federally regulated employers and service providers, including unintentional and systemic discrimination. This kind of discrimination results from the ordinary operation of established procedures of recruitment, hiring or service provision based on under-inclusive ideas about who should be doing certain kinds of work or who should be able to benefit from certain types of services.

Cases of direct discrimination are often resolved without recourse to adjudication, and often through mediated settlements. But the class of cases generally referred to human rights tribunals involves long-standing systemic practices, often affecting a wide range of employees and clients. When cases such as these come to the Tribunal, there is a broader interest at stake than just those of the individual complainant and respondent. Allowing such cases to be settled off the public record may prevent systemic discrimination from being detected, let alone rectified. By contrast, public hearings and published rulings help expose discriminatory practices and attitudes and create a climate in which these can be challenged and discouraged. When the Tribunal finds that a respondent's actions have not contravened the statute, this also becomes part of the public record. Finally, published decisions establish the parameters of what constitutes discrimination.

In light of these concerns, the Tribunal has suspended its mediation services pending a full review of its mediation program. Should the Tribunal decide to reintroduce mediation, we will be developing and implementing procedural and policy changes designed to protect not only the interests of parties to the dispute, but also the interests of the many.

Promoting Equality: A New Vision–Report of the *Canadian Human Rights Act* Review Panel

Responding to public concerns about delays and inefficiencies in the federal human rights enforcement process and to issues raised by the Auditor General of Canada in his 1998 report, the Minister of Justice launched a system-wide review of the CHRA in 1999. Chaired by former Supreme Court of Canada Justice the Honourable Gérard La Forest, the *Canadian Human Rights Act* Review Panel conducted an extensive review of the current Act, examining issues of substance and process, principle and procedure. In its final report, the Panel made recommendations intended to bring the legislation into step with contemporary concepts of human rights and equality and to modernize Canada's process for resolving human rights disputes.

Direct access model

In its report, issued in June 2000, the Panel recommended substantial changes to the current complaint process aimed at "ending the Commission's monopoly on complaint processing." The Panel recommended that the Act provide a process allowing claimants to bring their cases directly to the Tribunal with public legal assistance. In the proposed system, the Canadian Human Rights Commission would cease to investigate complaints, eliminating potential "institutional conflicts between the Commission's role as decision maker and advocate." Both the initial screening of claimants and the investigation phase, currently conducted by the Commission, would instead be undertaken by the Tribunal, and the Commission would cease to be a gatekeeper between complainants and the Tribunal.

The impact of such a change in process could be significant for the Tribunal. First, it would increase the Tribunal's caseload from 30–35 new cases a year to as many as 500–600 new cases a year. Such a dramatic increase in workload would necessitate a larger Tribunal, one with more members and a greater research and administrative capacity. The Tribunal would have to develop new methods of operation, including a new system of case management. And it would need to acquire a new range of skills. The Tribunal has begun researching how to implement such a model.

Mediation

The Tribunal Chairperson had asked the Panel to review the Tribunal's mediation process, to suggest how selection criteria might be improved and to offer guidance on whether the publication of mediated settlements should be made compulsory, rather than optional as it is now. The Panel chose to address mediation in the context of the proposed new complaint procedure. Under the direct access model outlined in the previous section, the Tribunal, rather than the Commission, would take primary responsibility for mediation, and this responsibility would be made explicit in the CHRA. All aspects of the mediation process, including the settlement, would be confidential. The Tribunal would be expected to develop and refine guidelines about the kinds of cases that would be excluded from mediation, based on

the nature of the claim, the public interest issues at stake, the likelihood of settlement and the interests of justice.

Appeals of a Tribunal order

In previous annual reports the Tribunal has lamented the frequency with which Tribunal decisions have been set aside on review, noting that the judicial system's lack of deference for Tribunal decisions has contributed to a flourishing culture of human rights litigation in which requests for reviews of Tribunal rulings have become routine. Despite the recent decline in judicial reversals of Tribunal rulings, a more highly litigious human rights process appears to have become a permanent feature of the system. This is reflected in the growing number of preliminary objections, *res judicata* motions and interim motions on procedural matters that have begun to claim a growing share of the Tribunal's time. Furthermore, the disposition of preliminary or interim motions by the Tribunal is commonly subjected to judicial review, which can result in further delays. The result is that the time needed for the Tribunal to reach a final decision is often disproportionate to the complexities of the complaint.

In its final report in June 2000, the *Canadian Human Rights Act* Review Panel noted that changes to the structure and credentials of the Tribunal since 1998 entitled Tribunal decisions to greater deference from the courts than had been accorded in the past. The Panel recommended that the Act be amended to include a "privative clause" requiring the courts to defer to the Tribunal on procedural and factual matters. It also proposed that Tribunal decisions relating to questions of jurisdiction and interpretation of the Act should be subject to review only by the Appeal Division of the Federal Court of Canada, rather than by the Trial Division as is currently the case. The Tribunal concurs with the recommendations of the Panel and feels that these changes would increase the efficiency of the federal human rights enforcement process.

> In the proposed system, the Canadian Human Rights Commission would cease to investigate complaints.

A time to act

Officials at the federal Department of Justice are reviewing the Panel's report. The Tribunal would expect an announcement advising of the government's intended course of action in response to the report in the near future. It further expects, based on the report, that some changes to the Tribunal's role may be made over the next few years. While the long-term effect of the Panel's recommendations on the Tribunal is undecided, the Tribunal does concur with the Panel that the current way of ensuring the human rights of Canadians needs some revision. The Tribunal will cooperate with the Department of Justice to provide whatever assistance department officials may require with this difficult task.

Improving the human rights adjudication process

Professional development has been a major focus of the Canadian Human Rights Tribunal since 1998, when it launched a comprehensive three-week members' training program on adjudication procedures. In 2000, Tribunal members attended two professional development sessions covering new procedural issues, case law updates and new developments in the field of human rights. Members also benefited from special meetings with experts in disability complaints, accommodation and harassment issues, as well as presentations by judges on such procedural issues as assessing the credibility of witnesses. Meanwhile, the Tribunal's Legal Services section has been issuing updates and analyses on relevant new legal precedents, including summaries of the decisions of other human rights adjudication bodies and the superior courts.

With fewer Tribunal members than before the 1998 amendments, the Tribunal is able to deliver a more consistent and timely adjudication process. Nearly all preliminary matters are dealt with by the Chairperson and Vice-Chairperson, improving the timeliness and efficiency of the pre-hearing process. With fewer members deciding on preliminary issues, rulings are delivered with minimal delay and are more consistent from one case to the next.

The introduction of case planning questionnaires to obtain basic information from each litigant at the beginning of the hearing process has been highly successful in improving scheduling procedures and ensuring that hearings are timely. Case planning was once a lengthy process, accomplished largely through conference calls requiring the coordination of many lawyers' schedules. Delays of two to three months were not uncommon. The use of case planning questionnaires has not only improved efficiency, but has also enabled the Tribunal to pay closer attention to the individual needs of the parties.

Rulings are delivered with minimal delay and are more consistent from one case to the next.

The Tribunal's recently revised Interim Rules of Procedure have proven most effective. No legal challenges to the rules have been raised, nor have any complaints been received. In fact, all feedback has been positive. Moreover, in contrast with the past, there have been very few requests for adjournment because a party was caught off guard by unexpected evidence.

Keeping the public informed

To keep the public informed about human rights adjudication and the role of the Tribunal, the Tribunal continued to add to its Web site in 2000, broadening the range of links to other human rights resources and increasing the volume and types of documents available. For example, the site now includes rulings on

procedural issues. With a search engine that allows users to search the Tribunal's decisions database by case name or keyword, the site also provides general information about the Tribunal, as well as access to such public documents as the Tribunal's Interim Rules of Procedure. The Web site describes the federal human rights adjudication process, lists active cases and includes a schedule of upcoming hearings. Visitors can also follow links to other human rights resources, including the Web pages of the Canadian Human Rights Commission and other provincial commissions and tribunals. Public interest in the revamped site continues to grow.

In keeping with its focus on improving access to information about Tribunal services, the Tribunal is also developing several plain language brochures that explain how the Tribunal operates and what a person can expect when participating in a hearing or testifying before the Tribunal. Written for a lay audience, the brochures demystify the Tribunal process and seek to familiarize complainants, witnesses and respondents with the legal jargon contained in correspondence they receive from the Tribunal or participating lawyers. The new brochures are expected to be ready in 2001.

New developments and emerging trends

Growing caseload

The volume of new cases being referred to the Tribunal is growing. In the five-year period leading up to 2000, the Tribunal averaged 25 new referrals a year. In 1999, there were 37 new referrals, and in 2000, there were 73. This doubling of new referrals between 1999 and 2000 may be partly attributable to the report of the *Canadian Human Rights Act* Review Panel, which took issue with the Canadian Human Rights Commission's role as gatekeeper of the human rights adjudication process. Based on information received from the Commission, the Tribunal now anticipates that it will be receiving an average of 100 new case referrals annually from the Canadian Human Rights Commission, an increase of 300 percent over a very short period. The Tribunal is therefore reviewing its current configuration of full- and part-time members, with a view to maximizing its effectiveness. Perhaps having more full-time members would help to maintain the quality of service the Tribunal's clients have come to expect.

The duty to accommodate

Another contributor to the Tribunal's growing caseload is a recent increase in the number of disability cases being heard by the Tribunal. Recent Supreme Court decisions that raised the bar for the *bona fide* occupational requirement defence, as well as a 1998 amendment to the CHRA introducing a duty to accommodate in cases of direct discrimination, have created a new era of uncertainty in an area of the substantive law that was once well-established. Because the guidance offered by the existing case law on employers' obligations vis-à-vis their disabled employees is no longer definitive, the Tribunal anticipates that a flurry of new disability-related complaints will dominate its caseload until the new standards for employers and service providers have been fully explored and interpreted by the Tribunal.

Employment equity

The Tribunal received its first three applications for hearings under the *Employment Equity Act* (EEA) in 2000. These cases are scheduled to begin hearings in 2001 and will serve as test cases of the 1996 statute, which has not yet been interpreted by the Tribunal. While the Tribunal is permitted to issue rules of procedure for the operation of the new Employment Equity Review Tribunal, we plan to conduct a few hearings before issuing any rules to obtain a better sense of the needs of the parties and how the Tribunal should function. In the interim, the Tribunal has issued a guide, *Guide to the Operations of the Employment Equity Review Tribunal*, to the parties to assist them in their preparation for a hearing.

Cases

The Tribunal saw a significant increase in its caseload in 2000 with 73 new referrals and more new cases assigned than in any year since the Tribunal was created. In addition to the five final decisions rendered in 2000, the Tribunal issued 22 written rulings on preliminary and interim motions, as well as several oral rulings. A significant proportion of the Tribunal's hearing schedule was devoted to three ongoing pay equity cases, discussed below.

Tribunal decisions rendered

***Carter* v. *Canadian Armed Forces* (Deschamps)**

Date referred: 22/03/1999

Decision date: 02/03/2000

Number of hearing days: 1

Robert Carter was a member of the Canadian Armed Forces. The Forces had a mandatory retirement policy that essentially obliged Mr. Carter to retire at age 50. He did so, but later filed a complaint alleging age discrimination. The Forces admitted that the policy was discriminatory, but argued that Mr. Carter's wage losses were limited by a special regulation passed several months after his release from the military. The effect of the regulation was to exempt the Forces' retirement policy from the application of the CHRA. The Tribunal agreed with the Forces' argument. It concluded that on the day the regulation came into effect, the retirement policy ceased to be discriminatory for the purposes of the Act. Thus Mr. Carter could not claim for damages incurred after the regulation's commencement. This case has been appealed to the Federal Court.

***Marinaki* v. *Human Resources Development Canada* (Mactavish/Chicoine/Devins)**

Date referred: 02/07/1999

Decision date: 29/06/2000

Number of hearing days: 32

Emilie Marinaki alleged that her manager had sexually and ethnically harassed her. The Tribunal found that there were a series of confrontations between Ms. Marinaki and her manager arising out of the latter's attempts to manage work-related issues, but that neither Ms. Marinaki's sex nor her ethnicity played any role in creating the conflict. While the manager's conduct during these various confrontations was inappropriate, abusive, unprofessional and constituted poor

management, it was not based on a prohibited ground of discrimination. Neither Ms. Marinaki's sex nor her ethnic origin was a factor in her manager's treatment of her. That said, had the Tribunal found her treatment to have been discriminatory, it would have held the department responsible for the manager's actions.

***Oster* v. *International Longshoremen's and Warehousemen's Union* (Pensa)**

Date referred: 08/09/1999

Decision date: 09/08/2000

Number of hearing days: 6

Helen Oster alleged that the respondent union had refused to send her to work as a cook/deckhand on a vessel on the basis of her sex. The Tribunal found that she had been discouraged from applying for the job in question because the vessel did not have separate sleeping accommodations for women. Counsel for the union argued that having a woman on board would make it a condition of employment for the other employees to accept sleeping accommodations with members of the opposite sex. However, the shift schedule indicated that Ms. Oster and her crewmates would not have been using the sleeping quarters at the same time. In the absence of evidence of undue hardship, the complaint was upheld. However, no lost wages were awarded because Ms. Oster's lack of experience would have precluded her obtaining the job in any event. This decision has been appealed to the Federal Court.

***Wachal* v. *Manitoba Pool Elevators* (Sinclair)**

Date referred: 15/02/2000

Decision date: 27/09/2000

Number of hearing days: 3

Shannon Wachal was dismissed because of her excessive absenteeism. She claimed that her absences were due to allergic and asthmatic reactions caused by the renovations to the offices where she worked. Her complaint alleged discrimination on the basis of disability and a failure to accommodate her disability. The Tribunal, however, did not find evidence that Ms. Wachal's absences were due to her disability. In particular, the Tribunal noted that there was no evidence that any of her co-workers had noticed her symptoms while she was at work. Furthermore, the medical certificates provided did not specifically indicate the nature of Ms. Wachal's illness. Finally, Ms. Wachal's absences generally fell at the end of each month, when the office workload was at its highest. The Tribunal dismissed the complaint.

***Vlug* v. *Canadian Broadcasting Corporation* (Mactavish)**

Henry Vlug alleged that the CBC had discriminated against him on the grounds of disability when it failed to provide full captioning for the hearing impaired in its Newsworld and English language network programming. The Tribunal acknowledged that the CBC was an organization under considerable financial stress and that it had made significant progress in expanding its captioning. However, the CBC's explanations as to why full captioning was not possible were simply not credible. In particular, it did not fully consider: (1) the revenues that could be realized from captioning sponsorships; (2) the possibility of asking its advertisers to provide captioned commercials; (3) the true cost of having centralized real-time captionists on stand-by for use by the affiliate stations. This decision has been appealed to the Federal Court.

Date referred: 11/04/2000

Decision date: 15/11/2000

Number of hearing days: 8

Pay equity update

Three major pay equity cases have consumed a disproportionate share of the Tribunal's time and resources for several years. Hearings in two of these cases — *Public Service Alliance of Canada (PSAC)* v. *Canada Post* and *Canadian Telephone Employees' Association (CTEA) et al.* v. *Bell Canada* — were suspended in the wake of the Federal Court's November 2000 decision, pending the decision of the Federal Court of Appeal. But hearings, at this point, continue in *Public Service Alliance of Canada (PSAC)* v. *Government of the Northwest Territories*.

Public Service Alliance of Canada (PSAC) v. *Canada Post* is the Tribunal's longest-running case, in hearings since 1993. In 2000, the case sat for 18 days, for a total of 348 hearing days. Before its adjournment in November 2000 pending the outcome of the appeal of the Federal Court decision in *Bell Canada*, the case had proceeded into Reply Evidence. If hearings resume in 2001, the evidence should be completed in 2001.

Date referred: 30/03/1992

Number of hearing days in 2000: 18

Number of hearing days to date: 348

In *CTEA et al.* v. *Bell Canada*, hearings had just begun in 1999 before they were suspended by the Federal Court decision of November 2000. The case had 40 hearing days in 2000. Depending on the outcome of the appeal of the Federal Court decision, hearings may proceed for a further two to three years.

Date referred: 04/06/1996[2]

Number of hearing days in 2000: 40

Number of hearing days to date: 55

Public Service Alliance of Canada (PSAC) v. *Government of the Northwest Territories* had 47 days of hearings in 2000. Since the case's referral to Tribunal in 1997, there have been 79 hearing days. The effect of the *Bell Canada* decision will be to stop the hearing after the Commission and the complainant have closed their cases (expected in early 2001). Once the Federal Court of Appeal has ruled on the *Bell Canada* case, the Tribunal will proceed based on the directions and parameters provided by the Court.

Date referred: 29/05/1997

Number of hearing days in 2000: 47

Number of hearing days to date: 79

2 This case was originally referred to the Tribunal by the Canadian Human Rights Commission in June 1996. However, the respondent challenged the validity of that referral and later also the impartiality of the Tribunal. These two challenges held up the Tribunal proceedings for nearly two years. In March 1998, the Federal Court upheld both challenges, quashing the original referral and, in a separate ruling, prohibiting the Tribunal panel from proceeding until structural changes to the Tribunal had removed the potential for institutional bias. Amendments to the CHRA in June 1998 arguably resolved the problems identified by the court. But the case could not proceed even with a new Tribunal panel because the referral itself had been ruled invalid. In November 1998, the Federal Court of Appeal overturned the Trial Division ruling that had quashed the referral. A new Tribunal panel was appointed to hear the case early in 1999.

Judicial review by the Federal Court

In 2000 the Federal Court Trial Division issued three rulings on final decisions of the Tribunal. Each of these decisions upheld the ruling of the Tribunal or Review Tribunal. The Federal Court of Appeal also rendered decisions on three appeals from Trial Division reviews of earlier Tribunal decisions. All of these decisions upheld or restored the original determinations of the Tribunal.

***Laslo* v. *Gordon Band Council* (Sharlow/Isaac/Strayer) Jul 20, 2000 FCA**

Date of original Tribunal decision: 04/12/1996

At issue in this appeal was whether the CHRA applied to the Gordon Indian Band's decision to deny housing on the basis of sex and marital status. The Tribunal had dismissed the complaint on the ground that decisions made pursuant to the *Indian Act* are exempt from the application of the CHRA (see s. 67). The Federal Court Trial Division set aside the Tribunal's decision, and the Band appealed.

Date of Federal Court of Appeal ruling: 20/07/2000

The Court of Appeal concluded that while exceptions to human rights legislation are to be interpreted narrowly, s. 67 of the CHRA must be respected and allowed to operate within its proper sphere. The denial of housing to Sarah Laslo by the Band Council was based on a "decision" or series of decisions made, authorized or adopted by the Band Council and therefore made under or pursuant to the *Indian Act*. Consequently, the Band's actions fell within the parameters of s. 67, immunizing it from review under the CHRA. The Tribunal was correct in determining that it lacked jurisdiction over the Band. The Court restored the Tribunal's decision.

***Green* v. *Treasury Board, Public Service Commission and Human Resources Development Canada* (Lemieux) Jun 2, 2000 FCTD**

Date of original Tribunal decision: 26/06/1998

The Tribunal had found that Treasury Board had discriminated against Nancy Green on the basis of disability when it denied her access to French language training on the basis of test results showing that she lacked the potential for learning a second language. The Tribunal had found that the testing methods unfairly evaluated Ms. Green's capabilities by focusing on limitations imposed by her auditory dyslexia and failing to account for the compensatory strategies that she would be able to avail herself of in an adapted learning setting.

Date of Federal Court ruling: 02/06/2000

The Court upheld the Tribunal's finding that ostensibly non-discriminatory tests applied to the general public service population had discriminatory adverse consequences on people with auditory dyslexia. The Court also upheld the Tribunal's conclusion that the Treasury Board and Public Service Commission had not fulfilled their obligation to accommodate Ms. Green's disability. The Court agreed with the Tribunal that a new method for evaluating language learning potential should be developed, and that Ms. Green should be promoted

to the level she would have reached but for the discrimination. However, the Court set aside the Tribunal's award of compound interest on monetary damages and its award of legal fees to Ms. Green.

Stadnyk* v. *Canada Employment and Immigration Commission
(Strayer/Isaac/Sharlow) Jul 21, 2000 FCA

Date of original Tribunal decision: 27/07/1993

Bobbi Stadnyk alleged that she had been subjected to differential treatment and harassment in the course of a job interview. The alleged discriminatory conduct consisted of hypothetical questions posed to her about how she would react to sexual harassment in the workplace. The employer also discussed her past media appearances wherein she was highly critical of the federal government's record on sexual harassment. It was suggested that there was an incompatibility with this profile and the duties of the job applied for, which involved media relations. The Tribunal, the Review Tribunal and the Federal Court Trial Division came to the conclusion that Ms. Stadnyk's treatment during the job interview had not been discriminatory.

Date of Federal Court of Appeal ruling: 21/07/2000

The Court of Appeal endorsed the Tribunal's reasoning that, because men and women perceive harassment differently, where the complainant is a woman, the determination of whether conduct amounts to sexual harassment must be made from the perspective of the "reasonable woman." Applying this test, the Court agreed that the conduct at issue had not been discriminatory. The hypothetical questions may have been inappropriate, but they were not illegal.

Singh* v. *Statistics Canada
(Teitelbaum) Apr 4, 2000 FCTD

Date of original Tribunal decision: 06/11/1998

Surendar Singh had alleged that Statistics Canada had discriminated against him on the basis of age and race in deciding not to consider him for a staffing competition. The Tribunal upheld his complaint, noting that the employer's failure to put Mr. Singh's name on an eligibility list was at least in part because, at 43 or 44, Mr. Singh did not fit the profile that Statistics Canada had in mind for entry-level economist recruits. The Tribunal ordered Statistics Canada to provide Mr. Singh with an economist position at the first reasonable opportunity, to compensate him for his loss of wages, to pay him $3,000 for hurt feelings and to pay interest on the amount awarded. Statistics Canada sought a review of the decision by the Federal Court.

Date of Federal Court ruling: 04/04/2000

In upholding the Tribunal's decision, the Court noted that Statistics Canada's failure to put Mr. Singh on an eligibility list despite a growing demand for economist recruits supported the Tribunal's determination. The Court also found the statistical evidence sufficient to establish the existence of systemic discrimination on the basis of age with respect to the selection of candidates for entry-level economist positions. Further, it was satisfied that the Tribunal had not allowed the complainant's

lack of credibility to cloud its decision. Lastly, given the finding of the Tribunal that it was probable that Mr. Singh would have been given an economist position, the Court held that the Tribunal's order to this effect was proper.

Cramm* v. *Canadian National Railway
(Mackay) Jun 16, 2000 FCTD

Date of Review Tribunal decision: 23/06/1998

When the Canadian National Railway shut down in Newfoundland, employee severance benefits were set out in a collective agreement that provided income maintenance benefits to employees who had accumulated 96 months of service. In calculating the number of days of service in any given year, employees were permitted to include absences of up to 100 days for such reasons as jury duty, injury and maternity leave, provided that they had worked at least one day that year. Because of an injury sustained on the job, Barry Cramm was absent from the workplace for four years preceding the layoff. This prolonged absence prevented him from accumulating the requisite 96 months for income maintenance. He alleged that the collective agreement was discriminatory. Although the Tribunal upheld his complaint, a Review Tribunal dismissed it. The Review Tribunal found that the agreement treated Mr. Cramm no differently than it did any other employee who had had lengthy absences.

Date of Federal Court ruling: 16/06/2000

In the Court's view, the Review Tribunal properly found that Mr. Cramm had not been treated differently from any other individual or group that had been absent for reasons set out in the agreement for similar periods of time.

MacNutt* v. *Shubenacadie Indian Band
(Stone/Isaac/Sexton) May 24, 2000 FCA

Date of original Tribunal decision: 11/10/1995

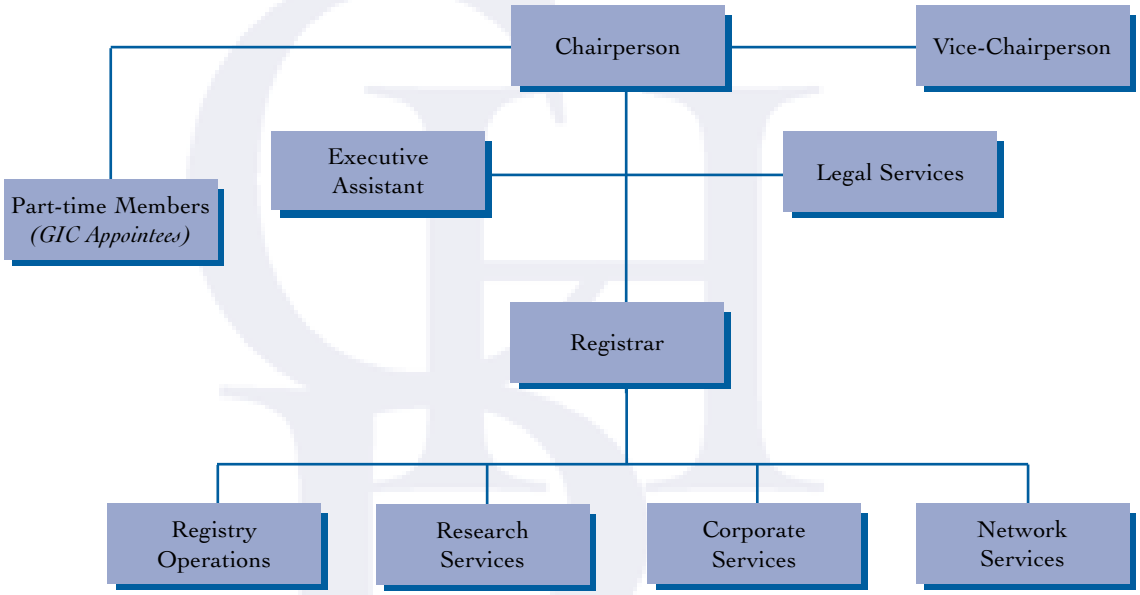
In this case, an Indian Band had denied social assistance benefits to non-Aboriginal residents of the reserve because of their race. The Tribunal had found that this constituted discrimination and had ordered that the Band make these benefits available to the individuals in question. In a subsequent review of this ruling, the Federal Court Trial Division upheld the Tribunal's decision, and the Band appealed the decision to the Federal Court of Appeal.

Date of Federal Court of Appeal ruling: 24/05/2000

In upholding the Tribunal's decision, the Court of Appeal refused to accept the Band's attempts to invoke the interpretative provisions of the *Canadian Charter of Rights and Freedoms* to contest the Tribunal's ruling, noting that the complainants themselves had not relied on the equality provisions of the Charter. The Court also found that the Tribunal had not intruded into provincial jurisdiction when it issued an order affecting the payment of social assistance to non-Indians. On the contrary, the non-Indians in question fell squarely within federal jurisdiction as they were living on the reserve, were spouses of Indians, and had been denied access to a federal program designed to benefit Indians and their dependants.

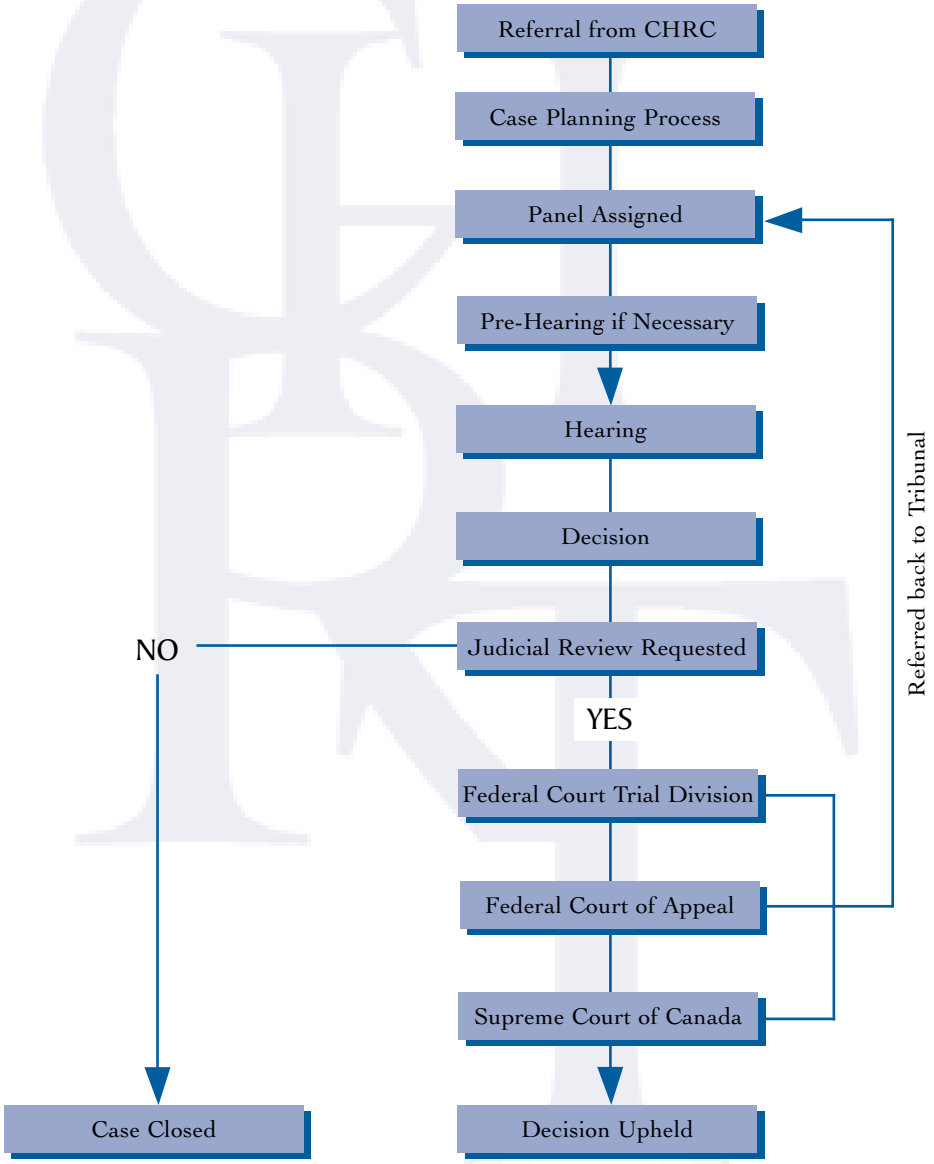
Appendix I

Organization chart



Appendix 2

An overview of the hearings process



Note: The normal process may be varied to meet the needs of a particular case.

An overview of the hearings process

The roles of the Canadian Human Rights Tribunal and the Canadian Human Rights Commission (CHRC) have parallels in the criminal justice system. Like the police, the Commission receives and investigates complaints. Some of these turn out to be unfounded. But when the Commission believes that further inquiry is warranted and an agreement cannot be reached through conciliation, it refers the case to the Tribunal, which acts as the judge. The Commission then takes on the role of Crown attorney and argues the case before the Tribunal on behalf of the public interest.

The Tribunal may inquire only into complaints referred to it by the Commission, usually after the Commission has conducted an investigation. The Commission resolves most cases without the Tribunal's intervention. On average, only six percent of complaints received by the Commission make their way to the Tribunal. These generally involve complicated legal issues, new human rights issues, unexplored areas of discrimination or multifaceted evidentiary disputes that must be heard under oath.

Referral by the CHRC

To refer a case to the Tribunal, the Chief Commissioner of the CHRC sends a letter to the Chairperson of the Tribunal asking the Chairperson to establish a panel to institute an inquiry into the complaint. The Tribunal receives only the complaint form and the addresses of the parties.

Within two weeks from the date of the request, a case planning questionnaire is sent to all parties to the complaint. The completed questionnaires provide sufficient information for the Registry to schedule hearing and disclosure dates. If necessary, a member of the Tribunal (normally the Chairperson or Vice-Chairperson) will confer with the parties to respond to any specific issues identified by the parties that could not be resolved through the use of the questionnaire.

Mediation

Until the spring of 2000, appropriate cases were referred to mediation if requested by the parties. In such cases, the Chairperson would designate a member of the Tribunal to serve as a mediator. However, all mediation services were suspended early in the year, pending an evaluation and policy review of the Tribunal's four-year experiment with alternative dispute resolution.

Hearing

The Chairperson assigns one or three members from the Tribunal as a panel to hear and decide the case. A person designated as a mediator on a case will not be appointed to the Panel that ultimately hears and decides the merits of the complaint. If required, additional pre-hearings may be held to consider preliminary issues, which may relate to jurisdictional, procedural or evidentiary matters. Hearings are open to the public.

During the hearing, all parties are given ample opportunity to present their case. This includes the presentation of evidence and legal

arguments. In the majority of cases, the Commission leads evidence and presents arguments before the Tribunal to prove that the respondent named in the complaint has contravened the statute. All witnesses are subject to cross-examination from the opposing side. The average hearing lasts from 12 to 15 days. Hearings are normally held in the city or town where the complaint originated.

The Panel sits in judgment, deciding the case impartially. Hearing the evidence and interpreting the law, the Panel determines whether a discriminatory practice has occurred within the meaning of the CHRA. At the conclusion of the hearing process, the members of the Panel normally reserve their decision and issue a written decision to the parties and the public within three to four months. If the Panel concludes that a discriminatory practice has occurred, it issues an order to the respondent, setting out the remedies.

Appeals

All parties have the right to seek judicial review of any Tribunal decision to the Trial Division of the Federal Court of Canada. The Trial Division holds a hearing with the parties to hear legal arguments on the correctness of the Tribunal's decision and its procedures. The Tribunal does not participate in the Federal Court's proceedings. The case is heard by a single judge, who renders a judgment either upholding or setting aside the Tribunal's decision. If the decision is set aside, the judge refers the case back to the Tribunal to be reconsidered in light of the Court's findings of error.

Any of the parties has the right to request that the Federal Court of Appeal review the decision of the Trial Division judge. The parties once again present legal arguments, this time before three judges. The Court of Appeal reviews the Trial Division's decision while also considering the original decision of the Tribunal.

Any of the parties can seek leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. If the Supreme Court deems the case to be of national importance, it may hear an appeal of the judgment. After hearing arguments, the Supreme Court issues a final judgment on the case.

Appendix 3

Canadian Human Rights Tribunal members

Anne Mactavish

Tribunal Chairperson

A member of the former Human Rights Tribunal Panel since 1992, Anne Mactavish was appointed acting President of the Panel in 1995 and President in 1996. During her years of legal practice in Ottawa, she specialized in civil litigation related to employment and commercial and health matters. A past president of the Carleton County Law Association, Ms. Mactavish has taught employment law at the University of Ottawa, as well as legal ethics and trial advocacy at the Bar Admission Course sponsored by the Law Society of Upper Canada.

Grant Sinclair, Q.C.

Vice-Chairperson

A member of the former Human Rights Tribunal Panel from 1989 to 1997, Grant Sinclair was appointed Vice-Chairperson of the Canadian Human Rights Tribunal in 1998. Mr. Sinclair has taught constitutional law, human rights and administrative law at Queen's University and Osgoode Hall, and served as an advisor to the Human Rights Law Section of the Department of Justice on issues arising out of the *Canadian Charter of Rights and Freedoms*. He has acted on behalf of the Attorney General of Canada and other federal departments in numerous Charter cases and has practised law for more than 20 years.

Guy Chicoine, Q.C.

Saskatchewan

Guy Chicoine joined the former Human Rights Tribunal Panel in 1995 and was appointed in 1998 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. Called to the Bar of Saskatchewan in 1980, Mr. Chicoine is a partner in the firm of Chicoine, Billesberger and Grimsrud, where he practises general law, with an emphasis on real estate law, commercial law, estate law, and matrimonial, civil and criminal litigation.

Shirish P. Chotalia

Alberta

Shirish Chotalia obtained an LL.B from the University of Alberta in 1986 and an LL.M from the same university in 1991. She was admitted to the Bar of Alberta in 1987 and practises constitutional law, human rights law and civil litigation with the firm Pundit & Chotalia in Edmonton, Alberta. A member of the Alberta Human Rights Commission from 1989 to 1993, Ms. Chotalia was appointed to the Tribunal as a part-time member in December 1998. She is also the author of the annual *Annotated Canadian Human Rights Act*.

Pierre Deschamps

Quebec

Pierre Deschamps graduated from McGill University with a BCL in 1975 after obtaining a Bachelor of Arts in theology at the University of Montréal in 1972. He is an assistant professor at the Faculty of Law of McGill University, as well as an assistant lecturer at the Faculty of Continuing Education. Mr. Deschamps was appointed to a three-year term as a part-time member of the Tribunal in 1999.

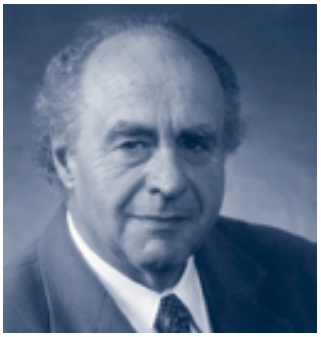
Reva Devins

Ontario

Reva Devins joined the former Human Rights Tribunal Panel in 1995 and was appointed in 1998 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. Admitted to the Ontario Bar in 1985, she served as a Commissioner of the Ontario Human Rights Commission from 1987 to 1993 and as Acting Vice-Chair of the Commission in her final year of appointment.

Roger Doyon

Quebec



Roger Doyon served as a member of the former Human Rights Tribunal Panel from 1989 to 1997 and was appointed in 1998 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. A partner in the law firm of Parent, Doyon & Rancourt, he specializes in civil liability law and the negotiation, conciliation and arbitration of labour disputes. Mr. Doyon also taught corporate law at the college level and in adult education programs from 1969 to 1995.

Sandra Goldstein

Ontario

Ms. Goldstein was appointed to a three-year term as a part-time member of the Tribunal in 1999. Educated in Toronto, she has a background in social sciences, philosophy and health sciences. Ms. Goldstein has sat on several education boards and committees, and negotiated 10 collective agreements with academic and administrative staff. Between 1992 and 1998, she served as Chief Conciliator at the Canadian Human Rights Commission, Pay and Employment Equity Directorate. She now runs a management consulting firm providing advice on human rights and pay and employment equity.

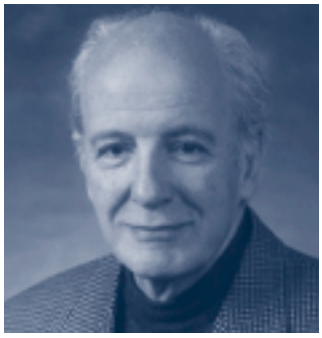
Athanasios Hadjis

Quebec

Athanasios Hadjis obtained degrees in civil law and common law from McGill University in 1986 and was called to the Quebec Bar in 1987. Since then, he has practised law in Montréal at the law firm of Hadjis & Feng, specializing in civil, commercial, corporate and administrative law. A member of the Human Rights Tribunal Panel from 1995 to 1998, Mr. Hadjis was appointed in 1998 to a three-year term as a part-time member of the Canadian Human Rights Tribunal.

Claude Pensa, Q.C.

Ontario



Claude Pensa joined the former Human Rights Tribunal Panel in 1995 and was appointed to a three-year term as a part-time member of the Canadian Human Rights Tribunal in 1998. Called to the Ontario Bar in 1956 and appointed Queen's Counsel in 1976, Mr. Pensa is senior a partner in the London, Ontario, law firm of Harrison Pensa.

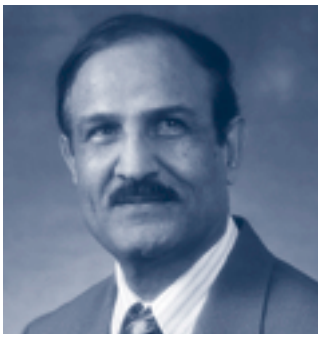
Eve Roberts, Q.C.

Newfoundland

A member of the former Human Rights Tribunal Panel from 1995 to 1997, Eve Roberts was appointed to a three-year term as a part-time member of the Canadian Human Rights Tribunal in 1998. Mrs. Roberts was called to the Bar of Alberta in 1965 and to the Bar of Newfoundland in 1981. A partner in the St. John's, Newfoundland, law firm of Patterson Palmer Hunt Murphy until she retired in 1997, Mrs. Roberts also served as Chair of the Newfoundland and Labrador Human Rights Commission from 1989 to 1994.

Mukhtyar Tomar

Nova Scotia



Mukhtyar Tomar joined the former Human Rights Tribunal Panel in 1995 and was appointed to a three-year term as a part-time member of the Canadian Human Rights Tribunal in 1998. Graduating with an LL.B and an M.A. in history from the University of Rajasthan in Jaipur, India, Mr. Tomar immigrated to Canada in 1968, where he taught junior high school in Dartmouth, Nova Scotia, for 19 years and served on the Nova Scotia Human Rights Commission until 1999.

Appendix 4

The Tribunal Registry

The Registry of the Canadian Human Rights Tribunal provides administrative, organizational and operational support to the Tribunal, planning and arranging hearings, providing research assistance, and acting as liaison between the parties and Tribunal members.

Registrar
Michael Glynn

Manager, Registry Operations
Gwen Zappa

Legal Advisor
Greg Miller

Executive Assistant
Monique Groulx

Registry Officers
Diane Desormeaux
Bernard Fournier
Holly Lemoine
Roch Levac
Carol Ann Middleton

Registry Officer—Equal Pay
Nicole Bacon

Network and Systems Administrator
Julie Sibbald

Information and Communications Officer
Ramona Jauneika-Devine

Hearings Assistant
Lyne Parent

Corporate Services Officer
Robert Le Voguer

Administrative Assistants
Francine Desjardins-Gibson
Thérèse Roy

Appendix 5

Tribunal contact information

Michael Glynn
Registrar
Canadian Human Rights Tribunal
473 Albert Street
Suite 900
Ottawa, Ontario
K1A 1J4

Tel: (613) 995-1707
Fax: (613) 995-3484

e-mail: registrar@chrt-tcdp.gc.ca
Web site: www.chrt-tcdp.gc.ca