Canadian Human Rights TRIBUNAL

ANNUAL REPORT 1998

Canada

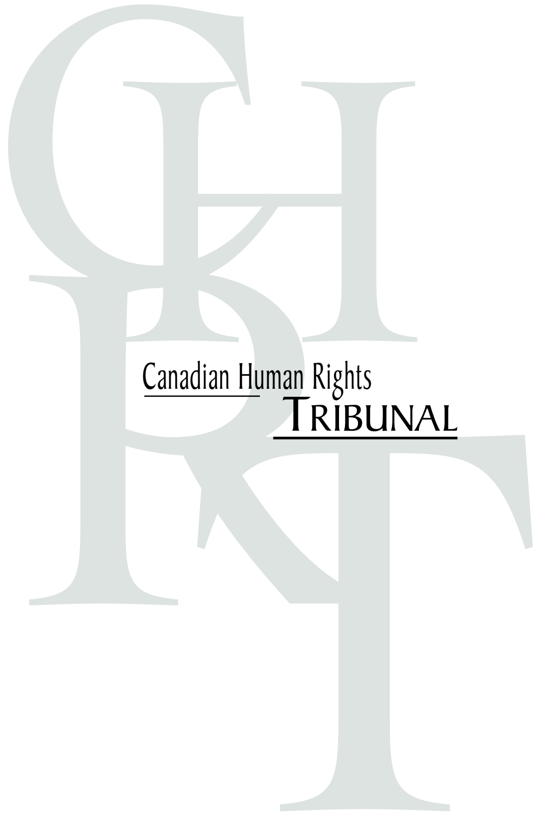
Canadian Human Rights Tribunal

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. The first Employment Equity Review Tribunals will likely be appointed in 1999.



March 31, 1999

The Honourable Gilbert Parent, Speaker
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Mr. Speaker:

I have the honour to present to you the first Annual Report of the Canadian Human Rights Tribunal for the year 1998, in accordance with the provision of subsection 61(3) of the *Canadian Human Rights Act*.

Yours sincerely,

Anne L. Mactavish
Chairperson

March 31, 1999

The Honourable Gildas L. Molgat, Speaker
The Senate
Ottawa, Ontario
K1A 0A4

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Minister of Public Works and Government Services Canada

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Message from the Chairperson

In many ways 1998 was a watershed year for the Canadian Human Rights Tribunal, as we severed the last of our formal links with the Canadian Human Rights Commission and underwent a major restructuring to become a smaller, permanent Tribunal with a core of full-time members. This was also the year we found ourselves catapulted into the spotlight after a landmark wage discrimination ruling that involved the interpretation of the pay equity provisions of the *Canadian Human Rights Act* (CHRA).

Although the attention paid to the ruling in the Treasury Board case was unusual, the ruling itself was not unique. Tackling complex evidentiary and legal issues has become a routine part of life at the Tribunal. Isolated instances of discrimination are accounting for a smaller proportion of the Tribunal's caseload as more and more complaints reflect long-standing systemic practices. Moreover, fewer cases are clear-cut, and the Tribunal is increasingly being called on to balance the legitimate rights and interests of parties with equally compelling points of view. Complicating matters further has been the loss of confidence by corporate Canada in the independence of the Tribunal. Repeated challenges to the Tribunal's competence or independence over the last decade finally culminated in 1998 in the finding by the Federal Court that a Tribunal appointed under the old CHRA did not have the requisite level of independence to be able to provide an impartial hearing. For all these reasons, the need for an independent and highly qualified Tribunal has never been greater. Recent changes establishing a requirement for expertise in human rights matters for those appointed to the Tribunal and changes to the structure and functioning of the Tribunal will undoubtedly help us rise to this challenge.

Tackling complex evidentiary and legal issues has become a routine part of life at the Tribunal.

In the meantime, the Tribunal is giving top priority to developing a higher level of expertise for its members and providing timely hearings and decisions. In 1998, in consultation with users of the Tribunal's services, the Tribunal developed new rules of procedure. It also improved its training of Tribunal members and streamlined the planning and execution of hearings. Late in the year, the Tribunal launched a major review of its alternative dispute resolution project to assess whether the growing popularity and apparent success of mediation is truly in the public interest.

I think the upshot of all these changes will be a more open and responsive Tribunal, with stronger guarantees of procedural fairness and greater consistency in its decisions. For Canadians this should translate into a system of human rights adjudication that is fair, equitable and expedient.

I look forward to working with my colleagues at the Tribunal and the Registry to implement the changes envisaged by the statutory reforms of 1998 and to cooperating with the Department of Justice in the coming year as it undertakes a full-scale review of human rights adjudication in Canada.

Anne Mactavish

A New Beginning

Although the operations of the Canadian Human Rights Tribunal and the Canadian Human Rights Commission have become progressively more independent of one another since 1988, amendments to the *Canadian Human Rights Act*, proclaimed on June 30, 1998, formalized this independence and imposed new reporting obligations on the Tribunal.

As a stand-alone federal agency, the Canadian Human Rights Tribunal will be required to account to Canadians through Parliament each year for its activities and expenditures. This 1998 Annual Report is the Tribunal's first such report to Parliament. It describes the Tribunal's activities during the 1998 calendar year, including those pertaining to its caseload, administration, restructuring, and training and mediation programs.

In the appendices, you will find an overview of the Tribunal's organizational structure (Appendix 1) and hearings process (Appendix 2).

CHRT

A New Agency with a Renewed Mandate

As a quasi-judicial body with a statutory mandate to apply and enforce the *Canadian Human Rights Act*, the Canadian Human Rights Tribunal must not only be impartial; it must also be seen to be impartial. For many years, however, this impartiality has been called into question because of the Tribunal's financial and administrative links to the Canadian Human Rights Commission, which until recently controlled the Tribunal's finances. Given that the Commission appears before the Tribunal as an advocate in almost every case, the administrative and financial links between the two bodies created a perception of bias and potential conflict of interest for the Tribunal.

Until mid-1998, the Canadian Human Rights Tribunal was an ad hoc, rather than a standing, body.

Many respondents challenged the jurisdiction of the Tribunal, alleging that it was incapable of giving them a fair hearing within the meaning of the *Canadian Charter of Rights and Freedoms*. They argued that the Tribunal and the Commission were too closely aligned and that they were in fact one organization with two addresses. The situation came to a head in March 1998, when a challenge by Bell Canada resulted in a Federal Court ruling that members of the Canadian Human Rights Tribunal presiding over the Bell Canada case failed to satisfy the criteria for an independent tribunal. As a consequence of this ruling, no new tribunals were appointed until Parliament had taken steps to address the Court's concerns.

Meanwhile, the Tribunal, which has operated separately from the Canadian Human Rights Commission since 1988, had been seeking by degrees to entrench its independence in law. On January 1, 1997, through Orders-in-Council and the approval of Treasury Board, the Tribunal became a separate agency under the provisions of the *Financial Administration Act*. In May 1998, Parliament passed amendments to the *Canadian Human Rights Act* (CHRA) that strengthened the independence of the Tribunal. These amendments took effect on June 30, formalizing the Tribunal's independence in law and mandating changes to the structure and function of the Tribunal.

Until mid-1998, the Canadian Human Rights Tribunal was an *ad hoc*, rather than a standing, body. When a case was referred from the Canadian Human Rights Commission, members were selected from the Human Rights Tribunal

Panel, a pool of about 50 part-time adjudicators. They served relatively short terms, which limited their opportunities to apply their expertise in human rights and administrative law and to gain experience conducting technical and highly sophisticated hearings.

Among the concerns raised by the short-term, part-time tenure of panel members was that their vastly disparate levels of adjudication experience had produced a sometimes inconsistent body of Tribunal case law. Some critics also argued that *ad hoc* tribunals were not always capable of handling the complex issues of law involved in some complaints. Finally, the fact that panel members were available only part time meant that it could take many months for a tribunal to hear all the evidence and reach a decision on a case.

The adoption of Bill S-5 created a smaller, standing Canadian Human Rights Tribunal — up to 13 members plus a full-time Chairperson and Vice-Chairperson. (The mandates of the Chairperson and the Vice-Chairperson are for periods of up to seven years — the former Tribunal Panel President was appointed for a maximum three-year term — and Tribunal members are appointed for fixed terms of up to five years.) All members of the Tribunal are required to have expertise in and sensitivity to human rights issues. And both the Chairperson and Vice-Chairperson must have been members of a Canadian bar for at least 10 years, a requirement comparable to that imposed on appointees to the bench under the *Judges Act*.

This smaller, more highly qualified group is likely to generate a more consistent body of decisions. Moreover, the greater availability of Tribunal members to hear cases will speed up the disposition of complaints.

Tribunal members who were assigned to cases before the new amendments took effect are no longer considered members of the Tribunal. However, they do have a mandate to see their cases through to completion. This means that the three cases that were in progress on June 30, 1998, will be unaffected by the changes.

The 1998 CHRA amendments also reduced the number of levels of review. Before the passage of Bill S-5, an appeal of the ruling of a one-member Tribunal was referred to a three-member Review Tribunal. Such review tribunals were set up as needed, and there have been 47 since 1979. Bill S-5 eliminated review tribunals; now parties who wish to challenge a decision of the Tribunal may apply directly to the Federal Court of Canada.

It is expected that the transformations envisaged by Bill S-5 will take about three years to realize. In-depth training of Tribunal members, the development of new rules of practice, and procedural changes in the hearings and adjudication process will contribute to that goal.

The Tribunal hopes that one important outcome of these changes will be an increased deference by the courts to the rulings of the Tribunal as this would eventually translate into increased certainty for complainants and respondents about the judicial interpretation of the CHRA. It would also mean that challenges of Tribunal decisions would become less frequent, resulting in speedier dispositions of complaints and reduced cost to the justice system.

Although the transition to a new Tribunal with a renewed mandate is well under way, the Minister of Justice's recent announcement of a broad review of the CHRA could preface still more changes to Canada's human rights investigation and adjudication system. For the past 20 years, changes to this system have been driven by court challenges, resulting in a patchwork of legislative amendments and process changes. The CHRA has been amended no fewer than five times in the past two decades, with the most recent round of amendments clarifying the Tribunal's jurisdiction. The system-wide review proposed by the Justice Minister would provide an opportunity to reassess Canada's approach to human rights adjudication from the ground up. The Tribunal fully supports this initiative and looks forward to working with the Department of Justice to increase the effectiveness of the human rights adjudication process.

Current Trends and New Directions

The Changing Nature of the Tribunal's Work

As the Auditor General of Canada observed in his September 1998 report, the Canadian Human Rights Commission and the Canadian Human Rights Tribunal operate in an increasingly complex environment. Not only are the prohibited grounds of discrimination becoming more numerous, but concepts of discrimination are also becoming more expansive, nuanced and complex. Moreover, as human rights litigation has flourished in the post-Charter era, issues of law and questions of evidence and procedure have grown more and more contentious.

Where once the majority of complainants were individuals seeking limited types of redress, today it is at least as common for complainants to be sophisticated and well-resourced advocacy groups or labour unions seeking fundamental changes to government policy, including the allocation of employment benefits and the implementation of social programs. Today's complaints are less clear-cut than those of, say, 10 years ago, and the opposing perspectives of complainants and respondents can appear equally compelling. The problems usually arise from long-standing systemic practices, legitimate concerns of the employer, or conflicting interpretations of the statute and precedents, and the evidentiary and legal issues are extremely complex. Such cases are also usually more time-consuming because of the increasing volume and complexity of the evidence to be heard and weighed. Fifteen years ago, cases referred to the Tribunal were heard for two to four days, and the time lapse between referral of the case from the Canadian Human Rights Commission and a final ruling by the Tribunal was about 18 months. By contrast, hearings in cases decided in 1997 and 1998 were in the order of 12 to 15 days and the interval between referral and judgment averaged 12 months. *PSAC v. Treasury Board*,[1] a pay equity case decided in July 1998, involved 275 days of hearings over several years. One statistician alone gave evidence for 44 days.

Since the Tribunal is required to deal with all complaints referred to it by the Commission, the new grounds of discrimination introduced in successive amendments to the *Canadian Human Rights Act* (CHRA) have technically broadened the Tribunal's mandate. In practice, however, the body of case law that has grown up in the past two decades has tended to offer enough guidance to prospective litigants to make it possible for many complaints based on

1 *P.S.A.C. v. Canada (Treasury Board) (No. 3) (1998), 32 C.H.H.R. D/349 (Can. Trib.)*

older grounds to be settled with the guidance of the Canadian Human Rights Commission. Thus the Tribunal's caseload tends to be dominated by new human rights issues and unexplored areas of discrimination.

Some of these are summarized in the following sections. The section on pay equity illustrates the kinds of problems encountered by the Tribunal in the six years since it began hearing these kinds of cases. Other sections, on the duty to accommodate, hate propaganda and employment equity, preview some new and emerging areas of human rights law that will represent a growing share of the Tribunal's caseload.

Pay Equity

The Tribunal's hearings commitments have shifted significantly since it began hearing its first pay equity cases in 1991. These cases are demanding an increasingly disproportionate share of Tribunal hearing days. In 1993, two pay equity cases alone accounted for more than a third of the 345 days of tribunal hearings. Over the past six years, pay equity cases that proceeded to a full hearing consumed an average of 175 days of hearings each. In 1998 the Tribunal's caseload included three pay equity complaints that alone accounted for about 50 percent of its hearings schedule. The longest-running Tribunal still in hearings is *PSAC v. Canada Post*, which has heard 280 days' worth of evidence and arguments since 1992. This case is scheduled for a further 40 to 50 days of hearings in 1999.

Almost as noteworthy as the time they consume is the controversy these cases generate. Requests for judicial review of preliminary procedural or jurisdictional matters for pay equity cases are common and 1998 was no exception. The Tribunal's July 1998 ruling in *PSAC v. Canada (Treasury Board)* (see Section 5 for details) precipitated much public controversy and the government's response to the ruling was a request for judicial review by the Federal Court of Canada. Meanwhile, Bell Canada launched two appeals to the Federal Court, challenging both the jurisdiction of the Tribunal to hear the case and the validity of its referral to the Tribunal by the Canadian Human Rights Commission.

The first of these applications alleged that the Tribunal was not competent to rule on a pay equity complaint brought against the telephone company by the Canadian Telephone Employees' Association (CTEA). In March 1998, the Federal Court ruled that Bell Canada could not be guaranteed a fair hearing because the job security of Tribunal members was at the discretion of the Minister of Justice and their wages were determined by the Canadian Human Rights Commission, which had a significant interest in how the case was decided. The ruling hobbled the Tribunal until Parliament reaffirmed the Tribunal's independence through amendments to the *Canadian Human Rights Act* (CHRA). In the other appeal, Bell Canada challenged the validity of the Commission's investigation into the CTEA's complaint and sought to quash the referral of the case to the Tribunal. Reversing the Federal Court's ruling in November 1998, the Federal Appeal Court referred the case back to the Tribunal, which was to begin hearings early in 1999.

A third wage discrimination case, *PSAC v. Government of the Northwest Territories*, is set to begin hearings in 1999 and the three cases will likely consume a significant proportion of the Tribunal's hearings schedule.

These high-profile cases underscore the challenges inherent in building a new body of case law. Because pay equity case law is still in its infancy and because the stakes are so high, many of these cases will likely take years to resolve, with obvious implications for the Tribunal's workload.

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The Duty to Accommodate

A key substantive amendment to the *Canadian Human Rights Act* (CHRA) in June 1998 was the broadening of the legal obligation or duty to accommodate the needs of persons protected by the Act, including religious minority groups and persons with disabilities. The amendment responded to the October 1996 report of the Federal Task Force on Disability Issues, which had recommended that the CHRA expressly incorporate a duty of accommodation. S. 15 of the CHRA increases the duty of service providers and employers to accommodate the needs of their clients and employees, and excuses them only in cases where factors relating to health, safety or cost would make the fulfillment of the duty unreasonable.

The new provision seeks to ensure that people with different types of needs do not encounter unfair barriers and have the same opportunities as other Canadians to find employment and take advantage of services. The duty to accommodate might, for example, include rendering a workplace wheelchair accessible.

The *Ontario Human Rights Code* and other provincial statutes provide for a similar duty, and the last decade has occasioned a significant body of case law on accommodation. Nevertheless, as with any new provision of the CHRA, the Tribunal will eventually be called on to interpret the duty to accommodate in the federal context. Given that complaints under the CHRA make their way to the Tribunal via the Canadian Human Rights Commission, the Tribunal will not likely be called on to interpret the new provision before 2000.

Hate Propaganda

Since 1979 it has been an offence under the *Canadian Human Rights Act* (CHRA) to use telephone lines to disseminate hate propaganda against identifiable groups. Amendments to the CHRA in 1998 gave the Tribunal authority to impose a financial penalty of up to $10,000 on the operators of telephone hate lines and to order compensation for any victim specifically

identified in the communication. The incidence of hate crime is rising around the world and modern technology has made it relatively easy to create hate propaganda hotlines and Web sites. The Tribunal has already been asked to interpret whether hate messages disseminated over the Internet are subject to the hate propaganda provisions of the CHRA. However, the Tribunal does not anticipate an increase in its caseload as a result of the CHRA amendments.

Employment Equity

The *Employment Equity Act* (EEA), proclaimed in October 1996, gave the President of the former Human Rights Tribunal Panel authority to appoint an Employment Equity Review Tribunal to hear applications arising from "directions" issued by the Canadian Human Rights Commission under the EEA. The new Act obligated large, federally regulated employers to eliminate employment barriers and institute positive employment equity policies (see sidebar). It also gave the Commission the authority to conduct employment equity audits and to order a non-compliant employer to take remedial action. Although the Commission seeks to resolve cases of non-compliance through persuasion and negotiation, it may also issue a "direction" requiring the employer to take specified action.

The role of the Employment Equity Review Tribunal is twofold: at an employer's request, it may review and overturn a "direction" issued by the Commission; or, where an employer has failed to comply with a "direction" of the Commission, the Review Tribunal may, at the request of the Commission, issue an order confirming or amending the "direction."

It is anticipated that the first Employment Equity Review Tribunal will be appointed in 1999. Projections based on the experience of provincial human rights commissions administering similar statutes suggest that employment equity cases will consume an increasing proportion of the Tribunal's caseload.

Obligations of employers under the *Employment Equity Act* include the following:

- Eliminate employment barriers and institute positive employment equity policies.
- Collect information to determine the under-representation of designated groups in each occupational group in the workforce.
- Prepare and implement employment equity plans.
- Inform employees about employment equity plans.
- Consult and collaborate with employee representatives to implement employment equity.
- Maintain records on the implementation of employment equity.

Alternative Dispute Resolution

In 1996 the Tribunal launched an alternative dispute resolution project that makes it possible to resolve complaints without the need for a full hearing. All parties to the complaint must consent to mediation before the Chairperson will designate a member of the Tribunal as a mediator. Mediation provides a final opportunity for the parties to meet privately with the assistance of a mediator and attempt to reach a settlement. Even when the parties request mediation, hearing dates are scheduled to guarantee that there's no delay in the disposition of the case. If the complaint is settled, there is a faster, less expensive and more satisfactory and harmonious resolution to the complaint. If the mediation is unsuccessful, the case proceeds without delay to a hearing before a Tribunal.

The program has proven very successful, with the majority of all complainants opting for mediation at the pre-hearing conference. It takes about two months to complete the mediation effort, and the settlement rate is about 70 percent. In its first three years of operation the mediation program saved the Tribunal an estimated $814,000 in hearing costs.

Generally, parties involved in the process have been pleased to avoid having a solution imposed on them by the Tribunal, in favour of a settlement. The Tribunal is concerned that, largely because the terms of the settlement may remain confidential, mediation may not always serve the public interest. Cases that are decided by the Tribunal tend to be precedent setting, and decisions in individual cases can have broad social implications. Therefore, while the individual complainant or respondent may be well served by mediation, other people in similar situations fail to benefit because the settlement remains confidential.

The Tribunal has launched a full-scale review of its mediation process to ensure that the program is responsive to the needs and experience of the complainants, respondents and counsel who use it, as well as to the public interest.

With this in mind, the Tribunal has launched a full-scale review of its mediation process to ensure that the program is responsive to the needs and experience of the complainants, respondents and counsel who use it, as well as to the public interest. The findings from a stakeholder consultation survey will enable the Tribunal to monitor and evaluate the process, refine its current mediation model and develop mediation information products for prospective users.

Auditor General's Report

The Canadian Human Rights Commission and the Canadian Human Rights Tribunal are expected to operate and be seen to operate independently of the government of the day. Government departments and Treasury Board are routinely respondents in hearings before the Tribunal. At the same time, the Tribunal is subject to Treasury Board regulations and policies, and the Tribunal's budget is subject to Treasury Board and Parliamentary approval.

In 1998, the Auditor General of Canada's audit of the Canadian Human Rights Commission and the Canadian Human Rights Tribunal sought to determine:

- whether existing accountability and independence frameworks guarantee independence from government while retaining appropriate accountability; and
- whether the process for handling human rights complaints is accessible, equitable and well-managed.

In addition to examining how complaints are handled, the Auditor General reviewed the Tribunal's financial and management controls and its mediation process.

In his September 1998 report the Auditor General found the Tribunal's financial controls satisfactory.

He observed that the Tribunal's approach to conducting hearings was cumbersome. Stakeholders had expressed concerns about the length of hearings, and attributed the delays to inefficient procedures and to scheduling problems caused by the fact that most Tribunal members are appointed on a part-time basis.

On the other hand, he found the Tribunal's approach to mediation generally satisfactory, but noted that the Tribunal had no statutory authority to mediate complaints. He also observed that mediators were forced to rely on their own experience since the Tribunal had no formal standards or policies governing mediation.

Endorsing the Justice Minister's announcement of a Parliamentary review of the *Canadian Human Rights Act* (CHRA), the Auditor General noted that the concerns raised in his audit were interrelated and could best be addressed through a comprehensive review.

He proposed that the government identify and present to Parliament an integrated set of specific measures for addressing human rights complaints more effectively. Among the specific measures proposed were:

- providing for periodic reviews by Parliament of the relevance and impact of the grounds of discrimination;
- broadening the array of alternative means of resolving human rights complaints, including possibly permitting complainants to sidestep the Canadian Human Rights Commission and take their complaints directly to the Tribunal or even to the Federal Court of Canada;
- ensuring that the Commission and the Tribunal are independent and accountable;
- providing for greater transparency in appointments to the Commission and the Tribunal; and

- ensuring that there is legislative authority for the mediation policies and procedures that may be used by the Commission and Tribunal.

He also thought that the Tribunal's performance reporting might benefit if the Tribunal set targets to reduce the average cost and number of hearing days associated with each case.

The Tribunal agreed with many of the Auditor General's points, and in particular the need to ensure transparency in the appointment of new Tribunal members. Many earlier concerns about the Tribunal's efficiency, independence, impartiality and accountability have been at least partially addressed as a result of CHRA amendments that restructured the Tribunal, severed its remaining links to the Commission and made it directly accountable to Parliament. Pursuant to the amendments, the individuals appointed to the Tribunal will be more highly qualified and will enjoy longer periods of tenure. Moreover, the scheduling of hearings will be made easier because some Tribunal members are now full-time appointees.

Notwithstanding the Auditor General's critique of the Tribunal's hearings procedures, the Tribunal considers that its hearings will be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow. Nevertheless, the 1998 amendments to the CHRA authorized the Tribunal to develop new rules of procedure that will have the status of regulations under the CHRA. The new rules will improve the hearings process by establishing clearly defined procedures and policies for conducting hearings.

Although their numbers have declined since 1992, the cases referred to the Tribunal pose increasingly difficult questions of law and are becoming more time-consuming and costly to resolve.

As for the Auditor General's suggestion that the Tribunal seek to reduce the number of days required to hear a case, the Tribunal does not agree that this is an appropriate measure of performance. The types of cases referred to the Tribunal are not consistent from one year to the next. Although their numbers have declined since 1992, the cases referred to the Tribunal pose increasingly difficult questions of law and are becoming more time-consuming and costly to resolve.

The Tribunal fears that imposing arbitrary time constraints on the length of hearings would put undue pressure on the parties involved in the process. However, the Tribunal remains committed to reducing the time it takes to bring a case to pre-hearing and to render a decision once the hearings are over.

Finally, the Tribunal has developed an intensive mediation training program for Tribunal members, which is to be implemented in 1999. In light of the Auditor General's report, the

Chairperson has written to the Minister of Justice asking that the necessary steps be taken to ensure that the Tribunal has a statutory mandate to continue to implement its alternative dispute resolution program.

New Training Program for Tribunal Members

This year the Canadian Human Rights Tribunal developed an intensive, three-week training program for Tribunal members. The program, which will be delivered early in 1999, will cover such topics as managing hearings, applying rules of evidence, writing decisions and finding new ways to facilitate adjudication. As well as reviewing the substantive provisions and regulations of the *Canadian Human Rights Act* and the *Employment Equity Act*, Tribunal members will discuss statutory interpretation of human rights law, remedial powers of the Tribunal, judicial review and cross-cultural issues. A full week will be devoted to mediation training, including sessions dealing with power imbalances between the parties and ethical issues for mediators.

New Rules of Procedure

Amendments to the *Canadian Human Rights Act* (CHRA) in June 1998 gave the Chairperson of the Tribunal authority to institute rules of procedure governing the conduct of Tribunal hearings. This jurisdiction extends to rules governing the giving of notice to parties, the summoning of witnesses, the production and service of documents, pre-hearing conferences and the introduction of evidence. The Chairperson has developed rules of procedure for both the Canadian Human Rights Tribunal and the Employment Equity Review Tribunal. The new rules will be published in the *Canada Gazette* and will be made available to all parties to a complaint. The rules will have the status of regulations under the CHRA and are expected to enhance the effectiveness and timeliness of the hearing process by providing improved guidance to both Tribunal members and hearing participants.

Decisions Rendered in 1998

Bader v. Department of National Health and Welfare

David Bader, a Caucasian male who owned a health food supply business, complained that Health Canada would not allow him to import certain oriental products that importers of Eastern ancestry were not impeded from obtaining. The Review Tribunal found that Mr. Bader had been discriminated against on the basis of his race. Health Canada was ordered to develop a clear policy statement committing to a uniform national approach to regulation and enforcement, which would not discriminate on the basis of race or ethnic origin.

Date referred:
31/01/96

Decision date:
11/03/98

Number of hearing days: 11

Cramm v. Canadian National Railway

Barry Cramm complained that the Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees Union discriminated against him on the basis of a temporary disability by excluding him from a company-wide severance package given to its laid-off workers. The only prerequisite for eligibility was that employees had to have worked at least one calendar day during the previous year. Mr. Cramm had sustained injuries that prevented him from working for several years prior to the layoff. He argued that the severance eligibility criterion was discriminatory. Canadian National argued that the policy was intended to provide a bonus to employees who had actually worked. While the union agreed with the railway, it also agreed with the complainant that the policy was discriminatory.

The original Tribunal ruled the policy discriminatory and found that the respondents had not met their duty to accommodate the complainant. It ordered the respondents to stop applying the policy and to pay Mr. Cramm lost wages plus $1,500 for hurt feelings. However, a Review Tribunal overturned the original Tribunal decision and dismissed the complaint.

Date referred:
12/11/97

Decision date:
23/06/98

Number of hearing days: 5

Franke v. Canadian Armed Forces

Kimberly Franke alleged discrimination on the basis of sex, specifically sexual harassment. This included an allegation of differential treatment in the course of employment after Ms. Franke had complained of the harassment to the respondent. The Tribunal dismissed the complaint in a 2-1 decision. The dissenting member would have substantiated both complaints and awarded past and future lost wages, severance pay, pension and medical benefits, as well as $5,000 for hurt feelings. The case is currently under judicial review in the Federal Court.

Date referred:
16/02/96

Decision date:
15/05/98

Number of hearing days: 22

Green v. Public Service Commission of Canada, Treasury Board and Human Resources Development Canada

The Tribunal heard two complaints that had been brought on behalf of Nancy Green. These complaints alleged that Treasury Board and the Public Service Commission had discriminated against Ms. Green in employment on the ground of disability, specifically dyslexia in auditory processing. The Tribunal found that the respondents followed practices that tended to deprive learning disabled individuals such as Ms. Green of employment opportunities. The respondents were ordered to appoint Ms. Green to the position she was seeking, provide her with appropriate language and management training and pension adjustments, compensate her for lost wages and pay her $5,000 for hurt feelings. The Tribunal also ordered the two agencies to ensure that their personnel adhere to federal government policies designed to prevent discrimination and directed them to provide employee education and training to support adherence to the policy.

Date referred:
16/02/96

Decision date:
26/06/98

Number of hearing days: 22

Jacobs and Jacobs v. Mohawk Council of Kahnawake

The Tribunal found that the Mohawk Council of Kahnawake discriminated against Peter and Trudy Jacobs when the Council passed regulations that had the effect of rescinding the Jacobs' band status. The Tribunal recognized that it was not possible to order a community to accept members it didn't want. Acknowledging that the Council had declared it would ignore any order made against it, the Tribunal nevertheless ordered the Council to cease all acts of discrimination against the Jacobs and allow them access to the benefits and services available to other members of the community.

Date referred:
26/05/94

Decision date:
11/03/98

Number of hearing days: 16

Singh v. Statistics Canada

Surendar Singh alleged that his chances of advancement within Statistics Canada had been detrimentally affected by his age, as well as by his national or ethnic origin. At issue were a series of staffing actions that Mr. Singh alleged were tainted by discriminatory considerations. The Tribunal found that Mr. Singh's national or ethnic origin played no role in any of the staffing actions, but that his age was a factor in the respondent's refusal to include Mr. Singh's name on an eligibility list arising out of a job competition. Accordingly, the complaint was substantiated. The Tribunal ordered the respondent to provide Mr. Singh with an economist level 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.

Date referred:
10/09/97

Decision date:
06/11/98

Number of hearing days: 22

CHRT

Pay Equity

Public Service Alliance of Canada v. Treasury Board

One of the first major pay equity cases referred to the Tribunal, this landmark ruling gives the first full interpretation of CHRA s. 11, which prohibits wage discrimination on the basis of sex (see sidebar).

The case involved a pay equity complaint filed against Treasury Board in 1984 on behalf of the Clerical and Regulatory (CR) Group, a large bargaining unit represented by the Public Service Alliance of Canada (PSAC). The group was 80 percent female and covered a very wide range of job functions. Treasury Board alleged that the results of the job evaluation study used for comparison were not sufficiently reliable for settlement of the complaints.

The Tribunal decision was rendered in two stages. In 1996, it found that the job evaluation data was sufficiently reliable to enable the parties to calculate the wage gap between female and male employees working in the same establishment and performing work of equal value, as set out in s. 11 of the CHRA and in the Canadian Human Rights Commission's *Equal Wage Guidelines*.

Once the validity of the data was established, the Commission still had to prove that men and women performing work of equal value were not being equally remunerated. The Commission, the Alliance and Treasury Board had each proposed a different method for assessing and comparing wages. The Tribunal

S. 11 of the *Canadian Human Rights Act* states:

(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be employed is the concept of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed to be the same establishment.

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights

Commission pursuant to subsection 27 (2), to be a reasonable factor that justifies the difference.

(5) For greater certainty, sex does not constitute a reasonable factor justifying difference in wages.

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

a) salaries, commissions, vacation pay, dismissal wages and bonuses;

b) a reasonable value for board, rent, housing and lodging;

c) payments in kind;

d) employer contributions to pension funds or plans, long-term disability plans, and all forms of health insurance plans; and

e) any other advantage received directly or indirectly from the individual's employer.

had to decide which of these was the most reasonable and consistent with s. 11 of the statute. All parties agreed that the choice of methodology should not be influenced by the ultimate cost to Treasury Board of the wage increases it might have to pay out as a consequence of the Tribunal's decision.

The main point of contention related to the composition of the male-dominated occupational group to be used for wage comparison. Treasury Board argued that this group should be the single lowest-paid male-dominated occupational group whose average job evaluation score was within 10 percent of the average job evaluation score of the CR Group.

The Commission argued that the group should be broken down into subgroups based on their job evaluation scores and that artificial or "deemed" male-dominated occupational groups should be constructed for comparison. These deemed groups, it said, should be composed of subsets of existing male-dominated occupational groups and that specifically, the subsets should be ones whose job evaluation scores were comparable to those of the various subgroups within the CR Group.

The Alliance concurred with the group selection method proposed by the Commission, but would have preferred a slightly different way of comparing wages.

Expert witnesses preferred the methodological approach taken by the Commission, finding it the most accurate, fair and responsive to the data. Treasury Board led no expert evidence to support its wage assessment methodology or to

verify the sufficiency of its sample size. The Tribunal ruled that the extent of the wage gap should be determined using the methodology proposed by the Commission and that wage adjustments should be made retroactive to March 1985.

The federal government disagreed with the Tribunal's interpretation of CHRA s. 11 and filed an application with the Federal Court in August 1998 seeking judicial review of the decision.

Date referred: 1990

Decision date: 15/02/96 and 29/07/98

Number of hearing days: 258

Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Limited and Air Canada

Date referred: 26/06/96

Decision date: 15/12/98

Number of hearing days: 36

This pay equity case dealt in depth with the concept of "establishment," which is used but not defined in s. 11 of the CHRA:

> S. 11(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

The issue to be decided by the Tribunal was whether the female-dominated flight attendants' group was part of the same "establishment" as the male-dominated pilots' group and technical operations personnel for the purposes of wage comparison. The respondents argued that their employees were divided into three long-standing, certified bargaining units of flight attendants, pilots and technical operations personnel, reflecting different working conditions and qualifications and were therefore three separate functional establishments with different personnel and wage policies. The complainants had the burden of proving that the three units were part of the same establishment.

The Tribunal found that the three bargaining units were separate "establishments" for the purposes of applying CHRA s. 11 because each negotiated its own collective agreement and had branch-specific manuals. This precedent-setting decision clarifies which groups can be used for wage comparison in pay equity actions. The case is currently under judicial review.

Judicial Review of Tribunal Decisions

Decisions of the Canadian Human Rights Tribunal are commonly reviewed by the Federal Court of Canada and requests for review are increasing. This is attributable, in part, to long-standing concerns about the administrative and financial links between the Tribunal and the Canadian Human Rights Commission. Although issues surrounding the Tribunal's independence and impartiality have been dealt with by degrees since 1988 and most recently in the 1998 amendments to the *Canadian Human Rights Act* (CHRA), the high proportion of court challenges of Tribunal rulings has tended to reflect the lack of public confidence in the reliability of Tribunal rulings.[2]

Meanwhile, other factors contributing to the high incidence of judicial review of Tribunal decisions are likely to become even more important in the future. Future Tribunal rulings are more likely than ever to be first-time judicial interpretations of new or revised sections of the CHRA. With the development of a growing body of case law to guide the Canadian Human Rights Commission in negotiating settlements, the cases referred to the Tribunal will tend to be ones involving new areas of human rights law, unexplored areas of discrimination, contentious evidentiary issues or conflicting interpretations of precedent. Such cases tend to be prime candidates for judicial review. What's more, the high cost of complying with some pay equity orders virtually guarantees that respondents will be appealing Tribunal rulings until the Supreme Court of Canada has pronounced itself on s. 11 of the CHRA. Since pay equity cases are expected to make up a growing proportion of the Tribunal's caseload, the rate of judicial review of Tribunal decisions is likely to grow as well.

Table 1 shows how many decisions of the Tribunal were reviewed by the courts between 1992 and 1998 and how well the decisions fared under the scrutiny of the courts.

[2] *Since January 1996, 19 Federal Court decisions on Tribunal rulings have been handed down, with 11 reversing the Tribunal. The most common reason for reversing a Tribunal ruling was that the Tribunal had made errors in law.*

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Table 1

Judicial Review of Tribunal Decisions, 1992–1998*

	1992	1993	1994	1995	1996	1997	1998	Total
Cases referred to the Tribunal	67	31	35	26	15	23	22	219
Decisions rendered †	32	16	15	9	7	2	0	81
Decisions challenged								
• upheld	4	1	4	0	0	0	0	9
• overturned	3	1	3	0	0	0	0	7
• withdrawn	3	1	1	0	1	1	0	7
• still pending	1	4	0	3	2	0	0	10
• total	11	7	8	3	3	1	0	33

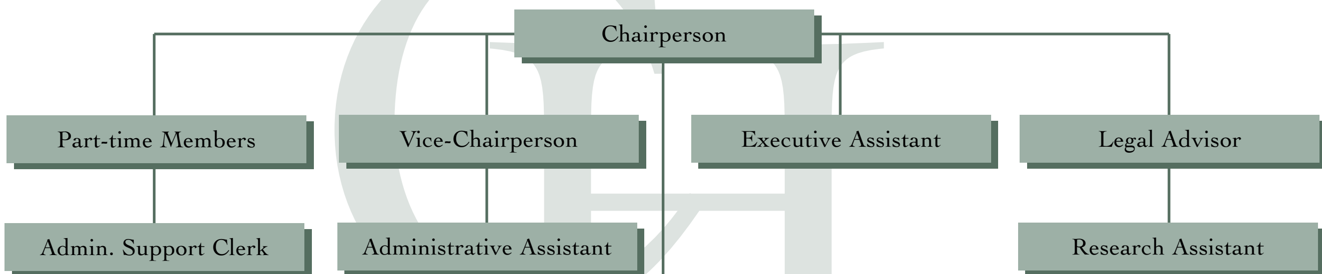
* *All data on the disposition of Tribunal cases appears under the year in which the complaint was originally referred to the Tribunal, regardless of when the case was decided or judicially reviewed. For example, although the Tribunal rendered eight decisions in 1998, none of them appears under 1998 "Decisions rendered" because all of them pertain to complaints referred to the Tribunal in earlier years. Of the 22 cases referred to the Tribunal in 1998, none had been decided by the end of the year.*

† *The cases included in this column are those for which the Tribunal wrote and submitted a final judgment. They do not include complaints that were withdrawn or settled by mediation.*

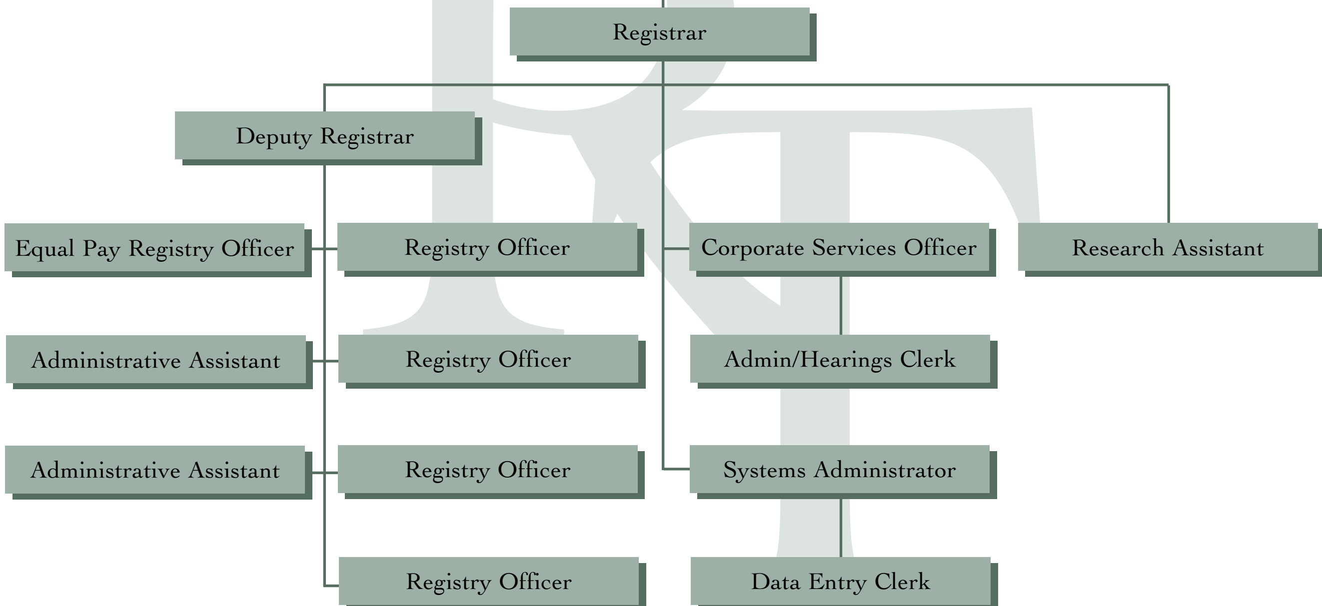
Appendix I

Organization Chart

Tribunal Members



Registry Operations



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Appendix 2

An Overview of the Hearings Process

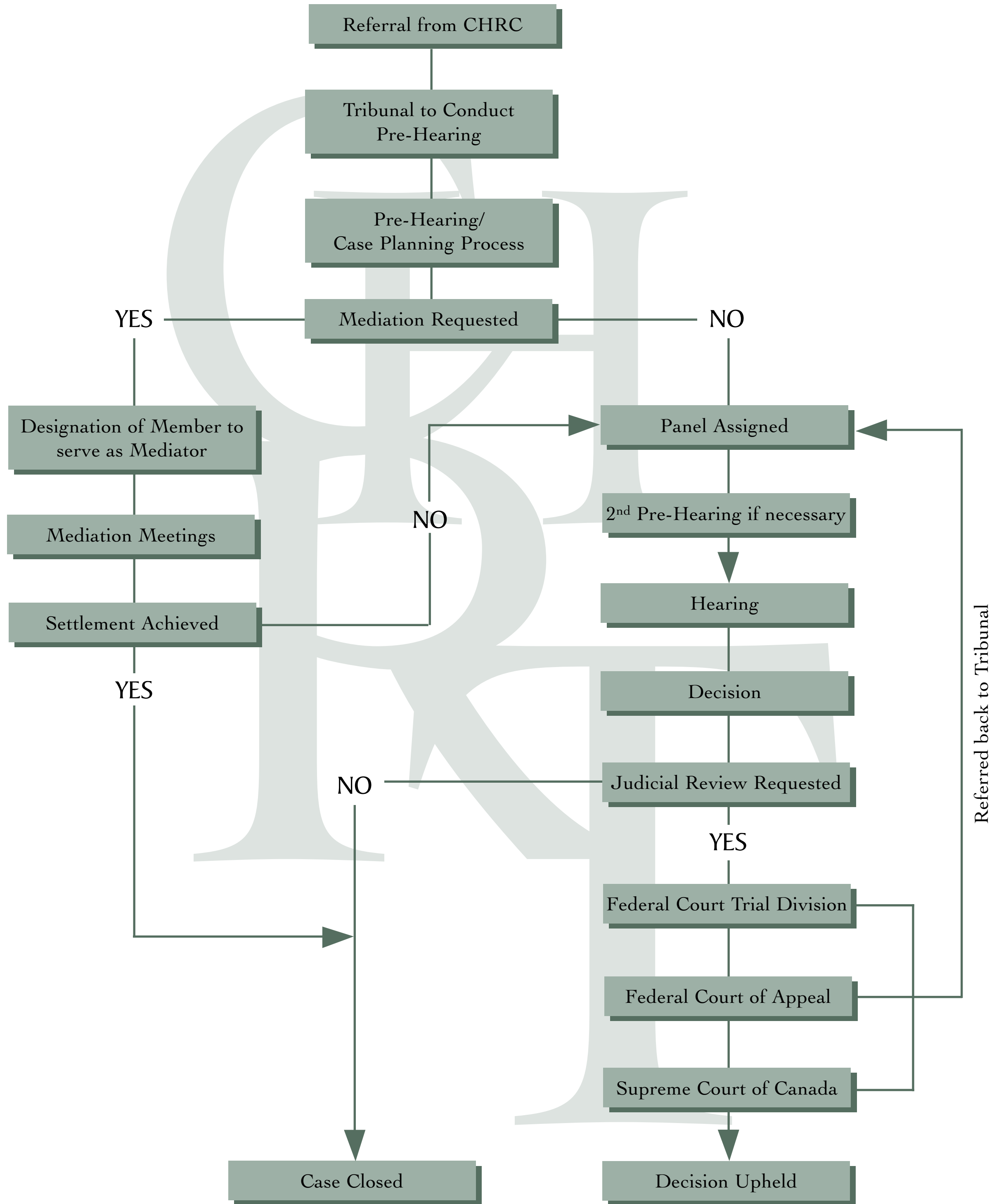
The roles of the Canadian Human Rights Tribunal and the Canadian Human Rights Commission have parallels in the criminal justice system. Like the police, the Commission receives and investigates complaints. Some of these turn out to be unfounded. But when the Commission believes that further enquiry is warranted and an agreement cannot be reached through conciliation, it refers the case to the Tribunal, which acts as the judge. The Commission then exchanges its investigator's hat for that 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.

When the Commission refers the case to the Tribunal, the Commission leads evidence and presents arguments before the Tribunal in the majority of cases, to prove that the respondent named in the complaint has contravened the statute. The Tribunal acts as the judge, deciding the case impartially.

The adjudication process is conducted through public hearings. Hearing the evidence and interpreting the law, the Tribunal determines whether a discriminatory practice has occurred within the meaning of the CHRA. If the answer is yes, the Tribunal formulates an appropriate remedy to deter future discrimination and to compensate the victim. Decisions of the Tribunal can be reviewed by the Federal Court of Canada, which will either uphold them or send them back to the Tribunal to be heard again.

Based on data from cases decided between 1996 and 1998, the Tribunal takes an average of one year to issue a ruling on a complaint referred by the Canadian Human Rights Commission, when the case is not settled through mediation. The Tribunal renders its decision on average about five months after the last day of hearing. Pay equity cases are the exception to this rule. Those that proceed to full hearings take on average 175 days of hearings and cost more than $700,000 each.



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

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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.

J. 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

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*.

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.

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 Montreal at the law firm of Hadjis & Feng, specializing in civil, commercial, corporate and administrative law. A member of the former 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 a senior partner in the London, Ontario, law firm of Pensa & Associates.

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 1998.

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.

Registry Staff

Registrar	Michael Glynn
Deputy Registrar	Gwen Zappa
Legal Advisor	Greg Miller
Registry Officers	Suzie Blier Bernard Fournier Holly Lemoine
Systems Administrator	Julie Sibbald
Research Assistant	Nicola Hamer
Registry Operations	David Curtin
Administrative Assistants	Lorraine Gordon Thérèse Roy