To ensure that Canadians have equal access to the opportunities that exist in our society through the fair and equitable adjudication of human rights cases that are brought before the Tribunal.

Canada

CANADIAN HUMAN RIGHTS TRIBUNAL

Created by Parliament in 1977, the Canadian Human Rights Tribunal is a quasi-judicial body that adjudicates 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 Tribunal has a statutory mandate to apply the CHRA based on the evidence presented and on current case law.

The purpose of the *Act* is to protect individual Canadians from discrimination and to promote equality of opportunity. The *Act* applies to all undertakings within federal jurisdiction such as 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 or accommodation that are customarily available to the general public. Complaints may also relate to the telecommunication of hate messages. The CHRA prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual orientation, disability and 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 federal government employees and to federally regulated private sector employers with more than 100 employees. Employment Equity Review Tribunals are assembled as needed from the members of the Canadian Human Rights Tribunal.

It must be remembered that the Tribunal is not a policy-making body. Its sole purpose is to hear and adjudicate cases of discrimination, based on the facts of each case and the current law. As such, it may only deal with cases referred to it by the Commission. The Tribunal cannot create its own caseload; it cannot lobby or attempt to influence or adjust the government's or the Commission's agendas, other than by its public decisions; and it cannot take sides on human rights issues. In addition, its process must be fair and efficient without being seen as a rush to complete the adjudicative process. Unreasonable delay is not acceptable, but neither is speed for the sake of expediency. In this, the Tribunal must find balance. Human rights, both for the individual and the respondents – and for Canadians as a whole – are too important not to ensure an equitable and accessible process.

Message from the Chairperson

For the fourth consecutive year, the number of cases referred by the Canadian Human Rights Commission has continued to increase. This level of workload poses a significant challenge for the Tribunal, particularly because of the number of parties appearing before the Tribunal without legal assistance or representation. Many complainants are people of modest means and are not able to afford legal representation. Respondents at the federal level, however, are mostly large corporations or government departments, well resourced and well represented at Tribunal hearings.

One of the results is that cases that proceed to hearing take longer to complete as lay litigants struggle to cope with an unfamiliar process. Another result is an extra burden on Tribunal staff, to who unrepresented parties turn for guidance for dealing with pre-hearing procedures and for presenting their case at the hearing.

As a response, the Tribunal has prepared guides designed to assist unrepresented parties in understanding the Tribunal's process. The Tribunal will also be introducing new technology to assist in better management of the cases that come before it.

In late 2003, the Tribunal's Chairperson was appointed to the Federal Court. This position was only recently filled in December 2004 by a promotion from the Vice-Chairperson position. The position of Vice-Chairperson has remained vacant to end of 2004, however, a full-time member has since been promoted to Vice-Chairperson by the Minister.

The Tribunal also experienced a transition in management during the last year. A new Registrar was appointed in May 2004 to replace the retiring Registrar, who had 26 years of corporate history and had been with the Tribunal since its creation as a separate, independent body from the Commission.

The increased caseload will again challenge the Tribunal over the next year. However, I am sure that the Tribunal is well positioned to meet these challenges and to continue to offer Canadians a full and fair hearing in a timely fashion.

J. Grant Sinclair

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Canadian Human Rights Tribunal/Annual Report 2004

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The Year in Review

HOW ARE WE DOING?

The Tribunal had a remarkably productive year in 2004. For a second consecutive year, the number of complaints referred to the Tribunal, by the Canadian Human Rights Commission, was the highest in its history. In 2003, the Tribunal opened 130 case files. In 2004, the number of case files opened rose again to 139 cases. This equates to a 200 per cent increase over the Tribunal's previous seven-year average of 44.7 cases per year. In addition, the Tribunal rendered 16 decisions and 24 rulings in 2004. It also published an information pamphlet on the Tribunal, transitioned to new management with the appointment of a new Chairperson, formerly the Tribunal's Vice-Chairperson, and a new Registrar, and it followed up on the implementation of its Modern Comptrollership Action Plan.

The Tribunal's mission is to better ensure that Canadians have equal access to the opportunities that exist in our society through fair and equitable adjudication of the human rights cases brought before it. Pursuit of that goal requires that the determination of human rights disputes be made by the Tribunal in a timely, well-reasoned manner that is consistent with the law.

In 2004, the Tribunal focused on these objectives in a climate of its highest ever caseload volume where issues are becoming increasingly more complex and many parties appearing before the Tribunal are without expert legal assistance. To address these challenges, the Tribunal has adapted its procedures and processes and begun to take a much more active approach in managing cases as they progress through the system. Doing so, however, engenders additional challenges such as ensuring the parties are afforded a full opportunity to present their respective positions in the dispute and avoiding delays, while at the same time ensuring that the expected results of the Tribunal's operations are achieved in the most fair, equitable and cost-effective manner.

Tribunal Membership

The Tribunal's Vice-Chairperson has taken on the additional role of Acting Chairperson since his predecessor was appointed to the Federal Court in November 2003. The Minister appointed the Tribunal's Vice-Chairperson as Chairperson in December 2004.

The position of Vice-Chairperson has remained vacant to end of 2004, however, a full-time member has since been promoted to Vice-Chairperson by the Minister.

The Tribunal has been able to take advantage of efficiencies, begun in 2003, in managing and scheduling cases as a direct result of the continuity of the Tribunal's Vice-Chairperson having acted, and then becoming, Chairperson. His established expertise with the Tribunal system, with its inquiry process and with mediations has served to avert the loss of efficiency that likely would have followed the learning curve phenomenon of a novitiate to the role of Tribunal Chairperson. This continuity has been especially helpful over the past year in meeting the challenge of the Tribunal's heaviest ever workload. It has helped as well, to some degree, to mitigate the limited resources of the Tribunal's full-time member complement which remains at the reduced level of three, rather than four, since November 2003.

In addition to full-time members, the Tribunal membership in 2004 included six part-time members representing various geographical locations across Canada (see Appendix 3).

Amendments to the CHRA

In 2000, the Canadian Human Rights Act Review Panel, chaired by former Supreme Court of Canada Justice the Honourable Gerard La Forest, recommended sweeping changes to the way the federal government enforces human rights. The Tribunal continues to await the response of the Department of Justice.

Promoting Equality: A New Vision recommended a new process for resolving human rights disputes and proposed that public legal assistance be made available for complainants to bring their cases directly to the Tribunal (La Forest Report available at http://www.justice.gc.ca/chra/en/toc.html). The Review Panel also recommended that the Commission cease to investigate complaints; rather, both the initial screening of complaints and the investigation phase would be undertaken by the Tribunal. The changes would eliminate potential "institutional conflicts between the Commission's role as decision maker and advocate," according to the Report.

Such profound changes would significantly transform the structure and function of the Tribunal. Not only would the larger caseload necessitate the appointment of more members, but the Tribunal would also need to increase its research and administrative capacity. Moreover, it would have to develop new methods of operation, including a new system of case management. Much work has been done by the Tribunal with respect to the implementation of the Review Panel's recommendations. In May 2002, the Minister of Justice announced that he planned to introduce amendments to the *Act*. The Tribunal remains prepared to implement a new system in whatever form and whenever amendments are brought forward and approved by Parliament.

TABLE 1 New Cases, 1996 to 2005

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005 (projected)	Totals
Human Rights Tribunals/Panels	15	23	22	37	70	83	55	130	139	90	664
Employment Equity Review Tribunals	0	0	0	0	4	4	0	0	2	0	10
Totals	15	23	22	37	74	87	55	130	141	90	674

Note: The number of cases before the Canadian Human Rights Tribunal depends entirely on how many cases are referred by the Canadian Human Rights Commission.

The Tribunal's Results in 2004

Last year's Annual Report remarked that "*… Recent changes in the Commission's approach to the referral process mean that the Tribunal is projecting a 225 per cent increase in its workload for 2003-2004 over that experienced in 2002-2003. This will obviously impact on the work of the Tribunal and it raises serious questions as to the adequacy of current funding levels.***"**

The number of case files opened in 2003 was 130, a 200 per cent increase over the Tribunal's previous seven-year average of 44.7 cases per year. The number of new case files opened in 2004 increased further to a record 139 cases. In addition to this heavy caseload, the Tribunal was also faced with the following events:

- The position of Chairperson remained vacant for the greater part of 2004, resulting in only three, rather than four, full-time members being available to schedule and hear cases.
- A significant number of parties continued to request mediation by the Tribunal.
- The Commission participated at all mediation proceedings, however its participation at full hearings (i.e., on the merits) before the Tribunal was limited to a small number.
- The unusually heavy caseload and ambitious targets for progressing cases through the system have necessitated further adjustments to the Tribunal's procedures.
- After 26 years of dedicated service, the Tribunal's Registrar retired. A new Registrar was appointed in 2004.
- Although not strategically significant, the Tribunal addressed considerable attention to obligations for follow-up on its Modern Comptrollership Action Plan and began readiness preparations for changes taking effect in 2005 for the modernization of human resources management in federal public service organizations, including the Tribunal.

The Tribunal addressed these events in a number of ways, including both operational and administrative adjustments, to ensure the continued provision of quality human rights adjudication services to Canadians. The following discussion expands on these events and how the Tribunal responded.

Workload Issues

In 2003, the Tribunal received 130 complaints from the Canadian Human Rights Commission. In 2004, that number rose further to 139. This equates to a 200 per cent increase over the Tribunal's previous seven-year average of 44.7 cases per year. Based on projections from the Commission, the Tribunal expects between 80 and 100 new referrals in each of 2005 and 2006. Table 1 identifies referrals from the Commission since 1996.

The Tribunal sat for 294 days in 2003. This represented a 75 per cent increase in the number of hearing days as compared to 2002. In 2004, the Tribunal sat 281 days. Although a slight decrease over the previous year, sittings in 2004 represent a remarkable achievement when considered in the context of only three full-time members, rather than four, being available during the year to schedule and hear cases.

The workload of the Tribunal has also been dramatically affected by the increasing complexity of cases and procedural wrangling between the parties. When the Tribunal first began holding hearings under the CHRA in 1979, the style of advocacy was markedly different from what it is today. Generally speaking, a panel was appointed to hear a complaint and the inquiry commenced promptly after minimal pre-hearing procedures. The inquiry itself was quite brief (often under a week) and all issues were dealt with at some point during the hearing on the merits.

Much has changed over the past 25 years, most especially so in very recent years, both in terms of litigation before the Tribunal and civil litigation generally. Most observers agree that the tone of hearings has become more adversarial and the hearing process itself has become fragmented by numerous motions and objections. In the past year alone the Tribunal has rendered 24 formal rulings on motions, compared to 16 decisions on the merits of complaints. This does not take into account numerous rulings made without written reasons.

The Tribunal has attempted to minimize the effect of these disruptions in a number of ways: (1) Where circumstances warrant, Tribunal members defer the disposition of motions to the hearing on the merits; (2) Where they are heard on a preliminary basis, most motions are only dealt with in writing; (3) The CHRT Rules of Procedure set out clear expectations for disclosure; (4) The Tribunal's case management system seeks to identify and resolve disclosure disputes before they fester.

As overly vigorous advocacy renders the inquiry process more time-consuming, and expensive, it also impacts heavily on the workload of the Tribunal itself. Nevertheless, the average delay for rendering decisions only slightly surpassed the Tribunal's four-month target from last day of hearing. This is especially remarkable given again the vacancy of a full-time member position at the Tribunal during the past year.

Timeliness of the Hearing Process

Since January 1998, the Tribunal has been committed to reducing the time to complete a case to 12 months (from the date of referral to the release of the decision). The average number of days to complete cases in 2002 was 208. Although this average increased slightly to 225 in 2003, over 90 per cent of the cases in 2003 were completed within 12 months. So far in 2004, the average time to complete cases was 124 days with just under half closed. All are well within the one-year target, however the time to complete cases continues to vary widely.

Most cases are settled without the need for a hearing. For cases requiring a full hearing and decision, the average time to close a case in 2001 was 384 days, with six cases requiring more than one year to finalize. In 2002, the average was reduced to 272 days, none of which exceeded the one-year time frame. In 2003, the average was 405 days, with eight cases requiring more than one year to complete. Of the cases that have proceeded beyond the one-year target in 2003, delays incurred are mostly in response to requests from the parties or are the subject of Federal Court proceedings. Statistics on finalizing files that were opened in 2004 are not available at time of publication.

In 2002, the average number of days from referral to first day of hearing was 169. In 2003, that figure rose to 224 days. In 2004, it increased again, although only marginally, to 229 days. However, many of the cases referred in 2004 remain open at time of publication, suggesting that the Tribunal's target of conducting the first day of hearings within six months of referral will likely be tested more severely in 2005 than previously. As discussed to in the workload section above, the pre-hearing phase of cases is becoming increasingly litigious, in general. The Tribunal has, for the most part, been able to meet dates for hearing that are of earliest convenience to the parties. More time will be required before we are able to determine performance with respect to the cases referred later in 2004.

Timeliness of Rendering Decisions

Since 1998, the Tribunal has also been committed to reducing the time for rendering decisions to 4 months (from the last day of hearing). In 2003, decisions took 84 days on average, with four decisions surpassing only marginally the four-month target. In 2004, however, decisions took an average of 121 days. Although only slightly above the four-month target, and only marginally above the seven-year average of 117 days beginning 1997, half of the decisions rendered in 2004 surpassed the Tribunal's target. The dramatic increase of 200 per cent in the number of new referrals during the last two years is weighing heavily on the workload of the Tribunal members. Next year's report will provide a better view of whether this level of caseload continues to impact the Tribunal's target of continuing to strive for the earliest possible disposition of cases. In the meantime, the Tribunal will be looking to more active case management, discussed further in the section below, as a means of helping the parties to better focus on, and thereby reduce, the issues that require to be decided by the Tribunal at hearing.

Tribunal Settlements and Mediations

The average rate of settlements since 1995 has been 77 per cent. Settlements reached in 2002 and 2003 were in the 58 per cent range. In 2004, settlements were achieved at a rate of 41 per cent, however many 2004 files remain open. In addition, and as has been noted earlier in this report, with the evolution of the law on human rights, issues arising at settlement discussions are becoming increasingly more complex . While we are of course striving to continue at a high rate of settlements, it is therefore unlikely, perhaps, to expect that settlements will be attainable as readily as in the past.

As noted in last year's report, settlements reached by parties often occur within two weeks of the scheduled commencement of the hearing. With such little warning of a settlement, the time, effort and resources devoted to plan and organize hearings by Registry staff are still required. As a result, when a settlement is confirmed at the last minute, the Registry is still obliged to pay cancellation fees for professional services and facilities contracted to conduct the hearing.

TABLE 2 Average Days to Complete Cases, 1997-2004

	1997	1998	1999	2000	2001	2002	2003	2004
From date of referral from the Canadian Human Rights Commission								
To mediate a case	-	-	-	-	-	-	124	120
To settle a case	152	245	232	230	202	150	204	124
To first day of hearing	93	280	73	213	293	169	224	229
For decision to be released from end of hearing	75	103	128	164	84	89	84	-
Average processing time to close case	260	252	272	272	244	208	225	124

* Note: There are still many open files from 2004; this will change the averages for that year.

With the reintroduction of Tribunal mediation services in 2003, settlement discussions now occur much earlier in the process and cases are settled well before the planned start of the hearing. This saves Tribunal staff many hours of work and also results in direct financial savings.

Refer to Table 2 for more information about the average number of days to complete cases from 1997 to 2004.

> ***"By conducting case management conferences… the Tribunal will be better able to ensure a more effective and efficient hearing on the merits, one that is more consistent with the expeditious process contemplated by the Act."***

Case Management

The tone of hearings before the Tribunal has become more adversarial and the hearing process more frequently subjected to motions and objections. Although pre-hearing disclosure procedures have been developed by the Tribunal to ensure a fair and orderly hearing, they are frequently threatened by missed deadlines, adjournment requests and issues vehemently contested between the parties. Moreover, such situations can often be exacerbated in cases where parties are without legal assistance. At the end of the day, the only way out of an impasse between the parties is for the Tribunal to intervene by holding a case conference.

Hearings on the merits are also now longer and more complex than in the past. Parties are sometimes uncertain, or untrained, on how to focus on the issues that require adjudication by the Tribunal. The end result is often manifested in additional hearing days, at unnecessary expense to the parties, as well as to the Tribunal and the public in general. Here again, the Tribunal has seen an opportunity to play a key role in guiding the parties toward a more predictable, streamlined and fair approach to the conduct of cases. By conducting case management conferences with the parties at strategic points throughout the pre-hearing process, the Tribunal will be better able to ensure a more effective and efficient hearing on the merits, one that is more consistent with the expeditious process contemplated by the *Act*.

Faced with the highest ever volume of new cases and with the kind of delays described above, the Tribunal cannot reasonably expect that all cases can be completed in a 12-month period. However, based on the procedural adjustments made in 2003-2004 and the more active case management approach being adopted by the Tribunal, we are optimistic of being able to minimize the impact those delays might otherwise have on the 12-month target. And while the Tribunal is always conscious that care must be taken when imposing constraints, particularly in time, so as not to have the ill-desired effect of exerting undue pressure on the parties involved, it nevertheless sees a more proactive case management approach as one that will benefit the parties through a more balanced and efficient utilization of the resources at their disposal.

Provision of Service / Awareness / Information to Parties and the Public

The Tribunal conducted a client survey in 2002. The results of that survey (available at www.chrt-tcdp.gc.ca/about/other_e.asp), combined with some informal feedback from our clients, indicated a high level of satisfaction with the Tribunal services. In one area, however, communication about hearing services, satisfaction was reported as somewhat less. There also appeared to be some confusion about the roles of the Tribunal versus that of the Commission. In 2002, the Tribunal published *What Happens Next?*, a guide that explains the entire case process in non-legal language. This was followed in 2004 with a publication of further

information clarifying the Tribunal's role and how it conducts its business, as compared to the mandate or service offered by the Commission. In 2004, the Tribunal also updated its guide that explains the mediation process used by the Tribunal. The mediation guide also provides information to assist the parties in deciding whether or not they wish to participate in mediation and how to prepare. Both the *What Happens Next?* and *Mediation Procedures* guides are available on the Tribunal Web site at www.chrt-tcdp.gc.ca/about/tribunalrules_e.asp.

The survey that was conducted in 2002 was based on responses from a relatively small number of clients available at the time. This raised some concern about the validity of the results. For that reason, together with a perception that a follow-up survey would benefit greater from three to five years of performance results, the next client consultation will be planned for 2006-07.

Informally, the Tribunal continues to receive very few complaints about its services. Some concern has been expressed, however, about the availability of complete information on past Tribunal decisions. The Tribunal's Web site was redesigned in 2003 according to the Federal Government On-Line Initiative for "Common Look and Feel". Further enhancements were made to improve access to decisions and rulings, including a more powerful search engine, a decision classification system and the availability of decisions and rulings on date of release (see www.chrt-tcdp. gc.ca/decisions). As is sometimes a misconceived expectation, technology enhancements do not always engender resource savings. The reality is that modern technology has manifested an insatiable appetite for information of the most complete and immediate nature. The Tribunal's very limited size has come face-to-face with this phenomenon. We will be engaged in the upcoming years in finding the earliest and most cost effective means for providing our clients with the continuous, up-to-date information they have come to expect from our Web site upgrades.

Change in Tribunal Management

The Tribunal's Vice-Chairperson, originally appointed as a part-time member a number of years earlier, took on the added responsibility of Acting Chairperson in November 2003 following the unexpected appointment of the Tribunal's Chairperson to the Federal Court. He was then promoted, by the Minister, to the position of Chairperson in December 2004. The position of Vice-Chairperson has remained vacant to end of 2004, however, a full-time member has since been promoted to Vice-Chairperson by the Minister. In May 2004, a new Registrar was appointed through a competitive government staffing process, replacing the Tribunal's long-time Registrar who retired after 26 years of service with the Tribunal.

Although planning was already in place for the introduction of a new Registrar, the loss of the Tribunal's Chairperson to the Federal Court and the tentative nature of an Acting Chairperson role for the greater part of 2004 posed significant challenges for long-term planning. Thankfully, the Acting Chairperson's vast experience with the Tribunal, combined with the solid management acumen and skill of the Tribunal's existing management team, contributed effectively to helping the Tribunal continue uninterrupted along its continuum of service improvement objectives.

The Tribunal has a history of retaining its employees through a program of fairness, equality and respect, for which the Tribunal's staff themselves deserve particular recognition. A significant percentage of the Tribunal's small complement of 26 employees have more than 15 years of experience – and some with more than 25 years of experience - in the federal human rights process. Further retirements are expected over the next few years. However, a human resource planning framework is in place to mitigate against the always uneasy impact of such transition.

Cases

Tribunal Decisions Rendered

Date of decision:
28/1/2004

Member:
Michel Doucet

Employment:
Canada Post Corporation

Discrimination on the ground of mental disability

Complaint dismissed

Beauregard v. Canada Post 2004 CHRT 4

The complainant had been employed for several years with Canada Post Corporation. After a temporary assignment to different duties, he returned to his substantive position in the letter sorting section of a mail processing plant. The following day, he left work on sick leave claiming a workplace injury. Over the next two months (during which he was mostly absent), he was examined by a number of doctors and was ultimately dismissed by the respondent for refusing to return to work. He claimed discrimination on the ground of mental disability.

The complainant's doctor had diagnosed him with situational depression resulting in permanent functional limitations, namely, that he could not work the night shift in a mail processing plant. This doctor, however, recorded no symptoms in the contemporaneous medical reports. Neither did the other doctors who examined the complainant during the relevant period. Moreover, also absent from the medical records were any clear and consistent observations of symptoms consistent with adjustment disorder (e.g. sad demeanour; lack of sleep, loss of concentration, slowed thinking).

The assessments performed by the complainant's doctor were also suspect because the clinic appointments were very short in duration (the doctor saw an enormous quantity of patients). Moreover, several of the recommendations in the doctor's examination records had actually been suggested to the doctor by the complainant. The doctor conceded that some of his written notes were erroneous and he admitted that the complainant's problem was not so much medical as having to do with his relationship with management at work. All in all, the Tribunal could not conclude that the complainant suffered from a disability during the relevant time, because it was not proven that he exhibited any symptoms. Moreover, it was not possible, on the evidence to clearly identify a stressor which could have caused the complainant's alleged condition; evidence suggesting a workplace conflict was inconclusive. At most, it was clear that the complainant was unhappy in his current position, but this in itself was not sufficient evidence of a disability. The complaint was dismissed. Judicial review pending: T-386-04

Brown v. Royal Canadian Mounted Police 2004 CHRT 5

The complainant was a member of the RCMP, posted to Coquitlam, B.C., and married to another RCMP member. She had successfully written an exam entitling her to promotion to the rank of Corporal. She applied for many different postings, and although she was highly ranked on the candidate eligibility list, she was only awarded her 17th choice; an on-site promotion in Coquitlam. The complainant alleged discrimination, in that she was passed over for many positions in favour of lower-ranked members due to the logistical challenges of relocating her husband along with her. She also alleged discrimination based on sex in the denial of certain postings.

The Tribunal did not find any convincing evidence that whatever gender bias there may have been on the part of the respondent played any role in the competition for promotions. Turning to the allegation of marital status discrimination, the Tribunal acknowledged that, up to a certain point, the respondent's career management authority was entitled to appoint other members to postings for which the complainant was more qualified. Considerations justifying such action would include moving costs, the need to accommodate the complainant's spouse, specific qualifications and the special circumstances of other candidates. However, on the facts of the case, management had exhausted its prerogative in this regard.

The respondent openly conceded that marital status was the major factor in the decision to deny the complainant her first 16 preferred postings, and no real explanation was given for this, other than to establish that there were significant expenses associated with moving a member to another posting. (The respondent's career management authority was bound by strict austerity measures at the time). The Tribunal upheld the marital status complaint, and ordered that the complainant be transferred to a satisfactory posting, as previously expressed by the complainant. It retained jurisdiction on this remedy, however, as well as on the questions of damages and costs.

Date of decision:
04/2/2004

Member:
Paul Groarke

Employment:
Royal Canadian Mounted Police

Discrimination on the grounds of marital status and sex

Complaint upheld in part

Montreuil v. National Bank of Canada 2004 CHRT 7

The complainant applied for an entry-level position as a call centre agent with the respondent, and was not offered employment. She filed a complaint with the Canadian Human Rights Commission alleging that the respondent refused to employ her because she is a transsexual person, thereby discriminating against her on the ground of sex, contrary to s. 3 and 7 of the CHRA.

Date of decision:
05/2/2004

Member:
A. Hadjis

Employment:
National Bank of Canada

Discrimination on the ground of sex

Complaint substantiated

The Tribunal applied the test developed in *Israeli* v. *Canadian Human Rights Commission* to determine whether a *prima facie* case of discrimination had been established, and found that all 4 criteria were satisfied: the complainant belongs to one of the designated groups; the complainant applied and was qualified for a job the employer wished to fill; although qualified, the complainant's candidacy was rejected; and the employer continued to seek applicants with the complainant's qualifications.

The respondent offered three explanations for its behaviour, namely that the complainant was overqualified, she was self-centred and condescending, and her real motive was to use the position to promote the rights of transgendered persons. The Tribunal found that discrimination was a factor underlying the first and third explanations, but did not definitely decide on the second explanation. To find liability, it is sufficient that discrimination be one of the factors in the employer's decision not to hire the individual. The respondent's conduct was discriminatory. In particular, the respondent's apprehension that the complainant would use her job as a platform to advance a personal interest was based on unfounded speculation, and such a belief adversely singled out persons belonging to equality seeking groups. Although no intent to discriminate was demonstrated, the intent to discriminate is not a pre-condition to a finding of discrimination.
The complaint was substantiated.

Date of decision:
12/2/2004

Member:
Shirish Chotalia

Employment:
Canadian Armed Forces

Discrimination on the ground of disability

Complaint upheld

Irvine v. Canadian Armed Forces 2004 CHRT 9

The complainant, who suffered from coronary artery disease (CAD), was released from the Canadian Armed Forces (CAF) for not meeting the universality of service principles. Universality of service in the CAF requires every member to be fit to be a "soldier first". The Tribunal found in the complainant's favour. Further to judicial review by the Federal Court, the Tribunal now had to reconsider the issue of universality of service with reference to the third portion of the BFOR test developed in *Meiorin*.

The Tribunal found that the standards for assessing universality of service must be as accommodating as possible (in other words individualized), as required by the reasonable necessity and accommodation branch of the *Meiorin* test. Reading the FCA decision in Anvari in the context of other Federal Court jurisprudence, the Tribunal found that it had the jurisdiction to examine the medical assessments proffered as BFORs with a view to determining whether they were arbitrary, hasty, imprudent or inadequate, i.e. discriminatory.

The Tribunal concluded that the CAF adversely differentiated against Mr. Irvine's employ, on the basis of his disability, in its stated policies governing Mr. Irvine as a member with CAD, in its medical assessments of his condition and in its assignments of employment limitations to him. CAF guidelines contemplated that a certain group of CAD patients were eligible for retention and could meet universality of service. The CAF was required to take all steps possible pre-release to ensure that Mr. Irvine's ability to fall within this group was fully considered. The CAF failed to establish that it applied its standards to Mr. Irvine in a discrimination-free manner. The medical standards were not a BFOR. The Tribunal upheld the complaint again. Judicial review pending: T-533-04

Bergeron v. Télébec et Rivard 2004 CHRT 16

Date of decision:
21/5/2004

Member:
Roger Doyon

Employment:
Télébec et Rivard

Discrimination on the ground of disability

Complaint dismissed

The complainant, who suffered from depression, alleged that his employer, the respondent Télébec, had discriminated against him on the ground of disability. The complainant also alleged harassment on the basis of his disability. In 1996, the complainant obtained work with Télébec, but was soon off work for several months due to depression. He returned to work, but was laid off in early 1997 due to poor performance. The Tribunal found that the complainant's disability played no role in Télébec's decision to lay him off in early 1997; the respondent's doctor had cleared the complainant to return to work without restrictions, and at the time of his lay-off the complainant had no symptoms of depression. The complainant obtained more work in the fall of 1997, but began to feel depressed again in December, was hospitalized that same month, and was laid off effective December 24. The Tribunal did not find that the complainant's disability played a role in this lay-off either; the job was always scheduled to end on December 24, and at the time the respondent gave the complainant his lay-off notice, it was unaware that the complainant was depressed again. Turning to the harassment issues, the Tribunal noted that while the complainant was off work sick, a respondent representative visited his home to drop off a medical form, to be filled out by his doctor. This did not constitute harassment. Nor did a series of meetings held with the complainant and respondent representatives, wherein they expressed dissatisfaction regarding his leave practices; there was no indication from the respondent's doctor that the meetings impacted the complainant emotionally. The complaints were dismissed. Judicial review pending: T-1150-04

Date of decision:
04/6/2004

Member:
Roger Doyon

Employment:
Bell Mobilité

Discrimination on the grounds of sexual orientation and marital status

Complaint dismissed

Genest v. Bell Mobilité 2004 CHRT 19

The complainant, an employee of the respondent, was involved in a same sex relationship. He alleged that the respondent failed to inform him that under the company group insurance plan, he could obtain insurance coverage on the life of his spouse. Yet the preponderance of the evidence indicated that the respondent had organized information sessions explaining the plan, and that brochures were distributed to the employees. The evidence also indicated that the human resources administrator, who was extremely knowledgeable about the plan and had educated others about it, always mentioned that the life insurance option was available for same sex spouses. The administrator denied having indicated to the complainant that this option was not available for his spouse. The Tribunal accepted her evidence; she had no reason to conceal the truth from the complainant. It was noteworthy that another employee of the respondent testified that he had taken out an insurance policy on the life of his same sex spouse. Given that the complainant had been made aware that his same sex spouse was eligible for other insurance coverage, there was no reason to believe the respondent would have failed to inform him about the situation with respect to life insurance. The Tribunal concluded that at the time he selected his insurance coverage options, the complainant was aware of the spousal life insurance option, but chose not to pursue it, because he knew that his spouse had a life insurance policy in respect of which he was the beneficiary. The complaint of discrimination on the grounds of sexual orientation and marital status, was dismissed.

Date of decision:
30/6/2004

Member:
Roger Doyon

Employment:
Great Circle Marine Services Inc.

Discrimination on the ground of disability

Complaint upheld

Boudreault v. Great Circle Marine Services Inc. 2004 CHRT 21

The complainant, who had had knee surgery, alleged that the respondent's decision to dismiss him from the position of helmsman and longshoreman constituted discrimination on the ground of disability. The respondent had hired the complainant to work aboard a supply ship delivering goods to destinations in the far north. A few days after boarding the vessel, the complainant was observed putting ice on his knee. He explained to the captain that he had had a knee operation three years earlier and that at times he experienced stiffness and pain. The captain dismissed him, believing that his condition rendered him unfit for duty, and that it could potentially endanger the health and safety of the crew. The Tribunal found the dismissal to be discriminatory. The captain had insufficient information about the complainant's disability at the time he made his decision. Significantly, the complainant's offer to contact his orthopaedist or produce his hospital records was rejected, on the ground that the ship was to be

leaving port in two days. The evidence indicated, however, that the ship didn't leave for six days. The respondent's contention that there was insufficient time to obtain an independent medical examination was not credible; the respondent had had dealings with a firm of medical experts for several years. Moreover, once it became known that the planned voyage would be extended to international waters, different regulations became applicable and a doctor was brought on board prior to departure, to examine everyone who did not have a medical certificate. The respondent was ordered to pay compensation for lost wages, clothing expenses, legal expenses and pain and suffering.

Brown v. Royal Canadian Mounted Police 2004 CHRT 24

Date of decision:
16/7/2004

Member:
Paul Groarke

Employment:
Royal Canadian Mounted Police

Discrimination on the ground of marital status

Complaint upheld

Following a decision wherein the Tribunal had determined that the complainant, a member of the respondent force, had been discriminated against on the basis of marital status in respect of the promotion process, the Tribunal addressed certain remedial issues. In regard to the complainant's claim for pain and suffering, it noted that she had suffered emotionally and that her self-esteem had been damaged. Furthermore, the respondent had been intransigent, prolonging resolution of her situation. However, the complainant had been stubborn as well, refusing to return to work without an admission that she had been wronged. The Tribunal found that the respondent did make sincere attempts to resolve the matter. Moreover, many circumstances outside the respondent's control contributed to the complainant's emotional and mental state; in particular, she had certain pre-existing health issues, and her father was dying. Taking into account all of these factors, the Tribunal ordered compensation in the amount of $10,000. But the Tribunal rejected the complainant's claim in respect of reckless or willful discrimination. There was no evidence of insulting or flagrantly offensive conduct. Rather, the respondent conducted itself professionally and within normal standards of management. Moreover, there was no evidence of recklessness; the respondent was unaware that the complainant was in a precarious psychological state, and acted without knowing that its actions might precipitate a break-down. Finally, the Tribunal ruled that since the respondent had complied with the substance of its earlier remedial order, the Tribunal's jurisdiction was now exhausted, except in regard to the claim for hearing costs.

Date of decision:
17/8/2004

Member:
A. Hadjis

Employment:
Department of Health and Welfare

Discrimination on the ground of national or ethnic origin

Complaint upheld in part

Chopra v. Department of Health and Welfare 2004 CHRT 27

In an earlier decision, the Tribunal had determined that the complainant, an employee of the respondent, had been discriminated against on the ground of national or ethnic origin in respect of the staffing process. After reconvening on the issue of remedy, the Tribunal found that there existed a serious possibility that the complainant would have been assigned to act in a Director's position, were it not for the discrimination; the respondent was not overly concerned with qualifications in regard to the acting assignment. The complainant also claimed wage loss arising from not having been appointed to the Director's position on an indeterminate basis. The Tribunal held that had the complainant acted in the Director's position, there was a possibility of his later obtaining this appointment. However, he had not proven that he was qualified, and the successful candidate had much more extensive management experience. Given that his appointment was far from certain, the Tribunal reduced his wage loss claim by two thirds. Moreover, given the complainant's failure to adequately mitigate his loss of the promotion, the Tribunal limited the compensation period to six years. The Tribunal rejected the complainant's claim for wage loss in respect of subsequent promotions that he would have received; this claim was too remote and speculative. The Tribunal also denied the complainant's claim for immediate instatement into an executive position; his claim regarding the Director's position was too uncertain, and he had already received restitution through the Tribunal's order for wage compensation. The respondent was, however, ordered to pay special compensation. Judicial review pending: T-1683-04

Date of decision:
18/8/2004

Member:
J. Grant Sinclair

Employment:
Canadian Armed Forces

Discrimination on the ground of age

Complaint upheld

Adair et al. v. Canadian Armed Forces 2004 CHRT 28

On September 3, 1992, a regulation came into effect making it legal for the Government to implement compulsory retirement in the Forces. Prior to that date, the Forces' mandatory retirement policy was discriminatory. None of the complainants had been released by September 3, 1992, but they had all been required to take retirement leave beforehand, in the expectation that their retirement (as provided for by the then discriminatory policy) was imminent. The complainants argued that they had been compelled to take retirement leave under the respondent's retirement policy, at a time when such policy was still discriminatory. They were, in effect, forced out of the workplace because of their age. The respondent argued that being required to take retirement leave does not constitute an adverse consequence or lost opportunity; therefore it cannot be viewed as a discriminatory practice. The Tribunal found that the complainants had

been discriminated against on the basis of age. They did indeed suffer adverse consequences: When they were put on retirement leave, they became "stay at home soldiers". They were no longer eligible for promotions or transfers. The Tribunal further found that while the complainants were all released after the regulation came into effect (at which time the retirement policy was no longer discriminatory), the regulation could not change the past as far as the compelled taking of retirement leave was concerned. At the time the complainants went on retirement leave, the policy requiring them to do so was discriminatory.
Judicial review pending: T-1702-04

Goodwin v. Birkett 2004 CHRT 29

Date of decision:
20/8/2004

Member:
A. Hadjis

Employment:
Bus Operator

Discrimination on the ground of sexual harassment

Complaint upheld

The complainant was employed as a bus operator. She alleged that the respondent, one of her co-workers, had sexually harassed her while on an overnight charter. According to the complainant, on the night in question, the parties had been watching television together in the complainant's hotel room, each sitting on a separate bed. She fell asleep, and woke up during the night to find the respondent lying on her bed next to her; he was nude and was touching her below the waist with his hand. The respondent admitted watching television in the complainant's hotel room, but denied ever being in bed nude with her or touching her as alleged. The Tribunal preferred the complainant's version of events. It noted that her evidence was unwavering and forthright, whereas the respondent's recollection was patchy and inconsistent. The complainant's failure to report the incident to the police did not weaken her credibility, given the nature of the incident, her dedication to completing her job and the hardship that criminal complaints sometimes entail. At the hearing, the complainant's submissions on remedy contradicted any suggestion that she had fabricated her claim, for financial gain. Nor did the evidence support the suggestion that the previously amicable relationship between the parties was unchanged following the night in question. The Tribunal concluded that the hotel room incident constituted sexual harassment: while only occurring during a single evening, the conduct created a hostile working environment for the complainant. The respondent was ordered to pay compensation for pain and suffering, and for willful or reckless conduct.
Judicial review pending: T-1701-04

Date of decision:
23/9/2004

Member:
Shirish Chotalia

Employment:
Canadian Armed Forces

Discrimination on the ground of disability

Complaint denied

Howell v. Canadian Armed Forces 2004 CHRT 31

The complainant was a member of the Canadian Armed Forces. He had a longstanding history of right knee injuries, for which he had been prescribed a knee brace. While participating in a military training course, he sought to be excused from drill because he did not have his knee brace with him. His request was ultimately denied and he was ordered to participate in the drill without the brace. Following this incident, his knee problems persisted and subsequently led to his medical discharge from the Forces. The Tribunal held that the complainant's treatment on the day in question was not discriminatory: According to the evidence, the knee brace was no longer medically required for him to perform drill safely. Further, a few hours prior to the drill, the complainant was observed playing an aggressive game of basketball, without the brace. Thus there was no objective basis for accommodation. The Tribunal was not convinced that the drill incident materially contributed to the complainant's pre-existing knee-problems; degenerative change was inevitable in the long term. The evidence showed that the complainant seriously injured himself four days after the drill incident; it also showed that a surgical procedure four months later was viewed as successfully resolving his knee problems. It was almost two years after the drill incident that the complainant finally evaluated himself as being unable to perform certain military duties; he was discharged voluntarily. Finally, the respondent did not discriminate against the complainant by failing him in the course in which the drill took place; had the drill incident not occurred, he would have likely still been unsuccessful in the course.

Date of decision:
05/10/2004

Member:
A. Hadjis

Employment:
Bell Canada

Discrimination on the ground of disability

Complaint denied

Benoit v. Bell Canada (Québec) 2004 CHRT 32

The complainant was employed with the respondent as a director of installations and repairs. He had an alcohol dependency problem. While attending a treatment program for his alcoholism, the complainant received word that he was being dismissed pursuant to a downsizing initiative. He alleged discrimination based on disability. The Tribunal, however, was not convinced that the complainant's alcoholism was a factor in the respondent's decision to terminate his employment. Rather, this decision was based on deficiencies that had been identified in the complainant's management style; at the time it was made, the complainant's superiors had no knowledge of his alcoholism. It is true that the complainant had also received treatment for alcoholism from the respondent 10 years earlier, when he was working in another division, but there was no reason to believe that this confidential information had been passed on to his current managers.

Moreover, the complainant's dismissal was implemented at a time of large-scale cutbacks in the respondent's ranks. The complainant argued that his poor performance was linked to his alcoholism; had the respondent sent him to treatment at an earlier stage, he could have improved his performance and avoided dismissal. The Tribunal rejected this argument, however, noting that the complainant had gone to great lengths to conceal his alcohol dependence from his supervising directors, and had deliberately misled the respondent about his health. The respondent could not be expected to inform itself or explore accommodation possibilities in respect of a disability of which, in good faith, it had no knowledge whatsoever. Judicial review pending: T-1956-04

Brooks v. Department of Fisheries and Oceans 2004 CHRT 36

Date of decision:
03/12/2004

Member:
Paul Groarke

Employment:
Department of Fisheries and Oceans

Discrimination on the ground of race

Complaint upheld

The complainant, who is black, alleged that he was discriminated against on the basis of colour in the course of his employment with the Coast Guard, in regard to the hiring and promotion process. The Tribunal dismissed his first two allegations for insufficient evidence; in one case the matters complained of occurred fifteen years ago. The third allegation concerned the establishment of an eligibility list in 1992, on which the complainant was ranked 13th. The Tribunal found that the complainant was better qualified than the two white candidates who were ranked first and second on the list. Moreover, the two top-ranked white candidates did not even possess the requisite experience to be screened into the competition. The Tribunal noted that while the competition process may have been corrupted by favouritism victimizing other white candidates as well as black candidates, this did not rule out the possibility of discrimination insofar as the black candidates were concerned. Given the *prima facie* evidence of discrimination, the respondent had the burden of establishing that there was no racial element in the favouritism. Yet there was evidence that race had entered the employment process; concerns of this nature had been expressed by visible minority employees, and they were shared by respondent management. The Tribunal found the complaint to be substantiated. The Tribunal also found, however, that the complainant would not have obtained a position from the 1992 competition, even if it had been properly conducted; it invited the parties to make submissions on the appropriate remedy. Judicial review pending: T-4-05

Date of decision:
07/12/2004

Member:
Michel Doucet

Employment:
Purolator Courier Ltd.

Discrimination on the ground of disability

Complaint upheld

Coulter v. Purolator Courier Ltd. 2004 CHRT 37

The complainant, who had been diagnosed with a degenerative disease affecting his muscular control, was employed as the driver of a courier delivery truck. After working in his job for seven years, he was dismissed by the respondent. The Tribunal found a *prima facie* case of discrimination based on disability: A manager had noted that the principal cause of problems observed with the complainant's driving was that he suffered from a degenerative disease, and that this constituted a serious safety and image problem. The Tribunal was unconvinced that accommodating the complainant as a driver would have caused the respondent undue hardship: Evidence concerning numerous traffic accidents in which the complainant had been involved was weak. A neurologist's report indicating that the complainant presented an increased safety risk was premised on his driving for an eight-hour period. The report also showed no obvious deterioration in the complainant's muscle strength since a previous medical assessment commissioned by the respondent two years earlier. Moreover, the respondent made no attempt to accommodate the complainant by examining different ways of performing his duties. With respect to the efficient performance of the work, no evidence of customer complaints was presented. Notwithstanding the foregoing, the respondent finally accommodated the complainant by offering him a position in the telephone call centre; his dismissal from this last position due to poor performance was not discriminatory since it was not linked to his disability. The Tribunal ordered compensation for lost wages, leasing expenses, pain and suffering and recklessness.

Date of decision:
24/12/2004

Member:
A. Hadjis

Employment:
Kettle and Stony Point First Nation Band Council

Discrimination on the ground of family status

Complaint partially upheld

Bressette v. Kettle and Stony Point First Nation Band Council 2004 CHRT 40

The complainant alleged that the respondent Council had refused to hire him for a family caseworker position because he was not related to the Band's Chief. The complainant also alleged that after he filed a CHRA complaint about the respondent's refusal to hire him, the respondent retaliated against him. The Tribunal dismissed the allegation regarding the staffing of the family caseworker position. It noted that an interview panel, independent of the Chief and Council, had found the complainant's qualifications to be lacking. Moreover, the two candidates whom the interview panel had found to be qualified were not related to the Chief. Although the Chief's sister was eventually hired for the position, this occurred months later and was a sound management decision.

That said, the Tribunal found some of the retaliation claims to be substantiated: During a council meeting the Chief had berated the complainant for having brought a CHRA complaint against the Band. On another occasion, the respondent Council circulated a notice in the community stating that the complainant's human rights claim against the respondent had impeded council's ability to function in an open manner. At around the same time, the complainant's designation as a Band Council delegate to an upcoming conference was "mysteriously revoked". Four months later, the complainant was basically the only councilor not invited to a special meeting convened by the respondent. It was reasonable to perceive these incidents of differential treatment as retaliation for having filed a human rights complaint. The respondent was ordered to compensate the complainant for pain and suffering as well as for certain expenses related to the hearing.

Federal Court Judicial Review of Tribunal Decisions

CUPE v. Air Canada 2004 FCA 113 (Mar. 18) Evans, Nadon, Rothstein JJA.

CUPE filed complaints with the Commission against the respondent alleging wage discrimination against the predominantly female flight attendants, as compared to two predominantly male employee groups. As a preliminary issue, the Tribunal had to determine whether the three employee groups are in the same establishment, a requirement for the application of s. 11 of the CHRA. The Tribunal, after studying the terms of the collective agreements, found that the three employee groups were not in the same establishment. The Trial Division of the Federal Court dismissed the judicial review applications of the CHRC and the union.

Rothstein J.A. for the Federal Court of Appeal stated that while human rights statutes must be interpreted broadly and purposively with a view to advancing their objects, a board or a court cannot ignore the words of the *Act* in order to prevent discrimination wherever it is found. A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Given subsection 11(1) of the CHRA and s. 10 of the *Equal Wages Guidelines*, an establishment therefore had to be defined as including all employee groups subject to a common personnel and wage policy.

The Court found that the Tribunal was in error when it had regard to the details of the collective agreements of the three employee groups to determine if they were in the same establishment. Rather, the Tribunal should have examined whether the same general principles or approach guided the employer in personnel and wage matters affecting the groups in question. The Tribunal should have focused on the document entitled "*Air Canada's Labour Relations Policy and Principles*", which revealed that Air Canada treated all of its employee groups as being part of a single, integrated business with a common objective. Rothstein J.A. allowed the appeal, and Nadon J.A. agreed. Evans J.A. concurred, but presented a separate opinion in which he emphasized that the Tribunal erred in interpreting the legislation without regard to its human rights context. An appeal of this decision is pending before the Supreme Court of Canada.

Quigley v. Ocean Construction Supplies Ltd. 2004 FC 631 (Apr. 29) Gibson J.

The applicant worked as a deckhand (a cook) with the respondent, a company that operates tug boats. Between 1991 to 1996, he took five compassionate or disability leaves, each of significant duration. He suffered from thoracic outlet syndrome (TOS), which affected his capacity to perform heavy physical labour, including the form of labour demanded of a deckhand. In late August of 1996, after numerous work trials offered by the employer, his employment was terminated. The Tribunal found that although a *prima facie* case of discrimination on the ground of disability had been made, the employer satisfied its burden of showing that it had reasonably assessed the applicant's situation before terminating him, and had made every effort to accommodate him, to the point of undue hardship. The complainant sought judicial review of this decision.

The Federal Court briefly discussed the appropriate standard of review, and stated that the traditional standard has been correctness for questions of law, reasonableness simpliciter for questions of mixed law and fact, and patent unreasonableness for "fact-finding and adjudication in a human rights context". The Court performed a functional and pragmatic evaluation of the case at hand and found that this did not modify the applicable standard of review.

The Court suggested that the Tribunal may have made certain oversights in its interpretation and application of the test regarding the establishment of a BFOR and the attainment of undue hardship, as set out in *Meiorin*.

Firstly, the impugned work standard at issue was: "physical fitness for work as a sole deckhand" directed to achievement of "safety on the water"; in this case the work standard did not involve the procedure for ascertaining physical fitness. That said, the testing process followed by the employer leading to the complainant's termination was "less than perfect". Finally, the Tribunal may have "overstated its case" when it questioned the utility of post-termination evidence.

Ultimately, however, the Court was satisfied that the Tribunal made no reviewable error, against a standard of reasonableness simpliciter. The Court concluded that the respondent terminated the applicant on the basis of his disability. However, the respondent began a series of accommodating measures from 1991 onward. It finally fulfilled its obligation of attempting to accommodate Mr. Quigley, to the point of undue hardship, in 1996, when the applicant insisted that he be accommodated with respect to the deckhand position. The judicial review application was dismissed.

Lincoln v. Bay Ferries Ltd. 2004 FCA 204 (May 27) Evans, Létourneau, Stone JJA.

The Tribunal had dismissed the complaint, holding that the complainant was not hired for the position in question because he did not possess the qualities sought by the respondent to the same degree as the candidates who were hired. The Tribunal also found that the complainant's race had played no role in the respondent's decision to not hire him. The complainant sought judicial review of the Tribunal's decision. After his application was dismissed by the Federal Court, he appealed to the Federal Court of Appeal.

The Federal Court of Appeal dismissed the complainant's appeal. It noted that the Tribunal had failed to follow the proper approach in determining whether a *prima facie* case of discrimination had been made out. Instead of determining whether the complainant's allegations, if believed, justified a verdict in favour of the appellant, the Tribunal also took into account the respondent's answer before concluding that a *prima facie* case had not been established. As was clear from the authorities, this latter element should not have figured into a determination of whether a *prima facie* case of discrimination had been established. That said, the Court of Appeal concluded that the Tribunal's overall conclusion – that the complaint was not substantiated – was supported by the evidence and was reasonably open to it on the record.

The Court of Appeal also held that the two factual findings impugned by the appellant did not disclose a reviewable error. In the first case, evidence attributed by the Tribunal to one witness had actually been given by another, but this juxtaposition was inconsequential in the circumstances. In the second case, an inference drawn by the Tribunal was not shown to be patently unreasonable. Finally, the Court, in the context of a human rights complaint, was not prepared to consider the respondent's compliance with the *Employment Equity Act*. The EEA was designed to operate and be enforced independently from the CHRA.

Laronde v. Warren Gibson Ltd. 2004 FC 1439 (Oct. 18)

The Tribunal had found that the complainant was discriminated against on the basis of sex, because she was disciplined more harshly than a particular male co-worker in respect of a similar incident of misconduct. The Tribunal found the complaint to be substantiated in this respect. The respondent sought judicial review.

The Federal Court set aside the Tribunal's decision. It held that it was unreasonable for the Tribunal to have compared the complainant's treatment to that of the male co-worker in question (the "comparator"). In order for a comparator to be valid, there had to be sufficient similarity between the comparator, his position and

circumstances, and those of the complainant, to be able to assess the relativity of treatment as between persons in similar situations.

Both the complainant and the comparator were truck drivers hauling on behalf of the respondent. However, unlike the complainant, the comparator was not an employee of the respondent, not subject to the respondent's employment policies and outside of the respondent's ability to discipline. These were critical distinctions, which went to the root of the validity of the comparison. The respondent did not have the control over or power to punish the comparator, as it did the complainant. If the respondent was unable to punish the two people in the same way, then one could not compare the respective punishments meted out by or on behalf of the separate employers.

Desormeaux v. City of Ottawa (OC Transpo) 2004 FC 1778 (Dec. 23) Heneghan J.

The Tribunal had found the complaint to be substantiated, holding that the complainant was discriminated against on the ground of disability when she was dismissed from her job as a bus operator due to chronic absenteeism. The Tribunal determined that the migraines from which the complainant suffered constituted a disability within the meaning of the CHRA. The headaches caused her to become significantly incapacitated and interfered with her ability to do her job. The respondent sought judicial review of the Tribunal's decision.

The Court set aside the Tribunal's decision. It noted that at the Tribunal hearing, evidence had been received from the complainant's treating physician, a family medicine practitioner. On consent, the physician was qualified as an expert in family medicine with the proviso that she was not a neurologist. Furthermore, she was qualified for the limited purpose of addressing the state of the complainant's health. The Court further noted that the Tribunal had accepted the evidence of the complainant's physician as the basis for finding that the complainant suffered from migraine headaches to the extent of constituting a disability.

The Court concluded that the Tribunal's finding that the complainant suffered from a disability was unreasonable based upon the evidence. The complainant's physician was qualified as an expert in family medicine, not as a neurologist. Thus the Tribunal's reliance on her evidence was in error to the extent that her evidence exceeded the legitimate purpose for which her expert testimony was receivable. Given the lack of properly admissible evidence to support a finding of disability, there was no *prima facie* case for the employer to answer.

Parisien v. City of Ottawa (OC Transpo) 2004 FC 1778 (Dec. 23) Heneghan J.

The Tribunal had found the complaint to be substantiated, holding that the complainant was discriminated against on the ground of disability when he was dismissed from his job as a bus operator due to chronic absenteeism. The Tribunal found that accommodation of the complainant would not have imposed undue hardship on the respondent. In particular, it noted that the respondent had a large and interchangeable workforce designed to cope with absenteeism. The respondent sought judicial review of the Tribunal's decision.

The Court set aside the Tribunal's decision. It noted that the factual context of the case was the employment relationship. That relationship was subject to the *Canadian Human Rights Act*, but the fact remained that the nature of the bargain between the parties was that the complainant would appear for work on a regular and reliable basis and the respondent would pay for the service. Excessive innocent absenteeism had the potential to nullify that relationship. There comes a point when the employer can legitimately say that the bargain is not completely capable of performance.

The record in this case showed a horrendous level of absenteeism from the time the complainant began his employment with the respondent. It was not reasonable, in the Court's opinion, to require the respondent to tolerate an absenteeism rate in excess of 30 percent.

Tribunal Rulings on Motions, Objections and Preliminary Matters

In addition to the 16 decisions rendered on the merits of discrimination complaints, the Tribunal also issued 24 rulings (with reasons) dealing with procedural, evidentiary, jurisdictional or remedial issues. This can be viewed as a plateau following an upward trend observed over the past several years. Among the issues addressed in the 2004 rulings were requests for adjournments pending decisions of the Federal Court on key questions, objections based on the availability of recourse in another forum, and the question of the Tribunal's jurisdiction to award compensation for the costs of representation at the hearing.

> ***"...this shift in the make-up of the CHRT's adjudicative output can be regarded as a positive development."***

It is difficult to identify any trends in respect of 2004. One observes that issues surrounding the admissibility of expert witness testimony and expert's reports were addressed several times, as was the Tribunal's ability to amend a complaint.

Perhaps the most significant observation to be made is that the ratio of rulings to decisions on the merits has swung more towards the latter form of disposition. Last year, the Tribunal only issued 12 decisions on the merits, and over 30 rulings. Given the Tribunal's *raison d'être*, as expressed in the words of the *Act*, this shift in the make-up of the CHRT's adjudicative output can be regarded as a positive development.

Federal Court Judicial Review of Tribunal Rulings

The Federal Courts rendered five decisions that reviewed Tribunal rulings. Two of these rulings were essentially refusals by the Tribunal to adjourn its proceedings. The applicants were already challenging the constitutionality of the human rights process in Court and wanted the Tribunal to adjourn until these challenges had been judicially decided. When the Tribunal refused to adjourn, the applicants sought a judicial stay of the Tribunal's proceedings. In declining to grant the stay, the Court pointed out that an inquiry by the Tribunal becomes less effective as the time between the events complained of and the holding of the inquiry lengthens. It also noted that the Tribunal had given the applicants the opportunity to defend themselves and to argue their constitutional position before the Tribunal, which was a body competent to decide the question. The granting of this opportunity did not constitute irreparable harm justifying a stay.

Another two Court decisions concerned the Tribunal's jurisdiction to dismiss a case for abuse of process. They are discussed in greater detail below:

CHRC v. Canada Post Corporation (Cremasco) 2004 FC 81 (Jan. 21) von Finckenstein J.

The Tribunal had dismissed the complaint on a preliminary motion for abuse of process and delay. The CHRC sought judicial review of this ruling on the grounds that the Tribunal did not have jurisdiction to dismiss a complaint without a hearing, and secondly, that even if it had this power, it was not justified in exercising it in this instance.

The Court held that the Tribunal could dismiss complaints for abuse of process without holding a hearing. In so doing it was not purporting to review the CHRC's decision to refer the case. The issue of abuse of process was never squarely put before the CHRC. The Tribunal was ruling on abuse of its own process. If administrative tribunals are truly "masters in their own house", they must necessarily be able to protect their own process from abuse. Finally, the different wording in ss. 50(1) and 50(3) of the CHRA suggests that while the Tribunal is obliged to "inquire" into every complaint referred, this does not entail a "hearing" in every case.

In examining whether the dismissal was founded in the circumstances, the Court observed that the Tribunal's abuse of process decision was based on issue estoppel or *res judicata*. It agreed with the Tribunal that the same issue and the same material facts were being placed before the CHRT as had been previously considered by a labour arbitrator. It also agreed that the earlier arbitral determination was a final, "judicial" decision, in the sense that it resulted from a hearing designed to be a fair, independent and binding adjudicative process.

Finally, the Court was of the view that the parties remained the same, given that the same parties who had been before the arbitrator were also before the CHRC when it dismissed the subject matter of the complaint, before subsequently referring it to the Tribunal in the body of a new complaint. It was reasonable for the Tribunal to apply *res judicata* in these circumstances. The judicial review application was dismissed.

On appeal, it was held that the Federal Court decision disclosed no error of law or other error that would warrant the intervention of the Federal Court of Appeal. 2004 FCA 363 (Oct. 25) Rothstein, Noël, Sharlow JJ.A.

> ***"In 1999, the Government of Canada announced its intention to conduct a review of section 11 of the Canadian Human Rights Act 'with a view to ensuring clarity in the way pay equity is implemented in the modern workforce.'"***

Pay Equity Update

In 1999, the Government of Canada announced its intention to conduct a review of section 11 of the *Canadian Human Rights Act* "with a view to ensuring clarity in the way pay equity is implemented in the modern workforce." In 2004, the Pay Equity Task Force published its final report, *Pay Equity: A New Approach to a Fundamental Right* (available at http://www.justice.gc.ca/en/payeqsal/index.html). The Tribunal is awaiting, with interest, the Government's reaction to this Report.

In 2004, hearings continued in one of the Tribunal's two remaining pay equity cases. The other remained under reserve:

- **Canadian Telephone Employees' Association (CTEA) et al. v. Bell Canada** – Hearings in this case continued through 2004 for 67 hearing days, a total

of 237 days since hearings began in 1998. A notable change took place in this case in October 2002 as the CTEA settled, and then withdrew its complaint against Bell Canada. The complaints of the Communications, Energy and Paperworkers Union of Canada and Femmes-Action are continuing. On June 26, 2003, the Supreme Court dismissed Bell Canada's appeal in regard to the Tribunal's independence and impartiality, allowing hearings to continue, possibly for another two to three years.

- **Public Service Alliance of Canada (PSAC) v. Canada Post Corporation**– After nearly a decade – and comprising a total of 414 hearing days – this is the Tribunal's longest-running case. Written final submissions were completed early in 2004. Final arguments were heard in the spring and early summer 2004. A final decision may be released in spring 2005.

Four new pay equity cases were referred to the Tribunal under s.11 of the *Act* in 2004, one of which has settled between the parties. Initial conferences have been held with the parties in the three remaining cases. Dates for disclosure and next case management conferences have been fixed by the Tribunal. No clear estimates are available as yet with regard to the expected duration of hearings on the merits in these cases.

Employment Equity

In 1996, the Tribunal's responsibilities were expanded to include the adjudication of complaints under the *Employment Equity Act*, which applies to all federal government departments and to federally regulated private sector employers with more than 100 employees. Employment Equity Review Tribunals are created as needed from members of the Tribunal. Since the first appointment of such a tribunal in 2000, only seven other applications have been received, none of which were made in 2003 or 2004. To date, there are no open cases and no hearings have been held given that the parties have reached settlements before hearings commenced. The *Employment Equity Act* is scheduled for parliamentary review in 2005.

Update on Other Tribunal Matters

TRIBUNAL RULES OF PROCEDURE

Amendments to the *Canadian Human Rights Act (CHRA)* in 1998 gave the Tribunal Chairperson the authority to institute rules of procedure governing the conduct of Tribunal inquiries. Draft rules introduced in 1999 sought to address bottlenecks by sharpening the focus of hearings and minimizing the need for adjournments. The rules encouraged pre-hearing disclosure of evidence and identification of all issues well before the hearing.

Three years of testing indicated that the rules reduced logistical problems related to disclosure, while legal and procedural motions were handled smoothly and expeditiously. In early 2002, the Tribunal therefore submitted the rules to the Department of Justice for review and eventual publication in the *Canada Gazette*. Before the rules were approved, however, a client satisfaction survey commissioned by the Tribunal in the Fall of 2002 revealed shortcomings that had not come to light earlier. In addition, the then Chairperson convened a roundtable meeting with counsel who regularly appear before the Tribunal to obtain their views on how the rules were working. With this new information, the Tribunal's rules of procedure were further revised in Spring 2004.

Although substantially similar to the previous version, the new rules provide *inter alia* clearer instruction to parties on their disclosure obligations and shift the management of time frames for filing experts' reports to the control of the Panel hearing the inquiry. In addition, an attempt has been made to generally streamline and standardize the language used in the rules, and also to eliminate superfluous or redundant provisions. Some time will be required to sufficiently assess the adequacy and efficacy of the Tribunal's new rules. This is especially so given the high volume of cases now being experienced by the Tribunal and the emerging realization of a need for increased case management involvement by the Tribunal early in the pre-hearing stage of cases. It is the Tribunal's intention to test these new procedures over the next year, at least, before proceeding for approval and publication.

Modern Comptrollership Action Plan

The Tribunal reported last year on the many tasks undertaken in 2003 toward completing our Modern Comptrollership Action Plan (available at http://www.chrt-tcdp.gc.ca/about/reports_e.asp). In 2004, the Tribunal continued this initiative by strengthening its performance management accountability framework and liaising with the internal audit and evaluation sector of the Treasury Board Secretariat to begin developing a strategy for a program evaluation within the next two to three years. In addition, the Tribunal contributed to the Small Agencies Administrators Network working group on the Treasury Board's Evaluation Policy and the release of the publication *Evaluation Guidebook for Small Agencies* (available at http://www.tbs-sct.gc.ca/eval/dev/sma-pet/guidelines/guidebook_e.asp). The Tribunal also hired a consultant in 2004 to assist in completing our Results-Based Management Accountability Framework (RMAF), which will articulate the performance information required for reporting on the Tribunal's Program Activity Architecture (PAA). Together the RMAF and PAA will better explain to Parliamentarians and Canadians the objectives and results expected of the Tribunal's program activities with the resources provided. This exercise will further help the Tribunal over the upcoming year to

review the components of our Modern Comptrollership Plan to ensure an integrated focus on effectively achieving our reported program outcomes and, ultimately, the services most needed by our clients and stakeholders. In 2005–2006, the Tribunal will implement the management practices, performance indicators and targets set out in the RMAF; we will monitor their effectiveness and address any weaknesses.

In 2006–2007, a consultant will be hired to assist in assessing the effectiveness of the Tribunal's RMAF. Specifically, the consultant will help us determine whether individual components of the RMAF and the MC Sustainability Plan—such as targets, indicators and risk management practices—should be changed. This assessment will be a preamble to a program evaluation planned for 2007–2008.

> ***"It has been long recognized that the needs of Canadians are changing and that public service organizations must adapt to better meet those needs."***

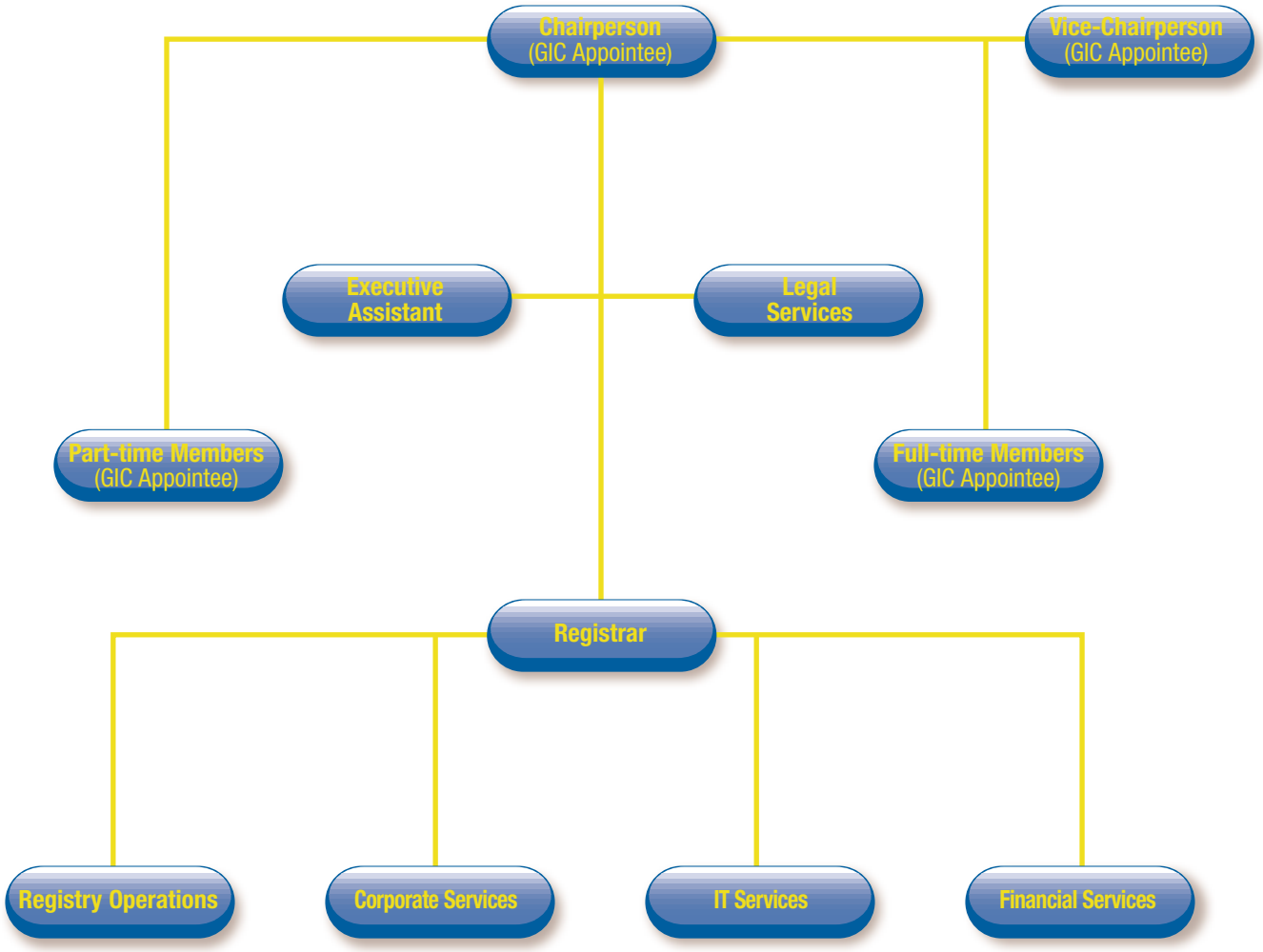
The Tribunal remains committed to the implementation of Modern Comptrollership in order to continue to improve the management capabilities of the Tribunal and the services we provide. Although an evaluation of the success of the Tribunal's Modern Comptrollership Action Plan was originally planned for early 2005, this will await another year in order to allow time for full and complete alignment of the Plan's components with the testing of the Tribunal's Program Activity Architecture.

Modernization of Human Resources Management

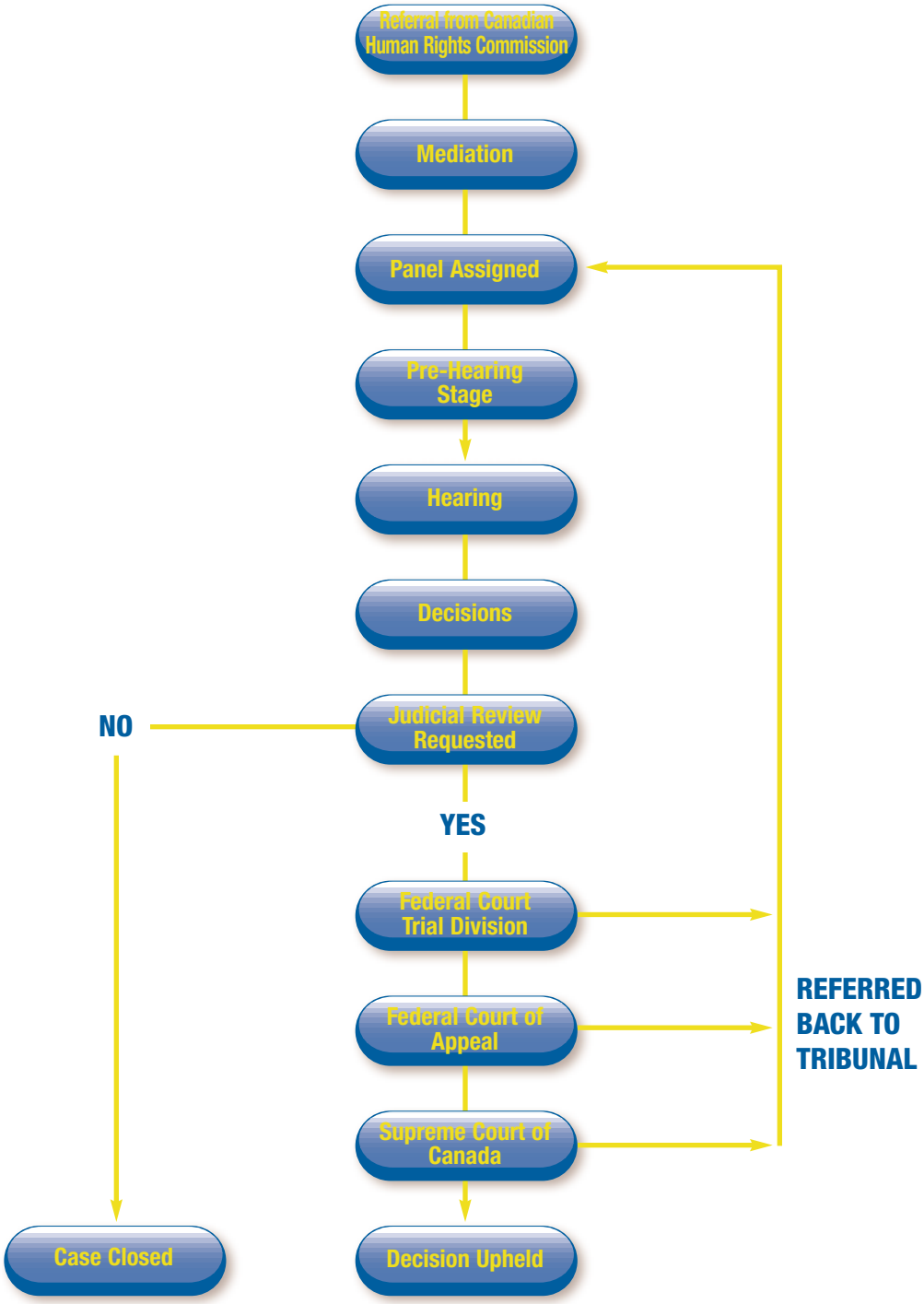
It has been long recognized that the needs of Canadians are changing and that public service organizations must adapt to better meet those needs. With the recent promulgation of the *Public Service Modernization Act*, changes will occur in the public service that will introduce more flexibility, strengthen accountability, improve collaboration and integrate learning, while at the same time safeguard the principles of transparency, fairness, and respect. Introduction of the new *Public Service Labour Relations Act* and consequential amendments to the *Financial Administration Act* and the *Public Service Employment Act* will come into force in 2005. These *Acts* are a cornerstone of the modernization of human resources management in the federal public service. Together with other initiatives, these *Acts* will position the public service to provide better programs and services to Canadians.

Many areas of human resources management at the Tribunal will be affected by these changes, such as performance and measurement processes, accountability, labour-management relations, staffing and staffing recourse, to name a few. In 2004, the Tribunal's Registry took steps toward readiness for these changes. As noted above in the section on modern comptrollership, a plan is in place to strengthen the Tribunal's accountability framework. As well, a human resource management modernization learning plan is in place, action has been taken to strike a labour-management consultation committee and we are researching opportunities for cost-effective partnerships with other organizations to develop and implement an informal conflict management system. Much more work will need to be done to be fully ready for the coming changes, however the Tribunal is confident that it will be well-positioned in 2005 for these changes.

Appendix 1: Organization of the Tribunal



Appendix 2: An Overview of the Hearing Process



Appendix 2: An Overview of the Hearing Process

Referral by the Canadian Human Rights Commission

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

Within two weeks of the date of the request, a letter is sent to the parties offering the mediation services of the Tribunal. If mediation is declined, or occurs but fails to achieve settlement of the complaint, a case management conference call is convened within two weeks where a Tribunal member begins discussion with the parties to schedule disclosure and hearing dates and guides the parties in responding to any specific pre-hearing issues.

Hearings

The Chairperson assigns one or three members from the Tribunal to hear and decide a case. Additional case management conferences are held to help resolve preliminary issues that 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 some cases, the Commission participates by leading evidence and presenting arguments before the Tribunal intending to prove that the respondent named in the complaint has contravened the *Act*. All witnesses are subject to cross-examination from the opposing side.

The average hearing lasts from five to ten days. Hearings are normally held in the city or town where the complaint originated. The panel sits in judgment, deciding the case impartially. After hearing the evidence and interpreting the law, the panel determines whether a discriminatory practice has occurred within the meaning of the *Act*. 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 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 by the Federal Court. The Federal Court holds a hearing with the parties to hear legal arguments on the validity 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 may refer 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 Federal Court judge. The parties once again present legal arguments, this time before three judges. The Court of Appeal reviews the Federal Court'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 public 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

Full Time Members

J. Grant Sinclair, Q.C.
Chairperson

A member of the former Human Rights Tribunal Panel from 1989 to 1997, J. Grant Sinclair was appointed Vice-Chairperson of the Canadian Human Rights Tribunal in 1998 and Chairperson in 2004. Mr. Sinclair has taught constitutional law, human rights, and administrative law at Queen's University and Osgoode Hall, and has 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.

Paul Groarke

A member of the Tribunal since 1995, Dr. Paul Groarke became a full-time member in 2002. Since being admitted to the Alberta Bar in 1981, he has acted in a variety of criminal, civil and appellate matters. Currently on leave of absence from St. Thomas University in Fredericton, New Brunswick, Dr. Groarke is an Assistant Professor in the Department of Criminology and Criminal Justice. He has had a long-standing interest in human rights issues in the international arena and has authored numerous articles, publications and reports on a range of topics in his areas of expertise.

Athanasios D. Hadjis

Athanasios Hadjis obtained degrees in civil law and common law from McGill University in 1986 and was called to the Quebec Bar in 1987. Until he became a full-time member, he practised law in Montreal 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 and became a full-time member in 2002.

Part-Time Members

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 Alberta Bar 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 and reappointed in 2002. 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 Université de Montréal in 1972. He is an assistant professor in the Faculty of Law at 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 and reappointed in 2002.

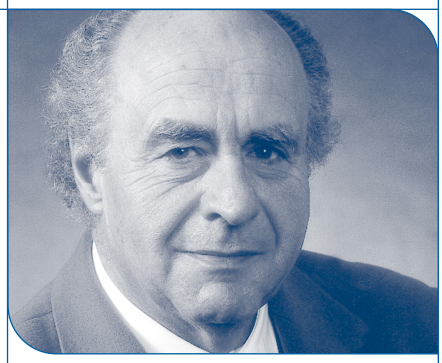
Reva Devins
Ontario

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. Ms. Devins was reappointed to the Tribunal in 2002.

Michel Doucet
New Brunswick

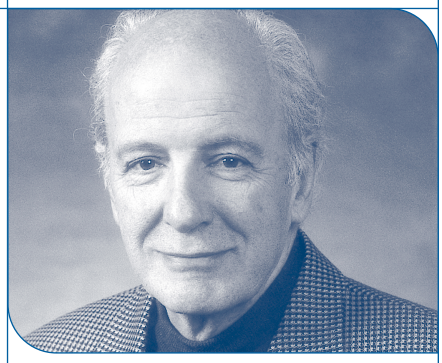
Michel Doucet was appointed to the Tribunal as a part-time member in 2002. He obtained a degree in political science from the Université de Moncton and a law degree (common law program) from the University of Ottawa. He acquired his LL.M. from Cambridge University in England. Mr. Doucet teaches at the Law School at the Université de Moncton and is an associate with the Atlantic Canada law firm of Patterson Palmer.

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. His term was renewed in 2001. A partner in the law firm of Parent, Doyon & Rancourt, he specializes in civil liability law and in 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.

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. His term was renewed in 2002. 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 Harrison Pensa.

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/Gregory M. Smith

Special Advisor to the Registrar
Bernard Fournier

Executive Assistant to Chairperson
Louise Campeau-Morrissette

Manager, Registry Operations
Gwen Zappa

Registry Officers
Nicole Bacon
Linda Barber
Diane Desormeaux
Carol Ann Hartung
Line Joyal
Pauline Leblanc
Holly Lemoine
Roch Levac

Mediation Coordinator
Francine Desjardins-Gibson

Counsel
Greg Miller

Chief, Financial Services
Doreen Dyet

Analyst, Financial Services
Nancy Hodgson-Grey

Chief, Corporate Services
Bernard Fournier/Marilyn Burke

Human Resources Coordinator
Karen Hatherall

Senior Administrative Assistant
Thérèse Roy

Administrative Assistant
Jacquelin Barrette

Chief, Information Technology Services
Julie Sibbald/Raymond Pilon

Data Entry Assistant
Alain Richard

Appendix 5: How To Contact The Tribunal

Canadian Human Rights Tribunal

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11th Floor
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