CANADIAN HUMAN RIGHTS TRIBUNAL

Annual Report 2003

"To better ensure that Canadians have equal access to the opportunities that exist in our society through the fair-minded and equitable interpretation of the Canadian Human Rights Act and the Employment Equity Act."

Canada

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 is the only statutory entity that may impartially and legally decide whether a person has contravened the statute. 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 and accommodation that are customarily available to the general public. Complaints may also relate to the telephonic communication 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, or conviction for which a pardon has been granted. Complaints of discrimination based on sex may 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 cover the adjudication of complaints under the *Employment Equity Act*, which applies to federal government departments 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.

This annual report, in contrast to previous years, focuses on illustrating the Tribunal's processes and results as well as where it sees a need to improve its service to Canadians.

March 31, 2004

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

Dear Mr. Speaker:

I have the honour to present to you the 2003 Annual Report of the Canadian Human Rights Tribunal in accordance with subsection 61(3) of the *Canadian Human Rights Act*.

Yours sincerely,

J. Grant Sinclair
Chairperson

March 31, 2004

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

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I have the honour to present to you the 2003 Annual Report of the Canadian Human Rights Tribunal in accordance with subsection 61(3) of the *Canadian Human Rights Act*.

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Message from the Chairperson

The last year was a significant one for the Canadian Human Rights Tribunal. A number of important developments will result in significant changes to the way that the Tribunal carries out its mandate.

The first of these developments is the decision of the Supreme Court of Canada confirming the Tribunal's institutional independence. Questions have existed for many years as to whether the Canadian Human Rights Tribunal enjoys a sufficient degree of institutional independence from both the government and the Canadian Human Rights Commission so as to be able to afford litigants appearing before the Tribunal a fair and impartial hearing. This has resulted in numerous jurisdictional challenges being brought before the Tribunal and in the courts. With the recent decision of the Supreme Court of Canada in the *Bell Canada* matter, the uncertainty surrounding the Tribunal has ended.

Changes at the Canadian Human Rights Commission will undoubtedly have a profound impact on the business of the Tribunal in the months — and years — ahead. The Tribunal has no control whatsoever over the number of cases that come before it for decision. The decision to refer a case to hearing is one made by the Commission. 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 have a tremendous impact on the work of the Tribunal and it raises serious questions as to the adequacy of current funding levels.

The decision of the Commission to limit its participation in the majority of cases coming before the Tribunal also represents a significant change to the way in which human rights cases are litigated. In the past, the interest of the Commission in a particular case was often closely aligned with that of the complainant, meaning that many complainants were able to appear before the Tribunal without having to hire their own counsel. This went a long way towards "levelling the playing field", as most complainants are people of modest means and are not able to afford legal representation. This is in contrast to the federal sector, where most respondents are large corporations or government departments that are well-resourced and usually well-represented at Tribunal hearings.

The limited participation of the Commission at Tribunal hearings means that the majority of complainants will try to represent themselves. There is no doubt that some complainants will be too daunted by the prospect and will simply abandon their complaints. Other complainants may lack the psychological, emotional or intellectual wherewithal to proceed. For these complainants — people who the Supreme Court has

Message from the Chairperson (continued)

described as the disadvantaged and the disenfranchised — meaningful access to the redress mechanisms established in the *Canadian Human Rights Act* may prove illusory.

Those cases that do proceed to a hearing will inevitably take longer to complete, as self-represented litigants struggle to cope with an unfamiliar process. This will result in a greater cost to the public purse as well as increased expenses for respondents.

The Tribunal has taken a number of steps to try to meet the challenges presented by the changes to the Commission's approach. The Tribunal has reinstated its mediation program in order to assist parties in coming to a negotiated resolution of their dispute without the need for a Tribunal hearing. The Tribunal is also reviewing its forms and procedures to see what can be done to make the process more accessible to non-legally trained individuals while still safeguarding the fairness of the process. Consideration is also being given to the increased use of technology, such as video-conferencing, in order to assist the parties who may be in geographically remote locations.

Our role as neutral adjudicators, however, means that there is only so much that the Tribunal can do without compromising its impartiality, and thus the integrity of the process. Given the current statutory framework and budgetary limitations, the actions of the Commission are clearly a well-meaning attempt to address the concerns that have repeatedly been voiced regarding delays in the complaints process. Nevertheless, we trust that this approach will not result in other types of delays or possibly undermine the integrity of the human rights complaints process.

In response to long-standing concerns as to the efficacy of the human rights complaints process, the *Canadian Human Rights Act* Review Panel was asked to review the current process and to recommend ways to improve the system. The Panel, under the chairmanship of the Honourable Gérard La Forest, gave the matter careful study and consulted with numerous stakeholders. In June of 2000, the Review Panel came up with detailed recommendations for a comprehensive overhaul to the complaints processing system. The government has had the report of the La Forest Panel in its hands for over three years. The time for "cut-and-paste" solutions is long past. Canada prides itself on its human rights record; however, if the promise of equality contained in the *Canadian Human Rights Act* is to ring true, it is time for a comprehensive, well-thought-out overhaul to the human rights complaints process.

J. Grant Sinclair

The Year in Review

Another Year of Imposed Change

Last year we introduced our Annual Report with the statement: *"... The Canadian Human Rights Commission has referred a great many more cases to the Tribunal for hearing than has historically been the case."* While we thought the number of referrals might level off, in 2003 the number of new referrals actually increased by another 136 per cent, as compared to 2002. The total number of new cases referred in 2003 was 130.

In addition to this dramatic increase, the Tribunal was also faced with the following events:

- The Commission made numerous and very consequential changes — on four different occasions in 2003 — to how it manages the cases referred to the Tribunal.
- The Tribunal, as part of its efforts to respond to the above, reintroduced mediation.
- In June, the Supreme Court rendered its long-awaited judgment on the independence of the Tribunal.
- In November, our Chairperson for the past five-and-a-half years was appointed to the Federal Court of Canada.
- The Tribunal's Registrar, after 25 years of service, announced his retirement for early 2004.
- Although not as strategically important, the Tribunal was advised that it would have to relocate its current office space to a new office building in early 2004.

To respond to these events, the Tribunal was forced to make many operational adjustments to ensure continued provision of quality services to Canadians.

The following is a discussion of what precipitated the above events and how the Tribunal responded.

Workload Issues

The number of cases being referred to the Tribunal has risen dramatically over the past year, with 130 new cases referred to the Tribunal in 2003. This is notably higher than the average of 25 referrals per year from 1996 through to 2000. In response to this increase, the Tribunal hired new staff on a temporary basis and made major revisions to its operating policies and procedures in order to continue to process cases through the system. However, with such a large increase in the number of cases, the Tribunal has been unable to maintain its time frames in the processing of cases.

While the delays are not significant, any decline in service to Tribunal clients is not acceptable. Workload issues are being closely monitored to see if this pattern continues in order to ensure that the quality of services provided is not compromised. To address this problem, the Tribunal completed a detailed analysis of its capabilities, based on existing resources. This resulted in the operational changes that are outlined later in this report. (Refer to page 6 for details.) The Tribunal will likely require additional resources, at which time a detailed report will be submitted to the appropriate funding authorities within the government. These authorities have already been made aware of the Tribunal's current situation.

It is understood that the increase in referrals from the Commission is based on two basic factors:

- the Commission is receiving more complaints than ever before; and
- the Commission has introduced new measures to clear its backlog, resulting in more cases being considered at its monthly meetings.

Based on projections from the Commission, the Tribunal expects, at a minimum, an equivalent number of new referrals in 2004.

Table 1 identifies referrals from the Commission since 1996.

Table 1 New Cases, 1996 to 2003

	1996	1997	1998	1999	2000	2001	2002	2003	2004 (Projected)	Totals
Human Rights Tribunals/Panels	15	23	22	37	70	83	55	130	130	564
Employment Equity Review Tribunals	0	0	0	0	4	4	0	0	2	10
Totals	15	23	22	37	74	87	55	130	132	**574**

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. As noted, the number of referrals since 1996 has generally continued to increase. For 2004, the number of referrals of human rights and employment equity cases is projected to be equivalent to 2003, which is a 900 per cent increase over 1996 referrals.

How the Tribunal Responded

The Tribunal is still analyzing the growth in referrals to ascertain if it is just a short-term aberration or whether it will be an ongoing pattern for the foreseeable future. The early view is that, with the number of new complaints being filed at the Commission, the number of referrals to the Tribunal will remain constant or will slightly increase over the next few years.

As a direct response to the above reality, the Tribunal undertook the following initiatives:

- Tribunal-sponsored mediation was reintroduced.
- Operating procedures were adjusted to better meet the needs of unrepresented parties.
- Initial correspondence to the parties was revised on three different occasions to ensure that all parties were aware of the Commission position and to indicate what information was now required by the Tribunal to process a complaint.
- Members took a more aggressive approach to case management to keep the process on track and to ensure that parties met deadlines.
- Three new Registry Operations staff were hired on a term basis to help process cases. One of the three new positions was a Mediation Coordinator position responsible for the coordination and planning of mediation sessions. This has reduced the workload on Registry Officers and has enhanced the independence and confidentiality of the mediation process.

New Procedures at the Canadian Human Rights Commission

In response to an ever-increasing caseload and limited resources, the Commission has made many strategic changes to how it manages cases once they are referred to the Tribunal. Those changes have required the Tribunal to make ongoing adjustments to how it conducts its business. The following is a brief outline of the new Commission procedures.

In early 2003, the Commission advised that it would fully participate in only 20 to 25 cases per year. This would result in 100 cases in which the complainants would be without Commission support and would therefore be responsible for presenting evidence and legal arguments on their own behalf.

The Commission further advised in early 2003 that it would have a counsel at all hearings, but for those cases where it would not be a full participant, the counsel's participation would be limited to a brief opening statement on the law and the Commission's understanding of the facts.

In September, the Commission introduced a new procedure wherein any case being referred to the Tribunal would first be given 60 days to be resolved through the Commission's conciliation process. If not resolved in 60 days, the case would then be forwarded to the Tribunal for hearing. If the case was resolved through conciliation, the Tribunal would not be informed of the case.

In November, the Department of Justice, as the legal representative of government departments, challenged the Commission's limited role at the Tribunal process, specifically the concept of making an opening statement and then disengaging from the process. The Tribunal, in a written ruling, accepted the Department of Justice's argument and advised that the Commission could no longer follow this procedure. The effects of this ruling on the Commission's participation in the hearing process are still to be determined.

Changes at the Tribunal as a Result of the Commission's New Direction

Unrepresented Parties

With the Commission's decision to not fully participate in all Tribunal hearings, the number of unrepresented parties appearing before the Tribunal has risen to unprecedented numbers. As a result, it became imperative that the Tribunal develop easy-to-use documents to help those parties understand both the "legalese" and how the process works. The Tribunal has attempted to simplify its processes and is preparing a number of "how-to" pamphlets to explain in plain language its legal processes. These new documents should be available in early 2004. In addition, Tribunal staff have taken the lead in assisting any party who appears before the Tribunal. The Registry staff make sure that they take the necessary time to fully explain Tribunal procedures and processes to anyone who needs help. This adds to the staff's workload, but they feel that assisting individuals — who are already under great stress — is one of their most important functions. Quality and informative service facilitates improved participation from the parties and, ultimately, better human rights decisions.

Tribunal Mediation

With the large increase in the number of referrals and the Commission's decision to participate in only a limited number of cases, the Tribunal was faced with a significant case flow management problem: How can it process so many cases with the same resources while ensuring a fair and equitable process, considering the potential power imbalance between unrepresented complainants and sophisticated employers? The Tribunal's first decision was to reintroduce mediation.

Past annual reports detailed why the Tribunal discontinued offering mediation services. Although the reasons given are still accurate and continue to cause concern, the new situation facing the Tribunal (primarily unrepresented parties and a large increase in the number of cases) resulted in the reintroduction of mediation in March 2003. The Tribunal believes that mediation, especially when it involves unrepresented parties, allows for a more equitable and informal resolution of complaints; therefore, mediation is now offered in all cases referred to the Tribunal.

However, there must be unanimous consent from all parties for mediation to take place. A Tribunal member is assigned as a mediator to assist the parties in determining whether a satisfactory resolution to the complaint can be found. Mediation is normally held within two to three months of referral, and the parties are advised that if mediation does not resolve the matter, a hearing will commence within six months of referral from the Commission.

To meet the concerns regarding mediation cited in previous reports, the Tribunal has introduced revised operating procedures for its mediation process, such as more detailed written mediation briefs, pre-mediation case conference calls and the publication of generic settlement results. The Tribunal also developed and delivered a very intensive training session on mediating human rights matters for its members. The expertise of Tribunal members provides a level of credibility to the process, allowing the parties to have confidence that their concerns will be heard and understood within a human rights context.

For cases not resolved through mediation, the more formal hearing process is still a necessary and viable option, allowing for the establishment of important legal precedents that can be used to

resolve future complaints based on similar grounds or circumstances. There are many cases for which, because of the nature of the complaint, a formal hearing and decision are more appropriate for determining the issue of discrimination. This will always be the case. Mediation, while a valuable tool, is not the answer for all cases. For example, public debate and the presentation of expert testimony is extremely important for cases involving systemic discrimination issues, safety and health issues, or cases that establish national policy or define hiring or service standards for national industries.

Since March 2003 the Tribunal has mediated 45 cases. Refer to Table 2 below for an overview of the number of mediated cases in 2002 and 2003.

To date, the rate of settlement through mediation has reflected the Tribunal's early projections. However, it cannot take all the credit for the initial success of mediation. In most cases, the parties who come to mediation should be congratulated for their commitment, flexibility and sincere effort to find a workable solution. As previously indicated, the Tribunal does have some concerns about the potential imbalance between complainants and respondents. However, in most cases, respondents have been co-operative and understanding and have gone to great lengths to ensure that the complainant is treated with respect throughout the process. This has been very encouraging.

Supreme Court of Canada Decision Dealing with the Tribunal's Institutional Impartiality

For almost 20 years, respondents have been challenging aspects of the statutory framework that created the Tribunal and the Commission. The main concern was that, because of certain structural links between the two organizations, parties at the inquiry stage of the process would not

Table 2 Cases Mediated, 2002 to 2003

Year	Resolved	No Resolution (Proceeded to hearing)	Pending	Totals
2002	2	3	0	5
2003	28	11	1	40
Total	30	14	1	45

Note: Since March 2003, an offer of mediation was declined by one of the parties out of 14 occasions.

receive a fair hearing from an independent and impartial decision maker.

In the 1990s, Bell Canada, a respondent to equal wages complaints before the Tribunal, raised this and other institutional concerns in a Federal Court application. After a 1998 Trial Division decision upheld Bell Canada's arguments and halted the inquiry into the equal wages complaints, Parliament amended the *Canadian Human Rights Act* (CHRA). These amendments significantly reduced the statutory linkages between the Commission and the Tribunal. Nevertheless, Bell launched a new application and a 2000 Trial Division decision held that, even with the amendments, the Tribunal was still not sufficiently independent so as to provide a fair hearing. In 2001, however, this decision was overturned by the Federal Court of Appeal, which endorsed the fairness of the current statutory framework.

Bell received leave to appeal the matter to the Supreme Court of Canada, and on June 26, 2003, this Court issued its decision in *Bell Canada v. Canadian Telephone Employees Association* 2003 SCC 36.

Before the Supreme Court, the institutional independence and impartiality of the Tribunal were challenged on two grounds, namely (1) the power of the Commission to pass binding guidelines governing the interpretation the Tribunal must give to the CHRA in a class of cases and (2) the power of the Chairperson to extend members' expired terms to complete any cases with which they are seized.

The Court rejected all arguments. In particular, it noted that the guideline-making power does not undermine the Tribunal's impartiality because the guidelines are merely another form of law. Being fettered by law does not in itself compromise impartiality. Furthermore, the Court held that the Tribunal has the authority to refuse to apply guidelines that it finds to be *ultra vires*, unconstitutional, made in bad faith or that infringe on procedural fairness. Moreover, it observed that guidelines cannot be passed to retroactively govern a case already before the Tribunal.

With respect to the power to extend members' appointments, the Court found that no concerns arise since the power is exercised by the Chairperson who can be regarded as disinterested in the outcome of cases. At any rate, it noted that the Chairperson loses virtually all power over members once their appointments have expired and that their jurisdiction is extended merely to the completion of their outstanding cases.

The issuance of the Supreme Court's decision signifies the end of a long period of uncertainty for the Tribunal. It is now clear that not only is the Commission's current guideline-making power acceptable from a fairness perspective, but also that the statute more generally strikes an appropriate balance between the advancement of policy objectives and the rights of litigants to be judged by an independent and impartial decision maker.

Changes in Tribunal Management

The Canadian Human Rights Tribunal is a very small organization comprising approximately 25 full-time employees, including 4 full-time members. The organization has had a history of retaining its employees through a program of fairness, equality and respect. It has 6 employees (25 per cent of current staff) who have more than 15 years' experience — including 3 with more than 25 years' experience — in the federal human rights process. The Tribunal's Chairperson and Vice-Chairperson were originally appointed as

part-time members some 15 years ago. This long-term stability has allowed the Tribunal to deliver a very high and well-respected level of service to Canadians.

However, there will now be some management changes. In October 2003, with the announced retirement of the Registrar after 25 years of service and the unanticipated appointment of the Chairperson as a judge of the Federal Court, the Tribunal will undergo a rebirth with new leadership. In addition, over the next three years, the Tribunal will lose three long-serving employees and possibly two full-time members to retirement.

The Chairperson's appointment to the Federal Court was a difficult and challenging event to which the Tribunal had to respond. Appointments to the Bench are made with no advance warning, and the individuals must immediately cease all duties of their current positions. The Tribunal is fortunate that its current Vice-Chairperson was just recently reappointed to a five-year term. As required by the statute, he has assumed the duties of the Chairperson until the government makes a permanent appointment. Thankfully, his vast experience with the Tribunal has made this transition smooth and seamless. The staff has commenced its transition planning in the event the appointee comes from outside the agency or even the government itself. Detailed briefings will be prepared for the new Chairperson.

Preparations for the Registrar's replacement have followed a more routine process. Updates and revisions were made to the position description and core competencies were modernized to reflect current needs. The Public Service Commission, as the recruiter for executive-level positions, has assumed responsibility for the staffing of the position in accordance with government hiring practices. The process has commenced with the intent of having the new Registrar on staff before the departure of the incumbent by March 31, 2004.

In addition, succession planning for the replacement of the three upcoming retirements over the next three years is in place. The Tribunal is confident that existing employees are fully capable of filling these positions, thereby carrying on the tradition of providing quality service to its clients.

The loss of two senior officials within a four-month period will place an additional burden on staff. There will also be a period of adjustment to the styles and priorities of the new leadership.

Office Relocation

The Tribunal's offices have been at the same location for the past 12 years. In 2003, Public Works and Government Services Canada (PWGSC) advised that the lease on the existing premises would expire in late 2003, thereby requiring a relocation. While this was good news in that the Tribunal would occupy a more central location, it added to an already very heavy workload. PWGSC has been very helpful in this process, but staff were required to develop very detailed and lengthy reports on specific space and operational needs; inspect various proposed sites; spend many hours working with architects and designers on developing floor plans as well as concepts and designs for a variety of unique millwork requirements; locate and work with various suppliers on the delivery of equipment, furnishings and supplies; and oversee many other details in planning such a relocation. The successful move occurred in February 2004.

An Open Discussion of Settlements in Human Rights Cases

The rate of private and mediated case settlements observed in the past two years held relatively steady in 2003. The Commission, after referring complaints to the Tribunal, has continued to settle cases either through Tribunal mediation or independent settlement discussions. In 2003, cases resolved before the commencement of a hearing continued at a rate of about 73 per cent. With the reintroduction of Tribunal mediation, the settlement of cases — independent of the Tribunal but through the Commission — has dropped sharply, as expected. Table 3 outlines the rates of settlement from 1995 to 2003.

Table 3 Rates of Settlement, 1995 to 2003

Year of Referral	Referrals	Settled	Hearing Commenced	Pending	Withdrawn/ Discontinued	Percentage Settled*
1995	26	11	14	1	0	42.3
1996	15	4	11	0	0	26.7
1997	22	18	4	0	0	81.8
1998	18	11	7	0	0	61.1
1999	35	26	8	1	0	74.3
2000	70	47	21	2	0	67.1
2001	83	66	13	4	0	79.5
2002	55	32	21	1	1	58.2
2003	130	49	18	56	7	37.7
Total	**454**	**264**	**117**	**65**	**8**	**58.2**

*Note: "Percentage Settled" does not include pending cases. Negotiated settlements between parties are beneficial and meet the requirements of the Act so long as each settlement meets the needs of the complainant and respondent and serves the public interest. Based on the intent of the Act, one without the others does not serve the interests of Canadians.

The Impact of Settlements on Canadians

What is the impact of mediated confidential settlements on Canadians? At this point, the Tribunal is not really sure. Although settlements have always been an important ingredient in the litigation process, the current numbers may show too much of a tendency to settle human rights disputes, and with what consequences?

The more formal hearing process may have a much wider impact on ending discriminatory practices because it allows for a complete review and judicial analysis of the evidence and results in a published and public decision. There will always be cases that are settled. The Tribunal expects about 65–70 per cent of cases will be settled through the Tribunal's mediation process. It is confident that, with members conducting the mediation, systemic and policy issues will be fully addressed and explored. Although the Tribunal cannot dictate the terms of final settlements, the fact that all issues are placed on the table for discussion provides the parties with at least some confidence that the issues at hand have been fully explored with an independent expert in the field. With the publication of brief summaries of the mediation results on the Tribunal's Web site, it is possible that similar discriminatory practices or acts are much less likely to occur in the future.

> Canadians have placed their trust in the Commission and the Tribunal to ensure that their rights and society's rights are fully protected within the meaning of the CHRA.

Canadians have placed their trust in the Commission and the Tribunal to ensure that their rights and society's rights are fully protected within the meaning of the CHRA. The Tribunal must continue to ensure that its actions prove that that trust is properly deserved.

The Impact of Settlements on the Parties Involved

The rate of settlement of cases also has an impact on the parties involved. For those cases where settlements were not reached — either through the Commission or the Tribunal mediation process — and where the Commission considered that a reasonable offer had been made by the respondent, the Commission typically decided that it was appropriate to withdraw from the cases. In these situations, the complainants were required to proceed to hearings and present the cases on their own. This adds to the emotional burden and stress placed on complainants and also adds to the Tribunal's workload. To ensure that complainants are fully aware of the potential for the Commission's withdrawal from a case, the Tribunal mediator now raises with all parties the issue of future Commission participation in order to assist the complainants in making the decision as to the acceptance of the respondent's final offer of settlement.

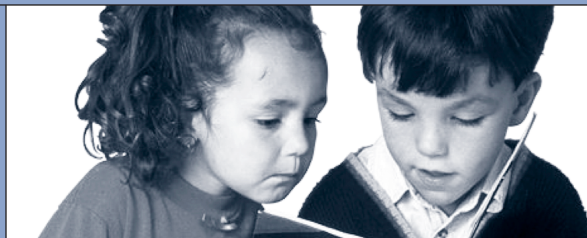
The Impact of Settlements on Tribunal Resources

Most settlements reached by the parties in the past two years occurred 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 were still required. As a result,

when a settlement is confirmed at the last minute, the Registry is still obliged to pay for last-minute cancellation fees for professional services and facilities contracted to conduct the hearing.

However, with the reintroduction of mediation 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 and verifiable financial savings. In addition, to ensure that mediation does not become a delaying measure, the parties are given two months from the date of referral to make use of the Tribunal's mediation services. If mediation does not happen or a settlement is not achieved within two months, a hearing date is set and that date cannot be postponed for the purpose of new mediation. This has proven to be a balanced approach to fairness and expediency.

The Tribunal's Results in 2003



The mission of the Tribunal is to provide Canadians with a fair and efficient public inquiry process for the enforcement of the CHRA and the *Employment Equity Act*. Its principal goals in carrying out this responsibility are to conduct hearings as expeditiously and fairly as possible, and to render fair and impartial judgments that will stand up to the scrutiny of the parties involved as well as to the courts. In other words, whatever the result of a particular case, all parties should feel they were treated with respect and fairness and were given the opportunity to fully present their cases.

The Tribunal's operational goals for 2003 were to

- commence a hearing within 5 months of a referral 80 per cent of the time,
- render Tribunal decisions within 4 months of the conclusion of a hearing 90 per cent of the time,
- work with the Department of Justice on possible amendments to the CHRA in response to the La Forest Report, and
- provide all clients with quality service through the provision of fair and accurate information on the Tribunal's procedures and processes.

Our results for 2003 are as follows:

- ***Timeliness of the hearing process*** – The Tribunal did not fully meet its first objective. For cases referred in 2003, of the 17 cases that commenced a hearing, 8 commenced within 5 months of the referral. As noted later in this section, we are now of the view that 6 months is a more reasonable time frame to commence a formal hearing. In fact, 13 of the 17 cases did hold the first hearing day within the 6-month period. For a comparison, in 2002, 17 cases proceeded to hearing: 2 within 5 months, 6 within 6 months and 11 required more than 6 months to begin the formal hearing process.
- ***Timeliness of rendering decisions*** – In 2003, 10 of the Tribunal's 12 final decisions were rendered within our 125-day time period. Members have rendered 78 per cent of the Tribunal's last 19 decisions within the 4-month target. Progress is being made in this area, and the Tribunal believes that in 2004 it will be able to release 90 per cent of its decisions within 4 months of the conclusion of the hearing.
- ***Amendments to the CHRA*** – The Department of Justice has not moved forward with the drafting of amendments to the CHRA. There have been some very preliminary discussions; however, the Tribunal does not anticipate any substantive discussions until late in 2004–2005.
- ***Provision of service/information to clients*** – The Tribunal has carried out many changes to its public information to better serve its clients. This includes a complete redesign of its Web site with upgraded search capabilities and new information, a guide to how the Tribunal operates, revised operating procedures and mediation services. An information kit is in development, as are pamphlets designed to help unrepresented parties, information about e-filing and samples of legal documents.

The next section expands on the Tribunal's operational goals and the results to date.

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 a decision). Although the average number of days to complete a case was 244 in 2001 and 208 in 2002 — and, so far in 2003, an average of 152 days with about half of the cases now closed — all are well within the one-year target. However, the time to complete cases varies widely. Refer to Table 4 for more information about the average number of days to complete cases from 1997 to 2003.

As noted, 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 272 days, with none exceeding the one-year time frame. (Note: One case is still in the system and, if it requires a hearing, will have been active for more than one year.) Although the Tribunal's performance appears improved in 2003, many cases remain active and the numbers for 2003 still will not be fully satisfactory as not all cases will be completed within one year. In a number of the longer proceedings, these delays have been beyond the Tribunal's direct control, resulting

Table 4 Average Days to Complete Cases, 1997 to 2003

	1997	1998	1999	2000	2001	2002	2003*
From date of referral from the Canadian Human Rights Commission							
To provide direction to parties	24	40	15	7	12	6	6
To mediate a case	–	–	–	–	–	–	109
To settle a case	152	245	232	230	202	150	151
To first day of hearing	93	280	73	213	293	169	178
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	152

*Note: There are still many open files from 2003; this will increase the averages for that year.

from, for example, requests for additional time from the parties, Federal Court applications or the complexity of the case.

Unrepresented Parties

For cases with unrepresented parties, the Tribunal finds it increasingly difficult to close cases within one year. At the end of 2003–2004, this target will be reviewed to determine whether it is still viable and valid. Next year's report will indicate how the Tribunal has been doing with its increased caseload and with those cases involving unrepresented parties.

Tribunal Responses

There is an overall reduction in the average number of days required to process and close case files. While the number of referrals has increased more than threefold — from 37 in 1999 to 130 cases in 2003 — the number of available members and staff has decreased. Although two of our part-time members became full-time in 2001, since the start of 2002 we have lost two part-time members and the Chairperson was appointed a judge. As of the end of 2003, none of these individuals have been replaced. Most cases in 2002 and 2003 were assigned to full-time members who were able to devote as much time as necessary to each case. However, with the recent departure of the Chairperson, more cases are now being assigned to part-time members.

With the increased caseload, part-time members will be called on more frequently than in the past to adjudicate cases, increasing operating costs and probably adding to delays in processing cases. The Tribunal has asked the Minister to confirm the appointment of a new Chairperson and to consider more full-time and/or part-time members to address this concern.

Until the winter of 2003, the Tribunal's case management process allowed it to schedule hearings as quickly as the parties were prepared to move forward. In the past, the Tribunal has boasted about its ability to hold a hearing on any issue within five days — and in some cases within 24 hours — of receiving a referral or a request for a ruling. Today, with the dramatic increase in the number of cases, the Tribunal regrets that it can no longer live up to the statement. In fact, for a brief time in mid-2003, new cases were placed on hold while the Tribunal attempted to catch up with its existing caseload. While the above figures seem comparable to 2002, there are still many active files open from 2003; this will increase the averages (see Table 4). As stated earlier, new staff have been hired on a term basis to ensure that the Tribunal continues to do its best in meeting established service standards and, most importantly, the needs of its clients. However, without additional permanent resources, it is possible that a backlog in processing cases may happen for the first time in the Tribunal's history.

To date, the Tribunal has not received complaints from its clients about the delay in moving cases through the system. In part, this is because the counsel who will be present at the hearing do not usually become involved in the case until after it is referred to the Tribunal by the Commission — and any short delay is usually welcomed by counsel.

The Scheduling Process

For the Tribunal process to be meaningful and effective, parties must be given sufficient time to prepare and complete well-thought-out cases. New procedures incorporating questionnaires have allowed the scheduling process to be completed within four to six weeks after a case is referred by the Commission. The Tribunal

believes, if procedural fairness is to be given to all parties, it is unrealistic to expect that the scheduling process put in place at the end of 2002 and used throughout 2003 can be meaningfully improved, since hearing dates are determined more by the availability of counsel than by the Tribunal.

Hearings have typically started three to five months after referral. Based on current workload and new operating procedures related to mediation, the time required to commence a hearing is expected to be six months. The Tribunal believes this new timeline is fair and reasonable. In addition, it is prepared and can move more quickly at the request of individual parties. Hearings, if requested by the parties, can be commenced within two months of referral for specific or unusual cases.

Motion Interventions/ Procedural Challenges

Motion interventions and procedural challenges are also common and they continue to cause slowdowns in the process. However, with the sensitivity and importance of the issues the Tribunal deals with, these types of legal challenges are to be expected.

With the many unrepresented parties now appearing before the Tribunal, logistical and operational problems are now adding to delays. For example, the Tribunal received a complaint from an individual who worked in the North. Since filing the complaint, the complainant has moved to another province. The Commission is no longer a party to the proceedings and will not pay for the complainant to travel to the North. The respondent, who owns a very small business and is without legal counsel, is also not prepared to travel because this individual's witness, whose travel costs would have to be paid by the respondent, lives in a small isolated community in the North. Video conferencing is not available. Needless to say, this is a logistical dilemma for the Tribunal. To further complicate the matter, the respondent's representative is not fully conversant in either French or English, a situation that reduces the effectiveness of a telephone conference.

The Tribunal developed and submitted several options to the parties for consideration. However, the case was delayed for more than seven months. If the Commission were a full participant, it would have arranged for the complainant to travel to the North, and either mediation or a formal hearing would have concluded by now. The reality is that this type of situation is going to become more frequent. With so many unrepresented parties, the Tribunal is going to be faced with many new challenges and it must become more creative in finding workable solutions to these problems.

There has also been an increase in the number of disability complaints involving complainants suffering from depression, post-traumatic stress syndrome or other mental illness. The Tribunal recognizes the special needs of these individuals and is sensitive when implementing a case management process for these types of cases. These complainants are normally slow to respond to Tribunal inquiries and at times have difficulty making firm commitments on dates and processes. It is even more difficult to proceed when the Commission is not a full participant and the complainant is on his or her own. The complainant normally seeks delays in the process until counsel or other professional assistance can be retained. In most cases, the complainant is not successful in retaining the services required and, as a result, cases of this kind often do not proceed within the time frames established under our guidelines. However, the Tribunal will not unnecessarily

pressure a person who is suffering from these disorders to meet its schedule. That being said, the Tribunal must also ensure fairness to the respondent, and will not consent to the case being indefinitely delayed. The Tribunal has found respondents to be extremely co-operative and understanding when dealing with these individuals.

Looking Ahead

With the kind of delays outlined above, expecting that all cases can be completed in a 12-month period is not realistic. However, based on new operating procedures and some recent rulings from the courts, the Tribunal is cautiously optimistic that, once it adjusts to the new realities, it can complete most cases within the 12-month time frame. In the winter of 2002, the Minister appointed two new full-time members to the Tribunal; this has helped tremendously in the processing of cases. As mentioned previously, the Tribunal may also find it necessary to ask the Minister to consider additional full-time appointments.

Because of the nature of the cases before the Tribunal, imposing tighter time constraints might exert undue pressure on the parties involved, thereby denying Canadians natural justice and the right to be heard. Unreasonable timelines lead to poor presentations of cases and poor judgments. This benefits neither the interest of Canadians nor the human rights process. The challenge for the Tribunal is to find the right balance in each case. With case management now in the control of full-time members, it is much more likely to find that balance.

On average, the number of days required to hear a case by each of the major grounds are comparable, except for complaints based on race, colour, or national or ethnic origin. These complaints generally involve allegations of a systemic problem and multiple discriminatory actions over a long period of time. Consequently, the number of witnesses called in these types of cases is much greater than for other grounds. In cases where race, colour, or national or ethnic origin is not the basis for the complaint, the alleged discriminatory act is generally a single occurrence.

Since the introduction of full-time members to the Tribunal, it has seen a decrease in the number of days required to complete individual cases. The increased experience of these members combined with improved case management has allowed for greater efficiency in the hearing process.

Timeliness of Rendering Decisions

In 2003, 12 final decisions and 32 interim rulings were rendered by the Tribunal. Of those, only two were outside the four-month guide for rendering decisions from the close of a hearing. There has been an improvement each year for the past four for releasing decisions in a more timely fashion. The Tribunal expects that, with many referrals in 2003, 2004 will produce many more final decisions and interim rulings than in the past.

Amendments to the CHRA

Three and a half years after the *Canadian Human Rights Act* Review Panel 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, one designed to end the Canadian Human Rights Commission's "monopoly on complaint processing." Chaired by former Supreme Court of Canada Justice the Honourable Gérard La Forest, the Review Panel proposed that public legal assistance be made available for complainants to bring their cases directly to the Tribunal. It 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 Review Panel.

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 over the last year 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 in the fall of 2002. However, such amendments have not yet been introduced. The Tribunal remains prepared to implement a new system whenever amendments are brought forward and approved by Parliament.

Provision of Service/ Information to Parties and the Public

For its central mandate — to conduct fair and impartial hearings — the Tribunal has not completed any formal studies or reviews since 2002. However, informal feedback from its clients indicates Registry services are meeting the needs of parties. In accordance with the government's initiative on service delivery, the Tribunal conducted a survey in the fall of 2002 based on the Common Measurement Tool developed by Treasury Board. The survey was administered to the Tribunal's primary clients: complainants, respondents, complainant counsel, respondent counsel and counsel for the Commission.

The results of the survey show that the level of satisfaction with the services provided by the Tribunal is 72 per cent. The survey demonstrates

that the Tribunal is doing very well in all areas assessed by the Common Measurement Tool, except perhaps in its communication about hearing services, an area with which only 60 per cent of questionnaire respondents were satisfied. At the time of the survey, the Tribunal had already started developing a guide that explains the entire case process in non-legal language. It is confident that *What happens next?* A guide to the Tribunal process (available on the Tribunal Web site at www.chrt-tcdp.gc.ca/about/tribunalrules_e.asp) will help to increase satisfaction in this area.

The clients surveyed also seemed to be confused about the roles of the Tribunal versus that of the Commission, as some comments pertained to a mandate or service offered by the Commission and not by the Tribunal. For this reason, the Tribunal engaged a firm to conduct an analysis of its communication tools and strategies. To respond, the Tribunal developed some new informational materials aimed at clarifying the Tribunal's role and how it conducts its business. These materials will be available in early 2004.

The Tribunal decided not to conduct another survey this year, as was suggested by the guidelines for the Service Improvement Initiative. This decision stems from concerns as to the validity of results based on responses from the relatively small number of clients who would be available for a survey. Moreover, a period of at least two years is necessary to establish a client base sufficient for the purpose of validating the survey results.

Informally, very few complaints have been received about Tribunal services. The Tribunal did receive an informal complaint about the inability of callers to access the Tribunal's voice-mail system in French. The Tribunal identified the problem and took immediate action to solve it.

Improve Public Awareness and Use of the Tribunal's Public Documents

As part of the Government On Line initiative, the Tribunal Web site was redesigned according to the Common Look and Feel guidelines as well as the results of a client satisfaction survey. The new site has been operational since early 2003 and comments received from members of the legal community and the public have been positive. Further enhancements were made to improve access to decisions and rulings, including the implementation of a more powerful search engine and decision classification system. A hearings schedule is updated regularly, and new decisions and rulings are available on the date of release (see www.chrt-tcdp.gc.ca/decisions). All previous decisions and rulings continue to be accessible in either HTML or portable document format (pdf) and they are keyword searchable.

In June 2002, the Tribunal published *What happens next?*, a plain-language guide that describes what happens when a human rights case is referred to the Tribunal from the Canadian Human Rights Commission. For publication in early 2004, the Tribunal is developing some new informational materials aimed at clarifying the Tribunal's role and how it conducts its business.

Update on Other Tribunal Issues

Modern Comptrollership

In 2003, the Tribunal made significant progress in completing many of the activities identified in the Modern Comptrollership implementation action plan of November 2002 (available at http://www.chrt-tcdp.gc.ca/about/reports_e.asp).

Completed tasks included the following:

- preparing a departmental employment equity plan;
- identifying roles and responsibilities and service level standards for all positions;
- updating competency profiles for core positions;
- developing training plans for all staff;
- documenting risks and mitigation measures;
- preparing a risk policy and corporate risk profile;
- preparing a departmental policy on values and ethics;
- taking a complete inventory of all assets, furniture and equipment; and
- establishing an Intranet site to communicate information to staff on a wide variety of subjects, including Modern Comptrollership.

Completing these activities provided the Tribunal with the foundation needed to implement and sustain the Modern Management practices that will provide Canadians with better programs, services and public policies.

Tribunal Rules of Procedure

Since 1998, the Tribunal Chairperson has had the authority to institute rules of procedure governing the conduct of Tribunal hearings. For the past few years the Tribunal has been working with draft rules — making occasional amendments — with a view to one day submitting a refined version to the Department of Justice for review and eventual publication in the *Canada Gazette*. At the end of 2002 and beginning of 2003 the Tribunal Chairperson convened roundtable meetings with counsel who regularly appear before the Tribunal to obtain their views on how the rules are working. While a number of discreet concerns arose out of these meetings, there seemed to be a consensus that the rules were working well in that they were facilitating timely and orderly disclo-

sure as well as generally enhancing the fairness of the process.

While another set of amendments (largely based on the latest round of counsel feedback) was projected for 2003, this has been delayed due to uncertainties surrounding the participation level of the Commission in cases before the Tribunal. In effect, it appeared for a time that specific changes to the rules might be necessary to address the respective responsibilities of the complainant and Commission in the pre-hearing phase. Nonetheless, the expectation is that regardless of how the situation related to Commission participation evolves, there are enough amendments that do not touch directly on this issue to warrant their prompt implementation in 2004.

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. To date, there are no open cases and no hearings have been held because the parties have reached settlements before hearings commenced.

The *Employment Equity Act* is scheduled for parliamentary review in 2005.

Pay Equity

There have been no new pay equity case referrals under s.11 of the Act since 1997. The Tribunal is awaiting, with interest, the recommendations of the Bilson Committee Pay Equity Task Force, upon completion of its review of s.11.

In 2003, hearings continued in one of the Tribunal's two remaining pay equity cases and concluded in the other, as follows:

- ***Canadian Telephone Employees' Association (CTEA) et al. v. Bell Canada*** – Hearings in this case continued throughout 2003, resulting in 37 hearing days in 2003 and a total of 166 days since hearings began in 1998. A notable change took place in this case in October of 2002, as the CTEA 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*** – After nearly a decade — and comprising a total of 414 hearing days — this is the Tribunal's longest-running case. In 2003, there were 14 days of hearings, during which all parties finished presenting their evidence. Written final submissions were completed early in 2003 and final arguments were heard in the spring and early summer. A final decision may be released by the end of 2004.

Cases

Tribunal Decisions Rendered

Date of decision: 14/01/2003

Member: Anne L. Mactavish

Employment: Public transit

Discrimination on the ground of disability

Complaint upheld

Desormeaux v. Ottawa-Carleton Regional Transit Commission 2003 CHRT 2

The complainant was employed with the respondent as a bus operator for nearly nine years. The complainant was frequently absent from work because of a variety of illnesses and injuries, including migraines, kidney stones, gall bladder problems, ovarian cysts, viruses, a broken ankle, a back injury, bronchitis and stress. Her employment was terminated in 1998 because of her chronic absenteeism. She alleged that this constituted discrimination on the basis of disability.

At issue in this case was whether the complainant was disabled, and whether the respondent accommodated the complainant to the point of undue hardship. The respondent argued that no *prima facie* case of discrimination had been established because the complainant could not be considered to be suffering from a disability. However, after considering evidence from the complainant's physician, the Tribunal determined that the migraines from which the complainant suffered did indeed constitute 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 Tribunal also found that this disability was a factor in terminating her employment. This established a *prima facie* case of discrimination. Moreover, the Tribunal found that the respondent had not accommodated the complainant to the point of undue hardship.

Although the Tribunal accepted that intermittent absenteeism could potentially create undue hardship for an employer, that was not the case here. The Ottawa-Carleton Regional Transit Commission had a large and interchangeable workforce. The services provided by the respondent were time-sensitive, but a system was in place to compensate for driver absences. As a result, the complainant's absences would not have caused an excessive drain on the system. Furthermore, the respondent did not

explore the possibility of providing a non-driving job to the complainant. The complaint was therefore substantiated. The complainant was reinstated to her former position and awarded damages for lost wages and special compensation. (Judicial review pending.)

Hill v. Air Canada 2003 CHRT 9

Date of decision: 18/02/2003

Member: Paul Groarke

Employment: Airlines

Discrimination on the ground of race (harassment)

Complaint dismissed

The complainant was employed as a mechanic with the respondent. He believed his work environment was overtly racial. He also believed that menial tasks were being assigned to him; he considered these tasks to be beneath his dignity. The complainant also experienced problems with his supervisor and alleged that he was supervised more closely than other employees. However, the Tribunal was of the view that the complainant's provocative attitude was partly responsible for this increased level of supervision. The complainant also argued that he was denied the position of Aircraft Planner III because of racial motives. However, the evidence suggested that the complainant was not qualified for the position and had fared badly on the interview.

The Tribunal found that the complaint of discrimination was not substantiated and that the evidence in support of the complaint was vague and impressionistic. Although there was a lack of minorities employed in senior positions with the respondent, the Tribunal could not infer from this that the complainant was discriminated against. Rather, the Tribunal was of the view that the complainant's problems were a product of his own making. Similarly, the Tribunal ruled that the conflict between the complainant and his supervisor was not a product of race, but of the complainant's attitude towards his work and his resentment of authority.

The harassment complaint was based on the racial jokes and graffiti in the workplace. In dealing with a harassment complaint, the Tribunal adopts the perspective of a reasonable victim. In this case, the respondent had put in place a harassment policy. The Tribunal was of the view that management made a serious, albeit limited, attempt to deal with the racial issues in the workplace. The evidence regarding the graffiti was that it was only a problem in the washrooms and that the respondent took steps to control it. As for the racial jokes, the evidence showed that they were a general rather than a specific problem in the respondent's workplace: many mechanics, including the complainant, were not respectful of other employees. It would not be acceptable for the complainant to come before the Tribunal to seek relief for activities in which he willingly participated. Accordingly, the Tribunal dismissed the complaints.

Date of decision: 06/03/2003

Member: Athanasios D. Hadjis

Employment: Public transit

Discrimination on the ground of disability

Complaint upheld

Parisien v. Ottawa-Carleton Regional Transit Commission 2003 CHRT 10

The complainant was employed with the respondent as a bus operator for more than 18 years. The complainant suffered through several traumatic episodes from 1979 until 1994, including the end of his engagement, the death of his mother, a violent assault by a bus passenger, the sudden death of his father and death threats made by another passenger. Following the last of these incidents, the complainant began experiencing stomach pains and felt sick. He subsequently went on a leave of absence based on medical certificates issued by his family physician that referred to his state of anxiety and job tension. The complainant was later diagnosed with post-traumatic stress disorder (PTSD) by a psychiatrist and psychologist. He received therapy and was later deemed ready to return to work. However, other unsettling incidents on the job led to a recurrence of his anxieties. He underwent more therapy, and in January 1996 his doctors cleared him for a return to work. The respondent terminated his employment in February 1996 because of chronic absenteeism.

The complainant established a *prima facie* case of discrimination: there was no question that PTSD constituted a disability and that this was a factor in terminating the complainant's employment. The evidence showed that the decision was based on his past record of attendance, which was inextricably linked to his disability. The Tribunal found that the respondent, in contravention of the requirements of its Attendance Management Program, had not made every effort possible to accommodate the complainant. There was no evidence that the respondent consulted the doctors regarding the possibility of alternate employment. Furthermore, the respondent had a large and interchangeable workforce designed to cope with absenteeism. The Tribunal accordingly found that accommodation of the complainant would not impose undue hardship on the respondent. The complainant was reinstated to his former position and awarded damages for lost wages and special compensation. (Judicial review pending.)

Date of decision: 04/04/2003

Member: Paul Groarke

Employment: Federal government

Discrimination on the ground of sex (harassment)

Complaint dismissed

Day v. Department of National Defence and Hortie 2003 CHRT 16

The complainant alleged, among other things, that the individual respondent had sexually harassed her while they were both in the service of the government respondent. Partway through the hearing of the inquiry, the respondents brought an application for the dismissal of the

case on the grounds that the complainant was incapable of testifying or prosecuting the complaint. The Tribunal noted the complainant's assertion in her testimony that other people had planted thoughts or phrases in her mind, certain of which related to the substance of her allegations in the case. It further noted that the complainant's conduct on the witness stand revealed disassociative states and an inability to distinguish between her own disordered perceptions and reality. Ultimately, the Tribunal was unable to assess the accuracy of her testimony and it concluded that her psychological state, both at the time of the events she was testifying about, and at the current time, prevented her from giving testimony that could be relied upon.

On the issue of the complainant's ability to prosecute the case, the Tribunal noted that she was unrepresented and yet had carriage of the complaint. It then observed that she did not have the emotional and psychological resources to participate normally in the process, regardless of any accommodation that could be extended to her. Her behaviour was irrational and she did not appreciate the consequences of the decisions she made in the context of the hearing process. Ultimately, her inability to make meaningful decisions could result in her subjecting herself to irreparable legal, psychological and emotional harm. She was thus found to be incapable of participating in the process or instructing counsel. In these circumstances, the only appropriate recourse was to dismiss the complaint; granting an adjournment to the complainant until she became competent would add an unacceptable delay to a process that had already gone on for too long. The respondents had always denied the allegations, and had had to endure their scandalous repercussions for several years. (Judicial review pending.)

Warman v. Kyburz 2003 CHRT 18

Date of decision: 09/05/2003

Panel: Anne L. Mactavish, Shirish P. Chotalia, Eve Roberts

Telephonic communication of hate messages

Complaint upheld

The respondent Kyburz (who did not appear at the hearing) was alleged to have telephonically communicated material that was likely to expose persons identifiable on a prohibited ground of discrimination to hatred or contempt. The Tribunal first noted that the act of posting messages on the Internet fell within the definition of telephonic communication for the purposes of the Act. The Tribunal then reviewed messages posted on the respondent's Web site and found that they asserted that Jewish people are innately devious, treacherous and murderous. The messages stated that Jews intend to kill "white children" and take over the world. Other messages openly advocated the extermination of the Jewish peo-

ple. Jews were described as "sub-human", "scum", "vermin" and "low-lives". The messages were rendered more persuasive through reliance on purportedly academic sources.

The Tribunal concluded, in light of the foregoing, that these messages were likely to expose persons of the Jewish faith to hatred or contempt on the basis of religion or perceived race — and in the case of Jews of European descent — national or ethnic origin. The Tribunal also found that the respondent had infringed the Act by retaliating against the complainant. After the complainant filed his complaint against the respondent, the respondent escalated a campaign of Web forum messages directed against the complainant; one posting in particular appeared to be a letter addressed to the complainant's place of employment, urging that he be dismissed. In other postings the respondent threatened the complainant's life, threatened to file criminal charges against him and threatened to distribute flyers in his neighbourhood that were designed to destroy his reputation. The Tribunal ordered the respondent to cease the discriminatory conduct (including the retaliation), and also ordered the payment of a penalty, damages for wilful and reckless conduct, and damages for pain and suffering.

Date of decision: 05/06/2003

Member: Athanasios D. Hadjis

Discrimination on the ground of sex (harassment)

Complaint upheld

Bushey v. Sharma 2003 CHRT 21

The complainant alleged that the respondent sexually harassed her during the period when they were both members of their union's local executive. The Tribunal found that the complainant was a credible witness whose testimony was detailed, comprehensive, forthright and bolstered by contemporaneous notes. In addition, the respondent's credibility was weakened by his unbelievable assertions of fabrication on the complainant's part, his vague testimony and his failure to even reply to several significant allegations against him.

The Tribunal noted that the respondent directed sexual conduct towards the complainant on numerous occasions. In particular, after driving her home from the union office one afternoon, he suggested that they have sex and asked if he could kiss her. On another occasion, in the union office itself, he pinned her from behind between a chair and a desk, grabbed her forearms, began kissing her hair, head and neck, and insisted that she have sex with him. In addition, he would leer at her and make repeated compliments about her appearance. The Tribunal was also persuaded that the complainant had made it plain, in part through written communications clearly rejecting the respondent's

advances, that his conduct was unwelcome. The unwelcome nature of the respondent's actions should also have been evident to him given the sexual harassment sensitivity training he had received as well as his receipt of an express notification from union colleagues to cease contacting the complainant. Finally, the Tribunal found that the respondent's actions were severe and persistent enough so as to poison the complainant's work environment to the point where she feared for her physical well-being. The Tribunal ordered that the respondent compensate the complainant for part of the expenses related to her change of residence, pay damages for pain and suffering, pay damages for wilful and reckless conduct, and attend a training session in regard to sexual harassment.

Dawson v. Eskasoni Indian Band 2003 CHRT 22

Date of decision: 17/06/2003

Member: J. Grant Sinclair

Discrimination on the grounds of race and colour

Complaint upheld

The complainant alleged that the respondent had denied him social assistance benefits because he was not a band member, thereby discriminating against him on the basis of race and colour. At the hearing, the respondent conceded that the complainant is entitled to receive social assistance benefits. It agreed to commence paying him benefits and to compensate him in respect of his past entitlement.

The complainant also claimed $20,000 in damages in respect of his pain and suffering and $20,000 in respect of the respondent's wilful and reckless conduct. While the Act currently allows damage awards up to these amounts, prior to 1998 the maximum amount allowable for both wilful and reckless conduct as well as suffering in respect of feelings or self-respect was a combined total of $5,000. The Tribunal noted that the complaint had been filed in 1996, prior to the 1998 amendments that raised the damages limit. The Commission argued, however, that the amendments should still apply, since the refusal to grant the complainant his benefits was a continuing and ongoing discriminatory practice. The Tribunal held that to accept this argument would be to automatically grant retrospective effect to every legislative amendment so long as the complainant continues to suffer from a long past event. It concluded that the amendments could only apply prospectively. Therefore the complainant was subject to the old combined damages limit of $5,000. The Tribunal considered the deep sense of unfairness the complainant felt when he was denied social benefits as well as the fact that the respondent had continued to deny him benefits despite a 1996 Tribunal decision (in another case) that had held such a denial to

be discriminatory. It ordered the respondent to pay the maximum payable at the time: $5,000. It also ordered payments to commence for the future as well as interest on the back payment of benefits.

Date of decision: 27/06/2003

Member: Athanasios D. Hadjis

Employment: Telecommunications/ broadcasting

Discrimination on the grounds of sex, race and national or ethnic origin (harassment)

Complaint upheld

Groupe d'aide et d'information sur le harcèlement sexuel and Des Rosiers v. Barbe 2003 CHRT 24

The complainants alleged that the complainant, Des Rosiers, had been harassed by her supervisor, Barbe, in respect of her race, sex and national or ethnic origin. The harassment was alleged to have occurred while Des Rosiers and Barbe were both employed on the production team of a cultural affairs television show.

The Tribunal found that Barbe (who did not appear at the hearing) had exposed Des Rosiers to conduct implicating a number of prohibited grounds of discrimination. (1) His sexual conduct included gesturing towards his crotch in her presence, making repeated comments about her breasts, advising her to have sex with her colleagues in order to get ahead at work and suggesting she only got her job because she had slept with an executive in the corporation. (2) In addition, he targeted her race and national or ethnic origin by making remarks about her skin colour, comparing her to his dog, stating that dancing was in her blood, exhibiting distaste for all things related to her Haitian background, implying that she was not worthy enough to report on mainstream Québec culture, and exposing her to a demeaning and insulting "masquerade" ridiculing Black persons.

The Tribunal held that Barbe's conduct was clearly undesired and unsolicited. On occasion, Des Rosiers verbally objected to his remarks, but she also expressed her concerns about Barbe's behaviour to management. Ultimately, Barbe ought to have known that conduct such as his was unwelcome. Moreover, given the extended duration of his offensive conduct, the extreme gravity of the week-long masquerade incident and the myriad other incidents attacking numerous facets of Des Rosiers' identity, the Tribunal concluded that her workplace environment had been poisoned. It ordered Barbe to compensate Des Rosiers for psychologists' fees, to pay damages for suffering in respect of feelings, to pay damages in respect of wilful and reckless behaviour, and to attend a training course dealing with harassment and human rights.

Desrosiers v. Canada Post Corporation 2003 CHRT 26

Date of decision: 10/07/2003

Member: Michel Doucet

Employment: Canada Post Corporation

Discrimination on the grounds of disability, perceived disability and family status

Complaint upheld in part

The complainant alleged that the respondent had discriminated against him on the grounds of disability, perceived disability and family status by rejecting his candidacy for a computer technology management position. The Tribunal dismissed the allegation of family status discrimination; it found that while the complainant's family obligations may have been raised in communications with the respondent, ultimately this issue played no role in the respondent's decision not to assign the job to him.

However, the Tribunal noted the respondent's admission that the complainant's candidacy was not accepted because he was medically unfit to perform the requirements of the position due to a back injury. It also noted that although the complainant's physical ability to perform the job duties was limited (e.g., his ability to lift heavy objects), the respondent had rejected the option of hiring another employee to assist the complainant in his performance of the duties without doing a cost analysis of this option. By failing to conduct a financial analysis, the respondent was unable to rely on costs to justify a refusal to accommodate. On the whole, no real or serious consideration was given to possible accommodation at the time the decision was taken to screen out the complainant. As an example, the respondent could have inquired into the feasibility of the complainant performing some tasks with assistive devices. The Tribunal upheld the disability/perceived disability complaint and retained jurisdiction to hear evidence and argument on the question of remedy.

Milano v. Triple K Transport Ltd. 2003 CHRT 30

Date of decision: 12/09/2003

Panel: Anne L. Mactavish

Employment: Trucking

Discrimination on the ground of disability

Complaint upheld

The complainant, who has epilepsy, worked as a mechanic for the respondent. Three months after suffering a seizure while at work, he was dismissed. He alleged that the termination of his employment was based on his disability. The Tribunal found that immediately after the complainant's employment was terminated, another individual (who was not an epileptic) began working for the respondent, performing mechanic's duties. The replacement mechanic was no better qualified than the complainant, who, in fact, had superior qualifications and work experience.

The Tribunal rejected the respondent's assertion that the complainant's dismissal was part of an economically motivated downsizing initiative. On the evidence, the company had been actively recruiting mechanics (and had hired the complainant) shortly before it let him go. Moreover, while the

replacement mechanic was engaged on a contract basis, this did not save the respondent money. The respondent also claimed that the replacement mechanic was working on trailer refurbishment and therefore not doing the same job that the complainant had been doing. The Tribunal found that most of the replacement mechanic's work was being performed on trucks. If the respondent did not think the complainant could do the trailer work, it could have assigned a longer-term employee to these duties. It was noteworthy that the complainant was not laid off with the possibility for recall. In addition, while the respondent claimed that the complainant was let go on the basis of seniority, seniority played no role in other layoffs.

Ultimately, the Tribunal was convinced that the complainant's disability was a significant factor in the decision to terminate his employment. The Tribunal ordered the respondent to develop a policy and institute training in respect of accommodation of disabled employees and to compensate the complainant for lost wages, pain and suffering, wilful and reckless conduct, legal expenses, and other expenses related to the hearing.

Date of decision: 06/11/2003

Panel: Anne L. Mactavish, Pierre Deschamps, Michel Doucet

Employment: Transportation/bus company

Discrimination on the grounds of disability and perceived disability

Complaint upheld in part

Milazzo v. Autocar Connaisseur Inc. 2003 CHRT 37

The complainant, a motor coach driver, was dismissed by the respondent because his urine tested positive for cannabis metabolites. He alleged that his dismissal, as well as the respondent's drug testing policy, were discriminatory in respect of disability or perceived disability. Given the complainant's denial (under oath) that he was dependent on cannabis, the Tribunal was unable to conclude that he was disabled within the meaning of the Act. Furthermore, the evidence did not even reveal any "perception" on the part of the respondent that the complainant was drug dependent; the respondent fired him simply because he failed the drug test. Given these facts, the complainant's dismissal was not discriminatory.

As for the respondent's policy, the Tribunal found that pre-employment testing and random testing for drugs was reasonably necessary. Less invasive measures of monitoring for possible employee impairment (such as observation by supervisors) were more expensive and less reliable, especially given the work environment of a motor coach company. On the other hand, drug testing of urine, while it did not establish that an employee was impaired on the job, was proven to assist in identifying drivers who were at an elevated risk of accident. Moreover, a drug-testing policy would deter some employees from using alcohol and drugs in the workplace, and would allow the respondent to comply with American drug-testing legislation.

That said, the Tribunal found that the portion of the policy providing for summary dismissal of employees who tested positive did not provide adequate accommodation of drug-dependent persons. Such persons should be given the opportunity to rehabilitate themselves, with a view to return to work, subject to follow-up monitoring. Accommodation should also be considered for drug-dependent individuals who tested positive in pre-employment tests. The policy was ordered to be modified.

Laronde v. Warren Gibson Limited 2003 CHRT 38

Date of decision: 07/11/2003

Member: J. Grant Sinclair

Employment: Trucking

Discrimination on the ground of sex (harassment)

Complaint upheld in part

The complainant (Laronde) alleged sexual harassment and differential treatment in respect of her employment driving tractor-trailers. The Tribunal found that on two occasions the complainant was assessed major disciplinary infractions for late deliveries. She appealed the first infraction, but her arguments were rejected by the respondent on the ground that "a late is a late". Because of this decision, she did not appeal the second infraction even though she had an explanation for this incident. In contrast, a male driver who made a late delivery during the same month she had made her late deliveries merely received a note to file. The respondent was unable to explain this differential treatment. Moreover, the late delivery infractions played a determinative role in the respondent's subsequent decision to dismiss the complainant.

On the question of sexual harassment, the Tribunal accepted that four relevant incidents occurred involving the complainant and a male co-worker: (1) he annotated her trip envelope with a suggestion that she make him coffee; (2) he related a story to other drivers (in her presence) involving a sexual encounter he had had; (3) he sent her a satellite message indicating that another driver, who was waiting to meet her, was in a state of sexual arousal; and (4) he said to others (in her absence), "I'm going to have that bitch fired. I'm tired of her being here." The Tribunal concluded, however, that these incidents were not individually severe enough to constitute sexual harassment. Further, they did not present a persistent pattern of offensive conduct as they took place over at least 18 months. Finally, the Tribunal rejected a separate allegation of differential treatment regarding the respondent's refusal to select Laronde to be an owner/operator; while the respondent's rationale in preferring the male candidates may have been questionable, it did not reveal gender bias. The complainant was awarded lost wages, damages for injury to feelings and self respect, and hearing expenses. (Judicial review pending.)

Federal Court Judicial Review of Tribunal Decisions

Kavanagh v. Correctional Service of Canada 2003 FCT 89 (Layden-Stevenson J.)

Date of Tribunal decision: 31/08/2001
Date of Federal Court decision: 30/01/2003

The complaint before the Tribunal was filed by a transsexual inmate who alleged that Correctional Service of Canada's (CSC's) policies in respect of transsexuals were discriminatory. The Tribunal held, in particular, that while transsexual inmates require special protection from the general inmate population, CSC should not be obliged to house pre-operative transsexuals in institutions populated by the target gender. It also held, however, that CSC should pay for an inmate to undergo gender reassignment surgery when it was deemed to be an essential medical service by the inmate's physician.

Both CSC and the Commission sought judicial review, which was dismissed in each case by the Court.

With respect to the housing of pre-operative transsexual inmates, the Court found that the Tribunal had properly placed the onus on CSC to show that any change to the current placement policy was impossible: indeed, the Court noted, the Tribunal had found that CSC's policy of simply providing for the placement of pre-operative transsexuals with other inmates of the same biological gender did not satisfy this onus. On the other hand, the Court further found that in rejecting the change to the policy proposed by the Commission, the evidence relied upon by the Tribunal as to the potential for harm to female inmates was not impressionistic in nature.

With respect to the funding of gender re-assignment surgery, the Court held that, based on the evidence, it was reasonably open for the Tribunal to find that such surgery could constitute an essential service in some cases. Furthermore, the Tribunal was correct to hold that the inmate's own physician should determine the necessity of the surgery since only this practitioner (and not a CSC physician) is in a position to make such a determination. Finally the Court held that CSC's arguments with regard to financial cost were not based on sufficient evidence, and thus rightly did not influence the Tribunal's decision.

Stevenson v. Canadian Security Intelligence Service 2003 FCT 341 (Rouleau J.)

Date of Tribunal decision: 05/12/2001
Date of Federal Court decision: 24/03/2003

The Tribunal had awarded the complainant (Stevenson) damages for out-of-pocket expenses in respect of legal fees incurred (1) when he consulted a lawyer prior to filing his complaint and (2) when he sought to make submissions to the Commission prior to referral of the complaint to the Tribunal. The Tribunal also ordered the chief executive of the respondent agency to provide Stevenson with a letter of apology for the discriminatory treatment. The respondent challenged the Tribunal's jurisdiction to make these awards.

The Court held that the Tribunal had the jurisdiction to award damages for legal costs incurred in the course of filing a complaint. It noted observations made in Tribunal case law that the public policy underlying the Act (including the goal of access to the adjudication process) supported such a result. Moreover, Parliament envisioned that a complainant would have the right to be represented by counsel before the Tribunal. As such, when Stevenson consulted a lawyer regarding the well-foundedness of his complaint of discriminatory dismissal, he in effect incurred expenses "as a

result of the discriminatory practice" within the meaning of the CHRA.

On the other hand, the Tribunal did not have jurisdiction to order the respondent to provide a letter of apology. A coerced apology does not advance the primary objective of the CHRA, namely the eradication of discriminatory practices. In addition, the Tribunal's order would force the respondent to utter a misleading and untrue opinion; such an eventuality was not contemplated in s.53 of the CHRA. Moreover, it would be astonishing for the Tribunal to possess such a power when it is not even clear that superior courts have this power.

Irvine v. Canadian Armed Forces 2003 FCT 660 (Noël J.)

Date of Tribunal decision: 23/11/2001
Date of Federal Court decision: 27/05/2003

The Tribunal found that the respondent (Canadian Armed Forces) had failed to accommodate the complainant (Irvine) to the point of undue hardship when it released him for medical reasons. In so finding, the Tribunal applied the new consolidated approach to accommodation expressed by the Supreme Court of Canada in the *Meiorin* decision. The respondent argued that the Tribunal had erred by failing to consider the principle of universality of service, as set out in a trilogy of Federal Court of Appeal decisions from 1993-94. The universality principle states that, when carrying out a discrimination analysis, one must take into account that all military personnel can be liable to perform combat duties at any time and under any conditions. This principle had been found to constitute a BFOR (*bona fide* occupational requirement) in direct discrimination claims.

The Court found that the Tribunal had not given sufficient consideration to the state of the law at the time Irvine was discharged, namely the Court of Appeal trilogy pre-dating *Meiorin*. While the Tribunal was entitled to apply *Meiorin* retroactively, it failed to analyze it in the context of the trilogy's universality principle, which had its roots in provisions of the *National Defence Act*. It also failed to recognize that, at the time the decision was made to discharge Irving, there was no duty to accommodate in direct discrimination cases.

Vollant v. Health Canada, Bouchard and Parenteau 2003 FCT 799 (Tremblay-Lamer J.)

Date of Tribunal decision: 06/04/2001
Date of Federal Court decision: 27/06/2003

The Aboriginal complainant alleged (1) that the Tribunal member had made racially insensitive comments to her representative in the context of a private conversation that took place during a break in the proceedings; (2) that the Tribunal had made erroneous findings of fact; (3) that the Tribunal erred in failing to order disclosure of unexpurgated documents that were in the respondent's possession; and (4) that the Tribunal improperly considered the intent of certain respondents in assessing whether their remarks were discriminatory.

The Court rejected all grounds of review:

- In the conversation in question, the member had inquired whether it would be safe for the Tribunal member, as a non-Aboriginal, to travel to a reserve that was well-known to the complainant's representative. While the practice of having a private conversation with the respondent's representative during a hearing was unwise, in this case it did not reveal a racist or biased attitude on the part of the Tribunal member. Moreover, the Tribunal member's reasons for decision demonstrated that he found

certain Aboriginal witnesses to be very credible. Finally, the complainant did not raise her bias concerns promptly (i.e., before the member himself).

- The record revealed no patently unreasonable findings of fact. Findings of fact generally are the province of the Tribunal, and in this case the member very carefully described in his reasons the evidence he had heard in the hearing.
- As for the non-disclosure of documents, in this case the complainant had been unable to convince the Tribunal that the documents in question were relevant to the inquiry. The Court noted that the Commission did not deem them relevant either because it closed its case without requesting their disclosure. Ultimately, this was a last-minute disclosure request, and the assessment of relevance fell within the Tribunal's discretion.
- The Tribunal did not improperly rely on the non-discriminatory intentions of certain respondents who allegedly made discriminatory comments. Rather, it took into account the context in which the comments were made, something it was entitled to do in order to obtain an accurate picture of them.

Lincoln v. Bay Ferries Ltd. 2003 FC 1156 (Dawson J.)

Date of Tribunal decision: 20/02/2002
Date of Federal Court decision: 06/10/2003

The complainant (Lincoln) alleged that the Tribunal had applied the incorrect test for determining if a *prima facie* case of discrimination had been established. The Court reviewed the two tests for a *prima facie* case. Under the *Shakes* test it must be shown that (1) the complainant was qualified; (2) the complainant was not hired; and (3) someone no better qualified but lacking the feature upon which the complaint is based was hired. Under the *Israeli* test it must be shown that: (1) the complainant belongs to a protected group; (2) he applied and was qualified for a job the employer wanted to fill; (3) he was not hired; and (4) thereafter the employer kept looking for applicants with his qualifications. Lincoln argued that, on the facts of the case, the Tribunal should have applied *Israeli* instead of *Shakes* since Lincoln was a member of a visible minority who was qualified, he was rejected for the job and subsequently the search for candidates continued.

The Court noted that the respondent did not continue to look for other suitable candidates after deciding not to hire Lincoln. Rather, one of the other candidates (Hamilton) who was interviewed some two weeks after Lincoln had always been in the mind of management as a suitable candidate, but Hamilton had only expressed his interest in the position later on. No final hiring decision was made with respect to any candidate until after Hamilton had been interviewed. Thus the Tribunal was entitled to apply *Shakes* and thereby compare Lincoln's qualifications to those of the four individuals hired to do the job in question. Even if the Tribunal had applied *Israeli*, it was apparent that the employer was looking for candidates with superior qualifications to Lincoln in respect of experience and adaptability. Finally, the Tribunal had not made any patently unreasonable errors of fact in assessing and comparing the qualifications of Lincoln vis-à-vis the other candidates.

The complainant has appealed this case to the Federal Court of Appeal.

Wignall v. Minister of National Revenue 2003 FC 1280 (O'Reilly J.)

Date of Tribunal decision: 08/06/2001
Date of Federal Court decision: 04/11/2003

The complainant, who is deaf, received a federal government grant for disabled students, which he passed on to his university to help it defray the cost of providing him with sign language interpretation. The Tribunal held that the respondent did not discriminate against the complainant when it treated the grant as taxable income.

The Court agreed that treating the grant as taxable income was not discriminatory on the ground of disability. It noted that the Tribunal had erred in adopting a definition of discrimination that had been developed for equality rights cases based on s.15 of the *Canadian Charter of Rights and Freedoms*. Under the Act, discrimination is defined as adverse treatment on a prohibited ground. That said, the Tribunal did address the essential legal question in the case, and the improper aspects of its analysis did not contaminate its overall conclusion.

On the merits of the issue, the Tribunal acted reasonably when it noted that the complainant was not treated differently from other grant recipients and that the tax consequences flowing from his grant were unrelated to his disability. Further, the complainant suffered no adverse financial consequence from the tax policy; the grant put him further ahead than he was before, and while its taxable nature reduced his refundable tax credit by $25, this financial cost was a product of the university's request that he turn over the full amount of his grant (instead of holding back a portion to cover tax liability). Moreover, the first $500 of the grant in question was tax exempt, which revealed the respondent's desire to alleviate the tax consequences of treating grants as income. Ultimately, the respondent's conduct was grounded in the *Income Tax Act*; to change it would have required a constitutional challenge.

Morris v. Canadian Armed Forces 2003 FC 1373 (Simpson J.)

Date of Tribunal decision: 20/12/2001
Date of Federal Court decision: 20/11/2003

The Tribunal had found that the respondent discriminated against the complainant (Morris) on the basis of age when it assessed his suitability for promotion in a national merit list ranking. In so finding, the Tribunal was of the view that it is not always necessary to know whether other individuals who obtain promotions are in fact qualified for the position, or whether they possess the same trait as the complainant. If a complainant can present other evidence suggesting that discrimination was a factor in denying a promotion, a *prima facie* case of discrimination will be made out, and it will be up to the respondent to provide an explanation.

The Court disagreed. It held that a complainant is always obliged to tender evidence of the qualifications of other candidates ("comparison evidence") where he or she alleges discrimination in a promotion process unless there were no other candidates. On the facts of the Morris matter, there actually were other candidates who (unlike Morris) were successfully promoted; thus comparison evidence should have been presented in order to make out a *prima facie* case. The Court went on to say that if comparison evidence had not been available, a *prima facie* case could have been made out on the strength of other evidence presented, as follows: (1) evidence that the assessment process did not define how one evaluated a candidate's "potential"; (2) evidence that evaluation of "employability" included the time remaining in a candidate's career; and (3) evidence that Morris's score under "potential" dropped in successive evaluations as he

aged. Finally, assuming a valid *prima facie* case had been made out, thereby requiring the respondent to provide an explanation, the Court held that the Tribunal was entitled to question the validity of such an explanation, given that the respondent had failed to tender comparison evidence. The Commission has appealed this decision to the Federal Court of Appeal.

Carter v. Canadian Armed Forces 2003 FCA 86 (Richard C.J./Desjardins/ Rothstein JJ.A.)

Date of Tribunal decision: 02/03/2000
Date of Federal Court of Appeal decision: 17/02/2003

The complainant (Carter) had been forced to retire and was entitled to several months' lost wages to compensate him for age discrimination. The Commission argued that he was not required to deduct his pension income from his lost wages claim on account of the "insurance exemption" principle of tort law. This principle states that "...a tortfeasor ought not to benefit from a plan of insurance paid for by the victim as a result of his or her prudence and forethought." Other authorities invoked by the Commission suggested that (1) the insurance exemption could apply to pension plans where the employee contributes to the plan; and (2) damages under the Act should generally be assessed according to tort law principles. At the original hearing of the complaint, the Tribunal had agreed with the Commission's submissions and had not deducted the pension income.

The Court, however, found that regardless of whether the insurance exemption applied, the *Canadian Forces Superannuation Act* prevented any contributor from receiving pension income and salary income in respect of the same period. Therefore, the complainant's pension income was deducted from his award for lost wages.

Tribunal Rulings on Motions, Objections and Preliminary Matters

In addition to the 12 decisions rendered on the merits of discrimination complaints, the Tribunal also issued over 30 rulings (with reasons) dealing with procedural, evidentiary, jurisdictional or remedial issues. This is a continuing upward trend that has been observed over several years. Among the issues addressed in the 2003 rulings were matters related to disclosure (or the related issue of privilege protecting disclosure), matters related to third-party settlements and requests to join additional respondents to the case.

Two possible trends can be identified. The first is that the number of rulings on motions challenging the Tribunal's independence and impartiality has declined significantly. This is largely due to the Supreme Court of Canada's decision of June 26, 2003 in *C.T.E.A. v. Bell Canada* (discussed on pages 7-8 of this report) wherein it declared that the legislative structure of the CHRA does not raise a reasonable apprehension of institutional bias.

The second trend has to do with objections by respondents related to the Commission's level and mode of participation in cases. Specifically, several rulings have been rendered dealing with the Commission's obligations in connection with the making of opening statements.

Federal Court Judicial Review of Tribunal Rulings

The Federal Court rendered four decisions that reviewed Tribunal rulings. Three of these decisions were essentially dealing with requests to stay the Tribunal proceedings. Generally, the applicants were already challenging an aspect of the human rights process in Court and wanted the Tribunal to adjourn until these other challenges had been adjudicated. In each case, a stay was denied, with a key theme being that litigation before the Tribunal that may eventually prove needless in the event of intervening Court rulings does not constitute irreparable harm necessitating a stay.

The final ruling dealt with an allegation of bias arising from a Tribunal member's intervention in the cross-examination of the complainant at the hearing. It is discussed in greater detail below.

Caza v. Télé-Métropole, Malo 2003 FC 811 (Pinard J.)

Date of Tribunal ruling: 29/04/2002
Date of Federal Court decision: 04/07/2003

The Commission alleged that during the cross-examination of the complainant (Caza) at the hearing, the Tribunal had (1) acted in a biased fashion by suggesting a comparison between Caza and a well-known public figure linked to terrorism; (2) refused to allow Caza to make submissions; and (3) questioned Caza or otherwise intervened on 294 occasions, making at times hurtful, inopportune and condescending remarks to her. The Commission brought a motion asking the Tribunal member to recuse himself from the case due to these alleged improprieties, and when the member denied the motion, it sought judicial review of the Tribunal's ruling.

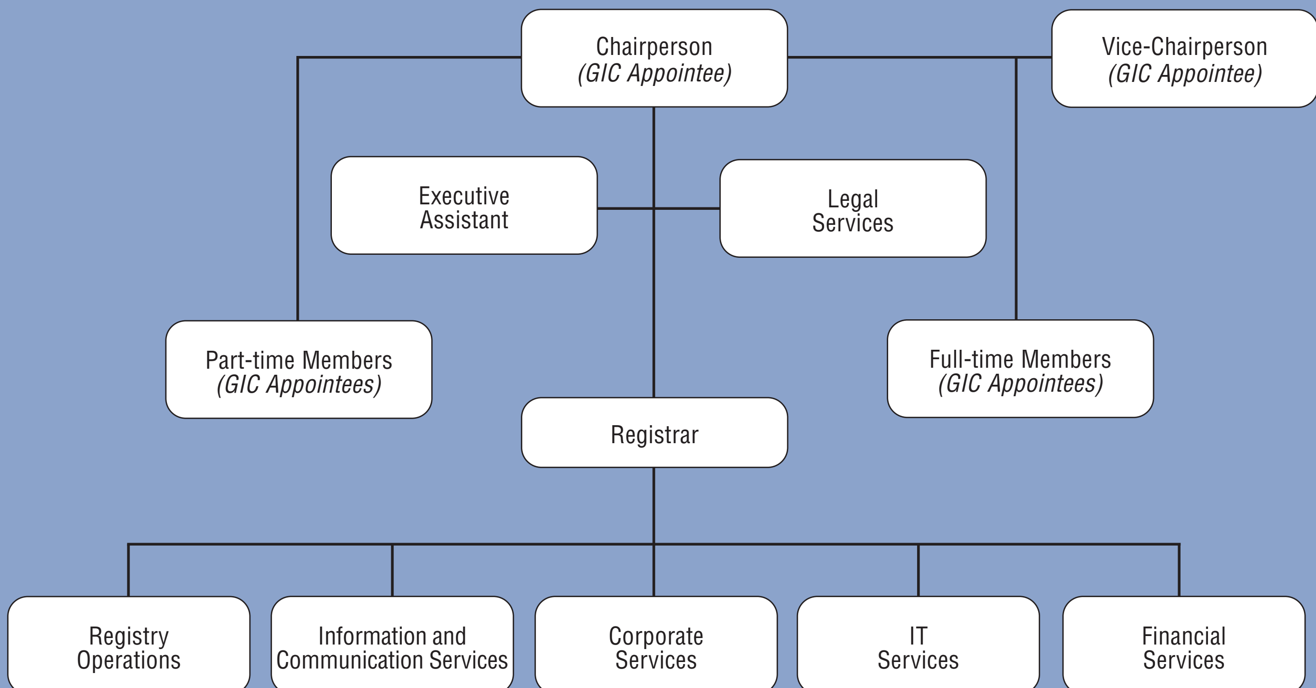
The Court dismissed the judicial review application for the following reasons:

- The remarks relating to the public figure were not said in jest, as alleged by the Commission. Rather, the Tribunal member was, through an example, trying to assist Caza in clarifying her opinion that the racist character of comments can vary depending on one's perception of them. While the member's intervention was perhaps unnecessary and imprudent, taken in context it did not compromise his impartiality. Review of another intervention of a similar nature demonstrated that the member was merely trying to help Caza understand the question posed to her in cross-examination. He was not adopting as his own the disdainful comment that had been put to her by counsel.
- Caza was not denied the right to be heard. Under a protocol established prior to her testimony, she agreed to adopt the same position as that taken by the Commission, but retained the right to make "on-the-spot" submissions if an issue arose, provided she consulted Commission counsel first. She did not have the right to interrupt her own cross-examination in order to have opposing counsel explain the purpose of his questions. It was up to the Commission counsel to object to the relevance of questions; alternatively, Caza could intervene herself, after consulting Commission counsel. At no time did Caza seek to consult Commission counsel, nor did the latter ever support objections voiced by Caza or object to the application of the protocol by the member.
- The Tribunal did not truly intervene 294 times. On several of these occasions, for instance, the member was merely trying to hear what had been said by Caza. Further, some of his interventions allowed Caza to correct inaccuracies and contradictions in her testimony. His remarks were not hurtful to Caza, but rather were properly motivated by "the search for the truth," and Commission counsel did not object to them at the time they were made.

On the whole, while the record revealed occasional impatience by the Tribunal member, the overriding impression given by the entire context was that the member sought to make the hearing as equitable as possible for the complainant.

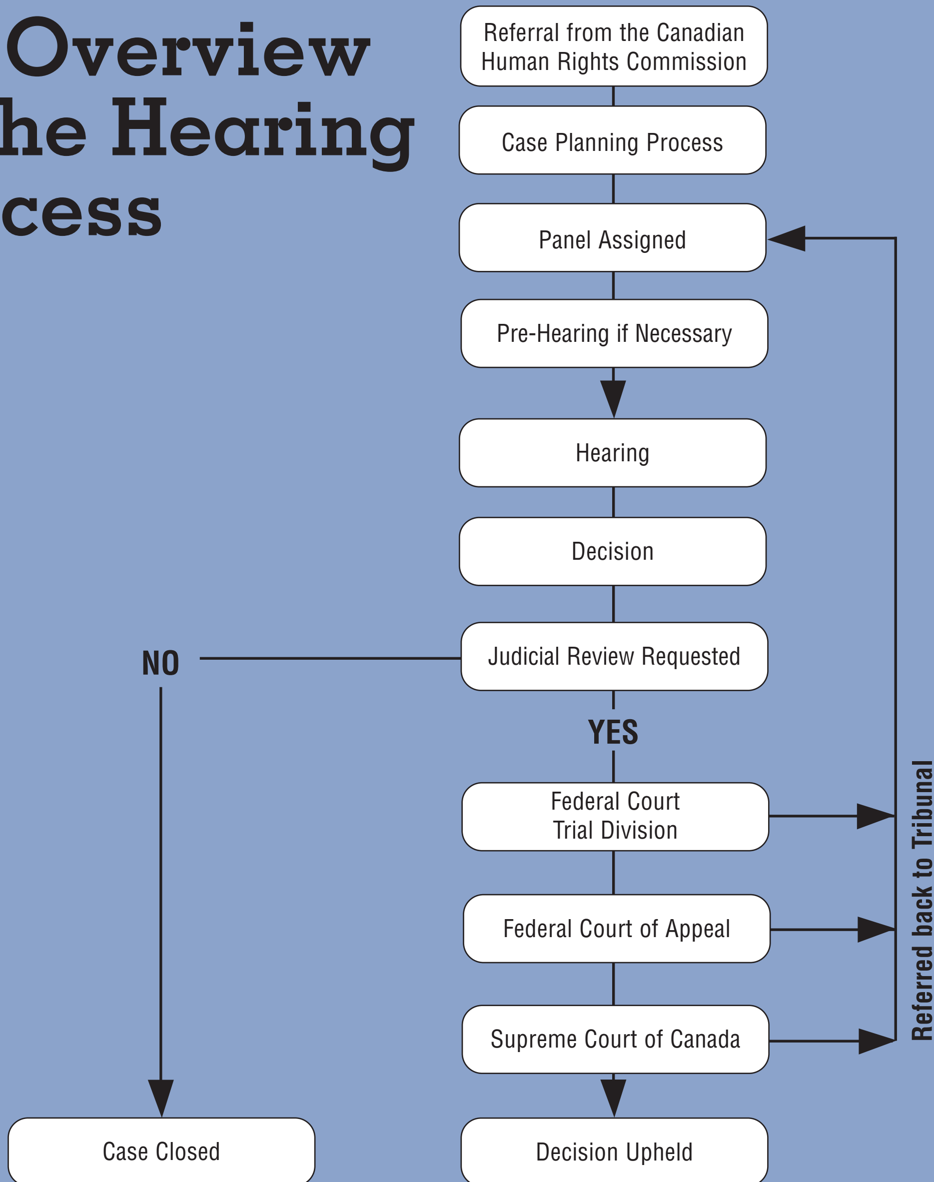
Appendix 1

Organization Chart



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 establish a panel to institute an inquiry into the complaint. The Tribunal receives only the complaint form and the addresses of the parties.

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

Hearings

The Chairperson assigns one or three members from the Tribunal to hear and decide a case. If required, additional pre-hearings may be held to consider preliminary issues, which may relate to jurisdictional, procedural or evidentiary matters. Hearings are open to the public. During the hearing, all parties are given ample opportunity to present their case. This includes the presentation of evidence and legal arguments. In many cases, the Commission leads evidence and presents arguments before the Tribunal intending to prove that the respondent named in the complaint has contravened the statute. All witnesses are subject to cross-examination from the opposing side.

The average hearing lasts from 8 to 10 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 three to four months. If the panel concludes that a discriminatory practice has occurred, it issues an order to the respondent, setting out the remedies.

Appeals

All parties have the right to seek judicial review of any Tribunal decision by the Federal Court of Canada. 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 refers the case back to the Tribunal to be reconsidered in light of the Court's findings of error.

Any of the parties has the right to request that the Federal Court of Appeal review the decision of the 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 national importance, it may hear an appeal of the judgment. After hearing arguments, the Supreme Court issues a final judgment on the case.

Appendix 3

Canadian Human Rights Tribunal Members

Full-Time Members

Anne L. Mactavish

Tribunal Chairperson (January 1 - November 19, 2003)

A member of the former Human Rights Tribunal Panel since 1992, Anne Mactavish was acting President of the Panel in 1995 and President in 1996, before her appointment as Chairperson of the Canadian Human Rights Tribunal in 1998. During her years of legal practice in Ottawa, she specialized in civil litigation related to employment and commercial and health matters. A past president of the Carleton County Law Association, Ms. Mactavish has taught employment law at the University of Ottawa as well as legal ethics and trial advocacy at the Bar Admission Course sponsored by the Law Society of Upper Canada. On November 19, 2003, Ms. Mactavish was appointed a judge of the Federal Court.

J. Grant Sinclair, Q.C.

Vice-Chairperson (Acting Chairperson as of November 19, 2003)

A member of the former Human Rights Tribunal Panel from 1989 to 1997, Grant Sinclair was appointed Vice-Chairperson of the Canadian Human Rights Tribunal in 1998. Mr. Sinclair has taught constitutional law, human rights and administrative law at Queen's University and Osgoode Hall, and 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 Montréal at the law firm of Hadjis & Feng, specializing in civil, commercial, corporate and administrative law. A member of the Human Rights Tribunal Panel from 1995 to 1998, Mr. Hadjis was appointed in 1998 to a three-year term as a part-time member of the Canadian Human Rights Tribunal 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.

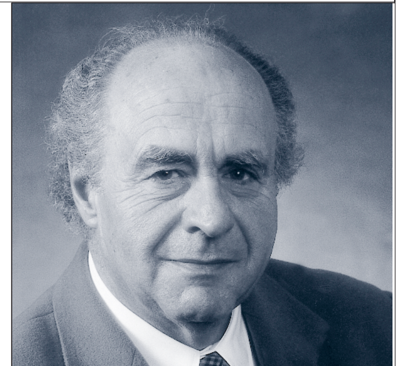
Reva Devins
Ontario

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

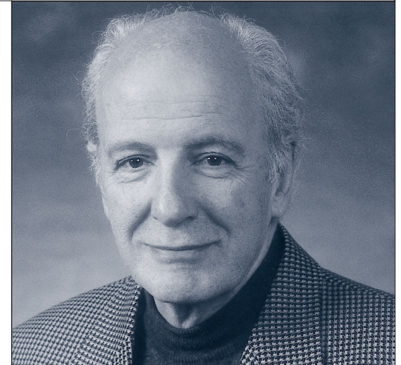
Michel Doucet was appointed to the Tribunal as a part-time member in 2002. He obtained a degree in political science from the Université de Moncton and a law degree (common law program) from the University of Ottawa. He acquired his LL.M. from Cambridge University in England. Mr. Doucet teaches at the 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.

Eve Roberts, Q.C.
Newfoundland and Labrador

A member of the former Human Rights Tribunal Panel from 1995 to 1997, Eve Roberts was appointed to a three-year term as a part-time member of the Canadian Human Rights Tribunal in 1998 and reappointed in 2002. Ms. Roberts was called to the Alberta Bar in 1965 and to the Newfoundland Bar in 1981. A partner in the St. John's, Newfoundland, law firm of Patterson Palmer Hunt Murphy until she retired in 1997, Ms. Roberts also served as Chair of the Newfoundland and Labrador Human Rights Commission from 1989 to 1994. Ms. Roberts resigned from the Tribunal in September 2003.

Appendix 4

The Tribunal Registry

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

Registrar

Michael Glynn

Manager, Registry Operations

Gwen Zappa

Counsel

Greg Miller

Executive Assistant to Chairperson & Vice-Chairperson

Line Joyal

Registry Officers

Nicole Bacon
Linda Barber
Diane Desormeaux
Pauline LeBlanc
Holly Lemoine
Roch Levac
Carol Ann Middleton

Registry Officer — Equal Pay

vacant

Mediation Coordinator

Francine Desjardins-Gibson

Administrative and Hearings Assistant

Nathalie Rodrigue

Chief, Information Technology Services

Julie Sibbald

Data Entry Assistant

Alain Richard

Chief, Corporate Services

Bernard Fournier

Human Resources Coordinator

Karen Hatherall

Senior Administrative Assistant

Thérèse Roy

Administrative Assistant

Jacquelin Barrette

Information and Communications Officer

Ramona Jauneika-Devine

Chief, Financial Services

Doreen Dyet

Analyst, Financial Services

Nancy Hodgson-Grey

Appendix 5

How to Contact the Tribunal

Canadian Human Rights Tribunal
160 Elgin Street
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