CANADIAN HUMAN RIGHTS COMMISSION

LEGAL REPORT

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Introduction

This Report is a review and discussion of various decisions of the Canadian Human Rights Tribunal, the Federal Court and the Supreme Court of Canada that have been rendered during the year 2000 on matters involving the Canadian Human Rights Commission (the "Commission"). **Its only purpose is to serve as an overview of the legal landscape in the year 2000 and it does not in any way constitute a legal opinion or represent the views of the Commission on any of the issues covered.**

The work of the Commission is inevitably impacted by broader developments in equality law, in particular, the decisions of the Supreme Court of Canada. In the year 2000 there were some significant developments in the jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*") which will undoubtedly serve to enhance and clarify anti-discrimination law generally. In a case from Quebec the subjective and objective dimensions to the notion of disability were considered by the Court. The principles reviewed in that case will provide guidance to the interpretation of similar concepts in federal law. That decision is reviewed here along with another decision of the Court that focuses on defining the correct comparator group for a claim of discrimination based on disability. The latter decision highlights the importance of considering factors such as disadvantage, stereotyping and vulnerability when determining if a person's dignity has been demeaned by a challenged law or government program.

In the context of legal developments under the *Canadian Human Rights Act*[2] (the "*Act*"), the duty to accommodate was reviewed by the Federal Court during the past year. In a case that involved aptitude tests used to determine eligibility for second language training, the Court considered the effects of such testing on persons with a certain type of learning disability. While aptitude tests *per se* were not viewed as illegitimate, the Court underscored that it is important to consider the special needs of persons who have disabilities which inhibit their ability to score well on the test, but who are nonetheless fully able to learn a second language. This case highlights the importance of using a non-discriminatory assessment process in order to take into consideration the real potential of individuals.

The Federal Court also reviewed how comparator groups should be selected for the purpose of determining whether disadvantage

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11.

[2] *Canadian Human Rights Act,* R.S.C. 1985, c. H-6.

constitutes discrimination. The matter before the Court involved the denial of collectively bargained job security benefits to persons who were absent from work without pay because of illness. The benefits were available as a function of time worked. Employees absent without pay for certain enumerated reasons (which included illness) were eligible on a limited basis which, in some circumstances, amounted to a denial of the job security benefit. Since the rules applicable to illness were the same as those applicable to the other enumerated reasons, no discernable discrimination based on physical disability was found by the Court. This decision suggests that whether or not disadvantage amounts to discrimination may depend on the basis of comparison.

Another significant question reviewed by the Federal Court involved the application of section 67 of the *Act* which states that the legislation does not affect "... any provision of the *Indian Act* or any provision made under or pursuant to that Act."[3] This section can have significant repercussions on cases involving clear discrimination (usually based on sex and/or race) by removing them from the scrutiny of human rights legislation. In the two cases considered by the Court, one invited the application of section 67 and the other did not. These contrasting decisions demonstrate the crucial importance of considering what constitutes a "provision made under or pursuant to"[4] the *Indian Act*.[5]

The decisions of the Canadian Human Rights Tribunal reported on here canvass a broad range of issues. They include a case arising from a complaint of sex-based discrimination in an industry dominated by men. The Tribunal considered the factors that should be weighed in evaluating an alleged *bona fide* occupational requirement, especially one based on sex. A lengthy decision was also issued regarding a complaint that the Deaf and hard of hearing are discriminated against in gaining full access to programs and other information broadcast by the CBC. Extensive consideration was given to the issue of whether costs can be raised as a *bona fide* justification for failing to caption all material broadcast by the CBC. In another decision, a Human Rights Tribunal ruled on a complaint of sexual harassment and found, based on the evidence, that vulgarity provoked by anger does not necessarily constitute sexual harassment in the work place. The crucial role of strong evidence linking the allegations to a prohibited ground is highlighted by this particular decision, as well as others rendered by Human Rights Tribunals and included in this report.

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[3] *Ibid.,* s.67.
[4] *Ibid.*
[5] *Indian Act*, R.S.C. 1985, c. I-5.

Developments in the case law in the past year continue to indicate that judicial review of jurisdictional and procedural issues have an important impact on the manner in which proceedings before a Human Rights Tribunal are conducted. The decisions reviewed here include one that focuses on the duty of impartiality that individual members of a tribunal must respect. The issue of institutional bias was raised in another case that placed in question the independence and impartiality of the Human Rights Tribunal in light of a number of statutory provisions relating to the Tribunal's security of tenure, financial security and decision-making freedom. The latter decision resulted in a stay of proceedings in a major pay equity case.

In other decisions, the Federal Court confirmed the principle that interlocutory decisions on matters that are not jurisdictional in nature do not generally justify judicial review before the completion of the proceedings. Where jurisdictional deficiencies are in issue, a party may also apply for a stay of proceedings before the Tribunal, pending the outcome of its review application. However, the Federal Court this year has confirmed a stringent three-pronged test that must be met to justify a stay of proceedings. The decisions included in this report demonstrate that a party must overcome significant hurdles in order to succeed on such an application.

A particular issue of jurisdiction arises whenever the application of section 37 of the *Canada Evidence Act*[6] is in question. The latter governs any claim to public interest immunity in the production of evidence before a body such as a Human Rights Tribunal. A decision included in this report makes clear that a Human Rights Tribunal has no jurisdiction to evaluate and rule upon a claim of public interest immunity arising under section 37. Authority to so rule is accorded the Federal Court (as well as Superior Courts) upon application by a Minister of the Crown in Right of Canada or other interested person.

The procedural protections that apply to administrative decisions such as those made by the Commission were also issues raised before the Federal Court in the year 2000. For example, the Court confirmed that a lower standard of procedural fairness applies to a decision to accept or reject a complaint prior to investigation under section 41 of the *Act*. This decision and others offer welcome guidance from the Federal Court regarding the content and scope of the duty of procedural fairness owed by the Commission to complainants and respondents.

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[6] *Canada Evidence Act*, R.S.C. 1985, c. C-5.

Judicial Review of Substantive Equality Issues

Non-discriminatory individual assessment and the duty to accommodate

Candidates chosen to occupy bilingual non-imperative positions in the federal Public Service must meet language proficiency levels within time periods specified in Treasury Board's Language Training Policy. Access to language training, however, is contingent upon how well a candidate scores in tests designed to evaluate his or her current language proficiency and second language learning abilities. The Federal Court recently reviewed the discriminatory impact of such tests upon persons with certain types of learning disabilities.[7] The case arose from a complaint filed by Ms. Green, whom a Selection Board had rated first in terms of knowledge, ability and personal suitability for a PM-6 bilingual non-imperative position. While Ms. Green was otherwise eminently qualified, she received a negative prognosis regarding the likelihood of her successfully completing language training within the required time frame. The tests used to evaluate her second language learning abilities are known as the Modern Language Aptitude Test (MLAT) and two Pimsleur subtests. Those involved in administering the tests found that Ms. Green experienced great difficulty linking sound to symbol, or moving from symbol to sound to meaning. There was some suggestion at the time that she might have a learning disability.

Despite the negative prognosis regarding language training, Ms. Green was assigned by her Department (the then Employment and Immigration Commission, EIC) to be the acting PM-6 in the position for which she had competed. Arrangements were also made for Ms. Green to be assessed by a psychologist to determine if her low scores on the MLAT and Pimsleur subtests were attributable to a particular disability. In due course, the psychologist determined that Ms. Green had a form of dyslexia that affected the auditory processing function. The psychologist also found that Ms. Green had done remarkably well in overcoming the effects of the dyslexia by developing compensatory strategies through her strengths in language and visual processing skills. Given Ms Green's high intellectual potential, her learning style and existing language abilities, the psychologist concluded that she would be able to learn the French language without major difficulties if a proper pedagogical approach were adopted. Such an approach would include one-on-one instruction, no time limits, a lot of context and the opportunity to make use of her strengths in language and visual processing.

Following the termination of Ms. Green's assignment as acting PM-6 (which position was filled by a surplus employee who could satisfy the language requirements), further professional assessment was sought regarding her potential to learn French as a second language and the

[7] *Canada (Attorney General) v. Green,* [2000] 4 F.C. 629 (T.D.) [hereinafter *Green* cited to F.C.T.D.].

type of second language instruction best suited to her needs. This second report confirmed the presence of a form of dyslexia, but concluded that persons with this condition were not necessarily unable to master a second language. In order to assess accurately such persons' second language learning potential, it was necessary to select carefully the type of instrument or test used to measure it. In this regard, the report observed that the use of MLAT and Pimsleur subtests by the Public Service Commission (the PSC) did not provide a valid indication of the actual second language learning potential of Ms. Green or other persons similarly situated. It concluded that Ms. Green was an exceptional learner who had developed compensatory strategies to facilitate comprehension and recall of information during new learning. As to the type of second language instruction best suited to Ms. Green and others with the same disability, the report recommended a dynamic, conversational, whole-language methodology.

Efforts by Ms. Green and the Department where she worked to have her case treated more favourably by the PSC were ultimately unsuccessful. The PSC took the view that Ms. Green's learning disability was essentially another way of saying that she had a low aptitude to learn a second language. It also emphasized that access policies to language training were intended to make language training more cost effective through the use of an objective screening process capable of identifying those persons with an acceptable level of second language learning potential. While accommodation would be made for persons with hearing or sight impairment, the PSC concluded that the type of impairment raised by Ms. Green's case could not be accommodated without undermining the very purpose of the aptitude tests used to screen candidates for language training.

Ms. Green filed a complaint of discrimination in employment based on disability, which complaint was eventually heard by a Human Rights Tribunal. The Tribunal found that the aptitude tests, while objective on their face, had an adverse effect on persons such as Ms. Green who were affected by this particular form of dyslexia. In light of this adverse effect, the PSC was under a duty to accommodate Ms. Green's disability to the point of undue hardship. On the evidence before it, the Tribunal concluded that virtually no accommodation was made by the PSC to overcome the discrimination that had unfairly inhibited Ms. Green's promotion to a PM-6 position. In the result, it awarded personal remedies to Ms. Green (including immediate appointment to a PM-6 position and back pay for lost salary) and issued an order aimed at resolving the systemic discrimination raised on the facts of the complaint.

The Tribunal's findings were upheld by the Federal Court. Upon examining at length the reasoning of the Tribunal, the Federal Court concluded that it had correctly understood and applied the notion of adverse effect discrimination enunciated by the Supreme Court of Canada.[8] It is of note that these kinds of legal distinctions (that is, between direct and adverse effect discrimination) are no longer central to the discrimination analysis in light of amendments to section 15 of the *Act* which came into effect in June 1998.[9] These amendments (and the decision of the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [10]) simplify the definition of discrimination.

The burden of proof respecting accommodation

The Federal Court in the *Green* decision also upheld as correct the Tribunal's finding that the burden of proof was upon the PSC to accommodate up to the point of "undue hardship".[11] In this regard, the Court found that the Tribunal had correctly identified the factors that should be considered when evaluating "undue hardship".[12] These factors include such things as financial cost, disruption of a collective agreement, problems of employee morale, and the interchangeability of the workforce and its facilities. On this point it is interesting to note that the 1998 amendments to section 15(2) of the *Act* restrict the factors relevant to assessing undue hardship to health, safety and cost.[13]

As to the issue of what accommodation could have been made by the government departments, the Federal Court saw this as a question of fact that the Tribunal had properly addressed. The Tribunal's decision in this regard was not patently unreasonable in light of all the evidence placed before it. The Court agreed with the Tribunal that, on the whole of the evidence, "the issue of the cost of accommodation of Nancy Green was not contemplated in response to the knowledge of her learning disability nor to the request of her Department to accommodate her."[14] Instead the PSC and Treasury Board had simply classed Ms. Green as someone with a low aptitude to learn a second language based on her learning disability.

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[8] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 505 - 6.

[9] *An Act to Amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts,* S.C. 1998, c. 9, s. 10, 15.

[10] [1999] 3 S.C.R. 3 [hereinafter *Meiorin* cited to S.C.R].

[11] *Supra*, note 2, s. 15(2).

[12] *Ibid.*

[13] *Supra,* note 9, s. 10.

[14] *Supra*, note 7 at para. 76.

For the most part, the Federal Court also upheld the broad and comprehensive remedies ordered by the Tribunal. The Federal Court emphasized that in cases of adverse effect discrimination the underlying rule or policy, being themselves neutral on their face, should not be struck down. It noted that the systemic discrimination remedy issued by the Tribunal did not throw out the MLAT or Pimsleur tests as the main identifier of language learning aptitude. What it did, in the words of the presiding Federal Court judge, was require "that in the case of a person with a learning disability, the PSC fine-tune the process in order to eliminate what it found the MLAT did not address, i.e. the nature of the disability and the nature of the compensatory strategies used by persons with learning disabilities."[15] The Court found that the order in question was supported by the evidentiary findings of the Tribunal, reasonably connected to the issues and consistent with the legal principles set out in the relevant case law.

It is disappointing that the Federal Court agreed with the Attorney General that an order to pay the complainant's legal costs was not within the Tribunal's statutory authority. The Court reasoned that "if Parliament had intended the Tribunal to award legal costs, it would have said so."[16] Since the *Act* is silent in this regard, the Tribunal had no authority to award legal costs to Ms. Green and its order was overturned. It should be noted that this narrow interpretation of the Tribunal's remedial power was based on the Court's reading of section 53(2)(d), not section 53(2)(c).[17] In an earlier decision, the Court of Appeal held that the language of "expenses incurred" in section 53(2)(c) includes the reasonable costs of counsel.[18]

Disadvantage or discrimination: selecting the comparator group

In the case of *Canadian Human Rights Commission and Cramm v. Canadian National Railway et al.*,[19] the Federal Court considered the issue of what constitutes an appropriate comparator group for the purposes of determining if a *prima facie* case of discrimination has been established. The subject matter before it involved a complaint of employment discrimination based on physical disability which had been heard by both a Human Rights Tribunal and the Review Tribunal (now abolished). The complainant, Mr. Cramm, challenged his exclusion from certain employment benefits related to job security which became operative when a railway operation was shut down.

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[15] *Ibid.* at para. 137.
[16] *Ibid.* at para. 186.
[17] *Supra*, note 2.
[18] *Canada v. Thwaites,* [1994] 3 F.C. 38 at 71.
[19] (16 June 2000), No. T-1503-98 (F.C.T.D.) [hereinafter *Cramm* cited to F.C.T.D.].

These benefits were calculated according to terms set out in a collective agreement. The right to these benefits was dependent upon an employee's total Cumulative Compensated Service (CCS). As a general rule, an employee was credited with one month of CCS for every month in which he or she worked for at least 11 days. In addition, an employee was able to accumulate CCS up to 100 days in a calendar year if he or she took unpaid time off on account of illness, injury, authorized maternity leave, attendance at committee meetings, or attendance at court as a witness or for uncompensated jury duty. However, the subrule relevant to CCS for time off without pay applied only where an employee worked at least one day in any given calendar year.

The benefits accorded as a function of CCS took on great importance when Mr. Cramm's employer, the Canadian National Railway, decided to close its operations in Newfoundland in 1990. Employees with eight years of CCS were guaranteed a job or full wages until age 55. In Mr. Cramm's case, he had suffered a job-related accident in 1980 and was unable to return to work until 1984. He therefore did not meet the requirement of at least one day's work per calendar year in order to benefit from the 100 days of CCS for each of the years when he was unable to work due to injury. Had he been eligible to accumulate these 100 days of CCS per year during his convalescence he would have had the minimum 8 years of CCS to qualify for job security benefits as set out in the collective agreement. Mr. Cramm argued that the rules used to calculate CCS had an adverse effect upon him due to his disability and thus constituted a prohibited form of discrimination.

The Federal Court released its decision in the *Cramm* case last year. The central issue for the Court was whether the proper comparator group to use in reviewing Mr. Cramm's complaint of discrimination was that composed of all those to whom the "time off without pay" rule applied. The Court noted that Mr. Cramm was treated no differently than any person who was absent for the same period of time for one of the enumerated reasons, and thus his complaint of discrimination based on disability was not established.[20] The Federal Court rejected submissions made by the Human Rights Commission that the position of Mr. Cramm should be compared to those who benefited from the more general rule for allocating CCS. The Court pointed out that the purpose of the more general rule was to compensate those who worked for a minimum of 11 days per month with a set amount of CCS: "That rule has no more adverse effect

[20] *Ibid.* at para. 18.

upon ill or injured employees, in my opinion, than upon any other group of employees absent from work, for whatever reason, for the same time in the month."[21] As to the "time off without pay" rule, the Court concluded that it served a different purpose: "It provides opportunity for employees to accumulate CCS, for up to 100 days in a calendar year, when they have been absent from work for stipulated reasons provided they have worked one day in that year."[22] The Court pointed out that examining the purpose of an employment rule alleged to be discriminatory, in order to properly identify a comparator group, has been mandated by the Supreme Court of Canada in *Battlefords and District Co-operative Ltd. v. Gibbs*.[23] Moreover, the Court adopted its own reasoning in an earlier human rights case (the *Dumont-Ferlatte* case[24]) in which it had concluded that women on maternity leave should be compared with those on other forms of leave without pay under collective agreements for the purposes of assessing possible adverse effect discrimination.

An appeal of the *Cramm* decision was withdrawn following a settlement between Mr. Cramm and the Canadian National Railway.

In a decision released in the year 2000 the Supreme Court also considered how comparators should be selected in order to assess whether disadvantage amounts to discrimination under section 15 of the *Charter*. In *Granovsky v. Canada (Minister of Employment and Immigration*,[25] the Supreme Court reviewed the issue of whether a person with a temporary disability should receive the same treatment as someone with a permanent disability for the purposes of the eligibility requirements under the Canada Pension Plan (CPP). Mr. Granovsky suffered an intermittent and degenerative back injury following a work-related accident in 1980. He was assessed as being temporarily totally disabled at that time. Prior to his accident, he had made CPP contributions in six of the ten previous years. Following the accident, Mr. Granovsky was profitably employed from time to time, though he maintained that his back condition continued to deteriorate and resulted in permanent disability in 1993, at which time he applied for a CPP disability pension. His application was refused by the Minister of Employment and Immigration in part because he had only made a CPP contribution in one year of the relevant ten-year contribution period prior to the date of application. To be eligible for

[21] *Ibid*. at para. 23.
[22] *Ibid*. at para. 23.
[23] [1996] 3 S.C.R. 556.
[24] *Canada (Human Rights Commission) v. Canada (Human Rights Tribunal)* (11 December 1997), No. T-1802-96 (F.C.T.D.)
[25] [2000] 1 S.C.R. 703.

consideration a person must have made contributions under the CPP in five of the last ten years or two of the previous three years. This requirement is relaxed for individuals suffering from severe disability during all or part of the ten years immediately preceding the application. Since Mr. Granovsky suffered only a temporary disability, he could not rely on the special provisions that relaxed rules regarding contributions to the CPP.

Although the Court reiterated that when looking at discrimination based on disability, the focus is not on the impairment as such, but rather on the problematic response of the state. The Court went on to state that not all disadvantage is discrimination. Mr. Granovsky's complaint was that persons with temporary disabilities were adversely affected under the plan compared to those who are able-bodied. While noting that Mr. Granovsky suffered under a disadvantageous distinction, the Supreme Court concluded that the proper comparator group was that composed of persons with permanent disabilities both at the time of application and during the contribution period. The question to be asked was whether the deprivation promoted "the view that persons with temporary disabilities are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration."[26] In this regard the Court found that no contextual factors, such as disadvantage, stereotyping or vulnerability were present in Mr. Granovsky's case. In short, he had failed "…to show that the government's response through the design of the CPP or its application demeans persons with temporary disabilities, or casts any doubt on their worthiness as human beings."[27] Rather the Court viewed the basis of the distinction between persons with permanent and temporary disabilities as one which was founded upon the recognition that those with temporary disabilities enjoy greater economic strength than those with permanent disabilities. In light of all these reasons, Mr. Granovsky's case was dismissed.

Deference to a Tribunal's fact-finding expertise

The Federal Court decision in *Attorney General of Canada v. Singh and Canadian Human Rights Commission*[28] demonstrates that reasonable inferences drawn from facts by a Human Rights Tribunal will not be lightly overturned on judicial review. This flows from the high level of deference shown to the Tribunal with respect to its findings of fact. The case involved allegations of discrimination based on age that emerged from the following circumstances. Mr. Singh competed for an ES-01 position (Economics, Sociology

[26] *Ibid*. at para. 58.
[27] *Ibid*. at para. 70.
[28] (4 April 2000), No. T-2116-98 (F.C.T.D.).

and Statistics group) in 1988 and came second out of a pool of approximately ten candidates. When the eligibility list was issued following the competition only the name of the successful candidate was included. Statistics Canada (the employer) explained that the one-name list was issued because no new positions at that level would be opening up in the near future, other than the one just filled. A few weeks later, however, Statistics Canada offered positions to 26 candidates under an ES recruitment plan. Evidence before the Tribunal also suggested that had Mr. Singh been on the eligibility list at the time he could have been picked up by a manager as an ES-01. It was also established that over a nine year period only one incumbent out of 340 persons at the ES-01 level was over forty. While Statistics Canada did not admit that age was a factor in staffing ES-01 positions, it stated that an individual's propensity to retire was a consideration. On the whole of the evidence, and given the fact that Mr. Singh was 43 or 44 years of age at the time of these events, the Tribunal concluded that there was compelling circumstantial evidence of an organizational predisposition against promoting older internal candidates into ES positions.

On the facts of the case, the Federal Court concluded that the Tribunal had properly inferred the presence of age discrimination. As regards any legal error, reviewable on a standard of correctness, the Federal Court found that the Tribunal had correctly understood and applied the law with respect to the requirements of a *prima facie* case. Once that case was made, it was incumbent upon Statistics Canada to offer evidence in answer to the claim of discrimination against it. The Federal Court could find no error in the Tribunal's conclusion that no adequate answer to the *prima facie* case had been offered. Moreover, the Court agreed with the Tribunal that the statistical evidence available regarding the age of incumbents was sufficient to establish systemic discrimination based on age.

Discrimination on Indian Reserves

Allegations of discriminatory practices on Indian Reserves raise both substantive and jurisdictional issues for a Human Rights Tribunal. The Federal Court in *Chief and Council of the Shubenacadie Indian Band v. MacNutt and Canadian Human Rights Commission et al.*[29] dealt with the exclusion of non-Indian spouses of Indian Band members from eligibility for social assistance payments. The issue arose on an Indian Reserve in Nova Scotia where the Council of the Shubenacadie Indian Band ("Band Council") administers a welfare program funded by the federal government. While the Band Council granted social assistance to female non-Indian spouses prior to

[29] *(2000), 187 D.L.R. (4th) 741 (F.C.A.).*

April 1992, it subsequently refused social assistance to all non-Indians living on the reserve in order to avoid any complaint of discrimination based on the gender of the persons involved. Three complaints with respect to this policy were made to the Commission. In all three complaints, the Band Council refused to accord welfare payments to the non-Indian spouses.

The framework under which welfare funding is accorded to Band Councils is contained in Treasury Board policies and in Annual Contribution and Master Funding Agreements entered into with the Department of Indian Affairs and Northern Development. Pursuant to policy guidelines, social assistance payments are available to residents of Indian reserves, such assistance being intended for the benefit of Indian people and their families, including dependents. There is no requirement that the "dependent" be a registered Indian.[30] It should also be noted that a Band Council has no authority to make by-laws respecting the payment of social assistance to persons resident on the reserve. In the case at bar, all three non-Indian spouses were refused social assistance as dependents of their applicant-spouses, which refusal resulted in the complaints and proceedings before the Human Rights Tribunal.

With respect to all three complaints, both the Human Rights Tribunal and the Federal Court had no difficulty in determining that discrimination based on race (and perhaps marital status) had occurred. However, the issues heard by the Federal Court concerned the very jurisdiction of the Tribunal over the matter in the first place. The Court characterized some of the arguments in this regard as "wholly devoid of merit"[31] and difficult to follow. For example, it was argued that the provisions of the *Act* were of no force and effect with respect to these complaints because of the combined effect of sections 15 and 25 of the *Canadian Charter of Rights And Freedoms.* Section 25 stipulates that the "guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms that pertain to the aboriginal peoples of Canada..."[32] The Court pointed out that this section is to be construed as a shield that protects the rights falling within the section from being adversely affected by other Charter rights. This was not the situation in the case at bar, for the complainants did not invoke the *Charter* in support of their

[30] *Ibid*. at para. 11. Refers to the document *Background of the development of the Social Assistance Program*, A.B., Vol. XVII, p. 2791.
[31] *Ibid*. at para. 42.
[32] *Supra*, note 1, s. 25.

position. Furthermore, no evidence was placed before the Court to establish the aboriginal right the Band Council purported to assert.

With respect to the alleged lack of general legislative competence of the federal government to create a social assistance program for Indians, the Court took the position that there was ample authority under section 91(24) of the *Constitution Act, 1867*.[33] While it is true that provinces have general legislative authority over social assistance, the authority of Parliament over Indians and land reserved to them is broad enough to include the type of social assistance program established by the federal government for the benefit of Indians and their families. As to whether such programs can validly extend to non-Indian members of Indian families, the Federal Court took the view that "the refusal to pay benefits to Indian applicants in respect of non-Indian spouses cannot transform what is in fact a programme designed to enhance the status of Indian peoples (a matter within the constitutional competence of Parliament) into a matter within provincial competence, simply because non-Indian spouses are involved."[34] Accordingly, the Federal Court upheld the decision of the Human Rights Tribunal ordering the Band Council to pay social assistance to the complainants for their respective non-Indian spouses (with provision for retroactive payments), as well as specific damages set out in its decision.

The Shubenacadie Indian Band sought leave to appeal this decision to the Supreme Court of Canada. Application for leave to appeal was dismissed on February 1, 2001.[35]

A case involving the allocation of housing on Indian reserves by Band Councils, *Canada (Human Rights Commission) v. Gordon Band Council*,[36] contrasts sharply with the previous decision. Here a female registered Indian, member of the Gordon Band and married to a non-Indian, was consistently denied housing on the reserve by the Band Council over the course of many years. Her efforts to acquire housing on the reserve began soon after she had regained her Indian status and membership in the Band as a result of Bill C-31, legislation which repealed provisions in the Indian Act found to be discriminatory against women. (The repealed provisions stripped an Indian women of her status upon marriage to a non-Indian man, although the same rule was not applied to an Indian man who married

[33] *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3.
[34] *Supra*, note 29 at para. 58.
[35] (1 February 2001) No. 28078 (S.C.C.).
[36] (2000), [2001] 1 F.C. 124 (C.A.).

a non-Indian woman.) She ultimately filed a complaint with the Commission alleging that the Band Council had discriminated against her on the basis of sex, marital status and race.

In light of all the evidence before it, as well as a statement of agreed facts, the Human Rights Tribunal found a *prima facie* case that the Gordon Band Council had discriminated against the complainant on the basis of her marital status, her sex and the race of her husband. However, the Tribunal also concluded that the decision to deny housing to the complainant was one that was taken by the Band Council pursuant to section 20 of the Indian Act, thus engaging section 67 of the *Act*, which provides that nothing in the Act "affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."[37] As a result, the Tribunal ruled that it was obliged to dismiss the complaint despite the finding of a *prima facie* case of discrimination.

The Federal Court of Appeal endorsed the conclusions of the Human Rights Tribunal. It affirmed a previous decision of the Federal Court to the effect that the wording of section 67 "refers not only to regulations or bylaws made under the authority of the *Indian Act*, but also to decisions that are an exercise of authority conferred by the *Indian Act*."[38] In the case at bar, the Court of Appeal concluded that the challenged decision of the Gordon Band Council was made in the exercise of its authority under section 20 of the *Indian Act*, specifically the provision which states that "no Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."[39] It further concluded that the authority under section 20 included by necessary implication the authority to deny housing to the complainant.

The Court also rejected arguments based on alleged procedural deficiencies in the decision-making process of the Band Council. In this regard, the Court of Appeal ruled that "the immunity that section 67 gives the Gordon Band Council does not depend upon whether its decision to deny housing to the complainant is recorded formally in the minutes of the meetings, or whether some aspect of the decision making process was based on a housing policy or delegated to a committee, or whether it was based on a bylaw enacted

[37] *Supra,* note 2, s. 67.
[38] *Supra*, note 36 at para. 15. The Court quoted from: *Desjarlais (Re)* [1989] 3 F. C. 605 (C.A.).
[39] *Supra*, note 5, s. 20(1).

under section 81."[40] As a result, the Court concluded that the Tribunal had correctly applied the law in deciding that it did not have the jurisdiction to deal with the complaint.

The contrast in the final results of these two cases illustrates the very different consequences which discrimination may attract depending on whether or not the allegations are "pursuant to" provisions of the *Indian Act*. It may be that the only recourse for persons alleging discrimination which is "pursuant to" provisions of the *Indian Act* is to seek judicial review of decisions of band government under section 18.1 of the *Federal Court Act*.[41]

Tribunal Resolution of Complaints

Sex

A complaint of sex discrimination within an industry dominated by men was heard by a Human Rights Tribunal in the case of *Oster v. International Longshoremen's & Warehousemen's Union (Marine Section) Local 400*.[42] The complaint arose from a conversation that occurred in the office of the union president regarding the selection of candidates for a job as cook/deckhand aboard a vessel called the Texada Crown. Ms. Oster was informed by the union president, after speaking by telephone to a prospective employer (Norsk Pacific Marine Services), that the Texada Crown had no separate accommodations for women and that the job as cook/deckhand was therefore unsuitable for her. Another union employee present at the time of the conversation concurred in the conclusion advanced by the union president that the position in question was unsuitable for a woman. Because of this conversation Ms. Oster did not go to the hiring hall where assignments were formally decided, believing that she would have no chance of being selected as a candidate for the job.

Ms. Oster eventually filed a complaint against the union as an "employee organization" bound by section 9 of the *Act* not "to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is the member of the organization and where any of the obligations of the organization pursuant to a collective agreement relate to the individual."[43] The facts of the complaint gave rise to two fundamental issues. First, did the incident in question reflect a practice or standard that established

[40] *Supra*, note 36 at para. 30.
[41] R.S.C. 1985, c. F-7.
[42] (9 August 2000), TD 4/00 (C.H.R.T.).
[43] *Supra*, note 1, s. 9.

a *prima facie* case of discrimination based on sex? And secondly, if so, did the practice or standard constitute a *bona fide* occupational requirement (BFOR).

The union argued before the Tribunal that the conversation in question was extraneous to the dispatch procedures that occurred in the hiring hall, and hence should not be construed as representing a union standard or practice. In this regard the Tribunal found that the union president had general supervisory authority and responsibility regarding the hiring process, although he had no day-to-day managerial responsibility over it. The Tribunal found that the exchange that took place between him and the other union employee was clearly related to the posted job of cook/deckhand aboard the Texada Crown: "By the end of that conversation, one could not have reasonably come to any other conclusion but that the Complainant would be discouraged from applying because the sleeping accommodations were not suitable for her as a woman."[44] The Tribunal therefore concluded that there existed a practice that discouraged women from applying for jobs on tugs where accommodations were "a little too close quartered".[45] This was sufficient to establish a *prima facie* case of discrimination.

Turning to the issue of whether the practice was justifiable in terms of safety, efficiency or other legitimate reasons, the Tribunal first considered the relevance of arguments of the union based on the accepted fact that Ms. Oster would not have been eligible for the job in question due to lack of experience. As the experience standard was motivated by concerns about hazardous conditions and possibilities of injury, it was considered justified and not open to attack. Had this been the standard applied to Ms. Oster, the Tribunal concluded that she would ultimately not have been selected for the job in question. However, the evidence before the Tribunal showed that this neutral standard had not in fact been applied to Ms. Oster. It therefore remained for the Tribunal to assess the practice complained of by Ms. Oster, namely her exclusion from the hiring process in the circumstances of the case solely on the basis of her sex.

In reviewing the possible BFOR underpinning this employment standard, the Tribunal applied the three-fold test set out in the 1999 *Meiorin* decision of the Supreme Court of Canada, to the effect that a BFOR must be for a purpose rationally connected to job performance, be adopted in good faith with an honest belief that it

[44] *Supra*, note 42 at para. 42.
[45] *Ibid.* at para. 10.

was necessary for the fulfilment of the work related purpose, and be reasonably necessary to accomplish the work related purpose.[46] While this test was in the context of employer-imposed standards or practices, the Tribunal pointed out that the Supreme Court has extended its application to unions if they cause or contribute to discrimination by participating in the formulation of the discriminatory work rule. The Tribunal concluded that no legal impediment existed to a complaint against a union only.

As to the justification of the standard raised on the facts of the case before it, the Tribunal concluded that the union had not "advanced persuasive evidence that the so-called standard was adopted for a purpose or goal rationally connected to the function being performed nor was the standard adopted in good faith in the belief that it was necessary for the fulfilment of the purpose or goal."[47] Moreover, the Tribunal found that there was no evidence before it that would support the conclusion that it was impossible to accommodate Ms. Oster without imposing undue hardship. In the result, the Tribunal found that the union had failed to discharge the onus upon it of justifying its sex-based employment standard. As a remedy Ms. Oster was awarded $3,000 as special compensation. The Tribunal took the view that it would be inappropriate to give any award for lost wages, as no loss had been shown.

This case is interesting in that in the absence of a claim against the employer, the Tribunal imposed liability for the discrimination on the union. Despite the fact that the facilities on the ships were provided by the employer and arguably within its control, the complainant was not precluded from proceedings against the union only.

Sexual harassment

A Tribunal decision in a case pertaining to allegations of sexual harassment in the workplace canvassed numerous factual issues[48]. The Tribunal noted that its outcome depended "almost entirely on our assessment of the credibility of the principal witnesses, and ultimately, on the sufficiency of the evidence led by the Commission and Ms. Marinaki."[49] In its decision, the Tribunal set out the central legal principles applicable to cases of sexual harassment. It quoted the Supreme Court's definition of sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work

[46] *Ibid.* at para. 53.
[47] *Ibid.* at para. 86.
[48] *Marinaki v. Human Resources Development Canada* (29 June 2000), TD 3/00 (C.H.R.T.).
[49] *Ibid*. at para. 192.

environment or leads to adverse job-related consequences for the victims."[50] It also correctly pointed out that pecuniary loss is not a prerequisite to establishing a case of sexual harassment and that "for behaviour to amount to harassment, some element of repetition or persistence will usually be required, although in some situations , a single, serious incident may be sufficient to constitute harassment."[51]

The Tribunal succinctly summarized its factual conclusions about the general work environment in which Ms. Marinaki worked at the time of alleged sexual harassment: "...International Operations was an organization under significant stress. Employees felt overworked as a result of downsizing at a time when the workload was increasing. There was evidence of a generally harsh management style where, in order to meet production objectives, supervisors were not always professional in their dealing with employees. There was also a perception on the part of some employees of unequal treatment by management."[52] It was in this context that Mr. Scarizzi had a series of confrontations with Ms. Marinaki during which he became very angry and used vulgar and abusive language when addressing her. The Tribunal characterized this behaviour of Mr. Scarizzi as inappropriate, abusive and unprofessional. However, it also found that while the language used by Mr. Scarizzi could certainly have a sexual connotation, in the context in which it was used here, it was clearly an expression of anger and frustration and was in no way sexual in nature.[53] The allegation of sexual harassment was dismissed by the Tribunal (as well as an allegation of ethnic harassment).

Attempts were made by Ms. Marinaki and the Commission to amend the complaint to include an allegation of retaliation by her employer, Human Resources and Development Canada(HRDC). This raised the issue of whether the employer had adequate notice that retaliation would be an issue before the Tribunal, as well as the question of the applicability of certain statutory provisions introduced in 1998 that made retaliation a discriminatory practice under the *Act*.[54] Before these amendments, the *Act* made it an infraction punishable on summary conviction to threaten, intimidate or discriminate against an individual because the individual had made a complaint under the *Act*.

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[50] *Ibid.* at para. 186, referring to the Supreme Court of Canada decision, *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.
[51] *Ibid*. at para. 189.
[52] *Ibid*. at para. 193.
[53] *Ibid*. at para. 200.
[54] *Supra*, note 9, s. 14.

With respect to the allegation of retaliation, the Tribunal sided with arguments advanced by the employer-department that lack of notice placed the department in an unfair position. On the issue of whether the 1998 amendments to the *Act* could be applied to the case, the Tribunal pointed out that the events relating to the allegations of harassment occurred before the changes were adopted. Since retrospective application of statutory provisions is generally not allowed, the Tribunal rejected the notion that retaliation (defined as a discriminatory practice under the 1998 amendments[55]) could be raised in the case before it. To do otherwise would be akin to attaching new consequences to events that took place before the enactment was adopted. Thus, even if the Tribunal had allowed the complainant and the Commission to amend its general theory of the case to include retaliation, it lacked the jurisdiction to consider the issue.

Disability

Barriers that persons who are Deaf and hard of hearing experience with respect to gaining full access to CBC broadcasting were reviewed and evaluated by a Tribunal decision in *Vlug and Canadian Human Rights Commission v. Canadian Broadcasting Corporation*.[56] Evidence was presented (by Mr. Vlug) regarding specific instances when he was unable to fully enjoy certain broadcasting due to the lack of captioning. Further evidence was provided by the Executive Director of the Canadian Association of the Deaf that related to the sense of exclusion from society experienced by the Deaf and hard of hearing as a result (in part) of inaccessible television programming, and the importance of T.V. programming to the deaf as a source of information (both social and related to public safety).

The Tribunal had no trouble concluding on the basis of the evidence before it that a *prima facie* case of discrimination based on disability with respect to the provision of services customarily available to the public had been shown. This being the case, it fell to the Canadian Broadcasting Corporation (CBC) to establish that there existed a *bona fide* justification for that denial of services within the meaning of s. 15(1)(g) of the *Act.* Pursuant to provisions under section 15(2) of the *Act* (adopted in June of 1998), a *bona fide* justification can only exist where it is proven that accommodating the needs of an individual or class of individuals would impose undue hardship, having regard to the factors of health, safety and cost.[57]

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[55] *Supra*, note 9.
[56] (15 November 2000), TD 6/00 (C.H.R.T).
[57] *Supra*, note 9, s. 10.

The CBC led evidence regarding the difficulties and cost involved in ensuring that 100% of its broadcasting was captioned for the Deaf and hard of hearing. Budgetary information relating to CBC operations was also made available indicating the impact that such a hypothetical increase in costs would have in a time of cut-backs and constraints on funding. Nevertheless, the evidence showed that a significant increase in captioning had occurred over the past few years even though no increase in funding had been allotted to the costs of captioning. This had been made possible by promoting sponsorship of captioning by advertisers and by encouraging the issue of captioning to be considered in production and purchasing decisions. Both factors tended to widen the use of captioning without its costs being directly reflected in specific budgetary items.

In reviewing all the evidence relating to costs, the Tribunal expressed its concern that it was too often impressionistic and not based upon objective cost-related studies. The Tribunal found that no effort had been made to identify what portion of late night broadcasting (consisting in large part of films already captioned) would in fact have to be captioned, nor was there any policy in place giving preference to the purchase of products already captioned. The insufficiency and inconsistency of the evidence led the Tribunal to declare: "... while excessive cost may justify a refusal to accommodate those with disabilities, the adoption of a respondent's standard must be supported by convincing evidence. Impressionistic evidence of increased cost will not generally suffice."[58]

Similarly, the non-programming costs of captioning (i.e. commercials, 'promos', unscheduled news flashes) alleged by the CBC were not adequately proven by objective evidence. With respect to commercials, the Tribunal pointed out that some evidence before the court indicated that 70-75% of those broadcast nationally were already captioned, though there was nothing to establish what the situation might be at the level of local stations. Even the hypothetical increased costs of requiring all commercials to be captioned was, in the view of the Tribunal, predicated on the assumption that the total cost would fall to the CBC. The Tribunal felt that advertisers themselves might be quite willing to assume a portion of the financial consequences, and was not convinced that the CBC would suffer a competitive disadvantage by requiring that commercials be captioned. No study of any sort has been done in an attempt to quantify the economic consequences to the network that would result if it were to insist that all commercials be provided in captioned format.

[58] *Supra*, note 55 at para. 110.

"Further, no attempt had been made even to discuss the matter with any advertisers in an effort to determine whether such an initiative would in fact be met with resistance, or whether, with education, advertisers might not be persuaded to 'buy-in' to the concept."[59] In other words, the CBC had not explored all the viable forms of accommodation that might resolve the problem of access to advertising experienced by the Deaf and hard of hearing. Evidence with respect to 'promos' was also deficient in the eyes of the Tribunal, the hypothetical costs amounting to nothing more than a "guesstimate".[60] As to unscheduled news flashes, the Tribunal declined to accept the logistical and cost estimates put forward by the CBC, implying that they were significantly exaggerated.

While the crux of the Tribunal's finding turned upon the weakness of the evidence presented by the broadcaster,[61] two points made in the course of its analysis bear repeating. First, the standard or policy put in place by the CBC was designed to increase the use of captioning gradually, within the limits of its resources. This was characterized as an incremental approach, one that did not necessarily ensure that all broadcasting would be captioned. It is this policy that the decision of the Tribunal has effectively placed in question. This is clear when the main remedy issued by the Tribunal is considered: "The CBC's English language network and Newsworld shall caption all of their television programming, including television shows, commercials, promos and unscheduled news flashes, from sign on until sign off. As required by section 53(2)(b) of the Canadian Human Rights Act, this must occur on the first reasonable occasion."[62]

The Tribunal also commented on the standards and requirements issued by the Canadian Radio-television and Telecommunications Commission (the "CRTC") that apply to the CBC. With respect to captioning, the CRTC had on a number of occasions commended the CBC for significantly exceeding the CRTC imposed requirements.

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[59] *Ibid* at para. 116.
[60] *Ibid* at para. 123.
[61] In summing up, the Tribunal said: "There is no doubt that the CBC is an organization under significant stress as a result of recent financial cuts. It may well be that, as a result of these pressures, the CBC did not fully turn its mind to the question of access to the deaf and hard of hearing. It may not have felt the need to do so, as, at least in recent years, the CBC has met the targets set for it by the CRTC. However, after considering all of the evidence adduced by the CBC in this case, I was left with the overwhelming impression that, although significant improvements to the level of captioning have been implemented in recent years, with a little corporate will and imagination, a good deal more could be done with respect to captioning without imposing an undue hardship on the CBC than has thus far taken place." *Ibid.* at para. 141.
[62] *Ibid.* at para. 144. The Tribunal also awarded Mr. Vlug damages for pain and suffering in the amount of $10,000.

In considering decisions made by the CRTC, the Tribunal noted that "...the CRTC applies a different test in the determination of the extent to which captioning must be provided from that applied by this Tribunal in dealing with a human rights complaint."[63] While it was prepared to give considerable weight to decisions of the CRTC on technical matters, the Tribunal found that issues related to the accommodation of the Deaf and hard of hearing could not be resolved by adopting requirements imposed by the CRTC.

An important step forward in the accommodation of Deaf and hard of hearing persons was also achieved in the case of *Simser v. Tax Court of Canada*.

Mr. Simser, who is Deaf, was an articling student with the Department of Justice from June 1997 to August 1998. As part of his duties, he was required to appear from time to time before the Tax Court of Canada. He requested that the Tax Court accommodate him by providing real time captioning during his appearance. When the Court refused to pay for the captioning, the Department of Justice agreed to pay for the costs associated with those services.

On January 13, 1999, Mr. Simser filed a complaint pursuant to section 5 of the *Act*, alleging that the Tax Court had discriminated against him in the provision of services customarily available to the public on the basis of disability by refusing to accommodate his request to provide real time captioning of the Court proceedings.

A Tribunal was appointed to hear the complaint and the proceedings were set to begin on September 11, 2000. However, prior to the beginning of the hearings, the Tax Court issued a notice to the legal profession dated September 5, 2000 which enacted the following policy, effective immediately:

- When a Deaf, deafened or hard of hearing person appears before the Court, the Registrar will arrange and pay for the services of a competent and independent real-time captionist or sign language interpreter or any other widely-recognized method of interpretation, as approved by the Registrar.

- The policy applies to all parties and witnesses appearing before the Court; and to all lawyers or articling students pleading before the Court.

[63] *Ibid.* at para. 32.

As a result of this policy change, Mr. Simser withdrew his complaint and a Notice of discontinuance was issued by the Tribunal.

The Commission has contacted other Federal Courts to encourage them to follow the lead of the Tax Court, and has informed Provincial Human Rights Agencies of this important development for the human rights of the deaf and hard of hearing in Canada.

A Tribunal decision in *Wachal and the Canadian Human Rights Commission v. Manitoba Pool Elevators*[64] demonstrates once again the important role that questions of evidence play in establishing facts crucial to a claim of discrimination. Ms. Wachal's employment with Manitoba Pool Elevators was terminated after only four months on the job because of excessive absences from work. During the four months she had been absent a total of 11 days on six separate occasions. Ms. Wachal claimed that her absences were the result of allergic and asthmatic reactions caused by renovations being carried out in the office building where she worked. She filed a complaint alleging that her employment had been terminated because of her disability and that no attempt to accommodate her condition had been made.

There was no dispute before the Tribunal about the fact that Ms. Wachal suffered from allergies and asthma. However, the link between this condition and her absences from work rested upon evidence that raised serious questions of credibility. For example, Ms. Wachal was absent from work twice before the renovations (allegedly the cause of her reactions) had commenced on her floor in the building where she worked. Moreover, all her absences (save one) occurred on the month-end and fiscal year reporting dates when the execution of her duties were particularly important. The Tribunal found that she "did not offer any credible explanation as to why the dust and allergens from the renovations caused her to suffer usually at month-end and not on any other days during the month. Nor did she provide any credible explanation as to why she did not tell Ms. Blundon or anyone else at Manitoba Pool Elevators, specifically that the renovations were causing her serious medical problems."[65] Added to this was what the Tribunal characterized as significant gaps in the medical evidence. This evidence was presented only in the form of written certificates and medical reports with no opportunity to question the doctor who prepared them. On their face, the written

[64] (27 September 2000), TD 5/00 (C.H.R.T).
[65] *Ibid*. at para. 39.

materials provided no details as to the nature of Ms. Wachal's disability or illness, nor any confirmation that such materials had been prepared following consultations with the patient. The Tribunal concluded that the medical evidence fell "short of supporting the conclusion that Ms. Wachal's absences from work were due to her disability."[66] The lack of credibility accorded the testimony of Ms. Wachal (who spoke of significant allergic reactions while at work) also prompted the Tribunal to accept more readily the testimony of another witness regarding the absence of noticeable symptoms related to Ms. Wachal's allergies and asthma. The Tribunal also noted that Ms. Wachal failed to call any co-workers who might have corroborated her testimony about allergic reactions in the work place. In light of all these evidential problems, the Tribunal found on a balance of probabilities that Ms. Wachal and the Commission had failed to prove that the complainant's absences from work were due to disability and that her employment had been terminated as a result of that disability.

An important decision concerning disability rights was released by the Supreme Court this year. The Court reviewed the scope of the term "handicap" under section 10 of the *Quebec Charter of Human Rights and Freedoms*[67] in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*.[68] It interpreted the term by reference to the meaning given to the concept of "disability" under section 15 of the Canadian *Charter*. The issue came to the Supreme Court on appeal from two conflicting lower court decisions. One case had been dismissed because the objective medical evidence did not establish that the physical anomaly resulted in any functional limitation.[69] In the other, a narrow definition of what constituted discrimination based on handicap was widened to include a subjective component, i.e. the subjective perception of those making a decision that excludes an individual from an employment opportunity.[70] In neither case was there a dispute about the fact that employment decisions had been made on the basis that the physical anomalies were present, but did not result in any inability to perform the duties in question. However, the employers took the view that such conditions might in future result in a higher risk of absenteeism due to the development of various medical conditions.

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[66] *Ibid*. at para. 45.
[67] R.S.Q. c. C-12.
[68] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City),* [2000] 1 S.C.R. 665.
[69] The conditions involved minor spinal chord anomalies that employers felt might lead to lower back pain problems in the future. See para. 3 of judgment, p. 671-672.
[70] In this case, the condition involved Crohn's disease, an intestinal inflammation.

On the issue of whether actual handicap must be shown in order to found a claim of discrimination, the Supreme Court declared that:

> "…the right to equality and protection against discrimination cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer."[71]

The comparative approach reflected in this judgment thus reinforced the conclusion that the notion of handicap "…can include both an ailment, even one with no resulting functional limitation, as well as the perception of such an ailment."[72] The notion of handicap was broad enough to prohibit discrimination based on the perceived possibility that an individual might develop a handicap in the future.[73] It stressed that the assessment of possible discrimination based on handicap (or disability) involves more than a strictly medical evaluation of a person's condition, though the latter is not irrelevant. In its own words:

> "This is not to say that the biomedical basis of "handicap" should be ignored, but rather to point out that, for the purposes of the Charter, we must go beyond this single criterion. Instead, a multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a "handicap". In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes."[74]

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[71] *Supra*, note 68 at para. 39 at p. 687.
[72] *Ibid*. at para. 72 at p. 697.
[73] With respect to the subject component, the Court declared: "The liberal and purposive method of interpretation along with the contextual approach, which includes an analysis of the objectives of human rights legislation, the way in which the word "handicap" and other similar terms have been interpreted elsewhere in Canada, the legislative history, the intention of the legislature and the other provisions of the Charter, support a broad definition of the word "handicap", which does not necessitate the presence of functional limitations and which recognizes the subjective component of any discrimination based on this ground." *Ibid.* para. 71 at p. 697.
[74] *Ibid*. at para. 77 at p. 699.

When all these factors are considered, and in light of the facts of the case before it, the Supreme Court found that the complainants had been the victims of discrimination based on disability.

Age

The proper time period to consider when assessing damages for lost wages suffered as a result of discrimination was reviewed by a Tribunal in the case of *Carter and the Canadian Human Rights Commission v. Canadian Armed Forces*.[75] The discrimination in question, which was not in dispute, concerned mandatory retirement policies of the Armed Forces. These policies had been declared discriminatory by a Tribunal decision of August 14, 1992.[76] The policies were subsequently brought within section 15(1)(b) of the *Act* by regulatory amendments adopted on September 3, 1992. Mr. Carter had been mandatorily released from the Armed Forces on May 27, 1992, after having reached the compulsory retirement age of 50.

Relying on the *Martin* decision, Mr. Carter and the Commission argued that the proper time period within which to calculate lost wages in this case should be two years. Instead, the Tribunal took the view that the amendments to the *Queen's Regulations and Orders for the Canadian Forces*[77] (which brought the mandatory retirement rules within section 15(1)(b) of the *Act*) must be taken into consideration in calculating an award for lost wages: "When a discriminatory practice ends, this fact should be taken into consideration in determining the period of compensation for which a person can claim damages for lost wages."[78] Considering all the circumstances from which Mr. Carter's complaint arose, the Tribunal found that the appropriate time frame within which to calculate lost wages was that between the date of his mandatory release and the date of the amendments to the *Queen's Regulations*. This is a disappointing result for Mr. Carter given that his reasonably foreseeable loss continued after the amendments brought about by the *Queen's Regulations*. On a more positive note, the Tribunal agreed that pension income and severance pay should not be considered as earned income to be set-off against wages that would otherwise have been earned by the complainant.

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[75] (2 March 2000), TD 2/00 (C.H.R.T.).
[76] *Martin v. Canadian Armed Forces* (1992), 17 C.H.R.R. D/435 (C.H.R.T.)[hereinafter *Martin* refers to C.H.R.T.].
[77] (1994 Revision), Volume 1 (Administrative), issued under the authority of the *National Defence Act,* R.S.C., 1985, c. N-5 [hereinafter the "*Queen's Regulations*"].
[78] *Supra*, note 75 at p. 8 of 13.

Judical Review of Procedural and Jurisdictional Matters

Standards of independence and impartiality

In *Zundel v. Citron*,[79] the Federal Court of Appeal dealt with the standard of impartiality applicable to members of a Human Rights Tribunal. The issue emerged during the course of a hearing regarding a complaint that Mr. Zundel operated a website the content of which was likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination, contrary to ss. 13(1) of the *Act*. A number of years prior to this complaint, Mr. Zundel had been convicted of the Criminal Code offense of wilfully publishing a pamphlet that he knew was false and likely to cause injury or mischief to a public interest (the pamphlet denied that the Holocaust had occurred). Mr. Zundel's conviction was ultimately overturned by the Supreme Court of Canada, which found that the criminal offense under which he had been convicted was contrary to freedom of speech under the *Charter*. After Mr. Zundel's trial, the then Chief Commissioner of the Ontario Human Rights Commission issued a press release in which he applauded Mr. Zundel's conviction and the sanctions imposed against him "for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."[80]

The Federal Court of Appeal ultimately decided that Ms. Devins was not subject to a reasonable apprehension of bias. It first set out the test that should be applied when considering such an accusation, citing the Supreme Court of Canada: "The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [...] [The] test is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude [...]".[81] With this test in mind, the Court of Appeal reviewed the content of the impugned news release and concluded that the statements reasonably attributable to the Ontario Commission as a whole were irrelevant to the issue to be determined before the Human Rights Tribunal. These statements concerned Mr. Zundel's denial of the Holocaust, a denial that had raised the issue of truthfulness at his criminal trial. With respect to a complaint under section 13(1) of the *Act*, the truth or non-truthfulness of statements is immaterial to whether the complaint is substantiated. Given this crucial difference in issues to be determined, the Court of Appeal saw no rational link between the statements attributable to the Ontario Commission (of which Ms. Devins was a member at the time) and the issue of reasonable apprehension of bias on the part of Ms. Devins as a member of a

[79] [2000] 4 F.C. 225 (C.A.).
[80] *Ibid.* at para. 3.
[81] *Ibid*. at para. 15, citing [1997] 3 S.C.R. 484, p.530.

Human Rights Tribunal 10 years later. While one statement in the news release directly attributable to the Chief Commissioner alone might have been material to this issue, the Court of Appeal ruled that it could not reasonably be attributed to Ms. Devins and hence could not be cited to establish a reasonable apprehension of bias on her part.

The Court of Appeal also commented on the issue of what standard of impartiality might be expected of administrative decision-makers with policy responsibilities. While it agreed that the case law established a lower threshold of impartiality for such decision-makers, and that in some cases boards might be charged with both adjudicative and policy-making functions and hence subject to a variable standard depending on the function being exercised, the Court of Appeal made it clear that the Human Rights Tribunal was purely adjudicative. It said: "...there is no statutory authority for the proposition that Parliament specifically envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate."[82] With respect to the Ontario Human Rights Commission, the Court of Appeal noted that it was vested with policy-making functions and had an obligation to educate and inform the public. It disagreed that the press release issued by the Ontario Human Rights Commission was thoroughly inappropriate. In its view, the statements made therein were consistent with the Ontario Commission's statutory obligation to advance the policy of recognizing the dignity and worth of every person.

Mr. Zundel, in another application before the Federal Court, also sought to question the impartiality of the original decision of the Commission to appoint a tribunal to adjudicate the complaint regarding the website.[83] He argued that the Deputy Chief Commissioner had made speeches in which she expressed opinions on issues regarding the website, and the application of the *Act*, which are issues that a tribunal would be called upon to determine. As she participated in the decision to refer the complaint against Mr. Zundel to a tribunal, he argued that the referral process of the Commission was tainted with bias. Both a motions judge and the Federal Court of Appeal rejected the arguments of Mr. Zundel and refused his application for judicial review.[84]

[82] *Ibid*. at para. 61.
[83] *Zundel v. Attorney General of Canada et al.* (13 December 2000), No. A-388-99 (F.C.A.).
[84] Mr. Zundel also raised constitutional arguments related to the application of provisions of the *Act* to activities occurring outside Canada, as well as arguments based on the alleged breach of freedom of expression. The Court of Appeal found these arguments to be premature and essentially unrelated to the decision to refer the matter to a tribunal. It left open the question of whether they would be entertained at a later stage in the adjudicative process.

The issue of institutional impartiality and independence was raised generally in the case of *Bell Canada v. CTEA, CEP and Femmes Action and the CHRC.*[85] This is a major case involving pay equity in which Bell alleged that the Tribunal did not have the requisite independence and impartiality to dispose properly of the matter before it. Bell argued the Tribunal lacked institutional independence because it was bound by guidelines issued by the Commission, that it lacked security of tenure and financial security.

In reviewing the issue of institutional bias, the Federal Court emphasized that the independence and impartiality of judicial and quasi-judicial bodies are rooted in three core characteristics: security of tenure, financial security and administrative independence (as set out in *Valente v. The Queen et al.*[86]). The Court also recognized that administrative tribunals do not have to reflect the same degree of independence as actual courts of justice. In determining what degree of institutional independence is applicable to a tribunal, it is necessary to look at the functions being performed by the tribunal, its nature, and the interests at stake. As regards a human rights tribunal, the Court determined that a high level of independence is required because a human rights tribunal performs a pure adjudicative role with respect to rights and interests which are quasi-constitutional in nature.[87]

As regards the issue of the Commission's power to issue guidelines, the Federal Court found that the binding nature of the guidelines is incompatible with the guarantees of institutional independence and impartiality. As the Court declared: "It gives the Commission a special status that no other party appearing before the tribunal could enjoy. It can influence the Tribunal in telling it how to interpret the law...This power is quite unique. No regulation-making power in any legislation allows a party to determine the extent and manner to which the enabling legislation is to be interpreted."[88] On this basis alone, the Federal Court ruled that there was a reasonable apprehension of institutional bias.

In reaching this conclusion, the Federal Court rejected arguments to the effect that the *Equal Wages Guidelines,*[89] issued in accordance

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[85] (2 November 2000), No. T-890-99 (F.C.A.). This decision flows from and is related to another Federal Court decision that dealt with identical and similar issues, often referred to as Bell decision no. 4 (See: [1998] 3 F.C. 244).
[86] *R. v. Valente*, [1985] 2 S.C.R. 673. See also [1998] 3 F.C. 244 (F.C.T.D.) (Bell Canada decision no. 4).
[87] *Supra*, note 85 at para. 67.
[88] *Ibid*, paras. 76-78.
[89] SOR/86-1082.

with the *Statutory Instrument Act*,[90] should be construed as regulations and thus not open to the reproach of tainting the institutional independence and impartiality of the Tribunal. Moreover, in the Court's view, the Tribunal has no jurisdiction to declare such guidelines of no force and effect. Because the *Act* does not give to a human rights tribunal the general power to consider questions of law, such a tribunal cannot consider the constitutional validity of a statutory or regulatory provision. A tribunal's authority is restricted to interpreting and applying the *Act* for the purposes of resolving disputes before it. In support of its position, the Court adopted the reasoning in the Supreme Court decision of *Cooper v. Canada (Human Rights Commission)*.[91]

The Federal Court also considered the power of the Chairperson of the Tribunal to extend the mandate of a tribunal member which expires during the course of a hearing. On this point, the Federal Court adopted reasoning of the Supreme Court to the effect that "security of tenure requires that the tenure of a decision-maker must not be subject to any form of interference that is discretionary or arbitrary."[92] On this basis, the Court found that:

> "[t]he principle of institutional independence requires that a tribunal is structured to ensure that the members are independent. In the case at bar, the ability of a member to continue a case will depend on the discretion of the Chairperson. The difficulty is not necessarily in the manner in which the discretion is exercised but rather in the existence of the discretion itself... There exists no objective guarantee that the prospect of continuance of a tribunal member's duties after expiry of his or her appointment would not be adversely affected by any decisions, past or present, made by that member."[93]

In light of the problems regarding the Tribunal's institutional independence, the Federal Court quashed the preliminary decisions made by the Tribunal and ordered that no further proceedings be

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[90] R.S.C. 1985, c. S-22.

[91] [1996] 3 S.C.R. 854. Here the Court ruled: "...a tribunal does not have any special expertise except in the area of factual determinations in the human rights context. Second, any efficiencies that are *prima facie* gained by avoiding the court system will be lost when the inevitable judicial review proceeding is brought in the Federal Court. Third, the unfettered ability of a tribunal to accept any evidence it sees fit is well suited to a human rights complaint determination but is inappropriate when addressing the constitutionality of a legislative provision. Finally, and perhaps most decisively, the added complexity, cost, and time that would be involved when a tribunal is to hear a constitutional question would erode to a large degree the primary goal sought in creating the tribunals, i.e., the efficient and timely adjudication of human rights complaints. Page 897.

[92] *Supra*, note 85 at para. 106.

[93] *Ibid.* at paras. 109 and 111.

conducted regarding the complaint until the problems had been corrected. The Commission is appealing this decision to the Court of Appeal.

Given the wide-ranging consequences of the decision in the Bell case reviewed above,[94] it is perhaps not surprising that persons appearing before other human rights tribunals would attempt to invoke the authority of that decision in an attempt to discontinue other hearings. This was the case in *Zundel v. Canadian Human Rights Commission et al.,*[95] in which Mr. Zundel raised arguments regarding the Tribunal's institutional independence similar to those made by Bell Canada. His arguments were raised after the commencement of proceedings, but soon after a relevant decision in the Bell case had been rendered. The Tribunal ruled that he had waived his rights to challenge the institutional independence of the Tribunal.

The Federal Court of Appeal ultimately upheld the Tribunal's decision. The Court pointed out that ample case law exists supporting the proposition that the doctrine of waiver is applicable to allegations of institutional bias. The Court of Appeal also rejected Mr. Zundel's contention that he had never in fact waived his right to object to the Tribunal's lack of independence and impartiality. While the Court recognized that a waiver must be made freely and with full knowledge of all relevant facts, it also concluded that:

> "...it was the provisions of the Act itself as they stood at the time the hearing commenced which created the reasonable apprehension of bias, and that nothing prevented the appellant from challenging the validity of the proceedings at the outset on that basis. The decision in the [Bell case] changed nothing in this regard and presented the appellant with no new facts. It merely alerted the appellant to the deficiency in the statute. It seems to me, therefore, that this was not a reason for failing to raise the issue of institutional independence at the outset. Instead of doing so, the appellant, who was represented by counsel throughout, proceeded with the hearing before the Tribunal without raising the slightest objection up to the time that he filed [his] motion."[96]

In light of these conclusions, Mr. Zundel's motion was dismissed.

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[94] As well as the related decision known as Bell decision no. 4: see note 85.
[95] (10 November 2000), No. A-215-99 (F.C.A.).
[96] *Ibid*. at para. 8.

Judicial review of interlocutory decisions

This year the Federal Court confirmed its reluctance to review interlocutory decisions before the proceedings as a whole have been brought to an end. This issue also arose in the Zundel case, though in a separate decision.[97] In the course of proceedings before the Tribunal, Mr. Zundel wished to pursue a certain line of cross-examination to which objection had been made. The Tribunal ruled against him. He also tendered a witness whom he wished accepted as an expert in his field. The Tribunal refused to qualify the witness. Mr. Zundel applied for judicial review of both of these decisions before completion of the hearing before the Tribunal.

The Federal Court of Appeal (to which the matter came after the Motions Judge had decided in Mr. Zundel's favour) set out the general rule that, absent jurisdictional issues, rulings made during the course of a tribunal proceeding should not be challenged until the tribunal's proceedings have been completed. The Court emphasized that the rationale for this rule "...is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such appeals can bring the administration of justice into disrepute."[98] While Mr. Zundel argued that the two decisions under review were so significant that they went to the very jurisdiction of the Tribunal, the Court of Appeal disagreed. It stated:

> "The rulings at issue in these appeals are mere evidentiary rulings made during the course of a hearing. Such rulings are made constantly by trial courts and tribunals and if interlocutory appeals were allowed from such rulings, justice could be delayed indefinitely. Matters like bias and a tribunal's jurisdiction to determine constitutional questions or to make declaratory judgments have been held to go to the very jurisdiction of a tribunal and have therefore constituted special circumstances that warranted immediate judicial review of a tribunal's interlocutory decision."[99]

In light of these considerations, Mr. Zundel's arguments were rejected and the decision of the Motions Judge overturned.

The Federal Court had occasion to reaffirm the approach set out in the *Zundel* decision in two applications for judicial review of interlocutory decisions arising in the case of *Bell Canada v. CTEA,*

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[97] *Zundel v. Canada (Human Rights Commission)*, [2000] 4 F.C. 255 (C.A.).
[98] *Ibid*. at para. 10.
[99] *Ibid*. at para. 15.

CEP and Femmes Action and the CHRC.[100] The case concerns a long-standing pay equity dispute. One application dealt with, *inter alia*, a preliminary motion to have the complaints dismissed as being void for vagueness or void as lacking the essential elements of a valid complaint. The second application concerned the alleged confidentiality of documents that Bell wished to exclude from evidence before the Tribunal. Both motions were dismissed by the Tribunal.

In two applications for judicial review, the Federal Court found that it was premature to challenge the validity of the interlocutory decisions made by the Tribunal. With respect to the first application, the Court could see no special circumstances, such as a possible error going to jurisdiction or a decision dispositive of a substantive right, that would cause it to exercise its discretion to intervene. In so doing it referred to and applied the reasoning in the *Zundel* decision, as well as emphasizing that the applicant (Bell) would suffer no serious hardship if it were required to continue before the Tribunal without having the questions raised in its application resolved. Should Bell lose on the underlying case, the Court pointed out that it could ultimately bring an application for judicial review of the final decision under section 18.1 of the *Federal Court Act*[101], at which time a Court could consider the alleged error in dismissing the preliminary motions. With respect to the second application, the Court once again adopted the reasoning in the *Zundel* decision, indicating that interlocutory decisions made on most evidentiary matters did not go to the jurisdiction of a tribunal. The Court also ruled that a decision to admit evidence that is relevant is not the same as rejecting evidence which would have an impact on the fairness of the proceedings and amount to a breach of the rules of natural justice. The right of a person affected by a decision to be heard is an important component of the rules of natural justice, but this right is not offended when evidence is heard over the objections of a party. In the latter case, "[t]he reception of that evidence may subsequently give rise to an allegation that the Tribunal has acted on the basis of irrelevant considerations but only after the Tribunal has made a decision on the merits."[102]

In rejecting both applications, the Court considered the issue of whether some sanction should be imposed on Bell for having caused delay and additional expenditures by bringing an application for judicial review that ultimately failed. The respondent had argued that

[100] (20 June 2000), No. T-756-00 (F.C.T.D.); (7 July 2000), No. T-2281-99 (F.C.T.D.).
[101] *Supra*, note 41, s. 18(1).
[102] *Ibid.*, No. T-756-00 at para. 15.

the case reflected a type of practice that should be discouraged. While the Court was partially sympathetic to the concerns raised by the respondent, it did not feel it had sufficient evidence before it to make a definitive conclusion. It stated: "It is obvious that proceedings such as this hinder and delay the work of a body charged with discharging a statutory duty. However, in the absence of some evidence of an intent to delay or to wage litigation by attrition, I am not prepared to sanction Bell by the imposition of solicitor and client costs. But given the efforts to which the respondents were put, they shall have their costs at the high end of Column V, payable upon assessment."[103]

Judicial review of Commission decisions — confirming and clarifying the duty of procedural fairness

The Federal Court reviewed several cases in which the Commission dismissed complaints of discrimination. It was confirmed in *Bourgeois v. Canadian Imperial Bank of Commerce*[104] that the standard of review of a decision of the Commission to dismiss a complaint requires a very high level of deference by the courts. Only where there has been a breach of procedural fairness or a decision is reached that can not be supported on the evidence before the Commission will a court intervene. It is not the court's task to re-examine the evidence and come to its own conclusion. In the case before it, the Federal Court dismissed the applicant's application for judicial review, noting that he had the opportunity to comment upon the investigator's report, which he did so in writing, and that those comments as well as the report were before the Commission at the time of its decision.

A similar conclusion was reached in the case of *Close v. Air Canada*.[105] Here the Federal Court reiterated that the Commission's decision to dismiss a complaint need not be arrived at by strict adherence to the formal rules of natural justice that would apply to a judicial proceeding. In the case before it, the Court found that the parties involved were asked to submit their position in writing as well as any documentation relevant to the complaint. The respondent in the matter did so, and following the investigator's report, the complainant made her own submissions. Since there was nothing procedurally unfair in the process, and the decision of the Commission was not based on erroneous findings of fact made in a perverse and capricious manner, the decision of the Commission to dismiss the complaint was upheld by the Court.

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[103] *Ibid*. at para. 21.
[104] (27 March 2000), No. T-1327-99 (F.C.T.D.).
[105] (27 March 2000), No. T-496-99 (F.C.T.D.).

An example in which the Commission was found to have breached procedural fairness is the case of *Hutchinson v. Honourable Christine Stewart (Minister of Environment Canada)*.[106] Following the investigation of the complaint, the Commission concluded that the circumstances of the case could not support a finding of discrimination and that the government department in question had in fact attempted to accommodate the complainant's disability. The Commission therefore declined to request the appointment of a tribunal to adjudicate the dispute. In an application for judicial review of this decision, Ms. Hutchinson contended that the Commission had failed to inform her of information transmitted to it by the respondent department (Environment Canada) regarding her complaint. As a result, she was not given the chance to respond fully to the position adopted by the respondent department with respect to the complaint filed against it. Specifically, a letter sent to the investigator assigned to the complaint raising a number of points relevant to the case was never transmitted to the complainant. The Federal Court found that much of the information contained in this letter (prepared by an Environment Canada inspector) was not in a departmental report sent to the Commission investigator and made available to Ms. Hutchinson. Given the relevance of information contained in the letter, procedural fairness required the Commission to apprise Ms. Hutchinson of its contents. As the Court said: "[t]he investigator was required to act fairly to the applicant and in order to act fairly to Ms. Hutchinson, the inspector should have advised Ms. Hutchinson of the statements contained in the October 22, 1997 letter so that she could have responded to the statements."[107] A further breach of procedural fairness was committed by the Commission by the failure of its investigative branch to transmit to Ms. Hutchinson a copy of a Public Service Staff Relations Board decision (regarding Ms. Hutchinson) that had been sent to it by the respondent department after the deadline for submissions had passed. While this decision was not forwarded to the Commission itself, the Federal Court nonetheless concluded that it was a breach of procedural fairness not to have sent the decision (critical of Ms. Hutchinson) to the complainant for her comment.

The refusal of the Commission to accept a complainant's request to amend the grounds of his complaint may amount to a breach of the Commission's duty to deal with complaints under section 41. This possibility arose in the case of *Tiwana v. Canadian Human Rights Commission et al*.[108] where the complainant, after a complaint form

[106] (26 October 2000), No. T-1072-98 (F.C.T.D).
[107] *Ibid*. at para. 36.
[108] (29 November 2000), No. T-60-00 (F.C.T.D.).

had been signed and an investigation was underway, expressed the desire to expand the scope of his complaint beyond the issue of discrimination based on age, to include the issue of discrimination based on race. The complainant alleged that he had always assumed that the possibility of race or colour discrimination would be included in any investigation. After various communications in this regard, the complaint received word from the investigator that no amendment to the existing complaint could be accepted, but that he was free to submit another separate complaint dealing with the supplementary accusations. However, the investigator informed the complainant that the two year delay since the time of the alleged discrimination would result in a recommendation to the Commission that such a complaint be dismissed as out of time.

While the complaint based on age discrimination was rejected by the Commission following the investigation, the complainant sought judicial review of the refusal to amend his original complaint to include race and colour discrimination. On the facts of the case, the Federal Court determined that the complainant had communicated his desire to amend the original complaint. His failure to initiate a separate complaint raising the new grounds was clearly related to the fact that a recommendation would be made by the investigator to dismiss it as out of time. In the circumstances the failure to make a fresh complaint could not, in the view of the Court, be relied upon as a ground for not dealing with the complaint of race discrimination. The Court took the view that the appropriate route to have followed would have been an amendment to the existing complaint. In other words, "section 41 does not authorize the Commission to refuse to deal with a complaint on the ground of procedural irregularity."[109]

For these reasons, the application of the complainant was allowed and the Commission was ordered to deal with the complaint of race discrimination as an amendment to the original complaint, pursuant to section 41 and, if necessary, section 42 of the *Act*.

In another case, *Singh v. Canada Post Corporation et al.*,[110] the Federal Court emphasized that erroneous findings of fact must relate to significant elements of a case if they are to be considered important on judicial review. Where an error is inconsequential to the decision of the Commission, it will carry little or no weight if that decision is judicially reviewed. In the case before it, the Court noted that an investigator had made an error in reporting that Mr. Singh had

[109] *Ibid*. at para. 31.
[110] (19 June 2000), No. T-157-97 (F.C.T.D.).

been warned about sexual harassment in writing, when in fact this had not occurred. Nevertheless, Mr. Singh's knowledge and awareness of what constituted sexual harassment, as well as his employer's policy regarding it and Mr. Singh's disregard of it, were facts that had been well established on the evidence as a whole. The Court therefore characterized the investigator's error as inconsequential and denied Mr. Singh's challenge to the Commission's decision to dismiss his complaint of discrimination based on race or ethnic origin.

The issue of what procedural standards should apply to the Commission when it makes a preliminary decision, under section 41 of the *Act*, to accept and deal with a complaint was also considered by the Federal Court of Appeal in *Canada Post Corporation v. Barrette*.[111] The preliminary screening stage takes place before an investigation is conducted by the Commission. Since considerable deference is given to the Commission regarding decisions made in the context of investigations, the Court of Appeal recognized that even more deference should be given to decisions taken at the initial screening stage under section 41. However, the Court emphasized that the Commission must not take its initial screening function lightly, and thus cannot ignore submissions made to it by persons against whom allegations of discrimination have been made. The Commission may not simply ignore or routinely dismiss submissions made by a person at the preliminary screening stage on the ground that in any event that person still has the opportunity to reiterate its submissions at a later stage in the complaint handling process.[112] While no stringent standards of procedural fairness are imposed on the Commission at this stage of its proceedings, it is expected to "do its work diligently".[113]

Regarding the case before it, the Court of Appeal found that Canada Post had made representations to the Commission that the complaint should be dismissed prior to investigation because the matter had been dealt with through four grievances filed under the *Canada Labour Code*.[114] The Court of Appeal found that the Commission made no effort to review the decision of the arbitrator under the *Canada Labour Code*. In the words of the presiding judge: "Clearly, in my view, the Commission must turn its mind to the decision of the arbitrator, not to determine whether it is binding on the Commission, but to examine whether, in light of that decision and

[111] [2000] 4 F.C. 145 (C.A.) [hereinafter *Barrette* cited to F.C.A.].
[112] *Ibid*. at para. 24.
[113] *Ibid.* at para. 25.
[114] *Canada Labour Code*, R.S.C. 1985, c. L-2.

of the findings of fact and credibility made by the arbitrator, the complaint may not be such as to attract the application of para. 41(1)(d)."[115] The Court of Appeal therefore set aside the decision of the Commission to deal with the complaint and sent the matter back to the Commission for reconsideration in light of the reasons set out in its judgment.

Similar issues about how the Commission should exercise its discretion under s. 41(1) arose in the case of *Canada Post Corporation v. Attorney General of Canada et al.*,[116] where the Commission had decided to deal with a complaint after considering whether the alleged victim of the discriminatory practice to which the complaint related ought to have exhausted grievance or review procedures otherwise reasonably available [s. 41(1)(a)]. The Commission decided to proceed with the complaint and this decision was communicated to Canada Post.

The Federal Court confirmed the narrow scope of judicial review of decisions made by the Commission under s. 41(1), emphasizing that only "considerations such as bad faith by the Commission, error of law or acting on the basis of irrelevant considerations are applicable."[117] A certain standard of procedural fairness is required as a matter of law but this is limited to the requirement that the "Commission inform the parties of the substance of the evidence obtained and give them the opportunity to respond to the evidence".[118] In the case before it, Canada Post had been informed of the preliminary analysis of the complaint and had in fact made submissions to the Commission. Since this satisfied the standard of procedural fairness, and since the Commission had not based its decision on any erroneous finding of fact, the application of Canada Post to overturn the decision was dismissed.

Stay of proceedings

In *Canadian National Railways v. Leger and CHRC*,[119] an application was made to the Federal Court for a stay of proceedings of a hearing to be conducted before a Human Rights Tribunal. The Tribunal itself had denied Canadian National Railway's (CNR) request that the hearing on the complaint be postponed until such time as CNR's preliminary challenge to the legality of that hearing was disposed of

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[115] *Barrette*, *supra*, note 111 at para. 28.
[116] (6 April 2000), No. T-2427-98 (F.C.T.D.).
[117] *Ibid.* at para. 22. Referring to *Canada Post Corporation v. Canadian Human Rights Commission and Canadian Postmasters and Assistants Association* (8 May 1997), No. T-2788-94 (F.C.T.D.).
[118] *Ibid*. at para. 22 and 27.
[119] (22 February 2000), No. T-1547-99 (F.C.T.D.)[hereinafter *Leger* cited to F.C.T.D.].

by Federal Court. With respect to an application for a stay of proceedings, the Federal Court confirmed that a stringent three-pronged test must be applied. In order to succeed an applicant must establish that (1) there is a serious issue to be tried; (2) it will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours granting the stay.

Evaluating the seriousness of an issue at this stage does not require a detailed assessment of its merits. It is sufficient that the evaluation be conducted "on the basis of common sense and an extremely limited view of the case on the merits..."[120] The Court also emphasized that unless the case on its merits is frivolous or vexatious a judge should pass on to the other two stages of the three-pronged test. On the case before it, the Court accepted that arguments based on *res judicata*, as well as those related to a six year delay between the alleged act of discrimination and the commencement of proceedings, involved issues sufficiently serious to satisfy the first stage of the test. However, on the issue of irreparable harm the Court disagreed with the arguments put forward by the applicant. The latter had argued that the six year delay before commencement of proceedings gave rise to substantial procedural unfairness and abuse of process, for the erosion of witnesses' memories, the unavailability of witnesses and inability to procure proper medical evidence would deprive the applicant of its right to make full answer and defence. The Court felt that these were evidential matters with which the Tribunal was fully competent to deal, and thus did not raise the likelihood of irreparable harm to the applicant. The Court also decided that the demands of litigation (the expenditure of considerable time, effort, energy and cost) would not constitute irreparable harm in and of themselves in the absence of some act of negligence on the part of the Commission.

While its conclusion on the second stage of the test obviated any real need to proceed to the final consideration involving the balance of convenience, the Court nonetheless pointed out that there is a strong public interest in having Human Rights Tribunals' hearings proceed as expeditiously as possible. In the case at bar, the Court could find no reason to believe that granting a stay of proceedings would only result in a brief delay. Not only was there a possibility of appeal, there was no evidence before the Court to suggest that the hearing of the Human Rights Tribunal could be rescheduled without causing further delay.

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[120] *Ibid*. at para. 5. Referring to *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

An application for a stay of a Federal Court order was made in the case involving Bell Canada. As discussed above, Bell Canada was successful in its challenge to the tribunal's institutional independence and impartiality, and the Federal Court issued an order precluding any further proceedings until such time as the legislative deficiencies giving rise to a perceived lack of independence were corrected. The complainants sought to have this order stayed so as to allow proceedings before the Tribunal to continue while the decision of the Federal Court on the issue of institutional independence was appealed.[121]

In deciding this matter, the Federal Court of Appeal applied the same three-pronged test explained above in *Leger*. The Court had no trouble in determining that the grounds upon which the appeal against the court order was based involved serious questions of law. It then reviewed the possible irreparable harm that could be caused the applicants, emphasizing that a delay in the obtaining of a monetary remedy does not normally qualify as such harm. However, the Court considered further arguments to the effect that the already long delays in the pay equity dispute, corporate restructuring of Bell, lay-offs, retirements and deaths could very likely result in the complainant's losing contact with numerous persons who would benefit from the favourable resolution of the pay equity dispute. These people would therefore be precluded from sharing in the remedies that a tribunal might ultimately award. In the face of evidence from Bell that complete lists of employees, pensioners and former employees who wish to remain in touch were available, and that little effort had been made by the complainants to compile their own lists, the Court determined that the risk of losing track of people could not be construed as the kind of irreparable harm that would justify a stay. The Court also ruled that delays *per se* resulting in stress to the parties do not necessarily give rise to irreparable harm, especially where difficult and complex legal issues are at stake. Nor does the possibility that the mandates of some tribunal members might expire before the conclusion of the proceedings give rise to irreparable harm. The Federal Court also pointed out the unusual nature of this particular application for a stay: "In most cases in which a stay of proceedings is sought in the context of proceedings before tribunals, a party is seeking to stop the proceedings pending a decision on the merits. Here, a party is seeking to have proceedings resume in the face of a judicial determination of a fatal flaw in the governing statute. Bell Canada should not lightly be denied the benefit of that decision..."[122] The application for a stay was therefore dismissed.

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[121] *CEP, CHRC, CTEA and Femmes Action v. Bell Canada* (29 November 2000), No. A-698-00 (F.C.A.).

[122] *Ibid.* at para. 22.

The Supreme Court of Canada has recently had the occasion to consider a lower court order to stay proceedings before a human rights tribunal in British Columbia, in a case in which the Commission was granted leave to intervene.[123] The matter involved a complaint of sexual harassment brought against a prominent provincial politician (and member of cabinet) which took more than 30 months to reach the adjudicative stage. The two complaints to the B.C. Human Rights Commission were filed some six months after allegations of sexual harassment had been made against the provincial cabinet minister (Mr. Blencoe) by his office assistant, which allegation generated great media attention and resulted in Mr. Blencoe's removal from cabinet and ultimate dismissal from his party's caucus. The circumstances surrounding the complaints before the B.C. Human Rights Commission predated or were unrelated to the incidents complained of by the female office assistant who had originally gone public with her allegations of sexual harassment. It was not until 2 1/2 years after the filing of the two complaints that hearings were scheduled to take place before a human rights tribunal.

A majority of the Supreme Court of Canada concluded that the type of psychological harm that section 7 of the *Charter* protects includes only that which is actually caused by the State and can be characterized as "serious". In the case at bar, a significant part of the prejudice suffered by Mr. Blencoe was related to the intense media attention given the original allegations of his office assistant (who was not involved in the complaints before the Human Rights Commission) and his consequential removal from cabinet and his party's caucus. The Supreme Court felt there was an insufficient causal nexus between the proceedings before a provincial human rights tribunal (including all the attendant delays) and the degree of stress and psychological damage suffered by Mr. Blencoe, who also faced an ongoing civil suit related to the allegations. The Court also determined that the delay did not seriously exacerbate the damage that Mr. Blencoe had already suffered as a result of adverse publicity and stigma surrounding his dismissal from cabinet. Even if a sufficient causal nexus were presumed to exist, the Supreme Court further decided that section 7 of the *Charter* does not protect a free standing individual right to dignity, or protection from the stigma associated with a human rights complaint. Only a narrow range of circumstances involving delays could engage the protections set out in section 7: "It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that

[123] *Blencoe v. British Columbia (Human Rights Commission)* (5 October 2000), No. 26789(S.C.C).

state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest."[124]

Given section 7 protections were not applicable in the circumstances of this case, consideration was briefly given to the possibility of remedies under administrative law. In this regard, the Court pointed out that a stay of proceedings is available where State-caused delays in proceedings have compromised the ability of an individual to have a fair hearing, or where the delays are such as to bring the administration of justice into disrepute. The Court could not conclude that the circumstances surrounding the delays in this case satisfied these requirements, nor that the alleged abuse of process was such as to constitute oppressive conduct by State authorities and hence susceptible to a lesser administrative law remedy. For all of these reasons the stay of proceedings issued by the B.C. Supreme Court was overturned.

The disclosure of documents and claims of public interest immunity

The production of documentary evidence is often an important element in cases heard before a Human Rights Tribunal. The issue of the Tribunal's jurisdiction to decide certain issues of admissibility came before the Federal Court in *Government of the Northwest Territories v. Public Service Alliance of Canada and Canadian Human Rights Commission*.[125] In a hearing involving the issue of pay equity, the Government of the Northwest Territories (GNWT) objected to a Tribunal order to produce certain documents which it claimed were subject to public interest privilege. The Tribunal had ordered their production in order to determine whether, in its view, the claim for public interest immunity should be upheld. The GNWT challenged the validity of this order and sought judicial review of the jurisdiction of the Tribunal to determine the issue of public interest immunity. Parallel to this application, the PSAC and CHRC sought an order of the Federal Court to dismiss the objection of the GNWT to the production of the documents in question. The Federal Court dealt with both the jurisdictional issue as well as the substantive elements of the claim that public interest privilege attached to the documents in question.

In reviewing jurisdictional issues, the Federal Court rejected the argument that the issue of public interest immunity involved an evidential matter over which the Human Rights Tribunal had full authority. This issue was governed by section 37 of the *Canada Evidence Act* (CEA).[126] The provisions of that section recognize,

[124] *Ibid*. at para. 83.
[125] (11 October 2000), No. T-1571-00 (F.C.T.D.).
[126] *Supra*, note 6.

inter alia, that where a Minister of the Crown in right of Canada or other interested person objects to the disclosure of information on the grounds of a specified public interest before a body vested with power to compel production by or pursuant to an Act of Parliament, the matter will be determined by the Federal Court Trial Division in accordance with the rules set out in that section. While section 37 also empowers a superior court to decide such questions, the Federal Court concluded that the Human Rights Tribunal could not be construed as such a court for the purposes of section 37. The Court therefore concluded that "in the case of objections to disclosure of information by the federal government or its agencies, in which I would include the Government of the Northwest Territories which acts pursuant to federal statutes, the general provisions of the Human Rights Act do not, in my opinion, create an exception to the application of ss. 37 to 39 of the CEA. When the objection was here raised by the GNWT with the Tribunal, the latter had no authority, in my view, but to leave to the determination of this Court whether the objection on grounds of public interest immunity should be respected."[127]

As to the merits of the objection, the Federal Court made it clear that no blanket immunity will attach to documents simply because they were used by, or prepared for, the executive arm of government. As the Court declared: "The general public interest in maintenance of confidential documents for efficient working of Cabinet government, without some other identified public interest, does not outweigh the public interest in the administration of justice, here involved in the Tribunal's inquiry into a major complaint of unlawful discriminatory treatment of certain employees."[128] The Federal Court acknowledged that it should proceed cautiously in weighing a specific public interest advanced for a claim of immunity. Factors to consider include the level of decision making process involved, the particular content of documents and the time when a document or information is to be revealed in relation to the level of public interest which might seriously inhibit proper functioning of Cabinet government.

In the case at bar, the GNWT identified the specific public interest for which protection was sought as being "effective collective bargaining with public sector employees' unions, and with related matters affecting employees' interests, such as job classification systems."[129] While the Court conceded that confidentiality concerning a government's strategy and planning of collective

[127] *Supra*, note 125 at para. 35.
[128] *Ibid.* at para. 17.
[129] *Ibid.* at para. 24.

bargaining was an important public interest, it was only so during a time frame of relevance to the bargaining process. As the Court said:

> "...public interest immunity in that information, without some greater explanation or evidence of prejudice, would not extend beyond conclusion of a collective agreement, unless the information concerns an ongoing matter of difference that is likely to be the subject of bargaining in a future round. A report on matters that have been agreed upon in the bargaining could hardly qualify as privileged on grounds of public interest some months or years after the agreement reported upon is in effect."[130]

The principles set out in this judgement were used by the Federal Court to review the documents for which a public interest had been claimed. Some of the information contained in these documents was ordered produced before the Human Rights Tribunal. Where some of the information in a given document was covered by public interest immunity, those parts were ordered excised before the remainder of the document was produced before the Tribunal. The Court further ordered the Tribunal to consider any other grounds of privilege, not related to public interest immunity under s. 37 of the CEA, that might be claimed by the GNWT with respect to the information released pursuant to the Court's order. Claims of privilege unrelated to s. 37 of the CEA were thus considered evidential matters with which the Human Rights Tribunal was fully competent to deal.

Settlement prior to adjudication

Given the role that settlement is intended to play under the *Act*, section 48 was amended in 1998 to provide for settlements between the parties at any time before the commencement of a hearing before a Human Rights Tribunal. Section 48 of the *Act* also provides that the settlement, once approved by the Commission, may be made an order of the Federal Court upon application to that Court by the Commission or a party to the settlement. In cases where the parties to a settlement agree to make it a court order, the Federal Court has ruled that proceedings leading to that result can be commenced by way of notice of motion with supporting affidavit and written submissions. Although the specific matter before it had been brought by way of application,[131] and hence could not technically be disposed of summarily upon consent of the parties, the Federal Court determined that the Rules of Court allowed the parties to be relieved of the obligation to comply with the relevant rules and to have the matter disposed of by way of written submissions.

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[130] *Ibid.* at para. 24.

[131] *Attorney General of Canada v. National Indian and Inuit Community Health Representatives Organization* (23 June 2000), No. T-981-00 (F.C.T.D.).

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