Canadian Human Rights
TRIBUNAL

Canadian Human Rights TRIBUNAL

ANNUAL REPORT 2001

Canada

Canadian Human Rights Tribunal

The Canadian Human Rights Tribunal is a quasi-judicial body that hears complaints of discrimination referred to it by the Canadian Human Rights Commission and determines whether the activities complained of violate the *Canadian Human Rights Act* (CHRA). The purpose of the Act is to protect individuals from discrimination and to promote equality of opportunity.

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

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

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

Canadian Human Rights Tribunal

March 31, 2002

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

Dear Mr. Speaker:

I have the honour to present to you the 2001 Annual Report of the Canadian Human Rights Tribunal in accordance with subsection 61(3) of the *Canadian Human Rights Act*.

Yours sincerely,

Anne L. Mactavish
Chairperson

Canadian Human Rights
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March 31, 2002

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

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Message from the Chairperson

There have been many positive developments as the Canadian Human Rights Tribunal completes its third year in its restructured form. After an initial 'test drive,' the Tribunal's draft Rules of Procedure appear to be working well, and will soon become regulations. Clarification has been obtained from the Federal Court with respect to the standard of review applicable to the restructured Tribunal. Most importantly, the Tribunal has been able to manage a significantly increased workload.

Some things never change, however, and the issue of the independence and impartiality of the Canadian Human Rights Tribunal remains an ongoing concern. In May the Federal Court of Appeal set aside the decision of Madam Justice Tremblay-Lamer, finding that the Tribunal does indeed enjoy a sufficient level of independence from both the government and the Canadian Human Rights Commission to allow it to provide Canadians with fair and impartial hearings. The decision of the Federal Court of Appeal allowed the Tribunal to proceed with cases that had been put on hold as a result of Madam Justice Tremblay-Lamer's decision. In December, however, the Supreme Court of Canada granted Bell Canada leave to appeal the decision of the Federal Court of Appeal.

It remains to be seen what effect this most recent development in the Bell Canada saga will have on the day-to-day operations of the Tribunal. What is certain, however, is that until such time as the Supreme Court of Canada renders its decision in the Bell Canada appeal — likely in the spring of 2003 — questions with respect to the institutional independence and impartiality of the Canadian Human Rights Tribunal will remain.

Canadians involved in the human rights process are entitled to have their cases heard by an independent and impartial Tribunal. As I noted in last year's message, the ongoing concerns regarding the independence of the Canadian Human Rights Tribunal can only serve to undermine the credibility of the Tribunal, and the public confidence in the institution. We do not know what the Supreme Court of Canada will decide in the Bell Canada matter. In the meantime, the only way to ensure that the Canadian Human Rights Tribunal is institutionally independent and impartial is through legislative action.

Anne L. Mactavish

Refining the human rights delivery process

Consolidating our gains

The Canadian Human Rights Tribunal enjoyed a year of relative stability in 2001, notwithstanding the increased workload brought on by the resumption in June of hearings involving approximately 17 private employers that had been put on hold since November 2000 and the record number of new referrals. Modifications to Tribunal operations, precipitated by the organizational restructuring that began in 1999, enabled the Tribunal to process cases more efficiently than ever before, helping to offset the growing workload. Even so, the tripling of the Tribunal's caseload since the late 1990s necessitated the appointment of two new full-time members, a development that will help stabilize the planning and hearings process.

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Allegations of institutional bias — The sequel

On November 3, 2000, the Federal Court ruled that two sections of the *Canadian Human Rights Act* compromised the institutional independence and impartiality of the Canadian Human Rights Tribunal. Ruling on an application for judicial review of an interim decision of the Tribunal, the Court found that the Tribunal was precluded from making an independent judgment in any class of cases in which it was bound by interpretive guidelines issued by the Canadian Human Rights Commission. In the opinion of Justice Tremblay-Lamer, the fact that the Commission has the power to issue such guidelines gives it a special status that no other party appearing before the Tribunal enjoys, and means that one party to the proceedings can "put improper pressure on the Tribunal as to the outcome of the decision in a class of cases." She found that the Tribunal's decision-making power was "unquestionably fettered" by the Commission's power to issue binding guidelines interpreting the Act. The Court also found that a second provision of the *Canadian Human Rights Act* compromised the institutional independence of the Tribunal. Under subsection 48.2(2), the Tribunal Chairperson has the power to extend the term of appointment of a Tribunal member whose term expires during the course of a hearing over which he or she is presiding. "The principle of institutional

independence requires that a tribunal is structured to ensure that the members are independent," said Madam Justice Tremblay-Lamer. "In the case at bar, the ability of a member to continue the case will depend on the discretion of the Chairperson. The difficulty is not necessarily in the manner in which the discretion is exercised but rather in the existence of the discretion itself. … In my opinion, given the high level of independence required, only an objective guarantee of security of tenure will give the necessary protection and afford the member the quietude needed to render a decision free of constraint," she said. "There exists no objective guarantee that the prospect of continuance of the tribunal member's duties after expiry of his or her appointment would not be adversely affected by any decisions, past or present, made by that member." Finding that the two flawed provisions of the Act compromised the institutional independence and impartiality of the Tribunal, the Court ordered that further proceedings in the pay equity complaint against Bell Canada be suspended until the problems created by the two offending sections of the Act had been corrected.

The impact of this decision was considerable. Not only was the Bell Canada case put on hold, but many other cases were also adjourned indefinitely.

On May 24, 2001, the Federal Court of Appeal set aside the decision of Justice Tremblay-Lamer. The Court noted that the Tribunal did not wield punitive powers, that no constitutional challenge had been made to the statute and that any guidelines passed by the Commission were subject to Parliamentary scrutiny. The Court noted that the 1998 amendments to the *Canadian Human Rights Act* meant that the Commission no longer had the power to issue guidelines binding on the Tribunal in a 'particular case' but only in a 'class of cases.' In the Court's view, the modified legislation, which has a general application, is less likely to give rise to a reasonable apprehension of institutional bias.

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The Federal Court of Appeal also addressed the argument that the powers of the Commission conflicted, in that its quasi-prosecutorial role and its role in setting guidelines overlapped. In the Court's view these functions were exercised separately and apart from one another, alleviating any implications of bias.

With respect to the power of the Chairperson to extend the term of any member of the Tribunal whose appointment had expired during an inquiry until that inquiry had concluded, the Court found that this power was not fatal to the institutional independence of the Tribunal. It found that the Chairperson herself was sufficiently insulated from the government, noting that the Chairperson cannot be

capriciously removed from office because of decisions made by her in the administration and operation of the Tribunal. Additionally, if the Chairperson were to abuse her power in extending or refusing to extend the appointment of a Tribunal member for reasons wholly extraneous to the proper administration of the Tribunal, her decision would be reviewable pursuant to section 18.1 of the *Federal Court Act*. Finally, the Court reiterated that the Tribunal's powers are remedial, not punitive, and thus the requirements of fairness are less stringent.

On December 13, 2001, the Supreme Court of Canada granted Bell Canada leave to appeal the decision of the Federal Court of Appeal. It is unlikely that there will be a final decision from the Court until at least the middle of 2003. In the interim the Tribunal will continue to operate in an atmosphere of uncertainty. This uncertainty undermines the credibility of the Canadian Human Rights Tribunal and does nothing to enhance public confidence in the institution. The Tribunal is of the view that only legislative action can resolve these concerns with the desired speed and certainty.

Acting on the recommendations of the *Canadian Human Rights Act* Review Panel

In June of 2000, the *Canadian Human Rights Act* Review Panel delivered its report entitled *Promoting Equality: A New Vision*. Chaired by former Supreme Court of Canada Justice the Honourable Gérard La Forest, the Panel made several recommendations intended to bring the legislation into step with contemporary concepts of human rights and equality and to modernize Canada's process for resolving human rights disputes. In particular, the Panel recommended substantial changes to the current complaint process with a view to "ending the Commission's monopoly on complaint processing." The Panel recommended that the Act provide a process allowing claimants to bring their cases directly to the Tribunal with public legal assistance. In the proposed system, the Canadian Human Rights Commission would cease to investigate complaints, eliminating potential "institutional conflicts between the Commission's role as decision maker and advocate." Both the initial screening of claimants and the investigation phase, currently conducted by the Commission, would instead be undertaken by the Tribunal, and the Commission would cease to be a gatekeeper between complainants and the Tribunal.

In particular, the Panel recommended substantial changes to the current complaint process with a view to "ending the Commission's monopoly on complaint processing."

The impact of such a profound change in process could be significant for the Tribunal. It would increase the Tribunal's yearly caseload from 100 or so new cases to as many as 500–600 cases. Such a dramatic increase would necessitate a larger Tribunal, one with more members and a greater research and administrative capacity. The Tribunal would also have to develop new methods of operation, including a new system

of case management. Considerable work has been done over the last year to prepare for the implementation of the Panel's recommendations.

Enhancing Tribunal operations

Amendments to the *Canadian Human Rights Act* in 1998 gave the Tribunal Chairperson the authority to institute Rules of Procedure governing the conduct of Tribunal hearings. This jurisdiction extends to rules governing notice to parties, summons to witnesses, production and service of documents, prehearing conferences and the introduction of evidence.

Draft rules were introduced in 1999. They were designed to encourage the full prehearing disclosure of evidence and the identification of all issues well before the hearing. The objective was to achieve a more focused hearing and to minimize the need for adjournments.

Since their introduction, the rules have reduced logistical problems related to disclosure and have facilitated the handling of legal and procedural motions. They will be forwarded to the Regulatory Section of the Department of Justice in 2002 for approval as regulations and publication in the *Canada Gazette*.

Another improvement in Tribunal operations has been the elimination of routine prehearing meetings and case conference calls. The introduction of a detailed questionnaire to obtain the necessary administrative planning information has proven to be an effective case management tool. The introduction of the questionnaire alone has reduced the time it takes to schedule hearings by one to three months. Extensive use of case management techniques allows the Tribunal to establish schedules for the exchange of documents, the production of expert reports and witness statements, and the hearings themselves. Conference calls continue to be used to address specific problems that may arise in the prehearing process, including disputes about the appropriate location of the hearing, motions relating to the adequacy of the disclosure obtained from opposing parties and adjournment requests. Preliminary motions on procedural or jurisdictional matters that must be addressed before the hearing are now often dealt with in writing, significantly reducing the costs associated with such motions. Finally, the Chairperson has imposed tighter restrictions on the planning, scheduling and granting of adjournments and postponements, leading to a more efficient use of resources, fewer last-minute adjournments and, ultimately, a speedier and less costly adjudication process.

Preliminary motions on procedural or jurisdictional matters that must be addressed before the hearing are now often dealt with in writing, significantly reducing the costs associated with such motions.

Table 1 illustrates the downward trend in case processing times between 1995 and 2001 with the exception of 1998, the year a Federal Court decision prompted the suspension of all cases until amendments to the *Canadian Human Rights Act* came into effect on June 28, 1998. Note that the figures relating to cases referred in 2001 are skewed by the relatively small number of cases that were referred in 2001 that were closed by the end of the year. We expect the final figures will nevertheless demonstrate continued improvements in processing efficiency.

Expediting Tribunal decisions

Although the human rights process in Canada is notoriously plagued with delay — resulting in increased stress for the parties, lapsed memories, lost documents, missing witnesses and, consequently, a more challenging adjudication process for the Tribunal — the Tribunal itself does not contribute significantly to process delays. In fact, its case management procedures enable the Tribunal to schedule hearings as soon after the case is referred from the Canadian Human Rights Commission as the parties are ready to

Table 1

Average Tribunal processing times for cases referred yearly, 1995 to 2001

	1995	1996	1997	1998	1999	2000	2001
Time to first Tribunal communication to parties (weeks)	6.7	3.27	3.2	5.8	2.2	1	1.7
Time to hold case planning conference call or questionnaire returns (weeks)	16.7	13.6	10.8	17.6	10.4	5.1	5.7
Time until case settled (weeks)	n/a	n/a	37	28.7	34.1	31.5	26.4
Time to last day of hearing (cases that proceeded to hearing only) (weeks)	43.4	50.3	27.8	67.3	50	34.9	31.9
Time to release the decision (weeks)	21	29	10.8	18	18.4	22	6.3
Total time to process case (all cases, including settlements) (to December 31, 2001) (weeks)	64	42.3	37.2	47.6	38.8	36.3	24.9
Cases pending	0	0	0	0	1	3	40

n/a = not applicable

proceed. Since parties usually wait until a case is referred to the Tribunal before engaging counsel, there is usually a five-to-six-month time lag between the referral and the start of the hearing to give the lawyers time to prepare. The Tribunal is ready to proceed when the parties are: it can ordinarily hold a hearing on any issue within five days — sometimes even within 24 hours — after receiving a Commission referral or motion.

Although the Tribunal does not contribute to prehearing delays, it could, nevertheless, accelerate human rights enforcement by shortening the time required to produce a final decision once hearings end. Despite the fact that Tribunal members have been trained in the analysis of evidence, the assessment of credibility and the drafting of decisions, a growing caseload has saddled part-time Tribunal members with more cases than their other professional commitments can accommodate, increasing the delay between the end of the hearing and the rendering of a decision. It is expected that the appointment of two new full-time members in 2002 will expedite the rendering of Tribunal decisions.

Keeping the public informed

Interest in the Tribunal's Web site has nearly tripled to 2100 visits per week compared with an average of 800 per week last year. The site provides rapid access to Tribunal decisions and procedural rulings and contains general information about the Tribunal, including its mandate and services. Annual reports, financial reports and other public documents, such as the *Canadian Human Rights Act*, the *Employment Equity Act* and the Tribunal's Rules of Procedure, are accessible on the site. And there are pages that answer frequently asked questions and link visitors to alternate human rights resources, as well as to the Web sites of other human rights organizations in Canada.

In an ongoing crusade to make information and resources increasingly accessible to the public, the Tribunal is creating a layperson's guide to the workings of the Tribunal and has improved access to its facilities and resources for people with disabilities. A TTY system, a communications device for those with a hearing impairment, was installed at the Tribunal's administrative headquarters in Ottawa, and work began in 2001 to translate some of the Tribunal's plain language resources into Braille.

International relations

Every year, representatives of the Tribunal meet with individuals involved in the human rights process in other countries who are visiting Ottawa. The primary purpose of these meetings is to offer foreign nationals the opportunity to learn about the adjudication of human rights complaints in Canada. Inevitably, these guests impart at least as much knowledge as they gain, and 2001 was no exception.

Representatives from the Indonesian National Commission on Human Rights, the National Human Rights Commission of Nepal, the Institute of Comparative and International Law of Brasilia and the Ugandan High Commission were among the visitors with whom Tribunal members exchanged experiences and insights in 2001.

New developments and emerging trends

Mounting caseload prompts new appointments

The number of new cases being referred to the Tribunal continues to increase. In the five-year period leading up to 2000, the Tribunal averaged 25 new referrals a year. (See Table 2.) In 1999, there were 37 new referrals, and in 2000, there were 73. This trend continued in 2001 with 87 new cases being referred to the Tribunal for hearing. The Canadian Human Rights Commission informed the Tribunal in 2000 that the number of new referrals would stabilize at about 100 annually. This is the volume of new cases expected in 2002. To cope with its mounting caseload, the Tribunal sought and obtained in 2001 the appointment of two highly experienced full-time members.

As noted in the Tribunal's Annual Report 2000, an increase in disability case referrals has been a significant contributor to this growing caseload. Recent Supreme Court rulings on disability cases and a 1998 amendment to the *Canadian Human Rights Act* introducing a duty to accommodate in cases of direct discrimination have ushered in a period of uncertainty about employers' obligations to meet the needs of people with disabilities. Not surprisingly, disability-related cases accounted for a large share of Tribunal decisions in 2001. Such cases will likely continue to dominate the Tribunal's caseload until the new standards for employers and service providers have been fully explored and interpreted by the Tribunal.

Employment equity

The *Employment Equity Act* was amended in 1996, to apply to both public and private sector employers. Under the amended legislation, both employers and the Canadian Human

Table 2

Tribunals created

Year	1996	1997	1998	1999	Average 1996 to 1999	2000	2001	2002 and 2003 projected
Number of referrals	15	23	22	37	**25 cases**	73	87	100

Note: Includes employment equity cases

Rights Commission can seek to have a case heard by the Employment Equity Review Tribunal, which is composed of members of the Canadian Human Rights Tribunal.

The Tribunal received its first three applications for hearings under the *Employment Equity Act* in 2000, and a further four cases in 2001. Many of these cases have been settled, and while jurisdictional motions have been heard in two cases, no cases have yet proceeded to a full hearing. However, several are scheduled to begin hearings in 2002 and will serve as test cases of the 1996 statute.

Although the Tribunal is permitted to issue rules of procedure for the operation of the new Employment Equity Review Tribunal, it plans instead to conduct a few hearings to obtain a better sense of the needs of the parties before issuing any new rules. In the interim, the Tribunal has produced a guide, *Guide to the Operations of the Employment Equity Review Tribunal* (available at: http://www.chrt-tcdp.gc.ca/english/publidoc.htm), which has been made available to all litigants to help them prepare for hearings.

Standard of judicial review

In October the Federal Court of Canada rendered its decision in *Oster v. International Longshoremen's and Warehousemen's Union*. *Oster* was the first final decision of the restructured Canadian Human Rights Tribunal to be judicially reviewed by the Federal Court. The Tribunal consequently sought permission to appear before the Court in these proceedings to make submissions on the issue of the appropriate standard of review to be applied to decisions of the restructured Tribunal.

In his decision, Mr. Justice Gibson ruled that the standard for overturning a Tribunal decision depended on the type of Tribunal finding being challenged. Tribunal findings of fact were the most immune to reversal by the Court, he said, and a Tribunal finding of fact would enjoy the deference of the Court unless that finding was patently unreasonable. On Tribunal rulings pertaining to mixed questions of fact and law, the Court said that the finding would be allowed to stand only if it was reasonable, that is, the Court would apply a standard of "reasonableness *simpliciter*." Pure questions of law would be subject to a standard of correctness; in other words, they would be immune from reversal only if the Court was satisfied that it would have reached the same conclusion as the Tribunal did.

In addition to the changes to the structure of the Canadian Human Rights Tribunal, there have been several developments in the law relating to the issue of deference since the Supreme Court of Canada last looked at the issue in relation to the Tribunal's predecessor (the Human Rights Tribunal) in *Canada (Attorney General) v. Mossop* in 1993. The decision of the Federal Court in *Oster* will undoubtedly provide welcome guidance to litigants and courts of higher authority in future reviews of Tribunal decisions.

Cases

The Tribunal's caseload continues to mount, with 83 new complainants referred in 2001. The decision of the Federal Court of Appeal in May, overturning the November 2000 Trial Division ruling of Madam Justice Tremblay-Lamer, enabled the Tribunal to resume hearings as usual, and the Tribunal rendered 18 final decisions and 32 written rulings in 2001.

Table 3 traces the steady growth in Tribunal appointments and hearing days since fiscal year 1999. The dip in the number of hearing days in 2001–2002 reflects both an unusually high rate of settlement and the fact that most hearings were suspended for part of 2001 in the wake of the ruling of Madam Justice Tremblay-Lamer. Discussions with the Canadian Human Rights Commission indicate that the exceptionally high rate of settlement of the past two years was an anomaly prompted by a push on the part of the Commission to clear its backlog of cases. The annual rate of settlement, which includes both settlements that precede the first day of hearings and those that take place once hearings have started, is expected to return to its earlier norm of 65–70% in 2002.

Table 3

Public hearings facts and figures

	Fiscal year*			
	1999–2000	2000–2001	2001–2002 (as of January 31, 2002)	2002–2003
Cases assigned to Tribunals	37	70	83	90
Employment Equity Review Tribunals appointed	0	3	4	10
Total appointments	37	73	87	100
Cost per case ($ thousands)	50	40	45	45
Total number of hearing days	218	278	244	420
Percentage of cases in which the parties settled	76.4	76.4	81	70

* *The fiscal year runs from April 1 to March 31.*

Tribunal decisions rendered

***Nkwazi* v. *Correctional Service of Canada* (Mactavish)**

Date referred: 11/26/1999

Decision date: 02/01/2001

Number of hearing days: 14

Beryl Nkwazi worked as a casual nurse in a Regional Psychiatric Centre operated by the Correctional Service of Canada. The Tribunal found that one of Ms. Nkwazi's superiors had told her she was required to take a "rest period" before beginning a new work term. This rest period coincided with the advertisement of a competition for a term staff nurse position. In the Tribunal's view, the supervising nurse deliberately misled the complainant to prevent her from competing for the post. It also found that this conduct was motivated by Ms. Nkwazi's race or colour. Although the complainant did ultimately compete for the position, she was upset by her supervisor's conduct and was unable to demonstrate her true potential. On another occasion, the same supervisor also told the complainant that the informatics department had been unable to provide Ms. Nkwazi access to a computerized information network because of her name. The Tribunal perceived this as a reference to her ethnicity. When the complainant finally complained to senior management about the treatment she'd received, they refused to renew her contract and eventually had her escorted from the workplace by a correctional guard. A reference letter relating to Ms. Nkwazi's performance furnished by the Centre was equivocal to the point of helping to dissuade a new potential employer from hiring her. Management's retaliation against Ms. Nkwazi for her complaint in the workplace occurred before the *Canadian Human Rights Act* specifically prohibited such conduct; nonetheless, it was relevant to the question of damages. The Tribunal ordered reinstatement of Ms. Nkwazi, reimbursement for lost wages and the issuance of an apology to her. It also ordered damages for hurt feelings and for wilful or reckless conduct. In a related ruling dated March 29, 2001, the Tribunal ordered that Ms. Nkwazi's legal costs be reimbursed.

***McAllister-Windsor* v. *Human Resources Development Canada* (Mactavish)**

Date referred: 06/16/2000

Decision date: 03/09/2001

Number of hearing days: 4

The *Employment Insurance Act* provides certain special benefits to people who are unemployed for reasons other than lack of work. At the time in question, the *Employment Insurance Act* provided a maximum of 15 weeks of maternity benefits, 10 weeks of parental benefits and 15 weeks of sickness benefits. The Act also provided that no person could receive more than 30 weeks of combined special benefits. The complainant suffered from an incompetent cervix, a disability requiring bed rest during much of her pregnancy. She collected 15 weeks of sickness benefits while pregnant and, following the birth of her daughter, she collected 15 weeks of maternity benefits. Having reached the 30-week limit for combined special benefits, she was subsequently denied parental benefits. The Tribunal found that the 30-week limit on combined special benefits discriminated against the complainant on the grounds of sex and disability; women in her situation were uniquely excluded from receiving parental benefits, it found, simply because they had been obliged to take sickness benefits. (In the complainant's case, there was no doubt that the sickness benefits had been taken in relation to a disability.) In the Tribunal's view, this discriminatory 30-week limit could not be justified. Although eliminating the limit would impose additional financial liability on the Employment Insurance fund (about an extra $3 million per year), it would not cause undue hardship for a fund with a surplus of about $29 billion. The Tribunal ordered the respondent to cease enforcing the 30-week limit, and the complainant was awarded $2,500 for hurt feelings.

***Popaleni and Janssen* v. *Human Resources Development Canada* (Mactavish)**

Date referred: 06/16/2000

Decision date: 03/09/2001

Number of hearing days: 4

The *Employment Insurance Act* allows a claimant to combine regular benefits (payable by reason of lack of work) with special benefits (payable by reason of sickness, maternity or parental leave). However, the *Employment Insurance Act* also provides that where a claimant is eligible for more than 30 weeks of regular benefits, the claimant's combined benefit eligibility (regular and special benefits) cannot exceed his or her regular benefit eligibility. The complainants each received maternity and parental benefits. Pursuant to the above rule, their entitlement to regular benefits was reduced. They alleged discrimination on the ground of sex.

(Ms. Popaleni also alleged discrimination on the ground of family status). The Tribunal dismissed the complaint. It found that the combined benefit rule was not discriminatory because it also limited the regular benefit eligibility of men who took parental benefits and of non-parents who received sickness benefits. Thus it did not have an exclusive adverse effect on women or parents.

***Vollant* v. *Health Canada, Parenteau and Bouchard* (Doyon)**

Date referred: 08/04/1999

Decision date: 04/06/2001

Number of hearing days: 12

The complainant, Jeanne-d'Arc Vollant, of Aboriginal descent, was employed as a driver/escort/interpreter in the branch of Health Canada that provided health care services to Aboriginal people living in remote communities in Quebec. Ms. Vollant alleged that Reine Parenteau and Noëlla Bouchard, her superiors, had harassed her on the basis of national or ethnic origin. She also alleged that Health Canada refused to provide her with a harassment-free workplace, differentiated adversely against her in employment and refused to continue to employ her on the basis of her national or ethnic origin. The Tribunal dismissed the complaints. The evidence did not support the allegation that the respondent Ms. Parenteau had a perfectionist or paternalistic attitude toward the complainant or the clients of the service. Rather, as a supervisor, Ms. Parenteau understandably exhibited vigilance with respect to checking the quality and execution of the work performed. When Ms. Vollant complained about Ms. Parenteau's conduct, the respondent Ms. Bouchard did not err in refusing to immediately transfer Ms. Parenteau; she properly obtained Ms. Parenteau's side of the story. Further Ms. Bouchard's comparisons of Band Council employment practices to public service employment practices or of the Aboriginal clients to children were not discriminatory when taken in their proper context. As for Health Canada, it took prompt action in the face of an allegation of harassment by attempting to facilitate a dialogue, trying to foster mutual understanding and ultimately conducting an internal inquiry. The reduction of the complainant's hours of work was motivated by genuine operational considerations and did not constitute retaliation. Nor did Health Canada intervene to the complainant's detriment during the administrative transfer of the patient services to the Aboriginal communities. It did not improperly block her bid for the contract to provide the services, nor did it discourage the successful

bidder from employing her. And it did not act unfairly in laying her off pursuant to the Workforce Adjustment Directive. **[Judicial review pending]**

***Wignall* v. *Department of National Revenue (Taxation)* (Chicoine)**

Date referred: 05/12/2000

Decision date: 06/08/2001

Number of hearing days: 3

The complainant was a deaf university student. The university provided and paid for sign language interpreters during his classroom lectures. At the school's request, the complainant sought additional funding for the interpretation services, and received a Special Opportunities Grant for Students with Permanent Disabilities from the Government of Canada. While the complainant turned all the money over to the university, Revenue Canada required that he report it in his income tax return as a taxable bursary. He alleged that this amounted to the discriminatory provision of services, on the ground of disability. The Tribunal dismissed the complaint. It noted that the Special Opportunities Grant was a source of income for the recipient, like all other grants, bursaries and scholarships (regardless of whether they are awarded based on the recipient's personal characteristics). As such, the grant must be declared as income. Furthermore, the complainant was not awarded the grant solely because of his disability; he also had to satisfy a means test and agree to use the funds for assistance in classroom accommodation. The amount of the grant took into account the student's own ability to pay. The fact that it was taxable (to a minimal degree) for some recipients also reflected their particular financial capabilities. The Tribunal held that the government needs latitude in selecting the exact level of assistance provided. It also held that the complainant was not taxed because he was disabled, but because he received income to assist him with his education costs. As a rule, disabled persons are not exempt from the payment of income tax, but must fulfill the obligations they share with all members of society. The minimal tax burden borne by the complainant was ultimately the result of the university's policy and its inability to receive the funds directly. Even so, it did not prevent the complainant from obtaining an education. **[Judicial review pending]**

***Wong* v. *Royal Bank of Canada* (Sinclair)**

Date referred: 03/15/2000

Decision date: 06/15/2001

Number of hearing days: 22

The complainant was of Chinese origin and worked at the Royal Bank Call Centre. After working for about 16 months at the call centre, she applied for a training program. The usual criteria for acceptance were two years at the Royal Bank and two annual appraisals. Although Ms. Wong had worked at the call centre for only 16 months, the centre put her name forward as a candidate. Ms. Wong was not accepted into the program, and she believed that it was because of her annual appraisal, which she viewed as unsatisfactory. She subsequently stopped working and commenced medical leave. She was diagnosed with depression. While on leave and receiving disability benefits, she commenced employment with Canada Trust. Eventually, the Royal Bank learned of this conduct and terminated her employment. She alleged that the Royal Bank discriminated against her by refusing her job opportunities on the grounds of race and ethnic origin, and by failing to accommodate her disability (depression). The Tribunal dismissed the complaint. The evidence indicated that the complainant's appraisals were in fact above average for someone with her amount of experience in the job. The complainant was not selected for the management training program because others were more qualified and because her attitude of persistent self-advancement was considered a weakness by her employer. The Tribunal found that her employer's decision to deny her entry into the program was not based on perceptions about her ethnic origin. Of the successful candidates several were of Asian origin, with longer tenure at the Royal Bank. While the complainant was on sick leave, the Royal Bank did not differentiate adversely in relation to her. It attempted to find alternative work that would be acceptable to her, given her medical condition. It also maintained her on the Royal Bank's disability benefits program. In the circumstances, the Royal Bank was not obliged to instate her into the management program. In dealing with her absence, it acted reasonably on the basis of the medical information that was made available to it. When the Royal Bank eventually terminated the complainant's employment for dishonesty, it did so justifiably; the medical evidence did not support her claim that her mental illness had caused her to be untruthful. Contacting Canada Trust to confirm the complainant's misconduct was not an act of retaliation.

***Crouse* v. *Canadian Steamship Lines Inc.* (Mactavish)**

Date referred: 10/13/2000

Decision date: 06/18/2001

Number of hearing days: 3

The complainant was refused employment as a permanent relief electrician on the respondent's cargo vessels. He alleged discrimination on the grounds of perceived alcohol dependency (disability). The complainant had worked for the respondent in 1988 and had been dismissed for intoxication and incompetence. The respondent notified him that he would not be re-hired until he had addressed both of these issues. The complainant provided documentation to the respondent, which the latter found satisfactory, indicating that he did not require addiction treatment. The respondent also asked for positive work references from other employers. While he provided some positive references from work on less demanding ships ("bulkers"), the complainant never attempted to upgrade his qualifications to a level commensurate with the more technically complex cargo vessels ("self-unloaders"). In 1995 the respondent hired him to work as a relief electrician on a self-unloader, where he received a satisfactory performance appraisal. However, he was denied employment in 1996 as permanent relief electrician on a self-unloader on the grounds of "his past work history." The Tribunal found that the denial of employment was based on the respondent's reasonable belief that the complainant lacked the necessary competence to work as a permanent relief electrician on self-unloaders. Had the respondent still been concerned about the complainant's alcohol use, it would have never hired him in 1995. The respondent's willingness to hire him in 1995, but not in 1996, can be explained by the fact that the responsibilities of the latter position were significantly more onerous. Moreover, the complainant's failure to comply promptly with the respondent's earlier information requests left the impression that he was not seriously interested in working for the respondent.

***Daniels* v. *Myron* (Sinclair)**

Date referred: 01/17/2001

Decision date: 07/16/2001

Number of hearing days: 1

The complainant was a member of the Long Plain First Nation and a university student who worked for the summer at the Health Centre on the Long Plain First Nation Reserve. The respondent, her supervisor, asked her to accompany him on an overnight business trip to Winnipeg. Upon arrival at the hotel, the complainant was surprised to learn that the respondent had only booked one room with two double beds. That night, after consuming several beers, the respondent lay down beside the

complainant on her bed, put his arms around her and told her he wanted to be with her. When she rejected his advances, he persisted, asking her repeatedly to turn around to be with him. Finally, the respondent moved over to his own bed and insisted that the complainant join him there. She refused. Eventually he passed out. The next day, the respondent informed the complainant that the meeting that had been the reason for their trip had been cancelled. He told her not to mention the previous night to the other summer students. Because of the incident, the complainant stopped working at the health centre, her psychological health suffered and she began drinking heavily. When university classes resumed, her academic performance was poor and she lost her year. Eventually she consulted a psychologist who assessed her as suffering from post-traumatic stress disorder. The Tribunal concluded that the respondent had sought to involve the complainant in some form of sexual activity and that this constituted both workplace sexual harassment and differential treatment on the basis of gender. (The respondent, who had received notice of the hearing, did not attend to rebut the complainant's and Commission's case.) The Tribunal ordered damages for lost wages, emotional suffering and legal expenses. It also ordered the respondent to apologize and attend sensitivity training.

***Cizungu* v. *Human Resources Development Canada* (Doyon)**

Date referred:
01/17/2001

Decision date:
07/31/2001

Number of hearing days: 5

The complainant, who was black and originally from Zaire, was employed as an information officer for six months. He worked in a call centre answering inquiries about the department's Income Security Programs. His original three-month contract was renewed for a second period of three months. The complainant hoped to obtain yet another renewal, but was allegedly informed by management that this would not happen because there was a problem with his accent. He alleged discrimination on the grounds of race, colour and national or ethnic origin. The Tribunal concluded that the complainant's contract had not been renewed due to his relatively poor performance, but that the complainant's slight accent played no role in the respondent's performance evaluation. Rather, the evaluation revealed that when callers did not understand what the complainant said, he would repeat the information in exactly the same manner, without using different words or phrasing to facilitate comprehension; as a result, the complainant spent too much time on the phone with each caller, thereby processing fewer calls. The complainant

was made aware of this shortcoming, but did not improve. The complainant was monitored in the same manner as all other staff. Moreover, another visible minority employee in the group where the complainant worked was offered a contract renewal, and visible minority employees formed 7.6% of the call centre staff. The complaint was dismissed.

***Chopra* v. *Department of National Health and Welfare* (Hadjis)**

Date referred: 04/09/1998

Decision date: 08/13/2001

Number of hearing days: 31

The complainant alleged that the respondent, in staffing a management position, had differentiated adversely against him on the basis of race, colour or national or ethnic origin. When the position in question had become vacant, the complainant immediately expressed his interest in filling it, at least on a trial acting rotational basis. His superiors, however, refused his request. Instead, they allowed a non-visible minority candidate to act in the position despite her lack of technical qualifications. They persisted in doing so despite a Public Service Commission Appeal Board decision forbidding this staffing practice. Consequently, when a competition was ultimately held, the other candidate benefited from the significant advantage of having recently acted in the position, while the complainant was deprived of the recent management experience he required to even be considered for the job. The Tribunal concluded that the respondent's refusal to allow the complainant to act in the position was influenced by a perception that, as someone of non-North American origin, he lacked the cultural attributes necessary for a career in management. In particular, the respondent's senior staff were predisposed to thinking that the complainant would be too authoritarian, and lack tact in his interpersonal contacts. Evidence of these beliefs appeared in an internal memo that commented on the career potential of visible minorities, and the complainant in particular. The respondent's explanation that the complainant was not allowed to act in the position because he lacked management experience was not credible; it was provided well after the fact and was inconsistent with the respondent's willingness to let another candidate act who lacked the technical qualifications. Finally, when the complainant alleged improper conduct by the respondent, the respondent altered the final version of the complainant's performance appraisal. The complaint was substantiated, with the question of remedy being left to the parties.

Kavanagh* v. *A.G. of Canada (Correctional Service of Canada)
(Mactavish, Goldstein and Sinclair)

Date referred: 12/22/1998

Decision date: 08/31/2001

Number of hearing days: 11

The complainant was a transsexual federal inmate who had been diagnosed with Gender Identity Disorder: although she possessed the anatomy of a male, she identified with the female gender. This incongruity caused her to suffer from a stressful condition called gender dysphoria. She sought to live as much as possible as a woman. The respondent's policies stipulated that anatomically male transsexuals were to be kept in male institutions and were not permitted to receive sex reassignment surgery during incarceration. The complainant alleged that these policies were discriminatory. The Tribunal held that while the policy regarding the placement of pre-operative transsexuals was discriminatory, this could be remedied by obliging the respondent to accommodate the individual needs and vulnerabilities of the transsexual inmates vis-à-vis the general population. The respondent, however, was not required to place transsexual anatomical males in a female institution; to do so would threaten the psychological and physical well-being of the female inmate population, many of whom had been traumatized by abuse suffered at the hands of men. Moreover, the creation of a dedicated facility for transsexuals was not logistically feasible, given the relatively small number of transsexual inmates and the level of services and programming required. As for the respondent's policy of imposing an absolute ban on sex reassignment surgery, the Tribunal found this to be unjustifiable. In particular, it did not allow for situations where the pre-operative transsexual inmate had acquired real life experience living in the target gender prior to incarceration, and had received a positive assessment from a doctor. Moreover, in circumstances where the surgery is deemed essential, the costs should be paid by the respondent. The complaint was substantiated and the respondent was required to amend its policies to comply with the Tribunal's decision. **[Judicial review pending]**

***Baptiste* v. *Correctional Service of Canada* (Mactavish)**

Date referred: 10/13/2000

Decision date: 11/6/2001

Number of hearing days: 17

The complainant, who was employed as a nurse in a penitentiary, alleged that she was denied promotional opportunities because she was black. The Tribunal dismissed the complaint. On the evidence, the complainant's performance appraisals identified demonstrably justifiable problems with her performance and did not indicate any differential treatment based on race. Due to her rudeness, poor attitude and duplicitous nature, the complainant was difficult to manage. Frustration on occasion drove her supervisor to refer to the complainant in a racially derogatory manner (in the complainant's absence), but this did not establish that the supervisor's appraisals were tainted with racism. The complainant was offered an acting team leader position in the future, provided that she begin consistently performing her duties in a fully satisfactory manner. When she failed to perform adequately, however, she was not given the position. The evaluations she received from her subsequent supervisors did not appear to be motivated by anything other than performance issues, in particular, the complainant's rude manner with inmates. While at times the complainant was evaluated by those who were potentially in competition with her for future job opportunities, these conflicts of interest *per se* do not constitute discrimination under the Act. Nor did the respondent's inadequate reaction on receipt of a report detailing widespread racism in the institution necessarily mean that the complainant had experienced racism in her particular circumstances. When the complainant was rumoured to be involved in inmate deaths, her temporary transfer was reasonable, and not demeaning. Finally, after being cleared of suspicion in the deaths, the reorientation she received on her return to the institution reflected her unique circumstances and the formative state of the reorientation program; it was not discriminatory.

***McAvinn* v. *Strait Crossing Bridge Ltd.* (Deschamps)**

Date referred: 04/11/2000

Decision date: 11/15/2001

Number of hearing days: 24

The complainant applied to work for the respondent as a bridge patroller. She was granted two interviews but ultimately was not hired. The complainant alleged discrimination on the ground of sex. The Tribunal substantiated the complaint. It noted that the respondent's employee who first interviewed the complainant had doubts about her literacy skills because her application was type-written; however, he

never inquired into this issue with the complainant. Furthermore, the interviewer failed to endorse the complainant's candidacy because he had concerns about her ability to "deal with situations" that might arise on the bridge. Nothing in the evidence pertaining to the interview, however, supported these conclusions. The complainant was the only female candidate for the job in question, and had successfully completed a law and security course given by a local college. There was evidence that the respondent viewed this course as a prerequisite for the patroller position, and yet male candidates who hadn't taken the course and who lacked some of the basic qualifications for the job were hired. Additional evidence suggested an attitude held by the respondent that it would only hire a woman as a last resort. The Tribunal concluded that the complainant was manifestly qualified for the position, had necessary experience gained from previous employment, and performed well in the initial interview. However, one could infer that she was basically disqualified at that point, at least in part because she was a woman; the respondent's reasons for not considering her candidacy further were simply a pretext. The Tribunal ordered the complainant to be given the job or, if this were not possible, that she receive 10 years' lost wages, subject to other earnings. It also ordered an apology and damages for pain and suffering. **[Judicial review pending]**

***Goyette* v. *Syndicat des employé(e)s de terminus de Voyageur Colonial Ltée (CSN)* (Théberge, Hadjis and Landry)**

Date referred: 06/22/1995

Decision date: 11/16/2001

Number of hearing days: 13

In 1997, the Tribunal upheld a complaint against the respondent union. It reserved jurisdiction, however, on the actual calculation of damages owed for lost wages and benefits, in the hope that the parties could settle this issue between themselves. The Federal Court upheld the Tribunal decision. Yet the parties were unable to agree on the amount of damages. Moreover, the respondent union, having filed an appeal to the Federal Court of Appeal, declared bankruptcy. In asking the Tribunal to reconvene, the complainant sought a determination of the damages, notwithstanding the possibility that the respondent's bankruptcy might prevent her from collecting. The complainant also asked the Tribunal to consider whether the Confédération des syndicats nationaux (CSN), with which the respondent union was affiliated, could be held liable for the damages owed. The Tribunal refused to examine the potential liability of the CSN, holding that its authority in this matter

had expired. When it rendered its first decision in 1997, the Tribunal reserved its decision on the amount of the award, but it had in no way reserved jurisdiction on the question of the CSN's liability. Indeed, the liability of the CSN had never been an issue in the proceeding leading up to the 1997 decision, and only became one after the respondent union declared bankruptcy. Since the question was never even contemplated, the Tribunal's jurisdiction with regard to it was exhausted. The Tribunal proceeded to calculate the complainant's lost wages and interest. It also accorded an amount for the legal fees she incurred in bringing the case back before the Tribunal.

***Irvine* v. *Canadian Armed Forces* (Chotalia)**

Date referred: 10/13/2000

Decision date: 11/23/2001

Number of hearing days: 19

The complainant worked as an air force aviation technician. Shortly after taking a physical fitness test, he had a heart attack. While he recovered to a significant extent, eventually the respondent released him. The complainant alleged discrimination on the ground of disability. In upholding the complaint, the Tribunal found that the respondent had failed to establish a *bona fide* occupational requirement in accordance with the criteria set out by the Supreme Court in the *Meiorin* case. The medical and fitness standards applied to Mr. Irvine were made and applied in good faith. However, they failed to consider his functional capacity and occupational strengths. While it was understandable for the respondent to be concerned about the complainant having another life-threatening event, it did not weigh the risk factors completely and logically. For example, the respondent failed to take a key heart performance measurement and failed to properly consider the absence of factors that would have indicated disease on a larger scale. Furthermore, the respondent did not diligently pursue the use of drug therapy to control the complainant's risk factors. While the respondent appeared to test and evaluate disabled members more rigorously than others, the complainant was not given the opportunity to prove his fitness by performing the standard physical tests applicable to all members. The work limitations that were imposed on him were vague and he was deprived of information about his illness that would have assisted him in contributing to his recovery. Under previously existing and subsequent policies, the complainant would have satisfied the occupational employability standards for retention; he could still do his job outside high-risk theatres of operation. Ultimately, the respondent failed to assess the

likelihood of the complainant's being posted abroad before retirement or of his even becoming involved in general military duties. **[Judicial review pending]**

***Stevenson* v. *Canadian Security Intelligence Service* (Chicoine)**

Date referred: 06/16/2000

Decision date: 12/5/2001

Number of hearing days: 6

The complainant was employed by the respondent as an intelligence officer in the B.C. region. As a result of an ultimately unfounded allegation of misconduct, the complainant's relationship with the regional director soured and he suffered psychological stress. Regional management put the complainant's name forward for transfer to Ottawa. The complainant, who was close to retirement, and whose family had local job and education commitments, opposed the transfer. The respondent granted his request for a temporary deferral. A psychologist diagnosed the complainant with major depression. The complainant then asked for cancellation of the transfer on compassionate grounds, which the respondent refused. When the complainant took three months of medical leave, the respondent had him evaluated for fitness to perform his duties. The evaluation indicated that the complainant was not currently fit to be transferred, but that his condition should be reassessed after six months of treatment. If allowed to return to work first in British Columbia, he should eventually be able to handle the transfer. The respondent, noting that the complainant's position in British Columbia was no longer available, and that his new position in headquarters had already been held vacant for him for more than six months, medically discharged him. The complainant alleged discrimination on the basis of (mental) disability. The Tribunal upheld the complaint. It found that the respondent had failed to consider information in the health evaluation indicating a positive prognosis over time. Furthermore, the evidence suggested that given the complainant's prognosis, he should have benefited from the generous sick leave policy extended to those with physical disabilities. Finally, the respondent was unable to prove that holding the complainant's position open for a longer time would have severely affected operations. The Tribunal ordered an apology as well as damages for lost income, legal expenses and emotional suffering. **[Judicial review pending]**

***Morris* v. *Canadian Armed Forces* (Hadjis)**

Date referred: 05/12/2000

Decision date: 12/20/2001

Number of hearing days: 12

The complainant had received high performance ratings and passed a prerequisite course, but was never promoted. The Tribunal found circumstantial evidence of age discrimination. First, there was anecdotal evidence that most graduates of the prerequisite course were promoted. Second, the respondent's manuals suggested that there was a prevailing view in the Forces that older members could not get promoted. In addition, a Career Manager had indicated to the complainant that at his age, his "potential" rating was a key obstacle to promotion, and his rating would be dropping each year. Finally, there was evidence that board members evaluating potential had ranked the complainant lower than the younger candidates. The explanations provided by the respondent with regard to the complainant's low potential ratings were not credible: the complainant's community work and college classes did not indicate an intention to retire. His French language ability, while limited, was never assessed as a significant component of his potential. Nor would his standing in the prerequisite course have adversely affected his potential rating. The complainant's lack of experience in foreign postings and unwillingness to accept long-range transfers might have explained his lower potential rating, but the respondent was unable to prove these hypotheses by providing comparative data on other candidates. No direct evidence was led as to any articulated (albeit subjective) reasons behind the complainant's low scores, and one could not infer reasons in the absence of information on the other candidates. The evidence did not bear out the assertion that some of the complainant's apparently high ratings had been inflated. Empirical data provided on the ages of various candidates who were promoted did not involve a large enough sample, and still indicated that those promoted were slightly younger than the complainant. The Tribunal ordered a retroactive promotion and payment of the salary and benefits differential, as well as special compensation. **[Judicial review pending]**

***Eyerley* v. *Seaspan International Limited* (Sinclair)**

Date referred: 05/12/2000

Decision date: 12/21/2001

Number of hearing days: 12

The complainant was employed as a cook and deckhand on tugboats operated by the respondent. Noting that the complainant's absenteeism rate exceeded 80 percent, the respondent concluded that his employment had automatically terminated by operation of law. The complainant's absenteeism was largely related to a wrist injury he suffered on the job, and he alleged discrimination on the ground of disability. The Tribunal upheld the complaint. It noted that the *Canadian Human Rights Act* does not just apply to terminations for cause, but also applies to employees whose contract of employment has been frustrated by non-culpable absenteeism. The respondent had failed to accommodate the complainant's disability. While management was concerned about the complainant's absences, it continued to employ him, but it refused the complainant's request to work only on smaller boats so as not to aggravate his injury. The complainant had to be fit to work on all boats. The respondent did not consider offering the complainant alternative deckhand work on particular vessels with which he might be more compatible. After termination, the respondent resisted attempts by the Workers Compensation Board to retrain the complainant in the less physical position of mate, since it did not think him fully capable of doing the mate's work for the company. The Tribunal ordered that medical and vocational assessments be undertaken to determine if the complainant could work on the respondent's ship assist tug, which was less physically demanding. If the assessments were positive, the complainant was to be instated to the first available permanent position, and in the interim, a relief position. The Tribunal also ordered damages for emotional suffering.

Interim rulings

In addition to rendering decisions on the merits of a complaint (deciding whether a discriminatory practice occurred or not, and if so, what remedy to order), the Tribunal renders numerous decisions on procedural, evidentiary or jurisdictional issues, often referred to as preliminary or interim rulings.

Rulings can either be formally written out (as are decisions on the merits) or they can be delivered orally during a hearing, in which case the only official record is the transcription of what the Tribunal members said. In the year 2001, the Tribunal issued 32 written rulings and 8 major oral rulings.

A large proportion of the rulings issued in 2001 had to do with objections relating to the Tribunal's independence. In November 2000, the Federal Court Trial Division had decided in the *Bell Canada* case that the Tribunal was incapable of holding a fair hearing owing to institutional bias arising from the *Canadian Human Rights Act*. For the first five months of 2001, many other parties in other cases objected to the Tribunal's jurisdiction on the same grounds as those mentioned in the *Bell Canada* decision. The Tribunal generally ruled that where a party had objected to the Tribunal's jurisdiction at the first practical opportunity (and thus had not waived its rights), the proceeding would be adjourned *sine die* (i.e., without naming a date for its recommencement) until the Act was adequately amended or until the Tribunal was found capable of holding a fair hearing.

This last condition was fulfilled on May 24, when the Federal Court of Appeal reversed the Trial Division ruling and endorsed the impartiality and independence of the Tribunal as constituted under the current legislation. Generally speaking, cases that had been previously adjourned because of this issue recommenced. Nevertheless, some parties still challenged the Tribunal for institutional bias after May 24. In these cases, however, the Tribunal applied the current state of the law as articulated by the Court of Appeal; the cases could continue. (The Tribunal did not have occasion in 2001 to issue a ruling addressing the legal effect of the Supreme Court's decision in December to grant leave to appeal the decision of the Federal Court of Appeal).

Apart from rulings on independence and impartiality, the Tribunal ruled on various other issues: that a successful complainant can be awarded compensation for legal expenses[1]; that the *Canada Evidence Act* limits the number of expert witnesses that can be called without leave of the Tribunal[2]; that disclosure of relevant medical records may be granted provided privacy interests are safeguarded[3]; that the withdrawal of a

complaint by the complainant divests the Tribunal of jurisdiction[4]; and that the Tribunal need not defer to pending arbitration proceedings that deal with the same underlying facts.[5]

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1 *Nkwazi* v. *Correctional Service of Canada* Mar. 29;
2 *Public Service Alliance of Canada* v. *Government of the Northwest Territories* Jul. 25;
3 *McAvinn* v. *Strait Crossing Bridge Ltd.* Jan. 3;
4 *Murphy* v. *HEA. and ILA Loc. 269* Feb. 27;
5 *Thompson* v. *Rivtow Marine* Nov. 28.

Pay equity update

The three major pay equity cases — *Public Service Alliance of Canada (PSAC)* v. *Canada Post*, *PSAC* v. *Government of the Northwest Territories*, and *Canadian Telephone Employees' Association (CTEA) et al.* v. *Bell Canada* — have all been part of the Tribunal's caseload for almost a decade, requiring an enormous amount of the Tribunal's time and resources. However, as noted in an earlier section (Allegations of institutional bias — The sequel), the Federal Court decision in November 2000 put a stop to the hearings in the *Bell Canada* case, as well as in the *Canada Post* case. They resumed after the Federal Court of Appeal set aside that decision in May 2001. In December, the Supreme Court granted leave to appeal the Federal Court of Appeal's decision; how the Supreme Court decision ruling will affect these cases is not known.

PSAC v. *Canada Post* (Schecter, Leighton and Rayner) is the Tribunal's longest-running case, in hearings since 1993. Before its adjournment in November 2000 pending the outcome of the appeal of the Federal Court decision in *Bell Canada*, the case had proceeded into reply evidence. Hearings resumed in the summer of 2001, and all the evidence is expected to have been presented by the fall of 2002.

Date referred: 30/03/1992

Number of hearing days in 2001: 26

Number of hearing days to date: 374

In *CTEA et al.* v. *Bell Canada* (Sinclair and Deschamps) hearings had just begun in 1999 when they were suspended by the Federal Court decision of November 2000. The hearings resumed in September 2001. Depending on the outcome of Bell Canada's appeal to the Supreme Court, hearings may continue for two to three years.

Date referred: 04/06/1996[1]

Number of hearing days in 2001: 22

Number of hearing days to date: 77

PSAC v. *Government of the Northwest Territories* (Groarke, Hadjis and Théberge) did not adjourn in the wake of the *Bell Canada* decision in November 2000. Instead, the parties decided to postpone the adjournment until after the Commission and the complainant had completed their cases. Because the Federal Court of Appeal decision in May 2001 overturned the Trial Division's ruling, the hearing in this case was never suspended. There have been 103 hearing days since the case was referred to the Tribunal in 1997. Additional days have been scheduled for 2002.

Date referred: 29/05/1997

Number of hearing days in 2001: 24

Number of hearing days to date: 103

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

Judicial review by the Federal Court

In 2001 the Federal Court Trial Division reviewed four decisions of the Tribunal. Three of the Federal Court decisions upheld the original findings of the Tribunal. The Federal Court of Appeal also rendered seven decisions on appeal from Trial Division reviews of Tribunal interim rulings. Six of these decisions upheld or restored the original determinations of the Tribunal.

***PSAC* v. *Government of the Northwest Territories* (Sharlow J.) Jan 10, 2001 FCA**

Date of original Tribunal ruling: 14/11/2000

During the Tribunal proceeding, the Government of the Northwest Territories (the respondent) challenged the institutional impartiality of the Tribunal, as constituted under the *Canadian Human Rights Act*. The Tribunal ruled that it was sufficiently impartial to hold a fair hearing and the respondent sought judicial review of this ruling in the Federal Court Trial Division. The Trial Division dismissed the respondent's judicial review application on the ground that the respondent, as a Crown entity, lacked standing to challenge the validity of a statute. The respondent appealed this decision to the Court of Appeal, but before an appeal decision was rendered, another Trial Division judge in another case ruled that institutional bias created by the Act prevented Bell Canada from obtaining a fair hearing before the Tribunal. This decision was also appealed. Given these developments, the respondent asked the Tribunal hearing the case to adjourn its proceedings pending a definitive decision from the Court of Appeal. The Tribunal declined to grant an immediate adjournment because it was nearing the end of hearing the complainant and Commission's case, although some outstanding disclosure issues remain outstanding. However, it conceded that the parties should not have to carry on indefinitely without some clarification from the Court of Appeal. Thus, it directed the complainant and Commission to present the rest of their evidence, without closing their case, whereupon it intended to adjourn pending the Court of Appeal's decision. The respondent challenged the Tribunal's ruling by seeking an immediate stay of proceedings from the Court of Appeal.

Date of Federal Court of Appeal ruling: 10/01/2001

The Court of Appeal refused to stay the Tribunal's proceedings. It found that the Tribunal's decision to adjourn imminently did not cause irreparable harm to the respondent, nor did the possibility that time and money may be spent in litigation that might ultimately prove to be needless.

***CTEA et al.* v. *Bell Canada* (Strayer, Rothstein and Sexton JJ.A.) May 2, 2001 FCA 139**

Date of original Tribunal ruling: 10/04/2000

The respondent had brought a motion before the Tribunal seeking the exclusion of certain documentary evidence on the ground that its disclosure would violate confidentiality undertakings between the parties. The Tribunal dismissed the motion, holding that the Canadian Human Rights Commission was

no longer governed by the undertakings. The respondent sought judicial review in the Federal Court Trial Division. The Trial Division dismissed the review application on two grounds: first, the confidentiality undertakings did not exist in the form asserted, and second, the application, which was related to an interim ruling, was premature.

Date of Federal Court of Appeal ruling: 02/05/2001

An appeal to the Federal Court of Appeal was also dismissed. The Court of Appeal agreed that the judicial review application was premature, and should not have been brought until the Tribunal proceedings were completed. This was because the parties could not know until the end of the proceeding whether the review of a Tribunal ruling on the admissibility of evidence would really be necessary. Moreover, any value in obtaining an early review of such a ruling was far outweighed by the attendant inconvenient delay.

CTEA et al. v. _Bell Canada_ (Strayer, Rothstein and Sexton JJ.A.) May 2, 2001 FCA 140

Date of original Tribunal ruling: 29/11/1999

The respondent Bell Canada had brought a motion before the Tribunal, challenging the standing of the complainant unions to bring complaints against it under the *Canadian Human Rights Act*. It argued that under the legislation, only groups of individuals could file complaints, and that the unions didn't qualify. The Tribunal denied the motion, holding that for the purposes of the Act, the unions constituted groups of individuals. The respondent sought judicial review of the Tribunal's decision before the Federal Court Trial Division. The Trial Division denied judicial review on the ground that it was premature, and the respondent appealed to the Federal Court of Appeal.

Date of Federal Court of Appeal ruling: 02/05/2001

The Federal Court of Appeal dismissed the appeal, noting that when the Commission had originally referred the complaints to the Tribunal five years earlier, the respondent had challenged the referral in the Federal Court, taking issue with a different aspect of the unions' participation in the case (the allegation being that the unions had not obtained the consent of all the alleged victims of discrimination). The Court dismissed this earlier challenge when it noted that the respondent had not challenged the unions' standing. Given the foregoing, the Court of Appeal in the present appeal concluded that it would be an abuse of process for the respondent to challenge an aspect of the unions' involvement or status that it could have raised in its earlier Court proceeding. The respondent may be able to raise the matter after the Tribunal renders a final decision, but even then, it may have to answer a plea of *res judicata* (i.e., that the issue has already been decided).

***CTEA et al* v. *Bell Canada* (Stone, Létourneau and Rothstein JJ.A.) May 24, 2001 FCA**

Date of original Tribunal ruling: 26/04/1999

During a Tribunal inquiry into a pay equity complaint by Bell Canada employees, the respondent brought a motion challenging the institutional independence of the Tribunal. In an interim ruling, the Tribunal found that there were no problems of institutional bias or lack of institutional independence and decided that the hearing into the complaints should proceed. The respondent applied to the Federal Court for judicial review. On November 3, 2000, the Federal Court ruled that two sections of the *Canadian Human Rights Act* compromised the institutional independence and impartiality of the Canadian Human Rights Tribunal. The Court found that the Tribunal was precluded from making an independent judgment in any class of cases in which it was bound by interpretive guidelines issued by the Canadian Human Rights Commission. In the opinion of Justice Tremblay-Lamer, the fact that the Commission has the power to issue such guidelines gives it a special status that no other party appearing before the Tribunal enjoys, and means that one party to the proceedings can "put improper pressure on the Tribunal as to the outcome of the decision in a class of cases." She found that the Tribunal's decision-making power was "unquestionably fettered" by the Commission's power to issue binding guidelines interpreting the Act. The Court also found that a second provision of the Act compromised the institutional independence of the Tribunal. Under subsection 48.2(2), the Tribunal Chairperson has the power to extend the term of appointment of a Tribunal member whose term expires during the course of a hearing over which he or she is presiding. Justice Tremblay-Lamer said the principle of institutional independence required that a tribunal be structured to ensure that the members are independent. She concluded that the Tribunal's independence was compromised by the fact that the Chairperson has the discretion to terminate or prolong a member's tenure. The difficulty is not necessarily in the manner in which the discretion is exercised, she said, but rather in the existence of the discretion itself. Finding that the two flawed provisions of the Act compromised the institutional independence and impartiality of the Tribunal, the Court ordered that further proceedings in the pay equity complaint against Bell Canada be suspended until the problems created by the two offending sections of the Act had been corrected. The Commission appealed the decision to the Federal Court of Appeal.

Date of Federal Court of Appeal ruling: 24/05/2001

The Federal Court of Appeal set aside the Trial Division decision, noting that the Tribunal did not wield punitive powers, that no constitutional challenge had been made to the statute and that any guidelines passed by the Commission were subject to parliamentary scrutiny. The Court added that the 1998 amendments to the *Canadian Human Rights Act* meant that the Commission no longer had the power to issue guidelines binding on the Tribunal in a 'particular case' but only in a 'class of cases.' In the Court's view, the modified legislation, which has a general application, is less likely to give rise to a reasonable apprehension of institutional bias.

The Federal Court of Appeal also addressed the argument that the powers of the Commission conflicted, in that its quasi-prosecutorial role and its role in setting guidelines overlapped. In the Court's view, these functions were exercised separately from one another, alleviating any implications of bias.

With respect to the power of the Chairperson to extend the term of any member of the Tribunal whose appointment had expired during an inquiry until that inquiry had concluded, the Court found that this power was not fatal to the institutional independence of the Tribunal. It found that the Chairperson herself was sufficiently insulated from the government, noting that the Chairperson cannot be capriciously removed from office because of decisions made by her in the administration and operation of the Tribunal. Additionally, if the Chairperson were to abuse her power in extending or refusing to extend the appointment of a Tribunal member for reasons wholly extraneous to the proper administration of the Tribunal, her decision would be reviewable pursuant to section 18.1 of the *Federal Court Act*. Finally, the Court reiterated that the Tribunal's powers are remedial, not punitive, and thus the requirements of fairness are less stringent. Bell Canada received leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada. **[Appeal pending]**

PSAC* v. *Government of the Northwest Territories
(Stone, Létourneau and Rothstein JJ.A.)
May 24, 2001 FCA

Date of original Tribunal ruling: 04/12/1998

The respondent brought a motion before the Tribunal alleging that the *Canadian Human Rights Act* compromised the institutional impartiality of the Tribunal and prevented it from holding a fair hearing. The Tribunal denied the motion, finding that it was constituted in a way that respected the principle of institutional impartiality. In particular, it noted that its members benefited from sufficient financial security to decide the case independently, that binding guidelines issued by the Commission did not affect the Tribunal members' impartiality, and that the members had sufficient tenure to complete the case despite the fact that their original terms had expired. The respondent sought judicial review of this decision. The Federal Court Trial Division denied judicial review on the ground that the respondent, as an emanation of the federal Crown, lacked standing to challenge the validity of a statute.

Date of Federal Court of Appeal ruling: 24/05/2001

The Court of Appeal allowed an appeal from the respondent, but dismissed the original judicial review application. It found that the respondent had standing to challenge the interpretation given to the *Canadian Human Rights Act* by the other parties. Further, the *Northwest Territories Act* granted the respondent broad powers comparable to those exercised by provincial governments. As such, it had standing to defend itself when sued for alleged abuse or

misuse of those powers. This included the right to be heard by an independent and impartial tribunal construing valid legislation.

On the question of tenure, the Court noted that the members' tenure depended neither on their now-expired appointments, nor on the newly created Tribunal structure. Rather, it was derived from transitional provisions that displaced and superseded the previously existing appointments and legislation. The members did not hold office indefinitely, nor at all; they simply were empowered to complete the inquiry before them. The fact that the members may not be subject to the disciplinary measures provided by the legislation did not detract from the conclusion that Parliament had clearly granted them jurisdiction.

The members' financial security was also guaranteed by the transitional provisions, which now allowed the Governor in Council rather than the Commission to fix their remuneration. Moreover, the *per diem* rates were fixed prior to the members' appointment and had not changed from the previous legislative regime. The allegation that the members would protract the hearing to obtain more *per diem* payments could not be accepted since it presumed bad faith on their part. Similarly, the Court dismissed as speculative the claim that Treasury Board, in providing or withholding financial support for the proceeding, would unduly influence the members.

Finally, on the issue of the guidelines, the Court concluded that in the present proceeding the members would be subject to the guidelines in their amended form, whereby guidelines could no longer be issued in respect of an individual case. Such a conclusion could be obtained from the remedial nature of the amendment to the guidelines' provisions. These same amended provisions were found not to raise an apprehension of bias in the Court's May 24 decision in *Bell Canada*. The respondent was granted leave to appeal the decision to the Supreme Court of Canada. **[Appeal pending]**

***Citron* v. *Zündel* (Malone, Linden and Isaac JJ.A.) Jun 25, 2001 FCA**

Date of original Tribunal ruling: 21/01/1999

The respondent brought a motion challenging the institutional impartiality of the Tribunal on the ground that, under the *Canadian Human Rights Act*, only persons who have sensitivity to human rights qualify for appointment to the Tribunal. The Tribunal dismissed the motion, holding in part that the legislative qualification for appointment referred to human rights, not only as embodied in the policies of the Act, but also in its broadest sense. The Tribunal noted that the members' overriding duty was to strive for fairness and a just result. The respondent's application for judicial review of the Tribunal's ruling was dismissed. According to the Federal Court Trial Division, the legislative qualification merely required that members of the Tribunal have a high level of knowledge and understanding about the subject matter being litigated.

Date of Federal Court of Appeal ruling: 25/06/2001

On appeal, the Federal Court of Appeal noted that the newly enacted qualifications for appointment to the Tribunal did not apply to members presiding over cases commenced under the old statutory regime; rather they applied only to new cases and new members appointed under the amended scheme. Alternatively, the Court of Appeal held that the legislated requirement for "sensitivity" on the part of Tribunal members would not have compromised the Tribunal's impartiality. The phrase "sensitivity to human rights" did not connote a predilection in favour of human rights. When read in context, it implied no more than recognition and awareness of human rights broadly speaking. Sensitivity to human rights did not imply insensitivity to other rights and, as a requirement for appointment, it would exclude only people with closed minds on human rights issues. This conclusion was supported by the French version of the term, which included the notion of being alive to, or socially aware of, human rights. The appeal was dismissed.

***Canadian Union of Public Employees* v. *Canadian Airlines International and Air Canada* (Hansen J.) Jul 27, 2001 FCTD**

Date of original Tribunal decision: 15/12/1998

The complainant alleged that the respondents had established or maintained discriminatory differences between wages paid to the predominantly female flight attendant group and those paid to the predominantly male pilot, maintenance and technical service groups working in the same establishment. The respondents argued that the predominantly female group was not employed in the same establishment as the predominantly male groups. Moreover, the respondents challenged the Tribunal's ability to hold a fair hearing, given that in deciding the establishment issue, it was bound by guidelines issued by the Commission, a party before it. The Tribunal held that it was only bound to consider the guidelines, and was not obliged to follow them. On the question of establishment, the Tribunal held that review of the distinct collective agreements and branch manuals for each group led to the conclusion that the groups were not part of the same establishment. The complainant sought judicial review, arguing that the Tribunal had erred in considering the collective agreements.

Date of Federal Court ruling: 27/07/2001

The Federal Court Trial Division concluded that, on the wording of the legislation, the Tribunal was entitled to take into account the existence of collective agreements in determining the issue of establishment. Further, it noted that the Tribunal had properly refused to hear evidence relating to systemic wage discrimination and occupational segregation; this evidence was irrelevant to the establishment question. Finally, the Court noted that by merely considering the existence of collective agreements, the Tribunal had not categorically equated the concept of establishment with that of bargaining unit. In construing the term "establishment," the Tribunal had not improperly relied on *Hansard* comments or labour legislation. The Tribunal's conclusion as to the non-binding nature of the

guidelines ultimately had no effect on the merits of its decision. The judicial review application was denied. **[Appeal pending]**

***PSAC* v. *Government of the Northwest Territories* (Evans, Rothstein and Sharlow JJ.A.) Sep 6, 2001 FCA**

Date of original Tribunal ruling: 19/05/2000

The respondent objected to the disclosure of certain documents on the ground that they were protected from disclosure by public interest immunity; their disclosure would be damaging to the collective bargaining and job classification activities of the territorial government, and was therefore not in the public interest. The Tribunal ordered that the documents be provided to it for inspection so that it could assess the immunity claim. The respondent sought judicial review of this ruling, and the complainant sought a dismissal of the respondent's objection to disclosure. The Federal Court Trial Division found that the Tribunal lacked jurisdiction to determine claims of public interest immunity. It also found that the respondent had made out a public interest immunity claim in respect of information dealing with current and future collective bargaining strategy, and in respect of information containing admissions against interest. The Canadian Human Rights Commission, supported by the complainant, appealed the decision.

Date of Federal Court of Appeal ruling: 06/09/2001

The Court of Appeal dismissed the appeal. Although it disagreed with the Trial Division's conclusion that public interest immunity protected all documents containing admissions against interest, it noted that this error was not material as none of the documents in issue contained such an admission. Furthermore, the Court of Appeal would not interfere with the finding that public interest immunity could protect from disclosure government documents relating to the government's future strategy for collective bargaining with its employees. It was a matter of the Trial Division judge's discretion to decide whether the public harm in disclosing these documents outweighed the damage to the due administration of justice resulting from their non-disclosure. The Court found that in exercising this discretion, the Trial Division judge had committed no reviewable error.

***Oster* v. *International Longshore and Warehouse Union (Marine Section) Local 400* (Gibson J.) Oct 15, 2001 FCTD**

Date of original Tribunal decision: 09/08/2000

The complainant alleged that the respondent union had discouraged her from applying for a deckhand job on a vessel, for which the employer in question had stated women were not suitable owing to the lack of separate sleeping quarters. The Tribunal found that, by not standing up for the complainant against the discriminatory attitude of the employer, the respondent acquiesced in the discrimination. Moreover, it was not convinced that having a woman work a six-hour opposite shift with a man and use the same sleeping quarters would have caused undue hardship. The respondent applied for judicial review on several grounds. First, that the filing of the complaint was itself

an abuse of process, particularly in light of the complainant's delay in filing. Second, the respondent argued that the Tribunal had applied the wrong legal test for discrimination and accommodation. And, finally, the Tribunal had made erroneous findings of fact.

Date of Federal Court ruling: 15/10/2001

The Federal Court Trial Division dismissed the application. Noting that nothing in the recent amendments to the *Canadian Human Rights Act* changed the standard of review applicable to Tribunal decisions, it added that some measure of deference was warranted with respect to mixed questions of law and fact. The Court held that the respondent's objections arising from the acceptance and referral of the complaint by the Commission should have been dealt with by the Federal Court, not the Tribunal. However, it found that the Tribunal had correctly modified the test for *prima facie* discrimination to a hiring hall situation and had properly concluded that the complainant was not qualified to be dispatched to the job in question, that the person who was dispatched lacked the feature on which the complaint was based (female gender) and that the person who was dispatched was better qualified than the complainant. The Court noted that the Tribunal had given due consideration to the respective roles and responsibilities of the respondent, complainant and employer when it came to accommodation. Finally, it held that the Tribunal's factual findings (1) with regard to whether the complainant had been discouraged from applying for the position, and (2) with regard to whether two deckhands might ever be occupying the sleeping quarters at the same time, were reasonably open to it on the evidence.

Vaid* v. *House of Commons and Parent
(Tremblay-Lamer J.) Dec 4, 2001 FCTD

Date of original Tribunal decision: 25/04/2001

The complainant alleged that he had been subjected to discrimination in the course of his employment with the respondent House of Commons. The respondents argued that parliamentary privilege prevented the Tribunal from inquiring into internal matters of the House and Speaker, and in particular, matters related to the appointment and management of staff. The majority of the Tribunal rejected the respondents' privilege claim; it held that the employment of the complainant as a chauffeur was not sufficiently related to the core operations of the House to warrant privilege. It also held that privilege should not insulate racial discrimination from review. The dissenting Tribunal member held that once it was determined that a privilege existed in respect of the House's power to appoint and manage staff, no inquiry into the exercise of the privilege was permissible. The respondent sought judicial review by the Federal Court.

Date of Federal Court ruling: 04/12/2001

The Trial Division agreed with the majority of the Tribunal and dismissed the application. It held that the privilege should not protect actions taken by the House that are based on an invalid ground, such as race or gender. Identifying improper grounds of privilege is appropriate and is not the same as reviewing

the exercise of an existing privilege. An inquiry by the Tribunal would not focus on the appointment and management of staff, but rather on the question of whether discriminatory actions were taken that violated the *Canadian Human Rights Act*. The Court was unconvinced that such an inquiry would injure the dignity and efficiency of the House. By analogy, the jurisdiction of the criminal courts would not be ousted were the complainant to have been assaulted by an MP. Finally, the Court approved of the Tribunal majority's finding that the Act applied to the respondents since their employee relations were within the legislative authority of Parliament. **[Appeal pending]**

***Carter* v. *Canadian Forces* (Nadon J.)**
Dec 18, 2001 FCTD

Date of original Tribunal decision: 02/03/2000

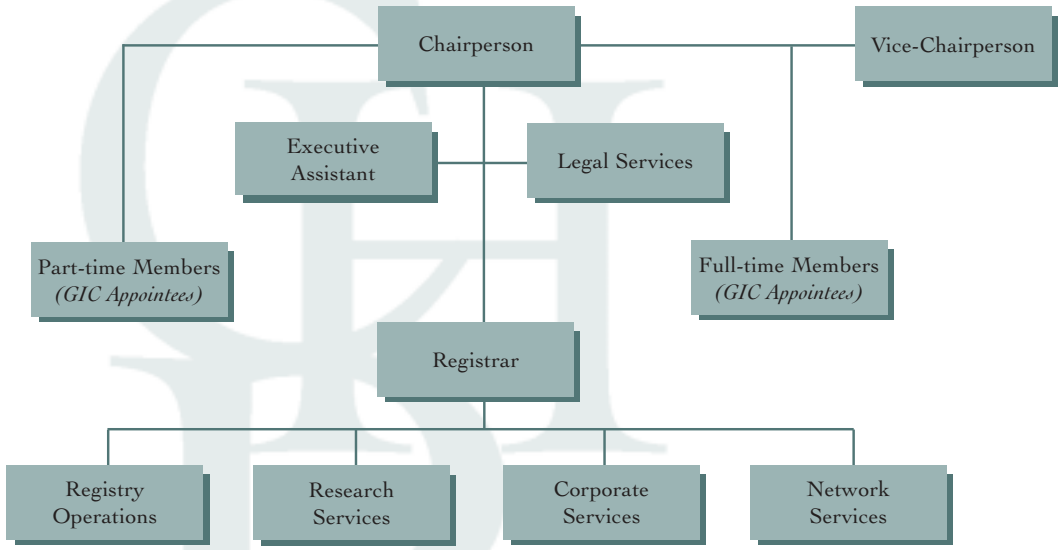
The complainant was released from the respondent Canadian Forces on reaching the compulsory retirement age. Roughly three months later, a regulation was passed that exempted the respondent's compulsory retirement age from the application of the *Canadian Human Rights Act*. The respondent conceded that the complainant's release had been discriminatory at the time it occurred. On the question of remedy, the Tribunal held that the compensation period for lost wages ended on the day the regulation came into force. It also held that pension income received by the complainant during the compensation period should not be deducted from his lost wages award. Both parties sought judicial review.

Date of Federal Court ruling: 18/12/2001

The Federal Court Trial Division agreed with the Tribunal's decision not to extend the compensation period beyond the date of the regulation; as of the regulation date, there no longer existed a causal link between the discriminatory discharge and the complainant's wage loss. In other words, the discharge had ceased to be discriminatory. Such a finding did not constitute a retroactive application of the regulation because the complainant did not have a vested right to be compensated for a specific period of time. But for the discriminatory discharge, the complainant would nonetheless have been legally discharged three months later. The Court also found that the Tribunal erred in not deducting pension income from the award for lost wages. Had the complainant kept working, he would not have received a pension; compensating him for wages without deducting pension income placed him in a better situation than he would have been in, had he not been wrongfully discharged. Finally, the Court held that the Tribunal had erred in ordering the accrual of interest from the complainant's discharge date, instead of from the day before the regulation came into effect. **[Appeal pending]**

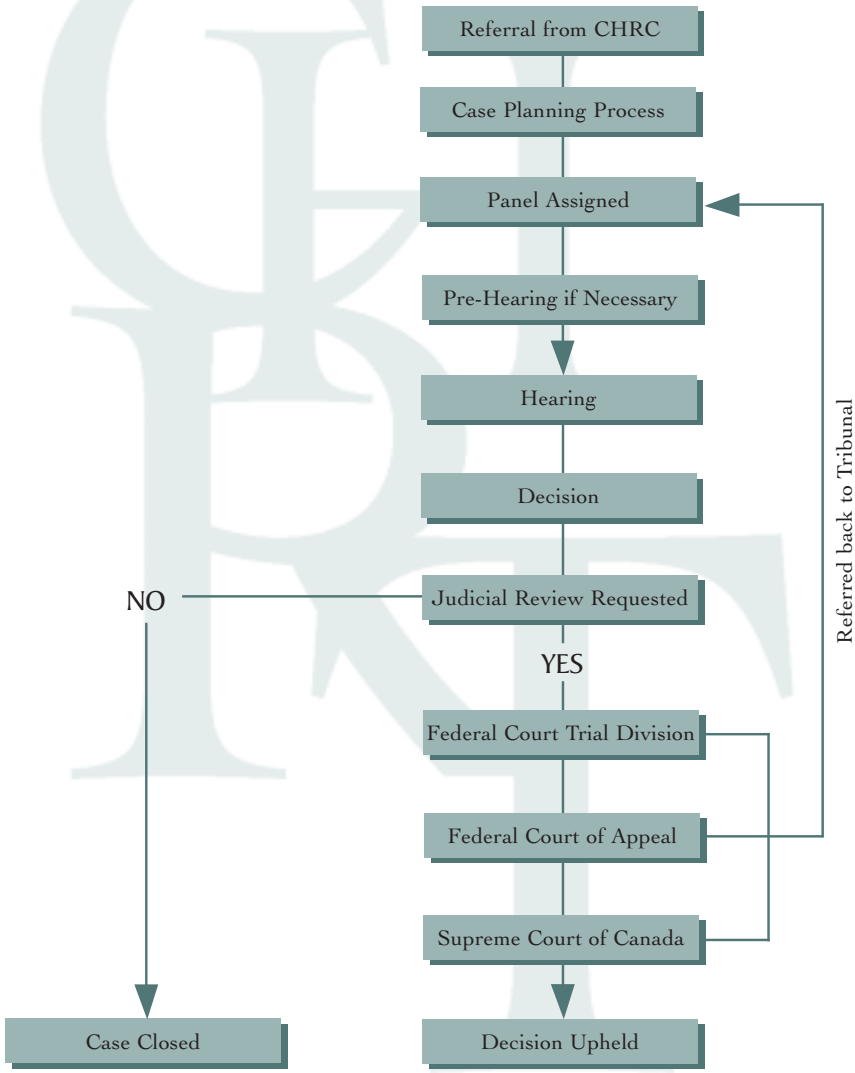
Appendix 1

Organization chart



Appendix 2

An overview of the hearings process



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

An Overview of the Hearings Process

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

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

Referral by the Canadian Human Rights Commission

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

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

Mediation

In 2001 the Tribunal ceased its mediation services. We had concerns that the public education aspect of our mandate was not being realized through the settlement of cases on a confidential basis. The *Canadian Human Rights Act* dictates that the Tribunal process be made public unless there are compelling reasons for excluding the public from a proceeding. The Tribunal is therefore of the view that until Parliament amends the Acts to include Tribunal-sponsored mediation, it is inappropriate for the Tribunal to continue with its mediation program.

Hearing

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

During the hearing, all parties are given ample opportunity to present their case. This includes the presentation of evidence and legal arguments. In the majority of cases, the Commission leads evidence and presents arguments before the Tribunal to prove that the respondent named in the complaint has contravened the statute. All witnesses are subject to cross-examination from the opposing side. The average hearing lasts from 12 to 15 days. Hearings are normally held in the city or town where the complaint originated.

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

Appeals

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

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

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

Appendix 3

Canadian Human Rights Tribunal members

Anne Mactavish

Tribunal Chairperson

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

Grant Sinclair, Q.C.

Vice-Chairperson

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

Guy Chicoine, Q.C.

Saskatchewan

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

Shirish Chotalia

Alberta

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

Pierre Deschamps

Quebec

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

Reva Devins

Ontario

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

Roger Doyon

Quebec

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

Sandra Goldstein

Ontario

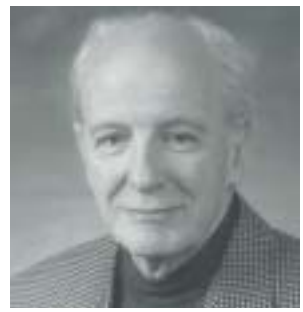
Ms. Goldstein was appointed to a three-year term as a part-time member of the Tribunal in 1999. Educated in Toronto, she has a background in social sciences, philosophy and health sciences. Ms. Goldstein has sat on several education boards and committees, and negotiated 10 collective agreements with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

Athanasios Hadjis

Quebec

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

Claude Pensa, Q.C.



Ontario

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

Eve Roberts, Q.C.

Newfoundland

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

Mukhtyar Tomar

Nova Scotia

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

Appendix 4

The Tribunal Registry

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

Registrar
Michael Glynn

Manager, Registry Operations
Gwen Zappa

Counsel
Greg Miller

Executive Assistant
Monique Groulx

Registry Officers
Linda Barber
Diane Desormeaux
Holly Lemoine
Roch Levac
Carol Ann Middleton

Registry Officer — Equal Pay
Nicole Bacon

Network and Systems Administrator
Julie Sibbald

Information and Communications Officer
Ramona Jauneika-Devine

Hearings Assistant
Francine Desjardins-Gibson

Corporate Services Officer
Bernard Fournier

Administrative Assistant
Thérèse Roy

Data Entry Assistant
Alain Richard

Appendix 5

Tribunal contact information

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