LEGAL REPORT 2001

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INTRODUCTION

This Legal Report covers a broad range of issues dealt with by the Human Rights Tribunal, the Federal Court, the Supreme Court of Canada and other courts of record and administrative tribunals. Its sole purpose is to provide a review and discussion of recent decisions related to the *Canadian Human Rights Act*[1], the impact of the *Canadian Charter of Rights and Freedoms*[2] on equality concerns, and other human rights legislation. It does not represent a legal opinion regarding the matters discussed, nor necessarily the views of the Commission.

The Report begins with a review of Tribunal decisions relevant to the resolution of complaints. These cases are ordered under the heads of discrimination alleged in each case. One such case concerns the impact of a 30 week cap on special benefits (illness, maternity and parenting) available under Employment Insurance.[3] The lack of evidence supporting the reasonableness of this limitation was cited by the Tribunal in reaching the conclusion that the 30 week cap adversely affected a woman complainant whose pregnancy also coincided with illness. However, in a another case involving female complainants whose unemployment coincided with pregnancy, the Tribunal upheld the validity of a cap imposed on receiving a combination of regular and special benefits under the Employment Insurance Plan.[4] The importance of evidence (both direct and circumstantial) in the establishment of a *prima facie* case, as well as the need for a respondent to provide a reasonable justification for a decision not to hire, is explored in another decision that turns upon its particular facts rather than the discriminatory impact of statutory provisions.

The mandatory inclusion in income (under the *Income Tax Act*[5]) of certain grants to disabled students is the focus of another decision of the Tribunal.[6] It explores the public policy considerations behind special grants to disabled students, provisions in the *Income Tax Act* and their actual impact on the specific complainant, the Tribunal ultimately upholding the validity of the tax rule in question. Three other decisions reviewed illustrate the principle that an employer must make reasonable accommodation to a disabled employee up to the point of undue hardship. One involved stress and depression-related illness[7], and another dealt with the Armed Forces and its response to members diagnosed with heart problems[8], while the last involved extensive absenteeism due to a work-related injury.[9] Alcoholism as a disability was recognized in another Tribunal decision[10], though on the facts of the case it was found to be extraneous to a refusal to hire. The treatment of transsexuals by Correctional Services, specifically its policies denying access to sex reassignment surgery and the placement of pre-operative transsexuals in penitentiaries as a function of their biological sex, was also examined in detail by the Tribunal.[11] In a carefully worded decision, the Tribunal identified those policy elements that were discriminatory based on sex and disability.

Cases involving race, ethnic or national origin provide an overview of evidentiary matters relevant to establishing a *prima facie* case of discrimination, issues surrounding systemic discrimination and its proof, the use of expert testimony, retaliatory acts, and the assessment of witness credibility. The establishment of a *prima facie* case was also central to the one decision included in this Report relevant to discrimination based on age, a decision that once again

involved policies and practices of the Armed Forces (this time with respect to promotion from one rank to the next).[12]

A major decision of the Tribunal regarding the telephonic communication of hate messages completes this particular section of the Report.[13] A crucial issue at the heart of this decision is whether or not messages repeatedly communicated by way of the Internet fall within the scope of the term "telephonic", found in section 13(1) of the *CHRA*. In deciding that they do, the Tribunal reviewed in detail past Supreme Court decisions relevant to hate propaganda and the underlying purposes of human rights legislation. The Tribunal also assessed the restrictions on freedom of speech that flow from sanctioning the communication of hate messages, concluding that any limitations imposed by section 13(1) are reasonable and demonstrably justified in a free and democratic society (within the meaning of section one of the *Canadian Charter of Rights and Freedoms*).

A variety of issues are included under sections dealing with Tribunal interim orders and procedural matters. Among other things, the decisions included here examine the applicability of the *Canada Evidence Act*[14] (expert witnesses)[15], rules governing access to medical records[16], the impact of a party's withdrawal prior to the hearing[17], the application of the *CHRA* to the House of Commons[18], the impact of the Bell decision (regarding Tribunal impartiality and independence) on other hearings[19], the application of the *CHRA* to First Nations[20], and questions regarding pre-hearing discovery of documents.[21]

Federal Court decisions related to the Commission's exercise of its statutory duties and authority are also covered. When receiving complaints, conducting investigations and making decisions to proceed or not to adjudication, the Commission is obliged to respect standards of procedural fairness appropriate to its administrative functions. The cases discussed here range across the various dimensions of fairness and reasonable conduct that apply to the Commission's processing of complaints, providing a synoptic view of the types of problems that may arise and the judicial responses to them.

The Federal Court also considers appeals from decisions of the Human Rights Tribunal. Recent cases covered in this section of the Report include the well known Bell decision that had placed in question the impartiality and independence of the Tribunal.[22] That Federal Court (Trial Division) decision has now been overturned by the Federal Court of Appeal, thus resolving difficulties that had delayed the adjudication of complaints generally.[23] Other cases reviewed include one challenging the new qualifications for Tribunal members (on grounds that the new qualifications created bias[24]), a case that questioned the applicability of the *CHRA* to the House of Commons[25], and various others involving fair process, questions of fact and law, and stays of procedure. Of particular importance for pay equity issues is a decision of the Federal Court upholding a Tribunal decision about the meaning to be given to the expression "same establishment".[26] The scope and meaning of this expression is central to the determination of comparator groups used to make comparisons between workers for the purposes of implementing section 11 of the *CHRA*.

The Report includes an examination of a number of judgments decided under the *Canadian Charter of Rights and Freedoms*. In one case, the termination of pension benefits to a surviving spouse upon remarriage (which occurred prior to the coming into effect of section 15 of the *Charter*) was challenged as discriminatory based on marital status.[27] The decision of the Nova Scotia Court of Appeal (rejecting the claim) explains the rule against retrospective application of the *Charter* to pre-*Charter* events, and explores the real nature of the distinction made between the plaintiffs and other remarried widows who benefited from the restoration of lost pensions. A decision of the Supreme Court of Canada is also included that deals with allegations of discrimination based on sexual orientation at a religiously-based university in British Columbia.[28] The case involved rules of conduct for students enrolled at the university which proscribed homosexual relations that the British Columbia College of Teachers used to deny full accreditation to the university education program. The case is noteworthy for the manner in which the Supreme Court balances freedom of religion against the right to equality in deciding that the British Columbia College of Teachers had erred in making its decision. Also originating in British Columbia is a decision of the British Columbia Court of Appeal that deals with mandatory retirement and discrimination based on age.[29] While the Supreme Court of Canada dealt with this issue some years ago, the majority of the British Columbia Court of Appeal concluded that the Supreme Court decision did not stand for the proposition that all mandatory retirement schemes were valid if provincial human rights legislation allowed distinctions to be made on the basis of minimum or maximum age. It felt that the reasonableness of the mandatory retirement plan at issue in the case had to be assessed under section one of the *Charter*, even though British Columbia human rights legislation permitted the type of age discrimination reflected in the retirement plan.

Two decisions of administrative tribunals are also included in this section of the Report. One deals with the decision of an Umpire under the *Employment Insurance Act*[30] that the minimum requirement of 700 hours of employable earnings for access to regular or special benefits has a discriminatory impact on women.[31] The other deals with a decision of the Canadian Transportation Agency regarding whether or not obesity should be considered a disability within the meaning of the *Canadian Transportation Act*[32]. Finally, although the issues involved do not engage equality rights directly, the Supreme Court of Canada decision in *R. v. Latimer*[33], concerning an accused's second degree murder of his severely handicapped daughter, is included. The decision is noteworthy for the Court's interpretation of what constitutes cruel and unusual punishment under the *Charter*, and the comments the Court made about the vulnerability of the disabled victim.

Finally, the Report concludes with a review of some important matters relating to international human rights law. That section discusses Canada's participation in the creation and implementation of some international human rights covenants as well as some case law where international human rights conventions have been applied..

TRIBUNAL RESOLUTION OF COMPLAINTS

Sex

The discriminatory impact on women of legislative provisions governing access to special benefits under the *Unemployment Insurance Act*[34] (now known as the federal Employment Insurance Plan[35]) was considered by the Tribunal in *McAllister-Windsor* v. *HRDC*.[36] Special benefits are available for limited periods of time in the case of pregnancy (15 weeks), illness (15 weeks) and with respect to parenting responsibilities (10 weeks at the time of this complaint). However, the maximum number of weeks for which special benefits are payable during a claimant's benefit period is limited to 30 weeks (at the time of this complaint). This is known as the anti-stacking rule.

In the *McAllister-Windsor* case, the complainant suffered from a medical condition known as incompetent cervix that made it difficult for her to carry a child to term. Her doctor advised her to remain in bed during her pregnancy in order to ensure that the child would be born successfully. She therefore stopped working and in the period leading to the birth of her child received 15 weeks of sickness benefits under the Employment Insurance Plan (EI) and long-term disability benefits under a plan offered by her employer. Following a successful birth the complainant received 15 weeks of EI maternity benefits. Upon her subsequent application for parental benefits, the complainant was informed that she had reached the maximum 30 weeks during which special benefits were payable (an eventuality about which she had been informed when first applying for EI benefits). As a result she was deemed ineligible to receive parental benefits.

In considering her complaint of discrimination based on sex and disability, the Tribunal reviewed in considerable detail the legislative history and purpose of special benefits. It determined that the enactment of special benefits departed from the underlying insurance principles of EI by introducing a social element into the scheme. This reflected evolving patterns in the labour market and gave due recognition to contingencies affecting employment other than involuntary loss of a job. As a result, special benefits were not made subject to the requirement applied to regular benefits that a claimant be ready, willing and able to work. Nevertheless, special benefits were considered limited in time just as regular benefits under EI.

Evidence before the Tribunal indicated that the period of maternity benefits was related to calculations about the time period during which women would normally require income support due to pregnancy. However, little or no evidence was presented concerning how the cap on illness or parental benefits was established, nor with respect to the cumulative maximum of 30 weeks applicable to any combination of special benefits during a claimant's benefit period.[36.1] The Tribunal found that the cumulative maximum of 30 weeks affected women exclusively due to the fact that only they were able to make a claim with respect to all three special benefits. This reality was reflected in statistics relevant to the 1998-99 fiscal year which showed that 2, 360 claims for special benefits were denied as a result of the anti-stacking rule and that in all

cases the complainants were women.

In determining whether the anti-stacking rule discriminated against the complainant by reason of her sex and disability, the Tribunal first established the comparator group against which her situation would be assessed. It found that the proper comparator group consisted of all persons eligible for special benefits. In this regard, it was clear that the legislation under scrutiny treated all persons eligible for special benefits in exactly the same way: all were subject equally to the cumulative maximum of 30 weeks of benefits. However, the Tribunal concluded that "...while subsection 11(3) of the *Unemployment Insurance Act* is, on its face, a neutral rule, it has not just a disproportionate effect, but an exclusive adverse effect on pregnant women such as Ms. McAllister-Windsor, who have claimed EI sickness benefits. While some women affected by subsection 11(5) may not suffer from conditions that would qualify as disabilities within the meaning of the *Canadian Human Rights Act*, it is undisputed that Ms. McAllister-Windsor does."[37]

Having found a *prima facie* case of discrimination, the Tribunal then turned to consider if there existed a *bona fide* justification for the anti-stacking rule. It had no difficulty in concluding that the rule was rationally connected to achieving the underlying purpose of the special benefits provision, which sought to provide short-term income replacement in cases of pregnancy, illness and child-care responsibilities. It also ruled that, in light of evidence presented regarding the financial repercussions of removing the cap on special benefits, the anti-stacking rule had been enacted in good faith. However, the Tribunal took a different view as to whether the financial cost of removing the rule in order to accommodate women like the complainant would constitute undue hardship. As a general proposition, the Tribunal accepted that it is appropriate (in weighing undue hardship) "...to consider the effect any changes to the EI plan may have on premiums and premium payers, as well as the consequences that these effects may have on the viability of the plan."[38] But this assessment had to be made by reference to evidence placed before the Tribunal. In this regard, the Tribunal found that "the rule against stacking benefits could very easily be absorbed by the surplus in the EI fund, without having any immediate impact on the contributors to the plan."[39] Beyond this, there was no evidence before the Tribunal "...as to what the cost of these changes would mean for premium rules, nor...any evidence of what the consequences of any increase in premiums would be for the contributors to the plan, or for the plan as a whole."[40] As a result, the Tribunal found the evidence insufficient to establish that eliminating the anti-stacking rule so as to accommodate the complainant would cause undue hardship.

Having found discrimination, the Tribunal issued a two-pronged remedy. First, it ordered HRDC to stop applying the anti-stacking rule, but suspended the application of its order for a period of 12 months in order to allow HRDC to consult with the Commission about what measures could be put it place to avoid similar problems arising in the future, and to give Parliament the opportunity to remedy the problem in a manner it deemed appropriate. The Tribunal also awarded damages to the complainant for injury to feelings and self-respect in the amount of 2,500 dollars.

Total benefits collected under EI are also subject to a rule that does not permit the stacking of special and regular benefits beyond the maximum number of weeks for which regular benefits could be collected. The possible discriminatory effect of this rule was considered by the Tribunal in *Popaleni et al.* v. *HRDC*.[41] The case involved the complaints of two women who experienced a period of involuntary unemployment coinciding with their pregnancy. Their entitlement to regular benefits was reduced by the number of weeks of maternity benefits they had taken. They alleged that this discriminated against them based on sex or sex and family status since, but for having needed maternity or parental leave as a result of having children, they would have been entitled to full regular benefits.

The Tribunal again acknowledged that the main purpose of the *Unemployment Insurance Act* is to provide help to workers who involuntarily lose their jobs but who are otherwise capable of working. It also took note of how the scheme has evolved over a number of years so as to include benefits, on a limited basis, to those temporarily not able to work by reason of illness, childbirth or child care responsibilities.

In assessing the allegations of discrimination, the Tribunal concluded that the correct comparator group consisted of all those who participate in the EI plan. The argument establishing discrimination was thus summarized as follows: "Both Ms. Popaleni's and Ms. Janssen's entitlement to regular EI benefits was reduced by the number of weeks of maternity benefits and parental benefits they collected. This suggests that they may have had fewer weeks during which they were able to look for alternate employment, while receiving regular benefits, than others in the same geographical area, who had not had a baby and claimed special EI benefits. While this may appear at first blush to be adverse, sex-based differential treatment, closer inspection indicates that this is not in fact the case."[42]

The Tribunal pointed out that a man who claimed sickness or parental benefits during a benefit period in which a claim for regular benefits was also made would be subject to the same adverse effects as the two complainants. This was more than theoretical, for the evidence before the Tribunal indicated that 35% of all claimants affected by the rule against stacking special and regular benefits were men. Similarly, the claim of discrimination based on family status as a mother could not be sustained, given the fact that fathers too would be affected by the rule should they apply for both regular and parental benefits. The Tribunal supported its conclusions by reference to a decision of the Federal Court of Appeal upholding the validity of another EI rule that established a cap of 30 weeks on total benefits where the number of weeks of eligibility for regular benefits was actually less.[43] In referring to that judgment, the Tribunal declared: "The gender-neutrality of the legislation was demonstrated by the fact that men who were injured while receiving regular EI benefits would also be subject to the 30 week limitation, as would fathers who had become unemployed, and were also claiming parental benefits."[44]

Even though the Tribunal dismissed the complaint because no *prima facie* case had been shown, it went on to consider whether a *bona fide* justification could have been established on the basis of the evidence heard. It first considered whether a rational connection existed between the rule against stacking special and regular benefits and the underlying purpose of the legislative

provisions. The Tribunal took the view that it was nonsensical to condition the receipt of one type of benefit by reference to another type of benefit where the benefits were motivated for different purposes. The Tribunal was therefore unable to conclude that HRDC had established a rational connection between the purpose of this particular anti-stacking rule and the payment of benefits under EI legislation. Furthermore, the lack of evidence placed before the Tribunal on the financial consequences of removing the rule made it impossible to conclude that such an abolition would have created undue hardship. As a result, had the Tribunal found a *prima facie* case of discrimination (which it did not), it would have concluded that HRDC had failed to show a *bona fide* justification for this particular anti-stacking rule.

Allegations of gender discrimination in employment were reviewed in *McAvinn* v. *Strait Crossing Bridge Limited*.[45] The respondent company was responsible for the operation of the Confederation Bridge linking PEI to the mainland, the construction of which had resulted in the loss of employment for those previously working on ferries operated by the Marine Atlantic Ferry Service. Employees on the ferries who lost their jobs were, however, given a right of first refusal regarding positions associated with the operation of the new bridge, provided they had the necessary qualifications or could be trained for the positions being offered.

The process of selecting applicants for the job of bridge patroller involved two series of interviews. Although the complainant failed to pass the initial screening interview, the decision in this regard was changed in light of the fact that she had successfully completed a Law and Security course. Following the second round of interviews, the complainant was informed that she had not been hired. She took that decision badly and formed the opinion that she had been excluded on the basis of her sex, especially in light of the type of questions she had been asked during the second interview. She felt that as a woman she had been singled out to answer questions about driving a vehicle with a standard transmission, boosting a car, working shift and being alone at night, questions she claimed had not been asked of male candidates for the job in question.

The Tribunal decision on this complaint involves a detailed examination of the evidence, both as it relates to the establishment of a *prima facie* case of discrimination and to the obligation of the respondent (once a *prima facie* case has been shown) to provide a credible justification for the decision not to hire the complainant. With respect to the former, the Tribunal emphasized that direct evidence of discrimination is often times difficult to establish and, hence, proof of discrimination may be based on circumstantial evidence.

On the basis of the evidence before it, the Tribunal had no difficulty in concluding that Ms. McAvinn was qualified for the job. She had taken the Law and Security course which, the Tribunal held, was a requirement for the bridge patroller job. Her past work experience with Marine Atlantic showed she was a "...good worker, had experience with the public, dangerous goods, emergency response and was used to physical work, shift work, as well as working in a male environment."[46] The Tribunal also took note of the fact that the individual most responsible for the final decision regarding the complainant's application testified repeatedly that

the complainant had been turned down because of concerns about her literacy. He claimed in his testimony that the mere fact that she had submitted her application in type-written form raised suspicions in his mind. In this regard the Tribunal found that there was not a "shred" of evidence on which to doubt her literacy.[47] Moreover, no inquiries were made about the issue of literacy between the first and second interviews.

Having found the complainant was qualified for the job, but had been turned down, the Tribunal considered the remaining factor necessary to establish a *prima facie* case of discrimination, namely whether male candidates with no better qualifications had been hired. In this regard, the Tribunal concluded that while Ms. McAvinn, who was fully qualified, was passed over, men who did not have some of the basic qualifications were given the job. These observations, when combined with other evidence raised the inference, in the opinion of the Tribunal, that gender was a factor "...in the selection process for the bridge patroller job and that some form of maleness was part of the job profile for the bridge patroller position."[48]

A *prima facie* case having been shown, the Tribunal was at a loss to find any credible evidence presented that reasonably justified the failure to offer employment as a bridge controller to the complainant. As a result, the Tribunal found the complaint of discrimination based on sex had been substantiated.

With respect to remedy, the Tribunal applied the principle that a complainant should be restored to the position he or she would have enjoyed had the discrimination not occurred, subject to a duty of mitigation of damages and to issues of proximate cause. After careful consideration of all the evidence, the Tribunal found that a claim for lost wages was justified in the present case, to be calculated from the moment she ceased working for Marine Atlantic for a period of 10 years. The period during which she would benefit from the award for lost wages was subject to the further order of the Tribunal that the respondents hire the complainant as a bridge patroller at the first reasonable opportunity. Should this occur, the 10 year period for lost wages would be reduced accordingly.

The health of the complainant, who suffered from anxiety and depression with attendant medical complications, was also at issue with respect to the remedies awarded. While her medical problems predated the events relevant to the complaint of discrimination, the Tribunal found that her condition had been aggravated by the conduct of the respondent. She was therefore awarded $2,000 for pain and suffering. In addition, the award for lost wages was not to be affected by her possible inability to fulfil the duties as bridge patroller should the respondent offer her a position. In other words, her medical problems could not be used by the respondent to avoid paying for lost wages over the 10 year time period established by the Tribunal.

The execution of a Tribunal decision relevant to a finding of discrimination based on sex gave rise to extensive legal procedures in the case of *Goyette* c. *Syndicat des employé(es) de terminus de Voyageur Colonial Limitée*.[49] The decision on the merits of the complaint was issued on October 14, 1997[50], although the Tribunal reserved jurisdiction to resolve any disagreement

between the parties as to the exact amount to be awarded for loss of salary and benefits.[51] Following disagreement between the parties, the complainant asked the Tribunal in March of 2000 to reconvene for the purposes of establishing the amount owing. In May of 2000 the respondent union declared bankruptcy and its assets were put under trusteeship pursuant to applicable legislation. Given that the union was an affiliate of another union, the CSN, the complainant notified the Tribunal that she wished to raise the issue of the liability of the CSN regarding the execution of the Tribunal's order against the respondent union. The CSN objected to reopening the case to consider additional substantive issues, arguing that, apart from the issue of quantum of damages against the respondent, the Tribunal was *functus officio* and hence devoid of jurisdiction.

At the hearing convened to fix the amount of damages for lost wages and benefits, the Tribunal first dealt with the question of its jurisdiction to determine the liability of the CSN. It found that the possible liability of the CSN was a substantive issue not reducible to a mere question of procedure. It also found that the Tribunal which presided at the original hearing had made no omissions and dealt with all issues brought forward at the time. While the question of CSN's liability for the actions of its affiliate union became significant at a later date, this alone could not justify the reopening of a case already completed and for which a final judgment had been issued, save for the quantum of damages to be awarded for lost wages and benefits.[52] The Tribunal then proceeded to determine the exact amounts owed to the complainant for lost wages and benefits, though its order in this regard applied only to the respondent union that had been a party to the original hearing on the allegations of discrimination.

Sexual Harassment

A hearing into a complaint of sexual harassment of a female employee was recently conducted despite the failure of the respondent to appear.[53] It concerned conduct of the respondent, who had been the complaint's supervisor, on a supposed business trip to Winnipeg during which it became clear he was seeking sexual contact with the complainant. The trip had been a ruse. The complainant alleged a breach of section 7 of the *CHRA*, which makes it a discriminatory practice to differentiate adversely against an employee on a prohibited ground of discrimination, and section 14, which makes it a prohibited practice in matters related to employment to harass an individual on a prohibited ground of discrimination (sexual harassment being deemed explicitly to constitute a prohibited ground of discrimination).

In reviewing the evidence, the Tribunal applied the standard test for establishing a *prima facie* case of discrimination, i.e. was the evidence sufficient to justify, on a balance of probabilities, a finding in favour of the complainant in the absence of an answer from the respondent. It also referred to the leading case on sexual harassment in the work place that characterized it "as being unwelcome conduct of a sexual nature that adversely affects the work environment or leads to adverse job related consequences for the victim of the alleged harassment." [54] The Tribunal further defined sexual harassment "as being a demeaning practice in the workplace that has a profound effect on the dignity of the employee affected"[55] and as having an impact on "the self-respect and dignity of the person affected both as an employee and as a human being."[56] On the

evidence presented, the Tribunal did not hesitate to find that the behaviour of the respondent had created a negative psychological and emotional work environment and thus fell squarely within the prohibition set out in sections 7 and 14. A *prima facie* case having been established, it fell to the respondent to provide an answer. As indicated, he had failed to appear at the hearing to give evidence and hence a decision was entered against him.

With respect to remedy, the respondent was ordered to write an apology to the complainant, pay her the maximum award for hurt feelings and loss of self-respect ($5,000), as well as a sum of money for lost wages ($480) incurred by the complainant's need to research and prepare for the hearing.

Disability

The alleged discriminatory impact of provisions in the *Income Tax Act*[57] that require a disability-related educational grant to be included in a person's taxable income was reviewed in *Wignall* v. *National Revenue*.[58] The complainant was a part-time university student whose deafness required him to have sign language interpreters in the classroom. While the university provided him with such interpreters in the first instance, it also requested that he seek out other sources of funding that could help pay for the expenses incurred. He therefore applied for and received a Special Opportunities Grant for Students with Permanent Disabilities in the amount of $3,000 from the Government of Canada. He then gave this money to the university to help defray the costs of sign language interpretation. A T4A Supplementary was subsequently issued to the complainant informing him that the amount of the Special Opportunities Grant was to be included in his income for the tax year in which it was received. As the grant money was earmarked exclusively to pay for the extraordinary expenses associated with the complainant's disability, he felt its inclusion in his income for tax purposes was unfair and discriminatory.

In analysing the complaint, the Tribunal referred extensively to the interpretation given equality rights under section 15 of the *Charter*. The Tribunal relied on the three inquiries enunciated by the Supreme Court of Canada in *Law* v. *Canada (Minister of Employment and Immigration*)[59] was guided in its analysis by three broad inquiries identified by the Supreme Court of Canada. First, can it be said that an impugned law draws a formal distinction between a claimant and others on the basis of one or more personal characteristics, or fails to take into account a claimant's disadvantaged position in society resulting in substantively differential treatment? Second, is the claimant subject to differential treatment on a prohibited ground of discrimination. Finally, does the differential treatment impose a burden or withhold a benefit from a claimant in a manner that reflects a stereotypical application of presumed group or personal characteristics, or otherwise perpetuates or promotes a view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?[60] With respect to disabled people specifically, the Tribunal took note of the jurisprudence that recognized a long history of disadvantages, isolation and barriers to their participation in mainstream society.

The Tribunal noted that access to a Special Opportunities Grant was conditioned by both an

evaluation of the personal finances of an applicant and the finite resources the government allotted to the program. There was no dispute that in the case of the complainant the inclusion of the Special Opportunities Grant in his income had resulted in no additional income tax payable. In point of fact, all income taxes withheld at source for the year in question had been returned to the complainant by means of an income tax rebate. The only identifiable repercussion was a small decrease ($25) in the amount of a provincial tax credit otherwise available to the complainant.

To assess the alleged discrimination, the Tribunal accepted the comparator group chosen by the complainant, i.e. all other students who receive grants and bursaries. The requirements of the *Income Tax Act* regarding the inclusion in income of all money received by way of grants or bursaries applied without exception to all students receiving them. The Tribunal was therefore unable to find that the relevant law or policy drew a formal distinction between the complainant and others on the basis of a personal characteristic. Turning to whether there was any substantively differential treatment based on a personal characteristic, the Tribunal found that the grant had not only been awarded on the basis of the complainant's disability "...but also because he was able to meet the means test of the Canada/Manitoba Student Loan program and because he agreed to use the funds to purchase services that would assist him in accommodating his disability in the classroom setting."[61]

However, did the policy to treat the grant to the complainant like any other bursary or scholarship fail to take into account the complainant's already disadvantaged position within society? On this issue, the Tribunal acknowledged that the creation of the Special Opportunities Grant was recognition by the government "...that students with disabilities were in need of special financial assistance to access education at the post-secondary level."[62] Nevertheless, the refusal to exempt the grant from inclusion in income for purposes of taxation did not amount to a failure to recognize the complainant's already disadvantaged position. In so finding, the Tribunal emphasized that other provisions in the *Income Tax Act* provided additional assistance to disabled Canadians, such as the disability and medical expenses tax credit. The Tribunal also found that "[w]hile social policy is reflected in our taxation scheme, it is the lawmakers who determine the amount of financial assistance to be given to the disabled pursuant to these types of programs. Such assistance should not be dependant on the creation of an exemption from taxation by circuitous application of a discriminatory practice provision of the *Canadian Human Rights Act*....Those persons who are more financially capable may find themselves in the position of paying back part of the grant through taxation. However, based on the fact that a means test forms part of the criteria to obtain the grant in the first place, the effect of taxing the grant will almost always be minimal."[63]

Although not strictly necessary to its decision, the Tribunal went on the consider the third broad inquiry that arises in cases of alleged discrimination. It concluded that the inclusion of the grant in income for purposes of taxation did not deny a benefit to the complainant in a way that reflects a stereotypical attitude towards the disabled and perpetuates a view that they are less able or equally deserving of concern, respect and consideration. It found that "the inclusion of the grant in income is consistent with the duties and obligations of all persons to pay a fair share

of tax on income. The burden imposed on Mr. Wignall in this case was minimal. It was not an affront to his dignity as a human being to test his entitlement to the grant against the yardstick of total income from all other sources."[64]

Failure to accommodate an employee suffering from anxiety and depression, and hastily releasing him as medically unfit to discharge his duties, were central to the Tribunal decision in *Stevenson* v. *Canadian Security Intelligence Service*.[65] The complainant had worked for the RCMP Security Service and the Canadian Security Intelligence Service (CSIS) for 26 years, rising to the position of Head of Internal Security for the BC Region. While occupying the later position the complainant came under suspicion of having leaked sensitive information, though he was subsequently exonerated of all wrongdoing following a voluntary polygraph test. This experience deeply shocked him and lead to increasing anxiety and depression, further exacerbated by an eventual lateral transfer out of internal security to human resources, a transfer he experienced as punishment related to the original allegations against him. Some time later he was informed by his Director General that he was being transferred from Vancouver to Ottawa. This later decision was taken without any prior consultations or discussions with the complainant. The prospect of transferring to Ottawa created yet more stress and strain, in particular within his family. As a result, his depression deepened even further.

The complainant took a number of steps to try delaying his transfer, though all requests made were to no avail, save for a change in the commencement date for reporting to his duties in Ottawa granted by his new supervisor. A month prior to assuming those duties the complainant obtained a medical certificate from his family physician that indicated he would have to be off work for a period of three months, during which time further evaluation and treatment would take place. This set in motion a series of events related to a formal health evaluation by a physician chosen by CSIS management. The initial report prepared by that physician described the anxiety disorder and depression suffered by the complainant and indicated that the further stress of being transferred to Ottawa would complicate his recovery. She took the view that following several months of therapy the complainant would probably be ready to re-integrate into his workplace in Vancouver. She felt that in time he would recover enough self-confidence to be able to undertake a transfer to Ottawa, although that would be subject to future evaluation (in approximately six months). Despite this assessment, management at CSIS remained determined that the transfer to Ottawa should proceed. It ultimately took the view that, as the complainant was then “unfit” to fulfil his duties, he should be discharged from the Service. He was therefore formally released on medical discharge, approximately six months after having obtained the medical certificate from his family physician regarding temporary leave due to illness.

In light of all the evidence, the Tribunal quickly concluded that a *prima facie* case of discrimination based on mental disability had been established. It pointed to the fact that within days of the complainant’s requested stress leave, “...the wheels were put in motion by his superiors to find a way to terminate his employment.”[66] The Tribunal also found that the employer’s own written policies regarding the medical assessment of an employee had been

ignored or improperly applied. These policies envisaged that an employee be assessed as either "Fit", "Unfit", or "Fit with Limitations". In the complainant's case, the views of the medical examiner that he be allowed to remain in Vancouver for medical reasons so as to facilitate his recovery were simply ignored. In so doing, CSIS had failed to consider that the complainant could be assessed as falling within the category of "Fit with Limitations" set out in its own policies.[67]

Having found a *prima facie* case, the Tribunal turned to the issue of whether a *bona fide* occupational requirement existed that could justify the health policies of CSIS. It first noted that these policies were vague and imprecise as to what standard should be applied to an employee whose ability to perform his or her duties was placed in question. The Tribunal accepted that some degree of mental and physical health was clearly necessary. It also accepted that the standard to which the complainant was put included a requirement of mobility. It summarized the key elements of the standard in the case before it as including: 1) capability to perform the duties expected, 2) prognosis for recovery, and 3) the requirement for mobility.[68]

The Tribunal had no difficulty concluding that the first two elements of the test in *Meiorin*[69] were satisfied on the evidence presented, i.e. that the standard was adopted for a purpose rationally connected to the performance of the job; and that the standard was adopted in good faith. Turning to whether reasonable efforts to accommodate the complainant had been made, short of undue hardship, the Tribunal reiterated that CSIS management had remained adamant about the timing of the transfer to Ottawa despite its knowledge of the complainant's severe anxiety and the course of psychotherapy he had undertaken. The Tribunal found it "...difficult to understand why his supervisors would not make an exception to the mobility requirement for an employee who had by this time provided 26 years of excellent service to the RCMP Security Service and to CSIS. The postponement of the transfer from June to September and the offer of temporary dual residence assistance hardly qualify as accommodation of Mr. Stevenson's disability. The suggestion that medical resources were available to him and his family in Ottawa was gratuitous at best. It was no offer of accommodation at all."[70]

The Tribunal also expressed serious concern about the apparent lack of good faith in the manner in which the complainant's transfer was determined and in the way the health evaluation was subsequently carried out. The Tribunal also criticized the lack of clarity in policies regarding sick leave at CSIS, arguing that this in itself was enough to call into question the adequacy of standards applied to the issue of employee health. It therefore found that the policies themselves of CSIS did not adequately address the issue of accommodation in the context of health related disabilities.

The remedies ordered by the Tribunal included the payment of lost wages that would bring the complainant up to 30 years plus a day of service (with appropriate sums paid for benefits and a gross-up amount to compensate for income tax consequences of a lump sum payment), legal costs in the amount of $2,000 for advice sought prior to filing his complaint with the Commission, the maximum of $5,000 for hurt feelings (the amended maximum of $20,000 not being applicable to his case), as well as the maximum of $5,000 for the wilful and reckless

nature of the discriminatory behaviour (the amended maximum of $20,000 also not being applicable). The Tribunal also indicated that had the amended maximum payments under the last two headings been applicable to the case a much higher award in both instances would have been ordered.

The discharge of an employee for medical reasons was again at issue in *Irvine* v. *Canadian Armed Forces*.[71] The case involved a 29 year veteran of the Canadian Armed Forces (CAF) who suffered a heart attack in March of 1994. Following this event he underwent heart bypass surgery and returned to work (as an aviation technician) after a short rehabilitation. While back on active duty he was monitored by medical personnel in the CAF. The medical follow-up consisted of physical examinations, counselling in risk factor control and prescription of medication designed to reduce cholesterol. Despite excelling in his position as aviation technician he was released from the CAF in July of 1995 on the grounds that he was not medically fit to serve. He subsequently filed a complaint with the Commission alleging that he had been discriminated against by reason of his disability.

The Tribunal reviewed in detail the various administrative procedures and health related policies of the CAF that applied to the complainant. First, the CAF uses a medical category system based on geographical and occupational factors that is designed to identify the minimum requirements needed to satisfy the principle of universality of service. The latter principle establishes that all members of the CAF are required to be able to perform at any time any lawful duty. This may include the duties of a soldiers regardless of their occupation. Both geographical and occupational factors are graded numerically with increasing magnitude. The higher the number, the greater is the degree of limitation on a member's ability to meet his or her responsibilities as a member of the CAF. In the case of the complainant, the minimal classification for full employment was G3O3. Following his heart surgery he was never able to achieve greater than a G4O3 category. The G4 classification meant that he was precluded from "serving at sea or in an isolated location where physician service was not readily available"[72] and thus not able to satisfy the principle of universality of service.

The process by which this classification of the complainant was arrived at involved a specialized medical board composed of medical specialists charged with the responsibility to review the medical file of a member who suffers from coronary heart disease (CAD). The CAD Committee makes recommendations regarding the medical category to be assigned. The standards it applies are, for the most part, now contained in September 1995 Guidelines that provide a detailed description of occupational categories and factors to be considered when determining health-related limitations on a member's ability to fulfil his or her duties as a member of the CAF. The 1995 Guidelines supersede those that date from 1979 and provide for greater individualized assessments, as opposed to the more rigid categorization reflected in policies up to that point. For example, the 1979 policies had automatically assigned a medical category of G4O4 to any member who suffered from CAD.

The Tribunal also pointed out that general CAF fitness policies run in parallel to the more

specific medical category procedures and policies. In practice the CAF uses an exercise prescription test known as EXPRES and requires that members score above the 20 percentile ranking when compared with the average non-military ranking of Canadians. A 20 percentile ranking means that 80% of the civilian population would have scored higher. The Tribunal also acknowledged that in "theory" the CAF used as well more stringent standards related to the ability of members to perform general military duties, though there was little evidence to establish how these standards were applied in reality. It pointed out that these standards were abolished following a 1999 review of policies, and added: "The review acknowledged that a serious weakness of the General Military Duties as a measure of individual capability was that many of the tasks were vaguely worded and failed to specify parameters (when, where, how) under which the duties of universality were to be performed, and where applicable, the individual level of capability or standard of performance necessary."[73]

The Tribunal had little difficulty in determining that a *prima facie* case of discrimination had been made out, both as regards to the specific decision to release the complainant because of his disability, and the differential CAF procedures and standards that treated able-bodied members differently that those who suffered from CAD insofar as ability to perform military duties was concerned. In the case of able-bodied members, they could establish minimal fitness by taking the EXPRES test, whereas the complainant was denied this opportunity. The Tribunal then turned to the issue of whether the CAF had demonstrated that the standards and policies at issue constituted a *bona fide* occupational requirement.

The standards and policies that the CAF applied to the complainant were found to be rationally connected to the goal of ensuring that a member could safely and efficiently perform the tasks of his occupation and general military duties, and to have been adopted in good faith. However, these standards and policies must also be shown to be reasonably necessary to accomplish their purpose and that accommodation of the complainant short of undue hardship had been made. Here the Tribunal determined that the pre-1995 policies were excessively rigid in assigning a G4 category to members who suffered from CAD and provided for little or no individualized assessment. It pointed out that the 1995 Guidelines demonstrated the possibility of greater individualized assessment. Some of the factors these guidelines established had not been applied to the complainant's situation, "...such as testing to determine Mr. Irvine's functional capacity, the frequency and level of medical care needed to appropriately manage Mr. Irvine's disease; and the employability-limiting side effects of any cardiac medications being taken."[74] Moreover, the assessment of the complainant's case had "...failed to consider Mr. Irvine's physical, occupational and emotional strengths vis-à-vis his ability to serve in the CAF."[75]

The Tribunal also found that the refusal to retain the complainant in the CAF by appropriate accommodation of his illness contrasted sharply with what the decision would have been under retention rules introduced in November of 2000. As the Tribunal explained: "Members are now to be retained as long as they can be fully employed in a position established for their rank and military occupation. Mr Irvine fell into such a category. His commanding officers confirmed that he could fulfill the general and specific tasks of an aviation technician for his rank. Under the November 2000 policies, even members who cannot deploy to high-risk theatres of operation

will be retained or re-assigned to another position established for his military occupation for which he can fulfill all normal duties. Also, members may be employed in positions where they are not directly exposed to any of the tasks or working conditions contemplated by U/S [universal service] principles."[76] The Tribunal also found that "the CAF itself recognized...that it had some empirical capacity to accommodate members in Military Non-Essential positions...[T]he duty of accommodation requires an assessment of the ability of the CAF to retain members in such positions prior to termination. No such assessment was made in Mr. Irvine's case."[77]

With respect to remedy (which the Tribunal suggested should recognize that the complainant would normally have served until his retirement in 2003), the Tribunal declined to issue any order at the request of the parties. However, it retained jurisdiction to hear evidence on the matter in the event the parties were unable to reach an agreement.

A refusal to employ allegedly based on perceptions that an individual was dependant upon alcohol was reviewed by the Tribunal in *Crouse* v. *Canadian Steamship Lines*.[78] The case involved a complainant whose work history aboard a number of vessels was mixed, though numerous incidents of unsatisfactory work performance were noted in the evidence as well as examples of drunkenness in the course of employment. The respondent company, Canadian Steamship Lines, made a decision (following accusations of drunkenness on the job and incompetence) not to consider the complainant for any future employment. A number of years later, the complainant applied for the position of permanent relief electrician with the respondent company after noticing the position posted in the union hiring hall. Very soon thereafter, union personnel at the hiring hall were informed by letter that due to the complainant's past work history Canadian Steamship Lines had refused his application.

As a point of departure, the Tribunal observed that addiction to alcohol is considered a disability within the meaning of the *CHRA*. Moreover, whether such an addiction actually exists is not necessary to a finding of discrimination, the Tribunal emphasizing that employment decisions made due to a perception that an individual suffers from such a disability may constitute a violation of the *Act*.[79] In the case at hand, the Tribunal found a *prima facie* case of discrimination had been made out, in particular because the respondent claimed that its hiring decision had been made by reference to the past work history of the complainant. Documents related to that work history and used by the respondent company included references to misconduct relating to abuse of alcohol by the complainant and to intoxication. Having found a *prima facie* case, the burden then shifted to the respondent to provide a reasonable explanation for its hiring decision.

With respect to the respondent's position, the Tribunal noted that it was not attempting to establish that freedom from alcohol dependance was a *bona fide* occupational requirement due to considerations of safety. Rather, the respondent claimed that its hiring decision had been motivated by concerns about the competence of the complainant to perform adequately the duties of the position. Considerable evidence had been heard by the Tribunal regarding the skills and

experience required of those hired as permanent relief electricians aboard ships known as self-unloaders. It found, as a question of fact, that the respondent had made its decision not to hire the complainant due to concerns that he did not possess sufficient skill and experience. Any concerns the respondent may have had in the past regarding the complainant's abuse of alcohol had been resolved, as was demonstrated by the fact that the complainant had been hired on a temporary basis by the respondent in the recent past. In light of these findings, the Tribunal concluded that the respondent had discharged its onus to provide a reasonable explanation for the decision not to hire.

Policies of Correctional Service Canada (CSC) denying pre-operative transsexual inmates access to sex reassignment surgery were reviewed by the Tribunal in *Kavanagh* v. *A.G. Canada*.[80] The case also involved decisions made by CSC to restrict initially the complainant's access to hormone therapy and to place the complainant in male penitentiaries. These policies and decisions of CSC were challenged by the complainant on the basis that they discriminated against her on the basis of sex and disability. Although the case was considered under both sex and disability discrimination, it is included here due to its relationship to an underlying medical condition known as Gender Identity Disorder.

Synthia Kavanagh had been taking female hormones since the age of thirteen. Her sense of herself being a female inhabiting a man's body began in early childhood. At the time of her trial and conviction for second degree murder (1989), she had been living as a female and been selected by a gender identity clinic as a candidate for sex reassignment surgery. In passing sentence, the presiding judge recommended that she be allowed to serve her sentence in a female jail. Despite the recommendation (which reflected the inmate's own desires), she spent the next eleven years in several high and medium security male penitentiaries. As mentioned, the complainant underwent sex-reassignment surgery following a settlement of her individual complaints against CSC. This left for the consideration of the Tribunal the formal policies of CSC as they pertain to prisoner access to such surgery and the selection of the institution within which a prisoner's sentence will be served. (The issue of access to hormone therapy had been resolved by the adoption of a written policy setting out the conditions under which such access would be allowed.)

Extensive evidence from expert witnesses was heard by the Tribunal regarding Gender Identity Disorder, a syndrome that is recognized in the medical community. It is broadly defined and includes behaviour ranging from a desire to imitate the opposite sex by, for example, cross-dressing, to the more dramatic cases of individuals who perceive themselves as actually being a member of the opposite sex. In such cases, the anatomical sex of an individual is at odds with his/her core gender identity. It is this intense conflict between the core gender identity and the clear anatomical sex of an individual that produces Gender Dysphoria. The latter term refers to the distress and torment felt by transsexuals who are unhappy with their biological sex.

Expert witnesses also reviewed the procedures for proper diagnosis of Gender Identity Disorder and the various treatments that are available, which include psychotherapy, drug treatment,

hormone therapy for people in the gender transition process and finally sex reassignment surgery. Given the invasive and irreversible nature of the latter, the selection criteria are stringent and require fulfilment of prerequisite stages before surgery is undertaken. While there was agreement among the expert witnesses on the fundamentals underlying the concept of Gender Identity Disorder, they disagreed on the appropriateness of providing access to sex reassignment surgery while a person was incarcerated. The abnormal social environment found in prisons may very well detract from adequate diagnosis or even distort the true feelings of the individual seeking access to the surgery. While there was no unanimity on this aspect of prison social realities, CSC settled on its policy of denying access because of doubts raised by some medical professionals working in the area of gender disorders.

Written policies with regard to the issues of placement (choice of carceral institution) as well as access to sex reassignment surgery are clear and unambiguous. They provide that "unless sex reassignment surgery has been completed, male inmates shall be held in male institutions" and that "sex reassignment surgery will not be considered during the inmate's incarceration."[81] Equally unambiguous was the Tribunal's initial finding regarding the placement policy: "CSC's policy requiring that anatomically male prisoners be held in male institutions clearly has an adverse, differential effect on pre-operative male to female transsexual inmates. Non-transsexual inmates are placed in prisons in accordance with both their anatomical sex and their gender. Transsexual inmates, however, are placed in accordance with their anatomical sex, but not their gender. Counsel for CSC indeed concedes that the policy is *prima facie* discriminatory, on the basis of both sex and disability."[82] The crux of the matter lay in assessing whether CSC had provided a *bona fide* justification for its policy on placement of transsexuals.

In support of its policy, witnesses for CSC had emphasized the vulnerability of the female inmate population and the problematic impact that the placing of an anatomical male in their midst would have. Though the evidence on this point was to a certain extent impressionistic, the Tribunal found that it had been supplemented by reference to objective studies on the needs of female prisoners as well as the views of one of the expert witnesses. It concluded that the difficulties women prisoners had with men were in part based on painful life experiences involving physical, psychological and sexual abuse. Put simply, they constituted a vulnerable group that were entitled to have their needs recognized and respected. It was therefore not a reasonable solution, as had been argued, to place male pre-operative transsexuals in a female penitentiary. The Tribunal also concluded that it was neither feasible not desirable to place pre-operative transsexuals in transition in wholly separate institutions, underscoring the extremely low numbers of inmates involved, difficult logistical problems and issues of rehabilitation.

Despite its findings on these two alternatives, the Tribunal went on to conclude that the policy in its present form was unjustified because it failed "to recognize the special vulnerability of the pre-operative transsexual inmate population."[83] In other words, CSC had failed to take reasonable steps to accommodate members of this group. The Tribunal ruled that any revamped policy "must recognize the differential effect that housing inmates in accordance with their anatomy has on transsexual inmates...acknowledge their susceptibility to victimization within the prison system...[and] require the individualized assessment of each transsexual inmate by

corrections officials, in consultation with qualified medical professionals, as to the appropriate placement within the various types of facilities available in the male prison system..."[84] It therefore ordered that a new policy for placement of transsexual inmates be formulated in consultations with the Commission so as to accommodate their specific placement needs.

Regarding access to sex reassignment surgery, the Tribunal had little difficulty finding a *prima facie* case of discrimination. It reasoned that CSC's blanket prohibition during the period of incarceration effectively denied a medical service to even those transsexual inmates who were good candidates, based on the opinion of medical professionals, for sex reassignment surgery. Such denial of medical services (whether classed as essential or elective) amounted to discrimination on the basis of both sex and disability. The Tribunal then went on to consider whether a *bona fide* justification for the prohibition had been demonstrated by CSC.

Since both the rationality of the policy and the good faith of those who established it were easily demonstrated, the Tribunal centred its analysis on whether the prohibition was reasonably necessary, in the sense that no accommodation of pre-operative transsexuals could be made without incurring undue hardship. It noted that serious doubts had been raised on the evidence about the ability of incarcerated transsexuals to fulfil a key prerequisite to selection as an appropriate candidate for sex-change surgery, namely the successful completion of a real life experience living as a member of the target sex. In the words of the Tribunal:

> "We agree with the experts called by CSC that the real life experience requirement of the treatment protocol cannot be satisfactorily fulfilled within the carceral setting. It appears from all of the evidence that pre-operative transsexuals need to be able to interact with *both* men and women in their day to day lives in order to properly fulfil the requirements of the real life experience...Can these individuals then obtain an appropriate real life experience while incarcerated in male penitentiaries? We think not...[T]he purpose of the real life experience is to test the resolve of the patient as it relates to proceeding with sex reassignment surgery, while also assessing the capacity of the individual to live in their target gender. The patient's resolve is tested by requiring the patient to face the potential loss of employment, family and friends, as well as the general social opprobrium that can follow the decision to live as a member of the target gender. Unlike society at large, the artificial environment of the male prison provides both positive and negative reinforcements that can distort the experience of the individual in such a way as to render the real life experience an unreliable test of an individual's resolve, the capacity to function in the preferred gender, and the adequacy of social, economic, and psychological supports. The real life experience carried out in the prison setting is, therefore, an unreliable indicator of the individual's suitability for sex reassignment surgery."[85]

While this conclusion narrows considerably the already small number of inmates who might be potential candidates for sex reassignment surgery, the Tribunal found that it did not justify the absolute prohibition currently set out in CSC policies. This could only be justified if CSC demonstrated that no one could possibly meet the eligibility requirements regulating access to "a legitimate medical treatment for a recognized medical condition."[86] The Tribunal provided one example of where an individual could very well fulfil the requirements, namely a case where the person "...had fulfilled the real life experience component of the selection criteria prior to their

incarceration."[87] As to who would make the judgement about an inmate's suitability and readiness for the operation, the Tribunal indicated that it should be made by the medical professionals who had been following the person through the transition process prior to incarceration (unless the inmate and CSC should agree otherwise).

Since CSC had failed to demonstrate that accommodation short of undue hardship could not be made, the Tribunal found the blanket prohibition discriminatory on the basis of sex and disability. It therefore ordered CSC to cease applying the policy in question, but suspended its order for a period of six months to allow CSC to consult with the Commission with a view to formulating a new policy consistent with the reasons set out in its decision.

The obligation of an employer to accommodate a disabled employee up to the point of undue hardship was the central focus of a Tribunal decision in *Eyerley* v. *Seaspan International*.[88] The case involved an employee who, during the course of 2,662 days (1989-1996) on the payroll of the respondent company, had worked only 17.5% of the time. For the most part, his absenteeism was due to a work-related injury to his right wrist which prevented him from performing some of the duties associated with his position as cook/deckhand on the respondent's coastal tugs. In light of his injury (due to which he had spent various periods of time on workers' compensation), Mr. Eyerley requested that he be assigned to smaller tugs with lighter gear in order to avoid heavy and strenuous work. Seaspan would give no guarantee in this regard, offering only to assign the employee to smaller vessels where it was administratively feasible. Work on smaller vessels also proved to be difficult for the employee, who went on workers' compensation again on July 18, 1995. Finally, in light of medical reports from doctors and the Worker's Compensation Board (WCB) indicating little prospect of the employee's return to work in the near future as a cook/deckhand, his employment was terminated on November 8, 1996 (for reason of non-culpable absenteeism). A complaint alleging discrimination in employment based on disability was made on May 7, 1998.

In its defence, the respondent company argued that when a person's employment is ended due to frustration of contract (i.e. through non-culpable absenteeism) no issue of discrimination based on disability can arise. As a result, the company argued, it cannot be said that on the facts of the complaint a *prima facie* case of discrimination was established. In support of its argument, the company relied on case law involving wrongful dismissal actions where the principle of frustration of contract had been invoked as a defence. The Tribunal rejected this argument, pointing out that none of the cases cited had dealt specifically with the impact of human rights legislation on the issue of frustration of contract. It referred with approval to an arbitral decision which had ruled that "...an employer has the right to its part of the employment bargain, namely, the employer's performance of the work. But, where the employment rule impacts negatively on a disabled person the correct approach for an arbitrator is to consider whether this employee could be accommodated to the point of undue hardship."[89] Moreover, the Tribunal pointed out that even the arbitral decisions cited by Seaspan accepted that the principle of non-culpable absenteeism did not operate freely and was in fact constrained by human rights legislation.

Having therefore found that a *prima facie* case of discrimination based on disability was established on the evidence presented, the Tribunal turned to the issue of accommodation. The work standard at issue, namely that an employee must have a reasonable record of attendance on the job, was clearly connected to legitimate work-related requirements of Seaspan. Yet even where a standard is reasonably necessary, an employer is obliged to accommodate an employee (suffering from a disability) up to the point of undue hardship. As to what constitutes undue hardship, the Tribunal adopted well-known criteria identified by the Supreme Court of Canada, such as financial costs, interchangeability of the workforce and facilities, collective agreements, substantial interference with the rights and morale of other employees, and employee safety. It also pointed out that any review of accommodation involves both a procedural and substantive aspect: "Procedural in the sense that the employer must consider all viable forms of accommodation. Substantive in the sense of assessing the reasonableness of the accommodation offered or the employer's reasons for not offering any accommodation."[90]

On the evidence before it, the Tribunal found that the only accommodation made by Seaspan was to consider the request of the complainant (Mr. Eyerley) to be assigned to smaller tugs. However, Seaspan had made it clear that it was not about to organize its crews around Mr. Eyerley's wrist and that he must be fit to sail on any Seaspan boat. The Tribunal found that Seaspan operated a full range of boats, some of which (such as trainships and shift tugs) involved much lighter work and would have been better suited to the complainant in light of his disability. While the Tribunal was not in a position to determine whether justifiable impediments would have precluded such alternative employment, it found that this possibility was given no consideration nor was a thorough assessment of Mr. Eyerley’s ability to do various jobs carried out.

In fashioning an appropriate remedy, the Tribunal considered it important to bear in mind the undoubted physical limitations of the complainant. It rejected submissions made that an order for lost wages be issued, pointing out that the complainant had received vocational rehabilitation benefits until December 31, 1998 and that he was in any event medically unfit (in light of the evidence presented) to assume duties as a cook/deckhand. As to alternative jobs the complainant might have been offered, the Tribunal considered it too speculative and remote to form the basis of an order for lost wages. The Tribunal also declined to order that the respondent rehire the complainant and give him the first available Mate's position. To do so, reasoned the Tribunal, would bypass the normal Seaspan assessment procedures, ignore the fact that the complainant had not yet successfully completed retraining and received his Mate's ticket, and fail to consider that a Mate's job included occasional deckhand duties that the complainant was unable to perform.

The final possibility considered by the Tribunal concerned deckhand work aboard ship assist tugs. It found that there was a strong possibility that the complainant would be able to perform the lighter duties involved in such work, and that the safety and risk factors were far less acute than aboard other types of tugs operated by Seaspan. It therefore ordered that Seaspan (at its own expense) arrange for a medical assessment of the complainant to determine his level of fitness and degree of impairment. It further ordered that a full vocational assessment be made of

the duties of a deckhand aboard ship assist tugs. Should the medical assessment find the complainant capable of performing the duties of a deckhand aboard ship assist tugs, the Tribunal ordered that Seaspan offer him the first permanent position of the sort that became available (without regard to seniority). However, no employee currently occupying such a position was to be removed in order to accommodate the complainant in this regard. Finally, the Tribunal ordered that a sum of $5,000 be paid to the complainant for hurt feelings and loss of self-respect.

Race/Ethnic or National Origin

The Tribunal issued an extensive decision in *Chopra* v. *National Health and Welfare*[91] regarding an individual complaint of race discrimination (as well as ethnic or national origin). In very general terms, the complainant (of South Asian origin and an employee of the respondent since 1969) alleged that Health Canada denied him the opportunity to compete fairly for senior management positions, in particular the position of Director, Bureau of Human Prescription Drugs. Originally filed n September of 1992, the complaint was heard by a tribunal during the course of several days in September and October of 1995. A decision was issued in March of 1996[92] dismissing the allegations of discriminatory treatment of the complainant in the staffing of a management position at the Department of National Health and Welfare. That decision was overturned on appeal due to the tribunal's legal error of excluding expert evidence related to issues of systemic discrimination.[93] The tribunal had excluded general evidence of a systemic problem at Health Canada that the complainant (and the Commission) had hoped to use to establish circumstantial evidence to infer that discrimination had occurred in the particular case of the complainant. The Federal Court returned the matter to the "original tribunal" to be disposed of on the basis of the record from the previous hearing and any further statistical evidence that the complainant or the Commission had sought to introduce, as well as materials in response that might be submitted by the respondent department. Since the original tribunal could not be reconstituted, a new tribunal was assigned to reconsider the matter in light of the Federal Court judgment.

A number of evidentiary issues were dealt with during the course of the new hearing. These included the question of the scope of new evidence that would be allowed, in particular as it applied to the respondent. The Tribunal determined that Health and Welfare should be allowed to lead new evidence even though it related to materials already placed before the original tribunal. It reasoned that the statistical evidence potentially reinforced the particulars of the complainant's case. As the respondent's original assessment of the alleged *prima facie* case against it affected the type of evidence it chose to submit in its defence at the original hearing, the Tribunal determined that fairness required that the respondent be allowed to tender evidence that went beyond the strict facts and issues raised by the new statistical evidence. At the same time, the Tribunal ruled that the respondent could not hold in reserve its evidence and move, at the conclusion of the complainant's case, that the allegations be dismissed as having failed to establish a *prima facie* case. In other words, the respondent would have to elect not to submit evidence on the substance of the allegations if it chose to present a motion for dismissal on this

basis, something it ultimately declined to do.[94]

The Tribunal also set out the principles that should guide it with respect to findings of fact made by the original tribunal. It emphasized that it would be imprudent for it to start reassessing the testimony of witnesses whom it had not directly heard. However, should new evidence be received, it would be incumbent on the Tribunal to reassess the issue to which it related. As to issues not related to new evidence, the Tribunal ruled that it was still entitled to reassess if there was "a palpable or manifest error in the first Tribunal's assessment of the facts or an error in its conclusion as to the law."[95] Beyond these matters, the Tribunal determined that it should defer to the findings of fact made by the original tribunal.

The Tribunal's decision explains in detail the factual circumstances surrounding the allegations of race discrimination. The manner in which the competition for this position was conducted, its temporary staffing and the ultimate appointment of the successful candidate to it (during the period 1990-92) was the central substantive focus of the Tribunal. With respect to the final competition (March-April, 1992), it concluded that the complainant had been screened out due to a lack of managerial experience. Since the complainant's failure to make the list of qualified candidates was the result of applying an objective criterion, he had failed to establish a *prima facie* case of discrimination.[96] Nevertheless, the evidence before the Tribunal raised other issues about possible discrimination against the complainant related to denial of opportunities. As the Tribunal observed: "...[T]he most important and troubling question is whether there is any evidence linking Dr. Chopra's lack of management experience to the actions or omissions of the employer and whether they are somehow associated with an adverse differential treatment based on a prohibited ground under the *CHRA*."[97]

This question was ultimately answered in the affirmative. To support its conclusion, the Tribunal pointed to several facts: (i) the failure of the department to appoint the complainant as acting Director, (ii) the appointment of someone else as acting Director even though the individual failed to meet the stated qualifications, (iii) the assumption of a senior manager that some "cultural" groups lacked "soft skills" related to communicating, influencing and negotiating.[98] The failure to appoint him on an acting basis was, in all the circumstances, crucial. As the Tribunal said: "The consequences of this failure by Health Canada to give Dr. Chopra the chance to act in this position when this opportunity arose are significant. Had he assumed these duties for all or part of the period leading up to the final competition, he would have acquired the recent management experience required to be screened into that competition."[99] Instead, the respondent appointed a person who was not a member of a visible minority to act on an interim basis, a person who did not meet the stated requirements of the position. As to the complainant, the Tribunal found "...that essentially no thought was given to appointing Dr. Chopra at all, he was simply perceived as lacking the 'soft skills', consistent with the Assistant Deputy Minister's general perception of certain persons with diverse cultural backgrounds. I find that this inference is more probable than other possible inferences. Applying the test articulated in the *O'MALLEY* case, I am satisfied that the evidence is sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent, and that the Complainant and the Commission have established a *prima facie* case of discrimination such that

the burden then shifts to the Respondent to provide a reasonable explanation for its actions."[100]

The respondent then pointed to the lack of managerial skills of the complainant to justify the decision not to appoint him on an acting basis. Given a number of inconsistencies in the evidence regarding the staffing of the position on an acting basis and, more importantly, the established fact that the person appointed to act did not meet the qualifications for the job, the Tribunal found the explanation offered by the respondent to be pretextual. Since the respondent was unable to satisfy the burden of proof, the complaint was found to be substantiated, at least insofar as it related to the failure of the respondent to offer the complainant the opportunity to act as Director on an interim basis.[101] As to remedy, the Tribunal chose to allow the parties to negotiate a suitable settlement, but retained jurisdiction to hear arguments on the issue should the parties fail to agree.

Statistical evidence regarding systemic discrimination, which had been excluded at the first hearing, played no significant role in the Tribunal's conclusion that the respondent had discriminated against the complainant. Nevertheless, the Tribunal's views in this regard give insight into how such evidence may be treated in the future. As the Tribunal acknowledged, the Federal Court has established that statistical evidence of systemic discrimination may be introduced as circumstantial evidence to infer that discrimination probably occurred in a particular case. However, additional evidence must be presented in cases of individual complaints that links the statistical data to specific acts of alleged discrimination. As applied to the case before it, the Tribunal underscored that "...even if the existence of systemic barriers to the promotion of visible minorities in the EX group was established, the Commission would be required to demonstrate a link between this evidence and the evidence, both direct and circumstantial, of individual discrimination in Dr. Chopra's situation, in order for a *prima facie* case to be established."[102]

The Tribunal found that there were serious methodological deficiencies in the expert evidence presented by the Commission that vitiated its reliability. The labour pools or "feeder groups" used by the Commission's witness in determining the availability of visible minorities for appointment to EX or management positions were considered inappropriate. For example, personnel data was distributed between two broad categories from which EX appointments are made that did not reflect the relative numbers coming from each group. This resulted in an over-estimation of the available candidates who might be expected to belong to visible minorities. The Commission's witness had also used a "static" analysis in establishing the representation rates of visible minorities, as opposed to an analysis based on "applicant flow". The former determines the representation rate at a specific moment in time, whereas the latter determines it over a period of time. The Tribunal felt that the use of a "static" analysis did not provide reliable data with respect to hiring patterns over time, which was important to establishing circumstantial evidence of discrimination. The Tribunal also criticized the methodology used by the expert witness because of the absence of any statistical testing of the findings. While the relatively small amount of data may render such statistical testing ineffective, the Tribunal pointed out that "...if numbers are 'too small', there is no logical justification for making any inference that discriminatory barriers exist against entry by visible minorities into the EX category."[103]

A further evidentiary matter considered by the Tribunal was issue estoppel. In its final submissions to the Tribunal, the Commission pointed out that the issue of systemic discrimination at senior management levels in the Department of Health and Welfare had already been litigated and decided in another case ("NCARR").[104] That being so, the Commission argued that the respondent should be precluded from relitigating an issue regarding which a finding had already been made (upholding the validity of the allegation). The NCARR case concerned a complaint under section 10 of the *CHRA* alleging that the Department was engaged in a discriminatory practice reflected in a policy or practice that deprived or tended to deprive a class of individuals (visible minorities) of employment opportunities. Dr. Chopra was both a witness at that proceeding and at the time chairperson of the Employment Equity Committee of NCARR. After reviewing the law applicable to issue estoppel, the Tribunal concluded that while the issues in the two cases were similar, the actual employee groups under scrutiny were sufficiently distinct to render inapplicable the doctrine of issue estoppel. Moreover, the Commission itself had effectively waived any right it might have had to plead issue estoppel by leading evidence on the issue of systemic discrimination and by its failure to raise the issue at an earlier moment in the proceedings. While this produced a conclusion which appeared at odds with that arrived at in previous adjudication on the class action, the Tribunal emphasized that it would be capricious to set aside its own findings, which were based on evidence it actually heard (and adduced by the Commission itself), in favour of findings based on evidence that was materially different and submitted in the context of another proceeding.

In *Nkwazi* v. *Correctional Service Canada*[105] allegations of race and colour discrimination in the workplace were upheld, in part, by the Tribunal. The complainant is a black woman born in Zimbabwe who immigrated to Canada in 1983. Following the successful completion of a Bachelor of Science degree (and previous upgrading of her nursing skills), she accepted part-time employment in October 1995 at the Regional Psychiatric Centre (RPC) operated by Correctional Service Canada in Saskatoon. Her status as a nurse at RPC was that of a casual employee governed by the terms of a three month contract, which meant she was called to work on an as-needed basis. Her casual contract was renewed nine times, though her contract stipulated that she could work no more than 125 days in any 12 month period.

The alleged discrimination against the complainant occurred in and around the time when a competition for a term staff nurse position took place. The evidence (extensively reviewed in the decision of the tribunal) established that a member of management attempted to exclude the complainant from consideration by unjustifiably insisting she take a one week rest period beginning on the anniversary of the date she first began working at RPC. It was alleged (wrongly) by the Respondent that all casual employees were required to take a one week break at the end of each 12 month period of work. As it applied to the complainant, the alleged rest period coincided with the competition for the nursing position and an unusually short time frame for applications. The Tribunal found that no one else but the complainant was subject to a deliberate attempt to exclude them from the competition (by attempting to restrict their knowledge of it). In particular, no Caucasian employee was so treated. The Tribunal therefore concluded, on a balance of probabilities, that the complainant's race and colour were motivating factors in the actions taken by management at RPC. Notwithstanding the attempt to exclude her,

the complainant did subsequently compete for the term staff nurse position, but failed to make the eligibility list.

The poor performance of the complainant in the competition was explained by nervousness caused by the fact that the very person who attempted to exclude her from consideration sat on the panel that interviewed the candidates. In light of this, the Tribunal concluded that the complainant had not been given a fair opportunity to compete on a level playing field. While the Tribunal could not find that the actions of management effectively denied the complainant access to the position in question, it indicated that these actions would be taken into consideration when assessing damages.

Of even greater concern to the Tribunal were allegations of intimidation of the complainant following her complaint of discriminatory treatment, in particular the failure to renew the complainant's term contract as a casual employee. While management at Correctional Service Canada maintained that this decision had been taken because of poor performance, the Tribunal could find no credible evidence to support the claim. The testimony offered was vague and devoid of any specific detail relevant to the performance of the complainant's duties as a nurse at RPC.[106]

While the Tribunal recognized that current provisions of the *CHRA* make a retaliatory act an independent discriminatory practice, the events relevant to this complaint predated amendments to the *Act* that brought these provisions into force. This raised the rule against giving retrospective effect to a new enactment, precluding the Tribunal from considering the retaliatory acts as an independent basis for liability under the *CHRA*. However, the Tribunal determined that such acts could be considered when assessing damages that resulted from the discrimination suffered by the complainant relevant to the competition for the staff nursing position.

In light of the relationship between the retaliatory act and the original discriminatory act, the Tribunal ordered that Correctional Service Canada reinstate the complainant as a casual employee at RPC for a three-month term at the first reasonable opportunity, and to renew the contract thereafter as a function of the needs of the institution. It further ordered payment for lost wages, an order that took into consideration an inappropriate job reference that had been given to another prospective employer of the complainant.[107] The concern of the complainant that negative comments by management at RPC would spread in the health care community if she too actively sought other employment had inhibited her efforts to find other employment. With respect to non-pecuniary damages for pain and suffering and due to the wilful and reckless nature of the discriminatory acts, the Tribunal found that current provisions in the *CHRA* (introduced in June of 1998) that allow for a maximum of $20,000 under both headings should not be applied to events that occurred before the provisions were adopted.[108] However, the Tribunal awarded the maximum damages of $5,000 that were available under the *CHRA* prior to the 1998 amendments.

Failure to substantiate allegations of discrimination before the Tribunal often turns on the credibility of witnesses. In *Wong* v. *Royal Bank of Canada*[109] it was the lack of credibility of the

complainant herself that resulted in the complaint being dismissed. The case involved a conflictual relationship between Ms. Wong and her employer with whom she worked for approximately two and a half years. Disagreements arose regarding performance appraisals and the inability of the complainant to achieve the promotions she thought she deserved. At a certain point her depressive illness was such that she could not return to work and was put on short term disability by the Bank. Eventually she began receiving long term disability from the Bank as well. The complainant alleged that her difficulties in getting the work for which she felt she was qualified, as well as denial of access to training programs, was due to her being of Chinese origin. After she began receiving disability payments she filed a complaint alleging that the Bank had discriminated against her by refusing her job opportunities because of her race and national or ethnic origin and by refusing to accommodate her disability (stress and depression). Her complaint was ultimately amended to cover the termination of her employment by the Bank approximately two years into her disability payments.

The credibility of the complainant was seriously damaged by what the Tribunal characterized as numerous examples of her being selective in what information she disclosed and adopting a strategy of deception or untruths. These included failure to disclose information relevant to her work status to insurance companies handling the disability insurance, concealing information from her employer relevant to her work status and misleading medical professionals with respect to personal information relevant to her depression. In point of fact, the complainant's employment with the Bank was terminated after it discovered that she was working at a trust company at the same time as receiving disability benefits.

Given the lack of credibility of the complainant, the Tribunal gave considerable weight to the testimony of other witnesses. The Tribunal found the evidence as a whole supported the Bank's view that the complainant had been treated fairly and equitably with respect to job performance assessment and access to training programs. Rather than being motivated by race or ethnic origin discrimination, the failure of the complainant to gain admission to the AMPB program related to her lack of competitiveness when compared to the other applicants. This conclusion was reinforced by the fact that four applicants of Chinese origin were accepted for the program as a result of the same competition in which the complainant participated. The eventual termination of her employment by the Bank was justified given the lack of honesty the complainant had demonstrated by collecting disability payments from the Bank while working for another financial institution.

Allegations that the Bank had failed to accommodate the complainant's depression were also rejected by the Tribunal. The Tribunal pointed to ample evidence about the fair and reasonable way the Bank had responded to her medical condition, underscoring that she had received the full six months of short-term disability payments, following which long-term disability was paid until the Bank discovered her lack of integrity. As to the complainant's contention that it was her illness that lay at the root of her dishonesty, the Tribunal referred to the psychiatric evidence heard at the hearing to the effect that depressive illness short of psychosis does not preclude rational decisions. In short, psychiatric patients do not lie more than members of the general public. Lack of honesty is just not an illness issue and cannot therefore be explained away as

part of a general depressive condition.

The credibility of the complainant was also at issue in the case of *Baptiste* v. *Correctional Service Canada*,[110] which involved another nurse with CSC. Ms. Baptiste alleged that she was denied promotional and career opportunities, that she was inappropriately assessed on her performance appraisals and that her work as a nurse at the Matsqui Institution was generally devalued because she is black. The evidence established that considerable conflict and animosity existed between the complainant and other staff members at the Matsqui Institution. Bad feelings also existed in her relationship to immediate supervisors and in her dealings with prisoners who at various times fell under her care.

At the outset of its decision, the Tribunal underscored the difficulties it had in explaining the selective and apparently flawed memory of the complainant regarding various incidents and documents relevant to the allegations of discrimination that had been attested to by various witnesses called by Correctional Services. It found that to accept the testimony of the complainant would require a finding that all these witnesses "...lied on the witness stand, that these incidents never happened, and that the documents purporting to record the incidents were fabrications."[111] In refusing to make such a finding, the presiding member of the Tribunal went on to declare that "I do not know whether Gloria Baptiste is consciously lying when she says that she did not receive these documents and that the recorded discussions and incidents never happened, or whether, for some reason, her memory is profoundly flawed. Either way, I am left with very serious reservations about the general reliability of her testimony. As a result of these concerns, unless otherwise noted, where the testimony of Gloria Baptiste conflicts with that of other witnesses, I prefer the testimony of the other witnesses."[112]

The atmosphere that prevailed in the prison hospital was depicted in the evidence as often crude, in great part because of the attitude of inmates towards the staff. For example, it was not unusual for nurses to be called "douche bag" or to be compared in a vulgar fashion to female sex organs. A male nurse was sometimes referred to as "faggot" and "queer". In the case of the complainant, she often received the epithets "black bitch" and "jungle bunny".[113] The evidence before the Tribunal was consistent in demonstrating that racial intolerance was generalized throughout the inmate population. The rough environment within the prison hospital spilled over from time to time into the way various members of the staff expressed themselves as well. The Tribunal found that some of the complainant's peers had periodically referred to her in racially derogatory terms. Even her immediate supervisor in a moment of exasperation had referred to the complainant as the "black bitch", though the complainant was not present at the time and the supervisor quickly apologized to other members of the staff who had overheard her remark. The Tribunal referred to this remark as having been "intemperate"[114] and not reflective of an attitude of racial intolerance.

With respect to the complainant's performance appraisals, the Tribunal concluded that the complainant's supervisor had become increasingly frustrated with her attitude and behaviour, that co-workers considered the complainant rude, aloof and unwilling to be a team player, and that several serious incidents of poor judgment had been appropriately recorded in performance

appraisals. The Tribunal did not consider the "intemperate" remark referred to above was sufficient to establish that the poor performance appraisals had been unfair or motivated by racial intolerance. It emphasized that the complaint was not about the 'poisonous work environment' but rather about the alleged unfairness in the evaluation of her work performance. On this issue, the Tribunal found that the appraisals were detailed and careful and that the complainant was not treated any differently than her co-workers in the process of evaluating their performance on the job.

In dismissing the complaint, the Tribunal pointed out that the use of racially derogatory language by inmates should be discouraged. While it admitted that this could probably never be completely eliminated, the Tribunal found it disturbing that verbal excesses were also reflected in the behaviour of members of the staff of Correctional Services. Even though the evidence in the case at bar did not establish that the complainant was adversely affected by racial intolerance regarding the issues of performance appraisals and denial of opportunities, the Tribunal underscored that the management of Correctional Services should take steps to ensure in the future that the use of racial derogatory epithets was effectively sanctioned.

Apart from issues of credibility, an allegation of discrimination may fail simply because of the insufficiency of evidence placed before the Tribunal. This was the case in *Cizungu* v. *Développement des ressources humaines Canada*,[115] which involved a complainant of African origin who worked in a call centre as a term employee (responding to French-language inquiries) from January 5 to June 10, 1998. This period of time covered two term contracts back-to-back. Following the refusal of the department to offer him a third contract, the complainant alleged that he had been discriminated against because of his race, colour and national or ethnic origin. At the time the complaint was filed, the complainant alleged that no explanation had been given to him to justify the refusal to renew his contract. However, the complainant testified before the Tribunal that reference had been made to his African accent by a departmental manager as being the reason for the non-renewal of his contract.

Two departmental witnesses testified that the question of accent was never an issue in evaluating the performance of the complainant. The difficulties that arose related to problems of communication experienced by the complainant, such as inflexibility in choice of phrase and repetitive responses to clients with difficulties of understanding. It was also noted that the duration of calls handled by the complainant were consistently longer than those taken by his colleagues. The Tribunal itself judged that the slight accent of the complainant was no impediment to understanding what he said. In light of all these factors (and the fact that the original complaint made no mention of the issue of accent), the Tribunal concluded that the reason for the non-renewal of contract had no relationship to the complainant's African accent when speaking French.

Age

The Tribunal dealt with allegations of discrimination based on age in the case of *Morris* v. *Canada (Canadian Armed Forces)*.[116] The complaint was made by a long-time member of the

Canadian Forces in September of 1996 who alleged that he was passed over for promotion to the rank of Master Warrant Officer because he was too old. He subsequently reached the age of mandatory retirement (55) and was released from the Forces in 1999.

The Canadian Forces stated that, while Mr. Morris satisfied all the criteria for promotion from Warrant Officer to Master Warrant Officer, his ranking on the annual Merit Lists (arrived at in part through performance evaluation) was too low to justify (according to the Canadian Forces) his being selected for promotion. The number of promotions in any given year were limited and priorities were established by reference to the annual Merit Lists.

The assessment of a member's performance was arrived at by a complex process of yearly evaluations involving immediate commanders and other personnel. The results were recorded in an annual Performance Evaluation Report (PER) for each non-commissioned officer above the rank of Corporal. While numerical ratings were assigned for each "objective" component of a member's performance evaluation, the overall assessment of a member was relative to that of other members. Moreover, the relative ranking of various Warrant Officers was arrived at through meetings that took place prior to the finalization of each member's PER.

Although the PER was composed of a "quantitative assessment"[117] of a member's performance across 14 aspects of employment, it did not constitute the only factor considered in establishing the annual Merit List. The National Merit Board charged with that responsibility also evaluated what was referred to as a member's "potential". Various elements were identified as falling within the category of "potential" and the relative weight to be assigned to each element was sometimes mentioned. The ranking of a member for the Merit List was therefore arrived at by the Board by both a review of his PER file and an assessment of his potential.

With respect to direct evidence that age was a consideration in denying the complainant a promotion, the Tribunal was unable to conclude that a Chief Warrant Officer's opinion that age was a liability actually influenced the establishment of the relevant Merit Lists. Nor did it find that anecdotal evidence about the prevailing attitude in the Forces regarding age was sufficient to prove that discrimination had been present in the specific case of the complainant. However, circumstantial evidence did establish to the satisfaction of the Tribunal that a general opinion prevailed in the Forces that older members did not get promoted. The Tribunal also emphasized that the assessment of a member's potential introduced a possible subjective factor into the process of establishing the Merit Lists. In the case of the complainant, it noted that a significant discrepancy existed between his high PER scores and the lower scores he was accorded with respect to potential. This occurred during a time period when the complainant was one of the oldest, if not the oldest, of the Warrant Officers being assessed. The circumstantial evidence was therefore sufficient, in the eyes of the Tribunal, to establish a *prima facie* case that age had been a factor in the denial of promotion to the complainant.

The Tribunal rejected the explanations proffered by the respondent to justify the denial of promotion to the complainant. It pointed out that while factors such as educational upgrading, communication skills, leadership, and experience with deployments and operational missions

were properly identified by the respondent as related to potential, no comparative evidence was presented that would have allowed the Tribunal to determine whether the scores given to the complainant were justifiably lower than those awarded his peers.

With respect to remedy, the Tribunal ordered that the complainant be promoted to the rank of Master Warrant Officer effective September 1, 1993; and that the respondent pay him the difference in salary to which he would have been entitled up to his retirement on April 1, 1999, as well as adjust the retirement severance package to reflect the rank he would have held at the time he retired. The Tribunal also ordered special compensation of $3,000 for hurt feelings and loss of self-respect.

Internet Communication of Hate Messages

The Tribunal has recently issued an important decision regarding the application of subsection 13(1) of the *CHRA* to a website containing messages that allegedly exposed persons of Jewish faith and ethnic origin to hatred and contempt.[118] Subsection 13(1) makes it a discriminatory practice "for a person or group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."[119] The complaint before the Tribunal involved material posted on a Homepage (Zundelsite) and accessible on the World Wide Web that denounced in vitriolic terms the alleged fraud of the Holocaust, Jewish/Zionist/Marxist racketeers who allegedly mounted a Holocaust extortion scheme, the supposed Judaization and attendant mental and spiritual circumcision of Western civilization, a long list of supposed lies by the Jewish Lobby, and various con games, cheating and infamous acts said to have been committed by the Jews.[120]

Before reaching the substantive issue of whether material available on the Zundelsite spread hatred or contempt, the Tribunal first dealt with two preliminary questions raised by the respondent (Ernst Zündel); namely, (i) who effectively exercised control over the Zundelsite and (ii) whether the material available on the website communicated telephonically. The respondent had maintained that the individual who owned and operated the website was an American citizen resident in the United States. In support of his contention, he pointed to a clause inserted at the end of the Zundelsite table of contents that specifically identified Dr. A Rimland as owner and operator of the site. However, there was also ample evidence before the Tribunal that Zundel was personally involved in the preparation, selection and editing of materials found on the site. The Tribunal pointed out that the *CHRA* does not require proof of legal ownership but rather sufficient evidence to establish that the respondent, acting alone or in concert, caused the offending documents to be communicated. In this regard, it concluded: "We are not persuaded that the inclusion of a single disclaimer found at the bottom of the Table of Contents on the Zundelsite is sufficient to displace the overwhelming evidence of control in the hands of Zundel. We would also note that the *CHRA* specifically contemplates that individuals might act in concert to communicate messages that contravene subsection 13(1). Even if Ms. Rimland

maintained some level of control, the evidence supports the finding that, at all material times, she was acting in concert with the named Respondent."[121]

Having found that Zundel controlled the site and caused the materials in question to be communicated, the Tribunal turned to the question of whether such communication fell within the scope of the term "telephonic". While expert evidence heard by the Tribunal diverged regarding the descriptive terms best applied to Internet communication, the Tribunal found that in "Canada the network access points and the Internet all run over the same circuits or lines that are used for telephone activity. Like the commercial reality for users wishing to connect with their ISP [Internet Service Provider], the overwhelming proportion of links between an ISP and the Internet backbone, or transmissions among Internet backbone providers use circuits that are, and were, a part of the global telephone network."[122] The factual relationship of Internet communications to telephone networks thus raised the question of whether the notion of "communicate telephonically" under subsection 13(1) of the *CHRA* should be construed to include transmission of information by means of a website.

As a point of departure, the Tribunal emphasized that the interpretation of human rights legislation must be undertaken within the context of its underlying purposes. It referred to the Supreme Court summary of the general purposes of the *CHRA* as being the promotion of equal opportunity unhindered by discriminatory practices. With respect to the specific harm to equality interests that subsection 13(1) was designed to alleviate, the Tribunal adopted the reasoning of the Supreme Court to the effect that "...messages of hate propaganda undermine the dignity and self-worth of target groups members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality."[123] The Tribunal also underscored that while the provisions of subsection 13(1) were intended to censure hate messages that could very well result in further acts of discrimination by those who listened to them (such as discriminatory denial of employment, housing or the provision of other services), they also sought to avoid independent harm to members of a vilified group that flowed directly from the communication. In the words of the Tribunal: "Equally important, there is an 'intensely painful reaction' experienced by individuals subjected to the expression of hatred. The mere fact that they are singled out for recurring, public vilification can erode an individual's personal dignity and sense of self-worth."[124]

In light of the above-mentioned legislative purposes, the Tribunal refused to construe the act of communicating telephonically as limited to traditional telephone hardware designed for voice transmission. It found that the adverb "telephonically" relates to the means by which communication is effected and not simply to the particular device that might be used: "Whether a message is communicated aurally, by voice, or visually, by text, has no effect on its capacity to influence the listener, or humiliate the subject. Nor does the specific device used to effect the communication alter the harmful character of the message conveyed. A telephone handset is not uniquely effective in the communication of hate messages...In our view, moreover, the interpretation we have adopted is the only form of analysis that can readily take into account advances in technology, and keep pace with those developments. A static interpretation of

subsection 13(1), where telephonic communication is restricted to voice transmissions using a conventional telephone device, would dramatically reduce the effectiveness of the *CHRA* as an aid to the promotion of equality."[125] The Tribunal also noted that hate messages on the Internet represented a greater threat to equality goals than traditional telephone communications, due to the vast amount of information that can be transmitted and the ease with which it can be accessed and down loaded.[126]

The last issue of statutory interpretation (before addressing the constitutional issues related to freedom of speech) concerned the substantive evaluation of the materials found on the Zundelsite. Were they likely to expose a person or persons to "hatred" or "contempt" within the meaning of subsection 13(1)? In conducting this evaluation, the Tribunal used the Supreme Court's view that the type of communications caught by the terms of that section were those likely to arouse "unusually strong and deep-felt emotions of detestation, calumny or vilification"[127] against members of a group, as well as those communications that looked down on or treated members of a group as being inferior. It found that materials on the Zundelsite vilified Jews in the most "rabid and extreme manner...[characterizing them] as "liars, cheats, criminals and thugs' who have deliberately engaged in a monumental fraud designed to extort funds..."[128] In short, the Tribunal concluded that readers of the materials in question would hold "Jews in very low regard, viewing them either with contempt, scorn and disdain, or hatred, loathing and revulsion."[129] It rejected the argument that Mr. Zundel was only engaging in an on-going historical debate about past events, pointing out that the manner in which his views were expressed was clearly inflammatory and tainted with animus towards all Jews. The Tribunal accepted that there must be ample room for legitimate debate and discussion regarding the events surrounding the Second World War: "If this truly were a neutrally worded, "academic" debate, our analysis might be quite different. The tone and extreme denigration of Jews, however, separates these documents from those that might be permissible. We have found that it is the linkage between the author's view of these events and the extreme vilification of Jews as a consequence: it is their denunciation as liars, racketeers, extortionists and frauds that is likely to expose them to hatred and contempt."[130]

The respondent also challenged he constitutional validity of subsection 13(1) of the *CHRA*, based on freedom of expression in section 2 of the *Canadian Charter of Rights and Freedoms*. Although the constitutional validity of subsection 13(1) had already been upheld by the Supreme Court of Canada in *Canada (Human Rights Commission)* v. *Taylor*,[131] the respondent took the position that any attempt to expand the scope of subsection 13(1) to include Internet communications would necessarily place in question the applicability of the previous Supreme Court decision. That decision, argued the respondent, should be read in light of its own particular facts, which involved the communication of a message through a telephone answering service. Seen in its factual context, the *Taylor* decision resulted in only a minimal impairment of freedom of speech. This would not be the case if the result in *Taylor* were applied to an interpretation of subsection 13(1) that included Internet communications within its scope. In the view of the respondent, any expansion of the scope of subsection 13(1) to include Internet communications required a new assessment of whether it constituted a reasonable limit on freedom of speech demonstrably justified in a free and democratic society (section one of the

Charter). The respondent felt that such a reassessment would show that subsection 13(1) was no longer a reasonable limit.

The Tribunal reviewed in detail the reasoning the Supreme Court in *Taylor*, which had applied the legal principles inherent in any inquiry under section one of the *Charter*. It noted that the Supreme Court had addressed its mind to whether the legislative purpose underlying subsection 13(1) was sufficiently important to justify restricting freedom of expression. The promotion of equal opportunity and the avoidance of psychological harm to members of groups targeted by hate messages were found by the Court to be important objectives that justified reasonable limits being imposed on freedom of speech. Moreover, the specific measures found subsection 13(1) were seen to be proportionate to the objective being sought, in the sense they were not arbitrary, unfair or irrational; nor did they impair freedom of expression any more than necessary; nor did they produce effects so severe as to constitute an unacceptable abridgment of freedom of expression. The Court in *Taylor* also found that dispensing with the need to prove intent under subsection 13(1) did not run afoul of the proportionality test under section one of the *Charter*:

Clearly an intention to expose others to hatred or contempt on the basis of race or religion is not required in subsection 13(1). As I have just explained, however, subsection 13(1) operates within the context of a Human Rights Statute. Accordingly, the importance of isolating effects (and hence ignoring intent) justifies this absence of a *mens rea* requirement. I also reiterate the point that the impact of the impugned section is less confrontational than would be the case with a criminal prohibition, the legislative framework encouraging a conciliatory settlement and forbidding the imposition of imprisonment unless an individual intentionally acts in a manner prohibited by an order registered with the Federal Court."[132]

The Tribunal accepted that the facts in the *Zundel* case raised potential restrictions on freedom of expression that went beyond those considered in *Taylor*. It therefore felt bound to engage in an analysis under section one of the *Charter* to determine if subsection 13(1) still constituted a reasonable limit on freedom of expression.[133] In so doing, it referred once again to the underlying purposes of the *CHRA* and, more specifically, subsection 13(1):

> "In our opinion, changes in technology that alter and expand the means of telephonic communication cannot diminish the importance of the purpose found in subsection 13(1) to prevent messages of hatred and contempt directed at identifiable groups that undermine the dignity and self-worth of those individuals. The Internet, as a technology, is capable of purveying and transmitting the same kind of hate messages restrained under subsection 13(1) in *Taylor*. We conclude therefore that while the Internet introduces a different context from the traditional use of the telephone, the first branch of the *Oakes* test is satisfied. Parliament's intent to prevent serious harms caused by hate propaganda remains a matter of pressing and substantial importance and this is so whether such messages are borne through the medium described in *Taylor* or through the Internet...We cannot read into Taylor an intention that the matter of pressing and substantial importance was to be confined narrowly to the facts in evidence in that case. We see no basis for such a restricted interpretation having in mind what the Court has said about the

> high purpose of the *Canadian Human Rights Act*."[134]

The means chosen to achieve the purpose of suppressing hate propaganda were also found to satisfy the test of proportionality, despite the factual differences between the case at bar and the *Taylor* case. The Tribunal pointed out that the type of messages targeted by subsection 13(1) were distant from the core value of freedom of expression. The latter was therefore restrained in a minimal way and no more than necessary to achieve the important objective of the legislation. It concluded that it was eminently rational to interpret subsection 13(1) as including messages repeatedly transmitted on the Internet:

> "As a society, our disapproval of hate messages does not depend narrowly on whether they are found on a telephone-answering device. Parliament has spoken. If the telephone is ideally suited to the effective transmission of prejudicial beliefs as part of a campaign to affect public beliefs and attitudes, how much more effective and ideally suited is the Internet to the efficient transmission of such detrimental beliefs...Since the focus of subsection 13(1) is on 'repeated' telephonic messages that are likely to expose persons to hatred or contempt, attention is directed to large scale, public schemes for the dissemination of hate propaganda. The structure of the Internet communications makes it especially susceptible to this analysis. It is difficult for us to see why the Internet, with its pervasive influence and accessibility, should be available to spread messages that are likely to expose persons to hatred or contempt. One can conceive that this new medium of the Internet is a much more effective and well-suited vehicle for the dissemination of hate propaganda."[135]

The section one analysis conducted by the Tribunal regarding restrictions on freedom of expression was also applied to the respondent's claim that his freedom of conscience and religion under the *Charter* had been unreasonably limited by subsection 13(1). It therefore concluded that any limitations imposed on the respondent's freedom of conscience or religion were reasonable and justified in a free and democratic society within the meaning of section one of the *Charter*. The Tribunal also rejected the respondent's argument that his rights under section 7 of the *Charter* to "life, liberty and security of the person" were breached by subsection 13(1), referring to the fact that any cease and desist order from the Tribunal regarding the material available on the Zundelsite did not in any way physically restrain the respondent (hence his liberty interest was not engaged), nor place in question his security of the person. Finally, the Tribunal dismissed arguments that amendments to the *CHRA* modifying the power of the Tribunal to issue remedies for any breach of subsection13(1) created a legislative framework that could no longer be considered compatible with *Charter* rights. First, these amendments did not apply to the case at bar as it concerned facts that predated the amendments in question. Second, the increased scope of penalties under the amendments could not be construed as transforming available remedies into criminal law sanctions. In this regard, the Tribunal relied on findings in *Taylor* that, "as an instrument designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *CHRA* is very different from the *Criminal Code*. The aim of human rights legislation, and of subsection 13(1) is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions

found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensation of the victim."[136] Applying this reasoning to the matter before it, the Tribunal found that the amendments relevant to remedies did not change the remedial nature of the *CHRA*, nor place in question its constitutional validity.

In light of its findings, the Tribunal issued an order against Ernst Zundel and any other individuals acting in his name to cease the discriminatory practices related to the Zundlesite that were reflected in the material placed before the Tribunal, or reflected in any other material of a substantially similar form or content. In so doing, it recognized the limits of remedial power available in the case:

> "There always exists the possibility that an individual, wholly unrelated to a named respondent, will engage in a similar discriminatory practise. The technology involved in the posting of material to the Internet, however, magnifies this problem and arguably makes it much easier to avoid the ultimate goal of eliminating the material from telephone communication. Nonetheless, as a Tribunal we are charged with the responsibility of determining the complaints referred to us, and then making an Order if we find that the Respondent has engaged in a discriminatory practise. We cannot be unduly influenced in this case by what others might do once we issue our Order. The Commission, or individual complainants, can elect to file other complaints, or respond in any other manner that they consider appropriate should they believe that there has been a further contravention of the Act."[137]

TRIBUNAL INTERIM ORDERS

Withdrawal of a Party Before Hearing

Two complaints involving alleged discrimination based on sex were referred to the Tribunal, to be heard together in a single inquiry in light of common issues of fact and law.[138] However, prior to the commencement of the hearing the complainant notified the other parties and the Tribunal that she no longer wished to pursue the matter and withdrew her complaint. The respondent then took the position that there was no longer any public interest in continuing with a hearing into the complaint and that the Tribunal should decline to proceed any further. However, the Commission opposed the request of the respondent, arguing that the Tribunal had no discretion in the matter and was obliged to continue with the proceedings. It also argued that only the Commission was vested with the authority to determine if a hearing should be discontinued for reasons of the public interest.

The Tribunal noted that this issue had to be resolved by reference to the underlying objectives of the *CHRA*: "In examining the statutory scheme governing complaints of discrimination at the federal level, it is important to keep in mind that human rights complaints are not strictly private disputes. Human rights legislation, and its enforcement, serve both public and private purposes:

the public purpose being the elimination of discrimination in society as a whole, and the private purpose being the determination of individual rights and remedies in individual cases."[139] These purposes are reflected in the fact that a complaint under the *CHRA* can be made by the victim of alleged discrimination as well as by the Commission directly (section 40). In addition, the *CHRA* accords party status at an inquiry before the Tribunal to the complainant, the respondent and the Commission, the latter mandated to represent the public interest (subsection 50(1) and 51).

Regarding the particulars of the case before it, the Tribunal pointed out that the anticipated inquiry was based only on two individual complaints, there being no suggestion that the Commission had ever contemplated exercising its authority under section 40(3) of the *CHRA*.[140] While the *CHRA* mandates the Commission to represent the public interest at an inquiry on individual complaints, this fact does not transform the Commission into a party to the complaint itself. The Tribunal therefore concluded that there was no independent *lis* (legal action) between the Commission and the respondent making it possible to continue with proceedings when the complainant had withdrawn. In essence, once the individual complaints were withdrawn there was nothing left into which the Tribunal could inquire.

Situations may arise where the Commission itself decides to withdraw as a party prior to the hearing on an individual complaint. This arose in a case involving allegations of discrimination based on disability (alcoholism and depression) against the CBC.[141] The complainant objected to the unexpected decision of the Commission to withdraw from the hearing, made just three days before the hearing was scheduled to begin. In his view, the public interest would not be served by allowing the withdrawal, especially when no justification for the decision had been offered. The complainant not only requested the Tribunal to force the Commission to remain as a party, but also to pay his legal costs. While the Tribunal deplored the inconvenience caused by the late withdrawal of the Commission, it found that it lacked the jurisdiction to assess the underlying reasons for the Commission's decision. It also lacked the authority to order that the complainant's legal costs be assumed by the Commission.

The impact of the death of a complainant on the continuation of a scheduled hearing was reviewed by the Tribunal in a case alleging discrimination based on disability.[142] Prior to the scheduled hearing date, the parties advised the Tribunal that they had agreed in principle to settle the complaint and were in the process of finalizing the Minutes of Settlement. Unfortunately, the complainant died before the Minutes of Settlement had been signed and the agreement finalized.

The respondent's counsel argued that, given the death of the complainant, there no longer existed a right to claim compensation or other relief under the *CHRA*. It based its position on the common law principle *actio personalis moritur cum persona* and the fact that nothing in the *CHRA* or other relevant legislation provided for the Estate of a deceased person to continue a complaint before the Tribunal.

In reviewing the position of the respondent, the Tribunal found that the *CHRA* extends beyond

the vindication of individual rights and "engages the broader public interest of freedom from discrimination."[143] It also noted that the parties before the Tribunal on an individual complaint include the Commission (representing the public interest) and (on order of the Tribunal) interveners. The Commission may also lay a complaint directly. In addition, the Tribunal referred to the types of remedies under the *CHRA* that extend beyond specific relief awarded a complainant, such as a "cease and desist order against the person who committed the discriminatory practice"[144], and an order that a "person adopt practices in consultation with the Commission to redress the discriminatory practice."[145] In light of the overall regime of the *CHRA*, the Tribunal found that a complaint did not have the character of an "action" such that it would be included in the common law rule based on *actio personalis*. To decide otherwise, reasoned the Tribunal, would allow an "anachronistic" legal maxim (now abolished in England and the common law provinces of Canada) "to override the purpose and objectives of the *Canadian Human Rights Act*."[146]

Expert Witnesses

The Tribunal has reviewed the applicability of provisions in the *Canada Evidence Act*[147] (regulating the number of expert witnesses) to hearings under the *CHRA*.[148] The issue arose when the respondent provided the Commission and the complainant with a list of 10 expert witness it proposed to call. Counsel for the complainant objected, citing section 7 of the *Canada Evidence Act* that requires a party to seek leave of a court or tribunal to call more than five expert witnesses.[149]

As a point of departure, the Tribunal emphasized that a presumption of coherence and consistency should be applied when interpreting statutes adopted by the same legislature. This means that a harmonious interpretation of the *Canada Evidence Act* and the *CHRA* should be favoured. While the Tribunal explicitly declined passing judgment on any provision other than section 7 of the *Evidence Act*, it pointed out that the *Act* as a whole provides a set of basic principles applicable to any proceeding. It being an *Act* of general application ("a highly developed and carefully thought out body of evidence law"[150]), the *Evidence Act* "should not be supplanted without a clear expression of intent from Parliament."[151]

The Tribunal also drew a distinction between substantive rules of evidence that govern questions of admissibility and rules that relate to questions of practice and procedure. Section 7 of the *Canada Evidence Act* is best characterized as falling within the latter. The Tribunal felt this distinction important in avoiding any perceived conflict between section 7 and the provisions found in subsection 50(3)(c) of the *CHRA* that empower the Tribunal to receive evidence whether or not it might be admissible in a court of law.

The Tribunal further found that the underlying purpose of section 7, which is to provide ample opportunity to present evidence without turning the proceedings into a showcase of experts, accords well with the purposes of the *CHRA*. Far from entrammelling the authority of the Tribunal, the provision in question arguably extends the powers of the Tribunal to control proceedings before it. In concluding that section 7 applies to human rights hearings, the

Tribunal characterized it as a "reasonable compromise"[152], pointing out that it could see no reason why a party should not be required to explain why more than five expert witnesses were needed to support its case.

Although case law existed that interpreted section 7 as applying to each factual issue raised, the Tribunal preferred to interpret the rule of five as applying to the total number of expert witnesses a party intended to call to establish its case as a whole. To decide otherwise, reasoned the Tribunal, "...would open the trial process to a virtually unlimited number of witnesses, particularly in a complex case, and deprive the court of its power to regulate the process."[153]

Access to preliminary or draft documents used in the preparation of expert opinion evidence was at issue in a recent interlocutory decision of the Tribunal.[154] The respondent in the case had requested answers to a number of written questions from the Evaluation Committee mandated to evaluate jobs for the purposes of pay equity. The resultant document, entered as an exhibit at the hearing, was the basis for the opinion evidence of the expert witness. The respondent argued that it was important to understand the process by which the final document was produced, in particular the nature of discussions and exchanges that had taken place amongst members of the Committee. It therefore requested access to the preliminary and draft documents, as well as responses and comments, that led to the final adoption of the Committee's report. This request was opposed by the other parties, notably because it would be contrary to the public interest to create a precedent requiring notes, observations and interim writings of experts to be produced before the Tribunal. The other parties felt that this would just simply open the door to the systematic destruction of preliminary materials, to which a discovery order might apply, once a final document had been produced.

In deciding this issue, the Tribunal took note of diverging lines of jurisprudence. One set of past decisions excluding discovery of such preliminary materials was based upon the concept of litigation privilege. These decisions viewed the latter as akin to solicitor-client privilege to which a very high degree of confidentiality applied. Other decisions treated the concept of litigation privilege as distinct from that applied to the relationship of solicitor and client. They stand for the proposition that, once an expert witness is called at a hearing, any litigation privilege that might exist regarding preliminary materials is automatically waived. While not attempting a final resolution of the underlying divergence in the case law, the Tribunal concluded that a rule of relevancy should be applied to the requested materials. It found that there was indeed some relevance in understanding the process by which the Committee had arrived at its opinion regarding job evaluation. Accordingly, the draft documents and responses thereto were ordered produced and delivered to the respondent, with copies to all other parties.

Medical Records

The rule of confidentiality that applies to the doctor-patient relationship may have to be balanced against the right of a respondent on a human rights complaint to provide a full answer and defence. A Tribunal decision has dealt with a request for access to medical records where a complainant was seeking an award for pain and suffering.[155] The Tribunal found that the

confidentiality and privacy rights of an individual can be waived expressly or be implied by an individual's acts. It noted that the commencement of legal action in a court of law for personal injuries caused by the negligence of another renders a plaintiff's medical records of vital importance to a fair and just resolution of the dispute. Applying this reasoning to human rights proceedings, the Tribunal found that "...when claiming compensation for pain and suffering, a complainant implicitly accepts some intrusions upon his privacy as well as the possibility that the respondent will be able to access his medical records and files or, put more broadly, his personal health information. This does not, however, entail that the complainant grants the respondent a licence to delve into private aspects of his life which are not related to his claim or are not arguably relevant for the proper disposition of the litigation."[156]

The Tribunal applied this rule of relevancy to the requested records in the case at bar and ordered access to various documents in the possession of named doctors and other health care officials. However, the Tribunal directed that any documents so produced be reviewed by the Chairperson in order to determine their admissibility in evidence. It also noted that the parties had agreed that the documents would be vetted by the Tribunal to determine which ones were actually related to the medical condition in question. This arrangement would "...ensure the proper protection of the privacy and confidentiality rights of the complainant without depriving the respondent of his right to have access to all relevant information and to present a full answer and defence. The agreed process will prevent unnecessary and vexatious infringements of the complainant's rights since the tribunal will be in a position to supervise and control the procedures that must be undertaken before the production of any relevant document."[157]

Application of *CHRA* to House of Commons

A complaint of discrimination against the Speaker of the House of Commons gave rise to the issue of whether the principle of parliamentary privilege is broad enough to preclude an employee from pursuing a complaint under the *CHRA*.[158] It was argued by the Speaker that all matters relevant to the employment of persons by a legislative assembly like the House of Commons were beyond the jurisdiction of the Tribunal. Other court decisions tended towards a more refined test to be applied whenever a claim of parliamentary privilege is invoked. As the Tribunal pointed out, the privilege existed in order to protect the core functions and the dignity, integrity and efficient operations of legislative bodies. A claim of privilege must therefore be assessed by reference to these underlying purposes. With respect to employee relations, the Tribunal approved of reasoning in a recent Ontario decision[159] that one must look to whether an employment claim against the legislature concerned matters that were central to its work and essential functions. If so, the privilege would apply to preclude the intervention of the courts. Assessing a claim of privilege against this standard would help prevent potential abuses from being inappropriately concealed. The Tribunal summed up its approach by adopting the following advice: "The courts, while vigilant to ensure that they do not interfere with the business of the legislature, must also be vigilant to ensure that parliamentary privilege is not carried so far that it interferes unnecessarily with the rights of citizens to have access to the courts in relation to matters that do not interfere with the parliamentary business of the

legislature."[160]

With respect to the case at bar, the Tribunal concluded that it was not necessary to protect the dignity, integrity and efficient functioning of the House of Commons to exclude in principle the normal operation of human rights laws. More specifically, employment of the complainant as chauffeur to the Speaker did not constitute a matter that fell within the core operations of the legislature. Accordingly, the Tribunal was found to have the necessary jurisdiction to conduct a hearing into the complaint of discrimination.

A dissenting opinion from one member of the Tribunal took issue with the conclusions reached by the majority. While she agreed with the basic test to apply (i.e. whether the matter in issue falls within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld) she found that "...the weight of judicial and arbitral jurisprudence favours the view that the appointment and management of staff falls indeed within the parliamentary privilege of the Speaker and the House of Commons."[161] Furthermore, this privilege exists as a matter of constitutional law and cannot be altered or varied by the general terms of the *CHRA*. It is Parliament itself that retains the constitutional authority to legislate the scope of its privilege, which presumably would be done in a clear and unambiguous fashion. While the *CHRA* is quasi-constitutional in nature (and hence takes precedence over other statutes in cases of conflict), it cannot operate to override a parliamentary privilege that enjoys constitutional protection.

Concurrent Jurisdiction

A complaint referred to the Tribunal had previously been the subject of both grievance procedures and an application to the Canadian Labour Relations Board.[162] The respondent therefore took exception to the matter being "relitigated" before the Human Rights tribunal, relying on a Supreme Canada decision to the effect that, "where the essential character of a dispute arises under a collective agreement, a claimant must proceed by way of arbitration."[163] However, the Tribunal pointed out that the Supreme Court decision in question did not remove all possibility of concurrent jurisdiction between labour arbitrators and statutory human rights adjudication processes. With respect to the case before it, the Tribunal was also not convinced that the essential nature of the complaint arose under the collective agreement. However, it noted that arguments based on issue estoppel and *res judicata* might conceivably be raised by the respondent. No such arguments had in fact been raised, thus precluding the Tribunal from passing judgment on them at that time. The respondent's application on the question of jurisdiction was therefore dismissed.

Impact of Bell Decision (Trial Level)

The Federal Court decision (November 2, 2000) in *Bell Canada* v. *CTEA et al.*[164], regarding the impartiality and independence of the Tribunal, was relied on subsequently to challenge the legality of hearings being conducted on a number of separate and unrelated complaints.[165] In each case, the Tribunal came to the conclusion that the reasoning of the Federal Court in *Bell*

was not confined to the adjudication of complaints regarding which actual guidelines had been issued. It found that "...the problem relating to the guidelines stems from the provisions of the *Canadian Human Rights Act* giving the Commission *the power* to make guidelines, and not from the existence of the guidelines themselves."[166] Consequently, the issue of a perceived lack of impartiality arose even in cases that had no connection to pay equity guidelines.

The Tribunal also concluded that any impairment of Tribunal independence associated with the Chairperson's power to extend the mandate of a member, should it expire during the course of a hearing, did not hinge on the manner in which that power was exercised in any given case. It therefore followed that the specific duration of a member's mandate was irrelevant to the institutional problem identified by the Federal Court.[167]

In light of the scope of the Federal Court decision, and its binding nature, the Tribunal felt constrained to adjourn proceedings *sine die* in the various cases cited here. Nevertheless, it did so with reluctance, pointing out that "[i]t is well established that there is a public interest in having complaints of discrimination dealt with expeditiously. The effect of my decision to adjourn this matter *sine die* does not serve this public interest...However, the public interest extends beyond speedy justice: Canadians involved in the human rights process are entitled to hearings before a fair and impartial Tribunal. According to the Federal Court, the Canadian Human Rights Tribunal is not such a Tribunal."[168]

The procedural facts of a given case may give rise to a finding that a party has waived its right to object to hearings on the grounds of perceived institutional bias or lack of independence. In effect, a party is obliged to raise these issues at the first reasonable opportunity in the process. The Tribunal has identified the reasons that justify imposing this obligation on the parties to a hearing: "There are several reasons favouring such a policy: a timely objection allows for the early determination of the issue. Parties are not put to the unnecessary expense of preparing for a hearing that may not proceed at the last minute. Early determination of the objection also allows the Tribunal to manage its process, the scheduling of its members, and the allocation of tax-payer funded resources in the most efficient manner possible."[169] In two cases, the Tribunal concluded that the respondents who raised the issue of impartiality had not done so at the earliest practicable opportunity, thus waiving their rights in this regard.[170] There was therefore no further impediment to the continuation of hearings into the substance of the underlying complaints.[171]

Finally, three Tribunal rulings were issued after the Federal Court of Appeal overturned the Trial Division regarding the issues of impartiality and independence.[172] In all three instances, the reasoning of the Court of Appeal was applied and challenges to the Tribunal's jurisdiction were dismissed. Furthermore, the fact that a respondent might appeal the Court of Appeal decision to a higher court was considered irrelevant to determining if a hearing before the Tribunal should be adjourned.

PROCEDURAL AND INTERLOCUTORY MATTERS

Application of *CHRA* to First Nations

A constitutional challenge to the jurisdiction of the Human Rights Tribunal to hear a complaint against a company wholly owned by the Ermineskin Cree Nation (the "Ermineskin") was recently made by Originating Notice of Motion before the Court of Queen's Bench of Alberta.[173] The jurisdictional issue was first raised when the Commission asked the Ermineskin to respond to a complaint it had received involving termination of employment because of disability. The Ermineskin maintained that its right to self-government under section 35 of the *Constitution Act, 1982*[174] rendered the *CHRA* inapplicable to its activities. The Commission took the view that it did indeed have jurisdiction to investigate the complaint and ultimately referred the matter to the Human Rights Tribunal for adjudication.

The Ermineskin sought a stay of proceedings from the Court on the basis that the Tribunal did not have the jurisdiction to decide the underlying constitutional issue or, if it did, that the Court of Queen's Bench should exercise its concurrent jurisdiction as being the more appropriate forum to hear the matter and to issue an effective remedy. In considering the Ermineskin motion, the Court looked first to a line of Supreme Court judgments that recognize the power of an administrative tribunal to determine the impact of the *Charter of Rights and Freedoms*[175] on its enabling statute, provided that the tribunal is otherwise authorized to decide questions of law. It emphasized, however, that this power of an administrative tribunal does not extend to a declaration of invalidity and "is limited to refusing to apply a provision which it has determined to be unconstitutional."[176] Moreover, the decision-making authority of administrative tribunals in this regard is subject to judicial review where no crucial deference is given to its decision. With respect to the Human Rights Tribunal, its enabling statute clearly gives it the authority to decide all questions of law or fact necessary to determining the matter before it. The Court therefore concluded, basing itself on the Supreme Court *Charter* decisions, that the Tribunal was fully competent to determine questions involving the constitutional validity of its enabling statute.

While the Court acknowledged efforts of the Ermineskin to distinguish issues canvassed in the Supreme Court *Charter* decisions from the issues raised under section 35 of the *Constitution Act, 1982*, it felt obliged to follow case law that clearly established that tribunals are fully competent to examine the boundaries of their own jurisdiction.[177] In its view, there was no reason in principle to distinguish "...*Charter* questions from section 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the Constitution."[178]

Even though bound by the higher court decisions, the Court of Queen's Bench expressed its concerns that "[t]he issues that will be determined in this case, the law that will be argued, and the evidence given on the jurisdictional question go far beyond the nature of inquiries usually before the Tribunal or those contemplated by the *CHRA*."[179] It found that these factors are relevant to determining if a section 96 court (which the Court of Queen's Bench clearly was) should exercise its undoubted concurrent jurisdiction to decide a constitutional issue. In the case at hand, the Court underscored that a "...section 35 hearing would take the Tribunal far out of its

area of expertise and require it to make difficult evidentiary findings and to deal with complex historical evidence."[180] Furthermore, it seemed inevitable that one party or another would seek judicial review of any decision of the Tribunal, thus causing increased delays in getting to the merits of the underlying claim of discrimination. Even the inherent complexity of the issues involved would, reasoned the Court, run the risk of draining resources from the proper adjudication of other complaints within the jurisdiction of the Commission and cause even further delays in the processing of claims. Finally, the Court pointed out that, while the Tribunal may be competent to decide a constitutional issue, it cannot issue a declaration of invalidity and its decisions lack the force of *res judicata*. For all these reasons the Court determined that it was best suited to hear the constitutional arguments. It therefore granted a stay of proceedings but subject to a number of conditions, most importantly the condition that the Ermineskin commence formal proceedings before the Court within 30 days relevant to the underlying constitutional issue. Should the Ermineskin fail to meet this 30 day limit, the Court indicated that the stay of proceedings would be lifted and the Tribunal would be authorized to continue with its hearing.

Discovery of Documentary Evidence

An application for judicial review of a Commission decision to dismiss a complaint under subsection44(3)(b)(i) gave rise in a recent case to a preliminary motion regarding production of a wide range of documents.[181] The Motion was brought under Rule 317 of the Federal Court Rules that provides that "a party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested."[182] The applicant requested all notes, documents, memorandum and any materials whatsoever relevant to her complaint. Her request was so broadly phrased that it covered essentially all material of any sort that the investigator had compiled or used during the course of the investigation.

Whether documents requested under Rule 317 are relevant is determined by reference to the grounds raised in an application for judicial review. In this particular case, the grounds raised covered jurisdictional issues, unsupportable findings of fact, legal error, failure to observe procedural fairness and acting on the basis of perjured evidence. The test of relevancy in the context of Commission decisions taken under the *CHRA* had been reviewed extensively in an earlier Federal Court decision (*Pathak*)[183] and was relied on by the Commission in the instant case to object to the scope of the applicant's Motion for production. The Court recognized in *Pathak* that the Commission is authorized to make its decisions on the basis of a report prepared by an investigator, that the law presumes the report accurately summarizes the evidence, and that this presumption must be taken into account when applying the test of relevancy. Thus, in the absence of any evidence that an investigator's report is inaccurate or incomplete, other documents relied on when preparing the report (but unseen by the Commission) do not have to be produced under Rule 317.[184]

Despite the findings in *Pathak*, the Court in the instant case (where the Commission's decision was made exclusively on the basis of the investigator's report) concluded that the materials

sought by the applicant were relevant to the grounds set out in the application. Though not specifically stated, one can only presume that the Court considered that allegations of fraud and false testimony might justify a request for some of the documents included in the Motion for production. Nevertheless, as the Motion was so broadly phrased as to bring within its scope any and all materials used in the investigation, the Court concluded that it must fail as amounting to a "fishing expedition"[185] into the files of the Commission. In this regard, it quoted with approval from a previous Federal Court decision: "It is long settled that judicial review proceedings are summary in nature, with no discovery or written pleadings, and the rules relating to those proceedings, including Rules 1612 and 1613 [now rules 317 and 318], are not intended to prolong summary proceedings or to permit a "fishing expedition" for information."[186] While the applicant's Motion was rejected because it was too vague and ambiguous, the Court nonetheless indicated that a subsequent Motion which was more specific and focused might be looked upon with greater favour.

Bell Canada Decisions

Last year's *Legal Report* included discussion of two applications brought by Bell Canada that challenged interlocutory rulings of the Tribunal made during the course of hearings on a pay equity dispute.[187] Both applications were rejected by the Federal Court but subsequently appealed. Regarding the application relevant to the admissibility or compellability of evidence, the Federal Court of Appeal has dismissed Bell Canada's appeal.[188] The Court endorsed the principle that rulings on evidentiary matters should not be the subject of court applications until the Human Rights Tribunal has completed its proceedings. It stressed that this principle is "based on the fact that the parties cannot know until the end of the proceeding whether a review of a particular interlocutory decision will be necessary; and on the fact that the inconvenience of the delay involved far outweighs any value in an early review."[189]

With respect to the second application, the Court of Appeal noted that the applicant based its argument on subsection 40(1) of the *CHRA*, which authorizes "an individual or group of individuals" to file a complaint with the Commission. However, the issue of whether a union had standing to file a complaint had been previously raised by Bell in the same case but on a different application. This had occurred in 1996 on an application for *certiorari* and prohibition which sought to prevent the referral of the complaints to adjudication. At that time Bell had relied on subsection 40(2) in support of its position, a fact that was specifically noted by the Federal Court in denying the application. Having regard to the procedural history of the complaint, the Court of Appeal took the view that it "is an abuse of process for Bell to advance now in a further interlocutory proceeding a new challenge to status based on a ground it could have invoked in the earlier proceedings. It is possible that this issue could be raised in judicial review proceedings after the panel has made its final decision, although the argument of *res judicata* may well be raised at that time and the Court will have to deal with the whole issue then."[190] Bell's appeal was therefore dismissed.

JUDICIAL REVIEW OF COMMISSION DECISIONS

The Commission enjoys broad discretionary powers with respect to the reception and processing of complaints under the *CHRA*. The cases highlighted in this section illustrate the type of issues that may result in Commission decisions being challenged before the Federal Court.

Complaint Form

Whether the Commission improperly declined to exercise its jurisdiction was the subject of an application for judicial review of a Commission requirement that a complainant sign a complaint form using the name appearing on her birth certificate.[191] The case involved a complainant who had been living under the name of Micheline Montreuil for a considerable length of time, even though her birth certificate identified her as Joseph Yves Pierre Papineau Montreuil. In point of fact, all her credit cards, tax returns, bank accounts and other financial documents carried her assumed name of Micheline Montreuil. The Commission took the view that it was beyond its jurisdiction to accept a complaint signed with the name "Micheline Montreuil", citing section 5 of the *Quebec Civil Code*[192] that required judicial procedures to be engaged in a person's name as it appeared on his or her birth certificate. In rejecting this position, the Federal Court pointed out that, while the *CHRA* gives the Commission the authority to determine what constitutes an acceptable form for a complaint, it cannot arbitrarily reject a complaint for reason only that it was not signed using the name of a person as it appeared on his or her birth certificate. The Court reasoned that the filing of a complaint did not in and of itself constitute a judicial procedure and hence was not caught by the formal rules set out in section 5 of the *Civil Code*. Given the mandate of the Commission, the Court felt it must show greater flexibility and less rigid formalism in determining the form in which a complaint should be filed. Its interpretation of section 5 of the *Civil Code* was also found to have been legally incorrect. In any event, the Court ordered that the complaint carry the name of "Joseph Ives Pierre Papineau Montreuil connu sous le nom de Micheline Montreuil"[193] and that the complainant be allowed to sign the complaint with the name she normally used.

Minimal Grounds to Support a Claim

Complaints related to alleged facts that reveal no ground for further action will understandably be screened out by the Commission following preliminary investigations. This was recognized by the Federal Court in a recent judgement concerning a Commission decision to reject a complaint based on alleged gender and age discrimination where the underlying circumstances could not support it.[194] The matter related to an altercation that occurred between Mr. Hem Ramlall and an employee of a Human Resources Development Centre. While seeking assistance for either job training or employment opportunities at an Employment Centre, Mr. Ramlall alleged that he was ordered to leave the Centre and was subsequently escorted out by a security guard. Though many calls and much correspondence were exchanged between the federal department responsible for the Centre and the complainant, the latter did not contact the Commission until 10 months later. The review of the complaint by the investigator revealed no information or indication that anyone at the Centre had referred to the applicant's gender or his age. Mr. Ramlall was unable to supply any further information that could provide a link between

the treatment he received at the Centre and a prohibited ground of discrimination under the *CHRA*. As a result, the Commission refused to accept the complaint. The Federal Court (on application to overturn the Commission's decision) agreed that there was no reason for the complaint to be pursued by the Commission noting that, in the absence of other evidence, an impolite and rude confrontation between individuals does not justify further investigation by the Commission

Procedural Fairness

Decisions of the Commission not to refer a complaint to the Human Rights Tribunal can involve far more complex factual circumstances than those evident in the case just reviewed. In *Grover* v. *The National Research Council*,[195] the Federal Court considered an application arising from allegations of racial discrimination in employment that prompted a lengthy investigation by the Commission. The investigation included a review of materials submitted by the complainant, responses provided by the National Research Council (NRC), the transmission of those responses to the complainant with an opportunity to respond, meetings with the applicant by investigators and interviews with various persons involved in the employment setting of the complainant. The Commission found that the evidence presented did not support the alleged act of discrimination and the complaint was dismissed. The complainant sought judicial review of the Commission's decision, alleging breach of procedural fairness, a biased and less than thorough investigation, an investigation allegedly conducted in bad faith and in an arbitrary manner, and a decision allegedly rendered without regard to the evidence presented.

In its decision, the Court cited well-known case law to the effect that the Commission is not obliged to hold anything like a formal hearing prior to making its decision in this regard and thus is not bound to respect the formal rules of natural justice applicable to judicial proceedings. However, in deciding whether there is a reasonable basis in light of all the evidence to proceed to the adjudicative stage, the Commission must comply with rules of procedural fairness. In the case at bar, the Court ruled that Dr. Grover "was not entitled to an oral hearing before the Commission when that body was considering the investigation reports...[nor is the Commission] required to embark upon an assessment of credibility when it reviews investigation report.[196]

Although the Court found that the complainant was given every opportunity to respond to the evidence and submissions of the NRC (and in fact did so), it emphasized that the rules of procedural fairness also require that investigations be both neutral and thorough. Factual deficiencies in an investigation report clearly raise the issue of thoroughness. Some omissions can be rectified by a complainant bringing the matter to the attention of a decision maker such as the Commission, thus making judicial review unnecessary. Nevertheless, the Court recognized that judicial review will be available where "the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or...where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it."[197]

The record before the Federal Court established that an important witness relevant to the

allegations of racial discrimination had not been interviewed. The Court concluded that this omission "was of such a fundamental nature that its absence could not be relieved simply by drawing it to the attention of the decision-maker, that is the Commission".[198] The Court underscored that the Commission could not properly exercise its administrative discretion when relevant information pertaining to a complaint was not in its possession. The Court also suggested that "the failure to interview a person who is vitally connected to the alleged discriminatory action may lead to the inference of pre-judgment by the investigator."[199] While no specific finding in that regard was made, the Court found that the Commission had breached its duty of procedural fairness and ordered that the complaints be returned to the Commission to be dealt with in a manner not inconsistent with its reasons.

Fundamental Omission

The issue of what constitutes a fundamental omission was also at the centre of the Federal Court's decision in *Singh* v. *A.G. Canada.*[200] The case involved allegations of harassment and employment discrimination based on ethnic or national origin and age arising from the decision of Human Resources Development Canada (HRDC) not to renew the employment contract of the complainant, a 51 year old woman of East Indian descent. The dispute surrounding the non-renewal of employment was investigated in the first instance by the Public Service Commission (PSC), insofar as issues of harassment and abuse of authority were concerned. The PSC determined that the allegations were unfounded. Soon after the decision of the PSC was issued the complainant filed a complaint with the Canadian Human Rights Commission alleging that derogatory comments had been made to her by co-workers and that the decision to refuse renewal of her employment contract was based upon her national or ethnic origin and her age.

While some external interviews were conducted in the course of the Commission's investigation of the complaint, much of the investigator's report consisted of information taken from the previous report of the PSC. The Commission dismissed the complaint on the basis that the evidence did not support the allegations of harassment and discrimination in employment but, rather, that the non-renewal of contract was unrelated to these claims.

On application for judicial review of the Commission's decision, the Federal Court first confirmed that the Commission can properly exercise its discretion to dismiss a complaint in light of all the evidence, including statements from several witnesses contradicting the allegations and a performance review of a complainant's work record. Moreover, an investigator for the Commission commits no error of jurisdiction by relying on evidence contained in a report of the PSC dealing with work-related matters within the latter's competence, so long as an investigator's conclusions are not simply based on that of the PSC. Nevertheless, the Court found that a serious issue remained in the case before it regarding the thoroughness of the investigation report upon which the Commission decision was made.

In reply to submissions made by HRDC, the complainant had maintained that information regarding work performance and shortage of work had been fabricated only after she had complained of discriminatory treatment. The Court observed that the investigator's report

contained no discussion of the possible pretextual nature of HRDC's submissions, an omission it characterized as fundamental. It was fundamental "...because any investigation of discrimination must, at minimum, ascertain who the decision-maker is and contain some inquiry into why that decision-maker decided the way they did. In this case, that would mean that the investigator should have investigated who actually decided not to renew the applicant's contract and why."[201]

The Court pointed out that discrimination can be found to have occurred even though a primary reason may exist for dismissing an employee or not renewing a contract. Hence, the fact that the PSC had found that her slow work performance justified the decision not to renew her contract did not necessarily suggest that discrimination had not occurred. The Court therefore overturned the Commission's decision and sent the matter back to the Commission to be dealt with in a manner not inconsistent with its reasons.

A further example of fundamental omission in the conduct of an investigation is found in *Sosnowski* v. *Minister of Public Works*.[202] The case involved a complaint of sex and age discrimination allegedly suffered in the course of employment. Ms. Sosnowski, a 56 year old women who had worked as a mechanical engineer for Public Works and Government Services Canada (PWGSC) for many years, lost her position and was obliged to take early retirement during a downsizing operation conducted by the department. She alleged that she had suffered adverse differential treatment over a period of time regarding project assignments that had a negative impact on her competitive position during the downsizing operation, and regarding a reverse order of merit evaluation linked to the assignment of surplus status. In addition, she alleged adverse differential treatment in access to alternative employment within the federal public service.

The investigation report (upon which the Commission based its conclusion to dismiss the complaint) contained a detailed review of the professional and work-history qualifications used to assess employees within the department for appointment to positions of Project Manager. The report pointed out that the complainant had received low evaluation scores with respect to some of the qualifications. In particular, the investigation report reproduced the view of the departmental manager to the effect that "...all the incumbents demonstrated a consistent ability to deliver projects with the specified parameters with the exception of the complainant who frequently had over runs with project costs and schedules and had difficulty finalizing projects. This was also pointed out to the complainant in her performance appraisals from 1988/1989-1992/1993. The complainant also received the lowest mark (4) in other highly rated qualifications such as the ability to provide consistent and effective team leadership, the ability to deliver high standards of business performance by applying the principles of Market Based Charging, and the ability to maintain a consistently high level of client satisfaction."[203]

The Federal Court found that the above-reproduced portions of the investigation report contained a significant error of fact regarding the past evaluations of the complainant's work. It found that those evaluations had all been consistently positive, in particular during the time period 1988-1993. The Court concluded that this error indicated that allegations of bias (based on age and sex) had not been adequately investigated by the Commission before making its decision. In

addition, the Court considered the investigation report flawed insofar as it failed to address possible systemic discrimination. Though a mechanical engineer, the complainant had been consistently denied the opportunity to work in civil engineering projects. Her lack of experience was then subsequently invoked by the department to justify a low evaluation during the downsizing operation. In the words of the Court: "...PWGSC states that she received the only zero score in the civil engineering category because of her lack of exposure to civil engineering projects during her tenure. In contrast, a male colleague, who also was a mechanical engineer, had been assigned a civil engineering project and subsequently received a higher ROM score than the Applicant."[204] Facts such as these suggested a pattern, in the eyes of the Court, that required an in-depth evaluation, "...especially in light of Canadian Human Rights Tribunal decisions in which a difference of assignments that have an impact on a complainant's employment opportunities have been found discriminatory."[205] It therefore concluded that "[w]here, as in the present case, a senior and sole female engineer in her professional group experiences such obstacles and subsequently finds herself unemployed, procedural fairness requires a thorough investigation of the possible existence of systemic age and sex discrimination."[206] As a result, the complaint was referred back to the Commission for reconsideration.

Cross Disclosure of Party Responses

Requirements of procedural fairness were again at issue in *Moran* v. *Industry Canada*.[207] The case involved allegations of discrimination in employment on the basis of physical disability arising from the decision of Industry Canada not to extend to a maximum of two years an eligibility list for appointment to the position of Senior Bankruptcy Officer. In 1994, Mr. Moran who had been seconded to Industry Canada, competed for the position and placed second out of two qualified candidates. Since the first candidate accepted the position, the complainant was therefore rendered first on an eligibility list for future appointments. Due to a minor stroke, the complainant was unable to work from the end of May 1995 to mid-October of the same year, at which time he returned to Revenue Canada when his secondment was terminated due to fiscal restraint. In April of 1996 a position as Senior Bankruptcy Officer became available at Industry Canada. However, the eligibility list dating from 1994 had expired on March 31, 1996 and had not been renewed. Had the eligibility list been renewed to the maximum two year period it would have been valid until September of 1996, and would have thus ensured the appointment of the complainant.

Although the investigator's report recommended that a conciliator be appointed, the Commission decided to dismiss the complaint. It invoked three reasons to justify the dismissal: (i) the evidence did not support the allegation that Industry Canada had discriminated against the complainant on the basis of disability, (ii) there was no evidence to link the complainant's stroke with the decision not to extend the eligibility list, and (iii) the complainant had been eligible to apply on the 1996 competition but had chosen not to compete.[208] The complainant raised the issue of procedural fairness in his application for judicial review of the Commission's decision, in particular as it related to information placed before the Commission in Industry Canada's submission. Upon a review of the record, the Court found that Industry Canada's submission

addressed the possible relationship between the staffing decisions and the complainant's disability and this had not been included in the investigator's report. It appeared to the Federal Court that Industry Canada had initially emphasized that managers involved in the situation had no authority to extend the term of the eligibility list. The issue of disability arose only in Industry Canada's submission on the investigation report. The submission contained strong arguments to the effect that the complainant had denied himself possible appointment to the position by failing to compete in the 1996 competition. This submission (delivered to the Commission in the form of a letter) was not communicated to the complainant prior to the decision of the Commission to dismiss the complaint. The Court viewed this omission as fatal to the validity of the Commission's decision, for the information in question "...raised the issue of the applicant's "alleged disability" and also put a much stronger position forward with respect to the applicant's failure to apply in the 1996 competition. In fact, the letter stated that by not applying in the 1996 competition, he "denied himself potential access to an opportunity". The investigator had stated in his report that the failure to apply did not effect the merits of the complaint, yet the CHRC used his failure to apply as one of its basis (sic) for dismissing the complaint."[209] As the failure to communicate the letter in question to the complainant for his comments amounted to a breach of procedural fairness, the Court allowed the application for judicial review and returned the matter to the CHRC for reconsideration.

Confidential Nature of Conciliation

Commission decisions to refer a complaint to the Human Rights Tribunal may also be challenged before the Federal Court, as is reflected in *Canadian Broadcasting Corp.* v. *Paul*.[210] The case involved allegations of employment discrimination based on age and gender against CBC, first made in a September 1989 complaint to the Commission. Due to legal challenges regarding subsequent complaints filed by Ms. Paul the investigation and preparation of a report on the 1989 complaint was not completed until July 29, 1996. The report recommended that the Commission appoint a conciliator for the purpose of attempting to bring about a settlement of the complaint.

Although CBC took exception to the appointment of a conciliator, an attempt was made to reach a settlement. These efforts failed and the conciliator prepared a final report that set out the positions taken by the parties and detailed the terms of an offer of settlement made by CBC but rejected by the complainant. CBC renewed its allegations that the investigation report was biased and strongly objected to the disclosure of its offer of settlement to the complainant.[211] By letter dated February 13, 1997, CBC was informed by the Commission that, upon reviewing the conciliation report and the complainant's submission in response, it had decided to refer the complaint to a Tribunal for adjudication. That decision was overturned on application for judicial review, the Federal Court Trial Division finding, inter alia, that there had been a breach of the rules of procedural fairness, as well as a violation of the statutory requirement of confidentiality with respect to the conciliation process. The Court further decided that it was inappropriate to send the matter back to the Commission for reconsideration.

Although four issues were considered by the Federal Court of Appeal,[212] the question of the

confidential nature of the conciliation process was central to its decision. The Court noted a long line of jurisprudence that existed regarding the principle of confidentiality, at common law, of processes designed to encourage out-of-court settlements, as well as the public policy considerations that underpin it. It then referred directly to subsection 47(3) of the *CHRA*, which explicitly declares that "any information received by a conciliator in the course of attempting to reach settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information."[213]

Although the Court of Appeal found it unnecessary to consider issues related to the alleged bias of the investigation report, it did go on to review elements of procedural fairness that seemed to be missing in the record before it. As mentioned above, the Commission in communicating to the CBC its decision to proceed to adjudication made explicit reference to having reviewed the conciliation report and the complainant's submission relevant to it. The Commission made no direct reference to any other documents it might have consulted or reviewed, referring only to having had regard "to all the circumstances.[214] On the face of the record, therefore, the Court of Appeal was in doubt as to whether the investigation report or the submissions of CBC had been considered by the Commission in reaching its decision to refer the matter to adjudication. It found that both the rules of procedural fairness and the statutory duty of the Commission (section 44 of the *CHRA*) to receive the report of the investigator obliged the Commission to consider the documents in question.[215]

The Court of Appeal disagreed with the lower court decision regarding the appropriate remedy to award. The lower court had effectively stayed further proceedings by refusing to return the matter to the Commission for reconsideration. The Court of Appeal considered this matter to be governed by administrative law principles relevant to abuse of process. It therefore considered the recent decision of the Supreme Court of Canada in *Blencoe* v. *British Columbia Human Rights Commission*[216] that highlighted a number of factors to be considered before issuing a stay of proceedings, factors which included the nature and reasons for time delays, legal and factual complexities and various types of prejudice that may be caused the parties. The Court of Appeal found that it was not apparent on the record who was more responsible for the delays in processing the complaints, nor which party might suffer the greater prejudice because of the passage of time. Accordingly, the Court ordered the complaint returned to the Commission for reconsideration, though it made it clear that only members of the Commission who had taken no part in the previous decision to refer the matter to adjudication should participate in the reassessment, nor was the report of the conciliator or its contents to be placed before those members of the Commission called upon to reconsider the complaint.

Legal Error

As is well known, an error of law or jurisdiction gives rise to judicial review based on the correctness of the decision made. This principle is illustrated in *Gee* v. *Minister of National Revenue*,[217] where the Federal Court reviewed a decision of the Commission to dismiss a complaint based on its legal interpretation of the consequences of an agreement entered into by a complainant with an employer. The facts of the case pertain to various events that occurred between 1990 and 1996 and concern allegations of harassment and racial discrimination in the work place. These complaints (24 in number) were investigated internally by the federal department concerned in 1993/94. Six of the allegations pertaining to harassment were determined to be well-founded, one was determined to establish a case of racial discrimination, and another established a case of abuse of authority. Following these decisions, the complainant sought to reopen a previous complaint with the Commission that had been dismissed in 1993 because it was out of time, but without success. She also was involved in communications and meetings with departmental managers in an effort to seek redress for the wrongs she had suffered. This resulted in a written agreement being reached appointing her to a position she felt she had been wrongly denied, although this appointment was subject to appeal by other employees. It was agreed that the department would defend her position should any appeals be launched. Ultimately 33 appeals were filed and, despite the agreement signed by the complainant and departmental managers, the department conceded the case and refused to defend the complainant's appointment.

The complainant succeeded in April of 1999 in having two complaints related to her allegations accepted by the Commission for investigation. Following investigation, the Commission dismissed the complaints on the basis that, in view of the agreement reached between the parties, no further proceedings were warranted.[218] The Commission's view on the legal consequences of the agreement were found by the Federal Court to be incorrect: "In finding that the Agreement is a relevant consideration, the Commission has ignored a stream of jurisprudence, much of which has emanated from the Supreme Court of Canada, in which it has clearly been expressed that human rights legislation is public policy out of which one cannot contract."[219] In addition, the evidentiary value of the agreement was placed in doubt by the Court: "Not only was the applicant asked to sign the Agreement without the benefit of independent legal counsel, consulting counsel was not even an option recommended to her. She was not fully informed by the respondent as to what rights she was ostensibly releasing and she was not informed of the consequences which ultimately arose out of the staffing appeals. Moreover, the respondent did not defend her position as agreed, and the Agreement, intended to benefit the applicant, subsequently placed her in a position worse that the one in which she started. This is not performance of a settlement agreement. By dismissing her claim on the basis of the Agreement, the CHRC has effectively removed the possibility that the applicant may seek redress for her complaint by way of those remedies which had been previously available."[220]

The Court further found that nothing on the record showed that the Commission considered any substantive evidence regarding the complaint once it was determined that the agreement operated to remove any remedy that the complainant might have under the *CHRA*. This compounded the

legal error regarding the effect of the agreement and resulted in the Commission failing to exercise its mandate under the governing statute. The application for judicial review was therefore granted and the matter was returned to the Commission for reconsideration by a differently constituted quorum of the Commission, or a designated tribunal, on the merits of the evidence and in the absence of the agreement between the parties.

Capricious or Unreasonable Decisions

Procedural fairness would appear to encompass the duty to avoid capricious and unreasonable decisions. This is illustrated in *Jane Hedges-Mckinnon et al.* v. *Canadian Human Rights Commission*,[221] a judgment of the Federal Court dealing with an alleged discriminatory denial of business expenses incurred by a wife but claimed by her husband under the *Income Tax Act*.[222] More specifically, Jane Hedges-Mckinnon was a professional golfer who entered into a sponsorship agreement in 1985 with her husband Richard Mckinnon whereby the latter undertook to pay expenses she incurred as a professional golfer. While this arrangement was accepted by tax officials for a number of years, the Canada Customs and Revenue Agency informed Mr. Mckinnon in September of 1997 that the expenses he incurred while sponsoring Ms. Mckinnon could no longer be deducted as a business expense against his income due to the fact that there was no reasonable expectation that the sponsorship would engender a profit. Moreover, in October of the same year, Mr. Mckinnon was reassessed for the taxation years 1994, 1995, and 1996. Ms. Hedges-Mckinnon was reassessed for the year 1996. In making its decision, the Agency explained in detail the objective criteria used to determine if a reasonable expectation of profit existed.

While both parties successfully appealed the Agency's decision to the Tax Court of Canada (judgment issued in November, 1999[223]), they filed separate complaints to the Commission alleging discrimination on the basis of marital status and, in the case of Jane Hedges-Mckinnon, on the basis of sex as well. With respect to Mr. Mckinnon's complaint, the investigator assigned to the matter determined that the complainant had been allowed the business expenses in question during the course of eight years. It was only after that length of time that federal income tax officials disallowed the expenses on the basis of revenue remaining consistently very much below expenses over the eight year period. Mr. Mckinnon's marital status had been irrelevant to the Agency's decision in that regard. In any event, the investigator concluded that Mr. Mckinnon's complaint was dealt with according to a procedure provided for under another Act of Parliament before the Tax Court of Canada and an appropriate remedy had been awarded, i.e. a ruling that the reassessment had been improper and that the expenses in question could legitimately be claimed by Mr. Mckinnon. For these reasons the Commission decided that an inquiry into the claim of discrimination was not warranted and his complaint was dismissed. The complaint of Ms. Hedges-Mckinnon, which in part related to allegations of discrimination based on sex, was also dismissed by the Commission, on the basis that the facts alleged did not constitute a discriminatory practice and thus fell outside the jurisdiction of the Commission. While Jane Hedges-Mckinnon may have had a grievance with federal tax officials regarding their views about the earning potential of female golfers, the Commission concluded that the dispute about business expenses involved Mr. Mckinnon and the Canada Customs and Revenue

Agency.

Upon application for judicial review, the Federal Court looked to whether the Commission's discretionary power to dismiss Mr. Mckinnon's complaint under subsection 44(3)(b)(i) of the *CHRA* had been exercised in a discriminatory, unfair, capricious or unreasonable manner, or whether its decision had been based on irrelevant or extraneous factors. This test was easily met by both the report of the investigator and the decision taken by the Commission, the Court emphasizing that considerable deference must be accorded the Commission when exercising its screening function under the *CHRA*. The Court also found that the conclusion of the investigator's report regarding the lack of jurisdiction to proceed with the complaint of Jane Hedges-Mckinnon was reasonable and that there was no basis to contest the decision of the Commission to dismiss her complaint pursuant to subsection 41(1)(c) of the *CHRA*.

The Federal Court applied the standard of review used in the *Mckinnon* decision in the subsequent case of *Rabah* v. *Attorney General of Canada*,[224] which involved a Commission decision to dismiss a complaint of employment discrimination based on national or ethnic origin. Mr. Rabah alleged that the investigation of his complaint had been inadequate and insufficient. However, the Federal Court found that the essence of the applicant's complaint had been addressed in sufficient detail by the investigator assigned to the case. It found that "[d]eference must be given to administrative decision-makers to access the probative value of evidence and to decide whether to further investigate accordingly. Only where unreasonable omissions have been made, such as the failure to investigate crucial evidence, is judicial review warranted."[225] In the case at bar, Mr. Rabah's allegation that his accent had been used to justify a poor assessment of his communication skills was difficult to reconcile with the fact that six of twelve successful candidates who were ultimately offered employment also spoke accented English. Furthermore, the test criteria used to assess the communication skills of candidates for the jobs in question were found to be objective and to have been applied in a manner free from bias. Given these investigative findings, and in the absence of any evidence that the Commission had dismissed the complaint [under subsection 44(3)(b)(i)] on the basis of irrelevant or extraneous factors, or acted in a discriminatory, unfair, capricious or unreasonable manner, the Court could find no reason to intervene. The application of the complainant to overturn the Commission's decision was therefore dismissed.

JUDICIAL REVIEW OF TRIBUNAL DECISIONS

Impartiality and Independence of Tribunal

The issues of impartiality and independence of the Canadian Human Rights Tribunal were canvassed in last year's Legal Report, in particular with respect to the Federal Court (Trial Division) decision in *Bell Canada* v. *CTEA, CEP and Femmes Action and the CHRC*.[226] The Trial Division had ruled that the power of the Commission to issue guidelines interpreting the principle of equal pay for work of equal value raised a reasonable apprehension of institutional bias. In addition, the Trial Division had determined that a statutory requirement conditioning the extension of a Tribunal members mandate (should it expire during the course of a hearing) on the

approval of the Chairperson of the Tribunal gave rise to the perception that the Tribunal was not sufficiently independent to preside fairly over a hearing. As a result, a stay of proceedings regarding the complaint against Bell had been issued. This decision was appealed to the Federal Court of Appeal, whose judgment has now been rendered.[227]

Before turning to an analysis of the two issues of impartiality and independence, the Court of Appeal reviewed the procedural history of the case (referral to the Tribunal having first taken place in May of 1996) and legislative changes that had been introduced in light of other court rulings. It pointed out that the first Federal Court decision[228] on this issue had determined that the authority of the federal Minister of Justice (based on the law as it then stood) to extend the mandate of a Tribunal member placed in question that Tribunal's independence and impartiality. The Court had also expressed serious reservations in the same judgement about the power of the Commission to issue binding guidelines with respect to "the manner in which, in the opinion of the Commission, any provision of [the *CHRA*] applies in a particular case"[229] (again based on the legislation as it then stood). Amendments to the *CHRA* relevant to the authority to issue guidelines came into effect in June of 1998.[230] These amendments removed any reference to guidelines being potentially applicable to a particular case and declared that they would be binding only "in a class of cases".[231] It was the possibility that the Commission might issue guidelines applicable exclusively to a case in which it was a party that had given rise to the greatest apprehension. The legislative amendments also removed the authority of the Minister of Justice to approve the extension of the mandate of a Tribunal member and accorded full authority in this regard to the Chairperson of the Tribunal. Nevertheless, a second Federal Court decision (the subject of the current appeal) concluded that the amendments were insufficient to cure the problems associated with a perception of bias and lack of independence in the Tribunal.

The Court of Appeal noted that the power to issue guidelines was clearly necessary in light of general statutory language in the *CHRA*, such as that which prohibited discriminatory pay practices as between men and women.[232] It referred favourably to a previous decision of the Federal Court to the effect that "...Parliament was aware that answers to many questions about the implementation of equal pay for work of equal value were not to be found in the lapidary language of section 11...[T]he correct interpretation of section 11...is that Parliament intended to confer on the agencies created to administer the *Act* a margin of appreciation in determining on a case-be-case basis, and with the assistance of the technical expertise available, how the statutorily endorsed principle of equal pay for work of equal value is to be given effect in any given employment setting."[233] While the authority to make normative rules akin to subordinate legislation is normally given to the Governor in Council, the Court of Appeal saw nothing unacceptable in derogating from this practice. It pointed out that the Commission would be precluded from acting arbitrarily given that guidelines issued under its authority would be made in the exercise of a legislative power conferred by or under an Act of Parliament and thus fall within the definition of "regulation" and "statutory instrument" in section 2 of the *Statutory Instruments Act*.[234] The enactment of guidelines would therefore be subject to the safeguards laid down in that Act, which includes compliance with the *Canadian Charter of Rights and Freedoms*[235] and the *Canadian Bill of Rights*.[236]

As to the alleged perception of institutional bias arising from the binding force of general pay equity guidelines on the Tribunal, the Court of Appeal ruled that the Motions judge had given insufficient consideration to the statutory amendments which removed reference to particular cases. It felt that the intent of these changes was to ensure that guidelines created general rules applicable to all cases falling within a given class. In its own words: "...[T]he opportunity formerly possessed by the Commission to inject itself into the determination of a particular case has been largely eliminated. This represents a significant change. Under the earlier version of subsection 27(2), the Commission could, pursuant to its guideline-making power, influence the outcome of a particular complaint, theoretically even to the extent of adopting a tailor made guideline. This is no longer possible. It seems to me that guidelines governing a "class of cases", with general and impersonal application, are considerably less likely to give rise to a reasonable apprehension of institutional bias."[237] The Court also felt that the fact the Commission played both an enforcement role and exercised guideline-making functions under the *CHRA* did not in and of itself give rise to a reasonable apprehension of bias. It emphasized that the test to be applied (as set out in a number of judicial decisions) was whether or not "a fully informed person viewing the matter realistically and practically - having thought the matter through - would have a reasonable apprehension of bias in a substantial number of cases."[238] Applying this test to the case before it, the Court of Appeal could find no such apprehension of bias.

The Court of Appeal also overturned the decision of the Motions judge on the issue of institutional independence. This issue had been raised in light of the authority of the Chairperson of the Tribunal to approve the extension of the mandate of a Tribunal member should it expire during the course of a hearing.[239] A review of the role and authority of the Chairperson, and the fact that he or she cannot be removed from office during their seven year term except for cause, guarantees the administrative independence of the office vis à vis the executive arm of government. Moreover, judicial review is available should the Chairperson abuse his or her authority when performing administrative functions under the *CHRA*. Given that there was no reasonable apprehension that the Chairperson would abuse his or her administrative discretion by failing to act in good faith and in the best interest of the Tribunal, the Court of Appeal could find no reason to place in question the independence of the Tribunal. Leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada was granted (without reasons) on December 13, 2001.[240]

Another case raising similar issues of bias and institutional independence relevant to the guideline-making authority of the Commission, as well as the manner in which members of the Tribunal would be remunerated, was recently reviewed by the Federal Court of Appeal and a judgment issued on the same day as the *Bell* decision.[241] While the procedural history of this pay equity dispute is as complex as that which occurred in the Bell case reviewed above, the focus of the Court of Appeal in this instance was narrowed to a number of procedural questions, one of which concerned the legal standing of the government of the NWT to challenge the validity of parts of the *Canadian Human Rights Act* allegedly creating a scheme that derogated from the requirements of natural justice. The Commission had argued strongly that the government of the NWT, not having legally acquired the constitutional status of a province, constituted a part of the

Crown in right of Canada and that, as such, could not purport to challenge the validity of federal statutes. It was on this basis that the Trial Division of the Federal Court had denied the NWT government legal standing to argue that the *CHRA* violated standards of impartiality and independence.

The Court of Appeal disagreed with this conclusion. It found that the nature of the arguments brought forward by the government of the NWT had been misconstrued. In essence, reasoned the Court of Appeal, the latter had not attempted to challenge the validity of the *CHRA*: "It actually relies upon the *Act* itself as enacted to contend and establish that subsections 27(3) and 48.2(2) produce a result which deprives it of its common law right to an independent and impartial tribunal. At the most, what the appellant did in the judicial review proceedings for which it was denied standing was to give these two subsections an interpretation which both respondents disagree with. In other words, the position taken by the appellant with respect to the impugned subsections is one which involves the interpretation and effect of the *Act*, rather than an attack on its validity."[242] While the Court found that the government of the NWT is a creation of federal law, it nonetheless had standing to seek recognition and enforcement of the powers it enjoys under federal legislation. Furthermore, concluded the Court: "This standing of the appellant extends to its right, as a requirement of natural justice, to seek an independent and impartial Tribunal who will apply and interpret an act whose validity the appellant does not contest. In my view, the motions judge erred when he denied the appellant standing "to argue that provisions of the *Canadian Human Rights Act* or a statutory instrument issued thereunder create a scheme which is contrary to the requirements of natural justice.""[243]

Fair Process Under *Bill of Rights*

As to the substance of the claim of institutional bias due to the binding nature of pay equity guidelines, the Court of Appeal adopted its reasoning in the *Bell* decision. Nevertheless, the Court went on to consider what recourse an aggrieved party might have if it were assumed that the legislative provisions in question interfered significantly with standards of impartiality and independence. The Court recognized that the exact scope of the rules of natural justice, from which standards of impartiality and independence are derived, can be varied by explicit statutory language insofar as they apply to administrative agencies and tribunals. However, such statutory variation had to be assessed against provisions found in subsection 2(e) of the *Canadian Bill of Rights* that guarantee a person will not be deprived of a "fair hearing in accordance with the principles of fundamental justice".[244] These provisions require a tribunal adjudicating upon a person`s rights to "act fairly, in good faith, without bias and in a judicial temper".[245] As to whether the Crown is a "person" and thus entitled to claim this protection, the Court referred to case law that established that both corporate and natural persons were included in the wording of subsection 2(e) of the *Bill of Rights*. Case law also established that the Crown in Right of Canada was for legal purposes a "person" at common law. The Court also emphasized that constitutional protection of a right to a fair hearing under the *Charter of Rights and Freedoms* did not extend to civil proceedings before administrative tribunals. Subsection 2(e) of the *Bill of Rights* could thus play an important supplementary role in helping to define the scope of procedural safeguards applicable to such proceedings. In light of these considerations, the Court

concluded that the Crown was not precluded from raising the right to a fair hearing guaranteed under the *Bill of Rights*.[246]

While the Court made no substantive finding on how the pay equity guidelines might interfere with the right to a fair hearing, it described the type of remedy that would be available in the event that standards of procedural fairness under the *Bill of Rights* were violated. In such a hypothetical case, the guidelines would be declared inoperative but only insofar as the instant proceedings were concerned. The hearing into the complaint would then proceed on the basis that the guidelines were not binding on the members of the tribunal presiding over the case. Leave to appeal the Federal Court of Appeal decision to the Supreme Court of Canada was granted (without reasons) on December 13, 2001.[247]

Stay of Proceedings

The case just reviewed (involving a pay equity dispute with the NWT government) also gave rise to an application for a stay of proceedings pending disposition of the government's appeal.[248] The application before the Federal Court was brought following a Tribunal decision to allow the Commission and the complainant to complete their evidence (which at that point was drawing to a close) before adjourning the hearing to await the outcome of the Court of Appeal's decision regarding the issues of impartiality and independence. The Tribunal took the view that this would allow the NWT to be fully cognisant of the outcome of its appeal before presenting its own evidence on the merits of the complaint.

Before the Federal Court of Appeal, the NWT argued that its application satisfied the three-pronged test for determining if a stay of proceedings should be accorded. First, the legal questions raised in its appeal (tribunal impartiality and independence) were serious ones that merited attention. Second, the NWT would suffer irreparable harm if a stay was not granted and its appeal was ultimately successful. Finally, the potential harm suffered by the government of the NWT was greater than the possible harm that might be incurred by the other parties. While the Court accepted that the questions raised on appeal were serious, it was unable to accept that the NWT would suffer irreparable harm if a stay of proceedings were not granted. In so deciding, the Court emphasized that the Tribunal had limited the continuation of the hearing to the completion of evidence already begun: "I am unable to accept [the applicant's argument], particularly in light of the decision of the Tribunal to adjourn the proceedings to await the outcome of this appeal after the evidence of the Commission and the PSAC is completed and before their case is closed...The Government has suggested no basis on which I can conclude that merely permitting the Commission and the PSAC to adduce the remainder of their evidence will cause irreparable harm to the Government."[249] The Court also underscored that the government of the NWT had not argued that its cross-examination of remaining witnesses for the Commission and PSAC would be affected by the outcome of its appeal regarding tribunal impartiality and independence. The Court therefore rejected the application for a stay, though it also indicated that, should the Tribunal decide to continue proceedings beyond the completion of evidence by the Commission and PSAC, the government of the NWT could rightfully make a new application to the Court.

Application of *CHRA* to House of Commons

The jurisdiction of the Human Rights Tribunal to hear a complaint alleging discrimination in employment against the Speaker of the House of Commons was contested before the Federal Court as being incompatible with the principle of parliamentary privilege.[250] The issue was brought to the Court on appeal from the majority decision of the Tribunal concluding that the employment of a chauffeur by the Speaker did not fall within the core functions of the legislature, nor engage its dignity, integrity and efficient operations. This being so, the Tribunal had found that the *Canadian Human Rights Act* properly applied to the complaint, involving allegations of discrimination based on race, colour and national or ethnic origin. (The decision issued by the Tribunal is summarized below under the heading *Tribunal Interim Orders*.)

The Federal Court recognized that the House of Commons enjoys a certain number of privileges that attach to it collectively, as opposed to privileges that apply to its individual members. Such collective privileges include: "the power to discipline and expel members; the regulation of its own internal affairs; the authority to maintain the attendance and service of its members; the right to institute inquiries and call witnesses and demand papers; the right to administer oaths to witnesses; and the right to publish papers containing defamatory material."[251] The question of whether any particular activity of the legislature gives rise to parliamentary privilege is subject to a test of necessity as set out by the Supreme Court in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)*.[252] This test is met where the matter under scrutiny engages the dignity or efficient operations of a legislature. In light of relevant jurisprudence and learned writings, the Federal Court concluded that the management and appointment of staff falls within the scope of parliamentary privilege. In short, such management authority is considered necessary for the proper functioning of the House of Commons.

In applying the test of necessity, the Federal Court underscored the importance of not engaging in a qualitative assessment of the proximity of a given employment relationship to the core functions of the legislative body. It felt that any such assessment would render the parliamentary privilege nugatory, by requiring the "...courts to embark every time on an inquiry as to whether a particular job responsibility falls within the core of parliamentary privilege. There is no doubt that, practically, in many instances it would be difficult to find the dividing-line."[253] In the case at bar, the remoteness of a chauffeur's job to the legislative functions of the House of Commons was therefore not considered determinative of the question of privilege. It was the employment relationship to the Speaker of the House that effectively placed the position of chauffeur within the scope of the privilege.

Even though the power to appoint and manage staff was protected by parliamentary privilege, the Federal Court went on to consider whether any statutory enactment constituted a waiver of the privilege regarding certain categories of employees. More specifically, it reviewed the provisions of the *Parliamentary Employment and Staff Relations Act*.[254] It concluded that the *Act*

intended to adopt specific provisions only in the *Canada Labour Code*[255] as they related to accidents and injury to health, as well as standards for hours, wages, vacations and holidays. In all other matters, the very terms of the *Act* made it clear that the privileges of the House of Commons and the Senate were preserved. The Court therefore rejected the argument that statutory enactment had effectively waived the privilege with respect to employees such as the complainant in the case at bar.

Despite its initial findings adverse to the complainant, the Court completed its analysis of the claimed privilege by examining an important principle established by the Supreme Court to the effect that grounds for disqualification of members of a legislative body based on race and gender can not be said to fall within the rules by which such bodies properly conduct their business.[256] Decisions made on illegitimate grounds cannot therefore be considered protected by the principle of parliamentary privilege. The Federal Court extended this reasoning to the case at bar, concluding that "...the scope of the privilege does not extend to human rights violations as this matter does not fall within the necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld."[257] In so doing, the Court also emphasized that it was not scrutinizing the manner in which authority protected by the privilege was exercised in a particular case. It took the view that a court could legitimately assess the legitimacy of the claimed privilege by examining the grounds upon which it was based. It concluded that the "House should not act as a sanctuary from the operation of the law unless there is a clear conflict with a matter that is privileged. As pointed out by one of the interveners, if the *Criminal Code*, which has no constitutional status, applies to employment relations in the House, then so does the *CHRA*. To hold otherwise would promote a view of parliamentary privilege that is contrary to the individual's guarantees of equality under the *Charter* which is also reflected in the provisions of the *CHRA*."[258] It therefore found that the Human Rights Tribunal had the necessary jurisdiction to conduct a hearing into the allegations of discrimination made by a chauffeur employed by the Speaker of the House of Commons.

New Qualifications for Tribunal Members

Amendments to the *CHRA* that came into effect on June 30, 1998 created a new Canadian Human Rights Tribunal and introduced the requirement that persons appointed to it possess "experience, expertise and interest in, and sensitivity to, human rights".[259] This requirement was challenged as creating a reasonable apprehension of bias, in that members of the Tribunal so qualified could not fairly balance equality rights interests under the *CHRA* against competing rights and freedoms under the *Canadian Charter of Rights and Freedoms*.[260] Both the tribunal before which this argument was first raised and a Motions Judge hearing an appeal from the tribunal's decision rejected this contention. The tribunal found that the qualifications set out in section 48.1(2) of the *CHRA* related to human rights in the broadest sense, whatever their legislative or constitutional basis. Moreover, the over-riding duty of tribunal members is to strive for fairness and a just result regarding complaints of discrimination.

While the Federal Court of Appeal found that the new requirements introduced in 1998 did not technically apply to members of a tribunal constituted before that date, and therefore would have

dismissed the appeal on that basis, it nonetheless considered the allegations of apprehended bias. It found that a tribunal composed of persons characterized by 'sensitivity to human rights' would not because of that fact be blind or insensitive to the interests or arguments of parties involved as respondents in adjudication under the *CHRA*. In its own words: "When read in association with the other qualifications for appointment, namely experience, expertise and interest in human rights, sensitivity implies no more than the need to recognize and be aware of human rights in the broadest sense. The word does not, as suggested by the appellant, require that appointees be individuals disposed to arguments supporting human rights or favourable to them as some dictionary definitions may indicate when taken in isolation. Sensitivity to human rights does not involve an insensitivity to other rights. It is only meant to exclude people with closed minds on human rights issues."[261]

Questions of Fact and Law

A Tribunal decision related to a union practice that discriminated against women (reviewed in *Legal Report 2000*) was appealed to the Federal Court for a number of alleged legal errors and erroneous findings of fact.[262] One error of law that appeared on the face of the record concerned the decision of the Tribunal to review and rule on preliminary objections of the union related to the timeliness of the complaint. While the Tribunal had acknowledged that its jurisdiction to review the decision of the Commission to extend the time limit for filing a complaint was problematic (due to diverging lines of jurisprudence), it nonetheless concluded that it had the authority to rule on the union's submissions in this regard. The Federal Court concluded that the Tribunal had erred against a standard of correctness by so ruling, though it also found that the error was inconsequential to the decision on the merits of the complaint and thus could not be used to overturn it.

Regarding alleged errors of mixed fact and law, the Federal Court applied a standard of reasonableness *simpliciter*. Despite arguments put forward by the Union, the Court could find no misinterpretation of the law in the Tribunal's understanding of the three-pronged test in the *Shakes* decision[263] for determining if a *prima facie* case of discrimination had been established. Furthermore the Tribunal was correct to have modified this test to conform to the specific features of the Union dispatch system in determining whether a discriminatory practice existed. Moreover, the application of this test to the facts of the complaint satisfied the standard of reasonableness *simpliciter*.

There were also no findings of fact by the Tribunal that could be said to have been made in a perverse or capricious manner, or without regard to the evidence before it. In other words, there was nothing patently unreasonable about the inferences drawn by the Tribunal from the evidence placed before it, nor with respect to other facts established by the evidence. Nor was the Tribunal obliged to recite every piece of evidence placed before it in explaining its final decision. The presiding judge of the Federal Court found that "taking into account the totality of the reasons of the Tribunal, I am satisfied its findings of fact...were reasonably open to it, particularly against a standard of review of patent unreasonableness which I am satisfied is the

appropriate standard in respect of such findings of fact by a Canadian Human Rights Tribunal."[264]

Meaning of *Same Establishment* in Pay Equity Disputes

A pay equity dispute involving flight attendants working for Air Canada was the subject of a complaint filed with the Commission in November of 1991. Predominantly female flight attendants alleged that they were discriminated against by being paid lower wages and having a salary structure that required more time to reach maximum salary than was the case for male dominated comparator groups. The comparator groups were identified as (i) first and second officers who fly the air planes, and (ii) workers who provide maintenance and other technical services in and around Air Canada's air planes and places of operations. A similar complaint was also filed against Canadian Airlines International in July of 1992.

Early in the investigative process, both companies defended their wage policies by arguing that the groups of workers with whom the flight attendants compared themselves were not employed in the same "establishment" within the meaning of section 11 of the *CHRA*.[265] To resolve this preliminary issue (which had prompted the respondent companies to seek a judicial order prohibiting further consideration of the complaint) a special three-person Tribunal was appointed to consider how the notion of "establishment" should be interpreted and applied. Consideration of this issue ultimately involved as well the meaning to be given to section 10 of the Equal Wages Guidelines (EWG) adopted under subsection 27(2) of the *CHRA*:

> For the purposes of section 11 of the *Act*, employees of an establishment include, notwithstanding any collective agreement applicable to any employees of the establishment, all employees of the employer subject to a common personnel and wage policy, whether or not such a policy is administered centrally.[266]

The Tribunal found that a proper interpretation of these provisions did not preclude the consideration of collective agreements. In other words, in determining whether employees of the same employer were subject to a common personnel and wage policy, neither section 11 of the *CHRA* nor section 10 of the EWG precluded the consideration of collective agreements. They constituted one factor amongst many that should be considered in reaching a decision. The Tribunal also concluded that section 11 did not establish a corporate definition of establishment, in the sense that all employees of the same employer were deemed to be working in the same establishment. Caution should therefore be exercised in considering such factors as "core function", "interrelatedness" of workers, and management rights in unionized work places that apply across bargaining units. It emphasized that a functional approach was necessary to arriving at a proper understanding of the word "establishment", one that included a consideration of general human resources policies but did not exclude the consideration of collective agreements.

In applying this interpretive approach to the facts of the complaint, the Tribunal concluded that the three groups of employees represented by the "pilots", "flight attendants", and "technical

operations personnel" were separate establishments within the meaning of section 11 of the *CHRA*. It underscored that these three groups had had different bargaining units and collective agreements for many years, and that the certification process for these units had included an assessment of the common interests of their respective employees, including wages, hours and working conditions. The vast majority of wage and personnel policies applicable to each group was contained in collective agreements negotiated by each bargaining unit. Even though some elements of human resources policies and negotiating strategies of the respondent companies were common across all three groups, the Tribunal found this to be insufficient to negate the clear impact of the terms and conditions set out in the separate collective agreements. An appeal of this decision to the Federal Court was taken by both the Commission and the Canadian Union of Public Employees (CUPE) representing the flight attendants.[267]

A key issue before the Federal Court concerned the legal interpretation to be given the phrase "notwithstanding any collective agreement" found in section 10 of the EWG. The Tribunal had rejected the argument that this phrase precluded a consideration of collective agreements in determining if groups of employees were subject to a common personnel and wage policy. The Federal Court agreed with the reasoning of the Tribunal in this regard, in part because the use of the word "notwithstanding" was not intended to resolve a conflict or inconsistency between provisions analogous to that which might exist between two sections in the *CHRA*, such as between subsection 11(1) and 11(4) or between subsection 9(1) and 9(2).[268] Moreover, to decide otherwise would lead to inconsistent applications of the definition of wages found in subsection 11(7) of the *CHRA* depending on whether factors identified in subsection 11(7) were contained in collective agreements or not. As the Court declared: "The logical consequences of the applicants' argument would be that wage comparisons for the purpose of subsection 11(1) would include a consideration of all the elements of remunerations listed in subsection 11(7), but at the same time, the search for wage commonalities to determine which employees fall within one establishment would exclude a consideration of the elements of remuneration listed in subsection 11(7) if they were contained in collective agreements."[269] While the Court agreed that the examination of a collective agreement was relevant to the issue of a common personnel and wage policy, all other factors and elements beyond such agreements must be considered as well.

Tribunal rulings on the admissibility of evidence were also challenged as constituting a breach of the principles of natural justice. Given its primary mandate to inquire into the meaning and application of the notion "establishment", the Tribunal had refused to allow expert evidence to be led with respect to gender predominance in certain occupational groups at Air Canada, as well as general contextual evidence tending to show systemic wage discrimination against women as a result of occupational segregation. With respect to the former, the Court agreed with the Tribunal that it was not relevant to determining what the word "establishment" meant, nor was it relevant with respect to determining whether the alleged comparator groups worked in the same establishment as the flight attendants. By limiting the scope of comparison to employees in the same establishment, section 11 of the *CHRA* established a threshold test that had to be met "before the issue of the gender predominance of an identifiable occupational group [became] relevant."[270]

The Court found that the general contextual evidence rejected by the Tribunal related to "systemic discrimination generally and to the knowledge and theories underpinning this type of discrimination."[271] Nevertheless, the Court pointed out that the Tribunal ruled it would consider "the social and historic context of systemic wage discrimination within the parties' arguments and submissions"[272] and thus "afforded the applicants the opportunity to present the contextual information..."[273] This being the case, the Court could see no breach of the principles of natural justice.

The Federal Court also rejected arguments to the effect that the Tribunal's interpretation of the notion of "establishment" failed to implement the underlying purpose of section 11 by allowing separate collective agreements to perpetuate systemic wage discrimination against women. The Court pointed out that this argument was based upon a false premise, namely, that the Tribunal decision stands for the proposition that an "establishment" will always equate to one bargaining unit or one collective agreement. While such a relationship is reflected in the specific facts of this case, the functional approach set out in the Tribunal decision to determining when employees are subject to a common personnel and wage policy cannot be said to lead necessarily to this result. On the other hand, reasoned the Court, excluding the consideration of collective agreements from such a determination would essentially result in a corporate definition of establishment and run contrary to the clear intent of Parliament.

Calculation of Lost Wages

The manner in which compensation for lost wages suffered as a result of discrimination should be calculated was reviewed by the Federal Court in *Canadian Human Rights Commission and Robert Carter* v. *A.G. Canada*.[274] The case involved a member of the Armed Forces who was released on May 27, 1992 after having reached the age of mandatory retirement. At the time of his release, the policies of the Armed Forces regarding mandatory retirement (found in the *Queen's Regulations*[275]) made no reference to the saving provisions of subsection 15(1)(b) of the *CHRA*. It was on the basis of this deficiency that a Human Rights Tribunal ruled (August 14, 1992[276]) that the mandatory retirement policies of the Armed Forces constituted a discriminatory practice. Amendments were subsequently made to the *Queen's Regulations*[277] (September 3, 1992) explicitly stating that the mandatory retirement policies were regulations adopted by the Governor in Council for the purposes of subsection 15(1)(b) of the *CHRA*.

In the case of Robert Carter, his mandatory retirement predated the September 3rd regulatory amendments by a period of more than three months. It was therefore clear that, at the moment of his release from the Armed Forces, he had been treated in a discriminatory fashion contrary to the provisions of the *CHRA*. While no party before the Tribunal adjudicating Carter's claim disputed this substantive conclusion, a difference of opinion arose regarding the remedy to which the complainant was properly entitled. The Tribunal concluded that the time period for which compensation could be awarded should run from May 27, 1992 (the date of Carter's mandatory retirement) to September 3, 1992 (the date of the amendments to the *Queen's Regulations*). It reasoned that the September 3 amendments put an end to the discriminatory practice and thus severed any causal link between the original discriminatory act and any claimed compensation

extending beyond September 3, 1992. Damages for lost wages would therefore only be awarded for the time period beginning with the mandatory retirement and ending on September 3. The Tribunal also concluded that the calculation of lost wages during that time period should not be reduced by any overlapping pension income or severance pay received by the complainant. Both these findings of the Tribunal were disputed before the Federal Court.

On the question of the proper compensation period, the Federal Court endorsed the Tribunal finding that there must be a causal connection between a discriminatory act and the compensation being claimed. While the right to receive compensation is vested when a discriminatory act takes place, the quantum of damages and their extension in time had to be assessed in light of all the circumstances of a given complaint. In the case at bar, the Court found that the Tribunal had carefully reviewed all the facts and circumstances and had properly concluded that after the September 3 amendments "...there no longer existed a causal link between the discriminatory practice and Mr. Carter's lost wages since the discriminatory practice had ended. Therefore, as there must be a causal connection between the discriminatory practice and the compensation for lost wages, no compensation was required after September 2, 1992."[278] The Tribunal ruling that overlapping pension income should not be deducted from an award for lost wages under the *CHRA* was linked to what is known as the "insurance exception".[279] This exception first arose in civil actions and established the principle that benefits received for lost wages pursuant to a private insurance contract are not deductible from an award for damages. Over time this principle was extended to include employee benefits under a collective agreement or contract of employment. The Federal Court concluded that decisions of the Supreme Court of Canada establish that, with respect to the law governing civil responsibility generally, "...the insurance exception applies to pension benefits, that is, that pension benefits, whether it be payments from the Canada Pension Plan or from an employer's private pension plan, will not be deducted from an award of damages against a third party tortfeasor"[280] What remained to be determined, however, was whether the exception applied to damages for lost wages awarded under the provisions of the *CHRA*.

The Federal Court decision reproduces *in extenso* portions of previous judgments on the meaning and application of the insurance exception. The Court adopted past judicial pronouncements that the insurance exception had been upheld and applied only in cases where a third party tortfeasor (defendant) would have been unjustly enriched if overlapping benefits for lost wages (pursuant to collective agreements or private insurance contracts) were subtracted from damages awarded under general tort law. However, concern about unjust enrichment by a third party tortfeasor was not relevant to the facts in the case at bar. Of more relevance was the possibility that the complainant under the *CHRA* might receive a double recovery for lost wages. The Court concluded “that had Mr. Carter remained an employee until September 3, 1992, he would not have received pension payments prior to September 3, 1992. Pursuant to sections 16 to 20 of the *Canadian Forces Superannuation Act*, it is clear that Mr. Carter could not receive a pension and accrue additional pension benefits at the same time. The tribunal’s failure to deduct the pension income leaves Mr. Carter in a better situation than he would have been had he remained in the Canadian Armed Forces until September 2, 1992, since he has received wages and pension income for the same period of time, i.e. May 27 to September 2, 1992.”[281] Although

the Court declined to rule on the possible application of the insurance exception to damage awards for lost wages under the *CHRA* in other circumstances, it found that the pension payments in the case before it did not fall within the scope of the exception.[282] It therefore concluded that the Tribunal had erred in excluding the pensions payments from the calculation of lost wages. It sent the matter back to the Tribunal for reconsideration.

OTHER HUMAN RIGHTS DECISIONS

Spousal Benefits

The termination of survivorship benefits on remarriage occurring prior to the coming into force of section 15 of the *Canadian Charter of Rights and Freedoms* was the subject of an equality rights challenge before the Nova Scotia Court of Appeal.[283] The case was brought by a group of 62 widows who were awarded survivor pensions under then existing provisions in the provincial *Workers' Compensation Act*[284] following the work-related deaths of their husbands, but lost them (prior to April 17, 1985) when they remarried. The rule regarding termination of a "widow's" pension upon remarriage was repealed by the provincial legislature in 1992, but it was not until 1999 that the government moved to reinstate survivor pensions where they had been terminated after April 17, 1985, the date section 15 of the *Charter* had come into effect. Pensions that had been terminated after that date were reinstated retroactively to the moment when they were lost. The legislative amendments introduced at that time also provided for the reinstatement of pensions that had been terminated prior to the coming into force of section 15 of the *Charter*, but effective only as of January 1, 1999. It was this difference in treatment between "post-*Charter*" and "pre-*Charte*r" widows that allegedly offended the equality guarantees in section 15.

In overturning the trial court's decision in favour of the plaintiffs, the Court of Appeal stressed the importance of separating any analysis of the rule against retrospective application of the *Charter* from the substantive analysis of equality guarantees. The Court pointed out that clearly the *Charter* cannot apply to past legislation that no longer exists. It therefore underscored that "[t]he "constitutionality" of the termination provisions pre-*Charter* is not in issue...They were not unconstitutional nor unlawful prior to 1985. The termination of pensions was not "discriminatory" within the meaning of section 15 of the *Charter* at any point prior to April 17, 1985. It is misleading to suggest otherwise."[285] In this sense, the equality provisions of section 15 could not be used to revive the payment of survivor pensions in the pre-*Charter* era. The real issue concerned the allegedly on-going, status-based consequences that resulted from the operation of past law. It was for this reason that the plaintiffs had asked that their pensions be revived only as of April 17, 1985. In their view (accepted by the trial judge), they were asking only that the *Charter* be applied prospectively so as to invalidate the on-going, status-based denial of a survivor pension.

The distinction between a discrete pre-*Charter* event (to which the *Charter* cannot be retrospectively applied) and an on-going condition or state of affairs is not always clear. The

Court of Appeal referred extensively to a previous Supreme Court decision ("Benner"[286]) that endorsed and applied this distinction in circumstances where repealed legislation had conditioned a grant of citizenship on the gender of the birth parents. Though repealed, the discriminatory effect of this legislation had been carried forward in successor statutes so that a person applying for citizenship in the post-*Charter* era was still affected. That being the case, the Supreme Court granted *Charter* relief to a plaintiff whose post-*Charter* application for citizenship had been denied due to discriminatory distinctions rooted in past law that still created current, on-going problems of status or condition. In so doing, the Supreme Court observed:

> The question then is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?
>
> I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the *Charter* to a past event or simply to a current condition or status will involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the *Charter* right which the applicant seeks to apply.[287]

In the instant case, the Court of Appeal could see no post-*Charter* continuing operation of the termination rule regarding "widow's" survivor pensions. In contrast to the situation in Benner, the claimants here were not "new applicants" in the post-*Charter* era who were affected by the discriminatory impact of past law. Rather, the most significant feature of their case were the dates (all pre-*Charter*) on which each claimant had remarried. "It was the event of remarriage that resulted in termination of the pension, not the status of being remarried. Had the claimants remarried and divorced or been widowed shortly thereafter, they were not eligible for reinstatement of the pension...[W]hile this is understandably viewed by the claimants as unfair, the termination provisions were not in contravention of the *Charter* at the time that they affected the claimants."[288]

Having found that section 15 of the *Charter* can not apply retrospectively to the decisions made to terminate the claimants' survivor pensions,[289] the Court of Appeal then turned to the reinstatement provisions found in the 1999 legislative amendments. Here it was clear that a distinction had been made that denied a benefit to the claimants. In assessing its possible

discriminatory impact, the Court of Appeal first identified the comparator group with which the complainants should be compared. It rejected the submission that the proper comparator group chosen by the claimants should be all widows who did not remarry. It found that "[t]he suggested comparator group might be appropriate in the context of a section 15 challenge to the termination provisions...Those provisions differentiated between remarried widows and those who did not remarry. To accept that comparator group, however, would be to permit a collateral challenge to the termination provisions. It would improperly circumvent the issue of retrospectivity discussed above. In addition, the constitutionality of the termination provisions post-*Charter* is irrelevant to the position of these claimants."[290] It found instead that the correct comparator group was that composed of the post-*Charter* widows. Both they and the claimants were the ones affected by the legislation and related to its purpose, which was to restore pensions to widows who had lost them upon remarriage.

The only material difference between the claimants and the comparator group was the date of remarriage, as they all were widows who had eventually remarried. The Court of Appeal found that the trial level judge had erred in concluding that the claimants had been discriminated against on the basis of marital status. The basis for distinguishing the claimants was strictly temporal, i.e. based on the date of remarriage. The Court rejected any notion that this type of distinction could amount to an enumerated or analogous ground of prohibited discrimination. As a result, the failure to reinstate pensions effective from April 17, 1985 to the claimants, whose remarriage and loss of original survivor pension occurred prior to that date, did not conflict with equality rights under section 15 of the *Charter*.

Access to Employment Insurance Benefits

A decision of an Umpire under the *Employment Insurance Act*[291] has reviewed eligibility criteria against the claim that they infringed equality rights under section 15 of the *Charter*.[292] The case was brought on appeal from a Board of Referees that had decided a claimant did not qualify for regular benefits, maternity benefits or sick benefits because she was 33 hours short of the requisite 700 hours of insurable earnings. The 700 hour rule[293] had replaced (in 1996) previous criteria that had established eligibility as a function of having worked at least 15 hours per week for a period ranging from 12 to 20 weeks, depending on the regional rate of unemployment. In the case of the claimant, her responsibilities as a mother had prevented her from working full time as a nurse. She therefore had worked part-time as a nurse on call in the city of Brandon. When she relocated to Winnipeg due to her husband's change of employment (and after a period during which they had tried to maintain two residences) she applied for benefits under the *Employment Insurance Act*. At that time she was pregnant with her second child and had been advised by her doctor to cease working for reasons related to her pregnancy.

Expert witnesses were heard by the Umpire regarding both the purpose and effect of the changes to the eligibility criteria governing benefits under the *EI Act*. One witness pointed out that the government had been concerned about the tendency of employers to create part-time employment of less that 15 hours per week in order to escape the contribution requirements of the *EI Act*. In order to halt actual and potential erosion of those covered by the *Act* the new

criteria introduced the notion of "first dollar coverage", designed to bring payroll taxes more into line with expected benefits under the *EI Act*. It was explained that under the old criteria a part-time worker who met the 15 hours per week minimum for 12 weeks (thus accumulating only 180 hours of insurable earnings) had been eligible for benefits, whereas an employee who had worked 10 hours a day, 7 days a week for 10 weeks (thus accumulating 700 hours of insurable earnings) was not. The new rules based on "first dollar coverage" were thus designed to introduce greater equity into the benefits scheme.

As to the composition of the part-time labour force, expert testimony established that women constitute over 80% of adult wage earners (age 25-54) working part-time. To a certain extent, this is explained by the fact that women remain the primary caregiver with respect to children, forcing them to try to balance domestic responsibilities with the need to work in order to supplement family income. Other factors of a socio-historical nature, prevailing gender roles and market conditions contribute as well to the concentration of women in part-time employment. While it was claimed that the changes to the eligibility criteria were motivated by a desire to improve access to benefits by part-time workers, one expert witness found otherwise. In referring to that testimony, the Umpire said: "It was her view that the weeks-to-hours change and the higher threshold of eligibility for re-entrance means that it is significantly more difficult for part-timers to qualify for benefits. When they do qualify, benefits are often of a shorter duration. Her study also revealed that there has been a dramatic drop in the proportion of the unemployed receiving employment insurance benefits and that the reduction has been greater for women than for men. Between 1996-97 and 1997-98, among regular claimants, claims by women dropped 20 percent, compared with a 16 percent decline for men."[294]

The *EI Act* also defines major attachment to the workforce in terms of a minimum number of hours (700) of insurable income. Only major attachment claimants are eligible for maternity and parental benefits. Whereas the old rules for determining major attachment (based on number of weeks worked) were arguably gender neutral, the new criteria were not. The Umpire summarized the claimant's argument:

> A standard based on weeks of employment does not tend to favour either men or women, since every man and woman who survives a calendar year has had exactly the same number of weeks in that year to pursue paid employment. Since women devote a significant portion of their available working hours to unpaid labour, spending roughly double the time spent by men on unpaid work, women have fewer hours each year to devote to paid employment. Since the average man spends almost a third more hours each year in paid employment than the average woman, an entrance requirement based solely on total hours of paid employment in a year is more easily met by male workers who have more hours available for paid employment. In other words, the hours-based standard has a natural tendency to exclude more women than men.[295]

It was argued that the hours-based criteria for eligibility for regular benefits does not draw a distinction between groups of people based on a personal characteristic. However, the Umpire found that this view did not fully consider the possible impact of the neutral rule on a group

already burdened with disadvantage. He pointed out that the 700 hour rule for regular benefits was arrived at by assuming a 35-hour work week for a given period of time, thus leaving the average women at a disadvantage. In his own words:

> ...as the evidence clearly indicates, women continue to perform two-thirds of unpaid labour, leaving them with fewer hours to devote to paid employment. Some women, like the appellant, with children, not yet of school age, face the toughest challenge. They are required to alter their paid work arrangements to meet demands of unpaid work, while the age or presence of children has little impact on men's paid or unpaid work patterns. They are often unable to undertake more hours of paid work because their juggling act would become much more complicated and may be just too stressful. Thus, the hours-based system disproportionately affects women by increasing the number of hours of work required to qualify and lowering the number of weeks of benefits if they are unable to increase their hours of work.[296]

The Umpire then went on to consider if the differential impact was based on a distinction that amount to a listed or analogous ground of discrimination under section 15 of the *Charter*. It had been argued that the distinction here was rooted in employment status and thus did not amount to an analogous ground. In short, the claimant had been denied benefits due to her weak labour force attachment calculated as a function of the number of hours worked in the preceding 52-week period, not because of some immutable personal characteristic. Notwithstanding, the Umpire found that the differential impact was based on the status of a person being in a parent and child relationship and that this amounted to an analogous ground under section 15. He said: "Parenthood is central to one's identity and personhood, it is a status that is immutable. It is true that the status will change when the children are no longer in need of a caregiver, but that does not change the fact that their status is immutable until that time comes. The appellant's status as a parent and primary caregiver is one that the government has no legitimate interest in expecting her to change to receive equal treatment under the law. When a mother works part-time because of her unpaid parental responsibilities she should not receive inferior employment insurance coverage on that account."[297]

The Umpire also found that the underlying purpose of section 15 of the *Charter* had been breached as well. This was so because the definition of major work force attachment ignored the contribution women made through unpaid work in the home: "The former Act gave some credit for completion of a minimum calendar based period of work for major attachment. Although a woman, under the present legislation, who works part-time year round has a strong attachment to the workforce, her attachment to the workforce is less than that of a man who is able to easily accumulate employment insurance dependence by working the 700 hours in the summer and collecting employment insurance benefits every winter. Since the appellant's attachment to the work force is deemed inadequate, not because she lacks regular employment, but because her weekly hours of paid employment are limited by her unpaid obligations, the dignity of the part time working mother with children is more directly violated."[298] He also found that the definition of workforce attachment promoted the view that a woman is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.

As to remedy, the Umpire found that he did not have the authority to declare the relevant sections of the *Employment Insurance Act* to be invalid. He therefore returned the matter to the Board of Referees, differently constituted, to rehear the application of the complainant as if the legislative provisions in question had never been enacted.

Sexual Orientation

The Supreme Court of Canada has issued a decision regarding alleged discrimination based on sexual orientation at a private, religiously-based university in British Columbia.[299] The case arose from the decision of the British Columbia College of Teachers (BCCT) to deny the request of Trinity Western University (TWU) that it be authorized to assume full responsibility for the final year of a five year baccalaureate degree in education. The BCCT invoked alleged discriminatory practices against gays and lesbians found in a TWU Community Standards document that all its students were required to sign. That document contains a paragraph identifying practices that are biblically condemned and enjoining students to refrain therefrom. These include drunkenness, profane language, dishonesty and cheating, abortion, and various sexual sins such as premarital sex, adultery and homosexual behaviour. The BCCT took the position that it would be contrary to the public interest and public policy to accept the TWU request, given that its proposed program reflected discriminatory practices based on sexual orientation. It felt that there was a risk that graduates of TWU would not provide a discrimination-free environment for students in the public schools should their entire teacher education program be under the exclusive control of TWU. In denying accreditation for the final year (thus maintaining the requirement of a final year attendance at Simon Fraser University), the BCCT purported to act pursuant to its authority under section 4 of the *Teacher Profession Act* to "establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership..."[300] The decision of the BCCT was overturned by the British Columbia Supreme Court, and an appeal by the BCCT to the provincial Court of Appeal was rejected.[301]

On the substantive issue of alleged discriminatory practices, the Supreme Court looked first to TWU documents. While it allowed that the Community Standards were such as to make it unlikely that a homosexual student would seek admission to TWU, that alone does not establish a discriminatory practice. It pointed out that TWU as a private religiously based institution is exempt in part from British Columbia human rights legislation (i.e. it can favour adherents to is own religion). Moreover, its private status precluded the application of the *Canadian Charter of Rights and Freedoms*. That said, the Court felt that arguments to the effect "that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage section 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."[302] Freedom was understood by the Court to embrace "...both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."[303]

The Court recognized that protection from discrimination based on sexual orientation is guaranteed in both the *Charter* (as an analogous ground) and the human rights legislation of British Columbia, as is freedom of religion and conscience. It is the potential conflict between these two guarantees that is raised in the case of TWU, one that can be resolved by the proper delineation of the rights and values involved. While the impact of TWU's admission policies on the public school environment is a legitimate concern of BCCT in assessing the public interest, reasoned the Court, such impact must be assessed in light of concrete evidence. In this regard, the Court concluded that "TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are insufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards should be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[304] In short, the BCCT had made no attempt to weigh the various rights involved in the situation presented by the TWU request for accreditation. Finding this to have been legally incorrect, the Supreme Court then proceeded to conduct that inquiry itself.

The Court identified two contextual factors it considered of great significance. First, the constitutional framework of Canada protects religious public education rights, that protection being part of the historic compromise that made Confederation possible. Moreover, many Canadian universities have traditions of religious affiliation. Second, the human rights statute of British Columbia provides that a religious institution does not offend the principles set out in that legislation if it prefers members of its own religious belief. How could one then reasonably argue that private institutions are so protected "but their graduates are de facto considered unworthy of fully participating in public activities [?]."[305] Other legislative initiatives of the government of British Columbia belied this conclusion as well: "In this particular case, it can reasonably be inferred that the British Columbia legislature did not consider that training with a Christian philosophy was in itself against public interest since it passed five bills in favour of TWU between 1969 and 1985."[306] As to the effect all this might have on homosexual students, the Court remarked: "While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully."[307]

This last observation led the Court to emphasize that a distinction must be made between holding a belief and acting upon it: "...the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of British Columbia, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."[308] Curiously, the Court seemed to ignore the distinction between an

institution that actively promotes racist or homophobic views and one that doesn't.

Alleged discriminatory conduct by a teacher can rightfully be the subject of disciplinary proceedings before the BCCT. While conduct subject to censure is normally related to on-duty responsibilities in the schools, off-duty conduct that has the effect of "poisoning" the environment within a school may be subject to disciplinary sanctions as well. In the case at bar, there was no evidence presented that related to past conduct of graduates of TWU being tainted by unacceptable discriminatory behaviour in the course of performing their duties as teachers. In effect, the BCCT had denied accreditation to TWU in the absence of any evidence of past problems with graduates of Christian institutions. The Court pointed out that BCCT "...could have asked for reports on student teachers, or opinions of school principals and superintendents... [or] examined discipline files involving TWU graduates or other teachers affiliated with a Christian school of that nature."[309] Its failure to do so constituted a fatal legal error.

In rejecting BCCT's appeal, the Supreme Court also considered whether the original order of mandamus issued by the trial judge requiring BCCT to approve the accreditation of TWU should be maintained. Given the statutory restrictions on BCCT's discretionary powers and the fact that denial of accreditation was motivated only by alleged discriminatory practices, the original order was considered appropriate. In short, the Court found that BCCT had acted on the basis of irrelevant considerations when it invoked the religious beliefs of TWU rather than the impact of those beliefs on school environments. In so doing it had acted unfairly.

Mandatory Retirement

A mandatory retirement case heard by the British Columbia Court of Appeal has placed in question the meaning and scope of previous decisions of the Supreme Court of Canada, in particular the latter's judgment in *Mckinney* v. *University of Guelph*.[310] Among other things, the *Mckinney* decision examined the constitutional validity of provisions in the Ontario *Human Rights Code*[311] which permitted discrimination in employment against those over 65. It found that those provisions violated equality rights under section 15 of the *Charter* but that they were saved under section 1 as being a reasonable limit prescribed by law in a free and democratic society. In applying section 1 of the *Charter*, the Supreme Court conducted a detailed analysis of the underlying policy concerns of government regarding mandatory retirement at 65, reflected in the contentious provisions of the Ontario *Human Rights Code*.

The case before the British Columbia Court of Appeal involved an employee of the Greater Vancouver Regional District (GVRD) who lost his employment as a waste plant operator two days before he was scheduled to start when management learned that he was 65 ½ years old.[312] He grieved that decision pursuant to procedures set out in a collective agreement. At the arbitration hearing management did not offer any material evidence regarding policy considerations that might justify mandatory retirement at 65. It took the view that it was not in breach of the *British Columbia Human Rights Code*[313] because the *Code* itself defined age for the purposes of prohibited discrimination as between 19 and 65. In other words, by the very terms of the *Code* its policy on mandatory retirement did not amount to a prohibited form of

discrimination based on age. In support of its position, GVRD cited the Supreme Court decision in *McKinney* where similar definitions of age in the Ontario *Human Rights Code* had been found to be constitutionally valid.

The Arbitration Panel rejected the view of management that it was not obliged to offer any evidence to satisfy the requirements of section 1 of the *Charter*. It ruled that the Supreme Court in *McKinney* had in fact conducted two section 1 inquiries, one with respect to specific university retirement policies and another regarding the constitutional validity of contested provisions in the Ontario *Human Rights Code*. It reasoned that "had the SCC intended its decision regarding section 9(a) of the Ontario *Code* to establish that mandatory retirement is always a reasonable limit on the *Charter* right to equality, it need not have devoted as much attention as it did to the question of whether the mandatory retirement measures of the universities were justified under section 1 of the *Charter*. The separate and extensive analysis of that question...is consistent with the necessity for an employer seeking to justify mandatory retirement to make its case for a section 1 limit."[314] Accordingly, the majority of the Arbitration Panel ruled that GVRD management was required to present evidence so that a proper analysis under section 1 of the *Charter* could take place. Since it had failed to do so, the Panel determined that GVRD mandatory retirement policies, based as they were on age, were contrary to section 15 of the *Charter*.

The decision of the British Columbia Court of Appeal turns almost exclusively on the proper interpretation to be given the *McKinney* decision.[315] The majority decision of the Court of Appeal carefully separates the two inquiries under section 1 that the Arbitration Panel had identified. In its view, the Supreme Court in *McKinney* had found "that the objectives of the mandatory retirement policies were pressing and substantial in the university context, that the policies were rationally connected to the objectives and that the measures used to obtain those objectives impaired the section 15(1) right as little as possible...[and] that the policies attempted to strike a balance between the claims of legitimate but competing social values such that deference should be accorded to them..."[316] The Court of Appeal took the view that this conclusion had been arrived at separate and apart from the issue of whether provisions in the Ontario *Human Rights Code* infringed equality rights under section 15 of the *Charter*. It pointed out that this latter issue had been the subject of extensive historical, economic and social analysis by the Supreme Court undertaken after having reached its findings on the specific retirement scheme of the university. Moreover, the Court of Appeal found that the Supreme Court had been focused mainly on the effects of mandatory retirement in the private sector when it assessed the validity of the *Human Rights Code*. It quoted the following passage from *McKinney*:

> It must be remembered that what we are dealing with is not regulation of the government's employees; nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled

> to obtain.[317]

The Court of Appeal also conducted an exhaustive review of other decisions issued on the question of mandatory retirement. This review reinforced its conclusion that the Supreme Court had not intended to declare that "all mandatory retirement policies in the public sector were saved under section 1 of the *Charter* simply because they do not contravene relevant provincial human rights legislation....[I]f the majority in McKinney had intended to resolve the issue of the constitutionality of mandatory retirement policies in the public sector for all employment of every kind, one would have expected them to say so in no uncertain terms."[318]

Returning to the specific circumstances of the case at bar, the Court of Appeal concluded:

> Is it reasonable to conclude that an employer such as this respondent could simply enact an admittedly discriminatory policy, which on its face does not offend the *Human Rights Code*, and do no more to justify its policy than refer to *McKinney*? In my view, the answer to this question is "no". *McKinney* is not definitive of the constitutionality of all mandatory retirement policies in the public sector, without regard to the nature of the employment or the underlying factual foundation of each case. It does not relieve an employer of the onus of establishing that its policy of mandatory retirement is justifiable under section 1 of the *Charter* on an *Oakes* analysis. It may be that the onus on an employer will be readily met in some cases because of similarities between the case at hand and other decided cases, but the onus must still be satisfied.[319]

One judge on the Court of Appeal (from a bench composed of three) dissented from the conclusion of the majority. After referring to different passages in the *McKinney* decision, the dissenting judge concluded:

> Any obligation to advance a specific occupational justification for mandatory retirement at age 65 would add a second tier to the obligation of *Code* compliance and could call in question the general justification underpinning the *Code* provisions. If this general justification is sufficient to support the *Code*, I see no reason why it should not be equally sufficient to justify a policy that is in compliance with the *Code*. The alternative would create a tension between general and specific justifications for mandatory retirement, which could lead to uncertainty, and conflict in government employment. I think that it would be incongruous to impose a higher standard than the *Human Rights Code* upon this employer simply because it is a government entity when it is an employer within provincial jurisdiction. In my view, the provisions of the *Code* by necessary implication provide justification for the mandatory retirement policy under section 1 of the *Charter* as a matter of general law applicable to both private and public sectors within provincial jurisdiction.[320]

It is unknown whether an appeal of this decision will be taken to the Supreme Court of Canada.

R. v. Latimer

The Supreme Court of Canada has ruled in the much publicized case of Robert Latimer, found guilty of the second degree murder of his 12-year-old daughter who suffered from a severe form of cerebral palsy.[321] Although second degree murder is subject to a minimum sentence of 10 years imprisonment, the judge who presided at Latimer's trial considered the punishment to be cruel and unusual in the circumstances of the case and hence contrary to section 12 of the *Charter*. He therefore granted a constitutional exemption to the minimum 10 year jail term and imposed a one year prison sentence, to be followed by one year of probation. The decision of the trial judge in this respect was overruled by the Saskatchewan Court of Appeal, which imposed the minimum sentence of 10 years, and a further appeal was taken to the Supreme Court of Canada.[322]

As a point of departure, the Supreme Court affirmed that cruel and unusual punishment within the meaning of section 12 of the *Charter* refers to punishment that is "so excessive as to outrage standards of decency."[323] It is only where punishment is grossly disproportionate to what would have been appropriate that the protection under section 12 can be engaged. In determining whether a sentence is grossly disproportionate, a court "...must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender."[324] Beyond these factors, a court must also consider "...the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed and a comparison of punishments imposed for other crimes in the same jurisdiction."[325] The Supreme Court also emphasized that the test for determining if a sentence is disproportionately long is stringent and demanding, and that a violation of section 12 will only be found on rare and unique occasions.

In applying these principles to the Latimer case, the Supreme Court first noted that the offence committed was one of extreme gravity: "[S]econd degree murder is an offence accompanied by an extremely high degree of criminal culpability . In this case, therefore, the gravest possible consequences resulted from an act of the most serious and morally blameworthy intentionality. It is against this reality that we must weigh the other contextual factors, including and especially the particular circumstances of the offender and the offence."[326] The Court found that both aggravating and mitigating circumstances characterized the crime of Mr. Latimer; so much so that their combined impact was greatly diminished when set off against the gravity of the offence.[327]

The seriousness of the offence was reflected in the minimum punishment provided for under the *Criminal Code*.[328] The Court found that a minimum sentence of 10 years imprisonment served

an important sentencing principle, namely, that punishment plays a significant denunciatory role with respect to crime: "The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law."[329] The role of denunciation is all the more important, reasoned the Court, when the crime under consideration involved considerable planning and premeditation and resulted in a high degree of coverage by the media. Denunciation of such crimes serves to deter other like-minded individuals, particularly important where the victim is vulnerable because of age, disability or other similar factors.

In light of all these reasons, the Court concluded that the minimum sentence of 10 years imprisonment imposed on Mr. Latimer did not violate his rights under section 12 of the *Charter*. In so doing, it also pointed out that the royal prerogative of mercy is explicitly preserved by the terms of the *Criminal Code*. It adopted its reasoning in a previous decision to the effect that "[w]here the courts are unable to provide an appropriate remedy in cases that the executive sees as unjust imprisonment, the executive is permitted to dispense "mercy", and order the release of the offender. The royal prerogative of mercy is the only potential remedy for persons who have exhausted their rights of appeal and are unable to show that their sentence fails to accord with the *Charter*."[330]

Obesity as a Disability

The issue of whether obesity constitutes a disability within the meaning of certain provisions of the *Canada Transportation Act* (*CTA*)[331] was raised before the Canadian Transportation Agency. The issue arose from a complaint made against Air Canada regarding both specific seating arrangements on a Calgary to Ottawa flight, and the airline's general policy of charging a higher fare to accommodate passengers who required additional seating space due to their obesity.[332]

The Agency's mandate and authority regarding disabilities generally is found in Part V of the *CTA*, which provides for the issuance of regulations designed to eliminate undue obstacles to the mobility of persons with disabilities in the transportation network under federal control, and establishes a complaint adjudication authority. Even in the absence of specific regulations, the Agency is empowered to adjudicate matters raised in applications relevant to undue obstacles to the mobility of persons with disabilities. It was under this authority that the present application was brought. However, whether obesity constituted a disability under Part V was considered a preliminary jurisdictional issue to be heard at a special hearing before which a number of expert witnesses testified.

In its decision following the special hearing, the Agency recognized that Part V of the *CTA* is by nature human rights legislation that should be given a broad, liberal and purposive interpretation. It also took note that section 171 of the *CTA* specifically requires the Agency and the Canadian Human Rights Commission to "...coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid

jurisdictional conflicts."[333] It was with these principles in mind that the Agency considered the evidence presented, and the arguments made, regarding the issue of obesity.

Expert testimony regarding the characterization of obesity as a disease diverged. However, none of the parties before the Agency took the view that the causes of obesity, medical or otherwise, determined the issue of whether it constituted a disability. In this regard, the Agency found that a health condition can be considered to be a disability for the purposes of accessibility under Part V without it being a disease. It cited as an example the hypothetical case of accidental quadriplegia. By the same token, evidence that tends to establish a relationship between obesity and other health problems and co-morbidities (which the Agency found to be weak) does not dispose of the question of whether obesity is a disability. More relevant and appropriate standards, concluded the Agency, can be found in the notions of impairment, activity limitations and/or participation restrictions, all of which are set out in the World Health Organization's International Classification of Functioning, Disability and Health (ICF).

With respect to impairment generally, the Agency noted the ICF model views it as a problem in body function or structure, a decrement in power or strength of a function or a deviation in functioning. The ICF model views obesity as a body function impairment based on an individual's BMI (Body Mass Index). The Agency observed, however, that based on this model fully 60% of the North American population would be overweight and technically disabled. It concluded therefore that impairment alone (at least in the present case) was insufficient to determine that a disability existed.

Turning to the notion of activity limitation, the Agency noted that the ICF model considers a limitation to be an incapacity, inability or other inherent difficulty in executing a task or function. Expert testimony suggested that any conclusion regarding a limitation must be based on the facts of a given case. In other words, such a determination cannot be made *a priori* or by definition, as is the case with impairment. The Agency found that while some obese persons experience certain activity limitations, a considerable percentage of them do not. If further emphasized that the medical evidence showed that there is no specific BMI beyond which activity limitations will inevitably be present. The Agency took a similar view with respect to participation restrictions, pointing to the view of experts that the assessment of such restrictions must be done on a case-by-case basis. While the Agency did not disagree with testimony to the effect that obese persons face stigma and denial of opportunity generally and that social attitudes towards them are often discriminatory, it found that no evidence was presented to support the conclusion that obese persons necessarily experience participation restrictions in the context of the federal transportation network. It reached the same conclusion regarding activity limitations.

In light of its findings regarding the facts-based nature of activity limitations and participation restrictions, the Agency ruled that obesity *perse* is not a disability within the meaning of Part V of the *CTA*. However, it supplemented its ruling with the observation that "the evidence suggests that there may be individuals in the population of persons who are obese, who have a disability for the purposes of Part V of the *CTA* which can be attributed to their obesity."[334]

Accordingly, the Agency indicated that it would continue to examine applications raising such issues on a case-by-case basis. A decision regarding the merits of the specific application against Air Canada, which had given rise to the special hearing, has yet to be issued.

INTERNATIONAL LAW

The establishment of the Canadian Human Rights Commission in 1978 followed hard on the heels of Canada's ratification in 1976 of the two International Human Rights Covenants.[335] Since that time, the Commission has played an important role in ensuring Canada implements its international human rights obligations domestically and in helping to advance human rights standards at the international level. In fact, the Commission played a pivotal role in the development of the "Paris Principles" in 1991, principles which were subsequently endorsed by the UN General Assembly[336] (A/RES/48/134 of 4 March 1994). These Principles set out minimum standards for independent and impartial national human rights institutions, and provide that "national institutions should promote the harmonization of national legislation, regulations and practices with international human rights instruments."[337] In fulfilling this mandate, the Commission has recently begun to incorporate international human rights law into its analysis of new government legislation. For example, in 2001, in providing comments on the Anti-terrorism legislation (Bill C-36)[338] and amendments to the *Immigration and Refugee Protection Act (Bill C-11)*[339], the Commission examined international human rights standards binding on Canada and concluded that aspects of both pieces of legislation were inconsistent with Canada's obligations under international human rights law.

The importance of international human rights law in the Canadian context was highlighted in 2000 by the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest. In its report entitled *Promoting Equality: A New Vision*[340], the Review Panel made a series of recommendations to amend the *CHRA* and the mandate of the Commission. Specifically, the Review Panel recommended that the *CHRA* include explicit reference to international human rights law in the preamble and provide the Commission with a mandate to monitor Canada's performance in this regard. In 2001, the newly established Standing Senate Committee on Human Rights issued its first report[341] and reiterated the recommendation that the *CHRA* make explicit reference to international human rights instruments and that the Commission be given sufficient resources to conduct a systematic review of proposed legislation and policies for consistency with international human rights standards.

Similarly, Canadian courts are increasingly turning to international human rights law to provide persuasive interpretations of Canadian domestic law. In 1999 in the *Baker* case,[342] the Supreme Court of Canada went beyond the traditional presumption of statutory conformity with international obligations to state that the "values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review"[343]. In the particular case of *Baker*, this meant that immigration officials were bound to consider the values expressed in the *Convention on the Rights of the Child*[344] when exercising discretion. In early 2002, the reasoning set out in *Baker* was applied, in part, in the *Suresh* case,[345] where the Supreme Court examined the application of the *Convention Against Torture*[346] to interpret the

Charter and the non-refoulement provisions of the *Immigration Act*.[347] The Court wrote that "the inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law."[348]

A similar trend is being seen in other jurisdictions. In 2001, in a case involving Zambia, the African Commission on Human and People's Rights held that international treaties, although not part of a State's domestic law nor directly enforceable in the national courts, nonetheless imposed internal obligations on State parties.[349] These developments further highlight the fact that international human rights standards and trends can, and increasingly do, have a profound impact on human rights at the domestic level — within Canada as well as in other "dualist" states where international law is not automatically and directly applicable in domestic courts.

While international law is increasingly informing the interpretation of Canadian domestic law, there remain significant gaps between the two. In its report, the Standing Senate Committee on Human Rights also stressed that there are gaps between Canada's obligations under international human rights treaties and our domestic law, gaps which mean that "Canada is not entirely fulfilling its international commitments and risks denying its people access to certain of their human rights." [350]

For the first time a brief overview of developments and trends in international human rights law is being provided in the Commission's *Legal Report*. The section is not meant to be exhaustive, nor to cover every relevant issue. Rather it looks — at the three broad issues dealt with by the Canadian Human Rights Tribunal or other Canadian Courts this year and addressed in other sections of this report - discrimination on the grounds of sex, disability and race, the rights of indigenous peoples and economic, social and cultural rights. It also and examines major international developments on these issues.

1. *Discrimination based on sex*

Canada was one of the first countries in 1981 to ratify the UN *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).[351] Article 1 of the Convention defines discrimination against women as: "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[352]

In addition to the CEDAW, other conventions, declarations and international standards prohibit discrimination on the grounds of sex. These include the Universal Declaration of Human Rights (UDHR)[353], the International Covenant on Civil and Political Rights (ICCPR)[354], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[355] and the Convention on the Political Rights of Women[356] and International Labour Organisation treaties pertaining to equal pay.[357]

Key issues considered in 2001 were the focus on trafficking in women, a gender-based approach to security and the development of individual complaints mechanisms for women whose internationally-protected human rights have been violated.

In late 2000, Canada signed a new Protocol to the UN treaty on Transnational Organized Crime concerning "Trafficking in Persons, Especially Women and Children".[358] Also, late in 2000, the Security Council passed its first-ever resolution on gender and security. In 2000, attention was focussed on the adverse impact of armed conflict on women and girls, on the role of women in peace-building and on the gender dimensions of peace processes and conflict resolution.

Of great relevance to the Commission, was the coming into force late in 2000 the *Optional Protocol* creating a new individual complaint mechanism under the *UN Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).[359] There were 73 signatories, 28 of whom had ratified the protocol by the end of 2001. In 2001, the Government of Canada announced that it supported the adoption of the Optional Protocol. It is currently consulting the provinces and territories regarding ratification. Ratification by Canada of the Optional Protocol would allow women, after exhausting domestic Canadian remedies, to submit individual "communications" to the Committee on the Elimination of all Forms of Discrimination Against Women alleged violation of their rights under the CEDAW treaty.

Just as the *CHRA* addresses sex discrimination in employment or in the provision of services, the CEDAW treaty prohibits discrimination in economic and social benefits (Article 13) and in the field of employment (Article 11), guaranteeing women's right to work and their right to equal pay and equal treatment for work of equal value. The treaty also states that positive measures to accelerate de facto equality do not amount to discrimination. In many ways, the international legal framework guaranteeing women's equality in these spheres mirrors the legislative framework of the *CHRA*, including Pay Equity provisions and the *Employment Equity Act*.[360]

Over the past few years, human rights bodies within Canada have increasingly recognized the compound effects of discrimination on more than one ground, or "intersectionality". In 1998, the *CHRA* was amended to affirm that greater certainty that "a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds."[361]

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) demonstrated that international tribunals are developing a better understanding of the multi-dimensional and intersecting nature of discrimination. The Committee has issued a General Comment, an interpretive statement for the CERD treaty, which provides that "certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers."[362] The Committee thus endeavours when examining forms of racial discrimination, to "enhance its efforts to integrate gender perspectives, incorporate gender analysis, and

encourage the use of gender-inclusive language"[363] in its review of reports submitted by State parties on their compliance with treaty obligations. Other treaty bodies, such as the UN Human Rights Committee, have issued similar General Comments. For instance, commenting on article 3 of the ICCPR (equality of rights between men and women), the UN Human Rights Committee in 2000 stated that: "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes."[364] According to the Committee, State parties to the Covenant, who are responsible for ensuring the equal enjoyment of rights without any discrimination, should "ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights."[365] The Committee outlined various measures that States can undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set out in the Covenant. It also emphasizes that "Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status."[366]

2. *Persons with disabilities*

Under the UN *Charter*[367], States have pledged to take action jointly and separately to promote a better quality of life, full employment and conditions for economic and social progress and development. While none of the main international human rights instruments contain specific provisions pertaining to persons with disabilities, the UDHR recognizes that all human beings are born free and equal in dignity and rights. Furthermore, the ICCPR provides that all persons have the right to protection against discrimination and to full and equal enjoyment of their human rights. Therefore, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. This was further reaffirmed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993. It stated that "any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights."[368] International human rights law therefore clearly covers the need to ensure equality for persons with disabilities in all areas, including employment and social services and to eliminate all physical barriers to their full participation.

The UN Committee on the Economic, Social and Cultural Rights noted that States have the obligation "to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities."[369] This includes both the public and private sphere.[370] According to the Committee, in order to remedy past and present discrimination, and to deter future discrimination, State parties should adopt comprehensive anti-discrimination legislation in relation to disability. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

Case Law

In *Price* v. *The United Kingdom*,[371] the European Court of Human Rights held in 2001 that failure to accommodate disability can amount to cruel and unusual treatment in some circumstances. In this case, a four-limb-deficient thalidomide woman with numerous health problems was imprisoned in a cell with facilities unadapted to meet her specific needs. The Court rule that while there were no evidence in this case of any positive intention to humiliate or debase the applicant, the conditions in which she was detained constituted degrading treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[372]

In *PGA Tour Inc* v. *Martin*,[373] the US Supreme Court determined in 2001 that the *Americans with Disabilities Act*[374] requires the PGA to allow persons with disabilities the use of golf carts during qualification rounds for the PGA Tour. In this case, the respondent, a person with a disability, was challenging the Tournament "walking rule" which prevented participant to use golf carts. The Court reasoned that the golf course utilized by the Tour were public, thus subject to the *ADA* requirements, and the use of carts by persons with disabilities, who otherwise qualified, does not "fundamentally alter" the nature of the sport nor give the respondent an advantage over others.

3. *Racism and Racial Discrimination*

The year 2001 was the International Year of Mobilization against racism, racial discrimination, xenophobia and related intolerance. The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) was held in Durban in September 2001 and adopted a Declaration and Programme of Action.

The Canadian Human Rights Tribunal's main focus in this area during the past year was the issue of hate messages. Early in 2002, the Tribunal issued a decision in the case,[375] which concerned Zündel an Internet web site that exposed Jews to hatred. In its ruling, the Tribunal concluded that the site created conditions that allow hatred to flourish and went on to note that "...the benefit continues to outweigh any deleterious effects on [Mr. Zündel's] freedom of expression."[376] The Tribunal ordered the website to be shut down. At the international level, the World Conference Against Racism considered the issue of racist and xenophobic hate propaganda. While recognizing the positive contribution that the exercise of the right to freedom of expression can make to the fight against racism, the World Conference expressed its concern about the use of new information technologies, such as the Internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance.[377] It emphasized that education at all levels and all ages is key to changing attitudes and behaviour and is essential in the promotion, dissemination and protection of the democratic values of justice and equity[378] and insisted on the need to provide effective and appropriate protection and remedies to victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance.[379]

Case Law

In *Lacko* v. *Slovak Republic*, the UN Human Rights this year committee examined the issue of racial discrimination and the duty of State parties to the Convention on the Elimination of Racial Discrimination to prohibit and eliminate racial discrimination.[380] The petitioner, accompanied by other persons of Romany ethnicity, went to the Railway Station Restaurant located in the main railway station in Kosice, Slovakia, to have a drink. Shortly after entering the restaurant, the applicant and his friends were told by a waitress to leave the restaurant. The waitress explained that she was acting in accordance with an order given by the owner of the restaurant not to serve Roma. The petitioner's initial complaint was dismissed by the General Prosecutor's Office on the ground that an investigation had revealed that Roma women had been served at the restaurant and that the owner had arranged that there would be no further discrimination against any polite customers, Roma included. The petitioner claimed that the failure to remedy the discrimination was due to the absence of any Slovak legislation expressly and effectively outlawing racial discrimination in access to public accommodations[381] and that this absence of any legal norm constituted failure to comply with its obligation under article 3 of the Convention. Since criminal procedures had been undertaken against the restaurant owner for instigation to national and racial hatred, the Committee found no violation of the *Convention on the Elimination of Racial Discrimination.*[382] However, acting under article 14, paragraph 7 (b), of the Convention it recommended to the State party that it complete its legislation in order to guarantee the right of access to public places in conformity with article 5 (f) of the Convention and to sanction the refusal of access to such places for reason of racial discrimination. The Committee also recommends to the State party to take the necessary measures to ensure that the procedure for the investigation of violations is not unduly prolonged.[383]

In *Cyprus* v. *Turkey*, [384] the European Court of Human Rights found that the uniqueness and severity of discrimination or differential treatment based on race can amount to degrading treatment under article 3 of the Convention in some circumstances. With respect to the situation that has existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974, the applicant Government alleged that the Government of Turkey ("the respondent Government") has continued to violate the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). In particular, the applicant Government alleged that, as a matter of practice, Greek Cypriots living in the Karpas area of northern Cyprus were subjected to discriminatory treatment amounting to inhuman and degrading treatment. The Court established that the conditions under which that population is condemned to live, which could "only be explained in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion"[385] debasing and violate the very notion of respect for the human dignity of its members. In the Court's opinion, there has been a violation of Article 3 of the Convention in that the Greek Cypriots living in the Karpas area of northern Cyprus have been "subjected to discrimination amounting to degrading treatment."[386]

4. *Rights of Aboriginal Peoples*

The 1995-2004 period was proclaimed the International Decade of the World's Indigenous People. During this period, there have been significant international advances on aboriginal

issues, such as the progress made by the Working Group on Indigenous Populations, such as the achievements of the Working Group on the Draft Declaration in preparing the *UN Declaration on the Rights of Indigenous Peoples*[387], such as the establishment of a Permanent Forum on Indigenous Issues, and the appointment of a UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people. These international efforts have also been mirrored in the Americas where similar efforts are undertaken. The drafting of an *American Declaration on the Rights on Indigenous Peoples,*[388] the study on *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*[389] and a study on *The Human Rights Situation of The Indigenous People in The Americas*[390] are but three examples.

Discussions in all these fora suggest that much remains to be done to address current challenges, such as economic disparity, poverty and the protection of indigenous social, religious and cultural rights. As the UN Committee on the Elimination of Racial Discrimination points out: "in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."[391] Indigenous peoples and organizations are increasingly making use of various international and regional complaints procedures available to them.[392]

Case Law

The year 2001 was an important year for Aboriginal rights under the Inter-American system. The ***Mayagna (Sumo) Awas Tingni Indigenous Community*** of the Atlantic Coast of Nicaragua secured recognition of its rights to its ancestral lands in a case presented by the Inter-American Commission on Human Rights (IACHR) to the Inter-American Court of Human Rights. The Commission asked the Court to establish a legal procedure for the prompt demarcation and official recognition of the property rights of the Awas Tingni Community. In its decision released on August 31, 2001, the Court stated that: "indigenous peoples, by virtue of their very existence, have the right to live freely on their own lands; the close bond of indigenous peoples with their land should be recognized and understood as an essential element of their cultures, spiritual lives, well-being, and economic survival. For indigenous communities the relationship to land is not merely a question of ownership and production but a material and spiritual element they must enjoy fully, among other reasons to preserve their cultural heritage and pass it on to future generations."[393] The Court found that the members of the Awas Tingni Community are entitled to have the state delimit and issue titles to the Community's lands, and that the State must refrain from actions that would affect lands where members of the Community live and conduct their activities.[394]

5. *Economic, Social and Cultural Rights (ESCR)*

In the fall of 2001, the Canadian Human Rights Commission, along with its provincial and territorial counterparts, intervened at the Supreme Court of Canada in the *Gosselin*[395] case. The

case focussed on Quebec regulations respecting social aid, centred including whether they violated equality rights by excluding people between 18 and 30 from their purview and whether they violated the right to security of the person. On this latter issue, it was argued that the International Covenant on Economic, Social and Cultural Rights (ICESCR) should serve as a persuasive guide to the interpretation of the *Charter*. This is just one way of ensuring implementation within Canada of our binding international human rights treaty obligations.

Article 2, paragraph 1, of the ICESCR obligates each State party "to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means."[396] Such means can include the work of national institutions for the promotion and protection of human rights. The UN Committee on ESCR explained: "national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions."[397] This can include scrutinizing of existing laws, providing technical advice or examining complaints.

The question of the justiciability of economic, social and cultural rights (and the adoption of an Optional Protocol to the *International Covenant on Economic, Social and Cultural Rights* providing for a system of individual and group complaints) has been under consideration by the international community for many years. This past year, the Office of the UN High Commissioner for Human Rights organised an international workshop on the justiciability of economic, social and cultural rights in an effort to build international support for the proposed optional complaints mechanism under the Covenant.

Case Law

In the case *Government of the Republic of South Africa & Ors* v. *Grootboom & Ors*[398], the issue of ESCR, right to housing and the Covenant were raised before the South African Constitutional Court. In this case the respondents were evicted from privately owned lands where they had moved after leaving the Wallacedene squatter camp. They raised their right to adequate housing according to section 26(1) and (2) of the South Africa Constitution which calls on the Government "to take reasonable legislative and other measures within its available resources to achieve the progressive realisation" of the right of everyone to adequate housing. The Court held that the right of access to adequate housing has a close relationship with other socio-economic rights, all of which must be read together in the setting of the Constitution as a whole and with regard to their social and historical context. For a person to have access to adequate housing there must be land, services and a dwelling. The State must create the conditions for access to adequate housing for people at all economic levels of society and within different contexts, as the need may vary from place to place and person to person. This decision was reaffirmed in 2001 in the case *Minister of Public Works and others* v. *Kyalami Ridge Environmental Association and others*[399] where the Constitutional Court, recalling the *Grootboom* case and also analysing Canadian practice and doctrine,[400] supported South Africa's Government decision to establish a

transit camp on a Government-owned prison farm in the Kyalami area for the accommodation of the victims of the March 2000 Alexandria Township floods.

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

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

3. See *McAllister-Windsor infra* note 36 and accompanying text.

4. See *Popaleni infra* note 41 and accompanying text.

5. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1.

6. See *Wignall infra* note 58 and accompanying text.

7. See *Stevenson infra* note 65 and accompanying text.

8. See *Irvine infra* note 71 and accompanying text.

9. See *Eyerley infra* note 88 and accompanying text.

10. See *Crouse infra* note 78 and accompanying text.

11. See *Kavanagh infra* note 80 and accompanying text.

12. See *Morris infra* note 116 and accompanying text.

13. See *Zundel infra* note 118 and accompanying text.

14. *Canada Evidence Act,* R.S.C. 1985, c. C-5.

15. See *GNWT No. 9 infra* note 148 and accompanying text.

16. See *McAvinn No. 3 infra* note 155 and accompanying text.

17. See *Sawyer No. 2 infra* note 141 and accompanying text.

18. See *Vaid No. 1 infra* note 158 and accompanying text.

19. *Infra* note 165 and accompanying text.

20. See *Ermineskin infra* note 173 and accompanying text.

21. See *Bradley-Sharpe infra* note 181 and accompanying text.

22. See *Bell 2000 infra* note 226 and accompanying text.

23. See *Bell Decision infra* note 227 and accompanying text.

24. See *Zundel(FCA) infra* note 260 and accompanying text.

25. See *House of Commons infra* note 250 and accompanying text.

26. See *Airlines infra* note 267 and accompanying text.

27. See *Bauman* infra note 283 and accompanying text.

28. See *TWU infra* note 299 and accompanying text.

29. See *GRVD infra* note 312 and accompanying text.

30. *Employment Insurance Act*, S.C. 1996, c. 23.

31. See *Lesiuk infra* note 292 and accompanying text.

32. *Canadian Transportation Act*, S.C. 1996, c. 10.

33. *R.* v. *Latimer* (18 January 2001), 2001 SCC 1, No. 26980 (S.C.C.).

34. *Unemployment Insurance Act*, R.S.C. 1985, c. U-I.

35. See *Employment Insurance Act*, *supra* note 30.

36. *McAllister-Windsor* v. *Human Resources Development Canada* (9 March 2001) T.D. 2/01 (C.H.R.T.)[hereinafter *McAllister-Windsor*].

36.1 Although not directly related to the facts of the complaint, the Tribunal pointed out that the maximum benefit for parental responsibilities was raised (as of December 31, 2000) to 35 weeks; and the cumulative maximum was correspondingly adjusted upwards to 50 weeks. *Ibid.* at para. 15.

37. *Ibid.* at para. 52.

38. *Ibid.* at para. 68.

39. *Ibid.* at para. 67.

40. *Ibid.* at para. 69.

41. *Popaleni and Janssen* v. *Human Resources Development Canada* (9 March 2001), T.D. 3/01 (C.H.R.T.).[hereinafter *Popaleni*].

42. *Ibid.* at para. 48.

43. *Solbach* v. *Canada* (A.G.) (1999), 252 N.R. 137 (F.C.A.).

44. *Supra* note 41 at para. 52.

45. *McAvinn and CHRC* v. *Strait Crossing Bridge Limited* (15 November 2001), No. T.D. 13/01(C.H.R.T.).[hereinafter *McAvinn*].

46. *Ibid*. at para. 172.

47. *Ibid.* at para. 128.

48. *Ibid*. at para. 169.

49. *Goyette* c. *Syndicat des employé(es) de terminus de Voyageur Colonial Limitée (CSN)* (16 November 2001), No. T.D. 14/01 (C.H.R.T.).

50. *Goyette and Tourville* v. *Voyageur Colonial Ltée* (1997), 30 C.H.R.R. D/175(C.H.R.T.).

51. The Tribunal's written decision contained the following proviso: "S'il y a un problème pour effectuer les calculs et que les parties ne peuvent s'entendre au sujet des modalités pour déterminer les montants, le Tribunal pourra se réunir à la demande de l'une ou l'autre des parties pour entendre la preuve à cet effet et résoudre le différent [sic]." *Ibid*. at para. 4.

The Tribunal's written decision contained the following proviso: "If there is some problem in establishing the calculations and the parties prove unable to agree on the way to determine the amounts, the Tribunal will convene at the request of either of the parties to examine the evidence in this regard and resolve the issue." [unofficial translation]. *Ibid*. at para. 4.

52. The Tribunal's reasoning was as follows: "Même si cette question est devenue une préoccupation de la plaignante, suite à des faits nouveaux survenus après la décision, soit la faillite du syndicat affilié, le Syndicat des employé-e-s de terminus Voyageur Colonial Limitée (CSN), le Tribunal ne peut prolonger et étendre sa juridiction indéfiniment. Dans ce dossier, les règles de justice naturelle ont été respectées et le Tribunal ne peut tenir des audiences en vue de déterminer la nature juridique de la personne liée indirectement à la plainte puisqu'il a déjà exercé sa juridiction." *Supra* note 49 at para. 45.

The Tribunal's reasoning was as follows: "Although this became a concern of the complainant when new facts came to light following the decision, i.e. the bankruptcy of the affiliate union, the Syndicat des employé(e)s de terminus Voyager Colonial Limitée (CSN), the Tribunal cannot prolong or extend its jurisdiction indefinitely. The rules of natural justice have been respected in this case and the Tribunal cannot hold hearings to determine the legal status of a person indirectly connected to the complaint because it has already rendered a decision." [unofficial translation] *Supra* note 49 at para. 45.

53. *Daniels* v. *Myron* (16 July 2001), T.D. 8/01 (C.H.R.T.) The Respondent had acknowledged in writing receipt of a letter sent April 10, 2001 regarding hearing dates and a Notice of Hearing dated April 24, 2001. He also acknowledged by telephone receipt of correspondence that established the hearing date as May 28 of the same year.

54. *Ibid*. at para. 30. The judicial decision referred to was *Janzen* v. *Platy Entreprises,* [1989] 1 S.C.R. 1252.

55. *Supra* note 53 at para. 31.

56. *Ibid.*

57. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1.

58. *Wignall* v. *Department of National Revenue (Taxation) and the Council of Canadians with Disabilities (Interested Party)* (8 June 2001), T.D. 5/01 (C.H.R.T.).[hereinafter *Wignall*].

59. *Law* v. *Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497.

60. *Supra* note 58 at para. 32.

61. *Ibid*. at para. 46.

62. *Ibid*. at para. 47.

63. *Ibid*. at para. 48.

64. *Ibid*. at para. 51.

65. *Stevenson and CHRC* v. *Canadian Security Intelligence Service* (5 December 2001), No. T.D. 16/01(C.H.R.T.).[hereinafter *Stevenson*].

66. *Ibid*. at para. 60.

67. The Tribunal declared: "The question at this point should have been whether Mr. Stevenson should be granted a further six months of medical leave from December 10, 1997, in order to return to full employment with the Service. Instead, Ms. Dodd and Mr. Outhwaite came to the conclusion on January 7, 1998 that Mr. Stevenson was totally unfit to return to his normal employment and occupy a position in headquarters, and that therefore, he should be medically discharged. There appears to be a bias, given the way the health evaluation was conducted and subsequently interpreted, against Mr. Stevenson because he is mentally ill. The prognosis for full recovery within a reasonable period of time is ignored." *Ibid*. at para. 63-64.

68. *Ibid.* at para. 70.

69. *British Columbia (Public Service Employee Relations Commission)* v. *B.C.G.S.E.U.* [1999] 3 S.C.R. 3.[hereinafter *Meiorin*].

70. *Ibid*. at para. 82.

71. *Irvine and CHRC* v. *Canadian Armed Forces*(23 November 2001), No. T.D. 15/01(C.H.R.T.)[hereinafter *Irvine*].

72. *Ibid*. at para. 13.

73. *Ibid*. at para. 41.

74. *Ibid*. at para. 141.

75. *Ibid*.

76. *Ibid*. at para. 157.

77. *Ibid*. at para. 162.

78. *Crouse* v. *Canadian Steamship Lines Inc.* (18 June 2001), T.D. 7/01(C.H.R.T.) [hereinafter *Crouse*].

79. In support of these conclusions, the Tribunal cited: *Niles* v. *Canadian National Railway Company* (1992) 18 C.H.R.R. D/152(C.H.R.T.) and *Quebec (C.D.P.D.J.)* v. *Montreal (City)* [2000] 1 S.C.R. 665.

80. *Kavanagh* v. *Attorney General of Canada* (31 August 2001), T.D. 11/01 (C.H.R.T.). [hereinafter *Kavanagh*].

81. *Ibid*. at para. 35.

82. *Ibid*. at para. 141.

83. *Ibid*. at para. 166.

84. *Ibid*. at para. 166.

85. *Ibid*. at para. 78.

86. *Ibid*. at para. 187.

87. *Ibid*. at para. 181.

88. *Eyerley* v. *Seaspan International Limited* (21 December 2001), T.D. 18/01(C.H.R.T.)[hereinafter *Eyerley*].

89. *Ibid*. at para. 136. The arbitral decision referred to is *Re: Air B.C. Ltd. and C.A.L.D.A.* (1995), 50 L.A.C. (4th) 93.

90. *Ibid*. at para. 143, citing the Supreme Court decisions in *Meiorin* , *supra* note 69, and *British Columbia (Superintendant of Motor vehicles)* v. *British Columbia(Council of Human Rights)*, [1999] 3 S.C.R. 868 [hereinafter *Grismer*].

91. *Chopra* v. *Department of National Health and Welfare* (13 August 2001), T.D. 10/01 (C.H.R.T)

92. *Chopra* v. *Department of National Health and Welfare*, [1996] C.H.R.D. No. 3 (C.H.R.T.)

93. See *Canadian Human Rights Commission* v. *Department of National Health and Welfare* (1998) 146 F.T.R. 106 (F.C.T.D.); see also (1999) 235 N.R. 195 (F.C.A.).

94. Rebuttal evidence that the Commission wished to introduce following the respondent's case was, in large measure, refused by the Tribunal. It took the view that principles of fairness to the respondent required a complainant to present its relevant evidence during the initial presentation of its case. In the matter before it, the Tribunal determined that three of the four witnesses proposed by the Commission intended to give evidence that the respondent could not reasonably have anticipated at the close of its case. See tribunal decision, *supra* note 91 at para. 12-15.

95. For the Tribunal's discussion of this question see paragraphs 16-30 of its decision, *supra* note 91.

96. In this regard, the Tribunal also adopted the findings of fact of the original tribunal: "I see no reason to disagree with the Soberman Tribunal's findings that the Complainant possessed little line management experience for the senior management position he was seeking. I also agree that the Department's prerequisite of management experience for the indeterminate position of Director of a Bureau was a reasonable justification to screen him out." *Ibid*. at para. 257.

97. *Ibid.* at para. 259.

98. Regarding the appointment on an acting basis of an unqualified candidate, the Tribunal said: "What is striking about this appointment is that Dr. Franklin was not qualified for the position. Any mistaken belief on the part of the Respondent that she was qualified would have been put to rest on July 9, 1991, when the PSCAB ruled that she did not meet "the knowledge qualification for the position" nor the bilingual requirement. Although she had been found unqualified, the Respondent continued to employ her in the position, even after the PSC directive was issued ordering that she cease working on September 20, 1991. Over this entire period, of course, Dr Chopra continued to express his objection to her ongoing employment in the position, yet at no time did the Respondent see fit to appoint him or assign him to perform these duties on

an acting basis." *Ibid*. at para. 264-65.

99. *Ibid.* at para. 266.

100. *Ibid*. at para. 276.

101. The decision varied the findings of the original tribunal. On this point, the Tribunal said: "In coming to the conclusion that the Respondent is liable, I realize that I may be a variance with some of the findings of the Soberman Tribunal. However, I believe that my decision has been made in accordance with my authority to substitute my view where I find that there was a palpable or manifest error in the first Tribunal's assessment of the facts. In addition, much of the relevant evidence on these issues was received by me during the second set of hearings, including the expert evidence of Dr. Weiner and the testimony of Dr. Liston. I must necessarily assess this new evidence in light of the overall evidence including that of the first Tribunal." *Ibid*. at para. 284.

102. *Ibid*. at para. 211.

103. *Ibid*. at para. 229. For a more complete review of these evidentiary issues see para. 213-237 of the decision.

104. *National Capital Alliance on Race Relations (NCARR)* v. *Canada (Health and Welfare)* (1997), 28 C.H.R.R. D/179 (C.H.R.T.).[hereinafter *NCARR]*.

105. *Nkwazi* v. *Correctional Service Canada* (5 February 2001), T.D. 1/01 (C.H.R.T.).

106. In referring to the testimony of management, the Tribunal observed: "Mr. Brecknell says that there were problems with Ms. Nkwazi's charting. It would presumably have been a very simple matter for Mr. Brecknell to produce specific patient charts in order to illustrate the nature of his concerns in this regard. No charts were produced, however, and Mr. Brecknell was unable to identify a single instance where Ms. Nkwazi's charting was less than adequate...I reject this allegation in its entirety. Similarly, no details were provided with respect to the patient complaints that Mr. Brecknell says that he received, beyond the amorphous allegation that there were problems with Ms. Nkwazi's interaction. When challenged, Mr. Brecknell was unable to provide the name of a single patient who complained to him about Ms. Nkwazi. Ms. Thompson's allegations with respect to Ms. Nkwazi's purported difficulties interacting with patients were equally lacking in specificity." *Ibid*. at para. 215-216.

107. Regarding this issue, the Tribunal ordered that Correctional Service Canada provide the complainant with a letter of reference that truly reflected her performance as a nurse and to respond to verbal inquiries in a manner consistent with the letter of reference.

108. The Tribunal canvassed the law as it applied to the legal presumption against retrospective effect, pointing out that the provisions in question were not exclusively procedural in nature but created new liabilities. Since using them in the case before it would mean attaching prejudicial consequences to prior acts, it felt that the presumption should apply. For a more

complete discussion of this issue see paragraphs 257-269 of the Tribunal decision.

109. *Wong* v. *Royal Bank of Canada* (15 June 2001), T.D. 06/01(C.H.R.T.). Another decision of the Tribunal rejecting a complaint that turned exclusively on the credibility of witnesses is: *D'Arc Vollant* v. *Sante Canada et Reine Parenteau et Noella Bouchard* (6 April 2001), D.T. 4/01 (C.H.R.T.).

110. *Baptiste and CHRC* v. *Correctional Service Canada*(6 November 2001), T.D. 12/01(C.H.R.T.).

111. *Ibid*. at para. 18.

112. *Ibid*. at para. 19.

113. *Ibid*. at para. 85

114. *Ibid.* at para. 100.

115. *Cizungu and CHRC* c. *Développement des ressources humaines Canada* (31 July 2001), D.T.. 9/01(C.H.R.T.).

116. *Morris* v. *Canada (Canadian Armed Forces)* (20 December 2001), T.D. 17/01(C.H.R.T.).

117. *Ibid.* at para. 23.

118. *Citron and CHRC et al.* v. *Zündel*(18 January 2002), T.D. 1/02(C.H.R.T.)[hereinafter *Zundel*].

119. *Supra* note 1 at s. 13(1).

120. For more detail see the Tribunal's summary of the documents and pamphlets placed before it in evidence, *supra*.note 118 at para. 120.

121. *Ibid*. at para. 44.

122. *Supra* note 118 at para. 66.

123. *Ibid*. at para. 77. The Tribunal quoted from the Supreme Court decision in *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892, at 919[hereinafter cited as *Taylor*].

124. *Supra* note 118 at para. 81.

125. *Ibid*. at para. 85-86.

126. Much of the Tribunal's approach to interpreting subsection 13(1) is drawn from the Supreme Court decision in *Taylor*, which predates the technological advances underpinning Internet transmissions. In applying the reasoning found in *Taylor* to the *Zundel* case, the

Tribunal said: “We appreciate that the Supreme Court of Canada in *Taylor* focussed their analysis on the use of a telephone answering machine to deliver pre-recorded messages. There is nothing in that decision, however, that in our view restricts the application of subsection 13(1) to such devices. As we have already determined, the guiding principles outlined in the majority judgment in *Taylor* provide support for the conclusion that we have now reached regarding the issues of statutory interpretation raised in this complaint." *Ibid*. at para. 98.

127. *Ibid.* at para. 80, citing *Taylor* at 928.

128. *Ibid*. at para. 140.

129. *Ibid.* at para. 140.

130. *Ibid*. at para. 154.

131. [1990] 3 S.C.R. 892.

132. *Ibid*. at 935-936. Reproduced at para. 187 of the Tribunal’s decision, *supra* note 118.

133. In this regard, the Tribunal concluded: “There are, in our opinion, real differences between the facts in Taylor and the facts now before us. Moreover, there are potentially significant differences in the impact on freedom of expression based on these facts that require a fresh analysis and application of the principles discussed in *Taylor*. The Supreme Court of Canada dealt with the telephone as a medium of communication, whereas here we are dealing with a relatively new, growing and pervasive medium of communication, the Internet. The benefits to be secured by application of subsection 13(1) must continue to outweigh the seriousness of the infringement that the subsection imposes on freedom of expression when applied to the facts of this case." *Supra* note 118 at para. 229.

134. *Ibid*. at para. 233-235.

135. *Ibid*. at para. 238 and 240.

136. *Ibid*. at para. 256.

137. *Ibid*. at para. 298-299.

138. *Murphy and CHRC* v. *Halifax Employers' Association and Halifax Longshoremen's Association (Local 269)*(27 February 2001), Ruling No. 1 (C.H.R.T.).

139. *Ibid*. at para. 12.

140. In this regard the Tribunal remarked: "*The Canadian Human Rights Act* specifically contemplates that there may be situations where the Canadian Human Rights Commission may want to proceed with a complaint in the absence of an individual complainant. If the Commission is of the view that Ms. Murphy's complaint raised issues of concern to the

Commission, it is entirely open to the Commission to initiate complaints against the respondents pursuant to subsection 40(3) of the *Act*." *Ibid*. at para. 20.

141. *Sawyer et CCDP* c. *Société Radio Canada*(24 August 2001), Décision no.2 (C.H.R.T.).[hereinafter *Sawyer No. 2*].

142. *Stevenson and CHRC* v. *Canadian National Railway Company* (23 March 2001), Ruling No. 1 (C.H.R.T.).

143. *Ibid*. at para. 25.

144. *Ibid*. at para. 30.

145. *Ibid*. at para 30.

146. *Ibid*. at para. 33.

147. *Canada Evidence Act,* R.S.C. 1985, c. C-5.

148. *Public Service Alliance of Canada and CHRC* v. *Minister of Personnel for the Government of the Northwest Territories* (25 July 2001), Ruling No. 9 (C.H.R.T.)[hereinafter *GNWT No. 9*].

149. Section 7 provides: "Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without leave of the court or judge or person presiding."

150. *Supra* note 148 at para. 11.

151. *Ibid*.

152. *Ibid.* at para. 28.

153. *Ibid*. at para. 32. The Tribunal's detailed review of the case law can be found at paragraphs 29-44. It should be noted that the Tribunal concluded that the leading case relied on to establish that section 7 should be applied to each issue raised, rather than to a party's case as a whole, had been rendered *per incuriam*. The Tribunal felt therefore that this particular decision could be justifiably disregarded.

154. *Public Service Alliance of Canada (and the Canadian Human Rights Commission)* v. *Canada Post Corporation* (23 October 2001), Ruling No. 4 (C.H.R.T.). .

155. *McAvinn and CHRC* v. *Strait Crossing Bridge Limited* (3 January 2001), Ruling No. 3 (C.H.R.T.)[hereinafter *McAvinn No. 3*].

156. *Ibid*. at para. 9.

157. *Ibid*. at para. 20.

158. *Vaid and CHRC* v. *House of Commons and Honourable Gilbert Parent* (25 April 2001), Ruling No. 1 (C.H.R.T.)[hereinafter *Vaid no. 1*]. The Tribunal ruling was appealed to the Federal Court, whose decision is discussed above under the heading *Judicial Review of Tribunal Decisions*.

159. *Ibid.* at para. 9. See *Soth* v. *Ontario (Speaker of the Legislative Assembly)*(1997), 32 O.R. (3d) 440 (Ont. Div. Ct.).

160. *Supra* note 158 at para. 28.

161. *Ibid*. at para. 15 of dissenting opinion.

162. *Quigley and CHRC* v. *Ocean Construction Supplies* (17 September 2001), Ruling No. 2 (C.H.R.T.)..

163. *Ibid*. at para. 4. The Supreme Court decision referred to is: *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929.

164. *Bell Canada* v. *CTEA, CEP and Femmes Action and the CHRC,*[2001] 2 F.C. 392(T.D.).

165. *Perley* v. *Tobique Band* (22 March 2001), Ruling No. 1 (C.H.R.T.), *Premakumar* v. *Canadian Airlines International* (12 April 2001), Ruling No. 1 (C.H.R.T.), *Parent* c. *Lignes aériennes Royal* (12 April 2001), Décision No. 1 (C.H.R.T.), *Wilkinson* v. *B.C. Telephone Company* (21 March 2001), Ruling No. 1 (C.H.R.T.), *Jackson* v. *Staff Sergeant Robert Taubman* (17 January 2001), Ruling No. 1 (C.H.R.T.), *Rampersadsingh* v. *Dwight Wignall* (24 January 2001), Ruling No. 1 (C.H.R.T.), *Caza* c. *Télé-Métropole* (11 April 2001), Décision No. 1 (C.H.R.T.).

166. In *Perley* v.*Tobique Band, ibid.* at para. 7.

167. In *Premakumar* v. *Canadian Airlines International*, *supra* note 165 at para. 11,, the Tribunal said: "I do not accept the submission that it is unlikely that the term of a member hearing this case will expire before the hearing is completed, and thus the issue of extending the members' terms is not likely to arise. The problem that Tremblay-Lamer J. identified with the statute relates not to the way that the Chairperson's discretion may be exercised in a particular case, but rather to the existence of the discretion itself."

168. *Ibid*. at para. 23-24.

169. See *Perley* v. *Tobique Band*, *supra* note 165 at para. 15. On the procedural facts of this case, the Tribunal concluded that the right to object had not been waived.

170. *Stevenson* v. *Canadian National Railway Company* (23 March 2001), Ruling No. 1 (C.H.R.T.), *Corbeil* v. *Pro North Transportation and Brian Glass* (15 February 2001), Ruling No. 1 (C.H.R.T.).

171. Reference should be made as well to one Tribunal decision that authorized the partial continuation of a hearing (despite the *Bell* decision) in order that an expert witness could complete his testimony. The reconvening of the hearing for this purpose only was considered necessary in order to avoid considerable future delays in completing that testimony. See *Public Service Alliance of Canada* v. *Canada Post Corporation* (18 April 2001), Ruling no. 3 (C.H.R.T.).

172. *Laurentian Bank of Canada* v. *Canadian Human Rights Commission* (27 June 2001), Ruling No. 1 (C.H.R.T.), *Larente* v. *C.B.C.* (5 July 2001), Ruling No. 1 (C.H.R.T.), *Sawyer* c. *Société Radio-Canada* (3 July 2001), Décision No. 1 (C.H.R.T.).

173. *The Ermineskin Cree Nation* v. *Canada (Canadian Human Rights Tribunal)* (7 September 2001), 2001 ABQB 760 , No. 9903 18454 (Alta.QB)[hereinafter *Ermineskin*].

174. *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), (1982), c. 11[hereinafter the *Constitution Act, 1982*]. The provision in question (s. 35 of the *Constitution Act, 1982*) provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

175. *Supra* note 2.

176. *Supra* note 173 at para. 20.

177. It quoted the Supreme Court of Canada in *Canadian Pacific Ltd.* v. *Matsqui Indian Band* [1995], 1 S.C.R. 3 at 25-6: "It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference." Referred to in *Ermineskin*, *supra* note 173 at para. 44.

178. *Ibid.* at para. 51.

179. *Ibid*. at para. 52.

180. *Ibid*. at para. 64.

181. *Bradley-Sharpe* v. *Royal Bank of Canada* (18 October 2001), No. T-806-01 (F.C.T.D.)[hereinafter *Bradley-Sharpe*].

182. *Federal Court Rules*, SOR/98-106.

183. *Canada (Human Rights Commission)* v. *Pathak*, [1995] 2 F.C. 455 (C.A.).[hereinafter *Pathak*].

184. The Federal Court in the instant case reproduced the following finding of the Court in *Pathak*: "Only the report of the investigator and the representations of the parties are necessary matter for the Commission's decision. Anything else is in the discretion of the Commission. If the Commission, therefore, elects not to call for some document, that document cannot be said to be before it in its decision-making phase, as opposed to its investigative phase. It is therefore not subject to production as a document relied upon by the Commission in its decision, although it may well have been relied upon by the investigator in his report." *Supra* note 181 at para. 13.

185. *Supra* note 181 at para. 17.

186. *Ibid.* at para. 22. The decision quoted from is *Beno* v. *Létourneau* [1997] F.C.J. No. 535 (F.C.T.D.).

187. See *Legal Report 2000*, *infra* note 226 at p. 33-34.

188. *Bell Canada* v. *CTEA, CEP, Femmes Action and Canadian Human Rights Commission* (2 May 2001), No. A-472-00 (F.C.A.).

189. *Ibid*. at para. 5.

190. *Bell Canada* v. *CTEA, CEP, Femmes Action and Canadian Human Rights Commission* (2 May 2001), No. A-491-00 (F.C.A.) at para. 4.

191. *Montreuil* c. *La Banque National du Canada* (21 August 2001), No. T-788-00 (F.C.T.D.).

192. *Civil Code of Quebec*, Art. 1260 C.C.Q.

193. *Supra* note 191 at para. 11.

194. *Ramlall* v. *Attorney General of Canada et al.* (22 June 2001), No. T-1696-99 (F.C.T.D.)

195. *Grover* v. *National Research Council of Canada et al.* (21 June 2001), No. T-586-98 (F.C.T.D.).

196. *Ibid.* at para. 57.

197. *Ibid.* at para. 63, citing *Miller* v.*Canada* (1996), 112 F.T.R. 195 at 201.

198. *Ibid*. at para. 66, citing *Slattery* v. *Canada (Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.), at 600-601.

199. *Ibid.* at para. 71.

200. *Singh* v. *Attorney General of Canada* (19 March 2001), No. T-2259-99 (F.C.T.D.).

201. *Ibid.* at para. 23.

202. *Sosnowski* v. *Minister of Public Works et al.* (29 November 2001), No. T-1168-00 (F.C.T.D.).

203. *Ibid.* at para. 4.

204. *Ibid*. at para. 10.

205. *Ibid*. at para. 11.

206. *Ibid*. at para. 14.

207. *Moran* v. *Her Majesty the Queen as represented by Industry Canada* (24 May 2001), No. T-1360-99 (F.C.T.D.).

208. *Ibid.* at para. 8.

209. *Ibid*. at para. 22.

210. *Canadian Broadcasting Corp.* v. *Paul* (2 April 2001), No. A-132-99 (F.C.A.).

211. In its letter to Commission staff CBC had written: "The offer of settlement made to Ms. Paul and mentioned in this conciliation report was made on a strictly confidential basis, on the express understanding that it was without prejudice to the CBC's position that Ms. Paul's complaint was without merit. It is also contrary to the explicit prohibition on disclosure of such matters contained in section 47 of the Canadian Human Rights Act. Such disclosure goes against the basic purposes of conciliation, which is to provide parties (sic) to discuss on an informal and without prejudice basis, possible terms of settlement of a complaint." Parts of this letter are reproduced in the Federal Court of Appeal decision, *ibid*. at para. 13.

212. The Court of Appeal identified the following issues: "(1) Was the Respondent's application out of time? (2) Does the disclosure of the Conciliation Report to the Commission, without the consent of the CBC, vitiate the Commission's decision to refer the complaint to the Tribunal? (3) Did the Commission consider all of the relevant information properly available to it in making its decision to request the appointment of a Tribunal? (4) Did the Motions Judge err in deciding not to refer the matter back to the Commission for reconsideration?" *Ibid*. at para. 18.

213. *Ibid.* at para. 19.

214. *Ibid.* at para. 48.

215. However, the Court of Appeal emphasized that the Commission is not obliged in all cases to make reference to every document it has considered: "I do not wish to suggest that the Commission must always, in a decision made under section 44, make reference to all of the information that it has considered. However, in the circumstances of this case, the explicit reference to the Commission's consideration of particular pieces of information, combined with the failure to refer to other materials which it was under a duty to consider, gives rise to the inference that it did not consider those other materials." *Ibid*. at para. 51.

216. [2000] 2 S.C.R 307, 2000 SCC 44.

217. *Gee* v. *Minister of National Revenue* (2001), 39 C.H.R.R. D/454 (F.C.T.D.).

218. With respect to one of the complaints, the Commission also dismissed on the basis that it was beyond the jurisdiction of the Commission in that it was not based on a proscribed ground of discrimination.

219. *Supra* note 217 at para. 35.

220. *Ibid*. at para. 36.

221. *Hedges-Mckinnon and Mckinnon* v. *Canadian Human Rights Commission* (31 August 2001), No. T-1299-00 (F.C.T.D.).

222. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1.

223. *Hedges-Mckinnon and Mckinnon* v. *Her Majesty the Queen* (8 November 1999), No. 98-1987-IT-I, 98-1989-IT-I (T.C.C.).

224. *Rabah* v. *Attorney General of Canada* (11 November 2001), No. T-1228-99 (F.C.T.D).

225. *Ibid*. at para. 10. This reasoning is found in and adopted from the Federal Court decision in *Robinson* v. *Canada (Canadian Human Rights Commission)(re Royal Canadian Mint)* (1995), 90 F.T.R. 43(T.D.) at 49.

226. [2001] 2 F.C. 392(T.D.)[hereinafter *Bell 2000*].See also Canadian Human Rights Commission, *Legal Report 2000* (Minister of Public Works and Government services, 2001) p. 29-31.[hereinafter cited as *Legal Report 2000]*. Please note: In *Legal Report 2000*, the decision of the Trial Division was erroneously cited as emanating from the Federal Court of Appeal.

227. *Canadian Human Rights Commission* v. *Bell*, [2001] 3 F.C. 481 , 2001 FCA 161 (C.A.)[hereinafter cited as the *Bell decision*].

228. *Bell Canada* v. *Canadian Telephone Employees Assn.* [1998] 3 F.C. 244 (T.D.).

229. *Ibid.* at para. 154.

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

231. *Ibid.* at s. 20(2).

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

233. *Supra* note 227 at para. 36. The Court of Appeal quoted from Canada *(A.G.)* v. *Public Service Alliance of Canada,* [2000] 1 F.C. 146 (T.D.).

234. R.S.C. 1985, c. S-22.

235. *Supra* note 2.

236. *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

237. *Supra* note 227 at para. 39.

238. *Ibid*. at para. 41.

239. This is found in subsection 48.2 (2) of the *CHRA*: "A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58."

240. *Supra* note 227, leave to appeal to S.C.C. granted, [2001] S.C.C.A. No. 406, File no. 28743 (S.C.C.A.).

241. *Northwest Territories* v. *Public Services Alliance of Canada*, [2001] 3 F.C. 566 (C.A.).

242. *Ibid*. at para. 14.

243. *Ibid*. at para. 15.

244. *Supra* note 236.

245. The Court of Appeal referred to the Supreme Court of Canada decision in *Duke* v. *The Queen* [1972] S.C.R. 917, at p. 923: "Under ss. 2(e) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive [a person] of a "fair hearing in accordance with the principles of fundamental justice". Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith without bias and in a judicial temper, and must give to him the

opportunity adequately to state his case."

246. The Court ruled: "In view of the important suppletive role of the Canadian Bill of Rights and the significance for any litigant of a fair hearing in the determination of his rights as well as his obligations, I see no compelling reason why the word "person" in Paragraph 2(e) would not include Her Majesty the Queen or the Crown. I see no reason why they, and the citizens that they represent, would not be entitled to a fair hearing when they are a litigant in an administrative or a civil proceeding. It would make a mockery of justice if, as a matter of principle, they were not, especially when made a defendant in a proceeding, entitled to the fair hearing protections given by paragraph 2(e)." *Supra* note 227 at para. 55.

247. *Supra* note 241, leave to appeal to S.C.C. granted, [2001] S.C.C.A. No. 405, No. 28737 (S.C.C.A.).

248. *Government of the Northwest Territories* v. *Public Service Alliance of Canada and CHRC* (10 January 2001), No. A-13-00 (F.C.A.).

249. *Ibid.* at para. 18.

250. *House of Commons and the Honourable Gilbert Parent* v. *Vaid and the CHRC* (4 December 2001), No. T-732-01 (F.C.T.D.).[hereinafter *House of Commons*].

251. *Ibid*. at para. 32.

252. [1993] 1 S.C.R. 319. The test is reproduced at paragraph 34 of the Federal Court decision: "The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body."

253. *Supra* note 250 at para. 55.

254. *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33.

255. *Canada Labour Code*, R.S.C. 1985, c. L-2.

256. *Harvey* v. *New Brunswick (A.-G.),* [1996] 2 S.C.R. 876. In dealing with the expulsion of a member of a legislature (for reasons of corruption) by the legislative body in question, the Supreme Court declared: "Expulsion and disqualification from office may, if found to fall within the scope of parliamentary privilege, be beyond the purview of section 3 [of the *Charter*]. But section 3 still operates to prevent citizens from being disqualified from holding office on grounds which fall outside the rules by which parliament and the legislature conduct their business; race and gender would be examples of grounds falling into this category." Section 3 of the *Charter* recognizes that all Canadian citizen are qualified to be members of the House of Commons or a

legislative assembly.

257. *Ibid*. at para. 81.

258. *Ibid*. at para. 80.

259. *Supra* note 230, s. 27. This provision is now subsection 48.1(2) of the *CHRA.*

260. *Zundel* v. *Citron et al.* (25 June 2001), No. A-25-00 (F.C.A.).[hereinafter *Zundel FCA*].

261. *Ibid*. at para. 14.

262. *International Longshore and Warehouse Union (Marine Section), Local 400* v. *Oster et al.*(15 October 2001), No. T-1672-00 (F.C.T.D.). For a review of the factual background to this complaint see *Legal Report 2000*, supra note 226 at p. 15. As a preliminary question, the Federal Court considered the standard of review that should be applied to various findings of the Tribunal. It reconfirmed well-known case law that imposes a standard of correctness with respect to questions of law on the one hand, and a standard of patent unreasonableness to findings of fact, on the other. In so doing, it rejected arguments to the effect that amendments to the *CHRA* in 1998 and more recent decisions of the Supreme Court and the Federal Court of Appeal have substantially modified the approach that should be taken to issues of judicial review of Tribunal decisions. At the same time, the Court acknowledged that the Supreme Court in *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration,* [1998] 1 S.C.R. 982 has endorsed a pragmatic and functional approach to determining an appropriate standard of review. Factors to be considered in this functional approach are: (i) explicit statutory indicators, (ii) an administrative tribunal's relative expertise regarding the matter before it, (iii) statutory purpose, and (iv) the "nature" of the problem, i.e. whether a question of law, fact or mixed law and fact is involved. In light of these factors, the Court concluded that the standards of review on the issues before it were "correctness in respect of questions of law, reasonableness simpliciter in respect of questions of mixed law and fact, and patent unreasonableness in respect of '...fact-finding and adjudication in a human rights context'" See paragraph 22 of its decision

263. *Shakes* v. *Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001.(Ont. Bd. Inq.). The Court also refers to *Canada (Minister of National Health and Welfare)* v. *Chander et al.* (1997) 131 F.T.R. 301. A *prima facie* case is made out if: (i) the complainant was qualified for the particular employment, (ii) the complainant was not hired, (iii) someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

264. *Supra* note 262 at para. 46.

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

266. S.O.R./86-1082, s. 27(2).

267. *Canadian Human Rights Commission and CUPE (Airline Division)* v. *Canadian Airlines International Ltd. and Air Canada* (27 July 2001), No. T-62-99, T-63-99 (F.C.T.D.)[hereinafter *Airlines*].

268. In the words of the Court: "To construe notwithstanding as including the additional meaning of 'to the contrary' would require that the word notwithstanding was being used to resolve an inconsistency or conflict between the relevant provisions. But in the provisions referred to by the applicants, no such inconsistencies or conflicts exist. Therefore, the use of 'notwithstanding' in these instances signals only an exception to an earlier provision. Subsection 11(1) states it is a discriminatory practice to maintain different wages for male and female employees performing work of equal value. Subsection 11(4) simply creates an exception where certain facts exist, namely, if the difference in wages is based on a factor prescribed by the E.W.G., 1986...According, I reject the applicants' submission that the phrase 'notwithstanding any collective agreement' should be read to mean 'notwithstanding any collective agreement to the contrary.'" *Ibid*. at para. 62-63.

269. *Ibid.* at para. 68.

270. *Ibid*. at para. 84.

271. *Ibid*. at para. 86.

272. *Ibid*. at para. 88.

273. *Ibid.*

274. *Canada (Human Rights Commission)* v. *Canada (Attorney General)*(18 December 2001), No. T-590-00(F.C.T.D.).

275. *Queen's Regulations and Orders for the Canadian Forces* (1968 Revision as amended), Volume 1,(Administrative), issued under the authority of the *National Defence Act*, R.S.C. 1985, c. N-5.

276. *Martin* v. *Canadian Armed Forces* (1992), 17 C.H.R.R. D/435(C.H.R.T.).

277. *Queen's Regulations and Orders for the Canadian Forces* (1994 Revision), Volume 1,(Administrative), issued under the authority of the *National Defence Act*, R.S.C. 1985, c. N-5.

278. *Supra* note 274 at para. 44.

279. For discussion, see *ibid.* at para. 48 to 61.

280. *Ibid*. at para. 53.

281. *Ibid*. at para. 60.

282. It said: “In my view, the relevant question is not whether the insurance exception developed in tort law can be applied to assess compensation in proceedings under the *CHRA*, but rather whether the pension payments received by Mr. Carter should be considered in the calculation of his loss of earnings. In my view, the pension payments do not fall within the insurance exception and, as a result, they should be taken into account in the calculation of the loss of earnings." Ibid. at para. 59.

283. *Bauman* v. *Nova Scotia (Attorney General)* (2001), 2001 NSCA 51, 197 D.L.R. (4th) 644 (N.S.C.A.).[hereinafter *Bauman*].

284. *Workers' Compensation Act*, S.N.S.1994-95, c. 10, as am. by 1999, c. 1; 2000, c. 4, s. 93.

285. *Supra* note 283 at para. 30.

286. *Benner* v. *Canada (Secretary of State),* [1997] 1 S.C.R. 358[hereinafter *Benner*]

287. Quoted by the Court of Appeal, *supra* note 283 at para. 35 of its decision, from *Benner ibid.*

288. *Ibid*. at para. 36.

289. The Court of Appeal also rejected a decision of the British Columbia Supreme Court regarding similar reinstatement of pension provisions as being wrongly decided: *Grigg* v. *British Columbia* (1996) 138 D.L.R. 4th 548. Its view of the *Grigg* decision is found at paragraphs 91-103 of its own decision, *ibid*.

290. *Supra* note 283 at para. 61.

291. *Supra* note 30.

292. *In the Matter of the Employment Insurance Act and of the claim of Kelly Lesiuk* (on appeal from a Board of Referees)(22 March 2001), CUB 51142 [hereinafter *Lesiuk*].

293. The minimum number of hours for regular benefits is actually defined as a range from 420 to 700, depending on the regional rate of unemployment. In this particular case the claimant was subject to a minimum of 700 hours.

294. *Supra* note 292 at para. 25.

295. *Ibid*. at para. 29.

296. *Ibid*. at para. 50.

297. *Ibid*. at para. 59.

298. *Ibid*. at para. 66.

299. *Trinity Western University* v. *College of Teachers (British Columbia)* (17 May 2001), [2001] 1 S.C.R. 772 , 2001 SCC 31[hereinafter *TWU*]. All nine judges of the Supreme Court heard this appeal. The decision issued was unanimous save for one dissenting opinion.

300. *Teaching Profession Act*, R.S.B.C. 1996, c. 449.

301. See *Trinity Western University* v. *British Columbia College of Teachers* (1997), 41 B.C.L.R. (3d) 158 (B.C.S.C.). See also *Trinity Western University* v. *British Columbia College of Teachers* (1998), 59 B.C.L.R. (3d) 241 , 169 D.L.R. (4th) 234 (B.C.C.A.)

302. *Supra* note 299 at para. 25.

303. *Ibid*. at para. 28.

304. *Ibid*. at para. 33.

305. *Ibid*. at para. 35.

306. *Ibid*. at para. 35.

307. *Ibid*.

308. *Ibid*. at para. 36.

309. *Ibid*. at para. 38.

310. [1990] 3 S.C.R. 229.[hereinafter *McKinney*]

311. *Human Rights Code*, R.S.O. 1990, c. H.19.

312. *Greater Vancouver Regional District Employees' Union* v. *Greater Vancouver Regional District* (5 October 2001), [2001] BCCA 435, No. CA027457(B.C.C.A.).[hereinafter *GVRD*].

313. *Human Rights Code*, R.S.B.C. 1996, c. 210.

314. *Supra* note 312 at para. 42.

315. *Supra* note 312.

316. *Ibid*. at para. 58.

317. *Ibid*. at para. 71.

318. *Ibid*. at para. 120 and 122.

319. *Ibid*. at para. 125.

320. *Ibid*. at para. 16.

321. *R.* v. *Latimer* (18 January 2001), 2001 SCC 1, No. 26980 (S.C.C.).

322. Although various other criminal law issues were reviewed by the Supreme Court, such as the defence of necessity, only the question of cruel and unusual punishment under the *Charter* is addressed in this summary.

323. *Supra* note 321 at para. 73, citing *Miller and Cockriell* v. *The Queen*, [1977] 2 S.C.R. 680 at page 688.

324. *Supra* note 321 at para. 74.

325. *Ibid*. at para. 75.

326. *Ibid*. at para. 84.

327. The Court expressed it this way: "On the one hand, we must give due consideration to Mr. Latimer's initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and Tracy's extreme vulnerability. On the other hand, we are mindful of Mr. Latimer's good character and standing in the community, his tortured anxiety about Tracy's well-being, and his laudable perseverance as a caring and involved parent. Considered together we cannot find that the personal characteristics and particular circumstances of this case displace the serious gravity of this offence." *Ibid*. at para. 85.

328. *Criminal Code*, R.S.C. 1985, c. C-46.

329. *Supra* note 321 at para. 86.

330. *Ibid*. at para. 89.

331. *Canadian Transportation Act*, S.C. 1996, c. 10.

332. IN THE MATTER OF the jurisdictional question, arising in the context of an application received by the Canadian Transportation Agency from Linda McKay-Panos against Air Canada, of whether obesity is a disability for the purposes of Part V of the *Canada Transportation Act* (12 December 2001), Decision No. 646-AT-A-2001.

333. *Supra* note 331, s. 171.

334. *Supra* note 332.

335. The International Bill of Human Rights consists of the 1948 *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810(1948) 71 [hereinafter cited as UDHR], the *1976 International Covenant on Economic, Social and Cultural Rights* G.A. Res. 2200 A (XXI), 21 U.N. GAOR, (Supp.No. 16) 49, Doc. A/6316 U.N. (1966) [hereinafter cited as ICESCR], and the *International Covenant on Civil and Political Rights* 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368(Entered into force 23 March 1976),[hereinafter cited as ICCPR] and its two Optional Protocols.

336. *Principles relating to the status and functioning of national institutions for protection and promotion of human rights* , GA Res. 48/134 (4 March 1994)[hereinafter "*Paris Principles*"].

337. *Ibid.* at annex 3(b).

338. Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime(Money laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism,* 1st Sess., 37th Parl., 2001.(assented to 18 December 2001, S.C. 2001, c. 41).

339. Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to those persons who are displaced, persecuted or in danger*, 1st Sess., 37th Parl., 2001.(assented to 1 November 2001, S.C. 2001, c. 27).

340. Canadian Human Rights Review Panel, *Promoting Equality a new vision*, 2000.(Ottawa : Canadian Human Rights Review Panel, 2000).

341. Canada, Parliament, Standing Senate Committee on Human Rights, "Promises to keep: Implementing Canada's Human Rights Obligations", 2nd Report, 1st Sess., 37th Parliament, December 2001.

342. *Baker* c. *Canada*, [1999] 2 S.C.R. 217.

343. *Ibid.* at para. 70.

344. *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N.Doc. A/44/49(1989) (entered into force Sept. 2, 1990).

345. *Suresh* v. *The Minister of Citizenship and Immigration et al.*(11 January 2002), [2002] 2 SCC 1, File No. 27790.

346. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 March 1984, Can. T.S. 1987 No. 36, 23 I.L.M. 1027.

347. *Immigration Act*, R.S.C. 1985, c. I-2.

348. *Supra* note 345 at para. 46.

349. *Legal Resources Foundation* v. *Zambia*, Communication 211/98, Decision of the AfCmHPR, 29th Ordinary Session, April/May 2001.

350. *Supra* note 341.

351. *Convention on the Elimination of all Forms of Discrimination Against Women*(1981) 1249 U.N.T.S. 13[hereinafter cited as CEDAW].

352. *Ibid.*

353. *Universal Declaration of Human Rights, supra* note 335.

354. *International Covenant on Civil and Political Rights*, *supra* note 335.

355. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 335.

356. *Convention on the Political Rights of Women*, 193 U.N.T.S. 135, entered into force July 7, 1954.

357. For example, see *Recommendation (No. 111) Recommendation concerning discrimination in respect of employment and occupation*, General Conference of the International Labour Organisation, June 25, 1958., *Recommendation (No. 90) Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, General Conference of the International Labour Organisation, June 29, 1951., *Convention (No. 100) Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*, General Conference of the International Labour Organisation, May 23, 1953, *Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*, General Conference of the International Labour Organisation, June 25, 1958.

358. *Protocol to prevent, suppress, and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime,* G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. 1)(2001).

359. *Supra* note 351.

360. *Employment Equity Act*, S.C. 1995, c. 44.

361. *Supra* note 230.

362. *Gender related dimensions of racial discrimination* : 20/03/2000. CERD General recom. 25. (General Comments), para. 2.

363. *Ibid.* at para. 4.

364. *Equality of rights between men and women (article 3)* : . 29/03/2000. CCPR/C/21/Rev.1/Add.10, CCPR General comment 28. (General Comments), para. 5.[referred to as ICCPR].

365. *Ibid.*

366. *Ibid*. at para. 30.

367. *United Nations Charter*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

368. *Vienna Declaration and Programme of Action,* World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/Conf.157/24(Part I) at 20(1993) at para. 63.

369. *Persons with disabilities* : 09/12/94. CESCR General comment 5. (General Comments) at para 9.

370. *Ibid.* at para 11.

371. *Price* v. *The United Kingdom*(10 July 2001), REF00002640, Eur. Ct. H.R.

372. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

373. *PGA Tour, Inc.* v. *Casey Martin,* 8 U.S.C.S § 1409(U.S.S.C).

374. *Americans with Disabilities Act,* 42 U.S.C. § 12101.

375. *Supra* note 118.

376. *Ibid*. at para. 241.

377. *Ibid.* at para. 90-91.

378. *Ibid*. at para. 95.

379. *Ibid*. at para. 104. It should be noted that the issue of equating Zionism and racism as well as of "just and adequate reparation or satisfaction" for "historical injustices",such as colonialism and slavery, were controversial and led to the Governments of USA and Israel representatives to leave the Conference in protest.

380. Communication No. 11/1998 : Slovakia. 09/08/2001. CERD/C/59/D/11/1998. (Jurisprudence), (Decision dated 9 August 2001)

381. *Ibid*. at para. 2.1-3.1.

382. *International Convention on the Elimination of all forms of Racial Discrimination*, 660 U.N.T.S. 195, entered into force 4 January 1969.

383. *Ibid.* at para. 21.

384. *Cyprus* v. *Turkey* (10 May 2001), Application no. 25781/94, REF00002519, Eur. Ct. H.R.

385. *Ibid*. at para. 309.

386. *Ibid*. at para 311.

387. *Draft Declaration on the Rights of Indigenous Peoples*, E/CN.4/Sub.2/1994/2/Add.1 (1994).

388. Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session.

389. OEA/Ser.L/V/II.110 Doc 22, March 1, 2001.

390. OEA/Ser.L/V/II.108 Doc. 62, 20 October 2000.

391. *Indigenous Peoples* : 18/08/97. CERD General recom. 23 . (General Comments), para. 3.

392. For example, three complaints were presented against Canada before the UN Human Rights Committee: *Lovelace v. Canada*, Communication 24/1977, CLPR/C/27/D/24/1977, 1981; *Ominayak and Lubicon Lake Tribe v. Canada*, Communication 167/1984, CLPR/C/38/D/167/1984, 1990; *Mikmac Tribale Society v. Canada*, Communication 205/1986, CLPR/C/43/D/205/1986, 1991. Other countries have also been the objects of complaints from indigenous groups before the Human Rights Committee For example *Ivan Kitok v. Sweden*, Communication no. 197/1985: Sweden. 10/08/88. CCPR/C/33/D/197/1985.

393. *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua* (31 August 2001), Inter-Am. Ct. H.R. at para. 149.

394. See *Press Release* 23/01 of the court (text of decision not available at time of drafting).

395. *Gosselin* v. *Attorney General for Quebec*, SCC no. 27418, appeal heard 29 October 2001.

396. ICESCR, *supra* note 335.

397. *The role of national human rights institutions in the protection of economic, social and cultural rights* : . 03/12/98. E/C.12/1998/25, CESCR General comment 10. (General Comments), para. 3.

398. CCT38/00 (21 September 2000).[hereinafter cited as *Grootbroom*].

399. CCT55/00 (29 May 2001).

400. See for example para. 41, *ibid.*