



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

five years later...

Public Service Staffing Tribunal
2009–2010 Annual Report

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Chairperson of the Public Service Staffing Tribunal (2010)

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Staffing Tribunal**

**Tribunal de la dotation
de la fonction publique**

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The Honourable James Moore, P.C., M.P.
Minister of Canadian Heritage and Official Languages
Gatineau, Québec
K1A 0M5

Dear Minister Moore:

In accordance with section 110 of the *Public Service Employment Act*, I am pleased to submit the fifth annual report of the Public Service Staffing Tribunal for the period from April 1, 2009 to March 31, 2010, for tabling in Parliament.

Yours respectfully,

Guy Giguère
Chairperson and Chief Executive Officer

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Message from the Chairperson



Five years have already elapsed since the launch of the Tribunal. Established as part of the *Public Service Employment Act* (PSEA) in December 2005, the Tribunal – a new independent quasi-judicial body – was ready to hear the first complaints within a few months. There is provision for reviewing the legislation and its application five years after the coming-into-force of the PSEA. Therefore, this annual report, *five years later*, is focussed on presenting an overview of the Tribunal's accomplishments since its beginnings.

The implementation started with an extensive consultation in order to establish the complaint process. A consensus emerged wherein the complaint process would give the parties several discussion opportunities with a view to resolving the complaints. The Tribunal has been successful in this respect: 90 percent of the 3,000 complaints received were resolved without a hearing.

The PSEA brought about a new definition of merit, a new staffing system and new recourse mechanisms. The Tribunal was given the role of interpreting the new act through its decisions. There was a need for a new jurisprudence based on sound, consistent and well reasoned decisions. The parties, their representatives, as well as the employees, the managers and human resources specialists need to know the parameters of the new staffing system.

In its decisions, the Tribunal has shed new light on what constitutes abuse of authority – the main ground for complaint under the PSEA. On page 18, you will find a summary of the facts and the legal principles established in decisions where complaints of abuse of authority were substantiated.

Although this is a situation over which the Tribunal had no control, the time required to staff member positions was a challenge during the 2009–2010 fiscal year. While the PSEA provides for a minimum of five permanent members, the Tribunal only had two permanent members for most of 2009. The situation has since been resolved and the Tribunal will now be able to reduce the time required to issue its decisions.

We launched two 12-month pilot projects in January 2010: settlement conferences and telephone mediation. The results and effectiveness of these projects will soon be assessed. We hope these new tools will prove useful in resolving complaints. They will also be used to optimize the use of resources and maintain service costs at current levels.

I am proud of the work that our team has done so far, with the valuable cooperation of federal departments and agencies and bargaining agents. By assisting the parties in resolving their dispute, the Tribunal plays a key role in achieving the PSEA's objectives, namely fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues.

A handwritten signature in black ink, appearing to read 'Guy Giguère', with a stylized flourish at the end.

Guy Giguère
Chairperson and Chief Executive Officer

one

The implementation of the *Public Service Modernization Act* and its effects



one

The Public Service Modernization Act (PSMA), enacted in 2003, seeks to create a more flexible staffing framework for human resources management and to foster more collaborative labour relations while clarifying the responsibilities of deputy heads and managers. The legislation created the new *Public Service Employment Act (PSEA)* and facilitated the creation of an independent quasi-judicial

body that has replaced the Public Service Commission (PSC) appeals structure.

The work to implement the Public Service Staffing Tribunal (PSST) began in March 2005, following the appointment of the Chairperson. A small team quickly put into place the structure and staff necessary to be able to begin operations on December 30, 2005, when the provisions of the PSEA that officially empowered the Tribunal to consider complaints came into force.

Our intent was to create a body that focuses on service and results, responsible spending, adherence to high professional and ethical values, and transparent reporting. In this spirit, the Tribunal adopted practices that make it an efficient and flexible organization that can adapt to an unpredictable and changing workload.

Updated staffing terminology

New definition of merit and new recourse, abuse of authority

Relative merit, which had been defined through jurisprudence, is no more. Merit is now a matter of individual merit: to be appointed under the PSEA, the successful candidate must meet the essential qualifications for the position as established by the deputy head.

The PSEA gives deputy heads or the PSC, as the case may be, significant latitude in the assessment of candidates and the selection of the right fit for the position among the qualified applicants. However, this discretion is not absolute and cannot be exercised in an unreasonable, discriminatory, outrageous or arbitrary way, even without improper intention. The PSEA provides for recourse against abuse of authority for those who felt unfavourably treated through the exercise of discretion in staffing processes.

Flexibility

The previous rules-based system has been replaced with a more flexible human resources management system. Deputy heads have more flexibility with respect to selection. The Tribunal has encouraged, on many

occasions, deputy heads to use the staffing flexibility conferred by the Act and to move away from outdated practices under the old staffing system. Thus, it is no longer necessary to rank candidates or establish an eligibility list.

Furthermore, the PSEA makes no distinction in the choice of process; deputy heads can opt for an internal or external, advertised or non-advertised process. However, they are required to comply with the PSC appointment policy and guidelines.

The discretion conferred to deputy heads is not absolute and cannot be exercised in an unreasonable, discriminatory, outrageous or arbitrary way, even without improper intention.

The need to promote dialogue

The Preamble to the PSEA clearly expresses Parliament's intent to promote genuine dialogue and provide recourse mechanisms to help resolve appointment-related issues. The PSEA provides for informal discussions in staffing processes. Potential complaints can therefore be resolved through informal discussions where the deputy head and the person

Three grounds can be cited in a staffing complaint: abuse of authority in the application of the merit principle; (2) abuse of authority in the choice of appointment process (advertised or non-advertised); and (3) denial of the right of the person concerned to be assessed in the official language or his or her choice.

excluded from a process may discuss the reasons for the decision and related concerns. Similarly, within 25 days of filing a complaint the deputy head and the complainant have the opportunity to meet and discuss the complaint during the exchange of relevant information. Hence many complaints are resolved at that stage or at subsequent phases in the process (mediation, allegations, reply, pre-hearing conference).

Challenges implementing the new legislation

Any reform requires a review of the systems and processes already in place. This entails new practices, new methods, new regulations, and new habits — in short, a new framework. The Tribunal's mandate is an integral part of this public service renewal. Indeed, human resources modernization in the

federal government involved new recourse mechanisms, hence the Tribunal, whose mission is to consider and dispose of complaints. Complaints that can be dealt with pertain to internal appointments, layoffs, corrective action, and revocation of appointment.

Three grounds can be cited in a staffing complaint: abuse of authority in the application of the merit principle; (2) abuse of authority in the choice of appointment process (advertised or non-advertised); and (3) denial of the right of the person concerned to be assessed in the official language or his or her choice. In addition, the Tribunal may in certain situations interpret and apply the *Canadian Human Rights Act* (other than provisions involving pay equity) if the issues were raised in the complaint.

two

Take-off: the first two years



In order to deal with complaints as effectively as possible, the Tribunal holds hearings and provides mediation services. It was first necessary to set up a basic organizational structure for the following activities: recruitment

of staff, establishment of sectors (communications, registry, human resources, mediation), mediation training program, case management system, drafting of the Procedural Guide and of the *PSST Regulations*.

The Tribunal rendered its first final decision on September 28, 2006 (Tibbs). This date marks the beginning of its jurisprudence with respect to the notion of abuse of authority.

two

As part of its communications strategy, the PSST set up a website in the months preceding its official launch. It then undertook various

activities to let all stakeholders — federal departments and agencies and their staff, as well as unions and bargaining agents — know of its existence. Our first fiscal year, which comprised only three months, focussed in part on the following operations:

- developing the Tribunal’s official website;
- delivering 50 presentations about the Tribunal and the complaint process to various stakeholder groups;
- publishing a complete guide to the complaint process, available online, in February 2006; and
- publishing a brochure, in February 2006, explaining the Tribunal’s mandate and the types of complaints that it can consider.

The Tribunal’s new website was officially launched in July 2006. The activities of the 2006–2007 fiscal year included the preparation of a brochure on mediation (ultimately published in April 2007) and the delivery of ten different presentations, in both official languages, for staffing or HR advisors, delegated managers and bargaining agent representatives in every region of Canada.



The 2005–2006 fiscal year was a mere three months long and marked the beginning of the processing of complaints. As of March 31, 2006, the Tribunal had received 15 complaints, three of which were withdrawn.

The Tribunal developed an interactive training course on interest-based negotiation and mediation, intended for stakeholders involved in staffing cases.



The major increase in workload during the 2006–2007 fiscal year compelled the Tribunal to review its organizational structure and create several key positions that it needed to fill without delay as it improved its case management system. The number of complaints increased to 438. The Tribunal rendered its first final decision on September 28, 2006 (*Tibbs*). This date marks the beginning of its jurisprudence with respect to the notion of abuse of authority.

Interest-based negotiation and mediation training

As part of its conflict resolution activities, the Tribunal developed an interactive training course on interest-based negotiation and mediation. This three-day training course is intended for stakeholders involved in staffing cases — bargaining agents, delegated managers and their representatives, and staffing or HR advisors. It provides stakeholders with a better understanding of mediation and prepares them to get involved in the process as a party or as a representative. In 2006–2007, the course was delivered 17 times in major urban centres across the country in English and French. Since 2009–2010, the course is followed by a presentation on *Trends and Jurisprudence* delivered by the Tribunal’s Legal Services.

The first mediation session was held in May 2006.

three

Cruising altitude: 2007–2010

2007–2009

In the 2007–2008 fiscal year, the number complaints alleging abuse of authority increased by 69% to 742. This situation put a strain on our case management system since initial forecasts had estimated the annual volume at roughly 400 complaints. Nonetheless, the Tribunal rose to the challenge: 566 files were closed, and the remaining 24% were deferred to the following fiscal year.

three

In 2008–2009, 821 complaints were filed with the Tribunal. This led to a significant growth in the cases used to build our jurisprudence. There were 44 Decisions, and in six of them, the Tribunal ruled in favour of the complainants, finding that there had been an abuse of authority. The theme of the 2008–2009 annual report was defining of abuse of authority. It was important, at that time, to clarify this key concept of our jurisprudence.

2009–2010

During this year, the Tribunal processed 1,156 files which included 752 new complaints in addition to 404 files carried over from the previous fiscal year. The Tribunal also had to cope with the departure of three of its five full-time members, and replacing them took several months. This situation could have led to delays in the processing of motions and requests for orders from parties and in the number of pre-hearing conferences and hearings held. However, measures were taken to prevent a backlog of cases that would have been difficult to clear up even with the arrival of new members. With only two full-time members and with the help of temporary members and staff, the Tribunal was able to issue 1,070 letter decisions and close 681 files, 76% of which were closed within nine months of receiving the complaint. In cases where an oral hearing was not necessary, the Tribunal was able to proceed more rapidly on the basis of the parties' written submissions and issued 96 final decisions. The Tribunal held

27 hearings and rendered 27 Decisions, including 24 final decisions, but more time was needed to issue these decisions because of the reduced number of full-time members. At the end of the year, the Tribunal had a full complement of members, which will enable it to reduce the time required to issue its Decisions in the next fiscal year.

Mediation

Under section 97 of the PSEA, the Tribunal calls on its Dispute Resolution Services as soon as a complaint is filed. With the parties' consent, the mediation process can be put in motion at any stage of the proceedings in order to resolve the complaint informally without the need for a hearing. In other words, a party that initially refused mediation can resort to the service at any subsequent stage of the process, with the other party's consent. Mediation is conducted by the Tribunal's team of staff mediators and three temporary members based in the NCR, Winnipeg, and Vancouver. These multiple points of service facilitate resource optimization.



Statistical table – April 1, 2007, to March 31, 2010

Data	2007-2008	2008-2009	2009-2010
Number of complaints referred to mediation	304	295	315
Number of complaints where a party withdrew consent to mediation	53	28	37
Number of complaints withdrawn before scheduled mediation session	49	40	23
Number of mediations conducted	119	175	201
Number of complaints resolved	96	158	175
Mediation resolution rate	81%	90%	87%

From 2007 to 2010, the Dispute Resolution Services received 914 complaint files to mediate. Of the 495 files that were mediated, 429 ended in a settlement — an impressive 87% resolution rate.

Challenges, interests and options

While still ensuring that mediations remain confidential, the Dispute Resolution Services has put together a summary of the various matters discussed during the mediation sessions. These matters include issues, interests and options.

Examples of issues in mediation:

- Transparency of process
- Choice of non-advertised appointment process
- Assessment tools used
- Accommodation for disabled person
- Changes to process

Examples of complainants' interests during mediation:

- Career advancement
- Opportunity to participate in an appointment process
- Opportunity to obtain experience
- Need to have process-related concerns acknowledged
- Respect and recognition of complainants' skills, knowledge and experience
- Improvement of the overall situation for complainant and others
- Fear that manager will interfere with complainant's future prospects

Examples of respondent's interests during mediation:

- Fair and transparent selection process
- Maintaining integrity of staffing in general, and more specifically, of the process in question
- Compliance with legislation
- Defending initial decision
- Maintaining complainants' productivity and positive outlook
- Helping complainants understand staffing
- Concern about the fact that manager's integrity is being questioned
- Expedient resolution of complaints

Examples of options proposed during mediation:

- Career and training assistance
 - ♦ Training coordinator's assistance navigating sites to find skill-related tools and specific courses; help obtaining required training
 - ♦ Coaching and assistance in understanding merit criteria for future staffing processes, and preparation for selection interviews

- Staffing
 - ♦ Opportunities for rotating acting assignments
 - ♦ Helping employees increase chances of transfer, assignment or secondment
- Communication
 - ♦ Inclusion of merit criteria in all notices of appointment
 - ♦ Communication of information about future staffing processes in meetings with bargaining agents and in staff meetings

Parties in mediation (complainants, deputy heads' delegates, human resources and union representatives) are always aware that agreements resulting from mediation must

comply with all applicable legislation, regulations, policies and directives.

The Registry

The Registry keeps track of all complaint files, from the date that receipt is acknowledged to the date the file is closed. Over the last five fiscal years, the Tribunal has received a total of 2,768 complaints. Of that number, 2,315 were received in the last three fiscal years — an average of 772 complaints a year. The two preceding fiscal years are not included in this average, because they span the first 15 months after the PSEA came into force, and the data from that period do not reflect a typical year's operations. For the same reason, the statistics set out below are based on the three most recent fiscal years.

Complaints	2007-2008	%	2008-2009	%	2009-2010	%
Total number of complaints	742	100%	821	100%	752	100%
Advertised processes	502	67.7%	462	56%	495	66%
Non-advertised processes	223	30.1%	346	42.1%	231	30.7%
Revocations	5	0.7%	6	0.7%	10	1.3%
Layoffs	4	0.5%	1	0.1%	5	0.7%
Corrective action	2	0.3%	0	0.0%	3	0.4%
Unspecified	6	0.8%	6	0.7%	8	1.1%



Statistics calculated on an annual basis

- The Tribunal receives an average of 772 complaints annually, and closes an average of 676 of those complaints — more than 87%.
- The complaint process provides for fixed deadlines but the parties can submit requests for extension of time for cause; on average, 6,400 days of extension were granted in this way.
- The Tribunal puts timelines in abeyance in order to receive the parties' arguments and issue a decision following a request for order for provision of information or a motion to dismiss; sometimes at the parties' request to proceed with mediation. Nearly 2,600 days of extension were granted in this way.
- More than 65% of requests for orders for provision of information are granted, in whole or in part; 98% of these requests are brought by complainants.
- More than 300 complaints are referred to mediation.
- 165 cases are mediated, resulting in 144 settlements, a settlement rate of 87% of mediated cases and more than 18% of complaints received.
- The Tribunal receives about 144 motions to dismiss for lack of jurisdiction or for filing the complaint outside the deadline; these motions are generally addressed through preliminary proceedings or by paper hearing; of these, 120 are granted representing more than 15% of complaints received.
- On average, 112 cases are placed on the hearing schedule; of that number there is an average of 40 requests for postponement of the hearing, 59 are withdrawn before the hearing, and 38 are heard.

Communications

In 2007–2008, new online tools were implemented on our website in order to provide immediate access to the complaints process and simplify the activity by providing an electronic guidebook developed in cooperation with the Canada School of Public Service.

We strongly encourage the public to consult our Procedural Guide before requesting information about the complaints process.

In 2008–2009, improvements to existing communications tools continued: new modules were added, and the site was made Common Look and Feel 2.0 compliant. As a result, complaint forms could be filled out online starting in March 2009. In addition, the full text of each decision is now preceded by a summary that provides a clear idea of the decision's content without going into detail. Each summary begins with a list of the decision's keywords. This approach makes it easier for readers to spot

the various themes and legal principles developed in the jurisprudence so far. The decisions are posted by year of publication and under subject headings.

The 2009–2010 fiscal year was essentially devoted to improving our communications strategy, notably by restructuring our website, developing a modern information management system, revising electronic forms, and attending to other related matters.

Our website provides access to all kinds of background information about the Tribunal and its activities. The Frequently Asked Questions page provides helpful information on the PSST's operations. As far as client service is concerned, we strongly encourage the public to consult our Procedural Guide before requesting information about the complaints process. Relevant questions and comments can be sent by e-mail, fax, mail or telephone (see page 43 for contact information). We respond to e-mailed information requests within two business days.

Human Resources and Corporate Services

In March 2006, there were approximately 20 staff and members. It was estimated that 400 complaints would be received each year. While it is impossible to predict the precise number of complaints that will be filed, current trends show that the annual number of complaints is exceeding initial forecasts by 100%. Over time, we have had to hire staff to keep up with this constant increase in workload. There are now close to 40 people working for the Tribunal, including members, employees on secondment, and casual employees.

In the interest of transparency and fairness to staff, the Tribunal developed various internal policies, notably with respect to labour relations, grievance adjudication, informal conflict management, and travel during its second fiscal year. Toward the end of 2007–2008, once the majority of positions had been filled, the Tribunal implemented its learning policy by preparing training plans for its entire staff. This policy remains in effect, and employees have taken advantage of it by updating their skills in the activity sectors that fall within their competency profile.

Lastly, in the area of corporate services, we have streamlined financial procedures and internal reporting requirements.

four

Summary of the legal principles established in the Tribunal's key decisions

The Tribunal's 135 decisions have established a rich body of legal principles. Of those decisions, 83 were issued following a hearing, and in nine of them — approximately 11% — the Tribunal concluded that there was abuse of authority.

four

Since a finding of abuse of authority is required to substantiate a staffing complaint under the PSEA, it makes sense to provide a factual clarification of this concept by summarizing the legal principles laid down in the decisions where the complainants were successful.

In *Tibbs*, its very first final decision, dated September 28, 2006, the Tribunal highlighted five categories of situations that could be used as a framework for abuse of authority:

1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).
2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).
3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).
4. When the delegate exercises discretion on an erroneous view of the law.
5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

Abuse of authority has been clarified in the jurisprudence established so far, notably in key decisions like *Burke v. Deputy Minister of National Defence*, 2009 PSST 0003; *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024; *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 0021; *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029; *Rajotte v. President of the Canada Border*

Services Agency, 2009 PSST 0025; *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 0035; *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 0027; *Cameron and Maheux v. Deputy Head of Service Canada*, 2008 PSST 0016; *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012; *Visca v. Deputy Minister of Justice*, 2007 PSST 0024; *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 0033; and *Tran v. Commissioner of the Royal Canadian Mounted Police*, 2009 PSST 0031.

Legal principles established in substantiated complaints

Discretion fettered

Bowman

- Assessment board fettered its discretion by adopting rigid guideline and applying it in its assessment of one candidate
- Assessment board failed to assess the candidate's experience in any meaningful way
- Improper conduct, although unintended, amounts to abuse of authority

Bad Faith

Cameron and Maheux

- Manager failed to adequately explain decision to use a non-advertised process
- Manager relied on insufficient material in assessment:
 - ♦ Not all essential qualifications assessed
 - ♦ No CV or assessment report filed
- Not necessary to show intentional fault
- Includes serious carelessness or recklessness
- Can be established by direct or circumstantial evidence

Chiasson

- Changing instructions without follow up (serious negligence)
- Irrational and unreasonable conduct led to improper result
- All candidates must be assessed against same standards
- Assessment board relied on inadequate material
- Assessment board fettered its discretion by not examining complainant's individual case

Beyak

- Selection of appointee pre-determined
- Actions designed to circumvent PSER
- Explanations in rationale deceptive, untrue, inexplicable and incomprehensible

Rajotte

- Disregard for notice requirements under PSER
- Failure to notify and disclose initial acting appointment demonstrate serious careless/recklessness

Denny

- Reliance on insufficient material
- Serious flaw in administration of practical test (serious negligence)
- Practical test became test of complainant's ability to guess what he was supposed to do

Ayotte

- Reliance on insufficient material (process)
 - ♦ Decision to appoint X was pre-determined
 - ♦ Non-transparent process
 - ♦ No evidence to support choice of non-advertised process because of lack of other interested candidates
- Reliance on insufficient material (merit)
 - ♦ Essential qualifications modified
 - ♦ Essential qualifications not assessed
 - ♦ Appointee did not meet all essential qualifications

Serious errors and omissions amounting to bad faith

Robert and Sabourin

- Lack of written rationales and SMC
- Lack of written scan and assessment of appointee
- Language proficiency qualification not met
- Improper notification

Burke

- Amending SMC after assessment of candidates without reassessing them is a fundamental error
- Assessment tool flawed; did not assess amended qualification
- Assessment of candidates unreliable; assessment board did not properly apply assessment criteria
- No reliable evidence appointee meet essential experience qualification

Personal favouritism*Beyak*

- Preparation of work description that did not reflect actual duties to ensure higher classification and salary
- Establishment of essential qualifications and assessment of employee without regard to actual requirements of position
- Appointment of employee who did not meet essential qualifications because manager wanted to reward her

Ayotte

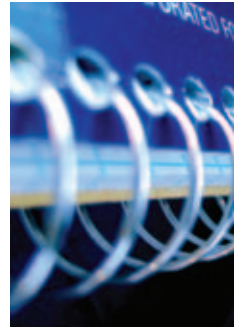
- SMC modified for benefit of appointee
- External non-advertised changed to internal non-advertised
- Appointment of X, who did not meet essential qualifications, to give X indeterminate status

Discrimination*Rajotte*

- Assumption: complainant not selected because not willing to work flexile hours and overtime because of family obligation
- Manager did not provide reasonable explanation or establish bona fide occupational requirement

Reasonable apprehension of bias*Denny*

- Based on evidence of previous conflict, informed person would think it is more likely than not that board member would not administer practical test fairly (consciously or unconsciously)



Judicial review

Five applications for judicial review were filed in 2009–2010. Two were discontinued and two are still pending. The Federal Court granted the one remaining application, but only the corrective measures ordered by the Tribunal in that particular case were set aside. The Tribunal's revocation of an appointment and its finding of abuse of authority on the basis of bad faith and personal favouritism were not challenged. Following the Court's decision, the Tribunal issued a new decision in which the corrective measures were amended.

Sometimes a judicial review application filed during one fiscal year is only heard and decided a year or two later. Hence, six decisions rendered by the Federal Court during the 2009–2010 fiscal

year pertained to applications filed in previous years. Only one of these applications was granted, but it did not quash the Tribunal's finding; only the corrective measures that it ordered were set aside. The Federal Court dismissed two of the five other matters and referred the remaining three back to the Tribunal for a new hearing by another member.

Altogether, over the course of the Tribunal's five fiscal years, 16 applications for judicial review have been filed. Five of these were allowed to some extent or another, five were withdrawn, three were dismissed, and three are pending. Overall 99% of the Tribunal's decisions have either not been challenged or in cases where they have been challenged, the decision has been confirmed.

five

Overall summary and the way ahead



Before the new PSEA came into force, staffing appeal structures were under the authority of the PSC, which was responsible for interpreting the employment act and regulations, and adjudicating the appeals. There was a perception by some that the PSC was both a judge and a party which could jeopardize the neutrality of a system in which the same organization was responsible for staffing and corrective action. This situation changed with the creation of

the PSST, an independent, quasi-judicial body whose mandate is to consider and dispose of complaints. Thanks to the PSST's work, there is now a body of decisions replete with legal principles regarding the concept of abuse of authority. These decisions are easy to consult on the website, and complaints can be filed online using an electronic form.

Over its five years of operation, the Tribunal has consistently promoted an approach based on the exchange of information, genuine dialogue and informal dispute resolution. The results are telling in many respects. Out of a total of 2,768 complaints received during these years, the Tribunal has issued 135 Decisions. In other words, less than 5% of complaints have needed to go through each step, up to and including a hearing. The vast majority of matters are settled through mediation, letter decisions or other informal processes. More than 87% of complaint files are processed and closed.

It is also interesting to note that of the 429 mediations that have taken place since 2007, in 86% of cases the complaint was withdrawn following mediation. This is why the Tribunal makes the most of its Dispute Resolution Services' resources in order to respond effectively to parties' dispute resolution needs. From April 1, 2006, to March 31, 2010, we held roughly 40 interactive training sessions on interest-based negotiation and mediation in every region of Canada. Over 800 stakeholders have had the opportunity to familiarize themselves with our mediation process.

five

With respect to the case management system, it takes 10 to 15 months on average — from the date of the acknowledgment of the complaint until the date the case is closed — to deal with a complaint file that goes to a hearing and final decision. Although this time frame only applies to 5% of complaints, the Tribunal believes it can do better. It is making every effort to improve the situation while acknowledging that there are procedural issues that are

From April 1, 2006, to March 31, 2010, we held roughly 40 interactive training sessions on interest-based negotiation and mediation in every region of Canada. Over 800 stakeholders have had the opportunity to familiarize themselves with our mediation process.

often beyond its control. For example, in the last two years, the number of days for files put in abeyance granted annually has increased from 548 in 2007–2008 to 4,331 in 2009–2010. In addition, the Tribunal extends time lines by an average of 6,400 days each year following requests made by the parties. We intend to discuss this situation with the various stakeholders at an appropriate time and place. We will also make the recommendations below to the committee that is reviewing the PSMA. These recommendations aim to streamline certain procedures without compromising effectiveness. We will also endeavour to update our case management system so that it can provide better reports that will help decision-making and performance management.



Recommendations

In anticipation of the upcoming PSEA review, we believe that the following recommendations would improve the Tribunal's internal operations:

- 1) That s. 88(1) be amended so the number of permanent members of the Tribunal be "... between five and nine permanent members ..."**

The number of complaints was originally estimated at 400 per year. The Tribunal receives on average 800 complaints per year. Having a maximum of five members is very limiting as members' terms often expire in close timeframes leaving the Tribunal with too few members. If the Tribunal had more permanent members, it would be

better able to manage its caseload when the term of more than one member expires or when a member retires or leaves before the end of their term.

- 2) That a provision be added allowing the Tribunal to review its own decisions.**

There is no provision for reconsideration in the PSEA. Such a provision is common in labour legislation; see section 43(1) of the *Public Service Labour Relations Act* (PSLRA) and section 18 of the *Canada Labour Code* (CLC), for example. This has proven to be difficult for the Tribunal as legislation does not expressly provide that it can revisit or amend a decision even when it would be most appropriate to do so.

3) That section 97 be amended to provide the same flexibility and discretion as found in the PSLRA and the CLC to resolve a complaint.

Section 97 of the PSEA refers specifically to mediation. Provisions of the PSLRA and the CLC have couched the idea in a broader context giving the Public Service Labour Relations Board (PSLRB) and the Canada Industrial Relations Board (CIRB) more discretion in manner in which they resolve disputes.

The Tribunal mediates an important number of complaints. It would be appropriate to have a provision as the one found in the PSLRA and the CLC that would specifically give it broad powers to resolve complaints using different means but leaving it with the power to determine issues that have not yet been settled.

4) That a provision be added that gives power to the Tribunal to delegate certain actions to its staff as found in the PSLRA and the CLC.

The PSEA has no delegation authority provision. A number of administrative actions or matters

must be decided by a Tribunal member. Most labour boards are given a delegation authority.

The delegation authority provided under the CLC is the most complete. It allows the CIRB to delegate, among other things, the power to issue a summon, order that pre-hearing conferences be held, administer oaths, compel a party to produce information and documents, adjourn or postpone the proceeding from time to time, and abridge or extend the time for doing any act, filing any document or presenting any evidence in connection with a proceeding.

It is incomprehensible that under the PSEA a request for an extension of a few days requires a decision of a Tribunal member.

The Tribunal could deal much more efficiently with the hundreds of requests it receives every year if it could delegate the management of these requests to its staff. Staff would still be required to respect the principles of procedural fairness in dealing with these requests.

5) That the provision for temporary members be amended to read that they can be appointed for a term not exceeding five years.

Both PSLRA and the CLC provide for the appointment of part-time members for a three-year term that can be renewed.

Two-year terms as envisaged in the PSEA are not sufficient. Member training requires time and by the time a part-time member is well trained and effective, their term is up.

6) That the term “temporary members” be changed to “part-time members” to reflect their actual status and the fact that they can be reappointed.

As well, the word “vacataire” (used in the French version) is not a common term.

appendices

Appendix 1 – Financial issues

Funding and expenses

At the beginning of the 2008–2009 fiscal year and upon the federal government’s request, a strategic review was conducted in relation to direct program spending by the Tribunal and five other organizations with central human resources management functions. The results of this horizontal review of human resources management functions demonstrated the importance of stable, long-term funding for the Tribunal. The Tribunal benefitted from this finding in 2009–2010, and, from now on, funds will be set aside for the Tribunal in future budgets. However, the PSST is encountering challenges in the implementation of a funding transfer flowing from the Horizontal Strategic Review of Human Resources Organizations, but it is working with the Treasury Board Secretariat to resolve this issue. The Tribunal is confident that the matter will be resolved in fall 2010.

The Tribunal’s 2009–2010 expenditures totalled \$5.6 million. Roughly \$4.2 million (75%) of this total was spent on wages and benefits. \$1.3 million (23% of the Tribunal’s expenditures) covered operating expenses such as transportation, professional services, lodging, and facilities for hearings and mediation. The remaining \$90,000 (2%) was spent on the translation of decisions.

Summary of expenditures over five fiscal years

Description	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010
Adjudication of complaints	459,874	1,158,951	1,705,957	2,130,175	2,350,870
Mediation of complaints	113,119	291,449	666,543	891,023	991,263
Corporate services	1,376,653	1,765,495	1,931,441	1,788,529	1,542,618
Total Spending	1,949,647	3,215,895	4,303,941	4,809,727	4,884,751
Unspent*	1,959,103	1,806,887	814,827	679,158	829,272
Total allocation	3,908,750	5,022,782	5,118,768	5,488,885	5,714,023

* Returned to the Consolidated Revenue Fund.

Figures have been adjusted to give a comparative basis.

Appendix 2 – Table of Complaints by Organization

Breakdown of Complaints by Organization		
Organization	Total	%
Assisted Human Reproduction Agency of Canada	1	0%
Atlantic Canada Opportunities Agency	2	0%
Canada Border Services Agency	93	12%
Canada School of Public Service	2	0%
Canadian Grain Commission	1	0%
Canadian Radio-television and Telecommunications Commission	4	1%
Canadian Space Agency	9	1%
Canadian Transportation Agency	1	0%
Correctional Service of Canada	127	17%
Courts Administration Service	4	1%
Department of Agriculture and Agri-Food	6	1%
Department of Canadian Heritage	1	0%
Department of Citizenship and Immigration	14	2%
Department of Finance	1	0%
Department of Fisheries and Oceans	27	4%
Department of Foreign Affairs	16	2%
Department of Health	27	4%
Department of Indian and Northern Affairs Canada	21	3%
Department of Industry	4	1%
Department of Justice	4	1%
Department of National Defence	70	9%
Department of Natural Resources	7	1%
Department of Public Works and Government Services	17	2%
Department of the Environment	16	2%
Department of Transport	19	3%
Department of Veterans Affairs	4	1%
Economic Development Agency of Canada for the Regions of Quebec	1	0%
Human Resources and Skills Development Canada	204	27%
Immigration and Refugee Board	3	0%
Office of the Chief Electoral Officer	1	0%
Office of the Information Commissioner of Canada	1	0%
Office of the Privacy Commissioner of Canada	1	0%
Passport Canada	11	1%
Privy Council Office	3	0%
Public Health Agency of Canada	4	1%
Public Service Commission	1	0%
Royal Canadian Mounted Police	12	2%
Statistics Canada	4	1%
Treasury Board	5	1%
Other Employer*	3	0%
	752	100%**

* These complaints involve organizations not subject to the PSEA.

** For simplicity, the percentages are rounded to the nearest integer, thus creating a slight discrepancy in the total.

Appendix 3 – Statutory Responsibilities

The *Public Service Employment Act* requires or permits the Tribunal to undertake the following activities:

1. consider and dispose of complaints presented to the Tribunal [subs. 88(2)];
2. in the case of a founded complaint involving a lay-off of an employee, set aside the decision of a deputy head to lay off the employee and order the deputy head to take any corrective action that it considers appropriate, other than the lay-off of another employee [subs. 65(4)];
3. in considering whether a complaint against a lay-off is substantiated, interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value [subs. 65(7)];
4. in the case of a founded complaint involving a revocation of an appointment, order the Public Service Commission or the deputy head to set aside the revocation [s. 76];
5. in the case of a founded complaint involving an internal appointment, order the Public Service Commission or the deputy head to revoke the appointment or not to make the appointment and to take any corrective action that it considers appropriate [subs. 81(1)];
6. in considering whether a complaint against an internal appointment is substantiated, interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to equal pay for work of equal value [s. 80];

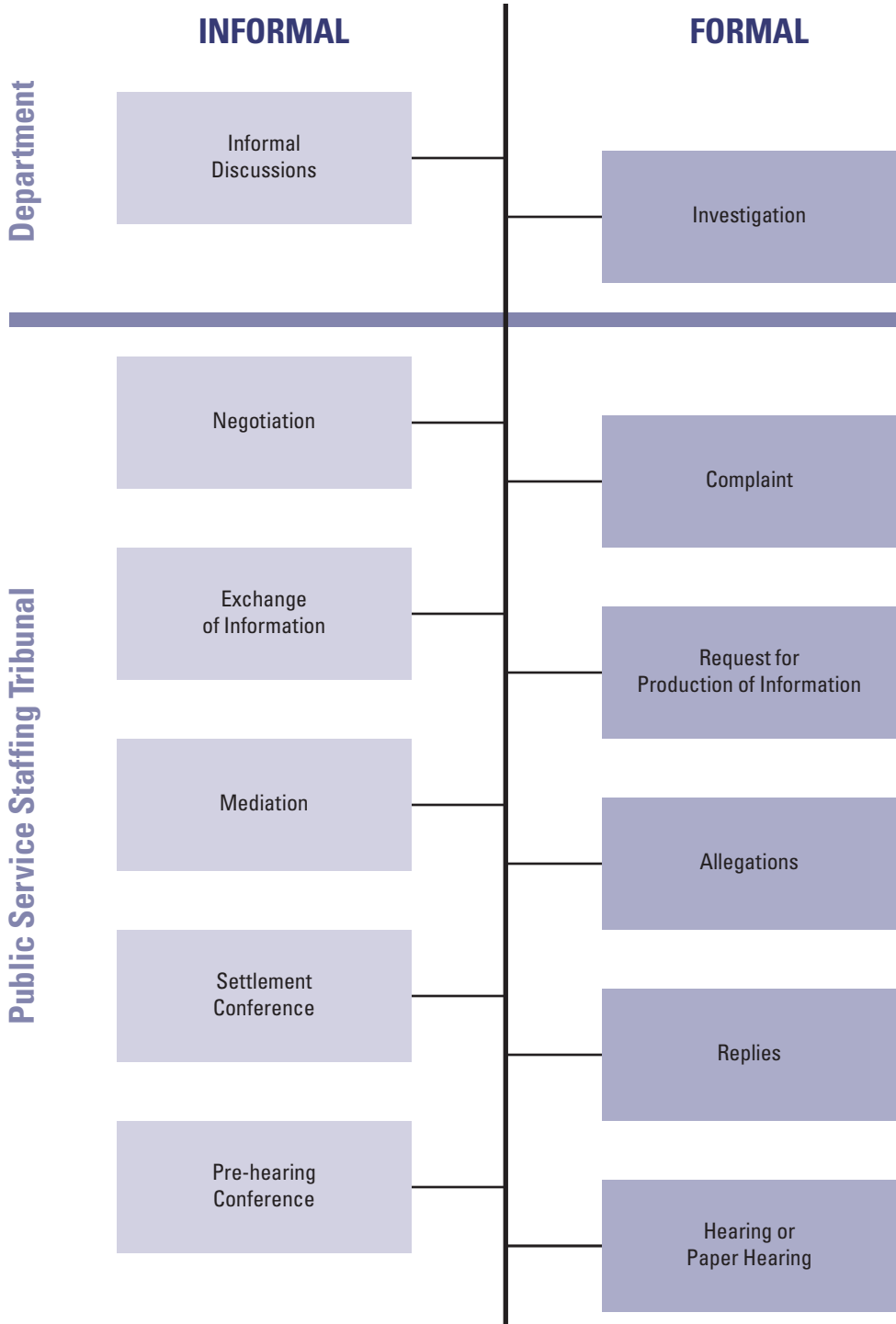
7. in the case of a complaint involving a corrective action ordered by the Tribunal, order the Public Service Commission or the deputy head to revoke the appointment made as a result of the implementation of the corrective action, or not to make the appointment, and give the Commission or the deputy head any directions that it considers appropriate with respect to the implementation of the corrective action [s. 84];
8. provide mediation services at any stage of a proceeding in order to resolve a complaint [subs. 97(1)];
9. summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath in the same manner and to the same extent as a superior court of record [par. 99(1)(a)];
10. order that a hearing be conducted using any means of telecommunication that permits all persons participating to communicate adequately with each other [par. 99(1)(b)];
11. administer oaths and solemn affirmations [par. 99(1)(c)];
12. accept any evidence, whether admissible in a court of law or not [par. 99(1)(d)];
13. compel, at any stage of a proceeding, any person to produce any documents and things that may be relevant [par. 99(1)(e)];
14. subject to any limitations that the Governor in Council may establish in the interests of defence or security, enter any premises of an employer where work is being or has been done by employees, inspect and view any work, material, machinery, appliances or articles in the premises and require any person in the premises to answer all proper questions relating to a complaint [par. 99(1)(f)];
15. summarily dismiss any complaint that, in its opinion, is frivolous or vexatious [subs. 99(2)];
16. decide a complaint without holding an oral hearing [subs. 99(3)];

17. render a decision on a complaint and provide a copy of it, including any written reasons, and any accompanying order to the Public Service Commission and to each person who exercised the right to be heard on the complaint [s.101];
18. make regulations respecting complaint time limits and procedures, procedures for the hearing of complaints, time limits and procedures for notices and other documents, notice of an issue to the Canadian Human Rights Commission and the disclosure of information [s.109];
19. prepare and submit an annual report to Parliament through the Minister of Canadian Heritage regarding activities during the fiscal year [subs. 110 (1)];
20. use any services and facilities of departments, boards and agencies of the Government of Canada that are appropriate for the operation of the Tribunal [subs.93(2)].

Appendix 4 – The Complaint Process



Appendix 5 – Staffing Complaint Resolution System



Appendix 6 – Members’ Biographical Notes

Guy Giguère, Chairperson and Chief Executive Officer

A seasoned adjudicator and mediator with over 25 years of experience in the federal public service of Canada, Guy Giguère was appointed Chairperson of the Public Service Staffing Tribunal in March 2005. Mr. Giguère was first a member of the Public Service Staff Relations Board from 1998 to 2000 and became Deputy Chairperson of the Board in 2001. He was reappointed for a five-year period on March 31, 2008. Mr. Giguère began his public service career in 1983 with Employment and Immigration Canada where he provided training and advice on human rights and access to information legislation. He later worked with the Office of the Privacy Commissioner, the Department of Justice and the Privy Council Office. Born in St-Jérôme, Québec, Mr. Giguère obtained a civil law degree (LL.L) from the Université de Montréal and has been a member of the Quebec Bar since 1978. Mr. Giguère is a frequent speaker on mediation and arbitration and trains new members of federal administrative tribunals on the conduct of a hearing. He is also President of the Council of Canadian Administrative Tribunals.





John A. Mooney, Vice-Chairperson

John A. Mooney was appointed Vice-Chairperson of the Public Service Staffing Tribunal in September 2009. Mr. Mooney holds a BA and License in Civil Law (LL.L) from the University of Ottawa and has extensive experience in administrative tribunals both as an adjudicator and manager. His prior experience includes working as a legal analyst for the Canadian Union of Public Employees; legal counsel for the Chambre de commerce du Québec, counsel for pension applicants before the Canadian Pension Commission and senior legal officer for the International Civil Service Commission of the United Nations. From 1992 to 1996, he was Chairperson of the Public Service Commission (PSC) Appeal Board. As part of the Privy Council Task Force on Modernizing Human Resources Management from 2001 to 2003, he helped draft the new *Public Service Employment Act* (PSEA). After the PSEA came into force, Mr. Mooney became the PSC Director of Regulations and Legislation where he managed the development of policies and regulations needed to implement the PSEA. In August, 2007, he was appointed as a full-time member of the Public Service Labour Relations Board.

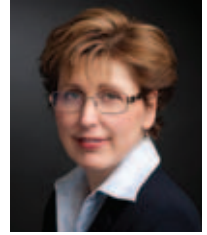


Joanne Archibald, Member

Joanne Archibald was appointed to the Public Service Staffing Tribunal as a permanent full-time member on March 1, 2010. Having obtained a Bachelor of Laws (LL.B) from the University of Calgary, Ms. Archibald is an active member of the Law Society of Alberta. She began her study of mediation in 1993 and is a Registered Practitioner in Dispute Resolution with the Canadian International Institute of Applied Negotiation. Ms. Archibald has served as a mediator both within the public service and with the Provincial Court of Alberta. Well versed in administrative law, Ms. Archibald conducted quasi-judicial hearings pursuant to the *Public Service Employment Act* from 1991 until her appointment to the Tribunal.

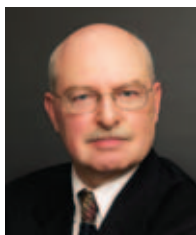
Lyette Babin-MacKay, Member

Lyette Babin-MacKay was appointed as a permanent full-time member of the Public Service Staffing Tribunal in July 2009. Ms. Babin-MacKay has over 26 years of experience in human resources, labour relations and staffing; having joined the federal public service of Canada in 1983, she served with Employment and Immigration Canada, Agriculture Canada and National Defence and was appointed to the Professional Institute of the Public Service of Canada in 1996. At the Institute, in addition to providing representation to members regarding grievances, complaints, staffing appeals and adjudication, she was an active member of several National Joint Council Committees and of the Public Service Commission Advisory Council. In 2004 and 2005, she was a member of working groups established by the Deputy Ministers' Sub-Committees on Staffing and Staffing Recourse and on Labour Relations and Dispute Resolution in order to assist departments and agencies in the implementation of the *Public Service Employment Act* and the *Public Service Labour Relations Act*. In 2007, she returned to the federal public service as Senior Policy Analyst with the Treasury Board Secretariat of Canada. Ms Babin-MacKay holds an Honours BA in History from the University of Ottawa.

**Merri Beattie, Member**

Merri Beattie is an experienced human resources professional with particular expertise in labour relations and staffing. Ms. Beattie began her public service career with Supply and Services Canada and has held positions in management since 1999. Ms. Beattie served on the Privy Council's Task Force on Modernizing Human Resources Management created in April 2001 to draft a new institutional and legislative framework for human resources management in the public service. Following the adoption of the *Public Service Modernization Act* (PSMA), Ms. Beattie participated in the planning of PSMA implementation across government departments and agencies. In January 2004, Ms. Beattie was named Director of Human Resources Modernization with Public Works and Government Services Canada. In this capacity, she led the design and implementation of the department's human resources policy frameworks and systems, including its response to the new Act. Ms. Beattie was appointed as a permanent full-time member of the Public Service Staffing Tribunal in November 2005.





Ken Gibson, Temporary Member

Ken Gibson was appointed as a temporary member of the Public Service Staffing Tribunal in November 2005. Mr. Gibson began his career as a researcher with the Science Council of Canada and later worked at the Professional Institute of the Public Service of Canada as both chief research officer and negotiator. From 1985 to 2000, he held a number of senior human resources management positions at the National Research Council, including Director of Employee Relations. Mr. Gibson has spent the last five years working as a human resources consultant with expertise in HR strategy, policy and program development, project management, labour relations and change management. Mr. Gibson holds an Honours BA in Commerce with specialization in economics and industrial relations.



Maurice Gohier, Member

Maurice Gohier began his career in the federal public service as a Staff Relations Officer with Veterans Affairs Canada in 1984. From there, Mr. Gohier joined Fisheries and Oceans Canada as its Chief, Staff Relations and Administration until 1990 when he moved to Training and Development Canada as a Labour Relations Instructor. In 1996, following assignments at the RCMP External Review Committee and the Treasury Board Grievance Adjudications Section, Mr. Gohier joined the Public Service Commission (PSC) Recourse Branch where he first worked as an Investigator and later as Chairperson of the PSC Appeal Board. Mr. Gohier also worked in the PSC Investigation Branch where he acquired management experience as Assistant Director of Operations and Director of the Jurisdiction and Case Management Directorate. During the transition years from the former to the new *Public Service Employment Act*, Mr. Gohier worked as Recourse Manager and Coach and was responsible for the training of newly hired PSC Investigators. Mr. Gohier holds a Bachelor's degree both in Business Administration and Education from the University of Ottawa. He was appointed as a permanent full-time member of the Public Service Staffing Tribunal in February 2010.

John Hall, Temporary Member

John Hall received his law degree from the University of British Columbia in 1980 and began his professional career as an arbitrator in 1985 when he was appointed to the B.C. Labour Relations Board. He served as Vice-Chair for two years before becoming a partner in a major Vancouver law firm. Mr. Hall returned to the Labour Board in 1992 as Associate Chair (Adjudication). He was named Acting Chair in 1996 and resigned two years later to pursue a private arbitration, dispute resolution and training practice. Since that time, he has also received a wide range of part-time appointments to both provincial and federal statutory tribunals and been selected to arbitrate and/or mediate numerous labour and employment disputes since the 1980s, with many of his decisions being reported nationally. He regularly instructs tribunal adjudicators on conducting hearings and writing decisions. Mr. Hall served as a Director of the Council of Canadian Administrative Tribunals, was the founding President and later a Director of the B.C. Council of Administrative Tribunal and, since 1999, has been the Secretary of the B.C. Arbitrators Association. Mr. Hall was appointed to the Public Service Staffing Tribunal as a part-time member on July 30, 2008.

John Korpesho, Temporary Member

John M. P. Korpesho began his career in labour relations in 1972 and joined the Manitoba Labour Board in July 1973 as a Board Officer. He then served as Registrar and Vice-Chairperson of the Board from 1978 to 1983 when he became the Chairperson of the Manitoba Labour Board, a position he held until his retirement in 2005. He also served as a Commissioner at the Workers Compensation Board. He has represented Canada on numerous North American Free Trade Agreement (NAFTA) panels. Mr. Korpesho was involved regularly in complex labour-management dispute resolution and on various labour/management committees respecting areas such as construction, labour relations and employment standards review. He has participated in numerous speaking engagements for various interest and professional groups, and been a contributor to a number of publications.

Gordon Roston, Temporary Member

Gordon Roston was appointed temporary member of the Public Service Staffing Tribunal in November 2005. From 1980 to 1995, Mr. Roston served the federal public service in many capacities, including Director General, International Marketing, Tourism Canada; Minister-Counsellor, Canadian Embassy, The Hague, Netherlands; Senior Staff Advisor to the Service to the Public Task Force, Public Service 2000 and Senior Advisor, Innovative and Quality Services, Treasury Board Secretariat. Since his early retirement from the public service, Mr. Roston has pursued a particular interest in Alternate Dispute Resolution and is a graduate and Fellow of the Canadian Institute for Conflict Resolution. As a mediator in the Ontario Civil Court Mandatory Mediation Program, he has acted in a wide variety of disputes ranging from breach of contract to harassment and has taught mediation and negotiation principles and practice. Mr. Roston has served as chairman, board member or advisor on a number of community and cultural organizations.

Former Members:

Members

Sonia Gaal, Vice-Chairperson (August 2005 – September 2008)

Helen Barkley, Member (November 2005 – January 2009)

Francine Cabana, Member (November 2005 – December 2008)

Temporary Members

Robert Giroux (January 2006 – June 2009)

Daniel Ish (January 2006 – July 2007)

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Notes