Annual Report

2009-2010

BRITISH COLUMBIA

British Columbia Human Rights Tribunal

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July 26, 2010

Honourable Michael de Jong
Attorney General
Province of British Columbia
Room 232
Parliament Buildings
Victoria, BC V8V 1X4

Dear Attorney General:

It is my pleasure to present the seventh Annual Report from the BC Human Rights Tribunal, covering the period April 1, 2009, to March 31, 2010.

This report has been prepared in accordance with section 39.1 of the *Human Rights Code*.

Yours truly,

Heather M. MacNaughton
Chair

HM/ll

Enclosure

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MESSAGE FROM THE CHAIR

I am pleased to present this annual report on the Tribunal's activities in 2009-10.

TRIBUNAL MANDATE AND PURPOSES

The Tribunal is an independent, quasi-judicial body created to fulfill the purposes set out in section 3 of the *Human Rights Code*:

a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

c) to prevent discrimination prohibited by this *Code*;

d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*;

e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*.

The Tribunal was established in 1997. It was continued as a standing adjudicative body pursuant to March 31, 2003 amendments to the *Code*, which instituted a direct access model for human rights complaints. Its authority and powers are set out in the *Code*.

The direct access model is complainant driven. The Tribunal does not have investigatory powers. Complaints are filed directly with the Tribunal which is responsible for all steps in the human rights process. On receipt, the complaint is reviewed to see that the information is complete, the Tribunal appears to have jurisdiction over the matters set out in it, and the complaint is filed within the six-month time period set out in the *Code*. If it is accepted for filing, the Tribunal notifies the respondents of the complaint and they file a response to the allegations of discrimination. Unless the parties settle the issues, or a respondent successfully applies to have the complaint dismissed, a hearing is held and a decision about whether the complaint is justified is rendered.

The Tribunal's office and hearing rooms are located in Vancouver, although the Tribunal conducts hearings and settlement meetings throughout the Province. The Tribunal manages its staff, budget and physical facilities, and engages its own consultants and specialists. Pursuant to the *Code*, the Tribunal developed rules to govern its practice and procedure. Its registry function is managed by a Registrar who is a lawyer.

Some complainants and respondents may access government-funded legal assistance to participate in the human rights process. The provincial government allocates funding to other organizations to provide these services.

LESSONS LEARNED

After our seven years of operating under the direct access system for human rights protection in British Columbia, we can now conclude a number of things with some certainty.

First, the number of complaints filed in any year has remained remarkably consistent, being 1,100 to1,200 complaints.

Second, when fully staffed and resourced, the Tribunal can process that same number of complaints within a year so that the number of complaints in the system at any time does not exceed 1,100 to1,200.

Third, regardless of the nature of the complaint, and with few exceptions, both complainants and respondents want a quick, fair resolution. As a result, the investment of the Tribunal's resources in all forms of

settlement meetings, at any stage in the process, is beneficial. Settlements crafted by the parties, most commonly with the Tribunal's assistance, save the Tribunal's and the parties' time and resources, reduce the stress on those involved in a human rights complaint, and offer more creative, acceptable and durable solutions than adjudicated results. Settlements often extend beyond the human rights complaints to other disputes between the parties.

Fourth, while historical areas and grounds of discrimination continue to be a source of much of the Tribunal's work, the Tribunal's work increasingly deals with issues that are controversial as our understanding of the rights and obligations under the *Human Rights Code* evolve. As our society evolves, the potential for competing interests, values and rights continues to grow, making human rights adjudication ever more challenging.

Fifth, the timeliness and quality of the appointments and reappointments of Members to the Tribunal is essential to its ability to effectively handle the case volume and to render quality decisions with respect to what the courts have called the "almost constitutional" nature of the rights protected in the *Code*.

Finally, since the successful implementation of the direct access model, two other jurisdictions in Canada, Nunavut and Ontario, have modelled their human rights systems after it.

MEMBERS

The skill of the Tribunal's Members as mediators, and adjudicators in the hearing process, is essential to meeting the Tribunal's statutory mandate in a professional, competent and efficient way.

At the end of 2009-10, a senior Member of the Tribunal resigned and recruitment efforts are currently underway to replace her.

To fill a vacancy, the Tribunal holds a competition in which participants are required to relate their past experience to the work of the Tribunal, write two decisions based on representative fact patterns, attend a situational interview with a panel, including a representative of the Board Resourcing and Development Office, meet with the Chair, and undergo thorough reference checks.

TRIBUNAL WORKLOAD

MEMBERS

The Tribunal continued to have a significant workload. We released 437 decisions in the year, 380 of which were preliminary decisions many of which finally determined the issues in the complaint. The number of final decisions released was 57.

The trend of parties participating in our proceedings without the benefit of legal counsel continues. It results in the need for additional resources at all levels of processing of a complaint and longer hearings. The skills required of Tribunal Members include the ability to deal with self-represented participants and those who have literacy challenges and mental health issues.

At the start of the year, the Tribunal had 834 active cases in its inventory. By the end of the year that number had decreased to 829 despite the fact that there were 1,123 new complaints filed, up more than ten percent than the previous year. Active cases do not include cases deferred or stayed at the request of the parties pending the outcome of another proceeding, those settling, or cases where petitions for judicial review have been filed after a final decision.

LEGAL COUNSEL

Most of the Tribunal's legal counsels' time and attention is spent appearing on behalf of the Tribunal on

judicial review of its decisions. As will be seen from the summary of the judicial reviews which is outlined on the following pages, Tribunal decisions are consistently upheld by the BC Supreme Court and the BC Court of Appeal.

SETTLEMENTS

The Tribunal's settlement meeting services continue to be heavily used.

We encourage participation in settlement discussions and provide the option of a tribunal-assisted settlement meeting before the respondent files a response to the complaint, and at any later stage in the process. Each member schedules an average of six settlement meetings a month, and the Tribunal continues to use contract mediators and legal counsel as needed. Many complaints settle as a result of these efforts and creative solutions are achieved which could not be ordered after a hearing.

The Tribunal conducted 269 early settlement meetings (before a response to the complaint is filed) and 114 settlement meetings (at any point after a response to the complaint is filed and prior to the commencement of a hearing). In addition, the Tribunal provided settlement assistance to the parties in 12 cases in the midst of hearing. The parties are able to resolve their disputes in over 70% of all cases in which the Tribunal provides assistance. In addition, some cases settle without the Tribunal's involvement.

Because settlement meetings are usually a confidential process, the Tribunal does not publish the results. In many cases, the settlement meeting resolves other aspects of the parties' relationship and this has transformative impacts without the adversarial process of a hearing. Some cases resolve on the basis of an acknowledgement that there has been a breach of the *Code* and an apology. In others, the mediated solution results in systemic change and awards greater than those that might be obtained after a hearing.

THE COMING YEAR

The Tribunal is not immune from the fiscal challenges facing all agencies of government. Most of the Tribunal's budgetary expenditures are for salaries and rent. In regard to staff, as the organization chart that appears later in this Annual Report indicates, we are a very lean organization. The Tribunal's rent is fixed pursuant to a five-year lease on accessible and purpose-built premises. Our next biggest expenditure is in travel. The Tribunal significantly reduced its travel budget as a result of initiatives introduced in the last two years. Access to available government video conferencing facilities is still under discussion with the Ministry of the Attorney General. Staff suggestions and belt-tightening resulted in a significant reduction in our office and business expenses.

In June of this year, I was advised that my appointment as Chair of the Tribunal would not be renewed when it expires at the end of July. As a result, this will be my last Annual Report. A change in the head of an organization is always an unsettling time and that is particularly the case where the Chair has been largely responsible for the creation and management of the structure. I have been proud to serve in my capacity as Chair for the last ten years and believe that the structure that is in place will assist the dedicated and hard working Tribunal staff to weather the transition.

MY THANKS

The achievements of the Tribunal, about which you will read in this report, are the result of all those who work with me. They exemplify the highest standards of public service.

Heather M. MacNaughton
Chair

Cost of Operation

BC Human Rights Tribunal Operating Cost
Fiscal Years 2008-09 and 2007-08

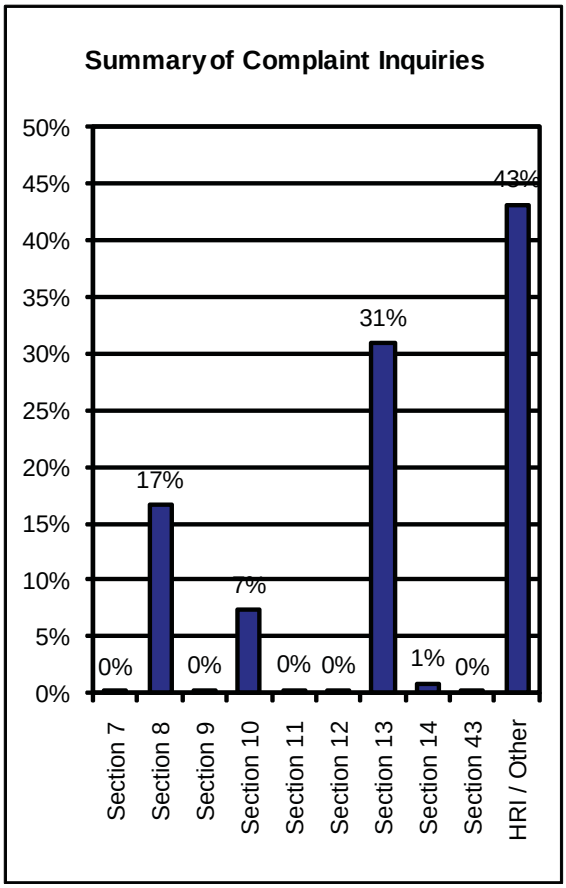
Category	2009-2010 Expenditure	2008-2009 Expenditure
Salaries (Chair, Members, Registry and Administration)	$ 2,241,133	$ 2,234,406
Employee Benefits	$ 576,215	$ 527,195
Retired Members – Fees for Completing Outstanding Decisions	$ 0	$ 2,100
Travel	$ 75,227	$ 87,034
Centralized Management Support Services	$ 0	$ 0
Professional Services	$ 67,769	$ 62,070
Information Services, Data and Communication Services	$ 3,495	$ 2,810
Office and Business Expenses	$ 64,598	$ 111,233
Statutory Advertising and Publications	$ 4,892	$ 4,933
Amortization Expenses	$ 33,933	$ 45,244
Building Occupancy and Workplace Technology Services	$ 630,349	$ 600,891
Total Cost	**$ 3,697,611**	**$ 3,677,916**

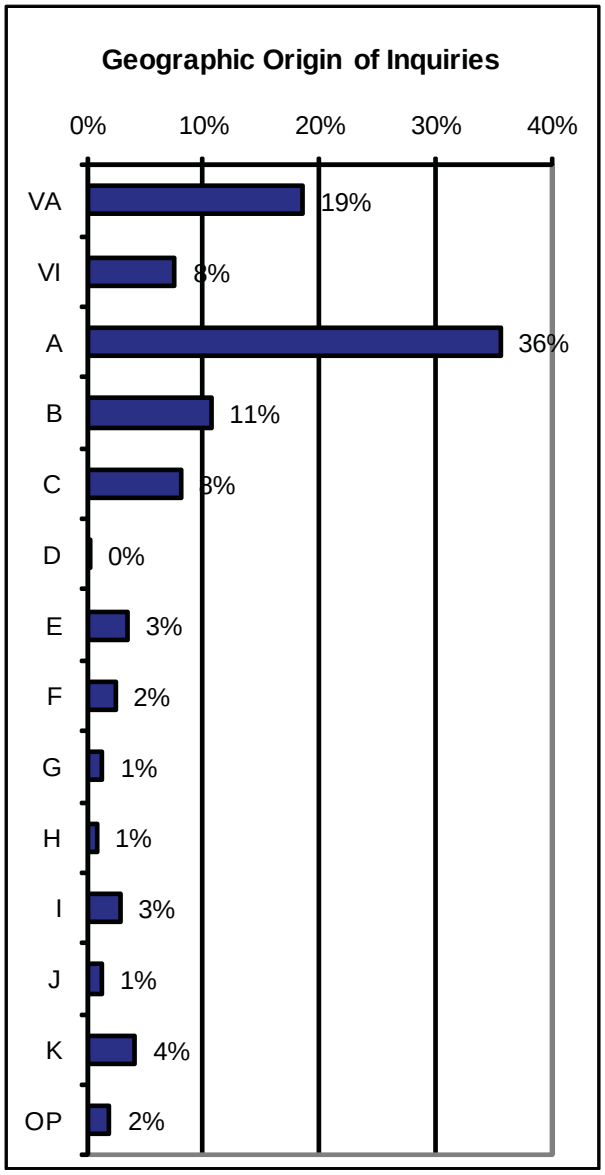
Inquiry Statistics

General inquiries about the Tribunal process are answered by two Inquiry Officers. The Inquiry Officers also provide basic information about the *Code* protections and refer callers to appropriate resources. They answered 9,092 inquiries this year, averaging 36 calls daily.

The highest percentage of complaint inquiries, 32%, related to employment (s. 13 and 14 of the *Code*). Inquiries relating to services (s. 8), represented 17% of the total inquiries, and those relating to tenancy (s. 10) represented 7%.

A toll-free number enables callers throughout the province to access the Inquiry Officers. The geographic origin of inquiries indicates that 19% originated from Vancouver, 36% from the Lower Mainland (excluding Vancouver), 8% from Victoria, and 38% from elsewhere in the province.





Legend

VA ..... Vancouver
VI ..... Victoria
A ..... Lower Mainland (Excluding Vancouver)
B ..... Vancouver Island & Gulf Islands (Excluding Victoria)
C ..... Okanagan
D ..... Rocky Mountains
E ..... Squamish / Kamloops
F ..... Kootenays
G ..... Sunshine Coast
H ..... Cariboo
I ..... Prince George Area
J ..... Skeena
K ..... Northern BC
OP ..... Out of Province

Complaint Statistics

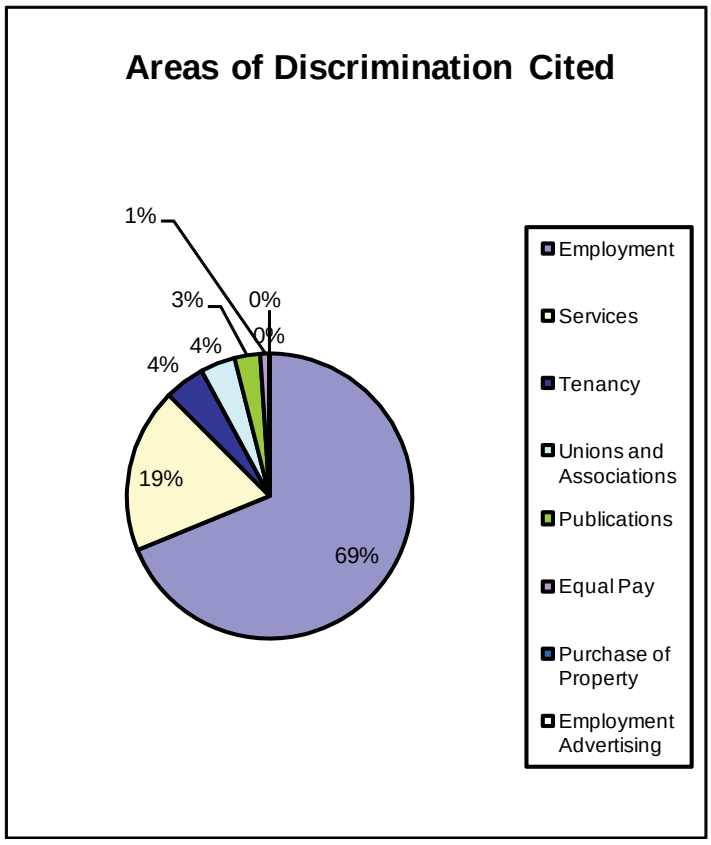
New Complaints

There were 1,123 new complaints filed at the Tribunal, of which 395 were screened out at the initial screening stage. The Chair makes all initial screening decisions to ensure consistency.

Areas of Discrimination

The *Code* prohibits discrimination in the areas of employment, employment advertisements, wages, services, tenancy, purchase of property, publication and membership in unions and associations. It also forbids retaliation against a person who makes a complaint under the *Code*.

Complainants cited the area of employment most frequently (69%), followed by services (19%), tenancy (4%), and membership in unions and associations (4%).

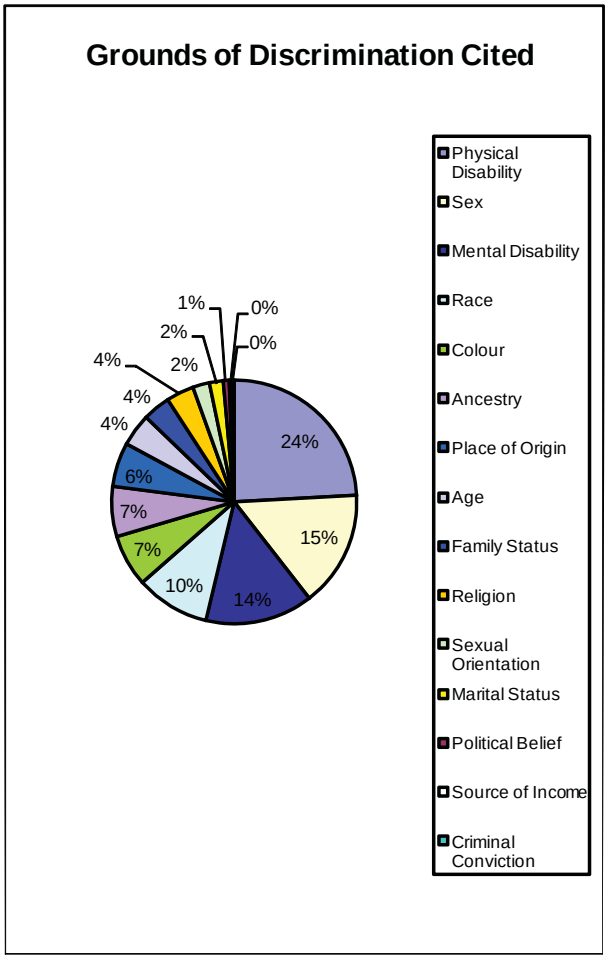


Grounds of Discrimination

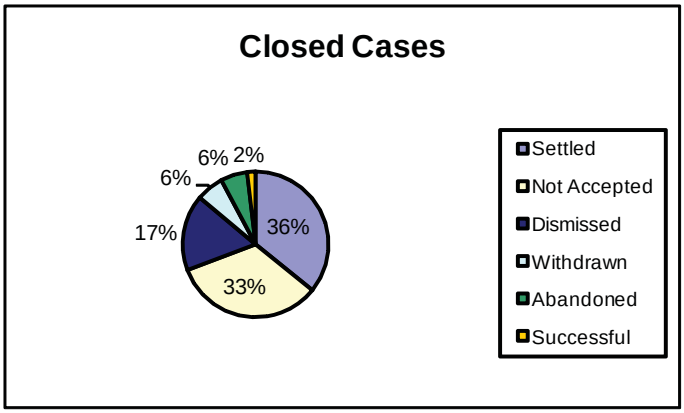
There are 15 prohibited grounds of discrimination: age (19 and over), ancestry, colour, family status, lawful source of income, marital status, place of origin, physical and mental disability, political belief, race, religion, sex (including harassment and pregnancy), sexual orientation, and unrelated criminal conviction. Not all grounds apply to all areas.

Some complaints cite more than one area and ground of discrimination. For instance, a complainant with a race-based complaint may also select grounds of ancestry, colour and place of origin.

As can be seen from the chart on the next page, the most common ground cited was physical disability (24%), followed by sex (including harassment and pregnancy) (15%), mental disability (14%), race (10%), and colour and ancestry (7%). Place of origin was at 6%, and age, family status and religion were at 4%. Sexual orientation and marital status were at 2%, while political belief was at 1%. Retaliation was cited in 3% of complaints. As a result of a BC Supreme Court decision in *Cariboo Chevrolet Pontiac Buick GMC Ltd. v. Becker*, 2006 BCSC 43, the ground of retaliation only applies after a human rights complaint has been filed.



The Tribunal has changed the way that it records complaints which are the subject of judicial review applications. This may marginally affect some of the statistics reported in this year as compared to earlier years.



CLOSED CASES

The Tribunal closed 1,181 cases this year. Cases are closed when they are not accepted at the initial screening stage, withdrawn because they have settled or otherwise, abandoned, dismissed, or a decision is rendered after a hearing. This year, 395 complaints were not accepted at the initial screening stage, 125 were dismissed under s. 27, 48 were dismissed under s. 22, and 48 decisions were rendered after a hearing, of which 22 were successful and 26 were dismissed. Due to administrative timing, some of these cases may not be closed in the same fiscal year as the decisions were rendered. The balance (565) were settled, withdrawn or abandoned.

Dismissal Applications

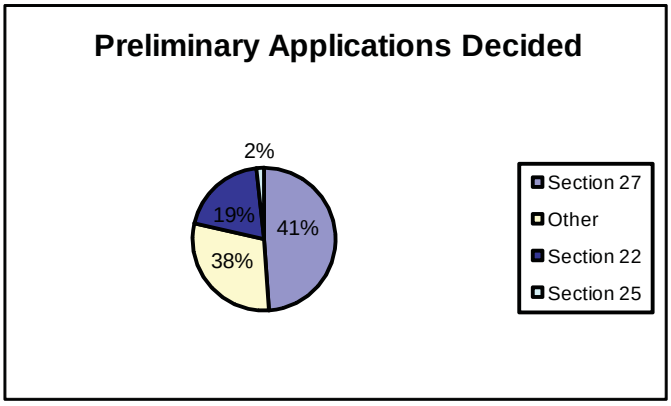
Screening

Normally, the Tribunal decides whether to accept a complaint based only on the complainant's submissions. On occasion, the Tribunal notifies the respondents of the complaint and asks for submissions on whether a complaint should be accepted at the screening stage.

Cases of Note:

A complainant alleged that a female co-worker was sexually harassed and the employer did not take appropriate steps to address the discrimination. He quit his job as a result. His complaint was not accepted for filing because it did not allege acts or omissions that could constitute discrimination on the basis his sex. (*da Silva v. Sammy J. Peppers and others*, 2009 BCHRT 379)

The issue of whether a complaint was within provincial or federal jurisdiction could not be resolved on the materials filed, so the Tribunal accepted it for filing and did not make a final decision on the jurisdictional issue at the screening stage. (*Motuz v. Songhees Nation and another*, 2009 BCHRT 405)



Dismissal Applications

Section 27(1) allows the Tribunal to dismiss, on a preliminary basis, complaints that do not warrant the time or expense of a hearing on the merits.

A complaint may be dismissed under s. 27(1) without a hearing. Generally, applications to dismiss a complaint are decided based on written submissions and materials. The Tribunal's *Rules of Practice and Procedure* require applications to dismiss to be brought early in the processing of a complaint.

The *Code* sets out seven reasons for dismissing a complaint without a hearing:

- There is no jurisdiction;
- There is no contravention of the *Code*;
- There is no reasonable prospect of success;
- Proceeding with it would not benefit those discriminated against or further the purposes of the *Code*;
- The complaint was filed for improper motives or in bad faith;
- The complaint was appropriately dealt with in another proceeding; and
- The complaint was filed out of time.

Applications to dismiss accounted for 41% of preliminary decisions this year. Of the 226 decisions, 125 (55%) were dismissed and 27 (12%) were partially dismissed. 74 (33%) dismissal applications were denied.

The Role of the Tribunal

When to consider applications to dismiss a complaint, and whether to do so, are discretionary decisions. The Tribunal exercises its specialized expertise in adjudicating human rights complaints and does so in accordance with the purposes of the *Code* and the Tribunal's Rules. In dismissing a complaint on a preliminary basis, the Tribunal performs what the Court of Appeal has called a "gate-keeping" function, by deciding whether a complaint warrants the time and resources of a full oral hearing. (*D'Cruz v. Stl'atl'imx Tribal Police Board and others (No. 3)*, 2009 BCHRT 420)

SECTION 27(1)(a) - NO JURISDICTION

The Tribunal may dismiss a complaint because of a lack of jurisdiction when it is against a federally-regulated company, the conduct was outside BC, or if the alleged area or ground of discrimination does not apply to the facts alleged.

CASES OF NOTE:

A transportation company falls under federal jurisdiction if its international or interprovincial services are a "continuous and regular" part of its operations. This is true even if the complainant was not involved in that part of the business. Jurisdiction is determined by the scope of the business, not the complainant's involvement in it. (*Bombo v. Livingston International and others*, 2009 BCHRT 236) (See also: *Schramm v. Auntie Fanny's and another*, 2009 BCHRT 416)

The Tribunal has jurisdiction over a complaint against a company in the business of fish farming, processing, distribution, and sales. The company's labour relations, including human rights protections, are not integral to the federal authority over fisheries. (*Krawietz v. Marine Harvest and another*, 2010 BCHRT 22)

Employment by a band under the *Indian Act* is subject to federal jurisdiction. It is different from employment by an agency that a band operates to provide essentially provincial services. (*Charleyboy v. Soda Creek Indian Band*, 2009 BCHRT 268

The Tribunal has jurisdiction over a complaint that the Employment and Assistance Appeal Tribunal discriminated when it processed an appeal. (The complaint was dismissed on other grounds.) (*B v. B.C. (Min. of Housing and Social Development) and others*, 2009 BCHRT 299)

SECTION 27(1)(b) - NO CONTRAVENTION OF THE *CODE*

The Tribunal can dismiss a complaint under s. 27(1)(b) if the acts or omissions alleged do not contravene the *Code*.

The Tribunal performs a gate-keeping function in considering these applications and the threshold a complainant must satisfy is low. The Tribunal only considers the facts set out in the complaint to determine whether if those facts are proven, it can draw an inference that discrimination occurred.

CASES OF NOTE:

The complainant alleged that because of his disability, he was excluded from an early retirement plan offered to able-bodied employees. This information set out the required elements of a complaint and the only facts considered are those alleged in the complaint. The purpose, structure and rationale behind the early retirement plan are set out in the response to the complaint, and are considered under s. 27(1)(c) of the *Code*, not s. 27(1)(b). (*Norbert v. Clear Lake Sawmills and Canfor Corporation*, 2009 BCHRT 157)

SECTION 27(1)(c) - NO REASONABLE PROSPECT OF SUCCESS

The Tribunal can dismiss a complaint under s. 27(1)(c) where it concludes, based on all the material filed, that there is no reasonable prospect it would be found to be justified if the complaint goes to a hearing.

CASES OF NOTE:

A complainant is not required to establish a reasonable prospect of success, rather the burden is on a respondent to show that the complaint has no reasonable prospect of success. Because of their religious beliefs, bed and breakfast operators denied accom-

modation to a gay couple. The respondents applied to dismiss the complaint. The case involved balancing competing rights and in the absence of evidence and legal argument, the Tribunal could not determine there was no reasonable prospect of success. (*Eadie and Thomas v. Molnar and others*, 2010 BCHRT 69)

On the other hand, a complainant must provide more that speculation that the alleged conduct was based on a ground of discrimination.

Disputes arise in the workplace where an employer is dissatisfied with an employee's performance. The employer may take corrective action. However, it is not discrimination unless an employer's actions were, at least in part, because of a prohibited ground in the *Code*. There is no reasonable prospect of success where an allegation of discrimination is merely speculative. (*Weilbacher v. Dyrand Systems (No. 2)*, 2010 BCHRT 6)

While the Tribunal acknowledged that it is difficult to prove discrimination in the hiring process, a complaint of age and gender discrimination was speculative. The employer provided enough information to show that the successful candidate was more suitable, that it wanted to consider the complainant for other positions consistent with his age and experience, and that it employed both older and male employees. (*White v. Abbotsford Community Services*, 2009 BCHRT 269)

The Tribunal assesses credibility on a global basis to determine, on all of the materials before it, whether a complaint has no reasonable prospect of success. A denial that the alleged conduct occurred would not usually, on its own, be enough to show there is no reasonable prospect of success. The Tribunal dismissed a complaint, however, where the respondents provided detailed affidavits, including one denying the alleged comments. The complainant had not identified the offensive remarks in his complaint, had changed his version of the context, timing and content of them, and in a complaint in another forum said that the respondent had "said nothing". (*Zampieri v. Maple Leaf Self Storage and others*, 2009 BCHRT 171)

However, where the parties allege significant differences in their versions of the events, and those differences are crucial to a determination, a hearing will often be needed to test the conflicting evidence. (*Dickey v. Coast Mountain Bus Company*, 2009 BCHRT 323)

The Tribunal denied an application to dismiss where there were conflicting affidavits on central issues. It noted that in many cases about accommodation of disability, it is difficult to determine on a preliminary basis whether each party fulfilled its responsibilities. Here, the employer and employee disagreed about both the accommodation process and its outcome. (*Jussila v. Finning International*, 2009 BCHRT 413)

The Tribunal dismissed a student's complaint alleging a failure to accommodate her learning disabilities. While the post secondary institution had a duty to accommodate, each time it responded to her complaints, she made new complaints and it was impossible to satisfy her escalating demands. The complainant had an obligation to accept a reasonable accommodation, not demand a perfect one. (*Fodor v. Justice Institute of British Columbia*, 2009 BCHRT 246)

A condominium owner alleged her strata discriminated against her on the ground of physical disability by installing new windows that negatively affected her medical condition. There was no reasonable prospect the complainant would be able to show the strata knew of her disability before the installation, or that her medical information supported that the windows had an adverse impact on her condition. Further, the complaint was premature since she had not given the strata the information it needed to

determine if an accommodation was required or to what extent, and what options were available short of undue hardship. (*Menzies v. Strata Plan NW 2924*, 2010 BCHRT 33)

In the area of publication, the Tribunal dismissed a complaint about a newspaper column that portrayed feminists in a negative stereotypical manner. The Tribunal considered:

- the need to balance the right to equality and the right to freedom of expression;
- women continue to be subject to discrimination;
- the words used were offensive to the complainant but not "hateful" and do not "expose the target group to feelings of an ardent nature and unusually strong and deeply felt emotions of detestation, calumny and vilification"; nor are they likely to have an adverse effect on women;
- the writer acknowledged he was expressing his opinions which were controversial on matters of social and religious debate;
- the social and historical background of the publication;
- the credibility and manner and tone of presentation of the article;
- that it is not enough that a publication is poorly researched, inaccurate or based on negative stereotypes to breach the *Code*. (*Watt v. The Abbotsford Times and others*, 2009 BCHRT 141)

SECTION 27(1)(d)(i) - PROCEEDING WITH THE COMPLAINT WOULD NOT BENEFIT THE PERSON, GROUP OR CLASS ALLEGED TO HAVE BEEN DISCRIMINATED AGAINST

The Tribunal dismissed a complaint where the respondent companies were defunct and the complainant agreed that there would be no benefit to her by continuing the complaint process. (*Larsen v. Opel Financial and Investment Group and others (No. 3)*, 2009 BCHRT 186)

SECTION 27(1)(d)(ii) - PROCEEDING WITH THE COMPLAINT WOULD NOT FURTHER THE PURPOSES OF THE *CODE*

The Tribunal dismissed a complaint of sex discrimination where men working at a historic tourist attraction were prohibited from wearing earrings. While workplace dress and grooming policies should usually be applied equally, in limited circumstances, such as hair length and earrings, the law allows some latitude for minor distinctions based on sex. Here, the restriction was not arbitrary, but was related to the period dress employees wore. (*Callahan v. Capilano Suspension Bridge*, 2009 BCHRT 127)

It would not be an efficient use of the Tribunal's or the parties' resources to hold a hearing where the employer had promptly addressed the discrimination issue, offered the job opportunity to the complainant, and made a reasonable "without prejudice" settlement offer. The offer met the requirement for a "with prejudice" offer on an application to dismiss under s. 27(1)(d)(ii) of the *Code*. It also met the second requirement of being reasonable. While not an admission of liability, the offer acknowledged that the conduct may have violated the *Code*. The compensation offered was within the Tribunal's range of awards at hearings. (*Moiceanu v. BC Hydro and Power Authority and another*, 2009 BCHRT 275)

It would not further the purposes of the *Code* to proceed with a complaint where the respondents made a reasonable settlement offer which it left open for two weeks after the decision on the dismissal application. While the offer was not marked "with prejudice", it was clear that the respondents would disclose the offer to the Tribunal in a dismissal application. Although not identical to the remedies that might be ordered if the complaint was successful at a hearing, the offer was comprehensive in accordance with the goals the *Code*, and there were no public policy considerations requiring that the complaint proceed. (*Grant v. FortisBC and others*, 2009 BCHRT 336)

Dismissal Applications

The Tribunal dismissed a complaint where the employer promptly took appropriate steps to remedy the alleged discrimination, by arranging that the complainant no longer had to work with the other employee, who received training to ensure that similar conduct would not reoccur. The Tribunal encourages employers to establish, use and enforce workplace discrimination policies to deal directly and appropriately with discrimination allegations. (*McLuckie v. London Drugs and another*, 2009 BCHRT 409)

Section 27(1)(e) - Complaint filed for improper purposes or in bad faith

It is not enough to present a different version of events and allege the complainant is untruthful to establish that the complaint was filed for improper motives or made in bad faith. Only exceptionally will the Tribunal be satisfied that a complaint was filed without an honest belief that the complainant experience discrimination. (*Benny v. Ben Moss Jewellers and another*, 2009 BCHRT 335)

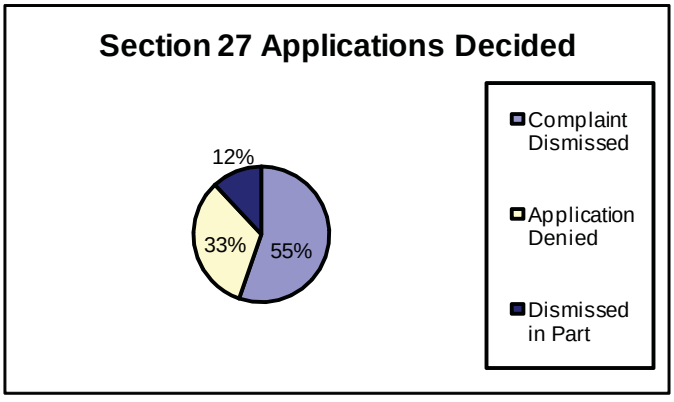
Applications under s. 27(1)(e), alleging that a complaint is filed for improper purposes or in bad faith, raise serious issues, which may have very serious consequences for a complainant, including dismissal of the complaint, findings of personal impropriety and potential liability for costs for improper conduct. A respondent must meet a high standard to have a complaint dismissed under s. 27(1)(e). Here, the employer made an arguable case, but both parties deserved a full opportunity to put forward all their information before the Tribunal decided the issue. (*Matesan v. B.C. (Min. of Public Safety)*, 2009 BCHRT 281) (See also: (*D'Cruz v. Stl'atl'imx Tribal Police Board and others (No. 3)*, 2009 BCHRT 420)

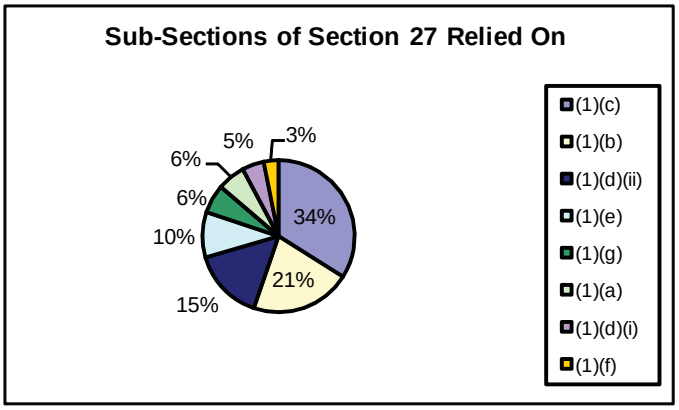
Section 27(1)(f) - Complaint appropriately resolved in another proceeding

An employee complained that the collective agreement discriminated against him on the basis of physical disability. He had made the same complaint about the union to the Labour Relations Board under s. 12 of the *Labour Relations Code*, and it, and a reconsideration panel, denied the complaint. The complainant and the union were parties to both proceedings, and while the complaint to the Board could only be filed against the union, the discrimination issue against the employer was fully litigated before the Board, where the employer was given an opportunity to respond. The complaint was dismissed as it had been appropriately dealt with and should not be relitigated at the Tribunal. (*Sharrock v. Nanaimo Forest Products and PPWC, Local 8 (No. 2)*, 2009 BCHRT 339)

Section 27(1)(g) - Alleged contravention outside the time limit

Decisions on applications to dismiss a complaint under section 27(1)(g) are reviewed under time limit decisions (section 22). There were 33 applications which resulted in 12 complaints being dismissed in whole or in part.





OTHER PRELIMINARY APPLICATIONS

SCREENING

The Tribunal did not accept a complaint where a male manager resigned because the company refused to dismiss a male employee who had sexually harassed a female employee. He alleged employment discrimination on the basis of sex. While it may be principled and honourable, the manager's resignation was not the result of discrimination against him based on his sex, as s. 13 of the *Code* requires. (*da Silva v. Sammy J. Peppers and others*, 2009 BCHRT 379)

A complainant alleged he was discriminated against in employment by the Chief of an Indian Band on the ground of family status. He was the successful candidate for a job at the Band health centre, but said that his employment was not confirmed after he was asked about his relationship with his sister, a Band member. The Tribunal did not have jurisdiction because the employment was federally regulated. The Band operated a federally funded health centre targeting health concerns disproportionately affecting aboriginals. Its services were provided by Band members for Band members on a reserve. The job was integral to the primary federal competence over Indians under s. 91(24) of the Constitution Act, 1867. (*Yamelst v. Blain*, 2009 BCHRT 400)

The Tribunal held that it had jurisdiction over a complaint alleging discrimination in employment and differential wages based on sex, involving a fish farming company. The company's labour relations, including human rights protections, were not integral to the exercise of federal authority over fisheries. (*Krawietz v. Marine Harvest and another*, 2010 BCHRT 22)

TIME LIMIT

That a complaint was about a poorly understood disability might be a factor making it in the public interest to accept it late but not where there was an inadequately explained lengthy delay. (*Wilkinson v. Edgewood Treatment Centre*, 2009 BCHRT 155)

The public interest in a complaint of serious allegations of racial segregation in the workplace outweighed the fact it was filed a week late. (*Hansen v. Lyncorp Drilling Services and others*, 2009 BCHRT 156)

The Tribunal refused to accept a complaint that was 3 days late where the complainant had legal advice to file it on time. (*Andres v. Hiway Refrigeration and Grehan*, 2009 BCHRT 135)

A Tribunal case manager mistakenly accepted for filing a complaint that was out of time. The Tribunal had jurisdiction to seek submissions and decide whether to accept the late filed complaint. (*Seifi v. North Shore Multicultural Society*, 2009 BCHRT 144)

Without deciding whether allegations about similar conduct experienced by two or more complainants separately could form a continuing contravention of the *Code*, it was a relevant factor that they related to different individuals and were separated by a significant time gap. (*Jimenez and Ayers v. Primerica Financial and another*, 2009 BCHRT 230)

Other Applications

A complaint of sexual harassment filed a year late was not accepted. The employee participated in an internal investigation and she and her union representative must have been aware of a collective agreement reference to the right to file under the *Code*. (*Humpherville v. Gateway Casinos and another*, 2009 BCHRT 270)

The Tribunal accepted a disability complaint filed 2 months late. The complaint raised substantial issues about discrimination and an employer's duty to accommodate. There was a public interest in accepting it, in the absence of strong countervailing reasons not to. The employer knew of the complainant's concerns throughout and the Tribunal did not accept the arguments of substantial prejudice without a factual foundation. (*Mitchell v. CNIB*, 2009 BCHRT 354)

The Tribunal accepted a complaint filed 10 months late where the complainant pursued her concerns in other forums, including filing a complaint at the Canadian Human Rights Commission within its time limit only to be advised it did not have jurisdiction. (*Clair v. WorkSafe BC*, 2009 BCHRT 390)

A Métis complainant alleged he was denied a licence to sell jewellery from 2006 to 2009 on a city harbour controlled by a First Nations Band because of his status. The Tribunal found that the applications prior to 2009 were not continuing contraventions as each denial was a new and separate act that lacked a continuing character and the separation in time between each year's request and denial was too great. Also, it was not necessary to accept the earlier allegations in order for the Tribunal to consider whether the policy was discriminatory. (*Motuz v. Songhees Nation and another*, 2009 BCHRT 405)

The Tribunal accepted an employment complaint on the ground of mental disability although some of it was filed late. The disability was difficult to diagnose or recognize and the complaint raised significant and infrequently encountered legal questions about when there may be an obligation to inquire about the possibility of a disability, and the related difficulty of arranging and settling matters without knowledge of a mental disability. These factors engaged the *Code*'s purposes and the answers may guide parties in the future. (*Rezaei v. University of Northern British Columbia and another*, 2009 BCHRT 406)

The Tribunal accepted an employment complaint filed 10 months late where the complainant's mental disability prevented her from filing in time. It is important to ensure that mental disability does not act as a bar to accessing the Tribunal's process. (*Wangler v. Varsteel*, 2010 BCHRT 18)

It was not in the public interest to accept a complaint filed 6 months late where it would require revisiting a settlement reached 5 years earlier. (*Gabre v. City of Surrey and CUPE, Local 402*, 2010 BCHRT 82)

Section 27(1)(g)

The Tribunal relied on the complainant's inaccurate chronology in initially accepting a complaint. That information, and a later affidavit, showed a pattern of misleading statements about the timeliness of the complaint, and were considered to be equitable factors favouring giving the respondent the benefit of the statutory time limit. (*Stewart v. Victoria Habitat for Humanity and others*, 2009 BCHRT 100)

A parent alleged continuing contraventions by a school district that included a teacher's failure to deal appropriately with problems between her child and other students. The Tribunal found no continuing contravention because the allegations did not link the teacher's conduct to the grounds of disability or place of origin, so the actions complained of could not be part of a repetition or succession of acts that could constitute contraventions of the *Code*. The Tribunal also did not accept that comments allegedly made by the school principal were part of a continuing contra-

vention when no date or context was provided. The complainant provided no explanation for the delay and a change in the school district's policy made part of the complaint moot. (*A obo B v. School District No. C and another*, 2009 BCHRT 256)

A deaf complainant alleged that she was evicted from her apartment because of complaints about her care dog and also complained about a note posted about the dog. The Tribunal found that it was in the public interest to accept the part of the complaint about the note, which was several days late, as it raised a novel question of whether a note on an apartment bulletin board amounts to publication under the *Code*, and if so, whether its substance was discriminatory. In addition, the posting of the note was inextricably linked to timely allegations of discrimination in tenancy. (*Devine v. david burr and others*, 2009 BCHRT 345)

A union filed a complaint against a government ministry and the Workers' Compensation Board on behalf of ambulance drivers, attendants and paramedics alleging discrimination in services on the grounds of physical and mental disability in respect of a statutory and policy framework about compensation for mental stress. Both respondents applied to dismiss the complaint under s. 27(1)(g). Only one union member's complaint was in time, the others were 5 to 24 months late.

The Tribunal held that it did not need to decide if the complaint had to be timely with respect to all members of the class. It was in the public interest to accept it because it related to the operation of workers' compensation legislation and policies, which had far reaching application and consequences for workers. One of the purposes of the *Code* is to identify and eliminate persistent patterns of inequality. Dealing with the issue as a class complaint was a more efficient use of resources, and promoted consistency in decision-making. Treating each person within a class as an individual complainant would defeat the purpose of s. 21(4), which allows a complaint on behalf of a class of persons and to provide an efficient means of redress for those who have been discriminated against. Accepting the class complaint was also consistent with the principle of fair access to the Tribunal, as it would be unfair to allow some members to pursue his complaint while denying other similarly affected members the right to do so.

The Tribunal concluded it would not presume prejudice from a substantial delay. Time issues regarding individual members and remedy could be addressed at the hearing. (*CUPE, Local 873 v. B.C. (Min. of Labour and Citizens' Services) and WCB (No. 2)*, 2009 BCHRT 446)

DEFERRAL

While most of the factors the Tribunal applies when considering deferring its proceedings to a grievance were neutral, a time limited deferral was appropriate. Proceeding with both would sap the parties' resources, particularly where one party was a non-profit organization. (*Balga v. Delta Community Living and another*, 2009 BCHRT 257)

The Tribunal deferred a retaliation complaint until an arbitration, nearing completion, finished. The arbitration had taken significant time and resources and the complainant conceded it might resolve his retaliation complaint. The original complaint had already been deferred to the same arbitration and both complaints should be dealt with together to determine whether the arbitration had appropriately dealt with the issues. (*Doherty v. B.C. (Min. of Children and Family Development) and another*, 2009 BCHRT 348)

Other Applications

Adding Respondents

In a racial discrimination complaint, an employee applied to add as respondents unidentified people who may have worked for the employer and a foreman who had been disciplined for an incident. The Tribunal declined to add the respondents because it was not in the public interest to do so as there was no persuasive explanation for the complainant's delay, and he failed to show that he would be deprived of a remedy. The foreman had a reasonable expectation that the racial incident had been dealt with. (*Scott v. Otis Canada (No. 2)*, 2009 BCHRT 213)

A factor in whether to add a respondent is the public interest. The Tribunal added a car manufacturer as a respondent in a paraplegic's complaint against a dealership that did not provide a courtesy car with hand controls. The Tribunal decided that it was in the public interest to add the manufacturer as the complaint raised issues not previously considered in regard to whether the manufacturer could be in a service relationship with the complainant. (*Derksen v. Murray Pontiac and another*, 2009 BCHRT 288)

Correction and Reconsideration of Decisions

The Tribunal's jurisdiction under Rule 37.1 to correct a technical error in a decision does not extend to making a new finding of fact. The Tribunal would also not reopen a decision, pursuant to its equitable jurisdiction, to address the effects of the Tribunal's factual findings on a non-party who had not been identified by name. (*Kalyn v. Vancouver Island Health Authority (No. 4)*, 2009 BCHRT 134)

The Tribunal reopened a decision to accept a late-filed complaint and reversed its conclusion where the Tribunal's decision to accept the complaint was based on the complainant's incomplete, inaccurate and misleading representations. The respondent acted prudently, reasonably, and promptly, in ruling out other explanations for the inconsistencies before applying to reopen, following receipt of disclosure of documents. In these circumstances, it was not in the public interest to accept her late-filed complaint. (*Wells v. UBC and others (No. 3)*, 2009 BCHRT 284)

The Tribunal refused to reconsider a dismissal decision under s. 27(1)(d)(ii) where the complainant had filed a petition for judicial review. He asserted that the Tribunal preferred the respondents' material and argued that he was not given a chance to respond to an affidavit. He further alleged unfairness because he did not have an opportunity to present evidence at a hearing. The complainant did not ask to file a sur-reply. As the Tribunal does not sit in appeal of its own decisions, its authority to reconsider does not extend to reopening decisions because one party or another feels that it contains errors. (*Karbalaeiali v. Vancouver Trolley and another (No. 2)*, 2009 BCHRT 370)

Limiting Publication

The Tribunal refused to grant an order limiting publication of information where some information was already published in an earlier decision. It noted that parties face a loss of privacy because the public has access to its legal proceedings. The applicant feared harm to her reputation but she had not discharged the heavy burden of showing that her privacy interest outweighed the public interest in the tribunal process. (*Kung v. Peak Potentials Training and others (No. 2)*, 2009 BCHRT 154)

The Tribunal ordered that employees not named as respondents, against whom potentially damaging allegations of sexual harassment had been made in the complaint, be identified by initials only until the hearing. Information about the location of the particular store concerned was also limited to protect them,

but the Tribunal refused to protect the identity of the corporate respondent. Sexual harassment allegations may be more damaging to personal reputations than other sorts of allegations, especially prior to hearing. It was not an impediment that there was no affidavit evidence respecting their privacy interests as they could be reasonably inferred in this case. (*Musa v. Costco*, 2009 BCHRT 271)

The Tribunal refused a newspaper's access to exhibits entered in an ongoing hearing. The exhibits were professional disciplinary files containing complaints against persons who were not parties to the Tribunal proceedings and who had an expectation of privacy. Many disciplinary proceedings had resolved without publicity. Some contained highly personal information that would be difficult to redact while retaining the context. Such Disclosure might undermine public confidence in the Tribunal's and the disciplinary body's processes. The application was made early in the hearing, so there had been no determination made on the information's relevance or weight. (*Brar and others v. B.C. Veterinary Medical Association and Osborne (No. 13)*, 2010 BCHRT 81)

TIME EXTENSIONS

The Tribunal did not extend the time limit for filing an application to dismiss where the respondent may have misunderstood the process, but it was unlikely to be successful and allowing an extension might have a negative impact on settlement meeting and hearing dates. (*Moore v. Vanguard Security Services and others*, 2009 BCHRT 168)

ADJOURNMENTS

With no submissions from the complainant, the Tribunal refused a respondent's application to adjourn deeming it unreasonable as it was based on unspecified and unsupported "scheduling conflicts" and "travel requirements" of "key staff", and the hearing date had been set months before. (*Pupic v. Gateway West Property Management (No. 3)*, 2009 BCHRT 296)

A professional regulatory body sought a six-month adjournment of a hearing after 280 completed hearing days to secure funding. An insurer had withdrawn coverage of defence costs. Coverage with another insurer was close to its limits. Because of concerns about confidentiality and privilege in its discussions with the first insurer and the government, the respondent provided no certainty that a lengthy adjournment might result in a positive outcome. It was also open to the respondent to raise money from its membership and it had not committed to take this step in the six-month period. That there had been breaks in the hearing dates did not mean that yet another gap would not prejudice the other parties.

The Tribunal accepted that the complainants' vulnerability to allegedly discriminatory disciplinary practices might be magnified if there were a further delay, but a short delay would not necessarily add to it. It granted a two week adjournment, indicated the information needed if a further adjournment was requested, and instructed the parties to ascertain if settlement discussions were possible. (*Brar and others v. B.C. Veterinary Medical Association and Osborne (No. 11)*, 2009 BCHRT 382)

A further adjournment was subsequently granted. (*Brar and others v. B.C. Veterinary Medical Association and Osborne (No. 12)*, 2009 BCHRT 422)

A lengthy hearing was adjourned pending a judicial review of a Tribunal decision removing individual respondents from a complaint. If the judicial review was successful, a hearing involving the individuals would have to be held and an adjournment would prevent fragmented, duplicated hearings. To limit any delay, the Tribunal agreed to set new hearing

dates as soon as the judicial review outcome was known. (*Zahedi v. Xantrex Technology (No. 3)*, 2009 BCHRT 403)

AMENDMENT OF A COMPLAINT

The Tribunal refused to accept proposed amendments, characterized as "particulars", to a complaint filed years earlier, as they were really late-filed amendments and would amount to a significant retroactive expansion of the time frame of the complaint. It was not in the public interest to adjudicate on whether stereotypical presumptions about men and fathers were applied in 1996 as too much time had passed to make a decision relevant to fulfilling the purposes of the *Code*. To accept the amendments would be prejudicial to the Director due to the passage of 13 years. (*Trociuk v. B.C. (Ministry of Health) (No. 3)*, 2009 BCHRT 361)

NO EVIDENCE MOTION

An aboriginal person alleged individual and systemic discrimination on the basis of ancestry and religion because he was denied access to aboriginal spiritual services while in prison. The Tribunal refused to dismiss the systemic complaint on a no evidence motion, or to limit the range of remedies available if the individual complaint was found to be justified. The relief should be addressed at the conclusion of the case. Further, as in this case, evidence of individual and systemic discrimination is often interwoven. Information about the systemic aspect was within the respondent's knowledge and control and the complainant could rely on evidence in the respondent's case. It was in the public interest to address the issues as completely as possible at this time. (*Kelly v. B.C. (Min. of Public Safety and Solicitor General) (No. 2)*, 2009 BCHRT 363)

SUR-REPLY

The Tribunal denied the respondents' application for sur-reply, deciding that a just and timely resolution of the complaint could be effected by not considering the part of the complainant's reply submission that tried to amend her complaint by alleging further violations of the *Code*, which were not part of the original complaint. (*Preston v. TRIUMF and others*, 2009 BCHRT 388)

Sur-reply is not limited to a response to new issues. The fundamental question is not whether new issues or information are raised but whether fairness requires that a party be given an opportunity to file further submissions in reply. Here, a complainant wanted to introduce new information which he could have discovered before his response was filed. The information was clearly relevant to an application under s. 27(1)(e), which could have serious consequences beyond dismissal of the complaint and places a high standard on a respondent seeking dismissal. Because of the potential consequences, fairness demanded that both parties have a full opportunity to put all relevant information before the Tribunal. The complainant was permitted to file submissions and affidavits in sur-reply and the respondent was permitted to cross-examine on the affidavits. (*Matesan v. B.C. (Min. of Public Safety)*, 2009 BCHRT 281)

DISCLOSURE

On the basis of privilege, a complainant opposed an application for disclosure of communications between him and the association which was his exclusive bargaining agent. The Tribunal accepted that communications between a union member and a union representative about a member's rights in relation to their employer satisfy the Wigmore test and are privileged. Although the association was not a union and there was no grievance filed, the Tribunal found that the Wigmore test did not turn on the certification

as a union, but on the confidential and representative nature of the relationships. As it decided there was no distinction between the association and a union, relevant to the issue of privilege, the Tribunal refused to order disclosure of most of the documents. (*Worobec v. University of British Columbia (No. 2)*, 2010 BCHRT 47)

FINAL DECISIONS

This year there were 48 final decisions made after a hearing on the merits.

Forty-two per cent of the complaints (20 of 48) were found justified after hearing. This compares to 36% in 2008/2009, 33% in 2007/08, 36% in 2006/07, and 40% in 2005/06. The success rate where the complainant appeared at the hearing was higher: 47% of the complaints (20 of 43) this year, as compared to 38% in 2008/2009, 42% in 2007/2008, and 42% in 2006/2007.

REPRESENTATION BEFORE THE TRIBUNAL

The Tribunal dismissed five complaints where the complainant did not attend.

Respondents did not attend three hearings. The Tribunal found the complaints justified in two of those cases, but dismissed the complaint where neither party attended.

As in prior years, complainants were unrepresented in more hearings than respondents. They had legal counsel in 20 cases, while respondents had legal counsel in 30 cases. Counsel from the Human Rights Clinic represented complainants in five of the cases. Complainants had no legal representation in 53% (23 of 43) hearings they attended. On the other hand, respondents had no legal representation in 33% (15 of 45) hearings they attended.

In past years, the Tribunal has noted a correlation between success and legal representation for complainants. This year, the difference in the success rate was not as significant. Complainants with counsel succeeded in 50% of their cases, while those without counsel succeeded in 43%. (Last year the success rate was 52% with counsel and 28% without.)

For respondents, the complaint was found to be justified in 40% of the cases where the respondent had counsel, as well as where they did not. (Last year the percentages were 38% and 30%, respectively.)

The complaints were found to be justified in 43% of the cases where both parties had legal counsel (6 of 14) and where only the respondent had legal counsel (also 6 of 14). The complaints were justified in 50% of the cases where only the complainant had counsel (2 of 4) and 44% of the cases where neither party had counsel (4 of 9). Complainants also had counsel in two of the cases where the respondent did not appear.

CASE HIGHLIGHTS

A complaint may cite allegations of discrimination in more than one area and ground. This year, the final decisions involved complaints in the areas of employment (s. 13), lower rate of pay based on sex (s. 12), services (s. 8), tenancy (s. 10), publication (s. 7), membership in a union, employer's organization, or occupational association (s. 14), and retaliation (s. 43). No decisions were about purchase of property (s. 9) or employment advertisements (s. 11).

EMPLOYMENT

Employment cases totalled 34 of the 48 final decisions (71%). Thirteen (38%) were found to be justified. Another employment case was found justified under s. 12, lower rate of pay based on sex. The vast majority of the employment cases (97%) were on the grounds of disability or sex.

Final Decisions

Disability Complaints

Twenty (59%) of the employment decisions involved allegations of disability discrimination, and in 9 of those (45%), discrimination was found to be proven. Sixteen decisions involved only the ground of physical disability, with 5 justified (31%), and four involved both physical and mental disability, each justified.

Cases of Note:

The respondents knew of the complainant's depression, and it was a factor in the respondents decision to withdraw a job offer and then terminate her. While medical evidence to establish a mental disability must be reliable, it need not be from a psychiatrist or psychologist. The type of evidence required will depend on the nature of the mental disability. In this case, the Tribunal accepted the general practitioner's evidence that he was qualified to diagnose major depression. It rejected the argument that because the employee was able to work, her depression was not a disability. The fact that a person is able to continue working is not inconsistent with a conclusion that a mental disability exists, just as many physical disabilities can be controlled and only cause occasional impairment. The complainant did not need to prove that her depression impaired her work performance, just that her depression, actual or perceived, was a factor in the employer's decisions. The Tribunal awarded lost wages, expenses and $12,500 for injury to dignity, feelings and self-respect. (*Bertrend v. Golder Associates*, 2009 BCHRT 274)

The union represented four mill workers on long-term disability leave, alleging the employer had discriminated against them based on physical and mental disability when it terminated them for non-culpable absenteeism. The Tribunal accepted that if an employer has in place, and regularly follows, a *bona fide* termination program for non-culpable absenteeism, then the application of that program to an individual employee, even if it results in the loss of entitlement to severance pay, is not discrimination. Here, however, the Tribunal found that the termination program itself was *bona fide*, while its application was not. Rather, the employer had rushed to terminate the employees before the mill was closed or the closure was announced, with the consequence that the employees would not be paid severance when the mill closed. The Tribunal ordered the mill workers to be reinstated to their employment status with credit for lost seniority. The Tribunal ordered that the mill workers be paid severance and amounts for their individual injury to dignity, feelings and self-respect ranging from $5,000 to $20,000. (*USWA, Local 1-423 v. Weyerhaeuser Company*, 2009 BCHRT 328)

Duty to Accommodate

The employer failed to accommodate an employee with a degenerative back problem in the months leading up to an approved medical leave on Employment Insurance benefits. Arrangements were not made to assist her to perform her work, and the employer did nothing in response to the information contained in a doctor's note it sought. It also cancelled her group insurance benefits without discussing the impact of her medical leave on those benefits and provided inaccurate information to the insurance provider. The Tribunal awarded expenses and $5,000 for injury to dignity, feelings and self-respect. (*Matonovich v. Candu Glass and Marklund (No. 6)*, 2009 BCHRT 145)

The Tribunal found that the employer knew about the complainant's back problems and unreasonably issued a Record of Employment stating he quit. The Tribunal rejected the employer's allegation that he did not provide medical information or stay in contact. The employer failed in its duty to accommodate by making no inquiries about the complainant's medical condition or ability to return to work, either in his

own or a modified position. The Tribunal awarded the complainant damages wage loss and $5,000 for injury to dignity, feelings and self-respect, but declined to award reinstatement. (*Wyse v. Coastal Wood Industries*, 2009 BCHRT 180)

The employer initially accommodated the complainant's sensitivity to light as a result of an injury by providing inside duties, but then insisted on regular duties without getting medical information necessary to determine if they could accommodate him. The employer failed to consider possible accommodations, and reduced his hours, removed him from the work schedule and then gave him a Record of Employment stating he quit. Because the complainant did not seek an award for injury to dignity, feelings and self-respect, none was awarded. (*Roberts v. T. MacRae Family Sales dba Canadian Tire and MacRae*, 2009 BCHRT 181)

The complainant had a degenerative visual impairment. The Tribunal found that the employer's refusal to allow her to return to work after a disability leave was *prima facie* discriminatory. The employer did not try to accommodate her in her previous or in another position, and the eventual return to work plan it developed was deficient. The Tribunal awarded significant wage loss and damages in the amount of $30,000 for injury to her dignity, feelings and self-respect, but declined to award future wage loss. (*Kerr v. Boehringer Ingelheim (No. 4)*, 2009 BCHRT 196, upheld on judicial review *Boehringer Ingelheim (Canada) Ltd./Ltée. v. Kerr*, 2010 BCSC 427. A Notice of Appeal has been filed)

The Tribunal found that the employer discriminated against the complainant when it refused to allow her to return to work after she submitted medical clearance of fitness to return. The Tribunal rejected the employer's argument that she was a casual employee who was not entitled to any hours on her return to work. The employer admitted that it could have accommodated the complainant by providing a special chair at her work station. The Tribunal reduced its wage loss award for failure to mitigate, and awarded $2,000 as damages for injury to dignity, feelings and self-respect. (*Mahowich v. Westgate Resorts dba Red Coach Inn and Carhoun (No. 2)*, 2009 BCHRT 247)

The complainant's mobility was affected by a back injury and she needed to alternate between standing and sitting. Her employer constantly assigned tasks that did not allow this accommodation, removed her stool, and criticized her slow movements. The employer viewed her as "lazy" and fired her, claiming it believed she was not "mentally ready" for work. This unfounded belief could not justify the termination and the evidence did not support the employer's claim that they went out of their way to accommodate her. The employer mistakenly believed they could terminate an employee during a probationary period without meeting the *Code*'s obligations. The Tribunal ordered compensation for wage loss and expenses. While the Tribunal accepted the complainant's evidence about her hyper-vigilance when starting her subsequent job, an expert opinion would be required to prove that the termination caused her incapacitation for the following year. Taking into account the complainant's vulnerability as she re-entered the workforce after a lengthy period of rehabilitation, the employer's lack of regard for her sense of dignity, the devastating effect the abrupt and unfounded termination had on her self-respect, and the humiliation she suffered due to the employer's false statements on her record of employment, the Tribunal awarded her $8,000 for injury to her dignity feelings and self-respect. (*Hurn v. Healthquest and others*, 2009 BCHRT 435)

Duty to Accommodate Satisfied

The Tribunal dismissed a complaint where the employer took reasonable steps to accommodate the complainant's back injury and provided her with a

harassment free workplace on the basis of disability and sex. The employer, among other things, paid for multiple assessments by qualified specialists, assigned modified work recommended by the specialists, allowed transfers to other positions and maintained her extended health benefits when she chose to leave active employment. (*Neumann v. Lafarge Canada (Richmond Cement Plant) (No. 6)*, 2009 BCHRT 187)

REQUEST FOR MEDICAL EVALUATIONS REASONABLE

An employee, off work for the stated reason of "medical stress leave" set out in a doctor's note, was unable to complete a functional capacity evaluation and refused to attend an independent medical evaluation. The Tribunal found the employer's request for these evaluations reasonable as it needed information to determine if he could return to work, in what capacity, and whether accommodations might be required. All parties involved in a search for an accommodation must participate meaningfully in the process. Ultimately, the complaint was not justified. (*Sluzar v. City of Burnaby (No. 3)*, 2010 BCHRT 19)

EMPLOYMENT WARNINGS

The complainant and his employer settled a complaint of discrimination on the basis of physical disability. Thereafter, he filed another complaint alleging further discrimination, and claiming retaliation for filing the original complaint. All allegations were dismissed on a preliminary basis, except one related to a warning letter the respondent sent regarding non-culpable absenteeism. The Tribunal concluded that putting the complainant on notice that his employment could be in jeopardy if his attendance did not improve was not discrimination. (*Horn v. Norampac Burnaby, a Division of Cascades Canada (No. 2)*, 2009 BCHRT 243)

After he returned from medical leave, with an accommodation, the employer terminated the complainant for poor performance. He argued that the employer should have inquired whether his disability affected his performance and warned him before firing him. The Tribunal found that there was nothing in the complainant's behaviour that alerted, or should have alerted, the respondent that his physical disability was affecting his job performance. An employer who grants an employee the accommodation sought is not obliged to make any further inquiries, where there is no evidence of a change in behaviour or job performance. While the employer could have warned him that his employment was in jeopardy and asked him if he required further accommodation or whether his poor performance was affected by his disability, the fact that it did not take these steps does not amount to a failure to accommodate contrary to the *Code*. (*Stevenson v. Dave Wheaton Pontiac Buick GMC (No. 2)*, 2010 BCHRT 67) (See also *Sluzar v. City of Burnaby (No. 3)*, 2010 BCHRT 19)

CONSTRUCTIVE DISMISSAL DUE TO DISABILITY

The complainant's manager perceived that her Parkinson's disease affected her memory and work performance, and proposed a four day work week. The complainant rejected this proposal twice but eventually reduced her work week using an unpaid day, rather than using sick time, because her manager pursued the issue. Although the employer believed its actions were beneficial to the complainant, it had not requested medical information or identified a serious safety issue and did not pay her. In the absence of medical information, the Tribunal could not infer either that the complainant's condition or medication affected any aspect of her work. Her performance was seen as satisfactory until she disclosed her disability, and there were reasonable explanations for a perceived decline in performance not related to it, and the employer made a stereotypical assumption that her performance must be related to her disability.

After the reduction in her work week, she filed an internal human rights complaint and left work. She was first told she could use sick leave pending mediation, but was then told she could not and had to return to work. Her offer to provide medical information was rejected. Her manager decided they could not work together effectively and she was offered a buy-out. In all of the circumstances, she was entitled to resign and not return to a poisoned working relationship. Her loss of employment flowed directly from the imposition of the reduced work week and resulting damaged relationship with her manager. The Tribunal awarded compensation for lost wages and $10,000 for injury to dignity, feelings and self-respect. The complainant filed an application for judicial review which was dismissed. A Notice of Appeal has been filed. (*Morgan-Hung v. Provincial Health Services and others (No. 4)*, 2009 BCHRT 371)

LACK OF SENIORITY ACCRUAL WHILE ON LEAVE NOT DISCRIMINATORY

The Tribunal found that the complainant's failure to accrue seniority while on unpaid sick leave and long-term disability was not discriminatory. She established *prima facie* discrimination, as her disability was a factor in the suspension of her seniority, however, the employer demonstrated a *bona fide* occupational requirement. When considering the operation of the collective agreement as a whole, a system of benefits and trade-offs had been negotiated in good faith, which linked seniority accrual for both compensation and access purposes in an integrated manner. The Tribunal found that it would unduly interfere with the operation of the collective agreement to disentangle compensation-related from access-related benefits and would fundamentally alter the earned benefit concept of seniority accrual under the collective agreement. Further, the Tribunal said that this was not a case where no reasonable steps were taken to accommodate the complainant's disabilities. Rather, substantial benefits had been negotiated to support and accommodate her during various periods of absence. (*Goode v. Interior Health Authority*, 2010 BCHRT 95)

SEX DISCRIMINATION

Thirteen decisions (38%) cited the ground of sex, with five (36%) found to be justified.

Four of the cases involved allegations of sexual harassment. Two were justified.

On hiring a 24 year old woman in her first professional employment, the complainant's 56 year old boss hugged and kissed her. He called her and asked her out to coffee before her first day of work and then hugged and kissed her again, and asked personal questions. She decided not to return to the workplace. The Tribunal found the complainant credible and that she was sexually harassed. It ordered compensation for wage loss and $6,000 for injury to dignity, feelings and self-respect, taking into account the nature and duration of the harassment, the age disparity, the complainant's vulnerability, and that as a result of the harassment, she sought counselling from her pastor and became more wary and untrusting. (*Kwan v. Marzara and another (No. 3)*, 2009 BCHRT 418)

An employee was sexually harassed by the owner of the company, which detrimentally affected her work environment and she resigned. The conduct was ongoing, included comments, touching and sexual invitations, and culminated in the owner forcing his way into her hotel room and aggressively kissing and groping her while they were out of town on business. The Tribunal awarded $25,000 in damages for injury to dignity, feelings and self-respect, the largest award in a sexual harassment complaint to date. This was due to the significant physical nature of the harassment and the fact that, due to the nature of the work, the complainant was isolated and vulnerable. (*Ratzlaff v. Marpaul Construction and Rondeau*, 2010 BCHRT 13)

Three of the cases involved allegations of pregnancy discrimination. One, also on the ground of family status, was justified.

The Tribunal found that the employer discriminated against the complainant because of her pregnancy including by not consulting with her about significant changes that might impact her job duties and earning potential, and establishing a new sales structure while she was on maternity leave. The changes while she was on leave included the elimination of her management duties, and denying her past flexibility with respect to working from home and scheduling her own time. The employer also discriminated on the basis of family status when it reneged on its promise of permanent flexible working conditions to allow her to meet her childcare obligations. The Tribunal awarded $10,000 as damages for injury to dignity, feelings and self-respect, but declined to exercise its discretion to award wage loss to her because of her failure to mitigate. (*Brown v. PML Professional Mechanical and Wightman (No. 4)*, 2010 BCHRT 93)

The one case alleging lower rate of pay based on sex was justified. The employer discriminated when it paid a female employer a lower hourly rate than it paid to men doing similar or substantially similar work. A judicial review has been filed. (*Pennock v. Kraska dba Centre City Drywall (No. 3)*, 2009 BCHRT 192)

Of the other six complaints of sex discrimination, one was justified.

A male registered care aide who was not hired to work in a residential care home was discriminated against in employment based on sex. The complainant, who was tall and muscular, was as qualified as other applicants, but was not hired because of the respondent's stereotypical gender-related assumptions that he was aggressive and thus unsuitable for hire. The Tribunal ordered lost wages, expenses and $5,000 as damages for injury to dignity, feelings and self-respect. (*Morrison v. Slizeck Investments dba AdvoCare Home Health Services and Pistak and Wright-Day*, 2009 BCHRT 298)

OTHER GROUNDS

Two decisions involved the grounds of race, colour, ancestry and place of origin. Both complaints were dismissed. Age was a ground two cases, both dismissed. Religion and sexual orientation were grounds in one complaint (also brought on other grounds), which was dismissed.

Family status was a ground in one complaint (also brought on the ground of sex), which was justified. (*Brown v. PML Professional Mechanical and Wightman (No. 4)*, 2010 BCHRT 93. See summary above.)

In another family status complaint, the complainant alleged that his employer discriminated on the basis of family status when it required him to work overtime and fired him when he refused, as overtime interfered with his ability to care for his young son. The Tribunal dismissed the complaint. Neither the pattern of the employee's work nor his childcare demands or arrangements had changed. Nothing took the case out of the ordinary obligations of parents who must juggle the demands of their employment and the provision of appropriate childcare, nor did the facts did establish a serious interference with a substantial parental or other family duty or obligation, as the case law requires. (*Falardeau v. Ferguson Moving and Storage and Reano and MacInnes*, 2009 BCHRT 272)

SERVICES

The Tribunal decided six complaints in the area of services. Three of the six complaints (50%) were justified.

Two of the unsuccessful complaints involved allegations of sex discrimination in a bar or restaurant (in one of these the complainants did not appear at the hearing). The other involved an allegation of discrimination on the grounds of race and ancestry against a government agency.

The Tribunal dismissed a complaint in the area of services based on sex against a bar that banned sleeveless "muscle" shirts on men, stating the prohibition was to discourage gang members and aggressive patrons. The Tribunal decided that the person involved in the complaint was not adversely affected by the prohibition. Even if he had been, the prohibition was a *bona fide* reasonable justification because it was reasonably necessary to maintain a safe night club and making an exception was not possible without undue hardship. (*Payne obo Payne v. Blue Grotto and Willey (No. 2)*, 2010 BCHRT 60)

Each of the successful complaints was on the ground of disability. They involved municipal by-law enforcement, a hunting permit scheme, and services provided by a strata corporation.

BY-LAW

Two complainants in a same-sex relationship alleged that City discriminated against them on the basis of their sexual orientation, marital status, and physical disability. One had a Health Canada permit to grow marijuana because of his physical disability. When the renewal of the permit was delayed, and knowing the history of the complainant's valid permits and that renewal was pending, the City enforced a bylaw prohibiting illicit marijuana cultivation and ordered the complainants to vacate their home and disconnected the water supply.

The Tribunal found that City had discretion in applying the bylaw, and failed to take into account the complainant's physical disability and that the production and possession of marijuana was to treat its symptoms when it decided to enforce the bylaw. The City failed to show how it would have caused undue hardship to accommodate the complainant. The City discriminated against the complainant based on physical disability, but not marital status or sexual orientation. The Tribunal ordered the ameliorative orders sought by the complainants. (*James and Moynan v. City of Salmon Arm*, 2009 BCHRT 285)

HUNTING PERMITS: ACCOMMODATION FOR HUNTERS WITH DISABILITIES

The Ministry of the Environment restricted motor vehicle access for hunting in designated areas. Disabled hunters were adversely affected by restrictions made to protect ecosystems and wildlife habitats, and to limit hunting pressures on wildlife. The main issue was whether disabled hunters were reasonably accommodated.

The Ministry discussed accommodations for motor vehicle access to the designated areas for disabled hunters and it largely met its obligation to allow access to areas inaccessible to them because of their disabilities. The Ministry is not obliged to provide a perfect accommodation or increase disabled hunters' competitive advantage. The speed, distance and weight restrictions were reasonably necessary and sufficiently accommodated disabled hunters' need to travel in motor vehicles for the purpose of hunting. A 100-metre walking requirement was also reasonably necessary; it was used only as a guideline and did not determine if motor vehicle access would be granted.

However, the Tribunal was not satisfied that the restriction to one non-hunting companion sufficiently accommodated disabled hunters. Allowing one hunting companion to travel in the motor vehicle would not cause undue hardship to the environment and, while the Ministry does not want to benefit hunting companions from hunting on the disabled hunter's access permit, this could be addressed in other ways,

such as license restrictions. Pursuant to the parties agreement, the appropriate remedies are to be decided separately. (*Hall v. B.C. (Min. of Environment) (No. 5)*, 2009 BCHRT 389)

STRATA CORPORATIONS

The complainant's lung disease was worsened by exposure to air conditioning. He installed a solar screen on the front window of his strata unit, which the strata council advised was contrary to strata by-laws and ordered removed. The Tribunal found that the strata corporation discriminated in the area of services based on physical disability, as it failed to demonstrate that it would involve undue hardship to allow the solar screen to remain on the front window of the home. The Tribunal allowed the reinstallation of the screen, and ordered the strata to deal with future applications from owners to alter the exterior of their homes in accordance with its obligation not to discriminate contrary to s. 8 of the *Code*. It awarded $2,500 for injury to the complainant's dignity, feelings and self-respect. (*Shannon v. The Owners, Strata Plan KAS 1613 (No. 2)*, 2009 BCHRT 438)

The Tribunal dismissed a complaint where a caretaker alleged the strata council discriminated by terminating him after conducting a survey where an owner, who was not on the council, may have expressed a discriminatory view. It did not infer that the strata council's decision was tainted by the owner's views. It concluded that it would be impossible for strata councils to get input of owners otherwise, which would be undemocratic and contrary to the way strata corporations are supposed to be run. This was not a case where one or two people with discriminatory motivations were able, through influence or power, to obtain a discriminatory result. (*Gordon v. AWM-Alliance Real Estate Group and The Owners, Strata Plan BCS 1461 (No. 2)*, 2009 BCHRT 279)

TENANCY

The Tribunal decided six complaints in the area of tenancy. Two were proven: one on the grounds of mental disability and family status, and one on the grounds of disability, lawful source of income, and sexual orientation. Four were dismissed. The grounds alleged were race and place of origin; race, colour and sex; physical disability; and sexual orientation. One of the unsuccessful complaints (physical disability) also included an allegation of discrimination in relation to a publication (s. 7).

The complainants received government benefits as they were unable to work due to disabilities. One roommate is gay and one is two-spirited. Their landlord and his son, acting as agent for him, discriminated in regard to their tenancy on the basis of sexual orientation, disability and lawful source of income. They used homophobic names, referred to them pejoratively in regard to having AIDS, disparaged their source of income, and physically assaulted them so that they were forced move. This had a profound negative impact on their self-esteem, sense of trust and safety, human dignity and health. The Tribunal ordered the respondent to pay each of the complainants $15,000 for injury to dignity, feelings and self-respect. A judicial review has been filed. (*Bro and Scott v. Moody (No. 2)*, 2009 BCHRT 8)

A 90 year old mother lived with, and was dependant on, her son, who suffered from mental illness and multiple physical disabilities. They complained they were adversely affected when the landlord of their residential trailer park failed to respond to repair requests, actively avoided the son, and encouraged other tenants to do the same, creating an intolerable living environment, and then evicted them. The landlord drew negative inferences about the son's behaviour based on her perceptions of his mental disability, and this played a central role in her decision to evict the complainants. There was no factual foundation for the landlord to have a reasonable

belief that the son's behaviour was actually a threat to the residents' safety. Her view was based on speculation, exaggeration, rumour, and a stereotypical view that some mentally ill persons are unpredictable, dangerous and a safety threat. A landlord has responsibilities to all tenants, including addressing safety concerns, but must also ensure compliance with the *Code*. The Tribunal ordered compensation for expenses and for a rent and utility differential for one year. Compensation of $9,000 for the son, and $6,000 for the mother was ordered for injury to dignity, feelings and self-respect. Both suffered considerable emotional distress during and after the events. A judicial review has been filed. (*Petterson and Poirier v. Gorcak (No. 3)*, 2009 BCHRT 439)

MEMBERSHIP IN AN OCCUPATIONAL ASSOCIATION

One decision dealt with membership in an occupational association.

The Law Society of BC, which is responsible for ensuring applicants are fit to practice law, discriminated on the ground of mental disability by requiring applicants for membership to disclose any treatment for certain listed psychiatric conditions. The Law Society assumed that the disabilities concerned are a risk to the public and conducted a more intensive and intrusive evaluation of a candidate who indicated that they had received treatment for psychiatric conditions. The review could result in delay of approval for membership and conditions on membership. This adverse treatment related to a disability or perceived disability must be viewed in the context of the historical disadvantage suffered by the mentally ill, and the significant stigma involved.

While the fitness standard was adopted in good faith, the Law Society did not show that the question was reasonably necessary to ensure fitness to protect clients and the public. It might have considered other approaches with a less discriminatory effect. Of the illnesses listed, "paranoia" is not a psychiatric diagnosis, and "major affective disorder" appeared to be included due to staff concerns rather than on the recommendation of experts. Other conditions that might affect the ability to practice law, such as delusional disorders, were excluded. There was no time limit involved despite the fact that the longer the remission, the less likely there will be a recurrence. It was not clear that the question effectively identified risk factors, as significantly fewer applicants reported a major disorder than the statistical occurrence in the general population and information suggested a higher percentage of law students and lawyers might suffer from depression. Therefore, the question as formulated had a discriminatory effect not justified by the Law Society.

The complainant confirmed he had suffered from depression which, coupled with other career events, resulted in an extensive review of his employment record. The Law Society required an independent psychiatric assessment, a more intrusive and invasive of his privacy than other options. It required closer to an absolute assurance rather than a reasonable assurance of medical fitness to practice law. The remedy will be determined at a later hearing. (*Gichuru v. The Law Society of British Columbia (No. 4)*, 2009 BCHRT 360)

OTHER

One decision, also in the area of tenancy, dealt with publication; it was dismissed. Two, also in the area of employment, alleged retaliation; both were dismissed.

COSTS

Claiming poor health, the complainant withdrew her complaint the day before a three-week hearing was due to begin and after settlement negotiations failed. The Tribunal did not accept that proceeding would

have been detrimental to the complaint's health, and awarded $1,500 in costs against her for abruptly terminating her complaint at the last minute, which had an adverse impact on the respondent and the Tribunal. (*Richardson v. Strata Plan NW1020 (No. 3)*, 2009 BCHRT 158)

In a previous decision, the Tribunal ordered the respondents to pay half of the complainants' actual costs until a particular point in the hearing. Section 37(4) costs awards are punitive, not compensatory, and are a tool to control the integrity of the Tribunal's processes. Unlike civil proceedings, costs do not "follow the cause". The success of a party is not determinative in awarding costs. A successful party who engages in improper conduct may be be subject to a costs order. The respondents were given an opportunity to make submissions about the reasonableness of the complainants' claim for actual costs, including whether they reasonably reflected the issues, the complexity of the proceedings, the nature of the improper conduct involved and its impact, and the time spent in preparation and hearing. (*Construction and Specialized Workers' Union Local 1611 obo Foreign workers v. SELI Canada, SNCP-SELI Joint Venture and SNC Lavalin Constructors (Pacific) (No. 9)*, 2009 BCHRT 161)

The respondent waited until the hearing to apply to dismiss the complaint on the basis it was federally regulated and therefore outside the Tribunal's jurisdiction. This caused unnecessary costs to the complainant and wasted the Tribunal's resources. Taking into account the complainant's actual costs and the respondent's improper conduct, the Tribunal awarded $6,500. A judicial review has been filed. (*Chaudhary v. Smoother Movers (No. 2)*, 2009 BCHRT 176)

The complainant settled an age discrimination complaint with the University, which allowed her to work past age 65, until June 2008. When legislation eliminated mandatory retirement in January 2008, the complainant filed a second complaint alleging that the enforcement of the settlement agreement was age discrimination. The Tribunal decided that proceeding with the complaint would not further the purposes of the *Code*, or in the alternative the complaint had no reasonable prospect of success because of the settlement, but declined to order costs against either party. The complainant had not engaged in improper conduct and significant weight was placed on the intervening amendment to the *Code*. (*Dyson v. University of Victoria*, 2009 BCHRT 209)

The Tribunal ordered $3,000 in costs where the complainant filed his complaint improperly to get a financial windfall similar to the settlement of a previous complaint, punish his employer, affect his employment conditions, and protect himself from the consequences of his behaviour. He made a serious but unsubstantiated allegation that his life was deliberately endangered, displayed a reckless disregard for the truthfulness of his testimony, and made malicious remedial requests, including that two employees be fired. (*Horn v. Norampac Burnaby, a Division of Cascades Canada (No. 2)*, 2009 BCHRT 243)

The respondent disclosed settlement discussions from a Tribunal-assisted mediation on a provincial media website and to a local newspaper reporter. The Tribunal awarded $2,000 costs against the respondent because it breached the Tribunal's confidentiality rule that settlement discussions and a signed agreement. The Tribunal's decision was overturned on judicial review and an appeal has been filed. (*Pivot Legal Society and VANDU obo individuals who are, or appear to be street homeless and/or drug addicted v. Downtown Vancouver Business Improvement Association and City of Vancouver (No. 2)*, 2009 BCHRT 372)

The Tribunal ordered $1,000 in costs because the complainant made false statements to shore up his complaint, was disrespectful about the religious

adequacy of witnesses, made inappropriate and unfounded allegations that those individuals only provided evidence because of threatened job loss, and attempted to intimidate a witness. (*Grewal v. Simard Westlink and Hensen and Bertran*d, 2010 BCHRT 51)

The Tribunal ordered $10,000 in costs where a respondent swore an inaccurate and misleading affidavit on an application to dismiss. The *Code*'s "direct access" system, results in hundreds of applications to dismiss complaints each year. In considering those applications, the Tribunal must rely on the information provided by the parties, often in affidavit form. Opposing parties rarely seek to cross-examine affiants and filing a misleading or inaccurate affidavit could lead to a complaint being dismissed unfairly, with little recourse for the complainant. Even successfully responding to such affidavits will put a party to additional and unnecessary expense. Given the heavy reliance on materials filed on preliminary applications to dismiss, the Tribunal must be vigilant to ensure that any impropriety is met with serious sanctions to deter others from engaging in similar conduct. (*Brown v. PML Professional Mechanical and Wightman (No. 4)*, 2010 BCHRT 93)

The Tribunal refused to award costs against a lawyer who represented a party and was not himself a party in the proceedings. It refused to add the lawyer as a party to the complaint. A lawyer who is not personally a complainant or a respondent is not a proper party. Here, the complainant engaged in improper conduct that could warrant a costs award against her. She was less than candid and forthright about the facts underlying her application to file her late complaint with the Tribunal. Her reliance on her counsel's advice did not absolve her of a costs award. A party is responsible for the improper conduct of their counsel while acting on their behalf. (*Wells v. UBC and others (No. 4)*, 2010 BCHRT 100)

LEGAL EXPENSES

The Tribunal's case law on whether it has the authority to order compensation for a complainant's legal expenses under s. 37(2)(d)(ii) of the *Code* is in a state of uncertainty.

In *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376, pursuant to its power to order expenses arising from the breach of the *Code*, the Tribunal ordered a respondent to pay a complainant's reasonable legal expenses as a remedy for discrimination. Subsequently, one of the cases that the Tribunal relied on to support its legal expenses order was overturned. (*Canada v. Mowat*, 2009 FCA 309).

Following the release of *Mowat*, in *Kerr v. Boehringer Ingelheim (Canada) (No. 5)*, 2010 BCHRT 62, the Tribunal determined that it did not have jurisdiction to order a respondent to pay for legal expenses incurred by a complainant in the processing of her human rights complaint.

After the *Kerr* decision was released, the Supreme Court of Canada granted leave to appeal in *Mowat*. The hearing is scheduled for December 2010.

There are several other applications for legal expenses currently before the Tribunal. With agreement of the parties, those applications have been held in abeyance pending release of the Supreme Court of Canada's decision in *Mowat*.

Judicial Reviews and Appeals

Judicial Reviews and Appeals

The *Code* does not provide for appeals of Tribunal decisions but judicial review to the B.C. Supreme Court, pursuant to the *Judicial Review Procedure Act* and the *Administrative Tribunals Act* ("*ATA*") is available. Applications for judicial review must be filed within 60 days.

Judicial review is a limited type of review. Generally, the Court considers the information that the Tribunal had before it and decides if the Tribunal made a decision within its power or in a way that was wrong.

The Court applies the standards of review in s. 59 of the *ATA*, which set out when the Tribunal's decision may be set aside or when it should stand even if the Court does not agree with it. If the Tribunal's decision is set aside, the Court may send it back to the Tribunal for reconsideration, or, if there can only be one right answer to the issue, the Court may supply the answer.

To assist parties, the Tribunal provides information sheets on how to seek judicial review and explains the Tribunal's role.

The Supreme Court's decision may be appealed to the BC Court of Appeal. A Court of Appeal decision can only be appealed to the Supreme Court of Canada if that Court agrees to hear it.

Judicial Reviews in BC Supreme Court

This year 24 petitions for judicial review were filed in the Supreme Court, an increase of 2 from 2008/2009. Parts of two petitions filed after the statutory time limit in the *ATA* were not accepted by the court.

The Court issued 11 judgments, in which 8 petitions were unsuccessful. One of the 3 successful petitions was overturned on appeal. In that case, the Court had remitted the Tribunal's decision back for reconsideration, and later held that the Tribunal was not in contempt when it subsequently granted an application delaying reconsideration until the outcome of the appeal. (*Armstrong v. British Columbia (Ministry of Attorney General*) (November 11, 2009, Victoria Reg. No. 08 1163, Johnston, J.)

Review of Final Decisions

In an oral decision, the Court upheld a Tribunal decision dismissing a complaint of tenancy discrimination, on the ground of family status and sexual orientation. Credibility issues and conflicting evidence as to the facts were not enough to convince the Court that the Tribunal's findings were made without evidence or otherwise unreasonable. The Court was also satisfied that the Tribunal had applied the proper test for discrimination, and was not biased or unfair. (*Ross and Dadvand v. BC Human Rights Tribunal and others*) (May 1, 2009, Vanc. Reg. No. L042211, Walker, J.)

Where much of the evidence was circumstantial, the Court held that the Tribunal was entitled to draw on its expertise to conclude that race, and family and marital status were factors in the complainants' loss of employment. It refused to interfere with the Tribunal's findings of fact and inferences as they were reasonable and within the range of acceptable outcomes. (*Langtry Industries Ltd. v. British Columbia (Human Rights Tribunal)*, 2009 BCSC 1091

A housing cooperative allowed only one member per residential unit. The Court found that the Tribunal erred in finding that the widow of a member was discriminated against on the grounds of marital or family status when she had to apply for membership to continue to occupy the suite and was unsuccessful. Under traditional human rights analysis, the "one member rule" was not discriminatory because it applied to the complainant because she was a non-member, not because of a change in her marital status. Under a comparator group analysis, the

comparator group was non-member single persons residing with members. She suffered no discrimination because, like all non-members whether single or married, she had to apply for membership when the member she lived with died. The Supreme Court of Canada decisions in Dunsmuir and Khosa did not change BC law that the correctness standard applies to all questions of mixed fact and law. An appeal has been filed. (*Lavender Co-operative Housing Association v. Ford*, 2009 BCSC 1437)

The Court found that the Tribunal was not biased or unfair when it decided that an employer discriminated on the basis of race, religion, place of origin and political belief when it did not deal with the poisoned work environment of an Arab Muslim employee who had been reported to police by a co-worker after the September 11, 2001 terrorist attacks. The Court refused to interfere with the Tribunal's discretionary award for injury to dignity, feelings and self-respect, finding that it had not fettered its discretion. It also found no basis to intervene in the discretionary decision to award costs against the employer for misconduct. (*Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33)

The Court upheld the Tribunal's finding of discrimination where an employer did not take meaningful steps to determine if it could accommodate an employee's visual impairment, once she was ready to return to work after a disability leave. It disagreed that the test for prima facie discrimination required the complainant to provide objective evidence that she was able to work, as this would insert the accommodation analysis into the prima facie test and place a greater burden on her than the law required at any stage. Even at the accommodation stage, the employee was not responsible for proving objective evidence of ability to work, as that was for the employer to assess and decide. Further, for the employer's argument to succeed, the court had to accept its version of the facts in preference to the Tribunal's findings. This was not the court's function nor within its jurisdiction on judicial review. An appeal has been filed. (*Boehringer Ingelheim (Canada) Ltd./Ltee. v. Kerr*, 2010 BCSC 427)

PRELIMINARY DECISIONS

The Tribunal correctly refused to accept part of a complaint alleging discrimination by a Provincial Court Judge during a trial. The complainant was a lawyer who alleged that the judge attacked her personally when she tried to schedule a matter for half days to accommodate her physical disability. The principle of judicial immunity applied because the judge was acting within his jurisdiction. (*Gonzalez v. Ministry of Attorney General*, 2009 BCSC 63)

The Tribunal dismissed a complaint of racism in employment under s. 27(1)(c) on the basis that it had no reasonable prospect of success. It found that the complainant had misconducted himself by filing inappropriate material, but did not decide whether the complaint could also be dismissed for this reason under s. 27(1)(e), as being filed in bad faith or for improper motives. The Court upheld the Tribunal's decision under s. 27(1)(c) as the Tribunal had made no error respecting the legal test to be applied and had not considered irrelevant factors. The Tribunal could make a finding of misconduct on an alternate ground, without relying on it in the result. An appeal has been filed. (*Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2009 BCSC 904)

A complainant alleged that she and her same sex partner were discriminated against when a comedian performing in a restaurant made homophobic and sexist comments, and was physically aggressive. The Tribunal refused a preliminary application to dismiss the complaint against the comedian, the restaurant and its owner/manager. It found that the latter were service providers and that the comedian was their agent or employee. It had jurisdiction because, if true, the acts alleged could constitute a breach of

the *Code*, there was a reasonable prospect that the complaint could succeed and the remedies under the *Code* could benefit the complainant. On judicial review, the comedian argued he was providing a service, and that his actions were protected expression under the *Charter*. The Court did not accept that these were questions of pure law that could be answered without the Tribunal first having the opportunity to do so. It remitted the jurisdictional aspect back to the Tribunal for reconsideration on more fulsome argument, including any *Charter* arguments. (*Earle v. British Columbia Human Rights Tribunal, Pardy, Ismail and Zesty Food Services Inc*.) (September 10, 2009, Vanc. Reg. No. S085249, Willcock, J.)

A lawyer alleged that the Law Society retaliated against him for filing a complaint against it, when it chose not to proceed with a professional misconduct complaint that he made against his former supervisor, who was also a lawyer. The Court upheld the Tribunal's dismissal of the retaliation complaint under s. 27(1)(c), finding that its reasons were thorough and the outcome wholly reasonable. An appeal has been filed. (*Gichuru v. The Law Society of British Columbia and BC Human Rights Tribunal*) (October 2, 2009, Vanc. Reg. No. S087831, Pitfield, J.)

The Court upheld the Tribunal's dismissal of a complaint under s. 27(1)(b) of the *Code*, confirming it correctly found the allegations did not disclose a connection between the complainant's mental disability and adverse treatment in his employment or his membership in a union. (*Engler v. BC Human Rights Tribunal*) (March 11, 2010, Vanc. Reg. No. S - 094582, Grauer, J.)

COURT OF APPEAL

This year the general upward trend in the number of judicial reviews generated an increase in appeals. Seven appeals were filed, including an application for leave to appeal a ruling made during a judicial review. The Court of Appeal issued four judgements. It upheld one final Tribunal decision, and two of three of its preliminary decisions.

FINAL DECISIONS

The Court restored the Tribunal's final decision that there was no discrimination on the basis of sex where a man had to pay for a PSA screening test for prostate cancer, while mammograms and pap tests to screen for women's cancers were free. It held that the Tribunal correctly set out the three part test for prima facie discrimination. The third step, which requires a link or nexus between the protected ground or characteristic and the adverse treatment, did not require the complainant to show, as a separate requirement, that the government's decision not to fund PSA testing was based on arbitrariness or stereotypical presumptions. (*Armstrong v. British Columbia (Ministry of Health*), 2010 BCCA 56)

PRELIMINARY DECISIONS

The Court affirmed the Tribunal has jurisdiction to dismiss a complaint under s. 27(1)(d)(ii) for failure to accept a reasonable settlement offer. The respondent's offer approximated the remedy the complainant wanted, but did not include an admission of liability, which the complainant believed would provide an advantage in related court proceedings. The Tribunal's decision was not patently unreasonable and the high level of deference due to it on this standard was not changed by the Supreme Court of Canada decision in *Dunsmuir*. (*Carter v. Travelex Canada Limited*, 2009 BCCA 180)

On an application under s. 27(1)(c), the Tribunal refused to dismiss a complaint that an insurer's policy making drivers in low velocity collisions go through a separate process for compensation claims was discriminatory, as it was based on a perception that they were not disabled. On appeal, the Court held that the chambers judge applied the proper principles in

deciding that the petition was not premature. It found that the Tribunal misread the *Code* as protecting anyone from being discriminated against on the basis that they were not disabled, and erred in characterizing an insurance company's differentiation between those with compensable injuries and those who are not injured as being discriminatory, when that was its function as an insurer. (*ICBC v. Yuan*, 2009 BCCA 279)

The Court confirmed that the legislature gave the Tribunal jurisdiction to adjudicate a complaint that a Workers' Compensation Board chronic pain compensation policy was discriminatory, even if the Board had already found the policy non-discriminatory. It affirmed the Tribunal's discretion under s. 27(1)(f) to decide whether to hear such complaints and its decision was reviewable on the patent unreasonableness standard. Common law doctrines, particularly those dealing with the finality of litigation such as res judicata and issue estoppel, may guide the Tribunal's exercise of its discretion, but they are neither directly applicable nor determinative. (*Workers' Compensation Board v. British Columbia (Human Rights Tribunal)*, 2010 BCCA 77)

SUPREME COURT OF CANADA

There were no applications for leave to appeal this year.

SPECIAL PROGRAMS AND POLICY

Section 42(3) of the *Code* recognizes that treating everyone equally does not always promote true equality and the elimination of discrimination. The section provides for the establishment of special programs which treat disadvantaged individuals or groups differently to recognize their diverse characteristics and unique needs.

Under the *Code*, applicants may apply for the approval of a special or employment equity program which has as its objective amelioration of the conditions of disadvantaged individuals or groups.

The effective of an approval is to deem the special or employment equity program not to be in breach of the *Code*. All approvals are time-limited and are generally for six months to five years but may be renewed. Employment equity programs are usually approved for several years. Periodic reporting may be a condition of approval.

Special programs do not require Tribunal approval, but are not protected from a human rights complaint if approval is not granted.

NEW SPECIAL PROGRAMS

The Chair approved five new special programs this year.

The College of New Caledonia received a five-year special program approval on a number of terms, including reports to the Tribunal. It may restrict hiring to Aboriginal applicants for a broad range of positions, including employees who provide direct operational, instructional or administrative service to primarily Aboriginal students; employees instructing courses whose content is primarily Aboriginal; and employees offering services or programs funded through Aboriginal-specific funding initiatives. The College also received approval to use language indicating a requirement of Aboriginal heritage, and proof of Aboriginal ancestry. The special program's goal is to close the socio-economic gap between Aboriginal and non-Aboriginal British Columbians by increasing the access, retention, completion and transition opportunities for Aboriginal learners, increasing the receptivity and relevance of post-secondary institutions and programs for Aboriginal learners, and strengthening partnerships and collaboration in Aboriginal post-secondary education.

Special Programs

Thompson Rivers University received five-year special program approval for two special programs allowing it to restrict hiring to a person of Aboriginal descent for the positions of Aboriginal Maternal and Child Health Endowed Research Chair and Aboriginal Transition Planner. The Research Chair will conduct research designed to inform and improve policies and practices related to community and women's health. The Planner will help the university make the campus curriculum and university community welcoming, supportive and positive environments for Aboriginal students to achieve their education goals. The University must report annually to the Tribunal on the positions.

Polaris Employment Services Society is a registered charitable society providing services to job seekers with developmental disabilities. It was granted approval to permit it to hire an individual with a developmental disability to work as a Customer Service Intern. The goal of the position is to provide a paid opportunity for an individual to gain skills in public speaking, customer service and as a greeter in a financial institution. The special program approval was given for the duration of the Intern position, ending December 31, 2009. Mid-term and final reports were required.

Seasons Consulting Group was granted five-year special program approval to allow it to advertise for and hire male candidates to provide certain disabled male clients with one-to-one cognitive and physical rehabilitation and community integration services. As a result of their disabilities, the clients exhibit fear and/or sexual disinhibition with female workers. The special program approval meets the specific needs of its male clients and provides a safe working environment for its employees. Seasons must report annually on the number of staff hired under the special program.

The Tribunal also granted several new special program approvals to organizations with existing approved special programs.

Métis Family Services, which administers child and family protection and care services for the benefit of Métis people, has an existing special program approval allowing it to restrict its services to Métis and to allow hiring preference to Métis for the Executive Director and Family Development Supervisor positions. This year, the Tribunal granted five-year approval to change "Métis" to the term Aboriginal, to specify a preference in hiring in future job postings and to extend the existing approval to all positions.

North Island College has a special program approval to restrict hiring to persons of Aboriginal ancestry for the position of Coordinator, Aboriginal Education in the Port Hardy, Port Alberni and Comox Valley/ Campbell River regions. The Tribunal granted the College's new special program application to allow the same restriction for the positions of Aboriginal Advisors; Faculty, Aboriginal Programming; and Elders. The special program will allow the College to implement effectively its expanded programming in Aboriginal Education, which includes a commitment to provide employment opportunities that reflect cultural diversity in local communities, strengthen relationships with Aboriginal communities, and model success for Aboriginal learners. The approval was granted for five years, and the College is required to report annually to the Tribunal.

The Legal Services Society is an independent, non-profit organization which provides legal aid for residents of British Columbia, particularly those living in poverty. The Society was granted five-year special program approval last year to limit hiring and give preference to people of Aboriginal ancestry for lawyer and staff positions in Terrace and Nanaimo. This year it was also granted approval for a staff position in Port Hardy. The purpose of the Special Program is to improve services to Aboriginal clients.

School District No. 36 (Surrey) has an existing special program approval allowing it to restrict advertising and hiring of 18 Multicultural Support Workers from specific minority cultures and linguistic backgrounds who speak specific languages, and, in some cases, require that the applicant be a member of that community. This year, the Tribunal granted a new five year special program to allow the District to hire a maximum of 24 Support Workers in Schools who speak one or more of the following languages: Russian, Punjabi, Hindi, Urdu, Mandarin, Cantonese, Lao, French, Spanish Karen, Burmese, Korean, Vietnamese, Swahili, Farsi, Azeri, Kurdish, Turkish, Tagalog, German, Somali, Arabic, Dinka, Polish and Taiwanese.

TRIBUNAL MEMBERS

During the 2009-2010 fiscal year, the Tribunal had nine full-time Members including the Chair, who mediate and decide human rights complaints under the *Code*. The Chair was appointed in 2000 and has acted as the head of human rights and equity tribunals in Canada for almost sixteen years. The eight members were qualified and experienced lawyers.

APPOINTMENTS

Members are appointed by the Lieutenant Governor in Council for renewable five-year terms, following a merit-based, multi-step qualification process. Candidates must demonstrate their ability for adjudicative work through decision-writing, situational interviews and peer reviews. Under the *Administrative Tribunals Act*, the Chair may appoint a member for two consecutive six-month terms to address workload issues and the Minister may appoint for temporary terms to address absences. During the 2008-2010 fiscal year, one member was appointed on a five-year term.

CODE OF CONDUCT

The Chair supervises the Members, designates preliminary applications and hearings to be decided by them, and monitors adherence to performance standards and timeliness. Members are subject to a Code of Conduct in the performance of their role, and complaints about the conduct of Members may be made to the Chair. Section 30 of the *Administrative Tribunals Act* requires Members to faithfully, honestly and impartially perform their duties and to maintain confidentiality.

DECISIONS

In making their decisions, Members are required by law to be independent and impartial. Although the Ministry of the Attorney General provides budget funding, the government may not direct or influence Members in their decision-making or otherwise interfere with their independence through administrative and budgetary matters that touch on decision-making.

The Tribunal does not make decisions on human rights complaints on a consensus basis. Each Member decides the matter before them independently and in good faith, according to the law and their own best judgment. To ensure flexibility in the application of the *Code*, Members are not bound by each others' decisions but are bound to follow decisions of the BC courts and the Supreme Court of Canada and may find guidance in decisions of courts and tribunals in other jurisdictions. To ensure consistency, Members departing from earlier Tribunal jurisprudence render decisions explaining why. Members' draft decisions are subject to a voluntary internal review process. To further promote the development of a principled and coherent body of jurisprudence, Members meet regularly to discuss, at a general level, their evolving articulation of the rights protected by the *Code*, and the practices and procedures that support it. Members and legal counsel also meet to discuss existing and

emerging legal issues and to review appeals and judicial reviews of their decisions.

HUMAN RIGHTS EDUCATION

Pursuant to sections 5 and 6 of the *Code*, the Attorney General is responsible for educating the public about human rights, and researching and consulting on matters relevant to the *Code*. The Tribunal does not have a mandate to monitor the state of human rights in the province, but it is a source of information to the public about their rights and responsibilities under the *Code*. Through open hearings, publication of its decisions, public speaking and media reporting, complaints which are upheld or dismissed perform an educative function.

PROVINCIAL CONTRIBUTIONS

During the last year, the Chair made presentations to the Continuing Legal Education Seminars on Human Rights and on Labour Law, the Human Rights section of the BC Branch of the Canadian Bar Association and a Lancaster House conference, and addressed a University of Victoria law and policy class. Legal counsel spoke at the Continuing Legal Education Seminar on Human Rights.

The Tribunal's Chair is the Chair of the BC Council of Administrative Tribunals' (BCCAT) Education Committee and spoke at their annual conference. The Chair is actively involved in training members of other administrative tribunals on hearing and mediation skills and decision writing. Due to her contribution, BCCAT gave the Chair a recognition award.

This year, the Chair and Tribunal hosted and trained members of the Nunavut Human Rights Tribunal.

Two Tribunal members are directors on BCCAT's board, two spoke at a Lancaster House conference and one was an adjunct professor at the University of British Columbia and taught administrative law.

EXTRA-PROVINCIAL CONTRIBUTIONS

The Chair is a director on the Canadian Council of Administrative Tribunals' Board and chairs the Nomination Committee. She presented a paper at CCAT's annual conference on models for government support for tribunal training without interference with independence, and moderated a panel discussion on the challenges presented to administrative justice by self and under-represented litigants.

The Chair is also a Director on the Canadian Institute for the Administration of Justice's Board and chairs its Administrative Tribunals Sub-Committee. She organized, chaired and moderated the National Roundtable on standards of review post Dunsmuir and Khosa, and presented a paper on comparative remedies in the human rights context at its annual conference.

The Chair also presented a paper on the lessons learned from the direct access model of human rights protection at the Canadian Association of Statutory Human Rights Agency's annual conference.

HEATHER MACNAUGHTON, CHAIR

Ms. MacNaughton was first appointed as Chair of the Tribunal on August 1, 2000, and was reappointed for a further five-year term beginning July 31, 2005.

She holds both a Bachelor of Laws (1982) and Master of Laws (1998) from Osgoode Hall Law School and a Bachelor of Arts (with distinction) from Brock University (1979). Her Master's work focused on the Litigation Process and Alternative Dispute Resolution.

Prior to her appointment to the Tribunal, Ms. MacNaughton chaired both the Ontario Human Rights Board of Inquiry and the Ontario Pay Equity Hearings Tribunal.

Ms. MacNaughton left private practice in 1995 to become a Vice Chair of the Ontario Human Rights Board of Inquiry, the Pay Equity Hearings Tribunal, and the Employment Equity Tribunal. Prior to that, she had been a partner with a national law firm practising in the areas of Labour, Employment, Human Rights, Administrative Law and Civil Litigation.

J.A. (TONIE) BEHARRELL, MEMBER

Ms. Beharrell was appointed as a full-time Member of the Tribunal on December 2, 2002 for a five-year term. She was most recently reappointed for a five-year term expiring in December 2012.

She holds a law degree from the University of British Columbia (1997) and a Bachelor of Arts from Simon Fraser University (1994).

Prior to joining the Tribunal, Ms. Beharrell was an Associate at a national law firm practising in the areas of Labour, Employment, Human Rights, and Administrative Law.

MURRAY GEIGER-ADAMS, MEMBER

Mr. Geiger-Adams was appointed a full-time Member of the Tribunal effective March 9, 2009 for a six-month term under a Chair's appointment. He was most recently reappointed for a five-year term expiring in January 2015.

He holds a law degree from the University of Toronto (1985), and a Bachelor of Arts (Honours) degree in political science from the University of British Columbia (1975).

Prior to joining the Tribunal, and from 1997-2008, Mr. Geiger-Adams was legal counsel for a professional association responsible for collective agreement administration.

Before that, and from 1985-1997, he was a student, associate and then partner in a Vancouver law firm, representing clients in matters including labour, human rights, aboriginal rights and employment.

BARBARA HUMPHREYS, MEMBER

Ms. Humphreys was appointed as a full-time Member of the Tribunal in 1997. She was most recently reappointed for a five-year term expiring in December 2014.

She holds a law degree from the University of Victoria (1984) and a Bachelor of Arts from Sir George Williams University (1969).

Ms. Humphreys joined the B.C. Council of Human Rights in 1990. She was actively involved in the transition from the former B.C. Council of Human Rights to the Human Rights Tribunal.

Prior to joining the B.C. Council of Human Rights, Ms. Humphreys was an Ombudsman Officer for the Office of the Ombudsman.

Tribunal Members

Lindsay Lyster, Member

Ms. Lyster was appointed as a full-time Member of the Tribunal on September 30, 2002 for a five-year term. She was most recently reappointed for a five-year term expiring in September 2011.

She holds a law degree from the University of British Columbia (1991) and a Bachelor of Arts (with distinction) from the University of Victoria (1987).

Ms. Lyster was an Associate at a national law firm practising in the areas of Labour, Human Rights, Constitutional Law, Administrative Law, and Employment Law. Prior to joining the Tribunal, Ms. Lyster was Policy Director of the B.C. Civil Liberties Association.

She left private practice to become an Adjunct Professor, Faculty of Law, University of British Columbia, teaching in the area of Canadian Constitutional Law.

Enid Marion, Member

Ms. Marion was appointed as a full-time Member of the Tribunal, effective July 27, 2008. She holds a law degree from the University of Victoria (1988).

Prior to joining the Tribunal, Ms. Marion practiced labour, employment and human rights law as an Associate with a Vancouver law firm and as an Associate and then Partner with another Vancouver law firm.

Kurt Neuenfeldt, Member

Mr. Neuenfeldt was appointed as a full-time Member of the Tribunal on January 6, 2003 for a five-year term. He was most recently reappointed for a five-year term expiring in January 2012.

He holds a law degree from the University of British Columbia (1978) and a Bachelor or Arts degree from the University of Wisconsin (1972).

For several years, Mr. Neuenfeldt worked with the Legal Services Society of BC. While there, he held a range of positions including Staff Lawyer, General Counsel and Director of Client Services. He then practised privately in Vancouver.

Prior to joining the Tribunal, Mr. Neuenfeldt had been a member of the Immigration and Refugee Board of Canada for over nine years.

Judith Parrack, Member

Ms. Parrack was appointed as a full-time Member of the Tribunal on August 1, 2005 for a five-year term. Ms. Parrack holds a law degree from Osgoode Hall Law School (1987).

Ms. Parrack was an Associate with a national law firm from 1989 to 1994 and a staff lawyer at the B.C. Public Interest Advocacy Centre from 1995 to 1999. She was a full-time Member of the B.C. Human Rights Tribunal from 1999 to 2002.

Prior to re-joining the Tribunal in 2004, Ms. Parrack was in private practice in the areas of Labour, Human Rights and Administrative Law.

MARLENE TYSHYNSKI, MEMBER

Ms. Tyshynski became a full-time Member of the Tribunal on December 1, 2005 for a temporary six-month term.

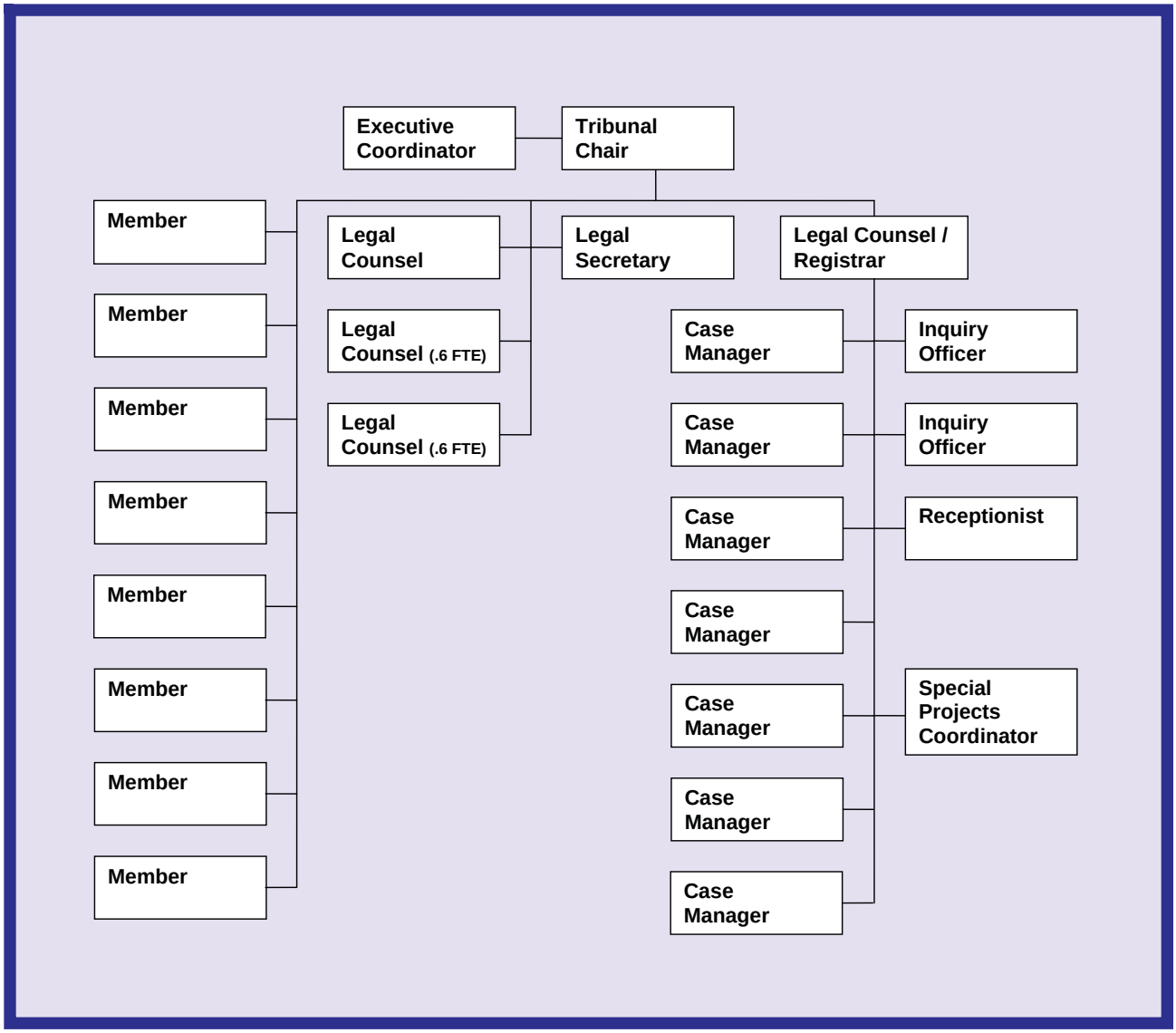
Upon expiry of her term, Ms. Tyshynski returned to her position as legal counsel to the Tribunal. In October 2007, following amendments to the *Administrative Tribunals Act*, the Chair appointed her to a second six-month term. She was most recently reappointed to a five-year term expiring in April 2013.

She holds a law degree from the University of Victoria (1988), a Master of Social Work degree from Wilfred Laurier University (1978) and an Honours Bachelor of Applied Science degree from the University of Guelph (1976).

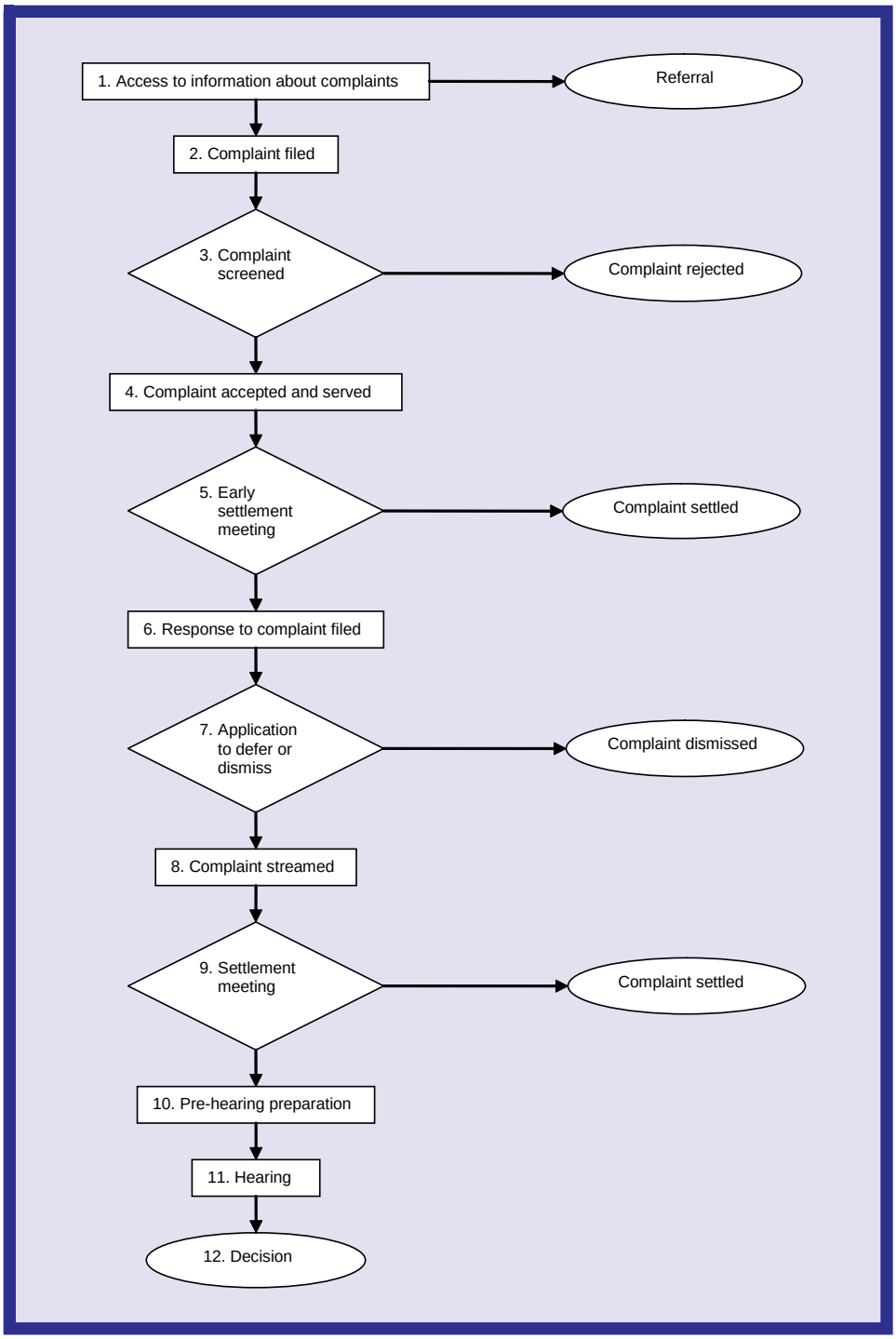
At the outset of her career, Ms. Tyshynski was an associate with two law firms in Victoria. She was in private practice for several years specializing in, among other areas, Administrative Law, then she worked as a staff lawyer for the Legal Services Society.

Prior to her appointment as Member, Ms. Tyshynski served as legal counsel to the Tribunal for three years.

Organization Chart



Complaint Flow Chart



Steps in the Complaint Procedure

1. Access to Information about Complaints

Two Tribunal inquiry officers give callers basic information about human rights protection under the *Code*, the complaint process and other organisations providing assistance in human rights matters. If the call is not about a human rights matter, the inquiry officers may refer the caller to another agency. Complaint forms, guides and information sheets are available from the Tribunal, on its website, at government agents' offices, the Human Rights Clinic and other organisations.

2. Complaint Filed

The first step in the complaint process is filing a complaint form.

3. Complaint Screened

The complaint is assigned to a case manager who reviews it to see it is complete, appears to be within the jurisdiction of the Tribunal, and is within the six-month time limit.

If the complaint form is not complete, the case manager explains why and gives the complainant a limited time to complete it.

If it is clear that the complaint does not involve a provincial matter or a human rights matter covered by the *Code*, the case manager will recommend to the Chair that the complaint be rejected.

If it appears that the complaint was filed after the six-month time limit, the case manager asks the parties whether it is in the public interest to accept the complaint and whether anyone would be substantially prejudiced by the delay in filing. A Tribunal member decides whether to accept the complaint.

4. Complaint Accepted and Served

After the complaint is screened, the Tribunal notifies the parties that it has been accepted.

5. Early Settlement Meeting

The parties may meet with a Tribunal mediator who will help them resolve the complaint before any further steps are taken. Many complaints are settled at this stage.

6. Response to Complaint Filed

If the parties do not settle or do not want an early settlement meeting, the respondent files a response to the complaint form and may also file an application to defer or dismiss the complaint.

7. Application to Defer or Dismiss

If a respondent applies to have the complaint deferred or dismissed, the Tribunal gets submissions from the parties and a Tribunal member makes a decision. Complaints may be deferred if there is another proceeding capable of appropriately dealing with the substance of the complaint. Complaints may be dismissed for the reasons provided in section 27(1) of the *Code*.

8. Complaint Streamed

Once a response to the complaint is filed and screened, the Tribunal decides whether it will follow the standard stream or be case-managed by a Tribunal member because of its complexity or other special characteristics.

9. Settlement Meeting

After the complaint is streamed, the parties have another opportunity to take part in a settlement meeting.

10. Pre-Hearing Preparation

If the complaint does not settle, the parties must prepare for the hearing and exchange relevant documents, witness lists, and positions on remedy. The case manager will telephone them several weeks before the hearing to check that they are ready.

11. Hearing

Hearings are held before a Tribunal member or a panel of three members in exceptional cases. The parties attend in person and the hearing is open to the public. Evidence is given through witnesses, documents and other items. Each party has an opportunity to challenge the other party's evidence and to make arguments supporting their position.

12. Decision

Based on the evidence, the arguments and the relevant law, the Tribunal member or panel decides whether the complainant has proven that discrimination occurred and, if so, whether the respondent has a defence to the discrimination. If the complaint is not justified, it is dismissed. If the complaint is justified, orders are made to remedy the discrimination.

Publications and Staff

The following Guides, Information Sheets and Policies are available in English, Chinese and Punjabi on our web-site or by contacting the Tribunal. Please refer to the back cover of this report for contact information.

Guides

1– The BC Human Rights Code and Tribunal
2– Making a Complaint and guide to completing a Complaint Form
3– Responding to a Complaint and guide to completing a Response to Complaint Form
4– The Settlement Meeting
5– Getting Ready for a Hearing

Information Sheets

1– Tribunal's Rules of Practice and Procedure
2– How to Name a Respondent
3– What is a Representative Complaint?
4– Time Limit for Filing a Complaint - Complainants
5– Time Limit for Filing a Complaint - Respondents
6– Tribunal Complaint Streams
7– Standard Stream Process - Complainants
8– Standard Stream Process - Respondents
9– How to Ask for an Expedited Hearing
10– How to Deliver Communications to Other Participants
11– What is Disclosure?
12– How to Make an Application
13– How to Add a Respondent
14– How to Add a Complainant
15– How to Make an Intervenor Application
16a–Applying to Dismiss a Complaint Under Section 27
16b–How to Respond to an Application to Dismiss a Complaint
17– How to Request an Extension of Time
18– How to Apply for an Adjournment of a Hearing
19– How to Require a Witness to Attend a Hearing
20– Complainant's Duty to Communicate with the Tribunal
21– How to Find Human Rights Decisions
22– Remedies at the Human Rights Tribunal
23– How to Seek Judicial Review
23a–Judicial Review: The Tribunal's Role
24– How to Obtain Documents From a Person or Organization Who is Not a Party to the Complaint
25– How to Enforce Your Order
26– Costs Because of Improper Conduct

Policies

- Complainant's Duty to Communicate with the Tribunal
- Public Access and Media Policy
- Settlement Meeting
- Special Programs

Tribunal Staff

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Vikki Bell, Q.C.

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Andrea Nash

Legal Counsel
Jessica Connell
Katherine Hardie (part-time)
Denise Paluck (part-time)

Legal Secretary
Mattie Kalicharan

Case Managers
Pam Bygrave
Janice Fletcher
Lindene Jervis
Anne-Marie Kloss
Lorne MacDonald
Maureen Shields
Margaret Sy (partial year)

Special Projects Coordinator
Luke LaRue

Administrative Assistant
Graeme Christopher (partial year temp assignment)

Inquiry Officers
Cheryl Seguin
Stacey Wills

Reception
Janet Mews

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