CANADIAN HUMAN RIGHTS TRIBUNAL

ANNUAL REPORT 2016

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CHAIRPERSON'S MESSAGE

As Chairperson of the Canadian Human Rights Tribunal, I have the honour to present this 2016 Annual Report to Parliament and to all Canadians. As I entered the third year of my mandate last year, the Tribunal's strategic plan for the future began to take shape and we continued to streamline and improve our services to Canadians.

The Canadian Human Rights Tribunal is an adjudicative body that hears complaints of discrimination under the *Canadian Human Rights Act*. We are governed by the laws enacted by Parliament and subject to interpretations of those laws issued by superior courts. Administrative tribunals like the CHRT were created to provide access to justice that is expedient, timely, accessible and administered by subject experts. However, much has changed since the founding of this institution in 1977 and our modern challenges are sometimes hampered by outdated language in our founding legislation, the *Canadian Human Rights Act*. Nevertheless, we work within those limitations to be expedient, accessible and to bring our level of expertise to the inquiry in an environment that is highly charged and sometimes controversial.

Over this past year, I was reminded by leaders of Human Rights Commissions and Tribunals from other countries that Canada is looked upon as a leader in human rights. We not only have comprehensive anti-discrimination laws, but through the CHRT, we also have a mechanism for compensation and restitution. Injured parties throughout Canada have access to remedies for human rights transgressions, whether through the CHRT or our provincial and territorial counterparts. However, many countries throughout the world do not have effective institutions with the authority to impose a remedy where human rights have been violated.

In May of 2016, the CHRT hosted a pan-Canadian Human Rights Tribunal Forum. This was the first time since 1999 that human rights tribunals from various Canadian jurisdictions assembled in one place. Eleven of thirteen jurisdictions were represented and over two days, the parties freely exchanged best practices, resource materials and other ideas about how all of us might improve access to justice. The Forum was an overwhelming success, and the attendees agreed that the Forum should be held on a bi-annual basis hereafter. The participants of this historic pan-Canadian Human Rights Tribunal Forum are featured on the cover of this annual report.

“Over this past year, I was reminded by leaders of Human Rights Commissions and Tribunals from other countries that Canada is looked upon as a leader in human rights.”

A landmark decision of the Tribunal (2016 CHRT 2) was released in early 2016. The *First Nations Child and Family Caring Society of Canada et al* v. *Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* matter was originally referred to the CHRT in 2008. In 2011, the Tribunal granted the Respondent's motion to dismiss the complaint. That decision was overturned by a judicial review at the Federal Court and the subsequent appeal to the Federal Court of Appeal was dismissed. As a result, the

complaint came back to the Tribunal where a three-member panel was appointed to hear the matter over a period that spanned almost three years. The decision is summarized in some detail later in this annual report. However, it is worth noting some of the remarkable facts outside of the decision. There were 72 days of hearings, 10 interim and two remedial rulings issued. Over 20,000 pages of documents and transcripts formed part of the evidentiary record. The National Film Board has recently released a full-length documentary on the Tribunal and this historic decision called, "We Can't Make the Same Mistake Twice." In the fall of 2016, the House of Commons voted unanimously on a motion to follow through on the findings and orders of the Tribunal in the decision. The Tribunal remains seized with the matter to oversee implementation of its orders and remedies.

As we produce this Annual Report, the Parliament continues to bring along Bill C-16 to introduce gender identity and gender expression as prohibited grounds of discrimination under the *CHRA*. As it happens, the Tribunal has already heard several cases on this ground of discrimination under the broader heading of "sex" in s. 3(1) of our *Act*. The change to the Act will bring more clarity and again give notice to the world where we, as Canadians, stand on human rights.

Over the past year I mandated our Secretariat to update and prepare our Rules of Procedure for publication in the *Canada Gazette* and formal adoption. Although this is required under the *CHRA,* the Tribunal had previously not taken the steps to bring our Rules into Regulation. We are now well underway in this lengthy process, which involves redrafting and revising the Rules in consultation with the Department of Justice legislative counsel. In due course, we will undertake consultations with stakeholder groups.

Another major undertaking commenced in 2016 was the recruitment of new Members for the Tribunal under the Government's new GIC Appointments process emphasizing qualification, merit and transparency. I have been working with a team of officials from the Prime Minister's Office, the Privy Council Office, the Office of the Minister of Justice and the Department of Justice. A Notice of Opportunity was posted in December and the selection committee is working through hundreds of applications received. As the process has moved more slowly than originally anticipated, the Governor-in-Council has given temporary extensions to Member Marchildon and Member Lustig. In addition, two full-time members, Member Gaudreault and Member Mercer, were appointed on an interim basis while the new selection process runs its course. Today the Tribunal has 12 Members. Five are full-time Members based in Ottawa and the remaining seven part-time Members are based all across Canada.

The increase in full-time capacity will be essential in the months to follow. For the first time in more than a decade, we have received referrals of pay equity cases, and presently have two underway. In the past, these types of cases had the tendency to consume enormous Tribunal resources and Member time. We anticipate these cases will give us the same challenges as they proceed towards full hearing. In addition, we have also received a number of new, high profile and potentially precedent-setting cases which will require the Tribunal's dedication and expertise to ensure the full, fair and impartial hearing of all sides.

As mentioned before, it challenges the CHRT to deliver its mandate on an expedited and informal basis when the stakes are so high. However, we must continue to do our best to deliver timely access to justice within the framework of our legislation and the jurisprudence which govern us.

Original signed by
David L. Thomas,
Chairperson

WHAT WE DO

The Canadian Human Rights Tribunal is a quasi-judicial body that inquires into complaints of discrimination referred to it by the Canadian Human Rights Commission and decides whether the conduct alleged in the complaint is a discriminatory practice within the meaning of the *Canadian Human Rights Act*. The Tribunal can also review directions and assessments made under the *Employment Equity Act*.

The Tribunal operates pursuant to the *Canadian Human Rights Act*, which aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. The Act prohibits certain discriminatory practices with a view to protecting individuals in employment, and in the provision of goods, services, facilities, and in leasing commercial or residential premises.

Like a court, the Tribunal must be—and must be seen to be—impartial. It renders decisions that are subject to review by the Federal Court at the request of any of the parties. However, the Tribunal provides a less formal setting than a court, where parties can present their case without strictly adhering to complex rules of evidence and procedure. The Tribunal also offers mediation services where parties have the opportunity to attempt to settle their dispute with the assistance of a Tribunal Member, acting as a Mediator.

The Act applies to federally regulated employers and service providers, including: federal government departments and agencies; federal Crown corporations; chartered banks; airlines; shipping and inter-provincial trucking companies; telecommunications and broadcasting organizations; and, First Nations governments.

> “Individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction.”

HOW THE TRIBUNAL WORKS

Tribunal Members conduct mediations, engage in case management, preside over hearings, issue rulings and render decisions. Parties to a complaint include the complainant, the respondent, the Commission, and at the discretion of the Tribunal, any other interested parties.

MEDIATION

Parties to proceedings before the Tribunal have the option of trying to address their differences through voluntary and confidential mediation. The goal of the mediation is to try to reach a solution to the dispute between the complainant and the respondent in an informal environment. If an agreement is reached at mediation, there will be no hearing.

The mediator is a neutral and impartial Member of the Tribunal with expertise in human rights matters, whose role is to assist the parties to a complaint in resolving their differences through the negotiation of a settlement agreement. The mediator is there to facilitate discussions between the parties and ensure that they occur in an atmosphere of good faith, courtesy and respect. The mediator has no power to impose a solution or agreement.

CASE MANAGEMENT

Before proceeding to a hearing, Members engage in case management to resolve a variety of preliminary issues. Case management conference calls with all parties are often used as an expedient way to guide parties, resolve disclosure issues, explore agreed statements of facts and to settle any other preliminary matters, such as hearing dates and venue. It often establishes the commitment of the parties to abide by their hearing schedule. This aims to ensure a fair approach to the inquiry process and minimize missed deadlines, requests for adjournments on hearing days, and disagreements between parties about the issues being heard.

HEARING

A hearing is held in a court-like setting where the parties to the complaint are given the opportunity to present their witnesses' testimony, other evidence and argument to the Tribunal. The objective of the hearing is to allow the Tribunal to hear the merits of the case directly so it can determine on a balance of probabilities, whether or not discrimination has occurred. At the hearing the parties may also present evidence and submissions on the appropriate remedy to be ordered, in the event the complaint is substantiated. The length of the hearing depends on such factors as complexity of the case, the number of witnesses and the volume of documentary evidence.

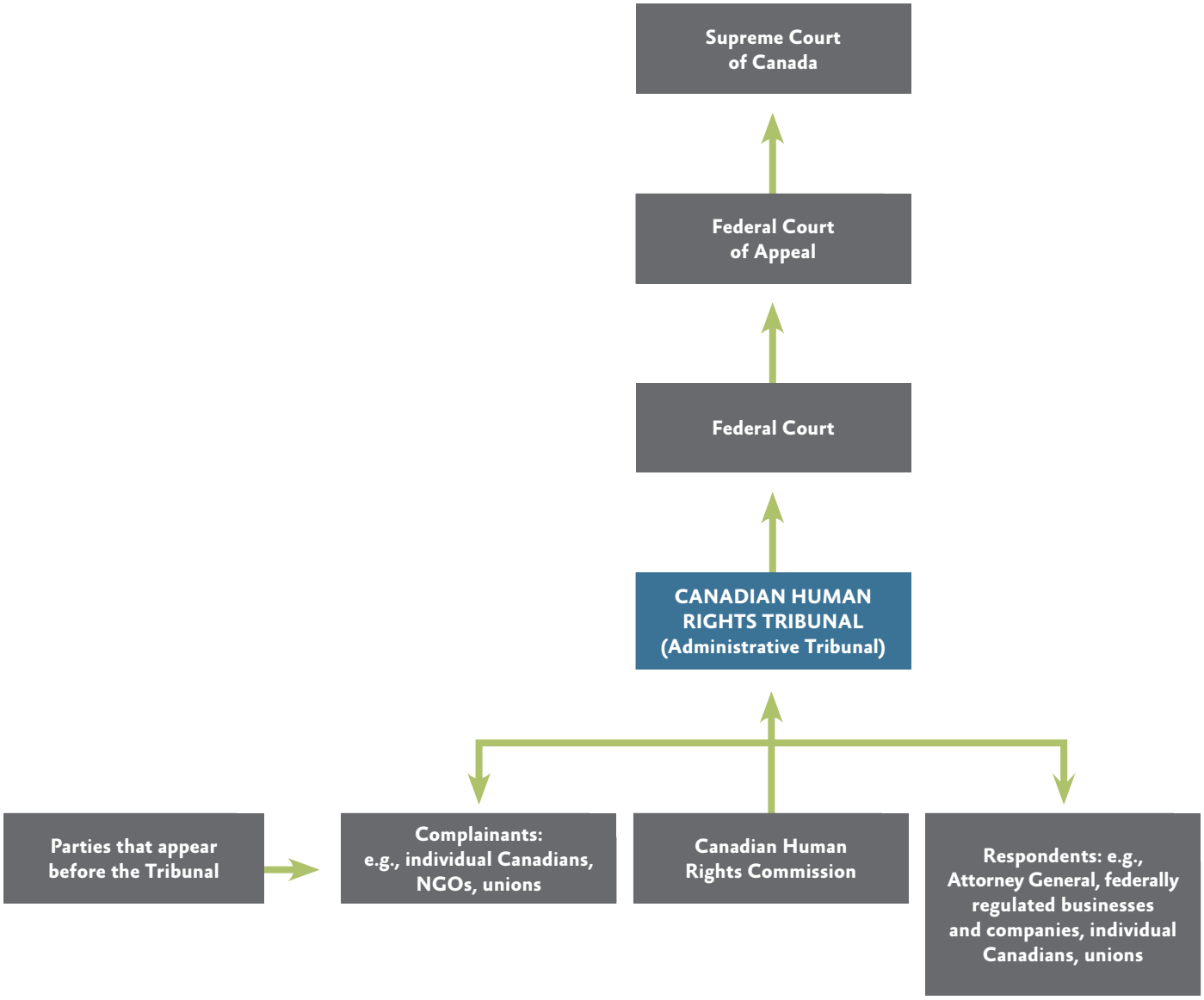
RULINGS

All sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (i.e. they do not answer the question of whether a discriminatory practice occurred) are classified as rulings. Rulings are usually issued in response to a preliminary motion raised by one of the parties before the hearing. For example, a ruling would be issued where a complaint is dismissed for lack of jurisdiction, abuse of process, delay, irreparable breach of fairness, or where the issue before the Tribunal is a motion for some type of procedural or evidentiary order (e.g. disclosure of documents).

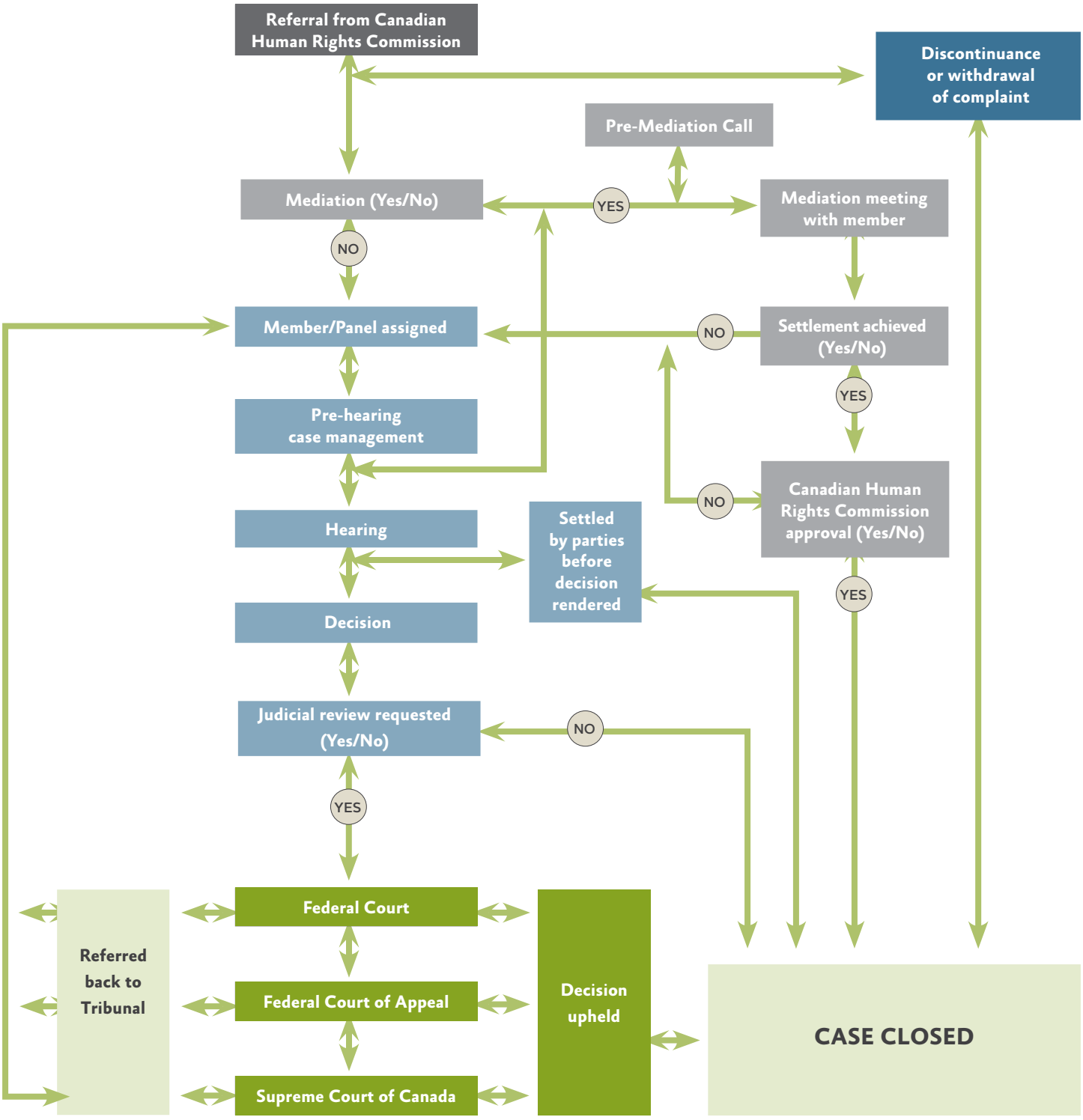
DECISIONS

For the purpose of this report, a "decision" is defined as a set of adjudicative reasons issued by a Member or Panel of the Tribunal following a hearing, which relate to and ultimately answer the question of whether a discriminatory practice occurred in a given case. If a complaint is substantiated, the decision may also order a remedy to rectify the discrimination, and will provide reasons in support of the order.

PARTIES BEFORE THE TRIBUNAL AND AVENUES OF JUDICIAL REVIEW AND APPEAL



TRIBUNAL INQUIRY PROCESS
AND JUDICIAL REVIEW



TRIBUNAL CASELOAD
(JANUARY 1 – DECEMBER 31, 2016)

CASELOAD

The Tribunal started the year with 330 complaints. After closing 67 and receiving 52 new complaints, the year ended with 315 active complaints. While there is a downward trend of complaints being referred by the Commission, the degree of complexity continues to rise as the social fabric of Canadian society continues to evolve and new challenges are brought for inquiry under the *CHRA*. An example of such cases include complaints that deal with service to Indigenous communities, enhanced airline screening of Canadians appearing on American passenger security lists, transgender identity, and historic pay equity cases that have already been through several years of litigation.

CASELOAD JANUARY 1-DECEMBER 31, 2016	
Active Caseload at January 1, 2016	330
Complaints Closed	67
New complaints received	52
Active Caseload at December 31, 2016	315

VOLUNTARY MEDIATIONS

The Tribunal continued to offer voluntary mediation as an alternative dispute mechanism. Thirty-two (32) pre-mediation conference calls were held with the parties to clarify issues and ensure shared understanding of the procedures. Fifty-four (54) mediations were held in person; thirty-seven (37) of which, or 68 percent, were settled at mediation.

In addition, seventeen (17) complaints, or 31 percent, were settled between the parties at various stages after referral of the complaint or during the case management process.

MEDIATIONS JANUARY 1-DECEMBER 31, 2016		
Pre-Mediation Conference Calls	Held in-person	Settled at Mediation
32	54	37 (68%)

ADJUDICATION

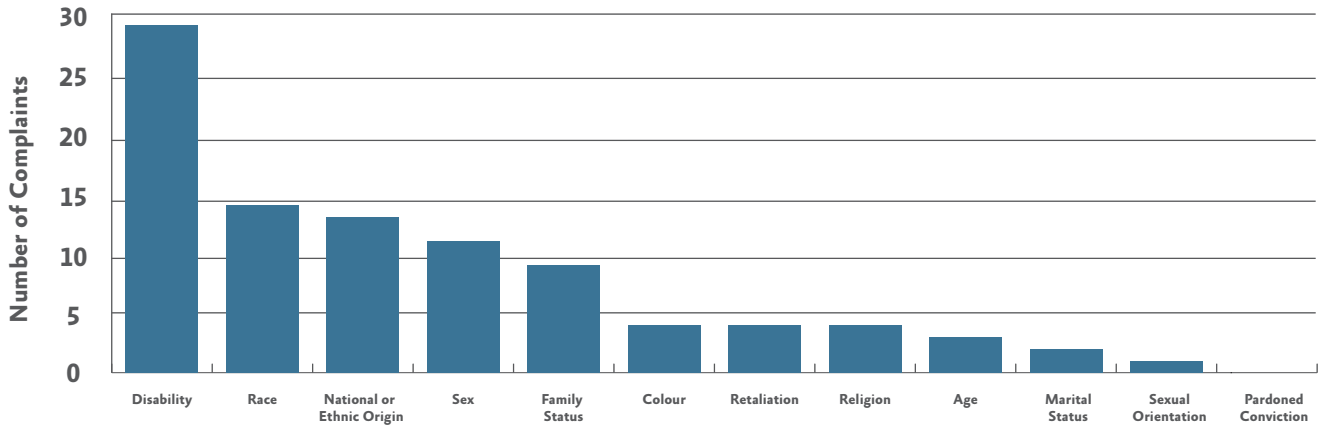
The Tribunal held 174 Case Management Conference Calls and 103 Hearing Days. By year-end, seventeen (17) Rulings and four (4) Decisions were released.

ADJUDICATION JANUARY 1-DECEMBER 31, 2016			
Case Management Conference Calls	Hearing Days	Rulings	Decisions
174	103	17	4

PROHIBITED GROUNDS OF DISCRIMINATION

The prohibited ground of disability (29) continues to top the list of complaints received. This is followed by those based on race (14), national or ethnic origin (13), sex (11), family status (9), colour (4), retaliation (4), religion (4), age (3), marital status (2), and sexual orientation (1). No complaints were referred on the ground of conviction for which a pardon has been granted. It should be noted that a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds. While retaliation is not a prohibited ground of discrimination complaints alleging retaliation under s.14.1 need not invoke a prohibited ground – thus they form a separate category of complaint.

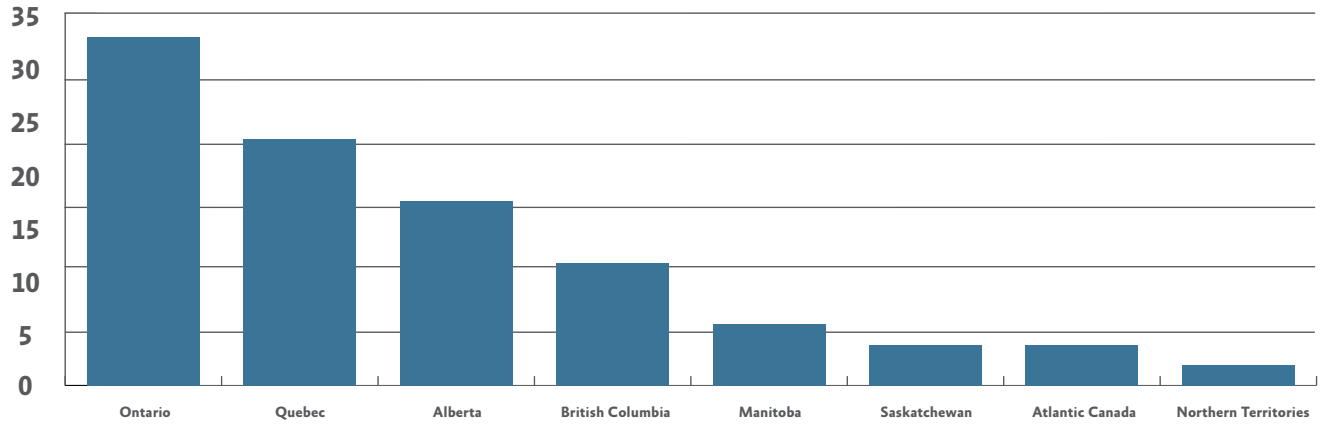
Complaints received in 2016 by prohibited grounds of discrimination



COMPLAINTS BY PROVINCE

The highest proportion of complaints received in 2016 continued to be from Ontario (32.7%) . This was followed by Quebec (23.1%), Alberta (17.3%), British Columbia (11.5%), Manitoba (5.8%) Saskatchewan (3.8%), Atlantic Canada (3.8%), and the Northern Territories (1.9%).

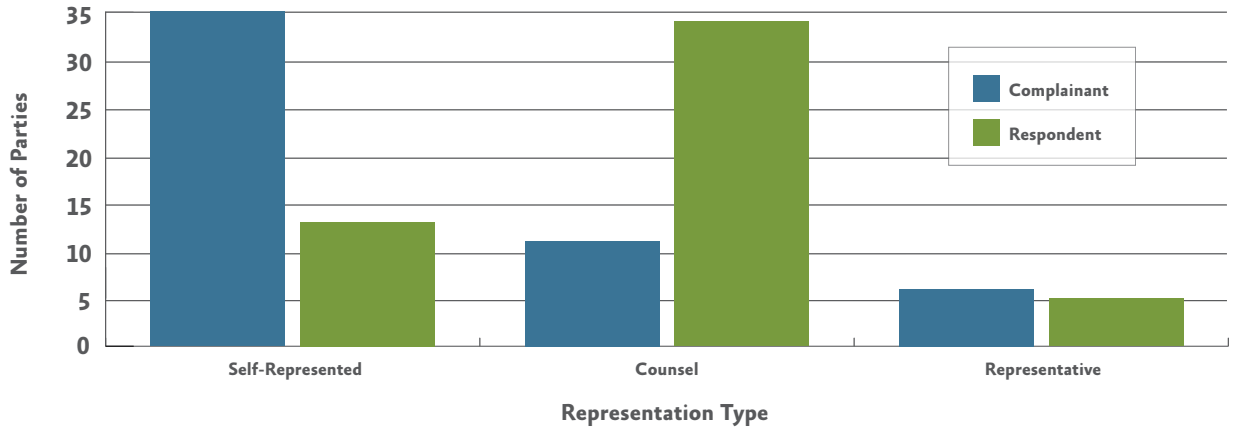
Complaints by Province Referred in 2016



REPRESENTATION OF PARTIES

More complainants (35) continue to be self-represented in comparison to respondents (13). The number of complainants represented by Counsel (11) continues to be lower than that of respondents (34). The number of complainants who had other types of representatives (6) was slightly higher than that of respondents (5).

Representation of parties – Complaints received in 2016



CARRIED TO NEXT REPORTING YEAR

A total of 315 Active Complaints were carried over to January 1, 2017, where fifty-eight (58) remained in case management; fifteen (15) were in mediation; twelve (12) were settled but were awaiting the Commission's approval; twelve (12) were in active Hearing; and fourteen (14) were awaiting Rulings or Decisions.

A cluster of 179 complaints are awaiting a ruling on a motion, and thirteen (13) other complaints are being held in abeyance pending a superior court's final determination of a similar matter. Six (6) files are on hold pending the parties' response and six (6) have been adjourned *sine die*.

ACTIVE COMPLAINTS CARRIED AS OF JANUARY 1, 2017

STATUS	NUMBER
Case Management	58
Mediation	15
CHRC Review of Settlement Pending	12
Hearing	12
Ruling/Decision Pending	14
Ruling pending on complaint cluster	179
In Abeyance pending court's final determination of a similar matter	13
Files on hold pending parties' response	6
Adjourned *sine die*	6
Total	315

SIGNIFICANT TRIBUNAL DECISIONS AND RULINGS

The following case summaries provide information about some Tribunal decisions that were particularly significant in their impact.

1. *FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA ET AL. v. ATTORNEY GENERAL OF CANADA (FOR THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA)*, 2016 CHRT 2

Pursuant to section 5 of the *Canadian Human Rights Act* (the *Act*), the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations alleged Indian and Northern Affairs Canada (INAC) discriminates in the provision of child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services.

At issue were the activities of INAC in managing the First Nations Child and Family Services Program (the FNCFS Program), its corresponding funding formulas and a handful of other related provincial and territorial agreements that provide for child and family services to First Nations living on reserve and in the Yukon. Pursuant to this program and other agreements, child and family services are provided to First Nations on reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. INAC funds the on-reserve child and family services provided by FNCFS Agencies or the province/territory. The objective of the FNCFS Program and other related provincial and territorial agreements is to support the provision of culturally appropriate child and family services to First Nations children and families in a manner that is reasonably comparable to those available to other provincial residents in similar circumstances.

In response to the complaint, INAC argued that its role in the provision of child and family services to First Nations was strictly limited to funding and being accountable for the spending of those funds. According to INAC, funding did not constitute a "service" and is not "customarily available to the general public" pursuant to the wording of section 5 of the *Act*. Rather, it is provided on a government to government; or, government to agency basis.

The Tribunal rejected INAC's argument and found that it indeed provided a service. It noted that there is nothing in the *Act* that excludes funding from the purview of section 5. Further, the history and objectives of the FNCFS Program and other related provincial/territorial agreements indicated that the benefit or assistance provided through these activities is to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children and families on reserve and in the Yukon. Without the FNCFS Program, related agreements and the funding provided through those instruments, First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities. INAC extends the FNCFS Program and other related provincial/territorial agreements as a partnership, including with First Nations, to improve outcomes for First Nations children and families on reserve. Ultimately, through the FNCFS Program, its funding formulas and the related provincial/territorial agreements, not only does INAC have a direct impact on the child and family services provided to First Nations children and families living on reserves and in the Yukon, but it exerts a significant degree of control over the provision of those services.

INAC further argued that child welfare services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, the Tribunal

found that that position did not take into consideration Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*. Instead of legislating in the area of child welfare on First Nations reserves, the federal government took a programing and funding approach to the issue. However, according to the Tribunal, this delegation and programing/funding approach did not diminish INAC's constitutional responsibilities, including its fiduciary relationship, towards First Nations or allow it to escape the scrutiny of the *Act*.

The Tribunal then examined whether First Nations are adversely impacted by the services provided by INAC. Based on the evidence presented to the Tribunal, it determined that INAC is far from meeting the intended goals of the FNCFS Program and other related provincial/territorial agreements. Rather, First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.

The Tribunal determined that the funding methodologies under the FNCFS Program have a number of shortcomings and create incentives to remove children from their homes and communities to place them in care. Mainly, funding is determined based on assumptions regarding population size and the number of children in care that ignore the real child welfare situation in many First Nations communities. Furthermore, whereas operations budgets are fixed for such things as preventive child welfare programing, maintenance budgets for taking children into care are reimbursable at cost. The result is that an FNCFS Agency that does not have the funds to provide services through its operations budget, often times takes the child into care in order to provide the necessary child and family services. For small and remote agencies, the population assumptions significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

The Tribunal also found that INAC's funding methodologies had not been consistently updated in an effort to keep them current with the child welfare legislation and practices of the applicable provinces. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. For example, consistent with sound social work practice, the provinces' legislation and standards dictate that all alternative measures should be explored before bringing a child into care. However, by covering in-care expenses at cost and providing insufficient fixed budgets for such things as prevention programming, INAC's funding formulas provided an incentive to remove children from their homes as a first resort rather than as a last resort.

For many years, notwithstanding numerous reports and recommendations identifying the adverse impacts of the program and agreements, including INAC's own internal analysis and evaluations, the Tribunal found that INAC had sparingly addressed the findings of those reports. While the Tribunal recognized that efforts had been made to improve the FNCFS Program, those improvements still fell short of addressing the service gaps, denials and adverse impacts found by the Tribunal; and, ultimately, failed to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on reserve that are reasonably comparable to those provided off reserve.

The Tribunal also examined INAC's application of Jordan's Principle, a child-first principle providing that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government, regarding services to a First Nations child, the government department of first contact pays for the service. It can then seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. However, the Tribunal found INAC's process for implementing the principle had delays inherently built into it and focused mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. In the Tribunal's view, INAC's narrow definition and approach defeated the purpose of Jordan's Principle and resulted in service gaps, delays and denials for First Nations children on reserve.

In substantiating the complaint, the Tribunal concluded that the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on reserve and in the Yukon. It is only because of their race and/or national or ethnic

origin that they suffer the adverse impacts of the program and agreements in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system. In this regard, the Tribunal noted that INAC's funding methodologies do not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, especially in Northern and remote communities, and highlighting the inherent problem with the assumptions and population levels built into the FNCFS Program.

Moving forward, the Tribunal emphasized substantive equality over formal equality. That is, human rights principles, both domestically and internationally, require that INAC consider the distinct needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances – in order to ensure them equality in the provision of child and family services. Legal instruments, such as the *Convention on the Rights of the Child* and the *United Nations Declaration on the Rights of Indigenous Peoples*, reinforced the need for due attention to be paid to the unique situation and needs of children and First Nations people and, especially, the combination of those two vulnerable groups: First Nations children. In this regard, the Tribunal stated that Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

The Tribunal ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle. The Tribunal retained jurisdiction to further refine the order and to deal with other requests for compensation.

RESULTS FOR CANADIANS

This complaint and decision draw attention to the systemic issues facing First Nations in the provision of child and family services on reserves across Canada. Through this decision, not only is awareness raised about the inadequacies and inequalities of child welfare services offered to First Nations on reserves, but it also serves as a catalyst for change and reform to INAC's approach to providing those services. Indeed, the Government of Canada has welcomed this decision and has chosen not to challenge it through judicial review.

In the spirit of reconciliation, this decision also recognizes the suffering of Aboriginal peoples across Canada who have been affected by residential schools, the sixties scoop and the First Nations child welfare system.

This case was one of the most significant cases the Tribunal has had to adjudicate, not only in terms of its impact on over 163,000 First Nations children and their families and communities, but also in terms of the Tribunal's time and resources. The hearing of this complaint spanned 72 days, from February 2013 to October 2014. Two interested parties participated at the hearing: the Chiefs of Ontario and Amnesty International. Amnesty International intervened to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the complaint, an area of the law that is not usually pled before the Tribunal. Throughout the hearing the Tribunal also dealt with various procedural issues, rendering 10 interim rulings. In order to decide this case, thousands of pages of evidence, along with the testimony of many witnesses, were considered by the Tribunal. Despite all these challenges, the Tribunal was able to efficiently manage this case, along with the rest of its caseload, and issued a decision on a companion retaliation complaint in June 2015 followed by this decision in January 2016.

While work on the implementation of the Tribunal's decision continues, progress has been made to ensure compliance with the Tribunal's orders. Through a series of subsequent rulings, the Tribunal has made further remedial orders and has documented some of the headway made since the decision, including increased funding for the FNCFS Program, adjustments to the funding methodologies of the FNCFS Program and changes to INAC's implementation of Jordan's Principle. The Tribunal continues to remain seized of this matter in order to ensure the discrimination found in this decision is eliminated.

2. *BEATTIE, BEATTIE, BREWER AND THE ESTATE OF JAMES LOUIE v. ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA,* 2016 CHRT 5

Under section 21 of the *Indian Act*, Mr. Beattie had submitted applications to register certain leases of land of the Okanagan Indian Reserve to the Indian Lands Registry. The applications were rejected for two reasons: (1) the leases did not indicate the Crown as a party; and, (2) no Ministerial approval had been provided. The Complainants alleged that by refusing to register the leases, Aboriginal Affairs and Northern Development Canada (AANDC) engaged in a discriminatory practice by denying a "service", pursuant to section 5 of the *Canadian Human Rights Act* (the *Act*), on the grounds of race and national or ethnic origin.

At the hearing before the Tribunal, AANDC raised a preliminary issue about whether the complaints were solely a challenge to or a collateral attack upon legislation, namely the *Indian Act*. If so, AANDC argued the complaint was beyond the jurisdiction of the Tribunal because legislation is not a service within the meaning of section 5 of the *Act*. This argument was based upon the decisions of the Federal Court of Appeal in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7; and, the Federal Court in *Canadian Human Rights Commission v. Canada (Attorney General)*, 2015 FC 398. In those decisions, the Federal Court and Federal Court of Appeal upheld Tribunal decisions that dismissed complaints because they were solely a challenge to legislation rather than a denial of a "service" under the *Act*.

Based on the testimony of the Manager of Lands Modernization in AANDC's Lands and Economic Development British Columbia Regional Office, and a review of the Land Management System under the *Indian Act*, the Tribunal determined that for registration to be completed under section 21 of the *Indian Act*, the Crown must be a party to the leases. Section 21 of the *Indian Act* mandated AANDC, without discretion, to refuse to register the leases as invalid documents within the legislative land management scheme of the *Indian Act*. Accordingly, the Tribunal found it is the *Indian Act* which denies access to the benefit sought by the Complainants, not AANDC. While the process of reviewing and registering valid documents or not registering invalid documents may be a "service", that was not what was being challenged by the Complainants. Rather, it was the legislative criteria provided by the *Indian Act* for registering documents that was being challenged.

As such, the Tribunal concluded that the refusal to register the leases did not violate section 5 of the *Act*, because the refusal was in accordance with the requirements of the *Indian Act*. The complaints were dismissed because they were solely a challenge to legislation rather than a denial of a service under the *Act* and, therefore, beyond the jurisdiction of the Tribunal.

Subsequently, the Complainants sought judicial review of the Tribunal's decision before the Federal Court. The Federal Court held that the Tribunal did not err in determining the scope of its jurisdiction and dismissed the application for judicial review (see *Beattie v. Canada (Attorney General)*, 2016 FC 1328). That decision is currently on appeal to the Federal Court of Appeal.

RESULTS FOR CANADIANS

This decision reinforces that section 5 of the *Act*, which protects against discrimination in the provision of goods, services, facilities or accommodation, cannot be used to challenge legislation. There is now a consistent line of jurisprudence, from the Tribunal to the Federal Court of Appeal, reinforcing this point. That said, while the Federal Court's decision in *Canadian Human Rights Commission v. Canada (Attorney General)*, 2015 FC 398 was subsequently upheld by the Federal Court of Appeal in 2016 FCA 200, leave to appeal that decision to the Supreme Court of Canada has been sought. The result of that application to the Supreme Court will have an impact on many other complaints before the Tribunal that may be challenging provisions of the *Indian Act* or other legislation. Those other complaints before the Tribunal have been adjourned pending the outcome of that case. Nevertheless, through the *Beattie* decision, the Tribunal has maintained a consistent interpretation of what constitutes a "service" for the purposes of a complaint under section 5 of the *Act*.

3. *OPHEIM v. GAGAN GILL & GILLCO INC.*, 2016 CHRT 12

Ms. Opheim alleged she was subjected to a series of harassing behaviours as a result of her sex and age from Mr. Gagan Gill, the individual respondent who ran Gillco Inc., the corporate respondent (collectively referred to as the "Respondents"). Ms. Opheim's allegations included the following unwelcome sexual conduct: a sexualized and demeaning work request, sexual comments, sexual requests and sexual touching.

Ms. Opheim was 18 years old when she began working for the Respondents. She testified that within the first two weeks of her employment, Mr. Gill began to make sexually explicit comments to her. Soon thereafter, Mr. Gill was grabbing and slapping her buttocks, attempting to grab her by the hips and pull her into his lap. She asked him to stop on each occasion, but he only laughed at her. This unwanted sexual touching continued and accelerated in severity, as Mr. Gill began forcing his hands up Ms. Opheim's skirt and grabbing at her breasts.

The employment relationship ended within two months. Ms. Opheim testified that on the same date, Mr. Gill's wife was in the Respondents' store and that she told Mr. Gill's wife about the sexual incidents. The Respondents did not call Mrs. Gill to give evidence in this matter or provide any explanation for her absence.

The Respondents never provided Ms. Opheim with a Record of Employment. As such, she could not apply for Employment Insurance and had to borrow money from her family. She also stated that she became depressed and anxious as a result of her experience with the Respondents, and was unable to work until she went on anti-depressants about a month later.

The Respondents provided little substantive evidence to rebut Ms. Opheim's testimony. Mr. Gill testified that there was "nothing sexual" and that he "never touched her". The Respondents did not address in their evidence any of the specific sexual allegations, nor did they challenge Ms. Opheim's evidence in their cross-examination of her. In addition, the Respondents indicated that they had access to video-taped security footage from the store that would exonerate Mr. Gill, but did not disclose this footage.

The Tribunal accepted Ms. Opheim's evidence as it was consistent, given in a forthright and straightforward manner. Further, the Tribunal had concerns about the Respondents' failure to call Mr. Gill's wife, the only alleged witness in the matter, and their failure to produce the videotapes that they indicated would exonerate them in relation to the allegations.

In accordance with sections 7(b) and 14 of the *Canadian Human Rights Act* ("the *Act*") the Tribunal concluded that the Respondents committed a discriminatory practice in sexually harassing Ms. Opheim and that this also constituted adverse differentiation in the course of her employment based on the prohibited ground of sex. The Tribunal dismissed the Complainant's allegation of discrimination based on age, due to lack of evidence.

Ms. Opheim was awarded compensation for lost wages for the month immediately following the end of her employment with the Respondents, after which time she had obtained employment elsewhere. She was also awarded compensation for pain and suffering in the amount of $7,500. Ms. Opheim's very young age (18) and resulting vulnerability at the time of the events were relevant factors in awarding compensation for pain and suffering due to the psychological damage caused in a case of sexual harassment.

The Tribunal also awarded Ms. Opheim special compensation, for wilful or reckless discrimination, in the amount of $12,000. The Tribunal explained that these damages were granted on the basis that the Respondents' actions, in repeatedly sexually harassing Ms. Opheim and in discriminating against her based on her sex, constituted a wilful and reckless discriminatory practice pursuant to section 53(3) of the *Act*. In arriving at this decision, the Tribunal considered that the Respondents were not a large or sophisticated employer, and that the harassment took place over a relatively short period of time. The Tribunal also explained that the harassment was severe, and that it continued despite requests from Ms. Opheim that it stop.

RESULTS FOR CANADIANS

This decision reinforces the importance of protection against sexual harassment found in section 14 of the *Act*. The Tribunal's remedial order for wilful or reckless discrimination serves as a deterrent to those who may be engaging in similar behaviour as was at issue in this case. Furthermore, both the awards for pain and suffering and wilful or reckless discrimination may be used as precedents, or starting points, to assess similar compensation in future complaints before the Tribunal.

RULINGS ON MOTIONS AND OBJECTIONS

In addition to decisions, the full text of all written reasons in support of rulings rendered in 2016 on motions and objections can be found on the Tribunal's website. **http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/2016/nav_date.do**

TRIBUNAL ACTIVITIES

NATIONAL HUMAN RIGHTS TRIBUNALS' FORUM – MAY 2016

The Tribunal hosted a two-day federal / provincial / territorial event where eleven (11) out of thirteen (13) jurisdictions were represented. Topics of discussion focused on exchanges of legal updates and best practices in matters related to procedural fairness and natural justice, disclosure of evidence, active adjudication models, and mediation as an alternative dispute mechanism. Participants overwhelmingly agreed to maintain the momentum with regular outreach, and to meet in person every two years.

ANNUAL MEMBERS' MEETING – SEPTEMBER 2016

The Tribunal held a two-day Annual Meeting for the full and part-time Members. In addition to discussion of legal developments and a jurisprudence update, the agenda featured two keynote speakers.

Ms. Ida Ngueng Feze, an Academic Associate at the Centre of Genomics and Policy (CGP) at McGill University, presented an informative overview of discrimination based on genetic profile. This was based on her main research projects at the CGP, which include the legal, ethical and social issues related to the access and use of genetic data by third parties.

Ms. Pearl Eliadis, a human rights lawyer with broad international experience and an author, presented an insightful Pan-Canadian overview of Human Rights Commissions and Tribunals over the years, to contextualize the role of Members.

INTERNATIONAL OUTREACH – NOVEMBER 2016

The Chairperson participated in the 2016 United Nations Forum on Business and Human Rights, the world's largest annual gathering on business and human rights, with some 2,300 participants from government, business, community groups and civil society, law firms, investor organizations, UN bodies, trade unions, academia and the media. Topics of discussions related to the Guiding Principles on Business and Human Rights (the "Protect", "Respect" and "Remedy" Framework), as well as current business-related human rights issues.

MEMBERS OF THE TRIBUNAL

The *CHRA* specifies that a maximum of fifteen (15) Members, including a Chairperson and a Vice-chairperson, may be appointed by the Governor in Council. At the time of publishing this report, the Tribunal has a total of twelve (12) Members. Five (5) full-time Members are based in Ottawa, and the remaining seven (7) part-time Members are based across Canada. A number of terms have ended or will soon be ending. A selection process is underway to determine future appointments, expected in the fall of 2017.

	NAME & TITLE	APPOINTMENT DATE	END OF TERM
FULL-TIME MEMBERS			
1.	David Thomas, Chairperson	2014-09-02	2021-09-01
2.	Susheel Gupta, Vice-chairperson	2010-08-03	2018-08-02
3.	Sophie Marchildon	2010-05-31	2017-09-29
4.	Gabriel Gaudreault	2017-01-30	2017-09-29
5.	Kirsten Mercer	2017-01-30	2017-09-29
PART-TIME MEMBERS			
6.	Dena Bryan, Nova Scotia	2015-03-26	2020-03-25
7.	Lisa Gallivan, Nova Scotia	2014-05-09	2017-05-08
8.	Olga Luftig, Ontario	2012-12-13	2020-12-13
9.	Edward Lustig, Ontario	2008-02-17	2017-09-29
10.	Alex G. Pannu, British Columbia	2015-06-18	2020-06-17
11.	Anie Perrault, Quebec	2015-04-30	2020-04-29
12.	George Ulyatt, Manitoba	2012-12-13	2020-12-13
MEMBERS WHOSE APPOINTMENT HAS EXPIRED, BUT WHO ARE CONCLUDING AN INQUIRY THAT THEY HAVE BEGUN, WITH THE APPROVAL OF THE CHAIRPERSON, AS PER SECTION 48.2 (2) OF THE *CHRA*.			
1.	Matthew D. Garfield, Ontario	2006-09-15	2016-09-14
2.	Ricki Theresa Johnston, Alberta	2013-06-06	2016-06-05
3.	Ronald Sydney Williams, Ontario	2013-06-06	2016-06-05

FOR FURTHER INFORMATION

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