



CANADIAN HUMAN RIGHTS TRIBUNAL

# ANNUAL REPORT 2019

ALL HUMAN BEINGS ARE BORN FREE AND EQUAL IN DIGNITY AND RIGHTS

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## **Executive Director and Registrar**

*Administrative Tribunals Support Service of Canada*

*Canadian Human Rights Tribunal Secretariat*

240 Sparks Street, 6<sup>th</sup> Floor West, Ottawa, Ontario K1A 1J4

Telephone: 613-995-1707 Toll-free: 1-844-899-3604 Fax: 613-995-3484 TTY: 613-947-1070

E-mail: Registrar-Greffier@chrt-tcdp.gc.ca Website: www.chrt-tcdp.gc.ca

## **About the cover**

The image on the cover of this report is derived from a photo of the Canadian Tribute to Human Rights monument.

Located in downtown Ottawa, this monument is the first in the world dedicated to universal human rights. It is a tribute to the historic struggle of all people to obtain and safeguard their fundamental rights. This monument symbolizes Canadians’ commitment to live in peace in a society based on these rights.

**Source:** [Canada.ca](http://Canada.ca) (retrieved on February 27, 2020)

# CHAIRPERSON'S MESSAGE



As the Chairperson of the Canadian Human Rights Tribunal (CHRT), I have the honour to present our *2019 Annual Report* to Parliament and to all Canadians.

The Canadian Human Rights Tribunal is an adjudicative body that hears complaints of discrimination under the

*Canadian Human Rights Act (CHRA)*. 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 matter experts.

Our acceptance of the *CHRA* is a clear message to the world that these are values we embrace as being fair, respectful and dignifying. It is a statement of the commonality of what we all value, and of what we freely choose to believe in.

We live in a pluralistic society, with people from a variety of backgrounds and different points of view. In this era of quick dissemination of information, especially through social media, it is remarkable to see how rapidly public sentiments evolve, and how rapidly issues can become very divisive. In these times, we are reminded of the importance of due process, and how the Tribunal is mandated (under section 48.9 of the *CHRA*) to follow this due process and respect the principles of natural justice.

Section 2 of the *CHRA* grounds the purpose of our work on the principle that all individuals should have an opportunity, equal with others, to make for themselves the lives that they are able and wish to have, and to have their needs accommodated, "***consistent with their duties and obligations as members of society***", without being hindered in or prevented from doing so by reason of discrimination.

I highlighted a phrase from section 2 to remind us of this aspect of the law that is often overlooked. Our duties and obligations as members of this society include recognizing that others are entitled to viewpoints and opinions that are different, and if allegations of wrongdoing are made, everyone is entitled to due process. The role of the Tribunal is to provide a fair and impartial process that permits redress and restitution, and also respects the requirements of natural justice.

Turning to the year's events, there were a number of important changes at the Tribunal in 2019. Firstly, a new Vice-chairperson, Jennifer Khurana, was appointed. Jennifer arrived from her position as a Vice-chairperson at the Social Security Tribunal. She is a tremendous asset to our team, having completed a Master's degree in Human Rights Law at Lund University in Sweden. She also served previously as a Vice-chairperson of the Human Rights Tribunal of Ontario. Tribunal Member Kirsten Mercer took up residence outside the National Capital Region in order to pursue new professional opportunities, and her CHRT membership status consequently changed from full-time to part-time. There was also the part-time appointment of Kathryn Raymond, QC, who had previously attended the National Human Rights Tribunals' Forum as a representative of the Nova Scotia Human Rights Board of Inquiry.

In 2019, the Tribunal was very productive and managed to bring to a conclusion a large number of files. The Tribunal held 146 case management conference calls to support parties to move forward to the hearing stage. It also held 53 in-person mediation sessions (in respect of 66 complaints, of which 45 were settled, reflecting a 68% success rate). We sat for 62 hearing days, and released 14 decisions based on merits and 37 interim rulings. In total, we resolved 99 complaints in 2019. The Canadian Human Rights Commission referred 102 new complaints to us in 2019, increasing our year-end inventory of cases slightly from 266 in 2018 to 269 in 2019.

In addition to our regular work at the Tribunal, we continually seek to improve our processes and service delivery standards. As we prepare for the implementation of our new mandates under the *Pay Equity Act* and the *Accessible Canada Act*, we continue to explore new methodologies and technologies to ensure the greatest possible access to justice for all Canadians. New *Rules of Procedure* will be forthcoming, and we look forward to engaging with our stakeholders as we build a more inclusive resolution process. Our goal is to make all parties, especially those who are self-represented, feel informed and prepared for the human rights resolution process that we deliver. This work will continue, as we always strive to live up to the expectations that Parliament and all Canadians have of us.

**David L. Thomas**  
Chairperson



### **The Canadian Human Rights Tribunal emblem explained:**

**Canada** is written at the very top to symbolize our representation of the Canadian Government. The **wreath of olive branches** is a reminder of the United Nations logo, because much of our work is premised on the United Nations Universal Declaration of Human Rights. The **multi-dimensional half maple leaf** in the upper left quarter has been borrowed from our sister organization, the Canadian Human Rights Commission. The **scales of justice** in the upper right quarter represent the nature of our work at the Tribunal – weighing evidence before us and rendering decisions impartially. Finally, in the bottom half, the Tribunal’s initials appear in both official languages: **CHRT/TCDP**.

# WHAT WE DO

The Canadian Human Rights Tribunal is a quasi-judicial body that serves several functions. It 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*. Moreover, in the near future, the Tribunal will be empowered to hear certain appeals and referrals pursuant to the *Pay Equity Act* and certain appeals pursuant to the *Accessible Canada Act*.

## HUMAN RIGHTS INQUIRIES

The *Canadian Human Rights Act (CHRA)* 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, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. The *CHRA* prohibits certain discriminatory practices with a view to protecting individuals in employment, in the provision of goods, services, and facilities, and in the occupancy of 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 settle their dispute with the assistance of a Tribunal member acting as a mediator.

The *CHRA* applies to federally regulated employers and service providers, including federal government departments and agencies; federal Crown corporations; chartered banks; airlines; shipping and interprovincial trucking companies; broadcasting and telecommunications organizations; and First Nations governments.

## EMPLOYMENT EQUITY ACT PROCEEDINGS

The CHRT is also mandated to review directions and assessments made under the *Employment Equity Act (EEA)*. The *EEA* requires employers under federal jurisdiction to engage in proactive employment practices to increase the representation of four designated groups: women, people with disabilities, Aboriginal peoples and members of visible minorities. When hearing a case under the *EEA*, members of the Tribunal are constituted as an Employment Equity Review Tribunal.

“  
The *Canadian Human Rights Act (CHRA)* aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices...  
”

## **PAY EQUITY ACT APPEALS AND REFERRALS**

In 2018, Parliament granted a new mandate to the Tribunal under the *Pay Equity Act (PEA)*. Under this legislation, most federally regulated employers are required to establish pay equity plans that will identify and redress any gender-based discrimination in compensation practices experienced by employees in predominantly female job classes. The administration and enforcement of the *PEA* are the responsibility of the Pay Equity Commissioner. The Commissioner's decisions are appealable to the Tribunal. Furthermore, the Commissioner may refer any important question of law or question of jurisdiction to the Tribunal. As is the case with the *CHRA*, the Tribunal will not receive any complaints under the *PEA* directly. The *PEA* is expected to come into force in 2020, with the first referrals or appeals to the Tribunal expected in 2021.

## **ACCESSIBLE CANADA ACT APPEALS**

In 2019, Parliament granted a new mandate to the Tribunal under the *Accessible Canada Act (ACA)*. This legislation aims to ensure that everyone in Canada can participate fully in society. To do so, it requires federally regulated organizations to proactively identify, remove, and prevent barriers to accessibility for persons with disabilities. It targets barriers in employment, the built environment, information and communication technologies, other aspects of communication, the procurement of goods, services and facilities, the provision of programs and services, and transportation. Under the *ACA*, organizations will be required to create and publish accessibility plans and to meet standards that will provide guidance on accessibility requirements.

Anyone who is negatively affected by a contravention of the new standards will have the right to file a complaint. The *ACA* establishes new structures and roles to deal with compliance and enforcement, including a new Accessibility Commissioner who will be part of the Canadian Human Rights Commission. In addition, the *ACA* provides a new mandate to the CHRT to decide appeals when either the complainant or the regulated organization disagrees with certain decisions made by the Accessibility Commissioner.

Other federal organizations, namely the [Canadian Transportation Agency](#), the [Canadian Radio-television and Telecommunications Commission](#), the [Canadian Human Rights Commission](#) and the [Federal Public Sector Labour Relations and Employment Board](#), will have distinct enforcement powers under the *Act*.

As is the case with the *CHRA*, the Tribunal will not receive any complaints under the *ACA* directly. The first appeals are expected at the Tribunal in 2023.

# HOW THE TRIBUNAL WORKS UNDER THE *CANADIAN HUMAN RIGHTS ACT*

Canadian Human Rights Tribunal members conduct mediations, engage in case management, preside over hearings (alone or as a panel of three), issue rulings and render decisions. Parties to a complaint include the complainant (an individual or group of individuals who filed the complaint), the respondent (the person alleged to have engaged in a discriminatory practice), the Canadian Human Rights 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 with resolving their differences through the negotiation of a settlement agreement. The mediator facilitates discussions between the parties and ensures 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, Tribunal 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 provide guidance to parties, to resolve disclosure issues, to explore agreed statements of facts and to settle any other preliminary matters, such as hearing dates and

venue. These calls often establish the commitment of the parties to abide by their hearing schedule. Case management aims to ensure a fair approach to the inquiry process and to minimize missed deadlines, requests for adjournments on hearing days, and disagreements between parties about the issues being heard.

“  
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.  
”

## **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 the complexity of the case, the number of witnesses and the volume of documentary evidence.

## **RULINGS**

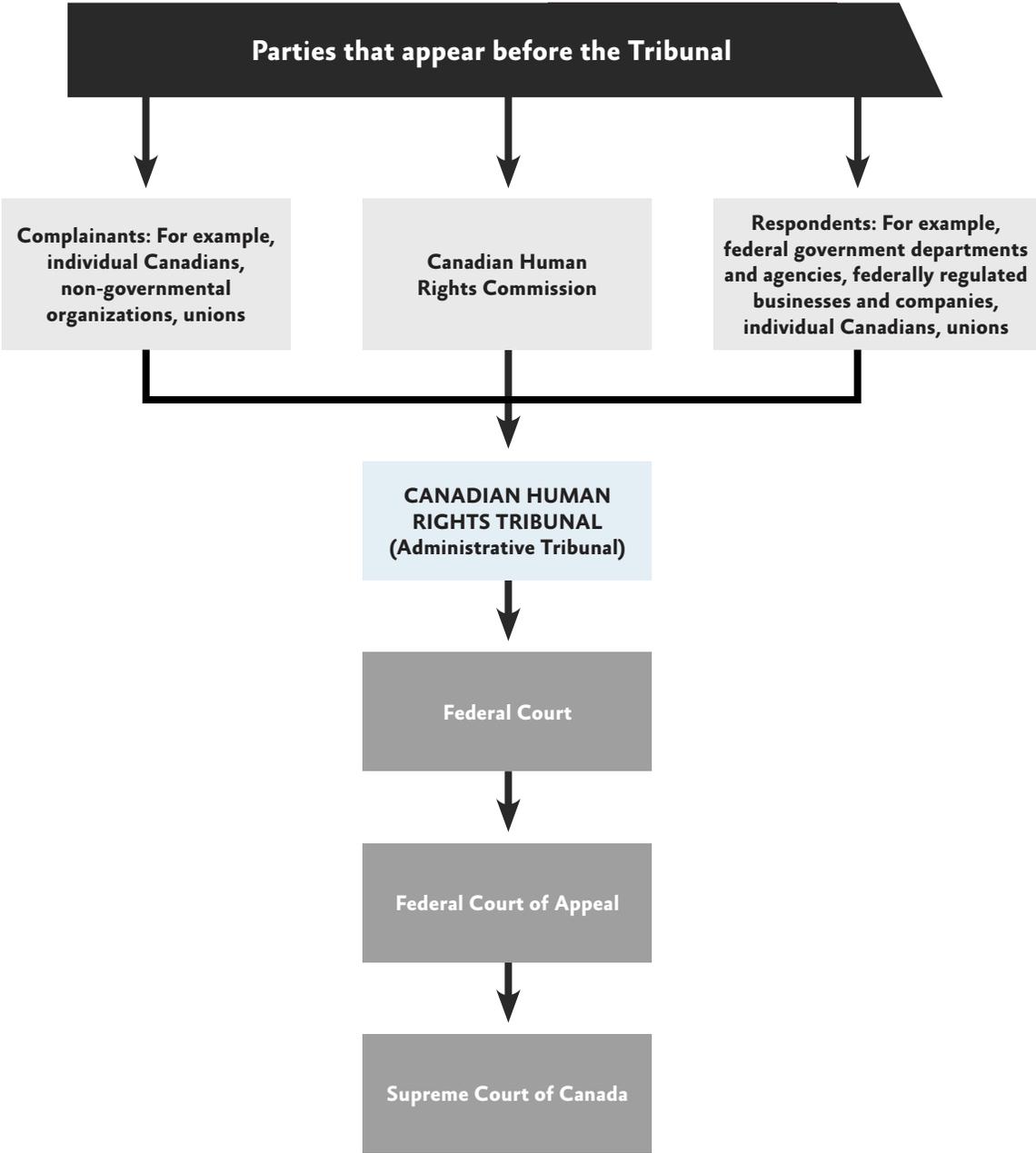
All sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (that is, they do not answer the question of whether a discriminatory practice occurred) are classified as rulings. Rulings are usually issued in response to a preliminary motion raised by one of the parties, prior to the hearing.

For example, a ruling would be issued where a motion is brought seeking dismissal of the complaint 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 (for example, disclosure of documents).

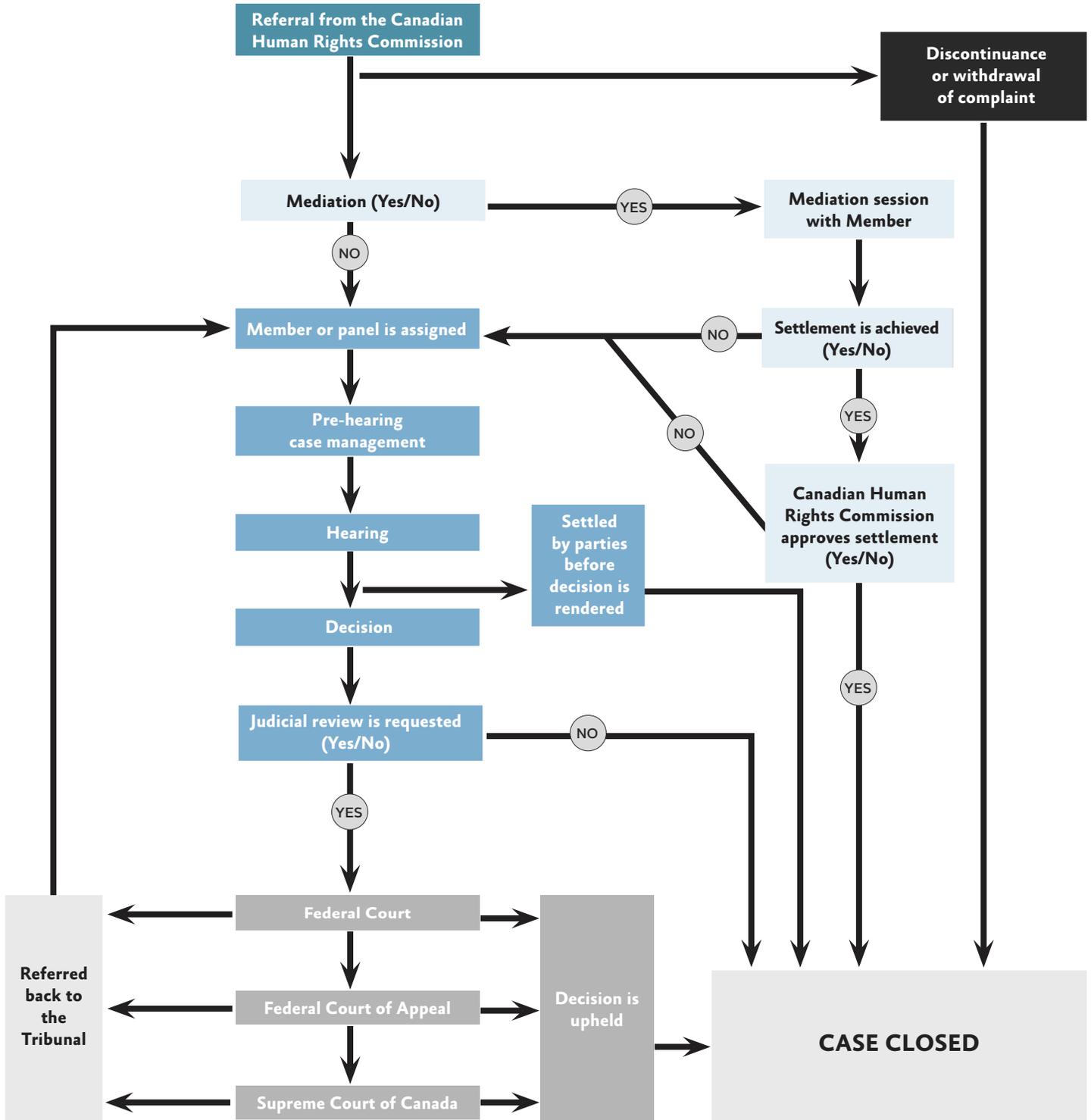
## **DECISIONS**

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 ultimately answers 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. In some cases, a separate hearing is held to determine the appropriate remedy.

# PARTIES BEFORE THE TRIBUNAL AND AVENUES OF JUDICIAL REVIEW AND APPEAL



# TRIBUNAL INQUIRY PROCESS AND JUDICIAL REVIEW



# TRIBUNAL CASELOAD

## (JANUARY 1 – DECEMBER 31, 2019)

This section of the *2019 Annual Report* presents detailed statistical information on the complaints handled by the Tribunal in 2019.

### CASELOAD

For the Tribunal, caseload is a way of looking at the volume of its active complaints at any given time or over a given reporting period. For the purpose of this analysis, caseload is calculated as the number of active cases carried over from the previous year, as well as all new active complaints referred to it by the Canadian Human Rights Commission (CHRC) during the current year, minus any complaints that were closed in the current year. As of December 31, 2019, the Tribunal's caseload numbered **269** active complaints.

The Tribunal started the year 2019 with **266** active complaints. After closing **99** complaints and receiving a total of **102** new complaints referred to it by the CHRC, the Tribunal ended the year 2019 with **269** active complaints.

CASELOAD JANUARY 1 – DECEMBER 31, 2019	NUMBER
Active caseload as of January 1	266
Complaints closed	99
New complaints referred by the Commission	102
Active caseload as of December 31	269

**Ninety-nine** complaints were closed in 2019: **49** complaints were settled at mediation, **26** were settled between the parties, **11** were withdrawn, **10** were closed after decisions were rendered, **2** were closed due to rulings on motions to dismiss and **1** was abandoned.

COMPLAINTS CLOSED IN 2019, BY WAY OF:	NUMBER
Settled at mediation	49*
Settled between the parties	26
Withdrawal of complaint	11
Decision rendered <sup>†</sup>	10
Ruling rendered <sup>†</sup>	2
Abandonment of complaint	1
<b>TOTAL</b>	<b>99</b>

Notes:

\* Of the **49** complaints settled at mediation in 2019, **4** complaints were mediated in 2018 and closed in 2019. This resulted in **45** cases being closed as a result of mediations held in 2019. (This included a mediation session for 10 joined files, all of which settled. There was another mediation comprising 4 joined files, of which 3 settled.)

<sup>†</sup> The Tribunal issued 14 decisions and 37 rulings in 2019; however, not all of these closed a complaint.

## VOLUNTARY MEDIATION

The Tribunal continued to offer voluntary mediation as an alternative dispute resolution mechanism. The mediation sessions resulted in a 68% mediation settlement rate, which represents the total complaints settled as a result of mediation (45), divided by the total complaints mediated in 2019 (66). It should be noted that 53 mediation sessions were held in 2019.

Twenty-four pre-mediation conference calls were held with the parties to clarify issues and ensure a shared understanding of the procedures.

## ADJUDICATION

The Tribunal held 146 case management conference calls and 62 hearing days. By year-end, 37 rulings and 14 decisions had been released.

ADJUDICATION JANUARY 1 – DECEMBER 31, 2019			
Case Management Conference Calls	Hearing Days	Rulings	Decisions
146	62	37	14

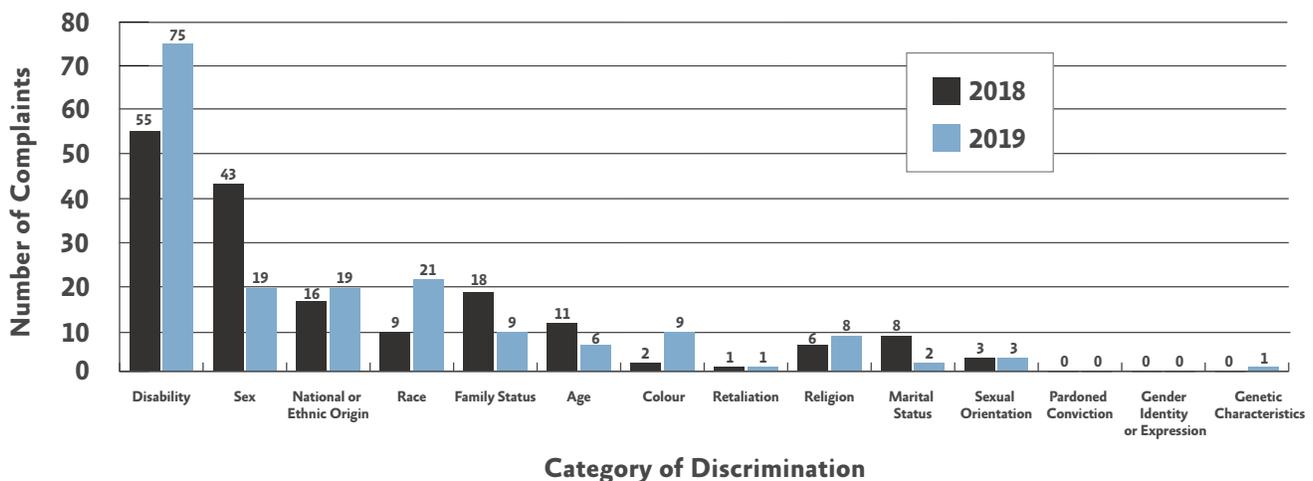
Of the 14 decisions rendered in 2019 by the CHRT, 4 complaints were substantiated in full; 7 complaints were substantiated in part; and 3 complaints were dismissed.

## COMPLAINTS BY CATEGORY OF DISCRIMINATION

A comparison between 2018 and 2019 shows that complaints related to disability have increased from 55 to 75, and remain as the most commonly cited or invoked ground of discrimination. Complaints based on sex decreased from 43 to 19, as did those based on family status (reducing from 18 to 9), age (decreasing from 11 to 6), and marital status (declining from 8 to 2). Complaints based on race increased from 9 to 21, as did those based on national or ethnic origin (16 to 19), colour (2 to 9) and religion (6 to 8). Complaints based on retaliation and sexual orientation were unchanged at 1 and 3 complaints, respectively. One complaint included the ground of genetic characteristics. No complaints included grounds relating to gender identity or expression, or conviction for which a pardon has been granted or in respect of which a record suspension has been ordered.

It should be noted that a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or based on the effect of a combination of prohibited grounds. While retaliation is not a prohibited ground of discrimination, complaints alleging retaliation under section 14.1 of the CHRA need not invoke a prohibited ground and they, therefore, form a separate category of discrimination.

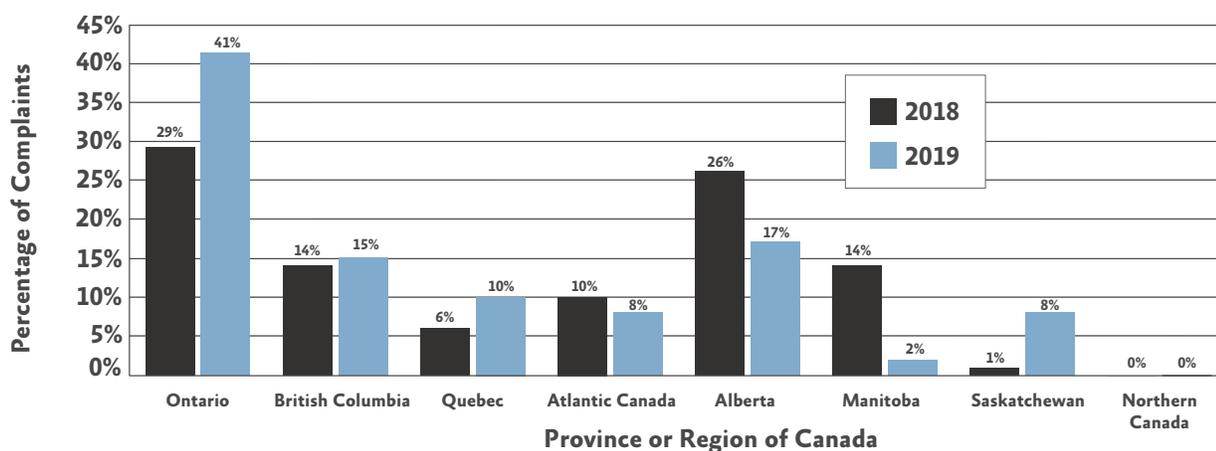
## COMPLAINTS RECEIVED IN 2018 AND 2019, BY CATEGORY OF DISCRIMINATION



## COMPLAINTS BY PROVINCE OR REGION OF CANADA

The highest proportion of complaints received continued to be from Ontario. A comparison between 2018 and 2019 shows that complaints from Ontario increased from 29% to 41% of total complaints received. Those from Alberta decreased from 26% to 17%, while complaints from British Columbia went up slightly from 14% to 15%. Complaints from Saskatchewan increased from 1% to 8% and those from Quebec increased from 6% to 10%. Complaints decreased for Manitoba from 14% to 2%, and for Atlantic Canada (that is, New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island) from 10% to 8%. No complaints were received from Northern Canada (that is, Yukon, Northwest Territories and Nunavut) in 2019.

### COMPLAINTS RECEIVED IN 2018 AND 2019, BY PROVINCE OR REGION OF CANADA



## COMPLAINTS BY RESPONDENT TYPE

A total of 102 complaints were received in 2019. The following table lists, in decreasing numerical order, the number of complaints received according to the type of respondent.

COMPLAINTS RECEIVED IN 2019, BY RESPONDENT TYPE	
RESPONDENTS	NUMBER
Federal Government	34
Road and Marine Transportation (Road/Marine Freight Shipping, and Bus Lines)	19
First Nations Government	13
Broadcasting and Telecommunications	10
Air Transportation	8
Financial Industry	6
Courier Services (Door-to-Door Delivery)	3
Unions/Associations/Groups	2
Rail Transportation	2
Food and Agriculture	2
Health and Health Services	1
Individual	1
Federal Crown Corporation	1
<b>TOTAL</b>	<b>102</b>

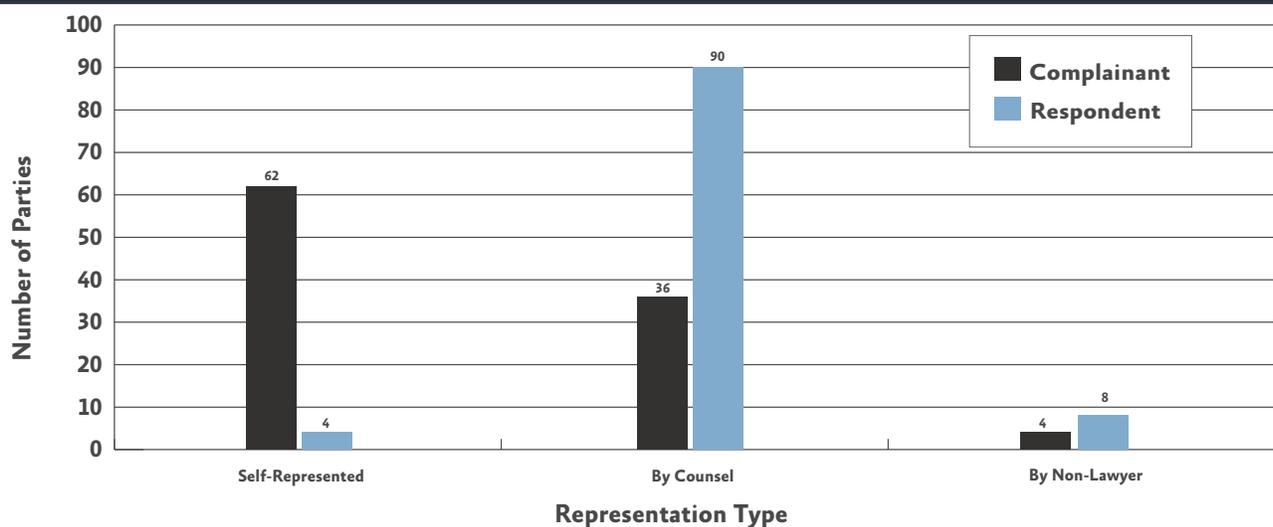
## REPRESENTATION OF PARTIES

As in previous years, the number of self-represented complainants remained high (62 complainants or 61% of the total) compared to self-represented respondents (4 respondents or 4% of the total). The number of complainants represented by counsel (36 or 35% of the total) remained low, compared to 90 respondents who were represented by counsel (corresponding to 88% of all respondents).

The number of respondents represented by non-lawyers (8 or 8%) is higher than complainants represented by non-lawyers (4 or 4%).

At year end, there were a number of complaints in the early phase of the inquiry and as such, the parties' representation may change going forward.

### REPRESENTATION OF PARTIES – COMPLAINTS RECEIVED IN 2019



## CARRIED OVER TO THE NEXT REPORTING YEAR

A total of 269 active complaints were carried over to January 1, 2020. Of these, 168 complaints (which include 90 related complaints) remained in case management; 59 complaints (which include 23 related complaints) were in mediation; 3 were at the active hearing stage; and 17 were awaiting rulings or decisions.

The remaining 22 complaints were either at the initial intake stage, or awaiting a response from the parties or a decision from the courts.

ACTIVE COMPLAINTS CARRIED OVER TO THE NEXT REPORTING YEAR AS OF JANUARY 1, 2020	
STATUS (BASED ON SEQUENTIAL ORDER OF STEPS IN THE TRIBUNAL PROCESS, FROM INITIAL INTAKE TO CONCLUSION)	NUMBER
Initial intake	6
Files awaiting parties' response	5
Mediation	59
Case management	168
Hearings	3
Rulings/decisions pending	17
Decisions under judicial review	11
<b>TOTAL</b>	<b>269</b>

# SIGNIFICANT TRIBUNAL DECISIONS

The following case summaries discuss some significant 2019 Tribunal decisions.

## 1. **LAFRENIÈRE v. VIA RAIL CANADA INC., 2019 CHRT 16**

<https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/417996/index.do>

Mr. Lafrenière claimed that his employer, Via Rail Canada Inc. (Via Rail), discriminated against him because of his disability. Mr. Lafrenière was disciplined for three separate incidents. He was assigned demerit points on all three occasions and was fired after the third incident. Mr. Lafrenière alleged that the disciplinary action that was taken was discriminatory on the basis of disability.

The Tribunal found that Mr. Lafrenière did not prove he suffered from a disability at the time of the first two incidents. Accordingly, Mr. Lafrenière did not show he suffered discrimination on a prohibited ground in these incidents.

However, the Tribunal found that the disciplinary action that was taken for the third incident was discriminatory on the basis of disability.

Mr. Lafrenière demonstrated he suffered from a mental health disability at the time of the third incident. Mr. Lafrenière proved his disability through circumstantial evidence. He was off work for a period of about three months for a documented mental health issue, returning to work about three months before the third incident. Shortly before the third incident, Mr. Lafrenière advised his supervisor that he felt stressed and anxious. His supervisor referred him to an employee assistance program, documented his stated concerns, and noted that she was not a doctor capable of assessing his health. Mr. Lafrenière also provided a medical note shortly after the incident.

The Tribunal found that Via Rail had sufficient evidence that it should have recognized Mr. Lafrenière's health problems during its investigation of the third incident. The Tribunal was of the opinion that Via Rail would have detected Mr. Lafrenière's disability had it viewed the overall picture, rather than looking at the facts in isolation.

The Tribunal found that Via Rail's accommodation policy failed to satisfy the employer's duty to accommodate. Via Rail had evidence of Mr. Lafrenière's disability. Therefore, it was not sufficient to rely on Mr. Lafrenière to initiate a formal accommodation process. Also, the French version of the collective agreement referred only to an accommodation process for physical disabilities, and not for mental disabilities.

Via Rail argued that the third incident was serious misconduct that justified firing Mr. Lafrenière, even with his disability. The Tribunal did not accept this argument. While a finding of misconduct may be relevant in labour law, this fact is not determinative of whether the employer's reaction was discriminatory in human rights law. Instead, the relevant human rights law argument is undue hardship. Via Rail did not argue undue hardship.

The Tribunal ordered systemic remedies, compensation for pain and suffering, and compensation for recklessly engaging in a discriminatory practice. The Tribunal did not order lost wages or reinstatement for Mr. Lafrenière.

The Tribunal ordered Via Rail to cease to discriminate and to consider employee disabilities in disciplinary processes. In particular, Via Rail must develop a clear labour relations policy that all disciplinary action must consider an employee's physical and mental health conditions. Also, all of Via Rail's policy documents concerning physical and mental disability (including the collective agreement) must be written in English and French and available to employees in the language of their choice.

The Tribunal awarded Mr. Lafrenière \$10,000 for pain and suffering. Mr. Lafrenière had said that he still lived with the consequences of his treatment by Via Rail, but provided limited evidence of ongoing pain and suffering.

Furthermore, the Tribunal awarded Mr. Lafrenière \$15,000 in special compensation because Via Rail engaged in the discriminatory practice recklessly. The Tribunal found Via Rail remained willfully ignorant of Mr. Lafrenière's disability and viewed his medical note only as a barrier to firing him.

The Tribunal did not order Via Rail to give Mr. Lafrenière back his job. The Tribunal found that Mr. Lafrenière was uncertain about wanting to return to work at Via Rail and that the trust required between the employer and employee was broken.

The Tribunal did not award Mr. Lafrenière lost wages. The Tribunal found that he would have been fired even if discrimination had played no role in Via Rail's decision. Also, Mr. Lafrenière did not show how much income he had lost.

## **RESULTS FOR CANADIANS**

This case allowed the Tribunal to reaffirm that an individual need not have a clear medical diagnosis of a mental health condition in order to establish a disability within the meaning of the *Canadian Human Rights Act*.

## **2. BENTLEY v. AIR CANADA AND AIR CANADA PILOTS ASSOCIATION, 2019 CHRT 37**

<https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/423861/index.do>

Mr. Bentley claimed that Air Canada and his union discriminated against him because of his age. Mr. Bentley claimed that Air Canada and his union signed a collective agreement that limited long-term disability benefits because of a pilot's age. In particular, pilots who are between the ages of 60 and 65 and who are eligible for an unreduced pension cannot receive long-term disability benefits.

Under the *Canadian Human Rights Act*, both the union and employer may be liable for a discriminatory provision in a collective agreement.

The *Canadian Human Rights Benefit Regulations*, SOR/80-68 state that denying long-term disability benefits to employees, who are eligible for an unreduced pension, is not a violation of the *Canadian Human Rights Act*.

Mr. Bentley argued that the regulations were a violation of his equality rights under section 15 of the *Canadian Charter of Rights and Freedoms* ("Charter").

The Tribunal followed the section 15 test established by the Supreme Court of Canada. The test requires the Tribunal to first identify a distinction based on a characteristic protected by the *Charter*. Second, the distinction must create a disadvantage by perpetuating a prejudice or stereotype. The second part of the test can be satisfied by showing the perpetuation of prejudice or disadvantage to members of a group on the basis of a protected personal characteristic.

The Tribunal found that the *Canadian Human Rights Benefit Regulations* created a distinction based on age. Age is a protected ground under section 15 of the *Charter*. Therefore, Mr. Bentley met the first part of the section 15 test.

However, the Tribunal found that the second part of the section 15 test was not met. The Tribunal found that the ineligibility for long-term disability benefits was part of a regime in which employees were provided with income replacement benefits. Employees not eligible for long-term disability benefits were eligible for pension benefits. The Tribunal also identified the increased cost of long-term disability benefits for older workers.

The Tribunal found that the regulation that protected the provision in the collective agreement was constitutional. Therefore, the Tribunal dismissed the complaint.

An application for judicial review of this decision has been filed with the Federal Court (File number T-1588-19).

### RESULTS FOR CANADIANS

This case demonstrates the relationship between equality, protected under section 15 of the *Charter*, and human rights protected by the *Canadian Human Rights Act*. It illustrates that provisions which could limit the scope of rights under the *Canadian Human Rights Act* may be challenged under the equality guarantee of the *Charter*.

### 3. CAMPBELL v. CANADIAN IMPERIAL BANK OF COMMERCE, 2019 CHRT 13

<https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/423478/index.do>

Mr. Campbell was fired by the Canadian Imperial Bank of Commerce (CIBC). Mr. Campbell claimed that he was fired because of his disability and that this was discrimination.

The Tribunal dismissed Mr. Campbell's complaint.

When he was 19 years old, Mr. Campbell was seriously injured in a car accident. He suffered a broken back, collapsed lung and traumatic brain injury. After the accident, he had to learn to walk, talk and tie his shoes again. Mr. Campbell was proud of his recovery and accomplishments.

More than a decade after the accident, CIBC hired Mr. Campbell. Mr. Campbell worked at a call centre where he was employed to answer phones for nearly 13 years. CIBC knew of Mr. Campbell's car accident, including his brain injury.

Mr. Campbell had some performance issues during his first 10 years with CIBC, but CIBC was generally satisfied with his performance. Then, CIBC introduced a new performance evaluation framework. Mr. Campbell did not perform as well under the new performance evaluation framework. In particular, performance issues arose in relation to the fact that Mr. Campbell used unprofessional language and made inappropriate comments during phone calls with clients. Some clients complained. He also did not follow proper procedures during his phone calls. For example, he often did not properly verify a client's identity.

CIBC provided employees with coaching and mentoring. Mr. Campbell's coaching and mentoring took significantly more time than that of other employees.

CIBC requested a doctor to determine if Mr. Campbell's poor job performance was linked to his head injury. The doctor concluded that Mr. Campbell had mild cognitive impairments overall, with moderate impairment only across very specific cognitive domains. The doctor recommended occupational therapy and psychological support.

CIBC hired an occupational therapist to recommend accommodations for Mr. Campbell. The accommodations included modified performance targets. Mr. Campbell's performance improved temporarily. However, his performance issues returned.

CIBC decided that Mr. Campbell could not continue answering phones at the call centre. Mr. Campbell did not meet his modified performance targets. CIBC was very concerned about Mr. Campbell's performance regarding two phone calls, in particular.

CIBC helped Mr. Campbell search for another job. It gave him two months to find another job at the bank. CIBC provided him with career counselling support and a training allowance. Ultimately, Mr. Campbell was dismissed.

The Tribunal found that the effects of Mr. Campbell's head injury were a disability. However, the Tribunal did not find that Mr. Campbell's disability was a factor in CIBC's decision to fire him. Mr. Campbell, therefore, did not show that CIBC discriminated against him.

The Tribunal found that Mr. Campbell's behaviour was his preferred way of doing business, and his way of making sales. Moreover, Mr. Campbell was capable of modifying his behaviour. He did not claim that his inappropriate comments were caused by his disability. The medical assessment indicated that he could complete his work duties and the doctor did not link his unprofessional behaviour to his disability. The Tribunal, therefore, concluded that the behaviour and the disability were unrelated.

CIBC also provided appropriate accommodations and supports to Mr. Campbell to help him overcome his disability. The Tribunal found that Mr. Campbell did not effectively use these supports.

An application for judicial review of this decision has been filed with the Federal Court (File number T-810-19).

## RESULTS FOR CANADIANS

This decision provides some guidance on the interplay between employment law principles and human rights law. The Tribunal did not accept the complainant's argument that employment law principles superseded his employer's right to bring certain defences under the *Canadian Human Rights Act*. The Tribunal accepted a variety of evidence regarding job performance prior to the complainant's termination.

### 4. *KAMALATISIT v. SANDY LAKE FIRST NATION*, 2019 CHRT 20

<https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/420910/index.do>

Ms. Kamalatisit alleged that the Sandy Lake First Nation discriminated against her based on her marital and family status.

Ms. Kamalatisit lived with her common-law partner, Mr. Fiddler, and her son on the Sandy Lake First Nation. Mr. Fiddler is a member of the Sandy Lake First Nation. Ms. Kamalatisit is a member of a different First Nation, and she and her son were guests on the reserve.

Mr. Fiddler was critical of the Chief and Council. The Tribunal found that Ms. Kamalatisit was not involved in Mr. Fiddler's political activities.

The Chief and Council ordered Ms. Kamalatisit and her son to leave the reserve. This demand was presented in an intimidating manner. This caused Ms. Kamalatisit to suffer health problems. For example, Ms. Kamalatisit feared that she was having a heart attack, and she and her son left the reserve through a medical evacuation.

The Tribunal found that the Sandy Lake First Nation did not demonstrate that Ms. Kamalatisit was behaving inappropriately. She did not break any rules which guests had to follow.

The Tribunal found that under the Sandy Lake First Nation's traditional law, it would be customary for the Chief and Council to first speak to Ms. Kamalatisit if there was a problem with her behaviour. That did not happen.

The Tribunal did not accept the Sandy Lake First Nation's argument that Ms. Kamalatisit was asked to leave the reserve because of threats against her.

The Tribunal found that Ms. Kamalatisit's status as Mr. Fiddler's common-law partner was a characteristic protected against discrimination. The Tribunal found that Ms. Kamalatisit was denied residential accommodation. The Tribunal found that Ms. Kamalatisit's relationship with Mr. Fiddler was a factor in her being told to leave her home. In fact, the Tribunal found that Ms. Kamalatisit was asked to leave the Sandy Lake First Nation because she was Mr. Fiddler's partner. This was retaliation for Mr. Fiddler's political involvement.

The Tribunal found that the Sandy Lake First Nation did not explain how Ms. Kamalatisit's treatment was grounded in good faith. The Tribunal did not accept that Ms. Kamalatisit was asked to leave because of threats against her. The Tribunal found that the Sandy Lake First Nation asked her to leave because of her relationship to Mr. Fiddler.

The Tribunal ordered the Sandy Lake First Nation to follow traditional law, to allow Ms. Kamalatisit, her children and grandchildren to return to the Sandy Lake First Nation as guests, and to remove the official statement ordering her to leave the reserve.

The Tribunal awarded Ms. Kamalatisit \$20,000 for pain and suffering as a result of a discriminatory practice. The Tribunal noted that she was an innocent victim in the dispute between the Sandy Lake First Nation's Chief and Council and Mr. Fiddler. She was targeted because of her common-law relationship to Mr. Fiddler. She suffered serious health effects that required a medical evacuation. She was removed from her home of 10 years and lost her jobs in the community. Ms. Kamalatisit and Mr. Fiddler were forced to sell their possessions to pay their bills.

## RESULTS FOR CANADIANS

This case provided another opportunity for the Tribunal to interpret and apply section 5 of the *CHRA*, in the context of housing and services provided by a First Nation. The application of a federal human rights statute to residential accommodation is quite limited, given that most housing and tenancy matters fall under provincial jurisdiction. Nonetheless, where—as in this case—the housing at issue is under the authority of an Indigenous community, the *CHRA* applies.

### ADDITIONAL DECISIONS AND RULINGS

Reasons for decisions and rulings are published in the Decisions section of the Tribunal's website at [www.chrt-tcdp.gc.ca](http://www.chrt-tcdp.gc.ca).

# TRIBUNAL ACTIVITIES

## **ANNUAL MEMBERS' MEETING – SEPTEMBER 2019**

The Tribunal held its annual two-day meeting for members on September 23 and 24. The agenda included presentations on such topics as best practices for case management, dealing with challenging parties, issues-based adjudication, and decision-writing pitfalls and tips. In addition, attendees participated in an interactive activity on credibility assessment, and discussed questions related to jointly called expert witnesses and experts called by a tribunal. Finally, Tribunal members were briefed on a new draft policy on public access to the CHRT's official record, and received updates on the Tribunal's new pay equity and accessibility mandates.

## **OUTREACH**

In 2019, with the focus on laying the groundwork for the new mandates, the Tribunal did not conduct any formal outreach activities. However, CHRT members did significantly contribute to the administrative justice community through their participation in the Council of Canadian Administrative Tribunals, whose annual symposium was held in Montreal in May, and which was co-organized by the CHRT Vice-chairperson Jennifer Khurana. Chairperson Thomas spoke on a panel discussing the topic of ethical challenges and the delivery of administrative justice. As well, Member Marie Langlois moderated a panel, which included fellow Member Kirsten Mercer, discussing access to justice for persons with disabilities and others from historically disadvantaged groups, particularly when self-represented.

## **NEW MANDATES**

In 2019, the Tribunal accelerated its planning and preparations in relation to the implementation of new mandates that were conferred by the *Pay Equity Act (PEA)* and the *Accessible Canada Act (ACA)*. The Tribunal expects to receive its first referrals and/or appeal files under the *PEA* as early as the spring of 2021, while appeals under the *ACA* are expected in spring 2023.

Member training sessions, which were held in June, covered the general structure of each statute and highlighted the specific mandates assigned to the Tribunal by these new pieces of legislation. A training session similar to the one offered to the members was held for Secretariat staff in November 2019.

The Canadian Human Rights Tribunal's *Pay Equity Act* and *Accessible Canada Act* Steering Committee was formed, and it held meetings to ensure the successful implementation of the new mandates. Furthermore, members were introduced to the new organizational structure proposed for the Tribunal Secretariat that will provide additional support for the new mandates. This included an increased complement in the Registry and Legal teams, as well as the creation of a new team, headed by its own Director for Research, Renewal and Infrastructure. (The Director position was staffed in August 2019.) In addition to staffing initiatives, work progressed on office accommodation requirements and on updating the Tribunal's website to include content on its new mandates.

Throughout the year, Tribunal representatives participated in the ACA Council of Heads of Agencies and the ACA Collaboration Working Group, which were designed to make collaboration easier among the numerous agencies that share adjudicative duties under the ACA. This collaborative effort aims to ensure that claimants who contact any one of the agencies in question will be referred seamlessly to the organization that has jurisdiction over their particular claim.

In October, as part of Economic and Social Development Canada's consultation exercise, the Tribunal provided feedback on regulations that the Government was proposing to make under the PEA. The Tribunal's representations dealt with its statutory authority to order employers to post decisions in the workplace, as well as with the lack of statutory direction regarding key aspects of the Tribunal's appeal mandate.

## NEW MEMBERS

As was mentioned in the *Chairperson's Message* of this annual report, the Tribunal welcomed a new Vice-chairperson, Ms. Jennifer Khurana, and a new part-time member from Nova Scotia, Ms. Kathryn Raymond, QC. In addition, the Government amended Member Kirsten Mercer's tenure from full-time to part-time to allow her to pursue professional opportunities outside of the National Capital Region.

No member's term expired in 2019.



### Annual Members' Meeting – September 23 and 24, 2019

Front Row: Alex Pannu, Jennifer Khurana, David Thomas, Colleen Harrington, George Ulyatt

Back Row: Edward Lustig, Anie Perrault, Olga Luftig, Gabriel Gaudreault, Kirsten Mercer, Marie Langlois

# MEMBERS OF THE TRIBUNAL

The *Canadian Human Rights Act* specifies that a maximum of **15** members, including a Chairperson and a Vice-chairperson, may be appointed by the Governor in Council. By the end of 2019, the Tribunal had a total of **13** members. (Four full-time members, including the Chairperson and the Vice-chairperson, were based in the National Capital Region, and nine part-time members were based across Canada.) Furthermore, there were **three** members whose appointments had expired but who were concluding inquiries, as is permitted under the legislation.

## FULL-TIME MEMBERS

	NAME (TITLE)	APPOINTMENT DATE	END OF TERM
1.	David Thomas (Chairperson)	2013-06-13*	2021-09-01
2.	Jennifer Khurana (Vice-chairperson)	2019-04-08	2026-04-07
3.	Gabriel Gaudreault	2017-01-30	2022-12-29
4.	Colleen Harrington	2018-01-29	2022-01-28

\* Note: David L. Thomas was appointed as a part-time member of the CHRT on June 13, 2013. Subsequently, he was appointed as Chairperson of the CHRT on September 2, 2014, for a seven-year term.

## PART-TIME MEMBERS

	NAME	PROVINCE/TERRITORY OF RESIDENCE	APPOINTMENT DATE	END OF TERM
5.	Dena Bryan	British Columbia	2015-03-26	2020-03-25
6.	Marie Langlois	Quebec	2018-06-21	2023-06-20
7.	Olga Luftig	Ontario	2012-12-13	2020-12-13
8.	Edward Lustig	Ontario	2008-02-17	2023-06-20
9.	Kirsten Mercer*	Ontario	2017-01-30	2021-12-29
10.	Alex G. Pannu	British Columbia	2015-06-18	2020-06-17
11.	Anie Perrault	Quebec	2015-04-30	2020-04-29
12.	Kathryn Raymond	Nova Scotia	2019-07-01	2024-06-30
13.	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 CANADIAN HUMAN RIGHTS ACT.

	NAME	PROVINCE/TERRITORY OF RESIDENCE	APPOINTMENT DATE	END OF TERM
1.	Lisa Gallivan	Nova Scotia	2014-05-09	2017-05-08
2.	Matthew D. Garfield	Ontario	2006-09-15	2016-09-14
3.	Sophie Marchildon	Ontario	2010-05-31	2017-12-30

\*Note: Effective September 4, 2019, Kirsten Mercer's tenure changed from full-time to part-time.

# FOR FURTHER INFORMATION

*Executive Director and Registrar*  
*Canadian Human Rights Tribunal*  
240 Sparks Street, 6<sup>th</sup> Floor West  
Ottawa, Ontario  
K1A 1J4

**Telephone:** 613-995-1707

**Toll-free:** 1-844-899-3604

**Fax:** 613-995-3484

**TTY:** 613-947-1070

**E-mail:** Registrar-Greffier@chrt-tcdp.gc.ca

**Website:** [www.chrt-tcdp.gc.ca](http://www.chrt-tcdp.gc.ca)