

Human Rights Commission

Province of Newfoundland and Labrador

Report for 2004/05

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INTRODUCTION

This Annual Report will reflect a number of changes emanating from new Treasury Board guidelines dealing with accountability and transparency with respect to the operation and activities of government agencies. Unlike previous reports which reported on a calendar year basis, this report will outline activities to March 31, 2005; the end of the Commission's fiscal year. To avoid a gap in reporting - the last Annual Report was for the calendar year 2004 - this document will outline the Commission's activities for a fifteen month period. As well, the Chief Adjudicator of the panel of adjudicators appointed under the Human Rights Code to act as Boards of Inquiry will file a separate Annual Report dealing with Board of Inquiry activities.

The most challenging aspect of the Commission's activity over the reporting period was the difficulty in scheduling Boards of Inquiry. The Commission takes a lead role in the scheduling process. Two factors contribute to the problem. First, the term of the panel of adjudicators expired on January 26, 2004. A new panel was not appointed until November 4, 2004. The effect of the delay in appointing the new panel was to cause a backlog of cases which have to be scheduled. As of December 2004, twelve complaints were waiting to be scheduled for adjudication. Second, with the increased reliance by parties on legal representation, scheduling now entails finding clear hearing days among the busy calendar of a number of lawyers. As a result, once an adjudicator has been appointed to hear a complaint, it can take six to eight months to have the matter commence. These problems are not unique to the human rights process but they do have the effect of frustrating the legitimate expectations of all parties to have complaints adjudicated in a timely fashion.

The Commission experienced some significant achievements in 2004-05. As indicated below, the Commission was able to obtain significant damage awards for thirty-three women who were discriminated against on the basis of their marital status. As well, through the litigation process, the Commission was able to remove the wait list for services available for autistic children as provided by the Department of Health and Community Services. These types of decisions are invaluable in the Commission's ongoing efforts to settle citizens' grievances before they become complaints, or once they do, before they are referred to Boards of Inquiry.

THE COMMISSION AND STAFF:

As of December 31, 2003 the members of the Human Rights Commission were:

Joan Myles	-	Chair
Gilbert Thomas	-	Vice-Chair
Roland King	-	Commissioner
Winston Green	-	Commissioner
Shirley Barr	-	Commissioner

The members of the Commission staff were:

Barry Fleming	-	Legal Counsel/Executive Director (Acting)
Kathleen O'Reilly	-	Human Rights Specialist
Colleen Murphy	-	Secretary
Jocelyn Walsh	-	Secretary

STATISTICS:

The following chart outlines the number and grounds of complaints received by the Human Rights Commission in 2004.

<i>SECTION</i>	<i>GROUND</i> S	<i>NUMBER</i>
9	Physical Disability	44
9	Mental Disability	12
9	Marital Status	2
9	Sex	9
9	Age	6
9	Sex/Pregnancy	3
9	Sexual Harassment	2
9	Race	2
9	Ethnic Origin	3
9	Social Origin	1
6	Mental Disability	6
6	Physical Disability	4
6	Religion	1
7	Physical Disability	1
12	Sexual Harassment	2
12	Sex/Marital Status	1
15 (Charter of Rights & Freedoms)	Age	1
	<i>TOTAL</i>	100

The Commission closed 83 files in 2004. They were closed in the following manner:

	<u>Number</u>	<u>Percentage</u>
Dismissed	62	75%
Referred to Boards of Inquiry	4	5%
Settled	15	18%
Withdrawal	<u>2</u>	<u>2%</u>
	83	100%

STATISTICS:

The following chart outlines the number and grounds of complaints received by the Human Rights Commission from January - March, 2005.

<i>SECTION</i>	<i>GROUND</i> S	<i>NUMBER</i>
9	Sex/Pregnancy	1
9	Physical Disability	8
9	Mental Disability	5
9	Sex	2
9	Sex Harassment	1
9	Race	3
12	Sexual Harassment	1
9	Age	4
	<i>TOTAL</i>	25

* The Commission did not close any files during the first three months of 2005 as the first quarterly Commission meeting could not be scheduled until April 2005 - one month beyond the reporting period.

DECISIONS FROM BOARDS OF INQUIRY

1. *George Smith v. PCL Industrial Constructors Inc. (2004) 48 C.H.R.R. D/474*

Mr. Smith alleged that he was discriminated against on the basis of a disability when he was laid off as a welder at the Bull Arm construction site a few days after his return to work from an absence to recuperate from a back injury. His employer argued that Mr. Smith was part of a large scale lay-off and his disability was not a factor in the decision to terminate his employment.

The Board of Inquiry concluded that given Mr. Smith's competence as a welder and the fact other less capable welders were not laid off, Mr. Smith's disability was a factor in the decision to lay him off. The Board ordered that Mr. Smith be compensated for lost wages and awarded \$2,000.00 general damages.

2. *P.M. v. Company A, Proprietorship O and A.V. (Feb. 27, 2004) (unreported)*

P.M. alleged that she had been sexually harassed by the owner of a private college while she was a student and subsequently when she became an employee. The Board of Inquiry accepted the Complainant's evidence that the owner made unwelcome comments of a sexual nature such as:

- We should have an affair;
- I don't want to hurt you, I just want to make love to you with romance and candles;
- I'm a horny old man and I want to have sex with you.

The Board of Inquiry found that the comments persisted after the owner was aware that they were unwelcome and therefore concluded that sexual harassment had occurred. The Board of Inquiry ordered the Respondent to pay the Complainant \$1,500.00 in general damages.

3. *Bailey et al v. Fogo Island Co-operative Society (2004) 50 C.H.R.R. D/6*

Thirty-three women from Fogo Island filed complaints with the Commission alleging that their employer, the Fogo Island Co-operative Society, discriminated against them on the basis of their marital status when they were denied employment on the basis of their marital status. They were denied employment as fish plant workers because their husbands, who were fishermen, would not agree to sell their catch to the Co-op. A Board of Inquiry had

confirmed that the women had been discriminated against. It reconvened throughout 2002 and in January 2003 to hear evidence concerning an appropriate remedy for each woman. The Board of Inquiry released a detailed judgement in June 2004 outlining the lost wages, lost E.I. benefits, interest, tax gross up and general damages owed to each Complainant.

4. *Keith et al v. Newfoundland Dental Board (October 18, 2004) (unreported)*

Nine foreign trained dentists filed complaints with the Commission alleging that they were discriminated against on the basis of their national and social origin by the Dental Board when it refused to grant them general licenses in January 2001 unless they undertook an expensive educational undertaking. The dentists held geographically restricted, but clinically unrestricted licenses. The effect was that they could perform all forms of dentistry but only in designated geographic areas. The Dental Board had negotiated a Mutual Recognition Agreement with other dental regulators in Canada which permitted those dentists with unrestricted licenses prior to July 1, 2001 to practice anywhere in Canada. It was the prospect of not being able to avail of this benefit because there were geographic restrictions of their licenses which precipitated the dentists' human rights complaints.

The Board of Inquiry found that the dentists, who had practiced in the Province an average of 15 years, were competent. The requirement that they undertake an expensive educational undertaking was unnecessary and adversely affected their practice. This requirement stemmed from the fact they were foreign trained. The Board found that the dentists had been discriminated against on the basis of their national and social origin and ordered the Dental Board to retroactively grant them general licenses so as to permit them to gain the benefit of the National Mobility Agreement. The Dental Board subsequently appealed the decision.

DECISIONS FROM THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR, COURT OF APPEAL AND TRIAL DIVISION

1. *Newfoundland (Human Rights Commission) v. Newfoundland Liquor Corporation (2004) 48 C.H.R.R. D/423*

Mr. Dawe sought employment with the Newfoundland Liquor Corporation as a Liquor Control Inspector. During the course of the job competition he was informed that if he was to be offered a job he would have to undergo a medical examination. Officials of the NLC had learned from one of Mr. Dawe's references that he might have a bad back. Mr. Dawe, after an eleven month delay, learned through a Freedom of Information Request that he was not recommended for the job because he would not submit to a medical examination. Officials of NLC had stated that Mr. Dawe didn't obtain the job because of his inappropriate response to being requested to undergo a medical examination if offered the position.

The Court of Appeal confirmed that requesting just one job candidate to undergo a medical examination was a discriminatory request. On the facts of the case, the Court confirmed that it was Mr. Dawe's reaction to the request which disqualified him from the job competition. The Court stated that as Mr. Dawe had not been offered the job, he was not subject to a discriminatory request and therefore no discrimination occurred. The Court provided valuable guidelines as to the meaning of a "continuing contravention" with respect to the limitation period as found in section 20 (2) of the Human Rights Code.

2. *Newfoundland and Labrador (Minister of Health and Community Services) v. Gloria Sparkes (2004) 48 C.H.R.R. D/457*

The Department of Health and Community Services had appealed a decision of a Board of Inquiry which found that a waiting list for services for autistic children discriminated against those children on the basis of their mental disability. The Board of Inquiry had ordered, inter alia that funding be provided so as to eliminate those wait lists. On appeal, the Trial Division confirmed the factual and legal findings of the Board of Inquiry and declared the remedy imposed by the Board of Inquiry to be appropriate. The Department has not further appealed this decision.

3. ***Newfoundland and Labrador (Human Rights Commission) v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Commission) (2004) 49 C.H.R.R. D/377***

Three women filed complaints with the Human Rights Commission alleging that they were discriminated against on the basis of their marital status. An amendment to the Workplace Health, Safety and Compensation Act provided retroactive benefits to persons who lost their spouses to workplace accidents and remarried after April 1, 1985. The three Complainants had remarried before April 1, 1985 and thus were not entitled to the benefits bestowed by the amendment. The Board of Inquiry ruled that it did not have the authority to grant a remedy that would have the effect of declaring void a piece of provincial legislation. The Commission appealed the decision to the Trial Division which confirmed the Board of Inquiry ruling. The Commission has subsequently appealed to the Court of Appeal.

4. ***Newfoundland and Labrador (Minister of Justice) v. Critch (2004) 50 C.H.R.R. D/119***

The Department of Justice appealed a decision of a Board of Inquiry which ruled that the Department's sick leave policy discriminated against Vivian Critch, an employee of the Department, on the basis of her disability. Ms. Critch missed work due to a bad back and a collapsed ear. Pursuant to the sick leave policy Ms. Critch was interviewed by her supervisor and counseled to do better with respect to her sick leave use. The policy contained a progressive disciplinary component which could result in dismissal.

The Trial Division reviewed the Board of Inquiry decision on the narrow issue of whether Ms. Critch had a disability for the purpose of human rights legislation. On the facts of the case it concluded that there was insufficient evidence of a disability. The Commission has subsequently appealed the decision to the Court of Appeal.

SECTION 21 (4) APPLICATIONS

Section 21 (4) of the Human Rights Code permits a complainant to apply to the Supreme Court of Newfoundland and Labrador, Trial Division for an order compelling the Commission to forward their complaint to a Board of Inquiry. Two decisions on these applications were released in 2004/05.

1. *Coady v. Memorial University of Newfoundland et al (2004) 49 C.H.R.R. D/115*

Mr. Coady alleged that the Respondent and its employees discriminated against him and harassed him on the basis of his sexual orientation. The Commission dismissed his complaint. The Court found that the dismissal of the complaint was reasonable based on the evidence before it. The facility manager at MUN had received a significant number of complaints from students that Mr. Coady was spending long periods in the showers and was watching and following other users of the recreational facilities. Some monitoring of Mr. Coady's use of those facilities was warranted to determine if the complaints were legitimate.

2. *Jason Mitchell v. Puglisevich Crews and Services Ltd. et al (2004) 246 Nfld.& PEIR*

Mr. Mitchell filed a complaint with the Commission alleging that his employer discriminated against him on the basis of mental disability. Mr. Mitchell suffered from stress arising from his relationship with a supervisor. He eventually had to be removed from the work-site. The Commission dismissed his complaint. Mr. Mitchell applied to Court pursuant to section 21 (4) of the Human Rights Code for a review of the decision. The Court ruled that the Commission staff had erred in conducting their investigation by failing to obtain a copy of a psychiatric report which commented upon Mr. Mitchell's psychiatric condition. The Court referred the complaint back to the Commission for further review once a copy of that report had been obtained.

Five other section 21 (4) applications filed in 2003 were abandoned or withdrawn in 2004/05. A sixth, Maxine Stevens v. Workplace Health, Safety and Compensation Commission was postponed until 2005/06.

Section 21 (4) applications filed for the reporting period are:

Eileen McBreairty v. College of the North Atlantic

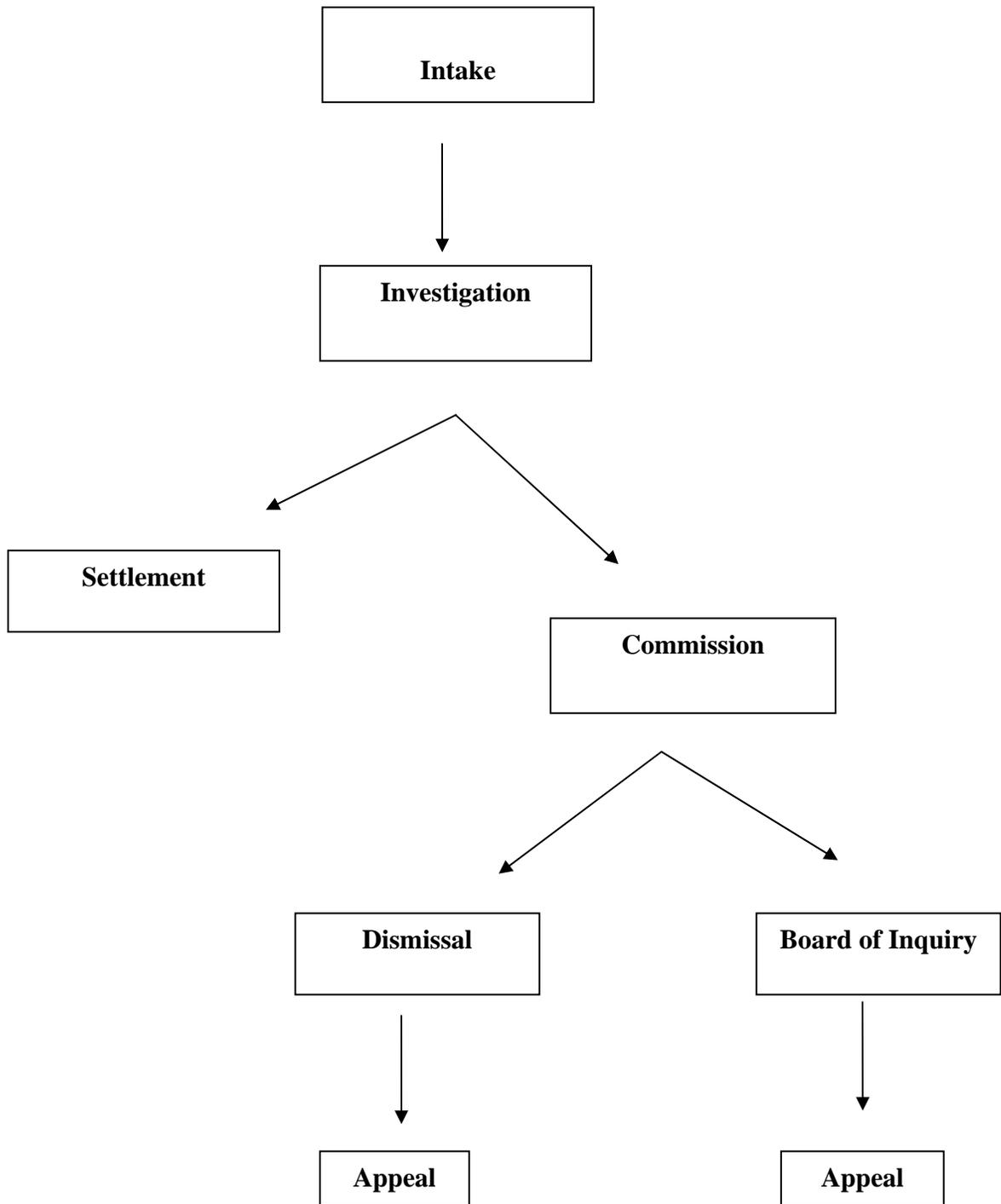
Gerard Coady v. Y.M.C.A.

FUNCTIONS OF THE COMMISSION

The Commission shall:

- forward the principle that every person is equal in dignity and rights;
- promote compliance with the legislation by investigating and resolving complaints of unlawful discrimination and harassment;
- develop and distribute information and conduct educational programs designed to eliminate discriminatory practices;
- advise and help government departments and agencies on activities concerning human rights;
- co-operate and help individuals, organizations or groups with human rights matters;
- advise government on suggestions and recommendations made by individuals, organizations, or groups concerning human rights.

THE COMPLAINT PROCEDURE



Throughout the complaint process the Commission tries to effect settlement between the parties. If settlement is not achieved, the complaint follows the outlined process.

THE COMPLAINT PROCESS

Investigating The Complaint

The Commission will accept for investigation complaints made *within six months* of the event giving rise to the complaint where it appears there may be a violation of the Human Rights Code. The Commission will notify the respondent of the complaint prior to commencing an investigation. The Commission is mandated to endeavour to effect a settlement and provides for this to occur at any stage in the investigation process. Where a settlement is not reached, the Executive Director will report on the case to the Commissioners who will determine whether or not to refer the matter to a Board of Inquiry. Settlements must also be approved by Commissioners, and where a settlement is reached, the Commission will notify the parties that no further action will be taken unless the terms of the settlement are not complied with.

Once the Commissioners order a complaint to a Board of Inquiry, the Executive Director will notify the Chief Adjudicator of the Adjudication Panel of this decision. A copy of the file will be sent to the parties. When the Commission dismisses a complaint, the parties may apply to the Supreme Court within 30 days for an order that the Commission refer the complaint to a Board of Inquiry.

Board Of Inquiry

The Human Rights Code provides for the appointment by Lieutenant Governor In Council of an Adjudication Panel which is separate and apart from the Human Rights Commission. The Adjudication Panel is mandated to hear complaints referred by the Commission to a Board of Inquiry and to issue a written decision on the matter.

A Board of Inquiry is a formal public hearing where the complainant and the respondent present their arguments before an Adjudicator. The Human Rights Commission shall have carriage of the complaint, but either party may be represented by legal counsel. The Adjudicator, after hearing all the evidence from the parties and witnesses, will determine if there has been a contravention of the Human Rights Code. If there is a finding of contravention, the Adjudicator will order the respondent to cease the contravention, make available denied opportunities or privileges, and may, when appropriate, order compensation. The Adjudicator's decision is legally binding on the parties but is subject to appeal to the Trial Division of the Supreme Court.

LEGAL AND RELATED SERVICES

		<u>2005/06</u> <u>Estimates</u> \$	<u>2004/05</u> <u>Revised</u> \$	<u>Budget</u> \$
2.3.04.	HUMAN RIGHTS			
<p>Appropriations provide for the operation of the Human Rights Commission which administers the Human Rights Code, conducts educational programs, investigates complaints and provides, where necessary, for a Board of Inquiry.</p>				
01.	Salaries.....	252,400	243,800	252,400
02.	Employee Benefits.....	2,600	2,400	2,400
03.	Transportation and Communication.....	28,000	18,000	28,000
04.	Supplies.....	4,000	5,000	4,000
05.	Professional Services.....	27,800	26,800	27,800
06.	Purchased Services.....	47,200	43,000	47,200
07.	Property, Furnishings and Equipment.....	-	11,000	-
	Amount to be Voted	362,000	350,000	361,800
	Total: Human Rights	362,000	350,000	361,800

***CONTACTING THE
HUMAN RIGHTS COMMISSION***

- By Mail:*** Human Rights Commission
P.O. Box 8700
St. John's NL
A1B 4J6
- In Person:*** Human Rights Commission
20 Crosbie Place
2nd Floor, Beothuck Building
St. John's NL
- By Telephone:*** (709) 729-2709
1-800-563-5808 (toll-free)
- By Fax:*** (709) 729-0790
- By E-mail:*** humanrights@gov.nl.ca
- By Internet:*** www.gov.nl.ca/hrc

