

**Canadian Human Rights Tribunal**

**personne**

**Tribunal canadien des droits de la**

**BETWEEN:**

**ROSS BOUTILIER,**

**LOREE-ANN HUARD,**

**GAYLENE GURR**

**Complainants**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**TREASURY BOARD**

**- and -**

**DEPARTMENT OF NATURAL RESOURCES**

**- and -**

**HUMAN RESOURCES DEVELOPMENT CANADA**

**Respondents**

## **ORDER**

2003 CHRT 20

2003/05/26

**PANEL:** Anne L. Mactavish, Chair

Paul Groarke, Member

Reva Devins, Member

[1] Upon reading the agreed statement of facts and the documents referred to therein; And upon being satisfied that it is a discriminatory practice to deny leave to employees for the purpose of participating in public same sex commitment ceremonies and that the complaints are therefore substantiated; And upon the consent of the parties; the Tribunal orders that:

1. The Treasury Board shall cease the discriminatory practice engaged in with respect to the Complainants.
2. The Treasury Board shall within six months of the date of this Order, take such steps as are necessary to eliminate the discriminatory practice in the application of all of the collective agreements to which it is a party. The Treasury Board shall ensure that the steps adopted to redress the discriminatory practice provide employees with leave to participate in public same sex commitment ceremonies on the same terms as leave is available under the collective agreements to heterosexual employees who request leave for the purpose of getting married.
3. From the date of this Order until the adoption of the steps provided for in paragraph 2 of this Order, the Treasury Board shall grant employees who apply for leave for purposes of participating in their public same sex commitment ceremonies leave on the same terms as leave is available to heterosexual employees who request leave for the purpose of getting married.

4. The Treasury Board, or the employing department, shall credit the Complainants for the annual leave that they were obliged to take as a result of the denial of marriage leave as follows:

Ross Boutilier: 5 days

Gaylene Gurr: 3 days 3 hours

Loree-Ann Huard: 5 days

5. The Respondents will pay to the Complainants the sum of \$5,000.00 each for pain and suffering pursuant to section 53(2)(e) of the *Canadian Human Rights Act*.

6. The Respondent Treasury Board will circulate a directive to all Directors of Personnel informing them of the terms of this Order.

"Anne L. Mactavish"

"Paul Groarke"

"Reva Devins"

OTTAWA, Ontario

May 26, 2003

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**COUNSEL OF RECORD**

TRIBUNAL FILE NO.: T727/3202, T781/3103, T782/3203

STYLE OF CAUSE: Ross Boutilier, Loree-Ann Huard, Gaylene Gurr v. Treasury Board and Department of Natural Resources and Human Resources Development Canada

PLACE OF HEARING: Ottawa, Ontario

ORDER OF THE TRIBUNAL DATED: May 26, 2003

APPEARANCES:

Ross Boutilier On his own behalf

Loree-Ann Huard On her own behalf

Leslie Reaume For the Canadian Human Rights Commission

Brian Saunders For the Respondents

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**File Nos. T727/3202  
T781/3103  
T782/3203**

**BETWEEN:**

**ROSS BOUTILIER,  
LOREE-ANN HUARD,  
GAYLENE GURR**

**Complainants**

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

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**TREASURY BOARD**

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**DEPARTMENT OF NATURAL RESOURCES**

- and -

**HUMAN RESOURCES DEVELOPMENT CANADA**

**Respondents**

## **AGREED STATEMENT OF FACTS**

For purposes of the hearing into these complaints, the parties agree as follows:

### **Ross Boutilier**

1. Ross Boutilier is a geologist employed with the Department of Natural Resources Canada (DNRC). He works at the Bedford Institute of Oceanography in Dartmouth, Nova Scotia. He has been employed with the federal Government since May 1986.
2. Her Majesty in right of Canada as represented by the Treasury Board is the employer of Mr. Boutilier. The DNRC is the employing department.

3. Mr. Boutilier is a member of the Professional Institute of the Public Service of Canada (PIPSC).
4. In 1994, Mr. Boutilier was covered by the 1991 Physical Sciences Group collective agreement between PIPSC and the Treasury Board.
5. Article 20.09(b)(iv) of the 1991 Physical Sciences Group collective agreement between the Treasury Board and PIPSC provides for up to five (5) days leave with pay for the purpose of getting married. A copy of article 20.09(b)(iv) of the collective agreement is attached hereto as Exhibit "1".
6. In June 1994, Mr. Boutilier made a verbal request of the DNRC for marriage leave for the period of July 11 to 15. Mr. Boutilier requested the marriage leave for the purposes of participating in a same-sex union celebration with his same-sex partner on July 9, 1994. Mr. Boutilier's request was approved by his immediate supervisor, Dr. Charlotte Keen, and initially by the head of his department, Mr. J. Verhoef, after consultation with the management team. At the time that the leave was initially approved, Mr. Boutilier disclosed that he required the leave for the purpose of participating in a same-sex commitment ceremony.
7. On July 8, 1994, Mr. Boutilier submitted a written request for leave. In his request, Mr. Boutilier requested five (5) days of marriage leave under art. 20.09(b)(iv) of the applicable collective agreement. Alternatively, he requested leave under art. 20.13 of the agreement, which provided the Employer with discretion to grant leave with or without pay for "purposes other than those specified in the agreement". In the event the request for leave under both art. 20.09(b)(iv) and 20.13 was denied, Mr. Boutilier requested vacation leave. A copy of the application for leave is attached hereto as Exhibit "2".
8. On July 9, 1994, Mr. Boutilier participated in a commitment ceremony with his same-sex partner. The ceremony took place in Nova Scotia before Reverend Young of the Universal Fellowship of Metropolitan Community Churches. A certificate of Holy Union was issued by Reverend Young: see Exhibit "3" attached hereto.
9. No licence or certificate of marriage was issued under the laws of Nova Scotia in respect of the ceremony, nor were banns read.
10. Following the ceremony, Mr. Boutilier took leave from July 11 to 14, 1994.
11. By memorandum dated August 4, 1994, J. Verhoef, Head of Regional Reconnaissance, denied both Mr. Boutilier's request for marriage leave under art. 20.09(b)(iv) and his request for leave under art. 20.13. A copy of the memorandum is attached hereto as Exhibit "4".
12. On August 19, 1994, Mr. Boutilier grieved the denial of leave under both art. 20.09(b)(iv) and art. 20.13 of the collective agreement. The grievance was referred to adjudication in June 1997 and the adjudicator allowed the grievance. The respondent applied to the Federal Court of Canada for judicial review of the adjudicator's decision. The Federal Court allowed the judicial review application on jurisdictional grounds in November 1998 holding that the adjudicator did

not have jurisdiction to deal with the grievance. The Court found that the grievor was required to file a complaint with the Canadian Human Rights Commission. Leave to appeal to the Supreme Court of Canada was denied in September 2000.

13. While Mr. Boutilier's grievance was under consideration, the DNRC did not seek to recover the leave that Mr. Boutilier had taken from July 11 to July 14, 1994. The leave credits have not yet been recovered.

14. On October 21, 2000, Mr. Boutilier filed a complaint against the DNRC under ss. 7 and 10 of the *Canadian Human Rights Act* in respect of the refusal of his request for marriage leave. On January 24, 2001, he filed a complaint under s. 10 of the Act against the Treasury Board in respect of the Board's interpretation of the marriage leave provision under the collective agreement.

15. As a result of being denied marriage leave, Ross Boutilier was ultimately required to use five (5) days annual leave.

16. Mr. Boutilier is presently covered by the 2002 Applied Sciences and Engineering Groups collective agreement between Treasury Board and PIPSC, which expired on September 30, 2002. Art. 17.13(b)(iv) of this agreement provides for marriage leave. A copy of the relevant article of this collective agreement is found at Exhibit "5".

### **Gaylene Gurr**

17. Gaylene Gurr has been an employee of the Government of Canada since September 1997. She works in the Employment Insurance Division of Human Resources Development Canada (HRDC), in Brandon, Manitoba.

18. Ms. Gurr is a member of the Public Service Alliance of Canada (PSAC). Her Majesty in right of Canada as represented by the Treasury Board is the employer for Ms. Gurr and HRDC is the employing department.

19. In 2000, Ms. Gurr was covered by the 2000 Program and Administrative Services Group collective agreement between Treasury Board and PSAC.

20. Article 45.01 of the collective agreement provides for up to five (5) days of leave with pay for the purpose of getting married. A copy of article 45.01 is attached as Exhibit "6".

21. On April 26, 2000 and May 1, 2000, Mr. Gurr requested annual leave of three (3) days and three (3) hours for the purpose of participating in a ceremony with her same-sex partner. Ms. Gurr and her partner refer to their ceremony as a "marriage ceremony" and not as a "commitment ceremony".

22. A co-worker advised Ms. Gurr of the provision for marriage leave under the collective agreement. On May 31, 2000, Ms. Gurr submitted a request to change her previously approved request for annual leave to marriage leave. She requested three (3) days and three (3) hours of marriage leave. A copy of her request for marriage leave is attached as Exhibit "7".

23. On June 2, 2000, Ms. Gurr's request for marriage leave was denied. The reason given to Ms. Gurr was that marriage leave is granted to those who enter a legal marriage. Ms. Gurr was required to use vacation leave instead.

24. On June 3, 2000, Ms. Gurr and her same-sex partner participated in a religious ceremony officiated by the Reverend Walter Gibbons, ordained by the United Churches Canada. Reverend Gibbons issued a marriage certificate: see Exhibit "8" attached hereto.

25. No licence or certificate was issued under the laws of Manitoba in respect of the ceremony.

26. Ms. Gurr subsequently grieved the refusal of marriage leave. In an e-mail, Arlene G. Janman indicated to Ms. Gurr that her request had been denied because "marriage leave can only be granted for the marriage of individuals of the opposite sex. Same sex marriages are not granted a marriage license and therefore are not legal." Her grievance was denied at the final level of the departmental grievance procedure and was referred to the Public Service Staff Relations Board (PSSRB). The PSSRB is holding the grievance in abeyance pending the outcome of the Tribunal hearing.

27. On January 8, 2002, Ms. Gurr filed a complaint against the respondent Treasury Board Secretariat under s. 10 of the *Canadian Human Rights Act* in respect of the Board's interpretation of the marriage leave provision of the collective agreement. The complaint was amended on May 23, 2002. Ms. Gurr also filed a complaint under s. 7 of the Act against her employing department HRDC.

28. Ms. Gurr is currently covered by the 2001 Program and Administrative Services collective agreement between the Treasury Board and PSAC. Art. 45.01 of that agreement provides for marriage leave. A copy of the relevant article of this collective agreement is attached hereto as Exhibit "9".

### **Loree-Anne Huard**

29. Loree-Ann Huard has been an employee of the federal Government since April 1989.

30. Ms. Huard is a member of PSAC. Until November 1, 1999, Her Majesty in right of Canada as represented by the Treasury Board was the employer of Revenue Canada employees. Revenue Canada was the employing department. On November 1, 1999, the Canada Customs and Revenue Agency became her employer.



31. At the time she made her request for marriage leave, Ms. Huard was covered by the 1989 Master Agreement between Treasury Board and PSAC.

32. Clause M 21.01 of the 1989 collective agreement provided employees up to five (5) days of marriage leave with pay for the purpose of getting married. A copy of article 21.01 of this collective agreement is attached hereto as Exhibit "10".

33. On May 18, 1994, Ms. Huard applied for marriage leave to participate in a same-sex marriage. This application was initially accepted by Mr. Frank Brock, the supervisor of Ms. Huard.

34. On May 25, 1994, upon learning from a co-worker that Ms. Huard was seeking marriage leave for a same-sex commitment ceremony, Mr. Brock informed Ms. Huard that her marriage leave was denied.

35. On June 25, 1994, Ms. Huard participated in a commitment ceremony with her same-sex partner.

36. Ms. Huard used her annual leave time to participate in the ceremony.

37. Ms. Huard grieved the denial of marriage leave, but was unsuccessful. Ms. Huard was advised by S.M. Black, Director Registered Plans, Headquarters, that "in the absence of a particular definition of the term 'marriage' in the Master Agreement, I referred to the definition of 'marriage' found in the Concise Oxford Dictionary (Eighth Ed.) which defines the term 'marriage' as the legal union of a man and woman. I also referred to the Hewens adjudication decision which dealt with the same issue and I have concluded that your intended marriage does not fall within the definition of the word 'marriage'."

38. Treasury Board is no longer the employer of Ms. Huard. Since November 1, 1999, she has been employed by the Canada Customs and Revenue Agency. That Agency reached its own collective agreement with the Public Service Alliance on June 21, 2000. Ms. Huard's employment is currently governed by that collective agreement.

39. On October 16, 2001, Ms. Huard filed a complaint under s. 10 of the *Canadian Human Rights Act* in respect of the Board's policy on the interpretation of the marriage leave provision of the collective agreement. The complaint named the Treasury Board as respondent. She also filed a complaint under s. 7 of the Act against her employing organization.

### **Marriage Leave under the Collective Agreements**

40. Under the *Public Service Staff Relations Act (PSSRA)*, the Treasury Board negotiates collective agreements on behalf of the Government of Canada. The Treasury Board is the Employer for those branches of the Public Service listed in Part I of Schedule I to the *PSSRA*: see s. 55 of the *PSSRA*.

41. The Treasury Board does not negotiate collective agreements on behalf of the federal government organizations that are separate Employers. Separate Employers are set out in Part II of Schedule I to the *PSSRA*. Those Employers negotiate their collective agreements separately. Pursuant to s. 56 of the *PSSRA*, the collective agreements of separate Employers are subject to the approval of the Governor-in-Council.

42. The Treasury Board is not the Employer for, and does not negotiate collective agreements with, employees working for the Canada Customs and Revenue Agency. By virtue of s. 58 of the *Canada Customs and Revenue Agency Act*, the Agency negotiates its own collective agreements.

43. Federal government employees are classified into different occupational groups. For collective bargaining purposes, bargaining units are established and certified for one or more of these occupational groups. Bargaining units are represented by bargaining agents at collective negotiations. There are currently 25 bargaining units, each with its own collective agreement with the Treasury Board.

44. There are currently 17 unions which are registered as bargaining agents. A union can be the bargaining agent for more than one bargaining unit.

45. Mr. Boutilier is a member of the Physical Sciences Group and his bargaining agent is the Professional Institute of Public Service Employees (PIPSC). Ms. Gurr is a member of the Clerical and Regulatory (CR) group and Ms. Huard of the Programme Administrative (PM) group. At the relevant times, the Public Service Alliance of Canada (PSAC) was the bargaining agent for these two groups.

46. To initiate the collective bargaining process, the bargaining agent must serve a notice of intent to negotiate. This can be done up to three months prior to the expiration of a collective agreement. At that stage, the unions have a choice of choosing one of two negotiating routes: conciliation/strike or binding arbitration. If there is an impasse in bargaining, this is resolved by the route chosen by the union. If arbitration has been selected by the bargaining agent, then disputes go to a panel of arbitrators who make a final determination. If the conciliation/strike route is chosen, then disputes go before a conciliation board which attempts to resolve the dispute. If the dispute remains outstanding, then the union can opt to go on strike.

47. There are certain issues that are not the subject of collective bargaining. They are set out in s. 57(1) of the *PSSRA*. In addition, any matters that are the subject of National Joint Council directives are not the subject of collective bargaining unless the bargaining unit has opted out of the directive. The Council consists of all the Public Service bargaining agents and the Treasury Board as Employer.

48. Both the PIPSC and PSAC have given notice to begin collective bargaining in respect of the collective agreements at issue here.

49. Marriage leave is currently available in all collective agreements for which Treasury Board is the Employer. There are, however, certain differences in the marriage leave clause from collective agreement to collective agreement. In some collective agreements, the marriage leave

comes under the leave with pay for family related responsibilities clause: see, for example, the collective agreement applicable to Mr. Boutilier at Exhibit "5". Employees are eligible for up to 5 days for family related responsibilities of all sorts. In other collective agreements, up to 5 days of marriage leave is provided independently of other leave taken: see, for example, the collective agreement governing Ms. Huard at Exhibit "10". Another difference found in respect of marriage leave is that in some collective agreements, employees are entitled to receive up to 2 days of marriage leave only.

50. Marriage leave has been in the Public Service collective agreements since the first collective agreements were entered into following the passage of the *PSSRA* in 1967. Prior to the introduction of collective bargaining, marriage leave was available as a form of special leave starting in the 1950's. The number of days available varied from time to time. Generally, up to five (5) days was available, though this could be reduced if other leave was taken. It was introduced at the time as the amount of annual leave available was generally limited.

51. Marriage leave in the collective agreements has certain limitations. Generally, employees must have worked for one year of continuous employment and it is only for the purpose of getting of married. As a result of this latter requirement, it has to be taken at the time of marriage. It cannot be taken at a time after or before the marriage. Marriage leave has not been made available to common law couples.

52. Treasury Board has consistently taken the position that marriage leave is for purpose of getting married and is not, therefore, available to employees either for purposes of entering into common law relationships or participating in commitment ceremonies.

53. Although Treasury Board is the Employer for purposes of negotiating collective agreements, the day-to-day administration of agreements is left with government departments. Where there is a doubt as to interpretation of a clause in an agreement, the Treasury Board must be consulted as it establishes the Employer's policy with respect to the interpretation and application of clauses of collective agreements.

54. In recent years, both the Treasury Board and some of the bargaining agents, including PSAC and PIPS, have sought to change the marriage clause in collective agreements. The Treasury Board has sought to eliminate marriage leave on the basis that it is no longer required given that employees now have more vacation leave credits than they had in the days when marriage leave was first introduced. Some of the unions have proposed to replace marriage leave with spousal union leave, which would be available for the purpose of declaring spousal union with another person in a public ceremony. As neither side has agreed to accept the other's proposal, the collective agreements clause has been signed with the marriage leave clause has remaining unchanged.

Dated at ....., this ..... day of ....., 2003.

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Ross Boutilier  
(Complainant)

Dated at ....., this ..... day of ....., 2003.

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Loree-Ann Huard  
(Complainant)

Dated at ....., this ..... day of ....., 2003.

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Gaylene Gurr  
(Complainant)

Dated at ....., this ..... day of ....., 2003.

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Canadian Human Right Commission  
**Per: Leslie Reaume**  
(Commission)

Dated at ....., this ..... day of ....., 2003.

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Treasury Board,  
Department of Natural Resources,  
Human Resources Development Canada  
**Per: Brian J. Saunders**  
(Respondents)