ESTIMATES

Canadian Human Rights Tribunal

Performance Report

For the period ending
March 31, 2000

Canada

Improved Reporting to Parliament
Pilot Document

The Estimates of the Government of Canada are structured in several parts. Beginning with an overview of total government spending in Part I, the documents become increasingly more specific. Part II outlines spending according to departments, agencies and programs and contains the proposed wording of the conditions governing spending which Parliament will be asked to approve.

The *Report on Plans and Priorities* provides additional detail on each department and its programs primarily in terms of more strategically oriented planning and results information with a focus on outcomes.

The *Departmental Performance Report* provides a focus on results-based accountability by reporting on accomplishments achieved against the performance expectations and results commitments as set out in the spring *Report on Plans and Priorities.*

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Foreword

On April 24, 1997, the House of Commons passed a motion dividing on a pilot basis the *Part III of the Estimates* document for each department or agency into two separate documents: a *Report on Plans and Priorities* tabled in the spring and a *Departmental Performance Report* tabled in the fall.

This initiative is intended to fulfil the government's commitments to improve the expenditure management information provided to Parliament. This involves sharpening the focus on results, increasing the transparency of information and modernizing its preparation.

The Fall Performance Package is comprised of 83 Departmental Performance Reports and the President's annual report, *Managing for Results 2000.*

This ***Departmental Performance Report,*** covering the period ending March 31, 2000 provides a focus on results-based accountability by reporting on accomplishments achieved against the performance expectations and results commitments as set out in the department's *Report on Plans and Priorities* for 1999-00 tabled in Parliament in the spring of 1999.

Results-based management emphasizes specifying expected program results, developing meaningful indicators to demonstrate performance, perfecting the capacity to generate information and reporting on achievements in a balanced manner. Accounting and managing for results involve sustained work across government.

The government continues to refine its management systems and performance framework. The refinement comes from acquired experience as users make their information needs more precisely known. The performance reports and their use will continue to be monitored to make sure that they respond to Parliament's ongoing and evolving needs.

This report is accessible electronically from the Treasury Board Secretariat Internet site: http://www.tbs-sct.gc.ca/rma/dpr/dpre.asp

Comments or questions can be directed to the TBS Internet site or to:

Planning, Performance and Reporting Sector
Treasury Board Secretariat
L'Esplanade Laurier
Ottawa, Ontario, Canada
K1A OR5
Tel: (613) 957-7167
Fax (613) 957-7044

Canadian Human Rights Tribunal

Performance Report

For the period ending March 31, 2000

Anne McLellan
Minister of Justice

Results Commitments		
to provide Canadians with:	**to be demonstrated by:**	**achievement reported in:**
a fair, impartial and efficient public inquiry process for enforcement and application of the *Canadian Human Rights Act* and the *Employment Equity Act.*	• timeliness of the hearing and decision process.	S. II, p. 3–5; S. IV, p. 21, 23
	• well-reasoned decisions, consistent with the evidence and the law.	S. II, p. 5, 8–9
	• changes to policies, regulations and laws made as a result of the Tribunal's decisions.	S. II, p. 5–6
	• application of innovative processes to resolve disputes.	S. II, p. 6–7
	• service that is satisfactory to the members, the parties involved and the public.	S. II, p. 7; S. IV, p. 21–24; S. V, p. 27
	• equity of access.	S. II, p. 7
	• public awareness and use of Tribunal's public documents.	S. II, p. 7

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Executive Summary

Created by Parliament in 1977, the Canadian Human Rights Tribunal is a quasi-judicial body that hears complaints of discrimination referred to it by the Canadian Human Rights Commission and determines whether the activities complained of violate the *Canadian Human Rights Act* (CHRA). The purpose of the Act is to protect individuals from discrimination and to promote equal opportunity. The Tribunal is the only entity that may legally decide whether a person has contravened the act.

For many years, the impartiality of the Tribunal had been questioned because of its financial and administrative links to the Commission. Amendments to the CHRA, which came into effect on June 30, 1998, increased the Tribunal's legal independence and mandated changes to its structure and function. Whereas the old Tribunal was an *ad hoc* body, drawing from a pool of about 50 part-time adjudicators, the new Tribunal is a smaller, permanent organization, with up to 13 members and a full-time Chairperson and Vice-Chairperson. Both the Chairperson and Vice-Chairperson must have been members of a Canadian bar for at least 10 years, a requirement comparable to that imposed on appointees to the bench under the *Judges Act*. At present, in addition to the full-time positions, 10 part-time members serve on the Tribunal.

Hearings were delayed last year pending members' appointments. This year, with the new members in place and trained, the Tribunal has been able to schedule its hearings as quickly as the parties were prepared to proceed. All members of the Tribunal are required to have expertise in and sensitivity to human rights issues. In addition, new members attended three intensive one-week training sessions in 1999. Throughout their three-year terms, all Tribunal members will have ongoing training in decision-writing techniques, evidence and procedure, mediation, and in-depth analysis of human rights issues.

We expected the transformations envisaged by Bill S-5 to take about three years to realize. The implementation has progressed more quickly than planned. The new structure and revised operating procedures appear to be meeting the needs of our clientele.

The result of Bill S-5 is a more highly qualified Tribunal that will generate a more consistent body of decisions. As discussed later in the report, there appears to be a greater acceptance of the Tribunal's work by the reviewing courts. The courts are learning about the new Tribunal and we must gain their confidence through our work. Eventually, confirmation from the courts will translate into increased certainty for complainants and respondents about our quasi-judicial interpretation of the CHRA. The result, in most cases, will be a more expeditious disposition of complaints and reduced cost to the justice system.

We have made progress. But we cannot rest with what we have accomplished. We will continue to find ways to make the service we provide to Canadians the best possible. They deserve nothing less.

Section I: The Chairperson's Message

The Canadian Human Rights Tribunal came into being on June 30, 1998 as a result of amendments to the *Canadian Human Rights Act*. We are now well into our second year of operations in our new form, and the transition to the new Tribunal structure is largely complete.

The amended *Canadian Human Rights Act* gives the Chairperson of the Tribunal the power to make rules governing the conduct of hearings before the Tribunal. The Tribunal has been operating under draft rules of procedure for the last year. The rules, which require significant pre-hearing disclosure, are designed to ensure that the issues involved in a particular case are fully articulated well in advance of the hearing. This should result in more focused hearings. Thus far, the new rules appear to be functioning well. After the draft rules have been fully "test driven," we will complete the legislative process necessary to give the rules the status of Regulations under the Act.

Alternative dispute resolution continued to play a significant role in resolving complaints before the Tribunal, with a substantial number of cases being settled through mediation. The large number of mediated settlements has, however, created some very specific challenges for the Tribunal. Last-minute settlements make it difficult to schedule Tribunal members for hearings in an efficient manner. Hearing dates are fixed well in advance of the commencement of the hearing, and many hearings are projected to occupy several weeks of hearing time. Last-minute settlements can leave large "holes" in schedules that cannot readily be filled. This is particularly problematic for full-time members. We have made a number of changes to our scheduling practices in an effort to address this problem. Concerns have also been raised as to whether the aims of the *Canadian Human Rights Act* are being fully addressed when the majority of cases coming before the Tribunal are resolved behind closed doors and on a confidential basis. We will continue to monitor these concerns closely.

In order to ensure that the Canadian Human Rights Tribunal is, and remains, a truly expert Tribunal, we have continued to devote considerable attention to the ongoing training of Tribunal members. Members receive regular briefings on recent jurisprudential developments, and semi-annual training sessions allow the members to meet and discuss matters of common concern.

The recent *Report of the Canadian Human Rights Act Review Panel* recommends sweeping changes to the human rights complaints process. If implemented by Parliament, these changes will have profound consequences for the Tribunal. Much work will have to be done in the months ahead to ensure that the Tribunal is ready in the event that these changes come to pass.

Anne L. Mactavish

Section II: Departmental Performance

Performance Expectations

Amendments to the *Canadian Human Rights Act* (CHRA) presented an exciting challenge for this organization because they significantly affect the structure, process and procedures of the Tribunal. We believe that the transition period has been completed with little or no adverse consequences upon the people we serve.

The Registry will monitor the cost and effectiveness of its procedures, making changes and improvements as required. The Tribunal is pleased with the progress made in the new process over the first year and feels confident that Canadians will be satisfied with the level of service provided to them.

Performance Accomplishments

Canadian Human Rights Tribunal	
Planned Spending	$4,751,000.00
Total Authorities	*$4,777,290.00*
1999–2000 Actuals	**$3,919,227.00**

New Operating Procedures

In the past year, two major operational changes have been instituted that dramatically improved our service to the parties and allowed for a more efficient adjudication process. Firstly, the Tribunal introduced new rules of procedure to reduce the time taken to begin the hearing process and to render decisions. Secondly, we have altered our pre-hearing procedures through the use of pre-hearing questionnaires. Questionnaires can be completed within two to four weeks, wherein we have sufficient information to schedule our hearings. Previously, a case planning conference call or meeting was required to obtain the information needed to set hearing dates. This required two to three months. Consequently, we have cut the entire hearing process down by one to three months based on this one change. Should a conference call be necessary, it can be scheduled without adversely affecting the already established hearing and disclosure dates.

Time Frames

Time Lines 1995–1999 (Average Days)					
From date of referral from CHRC	**1995**	**1996**	**1997**	**1998**	**1999**
Direction to parties	46.9	22.8	24.2	39.4	15.2
Prehearing	117.2	95.3	105.5	122.8	73
Time for decision to be submitted from close of hearing	137.2	189	49	103.2	94.5
Total processing time	417.2	266	260.2	251.7	181.9

Note: The above chart represents the average number of days required by the Tribunal to process cases. As is evident, there has been a steady decline in the processing time required by the Tribunal to close its case files.

However, to be fair, a number of cases referred in 1999 are still active, which means the time lines will be moderately higher with the closing of those cases.

In January 1998, we pledged to decrease to 12 months the time it takes to complete a case, from the point at which it is referred to the Tribunal to the release of the Tribunal's decision. Last year, we commented on the inappropriateness of using such arbitrary time lines to measure the Tribunal's performance.

Currently, the Tribunal can hold a hearing on any issue within five days, and in some cases within 24 hours, after receiving the referral or a motion request. However, consultations with our user group have shown that, almost without exception, lawyers presenting cases before the Tribunal do not become involved in their cases until after the referral from the Canadian Human Rights Commission. For the case process to be meaningful and effective, the parties must be given time to prepare a case that is complete and well reasoned. The new procedures on questionnaires have allowed us to complete the scheduling process within four to six weeks of the referral from the Commission. We do not believe that there is any realistic opportunity to improve on the scheduling process. Hearing dates are determined more by counsel than by the Tribunal. The hearings typically commence within three to five months after the referral.

Interventions and procedural challenges are also common, and can cause significant delays. For example, one case had been ongoing for three years because of interventions and procedural challenges, including applications to the Federal Court. As a result of a specific challenge to the Federal Court, the case was put on hold for 18 months while the court decided the issue. In the spring of 2000, the court allowed the Tribunal to continue with its hearings. With this kind of delay, it is unreasonable to expect that tribunals can,

on average, complete their work in a 12-month period. However, without procedural challenges in the courts, the Tribunal will be able to complete its work within 8 to 12 months for nearly all cases.

We have not developed a perfect system that will allow for a speedier adjudication process. There may not be one. The Tribunal generally hears only complex cases that may have national implications. Those with a knowledge of human rights law need only look at the complaints of Robichaud, Bhinder, O'Malley and the Alberta Dairy Pool case to find just a few examples of individual challenges to the status quo that improved the lives of thousands of Canadians. We fear that imposing a tighter time constraint on such cases would put undue pressure on one or all of the parties involved, thereby denying Canadians natural justice and the right to be heard.

However, this does not mean that we cannot try to improve time lines. There are still areas in the process where we do have some ability to control the time it takes to complete the process. Adjustments in procedures made by the Tribunal have been discussed earlier in this section. They have resulted in shorter delays without adversely affecting the parties' rights to a fair hearing.

Training

Training is a big part of the Tribunal's efforts to improve the case process. Members have been provided with training in decision-writing techniques and as they gain more experience, we will take no more than four months, on average, to render our judgments. We are improving in this area mainly because most decisions are written by full-time members. When a part-time member is tasked with writing a decision, it is more difficult for them to complete the decision within the four-month time allowance.

In addition, to make the Tribunal more responsive to the needs of its clientele, in 1999 members received a comprehensive three-week training program on rules and procedures, mediation and in-depth analysis of human rights issues.

Since then, members meet twice a year to update their skills and review improvements in the process. In addition, members receive regular updates on procedural and legal issues from staff.

Rules of Procedure

Amendments to the CHRA in June 1998 gave the Tribunal Chairperson the authority to institute rules of procedure governing the conduct of Tribunal hearings. This jurisdiction extends to rules governing the giving of notice to parties, the summoning of witnesses, the production and service of documents, pre-hearing conferences and the introduction of evidence.

Since their introduction in 1999, the rules have reduced operational problems related to disclosure issues and have facilitated the handling of legal and procedural motions. There have been no challenges to the rules, which may indicate an acceptance by those who use them. However, we are continually monitoring the effect of the rules and will adjust them as necessary to provide the best possible service to our clientele.

Alternative Dispute Resolution

In 1996, the Tribunal launched an alternative dispute resolution (ADR) project that makes it possible to resolve complaints without a full hearing. All parties to the complaint must consent to mediation before the Chairperson will designate a member of the Tribunal as a mediator. Mediation provides a final opportunity for the parties to meet privately with the mediator and attempt to reach a settlement. Even when the parties request mediation, hearing dates are scheduled to guarantee that there is no delay in the disposition of the case. If the complaint is settled, there is a faster, less expensive and more satisfactory and harmonious resolution to the complaint. If the parties do not reach a settlement through mediation, the case proceeds without delay to a hearing before the Tribunal.

The following chart outlines the results of mediation offered over the past four years.

Table 1

Statistical Analysis of Mediations

	Number of Complaints	Complaints Settled	Complaints Not Settled	Complaints Pending
1996 cases	12	6	6	0
1997 cases	19	17	2	0
1998 cases	7	6	1	0
1999 cases	22	17	5	0

The Tribunal began offering mediation in 1996. In its first four years the mediation program saved the Tribunal $1,564,334.08 in hearing costs. So far, two cases have been referred to mediation in 2000.

Not all cases should be mediated; some, because of their nature or complexity, require a full hearing and a comprehensive decision on the issues. Cases that are decided by the Tribunal tend to set precedents, and decisions in individual cases can have broad social implications. Although the individual complainant or respondent may be well served by mediation, other people in similar situations fail to benefit because the settlement remains confidential. With this in mind, the Chairperson has established criteria for determining which cases are suited to mediation; she uses these criteria to screen all cases being

offered mediation. The criteria are also made available to all parties and posted on the Tribunal's Web site.

In his September 1998 report, the Auditor General commented on the lack of formal structure in our mediation program. Although we had started our mediation procedures before the Auditor General's report, we have since conducted an extensive review of the mediation process, part of which was a survey of all those who had participated. We used the information gleaned from the review to formalize our process; we also produced formal procedures for mediation and a pamphlet explaining mediation to its users. Copies of both are provided to all parties when a case is referred to mediation. Members also received a full week of training on mediation in the spring of 1999.

As indicated in earlier reports, we have some concerns about the Tribunal's role in providing mediation. Early in 2000, the Tribunal placed its mediation program on hold pending a complete review of our mediation process. We hope to make a determination on the resumption of mediations early in 2001.

Public Access to the Tribunal

Given the nature of our work, the Tribunal can expect little direct feedback from the public.

In November 1997, the Tribunal set up a Web site to improve communication with the public and increase public understanding of the Tribunal's role. In addition to explaining the Tribunal's function and how it works, the Web site provides hearing dates and locations, a listing of all active cases, the full text of every Tribunal decision since 1990, and access to Tribunal documents such as the rules of procedure, mediation procedures and annual reports. A new design and search engine were introduced in 1999.

Although traffic to the site was low initially, it increased once we established links to several other sites. Since our Web site was listed by the search engine Yahoo!, we have been receiving more than 2,000 hits a week. This does not mean that 2,000 people are exploring our site in detail — that number is closer to 800 — but we know that awareness is increasing.

Tribunal Decisions

Overview Statistics

Table 2

Number of Cases Referred 1993–1999

	1993	1994	1995	1996	1997	1998	1999
	31	35	26	15	23	16	37

The number of cases before the Canadian Human Rights Tribunal depends entirely on how many cases are referred by the Canadian Human Rights Commission. The reduction in cases from 1996–1998 was the result of changes to the CHRC's case referral process and the Federal Court decision by Justice McGillis in *CTEA et al.* v. *Bell Canada*, which temporarily prevented the Tribunal from taking on new cases. There appears to be a new pattern commencing in 1999 of CHRC sending more cases to the Tribunal.

Decisions Rendered in 1999

Mills* v. *VIA Rail Canada (CHRT — May 17, 1999)
The complainant, Mills, who had injured his back, was found to be unfit for work by VIA and was eventually terminated for failing to maintain an absenteeism level within the average for his occupation. The Tribunal held that when VIA declared the complainant "unfit," it directly discriminated against him on the basis of disability or perceived disability. Further, VIA had failed to make out a *bona fide* occupational requirement: the doctor who declared Mills unfit was never asked if he could meet the job descriptions in the collective agreement. The doctor performed no assessment of the complainant against unequivocal lifting requirements or safety requirements which were sufficiently connected to the work. VIA acted recklessly, without testing the complainant's actual abilities. Finally, it declared him unfit for work without determining whether his absenteeism was affecting the economic and efficient work performance of services. The Tribunal upheld the complaint and ordered VIA to reinstate Mills.

Bernard* v. *Waycobah Board of Education (CHRT — June 11, 1999)
The complainant worked as a secretary to a school on a First Nations reserve. She gave a presentation to students on native spirituality during a heritage program. After the presentation, parents in the community began pressuring the school to take action against the complainant and eventually, the School Board dismissed her. The Tribunal found that, in fact, the Board terminated the complainant because it perceived that she was mentally ill. While the concerns of parents may have played a role in motivating the termination, these concerns were themselves based on a prejudiced opinion of the complainant as being mentally disabled. The Board's insistence at the hearing that the dismissal was motivated by public outcry from the community *per se*, as opposed to perceived disability, resulted in the Board making no attempt to lead evidence of a *bona fide*

occupational requirement. The Tribunal found that even if public reaction played a role in the Board's decision, it was in essence a call to discriminate on the prohibited ground of perceived mental illness. The complainant was ordered reinstated.

Nijjar* v. *Canada 3000 Airlines (CHRT — July 9, 1999)
The respondent, an airline, refused to allow a Sikh man to board an aircraft carrying a kirpan (ceremonial dagger) on the grounds that it constituted an item which had a greater potential for injury than the eating utensils used on board the aircraft. The complainant alleged discrimination on the ground of religious belief. The Tribunal found that the rule regarding dangerous objects was rationally connected to the respondent's legitimate business concerns. It also found that while the complainant was certainly upset about being denied access to the aircraft, his testimony failed to establish that wearing a kirpan with less of a potential for injury (so as to be no more dangerous than an eating utensil) would have offended his religious beliefs. His religion required him to wear a kirpan, but his choice of shape or size of kirpan was motivated by personal preference, not religion. Hence no *prima facie* case had been made. The Tribunal dismissed the complaint.

Conte* v. *Rogers Cablesystems Ltd. (CHRT — Nov. 10, 1999)
While working, Ms. Conte suffered voice loss on two occasions and missed work for one week each time. Eventually Rogers terminated her employment due to the fact that her vocal cords were injured and that this was not the first occurrence of the injury. The Tribunal found that Rogers had not satisfied its duty to accommodate Ms. Conte. Before deciding to terminate her, Rogers was obligated at the very least to engage in an examination of Ms. Conte's current medical condition, her prognosis for recovery and her capabilities for alternative work. Yet it did not do so. In particular, Rogers never sought information as to whether Ms. Conte's debilitating condition was likely to improve, or when she might return to work; it assumed her disability was permanent. Moreover, Rogers never turned its mind to whether Ms. Conte could be assigned any alternative work in lieu of termination. The Tribunal upheld the complaint.

Carter* v. *Canada (Canadian Armed Forces) (CHRT — Mar. 2, 2000)
The complainant alleged that the respondent Armed Forces' mandatory retirement policy discriminated against him on the ground of age. The respondent conceded that discrimination had occurred, but differed with the complainant on the amount of damages for lost wages he was owed. According to the respondent, the period of wage loss commenced at the time of the complainant's release from the Forces, but ceased running roughly three months later when a regulation was passed which explicitly exempted the respondent's policy from the application of the *Canadian Human Rights Act*. The complainant argued that the respondent's position amounted to a retroactive interpretation of the regulation. The Tribunal decided in favour of the respondent: the policy ceased to be discriminatory on the date on which the regulation came into force. Consequently, this is where the wage loss ended.

Results from the Courts

Federal Court of Canada

Franke* v. *Canadian Armed Forces (FCTD — Apr. 28, 1999) [upheld]
In 1998 a Tribunal had, by a 2–1 majority, dismissed a complaint of sexual harassment. The Court held that the Tribunal majority had applied the correct legal test for harassment. Given that comments had been made to the complainant of a sexual nature, the majority sought to determine whether the comments were unwelcome at the time they were made; it then assessed whether the comments were persistent or grave enough to constitute harassment. The Court refused to interfere with the majority's finding that the conduct was not unwelcome as there was evidence to support this finding. Furthermore the Court held that the majority's finding as to whether the conduct rose to the level of harassment was reasonable and thus did not warrant intervention. Moreover, based on the evidence, the Tribunal was reasonably entitled to find that the disciplinary action to which the complainant was subjected was not motivated by discriminatory differential treatment based on sex. The Tribunal's decision was upheld.

Canada (Treasury Board)* v. *P.S.A.C. (FCTD — Oct. 19, 1999) [upheld]
In 1998 the Tribunal hearing the pay equity complaint against the Treasury Board rendered a decision substantiating the complaint. The Tribunal found that a wage gap existed between the complainant, female-dominated, occupational groups and male comparators of equal value. The Treasury Board sought judicial review of this decision in the Federal Court Trial Division. It argued that the Tribunal had failed to (1) measure wage differences which were truly based on sex, (2) compare work of equal value, and (3) compare the complainants to male occupational groups.

In October, 1999, the Federal Court dismissed the application. The court found that the Tribunal's methodology revealed no reviewable error. It identified and measured a wage differential that would take into account the fact that women are under-represented among employees who are performing more highly valued work for which the remuneration increases more rapidly than the value of the work. Secondly, it rightly refused to confine its comparison to the wages of employees in the *lowest* paid male group. Third, the Tribunal rightly refused to base its comparison on occupational groups, since such groups are of a limited utility as a basis for setting salaries in general and for pay equity exercises in particular.

Table 3 Judicial Review of Tribunal Decisions, 1997–1999*	**1997**	**1998**	**1999**	**Total**
Cases referred to the Tribunal	23	22	37	**82**
Decisions rendered†	9	8	4	**21**
Decisions challenged				
• upheld	1	5	0	**6**
• overturned	0	0	0	**0**
• withdrawn	3	2	0	**5**
• still pending	0	1	1	**2**
• total	4	8	1	**13**

* *As discussed elsewhere in the report, the courts are more frequently endorsing the work of the Tribunal.*

† *The cases included in this column are those for which the Tribunal wrote and submitted a final judgment. They do not include complaints that were withdrawn or settled by mediation.*

McAleer* v. *Payzant (FCA — June 8, 1999) [upheld]
In 1994, the Tribunal had ordered the respondents to cease the discriminatory practice of communicating telephonically, or causing to be communicated telephonically, matters which were likely to expose a person or persons to hatred or contempt by reason that that person or those persons are identifiable on the basis of a prohibited ground of discrimination, i.e., sexual orientation, and in particular on the basis of their homosexuality and, to refrain from any such actions in the future anywhere within Canada. In affirming the Tribunal's decision, the Federal Court of Appeal held that the reference in the Tribunal's order to "sexual orientation" was not excessively vague. As the case law makes clear, the legal concept of "sexual orientation" does not encompass pedophilia (criminal activity); it does however include homosexuals, a group whom our system of law protects against discrimination.

S.E.T.V.C.* v. *Goyette (FCTD — Nov. 5, 1999) [upheld]
In 1997 a Tribunal upheld a complaint against the Union of Voyageur Terminal Employees by Mme. Lise Goyette. The Tribunal found that the union, by negotiating departmental seniority clauses in the collective agreement, had created a situation of systemic discrimination whereby women were prevented from accumulating enough seniority to be promoted permanently from less advantageous female-dominated positions to the more desirable male-dominated positions. The union sought judicial review. The court upheld the Tribunal's decision. The court found that there was evidence in the

record which supported the Tribunal's findings of fact. It also found that there was no legal impediment to holding a union solely liable for an act of discrimination which it committed, without making findings against the employer. The court further found that the Tribunal did not err by ordering the union to repay the complainant's lost wages, even though it is employers who are usually responsible for paying an employee's wages.

Intervention in *Conte* v. *Rogers Cablesystems*

When a supervisory court conducts a judicial review of a Tribunal decision, it applies a principle called curial deference. This essentially means that, in deciding whether the Tribunal committed an error, the court recognizes that on certain issues the Tribunal is in a better position to answer the question in dispute than the court.

Where the court grants deference to the Tribunal on an issue, it will only intervene if the Tribunal's decision on the issue appears flagrantly erroneous or obviously unreasonable. In situations where the court is unwilling to grant deference, it intervenes much more readily; the court basically makes the decision which, in its opinion, the Tribunal ought to have made.

Different tribunals are granted different levels of deference depending on the tribunal and the issue in dispute. In 1993, the Supreme Court of Canada, in a case called *Mossop,* decided that the Human Rights Tribunal was not entitled to a high level of deference. The court based its decision largely on the fact that the Tribunal did not possess any expertise superior to that of the court with respect to the legal question it had to answer.

Since 1993, two major developments have occurred. First, the Supreme Court has refined its general approach to determining how much deference should be given to a Tribunal. Secondly, in 1998, Parliament substantially amended the *Canadian Human Rights Act*, creating a permanent Tribunal with full-time members, all of whom must possess expertise in the field of human rights.

Late in 1999, the new Tribunal upheld a complaint in a case called *Conte* v. *Rogers Cablesystems.* The respondent, Rogers, has sought judicial review of this decision in the Federal Court. When the court carries out this review, it will be the first opportunity that a court has had to assess the appropriate level of deference for the newly configured Tribunal.

The Tribunal formed the opinion that, given the unique nature of this court proceeding, it would be important for the Tribunal to intervene in order to fully explain to the Court how the current Tribunal differs from the entity which was being reviewed in the *Mossop* case. It would also be useful to explain to the Court how the current Tribunal functions. In this way it is hoped that whatever decision is made on the appropriate level of deference to be accorded to the new Tribunal, it will be a decision informed by a full appreciation of the organization under review.

Pay Equity Tribunal Hearings

The Tribunal's hearings commitments continue to include a disproportionate share of hearing days for pay equity cases. In 1999, the Tribunal's caseload included three pay equity complaints that alone accounted for about 50 percent of its hearings schedule.

The longest-running Tribunal case still in hearings is *PSAC v. Canada Post,* which has heard 340 days' worth of evidence and arguments since 1992. In 1999, the complainants rested their case and the respondents began presenting. About 20 hearing days have been scheduled for reply evidence in the fall of 2000 with final arguments expected to commence in early 2001.

Almost as noteworthy as the time they consume is the controversy these cases generate. Requests for judicial review of preliminary procedural or jurisdictional matters for pay equity cases are common and 1999 was no exception. The Tribunal's July 1998 ruling in *PSAC v. Canada (Treasury Board)* gave the first full interpretation of s. 11, which prohibits wage discrimination on the basis of sex. The government's response to this landmark ruling was a request for judicial review by the Federal Court of Canada. The application was dismissed in October 1999, finding no error in the Tribunal's methodology.

Meanwhile, hearings were under way again in 1999 in *Canadian Telephone Employees' Association (CTEA), Communications Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada*. Previously, the respondent's Federal Court application challenging the adequacy of the Commission's investigation into the complaint had been granted, quashing the referral of the case to the Tribunal. In November 1998, the Federal Court of Appeal reversed the lower court's decision and referred the case back to the Tribunal. There have been 15 hearing days to date with a further 50 to 60 days scheduled to the end of 2000.

A third wage discrimination case, *PSAC v. Government of the Northwest Territories,* began hearings on preliminary motions in 1998. Since the case's referral to the Tribunal in 1997, many motions have been brought by the parties on preliminary procedural and jurisdictional matters, and there have been several requests for judicial review of the Tribunal's rulings on those motions. The hearings, however, continued through 1999, six days of which were held in Yellowknife and four in Iqaluit, bringing the total number of hearing days thus far to 48. More hearing days have been scheduled for the remainder of 2000 and into 2001.

These high-profile cases underscore the challenges inherent in building a new body of case law. Because pay equity case law is still in its infancy and because the stakes are so high, many of these cases will likely take years to resolve, with obvious implications for the Tribunal's workload.

Key Reviews, Audits and Evaluations

Auditor General's Report

Since the Auditor General of Canada's audit of the Canadian Human Rights Tribunal in 1998, no other reviews or audits have been conducted on the operations of the Tribunal. We understand that the Auditor General will soon conduct a follow-up to assess the recommendations made in its report. We are confident that we have responded effectively to these recommendations.

The report of the Review Panel studying the *Canadian Human Rights Act,* while not in itself an audit of the CHRT, considered how to provide Canadians with a meaningful and efficient way of resolving human rights issues. The recommendation of the panel expressing the need to greatly expand our role and mandate confirms the work the Tribunal has been doing. We consider the Review Panel's report as a positive comment on the programs and services we provide to Canadians.

Section III: Consolidated Reporting

Regulatory Initiatives

New rules of procedure for the Canadian Human Rights Tribunal have been developed as a result of amendments to the CHRA.

Statutory Annual Reports

Under Bill S-5, the Tribunal must produce an annual report for presentation to the Speakers of the House of Commons and of the Senate. The Tribunal's second annual report, published in March 2000, describes the Tribunal's activities during the 1999 calendar year, including its caseload, administration, restructuring, and training and mediation programs.

Section IV: Financial Performance

Financial Performance Overview

The Canadian Human Rights Tribunal spent less than it was allotted in 1999–00. First, funding for pay equity cases lapsed. The total lapsed funding was approximately $250,000. As a condition of Treasury Board's approval of funding for the pay equity cases, Treasury Board has stipulated that funding was to be used only in support of those individual cases. The funding shortfall was due to delays in the hearings, principally caused by procedural and jurisdictional challenges. There were also some scheduling difficulties caused by the unavailability of technical and specialized witnesses.

Finally, there was a funding lapse of approximately $500,000 in the Tribunal's main reference levels. A portion of these savings can be attributed to the implementation of the alternative dispute resolution (ADR) process. The remaining savings came from the transition of Bill S-5. In the early part of last year, fewer new cases were referred to the Tribunal. In the closing months of 1999–00 referrals increased; consequently, hearing days were lower than expected.

Financial Summary Tables

The following tables apply to the Tribunal:

1. Summary of Voted Appropriations
2. Comparison of Total Planned Spending to Actual Spending
3. Historical Comparison of Total Planned Spending to Actual Spending

Financial Table 1

Financial Requirements by Authority (in millions of dollars)			
	1999–00		
Vote	Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal			
30 Operating expenditures	4.7	4.7	3.8
(S) Contributions to employee benefits	0.1	0.1	0.1
Total Department	4.8	4.8	3.9

Total Authorities are Main Estimates plus Supplementary Estimates plus other authorities.

Financial Table 2

Departmental Planned versus Actual Spending (in millions of dollars)			
	1999–00		
Business Lines	Planned	Total Authorities	Actual
Canadian Human Rights Tribunal			
FTEs	17	17	17
Operating	4.8	4.8	3.9
Capital	—	—	—
Voted Grants and Contributions	—	—	—
Subtotal: Gross Voted Expenditures	4.8	4.8	3.9
Statutory Grants and Contributions	—	—	—
Total Gross Expenditures	4.8	4.8	3.9
Less:			
Respendable Revenues	—	—	—
Total Net Expenditures	4.8	4.8	3.9
Other Revenues and Expenditures			
Non-respendable Revenues	(—)	(—)	(—)
Cost of services provided by other departments	0.5	0.5	0.5
Net Cost of the Program	5.3	5.3	4.4

Financial Table 3

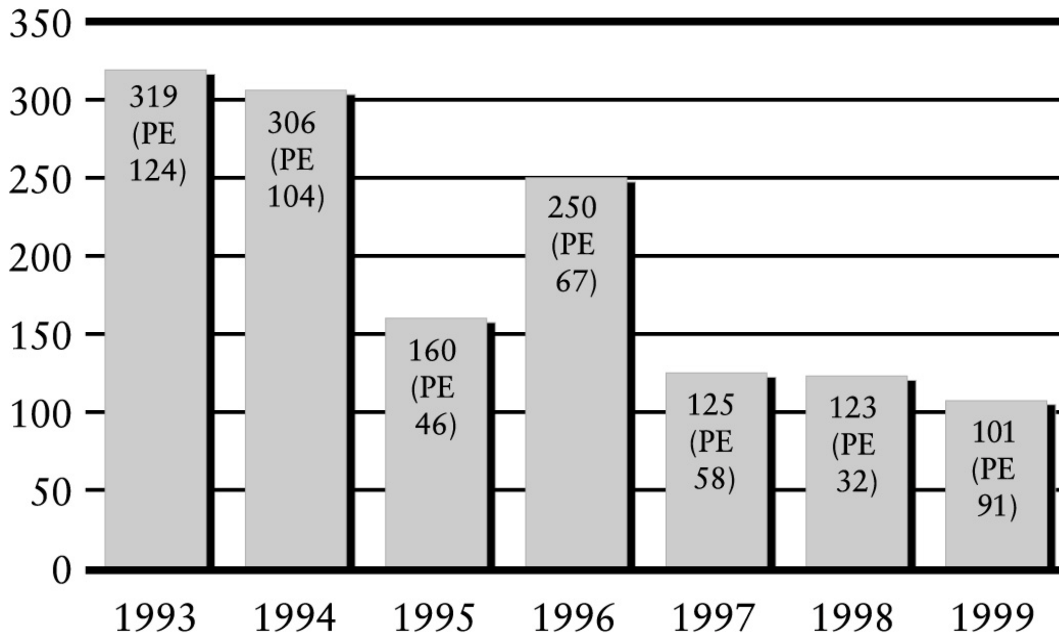
Historical Comparison of Departmental Planned versus Actual Spending (in millions of dollars)

			1999–00		
	Actual 1997–98	Actual 1998–99	Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal	2.1	2.2	4.8	4.8	3.9
Total	2.1	2.2	4.8	4.8	3.9

Total Authorities are Main Estimates plus Supplementary Estimates plus other authorities.
Note: Special one-time funding approvals were provided to the Tribunal for the implementation of Bill S-5 in 1999–00.

Detailed Examination of Cases

Figure 1
Number of Hearing Days per Year



Note: “PE” represents pay equity cases and includes *PSAC* v. *Treasury Board*, *PSAC* v. *Canada Post Corporation*, *CTEA et al.* v. *Bell Canada* and *PSAC* v. *Government of the Northwest Territories.*

Figure 2
Average Cost per Case by Ground *(in thousands of dollars)*

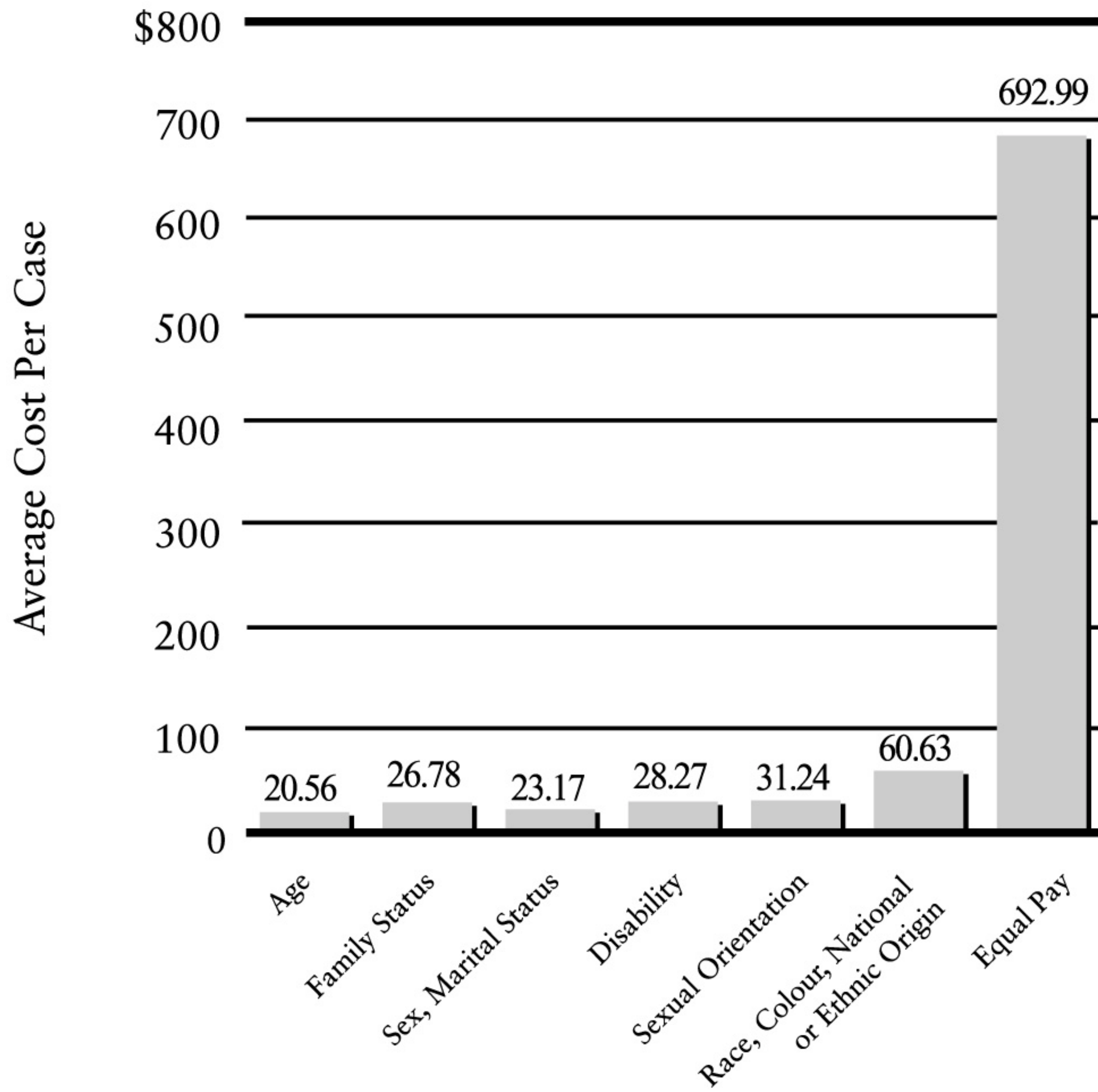


Figure 3
Average Number of Days per Case by Ground

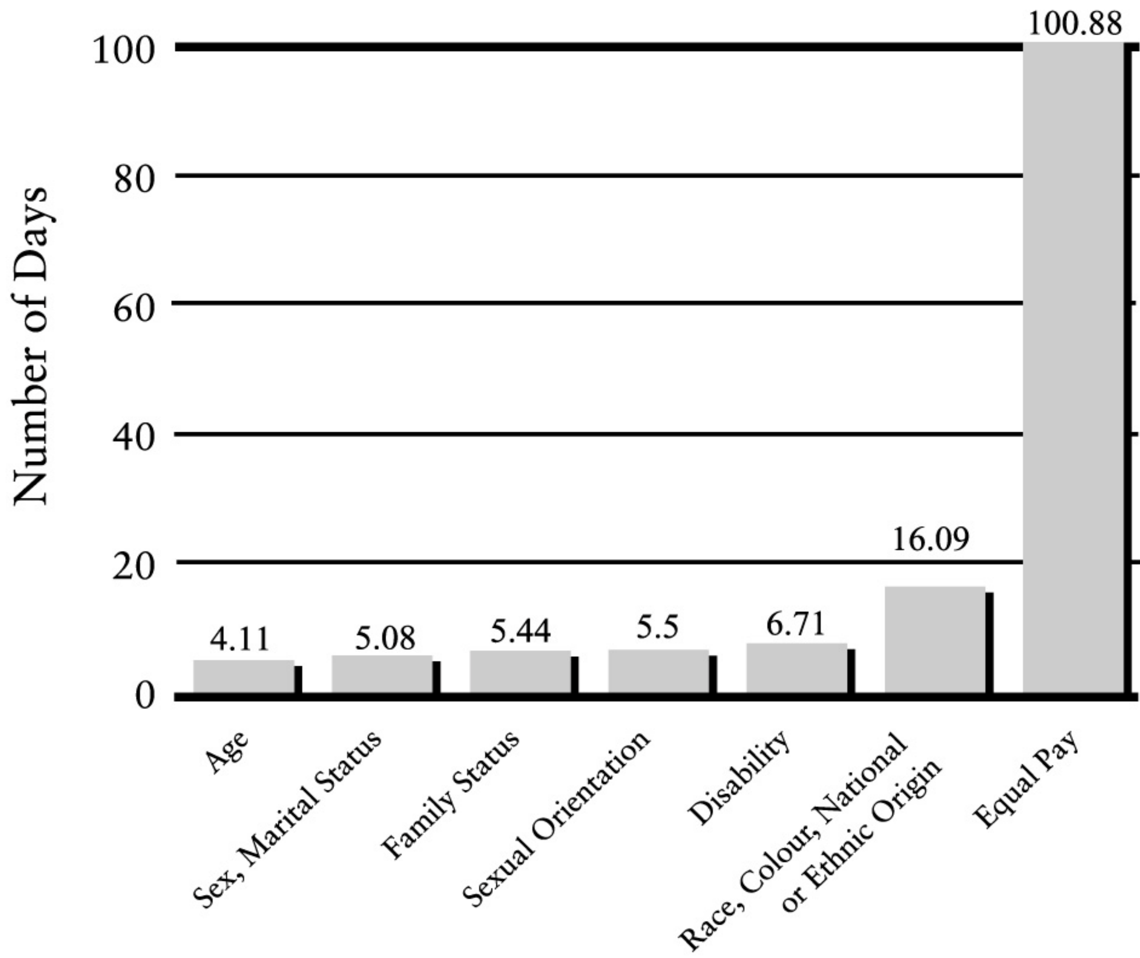


Figure 4

Cases by Grounds

Ground	1993	1994	1995	1996	1997	1998	1999
Sex	3	5	7	6	8	1	9
Sexual Harassment	0	0	2	3	7	2	2
Sexual Orientation	5	6	1	0	0	1	0
Marital Status	5	4	2	0	1	0	0
Family Status	2	6	2	3	1	0	1
Equal Pay	0	0	1	2	1	0	0
Age	1	3	2	2	2	0	2
Disability*	12	8	11	5	3	6	7
Race, Colour, National or Ethnic Origin	10	17	9	4	4	5	7
Religion	4	1	3	1	0	1	0
Totals	**42**	**50**	**40**	**26**	**27**	**16**	**28**

* From 1993 to 1997, the number of disability cases has gradually but distinctly decreased. This can be attributed to the large number of precedent-setting cases that have made laws clearer and have eased the need for litigation. However, as a result of new accommodation legislation created in Bill S-5, the number of disability cases is rising and will most likely continue to rise.

Section V: Departmental Overview

Mandate, Vision and Mission

The Canadian Human Rights Tribunal is a quasi-judicial body that hears complaints of discrimination referred to it by the Canadian Human Rights Commission (CHRC) and determines whether the activities complained of violate the *Canadian Human Rights Act* (CHRA). The purpose of the Act is to protect individuals from discrimination and to promote equal opportunity.

Our mission is to provide Canadians with human rights adjudications that are fair, impartial and timely.

The Tribunal has a statutory mandate to apply the CHRA based on the evidence presented and on current case law. Created by Parliament in 1977, the Tribunal is the only entity that may legally decide whether a person or organization has contravened the statute.

The Act applies to federal government departments and agencies, Crown corporations, chartered banks, railways, airlines, telecommunications and broadcasting organizations, and shipping and inter-provincial trucking companies. Complaints may relate to discrimination in employment or in the provision of goods, services, facilities and accommodation that are customarily available to the general public. The CHRA prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual orientation, disability or conviction for which a pardon has been granted. Complaints of discrimination based on sex include allegations of wage disparity between men and women performing work of equal value in the same establishment.

In 1996 the Tribunal's responsibilities were expanded to include the adjudication of complaints under the *Employment Equity Act*, which applies to employers with more than 100 employees. Employment Equity Review Tribunals are assembled as needed from the members of the Canadian Human Rights Tribunal. The first Employment Equity Review Tribunal was appointed in February 2000. It is currently on hold at the request of the parties, pending settlement discussions.

The Tribunal Registry's activities are entirely separate from the decision-making process. The Registry is accountable for the resources allocated by Parliament. It plans and arranges hearings, acts as liaison between the parties and Tribunal members, and gives Tribunal members the administrative support they need to carry out their duties.

Operating Environment

The Canadian Human Rights Tribunal, like any other quasi-judicial administrative board, has an arm's-length relationship with the government. The Tribunal does not work directly with any other government agency in meeting its objectives, as any agency or department could potentially appear before the Tribunal as a respondent. In short, the Tribunal, despite its limited size, is obliged to operate very much within its own sphere.

The stakeholders and clients affected by the Tribunal's decisions are many and varied. Moreover, the Tribunal's decisions may, on occasion, alter policies, procedures and government practices that affect all Canadians. For example, the Tribunal may order the government to change the way in which it allocates employment benefits, hires personnel or implements social programs. In light of the significance and consequences of its decisions for employers and individuals, the Tribunal is committed to ensuring that its decision-making process not only is independent and impartial, but also is seen to be independent and impartial.

The Tribunal's business is affected by many outside pressures. For example, a change in the direction of government policy may result in amendments to the CHRA, as occurred in June 1998. However, the main pressure affecting the Tribunal comes from the Federal Court and Supreme Court, which review the Tribunal's decisions and issue opinions in other cases that have a direct bearing on human rights law.

The Canadian Human Rights Act Review Panel

In April 1999, the Minister of Justice appointed a special panel consisting of legal and human rights experts to conduct an intensive review of the CHRA. The panel was chaired by former Supreme Court Justice, Gérard La Forest. The final recommendations of the panel will have a significant impact on how the Tribunal conducts its business.

While this performance report covers only the period up to March 31, 2000, we would be remiss if we did not offer preliminary observations on the potential impact of the La Forest Report. The panel released its findings on changes to the CHRA and made some far-reaching recommendations. The comments in this performance report will be restricted to their proposed process changes and not cover any substantive or policy issues raised in their report.

The panel has determined that, to provide a fair and improved service to potential victims of discrimination, all claimants are entitled to an independent quasi-judicial adjudicative system to make findings on their allegations. While this does not always require a full hearing, a specialized human rights adjudicator must make a considered decision on the merits of any claim that cannot be resolved amicably and equitably by the parties.

Currently, all human rights complaints must be screened and investigated by the CHRC before the Tribunal gains jurisdiction to inquire into a complaint. Only those cases in which the Commission considers an inquiry is warranted are referred to the Tribunal. At present, only three to five percent of all complaints received by the Commission are referred to Tribunal for hearing. The La Forest Report strongly recommends a direct access model where claimants would come directly to the Tribunal, eliminating the Commission's screening and investigation of cases. While the Tribunal would have procedures in place to handle some claims in a summary way, the number of cases going to full hearing could increase by as much as eight to ten times.

On average, from 1994 to 1998, fewer than 30 cases per year were referred to the Tribunal. So it is reasonable to expect, based on CHRC numbers, that the Tribunal could open 400 to 500 new cases each year. It is easy to foresee the impact of such a dramatic conversion on the Tribunal's resources. Consequently, the planning of the Tribunal's future is uncertain when taken into context with the recent La Forest Report. We anxiously await the Minister's decision on acceptance and implementation of the Panel's recommendations.

Second Language Training

In consultation with Treasury Board, it was deemed appropriate to offer second language training to Tribunal members. The purpose was to give the Tribunal greater flexibility in meeting its hearing needs and to provide an improved service to all Canadians.

In 1999, second language training was provided to the Chairperson and Vice-Chairperson. English language training was provided to a member from Quebec, and French language training to members from Saskatchewan and Alberta. The Chairperson and the members from Western Canada have improved their skills sufficiently to preside over bilingual hearings. Other members are making good progress, allowing them to participate more fully in all Tribunal activities. Second language training will continue to be available to our members.

Organizational Infrastructure

In 1999, Treasury Board allocated special funding to the Tribunal to implement the provisions of Bill S-5. During that period, new staff were hired to meet the operational needs of the Tribunal's mandate. Renovations were also completed to the Tribunal's offices to accommodate new staff, part-time members, pay equity hearings and to improve hearing facilities. The work was managed by Public Works and Government Services Canada and completed within the funding allocated by the Treasury Board. The changes made should meet the needs of the Tribunal for the next few years.

Judicial Review

Decisions of the Canadian Human Rights Tribunal are commonly reviewed by the Federal Court of Canada, and requests for review of Tribunal decisions have been less common than in the past few years. We believe, as we stated in previous departmental reports, that the new permanent Tribunal would develop a high level of credibility with the courts and the public. In the past year, the courts have been upholding the decisions of the Tribunal, to the point that the last six rulings of the court have supported the findings of the Tribunal. The new, smaller Tribunal is a major reason for the courts' approval of Tribunal work. Members have been engaged in lengthy training sessions in all aspects of their Tribunal responsibilities, especially concentrating on decision-writing skills. Fewer members also means that each member can hear more cases, enhancing their experience in conducting and deciding human rights cases. The reviewing courts have given greater understanding to the work of the Tribunal by recognizing that the members do have an expertise that should be acknowledged.

What does this mean to Canadians? Most importantly, complainants and respondents both have their cases decided more quickly and with some finality; therefore, they are able to get on with their lives and put the disquieting event behind them. Processing a human rights complaint is very stressful and difficult on all parties. The uncertainty that it creates, especially in a work environment, must be put to rest as quickly and fairly as possible. Moreover, both the financial and emotional costs to the parties are lessened when the Tribunal does its job expeditiously and impartially. We believe, by our work in the past year, that Canadians are regaining confidence in the adjudication portion of resolving difficult human rights disputes.

However, because of the controversial nature of some human rights issues and the impact they have on society as a whole, it is reasonable to expect that a number of the Tribunal's decisions will be challenged.

Last year there were a number of Tribunal interim rulings, although mainly procedural, that were challenged in the courts. The effect was a protracted hearing process with the Tribunal awaiting decisions from the courts on issues that did not relate to the merits of the complaint. We were optimistic that the courts would recognize the impact of these challenges on the rights of individuals and would prescribe an appropriate mechanism through their rulings to ensure the provision of natural justice and to protect the integrity of the CHRA. We are pleased to report that this is happening. The courts are saying, through their rulings, that the Tribunal should be allowed to get on with its work and only bring challenges to interim rulings on issues that go to the basic jurisdiction of the Tribunal. All other procedural questions should be delayed until the Tribunal has rendered its final judgment.

Other factors contributing to the incidence of judicial review of Tribunal decisions will become more important in the future. Future Tribunal rulings are more likely than ever to

be first-time interpretations of new or revised sections of the CHRA. With the development of a growing body of case law to guide the Canadian Human Rights Commission in negotiating settlements, the cases referred to the Tribunal tend to involve new areas of human rights law, unexplored areas of discrimination, contentious evidentiary issues or conflicting interpretations of a precedent. Such cases tend to be prime candidates for judicial review.

As indicated in last year's report, the Tribunal will be seeking status in the first judicial review application brought against a decision made under the amended CHRA. The purpose of the Tribunal's participation would be to explain to the reviewing court that the new Tribunal operates in a significantly different legislative context where experience and expertise are more strongly emphasized. Ultimately, we hope that the courts will acknowledge that the new Tribunal merits a new, higher level of deference.

See page 12 for detailed explanation on the Tribunal's intervention.

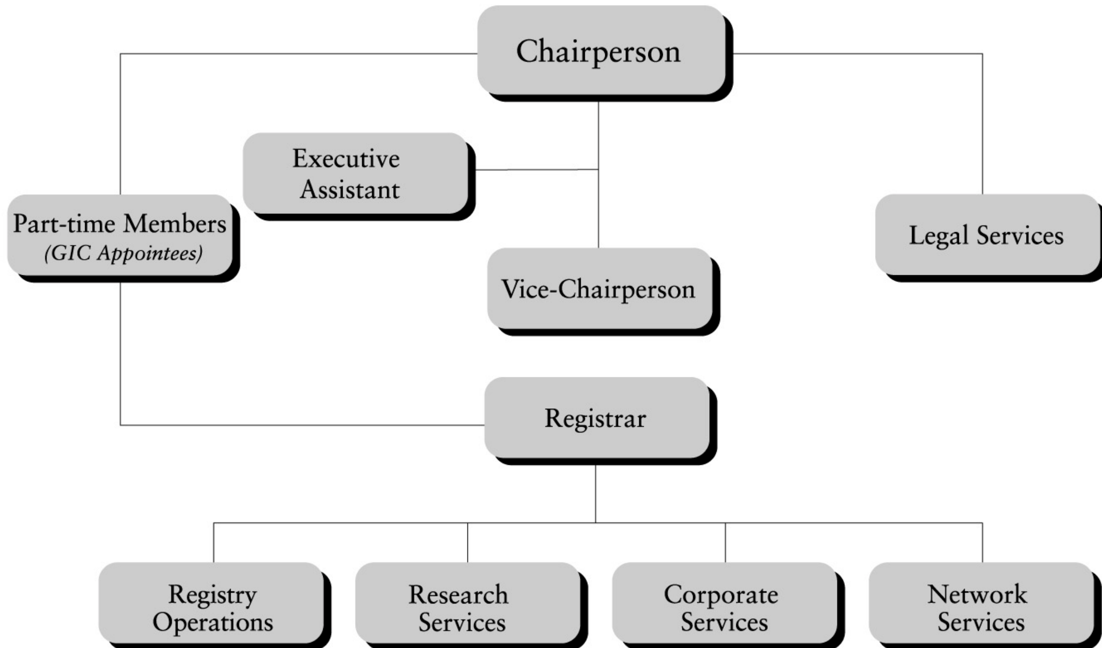
Departmental Organization

Amendments to the *Canadian Human Rights Act*, adopted on June 30, 1998, changed the structure and function of the Canadian Human Rights Tribunal. Figure 5 outlines today's structure of the Canadian Human Rights Tribunal, a permanent body with fewer members (maximum 15) than before 1998. This enables new members to develop superior expertise in the field of human rights and to commit more time and energy to their task.

The Tribunal Registry provides administrative and planning support to members, and service to those who appear before the Tribunal. With the creation of the permanent Tribunal under the new amendments, we will be moderately increasing Registry staff to provide the greater support the new members require. Previously, members, who were all part-time, used their own support staff to assist them in legal research and rendering decisions, but the new members now rely on the Registry for that support.

To control costs while maintaining services, the Registry regularly monitors and adjusts its procedures and practices. At the same time, it has to deal with varying numbers of cases, some of which are highly complex and require hearings in different locations. The Registry has no control over the number, location or duration of these hearings. Under these circumstances, providing support to the Tribunal and services to the public while staying within budget is often a challenge.

Figure 5



Section VI: Other Information

Contacts for Further Information and Web Site

Michael Glynn, Registrar
Canadian Human Rights Tribunal
473 Albert Street
Suite 900
Ottawa, Ontario
K1A 1J4

Tel: (613) 995-1707
Fax: (613) 995-3484

e-mail: registrar@chrt-tcdp.gc.ca
Web site: www.chrt-tcdp.gc.ca

Legislation and Associated Regulations Administered

The appropriate Minister is responsible to Parliament for the following Acts:

Canadian Human Rights Act (R.S. 1985, CH–6, amended)
Employment Equity Act (Bill C–64, given assent on December 15, 1995)

Statutory Annual Reports and Other Departmental Reports

The following documents can be found on the Tribunal's Web site:

Annual Report (1998 and 1999)
Report on Plans and Priorities (2000–2001 Estimates)
Rules of Procedure