ESTIMATES

Canadian Human Rights Tribunal

Performance Report

For the period ending
March 31, 1999

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 what was known as the annual *Part III of the Estimates* document for each department or agency into two documents, a *Report on Plans and Priorities* and a *Departmental Performance Report.*

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.

This year, the Fall Performance Package is comprised of 82 Departmental Performance Reports and the government's report *Managing for Result* - Volume 1 et 2.

This ***Departmental Performance Report,*** covering the period ending March 31, 1999, 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 pilot *Report on Plans and Priorities* for 1998-99. The key result commitments for all departments and agencies are also included in Volume 2 of *Managing for Results.*

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 and develop both managing for and reporting of results. 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/tb/key.html

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

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Canadian Human Rights Tribunal

Performance Report

For the period ending March 31, 1999

Anne McLellan
Minister of Justice

Result 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. III, p. 9–11; S. V, p. 28–29
	• well-reasoned decisions, consistent with the evidence and the law.	S. III, p. 11
	• changes to policies, regulation and laws made as a result of the Tribunal's decisions.	S. III, p. 11
	• application of innovative processes to resolve disputes.	S. III, p. 12–13
	• service that is satisfactory to the Members, the parties involved and the public.	S. III, p. 13; S. V, p. 28–29
	• equity of access.	S. III, p. 13–14
	• public awareness and use of Tribunal's public documents.	S. III, p. 13–14

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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 equality of opportunity. The Tribunal is the only entity that may legally decide whether a person has contravened the statute.

For many years, the impartiality of the Tribunal had been called into question because of its historical financial and administrative links to the Commission. The situation came to a head in March 1998, when a challenge by Bell Canada resulted in a Federal Court ruling that members of the Tribunal presiding over the Bell Canada case failed to satisfy the criteria for an independent Tribunal. As a consequence of this ruling, no new tribunals were appointed until Parliament had taken steps to address the Court's concerns.

Amendments to the CHRA, which came into effect on June 30, 1998, augmented the Tribunal's independence in law 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, standing 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*.

During the past year, hearings have been delayed while the Tribunal waited for the government to appoint new members. To date, 13 members have been appointed. 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.

It is expected that the transformations envisaged by Bill S-5 will take about three years to realize. The outcome of these changes will be a more highly qualified Tribunal that will generate a more consistent body of decisions. We hope that the new Tribunal will increase public confidence in its rulings, and that there will be an increased deference by the courts to Tribunal decisions. This would eventually translate into increased certainty for complainants and

- respondents about the judicial interpretation of the CHRA, and, in some cases, a speedier disposition of complaints and reduced cost to the justice system.

Section I: The Chairperson's Message

Amendments to the *Canadian Human Rights Act* (CHRA), which came into effect on June 30, 1998, created the Canadian Human Rights Tribunal. The impetus for Bill S-5 came from repeated challenges to the Tribunal's competence or independence over the last decade, which finally culminated in 1998 in the finding by the Federal Court that a Human Rights Tribunal appointed under the old CHRA did not have the requisite level of independence to provide an impartial hearing. We are now well into the first year of an expected three-year transition to a more open and responsive Tribunal, with stronger guarantees of procedural fairness and greater consistency in decisions.

Severing the last of our formal links with the Canadian Human Rights Commission, we have undergone a major restructuring to become a smaller, permanent Tribunal with a core of full-time members. For the first time, the CHRA requires that all members of the Tribunal have expertise in and sensitivity to human rights issues. Ongoing training is also a priority: in the Spring of 1999, Tribunal members attended an intensive, three-week training program that covered such topics as managing hearings, applying rules of evidence and decision-writing techniques, as well as substantive human rights topics.

In an effort to make the hearing process more effective and timely and to provide improved guidance to both Tribunal members and hearing participants, new rules of procedure for the Canadian Human Rights Tribunal have been developed. We have also developed rules of procedure for mediation, a pamphlet explaining mediation to its users, and criteria for determining which cases are best suited to this approach. These innovations resulted from a full-scale review of the mediation process launched in 1998. This review was designed to ensure that the program serves both the needs of the parties to an individual case and the public interest.

I look forward to working with my colleagues at the Tribunal and the Tribunal Registry as we continue to implement the changes envisaged by the statutory reforms of 1998 and to cooperating with the Canadian Human Rights Act Review Panel in the coming year as it undertakes a full-scale review of federal human rights adjudication in Canada.

Anne L. Mactavish

Section II: 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 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 equality of opportunity.

Our vision and 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 Tribunals will likely be appointed in 2000.

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 such an 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. Such changes are often motivated by pressure from individual Canadians or advocacy groups to alter the mandate of the federal human rights program, and with it, the mandate of the Tribunal. However, the main pressure affecting the Tribunal comes from the Federal and Supreme courts, which review the Tribunal's decisions and issue opinions in other cases that have a direct bearing on human rights law.

Judicial Review

Decisions of the Canadian Human Rights Tribunal are commonly reviewed by the Federal Court of Canada, and requests for review are increasing. In the past, this was attributable in part to long-standing concerns about the administrative and financial links between the Tribunal and the Canadian Human Rights Commission. Although issues surrounding the Tribunal's independence and impartiality have been dealt with by degrees since 1988 and most recently in the 1998 amendments to the CHRA, the high proportion of Tribunal rulings that are challenged by the courts has tended to reflect a certain lack of judicial and public confidence in the reliability of Tribunal rulings. We are hopeful that the new, permanent Tribunal will develop a high level of credibility with the courts and the public. 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.

Recently, there has been a significant increase in the number of Tribunal interim rulings, which are mainly procedural, being challenged in the courts. The effect has been a protracted hearing process, with the Tribunal awaiting decisions from the courts on issues that do not relate to the merits of the complaint. The Tribunal is optimistic that the courts will recognize the impact of these challenges on the rights of individuals, and will prescribe through their rulings an appropriate mechanism to ensure the provision of natural justice and to protect the integrity of the CHRA.

It will require a few years to determine whether changes to the structure and operations of the Tribunal — designed to increase confidence in Tribunal rulings — are having the desired effect. We are hopeful that, as our members earn the needed respect of the courts, judicial deference to Tribunal decisions will increase. An April 1999 Federal Court decision indicates that we are moving in the right direction. The Court held that, with respect to questions of mixed fact and law, Tribunal decisions should be reviewed on the standard of reasonableness. Madam Justice Tremblay-Lamer commented that "provided the decision is supported by reasons which can be justified by the evidence, the Court should not intervene."

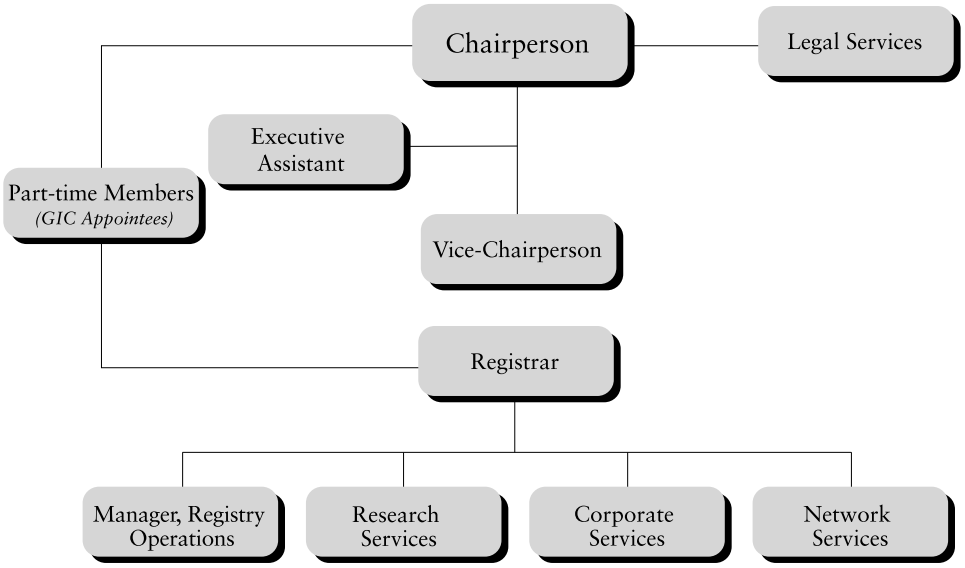
However, other factors contributing to the high incidence of judicial review of Tribunal decisions are likely to become even more important in the future. Future Tribunal rulings are more likely than ever to be first-time interpretations of new or revised sections of the CHRA. With the development of a growing body of case law to guide the Canadian Human Rights Commission in negotiating settlements, the cases referred to the Tribunal tend to be ones involving new areas of human rights law, unexplored areas of discrimination, contentious evidentiary issues or conflicting interpretations of precedent. Such cases tend to be prime candidates for judicial review. What's more, the high cost of complying with some pay equity orders virtually guarantees that respondents will appeal Tribunal rulings until the Supreme Court of Canada has clarified s. 11 of the CHRA. Since pay equity cases are expected to make up a growing proportion of the Tribunal's caseload, judicial review of these types of Tribunal decisions is likely to grow as well.

We are considering 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 a greater emphasis is placed on experience and expertise. Ultimately, we hope that the courts will acknowledge that the new Tribunal merits a new, higher level of deference.

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 1 outlines the structure of the Canadian Human Rights Tribunal today, 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.

Figure 1
Canadian Human Rights Tribunal/
Employment Equity Review Tribunal



The Tribunal Registry continues to provide administrative support to members. With the creation of the permanent Tribunal under the new amendments, we will be making moderate increases to 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 will now rely on the Registry for that help.

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.

Section III: Departmental Performance

Performance Expectations

Amendments to the *Canadian Human Rights Act* (CHRA), proclaimed on June 30, 1998, in Bill S–5, present an exciting challenge for this organization. As explained earlier, these amendments are significantly affecting the structure, process and procedures of the Tribunal. We are well into the first year of a three-year transitional phase during which many changes will come into effect. However, we do not foresee any adverse consequences to the stakeholders or to the users of our services.

The Registry will monitor the cost and effectiveness of its procedures and make changes and improvements as required. We will be watching our time lines closely to identify weaknesses, again with the aim of improving the delivery of service as set out in the Tribunal's commitments. The Tribunal has introduced new guidelines to reduce the time taken to begin the hearing process and to render decisions.

We are confident the courts will now more readily accept the work of the Tribunal, requiring less need for judicial intervention and the further re-hearing of matters. 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	$2,191,000.00
Total Authorities	*$2,815,933.00*
1998–1999 Actuals	**$2,419,904.00**

Time Frames

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. We have had some success — 13 of the 16 cases referred to us in 1998 took between two and 13 months to complete, an average of eight months. However, the majority of these cases were resolved through mediation and never went to hearings. Three cases referred to us are still active, although only two have exceeded the 12-month mark.

However, after further consideration, we do not feel that a 12-month time limit is a fair or accurate measure of the Tribunal's work, as the time to conduct the entire hearing process is more in the control of the parties than the Tribunal itself.

Under the new system, the Tribunal can hold a hearing on any issue within five days — and in some cases within 24 hours — after receiving the referral. 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. Case planning meetings usually take 45 to 60 days to be completed, with mediation sessions spreading over 75 to 100 days. Hearings typically begin within three to five months after the referral.

Interventions and procedural challenges are also not uncommon, and can cause significant delays. For example, one case has been ongoing for three years because of a large number of interventions and procedural challenges, including applications to the Federal Court. As a result, the case is currently on hold while a recent Trial Division decision is under review to the Court of Appeal. With this kind of delay, it is unreasonable to expect that tribunals can, on average, complete their work in a 12-month period.

We have not developed a perfect system that will allow for a speedier adjudication process. There may not be one. The Tribunal hears only complex cases that often 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 could 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. Specifically, the Tribunal can, with the cooperation and agreement of the parties, speed up the case process by reducing both the time it takes to commence the process and the time it takes the individual members to render decisions. To this end, the Chairperson and Vice-Chairperson, who are full-time members, will conduct the majority of case planning meetings within 6 weeks of referral from the Commission. During the case planning process, with the cooperation of the parties and based on the circumstances of each case, tight time lines will be placed on those parties to commence the hearing process.

As well, we have already begun, wherever possible, to schedule hearings in a single block of hearing dates. The average case requiring a hearing needs 16 days. Previously, a hearing may have been split into four one-week sessions spread over several months. Recently, at least four cases have been scheduled over four consecutive weeks, saving time and money.

Training

Training is a big part of the Tribunal's efforts to streamline 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.

In addition, to make the Tribunal more responsive to the needs of its clientele, members appointed to the new Tribunal have received training in rules and procedure, mediation and in-depth analysis of human rights issues. All members attended three intensive one-week sessions in 1999, and will have ongoing training throughout their terms. We also recommend the appointment of more full-time members to the Tribunal.

However, we do have some concerns about the length of appointments of members to the Tribunal. Currently, all part-time members have been appointed for only three years. We recommend that members hold a five-year term to maximize their training and expertise and provide Canadians with a more cost-effective adjudication process.

Rules of Procedure

Amendments to the *Canadian Human Rights Act* (CHRA) in June 1998 gave the Chairperson of the Tribunal 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. The Chairperson has developed detailed rules of procedure for the Canadian Human Rights Tribunal. Before being finalized, the rules were given to various users for their comments and views. The Tribunal is currently using the new rules, and has submitted them to the Department of Justice for review and publication. The rules will have the status of regulations under the CHRA and are expected to enhance the effectiveness and timeliness of the hearing process by providing improved guidance to both Tribunal members and hearing participants. The Chairperson is also developing rules of procedure for the Employment Equity Review Tribunal.

III

Alternative Dispute Resolution

In 1996 the Tribunal launched an alternative dispute resolution (ADR) project that makes it possible to resolve complaints without the need for 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 assistance of a mediator and attempt to reach a settlement. Even when the parties request mediation, hearing dates are scheduled to guarantee that there's 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.

Generally, parties involved in the process prefer to try mediation before having a solution imposed on them by the Tribunal. It takes about two months to complete the mediation effort, and the settlement rate is about 65 percent. In 1996 and 1997, only two complaints sent to mediation proceeded to the hearing stage; in 1998, this number decreased to one. In its first three years of operation the mediation program saved the Tribunal more than one million dollars in hearing costs.

However, as we anticipated in earlier reports, both the number of parties requesting mediation and the number of mediated cases that reach settlement are decreasing (see Table 1). In 1998, only seven complaints were referred to ADR (six of which were settled), compared with 12 complaints in 1996 (six of which were settled) and 19 complaints in 1997 (16 of which were settled, with one still pending).

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	16	2	1
1998 cases	7	6	1	0

The Tribunal began offering mediation in 1996. In its first three years the mediation program saved the Tribunal $1,015,783.62 in hearing costs. So far, seven cases have been referred to mediation in 1999.

This decrease in the number of cases referred to mediation is a good sign. 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 be precedent setting, 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 prior to 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 been participants. 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.

Public Access to the Tribunal

Given the nature of our work, the Tribunal can expect little in the way of direct feedback from the public. In 1995, in an effort to elicit some form of feedback, the Tribunal formed an ongoing User Group of Counsel, comprising lawyers who appear regularly before the Tribunal. The group tells the Tribunal how the planning and hearing process is working from its point of view. All members of the group report being very satisfied with the administrative planning and support provided by the Registry, although they would like to see the process move more quickly, which is something we are working on. With the implementation of the new CHRA, the Chairperson will be meeting with the user group in 1999–2000 to receive feedback on the transition to the new Tribunal.

In November 1997, the Tribunal set up a Web page to improve communication with the public and increase its understanding of the Tribunal's role. In addition to explaining the Tribunal's function and how it works, the Web page provides hearing dates and locations, a listing of all active cases, the full text of every Tribunal decision since 1990, and the e-mail address of every Registry staff member. A new design and search engines will be added 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 awareness is increasing.

Tribunal Decisions

Overview Statistics

Table 2

Number of Cases Referred 1993–1998

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

The number of cases before the Canadian Human Rights Tribunal depends entirely on how many cases are referred by the Canadian Human Rights Commission (CHRC). The recent reduction in cases is 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.

Cramm v. Canadian National Railway
(Review Tribunal Decision)
Barry Cramm complained that the Canadian National Railway Company and the Brotherhood of Maintenance of Way Employees Union discriminated against him on the basis of a temporary disability when it excluded him from a company-wide severance package given to its laid-off workers. The only prerequisite for eligibility was that an employee had to have worked at least one calendar day during the previous year. Mr. Cramm had sustained injuries that prevented him from working for several years prior to the layoff. He argued that the severance eligibility criterion was discriminatory. Canadian National argued that the policy was intended to provide a bonus to employees who had actually worked. Although the union agreed with the railway, it also agreed with the complainant that the policy was discriminatory.

The original Tribunal ruled the policy discriminatory and found that the respondents had not met their duty to accommodate the complainant. It ordered the respondents to stop applying the policy and to pay Mr. Cramm lost wages plus $1,500 for hurt feelings. However, a Review Tribunal overturned the original Tribunal's decision, and dismissed the complaint.

Franke v. Canadian Armed Forces
Kimberly Franke alleged discrimination on the basis of sex, specifically sexual harassment. This included an allegation of differential treatment in the course of

employment after Ms. Franke had complained of the harassment to the respondent. The Tribunal dismissed the complaint in a 2-1 decision. The dissenting member would have substantiated both complaints and awarded past and future lost wages, severance pay, pension and medical benefits, as well as $5,000 for hurt feelings. On judicial review, the Federal Court upheld the decision of the Tribunal majority.

Green v. Public Service Commission of Canada, Treasury Board and Human Resources Development Canada

The Tribunal heard two complaints that had been brought on behalf of Nancy Green. These complaints alleged that Treasury Board and the Public Service Commission had discriminated against Ms. Green in employment on the ground of disability, specifically dyslexia in auditory processing. The Tribunal found that the respondents followed practices that tended to deprive learning disabled individuals such as Ms. Green of employment opportunities. The respondents were ordered to appoint Ms. Green to the position she was seeking, provide her with appropriate language and management training and pension adjustments, compensate her for lost wages, and pay her $5,000 for hurt feelings. The Tribunal also ordered the two agencies to ensure that their personnel adhere to federal government policies designed to prevent discrimination and directed them to provide employee education and training to support adherence to the policy.

Singh v. Statistics Canada

Surendar Singh alleged that his chances of advancement within Statistics Canada had been detrimentally affected by his age, as well as by his national or ethnic origin. At issue were a series of staffing actions that Mr. Singh alleged were tainted by discriminatory considerations. The Tribunal found that Mr. Singh's national or ethnic origin played no role in any of the staffing actions but that his age was a factor in the respondent's refusal to include Mr. Singh's name on an eligibility list arising out of a job competition. Accordingly, the complaint was substantiated. The Tribunal ordered the respondent to provide Mr. Singh with an ES-01 level position at the first reasonable opportunity, to compensate him for his loss of wages, to pay him $3,000 for hurt feelings, and to pay interest on the amount awarded.

Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Limited and Air Canada

This pay equity case dealt in depth with the concept of "establishment," which is used but not defined in s. 11 of the CHRA:

> s. 11(1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees

employed in the same establishment who are performing work of equal value.

The issue to be decided by the Tribunal was whether the female-dominated flight attendants' group was part of the same "establishment" as the male-dominated pilots' group and technical operations personnel for the purposes of wage comparison. The respondents argued that their employees were divided into three long-standing, certified bargaining units of flight attendants, pilots and technical operations personnel, reflecting different working conditions and qualifications, and were therefore three separate functional establishments with different personnel and wage policies. The complainants had the burden of proving that the three units were part of the same establishment.

The Tribunal found that the three bargaining units were separate "establishments" for the purposes of applying s. 11 because each negotiated its own collective agreement and had branch-specific manuals. The case is currently under judicial review.

Results from the Courts

Federal Court of Canada

In 1998–99, the Federal Court of Canada issued five decisions that had a direct impact on the work of the Tribunal. Three of the decisions upheld the rulings of the Tribunal. Two did not. An explanation of each court decision follows.

Canadian Civil Liberties Association v. TD Bank — July 23, 1998 [quashed] A Tribunal had ruled that a Toronto-Dominion Bank policy requiring new and returning employees to submit to drug testing was not discriminatory on the basis of a disability, which is a prohibited ground. The Tribunal also found that, had there been any discrimination, it would have been adverse effect rather than direct. The Federal Court Trial Division held that this was indeed a case of adverse effect discrimination because the policy applied to all new and returning employees but negatively affected those who were drug dependent. The Court also found that the Tribunal failed to identify a rational connection between drug testing and job performance. On appeal of this decision, the Federal Court of Appeal majority held that the drug testing policy was a prohibited discriminatory practice but was divided as to whether it was adverse effect or direct discrimination. The matter was referred back to a differently constituted Tribunal on the basis that the policy was discriminatory.

Table 3

Judicial Review of Tribunal Decisions, 1992–1998*

	1992	1993	1994	1995	1996	1997	1998	Total
Cases referred to the Tribunal	67	31	35	26	15	23	22	**219**
Decisions rendered†	32	16	15	9	7	2	0	**81**
Decisions challenged								
• upheld	4	1	4	0	0	0	0	**9**
• overturned	3	1	3	0	0	0	0	**7**
• withdrawn	3	1	1	0	1	1	0	**7**
• still pending	1	4	0	3	2	0	0	**10**
• total	11	7	8	3	3	1	0	**33**

* *All data on the disposition of Tribunal cases appears under the year in which the complaint was originally referred to the Tribunal, regardless of when the case was decided or judicially reviewed. For example, although the Tribunal rendered eight decisions in 1998, none of them appears under 1998 "Decisions rendered" because all of them pertain to complaints referred to the Tribunal in earlier years. Of the 22 cases referred to the Tribunal in 1998, none had been decided by the end of the year.*

† *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.*

Moore and Akerstrom v. Canada — August 14, 1998 [upheld]
A Tribunal had found that the Attorney General of Canada, Treasury Board, the Department of Foreign Affairs and International Trade, and other government departments had discriminated against the complainants on the basis of sexual orientation. They, as well as other employees with same-sex partners, had not been provided with the same employment benefits as employees with opposite-sex partners. The Court agreed with the Tribunal's order that government departments prepare an inventory of statutes with a discriminatory definition of the word *spouse*. It further agreed that Treasury Board's proposal to implement a new benefits category for employees in same-sex relationships was discriminatory, creating a separate class of persons based on sexual orientation rather than spousal relationship. The Tribunal had retained jurisdiction to revisit these issues and to ensure Treasury Board's compliance with the CHRA.

McKenna v. Secretary of State — October 19, 1998 [quashed]
The complainant appealed a Federal Court Trial Division decision setting aside the Tribunal ruling that Ms. McKenna, a Canadian citizen, was discriminated against on the basis of family status. Although all of her children had been born

in Ireland, the two children she adopted in Ireland were denied automatic Canadian citizenship, while her biological children received it. The Tribunal had ordered that citizenship be granted, as it is a service available to the public within the meaning of s. 5 of the CHRA. On judicial review, the Federal Court, Trial Division ruled that Ms. McKenna had failed to establish a *prima facie* case of discrimination and to adequately define the issues in the complaint. On appeal, the majority of the Federal Court of Appeal found that the Tribunal had erred in considering whether the permanent residency requirement in the *Citizenship Act* was justified under the CHRA, as notice had not been given to the Minister that this section was at issue. Thus, the appeal was dismissed in part. The Court of Appeal, however, did agree with the Tribunal that Ms. McKenna was an alleged victim of discrimination for the purposes of filing a complaint in respect of her adopted children.

Citron v. Zündel — March 23, 1999 [upheld]
The complainant filed an application for judicial review as a result of the decision by Madam Justice McGillis in *Canadian Telephone Employees' Association et al. v. Bell Canada*, another complaint before a Canadian Human Rights Tribunal. In that case, Bell alleged that institutional bias existed because of certain elements in the Tribunal's operations and its relationship to the Canadian Human Rights Commission. It was held that a reasonable apprehension of bias existed but that this decision was confined to the hearing before the Bell Tribunal. However, upon the release of the Bell decision, Mr. Zündel launched a motion to quash his proceedings on the same ground of institutional bias. The Zündel Tribunal dismissed the motion, stating that the complainant had waived his right to object by not raising the concerns at the outset of the hearing. The Court agreed with the dismissal, finding that Mr. Zündel had waived his right to challenge the institutional independence of the Tribunal.

Franke v. Canadian Armed Forces — April 28, 1999 [upheld]
The majority of a Tribunal had dismissed an allegation of sexual harassment, finding also that there had been no differential treatment on the basis of the complainant's sex. On appeal, the Court agreed with the ruling and clarified the legal definition of *sexual harassment*. It ruled that the Tribunal had applied the proper test to determine whether the conduct was unwelcome and sexual in nature and to assess the persistence and gravity of that conduct. The Court held that, with respect to questions of mixed fact and law, Tribunal decisions should be reviewed on the standard of reasonableness. Madam Justice Tremblay-Lamer commented that "provided the decision is supported by reasons which can be justified by the evidence, the Court should not intervene." This finding demonstrated enhanced judicial deference to Tribunal decisions.

Pay Equity Tribunal Hearings

The Tribunal's hearings commitments have shifted significantly since it began hearing its first pay equity cases in 1991. These cases are demanding an increasingly disproportionate share of Tribunal hearing days. In 1993, two pay equity cases alone accounted for more than a third of the 345 days of tribunal hearings. Over the past six years, pay equity cases that proceeded to a full hearing consumed an average of 175 days of hearings each. In 1998 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 280 days' worth of evidence and arguments since 1992. This case is scheduled for a further 40 to 50 days of hearings in 1999, but may be delayed as the parties react to the new amendments to the CHRA.

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 1998 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 case was heard in late spring 1999 and a decision is expected in late autumn.

Meanwhile, Bell Canada launched two appeals to the Federal Court, challenging both the jurisdiction of the Tribunal to hear the case and the validity of its referral to the Tribunal by the Canadian Human Rights Commission. The first of these applications alleged that the Tribunal was not independent enough to rule on a pay equity complaint brought against the telephone company by the Canadian Telephone Employees' Association (CTEA). In March 1998, the Federal Court ruled that Bell Canada could not be guaranteed a fair hearing because the job security of Tribunal members was at the discretion of the Department of Justice and their wages were determined by the Canadian Human Rights Commission, which had a significant interest in how the case was decided. The ruling hobbled the Tribunal until Parliament reaffirmed the Tribunal's independence through amendments to the *Canadian Human Rights Act* (CHRA). In the other appeal, Bell Canada challenged the validity of the Commission's investigation into the CTEA's complaint and sought to quash the referral of the case to the Tribunal. In November 1998, the Federal Court of Appeal held that the Commission's referral of the case to the Tribunal had been valid. Hearings are ongoing and have been scheduled into 2000. A third wage discrimination case, *PSAC v. Government of the Northwest Territories*, is currently in hearings, with further hearings scheduled for 2000.

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

In 1998, the Auditor General of Canada's audit of the Canadian Human Rights Tribunal sought to determine whether existing accountability and independence frameworks guarantee independence from government while retaining appropriate accountability.

The Auditor General reviewed the Tribunal's financial and management controls and its mediation process. In his September 1998 report, the Auditor General found the Tribunal's financial controls satisfactory.

However, he observed that the Tribunal's approach to conducting hearings was cumbersome. Stakeholders had expressed concerns about the length of hearings. They attributed the delays to inefficient procedures and to scheduling problems caused by the fact that most Tribunal members are appointed on a part-time basis.

On the other hand, he found the Tribunal's approach to mediation generally satisfactory but noted that the Tribunal had no statutory authority to mediate complaints. He also observed that mediators were forced to rely on their own experience because the Tribunal had no formal standards or policies governing mediation.

Endorsing the Justice Minister's announcement of a departmental review of the CHRA, the Auditor General noted that the concerns raised in his audit were interrelated and could best be addressed through a comprehensive review.

He proposed that the government identify and present to Parliament an integrated set of specific measures for addressing human rights complaints more effectively. Among the specific measures proposed were the following:

- providing for periodic Parliamentary reviews of the relevance and impact of the grounds of discrimination;
- broadening the array of alternative means of resolving human rights complaints, including possibly permitting complainants to sidestep the Canadian Human Rights Commission and take their complaints directly to the Tribunal or even to the Federal Court of Canada;

- ensuring that the Commission and the Tribunal are independent and accountable;
- providing for greater transparency in appointments to the Commission and the Tribunal; and
- ensuring that there is legislative authority for the mediation policies and procedures that may be used by the Commission and Tribunal.

He also thought that the Tribunal's performance reporting might benefit if the Tribunal set targets to reduce the average cost and number of hearing days associated with each case.

The Tribunal agreed with many of the Auditor General's points, in particular the need to ensure transparency in the appointment of new Tribunal members. Many earlier concerns about the Tribunal's efficiency, independence, impartiality and accountability were addressed as a result of the 1998 CHRA amendments that restructured the Tribunal, severed its remaining links to the Commission, and made it directly accountable to Parliament. Pursuant to the amendments, the individuals appointed to the Tribunal are more highly qualified. Moreover, the scheduling of hearings will be made easier because some Tribunal members are now full-time appointees.

However, we do not agree that a reduction in hearing days is necessarily a valid measure of the Tribunal's performance. In our view, a faster process isn't necessarily a better process. If we restrict the number of hearing days or force parties to present their cases in less time, we may be accused of denying natural justice to one or all of the parties, and the courts may order the Tribunal to hear the case a second time. The new structure with fewer and better trained members allows the Tribunal to manage its hearings more efficiently, and to eliminate duplication. However, the CHRA stipulates that all parties must be given a full and ample opportunity to present their case. To deny a party the right guaranteed by this provision will only lead to more time being spent on the case during a second hearing.

IV

Section IV: Consolidated Reporting

Year 2000 Readiness

The Tribunal has no mission-critical or government-wide mission-critical systems. Our in-house database system for reconciling financial commitments and expenditures with Federal Judicial Affairs (FJA) is year 2000 (Y2K) compliant. We also have an older database system for case tracking that is not Y2K compliant, but that information is readily available elsewhere. This system is to be replaced before December 1999. Should either system fail, only Tribunal staff would be affected.

The FJA, which provides our official financial reporting and recording systems, assures us that its financial systems are Y2K compliant.

All computer hardware has been tested using Y2K testing software from the National Software Testing Library. Two systems will need manual date sets and this has been tested. This testing software was also provided to our court reporting firm to verify its computer systems.

Regulatory Initiatives

New rules of procedure for the Canadian Human Rights Tribunal have been developed as a result of amendments to the CHRA (see page 11).

Statutory Annual Reports

Under Bill S–5, the Tribunal must produce an annual report for presentation to the Speaker of the House and of the Senate. The Tribunal's first Annual Report, published in March 1999, describes the Tribunal's activities during the 1998 calendar year, including those pertaining to its caseload, administration, restructuring, and training and mediation programs.

Section V: Financial Performance

Financial Performance Overview

The Canadian Human Rights Tribunal spent less than it was allotted in 1998–99. First, funding for pay equity cases lapsed. The total lapsed funding was approximately $200,000. As a condition of Treasury Board's approval of funding for the pay equity cases, Treasury Board stipulated that funding was to be used only in support of those individual cases. The reason for the funding shortfall was as follows:

> **Canada Post Case**: A number of hearing days were cancelled because of the appointment of respondent counsel to the Bench. It took approximately five months for the respondent to engage new counsel and to fully brief him on the past six years of the case. Consequently, a small amount of funding for this specific case was lapsed.

Finally, there was a funding lapse of approximately $100,000 in the Tribunal's main reference levels. This can be directly attributed to the successful implementation of the alternative dispute resolution (ADR) process. Without the ADR process, the Tribunal would have run a significant deficit in its operational budget, requiring a special funding proposal to Treasury Board to continue. In addition, the transition to the new Tribunal and some delay in the appointment of members limited the number of hearing days held in the reporting period.

Financial Summary Tables

The following tables are applicable to the Tribunal:

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

Financial Table 1

Financial Requirements by Authority (millions of dollars)				
		1998–99		
Vote		Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal				
30	Operating expenditures	2.1	2.7	2.3
(S)	Contributions to employee benefits	0.1	0.1	0.1
Total Department		2.2	2.8	2.4

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

Financial Table 2

Departmental Planned versus Actual Spending (millions of dollars)			
	1998–99		
Business Lines	Planned	Total Authorities	Actual
Canadian Human Rights Tribunal			
FTEs	12	14	14
Operating	2.2	2.8	2.4
Capital	—	—	—
Voted Grants and Contributions	—	—	—
Subtotal: Gross Voted Expenditures	2.2	2.8	2.4
Statutory Grants and Contributions	—	—	—
Total Gross Expenditures	2.2	2.8	2.4
Less:			
Respendable Revenues	—	—	—
Total Net Expenditures	2.2	2.8	2.4
Other Revenues and Expenditures			
Non-respendable Revenues	(—)	(—)	(—)
Cost of services provided by other departments	.3	.3	.5
Net Cost of the Program	2.5	3.1	

Financial Table 3

Historical Comparison of Departmental Planned versus Actual Spending (millions of dollars)					
	1998–99				
	Actual* 1996–97	Actual 1997–98	Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal	N/A	2.1	2.2	2.8	2.4
Total	N/A	2.1	2.2	2.8	2.4

Total Authorities are Main Estimates plus Supplementary Estimates plus other authorities.
*The department became a separate entity in January 1997 — no figures available.

Detailed Examination of Cases

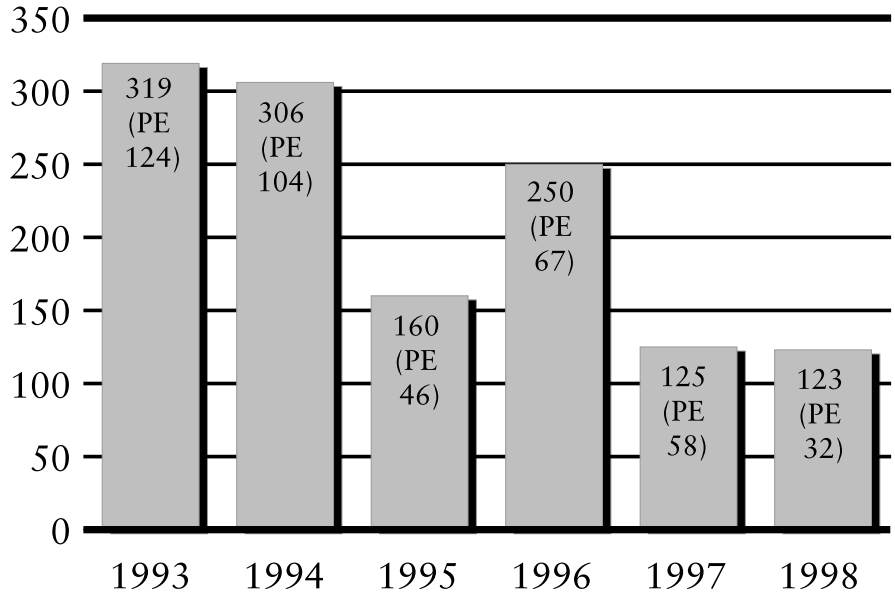
Table 4

Cases by Grounds

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

* The number of disability cases is gradually but distinctly decreasing. This can be attributed to the large number of cases in this area having served as precedents that make laws clearer and ease the need for litigation. However, as a result of new accommodation legislation created in Bill S–5, the number of disability cases will likely rise in the future.

Figure 2
Number of Hearing Days per Year



Note: "PE" represents pay equity cases and includes *PSAC* v. *Treasury Board* and *PSAC* v. *Canada Post Corporation.*

Figure 3
Average Cost per Case by Ground

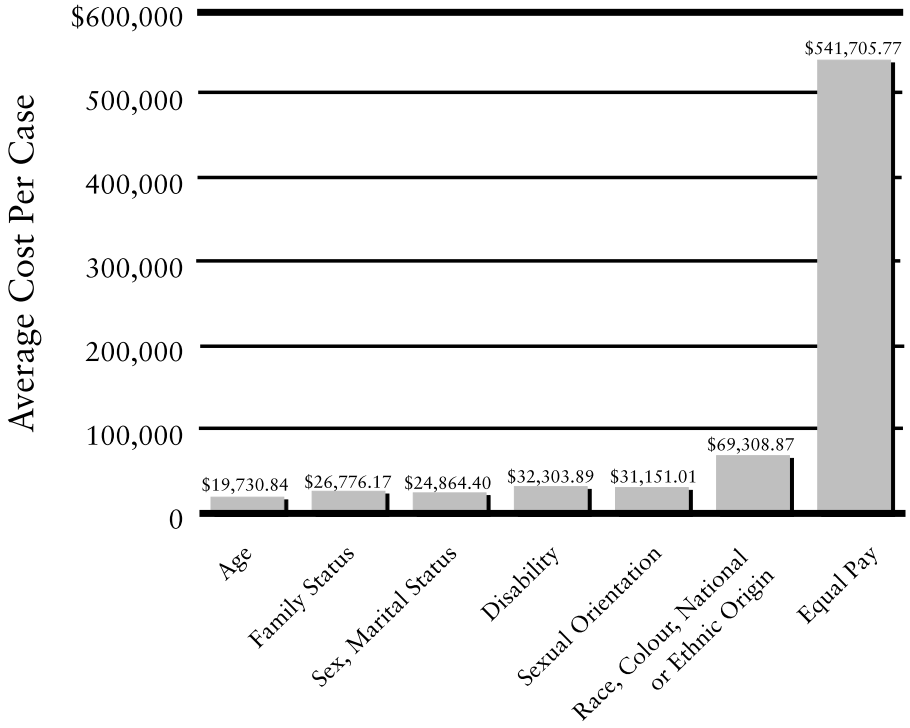
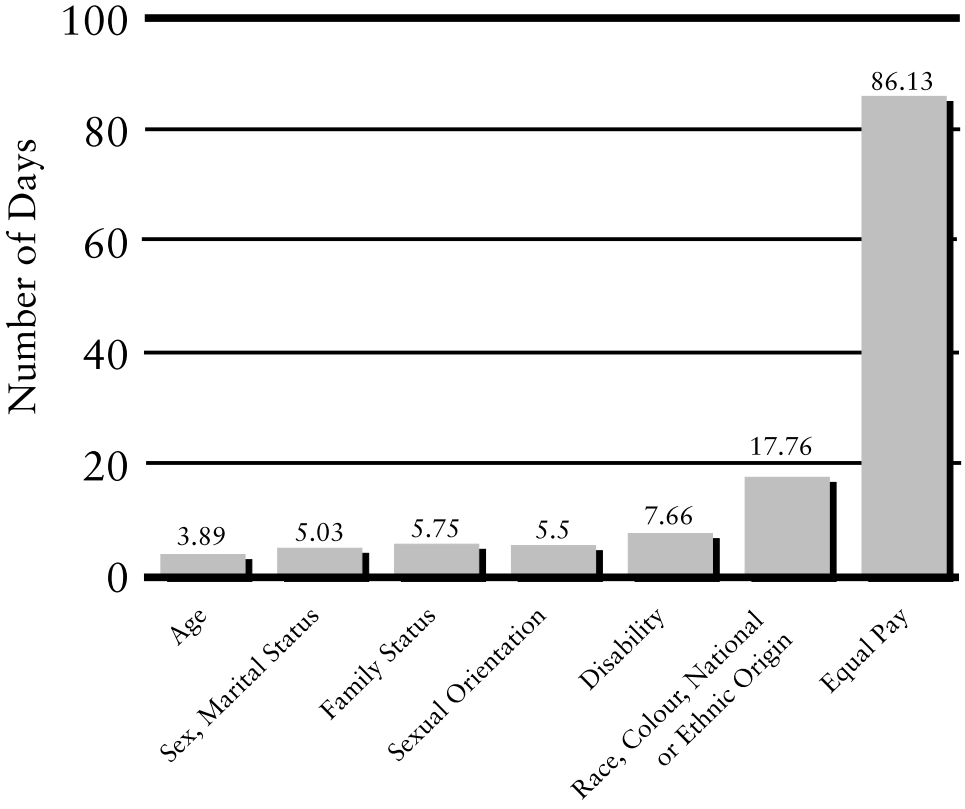


Figure 4
Average Number of Days per Case by Ground



VI

Section VI: Other Information

Contacts for Further Information and Web Sites

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