Canadian Human Rights Tribunal

2012–2013

Departmental Performance Report

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Minister of Justice and Attorney General of Canada

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Chairperson's Message

I am pleased to present the Canadian Human Rights Tribunal's Departmental Performance Report for the period April 1, 2012, to March 31, 2013. The Tribunal is the quasi-judicial body that hears complaints of discrimination in the federally regulated sphere that have been referred to it by the Canadian Human Rights Commission.

The Tribunal assesses evidence, listens to representations, and issues rulings and decisions that determine if a complaint is substantiated or not. Many of its decisions inform Canadians at large about how the *Canadian Human Rights Act* applies to specific facts that arise in particular cases. The Tribunal's goal is to foster access to speedy, fair and transparent mediations and/or hearings, and to provide just, concise and well-reasoned rulings and decisions for all proceedings falling under its mandate. (In addition to *Canadian Human Rights Act* inquiries, the Tribunal may also carry out adjudicative functions under the *Employment Equity Act*.) For the purposes of reporting to Canadians, the Tribunal measures its performance by the timeliness of its processing of complaints.

In reviewing our performance over the last year, I am pleased to report that the Tribunal continued to deliver on its mandate to ensure fair and impartial hearings as prescribed by the *Canadian Human Rights Act*. However, when measured against our self-imposed processing time, the targets continued to be elusive, prompting further analysis this year.

A more thorough review of our data indicates that the challenges we faced in meeting our targets can largely be attributed to a continuing trend of cases dealing with unrepresented parties or parties represented by non-lawyers, many of whom require special accommodation to meet the procedural requirements of a quasi-judicial inquiry. Accommodating Canadians by allowing them more time to file their supporting documents is, in many cases, our only available and responsive tool, given our obligation to remain impartial and not become an advocate for a party.

Another factor that impacted our processing time last year related to the assignment of a three-member panel. This panel assignment was carefully contemplated and was found to be necessary pursuant to section 49(2) of the *Canadian Human Rights Act* because of the significant factual, legal and procedural complexity of the case. (The ruling and reasons associated with the panel assignment are available online.) It nevertheless had resource implications that somewhat surpassed those that were reasonably foreseeable at the time the assignment was made.

Other internal management issues and resource constraints presented some challenges, most of which have been handled or will be dealt with in 2013–2014. A key position in the Registry that was vacated last fall has now been staffed. New part-time members were appointed in April and December 2012; their contribution to our case resolution activities has already been felt, and I am confident they will have an even greater impact in 2013–2014.

In closing, I must acknowledge that in delivering on our commitment to Canadians, I am fully indebted to our Tribunal staff for their hard work and dedicated efforts in assisting parties and explaining our procedures to ensure the inquiry process remains on track. I am also deeply indebted to our members for facilitating a good number of mediated

settlements negotiated in a safe and respectful setting, and for rendering rulings and decisions as fairly and expeditiously as the operating environment allowed.

I will continue to closely monitor our performance targets and our exposure to risk while remaining committed to the optimization of resources. More important, I remain optimistic and have confidence in our ability to deliver fair, expeditious and just resolution of discrimination complaints, for the benefit of the parties, and for all Canadians.

Susheel Gupta
Acting Chairperson and Chief Executive Officer

Section I: Organizational Overview

Raison d'être

The Canadian Human Rights Tribunal is a quasi-judicial body that hears complaints of discrimination referred by the Canadian Human Rights Commission and determines whether the activities complained of constitute a discriminatory practice within the meaning of the *Canadian Human Rights Act* (CHRA). The purpose of the CHRA is to protect individuals from discrimination and to promote equal opportunity. The Tribunal also decides cases brought under the *Employment Equity Act* (EEA) and, pursuant to section 11 of the CHRA, determines allegations of wage disparity between men and women doing work of equal value in the same establishment.

Responsibilities

In hearing complaints under the CHRA and the EEA, the Canadian Human Rights Tribunal considers matters concerning employment or the provision of goods, services, facilities or accommodation. The CHRA identifies a number of practices as discriminatory if they are based on any of the following prohibited grounds:

- race;
- national or ethnic origin;
- colour;
- religion;
- age;
- sex (includes pay equity, pregnancy, childbirth and harassment, although harassment can apply to all grounds);
- marital status;
- family status;
- sexual orientation;
- disability (can be mental or physical, and includes disfigurement and past, existing or perceived alcohol or drug dependence); and
- conviction for which a pardon has been granted or for which a record suspension has been ordered.

The Tribunal's jurisdiction covers matters that come within the legislative authority of the Parliament of Canada, including those concerning federal government departments and agencies, as well as banks, airlines and other federally regulated employers, and providers of goods, services, facilities and accommodation. The Tribunal holds public hearings to inquire into complaints of discrimination. Based on evidence and the law (often conflicting and complex), it determines whether discrimination has occurred. If it makes a finding of discrimination, the Tribunal determines the appropriate remedy to compensate the victim of the discriminatory practice, and it may also order policy adjustments necessary to prevent recurrence of the discrimination.

Many discriminatory practices that the Tribunal adjudicates are not malicious. Conflicts may arise from long-standing practices, legitimate concerns of employers, or conflicting interpretations of statutes and precedents. That said, the law is concerned with the *effects* of the practice; the intent, while relevant, is not determinative. The role of the Tribunal is to discern the positions of the parties and to determine, based on the evidence and the arguments presented, whether the complaint has been substantiated.

The Tribunal may inquire only into complaints under the CHRA that are referred to it by the Canadian Human Rights Commission, usually after a full investigation by the Commission. The Commission resolves most cases without the Tribunal's intervention. Cases referred to the Tribunal generally involve complicated legal issues, new human rights issues, unexplored areas of discrimination or multi-faceted evidentiary complaints that must be heard under oath, especially in cases with conflicting evidence that involve issues of credibility.

The Tribunal is not an advocate for the CHRA; that is the role of the Commission. The Tribunal has a statutory mandate to apply the Act based solely on the evidence presented and on current case law. If the evidence is insufficient to support an allegation, then the Tribunal must dismiss the complaint.

The Tribunal reports to Parliament through the Minister of Justice.

Organizational Structure

The Canadian Human Rights Tribunal is a small, permanent quasi-judicial organization comprising a full-time Chairperson and Vice-Chairperson, and up to 13 full- or part-time members. The Chairperson is the chief executive officer of the Tribunal and is supported by the Executive Director and Registrar (who is responsible for Registry operations and is the Chief Financial Officer), and by the Director of Corporate and Internal Services.

Members — To be eligible for appointment by the Governor in Council, Tribunal members must have experience, expertise, interest in and sensitivity to human rights. Under the CHRA, both the Chairperson and the Vice-Chairperson must have been a member of the bar for at least 10 years. Terms of office are up to five years for the 13 full- or part-time members and up to seven years for the Chairperson and Vice-Chairperson.

Registry Operations — Registry Operations staff plan and arrange hearings, act as liaison between the parties and Tribunal members, and provide administrative support to members.

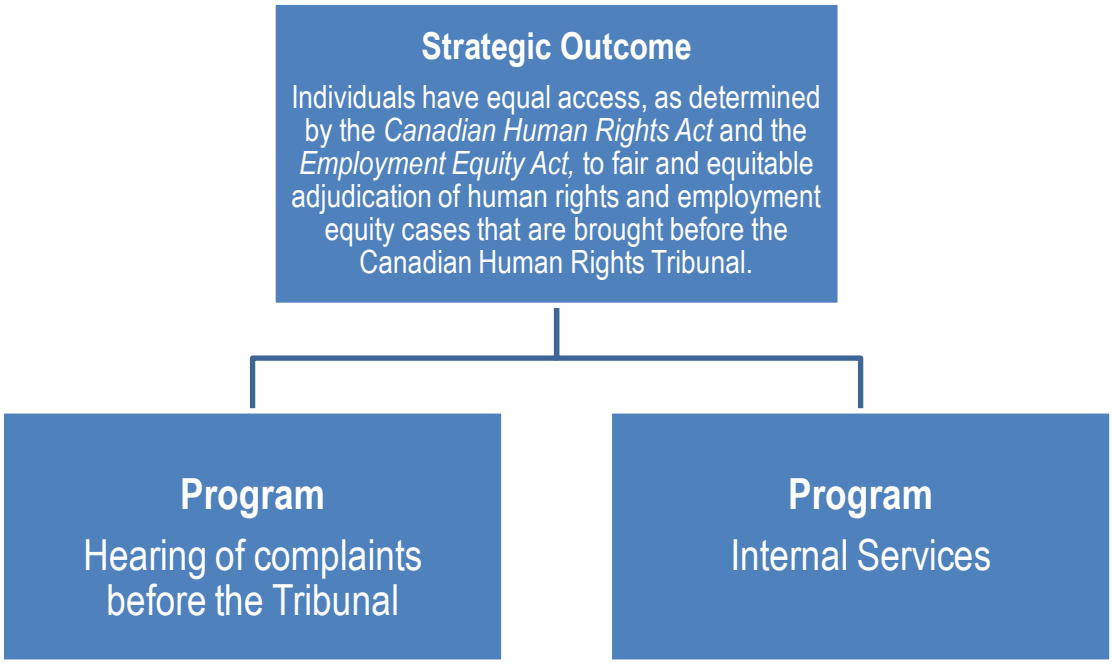
Internal Services — Internal services are activities and resources that support the needs of the Tribunal's operating program and other corporate obligations. They include corporate, legal, financial, human resources, and information management and information technology (IM/IT) services.

Strategic Outcome and Program Alignment Architecture

Strategic outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.

Two programs support achievement of the Tribunal's strategic outcome: (1) Hearings of complaints before the Tribunal; and (2) Internal Services.

Program Alignment Architecture



Organizational Priorities

Priority	Type	Strategic Outcome
Encourage and support parties in mediation activities	Ongoing	Promotes fairness and equitable treatment of parties and is directly linked to the Tribunal's strategic outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Tribunal.
Summary of Progress		
A cornerstone of the Tribunal's complaint resolution process is its voluntary mediation process, which may include an evaluative and a case assessment component. This process encourages resolution of complaints in less time than a hearing would take, and is more cost-effective for all parties, as well as for the Tribunal. In 2012–2013, the parties in 80 cases chose to pursue mediation and 43 of these were settled. Seven of the mediated cases are currently ongoing and their result will be recorded in the next Departmental Performance Report (DPR). The 30 mediated cases that did not result in a settlement are currently proceeding to a hearing.		

Priority	Type	Strategic Outcome
Conduct hearings efficiently and make rulings on a timely basis	Ongoing	A transparent adjudication process ensures a structured and objective approach consistent with the principles of justice and is directly linked to the Tribunal's strategic outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Tribunal.
Summary of Progress		
The utilization of our flexible complaints resolution process, including the use of proactive prehearing case management, continued to reduce the length and complexity of the process by narrowing the issues in dispute and enabling the parties to gain a clearer understanding of their case.		

Priority	Type	Strategic Outcome
Streamline internal services	Ongoing	Internal services directly support the activities of the Tribunal, providing a wide range of support services to the members involved in mediation and hearing-related activities. Improving these services contributes immediately to the Tribunal's strategic outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* and *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Tribunal.
Summary of Progress		
The Tribunal continued to look for innovative ways to streamline internal services to support its quasi-judicial mandate within its budget of human and financial resources. A number of projects initiated in 2012–2013 are expected to begin to show results in 2013–2014. Key ones focused on: a) workforce planning and a review of roles and responsibilities with emphasis on workplace well-being; b) early and better identification of IM/IT needs to allow for project delivery by a third party through a memorandum of understanding with Shared Services Canada; and c) more collaboration among Registry, Corporate and Legal Services. Internal decision making and discussions of operational effectiveness and workload distribution included all management team members as part of a focused effort to institute a more inclusive internal governance structure and ensure shared understanding of the Tribunal's plans and priorities.		

Risk Analysis

Risk	Risk Response Strategy	Link to Program Alignment Architecture	Link to Organizational Priorities
Operating Environment	• rebuilding a healthy and sustainable workplace • assessing competing demands • reallocating resources internally The risk was previously identified in the 2012–2013 RPP and the planned risk responses were not modified.	All risks noted relate to the Tribunal's sole strategic outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act,* to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.	Conduct hearings efficiently and make rulings on a timely basis Streamline internal services
Unpredictable Workload	• additional members • monitoring how cases related to the repeal of section 67 of the CHRA affect workload The risk was previously identified in the 2012–2013 RPP and the planned risk responses were not modified.		Encourage and support parties in mediation activities Conduct hearings efficiently and make rulings on a timely basis
Adequate Resources to Conduct Timely Mediations and Hearings	• additional members • offering mediation • proactive hearing case management The risk was previously identified in the 2012–2013 RPP and the planned risk responses were not modified.		Encourage and support parties in mediation activities Conduct hearings efficiently and make rulings on a timely basis Streamline internal services
Corporate Management	• seeking collaborative partnerships for financial services • assessing enterprise-wide solutions The risk was previously identified in the 2012–2013 RPP and the planned risk responses were not modified.		Streamline internal services

Operating Environment — The Tribunal remained attuned to the inherent risks associated with the uncertainties of managing its caseload. Key priorities focused on rebuilding a healthy and sustainable workplace while delivering on emerging government-wide initiatives within the constraints on its human and financial resources.

Ongoing risk management focused on mitigating the impact on its sole strategic outcome of events identified in the Tribunal's *2012–2013 Report on Plans and Priorities*, which are also discussed below. The Tribunal responded to the emerging challenges with ongoing assessment of competing demands and internal reallocation of resources.

Unpredictable Workload — The Tribunal's sole function is to inquire into cases referred to it under the CHRA or the EEA. As such, the Tribunal has no control or ability to predict and prepare for the number, nature or degree of complexity of cases, or the time at which these cases are brought forward.

Despite best planning efforts, the Tribunal has to accept the inherent risk of its business flow and the associated uncertainties. The complexity of cases is becoming more pronounced with each reporting year. As well, more and more complainants and respondents are representing themselves or designating individuals who are not lawyers to represent them (see box). These individuals or their representatives may not be familiar with the issue identification procedures and disclosure rules, or be able to comply with them in a timely fashion. Accommodating individuals due to medical reasons, in some instances, entailed cancelling or rescheduling hearing dates, which had a ripple effect on the scheduling of other cases. Logistical and procedural complexities, as well as the steep learning curve for non-lawyers navigating a quasi-judicial process, led to increased numbers of motions and rulings in a few cases.

Unrepresented Parties

Unrepresented complainants and respondents create challenges in the management of cases because of the quasi-judicial nature of the Tribunal process, that is, Tribunal members and the Registry are significantly constrained in the amount of assistance they can provide without becoming advocates for the party and thereby compromising the Tribunal's institutional impartiality. Unrepresented complainants poses particular challenges, since the adversarial model of litigation as reflected in the CHRA requires the complainant to define the scope and substance of the case — at least initially. An unrepresented complainant is often uncertain of how to proceed, which avenues to pursue, which to abandon and which to reserve for possible future use.

The appointment of new part-time members eliminated the most pressing and important risk in managing the unpredictable caseload.

An identifiable factor contributing to the Tribunal's unpredictable workload is the effect of the repeal of section 67 of the CHRA. The repeal of s. 67 was expected to dramatically increase the number of cases and introduce new categories of human rights complaint:

(i) complaints alleging that a provision of the *Indian Act* is discriminatory; and

(ii) complaints alleging that a decision made under or pursuant to the *Indian Act* is discriminatory.

As in previous years, in 2012–2013 the Tribunal did not experience an increase in the number of such cases on the scale expected. One factor that is likely helping to lower the number of cases in the first category is the precedent created by the Federal Court of Appeal in *Public Service Alliance of Canada v. Canada Revenue Agency*. On January 10, 2012, the Court of Appeal held that the CHRA does not provide for the filing of a complaint directed against an act of Parliament. On November 8, 2012, an application for leave to appeal this case to the Supreme Court of Canada was dismissed, adding finality to the Court of Appeal's precedent.

During the period under review, the Tribunal's caseload did include proceedings within the second category, complaints related to decisions made under or pursuant to the *Indian Act*. However, none of these cases advanced to a level of resource-intensive adjudication that could provide accurate workload measurements. Looking forward, it is expected that

at least one or two of these cases will arrive at the hearing stage of the Tribunal's process in 2013–2014. Because these cases will be exploring new areas of human rights law, their scope and complexity will probably exceed that of most of the complaints referred to the Tribunal to date. We will monitor the situation closely with the goal of reporting in more detail in next year's DPR about the workload impact of this category of cases.

Adequate Resources to Conduct Timely Mediations and Hearings — The Tribunal's efforts to offer proactive hearing case management and mediation contribute to the effective use of resources as well as to fair and equitable adjudication. Shortages in the number of available members to hear or mediate cases became evident at the beginning of the fiscal year, however, although this was rectified as additional members were appointed. The assignment of a three-member panel to one case of significant legal and procedural complexity had resource implications, as it limited members' availability to hear other cases.

Corporate Management — The Tribunal faced challenges dealing with the need to implement and report on an increasing number of government-wide change initiatives. As a micro-organization, the Canadian Human Rights Tribunal does not have adequate resources to react swiftly to multiple demands, all of which must be carried out by the same personnel.

Efforts were undertaken to seek opportunities for collaborative partnerships with other departments for the delivery of certain financial services. Concrete arrangements materialized in 2013–2014 and will be reported in next year's DPR.

Tribunal staff also continued assessing enterprise-wide solutions for other corporate and internal services across government.

Summary of Performance

The following tables display the financial and human resources managed by the Tribunal in 2012–2013.

Financial Resources — Total Tribunal ($ millions)

Total Budgetary Expenditures (Main Estimates) 2012–2013	Planned Spending 2012–2013	Total Authorities (available for use) 2012–2013	Actual Spending (authorities used) 2012–2013	Difference (Planned vs. Actual Spending)
4.5	4.5	4.9	4.2	0.3

Human Resources (Full-Time Equivalents — FTEs)

Planned 2012–2013	Actual 2012–2013	Difference 2012–2013
26	18	8

Performance Summary Table for Strategic Outcome and Program ($ millions)

Strategic Outcome 1: Individuals have equal access, as determined by the *Canadian Human Rights Act* and the *Employment Equity Act*, to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.

Program	Total Budgetary Expenditures (Main Estimates 2012–2013)	Planned Spending			Total Authorities (available for use) 2012–2013	Actual Spending (authorities used)			Alignment to Government of Canada Outcomes
		2012–2013	2013–2014	2014–2015		2012–2013	2011–2012	2010–2011	
Hearing of Complaints before the Tribunal	2.3	2.6	2.3	2.3	2.3	2.0	1.8	1.8	Social Affairs A diverse society that promotes linguistic duality and social inclusion.
Strategic Outcome 1 Subtotal	2.3	2.6	2.3	2.3	2.3	2.0	1.8	1.8	

Performance Summary Table for Internal Services ($ millions)

Internal Services	Total Budgetary Expenditures (Main Estimates 2012–2013)	Planned Spending			Total Authorities (available for use) 2012–2013	Actual Spending (authorities used)		
		2012–2013	2013–2014	2014–2015		2012–2013	2011–2012	2010–2011
Subtotal	2.2	1.9	2.2	2.2	2.5	2.2	3.4	2.6

Total Performance Summary Table ($ millions)

Strategic Outcome and Internal Services	Total Budgetary Expenditures (Main Estimates 2012–2013)	Planned Spending			Total Authorities (available for use) 2012–2013	Actual Spending (authorities used)		
		2012–2013	2013–2014	2014–2015		2012–2013	2011–2012	2010–2011
	4.5	4.5	4.5	4.5	4.9	4.2	5.2	4.4
Total	4.5	4.5	4.5	4.5	4.9	4.2	5.2	4.4

Hearing of Complaints before the Tribunal — Actual spending for this program was similar to the previous year's expenditures and was significantly less than planned. This is largely due to the inherent need to forecast with the assumption that all cases will go to full hearings and incur full associated costs (travel, facilities, translation, member fees, etc.) until the case is heard. In effect, the actual level of expenditure per case was dependent on how the cases proceeded. The Tribunal's use of mediation in some instances obviated the need for a hearing entirely where a settlement was reached. This ultimately resulted in reduced overall costs not only to the Tribunal but also to the parties involved.

Another factor in lowering actual spending is the Tribunal's continued utilization of case management conference calls, which form the cornerstone of our prehearing case management process. Case management conference calls help narrow the issues and help identify the facts in dispute at the prehearing stage. They guide unrepresented parties through the process, focus the parties' positions on remedial issues, alert them to the need for evidentiary support for their assertions, and can provide timely resolutions of procedural disputes. Generally, this approach makes eventual hearings more productive — and therefore often shorter and less costly — but until the process is completed, none of this can be used as a reliable forecast measure.

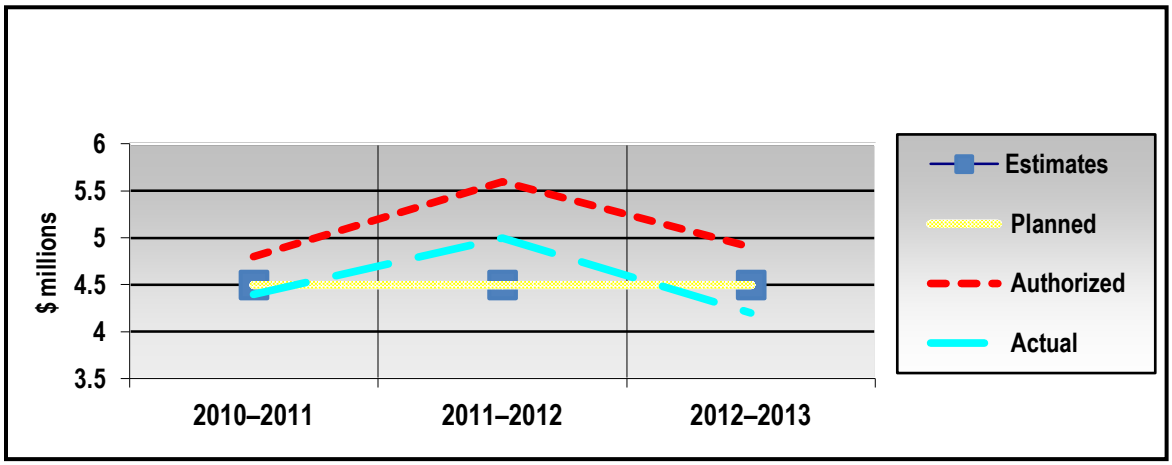
Other savings were generated by the Tribunal's continued efforts to reduce non-essential travel and to seek available free meeting facilities wherever possible, such as provincial and federal court facilities.

Internal Services — Actual spending for internal services saw a decrease largely due to delays in the implementation of an IT initiative to upgrade the Tribunal's financial management application, as well as continued vigilance to reduce operating costs. Examples include curtailed use of human resources through temporary help agencies or

professional services contracts; close monitoring of non-essential purchases and expenditures, and recycling of office supplies.

Expenditure Profile

Spending Trend from 2010–2011 to 2012–2013



Planned spending for 2012–2013 remained constant at $4.5 million, while authorized spending increased from the previous year by $0.4 million. The difference in authorized spending is attributable to an operating budget carry-forward from 2011–2012, and salary amounts for payments in lieu of severance due.

Actual spending for 2012–2013 was less than the planned spending amount. Savings were achieved due to staffing vacancies (which reduced spending on salaries), reduced contracting for professional services, reduced travel (by limiting it to case management, hearings or mediations), and delayed investment in an IT upgrade of the financial application and corresponding infrastructure.

Actual spending in the spending trend graph includes neither accommodation services provided by PWGSC at no charge, nor payments provided by Treasury Board to employee insurance plans. These services are valued at $1.2 million.

Estimates by Vote

For information on the Tribunal's organizational votes and statutory expenditures, please see the *Public Accounts of Canada 2013 (Volume II)*. An electronic version of the Public Accounts 2013 is available on the Public Works and Government Services Canada website.

Section II: Analysis of Program by Strategic Outcome

Strategic Outcome: Individuals have equal access, as determined by the *Canadian Human Rights Act* (CHRA) and the *Employment Equity Act* (EEA), to fair and equitable adjudication of human rights and employment equity cases that are brought before the Canadian Human Rights Tribunal.		
Performance Indicators	**Targets**	**Actual Results**
Tribunal decisions/rulings	Rendering decisions within four months of the close of the hearing in 80% of the cases	Not met. 29% of decisions were rendered within the sought-after four-month timeline from the close of hearing. Tribunal hearings often involve parties who cannot afford professional legal representation. This means they represent themselves in dealing with complex facts, evidence and law. This tends to make the hearing, as well as the post-hearing analysis stage, last longer than is typically the case for those administrative tribunals whose parties are generally represented by counsel.

Program: Hearing of complaints before the Tribunal

The Tribunal inquires into complaints of discrimination to decide, following a hearing before Tribunal members, if particular practices have contravened the CHRA. Tribunal members also conduct hearings into applications from the Canadian Human Rights Commission and requests from employers to adjudicate on decisions and directions given by the Commission under the EEA.

Financial Resources ($ millions)

Total Budgetary Expenditures (Main Estimates) 2012–2013	Planned Spending 2012–2013	Total Authorities (available for use) 2012–2013	Actual Spending (authorities used) 2012–2013	Difference 2012–2013
2.3	2.6	2.3	2.0	(0.6)

Human Resources (FTEs)

Planned 2012–2013	Actual 2012–2013	Difference 2012–2013
13	9	4

Performance Results

Expected Results	Performance Indicators	Targets	Actual Results
Access to mediation and adjudication processes that are transparent, timely and efficient Reasoned and objective application of the CHRA and the EEA Rulings that respond to complaints and provide guidance to employers and service providers within the federal sphere	(i) Average time taken to initiate mediation or a hearing	(i) Initiate mediation or hearing process within 10 days of receiving the referral from the Commission in 90% of cases	Not met. Of the 131 cases actioned, 73 were initiated within 10 days of receiving the referral from the Commission.
	(ii) Number of hearings	(ii) n/a	30 hearings were held in 2012–2013.
	(iii) Percentage of cases that commence within target	(iii) Commence mediation or hearings within six months of referral from the Commission in 70% of cases	Not met. 14% of cases were commenced within six months of referral from the Commission.
	(iv) Percentage of cases completed within target	(iv) Conclude inquiries within 12 months of referral from the Commission in 70% of cases	Not met. 53% of inquiries were concluded within the 12-month window.
	(v) Number of cases that go to mediation and number of cases resolved by mediation	(v) No target — Mediation requires the consent of both parties. The Tribunal makes its best efforts to encourage parties to mediate rather than adjudicate a resolution.	54% of cases that accepted mediation were resolved through that process.

Performance Analysis and Lessons Learned

The effective resolution of discrimination complaints depends on a process that is impartial, that is fair to all parties, and that delivers results in a timely and cost-effective manner. For some time now the Tribunal has been employing techniques such as intensive prehearing case management and member-facilitated mediation in an effort to improve its services and program delivery. These approaches serve to lower costs (both for parties and for the Tribunal) and reduce overall time for resolving complaints. That said, a tangible measure of their efficaciousness — and that of the Tribunal's entire process — can be garnered from an examination of our caseload statistics for the period under review.

An examination of the caseload must begin with the observation that the Tribunal's caseload includes 196 related complaints by a number of different individuals filed against the same respondents and arising from the same pattern of facts. This cluster of complaints is not being actively managed by the Tribunal, given that key legal issues present in the files are awaiting final judgment in similar files currently before the superior courts. The court judgments will be binding on the Tribunal. The analysis below compares the Tribunal's caseload when these complaints are presented as individual cases and as a single case.

Case status	Full caseload	Number	Caseload with complaint cluster	Number
Carry-forward from previous years	The Tribunal started 2012–2013 with 299 cases in progress	299	The Tribunal started 2012–2013 with 104 cases (299 – 195) in progress	104
New cases	Over the course of the fiscal year the Tribunal received an additional 121 cases from the Canadian Human Rights Commission ("new cases")	121	Over the course of the fiscal year the Tribunal received an additional 121 cases from the Canadian Human Rights Commission ("new cases")	121
Closed cases	• issuing a decision that put an end to the Tribunal's adjudicative process • facilitating a mediation that led to a settlement subsequently approved by the CHRC • acknowledging that the parties have settled the case through other means, or that the complainant has withdrawn the complaint	76	• issuing a decision that put an end to the Tribunal's adjudicative process • facilitating a mediation that led to a settlement subsequently approved by the CHRC • acknowledging that the parties have settled the case through other means, or that the complainant has withdrawn the complaint	76
Active cases carried into 2013–2014	(299 + 121) – 76	344	(104 + 121) – 76	149

With this analysis, it's clear that the number of open cases essentially increased by 43 percent during 2012–2013.

However, the Tribunal did conclude some cases that this analysis cannot include in its closed cases: mediation settlements awaiting approval by the Canadian Human Rights Commission. In these cases, a Tribunal member facilitates mediation leading to a settlement, but the Commission has to decide whether to approve the settlement (pursuant to section 48 of the CHRA). These cases cannot be classified as closed but their future status does not depend on Tribunal action. At the end of 2012–2013, the Tribunal was awaiting approval of 12 such settlements. If these cases are excluded from the active cases, the Tribunal still faces an increase of 32 percent in carry-forward cases for 2013–2014.

Review of the above data suggests a number of lessons that can be learned:

- Improvements can be made in the manner and methods for collecting milestone data to enable easier identification and management of patterns and trends in the Tribunal's rate of resolving cases during the fiscal year.
- Similarly, improvements can be made in the Tribunal's financial forecasting. A more rigorous and timely tracking of commitment and de-commitment of travel or per diems, facilities rental or accommodation costs can provide the Tribunal with a closer estimate of the potential surplus/deficit position *earlier in the fiscal year*. A good

degree of uncertainty would likely remain as some changes in hearing or mediation schedules may not be known until the last quarter.

- While the Tribunal was aware of the potential resource impact of assigning a three-member panel, greater precision in estimating that impact would be desirable. Three-member panels are contemplated under the CHRA, and in some cases, they are a necessity.
- It must be remembered that cost control and reduction is not the only guiding value of the Tribunal. The legal values of fairness, transparency, accessibility and just disposition all carry a certain cost. Compromising these values represents a false economy; in the long run that approach may end up costing the parties and the Tribunal much more — both financially and otherwise.
- Performance indicators need to be reassessed against the current operating environment, where a large proportion of complaints are being advanced by unrepresented complainants, or by complainants who are not represented by lawyers. Moreover, indicators may have to be adjusted to fully reflect the fact that the Tribunal process necessarily involves external actors whose control over the case cannot be managed by the Tribunal (e.g., files waiting for section 48 decisions in respect of settlements and files waiting for final disposition of a judicial review application in the Federal Court, Federal Court of Appeal or Supreme Court of Canada).
- Finally, the number of cases being advanced where the complainant — and sometimes the respondent as well — is not represented by a lawyer confirms the need for the Tribunal to invest in updating our communications material to assist parties to better understand our process. In particular, it points to updating the user's guide we developed several years ago, and enhancing its contents.

Sample Tribunal Decisions and Ruling in 2012–2013

The following summaries of Tribunal decisions and a ruling[1] from 2012–2013 illustrate the kinds of complaints brought before the Tribunal and how such cases affect all Canadians. All the Tribunal's decisions and rulings can be found on the Tribunal's website.

Grant v. Manitoba Telecom Services Inc. **2012 CHRT 10**

The complainant alleged that her employer engaged in a discriminatory practice when it decided to terminate her employment, choosing to retain a more junior employee, based on the complainant's negative performance appraisals. According to the complainant, the

[1] In this DPR, the term *decision* is defined as a set of adjudicative reasons issued by a member or panel of the Tribunal that actually decided the question of whether a discriminatory practice occurred in a given case. This would exclude sets of reasons where: (i) the only issue in contention before the Tribunal was what type of remedial order was appropriate; (ii) the complaint was dismissed for want of prosecution by the complainant; (iii) the complaint was dismissed for lack of jurisdiction, abuse of process, delay, irreparable breach of fairness, etc; or (iv) the issue before the Tribunal was a motion for some type of procedural or evidentiary order. Reasons issued in respect of matters in the preceding list are classified as *rulings*, one of which is also profiled in this section.

symptoms of her disability, type II diabetes, negatively affected her performance at work. Although aware of her disability, her employer, she claimed, negatively assessed her performance without considering the effects of her disability. As her performance appraisals were used to compare her performance with that of another employee for the purpose of determining who would be terminated, the complainant alleged that her disability was a factor in her employer's decision to refuse to continue to employ her.

The respondent argued that the symptoms associated with the complainant's disability did not affect her work performance or her performance appraisals. After weighing the evidence of two experts on this issue, the Tribunal determined that a person with a type II diabetic condition can experience communication/social issues due to the symptoms of their condition, especially when under stress. The Tribunal also found that the complainant was experiencing elevated blood sugar levels around the time when communication issues were identified by her employer as having a negative impact on her performance.

The respondent also claimed the complainant's performance appraisals showed a history of performance issues at work that were unrelated to the symptoms of her diabetic condition. As a result, it claimed it was justified in terminating the complainant based on the superior performance record of the other incumbent. After examining the complainant's performance appraisals, the Tribunal rejected this argument as well. Although there was an indication in one performance appraisal that the complainant needed some improvement in her communication with others, there was nothing significant enough in any of the performance appraisals to indicate that she had a history of performance issues. Performance issues only began to arise following the diagnosis of her disability and her attempts to reduce the impact of stress on her condition.

While the complainant tried to address these issues with the respondent and have her performance appraisals changed, the complainant's disability was not considered as a factor affecting her performance. As those performance appraisals were used as the basis for terminating the complainant, the Tribunal concluded that disability factored into the respondent's decision to no longer employ her.

This decision is currently subject to an application for judicial review.

Results for Canadians

For employers, this decision highlights some important aspects of the law surrounding disability accommodation. First, employers have a duty to seek all relevant information about an employee's disability once they become aware of it. This may include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. Second, based on this information, the employer must seriously consider how it can accommodate the employee's disability up to the point of undue hardship. Following this procedure and documenting it may provide a basis for successfully defending against a claim of discrimination on the basis of disability.

Nastiuk v. Couchiching First Nation and Sinclair **2012 CHRT 12**

The complainant alleged that her employer and supervisor harassed her on the basis of her sex. She also claimed that her employer retaliated against her by failing to address her concerns and failing to protect her from the effects of harassment by her supervisor.

According to the complainant, there was a breakdown of the working relationship between her and her supervisor, which resulted in a hostile workplace. From the complainant's perspective, the deterioration in the relationship had its origin in things said to her in casual conversation between them, anecdotal comments made by the supervisor about himself, or inquiries by him into her private life. These comments made her feel uncomfortable and resulted in the complainant having a deep-seated aversion to her supervisor. The complainant testified that she suffered in silence, unable to confront her supervisor and demand he stop making personal comments to her that she found offensive.

However, in her testimony, the complainant acknowledged occasions when she did engage in normal personal conversations with her supervisor, and other occasions when she was able to challenge him. She provided evidence of many interactions between them that were normal activities that she willingly engaged in, such as her supervisor repairing her car and fixing her air conditioning and her furnace. Despite the complainant's assertion that it was her supervisor who created a hostile workplace, the Tribunal found the evidence revealed it was the complainant's irascibility with and condescension to co-workers that created hostility toward her. Finally, when the complainant was asked in cross-examination to provide details and examples of the alleged sexual harassment by her supervisor, she was unable to describe a single example. Nor was she able to give an example as to how her employer failed to protect her in the workplace from the effects of her supervisor's alleged harassment.

Therefore, the Tribunal concluded that the complainant was not a credible witness, and that her testimony in support of her allegations of sexual harassment and retaliation did not establish a *prima facie* case. As a result, her complaints were dismissed.

This decision is currently subject to an application for judicial review.

Results for Canadians

The significance of this decision lies primarily in its provision of a clear and concise overview of the state of the law regarding the *prima facie* test for discrimination in the context of a complaint of sexual harassment. Specifically, in this case, the complainant failed to establish that her supervisor's conduct was unwelcome and sexual in nature. This decision therefore serves as a valuable reminder to complainants that they have an initial onus to lead some evidence in support of each constituent element of an alleged discriminatory practice.

Closs v. Fulton Forwarders Incorporated and Fulton **2012 CHRT 30**

The complainant made various allegations of discrimination stemming from his employment with the respondents. His wife suffered two miscarriages during this time, and the complainant claimed to have been denied time off to go to the hospital to be with

her during the miscarriages and to grieve the loss afterwards. According to the complainant, this constituted discrimination on the basis of family status. Following those incidents, the complainant suffered a knee injury and required time off from work to recover. Instead, his employment was terminated, which the complainant claimed was discrimination on the basis of his disability.

With regard to the miscarriages, the Tribunal found that the relationship between spouses is protected by the ground of family status, and that the loss of the pregnancies was suffered by the complainant and his spouse together, as a family. Therefore, the employer had a duty to consider whether it could accommodate the complainant's request for time off to attend to his family obligations. The Tribunal concluded there was no evidence to suggest the employer seriously considered the complainant's needs in requesting time off during and after the miscarriages, or that it seriously considered whether it could accommodate those needs.

With respect to the complainant's termination, the Tribunal found that despite presenting his employer with a doctor's note indicating when he could return to work following his leg injury, the employer hired another driver to perform the complainant's job. The employer maintained that the decision to hire another driver was in response to the complainant's notification that he could no longer drive at night safely because of the symptoms of his lupus. According to the employer, there was not enough daytime work to accommodate a driver who was restricted from driving at night. The complainant, for his part, denied having notified the employer of such a restriction. But regardless of whether such notification had actually been given, the employer never requested medical documentation regarding the complainant's lupus. The Tribunal could therefore not accept that the employer had seriously considered whether it could accommodate the complainant's alleged night-driving work restriction. Nor was sufficient evidence led to establish that accommodating the complainant's alleged work restriction would have caused the employer undue hardship. Therefore, the Tribunal concluded that the complainant had been subjected to discrimination when, as result of his disability (both his knee injury and his lupus), he was no longer offered continued employment.

Results for Canadians

The relevance and importance of this decision lies in the Tribunal's interpretation of the prohibited ground of "family status." As the circumstances of the case involved a miscarriage, and not obligations arising from a traditional parent-child relationship, it was argued that extending the definition of family status to cover the circumstances of the case would stretch its definition beyond that of any prior jurisprudence and beyond a reasonable interpretation of the statute. However, instead of focusing on whether the complainant fit into an identifiable category of persons protected by the ground of family status, the Tribunal chose instead to focus on the harm suffered by the individual. In so doing, the Tribunal recognized that it was the relationship between the complainant and his spouse that gave rise to the familial obligations in question in this case. As the term "family status" is not defined in the Act, the *Closs* decision has made a tangible contribution to the jurisprudential understanding of what is protected by this prohibited ground of discrimination.

Murray v. Immigration and Refugee Board **2013 CHRT 2**

The complainant alleged the respondent had, among other things, pursued a practice or standard that deprived him and other visible minorities of permanent employment advancements due to their race and colour. He also made similar allegations in complaints to the Public Service Labour Relations Board and the Public Service Staffing Tribunal (PSST). In fact, the PSST dismissed his complaint and determined there was no *prima facie* case of discrimination.

The respondent brought a motion to dismiss the complaint pending before the Canadian Human Rights Tribunal. Among other things, it argued the complaint should be dismissed on the basis of *issue estoppel* and/or abuse of process, pursuant to the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.

After reviewing the doctrines of *issue estoppel* and abuse of process, and the common principles that underlie these doctrines, the Canadian Human Rights Tribunal determined that the PSST had concurrent jurisdiction to decide the human rights issues alleged by the complainant; that the PSST had decided essentially the same legal issue as what was being complained of to the Canadian Human Rights Tribunal; and that the complainant had had a full and ample opportunity to present his case before the PSST. As a result, the Canadian Human Rights Tribunal determined that it did not make sense to expend public and private resources on the relitigation of what was essentially the same allegations the complainant had raised before the PSST. According to the Canadian Human Rights Tribunal, its role was not to judicially review or reconsider a legitimately decided issue in order to explore whether it might yield a different outcome.

Accordingly, as adjudicating the complaint would have amounted to an abuse of the Canadian Human Rights Tribunal's process, it was dismissed.

This ruling is currently subject to an application for judicial review.

Results for Canadians

In applying *Figliola*, and in determining that the substance of the complainant's allegations had already been appropriately dealt with, the Canadian Human Rights Tribunal avoided the expenditure of public and private resources on relitigating the matter. This ruling will serve as a valuable reminder to parties that, absent express statutory language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation and that the Canadian Human Rights Tribunal will not review the decisions of other tribunals in this regard, or provide parties with a forum to essentially relitigate issues that have already been decided by another body.

Judicial Review

In previous years the Tribunal's DPR included a table measuring, for the five previous calendar years, the number of complaints referred, the number of decisions rendered, as well as the status of any judicial review applications filed in respect of the decisions, that is, application pending, application withdrawn or struck for delay, application granted (Tribunal decision overturned), or application dismissed (Tribunal decision upheld).

This table will no longer be included in DPRs for several reasons:

- Judicial review statistics regarding Tribunal decisions rendered during the DPR reporting period often have most data falling in the pending category. The time lapse between the issuance of a Tribunal decision and the subsequent rendering of a final judgment by the Court in judicial review proceedings challenging that decision usually made it impossible to report on the adjudicative performance of the Tribunal in a given fiscal year. This time lapse is heightened if the case is appealed from the Federal Court to the Federal Court of Appeal or beyond.
- As noted, the pronouncement of a judicial review judgment at the Federal Court is often not the final disposition of the matter. A decision may be overturned by one court and then later upheld by another. In these instances, the category for the same decision changes from year to year.
- There are very few decisions from which to draw conclusions. For instance, in fiscal 2012–2013, the Tribunal issued seven decisions. Four of those decisions are the subject of applications for judicial review.[2]
- Finally, the table presented data based on calendar years; however, the DPR reporting period is the federal government's fiscal year from April 1 to March 31.

Benefits for Canadians

As a key mechanism of human rights protection in Canada, the Tribunal gives effect to the Canadian ideals of pluralism, equity, diversity and social inclusion. It provides a forum where human rights complaints can be scrutinized and resolved, and provides definitive interpretations on important issues of anti-discrimination law. The primary result of the Tribunal's program is that complainants can air their claims, respondents are able to test the validity of allegations made in a quasi-judicial setting, and the parties achieve closure in a respectful, impartial forum. In the longer term, Tribunal decisions create meaningful legal precedents for use by employers, service providers and Canadians at large.

[2] One of the four challenges was dismissed by the Federal Court in August 2013.

Internal Services

Internal services are activities and resources that support the needs of the Tribunal's operating program and other corporate obligations. They include corporate, legal, financial, human resources and IM/IT services.

Financial Resources ($ millions)

Planned Spending 2012–2013	Actual Spending 2012–2013	Difference 2012–2013
1.9	2.2	0.3

Human Resources (FTEs)

Planned 2012–2013	Actual 2012–2013	Difference 2012–2013
13	9	4

Performance Analysis and Lessons Learned

Internal services make a critical contribution to the achievement of the Tribunal's singular program. During the reporting period, the Tribunal continued to focus on rebuilding the workplace and re-establishing core controls and processes for the management of its financial, material and human resources. In light of the federal government's evolving direction on shared service delivery among small departments and agencies, the Tribunal continues to consider seeking alternate ways of delivering some of its corporate services.

Human resources management — During 2012–2013, the Tribunal remained focused on rebuilding its labour force and fostering a healthy environment, where people are valued and recognized as a priority. During the reporting period, the Tribunal also continued to deal with labour relations issues that commenced in 2010. Demonstrating its commitment to full compliance with applicable legislation and policy instruments, the Tribunal developed its own code of conduct, which should be finalized next year. The Acting Chairperson also set up and leads a workplace wellness initiative involving all employees with a view to creating a healthy and productive workforce where all individuals feel respected and respectful and are working together for better outcomes.

Financial management — The Tribunal continued to implement the recommendations made by the Core Control Audit of the Office of the Comptroller General and established new measures for the management of its financial resources. The Tribunal remains committed to ensuring compliance with legislative authorities and policy instruments that govern sound financial management practices.

Information technology — IT efforts focused on: providing adequate IT support; updating basic software tools so that the Tribunal could continue to conduct its operations smoothly; and advancing the planning for upgrading its key financial application system.

While integrated business and human resources planning discussions were held at the beginning of the fiscal year when the budget was being set, communication of the internal integrated plans and priorities could be improved. From an IT perspective, the Tribunal is receiving adequate support from Shared Services Canada to meet its essential needs for help desk, data back-up, basic infrastructure maintenance and IT security support, but continues to experience significant delays in implementing IT projects that seem to require a minimum of a year's up-front planning before implementation. The Tribunal therefore remains committed to exploring other options for internal service delivery, not just for IT services, but also for others, particularly financial services. The Tribunal plans to approach similar small agencies to discuss sharing internal services where it is feasible, cost-effective and in the best interests of the Tribunal.

Section III: Supplementary Information

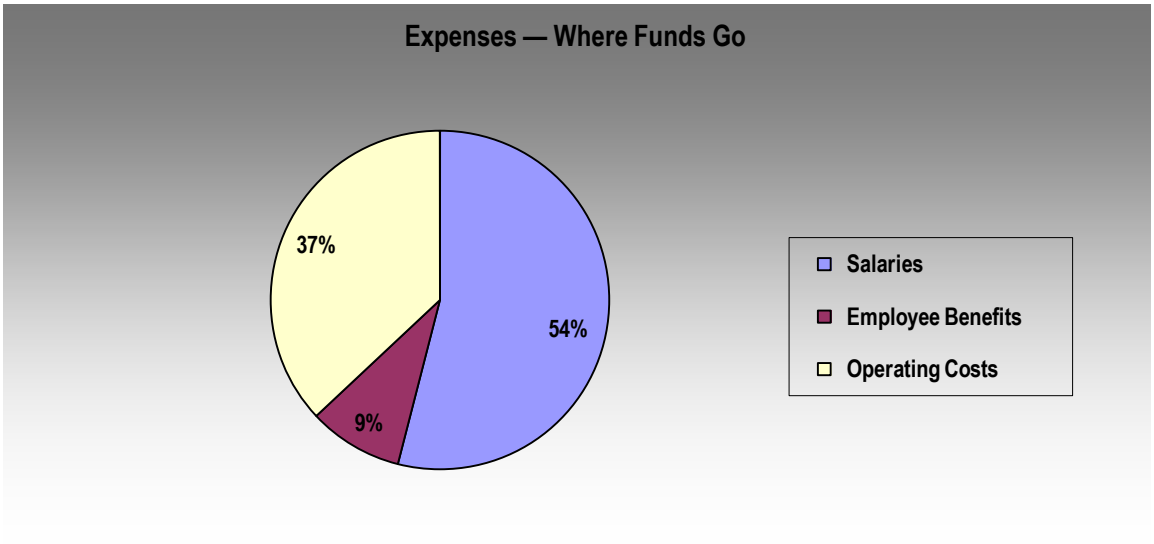
Financial Statements Highlights

Canadian Human Rights Tribunal Condensed Statement of Operations and Departmental Net Financial Position (Unaudited) For the year ended March 31, 2013 ($ millions)					
	2012–2013 Planned Results	2012–2013 Actual	2011–2012 Actual	$ Change (2012–2013 Planned vs. Actual)	$ Change (2012–2013 Actual vs. 2011–2012 Actual)
Total expenses	5.7	5.4	6.2	(0.4)	(0.8)
Total revenues	—	—	—	—	—
Net cost of operations before government funding and transfers	5.7	5.4	6.2	(0.4)	(0.8)
Departmental net financial position	n/a	(0.3)	(0.3)	n/a	0.0

Actual spending for 2012–2013 was less than the planned spending amount. Savings were achieved due to staffing vacancies (which reduced spending on salaries), reduced contracting for professional services (limiting travel to case management, hearings or mediations), and delayed investment in IT upgrade of the financial application and corresponding infrastructure.

Canadian Human Rights Tribunal Condensed Statement of Financial Position (Unaudited) As at March 31, 2013 ($ millions)			
	2012–2013	2011–2012	$ Change
Total net liabilities	0.7	0.7	0.0
Total net financial assets	0.4	0.4	0.0
Departmental net debt	(0.3)	(0.3)	0.0
Total non-financial assets	0.0	0.0	(0.0)
Departmental net financial position	(0.3)	(0.3)	0.0

The assets and liabilities have been fairly stable over the last fiscal years. There are no major fluctuations in the amounts reported in the above Condensed Statement of Financial Position.



These percentages are based on actual 2012–2013 expenditures of $4.2 million and do not reflect costs for services provided without charge or amortization costs. Major operating costs include travel to hearings across Canada, Tribunal member fees, professional services contracts and translation.

The Tribunal's financial statements can be found on its website.

Tax Expenditures and Evaluations Report

The tax system can be used to achieve public policy objectives through the application of special measures such as low tax rates, exemptions, deductions, deferrals and credits. The Department of Finance publishes cost estimates and projections for these measures annually in the *Tax Expenditures and Evaluations* publication. The tax measures presented in the *Tax Expenditures and Evaluations* publication are the sole responsibility of the Minister of Finance.

Section IV: Other Items of Interest

Organizational Contact Information

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Legislation

The Minister of Justice is responsible to Parliament for the *Canadian Human Rights Act*, (R.S. 1985, c. H-6, as amended).

The Minister of Labour is responsible to Parliament for the *Employment Equity Act*, (S.C. 1995, c. 44, as amended).

Reports

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

Annual Reports

Performance Reports

Reports on Plans and Priorities