# Canadian Human Rights Tribunal

## 2011–12

## Departmental Performance Report

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada

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# Chairperson's Message

Despite numerous financial and organizational challenges, the Tribunal ended the year on a positive, forward-looking note, armed with useful feedback from stakeholders and government audits, and a fully staffed organization for the first time in more than 18 months.

Challenges faced by the Tribunal this year had serious repercussions, however, as the Tribunal failed to meet most of its performance targets. Given judicial criticism in recent years of its lengthy inquiry process, the Tribunal had set itself a 12-month standard for processing complaints, and a target of meeting that standard 70 per cent of the time. Last year, the Tribunal met its 12-month standard in 88 per cent of cases. This year, its success rate fell to 41 per cent.

Several factors accounted for the Tribunal's poor performance. In April 2011 a malicious infiltration of its information technology system paralyzed many of the Tribunal's operations, forcing staff to work with information technology systems running far below their normal capacity.

The Tribunal saw an increase in the number of complex cases, which resulted in those cases taking more time to process in order to ensure natural justice and procedural fairness. This resulted in less resources being available to deal with other cases referred to the Tribunal.

Long-standing labour relations issues also took their toll on both productivity and finances. There were exceptional expenditures associated with rapid staff turnover, including the contracting of professional services needed to deal with labour relations issues, staff vacancies and organizational restructuring.

Meanwhile, the settlement of a long-standing litigation with one of its suppliers also strained the Tribunal's finances, as did two new program initiatives—a series of consultations with First Nations communities, and the first-ever national stakeholder consultations. The former was prompted by the repeal of section 67 of the *Canadian Human Rights Act*, which is expected to introduce two new categories of human rights complaints relating to the *Indian Act*. The second initiative sought feedback and constructive criticism on a 2010 amendment to the Tribunal's complaint resolution model to better accommodate the growing number of unrepresented parties appearing before the Tribunal. The Tribunal's findings from these consultations are expected to enhance both its complaint resolution process and its relations with stakeholders.

The Tribunal took extraordinary steps this year to rebuild its labour force, nurture a positive work environment and develop an action plan to move the organization forward.

As Acting Chairperson, I plan to build on the year's successes, capitalizing on our now fully functioning workforce to return the Tribunal to its former levels of productivity while maintaining our hard-won morale, and ensuring that people continue to be valued and recognized for their efforts.

Susheel Gupta
Acting Chairperson

# 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 violate 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 makes it an offence for a federally regulated employer or service provider to discriminate against an individual or group on any of the following 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.

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, as well as policy adjustments necessary to prevent future discrimination.

The majority of discriminatory acts that the Tribunal adjudicates are not malicious. Many conflicts arise from long-standing practices, legitimate concerns of employers, or conflicting interpretations of statutes and precedents. The role of the Tribunal is to

discern the positions of the parties and to establish fair and appropriate rules to resolve the dispute.

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 there is no evidence 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 Senior Registrar, who is responsible for registry operations 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 more than 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.

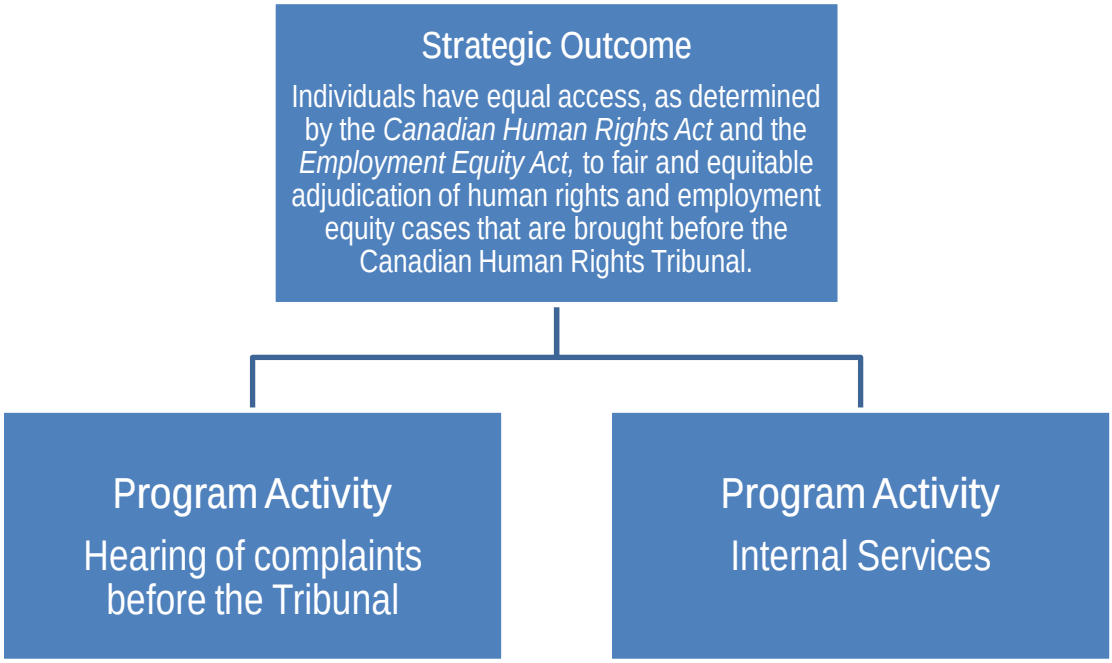
**Internal Services** — Internal services are activities and resources that support the needs of the Tribunal's operating program and other corporate obligations. They include corporate, legal, financial, human resources, and information management and information technology services.

## Strategic Outcome and Program Activity 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 program activities support achievement of the Tribunal's strategic outcome: (1) Hearings of complaints before the Tribunal; and (2) Internal Services.

## Program Activity 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:<br>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. |
| A cornerstone of the Tribunal's complaint resolution process is its customized mediation process, which includes 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 2011–2012 the parties in 40 cases chose to pursue mediation and 21 of these were settled. | | |

| 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:<br>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. |
| The implementation of the expedited complaints resolution process, including the use of proactive prehearing case management, reduced 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:<br>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. |
| This was a year of transition, renewal and ongoing effort to deliver quality services in support of the quasi-judicial mandate of the Tribunal. With ever-increasing demands on limited resources and severe financial pressures, the Tribunal continued to look for innovative ways to enhance the efficiency of its internal and program operations while improving the work environment. In addition, the Tribunal's IT services transitioned to the Information Technology Services Branch (ITSB) of Public Works and Government Services Canada (PWGSC), and under the leadership of the Chairperson, the Tribunal undertook outreach activities and stakeholder consultations. | | |

## Risk Analysis

The Tribunal remained proactive in its approach to risk in 2011–2012 through the identification of potential events and assessments of how these events might affect its sole strategic outcome. Mitigation strategies were developed that would not only address the challenges, but also embrace them as opportunities where possible. Below is a discussion of the risks of significance to the Tribunal in 2011–2012.

The Tribunal is a demand-driven organization with a mandate dependent on referrals from the Canadian Human Rights Commission. In addition, changes within the external environment, government policies and the legislative mandate have an impact on the Tribunal's operating environment.

### Effect of the Repeal of Section 67 of the *Canadian Human Rights Act*

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.

The Tribunal did not experience an increase in cases on the scale expected. One possible reason may be two court decisions rendered in the case of *P.S.A.C. v. Canada (Canada Revenue Agency)*. On February 22, 2011, the Federal Court upheld an earlier finding by the Tribunal that the mere performance by government of a statutory function does not in itself constitute a "service" within the meaning of the CHRA. On January 10, 2012, the Federal Court of Appeal upheld this finding, holding that the CHRA does not provide for the filing of a complaint directed against an act of Parliament. On March 9, 2012, leave to appeal this case to the Supreme Court of Canada was filed.

While early indications suggest the Tribunal can still expect 15 to 20 new cases annually directly related to the repeal of CHRA s. 67, the number of cases that will be referred is impossible to predict. The cases that make their way to the Tribunal are expected to be especially complex since they will be exploring new areas of human rights law, and the scope and breadth will undoubtedly exceed any complaints filed with the Tribunal to date. In an effort to address these future needs, the Chairperson conducted numerous outreach activities with First Nations communities across Canada to learn how the Tribunal can facilitate the process in a cost-effective and culturally sensitive manner.

### Operating Environment

In 2011–2012 the Tribunal's operating environment was exceedingly challenged—most critically by a significant financial shortfall and the unanticipated and urgent need to rehabilitate its information technology (IT) network and infrastructure, following a deliberate, unauthorized and malicious attack on the Tribunal's IT network. In addition, the Tribunal faced unprecedented labour relations and employee retention issues, including rapid staff turnover. In the past year, the Tribunal responded to these challenges by focusing on rebuilding a healthy and sustainable workplace, identifying additional sources of funding and outsourcing its IT capability to PWGSC's ITSB. These events also affected the Tribunal's management of its caseload. While the number of cases referred to the Tribunal remained constant over the planning period, there were approximately 148 cases pending at the beginning of 2011–2012 and the case inventory at the end of 2011–2012, stood at 231. The Tribunal's performance in this regard is further detailed in the second part of this report.

In addition, during the reporting period the Tribunal was subject to two audits: the Public Service Commission Staffing Audit and the Core Control Audit conducted by the Office of the Comptroller General. Both these audits identified areas of improvement, specifically as they related to control mechanisms and compliance. The Tribunal accepted the audit findings and prepared action plans to address the issues raised.

## Summary of Performance

The following tables display the financial and human resources managed by the Tribunal in 2011–2012.

### 2011–2012 Financial Resources ($ millions)

| Planned Spending | Total Authorities | Actual Spending* |
|---|---|---|
| 4.5 | 5.6 | 5.0 |

* Does not include a total of $1.2 million for services provided at no charge and amortization expense for capital assets.

### 2011–2012 Human Resources (full-time equivalents — FTEs)

| Planned | Actual | Difference |
|---|---|---|
| 26 | 22 | 4 |

**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.

| Performance Indicators | Targets | 2011–2012 Performance |
|---|---|---|
| Tribunal decisions/rulings | Rendering decisions within four months of the close of the hearing in 80% of the cases | Not met.<br>68% of decisions and rulings were rendered within the sought-after four-month timeline from the close of hearing. Unlike hearings before the courts, 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 administrative tribunals whose parties are represented by counsel. |

### Performance Summary, Excluding Internal Services

| Program Activity | 2010–2011 Actual Spending ($ millions) | 2011–2012 ($ millions) | | | | Alignment to Government of Canada Outcome |
|---|---|---|---|---|---|---|
| | | Main Estimates | Planned Spending | Total Authorities | Actual Spending | |
| Hearing of Complaints before the Tribunal | 1.8 | 2.6 | 2.6 | 2.6 | 1.8 | Social Affairs: A diverse society that promotes linguistic duality and social inclusion. |
| Total | 1.8 | 2.6 | 2.6 | 2.6 | 1.8 | |

### Performance Summary for Internal Services

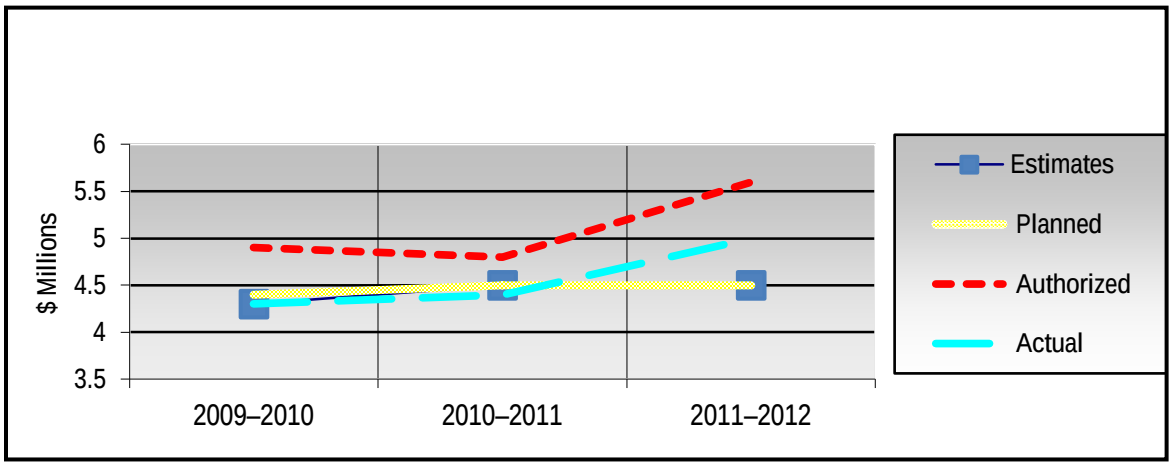
| Program Activity | 2010–2011 Actual Spending ($ millions) | 2011–2012 ($ millions) | | | |
|---|---|---|---|---|---|
| | | Main Estimates | Planned Spending | Total Authorities | Actual Spending |
| Internal Services | 2.6 | 1.9 | 1.9 | 3.0 | 3.2 |

***Hearing of Complaints before the Tribunal*** — Actual spending for this activity was identical to the previous year's expenditures and was significantly less than planned. Among the reasons for this was the lower than anticipated number of new and backlogged cases processed this year. A greater proportion of complaints were resolved through mediation this year, compared with last year, and there were shorter delays in hearing times due to the adoption of an expedited process for narrowing the issues and reaching agreement on the facts at the prehearing stage. The other main contributor to reduced operating costs was the Tribunal's liberal use of available free meeting facilities, such as provincial and federal court facilities, for hearings.

***Internal Services*** — Increased costs were incurred for professional and special services to provide human resources capacity to the organization in the critical areas of executive direction, registry and corporate services, settlement of a litigation dispute, and rebuilding of the Tribunal's IT infrastructure and outsourcing of its IT services to PWGSC. Outreach activities and stakeholder consultations that will enable the Tribunal to enhance program delivery and improve case management and resolution of complaints also contributed to the increased costs.

## Expenditure Profile

### Spending Trend from 2009–2010 to 2011–2012



Planned spending for 2011–2012 remained constant at $4.5 million, while authorized spending increased from the previous year by $0.8 million. The difference in authorized spending is attributable to an operating budget carry-forward from 2010–2011, a one-time transfer of funds to relieve financial pressures and salary amounts for payments in lieu of severance due.

Actual spending for 2011–2012 exceeded the planned spending amount. These include costs attributable to the settlement of a long-standing litigation, as well as the need to contract out for professional services to deal with labour relations issues, staff vacancies and organizational restructuring. Other spending increases included a Memorandum of Understanding with PWGSC for the redevelopment of its IT infrastructure and the provision of ongoing IT services, as well as outreach and stakeholder consultations.

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

## Estimates by Vote

For information on the Tribunal's organizational votes and statutory expenditures, please see *Public Accounts of Canada 2012* (Volume II).

# Section II: Analysis of Program Activities by Strategic Outcome

## 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.

## Program Activity: 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.

### 2011–2012 Financial Resources ($ millions)

| Planned Spending | Total Authorities | Actual Spending |
|---|---|---|
| 2.6 | 2.6 | 1.8 |

### 2011–2012 Human Resources (FTEs)

| Planned | Actual | Difference |
|---|---|---|
| 13 | 9 | 4 |

| Expected Results | Performance Indicators | Targets | Actual Results |
|---|---|---|---|
| Access to mediation and adjudication processes that are transparent, timely and efficient<br><br>Reasoned and objective application of the CHRA and the EEA<br><br>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.<br>Of the 124 new cases received in this fiscal year, only 27% were initiated within 10 days of receiving the referral from the Commission. |
| | (ii) Number of hearings | (ii) n/a | 16 hearings were held in 2011–2012. |
| | (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.<br>13% 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.<br>41% of inquiries were concluded within the12-month window. |

| Expected Results | Performance Indicators | Targets | Actual Results |
|---|---|---|---|
| | (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. | Met all.<br>52.5% of cases that accepted mediation were resolved through that process. |

### *Performance Summary and Analysis of Program Activity*

Access to justice for ordinary Canadians requires a process that is impartial, that is fair to all parties and that delivers results in a timely and cost-effective manner. The Tribunal implemented initiatives such as intensive prehearing management and greater use of evaluative mediation to improve its services and program delivery. Preliminary results indicate that these approaches are lowering costs and reducing overall time for achieving resolution of complaints.

In 2011–2012, 124 new cases were referred to the Tribunal by the Commission and 148 cases were carried forward from previous years, 16 of which were the subject of Federal Court review. These 16 cases actually represent 191 complaints and the judicial review process in all 16 cases had not been completed by the end of the fiscal year. In the reporting period, 36 inquiries were concluded by mediation or hearings, 5 complaints were withdrawn, 32 complaints were adjourned waiting for Federal Court review, and 25 decisions and rulings were released. At the end of the reporting period, the Tribunal had 231 cases to carry forward.

### *Lessons Learned*

The strategic shift away from interest- and position-based approaches to resolution of complaints before the Tribunal is producing positive results that bode well for continued and expanded use. The Tribunal will continue to research innovative methods for resolving complaints to enhance access to justice for ordinary Canadians.

### *Tribunal Decisions and Rulings[1] 2011–2012*

The following summaries of Tribunal decisions and rulings from 2011–2012 illustrate the kinds of complaints brought before the Tribunal and how such cases affect all Canadians. Summaries of other Tribunal decisions rendered in calendar year 2011 can be found on the Tribunal's website.

[1] In this Departmental Performance Report, 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*, two of which are also profiled in this section.

***Vilven and Kelly v. Air Canada and Air Canada Pilots Association*** **2011 CHRT 10**

Two pilots who had been employed with Air Canada alleged that they had been subjected to a discriminatory practice when, in accordance with provisions in a collective agreement between the Air Canada Pilots Association and Air Canada, they were forced to retire at age 60. In a previous decision in the matter (2009 CHRT 24), the Tribunal had found unconstitutional the section of the *Canadian Human Rights Act* (CHRA) that dealt with mandatory retirement. Pursuant to the impugned section 15(1)(c), it was not a discriminatory practice if the age of termination of employment was the normal age of retirement for employees working in similar positions. Also in that previous decision, the Tribunal found that Air Canada had not demonstrated, pursuant to CHRA section 15(1)(a), that age was a *bona fide* occupational requirement for its pilots. On judicial review, the Federal Court agreed that section 15(1)(c) was unconstitutional, but it ordered the Tribunal to redetermine the question of whether age was a *bona fide* occupational requirement for Air Canada pilots in light of a change to the rules of the International Civil Aviation Organization (ICAO). This United Nations organization, charged with fostering civil aviation safety, had enacted new rules in November 2006 that allowed pilots between the ages of 60 and 65 to continue to fly internationally, as long as the other pilots in a multi-pilot crew were under 60.

The Tribunal found that for decades Air Canada had engaged in a legitimate and meaningful bargaining process with the pilots' union and that the resulting collective agreement both enshrined seniority and provided for mandatory retirement at age 60 with a reasonable pension. The terms of the agreement made it possible for Air Canada to effectively balance the introduction of new pilots to replace a predictable number of retiring pilots. Mandatory retirement also accomplished the legitimate purpose of melding the company's needs with the collective rights and needs of its pilots. Finally, the Tribunal found that, given the restrictions of the ICAO over/under rule, accommodating the needs of the complainants in the period after November 2006 by abolishing mandatory retirement would result in undue hardship to Air Canada, including significantly increased operational costs, inefficiency in the scheduling of pilots, and negative ramifications for the pilots' pension plan and the collective bargaining agreement, particularly in maintaining an effective rule of seniority.

Given that accommodating the needs of the complainants after November 2006 would impose undue hardship on Air Canada, the Tribunal concluded that mandatory retirement of pilots at age 60 is based solely on a *bona fide* occupational requirement and is therefore not a discriminatory practice.

The complainants and the Canadian Human Rights Commission have applied for judicial review.

| *Results for Canadians* |
| --- |
| In the Federal Court decision remitting the 15(1)(*a*) issue back to the Tribunal for redetermination, the Court found that the Tribunal was statutorily limited to considering the factors of health, safety and cost in assessing whether a *bona fide* occupational requirement defence had been established. In re-determining the matter, the Tribunal had an opportunity to examine the role played by international instruments in a *bona fide* occupational requirement analysis and the resulting 'cost' implications this may have for a respondent. Given that Parliament has now repealed section 15(1)(*c*) of the CHRA, this type of *bona fide* occupational requirement analysis may provide guidance for future cases where mandatory retirement is asserted as a legitimate work standard. Furthermore, the Federal Court of Appeal has recently determined that section 15(1)(c) of the CHRA was constitutional. Should the matter be brought before the Supreme Court of Canada, it would provide a key opportunity for the Court to revisit its 1990 mandatory retirement decision in *McKinney v. University of Guelph* and provide further guidance on the mandatory retirement issue. While this debate may continue before the Supreme Court, the Tribunal has made a tangible contribution to the jurisprudential and policy discussion surrounding the mandatory retirement issue through the series of *Vilven and Kelly* decisions. |

***Cruden v. CIDA and Health Canada*** **2011 CHRT 13**

Health Canada conducts medical assessments of Canadian International Development Agency (CIDA) employees seeking postings in other countries. It developed medical evaluation guidelines specific to the assessment of employees seeking posting in Afghanistan. Pursuant to these *Afghanistan Guidelines*, under the heading "Absolute medical requirements," employees do not meet the medical requirements for posting if they have a medical condition that would likely lead to a life-threatening medical emergency if access to prescribed medication and/or other treatment is interrupted for a short period of time. On this basis, the complainant alleged that her employer, CIDA, engaged in a discriminatory practice when it decided that she was not suitable for a job posting in Afghanistan because she had diabetes. The complainant also alleged that Health Canada engaged in a discriminatory practice when it recommended to CIDA that she not be posted to Afghanistan because of her diabetic condition.

The evidence indicated that it would pose an undue hardship for CIDA to accommodate the complainant in Afghanistan. There are serious health and safety risks present for Canadians working in Afghanistan and these risks frequently materialize. It is not only the complainant who bears these risks, but also members of the Canadian Forces and other foreign military personnel. Medical services and facilities are limited and must therefore be conserved for the treatment of troops, injured Afghani civilians and unpredictable emergencies that affect all civilians posted in Afghanistan. Nevertheless, the Tribunal found that CIDA had breached its duty to explore all reasonable options to accommodate the complainant. It had a duty to obtain all relevant information about its employee's disability and seriously consider how the complainant could be accommodated. It did not lead sufficient evidence that it had explored all reasonable accommodation measures for the complainant in Afghanistan or otherwise.

Regarding the complaint against Health Canada, the Tribunal found that the *Afghanistan Guidelines* did not reflect equality between all members of society. Although the guidelines were meant to be instructive and informative, their wording suggested mandatory medical requirements without consideration of the individualized circumstances of each person. The process by which Health Canada assessed and arrived at its recommendation, influenced as it was by the *Afghanistan Guidelines*, failed to consider the inherent worth and dignity of the complainant. The complainant therefore

suffered adverse differentiation on the basis of her disability by the wording and application of the *Afghanistan Guidelines* by Health Canada.

As a result, both complaints were substantiated and the Tribunal ordered appropriate remedial action to eliminate the discriminatory practices.

The Attorney General of Canada has applied for judicial review.

| *Results for Canadians* |
| --- |
| The *Cruden* decision is unique because the Tribunal had to analyze the applicability of the duty to accommodate in the context of an international war zone. In its analysis, the Tribunal's decision referenced international law, including the *Convention on the Rights of Persons with Disabilities*. The decision also highlighted some important aspects of the law surrounding disability accommodation. First, employment policies can potentially be discriminatory if they are "absolute" and do not provide for a consideration of the individualized circumstances of each person. Second, in certain situations employers may have a duty to obtain all relevant information about an employee's disability and seriously consider how the employee can be accommodated. If this analysis is not performed, an employer may fail in its duty to accommodate an employee with a disability. |

***Fallan Davis v. Canada Border Services Agency*** **2011 CHRT 18**

The complainant alleged that by reason of her race, age and/or sex, and contrary to section 5 of the CHRA, she was subject to discrimination by Canada Border Services Agency (CBSA) officers at the port of entry on Cornwall Island in Cornwall, Ontario. The complainant claimed that CBSA officers selected her for additional inspection, subjected her to heightened suspicion or aggression, and subjected her to insulting and demeaning racial comments. The CBSA presented a motion before the Tribunal for an order dismissing the complaint on the ground that the CBSA does not provide "services" within the meaning of section 5 of the CHRA when it enforces Canada's customs and excise legislation. This ruling dealt with the CBSA's motion.

The CHRA does not define "services" and, while the Tribunal found the Federal Court of Appeal decision on the topic persuasive, it did not find it determinative of the issue.[2] According to the Tribunal, it had to consider whether CBSA officers conducting primary and secondary inspections of travellers and their vehicles were providing "services" within their mandate of "integrated border services." The Tribunal found the CBSA has a direct public relationship with all Canadians returning to Canada. It is a public body providing border services for the public good. It declares, unequivocally, its commitment to "service excellence" in keeping Canada's borders secure, and that "service excellence" is of vital importance in serving the trade community, Canadian citizens and visitors to Canada. The Tribunal also found that the enactment of the *Customs and Excise Human Rights Investigation Regulations* established a public right to file CHRA complaints

[2] In *Canada (Attorney General) v. Watkin*, 2008 FCA 170, the Federal Court of Appeal found that "services" within the meaning of section 5 of the CHRA contemplated something of benefit being "held out" as services and "offered" to the public. On this basis, the Court found that Health Canada, when enforcing the *Food and Drugs Act*, was not providing "services … customarily available to the general public" within the meaning of section 5. The actions in question were coercive measures intended to ensure compliance. The fact that these measures were undertaken in the public interest did not make them "services." CBSA argued that the same reasoning applied in the case of border inspections; however, the Tribunal found that the characterization of Health Canada's enforcement actions as "…coercive measures intended to ensure compliance" limited *Watkin* to its facts.

relating to the manner in which CBSA officers deal with travellers in administering or enforcing federal customs and excise law. Finally, the Tribunal found that there is general acceptance in the case law across Canada that police officers provide "services" within the meaning of provincial human rights law. According to the Tribunal, the similarity in the enforcement functions performed by police officers and CBSA officers ought not to be disregarded, since to do otherwise would fail to heed the Supreme Court of Canada's direction that human rights statutes should be interpreted in a consistent and harmonious fashion where possible.

The Tribunal concluded that in processing the complainant and her vehicle through primary and secondary examinations, CBSA officers were providing "services" within the meaning of section 5 of the CHRA. As a result, CBSA's motion was dismissed.

The Attorney General of Canada has applied for judicial review.

| *Results for Canadians* |
| --- |
| This ruling provides insightful analysis and interpretation of the CHRA in dealing with evolving human rights concepts. The determination of the "services" issue in this case is reflective of some of the novel and complex questions being brought before the Tribunal, which challenge the Tribunal to consider the extent of the protections created under the CHRA. With the repeal of section 67 of the CHRA, and the Tribunal's ability to now consider discrimination complaints emanating from the application of the *Indian Act*, the Tribunal anticipates dealing with many other complaints that will test the limits of the CHRA in regard to discrimination in the provision of "services." On judicial review, the Federal Court may have an opportunity to continue the jurisprudential dialogue surrounding the "services" issue and perhaps further define the ambit of the term as it appears in the CHRA. |

***Ray Davidson v. Health Canada*** **2012 CHRT 1**

The complainant alleged that the respondent discriminated against him on the basis of his race, sex and colour in refusing to hire him. Among other allegations, the complainant claimed that during a competition for a job with the respondent, he was marked unreasonably hard compared with other candidates, accounting for his rank as fifth out of five eligible candidates. According to the respondent, the complainant had twice appealed to the Public Service Commission Appeal Board (PSCAB), which had considered the question of whether the complainant had been marked unreasonably hard. The respondent therefore brought a motion to preclude the presentation of evidence on this aspect of the complaint as it had already been litigated. This ruling dealt with the respondent's motion.

Relying on the recent decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*, the Tribunal sought to determine whether the substance of the complaint had already been appropriately dealt with. In applying *Figliola*, the Tribunal found that there was no express statutory language removing the concurrent jurisdiction of the PSCAB to decide human rights issues. Although the complainant did not allege that he was the victim of discrimination before the PSCAB, the Tribunal found that if it were to examine the complainant's allegations regarding the assessment of candidates during the selection process, it would have to perform essentially the same analysis that the PSCAB had done: comparing the exams of all the successful candidates with that of the complainant to determine if the assessment had been performed in a fair and equitable manner. The Tribunal concluded that the complainant had had an opportunity before the PSCAB to present his case regarding the

assessment of candidates during the selection process and that it did not make sense to expend public and private resources to relitigate the same allegation.

As a result, the Tribunal allowed the respondent's motion and ruled that it would not receive evidence on the issue of whether the complainant had been marked harder than other candidates during the selection process.

| *Results for Canadians* |
|---|
| This ruling marked the Tribunal's first opportunity to consider the Supreme Court of Canada's decision in *Figliola* regarding the doctrines of *issue estoppel*, abuse of process and collateral attack, and their application in the context of human rights adjudication. Applying *Figliola*, and in determining that the substance of one of the complainant's allegations had already been appropriately dealt with, the Tribunal avoided the expenditure of public and private resources on relitigating the issue. 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 Tribunal will not review the decisions of other tribunals in this regard, or provide parties with another forum to essentially relitigate issues that have already been decided by another body. |

### *Judicial Review*

As the following table illustrates, 47 percent of the Tribunal's 51 decisions of the past four years have been challenged, and less than 10 percent have been overturned. Although fewer decisions were rendered in 2011 than in previous years, the proportion of decisions being challenged has also decreased. (While 59 percent of its 2010 decisions were the subject of judicial review applications, this number dropped to 50 percent for 2011.) The Tribunal remains satisfied that, on the whole, its decisions continue to provide fair and equitable interpretations of the CHRA and to set meaningful legal precedents.

Judicial Reviews, 2008 to 2011*

| | 2008 | 2009 | 2010 | 2011 | Total |
|---|---|---|---|---|---|
| Complaints referred to Tribunal | 103 | 80 | 191 | 82 | 456 |
| Decisions rendered by Tribunal** | 17 | 11 | 17 | 6 | 51 |
| Total challenges | 4 | 5 | 12 | 3 | 24 |
| · Decisions upheld by courts | 1 | 2 | 4 | 0 | 7 |
| · Decisions overturned by courts | 1 | 2 | 2 | 0 | 5 |
| · Judicial review withdrawn or struck for delay | 2 | 0 | 4 | 0 | 6 |
| · Judicial review pending | 0 | 1 | 2 | 3 | 6 |

* Case referral and judicial review statistics are kept on a calendar year basis only.

** Not all cases referred are resolved by a hearing that renders a decision. For example, a growing number of cases are being resolved by mediation.

### *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 discrimination. The primary result of the Tribunal's program is that complainants can air their grievances and achieve closure in a

respectful, impartial forum. Moreover, respondents are able to test the validity of allegations made in a quasi-judicial setting. In the longer term, Tribunal decisions create meaningful legal precedents for use by employers, service providers and Canadians at large.

During 2011–2012, the Tribunal issued five written decisions determining whether a discriminatory practice occurred in a particular instance (subject to rights of judicial review before the Federal Court). Although these decisions have a direct and immediate impact on the parties involved, they also have more far-reaching repercussions, giving concrete and tangible meaning to an abstract set of legal norms. While the CHRA prohibits discriminatory practices and provides certain justificatory defences, it does not provide examples. Nor does the Act define the term discrimination. Tribunal decisions are therefore the primary vehicle through which Canadians see the impact of the legislation and learn the extent of their rights and obligations under the Act.

## Program Activity: Internal Services

Internal Services are groups of related activities and resources that are administered to support the needs of programs and other corporate obligations of the Tribunal. These groups are: Management and Oversight Services; Communications Services; Legal Services; Human Resources Management Services; Financial Management Services; Information Management Services; Information Technology Services; Real Property Services; Material Services; Acquisition Services; and Travel and Other Administrative Services. Internal services include only those activities and resources that apply across the organization and not to those provided specifically to a program.

### 2011–2012 Financial Resources ($ millions)

| Planned Spending | Total Authorities | Actual Spending |
|---|---|---|
| 1.9 | 3.0 | 3.2 |

### 2011–2012 Human Resources (FTEs)

| Planned | Actual | Difference |
|---|---|---|
| 13 | 13 | 0 |

#### *Performance Summary and Analysis of Program Activity*

Internal services make a critical contribution to the achievement of the Tribunal's singular primary program. During the reporting period, the Tribunal's main focus was to normalize the workplace and re-establish core controls and processes for the management of its financial, material and human resources. Also, in light of the federal government's evolving direction on shared service delivery among small departments and agencies (SDAs), the Tribunal also laid the groundwork for seeking alternate ways of delivering some of its corporate services.

**Communications**. During the reporting period, the Tribunal Chairperson initiated numerous outreach events with First Nations communities across the country to explain

its mandate, processes and the impact of repealing section 67 of the CHRA, and undertook stakeholder consultations on the enhanced complaint resolution process.

**Human resources management**. In the second half of 2011–2012, the Tribunal 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 work through unprecedented labour relations issues that had also affected the Tribunal in 2010–2011. Demonstrating its commitment to full compliance with applicable legislation and policy instruments, the Tribunal was swift to begin addressing the findings of a Public Service Commission staffing audit conducted in the first quarter.

**Financial management**. The Tribunal focused on two specific areas of financial management during the second half of 2011–2012 to re-establish sound financial management practices and core controls. In September 2011, the Office of the Comptroller General began a core control audit and identified numerous areas of improvement. In December 2011 the Tribunal secured additional funding through the 2011–2012 Supplementary Estimates (C) process to relieve the budgetary pressures that affected its operations. Meanwhile, it began re-establishing core controls for effective and efficient management of its financial resources and remains committed to ensuring compliance with legislative authorities and policy instruments that govern sound financial management practices.

**Information technology**. In April 2011 the Tribunal experienced a debilitating malicious infiltration of its IT system, which required a complete rebuild of its entire infrastructure. Interim measures were secured from Public Works and Government Services Canada (PWGSC), but for more than six months the Tribunal's limited IT capacity paralyzed many of its operations. In the wake of this IT failure, the Tribunal decided to outsource its IT needs to PWGSC's ITSB. IT efforts were focused on providing adequate IT support so that the Tribunal could continue to conduct its operations smoothly during the transition. In the meantime, work continues on addressing interoperability issues relating to the Windows 7 platform.

### *Lessons Learned*

The Tribunal's experience with PWGSC–ITSB illustrated that despite its commendable efforts, this large organization is not yet structured to cost-effectively serve as a sole service provider for all the IT needs of an SDA. The Tribunal therefore remains committed to exploring other options for internal service delivery, not just for IT services, but also for other back-office support. The Tribunal plans to approach similar SDAs to discuss sharing internal services where it is feasible and cost-effective to do so.

# Section III: Supplementary Information

## Financial Highlights

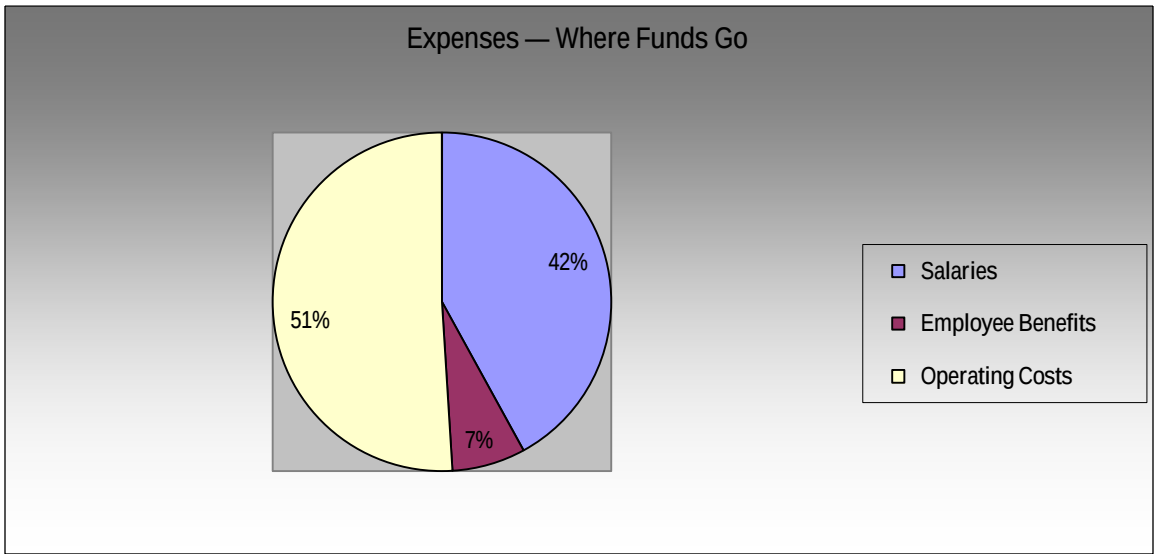
### Condensed Statement of Financial Position (Unaudited)
As at March 31, 2012 ($)

| | % Change | 2011–2012 | 2010–2011 (Restated) |
|---|---|---|---|
| Total net liabilities | 33 | 679,279 | 1,017,396 |
| Total net financial assets | 29 | 378,450 | 530,153 |
| Departmental net debt | 38 | (300,829) | (487,243) |
| Total non-financial assets | 46 | 48,548 | 89,899 |
| Departmental net financial position | 37 | (252,281) | (397,344) |

### Condensed Statement of Operations and Departmental Net Financial Position (Unaudited)
For the year ended March 31, 2012 ($)

| | % Change | 2011–2012 | 2010–2011 (Restated) |
|---|---|---|---|
| Total expenses | 10.3 | 6,165,077 | 5,589,627 |
| Total revenues | — | — | — |
| Net cost of operations before government funding and transfers | 10.3 | 6,165,077 | 5,589,627 |
| Departmental net financial position | 36.5 | (252,281) | (397,344) |

## Financial Highlights — Graph




These percentages are based on actual 2011–2012 expenditures of $5.0 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, temporary help and translation.

## Financial Statements

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

## Supplementary Information Table

Electronic supplementary information tables listed in the 2011–2012 Departmental Performance Report can be found on the Treasury Board of Canada Secretariat's website.

- Internal Audits and Evaluations

# 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