SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

Court File No.: 33668

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Appellant
(Appellant in the Federal Court of Appeal)

-and-

CANADA POST CORPORATION and CANADIAN HUMAN RIGHTS COMMISSION

Respondents
(Respondents in the Federal Court of Appeal)

Court File No.: 33670

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

Appellant
(Appellant in the Federal Court of Appeal)

-and-

CANADA POST CORPORATION and PUBLIC SERVICE ALLIANCE OF CANADA

Respondents
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CANADA POST CORPORATION and CANADIAN HUMAN RIGHTS COMMISSION

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(Filed pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. On October 7, 2005, the Canadian Human Rights Tribunal (the "Tribunal") upheld a human rights complaint presented by the Appellant, Public Service Alliance of Canada ("PSAC"), finding that the Respondent, Canada Post Corporation, had violated the pay equity provisions of the *Canadian Human Rights Act* ("*CHRA*"). In particular, the Tribunal found as a fact that a wage gap existed when the work of employees in the male-dominated Postal Operations Group ("PO") was compared to work of equal value performed by the female-dominated Clerical and Regulatory Group ("CR"). The Tribunal's decision was set aside by the Federal Court with a direction that the complaint be dismissed, a decision affirmed by the majority of the Federal Court of Appeal. Justice Evans provided a forceful and comprehensive dissent, stating he would allow PSAC's appeal and reinstate the Tribunal's order.[1]

2. This Court has noted that "'women's jobs' are chronically underpaid". Pay equity legislation seeks to remedy this deep-rooted systemic discrimination, which is caused by gender-based occupational segregation and stereotypical assumptions about the nature of work performed by women. While pay equity is a relatively simple principle to understand, complex and sophisticated mechanisms are required to achieve it. For this reason courts afford substantial deference to tribunal decisions that require an understanding of this type of evidence.[2]

3. In the present case, the Tribunal reached its conclusion after over 400 hearing days spanning 10 years. The Tribunal heard evidence from 14 expert witnesses, more than 50 lay witnesses, and reviewed over 1,000 exhibits. The Tribunal also considered an expert pay study tendered by PSAC, which concluded

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[1] **Decision of the Canadian Human Rights Tribunal**, dated October 7, 2005 ["Tribunal Decision"] [Appellant's Record ["AR"], Vol. I, Tab 2]; **Reasons for Judgment and Judgment of the Federal Court**, dated February 21, 2008 ["FC Reasons"] [AR, Vol. II, Tab 3]; **Reasons for Judgment and Judgment of the Federal Court of Appeal**, dated February 22, 2010 ["FCA Reasons"] [AR, Vol. II, Tab 4]; ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6, s. 11 ["*CHRA*"]

[2] ***Newfoundland (Treasury Board) v. N.A.P.E.***, [2004] 3 S.C.R. 381 at para. 45 ["*Nfld. v. N.A.P.E.*"] [PSAC Authorities, Tab 16]; ***Canada (Attorney General) v. Public Service Alliance of Canada***, [2000] 1 F.C. 146 (TD) at para. 86 ["*Canada v. PSAC*"] [PSAC Authorities, Tab 7]; ***Canada (Human Rights Commission) v. Canadian Airlines International Ltd.***, [2006] 1 S.C.R. 3 at para. 42 ["*Canadian Airlines*"] [PSAC Authorities, Tab 8];

that Canada Post had paid employees in the male-dominated PO Group more than employees in the female-dominated CR Group for work of equal value. Canada Post, for its own reasons, declined to put forward a pay study of its own.

4. The Tribunal ultimately accepted the evidence of PSAC's experts, rejecting outright the evidence of Canada Post's main witness. The Tribunal thus concluded that a wage gap existed when the work of the predominantly female CR Group was compared to work of equal value performed by the predominantly male PO Group. The Tribunal reduced its award by 50%, however, in light of the fact that certain evidence failed to satisfy the higher sub-bands of reasonable reliability.[3]

5. The reasons of the Courts below for setting aside the Tribunal's decision contain five fundamental errors. First, the applications judge erred in rejecting the male comparator group approved by the Tribunal on the basis that it improperly included a minority group of women. As Justice Evans noted in his dissenting reasons, the *Equal Wages Guidelines, 1986*, which govern federal pay equity complaints, provide the Tribunal with broad discretion to select a comparator group and "explicitly recognize that a predominantly male comparator group may contain a minority of women". Given that the PO Group clearly satisfied the threshold for a group its size to be considered male predominant, the decision to quash the Tribunal's decision on the basis that it included a minority of women constitutes an extraordinary departure from the framework established by the *1986 Guidelines*.[4]

6. Second, the majority of the Court of Appeal erred in ruling that the Tribunal failed to find that the CR and PO Groups performed work of equal value, a conclusion that had not been reached by the applications judge or set out in Canada Post's submissions. The Tribunal had squarely addressed this issue, however, stating that PSAC's expert evidence was "sufficient, on a balance of probabilities, to demonstrate a wage gap when the work of predominantly female CR's was

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[3] **Tribunal Decision** at paras. 569, 639, 801 [AR, Vol. I, Tab 2]

[4] ***Equal Wages Guidelines, 1986***, SOR 86-1082, Canada Gazette Part II, Vol. 120 ["*1986 Guidelines*"]; **FCA Reasons** at para. 185, per Evans J.A. [AR, Vol. II, Tab 4] [emphasis added]

compared with the work of equal value being performed by the predominantly male PO's at Canada Post".[5]

7. Third, the Courts below erred in concluding that, despite having repeatedly identified the correct standard of proof, the Tribunal applied a standard that was below the balance of probabilities. The Courts base their decision on a selective parsing of certain statements in the Tribunal's reasons, each of which, as Justice Evans noted, is explained by the evidentiary and jurisprudential context in which they were made. PSAC maintains that the Courts below failed to apply the presumption set out in *McDougall*, which holds that a decision-maker is presumed to have applied to correct standard of proof, and discarded the deferential approach to be taken when reviewing decisions at the heart of a tribunal's expertise.[6]

8. Fourth, the Courts below erred in failing to set aside the Tribunal's decision to reduce its damages award by 50%. Once a complaint has met the standard of proof in a pay equity case it has established, as a fact, the existence of a wage gap. The Tribunal erred in requiring evidence <u>above</u> a balance of probabilities for a full award of damages to be granted, and in failing to provide a principled basis for its order of damages.

9. Finally, the Courts below erred in concluding that the circumstances of the present case allowed them to refer the decision back to the Tribunal with the direction that it be dismissed. A reviewing court is not entitled to substitute its judgment on the facts for that of the Tribunal.

10. For these reasons, PSAC maintains that the judgment of the Federal Court of Appeal must be overturned and the decision of the Tribunal restored, save for its decision to reduce its award by 50%.

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[5] **Tribunal Decision** at para. 801 [AR, Vol. I, Tab 2]; **FCA Reasons** at para. 228, per Evans J.A. [AR, Vol. II, Tab 4]

[6] ***F.H. v. McDougall***, [2008] 3 S.C.R. 41 at paras. 40, 43-44, 54 ["*McDougall*"] [PSAC Authorities, Tab 13]; **FCA Reasons** at para. 151, per Evans J.A. [AR, Vol. II, Tab 4]

B. Background

I. Gender-Based Systemic Wage Discrimination

11. Gender-based wage discrimination is the by-product of hidden attitudes or forces that undervalue work traditionally associated with women, depressing the wages paid for that work. These attitudes and forces include occupational segregation and stereotypical assumptions about the nature of this work. To the extent that qualifications for women's work are seen as being related to the traditional role of women in the home, this work is undervalued and, ultimately, undercompensated.[7]

12. Occupational segregation has remained a consistent feature of Canadian workplaces for over 100 years, a pattern that has, for the most part, continued unchanged to the present. As noted in 2004 by the Federal Pay Equity Task Force, occupational segregation continues to be a "major obstacle" for women.[8]

13. Like most other workplaces, occupational segregation of men and women is found in the Federal Public Service, where the current occupational group structure has been in place since the mid 1960s. The Federal Government admitted that its occupational group structure and pay practices violated section 11 of the *CHRA*, making unilateral payments to CR and other female predominant groups at

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[7] ***Public Service Alliance of Canada v. Canada (Department of National Defence),*** [1996] 3 F.C. 789 (C.A.) at 798-802 ["*Department of National Defence*"] [PSAC Authorities, Tab 19]; **Weiner, N. & Gunderson, M., *Pay Equity: Issues, Options and Experiences*** (Toronto: Butterworths, 1990) at 6-10 ["Weiner"] [PSAC Authorities, Tab 42]; ***Service Employees International Union, Local 204 v. Ontario (Attorney General)*** (1997), 35 O.R. (3d) 508 (Gen. Div.) at 526 to 528, and 533 to 534 ["*SEIU v. Ontario*"] [PSAC Authorities, Tab 24]; ***Women's College Hospital, (No. 4)*** (1992), 3 P.E.R. 61 at 65 to 68 ["*Women's College Hospital*"] [PSAC Authorities, Tab 30]; ***Haldimand-Norfolk, (No. 3)***, [1989] O.P.E.D. No. 3 ["*Haldimand-Norfolk*"] at paras. 39-44 [PSAC Authorities, Tab 14]; ***PSAC v. Canada (Treasury Board) (No. 3)***, (1998) C.H.R.R.D/349 at paras 219-247 ["*PSAC v. Treasury Board No. 3*"] [PSAC Authorities, Tab 21]; ***Newfoundland (Treasury Board) v. N.A.P.E.,*** [2004] 3 S.C.R. 381 at para. 45 ["*Nfld. v. N.A.P.E.*"] [PSAC Authorities, Tab 16]; **Exhibit PSAC-2, 2A & 2B,** Equal Pay for Work of Equal Value, Dr. Pat Armstrong, January 1993, p. 7-8 ["Armstrong Report"] [AR, Vol. IX, Tab 35, pp. 153-154, CD#3]; ***Canadian National Railway Co. v. Canada (Human Rights Commission),*** [1987] 1 S.C.R. 1114 ["*Action Travail*"] at 1138-1140 [PSAC Authorities, Tab 10]

[8] **Pay Equity Task Force: *A New Approach to a Fundamental Right, Final Report, 2004,*** at 22; **Weiner**, *supra*, p. 6-7; **Exhibit HR-2, Tab 3, Abella J., *Report of the Commission on Equality in Employment* (October 1984)** at 245-249 [AR, Vol. IX, Tab 23 pp. 130-134, CD #2]; **Jackson, A., *Work and Labour in Canada: Critical Issues*** (Toronto: Canadian Scholars' Press Inc., 2005) at 79-80 and 86-91 [PSAC Authorities, Tab 36]

Treasury Board as early as 1990. The wage gap for these groups was later found by the Tribunal to be higher, a decision upheld by Justice Evans in the Federal Court. PSAC had every reason to believe that the problem identified for the CR Group in the Treasury Board case was also present at for the CR Group at Canada Post, given that Canada Post was a government department prior to 1981 and the compensation regimes of both employers were rooted in a common occupational group and wage structure.[9]

14. The pay equity issue was brought to the attention of Canada Post as early as 1981. During the 1994 round of collective bargaining, the wages of the CR Group were raised by the equivalent of one classification level, as were the wages of the secretarial group. This change amounted to an increase in pay of 15%, as compared to increases in the order of 1½% given to other groups. On August 3, 2002, Canada Post implemented a New Job Evaluation Plan that the parties agreed was "free of gender bias" and "[met] the requirements of section 11 of the *Canadian Human Rights Act*", introducing higher wage rates for the CR Group. As a result, the only issue before the Tribunal was whether Canada Post had violated section 11 of the *CHRA* for the period prior to this date.[10]

II. The Complaint and the Tribunal's Decision

15. On August 24, 1983, PSAC filed a human rights complaint alleging that Canada Post had violated section 11 of the *CHRA* by paying employees in the male-dominated PO Group more than employees in the female-dominated CR

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[9] ***Public Service Alliance of Canada v. Canada (Treasury Board) (No. 2)***, (1996) C.H.R.R.D/349 ["*PSAC v. Treasury Board No. 2*"] [PSAC Authorities, Tab 22]; **Exhibit PSAC-23, Public Service Equal Pay Adjustments, Treasury Board of Canada Secretariat**, April 1990 [AR, Vol. IX, Tab 36, CD #3]; ***Canada v. P.S.A.C.,*** *supra* [PSAC Authorities, Tab 7]; **Exhibit A-1, App. F, Occupational and Group Categories in CPC and their Bargaining Units Before Crown Corporation Status** [AR, Vol. 7, Tab 26, CD#2]; **Jones, Vol. 120**, p. 16344 ln 5 to ln 20 [AR, Vol. IV, Tab 13, CD #1]; **Tribunal Decision** at paras. 30-37 [AR, Vol. I, Tab 2]; **Classification Standard, Postal Operations Group Operational Category A-1, App. H,** [AR, Vol. VII Tab 27]; ***Canada Post Corporation Act***, S.C. 1980-81-82-83, c. 54, s. 68, 70 [PSAC Authorities, Tab 43]

[10] **Tribunal Decision** at paras. 957-961 [AR, Vol. I, Tab 2]; **Jones, Vol. 120**, p. 16355 ln 4 to p. 16360 ln 25 [AR, Vol. IV, Tab 13, CD #1]; **Jones, Vol. 122**, p. 16569 ln 9 to 16584 ln 18 [AR, Vol. IV, Tab 15, CD #1]; **Exhibit PSAC-27, Circular Letter, Public Service Alliance of Canada, June 22, 1994** [AR, Vol. IX, Tab 37, CD#3]; **Exhibit R-156, Bulletin, Union of Postal Communications Employees,** March 24, 1994 [AR, Vol. X, Tab 45, CD #4]; **Exhibit R-157, Bulletin, Union of Postal Communications Employees**, June 17, 1994 [AR, Vol. X, Tab 46, CD#4]

Group for work of equal value. Following a lengthy investigation by the Commission, the complaint was referred to the Tribunal for further inquiry on March 16, 1992.

16. It is broadly recognized that the most effective means of achieving pay equity is through the cooperative efforts of the employer and the union using an agreed-upon method of evaluation to conduct a joint pay equity study, as has happened in a number of earlier cases. As noted by Justice Evans in his dissenting reasons, however, the parties in this case were unable to work together in this manner. Indeed, notes taken by John Hucker, Secretary General of the Commission, following a September 14, 1990 meeting with Bill Kennedy, Corporate Vice President of Canada Post, state that Canada Post "made it clear that [the Commission] could not expect cooperation" given that "the cost implications for Canada Post were enormous". Canada Post would "take the 'legal' route on this one" and "safeguard its position with any means available to it on the pay equity side".[11]

17. To this end, the Tribunal was required to address a wide range of preliminary objections by Canada Post. First, the Tribunal dismissed Canada Post's challenge to its institutional independence and impartiality. Second, the Tribunal rejected Canada Post's argument that the *1986 Guidelines* were being applied retroactively and that they interfered with Canada Post's vested rights, a conclusion affirmed by the applications judge on judicial review. Third, the Tribunal rejected Canada Post's argument that portions of the *1986 Guidelines* were invalid as they established a "pay equity" regime. Fourth, the Tribunal rejected Canada Post's claim that the

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[11] **Tribunal Decision** at para. 673 [AR, Vol. I, Tab 2]; **FCA Reasons**, paras. 159-167, 198 per Evans J.A. [AR, Vol. II, Tab 4]; **Exhibit HR-1, Tab 22, Implementing Pay Equity in the Federal Jurisdiction, Canadian Human Rights Commission,** March 1992 [AR, Vol. IX, Tab 31, CD #2]; **Willis, Vol. 315**, p. 36766 ln 2 to p. 36768 ln 10, p. 36789 ln 16 to p. 36792 ln 1 and p. 36795 ln 5 to p. 36797 [AR, Vol. VI, Tab 22, CD #1]; **Exhibit HR-31, Tab 6 at 111-112, Memorandum from John Hucker, September 14, 1990** [AR, Vol. IX, Tab 34, pp. 143-144, CD #2]; **Exhibit A-1, Appendix K, Canadian Human Rights Commission Investigation Report, January 27, 1992** ["Investigation Report"] [AR, Vol. VIII, Tab 29, CD #2]; ***PSAC v. Treasury Board No. 2,*** *supra* [PSAC Authorities, Tab 22]; ***Department of National Defence***, *supra* [PSAC Authorities, Tab 19]

defences available to rebut the presumption against discrimination under section 11 extend beyond the "reasonable factors" in section 16 of the *Guidelines*.[12]

18. Having dealt with these preliminary issues, the Tribunal went on to consider the four elements necessary to establish a violation of section 11.

(i) The Four Elements of Section 11

1. The Selection of the Comparator Group

19. PSAC chose to compare the female-dominated CR Group with the male-dominated PO Group. Mr. Jones, a Classification and Equal Pay Officer at PSAC, testified that it did so because of similarities between the functions of the two groups and, more importantly, the fact that the PO Group was the largest occupational group at Canada Post and very obviously predominantly male:[13]

> Q. I would ask you now to turn to your selection of the comparator group. How did you come to choose the PO group?
>
> A. The best way to answer that question is to say how could we not have chosen the Postal Operations group? They were the dominant group at Canada Post. As a group, they were close to 47,000 or 48,000 employees. They were overwhelmingly the largest occupational group at Canada Post. It would have been strange to have taken a small group.

20. The PO Group, and each of its subgroups, have at all relevant times satisfied the 55% gender predominance required for a group of its size to be designated gender predominant. The following table illustrates the population distribution as of July 1983, when over 75% of the PO Group was male:[14]

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[12] **Tribunal Decision** at paras. 70-92, 100-145, 151-167, 203-253, 323-324 [AR, Vol. I, Tab 2]; **FC Reasons** at paras. 89-105 [AR, Vol. II, Tab 3]; **Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed.** (Markham: LexisNexis Canada, 2008) ["Sullivan"] at pp. 500-502, 669-670, 675, 686, 720 [PSAC Authorities, Tab 41]; ***1986 Guidelines***, *supra*, at s. 16

[13] **Jones, Vol. 118**, p. 15917 ln 14 to p. 15918 ln 11, p. 15857 ln 25 to p. 15860 ln 6 [AR, Vol. III, Tab 12, CD #1]; **Jones Vol. 121**, p. 16482 ln 12 to ln 19, p. 16478 ln 11 to ln 16 [AR, Vol. IV, Tab 14, CD #1]

[14] **Exhibit A-1, App. J, Complaint Form**, Appendices A-1, A-2 and A-3 [AR, Vol. VIII, Tab 28, CD #2]; ***1986 Guidelines***, *supra*

Subgroup	No. of Females	Percent Female	No. of Males	Percent Male	TOTAL
PO-EXT	2,396	11.0	19,265	89.0	21,661
PO-INT	9,972	39.8	15,084	60.2	25,056
PO-SUP	240	5.7	3,955	94.3	4,195
TOTAL	**12,608**	**24.76**	**38,304**	**75.24**	**50,912**

21. The CR Group totalled 2,316 employees in 1983, of which 1,872 or 80.8 percent were female.[15]

22. The Tribunal found that, at the time the Complaint was referred to Tribunal in 1992, the CR Group remained predominantly female with a percentage of over 83% female. The PO Group (now comprised of the PO-INT and PO-EXT subgroups) remained predominantly male with a percentage factor of just above 71% male. The following table illustrates the population distribution as of March 1992:[16]

Subgroup	No. of Females	Percent Female	No. of Males	Percent Male	TOTAL
PO-EXT	3,013	14.4	17,862	85.6	20,875
PO-INT	8,306	44.6	10,328	55.4	18,634
TOTAL	**11,319**	**28.6**	**28,190**	**71.4**	**39,509**

23. Canada Post objected that the PO Group was not an appropriate comparator for the CR Group. Canada Post claimed that the comparator group should be limited to the GS and GL&T Groups, and, alternatively, that the comparator should be limited to the PO-4 level of the PO-INT sub-group, despite the fact that this is not an employer-designated occupational group and was gender neutral. Canada Post further alleged that PSAC was "cherry picking" a highly paid group in order to increase the likelihood of demonstrating wage discrimination.[17]

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[15] **Exhibit A-1, App. J, Complaint Form**, Appendix A-5 [AR, Vol. VIII, Tab 28, CD #2]

[16] **Tribunal Decision** at para. 265 [AR, Vol. I, Tab 2]; **Exhibit A-1, App. L,** "Distribution of Employees by Group, Classification, Level and Sex", various years [AR, Vol. VIII, Tab 30, CD #2]

[17] **Tribunal Decision** at paras. 269-270, 274-277 [AR, Vol. I, Tab 2]

24. The Tribunal rejected Canada Post's position and accepted the PO Group as an appropriate comparator group. The Tribunal explained that the PO-4 level of the PO-INT sub-group was not an appropriate comparator group, given that it did not constitute an "occupational group" as required by the *1986 Guidelines*. Moreover, the Tribunal noted that, while Canada Post's expert testimony indicated that a complainant group in a pay equity complaint may attempt to "cherry pick" a small but highly paid comparator group, this concern did not apply in the present case where the PO Group represented approximately 80% of the Canada Post workforce.[18]

25. The Tribunal also found that PSAC had appropriately proposed the PO Group on the basis of its size and the knowledge that some members performed similar work to the CR Group. The Tribunal noted that the only other available groups "represented a small percentage of Canada Post employees" and that there was "no evidence that the work performed by members of these groups was observed to be similar to that of any members of the CR complainant group". In any event, Canada Post failed to tender any expert evidence comparing the CR Group with any of the comparator groups it proposed.[19]

2. Employed in the Same "Establishment"

26. The Tribunal accepted PSAC's position that Canada Post operated as an integrated business entity with corporate-wide personnel and wage policies, concluding that the PO and CR Groups both worked in the same establishment.[20]

3. Whether the Two Groups Performed Work of Equal Value

27. The Tribunal's determination of whether the CR and PO Groups performed work of equal value rested on its assessment of conflicting expert testimony with respect to three issues: (1) the reliability of the job evaluation system used to evaluate the positions; (2) the reliability of the process employed by PSAC's expert

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[18] **Tribunal Decision** at paras. 271-277 [AR, Vol. I, Tab 2]

[19] **Tribunal Decision** at paras. 278-282 [AR, Vol. I, Tab 2]

[20] **Tribunal Decision** at paras. 307, 328-354 [AR, Vol. I, Tab 2]

witnesses; and (3) the reliability of the job information used to perform this analysis. The Tribunal concluded that each of these inputs was reasonably reliable, such that the resulting values attributed by PSAC's experts to the two groups could be relied on to establish that the two groups performed work of equal value.

(a) PSAC's Expert Evidence

28. The job information available in the complaint can be divided into two categories. The principal source of job information was collected by the Commission during its investigation of the complaint. Job information for the CR positions consisted of successive lists of employee print-outs furnished by Canada Post and a Job Fact Sheet (a detailed questionnaire) designed by the Commission for completion by a random sample of 194 CR positions. Each Job Fact Sheet was to be completed by the employee and signed by the appropriate supervisor and Division Manager, with the relevant job description and organization chart attached. An Interview Guide was developed for use during follow-up interviews.[21]

29. Job information for the PO positions was less easily obtained. Canada Post would not allow PO employees to complete the Job Fact Sheet on company time and the union representing the PO employees declined to allow its membership to participate in "after hours" unpaid work. As a result, the Commission was obliged to create a grouping of 10 'generic' PO job categories using information provided by Canada Post. The 10 'generic' jobs did not include the PO supervisors ("PO-SUP") as it was considered too onerous to reconcile all the PO-SUP job titles and levels.[22]

30. In 1993, PSAC retained a three-member team of experts (the "Professional Team") to conduct an independent job evaluation study of the CR positions and 10 "generic" PO jobs. The Professional Team looked at all of the job information collected by the Commission during the investigation stage and conducted

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[21] **Tribunal Decision** at paras. 366-371 [AR, Vol. I, Tab 2]

[22] **Tribunal Decision** at paras. 375-376 [AR, Vol. I, Tab 2]; **Exhibit A-1, Appendix K, Investigation Report** [AR, Vol. VIII, Tab 29, CD #2]

telephone interviews with 114 CR incumbents. Dr. Wolf, the spokesperson for the Team, had significant expertise in the Hay method of job evaluation.[23]

31. The Professional Team evaluated the job information using a Hay XYZ Plan, although the Team created a more elaborate "working conditions" guide chart given that it considered this to be the least developed of the Hay Plan factors. The Professional Team employed a factor-by-factor comparison method, which, while more time-consuming, was considered to be the most accurate approach for this case. The Team met as a group to evaluate each position on a consensus basis; in cases of any doubt, it would evaluate a CR position lower and a PO higher.[24]

32. In 1994, the Professional Team provided an initial report based on the job information collected by the Commission during the investigation stage and the Team's telephone interviews. The Professional Team found that the job information was adequate for job evaluation purposes. Dr. Wolf explained:[25]

> We had information that we felt was sufficient to meaningfully evaluate the CR positions and to meaningfully evaluate the PO positions based on what we had in its totality [...]
>
> [...] I felt, as did my cohorts, that we had adequate information to evaluate these jobs accurately. Again I stress the word "adequate" as opposed to "ideal".

33. While under extensive cross-examination, Dr. Wolf repeatedly stated that, although he and the Professional Team would have preferred stronger job data, the information was adequate for reliable evaluation:

> Is it ideal? No. And [it is] less than we would have liked, which we noted. [...]
>
> Do you want to say that there wasn't enough information to make an expert opinion about the minimum evaluation of this job? I will dispute that with you.

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[23] **Tribunal Decision** at paras. 382-398, 442, 566 [AR, Vol. I, Tab 2]; **Wolf, Vol. 125**, p. 17053 ln 2 to 17057 ln 23 [AR, Vol. V, Tab 16, CD #1]

[24] **Tribunal Decision** at para. 386 [AR, Vol. I, Tab 2]; **Wolf, Vol. 126**, p. 17203 ln 17 to p. 17204 ln 4 [AR, Vol. V, Tab 17, CD #1]; **Wolf, Vol. 127**, p. 17356 ln 14 to 17357 ln 7, p. 17266 ln 22 to p. 17267 ln 6, p. 17270 ln 23 to p. 17271 ln 7, p. 17372 ln 4 to ln 21 [AR, Vol. V, Tab 18, CD #1]; **Wolf, Vol. 147**, p. 20255 ln 17 to 20257 ln 23 [AR, CD #1]

[25] **Wolf, Vol. 127**, p. 17345 ln 9 to ln 24 [AR, Vol. V, Tab 18, CD #1]; **Tribunal Decision** at paras. 483-486, 674 [AR, Vol. I, Tab 2]

If you want to say did we have the desired amount of information, the ideal amount of information, I will concede that. We did not. [Emphasis added][26]

[...]

If the question is, is there the potential that job understanding would be enhanced on some positions by having additional input from people within the company who knew these jobs, the answer is obviously yes.

If the question is am I confident that the results would be replicated with a very, very high degree of consistency, the answer to that is yes also.[27]

34. Dr. Wolf also stated that he was confident in the process used by the Professional Team and the validity of their evaluations:[28]

> I feel that these evaluations are valid representations of the particular jobs at hand. I wouldn't have evaluated the job if I didn't feel we could evaluate it in a meaningful and appropriate way. That's why we punted on the four we punted on, because we felt we just couldn't accurately evaluate those jobs.
>
> Q. How does the standard here compare with commercial standards?
>
> A. As I think I have indicated, we took a more rigorous approach, or more exacting than we would normally be. So it certainly at least meets, and in my opinion probably exceeds, the typical commercial standard, if you will, what consultants from Hay or other consulting firms are doing for their clients.

35. Indeed, Dr. Wolf was proud of the evaluation process followed by the Professional Team, noting that it "was without a doubt the finest in which [he] had participated in 20 years of using the Hay method".[29]

36. The Professional Team ultimately concluded that a significant wage gap existed between the work performed by employees in the female-dominated CR Group and work of equal value performed by the male-dominated PO Group.[30]

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[26] **Wolf Vol. 136**, p. 18544 ln 2 to ln 16 [AR, Vol. VI, Tab 20, CD #1]

[27] **Wolf, Vol. 146**, p. 20220 ln 2 to ln 10 [AR, Vol. VI, Tab 21, CD #1]

[28] **Wolf, Vol. 127**, p. 17373 ln 19 to p. 17374 ln 9 [AR, Vol. V, Tab 18, CD #1]

[29] **Wolf, Vol. 129**, p. 17558 ln 9 to 18 [AR, Vol. VI, Tab 19, CD #1]

[30] **Exhibit PSAC-30, Application of the Hay Method Evaluations to a Comparison of the Pay Equity of the CR and PO jobs Identified in the Complaint of Public Service Alliance of Canada v. Canada Post Corporation, Dr. Martin G. Wolf, February 1995** ["Exhibit PSAC-30, Wolf Report, February 1995"] [AR, Vol. X, Tab 39, CD #3]

37. In June 2000, Dr. Wolf was asked to reconvene the Professional Team to consider additional job information provided by Canada Post's numerous factual witnesses who had appeared before the Tribunal. This additional job information, which dealt with both the CR and PO Groups, was comprised of approximately 4,000 pages of exhibits and 70 days of testimony. This information had not previously been supplied to either the Commission or the Complainant.[31]

38. Following an initial screening by Dr. Wolf, the Professional Team reviewed this new material and issued a supplementary report, where it stated that, whereas the initial job information was adequate for evaluation purposes, "[a]t least for the 10 PO jobs, the committee now had more job knowledge than usual". Indeed, the Tribunal found that the additional information augmented and fortified the Professional Team's understanding of the jobs and positions to be evaluated.[32]

39. Dr. Wolf's overall conclusion is best summarized as follows:[33]

> By the time I got through reading all these transcripts, I felt that I could do these jobs. It was probably more than you ever wanted to know about these positions, certainly far more than you needed to know to do job evaluation. A lot of the material we could have done without. [Emphasis added]

40. Importantly, Dr. Wolf and the Professional Team were the only experts to review all of the relevant job information presented to the Tribunal.

(b) Canada Post's Expert Evidence

41. While Canada Post engaged expert witnesses, their only mandate was to criticize the job evaluation and compensation reports prepared by the Commission and the Professional Team. The credibility of Canada Post's expert witnesses was necessarily weakened by two factors: (1) not one expert was asked to actually

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[31] **Exhibit PSAC-182, List of Exhibits sent to Dr. Wolf** [AR, Vol. X, Tab 43, CD #3]

[32] **Tribunal Decision** at paras. 587-590, 639-643, 660 [AR, Vol. I, Tab 2]; **Exhibit PSAC-180, A Review of the Job Evaluation Impact of the Newly Provided CPC Documents and the Associated Testimony**, p. 14-15 [AR, Vol. X, Tab 41, pp. 72-73, CD #3]; **Exhibit PSAC-183, Material Identified by Dr. Wolf for Review by the Professional Team** [AR, Vol. X, Tab 44, CD #3]; **Wolf, Vol. 374**, p. 42069 ln 10 to p. 42070 ln 1 [AR, CD #1]

[33] **Wolf, Vol. 345**, p. 39232 ln 10 to ln 16 [AR, Vol. VII, Tab 23, CD #1]

evaluate the CR and PO jobs; and (2) not one expert looked at all of the job information from both the initial and the supplementary phases.

42. Ms Nadine Winter was Canada Post's primary expert witness and reviewed the Professional Team's 1994 Report. Ms Winter claimed that: (1) the Hay XYZ Plan employed by the Professional Team failed to accurately measure clerical and blue-collar positions; (2) the Team had diverged significantly from the standard application of the Hay Guide Chart-Profile; and (3) the quality of the job information was not adequate. Ms Winter based her assessment on a standard of absolute reliability, which she claimed was required by the jurisprudence.

43. PSAC argued that Ms Winter's evidence should be given no weight, particularly because she did not meet the standard of independence expected of an expert witness. In addition to noting that Ms Winter was not an expert in the Hay system, PSAC cited a series of inconsistencies, omissions and revisions in her testimony. PSAC also noted that Ms Winter had failed to address relevant Tribunal decisions and provisions from the *Act* and the *Guidelines* that conflicted with her view that absolutely reliable evidence was required.[34]

44. Mr. Norman Willis also reviewed the Professional Team's 1994 report on behalf of Canada Post. PSAC submitted that Mr. Willis' testimony should be given little weight in light of his acknowledgment under cross-examination that he "did not have the time" to read many of the documents sent to him by Canada Post, although he failed to acknowledge this in his expert report. Moreover, Mr. Willis failed to consider the litigious context of the Complaint in his report, as he himself had only taken part in cooperative union-management studies. Indeed, Mr. Willis conceded that the process he advocated would be impossible without the full

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[34] **Tribunal Decision** at paras. 489, 505-524, see also 544-545 [AR, Vol. I, Tab 2]; **Winter, Vol. 205,** p. 26180 ln 19 to 26181 ln 17, p. 26184 ln 10 to 26185 ln 3 [AR, CD #1]; **Winter Vol. 188**, p. 24427 to p. 24470 [AR, CD #1]; **Winter, Vol. 210**, p. 26653 ln 15 to p. 26654 ln 3, p. 26655 ln 4 to p. 26665 ln 9, p. 26677 ln 18 to p. 26678 ln 4, p. 26681 ln 20 to p. 26682 ln 17 [AR, CD #1]

cooperation of the employer. Like Ms Winter, Mr. Willis had not seen any of the additional evidence presented to the Tribunal by Canada Post.[35]

45. Mr. Phil Wallace was hired by Canada Post to review and criticize the supplementary report prepared by the Professional Team in 2000. Mr. Wallace, however, was not qualified as an expert in Hay Methodology and did not review all of the additional job information reviewed by the Professional Team in 2000. Nor did he review any of the initial job information or the reports prepared by Ms. Winter or Mr. Willis with respect to this information.[36]

(c) The Tribunal's Assessment of the Expert Evidence

46. The Tribunal began its analysis by acknowledging that the job information in the present case did not meet the standard that one would normally expect from a joint employer-employee "pay equity" study. The Tribunal noted, however, that this was not the threshold the evidence was required to meet, as the quality of the evidence would necessarily be reduced where the parties failed to cooperate.[37]

47. In considering whether the evidence before it was reliable, the Tribunal explained that the standard to be applied was one of reasonableness or "reasonable reliability", "there being no such thing as absolute reliability", the standard insisted on by Canada Post's witness Ms Winter. The Tribunal cited extensively from jurisprudence confirming that it would be improper to apply an "absolute standard of correctness" and that it should be "satisfied with reasonably accurate results".[38]

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[35] **Tribunal Decision** at paras. 550, 586-587, 591, 637, 639-642 [AR, Vol. I, Tab 2]; **Willis, Vol. 163**, p 21959 ln 22 to 21960 ln 3 [AR, CD #1]; **Willis, Vol. 310**, p 36301 ln 11 to p. 36313 ln 14 [AR, CD #1]; **Willis, Vol. 315**, p. 36764 ln 16 to p. 36765 ln 11, p. 36767 ln 2 to 36768 ln 10, p 36770 ln 1 to 17, p. 36789 ln 16 to p. 36791 ln 20 [AR, Vol. VI, Tab 22, CD #1]; **Willis, Vol. 316**, p 36871 ln 14 to ln 21 [AR, CD #1]

[36] **Tribunal Decision** at paras. 501-504, 533-541, 643 [AR, Vol. I, Tab 2]; **Wallace, Vol. 399**, p. 44736 ln 1 to p. 44739 ln 9 [AR, Vol. VII, Tab 24, CD #1]

[37] **Tribunal Decision** at paras. 356-361, 580-581, 673, 683-689 [AR, Vol. I, Tab 2]

[38] **Tribunal Decision** at paras. 411, see also 408-412, 417, 552-554, 596, 673 [AR, Vol. I, Tab 2]; ***PSAC v. Treasury Board No. 2,*** *supra*, at para. 187 [PSAC Authorities, Tab 22]; ***Canada v. PSAC,*** *supra*, at para. 79 [PSAC Authorities, Tab 7]; ***Department of National Defence***, *supra,* at 810 [PSAC Authorities, Tab 19]

48. The Tribunal found it helpful to conceptualize reasonable reliability as a spectrum with three sub-bands: upper reasonable reliability; mid reasonable reliability; and low reasonable reliability. In setting out this spectrum, the Tribunal took care to note that all three sub-bands met the "test" of reasonable reliability, although "the upper sub-band meets the test more abundantly and should [...] be the preferred choice for a 'pay equity' situation". The Tribunal also noted that it regarded the term "reasonably reliable" and the words "adequate" and "sufficient" as being interchangeable, in contrast to the word "ideal".[39]

49. In applying this framework, the Tribunal accepted evidence from PSAC's experts that the Hay Plan was appropriate for evaluating the work performed by the two groups in question, rejecting Canada Post's position that the Hay Plan was not suitable to evaluate clerical or "blue collar" work. The Tribunal stated:[40]

> The Tribunal finds that Dr. Wolf was the only expert who was sufficiently qualified to assess the validity and reliability of the Hay Plan generally, and the factor comparison approach, in particular, *vis-à-vis* the requirements of the Complaint. [...]

50. The Tribunal contrasted Mr. Wolf's opinion with that of Ms Winter, whose evidence it dismissed entirely:[41]

> [t]he Tribunal finds that the expert opinion of Ms. Winter, in categorically dismissing the Hay Plan, was presented in a rigid and immoveable fashion, leaving the impression of being a witness who was espousing the position of her client rather than being an independent expert who was attempting to help the Tribunal understand difficult concepts outside its realm of expertise.

51. With respect to the process employed by the Professional Team, the Tribunal again preferred the expert evidence of Dr. Wolf over that of Canada Post's witnesses. The Tribunal expressly noted that Ms Winter's testimony could be given no weight on account of her "tendency to rigidity and a requirement for absoluteness when measuring reliability", while Mr. Willis conceded that he had not

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[39] **Tribunal Decision** at paras. 679-682, 690-698, 941 [AR, Vol. I, Tab 2]

[40] **Tribunal Decision** at paras. 564, 566, see also 559-571 [AR, Vol. I, Tab 2]

[41] **Tribunal Decision** at para. 568-569 [AR, Vol. I, Tab 2]

read much of the material sent to him by Canada Post. The Tribunal noted that the difficulty in evaluating in a setting with no direct employer involvement "was largely off-set [...] by the particular competence of the three-member committee".[42]

52. Finally, while the Tribunal carefully detailed its concerns with the job information, it ultimately concluded that the evidence was "sufficient" or "adequate" to make out PSAC's case on a balance of probabilities. The Tribunal began by stating that the sample of the CR jobs was reasonably reliable, accepting the evidence of the Commission's expert, Dr. Kervin, on this point. The Tribunal also concluded that the creation of the 10 "generic" PO jobs was the result of the inability of the Commission and Canada Post to agree on sample size and data collection for the PO Group.[43]

53. Concerns regarding the reliability of the job information also turned on the Tribunal's assessment of the parties' expert witnesses. The Tribunal noted the "considerable job evaluation experience of the Professional Team", concluding that their opinion regarding the reliability of the available job information was "particularly compelling". To this end, the Tribunal was clearly impressed by Dr. Wolf's candour in assessing the information before him. The Tribunal stated:[44]

> Moreover, Dr. Wolf was not hesitant to identify deficiencies in instruments such as the Job Fact Sheet and certain job descriptions. He also demonstrated an ability to adapt to the situation before him as illustrated in his remarks about being "selective" in using data included in the Job Fact Sheet (paragraph [609]). He obviously knew how to avoid the most offensive aspects of the document. He and his two colleagues were therefore very aware of the imperfections, including certain inconsistencies and even incompleteness, in the job information, but still concluded that the material was "adequate" for work being performed by the Professional Team.

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[42] **Tribunal Decision** at paras. 580, 585, 591, see also 572-593 [AR, Vol. I, Tab 2]

[43] **Tribunal Decision** at paras. 630, see also 375, 450-471, 618-630 [AR, Vol. I, Tab 2]

[44] **Tribunal Decision** at paras. 685-686 [AR, Vol. I, Tab 2]

54. In contrast, Ms Winter was again found to lack credibility, given that she "relied on a standard of correctness as the foundation of her expert opinions". The Tribunal summarized its assessment of Canada Post's expert evidence as follows:[45]

> [t]he Tribunal concludes that the evidence of Messrs. Willis and Wallace should not be completely dismissed. Aspects of their evidence deserve some weight. As for Ms. Winter, in the Tribunal's view, her absolutist standard of correctness on virtually all fronts requiring a judgement about reliability, rendered her opinions beyond acceptance.

55. In the end, the Tribunal accepted the expert evidence of Dr. Wolf, ruling that "the job information, in the hands of the Professional team, was more likely than not, 'reasonably reliable', or 'adequate' as the Team described it, despite certain imperfections". While this evidence did not meet the standard one might expect from a joint employer-employee "pay equity" study, it did meet what the Tribunal called the "lower reasonable reliability sub-band".[46]

4. Wage Gap and Wage Adjustment Methodology

56. The Tribunal began this portion of its reasons by setting out two questions: (1) How reliable were the resulting job evaluation values attributed by the Professional Team to the CR positions and the PO jobs concerned? (2) Was a "wage gap" demonstrated between the female and male predominant groups performing work of equal value? In light of its previous conclusions, the Tribunal dealt with the first question regarding the reliability of the evaluation values briefly:[47]

> The Tribunal has already established the credibility of the three members of the Professional Team, having noted their qualifications in paragraph [382]. More particularly, Dr. Wolf was qualified as an expert in Hay-based job evaluation and Hay-based compensation.
>
> Accordingly, the Tribunal concludes that it is more likely than not that the aforementioned reasonably reliable Hay Plan, process and job information, in the hands of competent evaluators, as were the Professional Team, would

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[45] **Tribunal Decision** at paras. 585, 591, 594, 637-643 [AR, Vol. I, Tab 2]; **Winter, Vol. 194** at 25029 ln 12 to 16 [AR, CD #1]

[46] **Tribunal Decision** at para. 689, 672, 700 [AR, Vol. I, Tab 2]

[47] **Tribunal Decision** at paras. 702-704; see also 798 [AR, Vol. I, Tab 2]

result in reasonably reliable job evaluation values being attributed to the work performed by CR and PO employees.

The Professional Team in its Final Report on the Hay Method Evaluation concluded:

> Having found that a substantial portion of the CR jobs are of a value equal to, or greater than, that of the PO jobs, the logical next step was to identify the nature of the wage gap [...]

57. The Tribunal thus turned to addressing its second issue: the existence of the wage gap. Dr. Wolf's evidence was that the analysis of the pay and job value relationships between the male-dominated PO Group and the female-dominated CR Group revealed a substantial wage gap, no matter which wage approach was used. These findings were equally true in 1983, 1989 and in 1995. Dr. Wolf further explained that the differences in the wage gap across the various approaches were minor. Dr. Wolf concluded that "[a]ll of these approaches show a significant wage gap between the wages paid to CR's and to PO's performing work of equal value".[48]

58. Dr. Wolf also testified that the Professional Team's supplementary evaluation in 2000 resulted in only relatively minor changes to job evaluation scores, such that there remained a significant wage gap for each CR level, regardless of the wage method used or the time period considered.[49]

59. After reviewing all the evidence, the Tribunal concluded that a wage gap existed between the female-dominated CR Group and the male-dominated PO Group:[50]

> The Tribunal accepts that the evidence of the Professional Team, both through the *viva voce* evidence of Dr. Wolf and also through the presentation of the

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[48] **Tribunal Decision** at paras. 705-708, 800-801, [AR, Vol. I, Tab 2]; **Exhibit PSAC-30, Wolf Report, February 1995**, p. 28 [AR, Vol. X, Tab 39, p. 56 CD #3]; **Wolf, Vol. 129**, p. 17515 ln 12 to ln 22, p. 17545 ln 3 to p. 17546 ln 9, p. 17550 ln 15 to p. 17551 ln 22 [AR, Vol. VI, Tab 19, CD #1]

[49] **Exhibit PSAC-180, A Review of the Job Evaluation Impact of the Newly Provided CPC Documents and the Associated Testimony** [AR, Vol. X, Tab 41, CD #3]; **Exhibit PSAC-181, Application of the New Hay Method Evaluations to a Comparison of the Pay Equity of the CR and PO Jobs Identified in the Complaint of the Public Service Alliance of Canada v. Canada Post Corporation, Dr. Martin G. Wolf, August 2000** [AR, Vol. X, Tab 42, CD #3]; **Wolf, Vol. 345**, p. 39270 ln 8 to p. 39273 ln 23 [AR, Vol. VII, Tab 23, CD #1]

[50] **Tribunal Decision** at para. 801 [AR, Vol. I, Tab 2]

> Team's Reports to the Tribunal, is sufficient, on a balance of probabilities, to demonstrate a wage gap when the work of the predominantly female CR's was compared with the work of equal value being performed by the predominantly male PO's at Canada Post. [emphasis added]

60. Having concluded that a wage gap existed, the Tribunal considered the most appropriate wage adjustment methodology to eliminate the gap, ultimately accepting Dr. Kervin's proposal on behalf of the Commission. The Tribunal further accepted expert evidence tendered by PSAC that the non-wage compensation provided to the two groups did not detract from this conclusion, although the Tribunal noted that this evidence also fit in the lower reasonable reliability sub-band.[51]

(ii) The Reduction of Damages

61. Despite having found that the evidence before it established on a balance of probabilities that a wage gap existed between the CR and PO Groups performing work of equal value, the Tribunal reduced its award of damages by 50%. This decision was made on the basis of its conclusion that, while reasonably reliable, the evidence before it with respect to job information included "elements of uncertainty" and fit in the lower sub-band of reasonable reliability.[52]

III. The Federal Court's Judgment

62. Canada Post and PSAC both sought judicial review of the Tribunal's decision. Although the applications judge affirmed the Tribunal's decision to apply the *1986 Guidelines*, he ultimately concluded that the Tribunal had erred in selecting the comparator group and in failing to apply the correct standard of proof. With respect to the comparator group issue, the applications judge stated:[53]

> While the Tribunal analyzed the evidence about the appropriateness of the PO Group as a comparator group, the Court finds the Tribunal unreasonably ignored the factual reality that the largest group of women at Canada Post were the 10,000 women working as "mail sorters" within the PO Group, and that these 10,000 women were the best paid unionized employees at Canada Post.

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[51] **Tribunal Decision** at paras. 806, 833, 844, 887-930 [AR, Vol. I, Tab 2]

[52] **Tribunal Decision** at paras. 940-949 [AR, Vol. I, Tab. 2]

[53] **FC Reasons** at paras. 36, 207, 210 [AR, Vol. II, Tab 3]

> The Court finds it unreasonable to choose a comparator group that masked the 10,000 women, and in fact, considered them men for the purposes of section 11. This is contrary to the intent of section 11 and is illogical. Moreover, it is evident that there was no systemic wage discrimination against female employees at Canada Post since the largest group of women within Canada Post were the highest paid of all unionized employees.
>
> [...] [T]he Court finds as a fact that the choice of the PO Group, as a whole, which includes the 10,000 women employed therein, is clearly irrational and, accordingly, patently unreasonable, as well as being simply unreasonable. [Emphasis all in original

63. With respect to the standard of proof applied by the Tribunal, the applications judge agreed with Canada Post that, despite having identified the proper standard of proof, the Tribunal failed to apply that standard:[54]

> The Tribunal erred in law in applying a confusing, invented, and novel standard of proof with respect to the reliability of the job information in order to find liability. The Tribunal finding that the job information evidence was "reasonably reliable" at the "lower-reasonably reliable sub-band" level is less than a finding that the job information was reliable on the balance of probabilities.

64. The applications judge went on to state that the fact that the Tribunal did not find the job information to be acceptable on a balance of probabilities is "indirectly confirmed by the Tribunal's decision to discount the damages by 50 percent". On this basis, the Federal Court determined that the evidence before the Tribunal did not satisfy the appropriate standard of proof. The applications judge ordered that the complaint be returned to the Tribunal with the direction that it be dismissed.[55]

IV. The Federal Court of Appeal's Judgment

(i) The Decision of the Majority

65. The majority of the Federal Court of Appeal dismissed PSAC's appeal. First, the majority held that the Tribunal had failed to make any ruling on the question of whether the CR and PO Groups performed work of equal value. The Court concluded that this was an essential element of the test for wage discrimination

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[54] **FC Reasons** at para. 156 [AR, Vol. II, Tab 3]

[55] **FC Reasons** at paras. 157, 163-164, 275 [AR, Vol. II, Tab 3]

that required the Tribunal's decision to be set aside. This issue had not been addressed by the applications judge or advanced in Canada Post's submissions.[56]

66. Second, the majority affirmed the application judge's conclusion that, despite articulating the correct standard of proof, the Tribunal failed to apply that standard to the facts before it. The majority explained that the Tribunal had deviated from the correct standard as its conclusion that evidence was "reasonably reliable" fell short of a finding that the third element had been established on a balance of probabilities. The majority held that it was unnecessary and, based on the record before it, impossible to address the broader pay equity issues raised by the parties, returning the matter to the Tribunal with a direction that it be dismissed.[57]

(ii) Justice Evans' Dissenting Reasons

67. Justice Evans rejected the conclusions put forward by his colleagues, stating that he would allow the appeal and reinstate the Tribunal's order. Justice Evans explained that, when the reasons of the Tribunal are read holistically, and against the background of the expert evidence on which it relied, the Tribunal found, on a balance of probabilities, that members of the CR Group were paid less than members of the PO Group for work of equal value. To this end, Justice Evans highlighted the deference to be provided to an administrative tribunal on technical issues at the heart of its expertise, ruling that the Tribunal's conclusions were reasonably available to it given the evidence on the record.[58]

68. In particular, Justice Evans concluded that the Tribunal had applied the correct standard of proof. Noting the presumption identified by this Court in *McDougall* in favour of the Tribunal on this issue, Justice Evans explained: "I cannot imagine that an adjudicator would describe evidence as reliable unless it was more likely than not to be true, or would describe evidence as 'reasonably reliable' that she thought to be no more likely to be correct than to be wrong". Justice Evans

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[56] **FCA Reasons** at paras. 104-111 [AR, Vol. II, Tab 4]

[57] **FCA Reasons**, paras. 112-127 [AR, Vol. II, Tab 4]

[58] **FCA Reasons**, paras. 151, 162-164, per Evans J.A. [AR, Vol. II, Tab 4]

further explained that the decision to reduce the monetary award by 50% did not indicate that the Tribunal must have believed that the evidence fell short of a balance of probabilities:[59]

> The 50% reduction is better seen, in my opinion, as merely a "rounding down" figure. That the Tribunal chose a reduction of 50% rather than, say, 49%, seems to be inconsequential as far as the standard of proof being applied is concerned.

69. Justice Evans also dismissed the substantive concerns raised by Canada Post regarding the Tribunal's findings on the merits. In particular, Justice Evans concluded that, despite the presence of a large number of female employees in the PO Group, the Tribunal had not erred in selecting it as an appropriate comparator group. In so doing, Justice Evans relied on the *1986 Guidelines*, which explicitly recognize that a predominantly male comparator group may contain a minority of women, such that it cannot be said that this minority group of women is being "masked". Moreover, Justice Evans stated that "the fact that some women at Canada Post are relatively well paid does not necessarily preclude the existence of gender discrimination elsewhere in the corporation". Justice Evans explained that "systemic gender discrimination means that work performed by women <u>tends</u> to be undervalued, not that this is necessarily the case in every situation". Nonetheless, Justice Evans affirmed the Tribunal's decision to reduce its award of damages by 50%.[60]

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[59] **FCA Reasons**, paras. 210, 230, 234, per Evans J.A. [AR, Vol. II, Tab 4]

[60] **FCA Reasons**, paras. 190, , 237-293, 302, per Evans J.A. [AR, Vol. II, Tab 4] [emphasis in original]

PART II – QUESTIONS IN ISSUE

70. The Appellant submits that the following issues are raised in this appeal:

A. What is the appropriate standard of review?

B. Did the Federal Court err in finding that the Tribunal had unreasonably identified the PO Group as an appropriate comparator group for the adjudication of the pay equity complaint?

C. Did the Federal Court of Appeal err in concluding that the Tribunal had failed to decide whether individuals in the CR and PO Groups performed work of equal value?

D. Did the Courts below err in concluding that the Tribunal failed to apply the appropriate standard of proof, which it had identified in its decision?

E. Did the Courts below err in failing to set aside the Tribunal's decision to discount its award of damages by 50%?

F. Did the Courts below err in referring the complaint back to the Tribunal with the direction that it be dismissed?

71. The Appellant respectfully submits that the Courts below erred in fact and in law in setting aside the Tribunal's decision on the basis outlined above and in failing to set aside the Tribunal's order to discount its award of damages by 50%. Alternatively, the Courts below erred in directing that the complaint be dismissed by the Tribunal.

PART III – STATEMENT OF ARGUMENT

A. Standard of Review

72. This Court has established that there are two available standards of review: correctness and reasonableness. The reasonableness standard is concerned with whether the outcome falls within "a range of possible acceptable outcomes which are defensible in respect of the facts and the law". This Court has stated:[61]

> The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'"; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*". On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity"; (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues. [citations omitted]

73. An exhaustive analysis is not required where the jurisprudence has already determined the degree of deference to be accorded to a decision-maker on a particular category of question. Recent jurisprudence has confirmed that the reasonableness standard presumptively applies to a wide-range of determinations by the Tribunal. This includes not only questions relating to fact-finding, where the Tribunal has always been acknowledged to have "superior expertise", but also where it interprets its own legislation.[62]

74. While pay equity is a relatively simple principle to understand, complex and sophisticated mechanisms are required to identify and address wage discrimination. As Justice Evans noted in the Treasury Board pay equity decision:[63]

> I would note, however, that the Tribunal held over 250 days of hearing, many of which apparently resembled educational seminars conducted by the expert

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[61] ***Dunsmuir v. New Brunswick,*** [2008] 1 S.C.R. 190 ["*Dunsmuir*"] at paras. 34, 45, 47, 50, 54-55, 60 [PSAC Authorities, Tab 12]; ***Smith v. Alliance Pipeline***, 2011 SCC 7 at para. 26 [PSAC Authorities, Tab 25]; ***Canada (Citizen and Immigration) v. Khosa***, 2009 SCC 12 ["*Khosa*"] at paras. 25, 59 [PSAC Authorities, Tab 9]

[62] ***Dunsmuir***, *supra*, at paras. 57-58, 62, 64 [PSAC Authorities, Tab 12]; ***Tahmourpour v. Canada (RCMP)***, 2010 FCA 192 at paras. 7-8 [PSAC Authorities, Tab 27]; ***Vilven v. Air Canada***, 2009 FC 367 at paras. 69-73 [PSAC Authorities, Tab 28]; ***Walden v. Canada (Social Development)***, 2010 FC 1135 at paras. 44-45 [PSAC Authorities, Tab 29]

[63] ***Canada v. PSAC***, *supra*, at para. 86 [PSAC Authorities, Tab 7]; ***CHRA***, *supra*, ss. 11, 53

witnesses for the benefit of the parties and the Tribunal, studied volumes of documentary evidence and lived with this case for seven years. It is reasonable to infer from this that the members of the Tribunal were likely to have a better grasp of the problems of operationalizing the principle of pay equity in the federal public service than a judge would probably be able to acquire in the course of even an 8½ day hearing of an application for judicial review.

75. The legislative history of section 11 also calls for deference. When enacting section 11, Parliament established the principle of pay equity, but left its implementation to the Commission and ultimately, through the process of inquiry, to the Tribunal. Justice Evans has observed that considerable scope has been given to the Tribunal, with the assistance of experts, to decide how the principle is to be applied.[64]

76. In light of the above, PSAC maintains that deference is owed to each of the Tribunal's determinations in the present case. First, as this Court has recognized, significant deference must be afforded to the Tribunal's identification of an appropriate comparator group. This highly fact-intensive question "belongs to the core functions of the Commission and of the Tribunal" and is a matter on which the Tribunal has been granted broad discretionary powers.[65]

77. Second, a review of the Tribunal's reasons to determine if it rendered a finding as to whether the two groups performed work of equal value is also subject to deference. Given that the Tribunal stated that it found the work to be of equal value, this must be presumed to be the case. Indeed, in addressing this question, the Court of Appeal applied a reasonableness standard of review, declining to attempt to extricate a discrete legal component from the question before the

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[64] **Parliament, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs**, Issue No. 11, May 17, 1977, 2nd Session, 30th Parliament, 1976-77, at 11:23, 11:37-38, 11:46-47 [PSAC Authorities, Tab 37]; **Canada, House of Commons, *Commons Debates,* October 25, 1976**, per: Hon. Ron Basford, Minister of Justice, at 418 [PSAC Authorities, Tab 35]; **Canada, House of Commons, *Commons Debates,* February 11, 1977**, per: Hon. Ron Basford, Minister of Justice, at 2976-2977, 2981, 2985-2986 [PSAC Authorities, Tab 33]; **Canada, House of Commons, *Commons Debates,* June 2, 1977**, per: Hon. Ron Basford, Minister of Justice, at 6198, 6200 [PSAC Authorities, Tab 34]; ***CHRA***, *supra*, ss. 2, 11, 27(2), (3) and (4); ***Canada v. PSAC,*** *supra*, at paras. 75-84 [PSAC Authorities, Tab 7]; ***Bell Canada v. Canadian Telephone Employees Association***, [2003] 1 S.C.R. 884 at paras. 36-37, 47-48 ["*Bell*"] [PSAC Authorities, Tab 4]; ***Nfld. v. N.A.P.E.,*** *supra,* at para. 45 [PSAC Authorities, Tab 16]; ***Action Travail***, *supra* [PSAC Authorities, Tab 10]; ***Canadian Airlines,*** *supra,* at para. 24 [PSAC Authorities, Tab 8]

[65] ***Canadian Airlines,*** *supra*, at para. 42 [PSAC Authorities, Tab 8]

Tribunal, which it noted involved the application of legal principles to the facts as found by the Tribunal.[66]

78. Third, while the Tribunal must identify the correct standard of proof, deference is owed in determining whether the Tribunal applied this standard. This latter question includes an assessment of the evidence and a determination as to whether the presumption that the Tribunal applied the standard it identified has been rebutted. The Courts below applied a standard of reasonableness, stating: "whether the Tribunal applied the correct standard of proof is a question of mixed fact and law that contains no readily extricable legal issue". This conclusion comports with the paragraph 18.1(4)(d) of the *Federal Courts Act*.[67]

79. Fourth, in determining whether the Tribunal erred in reducing its award by 50%, PSAC acknowledges that questions regarding the standard of proof *applied* by the Tribunal involve matters of mixed fact and law and are to be reviewed on a reasonableness standard. Errors in identifying the standard are owed no deference.

80. Fifth, the decisions of the Courts below to refer the complaint back to the Tribunal with a direction that it be dismissed as unfounded are to be reviewed on a standard of correctness. An order in the nature of a directed verdict must only be issued in the most exceptional circumstances. A reviewing court seeking to issue such an order must satisfy the criteria for doing so.[68]

B. The Federal Court Erred in Concluding that the Tribunal Unreasonably Found that the PO Group was an Appropriate Comparator Group

I. General Principles of Human Rights and Pay Equity

81. The *CHRA* is fundamental law that is quasi-constitutional in nature. Consistent with this status and the requirements of the *Interpretation Act*, it must

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[66] **FCA Reasons** at para. 87 [AR, Vol. II, Tab 4]

[67] ***Federal Courts Act***, R.S.C, 1985, c. F-7, 18.1(4)(d); **FCA Reasons** at para. 130 [AR, Vol. II, Tab 4]; **FC Reasons** at para. 45 [AR, Vol. II, Tab 3]

[68] ***Rafuse v. Canada (Pension Appeals Board)***, 2002 FCA 31 ["*Rafuse*"] at para. 14 [PSAC Authorities, Tab 23]; see ***Brown v. National Capital Commission***, 2009 FCA 273 ["*Brown*"] at para. 6, leave to appeal ref'd [2009] S.C.C.A. No. 473 [PSAC Authorities, Tab 6]

be given a broad interpretation that extends its application and advances its essential purpose: the elimination of discrimination.[69]

82. The principle of equal pay for work of equal value, as found in section 11 of the *CHRA*, is general in nature and must be informed by the systemic gender-based wage discrimination it is designed to eliminate.[70]

83. The pay equity regime established by the *CHRA* and the *1986 Guidelines* recognizes that systemic gender-based wage discrimination results from the historical tendency to undervalue work performed by women. To address such discrimination, the *1986 Guidelines* call for the comparison of the value of work performed by male and female-predominant occupational groups. The *1986 Guidelines* were issued pursuant to the authority granted by Parliament to the Commission to determine the manner in which the principle of pay equity would be operationalized. The *Guidelines* govern pay equity complaints under the *Act* and are binding on the Tribunal.[71]

84. Section 12 of the *Guidelines* provides that a comparison for the purposes of a pay equity complaint must involve the work performed by an "occupational group" that is predominantly of one sex with the work performed by an "occupational group" that is predominantly of the opposite sex. A group is composed

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[69] ***Action Travail***, *supra,* at 1132-1138 [PSAC Authorities, Tab 10]; ***Zurich Insurance Co. v. Ontario (Human Rights Commission)***, [1992] 2 S.C.R. 321, at 338-339 [PSAC Authorities, Tab 32]; ***Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.***, [1985] 2 S.C.R. 536 at 547 ["*O'Malley*"] [PSAC Authorities, Tab 18]; ***Department of National Defence***, *supra*, at 805 [PSAC Authorities, Tab 19]; ***Interpretation Act***, R.S.C. 1985, c. I-21, s. 12 [PSAC Authorities, Tab 45]; ***B. v. Ontario (Human Rights Commission)***, [2002] 3 S.C.R. 403 at para. 44 [PSAC Authorities, Tab 2]; ***Canadian Airlines***, *supra,* at paras. 15-17 [PSAC Authorities, Tab 8]; **Sullivan**, *supra,* at p. 497 [PSAC Authorities, Tab 41]; ***CHRA***, *supra*, s. 2

[70] ***Canada v. PSAC***, *supra,* at para. 199 [PSAC Authorities, Tab 7]; ***Canadian Airlines***, *supra,* at para. 17 [PSAC Authorities, Tab 8]; see also ***Department of National Defence***, *supra*, at 802 and 808-810 [PSAC Authorities Tab 19]; **Sullivan, R., *Essentials of Canadian Law: Statutory Interpretation*** (Concord: Irwin Law, 1997) at 108 [PSAC Authorities, Tab 40]; **Sullivan**, *supra,* at pp. 256-257, 277-280 [PSAC Authorities, Tab 41]

[71] ***Department of National Defence***, *supra,* at 798-802 [PSAC Authorities, Tab 19]; **Weiner**, *supra*, at 6-7, 10 [PSAC Authorities, Tab 42]; ***Women's College Hospital***, *supra,* at 65 to 68 [PSAC Authorities, Tab 30]; ***Haldimand-Norfolk***, *supra* at paras. 39-44 [PSAC Authorities, Tab 14]; ***PSAC v. Treasury Board No. 3***, *supra,* at paras. 219-247 [PSAC Authorities, Tab 21]; ***Bell***, *supra*, at para. 48; ***Canadian Airlines***, *supra*, at paras. 24, 42 [PSAC Authorities, Tab 8]; **FC Reasons** at para. 105 [AR, Vol. II, Tab 3]; ***1986 Guidelines***, *supra*

predominantly of one sex if at least: 70% of a group with less than 100 members are of that sex; 60% of a group with between 100 and 500 members are of that sex; or 55% of a group that has more than 500 members are of that sex.[72]

II. The Federal Court's Decision is Inconsistent with the *Equal Wages Guidelines* and Basic Principles of Pay Equity

85. The applications judge's ruling, which rejected the PO Group as a comparator because it contained a minority group of women, is inconsistent with the very foundation of the federal pay equity regime: the comparison of the work performed by male and female-predominant groups. The failure to justify this extraordinary departure from the *Guidelines* requires his decision to be overturned by this Court.

86. There is no dispute that the PO Group significantly exceeded the 55% threshold established by the *1986 Guidelines* for a group its size to be considered male predominant. As of 1983, the PO Group was composed of over 50,000 employees, approximately 75% of which were male. In March 1992, just before the complaint was referred to the Tribunal, the PO Group as a whole and each of its sub-groups remained male-predominant. The PO Group, composed of the PO-EXT and PO-INT at this time, was over 71% male.[73]

87. Nonetheless, the applications judge rejected the comparator group approved by the Tribunal because it included a minority group of women:[74]

> [T]he Tribunal unreasonably ignored the factual reality that the largest group of women at Canada Post were the 10,000 women working as "mail sorters" within the PO Group, and that these 10,000 women were the best paid unionized employees at Canada Post. The Court finds it unreasonable to choose a comparator group that masked the 10,000 women and in fact, considered them men for the purposes of section 11. This is contrary to the intent of section 11 and is illogical.
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> [...]

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[72] ***CHRA**, supra*, s. 11, 17; ***1986 Guidelines**, supra*, s. 12-13

[73] **Tribunal Decision** at paras. 262, 265 [AR, Vol. I, Tab 2]; **Exhibit A-1, App. J, Complaint Form**, Appendices A-1, A-2, A-3 and A-4 [AR, Vol. VIII, Tab 28, CD #2] **Exhibit A-1, App. L**, "Distribution of Employees by Group, Classification, Level and Sex" [AR, Vol. VIII, Tab 30, CD #2]

[74] **FC Reasons** at paras. 207, 210, [AR, Vol. II, Tab 3]

> If the PSAC is correct and the standard of review is that of patent unreasonableness, the Court finds as a fact that the choice of the PO Group, as a whole, which includes the 10,000 women employed therein, is clearly irrational and, accordingly, patently unreasonable, as well as being unreasonable. [Emphasis in original]

88. With respect, the applications judge's conclusion on this issue is based on a fundamental misunderstanding of the central tenets of the federal pay equity regime, which, by virtue of s. 27 of the *CHRA*, are binding on the Tribunal. First, the applications judge's decision represents an extraordinary departure from the *1986 Guidelines*. As Justice Evans pointed out, the *Guidelines* "explicitly recognize that a predominantly male comparator group may contain a minority of women", such that "the female members of the comparator group are not thereby 'masked' or treated as males". This reality underpins any pay equity regime that compares the value of work performed by gender predominant groups, and holds true regardless of the size of the groups.[75]

89. The applications judge provided no basis to justify this departure from the *1986 Guidelines*. The Tribunal specifically rejected Canada Post's preliminary objections with respect to the validity of the *1986 Guidelines*. Given that the application judge affirmed this element of the Tribunal's decision, he could not then ignore the framework established by the *Guidelines*.[76]

90. Second, the applications judge erred in relying on the claim that the "10,000 women" at the PO-4 level of the PO-INT subgroup "were the best paid employees at Canada Post". Justice Evans explains that the relatively high pay of females in the male-dominated PO Group is not a concern: "[t]he assumption of the *Guidelines* is that a female minority in an occupational group may receive higher wages because of the male predominance" in a given group. In any event, all employees at the PO-5 level were paid more than their PO-4 counterparts.[77]

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[75] **FCA Reasons**, paras. 185, 189 per Evans J.A. [AR, Vol. II, Tab 4] [emphasis added]; ***CHRA**, supra,* at s. 27

[76] **Tribunal Decision** at paras. 93-233 [AR Vol. I, Tab 2]; **FC Reasons** at paras. 89-105 [AR, Vol. II, Tab 3];

[77] **FC Reasons** at para. 207 [AR, Vol. II, Tab 3]; **FCA Reasons**, para. 185 per Evans. J.A. [AR, Vol. II, Tab 4] [emphasis added]

91. Third, the applications judge's conclusion is premised on the discredited assumption that, since all women at Canada Post do not suffer from gender-based wage discrimination, such discrimination must not exist at Canada Post. This approach to discrimination has been rejected by this Court, which has repeatedly held that "it is not fatal to a finding of discrimination based on a prohibited ground that not all persons bearing the relevant characteristics have been discriminated against". Justice Evans applied this principle to the present case:[78]

> the fact that some women at CPC were relatively well paid does not necessarily preclude the existence of systemic gender discrimination elsewhere in the corporation. Systemic gender discrimination means that work performed by women tends to be undervalued, not that this is necessarily the case in every situation. The fact that the PO-4 Internal level has become gender-neutral, so that mail sorting has lost its character as "women's work", and is performed within a predominantly male occupational group, may well explain why women in the PO-4 Internal level are relatively well paid. [emphasis in original]

92. Fourth, the applications judge claimed that the Tribunal "unreasonably ignored" the 10,000 women in the PO Group, relying (1) on the "fact" that these women did not suffer wage discrimination and (2) that this indicated that "systemic undervaluation of the work typically performed by women" did not exist. With respect, the first of these conclusions is irrelevant as these women did not claim to be disadvantaged. More importantly, the second assertion is unhelpful: the determination of the comparator group is a step taken at the outset of the pay equity analysis. The Tribunal is then required to review the evidence and assess whether the female dominated group was paid less for work of equal value. In any event, the fact that there were, in 1992, 11,319 women in a comparator group of 39,509 cannot lead to the conclusion that occupational segregation and undervaluation of women's work was not present at Canada Post.[79]

93. The decision of the applications judge on this question, thus, constitutes a direct attack on the *1986 Guidelines*. Since the *Guidelines* have been upheld by this

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[78] ***Battlefords and District Co-operative Ltd. v. Gibbs***, [1996] 3 S.C.R. 566 No. 55 at paras. 27-28 [PSAC Authorities, Tab 3]; ***Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur***, [2003] 2 S.C.R. 504, 2003 SCC 54, paras. 76-78 [PSAC Authorities, Tab 17]; **FCA Reasons**, para. 190, per Evans J.A. [AR, Vol. II, Tab 4]

[79] **FC Reasons** at paras. 207-209 [AR, Vol. II, Tab 3]; ***Canadian Airlines**, supra,* at para. 17 [PSAC Authorities, Tab 8]; **Tribunal Decision** [AR, Vol. I, Tab 2 p. 94 at para. 265]; **Exhibit A-1, App. L** [AR, Vol. VIII, Tab 30, CD #2]

Court and were found by the applications judge to apply to the complaint, there was no basis to justify departing from their application.[80]

III. The Applications Judge Failed to Show Proper Deference to the Tribunal's Assessment of the Appropriate Comparator Group

94. The applications judge's decision also fails to show proper deference to the Tribunal's reasons for selecting the PO Group. The *1986 Guidelines* impose only two legal requirements in this regard: (1) the comparator must be an "occupational group"; and (2) the comparator must be predominantly of the opposite sex from the complainant group. Justice Evans explained that, apart from these requirements, "there are no statutory criteria that must be considered in the selection of a comparator. The choice is left to the discretion of the CHRC and the Tribunal." The Tribunal need not select *the most* appropriate comparator group. [81]

95. The Tribunal provided a cogent explanation for its selection of the PO Group as the comparator group: (1) it was the largest occupational group within Canada Post, representing approximately 80% of the Canada Post population; (2) it was predominantly male; (3) certain members of the PO Group performed work similar to that of the work being performed by the CR Group; (4) the other possible comparator groups that were male dominated, such as the GL&T and GS groups, only represented a small percentage of Canada Post employees; and (5) there was no evidence that the jobs performed by employees in GL&T and GS groups were similar to those performed by the CR Group.[82]

96. Moreover, there is no basis for suggesting, as Canada Post has previously alleged, that PSAC sought to "cherry pick" a comparator group with high wages to artificially create, or widen, a wage gap. As Canada Post's expert acknowledged, the concern with "cherry picking" arises where the complaint involves a small but

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[80] ***Bell**, supra* [PSAC Authorities, Tab 4]; **FC Reasons** at paras. 89-105 [AR, Vol. II, Tab 3]

[81] ***Canadian Airlines**, supra,* at para. 42 [PSAC Authorities, Tab 8]; ***1986 Guidelines*** at s. 12, 13; **FCA Reasons** at paras. 177-178, per Evans J.A. [AR, Vol. II, Tab 4]

[82] **Tribunal Decision** at paras. 278-282 [AR, Vol. I, Tab 2]; **Jones, Vol. 118**, p. 15857 ln 6 to 15861 ln 23, p. 15918 ln 1 to 15926 ln 5 [AR, Vol. III, Tab 12, CD #1]; **Durber, Vol. 40**, p. 5529 ln 7 to 5531 ln 9 [AR, Vol. III, Tab 10, CD #1]; **Durber, Vol. 44**, p. 6041 ln 1 to p. 6042 ln 8, p. 6055 ln 20 to p. 6058 ln 9 [AR, Vol. III, Tab 11, CD #1]

well-paid comparator group whose wages may not provide a reliable or representative sample. Indeed, one of the reasons the PO Group was selected was to avoid an allegation of cherry picking. Given the size of the PO Group, the suggestion that this concern applies in the present case is not sustainable, even if PSAC chose the PO Group *exclusively* because of its higher salaries. Regardless, Canada Post failed to conduct a pay study or tender any evidence demonstrating the impact that including the GS and GL&T groups would have had.[83]

97. The Tribunal was also entitled to reject Canada Post's claim that the PO-04 classification level is most representative of the PO Group and therefore should be defined as the appropriate comparator group. The PO-4 classification is not an employer-designated occupational group. As Justice Evans noted, there is no principle that requires the removal of some members of an occupational group from the comparator group. Given that the "levels" connote wage differentials within an occupational group, the "wages of one level cannot be considered in isolation from the rest of the occupational group".[84]

98. In light of the above, there is no basis to suggest that the Tribunal abused its discretion in approving the PO Group as the comparator for this complaint.

C. The Court of Appeal Erred in Concluding that the Tribunal Failed to Rule on the whether the Two Groups Performed Work of Equal Value

99. The majority of the Court of Appeal ruled that the Tribunal failed to make <u>any</u> finding as to whether the CR and PO Groups performed work of equal value. The majority explained that the Tribunal "terminated its analysis at the second step" (determining the reliability of the evidence on this question) and failed to complete the third step (determining whether the standard of proof had been met). In

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[83] **Tribunal Decision** at paras. 276-278 [AR, Vol. I, Tab 2]; **FCA Reasons** at paras. 186-187, per Evans J.A. [AR, Vol. II, Tab 4]; **Durber, Vol. 40**, p. 5529 ln 7 to 5531 ln 9 [AR, Vol. III, Tab 10, CD #1]; **Durber, Vol. 44**, p. 6041 ln 1 to p. 6042 ln 8, p. 6055 ln 20 to p. 6058 ln 9 [AR, Vol. III, Tab 11, CD #1]; **Exhibit A-1, App. K, Investigation Report** [AR, Vol. VIII, Tab 29, CD #2]; **Exhibit HR-1, Tab 28, Canada Post Submissions on the Commission's Investigation Report**, March 13, 1992 p. 54-57, [AR, Vol. IX, Tab 32, pp. 105-109, CD #2]

[84] **Tribunal Decision** at para. 271 [AR, Vol. I, Tab 2]; **FCA Reasons** at paras. 191-192, per Evans J.A. [AR, Vol. II, Tab 4]; **Exhibit A-1, App. F, Occupational and Group Categories in CPC and their Bargaining Units Before Crown Corporation Status** [AR, Vol. VII, Tab 26, CD #2]

coming to this conclusion, the majority narrowly interpreted numerous statements in the Tribunal's reasons that clearly set out its conclusion that the work performed by the two groups was of equal value, failing to read the Tribunal's reasons within the broader context of the expert evidence it had accepted.[85]

100. The Tribunal clearly accepted Dr. Wolf's evidence that the two groups performed work of equal value. The Tribunal began Section VII of its reasons by identifying two questions, the first of which was: "How reliable were the resulting job evaluation values attributed by the Professional Team to the CR positions and the PO jobs concerned?" In light of its previous conclusions that the Hay Plan, the process employed by the Professional Team, and the job information were all reasonably reliable, the Tribunal concluded that the resulting values attributed by PSAC's experts to the two groups could be relied upon to establish that the two groups performed work of equal value. The Tribunal stated:[86]

> Accordingly, the Tribunal concludes that it is more likely than not that the aforementioned reasonably reliable Hay Plan, process and job information, in the hands of competent evaluators, as were the Professional Team, would result in reasonably reliable job evaluation values being attributed to the work performed by CR and PO employees.

101. The majority erred in holding that a finding that "it is more likely than not" that the resulting values were "reasonably reliable" did not amount to a finding that the Tribunal accepted on a balance of probabilities that the two groups performed work of equal value. Justice Evans squarely addressed the majority's concerns on this issue. In particular, Justice Evans clarified that the Tribunal is only required to address two issues to substantiate a pay equity complaint:[87]

> First, the value of the jobs performed by the members of the two groups must be assessed. [...]
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> Second, on the basis of an evaluation of the work, the Tribunal must decide if enough members of the complainant group were performing work of at least

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[85] **FCA Reasons** at paras. 118-123 [AR, Vol. II, Tab 4]

[86] **Tribunal Decision** at paras. 701-704, see also paras. 798-799 [AR, Vol. I, Tab 2]

[87] **FCA Reasons**, paras. 112-114, 123-124; paras. 196-197, 199, per Evans J.A. [AR, Vol. II, Tab 4]

> equal value to that of members of the comparator group to enable it to determine if there is a gender-based wage gap in breach of section 11.

102. Given that the Tribunal accepted the Professional Team's evidence on both these points, Justice Evans dismissed the majority's conclusion that the Tribunal had failed to make a finding on this issue. Justice Evans explained:[88]

> It is said that the fact that the evidence before the Tribunal was such as to produce "reasonably reliable job evaluations" is not the same as concluding that on a balance of probabilities the work being compared is of equal value. However, if the evaluation of the jobs was "reasonably reliable" and a substantial portion of the CR group were performing work at least equal in value to the least valuable PO job, I cannot see what else needs to be proved, or what finding made, in order to establish that the wage comparison related to work of equal value. As already noted, the Tribunal accepted the evidence of the Professional Team that "a significant portion of the CR positions were of a value equal to or greater than the PO jobs". [emphasis added]

103. If there were any doubt as to the nature of the Tribunal's conclusion at paragraph 703, the Tribunal confirmed its finding at paragraph 801, where, summarizing its conclusions, it stated:[89]

> The Tribunal accepts that the evidence of the Professional Team, both through the *viva voce* evidence of Dr. Wolf and also through the presentation of the Team's Reports to the Tribunal, is sufficient, on a balance of probabilities, to demonstrate a wage gap when the work of predominantly female CR's was compared to the work of equal value being performed by the predominantly male PO's at Canada Post. [emphasis added]

104. In dismissing this statement, the majority relied on the fact that it is found in Section VII of the Tribunal's decision, "which follows the section of the reasons in which a conclusion with respect to the third element would have been expected to have been reached". The location of this conclusion in Section VII of the Tribunal's analysis is not surprising, however, given that the Tribunal began this section by asking how reliable the resulting job evaluations values were. It is also noteworthy that paragraph 801 is found at the outset in the Tribunal's analysis of the wage gap, which starts at paragraph 798 under the heading of "Preliminary" and begins

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[88] **FCA Reasons**, para. 228, per Evans J.A., see also paras. 200-202, [AR, Vol. II, Tab 4]; **Tribunal Decision** at paras. 798-801 [AR, Vol. I, Tab 2]

[89] **Tribunal Decision**, para. 801; see also para. 803 [AR, Vol. I, Tab 2]

by reiterating the Tribunal's conclusion at paragraph 703 regarding the reliability of the resulting values, which is set out above.[90]

105. The majority also stated that paragraph 801 "addresses no more than the acceptance by the Tribunal that the fourth element, which relates to the wages paid to employees in the two groups, has been established". It would be plainly illogical, however, for the Tribunal to state that there was a wage gap "when the work of the predominantly female CR's was compared with the work of equal value performed by the predominantly male PO's at Canada Post" if it had not, in fact, concluded that the two groups performed work of equal value.[91]

106. In summary, the Professional Team determined that a "substantial portion of the CR jobs are of a value equal to, or greater than that of the PO jobs". The Tribunal found that each of the inputs into this determination, as well as the determination itself, were reliable, accepting Dr. Wolf's evidence on these points. As such, there is simply no basis to suggest that the Tribunal terminated its analysis prematurely or otherwise failed to make a requisite finding on this point.[92]

D. The Courts Below Erred in Concluding that the Tribunal Applied a Standard of Proof Below that of a Balance of Probabilities

107. This Court's decision in *H.(F.) v. McDougall* established that there is only one civil standard of proof and that a decision-maker will be presumed to have applied the correct standard, whether or not it is expressly identified. In the present case, the Tribunal repeatedly confirmed that it was applying the civil standard of proof – a balance of probabilities – to the issues before it. Nonetheless, the applications judge and the majority of the Court of Appeal concluded that it failed to apply this standard. In doing so, the Courts below failed to properly apply the presumption set

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[90] **FCA Reasons** at paras. 124-127 [AR, Vol. II, Tab 4]; **Tribunal Decision** at paras. 798-801 [AR, Vol. I, Tab 2]

[91] **FCA Reasons** at paras. 123-124 [AR, Vol. II, Tab 4]; **Tribunal Decision** at para. 801 [emphasis added] [AR, Vol. I, Tab 2]

[92] **FCA Reasons** para. 114 [AR, Vol. I, Tab 2]; **Tribunal Decision** at para. 799 [AR, Vol. I, Tab 2]; **Exhibit PSAC-29**, Final Report on the Hay Method Evaluation of the CR and PO Jobs Identified in the Complaint of Public Service Alliance of Canada v. Canada Post Corporation, Dr. Martin G. Wolf, January 1995 p.7 [AR, Vol. IX, Tab 36, pp. 235, CD #3]

out in *McDougall* and discarded the deferential approach that required the Tribunal's reasons to be read as a whole, together with the evidence the Tribunal accepted.[93]

I. The Standard of Proof

108. This Court in *McDougall* rejected the notion that there is more than one civil standard of proof. In coming to its decision, this Court overturned previous case law that sought to impose a standard of proof above a balance of probabilities to deal with civil cases of a particularly serious nature.[94]

109. It is well established that a balance of probabilities only requires evidence that satisfies a reasonable degree of probability. The authors of *The Law of Evidence in Canada* cite Lord Denning, who defined this standard of proof as one that carries "a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged." Similarly, Cartwright J. in *Smith v. Smith* stated that a tribunal "must be reasonably satisfied" in order for the fact in issue to be proved.[95]

110. It is likewise well established that the threshold for establishing a complaint under section 11 is not above the ordinary civil burden, and is a long way from certainty. The Federal Court of Appeal in *Department of National Defence* stated:[96]

> The burden which a complainant before a Human Rights Tribunal must carry cannot, in my opinion, be placed any higher than the ordinary civil burden of the balance of probabilities. That is a long way from certainty and simply means that the complainant must show that his position is more likely than not. It is no valid defence for the opposite party to say that things might have been otherwise, for that will almost always be the case where the civil burden is in

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[93] ***McDougall**, supra,* at para. 40, 43-44, 54 [PSAC Authorities, Tab 13]; **FCA Reasons** at para. 164, per Evans J.A. [AR, Vol. II, Tab 4]

[94] ***McDougall**, supra,* at paras. 40, 43-44 [PSAC Authorities, Tab 13]

[95] ***Miller v. Minister of Pensions***, [1947] 2 All E.R. 372, at 374 (K.B) [emphasis added] [PSAC Authorities, Tab 15]; ***Smith v. Smith*** [1952] 2 S.C.R. 312 [emphasis added] [PSAC Authorities, Tab 26]; **Sopinka, J. Lederman, S., and Bryant, A., *The Law of Evidence in Canada*, 3rd ed.**, (Toronto: LexisNexis, 2009) at 203-204 [PSAC Authorities, Tab 39]

[96] ***Department of National Defence**, supra*, at 810 [PSAC Authorities, Tab 19]

> play. If a thing probably happened in a certain way, then by definition, it might possibly have happened in a completely different way. [Emphasis in original]

111. To this end, there is no absolute measure against which to assess the reliability of evidence relating to a pay equity process under section 11. Instead, the Tribunal must determine whether the evidence submitted is reasonably reliable, such that it is sufficient to meet the balance of probabilities threshold:[97]

> What is apparent from these comments and from the nature of the subject is that equal pay for work of equal value is a goal to be striven for which cannot be measured precisely and which ought not to be subject to any absolute standard of correctness. Moreover, gender neutrality in an absolute sense is probably unattainable in an imperfect world and one should therefore be satisfied with reasonably accurate results based on what is, according to one's good sense a fair and equitable resolution of any discriminatory differentiation between wages paid to males and wages paid to females for doing work of equal value. [Emphasis added]

II. The Tribunal Applied the Correct Standard of Proof

112. PSAC submits that the Courts below erred in finding that the Tribunal applied a standard of proof below a balance of probabilities. To begin, there is no dispute that the Tribunal repeatedly identified the correct standard of proof and the essential elements that must be established in order to meet a section 11 case on a balance of probabilities. The Tribunal did so at the outset of its analysis as well as in its subsequent discussion, where it confirmed that the evidence before it was "sufficient, on a balance of probabilities, to demonstrate a wage gap".[98]

113. In light of the fact that the Tribunal correctly identified the balance of probabilities as the appropriate standard of proof, Justice Evans explained that it was entitled to the *McDougall* presumption that this is the standard of proof it had applied. Justice Evans noted that the question to be addressed was[99]

> whether other aspects of the Tribunal's reasons were so wayward as to rebut the presumption and lead to the conclusion that, contrary to its clear assertion to the contrary, the Tribunal in fact applied some lower standard.

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[97] ***PSAC v. Treasury Board No. 2**, supra,* at para. 187 [PSAC Authorities, Tab 22]; see also ***Canada v. PSAC**, supra*, at para. 79 [PSAC Authorities, Tab 7]

[98] **Tribunal Decision** at paras. 257, 801, 803 [AR, Vol. I, Tab 2]

[99] **FCA Reasons** at para. 219, per Evans J.A. [AR, Vol. II, Tab 4]

114. PSAC maintains that there is nothing in the Tribunal's reasons that rebuts this presumption.

(i) The Tribunal's Statements Bolster the Presumption

115. Various statements by the Tribunal bolster the presumption that it applied the appropriate standard of proof. Dr. Wolf, whose evidence the Tribunal accepted, testified that the available job information was adequate for evaluation purposes:[100]

> We had information that we felt was sufficient to meaningfully evaluate the CR positions and to meaningfully evaluate the PO positions based on what we had in its totality[...]
>
> If I had had my druthers I would [rather] have had a management committee of people to work with us. If I had had my druthers, I would have gone to observe some of these jobs, but I felt, as did my cohorts, that we had adequate information to evaluate these jobs accurately. Again I stress the word "adequate" as opposed to "ideal". [Emphasis added]

116. The information initially available to the Professional Team was augmented by additional job information provided by Canada Post's witnesses during the hearing. After reviewing this additional information the Professional Team had far more information than would be available to a commercial job evaluation team:[101]

> By the time I got through reading all these transcripts, I felt that I could do these jobs. It was probably more than you ever wanted to know about these positions, certainly far more than you needed to know to do job evaluation. A lot of the material we could have done without. [Emphasis added]

117. The Tribunal accepted Dr. Wolf's view that the job information was adequate for job evaluation purposes, noting his experience and candour in this regard:[102]

> Given the very considerable job evaluation experience of Drs Wolf and Ingster of the Professional Team, including their application, over many years, of the Hay system to a wide range of jobs involving a variety of job information, the Tribunal considers that their opinion concerning the reliability of the available job information was particularly compelling.

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[100] **Wolf, Vol. 127**, p. 17345 [AR, Vol. V, Tab 18, CD #1]; **Tribunal Decision** at paras 483-486 [AR, Vol. I, Tab 2]

[101] **Wolf, Vol. 345**, p. 39232 ln 10 to ln 16 [AR, Vol. VI, Tab 23, CD #1] **Wolf, Vol. 127**, p. 17373 ln 19 to p. 17374 ln 9 [AR, Vol. V, Tab 18, CD #1]

[102] **Tribunal Decision** at paras. 685-686 [AR, Vol. I, Tab 2]

> Moreover, Dr. Wolf was not hesitant to identify deficiencies in instruments such as the Job Fact Sheet and certain job descriptions. He also demonstrated an ability to adapt to the situation before him as illustrated in his remarks about being "selective" in using data included in the Job Fact Sheet (paragraph [609]). He obviously knew how to avoid the most offensive aspects of that document. He and his two colleagues were therefore very aware of the imperfections, including certain inconsistencies and even incompleteness, in the job information, but still concluded that the material was "adequate" for the work being performed by the Professional Team. [Emphasis added]

118. Accordingly, while the Tribunal recognized that the job information "did not meet the standard one could normally expect from a joint employer-employee 'pay equity' study", it found it was adequate to support the Professional Team's conclusion that the two groups performed work of equal value:[103]

> The Tribunal must confess that navigating the job information through the straits of "reasonable reliability" has not been a relaxing passage. Yet, balancing the evidence presented by all parties and expert witnesses, and under the unique circumstances of this case in the realm of proscribed discrimination human rights legislation, the Tribunal finds that the job information, in the hands of the Professional Team, was more likely than not, "reasonably reliable", or "adequate" as that Team described it, despite certain imperfections. [Emphasis added]

119. It is not surprising that the Tribunal found the assessment of the evidence on this issue to be a "daunting task", given the prolonged circumstances of this case and Canada Post's attempt to challenge all aspects of the Professional Team's job evaluation reports. Canada Post, however, did not provide a job evaluation study of its own, despite being in the best position to do so. If anything, the evidence it did provide to the Tribunal served to substantiate the Professional Team's job evaluation and wage gap analysis as the Tribunal ultimately found the evidence to be "adequate", "reasonably reliable" or "good enough" on a balance of probabilities.

(ii) Nothing in the Tribunal's Reasons Rebuts the Presumption

120. Nothing in the Tribunal's reasons rebuts the presumption that it applied the correct standard of proof. The applications judge and the majority of the Court of Appeal relied on a number of elements of the Tribunal's decision to support the claim that the Tribunal failed to apply the standard of proof it had identified. As

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[103] **Tribunal Decision** at para. 689 [AR, Vol. I, Tab 2]

Justice Evans noted, however, each of these elements is explained by the evidentiary disputes before the Tribunal or previous pay equity jurisprudence on which the Tribunal relied.

121. First, Justice Evans explained that the Tribunal used the term "reasonably reliable" in response to Canada Post's expert witness who had equated "reliable" with an "absolute correctness" standard, which the Tribunal rightly concluded was improper and unattainable. Justice Evans' conclusion that the Tribunal's use of this terminology did not indicate it had applied a lower standard is supported by the Tribunal's explanation that it "regarded the term 'reasonably reliable' and the words 'adequate' and 'sufficient' as being interchangeable for the purpose of determining the state of the reliability of the job information available in this case".[104]

122. Justice Evans noted the use of similar terminology in previous pay equity jurisprudence. For instance, the Tribunal in the *Treasury Board No. 2* case accepted that "one should be satisfied with reasonably accurate results based on what is, according to one's sense, a fair and equitable resolution of a wage gap between men and women performing work of equal value".[105]

123. Justice Evans also explained that the isolated statements relied upon by the majority must be read within the broader context of the Tribunal's reasons. For instance:[106]

> [i]t can be argued that the Tribunal in this paragraph was diluting the standard of proof when it asked whether it is "more likely than not" that the material is "sufficiently adequate" to enable a "fair and equitable conclusion" to be reached on whether there were wage differences for work of equal value. I do not agree.

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[104] **FCA Reasons** at para. 230 [AR, Vol. II, Tab 4]; **Tribunal Decision** at para. 585 [AR, Vol. I, Tab 2]; **Winter, Vol. 170**, p. 23466 ln 21 to p. 23467 ln 1 [AR, CD #1]; **Winter, Vol. 180**, p. 23726 ln 1 to 8 [AR, CD #1]; **Winter, Vol. 183**, p. 24073 ln 3 to 5, p. 24081 ln 22 to 24082 ln 2 [AR, CD #1]; **Winter, Vol. 186**, p.24423 ln 15 to 24424 ln 3, p. 24424 ln 15 to p. 24425 ln 1 [AR, CD #1]; **Willis, Vol. 310**, p. 36269 ln 2 to ln 3 [AR, CD #1]

[105] **FCA Reasons** at paras. 225-226 per Evans J.A. [AR, Vol. II, Tab 4]; ***PSAC v. Treasury Board No. 2,*** *supra,* at para. 187 [PSAC Authorities, Tab 22]; ***Department of National Defence,*** *supra,* at 810 [PSAC Authorities, Tab 19]; ***Canada v. PSAC,*** *supra,* at para. 79 [PSAC Authorities, Tab 7]; see also **Tribunal Decision**, paras. 409, 490, 496, 553-554, 694 [AR, Vol. I, Tab 2]

[106] **FCA Reasons** at paras. 222, 224, per Evans J.A. [AR, Vol. II, Tab 4]

> [...]
>
> Indeed, in the previous paragraph, the Tribunal had quoted from the reasons of Hugessen J.A. writing for the Court in *Department of National Defence* at para. 33, where he reiterated that, in proceedings before the Canadian Human Rights Tribunal, a balance of probabilities is the standard of proof, a standard, he noted, which is "a long way from certainty". In my opinion, it is very unlikely that, in writing in paragraph 412 that the evidence must be adequate to enable a fair and equitable conclusion to be reached on whether there had been a breach of section 11, the Tribunal intended to contradict the statement it had just quoted on the standard of proof that it must apply.

124. To this end, Justice Evans stated that there is nothing in the term "reasonable reliability" that leads to the conclusion that the civil standard of proof was not applied. Justice Evans explained: "I cannot imagine that an adjudicator would describe evidence as reliable unless it was more likely than not to be true, or would describe evidence as 'reasonably reliable' that she thought was no more likely to be correct than to be wrong".[107]

125. Second, nothing in the Tribunal's description of sub-bands of reasonable reliability calls into question the standard of proof it applied. Justice Evans explained that evidence "can surely only be called 'reasonably reliable' if it is more likely than not to be true, regardless of the point on the 'reliability spectrum' [...]. 'Low-level reasonable reliability' is still 'reasonable reliability'." This conclusion fits with the Tribunal's statement that "all three sub-bands meet the test of 'reasonable reliability'", clearly indicating a bright-line that must be met in order to satisfy this threshold. Justice Evans stated that he interpreted the Tribunal's elaboration of a reasonable reliability spectrum, while "unnecessary", as evidence that it was "well aware of the limitations of the evidence, and weighed it with great care".[108]

126. To this end, the Tribunal's "sub-bands" are perfectly consistent with the proper standard of proof: clearly, the lowest sub-band meets the balance of probabilities, whereas the highest is closest to a certain or perfect case, a standard the Tribunal indicated would more likely to be satisfied where the parties engaged

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[107] **FCA Reasons** at para. 210 per Evans J.A. [AR, Vol. II, Tab 4]

[108] **FCA Reasons** at paras. 229-231, per Evans J.A. [AR, Vol. II, Tab 4]; **Tribunal Decision** at para. 698 [emphasis added] [AR, Vol. I, Tab 2]

in a joint evaluation process, unlike the circumstances of this case. This fits with the *Department of National Defence* decision cited by the Tribunal, which makes clear that a balance of probabilities is still "a long way from certainty". This point is confirmed at paragraph 930 of the Tribunal's decision where it expressly stated that the evidence with respect to non-wage compensation, which also met the lower reasonable reliability sub-band, satisfied the balance of probabilities.[109]

127. Third, Justice Evans rejected the majority's conclusion that the Tribunal's decision to discount the remedy by 50% indicates that it believed the evidence did not satisfy a balance of probabilities, which required more than 50% certainty. Having noted the Tribunal's discretion to reduce any award of damages, Justice Evans wrote: "[t]hat the Tribunal chose a reduction of 50% rather than, say, 49%, seems to be inconsequential as far as the standard of proof being applied is concerned".[110]

128. In fact, it is illogical to conclude that the Tribunal applied a lower standard of proof because it discounted the award of damages by 50%. Had the Tribunal not been convinced that the complainant met a *prima facie* case, it could not have awarded <u>any</u> damages. The more likely explanation for the Tribunal's sub-bands of reliability is that they served as the basis to impose a standard of proof <u>above</u> the balance of probabilities for a full award of damages to be granted, a conclusion that comports with other statements in the Tribunal's reasons.

129. For instance, this explanation is supported by the clear link drawn by the Tribunal between the lack of <u>full</u> certainty and the damages that ought to be awarded:[111]

> Taking into account these elements of uncertainty which affect the very crucial aspect of determining the extent of the wage gap, it is, in the Tribunal's view, more likely than not that if the job information and the non-wage benefits had

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[109] **FCA Reasons** at para. 224, per Evans J.A. [AR, Vol. II, Tab 4]; **Tribunal Decision** at paras. 411, 580-581, 673, 683-689, 927-930 [AR, Vol. I, Tab 2]; ***Department of National Defence***, *supra,* at 810 [PSAC Authorities, Tab 19]

[110] **FCA Reasons** at para. 234, per Evans J.A. [AR, Vol. II, Tab 4]

[111] **Tribunal Decision** at para. 943 [AR, Vol. I, Tab 2]

> been upper-reasonably reliable", the resulting wage gap would have more accurately reflected reality. In other words, the greater the reliability of the job information and the non-wage benefits, the greater the accuracy of the wage gap determination. This determination is seminal to the extent of the award of damages. [emphasis added]

130. That the Tribunal established a comprehensive sliding scale of damages, beginning from the high standard of job information one would expect from a joint pay equity study, also confirms this conclusion. The Tribunal states:[112]

> Following the spectrum analysis already completed for the two elements of uncertainty, the Tribunal concludes that a wage gap determination based upon "upper reasonable reliability" evidence should, logically, give rise to a 100% award of lost wages, a determination based upon "mid reasonable reliability" to a 75% award, and a determination based upon "lower reasonable reliability to an award of 50% or less.

131. Moreover, like the case law overturned in *McDougall*, the Tribunal sought to justify its requirement for a higher standard of evidence on the basis that it was appropriate given the serious consequences the ruling would have for the respondent. The Tribunal thus stated that "ultimate fairness to all parties in a 'pay equity' case would probably be achieved when the quality of the job information concerned fell comfortably into the 'upper reasonable reliability' sub-band". It is likewise significant that the Tribunal drew its inspiration for the spectrum of reasonable reliability from a text on the *Law of Damages*. The Tribunal's discussion of the reduction of the remedy illustrates this connection:[113]

> While the presence of uncertainty in determining the extent of damages should not, indeed must not, inhibit the Tribunal from awarding damages, that uncertainty can, nevertheless, result in a reduction, under some circumstances very appreciable, in the assessed value of the damages.

132. Fourth, there is no reason to conclude, as the applications judge did, that the Tribunal applied the standard of "a reasonable basis in the evidence", which is applied by the Commission when deciding whether to refer a complaint to the Tribunal (as described by the Federal Court of Appeal in *Bell Canada v. CEP*). The Tribunal does not rely on the *Bell Canada* judgment for this point and provides no

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[112] **Tribunal Decision** at para. 948 [AR, Vol. I, Tab 2]

[113] **Tribunal Decision** at paras. 697, 679-682, 940 [AR, Vol. I, Tab 2]; ***McDougall***, *supra*, at para. 39 [PSAC Authorities, Tab 13]

other indication that it applied this lower standard. The applications judge's statement on this point is speculative and fails to have regard to the Tribunal's extensive analysis of the evidence, ignoring the *McDougall* presumption.[114]

133. In summary, the Courts below failed to provide a proper basis to rebut the presumption that the Tribunal applied the standard of proof it repeatedly identified. Instead, the majority's decision selectively parsed the Tribunal's reasons, ignoring the broader context in which the Tribunal's statements were made. In doing so, the majority discarded the deferential approach called for by the *McDougall* presumption, and looked only to whether statements made by the Tribunal, read in isolation, could be construed as a failure to apply the correct standard of proof.

E. The Tribunal Erred in Reducing its Award of Damages by 50% Given its Finding that the Evidence Satisfied the Balance of Probabilities

134. The Tribunal's decision to reduce its award by 50% is unreasonable and must be set aside. First, as set out above, the Tribunal's reasons demonstrate that it required PSAC to satisfy a standard of proof above a balance of probabilities, noting that this would be the fairest approach in a "pay equity" case. This Court in *McDougall* noted the practical problems with such an approach:[115]

> As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads to one inquiry: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probably cannot.

> Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur.

135. Once the Tribunal has accepted, on a balance of probabilities, that a wage gap exists between two groups of employees performing work of equal value, it cannot reduce an award of damages simply because information used to establish

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[114] **FC Reasons** at paras. 161-163 [AR, Vol. II, Tab 3]; ***Bell Canada v. Communications, Energy and Paperworkers Union of Canada***, [1999] 1 F.C. 113 (C.A.) [PSAC Authorities, Tab 5]

[115] ***McDougall**, supra,* at paras. 43-44 [PSAC Authorities, Tab 13]; **Tribunal Decision** at paras. 679-682, 690-698, 941 [AR, Vol. I, Tab 2]

the wage gap lacked a particular degree of certainty. Such an approach, which requires near-perfect evidence, would greatly undermine the efficacy of human rights remedies. This is particularly so in the pay equity context, where the Tribunal indicated that upper reasonably reliable evidence would likely only be available where the parties participate in a joint job evaluation process. This approach also contradicts the pay equity jurisprudence, which specifies that the Tribunal must be satisfied with reasonably accurate results.[116]

136. Second, the Tribunal erred in failing to provide a principled justification for its reduction in the damages award. The purpose of the broad remedial authority granted to the Tribunal under section 53 of the *CHRA* is to ensure that complainants are fully compensated for damages suffered as a result of violations their human rights. Once liability is established, it is the duty of the Tribunal to restore the complainant to the position he or she would have been in but for the discriminatory conduct. The Federal Court of Appeal has confirmed that common law limitations on damage awards, such as reasonable forseeability, should not be incorporated into human rights analysis, since these remedies are provided by statute.[117]

137. Moreover, different considerations apply to determining damages in a pay equity complaint than in a complaint seeking compensation for lost wages, which requires the Tribunal to effectively "rewrite history". Once it has been determined that there is an actual wage gap between two groups of employees performing work of equal value, it must follow that the victims are entitled to compensation for all of the difference. Pay equity cases are unique in this regard because discrimination is proven by establishing, as a fact, a specific wage gap, which then provides the basis for the award of damages.[118]

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[116] ***PSAC v. Treasury Board No. 2***, *supra,* at para. 187 [PSAC Authorities, Tab 22]; **Tribunal Decision** at paras. 356-361, 580-581, 673, 683-689 [AR, Vol. I, Tab 2]

[117] ***Chopra v. Canada (Attorney General)***, 2007 FCA 268 at paras. 26-39 [PSAC Authorities, Tab 11]; ***CHRA***, *supra,* s. 53

[118] ***Department of National Defence***, *supra,* at paras. 798-802, 815 [PSAC Authorities, Tab 19]; ***PSAC v. Treasury Board No. 2***, *supra,* at para. 187 [PSAC Authorities, Tab 22]

138. Finally, there was no evidence before the Tribunal that would support a reduction of the award for lost wages by 50%. In fact, it cannot logically follow that the "lower reasonable reliability" standard must result in a reduction of the award. The Tribunal erred in assuming that uncertainty resulted in an over-valuation of CR work, or under-valuation of PO jobs. It is equally plausible that the uncertainty resulted in under-valuation of CR jobs and over-valuation of PO jobs. Indeed, the only evidence on this matter supports the conclusion that the wage gap was larger, given that the Professional Team made clear it adopted a conservative approach to job evaluations that gave the benefit of the doubt to the PO Group.[119]

139. Accordingly, the Tribunal's decision to discount the award of damages by 50% must be set aside.

F. The Courts Below Erred in Referring the Complaint back to the Tribunal with the Direction that it be Dismissed

140. Should doubt remain as to which standard of proof the Tribunal applied, the appropriate disposition is to remit the complaint together with the appropriate standard of proof to the Tribunal. The Court of Appeal was not entitled to substitute its judgment on the facts for that of the Tribunal, particularly given its finding that the Tribunal "had terminated its analysis at the second step", failing "to make a finding that the third element had been established". If the majority were right on this point, or if it properly concluded that the wrong standard of proof was applied, it was required to remit the matter to the Tribunal for re-determination.

141. It is well established that the authority to issue directions in the nature of a directed verdict is "an exceptional power that should only be used in the clearest of circumstances". In *Xie v. Canada* Rothstein J., as he then was, stated:[120]

> it seems to me that the Court should only issue directions to a tribunal in the nature of a directed verdict, where the case is straightforward and the decision of the Court on the judicial review would be dispositive of the matter before the tribunal. While such cases undoubtedly will arise, as a general rule,

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[119] **Wolf, Vol. 126** at 17203 ln 17 to 17204 ln 4 [AR, Vol. V, Tab 17, CD#1]

[120] ***Xie v. Canada*** *(Minister of Employment and Immigration)* [1994] F.C.J. No. 286 at p. 7 [PSAC Authorities, Tab 31]; ***Rafuse**, supra,* at para. 14 [PSAC Authorities, Tab 23]

> the Court should leave to tribunals, with their expertise in the matters over which they have jurisdiction, the right to make decisions on the merits based on the evidence before them. [Emphasis added]

142. The Federal Court of Appeal recently confirmed the limited role of a reviewing court in this regard in *Brown v. National Capital Commission*, where the Court overturned the applications judge's remedial order, concluding that the judge "ought to have returned the matter to the Tribunal".[121]

143. The Federal Court in *Ali v. Canada* identified a number of factors to consider in determining whether it is appropriate for a reviewing court to issue a directed verdict. These include: whether the evidence on the record is clearly conclusive that there is only one possible conclusion; whether the sole issue to be decided is a pure question of law which will be dispositive of the case; whether the legal issue is based on uncontroverted evidence and accepted facts; and whether a factual issue that is central to the case involves conflicting evidence.[122]

144. PSAC maintains that this is not an exceptional case that meets the criteria to issue such a direction. To start, the remaining issues are not pure questions of law; on the contrary, they are highly fact-intensive and the evidence is not so conclusive that there is only one possible result. Moreover, the majority's direction that the complaint be dismissed usurps the Tribunal's jurisdiction to render a decision as to whether it was satisfied on a balance of probabilities that the two groups performed work of equal value. The Court of Appeal cannot conclude, based on its reading of the Tribunal's reasons, that the Tribunal would have found that the appropriate standard of proof had not been met. Indeed, given the Tribunal's findings on the credibility of the expert witnesses and the reliability of the evidence, there is a strong likelihood that the Tribunal would have concluded that the standard had been met.

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[121] ***Brown***, *supra,* at para. 6 [PSAC Authorities, Tab 6]

[122] ***Ali v. Canada (Minister of Employment and Immigration)***, [1994] 3 F.C. 73 at 82 [PSAC Authorities, Tab 1]

145. While PSAC shares the applications judge's frustration with the delays in the Tribunal process, he was, with respect, incorrect in stating that "each time the evidence was found to be deficient, the hearing was extended to repair or buttress the deficient evidence". PSAC *was* permitted to supplement the evidence collected by the Commission during the investigation stage with the evidence of the Professional Team. The 2000 report of the Professional Team, however, to which the applications judge presumably refers, arose properly in reply to evidence introduced by Canada Post's witnesses which had not previously been disclosed.[123]

146. The Tribunal members are the only ones who heard all the testimony, reviewed all the evidence, and assessed the credibility of each witness. If the Tribunal failed to apply the correct standard of proof, the appropriate remedy would be to refer the complaint back to the Tribunal to be dealt with in accordance with this Court's reasons.

Conclusion

147. Determining whether wage discrimination exists in a particular workplace is a complex and difficult process. On the basis of the extensive evidence before it, the Tribunal made numerous findings of fact and credibility. Ultimately, the Tribunal accepted the evidence of PSAC's expert witnesses over that of Canada Post's, concluding that there was a wage gap between work of equal value performed by the female predominant CR Group and the male predominant PO Group. These findings are subject to significant deference.

148. PSAC respectfully maintains that the Courts below erred in interpreting the *CHRA* and the *1986 Guidelines* and failed to provide a proper basis for overturning the Tribunal's decision. The Courts below also failed to read the Tribunal's reasons in the context of the evidentiary and jurisprudential issues it was required to address, incorrectly ruling that the Tribunal had failed to apply the standard of proof it had identified in its reasons. In light of all of the above, PSAC requests that this Court allow its appeal and reinstate the Order of the Tribunal, save for its decision to reduce its award by 50%.

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[123] **FC Reasons** at paras. 256-266, 274 [AR, Vol. II, Tab 3]

PART IV – SUBMISSIONS ON COSTS

149. The Appellant seeks its costs in this Court and in the Courts below.

PART V – ORDER REQUESTED

150. The Appellant respectfully requests that this Honourable Court grant an Order:

A. Allowing this appeal, with costs in this Court and the Courts below;

B. Overturning the Court of Appeal's decision and restoring the Tribunal's decision, which concluded that Canada Post had violated s. 11 of the *CHRA*;

C. Setting aside the Tribunal's decision to discount its award by 50%;

D. Alternatively, allowing this appeal in part and referring the matter back to the Tribunal with the direction that the Tribunal reconsider its Decision in light of the reasons of this Court; and

E. Such further and other relief as Counsel may request and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa this 26th day of April, 2011.

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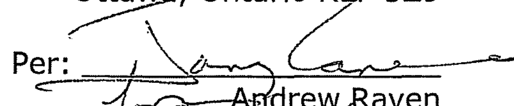
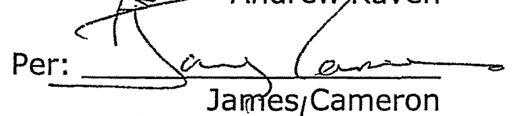
Per: 
Andrew Raven

Per: 
James Cameron

Per:
David Yazbeck

Per:
Andrew Astritis

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Public Service Alliance of Canada

PART VI – LIST OF AUTHORITIES

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PART VII –STATUTES DIRECTLY AT ISSUE

Canadian Human Rights Act, R.S. 1985, c. H-6

Equal Wages Guidelines, SOR 86-1082, Canada Gazette Part II, Vol. 120

CONSOLIDATION

CODIFICATION

Canadian Human Rights Act

Loi canadienne sur les droits de la personne

CHAPTER H-6

CHAPITRE H-6

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CHAPTER H-6

CHAPITRE H-6

An Act to extend the laws in Canada that proscribe discrimination

Loi visant à compléter la législation canadienne en matière de discrimination

SHORT TITLE

Short title

1. This Act may be cited as the *Canadian Human Rights Act.*

1976-77, c. 33, s. 1.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi canadienne sur les droits de la personne.*

1976-77, ch. 33, art. 1.

PURPOSE OF ACT

Purpose

2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

R.S., 1985, c. H-6, s. 2; 1996, c. 14, s. 1; 1998, c. 9, s. 9.

OBJET

Objet

2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

L.R. (1985), ch. H-6, art. 2; 1996, ch. 14, art. 1; 1998, ch. 9, art. 9.

PART I

PROSCRIBED DISCRIMINATION

GENERAL

Prohibited grounds of discrimination

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

PARTIE I

MOTIFS DE DISTINCTION ILLICITE

DISPOSITIONS GÉNÉRALES

Motifs de distinction illicite

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

R.S., 1985, c. H-6, s. 10; 1998, c. 9, s. 13(E).

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

L.R. (1985), ch. H-6, art. 10; 1998, ch. 9, art. 13(A).

Equal wages

11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.

Disparité salariale discriminatoire

11. (1) Constitue un acte discriminatoire le fait pour l'employeur d'instaurer ou de pratiquer la disparité salariale entre les hommes et les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

Assessment of value of work

(2) In assessing the value of work performed by employees employed in the same establishment, the criterion to be applied is the composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.

Critère

(2) Le critère permettant d'établir l'équivalence des fonctions exécutées par des salariés dans le même établissement est le dosage de qualifications, d'efforts et de responsabilités nécessaire pour leur exécution, compte tenu des conditions de travail.

Separate establishments

(3) Separate establishments established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees shall be deemed for the purposes of this section to be the same establishment.

Établissements distincts

(3) Les établissements distincts qu'un employeur aménage ou maintient dans le but principal de justifier une disparité salariale entre hommes et femmes sont réputés, pour l'application du présent article, ne constituer qu'un seul et même établissement.

Different wages based on prescribed reasonable factors

(4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.

Disparité salariale non discriminatoire

(4) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) la disparité salariale entre hommes et femmes fondée sur un facteur reconnu comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne en vertu du paragraphe 27(2).

Idem

(5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages.

Idem

(5) Des considérations fondées sur le sexe ne sauraient motiver la disparité salariale.

No reduction of wages

(6) An employer shall not reduce wages in order to eliminate a discriminatory practice described in this section.

Diminutions de salaire interdites

(6) Il est interdit à l'employeur de procéder à des diminutions salariales pour mettre fin aux actes discriminatoires visés au présent article.

Definition of "wages"

(7) For the purposes of this section, "wages" means any form of remuneration payable for work performed by an individual and includes

(*a*) salaries, commissions, vacation pay, dismissal wages and bonuses;

(*b*) reasonable value for board, rent, housing and lodging;

(*c*) payments in kind;

Définition de « salaire »

(7) Pour l'application du présent article, « salaire » s'entend de toute forme de rémunération payable à un individu en contrepartie de son travail et, notamment :

a) des traitements, commissions, indemnités de vacances ou de licenciement et des primes;

b) de la juste valeur des prestations en repas, loyers, logement et hébergement;

(*d*) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and

(*e*) any other advantage received directly or indirectly from the individual's employer.

1976-77, c. 33, s. 11.

Publication of discriminatory notices, etc.

12. It is a discriminatory practice to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation that

(*a*) expresses or implies discrimination or an intention to discriminate, or

(*b*) incites or is calculated to incite others to discriminate

if the discrimination expressed or implied, intended to be expressed or implied or incited or calculated to be incited would otherwise, if engaged in, be a discriminatory practice described in any of sections 5 to 11 or in section 14.

1976-77, c. 33, s. 12; 1980-81-82-83, c. 143, s. 6.

Hate messages

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Interpretation

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommuni-

c) des rétributions en nature;

d) des cotisations de l'employeur aux caisses ou régimes de pension, aux régimes d'assurance contre l'invalidité prolongée et aux régimes d'assurance-maladie de toute nature;

e) des autres avantages reçus directement ou indirectement de l'employeur.

1976-77, ch. 33, art. 11.

Divulgation de faits discriminatoires, etc.

12. Constitue un acte discriminatoire le fait de publier ou d'exposer en public, ou de faire publier ou exposer en public des affiches, des écriteaux, des insignes, des emblèmes, des symboles ou autres représentations qui, selon le cas :

a) expriment ou suggèrent des actes discriminatoires au sens des articles 5 à 11 ou de l'article 14 ou des intentions de commettre de tels actes;

b) en encouragent ou visent à en encourager l'accomplissement.

1976-77, ch. 33, art. 12; 1980-81-82-83, ch. 143, art. 6.

Propagande haineuse

13. (1) Constitue un acte discriminatoire le fait, pour une personne ou un groupe de personnes agissant d'un commun accord, d'utiliser ou de faire utiliser un téléphone de façon répétée en recourant ou en faisant recourir aux services d'une entreprise de télécommunication relevant de la compétence du Parlement pour aborder ou faire aborder des questions susceptibles d'exposer à la haine ou au mépris des personnes appartenant à un groupe identifiable sur la base des critères énoncés à l'article 3.

Interprétation

(2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

Interprétation

(3) Pour l'application du présent article, le propriétaire ou exploitant d'une entreprise de télécommunication ne commet pas un acte discriminatoire du seul fait que des tiers ont utilisé

objectives the program, plan or arrangement was designed to achieve.

Collection of information relating to prohibited grounds

(3) It is not a discriminatory practice to collect information relating to a prohibited ground of discrimination if the information is intended to be used in adopting or carrying out a special program, plan or arrangement under subsection (1).

R.S., 1985, c. H-6, s. 16; 1998, c. 9, s. 16.

Plans to meet the needs of disabled persons

17. (1) A person who proposes to implement a plan for adapting any services, facilities, premises, equipment or operations to meet the needs of persons arising from a disability may apply to the Canadian Human Rights Commission for approval of the plan.

Approval of plan

(2) The Commission may, by written notice to a person making an application pursuant to subsection (1), approve the plan if the Commission is satisfied that the plan is appropriate for meeting the needs of persons arising from a disability.

Effect of approval of accommodation plan

(3) Where any services, facilities, premises, equipment or operations are adapted in accordance with a plan approved under subsection (2), matters for which the plan provides do not constitute any basis for a complaint under Part III regarding discrimination based on any disability in respect of which the plan was approved.

Notice when application not granted

(4) When the Commission decides not to grant an application made pursuant to subsection (1), it shall send a written notice of its decision to the applicant setting out the reasons for its decision.

1980-81-82-83, c. 143, s. 9.

Rescinding approval of plan

18. (1) If the Canadian Human Rights Commission is satisfied that, by reason of any change in circumstances, a plan approved under subsection 17(2) has ceased to be appropriate for meeting the needs of persons arising from a disability, the Commission may, by written notice to the person who proposes to carry out or maintains the adaptation contemplated by the plan or any part thereof, rescind its approval of the plan to the extent required by the change in circumstances.

Effect where approval rescinded

(2) To the extent to which approval of a plan is rescinded under subsection (1), subsection

Renseignements relatifs à un motif de distinction illicite

(3) Ne constitue pas un acte discriminatoire le fait de recueillir des renseignements relatifs à un motif de distinction illicite s'ils sont destinés à servir lors de l'adoption ou de la mise en œuvre des programmes, plans ou arrangements visés au paragraphe (1).

L.R. (1985), ch. H-6, art. 16; 1998, ch. 9, art. 16.

Programme d'adaptation

17. (1) La personne qui entend mettre en œuvre un programme prévoyant l'adaptation de services, d'installations, de locaux, d'activités ou de matériel aux besoins particuliers des personnes atteintes d'une déficience peut en demander l'approbation à la Commission canadienne des droits de la personne.

Approbation du programme

(2) La Commission peut, par avis écrit à l'auteur de la demande visée au paragraphe (1), approuver le programme si elle estime que celui-ci convient aux besoins particuliers des personnes atteintes d'une déficience.

Conséquence de l'approbation

(3) Dans le cas où des services, des installations, des locaux, des activités ou du matériel ont été adaptés conformément à un programme approuvé en vertu du paragraphe (2), les questions auxquelles celui-ci pourvoit ne peuvent servir de fondement à une plainte déposée en vertu de la partie III portant sur une déficience visée par le programme.

Avis de refus

(4) Dans le cas où elle décide de refuser la demande présentée en vertu du paragraphe (1), la Commission envoie à son auteur un avis exposant les motifs du refus.

1980-81-82-83, ch. 143, art. 9.

Annulation de l'approbation

18. (1) La Commission canadienne des droits de la personne peut, par avis écrit à la personne qui entend adapter les services, les installations, les locaux, les activités ou le matériel conformément à un programme approuvé en vertu du paragraphe 17(2), en annuler l'approbation, en tout ou en partie, si elle estime que, vu les circonstances nouvelles, celui-ci ne convient plus aux besoins particuliers des personnes atteintes d'une déficience.

Conséquence de l'annulation

(2) Le paragraphe 17(3) ne s'applique pas à un programme, dans la mesure où celui-ci est

Tenure

(4) Each member of the Commission holds office during good behaviour but may be removed by the Governor in Council on address of the Senate and House of Commons.

Re-appointment

(5) A member of the Commission is eligible to be re-appointed in the same or another capacity.

1976-77, c. 33, s. 21.

POWERS, DUTIES AND FUNCTIONS

Powers, duties and functions

27. (1) In addition to its duties under Part III with respect to complaints regarding discriminatory practices, the Commission is generally responsible for the administration of this Part and Parts I and III and

(*a*) shall develop and conduct information programs to foster public understanding of this Act and of the role and activities of the Commission thereunder and to foster public recognition of the principle described in section 2;

(*b*) shall undertake or sponsor research programs relating to its duties and functions under this Act and respecting the principle described in section 2;

(*c*) shall maintain close liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;

(*d*) shall perform duties and functions to be performed by it pursuant to any agreement entered into under subsection 28(2);

(*e*) may consider such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment on any such recommendation, suggestion or request;

(*f*) shall carry out or cause to be carried out such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice and include in a report referred to in section 61 a report setting out the results of each such study together with such

Occupation du poste

(4) Les commissaires occupent leur poste à titre inamovible, sous réserve de révocation par le gouverneur en conseil sur adresse du Sénat et de la Chambre des communes.

Nouveau mandat

(5) Les commissaires peuvent recevoir un nouveau mandat, aux fonctions identiques ou non.

1976-77, ch. 33, art. 21.

POUVOIRS ET FONCTIONS

Pouvoirs et fonctions

27. (1) Outre les fonctions prévues par la partie III au titre des plaintes fondées sur des actes discriminatoires et l'application générale de la présente partie et des parties I et III, la Commission :

a) élabore et exécute des programmes de sensibilisation publique touchant le principe énoncé à l'article 2, la présente loi et le rôle et les activités que celle-ci lui confère;

b) entreprend ou patronne des programmes de recherche dans les domaines qui ressortissent à ses objets aux termes de la présente loi ou au principe énoncé à l'article 2;

c) se tient en liaison étroite avec les organismes ou les autorités provinciales de même nature pour favoriser l'adoption de lignes de conduite communes et éviter les conflits dans l'instruction des plaintes en cas de chevauchement de compétence;

d) exécute les fonctions que lui attribuent les accords conclus conformément au paragraphe 28(2);

e) peut étudier les recommandations, propositions et requêtes qu'elle reçoit en matière de droits et libertés de la personne, ainsi que les mentionner et les commenter dans le rapport visé à l'article 61 dans les cas où elle le juge opportun;

f) fait ou fait faire les études sur les droits et libertés de la personne que lui demande le ministre de la Justice et inclut, dans chaque cas, ses conclusions et recommandations dans le rapport visé à l'article 61;

g) peut examiner les règlements, règles, décrets, arrêtés et autres textes établis en vertu d'une loi fédérale, ainsi que les mentionner et les commenter dans le rapport visé à l'article 61 dans les cas où elle les juge incompatibles avec le principe énoncé à l'article 2;

recommendations in relation thereto as it considers appropriate;

(*g*) may review any regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament and, where deemed by the Commission to be appropriate, include in a report referred to in section 61 reference to and comment on any provision thereof that in its opinion is inconsistent with the principle described in section 2; and

(*h*) shall, so far as is practical and consistent with the application of Part III, try by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices referred to in sections 5 to 14.1.

h) dans la mesure du possible et sans transgresser la partie III, tente, par tous les moyens qu'elle estime indiqués, d'empêcher la perpétration des actes discriminatoires visés aux articles 5 à 14.1.

Guidelines

(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

(2) Dans une catégorie de cas donnés, la Commission peut, sur demande ou de sa propre initiative, décider de préciser, par ordonnance, les limites et les modalités de l'application de la présente loi.

Directives

Guideline binding

(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

(3) Les ordonnances prises en vertu du paragraphe (2) lient, jusqu'à ce qu'elles soient abrogées ou modifiées, la Commission et le membre instructeur désigné en vertu du paragraphe 49(2) lors du règlement des plaintes déposées conformément à la partie III.

Effet obligatoire

Publication

(4) Each guideline issued under subsection (2) shall be published in Part II of the *Canada Gazette*.

R.S., 1985, c. H-6, s. 27; 1998, c. 9, s. 20.

(4) Les ordonnances prises en vertu du paragraphe (2) et portant sur les modalités d'application de certaines dispositions de la présente loi à certaines catégories de cas sont publiées dans la partie II de la *Gazette du Canada*.

L.R. (1985), ch. H-6, art. 27; 1998, ch. 9, art. 20.

Publication

Assignment of duties

28. (1) On the recommendation of the Commission, the Governor in Council may, by order, assign to persons or classes of persons specified in the order who are engaged in the performance of the duties and functions of the Department of Human Resources and Skills Development such of the duties and functions of the Commission in relation to discriminatory practices in employment outside the federal public administration as are specified in the order.

28. (1) Sur recommandation de la Commission, le gouverneur en conseil peut, par décret, déléguer à des personnes ou catégories de personnes données travaillant pour le ministère des Ressources humaines et du Développement des compétences certaines fonctions de la Commission, qui y sont précisées, concernant les actes discriminatoires en matière d'emploi à l'extérieur de l'administration publique fédérale.

Délégation de fonctions

Interdelegation

(2) Subject to the approval of the Governor in Council, the Commission may enter into agreements with similar bodies or authorities in the provinces providing for the performance by

(2) Sous réserve de l'autorisation du gouverneur en conseil, la Commission peut conclure avec les organismes ou les autorités provinciales de même nature des accords portant, à

Délégations réciproques

fidentiality of a hearing held in respect of an application under subsection (1).

R.S., 1985, c. H-6, s. 52; 1998, c. 9, s. 27.

Complaint dismissed

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(*d*) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*e*) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Rejet de la plainte

53. (1) À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

Plainte jugée fondée

(2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire :

a) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables, notamment :

(i) d'adopter un programme, un plan ou un arrangement visés au paragraphe 16(1),

(ii) de présenter une demande d'approbation et de mettre en œuvre un programme prévus à l'article 17;

b) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l'acte l'a privée;

c) d'indemniser la victime de la totalité, ou de la fraction des pertes de salaire et des dépenses entraînées par l'acte;

d) d'indemniser la victime de la totalité, ou de la fraction des frais supplémentaires occasionnés par le recours à d'autres biens, services, installations ou moyens d'hébergement, et des dépenses entraînées par l'acte;

e) d'indemniser jusqu'à concurrence de 20 000 $ la victime qui a souffert un préjudice moral.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

R.S., 1985, c. H-6, s. 53; 1998, c. 9, s. 27.

Orders relating to hate messages

54. (1) If a member or panel finds that a complaint related to a discriminatory practice described in section 13 is substantiated, the member or panel may make only one or more of the following orders:

(*a*) an order containing terms referred to in paragraph 53(2)(*a*);

(*b*) an order under subsection 53(3) to compensate a victim specifically identified in the communication that constituted the discriminatory practice; and

(*c*) an order to pay a penalty of not more than ten thousand dollars.

Factors

(1.1) In deciding whether to order the person to pay the penalty, the member or panel shall take into account the following factors:

(*a*) the nature, circumstances, extent and gravity of the discriminatory practice; and

(*b*) the wilfulness or intent of the person who engaged in the discriminatory practice, any prior discriminatory practices that the person has engaged in and the person's ability to pay the penalty.

Idem

(2) No order under subsection 53(2) may contain a term

(*a*) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or

(*b*) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained such premises or accommodation in good faith.

R.S., 1985, c. H-6, s. 54; 1998, c. 9, s. 28.

Indemnité spéciale

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

Intérêts

(4) Sous réserve des règles visées à l'article 48.9, le membre instructeur peut accorder des intérêts sur l'indemnité au taux et pour la période qu'il estime justifiés.

L.R. (1985), ch. H-6, art. 53; 1998, ch. 9, art. 27.

Cas de propagande haineuse

54. (1) Le membre instructeur qui juge fondée une plainte tombant sous le coup de l'article 13 peut rendre :

a) l'ordonnance prévue à l'alinéa 53(2)*a*);

b) l'ordonnance prévue au paragraphe 53(3) — avec ou sans intérêts — pour indemniser la victime identifiée dans la communication constituant l'acte discriminatoire;

c) une ordonnance imposant une sanction pécuniaire d'au plus 10 000 $.

Facteurs

(1.1) Il tient compte, avant d'imposer la sanction pécuniaire visée à l'alinéa (1)*c*) :

a) de la nature et de la gravité de l'acte discriminatoire ainsi que des circonstances l'entourant;

b) de la nature délibérée de l'acte, des antécédents discriminatoires de son auteur et de sa capacité de payer.

Idem

(2) L'ordonnance prévue au paragraphe 53(2) ne peut exiger :

a) le retrait d'un employé d'un poste qu'il a accepté de bonne foi;

b) l'expulsion de l'occupant de bonne foi de locaux, moyens d'hébergement ou logements.

L.R. (1985), ch. H-6, art. 54; 1998, ch. 9, art. 28.

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CANADIAN HUMAN RIGHTS ACT

Equal Wages Guidelines, 1986

The Canadian Human Rights Commission, pursuant to subsections 11(3) and 22(2)* of the Canadian Human Rights Act**, hereby revokes the Equal Wages Guidelines, made on September 18, 1978***, and makes the annexed Guidelines respecting the application of section 11 of the Canadian Human Rights Act and prescribing factors justifying different wages for work of equal value, in substitution therefor.

Ottawa, November 18, 1986

GUIDELINES RESPECTING THE APPLICATION OF SECTION 11 OF THE CANADIAN HUMAN RIGHTS ACT AND PRESCRIBING FACTORS JUSTIFYING DIFFERENT WAGES FOR WORK OF EQUAL VALUE

Short Title

1. These Guidelines may be cited as the *Equal Wages Guidelines, 1986*.

Interpretation

2. In these Guidelines, "Act" means the *Canadian Human Rights Act*. (*Loi*)

Assessment of Value

Skill

3. For the purposes of subsection 11(2) of the Act, intellectual and physical qualifications acquired by experience, training, education or natural ability shall be considered in assessing the skill required in the performance of work.

4. The methods by which employees acquire the qualifications referred to in section 3 shall not be considered in assessing the skill of different employees.

* S.C. 1977-78, c. 22, s. 5(1)
** S.C. 1976-77, c. 33
*** SI/78-155, 1978 *Canada Gazette* Part II, p. 3695

Enregistrement
DORS/86-1082 18 novembre 1986

LOI CANADIENNE SUR LES DROITS DE LA PERSONNE

Ordonnance de 1986 sur la parité salariale

En vertu des paragraphes 11(3) et 22(2)* de la Loi canadienne sur les droits de la personne**, la Commission canadienne des droits de la personne abroge les Ordonnances sur l'égalité de rémunération, prises le 18 septembre 1978*** et prend en remplacement l'Ordonnance de la Commission canadienne des droits de la personne précisant les modalités d'application de l'article 11 de la Loi canadienne sur les droits de la personne et les facteurs justifiant la disparité salariale pour des fonctions équivalentes, ci-après.

Ottawa, le 18 novembre 1986

ORDONNANCE DE LA COMMISSION CANADIENNE DES DROITS DE LA PERSONNE PRÉCISANT LES MODALITÉS D'APPLICATION DE L'ARTICLE 11 DE LA LOI CANADIENNE SUR LES DROITS DE LA PERSONNE ET LES FACTEURS JUSTIFIANT LA DISPARITÉ SALARIALE POUR DES FONCTIONS ÉQUIVALENTES

Titre abrégé

1. *Ordonnance de 1986 sur la parité salariale.*

Définitions

2. La définition qui suit s'applique à la présente ordonnance.
«Loi» La *Loi canadienne sur les droits de la personne.*

Équivalence des fonctions

Qualifications

3. Pour l'application du paragraphe 11(2) de la Loi, les qualifications comprennent les aptitudes physiques et intellectuelles acquises par l'expérience, la formation ou les études ou attribuables à l'habileté naturelle.

4. Il est fait abstraction, lors de la comparaison des qualifications de différents employés, de la façon dont celles-ci ont été acquises.

* S.C. 1977-78, ch. 22, par. 5(1)
** S.C. 1976-77, ch. 33
*** TR/78-155, *Gazette du Canada* Partie II, 1978, p. 3695

Effort

5. For the purposes of subsection 11(2) of the Act, intellectual and physical effort shall be considered in assessing the effort required in the performance of work.

6. For the purpose of section 5, intellectual and physical effort may be compared.

Responsibility

7. For the purposes of subsection 11(2) of the Act, the extent of responsibility by the employee for technical, financial and human resources shall be considered in assessing the responsibility required in the performance of work.

Working Conditions

8. (1) For the purposes of subsection 11(2) of the Act, the physical and psychological work environments, including noise, temperature, isolation, physical danger, health hazards and stress, shall be considered in assessing the conditions under which the work is performed.

(2) For the purposes of subsection 11(2) of the Act, the requirement to work overtime or to work shifts is not to be considered in assessing working conditions where a wage, in excess of the basic wage, is paid for that overtime or shift work.

Method of Assessment of Value

9. Where an employer relies on a system in assessing the value of work performed by employees employed in the same establishment, that system shall be used in the investigation of any complaint alleging a difference in wages, if that system

(*a*) operates without any sexual bias;

(*b*) is capable of measuring the relative value of work of all jobs in the establishment; and

(*c*) assesses the skill, effort and responsibility and the working conditions determined in accordance with sections 3 to 8.

Employees of an Establishment

10. For the purpose of section 11 of the Act, employees of an establishment include, notwithstanding any collective agreement applicable to any employees of the establishment, all employees of the employer subject to a common personnel and wage policy, whether or not such policy is administered centrally.

Complaints by Individuals

11. (1) Where a complaint alleging a difference in wages is filed by or on behalf of an individual who is a member of an identifiable occupational group, the composition of the group

Efforts

5. Pour l'application du paragraphe 11(2) de la Loi, les efforts comprennent l'effort intellectuel et l'effort physique.

6. Pour l'application de l'article 5, l'effort intellectuel et l'effort physique peuvent être comparés.

Responsabilités

7. Pour l'application du paragraphe 11(2) de la Loi, les responsabilités comprennent les responsabilités de l'employé sur le plan des ressources techniques, financières et humaines.

Conditions de travail

8. (1) Pour l'application du paragraphe 11(2) de la Loi, les conditions de travail comprennent les conditions liées à l'environnement physique et au climat psychologique au sein de l'établissement, notamment le bruit, la température, l'isolement, les dangers matériels, les risques pour la santé et le stress.

(2) Pour l'application du paragraphe 11(2) de la Loi, il est fait abstraction, dans l'évaluation des conditions de travail, de l'obligation de travailler des heures supplémentaires ou par poste lorsque l'employé reçoit une prime pour ce travail.

Méthode d'évaluation

9. Lorsque l'employeur a recours à une méthode d'évaluation pour établir l'équivalence des fonctions exécutées par des employés dans le même établissement, cette méthode est utilisée dans les enquêtes portant sur les plaintes dénonçant une situation de disparité salariale si elle:

a) est exempte de toute partialité fondée sur le sexe;

b) permet de mesurer la valeur relative des fonctions de tous les emplois dans l'établissement; et

c) permet d'évaluer les qualifications, les efforts, les responsabilités et les conditions de travail visés aux articles 3 à 8.

Employés d'un établissement

10. Pour l'application de l'article 11 de la Loi, les employés d'un établissement comprennent, indépendamment des conventions collectives, tous les employés au service de l'employeur qui sont visés par la même politique en matière de personnel et de salaires, que celle-ci soit ou non administrée par un service central.

Plaintes individuelles

11. (1) Lorsqu'une plainte dénonçant une situation de disparité salariale est déposée par un individu qui fait partie d'un groupe professionnel identifiable, ou est déposée au nom de cet individu, la composition du groupe selon le sexe est prise en

according to sex is a factor in determining whether the practice complained of is discriminatory on the ground of sex.

(2) In the case of a complaint by an individual, where at least two other employees of the establishment perform work of equal value, the weighted average wage paid to those employees shall be used to calculate the adjustment to the complainant's wages.

Complaints by Groups

12. Where a complaint alleging different wages is filed by or on behalf of an identifiable occupational group, the group must be predominantly of one sex and the group to which the comparison is made must be predominantly of the other sex.

13. For the purpose of section 12, an occupational group is composed predominantly of one sex where the number of members of that sex constituted, for the year immediately preceding the day on which the complaint is filed, at least

(*a*) 70 per cent of the occupational group, if the group has less than 100 members;

(*b*) 60 per cent of the occupational group, if the group has from 100 to 500 members; and

(*c*) 55 per cent of the occupational group, if the group has more than 500 members.

14. Where a comparison is made between the occupational group that filed a complaint alleging a difference in wages and other occupational groups, those other groups are deemed to be one group.

15. (1) Where a complaint alleging a difference in wages between an occupational group and any other occupational group is filed and a direct comparison of the value of the work performed and the wages received by employees of the occupational groups cannot be made, for the purposes of section 11 of the Act, the work performed and the wages received by the employees of each occupational group may be compared indirectly.

(2) For the purposes of comparing wages received by employees of the occupational groups referred to in subsection (1), the wage curve of the other occupational group referred to in that subsection shall be used to establish the difference in wages, if any, between the employees of the occupational group on behalf of which the complaint is made and the other occupational group.

Reasonable Factors

16. For the purpose of subsection 11(3) of the Act, a difference in wages between male and female employees performing work of equal value in an establishment is justified by

(*a*) different performance ratings, where employees are subject to a formal system of performance appraisal that has been brought to their attention;

(*b*) seniority, where a system of remuneration that applies to the employees provides that they receive periodic increases in wages based on their length of service with the employer;

considération avant qu'il soit déterminé si la situation constitue un acte discriminatoire fondé sur le sexe.

(2) Si une comparaison peut être établie avec au moins deux autres employés exécutant des fonctions équivalentes à celles du plaignant visé au paragraphe (1), le salaire moyen pondéré versé à ces employés doit être utilisé dans le calcul du rajustement qui doit être apporté au salaire du plaignant.

Plaintes collectives

12. Lorsqu'une plainte dénonçant une situation de disparité salariale est déposée par un groupe professionnel identifiable ou en son nom, ce groupe doit être composé majoritairement de membres d'un sexe et le groupe auquel il est comparé doit être composé majoritairement de membres de l'autre sexe.

13. Pour l'application de l'article 12, un groupe professionnel est composé majoritairement de membres d'un sexe si, dans l'année précédant la date du dépôt de la plainte, le nombre de membres de ce sexe représentait au moins:

a) 70 pour cent du groupe professionnel, dans le cas d'un groupe comptant moins de 100 membres;

b) 60 pour cent du groupe professionnel, dans le cas d'un groupe comptant de 100 à 500 membres;

c) 55 pour cent du groupe professionnel, dans le cas d'un groupe comptant plus de 500 membres.

14. Si le groupe professionnel ayant déposé la plainte est comparé à plusieurs autres groupes professionnels, ceux-ci sont considérés comme un seul groupe.

15. (1) Pour l'application de l'article 11 de la Loi, lorsque la plainte déposée dénonce une situation de disparité salariale entre un groupe professionnel et un autre groupe professionnel et qu'une comparaison directe de ces deux groupes ne peut être faite quant à l'équivalence des fonctions et aux salaires des employés, une comparaison indirecte de ces éléments peut être faite.

(2) Pour la comparaison des salaires des employés des groupes professionnels visés au paragraphe (1), la courbe des salaires du groupe professionnel mentionné en second lieu doit être utilisée pour établir l'écart, s'il y a lieu, entre les salaires des employés du groupe professionnel en faveur de qui la plainte est déposée et de l'autre groupe professionnel.

Facteurs reconnus raisonnables

16. Pour l'application du paragraphe 11(3) de la Loi, les facteurs suivants sont reconnus raisonnables pour justifier la disparité salariale entre les hommes et les femmes qui exécutent dans le même établissement des fonctions équivalentes:

a) les appréciations du rendement, dans les cas où les employés sont soumis à un régime d'appréciation du rendement qui a été porté à leur connaissance;

b) l'ancienneté, dans les cas où les employés sont soumis à un régime salarial qui prévoit des augmentations périodiques fondées sur les états de service auprès de l'employeur;

(*c*) a re-evaluation and downgrading of the position of an employee, where the wages of that employee are temporarily fixed, or the increases in the wages of that employee are temporarily curtailed, until the wages appropriate to the downgraded position are equivalent to or higher than the wages of that employee;

(*d*) a rehabilitation assignment, where an employer pays to an employee wages that are higher than justified by the value of the work performed by that employee during recuperation of limited duration from an injury or illness;

(*e*) a demotion procedure, where the employer, without decreasing the employee's wages, reassigns an employee to a position at a lower level as a result of the unsatisfactory work performance of the employee caused by factors beyond the employee's control, such as the increasing complexity of the job or the impaired health or partial disability of the employee, or as a result of an internal labour force surplus that necessitates the reassignment;

(*f*) a procedure of gradually reducing wages for any of the reasons set out in paragraph (*e*);

(*g*) a temporary training position, where, for the purposes of an employee development program that is equally available to male and female employees and leads to the career advancement of the employees who take part in the program, an employee temporarily assigned to the position receives wages at a different level than an employee working in such a position on a permanent basis;

(*h*) the existence of an internal labour shortage in a particular job classification;

(*i*) a reclassification of a position to a lower level, where the incumbent continues to receive wages on the scale established for the former higher classification; and

(*j*) regional rates of wages, where the wage scale that applies to the employees provides for different rates of wages for the same job depending on the defined geographic area of the workplace.

17. For the purpose of justifying a difference in wages on the basis of a factor set out in section 16, an employer is required to establish that the factor is applied consistently and equitably in calculating and paying the wages of all male and female employees employed in an establishment who are performing work of equal value.

18. In addition to the requirement of section 17, for the purpose of justifying a difference in wages on the basis of paragraph 16(*h*), an employer is required to establish that similar differences exist between the group of employees in the job classification affected by the shortage and another group of employees predominantly of the same sex as the group affected by the shortage, who are performing work of equal value.

19. In addition to the requirement of section 17, for the purpose of justifying a difference in wages on the basis of paragraph 16(*i*), an employer is required to establish that

(*a*) since the reclassification, no new employee has received wages on the scale established for the former classification; and

(*b*) there is a difference between the incumbents receiving wages on the scale established for the former classification

c) la surévaluation d'un poste, dans les cas où le poste d'un employé est réévalué et déclassé et où son salaire demeure fixe pour une période limitée ou ses augmentations salariales sont bloquées jusqu'à ce que le salaire propre au poste déclassé soit égal ou supérieur au salaire de l'employé;

d) l'affectation de réadaptation, dans les cas où l'employeur verse à un employé un salaire supérieur à la valeur du travail qu'il exécute pendant qu'il se remet momentanément d'une blessure ou d'une maladie;

e) la rétrogradation, dans les cas où l'employeur, tout en maintenant le salaire d'un employé, le réaffecte à un poste d'un niveau inférieur, soit à cause du rendement insuffisant de l'employé attribuable à l'accroissement de la complexité du travail, à des problèmes de santé, à une incapacité partielle ou à toute autre cause indépendante de la volonté de l'employé, soit à cause d'un surplus de main-d'œuvre au sein de l'établissement de l'employeur;

f) la réduction graduelle du salaire, dans les cas où celle-ci est effectuée pour l'un des motifs mentionnés à l'alinéa *e*);

g) l'affectation temporaire à des fins de formation, dans les cas où, dans le cadre d'un programme de perfectionnement des employés qui est accessible tant aux hommes qu'aux femmes et leur offre des chances égales d'avancement, un employé est affecté temporairement à un poste et reçoit un salaire différent de celui du titulaire permanent;

h) la pénurie de main-d'œuvre dans une catégorie d'emploi particulière au sein de l'établissement de l'employeur;

i) la reclassification d'un poste à un niveau inférieur, dans les cas où le titulaire continue à recevoir un salaire selon les taux de l'ancienne classification;

j) les variations salariales régionales, dans les cas où le régime salarial applicable aux employés prévoit des variations de salaire pour un même travail selon la région où est situé le lieu de travail.

17. L'employeur qui entend justifier une disparité salariale en invoquant l'un des facteurs énumérés à l'article 16 doit prouver que ce facteur est appliqué de façon uniforme et équitable dans le calcul et le versement des salaires des hommes et des femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

18. Outre les exigences de l'article 17, l'employeur qui entend justifier une disparité salariale en invoquant le facteur visé à l'alinéa 16*h*) doit prouver qu'une disparité salariale existe entre le groupe d'employés appartenant à la classification touchée par la pénurie et un autre groupe d'employés qui exécute des fonctions équivalentes et est composé majoritairement d'employés du même sexe que le groupe mentionné en premier lieu.

19. Outre les exigences de l'article 17, l'employeur qui entend justifier une disparité salariale en invoquant le facteur visé à l'alinéa 16*i*) doit prouver ce qui suit:

a) depuis la reclassification, aucun nouveau titulaire n'a reçu un salaire selon les taux de l'ancienne classification;

b) une disparité salariale existe entre les employés recevant un salaire selon les taux de l'ancienne classification et un

and another group of employees, predominantly of the same sex as the first group, who are performing work of equal value.

autre groupe d'employés qui exécute des fonctions équivalentes et est composé majoritairement d'employés du même sexe que le groupe mentionné en premier lieu.

EXPLANATORY NOTE

(This note is not part of the Guidelines.)

These guidelines prescribe

(*a*) the manner in which section 11 of the *Canadian Human Rights Act* is to be applied; and

(*b*) the factors that are considered reasonable to justify a difference in wages between men and women performing work of equal value in the same establishment.

NOTE EXPLICATIVE

(La présente note ne fait pas partie de l'ordonnance.)

L'ordonnance vise à préciser:

a) les modalités d'application de l'article 11 de la *Loi canadienne sur les droits de la personne*;

b) les facteurs reconnus raisonnables pour justifier la disparité salariale entre les hommes et les femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

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