Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 14
Date: March 31, 2023
File No.: T1817/4712

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Decision

Member: Olga Luftig

Contents

I. OVERVIEW 1

II. DECISION 4

III. PRELIMINARY ISSUES 4

Confidentiality Orders 4

Which part of Section 7 of the *Act* applies to the Complaint? 5

IV. ISSUES 9

V. LEGAL FRAMEWORK 9

The test for discrimination 9

Credibility 12

The Complainant 13

VI. ANALYSIS 14

Protected Characteristic 14

Did CBSA's actions adversely impact Mr. Itty in relation to employment? 14

Was one or more of the protected characteristics a factor in CBSA's treatment of Mr. Itty? 14

Classroom Engagement: 15

Changes to Mr. Itty's classroom seat assignment 18

The Control and Defensive Tactics Simulation 21

The allegation that the Complainant was assessed more strictly than his classmates during the D-II Behavioural Simulations, and that POERT was flawed 29

Mr. Itty's D-II Assessments 41

VII. Experts 54

Dr Willis, The Complainant's Expert 56

Credibility - Dr. Willis 64

Dr. Durand, The Respondent's Expert 65

Credibility – Dr. Durand 70

Complainant's Final Feedback Session 70

VIII. CONCLUSION 77

IX. THE EVIDENTIARY ISSUE OF SPOLIATION 78

a) Was the destroyed evidence relevant? 79

b) Was the evidence destroyed intentionally? 80

c) Was litigation contemplated or ongoing at the time the evidence was destroyed? 95

d) Is it reasonable to infer that the evidence was destroyed to affect the outcome of the litigation? 95

X. ORDER 97

Note: This is the public version of this Decision, containing redactions of confidential information. The confidential version of the Decision has been issued to the parties.

I. OVERVIEW

[1] Geevarughese Johnson Itty (Complainant or Mr. Itty), alleges that the Respondent, Canada Border Services Agency (Respondent or CBSA), discriminated against him on the grounds of race, colour and national or ethnic origin, contrary to sections 7 and 10 of the *Canadian Human Rights Act,* R.S.C.1985, c.H-6 (*Act* or *CHRA*) in the course of his participation in the CBSA's Port of Entry Recruit Training program (POERT), which he did not pass.

[2] In 2007, the Complainant, a naturalized Canadian citizen born in India, was employed as an Appeals Officer with the Canada Revenue Agency. Through an interchange program, he applied to the Respondent for the position of Border Services Officer (BSO). He passed the initial screening which was the first part of POERT, and was invited into the nine-week portion of POERT in Rigaud, Quebec as a BSO candidate (also called "recruit" or "trainee"). There were 16 or 17 recruits in the Complainant's class.

[3] This nine-week part of POERT contains two evaluation stages, called "Determination Points": Determination Point I (D-I), administered during the fourth week, and Determination Point II (D-II), administered at the end. Candidates must pass both D-I and D-II in order to be placed in the pool of those eligible to be hired as BSOs.

[4] The D-I evaluation consists of two written exams and three exercises which are called "simulations" (Simulations). Simulations are explained in more detail later in the Decision, so for context, briefly, Simulations are live role plays in which the BSO candidate plays a uniformed BSO in a Canadian Port of Entry at a border crossing, and an actor plays a traveller (Traveller) and they interact as they would in either what is called a "primary" interview, primary being the first contact a traveller has with Canada when arriving at a Port of Entry, or "secondary", which is where a primary BSO refers a traveller for more intensive examination if the primary BSO has concerns or is unsure about either the traveller's admissibility into Canada or the admissibility of the traveller's goods. The recruit's performance in the Simulations in both D-I and D-II are assessed by CBSA personnel,

trained as assessors (Assessors). The Assessors make handwritten notes on the Simulation as it unfolds, contained in what this Decision calls “Assessment Forms”.

[5] Each of the D-I Simulations assess seven skills or attributes called “Behavioural, Organizational or Technical Competencies”, which if referred to as a group in this Decision, I call “Behavioural Competencies”: Client Service Orientation; Supporting CBSA Values; Analytical Thinking; Decisiveness; Effective Interactive Communication; Information Seeking Techniques; and Legislation, Policies and Procedures.

[6] During the D-I evaluations, the CBSA also informally assesses and provides feedback to the recruits on Competencies called “Dealing with Difficult Situations” and “Self-Confidence”. These two Competencies are formally evaluated at the end of D-II.

[7] The D-II evaluation consists of another set of two written exams, a Control and Defensive Tactics Simulation which tests if the recruit knows how to use force when required, and three Behavioural Simulations. The Behavioural Simulations in D-II each assess the same Competencies as assessed in D-I, plus Dealing with Difficult Situations and Self-Confidence.

The Complainant’s position

[8] The Complainant passed all the D-I written exams and Simulations. He continued on to the D-II training portion, which included classroom instruction, Control and Defensive Tactics (CDT) instruction, and practice Simulations, and was assessed at the end of D-II. The Complainant passed the D-II written exams and the CDT Simulation but did not pass all the Competencies in the D-II Simulation and was not placed in the pool of potential BSOs. He alleges that his failure, along with certain negative experiences during the POERT program, were tied to his race, colour, and/or national or ethnic origin, which are characteristics protected by the *Act.*

The Respondent’s position

[9] The Respondent’s position is that the only reason Mr. Itty did not pass the POERT Simulations was that he could not demonstrate the Competencies necessary to be a BSO. CBSA did not treat him differently than any other candidates. There is no evidence, direct

or circumstantial, that race, colour, ethnic or national origin played any part in CBSA's decision not to pass him. The job of Border Services Officer entails a large responsibility to protect the health, safety, security and economy of Canada and its citizens; therefore, CBSA expects BSO candidates to demonstrate specific Competencies.

[10] Mr. Itty filed the Complaint against CBSA with the Canadian Human Rights Commission (Commission) on January 20, 2010.

Overview of spoliation

[11] In the course of its investigation (Investigation), the Commission requested various documents from CBSA, including copies of the Assessors' handwritten Assessment Forms for all of D-I and D-II Simulations of Mr. Itty's classmates. As discussed in detail below under "Spoliation", it transpired that unfortunately, the CBSA had already destroyed the documents before this request. The Commission referred the Complaint to the Tribunal on April 24, 2012.

[12] The Complainant has asked the Tribunal to find that the CBSA deliberately destroyed these documents – that is, that the CBSA engaged in what is called "spoliation" of the documents and that therefore, the Tribunal ought to draw a negative inference against the CBSA that the destroyed documents would have told against the CBSA. I have **not found** that spoliation occurred, for the reasons set out below. Therefore, I do not make an adverse inference against the Respondent about what those documents may have contained, although I acknowledge that is both unfortunate and frustrating that the parties and the Tribunal did not have access to them during this proceeding.

Approach to the evidence

[13] Pursuant to the Tribunal's statutory authority in section 50 of the *Act*, I have carefully considered and weighed all the evidence, including testimony from expert and lay witnesses, and documentary evidence, and the parties' submissions, but I have not repeated or summarized all of it. I have gone into greater detail where I have found evidence or submissions to be material to the ultimate decision.

II. DECISION

[14] For the reasons which follow, I conclude that the Complaint is not substantiated because the evidence failed to establish on the balance of probabilities that the Complainant's race, colour, or national or ethnic origin were a factor in his negative experiences at the POERT program and in his final failing assessment. The evidence also failed to establish that POERT was systemically discriminatory, contrary to section 10 of the *Act*.

[15] Therefore, the Complainant is not entitled to remedies.

III. PRELIMINARY ISSUES

Confidentiality Orders

[16] Because of the sensitive nature of parts of the evidence surrounding the POERT program, the Tribunal made several orders of confidentiality pursuant to section 52 of the *Act* before and during the hearing (Confidentiality Orders). In other Rulings, the Tribunal ordered that the Confidentiality Orders applied to certain documents named in those Rulings. The Confidentiality Orders are: *Itty v. Canada Border Services Agency*, 2013 CHRT 34, dated December 16, 2013 (*First Confidentiality Order*); *Itty v. Canada Border Services Agency*, 2015 CHRT 26, dated January 14, 2015, (*Second Confidentiality Order*), and *Itty v. Canada Border Services Agency,* 2017 CHRT 26 (*Third Confidentiality Order*).

[17] There were also confidentiality orders in the following Rulings: all styled *Itty v. Canada Border Services Agency:* 2015 CHRT 2; 2019 CHRT 31 (2019 Disclosure Order) and 2020 CHRT 38 (Two Letters Ruling).

[18] The Tribunal made oral confidentiality orders at the hearing to apply to unredacted documents it ordered disclosed.

[19] The parties also agreed that the Tribunal would issue two versions of the Decision: one for the parties, containing confidential information as required, and one for the Tribunal's website, accessible to the public, without confidential information.

Which part of Section 7 of the *Act* applies to the Complaint?

[20] Section 7 of the *Act* states:

> "It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination".

[21] The Complainant's allegations of discrimination were based on section 7 of the *Act*, but prior to the commencement of the hearing he had not specified whether the Complaint was pursuant to subsection 7(a) or subsection 7(b) of the *Act*. The Tribunal understood subsection 7(a) to be the relevant subsection and asked all parties if they agreed.

[22] Both parties agreed that subsection 7(a) applied to the facts at hand. However, the Complainant argued that subsection 7(b) further applied since the Complainant was "…already a Crown employee on an interchange…" from the Canada Revenue Agency (CRA) and all the events at issue occurred during his employment with the CRA. The Respondent disagreed that subsection 7(b) was at issue here since the Complainant was not a Canadian Border Services Agency (CBSA) employee at the time of the alleged discriminatory practice.

[23] The Complainant claims that no matter the specific name of the "departmental corporation" used, whether it is the CRA or the CBSA under Schedule II of the *Financial Administration Act*, RSC 1985, c.F-11 (*Financial Administration Act*), the Complaint remained an employee of the Crown at all relevant times. Citing *Harkin v. Attorney General (Canada*), 2010 CHRT 11 (CanLII) ["*Harkin*"], the Complainant explains that the Tribunal has refused to make any distinction between "Crown entities" for the purposes of subsections 7(a) and (b), even when those entities are "separate establishments" within the meaning of another section of the *Act* (*Harkin* at paras 101-104). The Complainant therefore argues that section 7 of the *Act* should be read and applied as a whole and that "nothing turns on" making a distinction between subsections 7(a) and 7(b).

[24] The Respondent claims that on the plain reading of section 7, it clearly addresses two different aspects of employment-related discrimination: one with respect to hiring and firing of employees, while the other deals with discrimination during actual or ongoing employment. The Respondent cites *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 [*Robichaud*], where the Supreme Court of Canada interpreted subsection 7(b) as applying to discrimination during ongoing employment, and as aiming to remove discrimination "in the workplace" (*Robichaud* at para 12). The Tribunal endorsed this interpretation of subsection 7(b) in *Cluff v. Sage*, 1992 CanLII 20 (CHRT) [Cluff].

[25] In *Harkin*, the case the Complainant relies on, the Tribunal did not find that the Public Service Staff Relations Board (PSSRB) employees were included in the category of employees subject to a Consent Order involving the Treasury Board (TB). Even though the TB exercised "de facto control over the personnel management of the PSSRB", the PSSRB remained a separate employer. In *Harkin*, the Tribunal did not need to draw further distinctions between Crown entities for the purposes of subsection 7b) of the Act since the Complaint had failed based on the Complainant's inability to provide sufficient evidence to substantiate the Complaint. I do not agree with the contention that the fact the Tribunal did not draw further distinctions between Crown entities in that case equivalates to accepting that they can all fall under the definition of the same employer for the purposes of subsection 7b).

[26] The jurisprudence of this Tribunal has established that the phrase "in the course of employment" found at subsection 7(b) of the *Act* equivalates to "work-or job-related" (*Robichaud* at para 12*, Cluff* at p.9). In *Cluff*, the Tribunal established that an employee is "in the course of employment" when carrying out activities:

> 1. which they might normally or reasonably do or have specific authorization to do while employed;
>
> 2. "which fairly and reasonably may be said to be incidental to the employment or logically or naturally connected with it";
>
> 3. "in furtherance of duties they owe to their employer";
>
> 4. "in furtherance of duties owed to the employer where the employer is exercising or could exercise control over what the employee does" (see p.10).

[27] In the present case, when considering all the documentary evidence presented, I do not find that the Complainant was “in the course of employment’ at POERT when the alleged discrimination occurred.

[28] There is no dispute that when Mr. Itty applied for the Border Services Officer (BSO) position with the Respondent, he was employed by the Canada Revenue Agency (CRA) as an Appeal’s Officer. In the document tilted, “Assignment/Interchange/Secondment Information”, it is stated, among other things, that Mr. Itty is an Appeals Officer in the “Substantive Government Department” of the CRA. His duties involved, amongst other things, receiving and reviewing taxpayers’ files, including files from the CRA’s audit department.

[29] In a letter dated October 7, 2008, the CBSA informed Mr. Itty that he had been selected for POERT. This same letter advised that he would retain his substantive position with the CRA during the POERT training and that if he was unsuccessful at POERT, he would return to his substantive position. The terms and conditions of his participation in POERT, attached to the letter, included that he would remain subject to the “Terms and Conditions of employment of [his] substantive group…”. Mr. Itty signed and accepted those Terms and Conditions.

[30] Mr. Itty also signed an “Interchange Agreement” with the CRA and the Respondent, CBSA. In it, the parties agreed that Mr. Itty would attend POERT, but that while he was at POERT, the CRA would continue to pay him his salary. The Respondent would reimburse the CRA for those payments. I disagree with the Complainant that the CBSA “indirectly” paid Mr. Itty’s salary when he was at POERT. The fact the CBSA made reimbursements to the CRA does not mean the relationship between the CBSA and Mr. Itty was now one of employer and employee. Rather, the reimbursement was the reflection of a financial arrangement between the CBSA and CRA pursuant to the Interchange Agreement. This was reasonable given the fact the CRA was not benefiting from Mr. Itty’s normal duties as an Appeals Officer during his time at POERT.

[31] The status of Mr. Itty at POERT was one of trainee/participant. The POERT program constituted the final stage of his application to become a BSO with the CBSA. Only after

participated in and successfully passing the POERT program could he *then* qualify to become an employee with the CBSA (emphasis added). Mr. Itty also acknowledged in his testimony that his potential employment with the CBSA as a BSO was conditional to him passing the POERT.

[32] When applying the criteria established by the Tribunal in *Cluff*, none of the evidence adduced established that the activities Mr. Itty engaged in as a participant in POERT were "fairly and reasonably incidental" or "logically or naturally connected to his duties" as an Appeals Officer with the CRA. Additionally, Mr. Itty's participation at POERT was in no way "in furtherance of his duties" at the CRA. There was no evidence submitted that the CRA did or could control any of Mr. Itty's actions and activities at POERT.

[33] Mr. Itty was not dealing with taxpayers' "Notices of Objections" or income tax returns; he was not reviewing their files or researching them, nor was he making decisions on them or writing reports reflecting his analysis and decisions on them. Rather, he was taking part in classroom instruction as a trainee, studying the written course materials, taking written exams and being tested on Simulations, all based on the duties, responsibilities and knowledge required of a BSO, including customs and excise laws; immigration laws; assessing the conduct or travellers and their verbal responses to questions in face-to-face interactions; learning how to physically control and arrest unruly travellers; and learning and demonstrating other aspects of the duties of a BSO.

[34] In sum, I find that the alleged events and behaviour which form the basis of the allegations in Mr. Itty's Complaint did not occur either directly or indirectly in the course of his employment with the CRA – they occurred while he was a trainee/participant in POERT. At that time, Mr. Itty was not directly or indirectly performing his CRA duties nor doing work related to those duties. I also note in passing that the CRA was never named as a Respondent to this Complaint.

[35] For the above reasons, I conclude that it is subsection 7a) of the *Act*, rather than subsection 7b), which applies to this Complaint.

IV. ISSUES

[36] I must decide the following issues:

1. Has Mr. Itty established that CBSA discriminated against him, contrary to sections 7 and 10 of the *CHRA?*

More specifically, I must determine:

a. whether one or more prohibited grounds of discrimination were a factor in CBSA's decision to fail Mr. Itty from the POERT program, thus eliminating him from the pool of potential BSO employees of CBSA, contrary to subsection 7(a) of the *CHRA;* and

b. if the CBSA is pursuing a practice or a policy that tends to deprive individuals of any employment opportunities on the prohibited grounds of race, colour and national or ethnic origin, contrary to section 10 of the *CHRA*.

V. LEGAL FRAMEWORK

The test for discrimination

[37] For Mr. Itty to establish a *prima facie* case of discrimination, he must establish on the civil standard of the balance of probabilities that:

a. he had one or more of the identified characteristics protected against discrimination by the *Act* at the relevant time, specifically, race, colour and national or ethnic origin; and

b. that CBSA's actions adversely impacted him in relation to employment contrary to section 7 of the *Act,* (here, adverse treatment in respect of hiring), and section 10 of the *Act* (here a discriminatory policy or practice in respect of hiring); and

c. that one or more of his protected characteristics was a factor in how CBSA treated him.

(*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre),* 2015 SCC 39 (CanLII) at para 63 [*Bombardier*] and *Moore v. British Columbia (Education),* 2012 SCC 61 (CanLII) at para 33).

[38] A protected characteristic need only be one contributing factor in the adverse treatment. It does not have to be a “causal connection”. In other words, the discriminatory act can be explained by a variety of reasons, so long as one of the reasons is discrimination linked to a protected characteristic (*Bombardier*, *supra,* at paras 44, 56). In addition, there is no need to establish an intention to discriminate, because discrimination can be unconscious and can be the result of various factors (*Bombardier, supra* at para 41).

[39] A *prima facie* case of discrimination has been described as "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para 28).

[40] In deciding whether a Complainant has met its burden of establishing a *prima facie* case of discrimination on the balance of probabilities, the Respondent can either present evidence to refute the allegation of *prima facie* discrimination, offer a defence that justifies the discrimination (that is, the *bona fide* occupational requirement statutory defense pursuant to section 15 of the *Act*), or it can do both (*Bombardier* at para 64). In other words, the Respondent can show that discrimination never occurred and/or if it did, that there was a defensible legal explanation for it.

[41] In deciding whether the Complainant has successfully met his onus of establishing a *prima facie* case of discrimination, the Tribunal considers all evidence presented. This includes any evidence of the Respondent attempting to refute the existence of a *prima facie* case of discrimination. If a complainant has been able to meet their burden that there is a *prima face* case of discrimination, then the burden of proof transfers to the Respondent who can then put forward a defence justifying the discrimination (*Campbell v. Canadian Imperial Bank of Commerce*, 2019 CHRT 13 (CanLII) at para 113; *White v. Canadian Nuclear Laboratories Ltd*., 2020 CHRT 37 (CanLII) at para 41).

[42] Mr. Itty alleges that the Competencies on which the Assessors evaluated his performance in the Simulations, particularly the three Competencies he failed “…are extremely subjective and therefore vulnerable to prejudice and discrimination”

(Complainant's SOP, at para 3). Most of the witnesses agreed that personnel selection in general and behavioural assessment in particular are inherently vulnerable to bias, but the Respondent's witnesses say that the Assessment Center methodology is designed to minimize the risks of results being tainted by conscious or unconscious bias. The Complainant says that the POERT program deviates from the Assessment Center method in several important ways, such that it does not follow best practices to minimize the risk of bias.

[43] The Complainant specifically cites the following as examples of ways in which the POERT program is systemically discriminatory: Lack of diversity in the assessor pool; inadequate training for assessors (including not enough training of bias, lack of refresher training, lack of evaluation of assessors); failure to ensure inter-rater reliability for visible minorities; and the lack of data on failure/attrition rates for visible minority recruits.

[44] The majority of the submissions made before me at the hearing and in the parties' closing submissions appeared to focus on section 7 of the Act. However, I found that much of this evidence, in particular the expert evidence and Dr. Ducharme's evidence, was also relevant to the Complainant's allegations of systemic discrimination.

[45] Section 10 of the *Act* addresses discriminatory policies or practices, and states:

> 10. It is a discriminatory practice for an employer, employee organization or employer organization
>
> a. to establish or pursue a policy or practice, or
>
> b. to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other 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.

[46] In *Chopra v. Health Canada*, 2008 CHRT 39, at para. 255, the Tribunal quoted the Supreme Court of Canada case *Action Travail des Femmes v. CNR*, 1987 CanLII 109 (SCC) as defining systemic discrimination in employment as follows:

> "Systemic discrimination in an employment context….results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. Systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false…"

Credibility

[47] Credibility played an important role in the hearing of this matter. In considering the significant questions of credibility at play in this Complaint, have done my best to follow the guidance of the leading case of *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at 357:

> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility.…
>
> The test must reasonably subject his [witness'] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[48] Deciding if a person is credible or not is not a science and it is not always possible to precisely describe how credibility is assessed.

[49] My conclusions about a witness's credibility need not be universally applicable to that witness's testimony: while I may believe someone in some instances, this does not mean I must believe everything they said. Similarly, if I don't believe some aspects of a witness's testimony, I am not required to disbelieve all of it. As an adjudicator, I have not given much importance to witness demeanour, as demeanor is often not a sufficient indicator of credibility.

The Complainant

[50] In these Reasons, I comment on the credibility of various lay and expert witnesses. At the outset, however, I will begin by commenting on the credibility of the Complainant. It is the Complainant who bears the initial prima facie burden to establish his allegations.

[51] At times when Mr. Itty was asked a question about an exhibit, he would respond by reading *verbatim* from the exhibit. I noted that he was not tuning in to what his own and Respondent counsel were asking him. At times he appeared to not understand what was being asked (and in certain cases this was understandable), while at other times, it appeared that he was not listening to the question. He was both argumentative and evasive during different parts of his testimony, and at times combative towards counsel.

[52] I find it understandable that a complainant would have a certain amount of frustration, anger and even hostility towards a respondent who the complainant feels has treated him unfairly by discriminating against him. However, when Mr. Itty became evasive in answering certain questions and argumentative about legal points during his testimony, it weakened the credibility of those parts of his testimony. For example, it was undisputed that Mr. Itty passed D-II Simulation 6, assessed by Gregory Zbitnoff. However, for a period in his testimony, he refused to acknowledge that fact, saying he did not know what happened in the Integration Meeting of the Assessors after the Simulations were completed. He finally admitted that he passed Simulation 6. This kind of sparring with counsel on an obvious, undisputed fact did not support Mr. Itty's credibility. I formed the impression that although Mr. Itty honestly believed his allegations, his viewpoint and testimony on certain alleged incidents was not reliable. I wish to note that in assessing Mr. Itty's credibility, I have not given much importance to his demeanour, as demeanor by itself is often not a sufficient indicator of credibility or reliability of testimony.

[53] The Respondent says that Mr. Itty was not credible, and provided many examples. Some, I agree with and have noted above. Others, which relate to matters which might better be described as litigation strategy, I disregard entirely. In summary, I accepted parts of his testimony and did not accept other parts. In the Decision, I say which parts I did not accept, and why.

VI. ANALYSIS

Protected Characteristic

[54] There was no dispute that the Complainant was born in India or that he is South Asian. There was also no dispute when he described himself as “not Caucasian”—that is, not white. Therefore, I find that the Complainant has the following characteristics protected by section 3(1) of the *Act:* race, colour, and national or ethnic origin.

Did CBSA’s actions adversely impact Mr. Itty in relation to employment?

[55] There was also no dispute that Mr. Itty failed the POERT program and consequently was not placed into the qualified pool for employment as a BSO. This was an adverse impact on him within the meaning of the *Moore* test.

[56] In addition to failing the POERT program, Mr. Itty alleged a series of discriminatory events and behaviour by CBSA personnel that had adverse impacts on him throughout his time at POERT in Rigaud. I will address them in turn in the following section.

Was one or more of the protected characteristics a factor in CBSA’s treatment of Mr. Itty?

[57] This was the most disputed area of the Complaint. The Complainant made a series of allegations that certain behaviours by CBSA personnel constituted discriminatory practices pursuant to subsection 7(a) of the *Act*.

[58] Specifically, the Complainant alleged that:

a. Many times in the classroom, Instructor Jean-Pierre Landry ignored the Complainant’s questions while answering those of others who asked many more questions;

b. his classroom seat assignment was changed three times while some other recruits experienced no seat changes;

c. he had to play the Traveller role twice in the D-II CDT Simulations while other recruits only had to play the Traveler once, if at all, thereby negatively impacting his

Behavioural Simulations and that CBSA did this intentionally so that he would fail in his D-II Behavioural Simulations, which followed the CDT Simulations;

d. he was assessed more strictly than his classmates in the D-II Behavioural Simulations; and,

e. CBSA personnel humiliated and insulted him during his Final Feedback, barred him from taking notes and did not give him reasons for his failure from POERT.

[59] Further, under s.10, he alleged that the POERT program itself had several failings in its design and execution which led to the outcomes he experienced. The evidence on his personal experience and the allegations of broader systemic issues was highly intertwined; and as such I am dealing with them together to avoid repeating evidence.

[60] I will proceed through each allegation as it was presented:

Classroom Engagement:

[61] Mr. Landry was the lead Facilitator/Instructor (Instructor) for Mr. Itty's class, and taught Customs and Secondary Baggage Examination and other subjects. He was also the co-ordinator for Mr. Itty's class.

[62] Mr. Itty testified that there were 16 candidates (recruits) in his class. The Instructor was at the front and wrote on a board. Each recruit had a module of the training materials. The training required group exercises after each module; the Facilitator formed smaller groups of four or five recruits, who would go up to the board. If recruits had clarification questions, the Facilitator would answer them.

[63] In terms of the number of questions asked per day in Mr. Landry's class, Mr. Itty alleged that another recruit would have asked 10 to 15 questions and Mr. Itty would have asked 6 or 7. Mr. Itty alleged that Instructor Landry answered all of the other recruit's questions, but at the most, only answered one or two of Mr. Itty's questions, although Mr. Itty did not remember Mr. Landry answering any of his own questions, particularly when he taught Customs penalties on the computer program dealing with that. Some recruits, including Mr. Itty, had difficulty navigating between the screens, and Mr. Landry was walking around the room. When Mr. Itty raised his hand to ask for help, Mr. Landry would just look

at him and walk away. The candidates in the class with some BSO experience helped Mr. Itty.

[64] The Respondent denies that this was the case. Mr. Landry testified that he did not recall doing so. The Respondent argues that even if Mr. Landry did refuse to answer some of Mr. Itty's questions in class, he treated other recruits the same way to keep lessons on track. Mr. Landry testified that he offered to answer students' questions at lunch or during breaks or after class if they required more time to discuss their questions and told them to write their questions on what was called the "parking lot blackboard" which was in the classroom. He would then answer those questions later.

[65] In December of 2008, recruits were given an opportunity to assess their Facilitators. Mr. Itty wrote in his assessment that Mr. Landry "stated that all of us should ask questions but on several instances he appeared unresponsive, maybe he didn't pay attention". However, Mr. Itty also noted that Mr. Landry was approachable and available for individual questions. Mr. Itty further noted that Mr. Landry was sensitive and respectful of diverse opinions "to a certain extent", offered constructive feedback, remained on topic, and ensured teaching objectives were met. When asked to identify the instructor's weaknesses the only thing Mr. Itty noted at the time was that he "[f]ailed to provide live examples and failed to relate life experiences on the job." In reviewing these assessments from the class as a whole, the Tribunal notes that several other recruits in Mr. Itty's class wrote that Mr. Landry was very good at keeping lessons on track, and that he did not let questions that were off topic take up too much classroom time.

[66] Mr. Landry testified that in class, he recalled Mr. Itty asking him a question twice. Mr. Landry had told the class that he had to write something on the board and he would not be answering questions then. Mr. Itty asked him the questions while Mr. Landry was writing on the board. Mr. Landry noted that at the end of every lesson he covered, he would tell the class that they could ask questions at the break or during lunch, Mr. Landry testified he had a "vivid" recollection of the incident with Mr. Itty because he had never had a recruit ask him a question when he was writing something on the board and not approach him afterwards to ask clarifying questions, except for Mr. Itty. Mr. Landry testified that he may have needed to cover new material at that time. Mr. Landry acknowledged that if he was in that kind of

situation again, perhaps he might do it differently. Mr. Landry remembered AM's name, but did not remember ignoring Mr. Itty and answering all of AM's questions, nor did he remember not helping Mr. Itty on the computer, and he noted that sometimes recruits help each other.

[67] I find that Mr. Itty truly believed that Mr. Landry ignored his questions, and I accept that Mr. Itty thought Mr. Landry should have answered them, and his comments about Mr. Landry in his Assessment of the Facilitator form confirm that Mr. Itty believed this. However, I do not accept that Mr. Landry ignored all of Mr. Itty's questions.

[68] The evidence also failed to establish that Mr. Landry ignored Mr. Itty's questions or requests for assistance more than anyone else's. But even if Mr. Landry did so, the evidence did not establish that any failure to answer Mr. Itty's questions with the same frequency as those of his classmates was linked to Mr. Itty's protected characteristics. Further, Mr. Landry testified that one of the reasons he would change the classroom seating arrangements was to put recruits who were weaker in an area next to recruits who were strong in that area, to foster a better learning environment for those who were struggling with some aspect of the teaching area. Therefore, I do not place any weight on the fact that other recruits, and not Mr. Landry, assisted Mr. Itty in switching screens, because this was part of the teaching design and method Mr. Landry used.

[69] As well, other recruits' Assessment of the Facilitator forms stated that Mr. Landry was very good at keeping on topic, and making sure subjects were covered, and that this included stopping questions that veered off-topic. Mr. Landry testified that there was a lot of material to teach and he had to cover it in the time available.

[70] I conclude that the evidence failed to establish, on the balance of probabilities, that if Mr. Landry ignored some of Mr. Itty's questions, Mr. Itty's race, colour, or national or ethnic origin was one of the factors in Mr. Landry's treatment of Mr. Itty in terms of answering his questions.

[71] The Tribunal therefore dismisses this allegation.

Changes to Mr. Itty's classroom seat assignment

[72] The Complainant testified that Instructor Landry changed his classroom seat three times, and that these seat changes unsettled him a great deal, particularly the last one. He submitted that the seat changes were discriminatory because he was singled out – he testified that no one else in his class had their seats changed as many times as he did, and many never had their seats changed at all. Particularly because of the timing of the final seat change, he had a sense of foreboding for the future and that something was seriously wrong.

[73] Approximately one week before the D-II Simulations and exams, a classmate of Mr. Itty's (candidate X) asked Mr. Landry to change her seat "discreetly" because she was being distracted by another student. Eventually she revealed that the distractions were caused on two occasions by Mr. Itty, who she said was laughing at inappropriate gestures and comments made by others in the class and himself. Mr. Landry recorded candidate X's concerns in a POERT computer program called the G-Drive, on candidate X's G-Drive file, naming Mr. Itty. But Mr. Landry did not ask Mr. Itty about his side of the story.

[74] In this context and atmosphere, Mr. Landry changed Mr. Itty's classroom seat for the last and what Mr. Itty alleges was the third time, in response to candidate X's complaint, without telling Mr. Itty the reason.

[75] Mr. Landry testified that at the same time as he changed Mr. Itty's seat, he changed the classroom seating of four or five other candidates.

[76] Mr. Itty testified that this seat change reflected that something bad was happening. It made him very nervous and anxious, and caused him worry, because it happened one week before the D-II Simulations and exams. He tried to put aside his worry, because he knew he had to study hard for the upcoming D-II exams. I accept Mr. Itty's testimony on how this seat change made him feel.

[77] Mr. Itty testified that he did not find out about this entry into candidate x's G Drive until two or three weeks before the hearing began, when his representative obtained the document. I find that it was understandable that Mr. Itty described himself as being very

angry and upset. Mr. Itty denied that he ever did or would do anything of the kind that candidate X alleged he did.

[78] The Respondent argued that the evidence demonstrated that it was not unusual for the classroom seating arrangements to change multiple times over the course of the program, and that in fact several other classmates in Mr. Itty's class were moved. This practice was actually encouraged, they argued, because it was considered beneficial to learning, by exposing candidates to other students with different learning styles in order to learn from each other; and by giving candidates who were weak in a topic the opportunity to learn from a candidate who was stronger in that topic and by resolving distractions or other impediments to learning by giving students a different learning environment. Mr. Landry testified that he made several reassignments based on these different considerations. The Respondent also points out that Mr. Itty acknowledged during his testimony that on the final day his seat was reassigned, "four or five" other recruits also had their seats reassigned.

[79] The Respondent further submitted that the seat change pursuant to candidate X's complaint was not relevant. CBSA says the Complainant failed to provide any supporting evidence for his claim that allegations of "seriously inappropriate behaviour" against other students went unrecorded.

[80] Ms. Nathalie Surprenant, who was co-Manager of POERT at Rigaud when Mr. Itty was there, and a number of other Respondent witnesses testified that the G-Drive is a tool where POERT Instructors record observations and problems which a recruit is having which require improvement. Each recruit had a separate file on the G-Drive.

[81] Mr. Itty testified that "everyone" had access to the G-Drive, calling it an "open shelf" and that therefore, everyone at Rigaud had a bad impression of him before the D-II Simulations based on these entries, and that this led to his being failed. Furthermore, he alleged in his testimony that this would not have happened to any Caucasian recruit.

[82] The evidence established that in fact, *not* everyone had access to the G-Drive. The testimony of Mr. Itty's D-II Assessors Gregory Zbitnoff, Shellie Fowler, and Kevin Phillips, which I accept on this issue, established that the Assessors had no knowledge of Mr. Itty

before they assessed him in D-II, including not reading any information on the G Drive. I find that their testimony established this, notwithstanding that Ms. Fowler could have had access to the G Drive as an Instructor. She, like the other two Assessors, testified that they knew nothing about Mr. Itty before they assessed him. Ms. Surprenant confirmed that Assessors did not have access to the G Drive and that only Instructors and Administrators did.

[83] I find that the evidence established that Mr. Landry did not record candidate X's complaint on Mr. Itty's G Drive file - rather, he recorded it on candidate X's file.

[84] That said, POERT Administrator Marie-Josee Roy's January 23, 2009 note in the G Drive is replete with the assumption that everything candidate X told Mr. Landry and Ms. Roy was true, without ever asking Mr. Itty for his side of what X alleged. Ms. Roy went so far as to opine that candidate X displayed "…integrity …in addressing inappropriate comments to LANDRY". Nowhere in Ms. Roy's note is there an acknowledgment that candidate X's complaint was based in part on hearsay.

[85] Mr. Landry, however, did note in his G Drive entries on the matter that much of candidate X's complaint was hearsay, and noted it several times. He also testified to that effect and that it surprised him that no one asked Mr. Itty about candidate x's complaint. Mr. Landry testified that candidate X later said that the seat change worked – she was no longer distracted from learning, and further, when Ms. Roy asked her, she told Ms. Roy that she would have no problem working with Mr. Itty as a BSO.

[86] Most significant, the combination of Mr. Landry's testimony, Mr. Itty's testimony which I accept in this regard, and the notes from the G-Drive about candidate X's complaint established that Ms. Roy never asked or directed Mr. Landry or anyone else to obtain Mr. Itty's side of the story, and in fact told Mr. Landry not to do so. While this finding does not impact the Tribunal's determination of the Complaint, I wish to note that CBSA did not handle Candidate X's complaint properly and Mr. Itty ought to have had an opportunity to provide his side of the situation. Having said that, I take into account that Administrator Roy also instructed Mr. Landry not to note anything about Candidate X's complaint in Mr. Itty's file in the G-Drive, which I conclude would have materially lessened the likelihood that the alleged incident would be seen by those in a position to affect Mr. Itty's D-II Assessments.

[87] Lastly, Mr. Itty alleged that the G-Drive entries may have had a negative impact on the Administrator, Helene Helde, and Co-Manager Guy Cormier who were later involved in the Integration Meeting review of his Assessors' evaluations of his Behavioural Simulations.

[88] I find that there is no evidence that Ms. Helde or Mr. Cormier knew about Candidate X's complaint against Mr. Itty or that it affected their confirmation of Mr. Itty's Assessors' D-II Simulation evaluations. While Mr. Itty did suffer adverse impacts on account of the last seat change in the sense that he was upset and concerned about the last change in his classroom seating about one week before the D-II exams and Simulations, there is no evidence that those adverse impacts were linked to his race, colour, or national or ethnic origin. Rather, I conclude that the last seat change was CBSA's response to candidate X's allegations.

[89] The Tribunal dismisses this allegation.

The Control and Defensive Tactics Simulation

[90] Control and Defensive Tactics (CDT) is a course on the use of force in the BSO role. The candidates in the course are assessed in D-II, in the CDT Simulation. Candidates must obtain a pass in the CDT Simulation in order to pass POERT. The evaluation of candidates' CDT Simulation is done only once, at the end of D-II, on the same day as the other three D-II Simulations.

[91] During the CDT Simulation, the candidate being assessed plays the role of the BSO. Another candidate plays the role of a Traveller. The Traveller wears a special protective suit. The Simulation is designed for the BSO candidate to demonstrate the techniques learned in the CDT classes to gain control over and arrest a Traveller who is being aggressive and out of control. Then the candidates switch roles-- the former BSO role-player takes the role of the Traveller, and the former Traveller takes the BSO role and is assessed. However, on some occasions for reasons set out below, some recruits do not play the Traveller at all, and some recruits play the Traveller twice.

[92] There was no dispute that Mr. Itty played the role of the protective-suited Traveler twice, or that he passed the CDT Simulation.

[93] Mr. Itty alleged he suffered adverse differential treatment in the CDT Simulation because CBSA made him the Traveller twice for two white candidates, in back-to-back CDT Simulations, when he should have been the Traveller only once, as others in his class were who did not share his attributes. The Simulation subjects the Traveller to force. He alleged CBSA deliberately made him the Traveller twice to cause him to be nervous and insecure so that he could be failed in the other D-II Simulations. He also alleged that playing the role twice caused his wrist to hurt and that it deprived him of enough time to prepare for his subsequent Behavioural Simulations. Mr. Itty submitted this is an example of how CBSA discriminated against him during the POERT program.

[94] The Respondent submitted that the Complainant's allegations related to his CDT Simulation are not substantiated. The Respondent pointed out that the Complainant himself admitted that he was not the only candidate in his class who twice played the role of the Traveller. The Respondent's witness Fernando Borgia was a part-time Instructor/Facilitator and Assessor in the POERT CDT course before, during and after Mr. Itty was at POERT. The Respondent cited Mr. Borgia's testimony that the CDT Simulation is not overly physical. The Complainant admitted in his testimony that the allegation that he had less than one hour to recover from the CDT Simulation and prepare for his next Simulation was incorrect. There was no evidence, they argued, that because of his protected characteristics, the Respondent scheduled the Complainant to play the Traveller twice, or did so to make him nervous and cause him to fail his other Simulations. The POERT Test Objective Booklet and the POERT Training Handbook advise the candidates that if they have any physical injury or conditions that could be aggravated by participating in CDT, they should notify their trainers. Mr. Itty did not do so, nor did he say after his CDT Simulation that his sore wrist would impede his performance in the rest of the D-II Simulations.

[95] In the first group of two CDT Simulations on January 30, 2009, Mr. Itty played the BSO, in uniform, and his classmate was the protective-suited Traveller. Mr. Itty testified that the BSO candidate in a CDT Simulation is faced with a physically aggressive and uncontrollable Traveller who wears a special protective padded suit (protective suit). The BSO must use combined defensive tactics skills such as tackling and handcuffing, to bring the Traveller into compliant behaviour, without any abuse or using unacceptable language,

while using caution to avoid physically injuring the Traveller. The BSO must then safely bring the Traveller to a designated place, at which point the Simulation ends. Mr. Itty testified that playing the Traveller was “pretty intense” physically.

[96] Mr. Itty explained that when he was the suited Traveller the second time, the BSO candidate being tested put the handcuffs on Mr. Itty’s right hand extremely tightly. Mr. Itty told an Assessor, who loosened the handcuff. Mr. Itty testified that his wrist was very painful and he couldn’t move his hand for half an hour afterwards. He testified that the protective suit does not cover areas exposed to handcuffing.

[97] Mr. Itty identified the document titled “POERT – Combat & Defense Tactics Simulation Exercise – Class A – Schedule DII” (CDT Schedule) as the schedule for his class’ CDT Simulations. He confirmed he was candidate “A8” on the CDT Schedule. He relied on the Schedule for the times of the CDT Assessments in which he participated because he could not remember them precisely given that they were so long ago. He testified that according to the CDT Schedule, he participated in the CDT Simulations from 8:30 to 9:00 a.m. and from 9:00 a.m. to 9:30 a.m. first in the role of BSO, then twice in the role of the Traveller in the protective suit.

[98] Mr. Borgia testified that the time shown in the CDT Schedule is when the candidate starts; “recruit’s Activity” outlines the type of Simulation. Mr. Borgia explained that the CDT Schedule shows “CDT Testing” twice because the candidates come in pairs, and there are two CDT Simulations which run consecutively in each half-hour time frame. For example, from 8:30 a.m. to 9:00 a.m., the “Recruits Involved” are first A8 as BSO and A9 in the protective suit as Traveller; then they switch roles: A9 is BSO and A8 is the suited Traveller. The Assessors do not evaluate the candidate in the Traveller role – the evaluation is only of the candidate in the BSO role.

[99] Eleven candidates in Mr. Itty’s class, including Mr. Itty, were assessed as BSOs in their CDT Simulations. Present during the Simulations are the two CDT Assessors; the candidate being evaluated as the BSO and another candidate from the same class who is the protective-suited Traveller.

[100] Mr. Itty was identified as candidate A8 who was assessed as BSO in the first half of the 8:30 a.m. to 9:00 a.m. time slot as the BSO, and A9 was the protective-suited Traveller. Mr. Borgia and Mr. Slee assessed Mr. Itty. There was no dispute that they passed him.

[101] Still in the period between 8:30 a.m. and 9:00 a.m., the next CDT Simulation was A9, who was assessed as the BSO and Mr. Itty (A8) as the protective-suited Traveller. The CDT Schedule shows that in the first half of the period between 9:00 a.m. and 9:30 a.m., Mr. Itty was again the protective-suited Traveller and candidate A10 was the assessed BSO.

[102] In the second half of the period between 9:00 a.m. and 9:30 a.m., candidates A12 as BSO and A16 as the suited Traveller did the CDT Simulation, and Mr. Itty did not participate at all. I find that he finished participating in the CDT Simulations at 9:30 a.m. at the latest. He did not participate further in the CDT Simulations and was free to leave and return to his room to change and prepare for the other three D-II Behavioural Simulations.

[103] Candidate A16 was again the suited Traveller in the Simulation in the top half of the period from 9:30 a.m. to 10:00 a.m. Therefore, candidate A16 was the protective-suited Traveller twice in a row, in back-to-back CDT Simulations, between 9:00 a.m. and 10:00 a.m., after Mr. Itty.

[104] Candidate A3 was the suited Traveller between in the Simulation in the bottom half of the period 13:30 hours (1:30 p.m.) and 14:00 hours (2:00 p.m.) when candidate A4 was the BSO. Candidate A3 was again the suited Traveller for the second time in the Simulation of candidate A6 as BSO, between 14:15 hours (2:15 p.m.) and 14:45 hours (2:45 p.m.).

[105] The above evidence establishes that out of the eleven candidates in Mr. Itty's class who participated in the CDT Simulations, two other candidates besides Mr. Itty played the role of the suited Traveller twice, in back to back CDT Simulations. They were candidate A16, in back-to-back CDT Simulations some time between 8:30 a.m. and 10:00 a.m., and candidate A3, in back-to-back Simulations some time between 1:30 p.m. and 2:45 p.m.

[106] Therefore, including Mr. Itty, a total of three candidates out of the eleven participants in the CDT Simulations for Mr. Itty's class twice played the suited Traveller in back-to-back

Simulations. Mr. Itty agreed that there were three candidates in his class who were the Traveller more than once in the CDT Simulation.

[107] Mr. Itty's position on the amount of time he had between the end of his role as Traveller in the CDT Simulations and the start of his other D-II Simulations was partly based on his firmly held belief, repeated at least twice in his testimony, that candidates had to report to the Simulation testing area about half an hour before the Simulation started. I find that the documentary evidence does not support this assertion.

[108] Paragraph 50 of the Complainant's SOP states, in part, that after the gruelling takedown in his CDT Simulations, he had to present himself for the next Simulation within less than one hour and that "all these actions were done to make Mr. Itty nervous and insecure so he could be failed in the Simulations".

[109] The evidence established that after his CDT Simulations, Mr. Itty's next Simulation was Simulation 6, assessed by Gregory Zbitnoff (the only D-II Simulation he passed). Mr. Itty acknowledged that Mr. Zbitnoff recorded him as entering the Simulation Area for Simulation 6 at 11:55 a.m. but asserted that candidates were required to arrive in the waiting area at least half an hour before the scheduled Simulation start time and wait until called to begin the actual Simulation.

[110] I find that Mr. Itty was not deliberately untruthful in paragraph 50 of his SOP or in his assertion during most of his testimony on the CDT Simulations about the amount of time he had to rest and prepare himself for the first of the next three D-II Behavioural Simulations. He truly believed his own timeline, but when other evidence was put to him, he finally acknowledged that his timeline could be incorrect. However, he remained firm in his assertion that candidates had to present themselves half an hour before the start of the first Behavioural Simulation which came after the CDT Simulations.

[111] Having reviewed the documentary evidence, I find that Mr. Itty's testimony on this point was not reliable, and that he did in fact have materially more time to prepare.

[112] Mr. Itty testified that he was twice subjected to the physical toll of being a Traveller in the CDT Simulations, which were the same day as the D-II Behavioural Simulations. He

testified that after all the exertion he had in the morning, he had to return to his room, shower, get into uniform, ”re-set” his mind for his next Simulation, and get to the his next Simulation station, where he waited to be called to do the next Simulation. He described this sequence of events as very stressful for him, because he had to do so in about one hour or less. He felt rushed and that he was being used as a “guinea pig” by having to play the Traveller twice in back-to-back CDT Simulations.

[113] Mr. Borgia testified that participants have at times approached him about not playing the Traveller, for example because of previous injuries, and they have been excused from doing so. The candidates know they can raise the issue because the Instructors tell them they can do so both throughout the training and in practice simulations. Usually the issue was raised in the evaluated practice scenario before the actual CDT Simulation, which also gave the Instructors the chance to identify anyone who had problems.

[114] Mr. Borgia testified that playing the Traveller twice typically happens in back-to-back Simulations because it makes sense logistically for ease and simplicity: preparation time is needed to ensure the Traveller is ready for the Simulation, including ensuring the protective suit fits, providing a helmet, applying tape on the wrists if requested, and organizing the other equipment. Each time the Assessors remove a Traveller’s safety equipment, it must be sanitized before the next person wears it, which takes time. Back-to-back helps save time because the Assessors do not have to take as much time to explain the role to a candidate who has played the Traveller once before.

[115] Mr. Borgia did not remember Mr. Itty raising concerns about his ability to participate in CDT either as BSO or Traveller, and was not aware of him doing so with anyone else. He was not aware of Mr. Itty raising any concerns before the CDT Simulation regarding playing the Subject Traveller more than once. In his testimony, Mr. Itty made no mention of requesting that he be excused from acting as the Traveller before the CDT Simulations.

[116] Mr. Itty’s position was that CBSA treated him differently than his classmates who had more time to re-set themselves for the other three D-II Simulations by being scheduled to do them in the morning and the CDT Simulation in the afternoon, or vice-versa. He was firm

in his position that both the CDT Simulations and the D-II Behavioural Simulations should not have been scheduled in the same morning as was done to him.

[117] The Respondent's witness Nathalie Surprenant, one of two Co-Managers of the POERT program when Mr. Itty attended POERT, testified about the CDT Simulations, including how and when CBSA scheduled the recruits to do the Simulations, why it scheduled some recruits to be the Traveller more than once, and it did not schedule some recruits to be the Traveller at all. I found Ms. Surprenant to be an honest, straightforward, forthright witness, whose testimony I found credible and reliable. For those reasons, I have given her testimony much weight.

[118] Fernando Borgia was a part-time Instructor at Rigaud for the CDT course when Mr. Itty was there. He had been a BSO for three years at Pearson International Airport. Mr. Borgia had been an Assessor for hundreds of CDT Simulations before he assessed Mr. Itty in the BSO role. Mr. Borgia and Ryan Slee assessed Mr. Itty in the BSO role in his CDT Simulation.

[119] Mr. Borgia testified about the use of force in the BSO role, teaching the CDT course, the safety measures applied in the CDT classroom and CDT Simulation, and the level of physical intensity on the Traveller in the CDT Simulation. I found Mr. Borgia to be a straightforward, honest and forthright witness, whose evidence I found credible and reliable, and except on one point about CDT, I have also given it much weight.

[120] The document titled "Control and Defensive Tactics Testing Sheet" (CDT Testing Sheet) contains both Mr. Borgia's and Mr. Slee's Assessments of Mr. Itty in the BSO role. There is no dispute that both Mr. Borgia and Mr. Slee passed Mr. Itty in his CDT Simulation.

[121] According to the combined testimony of Ms. Surprenant and Mr. Borgia, it was not unusual for a candidate to be the Traveller more than once in the CDT Simulations. This could happen because of an uneven number of recruits in the class; some recruits may have already been certified in CDT; some candidates could have conditions or an injury which wearing the protective suit could aggravate so CBSA would not have them be the Traveller at all to avoid aggravating an injury or condition. The word "CERTIFIED" beside a candidate's name meant they had already successfully completed CDT and were not

required to repeat the CDT Simulation. Mr. Borgia explained that the right-hand column titled "Recruits Involved", below which were the sub-headings "BSO" and "In suit", designated who was assessed as the BSO and who was the Traveller in the protective suit during each pair's tests.

[122] Mr. Itty claimed that he had less than one hour to recover between these Simulations; I accept that this was his sincerely held belief. It was only when documentary evidence was put before him showing the contrary that he admitted he may have had more time.

[123] Mr. Itty's position on the amount of time he had between the end of his role as Traveller in the CDT Simulations and the start of his other D-II Simulations was partly based on his firmly held belief, repeated at least twice in his testimony, that candidates had to report to the Simulation testing area about half an hour before the Simulation started. I find that the documentary evidence does not support this assertion.

[124] Paragraph 50 of the Complainant's SOP states, in part, that after the gruelling takedown when he was the Traveller, he had less than one hour to go back to his room, shower, change into the BSO uniform, re-set, and present himself for his first Behavioural Simulation, and that "all these actions were done to make Mr. Itty nervous and insecure so he could be failed in the Simulations".

[125] The evidence established that after his CDT Simulations, Mr. Itty's next Simulation was Simulation 6, assessed by Gregory Zbitnoff. Mr. Itty acknowledged that Mr. Zbitnoff recorded him as entering the Simulation Area for Simulation 6 at 11:55 a.m., but asserted that candidates were required to arrive in the waiting area at least half an hour before the scheduled Simulation start time and wait until called to begin the actual Simulation.

[126] I find that Mr. Itty was not deliberately untruthful in paragraph 50 of his SOP and in his assertion during most of his CDT testimony about the amount of time he had to rest and prepare himself for the first of the next three D-II Behavioural Simulations. He truly believed his own timeline, but when other evidence was put to him, he finally acknowledged that his timeline could be incorrect. However, he remained firm in his assertion that candidates had to present themselves half an hour before the start of the first Simulation which followed the CDT Simulation.

[127] Having reviewed the documentary evidence, I conclude that Mr. Itty's testimony on this point was not reliable, and that he did in fact have materially more time to prepare for his next Simulation.

[128] I also conclude that the evidence failed to establish that CBSA scheduled Mr. Itty to be the Traveller twice in back-to-back CDT Simulations with the intention of making him nervous and insecure so that he would fail his D-II Simulations.

[129] For the above reasons, the Tribunal dismisses these allegations.

The allegation that the Complainant was assessed more strictly than his classmates during the D-II Behavioural Simulations, and that POERT was flawed

[130] Mr. Itty alleges that the Respondent held him to a higher standard than his white classmates when it assessed him in the D-II Simulations, and that this higher standard was tied to his race, colour, or national or ethnic origin. As a consequence, the Complainant asserts the Respondent differentiated adversely against him on those prohibited grounds, within the meaning of section 7 of the *Act*. He also alleged that the very design of the POERT program gave rise to the potential for the types of bias he alleges he experienced to creep into the assessment process, contrary to section 10 of the Act.

[131] Paragraph 28 of Mr. Itty's Statement of Particulars (SOP) used as an example of this higher standard that white classmate AA1 made a "significant error" in Simulation 4, specifically, AA1 [redacted] yet Assessor Fowler passed AA1. After Mr. Itty completed his testimony, he withdrew paragraph 28. He retained paragraph 27's general allegation of higher standard.

[132] Therefore, this Decision gives no weight to evidence related to AA1 and AA1's D-II Recruit Simulation Assessment Report as an example of the allegation of higher standard.

[133] Mr. Itty specifically believed that feedback he received about how he worded or phrased certain things was because he has an accent and was the only person in his class who had an accent. I accept Mr. Itty's testimony that he was the only person in his class who had an accent.

[134] Mr. Itty also alleged that comments regarding his failure to make eye contact stemmed from cultural differences regarding the appropriateness of making prolonged eye contact and that his Assessors discriminated against him by not taking these cultural differences into account. His expert witness, Dr. Linsey Willis, also opined that his Assessors failed to do so.

[135] After his CDT Simulation, Mr. Itty had a break, and then went to the first of his D-II Behavioural Simulations, Simulation 6, assessed by Gregory Zbitnoff. He then went to Simulation 5, assessed by Kevin Phillips, and finally to Simulation 4, assessed by Shellie Fowler. He was assessed as having "Met" Simulation 6, and as having "Not Met" Simulations 5 and 4. These last two "Not Met" evaluations resulted in his failing POERT.

[136] The three D-II Behavioural Simulations were role-plays involving scenarios which were set in the secondary examination areas of various Ports of Entry. The CBSA hired a local acting company to provide actors to play the Traveller in each Simulation. The scenarios centred around Travellers who were upset or angry or concerned about being referred to secondary examination, with the recruits role-playing as the BSO. There were also other aspects of each Simulation involving the admissibility into Canada of either the Traveller and/or the Traveller's goods. The Respondent's witness Dr. Francois Ducharme testified that the Simulations were designed to elicit behaviours and knowledge from the recruits which would demonstrate the ten Competencies on which they were being assessed.

[137] In POERT, Competencies are defined as any skill, knowledge, ability or personal attribute that is relevant for the performance of a job or job accountability. The CBSA draws its Competencies from the former Canada Customs and Revenue Agency's Competency Catalogue as used by the CBSA (Competency Catalogue). The Competencies assessed in the D-II Simulations were:

> **(i) Organizational and Behavioural Competencies:** Client Services Orientation, Supporting Agency Values, Analytical Thinking, Dealing with Difficult Situations, Decisiveness, Effective Interactive Communication, and Self-Confidence; and,

(ii) Technical Competencies: Inspection Techniques, Information Seeking, and Knowledge of Legislation, Policies and Procedures

[138] The Competencies and the ways in which they were assessed are at the heart of Mr. Itty's Complaint. He alleges that the Competencies themselves are susceptible to bias on the part of the Assessor because they are subjective (particularly the three Competencies he did not meet), and that they were applied to him in a biased manner, causing him to fail the program. CBSA argues that the Competencies themselves are not subjective and were properly chosen using accepted analysis. Further, CBSA submits that BSO's must demonstrate proficiency in the Competencies, because it would jeopardize the health and safety of Canadians to allow recruits to become BSOs who cannot demonstrate that they possess the necessary knowledge and skills for the BSO job.

[139] A significant amount of evidence was introduced about the CBSA's assessment methods and the Competencies: each party tendered an expert report and testimony by each author. A psychologist who was involved in the development of the Assessor training program and the Simulations and whose company was involved in the Competency selections also testified.

(a) Evidence on the history of the POERT Program: Dr Francois Ducharme

[140] The Respondent's witness Dr. Francois Andre Ducharme has worked for Korn Ferry Hay Group (Hay Group), a large human resource consultancy, since 1998. He has a doctorate and a Master's degree in Industrial and Organizational Psychology. He described Industrial and Organizational Psychology as applying the principles of psychology and behaviour modification and assessment to the workplace, with its sole purpose often being to enhance human effectiveness and capability for the purpose of organizational effectiveness. From 1993 to 1997 he worked at the Personnel Psychology Centre of the Public Service Commission of Canada, where he ran what are called "assessment centres", including what is called "simulation assessment" and training people in assessment simulation and developing assessment tools and tests. Dr. Ducharme was not tendered by the Respondent as an expert witness.

[141] The Hay Group had two contracts with the then named Canada Customs and Revenue Agency (CCRA). In the first contract, Hay Group was involved in developing a Competency-based management system for CCRA and which included developing the Competencies which BSOs would require. In the second, later contract, Hay Group was involved in developing the assessment tools to assess BSO's during their training period in Rigaud and how to train the Assessors.

[142] Dr. Ducharme was not personally involved in developing the Competencies for BSOs, but a Hay Group colleague of his was, and Dr. Ducharme testified that they followed the same process as they did in every other similar project. Therefore, this aspect of Dr. Ducharme's testimony involved some hearsay. However the *Act* permits the Tribunal to receive hearsay evidence. He himself was involved with developing Competency profiles for other positions at CCRA. He was, however, personally involved with developing the assessment tools, specifically the Simulations, and the training of Assessors.

[143] Dr. Ducharme testified that members of the Hay Group consulted CBSA management and employee focus groups, including employment equity groups, to identify the skills, abilities, and personal attributes required to perform various CBSA jobs. Based on the input received, the Hay Group developed competency catalogues that defined each competency, explained different ways to demonstrate it, and established competency target levels, also called "Threshold Levels". As part of this process, the Hay Group met with groups of CBSA managers and incumbent BSOs to identify the Competencies required of a BSO based on real-world experiences and incidents.

[144] Once the Hay Group identified the proposed BSO competency, it engaged in further consultations with diverse BSO focus groups across Canada to refine the competencies. This process included input from various employment equity groups, including visible minority employees, to ensure the competencies chosen did not inadvertently disadvantage or adversely affect group members. This process culminated in the creation of the BSO Competency profile and Threshold Levels to achieve the Competencies for which BSO recruits were assessed during POERT at Rigaud.

[145] In developing the Simulations, Dr. Ducharme testified that he used a version of the *Guidelines and Ethical Considerations for Assessment Center Operations, International Task Force on Assessment Centre Guidelines,* endorsed by the 28th International Congress on Assessment Center Methods, May 4th 2000 (the Guidelines) in the Exhibits as a starting-off point for the design of the Simulations. Dr. Ducharme testified that the psychologists involved in creating the 2000 Guidelines were all expert psychometricians in Assessment Centres. The Respondent's expert witness, Dr. Durand, testified that the *Guidelines* are authoritative because they are meant to be consensual, are done by committee, include a lot of psychology consultations internationally, are circulated for feedback and ultimately adopted at major international conferences where all major countries are represented. In his testimony and Expert Report, Dr. Durand used the 2015 version of the *Guidelines,* which are Appendix B in his Report.

[146] The *Guidelines* included 10 essential elements of an Assessment Centre, which Dr. Ducharme testified were applied in the design of POERT to the maximum Hay Group and CBSA were able to do. Dr. Ducharme explained that Assessment Centres are not always physical centres, but rather are a well established and recognized standardized methodology for assessing various employment-related requirements. For example, Dr. Ducharme testified that Hay Group did a BSO job analysis, including the Flanagan Critical Incident Technique, in designing the Simulations. Under this approach, active BSOs were asked to identify events from files – recent border crossing events which were realistic, which had actually happened, and which would also allow the demonstration of the Competencies.

[147] Dr. Ducharme also testified that after the CCRA employment equity review group reviewed the list of Competencies for the BSO position, it asked the Hay Group whether it was possible that the Competencies could be deemed discriminatory against any of what are called "target groups". Dr. Ducharme was in charge of a validation study with 300 volunteers selected from the CCRA – some were BSOs. Approximately half were women, he testified, and 10-15% were visible minorities. This was the largest validation study Dr. Ducharme knew of in the federal government. He testified that there were hardly any

differences in scores among the target groups on the same Competencies. The Complainant notes that this study did not include the Simulations, and I accept that.

[148] Dr. Ducharme also testified about the importance of Assessor selection and training. He pointed out that the 2000 Guidelines require multiple assessment techniques and that Hay Group selected multiple Simulations for this element - that is, three Simulations with three different Assessors. He testified that they chose to have three Assessors for each recruit so that the assessment would benefit from multiple inputs. Three Assessors, he testified, would allows an Assessor's personal bias to be controlled by the other two Assessors. Each Assessor could challenge the other if a bias was being expressed, consciously or not. He testified that they wanted to have Assessors from all "target groups" so that characteristics such as race, ethnicity, gender, and others could be included in the Assessor pool, but that this was not always possible.

[149] Dr. Ducharme's testimony was that bias is minimized by training the Assessors, having three Assessors and an integration phase, and then two levels of oversight by an Administrator and then a Manager. Five people must agree for the recruit to fail: three Assessors, a Manager and the Director. I note that in Mr. Itty's POERT program, the fourth and fifth people who had to agree were called, respectively, "Administrator" and "Manager" but the concept of two higher levels having to approve the Assessors' decision that a recruit had failed is the same.

[150] The *Guidelines* stressed that Assessor training is critical and recommended two days, although this was not a strict requirement. Dr. Ducharme testified that it was his view that the time and effort devoted to training POERT Assessors was "exceptional". Most other organizations that he has seen train for half a day, but CBSA decided to make it four or five days. He had not seen that anywhere else in his 25 years of experience doing this.

[151] Dr. Ducharme testified about the "Train the Assessor Manual" which was used for training Assessors and which Hay Group helped develop. Dr. Ducharme himself was the instructor for the first day. He taught notetaking and taught the trainee Assessors about various pitfalls in assessment, for example, those that could lead to biased assessments such as: the "halo effect", "projection", "similar-to-me bias", "stereotyping" and other potential

pitfalls shown in the Hay Group slides in the Train the Assessor Manual, and how to avoid them. In his testimony, Dr. Ducharme explained each of these pitfalls. He testified that he made it clear to the trainee Assessors how important it was to avoid these pitfalls. Dr. Ducharme, Ms. Surprenant and Assessors Fowler and Phillips testified that during the remainder of the course, the trainee Assessors conducted practice simulations where they practiced assessing actors posing as BSOs and travellers, using the real Marking Sheets forms, and received feedback on their work. They also practiced notetaking and had their notes critiqued. They also discussed these issues with their fellow trainees. Dr. Ducharme testified there is no test at the end of the Train the Assessor course. Dr. Willis, the Complainant's expert, criticized this lack of formal testing.

[152] Assessor Kevin Phillips testified that CBSA encourages those who have completed the Train the Assessor course to do an actual Assessment as soon as possible after the course to keep the Assessment principles fresh in their minds. However, there was no built-in process for monitoring Assessor performance, except for situations where the Assessors fail a recruit and the higher-level Administrator and Managers check their Assessment.

[153] After hearing Dr. Ducharme's testimony, I was left with the impression that Hay Group had tried to do a very thorough job in both selecting the Competencies and in devising the Simulations. It was clear to me that the Competencies were closely related to the real job requirements for a BSO. The Simulations were based on real life events that a BSO would be very likely to encounter in the course of their day-to-day duties. I found that there was also work done to minimize bias in the assessment process: the Hay Group and CCRA were conscious of the goal of having diverse Assessors in terms of gender, colour and ethnicity, and they wanted to ensure that the Competencies could be clearly understood by various underrepresented groups. I recognize that Dr. Ducharme's testimony was primarily concerned with "ideal state" situations. In practice, perfection is not always achieved, and I do not mean to suggest that I found the implementation by CBSA to be perfect. But I do find that throughout the process of conceptualizing and choosing the Competencies and designing the Simulations, Hay Group and the CCRA were mindful of minimizing bias and therefore, potential discrimination.

[154] I wish to note that in accordance with Ms. Surprenant's testimony, in 2003, CCRA split its taxing and customs and border control functions in two: one part became the Canada Revenue Agency (CRA) which dealt with taxes and the other part became the Canada Border Services Agency (CBSA), which deals with border crossings and customs matters, and whose employees include BSOs, who when in the CCRA, were sometimes called Customs Inspectors.

[155] I found Dr. Ducharme was an honest and forthright witness. His evidence was credible and reliable. While I am aware that he had a certain vested interest in the Competencies and Simulations being well thought of and of putting the Hay Group in a good light and appeared to have professional pride in the work Hay Group and he did on them, I did not find him to be partial, or to ever cross over into advocacy. He was clear when evidence he was sharing was not based on first-hand experience. He was not combative or evasive or defensive, and his testimony was internally consistent.

Assessor Selection

[156] Nathalie Surprenant testified about how CBSA selected Assessors for the POERT program. Assessors are either Superintendents or chiefs or people who have experience as a BSO at a border or those who have been POERT Instructors for at least three years. All must be trained in POERT's Train the Assessor course.

[157] Ms. Surprenant explained that CBSA sends what is called a "call letter" to the Regional Directors General, who sent it to the BSO community, and to the aforementioned people. The Director General for each Region selects and endorses individuals out of those who apply.

[158] The Complainant's expert, Dr. Willis, opined that the fact that the Regional Directors General selected and endorsed the applicants for the Assessor position meant that there was a risk of "similar to me" bias; that is, they selected and endorsed people like themselves, thus hindering diversity among Assessors. She also criticized what she thought was the lack of the diversity of the existing Assessor panels, in terms of race, colour and ethnicity, and opined that this was also constituted a risk of bias.

[159] I find that there was no evidence on the race, colour or ethnic or national origin of the Regional Directors General. Therefore, I find that the evidence does not support Dr. Willis' opinion on the risk of "similar to me bias".

[160] Dr. Willis acknowledged in her testimony that simply because an Assessor is not of the same colour, race or ethnic or national origin as the person they are assessing does not in and of itself lead to their making a biased assessment.

[161] When asked about the fact that Mr. Itty's D-II Assessors all were white and whether this accorded with the Guidelines, the Respondent's expert Dr. Durand responded that the Guidelines require than an Assessment Centre strive for diversity in its Assessors, but it is not always possible to attain it. I find that there was no evidence on which to make a finding as to whether or not CBSA strove for Assessor diversity.

[162] Assessor Kevin Phillips testified that he knew of Assessors who were visible minorities, as did Assessor Fowler. Dr. Durand testified that the CBSA Train the Assessor materials addressed bias, and the meaning of "Stereotype" bias on account of includes race.

[163] I find that the evidence failed to establish that the CBSA did not strive to select Assessors who were diverse in terms of race, colour or national or ethnic origin, and the evidence failed to establish that the fact that all of Mr. Itty's D-II Assessors were white ors was a factor in his receiving an overall "Not Met" in POERT.

(b) The Data for Visible Minority BSO's

[164] The Respondent also called Richard Giles to testify during the hearing. Mr. Giles has worked for the CBSA since 2004, and at the time of the hearing was the manager of demographics and workplace analysis. He provided testimony about the CBSA in general, and BSOs in particular, to support the Respondent's claim that the workforce is diverse and representative.

[165] At the time that Mr. Itty was in the POERT program (from November 2008 to February 4, 2009), the CBSA was consistently exceeding employment equity targets for representation of visible minorities. Mr. Giles explained that the employer CBSA regularly

encouraged employees to self-identify if they belonged to a designated group (visible minorities, women, persons with disabilities and Aboriginal people). They would then compare those numbers to the expected workforce availability data for each designated group, which the Treasury Board provided to CBSA.

[166] Section 3 of the *Employment Equity Act* defines the term "members of visible minorities" as meaning "…persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour." There was no dispute that the Complainant is a member of a visible minority as defined by the *Employment Equity Act*.

[167] Mr. Giles provided the Tribunal with data for visible minorities across Canada and in the Greater Toronto Region, which is where Mr. Itty would have worked. He presented tables which showed the number of visible minorities within the BSO occupational group (he noted that BSO's fall under the CBSA's "operational" category, and Mr. Giles testified that generally BSO's make up more than half of that group, as well as more than half of those who identify as visible minorities therein). From 2009 to 2012, the tables showed that visible minorities in the BSO occupational group exceeded workforce availability targets by hundreds of individuals and that this percentage grew consistently in those years. He also provided data on what are called sub-groups of the visible minority category. Specifically, he provided data on BSOs in the GTA self-identifying as South Asian/East Indian (which is the group Mr. Itty would have been in had he been hired). He noted that when BSOs self-identify as visible minorities, they have the option to additionally self-identify as a more specific sub-group of visible minorities. The data showed that the South Asian/East Indian group was the most represented visible minority subgroup among all BSOs in that region.

[168] He explained that the workforce availability data from the Treasury Board is based on the most accurate data the Canadian government is capable of collecting, but of course it may not be 100% accurate and he conceded this on cross-examination. Likewise, the employee numbers are self-limited by the fact that some employees may choose not to report their status. Mr. Giles was forthright in acknowledging that he was not aware of, and/or did not have access to, the employment equity data for candidates going through the POERT program: his evidence was that this information was only collected once a potential recruit passed the program and was actually hired as a BSO. Even allowing for this, and

having heard Mr. Giles' evidence on examination and cross-examination, I am satisfied that these numbers provide a good view of the BSO workforce. I also note that every BSO must successfully complete BSO training.

(c) Colour-Blindness

[169] While we are discussing the term "visible minority" to describe a contentious area of testimony that arose when the Complainant's counsel was cross-examining the Assessors. One of the first questions he asked each of them was to what ethnic group or race they assumed Mr. Itty belonged when they first saw him. Ms. Fowler responded that she did not give any thought to it. When asked whether she noticed that he had an accent, she first replied that she did not. When asked the same question again, she responded that she did not recall. When the same question was asked of Mr. Phillips, Mr. Phillips stated that he did not look at ethnicity so he did not hazard to make a guess about it. He said that he did not know. Similarly, in a practice Simulation that Mr. Itty did where Mr. Landry was his Assessor, under Effective Interactive Communication, regarding the element of "using appropriate words and phrases," Mr. Landry quoted what Mr. Itty said as "are you having alcohol or tobacco products?". Mr. Landry testified that it should have been "Do you have any alcohol or tobacco products?" He said that the recruits are taught to ask a series of questions *verbatim* and that the question as phrased by Mr. Itty could result in an incorrect referral. Mr. Landry said that he did not recall that Mr. Itty has a strong accent or any different syntax in how he phrases sentences. When asked if he had any view or assumption about Mr. Itty's national or ethnic origin, Mr. Landry acknowledged that he was a person of colour, but said "that is not a predisposition that I look at". When asked if there were other people of colour in the class, he said he would not "assume the colour of someone's skin." He also said that he didn't recall if there were other students in the class with an accent. In cross-examination, Ms. Fowler was asked whether what the Hay Group was training assessors on in the Pitfalls section was to keep in mind a difference in racial or ethnic background and not to allow it to create bias in how they assessed a recruit. The Complainant's counsel referred to it as an individual's unchangeable characteristics such as race or national or ethnic origin. She replied that she wanted to see where in the training materials it said that and that she did

not interpret “characteristics” to be so narrow but rather “wide open, any characteristic” that was different from the Assessor’s. She was again asked if the training materials ever provided training on those things that could cause some level of bias in how she assessed or viewed a person. Ms. Fowler responded that they did not but that she had received diversity training from the CBSA.

[170] The Complainant points to all of the above exchanges as evidence of the POERT program’s vulnerability to bias, by demonstrating that several staff ascribed to the so-called “myth of colour-blindness”, which the Complainant describes as a “false mythology” and an exemplar of a formal equality mindset that is “all too pervasive in Canadian society.”

[171] On this point, the Complainant submitted a number of scholarly works on the topic of racism including colour-blindness. The Respondent says that the Tribunal should disregard these articles. Their reasons are twofold: the authors were not called and qualified to give expert evidence; and second, the Supreme Court has recognized that the CHRT has inherent expertise as relates to fact finding in the human rights context, rendering the use of extraneous articles unnecessary.

[172] The Complainant says the articles are permissible. They have not been tendered as expert evidence, they argue, and the Tribunal’s Rules of Procedure allow latitude for reliance on scholarly work from the legal and academic literature.

[173] I agree with the Complainant and have admitted the articles. At the same time, the Respondent is correct that the Tribunal has expertise in this area in the sense that the Tribunal is well aware that racism and other forms of discrimination exist in Canadian society and I have placed very little reliance on them.

[174] Our society has evolved to the point where many people in Canada are aware that it is not socially acceptable to overtly state critical comments about other people based on racial or ethnic stereotypes, or those based on national origin. I do believe that the Assessors did not spend time thinking about Mr. Itty’s national or ethnic origin, notwithstanding his accent. I do not accept, however, that his race or colour did not register with them in some way. His accent and skin colour are simply facts. I take the quote from one of the authorities provided as being relevant here:

> "[E]rasing my racial identity does not make me feel empowered and, in fact, does the opposite. Although I can understand the meaning of this well-intentioned notion […] in fact, it is an insult to human intelligence to enthuse that 'we should not see color.'" (from *"We cannot be Color-Blind: Race, Antiracism, and the Subversion of Dominant Thinking*", E Wayne Ross, ed, Race, Ethnicity, and Education: Racism and Antiracism in Education, vol 4 (Westport: Praeger, 2006) at 26.

[175] Notwithstanding that I do not accept that Mr. Itty's race, colour or national or ethnic origin, by way of his accent,did not register with the Assessors, that finding does not lead to a conclusion that they were biased against him in their Assessments.

Mr. Itty's D-II Assessments

[176] I now turn back to the assessment process as it unfolded for Mr. Itty. One Assessor assessed each Simulation. It should be noted that each Assessor assessed the same Simulation for every member of Mr. Itty's class. Twenty minutes was allotted for each Simulation (not including the time after the Simulation when the recruit answers two questions the Assessor asks). The Assessor would introduce themselves to the recruit as soon as they entered the room. This is the only interaction between recruit and Assessor until the end of the Simulation. The recruit first reads the background information card which is left on the desk to familiarize themselves with the background of the Simulation, including the location of the port of entry in the scenario. The recruit then calls in the actor playing the traveller (Traveller). The Traveller has been given a script beforehand to guide their behaviour and outline what they should and should not say or do during the Simulation. The actor has also been given copies of documents related to the particular Simulation, for example, [redacted].

[177] The Respondent's witness, Dr. Ducharme testified about the Assessor's role during the Simulation and described what the Assessor was to do during the Simulation. The Assessor was given a separate booklet to use for the assessment of each recruit playing the BSO in the Simulation. The Assessor was to make handwritten notes called Observations in pages 2, 3, 4, 5 of the booklet, recording only what the recruits did and said as the Simulation unfolded. The Assessors were to make these notes while the recruit was

performing the Simulation – in other words, in real time. The notes were only to include Observations made during the Simulation about the interactions between the Traveller and the recruit. The notes were not to include the Assessor's conclusions or any assumptions. The verbatim noting of what the recruit said was considered ideal.

[178] The booklet's page 8 was to record the recruit's answers to the printed questions on page 8, which the Assessor asked the recruit after the Simulation ended. The questions were: 1. why the recruit trainee made the decisions they did during the Simulation; and 2. the justifications for those decisions. The Assessor was to write the recruit's answers on page 8. After the recruit answered the questions, they left the room.

[179] The booklet's pages 6 and 7 were the ratings guide or Marking Sheet (Marking Sheet). After the recruit left the room, the Assessor was to go to a private space, consult the Observation Notes and page 8, and/or the Competency Catalogue, and decide if the recruit had Met or Not Met the Competencies, and record the Assessor's decision.

[180] Once the recruits had completed all the D-II Simulations and their Assessors had filled out the Assessment Forms containing their Observations, the recruit's answers to the questions on page 8, and the Marking Sheet for each recruit, the Assessors would meet in what is called an "Integration Meeting", to share and discuss the performance and ratings they had given to each recruit and why they assessed them as they did. Dr. Ducharme explained that the concept of the Integration Meeting was that the three Assessors of the same recruit would discuss each other's decisions, justify them and ideally, agree on whether the recruit had passed or not passed the D-II Behavioural Simulations.

[181] Dr. Ducharme testified that the Assessor could cross-reference his or her decision of "Met" or "Not Met" on the Marking Sheet with the Assessor's Observation Notes they had recorded in the booklet. Assessors sometimes used short forms in their notes, but so long as when the Assessor reviewed their Observation Notes, they understood what the short forms meant and could explain them to the other Assessors, including whoever of them was the Lead Assessor who typed up the summary Recruit Simulation Assessment Forms, the short form aspect of their notetaking was acceptable.

[182] To pass the Simulation testing, recruits had to consistently meet each Competency being tested, and "consistently" is defined as meeting *every* Competency in at least two out of the three Simulations, except for the Inspection Techniques Competency, which is defined as one out of two Simulations passed. Candidates are told they will not be able to continue in the program if they do not meet these conditions in the Simulation exercises. Recruits must also attain a "Met" in the CDT Simulation in D-II. The CDT Assessors would not be at the Integration Meeting.

[183] Dr. Ducharme testified that Assessors were to give the recruit the benefit of the doubt if an Assessor was not sure of what the recruit's rating should be – that if it could go either way, the recruit got the benefit of the doubt so that CBSA would not lose a potentially good recruit. As well, if the Assessors could not reach a consensus on the rating to give the recruit, then the rating by two of the three Assessors would be the rating given to the recruit.

[184] Once the Assessors either reach a consensus or a majority decision as to whether the recruit has "Met" or "Not Met" the D-II Behavioural Simulations, the Lead Assessor - here, Mr. Phillips for Mr. Itty - types up the summary D-II Recruit Simulation Assessment Report for each recruit, which each would receive during their Final Feedback and take with them. This Report is not meant to contain the same level of detail as the Observation Notes in the Assessment Forms or the notes on the recruit's answers on page 8 of the booklet. Dr. Ducharme explained that Assessors were taught to use more general Observations and comments, and not put much detail into the D-I and D-II Recruit Simulation Assessment Reports to preserve the confidentiality of the Simulations, because those Reports were accessible to the public.

[185] Mr. Itty was assessed as having "Not Met" the Competencies of Effective Interactive Communication, Dealing with Difficult Situations, and Self-Confidence in two of the three D-II Behavioural Simulations.

[186] I will address each of these three Competencies and how his D-II Assessors assessed Mr. Itty's performance of them to determine whether, on a balance of probabilities, there was a link between Mr. Itty's protected characteristics and his D-II Behavioural Simulation results. I will first comment briefly on the credibility of the Assessors who testified.

[187] I found Shellie Fowler to be a basically honest witness, but at times defensive during parts of her cross-examination. Her defensiveness was a bit understandable, because in direct examination, she had testified that during Mr. Itty's Final Feedback Session, she thought he took particular exception to her results and comments about her assessment of him in D-II Simulation 4. I also formed the impression that she was very knowledgeable about the job of BSO. On the whole, I found her testimony about her assessment of Mr. Itty credible. When questioned about matters of diversity, I found her less knowledgeable and convincing and somewhat defensive. She did not seem to accept or understand that the phrase "visible minority" referred to a person of colour. However, she also testified that if someone she was assessing wore or did something that was not the usual uniform or was not the usual procedure, if she thought it was because it was because of their culture or was not sure whether it was part of their culture, she would ask a Supervisor or another Assessor if it was, so that she would not assess that particular behaviour or uniform negatively. Although on one important point, as stated in these reasons below, I did not find her testimony credible, on the whole, I found her a credible and reliable witness, particularly about the job of a BSO.

[188] Kevin Phillips was Mr. Itty's Assessor in D-II Simulation 5. I found him to be an honest and forthright witness, who candidly acknowledged that he did not remember all the specifics of Mr. Itty's Simulation because it happened years before and required the exhibits to refresh his memory. He did definitely remember certain things about Mr. Itty's Simulation and why he made many of the notes he did in his Assessor Form. His recollection of Mr. Itty's Feedback Session, although not the same as Ms. Fowler's and Gregory Zbitnoff's about telling Mr. Itty to stop taking notes, was also credible. Mr. Phillips was not defensive in cross-examination. On the whole, I found his testimony to be credible and reliable.

[189] Assessor Zbitnoff was a credible, honest and reliable witness. His testimony remained consistent on cross examination and he was not defensive. He assessed Mr. Itty as having attained a "Met" in all the Competencies of Simulation 6.

Dealing with Difficult Situations

[190] The POERT Training Handbook, given to all recruits, defines the Competency of Dealing with Difficult Situations (DDS) as "Keeping one's emotions under control and restraining negative responses when provoked, or when faced with opposition or hostility from others."

[191] The Competency Catalogue assigns a scale of proficiency required in what it calls "Threshold Levels", from Level 1 to Level 4, depending on the extent to which the provocation is targeted directly at the BSO and the potential consequences. [redacted]

[192] [redacted]

[193] I will address some, but not all, of the specific comments and testimony regarding the DDS competency that arose regarding D-II Simulations 4 and 5, which Mr. Itty did not meet. Mr. Itty passed all the Competencies in Simulation 6, assessed by Gregory Zbitnoff.

[194] Shellie Fowler assessed all the recruits in Mr. Itty's class on D-II Simulation 4. Kevin Phillips assessed all the recruits in Mr. Itty's class on D-II Simulation 5.

[195] The evidence demonstrated that on three occasions before the D-II Simulations, Mr. Itty was given feedback identifying concerns with his competence in DDS. The Respondent notes that during practice simulations, Mr. Itty had problems in maintaining his composure, confidently communicating, and striving to find effective results. I take into account that none of Mr. Itty's D-II Assessors had access to any of Mr. Itty's POERT performance history, including in D-I, before they assessed him in their D-II Simulations.

[196] Assessor Fowler noted in her Assessment Form Observations in Simulation 4, that Mr. Itty let the Traveller set the tone of their interaction and failed to maintain control through

confident communication. Assessor Phillips noted that in Simulation 5, Mr. Itty did not project sufficient confidence in his voice when interacting with the Traveler to meet the required [redacted] Threshold for DDS.

[197] On "striving to find effective results", Assessor Fowler assessed Mr. Itty as achieving only a Level 1 proficiency. Level 1 requires only passive behaviour and does not include proactive conduct which must be displayed to meet the requisite Level [redacted]. Ms. Fowler noted issues such as failing to de-escalate the situation, and failing to respond appropriately, that is, immediately, to the Traveler's displays of agitation and frustration. Ms. Fowler testified that recruits are taught to deal with a Traveller's concerns as soon as the Traveller raises them, because by doing so, the recruit can minimize the chances of the situation escalating.

[198] Assessor Phillips also found that Mr. Itty did not meet the [redacted] Threshold. Although Mr. Itty did reach the correct decision, Assessor Phillips testified that Mr. Itty did not ask the Traveller [redacted] questions that the recruits were taught to ask when it was a situation of someone's admissibility into Canada. Even though asking those questions would likely not have changed the decision, Assessor Phillips emphasized that reaching the right decision was not the only thing Assessors were looking for – additionally, the process or path that recruits took to arrive at the decision mattered. Reaching the "right" answer by way of the "wrong" process could pose a problem. I find that this makes sense: an incorrect process which happens to lead to a correct answer on one occasion does not guarantee the same result in a different set of circumstances. I accept Assessor Phillips' evidence that the recruits were taught to ask the questions that Assessor Phillips referred to.

[199] I also take into account that on both pages 8 and 15 of POERT's Test Objective Booklet which every recruit receives before the D-I evaluation process, recruits are told that with respect to both D-1 and D-II Simulations, that "Both your technical abilities (i.e. what needs to be done) and behavioural competencies (i.e., how it is done) will be assessed." This is another indication that the path or process the recruit uses to come to a decision is assessed.

Effective Interactive Communication

[200] The POERT Training Handbook defines Effective Interactive Communication (EIC) as “transmitting and receiving information clearly and communicating actively to others by considering their points of view in order to respond appropriately. It includes receiving information, understanding and responding openly and effectively in interactions with others.”

[201] [redacted]

[202] [redacted]

[203] I will now address some, but not all, of the specific notes the Assessors made and their testimony regarding the EIC Competency in Mr. Itty’s performances in D-II Behavioural Simulations 4 and 5.

[204] Assessor Fowler assessed Simulation 4 for all the recruits in Mr. Itty’s class. She testified that in the system she used, a circle around a behaviour meant either that the recruit missed the behaviour or that there was a concern and she had to look into it further. The check mark represented that the Assessor had no concern about the behaviour. In her Marking Sheet, Assessor Fowler circled five of the seven elements of Effective Interactive Communication. Ms. Fowler testified that she did not think that Simulation 4 called for empathy, so she did not assess it. She noted the following in the “Observations” column: Mr. Itty’s use of the phrase “Sir, I’m in the process of doing that” and explained in her testimony that this was not an effective response to the Traveller’s question of [redacted] which indicated that the Traveller was getting impatient and irritated. She assessed

that Mr. Itty should have explained to the Traveller the "what, why and how" of what was happening, and that the examination would take as long as it took.

[205] Assessor Fowler's Marking Sheet Observations also noted that Mr. Itty assumed that the Traveller was [redacted] and that this was evident in the "leading question" he asked the Traveller.

[206] She also recorded in her Observations that Mr. Itty said to the Traveller: "So we will be doing an examination of your bags verifying all goods, OK?" Ms. Fowler testified that the problem with this statement was that by using the phrase "OK", Mr. Itty was asking for permission to do his job, and BSOs should not do that. As she wrote further down in the lined left-hand column, Mr. Itty later said to the Traveller "Sir if you don't mind, I would like you to take a few steps back"; and although this was polite, he was again asking the Traveller for permission. Ms. Fowler testified that the BSO should explain, but not ask permission.

[207] From the left lined column beside the next group of questions Mr. Itty asked the Traveller, Ms. Fowler drew a line to her note in the right-hand column stating "robotic, rehearsed, had to say". She explained that the note described that Mr. Itty's manner in asking the group of questions in the left column was that he acted in a robotic and rehearsed manner, and as if he had to say what he said to the Traveller.

[208] The Complainant's expert, Dr. Willis, criticized this note, rhetorically asking what a "robotic, rehearsed manner" had to do with doing a good job as a BSO. In other words, I assume she meant that it had nothing or very little to do with Mr. Itty's suitability for the BSO job. I prefer the evidence of Assessor Fowler on this point.

[209] In the lined left-hand column, Ms. Fowler noted that Mr. Itty again asked [redacted] In the far-left space beside the question, Ms. Fowler recorded the Traveller's answer: [redacted]. Ms. Fowler testified that this answer indicated that Mr. Itty had already asked the question and explained the concern with the repeated question: it displayed a lack of active listening, which a BSO must do in order not to repeat questions.

[210] Assessor Fowler also noted in her Observations that the Traveller said “I’m not sure why I’m here” – and below that, “pause instead”. She testified this indicated that Mr. Itty did not respond to the Traveller’s concern, which was tied to striving to find effective results.

[211] During the hearing Assessor Fowler was asked if choosing not to respond to a hostile comment could be a way of de-escalating, and she testified that it was not, and that a BSO had to address the Traveller’s concerns when the Traveller raised them.

[212] Ms. Fowler noted Mr. Itty asked the Traveller [redacted] The Traveller did not answer, which Ms. Fowler recorded in green-highlighted note as “did not address”. She explained that Mr. Itty did not follow up by repeating his question, or asking it another way, which behaviour Ms. Fowler assessed as indicating a lack of self confidence, because if the BSO asks a pertinent question and does not get an answer, he needs to ask again or follow up until he does get an answer.

[213] The Respondent submitted that the D-II Simulations were not the first time that Mr. Itty had difficulty with this Competency. They submitted, correctly, that before his D-II Simulations he had received feedback identifying concerns about his EIC Competencies on twenty-five separate occasions, and had failed to meet the EIC Competency during one of the D-I Simulations.

[214] Assessor Fowler noted that at one point in the Simulation, Mr. Itty turned towards the wall and away from the Traveller while he was examining the Traveller’s luggage. She assessed him as not making sufficient eye contact.

[215] Dr. Willis concluded in her Report that “the Assessors did not take into account that Mr. Itty is soft spoken and does not make eye contact with a person (the role player) because this is part of his culture (it is inappropriate to look someone directly in the eye).” In explaining this, Dr. Willis explained the concept of communication styles in what are called “high context” and “low context” cultures. High context cultures, such as India, she explained, do not need to talk to each other as much – they can communicate by looking at each other, or just grunting and not having a long conversation. Low context cultures like the United States, which is an individualized culture, deals more with verbalized

communication and members are more direct. I took her explanation of low context communication to apply broadly to Canada.

[216] Dr. Willis explained that for people who work in another country as an expat it is important to understand how people in their new country communicate so they can get along better in the workplace. However, I find that the BSO-Traveller dynamic is very separate from business people making deals or other workplace situations. The relationship between a BSO and a Traveller is not a negotiation- the BSO is in a position of authority and although the BSO must show empathy, and be polite, they are nevertheless a decision-maker with whom the Traveller must comply.

[217] Dr. Willis was asked what measures she took when designing a Simulation to ensure that the differences between high and low context cultures did not skew the results. She answered that she did not take any such measures. She simply designed the Simulation to tap into whether someone communicates effectively or ineffectively. I find that this aspect of her criticism was directed not at how the Simulations were designed, but at how she assumed the Assessors were trained. I have previously found that some of Dr. Willis' assumptions about Assessor training were incorrect. This testimony in fact supports the design of the Simulations.

[218] Dr. Ducharme also testified about the concept of eye contact. He said it was not a "staring contest" and described it as meaning that not only should the BSO look at the Traveller's eyes, but at their whole face, and the whole body to ascertain whether the Traveller was being truthful or was showing signs of nervousness or evasiveness. Although he acknowledged that body language could include eye contact, he said that nevertheless eye contact was a separate skill.

[219] Mr. Itty testified to his upbringing. He described that he was brought up and still follows the behavioural norms that the only person he would look at in the face or make eye contact with for a long time would be his wife or mother. He asserted that he did maintain eye contact but that one did not look at people for a long period of time, for example authority figures. I accept that while this was true in his personal life, I find that Mr. Itty understood that EIC required eye contact, and I accept that this requirement was completely reasonable

for the BSO position. This is especially so in light of Dr. Ducharme's testimony that eye contact was not a "staring contest" but rather also involved looking at a Traveller's whole body.

[220] I also take into account that Mr. Itty had been in Canada for over 20 years by the time he attended POERT and had worked in many different contexts for different Canadian companies before moving to the CRA. I find that he had to have been able to effectively cross-culturally communicate to achieve the level of success he did.

Self-Confidence

[221] The POERT Training Handbook defines Self Confidence as "Believing in one's own capability to accomplish a task and select an effective approach to a task or situation. This includes confidence in one's ability as expressed in increasingly challenging circumstances and confidence in one's decisions or opinions."

[222] The BSO Competency Profile in the Train the Assessor materials requires a [redacted]

[223] [redacted]

[224] Now I will address some, but not all, of the specific comments and testimony regarding the Self Confidence (SC) Competency that arose regarding Mr. Itty's D-II Simulations 4 and 5.

[225] In her testimony about Simulation 4 and Self Confidence, Assessor Fowler read out some excerpts of her written Observations from her marking booklet (Exhibit A3-8): [redacted] She testified

that Mr. Itty [redacted]. With respect to the element of sounding certain when challenged, she noted that Mr. Itty did not take control of the interaction. The Traveller did not always answer Mr. Itty's questions and Mr. Itty did not all follow through on the questions. She explained that the BSO may phrase the question another way but needs to continue asking it until they get the answer.

[226] It appeared that on one of Assessor Fowler's marking sheets, a "Met" had been changed to a "Not Met". The Complainant put a lot of focus on this. Assessor Fowler testified that by the time she went into the Integration Meeting, her marking sheet was finished and nothing changed during the Integration Meeting. I can find no link between the potential that an Assessor changed their own mind during their private marking session, and Mr. Itty's protected characteristics. The evidence established that Assessors have the option of changing their rating during the Integration Session, so I am not concerned with the fact that Ms. Fowler may have done so even prior to that, on her own.

[227] Kevin Phillips assessed Mr. Itty in Simulation 5 and assessed him as having "Not Met" the Self Confidence Competency. In his Marking Sheet, he noted that Mr. Itty did not deal with the client's concerns when challenged, and that he needed to project more confidence in his voice. Mr. Phillips testified that Mr. Itty did not deal with the client's concerns when challenged, and that this was important for a BSO to do because a situation where the client was upset or angry could escalate if the BSO did not address the client's upset or anger. He explained that there was uncertainty in Mr. Itty's voice during the Simulation when the client was challenging him. Mr. Phillips also testified that in making these Assessments, he applied his Assessor training and his experience as a BSO. Mr. Phillips was a CBSA Superintendent when he testified. I accept Mr. Phillips' explanation for why he assessed Mr. Itty as a "Not Met" in Self Confidence.

[228] In deliberating on, considering and deciding the allegations in this Complaint, the Tribunal is limited to what is in the evidentiary record. I have Mr. Itty's Assessment Forms for Simulations 4, 5, and 6. I have Mr. Itty's testimony, his Assessors testimonies, and two Expert's testimonies. The Assessment Forms for Mr. Itty's classmates are not in the

evidentiary record (only the D-II Recruit Simulation Assessment Forms are), therefore I must make a determination in their absence.

[229] While the detailed Observation notes are not in the evidentiary record, in reviewing the D-II Recruit Simulation Assessment Forms, I note that Assessors Fowler and Phillips made many similar comments to those they made for Mr. Itty under the "Assessors' Observations" area of the Form. For example, several other recruits received feedback about eye contact deficiencies and issues with "words and phrasing", despite not sharing Mr. Itty's protected characteristics.

[230] It is understandable that it is extremely frustrating for the Complainant that the circumstances described under 'Spoliation' led to his Assessors' hand-written D-II Assessment Forms for his classmates not being in the evidentiary record of this Complaint. It is also concerning for the Tribunal. The Respondent's document disposal and retention policies and practices which occurred in the relevant period do not put the Respondent in a good light – instead, they highlight the gaps that existed at CBSA in both who was in charge of making decisions about which documents were relevant to a human rights complaint, and in the decisions themselves. The finding that the destruction did not constitute spoliation does not make it less frustrating for the parties.

[231] I accept the Complainant's hearsay evidence that certain candidates told the Complainant that they made what they thought were crucial errors during their D-II Simulations. His submission and his testimony were that despite what he referred to as these crucial and grave errors, the Respondent passed them but did not pass him, because the Respondent marked him using a higher standard based on discriminatory grounds.

[232] Although I accept that candidates made these statements to Mr. Itty, I do not give this evidence much weight. The fact that the statements made to the Complainant are hearsay is not the definitive reason for my not giving them much weight, because the Tribunal may admit hearsay evidence. I do not give it much weight because of the circumstances in which the statements were made to Mr. Itty and because of the situation the people who made them were in: after going through D-II Simulations in what has been described as a heightened atmosphere of tension and nerves, I formed the impression that

they made their self-critical statements to Mr. Itty in very emotional states – for example, one of these candidates told Mr. Itty they vomited after their Simulation. I also take into account that the recruits were not trained Assessors, so I find they were not in a position to objectively assess their own performances.

[233] I accept Mr. Itty's testimony that during the CDT Simulation in which he was the Traveller, the candidate playing the BSO dropped their baton. I weigh his testimony that an Instructor had told his class that dropping the baton was an automatic fail against Mr. Borgia's testimony that dropping the baton was not an automatic fail, and that the Assessor would have to take the recruit's whole CDT performance into account in deciding whether they passed or failed. I prefer Mr. Borgia's evidence on this point, because of his experience as both a POERT CDT instructor and CDT Assessor.

VII. Experts

[234] Before making a determination about whether there was a link between Mr. Itty's protected characteristic and his failure and/or whether certain aspects of the POERT program contributed to his failure on a discriminatory ground, I will first address the significant volume of expert evidence that was introduced. The parties each engaged one expert witness to prepare an expert report and testify at the hearing: Dr. Linsey Craig Willis for the Complainant, and Dr. Francois Durand (Dr. Francois Chiocchio when he wrote his Report) for the Respondent. Their testimonies addressed both s.7 and s.10 of the *Act*.

[235] At the hearing, each party objected to the suitability of the other's expert witness. In the interests of expediency and keeping in mind the inherent flexibility that the Tribunal has to control its own process (and the freedom from adherence to strict rules of evidence) as set out in subsection 50(3)(c) of the *Act,* which reads:

> 50.(3) In relation to a hearing of the inquiry, the member or panel may
>
> …
>
> (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

[236] I heard the parties' objections and submissions. Both experts were examined and cross-examined on their qualifications. I qualified both experts to testify at the hearing (with certain restrictions). In doing so, I reserved the right to consider all issues regarding factors going to admissibility and the weight to be accorded to their evidence during my deliberations.

[237] In their Reports and testimony, at times both experts veered into the realm of advocacy for the parties who had retained them. They each appeared to misapprehend the role of Statements of Particulars (SOP) in the Tribunal process. In the particular circumstances of this hearing, including the *Confidentiality Orders*, Dr. Willis was missing critical information pertaining to the process behind the design of the Simulations, as testified to by the Respondent's witness, Dr. Ducharme). The Respondent's expert Dr. Durand opined on the "ultimate issue" on numerous occasions. Assessing these factors with the benefit of the Supreme Court of Canada's guidance in *Mohan* and *White Burgess,* I have excluded some aspects of their evidence and ultimately placed little or no weight on some others, which I discuss in greater detail below.

[238] The Supreme Court of Canada has established a legal framework for determining the admissibility of opinion evidence that "guards against the dangers of expert evidence", ensuring that a hearing does not "devolve into 'trial by expert' and that the trier of fact maintains the ability to critically assess the evidence" (*R v Bingley*, 2017 SCC 12 (CanLII) ["*Bingley*"] at para 13). This framework was established by the Supreme Court in *R v Mohan,* 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [*Mohan*] and later clarified in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 (CanLII) [*White Burgess*]. The framework includes a two-part analysis. The first part of the analysis requires the trier of fact to determine whether the expert evidence meets the *Mohan* criteria for admissibility, which are relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert (*Mohan* at pp. 20-25; see also *White Burgess* at para 19). If any of these threshold requirements is not met, the evidence is inadmissible and there is no need to do the second part of the analysis.

[239] The second "gatekeeping" part of the analysis requires a weighing of the potential risks against the benefits of admitting the evidence (*White Burgess* at para 24).

[240] In assessing these reports in the course of this matter, I kept in mind the following from *Brooks v. Department of Fisheries and Oceans*, 2004 CHRT 20 (CanLII), the Tribunal, in assessing the eligibility of a prospective expert report, wrote:

> There are additional concerns that arise in the context of necessity. One is that the Human Rights Tribunal is an expert Tribunal, with its own expertise in the area of discrimination. It is accordingly in a position to reach an informed opinion as to the weight and value of any evidence of discrimination, without the assistance of an expert.

[241] I will now go through each expert in turn to explain which parts of their evidence will ultimately factor into the Decision.

Dr Willis, The Complainant's Expert

[242] The Complainant's expert, Dr. Willis is a management consultant and owner of a small management organizational consulting firm. For the last five years, and currently, she has been a visiting full-time instructor in the Management Department of the College of Business of Florida Atlantic University (FAU). She is not a professor and not a research faculty. Dr. Willis has a doctorate in Public Administration (DPA), which she candidly explained is not as high a category as a doctorate classified as a "Ph. D". She also has Masters' degrees in Public Administration and Forensic Studies. She has a Certificate as a Senior Professional in Human Resources (SPHR) for which she requalifies every three years. She has had about 30 years' experience in Assessment Centre methodology, and in the design of Assessment Centres and has spoken at international conferences on Assessment Centres. Dr. Willis is not a psychologist and does not have a degree in psychology.

[243] The Complainant asked that the Tribunal recognize Dr. Willis as a certified Senior Professional in Human Resources and that it qualify her as an expert on testing and assessment principles, practices, tools and systems.

[244] At the hearing, the Tribunal ruled that Dr. Willis was qualified to testify about testing, assessment principles, practices, tools, and systems, as well as communication based on culture. The Respondent submitted during the hearing that Dr. Willis was not a properly

qualified expert in that field. In accordance with *White Burgess*, independence and impartiality are factored in at this step. At the threshold stage, this is a high bar. While I did have some concerns about Dr. Willis' impartiality, these did not rise to the level of concern that would result in the exclusion of her evidence at this stage.

[245] Dr. Willis had three broad general opinions about the POERT program. First, that the program does not contain adequate measures to prevent discrimination because the POERT design on its face does not comply with guidelines for developing assessment tests, particularly with respect to Assessment Centre methodology. Second, the marking system POERT uses is not reliable because it uses a "Met" or "Not Met" rather than a rating scale of one to five or one to seven, which as Dr. Willis described it, "is standard operating procedure" in Assessment Centre methodology. Third, she opined that there were serious problems in how CBSA selected people to train as Assessor, and in its Assessor training, particularly in the lack of training on notetaking, including recording observations versus conclusions, how to document and properly evaluate behaviour.

[246] Regarding Mr. Itty specifically, Dr. Willis made the following "summary comments" (among others) at page 31 of her first Report, dated July 10, 2015 (Willis Report or Report), after her comparative analysis of how the Assessors evaluated Mr. Itty in his Simulations compared to how they evaluated his classmates:

> "1. It appears that the assessors were more strict in their categorization of Itty's performance compared to the other recruit data I reviewed.
>
> 2. This may be based on their personal biases based on Itty's national origin/ethnicity and possibly his accent."

[247] The Respondent submitted that Dr. Willis' evidence did not meet the *Mohan* criteria of necessity in assisting the trier of fact. They also alleged that some sections of her Report spoke in generalities and was therefore not relevant. The Respondent further objected to the admission into evidence of parts of the Willis Report and related testimony because they fell outside her expertise in general and specifically outside her expertise as framed by the Complainant.

[248] Part of the Report, starting on page 7, titled “Literature Review”, is a review of academic literature, made up of five sub-sections on certain topics. At the bottom, Dr. Willis summarizes the literature review: “In summary, the aforementioned literature review reinforces the importance of how a person’s cultural background (their accent), and the prejudice, unconscious bias and stereotypes that are prevalent can adversely affect employment decisions.”

[249] After considering the parties’ submissions, I excluded the section of Dr Willis’ Report, starting from portion on page 8 titled “Bias in the hiring process” to the two lines at the top of page 17, which was almost the entire Literature Review. As I explained to the parties regarding the parts of the Willis Report on which I did not permit her to testify, they are not necessary because the Tribunal has expertise in human rights and discrimination. That expertise has been recognized by the Courts (see *Basi*). The Tribunal does this day-in-and day-out, in its Rulings and Decisions; we decide if people have been discriminated against and whether a system is discriminatory. The Tribunal therefore did not need the excluded evidence from Dr. Willis.

[250] In its final written arguments, the Respondent says that Dr. Willis’ testimony was significantly undermined by “fundamental errors and misunderstandings about the POERT program and its assessor training.” The Respondent submits that her analyses were overly simplistic and contended that much of her Report was not necessary for the Tribunal to make a finding.

[251] The Respondent’s expert, Dr. Durand, critiqued the Willis Report in section 5 of his own report dated June 6, 2016 (Durand Report or Report). His primary focus in his section 5 was on the Tables Dr. Willis created, but he also commented on her opinions. I am not taking into account the first paragraph of page 15 of the Durand Report because it deals with Dr. Willis’ literature review, most of which I excluded at the hearing. I found his critiques helpful, objective and nuanced. For example, with respect to Dr. Willis’ conclusion in her Report that CBSA did not do a job analysis of the BSO position, which she saw as a fatal flaw in the POERT program, Dr. Durand explained that the *Guidelines* were “not as narrow” as Dr. Willis’ opinion indicated, and that what was called “Competency Modeling” was also a viable source for the design of Assessment Centres.

[252] Another critique Dr. Durand made was regarding Topic 8 of Dr. Willis' Table 1, where she stated that "just because a recruit receives a NM in three out of 10 competencies should not mean he or she fail at the job". Dr. Durand opined that this is a criticism of the validity of the criteria used in POERT. He further stated that the authoritative documents such as the *Guidelines* state in effect that what is "paramount" is that validation evidence supporting the way in which validation scores are ultimately used (in terms of their validity and reliability for the purpose at hand) is provided by the Assessment Centre developer and user. He states that because the information such as the results from subject matter experts' working sessions to decide how many competencies were required were not available, and Dr. Willis did not or could not substantiate her statement. (Neither expert heard Dr. Ducharme's testimony).

[253] Dr. Durand's opinion was that the level of detail in the POERT Simulation materials could not have been obtained without having what he calls "a very strong fidelity to real work situations." In his testimony, he explained that the concept of fidelity ("Fidelity") means how much the scenarios in the Simulations are related to or reflect real life situations in the job for which the candidate is being assessed – here, the BSO job. He came to that opinion because he did not assume that no job analysis was done just because he was not provided with evidence of it – he looked deeper, even though he did not have the benefit of Dr. Ducharme's testimony about job analysis that Hay Group and CCRA had done.

[254] Dr. Willis also did not have the benefit of Dr. Ducharme's detailed testimony about the design of critical aspects of the Assessor Training program, nor did she have testimony such as Assessor Shellie Fowler's about her experience going through Assessor Training. Nor did Dr. Willis have Dr. Ducharme's testimony about how Hay Group chose the Competencies and designed the Simulations. Both parties were very conscious of complying with the Confidentiality Orders, and so did not provide these testimonies to their Experts. Having said that Dr. Willis did not have the benefit of the aforesaid testimony, she nevertheless made significant assumptions, such as that no job analysis or critical incident analysis had been done before the Competencies and Simulations were chosen, but Dr. Durand did not. I found his approach to be that if there was no evidence for him to analyze on a given topic, then he could not have an opinion. I prefer Dr. Durand's approach because

with Dr. Willis' approach, she made incorrect assumptions on job analysis, critical incident analysis and parts of Assessor Training. To her credit, when certain aspects of Assessor Training was put to her in cross-examination, she acknowledged that it would have affected her opinion.

[255] Even given Dr. Willis' examples of "ideal-state" Assessor Simulation notetaking, I found that for example, Assessor Fowler's notes in some parts of her Observations of Mr. Itty were very good, because she included what the Actor said, which gave context to both what was happening in Simulation 4 and to Mr. Itty's actions and what he said in the Simulation.

[256] When Dr. Durand was questioned about the quality of the Assessors' notetaking in the Simulations, he testified that when the Assessors noted that a recruit did not do something, it was very difficult to describe this further, because it is very difficult to describe a negative.

[257] Dr. Willis testified that the use of the Assessment Centre process is the "Cadillac or Bentley" approach, used since World War II, where candidates go through a variety of simulation exercises. She testified that custom-designing an Assessment Centre starts with a job analysis, including gathering critical job incidents, and then a validation report, followed by a leadership training program. She opined that, based on the materials available to her, the design of the POERT program had not followed these key steps. As outlined earlier, based on Dr. Durcharme's extensive testimony, which I found credible, and the other evidence presented, I find that these elements were in fact used in the design of POERT. Unlike Doctors Ducharme and Durand who focussed significantly on the *Guidelines and Ethical Considerations for Assessment Center Operations (the Guidelines)*, Dr. Willis referred to the *American Uniform Guidelines on Selection Procedures, 1978 (American Guidelines)*, used in American court cases, as one of the "Bibles" which people in the testing business use. It was not clear however, whether Dr. Willis was relying on the requirements of the American Guidelines in her opinions on POERT in her Report and testimony, and she did not provide a copy to the Tribunal.

[258] I turn now to the expert evidence that I did not exclude at the hearing. In Appendix A, Table 1 to the Willis Report, Dr. Willis goes through each element of the Assessor Training

program from Assessor selection to practice simulations and more. There are two significant issues with this Table: first, it is clear that Dr. Willis was not aware of significant elements of the POERT program's development - for example, she extensively criticizes what she perceived as the lack of a job analysis. Second, it is not clear what the source is regarding the column "principles and practices" which she appears to use as an authoritative source against which to measure the POERT program's various aspects, including the selection of Assessors.

[259] I find that the evidence did not support Dr. Willis' conclusion that the Assessors assessed Mr. Itty more critically than they did his classmates. From pages 26 to 31 and in Table 5 of her Report, Dr. Willis did a "Comparative Analysis of Assessor's Summary Evaluation of Itty with Other Recruits". For this comparison, Dr. Willis used the D-II Recruit Simulation Assessment Reports, which were given to each recruit at their Final Feedback session for them to keep and take with them, and, if they had passed POERT, to show to their Supervisors when they went to their BSO position, so the Supervisor could continue coaching the new BSO on areas they needed to improve. For Mr. Itty, she also had the handwritten Assessment Forms of his Assessors for both the D-I and D-II Simulations, but did not include them in this Comparative Analysis or Table 5.

[260] Dr. Willis opined that several of the Assessors' comments in Mr. Itty's D-II Recruit Simulation Report were substantively or actually the same as comments in those Reports of his classmates who passed, and yet Mr. Itty was failed. I find that because the Assessors were instructed to use very general terms in those type-written summary Reports, and not provide too much detail or examples, as Dr. Ducharme testified (unbeknownst to Dr. Willis), the D-II Recruit Assessment Reports simply do not tell the reader enough of the detail of what actually happened in the Simulation. In the comparison section of her Report, Dr. Willis is frequently critical of the lack of examples and detail included. However, this lack of detail and examples are by design - and because she was using only the D-II Recruit Simulation Assessment Reports for this comparison. Further, her opinion that the Assessors used the same or similar criticisms at times for Mr. Itty as they did for his classmates who passed but couched the comments about Mr. Itty in more negative terms is, I find, a circular argument. If his Assessors did not assess him as reaching the required Threshold Levels in the

Competencies, it is natural that their comments would be more critical because they assessed him as not passing.

[261] For example, at page 30 of her Report, Dr. Willis wrote that the Assessors had five negative comments for Mr. Itty and five negative comments for the recruit she was comparing him to, but that Mr. Itty was failed while his classmate was not. This is taking too simple a view of the Assessment process, and nowhere is it suggested that the number of comments ranks higher than their contents or substance. Further, in some cases a side-by-side comparison as shown in her Table 5 illustrates that the Assessors assessed a recruit as having performed well on certain Competencies on which they assessed Mr. Itty as having failed to meet the Threshold. For example, on p. 58 comparing recruits #8 and #9, under "Dealing with Difficult Situations", in the Assessors' Observations column, recruit #8 was "able to deal with difficult client and maintained [your] composure in all three simulations." And recruit #9 "showed confidence and did not waiver when challenged". In contrast, Mr. Itty's Report for this section contained several negative or critical pieces of feedback. I simply cannot draw the conclusion from the comparison of these comments that the Assessors were "more harsh" with Mr. Itty than with some of his classmates.

[262] Dr. Willis acknowledged in her testimony that the D-II Recruit Simulation Assessment Reports do not contain the individual Met or Not Met mark for each of the three Simulations, only Observations and the overall Met or Not Met for the recruit. Many times, the Observations will relate to a specific Simulation ("in S4" or "in S6") but there is no specific overall assessment of Met or Not Met for that Simulation. Therefore, one cannot rule out the possibility that recruits who Dr. Willis cites as having received an overall Met in the DDS, EIC and SC Competencies were marked "Not Met" in a Competency in one Simulation, but marked "Met" for that Competency in the other two Simulations, and that during the Assessors' Integration Meeting, the Assessors either came to a consensus that the recruit was an overall Met, or relied on the instruction which Mr. Ducharme and Ms. Fowler testified about, specifically, that if two Assessors agreed on a Met and one did not, the recruit received an overall Met.

[263] Dr. Durand, the Respondent's expert, testified that the D-II Recruit Simulation Assessment Reports did not provide "the full picture" of what happened in a Simulation.

Assessor Fowler testified that she needed her hand-written notes in the Assessment Forms of the Complainant's classmates to see why she failed the Complainant and not his classmates, about whom she had made similar comments in their D-II Recruit Simulation Assessment Reports. Assessor Kevin Phillips also testified that he would have to see his notes for the same reason.

[264] Because the D-II Recruit Simulation Assessment Reports do not contain the individual marks for each of the three Simulations, I find that there is the possibility that the negative Observation notes made about any of Mr. Itty's classmates about a specific Simulation, although similar to or the same as an Observation about Mr. Itty, may have reflected that the classmate received a Not Met in that Simulation, but a Met in the other two Simulations.

[265] There was a significant point of confusion in both the body and Table 5 of Dr. Willis' Report, specifically, whether Dr. Willis understood that Assessor Zbitnoff marked Mr. Itty as having Met all the Competencies in Simulation 6.

[266] In Table 6, titled "Problems with Assessors' Categorization of Itty's performance in the Competencies of DDS, EIC and SCF", Dr. Willis goes through each comment from Mr. Itty's Assessors in their handwritten notes in their Assessment Forms and adds comments or questions of her own. For example, for Dealing with Difficult Situations, an assessor wrote "ignores concerns". In response to this, Dr. Willis asks "what would/should candidate say?" I note that at the top of page 1 of the Assessment Form Dr. Willis used to create this Table, is written the instruction to the Assessor: "For each competency, check ("✓") the behaviour that best describes what the recruit <u>actually</u> did (not what you think he or she could do.)" I find that what the recruit should have done is addressed in the box titled "Summary of Areas for Development" in the D-II Recruit Simulation Assessment Report.

[267] Finally, having heard the evidence in its entirety and upon reviewing the Willis Report and Dr. Willis' testimony, I also conclude that the comparative analysis section is largely a side-by-side comparison, which is something that the Tribunal is capable of doing. Dr. Willis' expertise is not required to look at this type of non-technical evidence, which was designed to be accessible to lay people, that is, the recruits themselves and their future Supervisors.

[268] For the reasons above, I do not put any weight on this section.

[269] Dr. Willis criticized the concept of Threshold Levels. I noted that in some of the Complainant's classmates' D-II Recruit Simulation Assessment Reports, an Assessor noted in their Observation of a recruit's performance of a Competency that the recruit Met the Threshold Level for that Competency. Then, often, the Assessor would note how the recruit could improve. I find that this evidence establishes that the Assessors kept the required Threshold Levels in mind when they assessed recruits, and further, that they based their grade of the recruit's performance of the Competency on whether the recruit met the Threshold Level.

[270] In her Rebuttal Report dated August 4, 2016, in which she responded to Section 5 of Dr. Durand's Report, Dr. Willis did temper her opinions on a couple of subjects. For example, she agreed with Dr. Durand that bias cannot be completely eliminated in human beings and acknowledged that Dr. Durand's comment that bias is possible even if the Assessor panel is diverse was true. Although she did not accept most of Dr. Durand's opinions about her Report because she felt she had more practical experience in Assessment Centres, and that knowing what was in the Guidelines was not sufficient without that experience, she stated that Dr. Durand's biography indicates that he is "well versed in measurement and assessment". However, she stated that his knowledge of psychometric principles and testing is not enough to be an expert in the design, development and administering of Assessment Centres.

Credibility - Dr. Willis

[271] I found Dr. Willis to be an honest witness who was not evasive. She was forthright, but she had a tendency to sometimes answer a question with a rhetorical question, and also did this a few times in her Report. This was not helpful. I found her willing to modify her critical opinions on certain aspects of the POERT program when new information was put to her during her testimony – for example, regarding Assessor Training. I did find it very surprising that at one point in her testimony she became extremely defensive when the Respondent's counsel pointed out an error in Table 5, where she incorrectly noted that all

Assessors had failed Mr. Itty on the three Behavioural Competencies when in fact Mr. Zbitnoff had passed him on all Competencies. She called this a “transposition error” and reacted by saying that what counsel was implying was that all her data was incorrect. I did not form the impression that this was what counsel was doing, although he was obviously pointing out a weakness in her Report. Her reaction was surprising, particularly in light of the fact that she has been an expert in about 26 other cases, including in at least some of them, appearing as an expert witness in court. In my view, this defensive reaction detracted from her testimony.

[272] I also found Dr. Willis to be entrenched in her views of how an Assessment Centre ought to run, and this entrenched view led at times to advocacy for the Complainant. For example, one of her conclusions in her Report concerning the POERT program ended with “Therefore, the Canada Border Services Agency (“CBSA”) should seriously consider revamping the entire system.” I found this to be an extreme opinion which she repeated in another part of her Report.

[273] Dr. Willis provided opinions and suggestions to improve certain aspects of the POERT program’s methods, particularly regarding Assessor notetaking, assessment practices such as the benefits of having video cameras and three-person panels of Assessors for each Simulation. These suggestions may be valid and CBSA may wish to consider them. However, my task is not to determine whether POERT is the perfect program or how it could be improved – my task is to determine only whether its design or execution was discriminatory.

Dr. Durand, The Respondent’s Expert

[274] The Respondent’s expert, Dr. Durand, has been an Associate Professor at Telfer School of Management at the University of Ottawa since 2013, where he teaches at both the graduate and undergraduate levels. He teaches staffing organization, and a course on selection to undergrads, and teamwork at the graduate level. He explained that “Selection” means the decision-making process that enables a person to be hired into an organization. In the Staffing course, he teaches bias and how bias may or may not factor into the Staffing

process. He is also a consultant on selection procedures and instrument design in the context of selection.

[275] He testified that his particular area of interest was what is called the “validity” of Selection tools – that is, whether the Selection tool used measures what it is supposed to measure. Dr. Durand holds a Ph. D. in psychology. In his Ph. D. work, his focus was around the measurement of competencies on one hand, and job requirements on the other, and to further develop mathematics behind how one matches qualifications to job requirements. He explained that this area is referred to as “psychometrics”, and his Ph. D. looked at the measurement of the two together.

[276] Dr. Durand also worked at the Personal Psychology Centre of the Canadian government’s Public Service Commission, where he operated a few Assessment Centres as a psychologist. He testified that his role was to ensure that the Assessors would stay within their instructions, that they would write good notes, that they would have discussions during their Integration, and that they would write good reports. The foregoing were elements of the Guidelines, which he applied.

[277] After having heard the parties’ submissions, Dr. Durand’s testimony on his qualifications, and reviewing his Curriculum Vitae, including his education, working experience, articles written and teaching, the Tribunal qualified Dr. Durand as an expert in industrial and organizational psychology to provide an expert opinion on the effectiveness and validity of the POERT assessment process. The Complainant challenged his qualifications but I was satisfied that he met the requirements.

[278] On the whole, his evidence can be summarized as stating that the POERT program was well designed including in the training of the assessors, the Simulations had a high rate of fidelity, in other words, reality, the program had good standardization and that although the Assessors’ note taking could have been better, it was not a significant detriment to the program.

[279] The Respondent consented to the deemed removal of pages 36 to and including 39 from Dr. Durand’s Report.

[280] Dr. Durand structured Section 6 of his Report as his paragraph-by-paragraph response to the Complainant's SOP. For example, his comment on paragraph 48 of the Complainant's SOP: "The notion that changing seating arrangements is an indicator of cultural bias is not substantiated and has no bearing on the assessments that lead to classifying the complainant as a true negative or in any quadrant of Figure 1 for that matter."

[281] The Complainant objected to this and other aspects of the Durand Report because they purported to inappropriately provide legal opinions and conclusions. The Respondent acknowledged during the hearing that Section 6 of the Durand Report could have been better had it not been framed in that manner but argued that the crux of Dr. Durand's analysis relates to matters properly within his expertise and that the Tribunal ought to consider the substance of Section 6 rather than its form.

[282] I find that even through this lens, Dr. Durand provided information and opinion in Section 6 which goes beyond the scope of a permissible expert opinion. For example, he explained concepts like "adverse impact" and "adverse differential treatment" as American terms not used in authoritative psychology sources – but these terms are in fact key concepts in Canada's federal human rights regime. He also commented on evidence that, in his view, was missing from the SOP. That is not the role of an expert and confuses his mandate with that of the Tribunal. Further, significant portions of this section opine on the "ultimate issue" before the Tribunal. I find these deficiencies went beyond form and that if I took that evidence into account, I would risk having an expert usurp the Tribunal's role as the finder of fact and as the decision maker on questions of law.

[283] I am therefore placing no weight on Section 6 of the Durand Report.

[284] Section 8 (there is no section 7) of the Durand Report consists of a variety of empirical data in the form of charts and accompanying explanations. The charts included analyses of pass/fail rates based on sex and age as well as overall pass/fail rates for various Intakes. The Complainant withdraw age as a ground in the Complaint in 2019, and had never alleged discrimination on the ground of sex. Dr. Durand explained that he looked at sex as a proxy for other types of discrimination because of literature which posits that where sex discrimination occurs, discrimination on other grounds is likelier to co-occur. On the basis of

the evidence submitted, I am not prepared to make that leap. There are also more generalized tables detailing mean and absolute fail rates of the particular class and/or Intake group. Absent links to the protected characteristics at issue in this Complaint, I do not place any reliance on this information.

[285] I am therefore also not placing any weight on the section 8 empirical data and accompanying statistical analyses contained in the appendices to the Durand Report.

[286] Dr. Willis testified and opined in her Report that the fact that Mr. Itty was assessed as passing all 10 Competencies in one D-II Behavioural Simulation, seven out of 10 in another, and five out of 10 in the third was too wide a spread in ratings, and was evidence of a lack of what is called “Inter-rater reliability”, which is important in Assessment Centres.

[287] Dr. Durand testified that he did not think that POERT specifically addressed “inter-rater reliability” and agreed that it would be ideal for POERT to do so. He testified that if the nature of the raters’ observations is to pick up the frequency of certain behaviours, then one could compare the frequency among raters. He further testified that there is a complex statistical test to ascertain inter-rater reliability. Dr. Durand meant that his ability as an Assessor to see someone and think they’re doing well and another Assessor to see the same thing – then there would be the same frequency and by the interplay of the frequencies, one can create a test.

[288] Although it was not in Dr. Durand’s Report, he testified that he had calculated the inter-rater reliability in the D-II Assessments of Mr. Itty’s three D-II Behavioural Simulations both by Assessor and by Competency. Ms. Fowler assessed Mr. Itty a “Met” on five out of 10 Competencies; Mr. Phillips on seven out of 10 and Mr. Zbitnoff on 10 out of 10. Dr. Durand found that the inter-rater reliability came to 83% similarity. He opined that therefore, the method of describing the “five out of 10”, “seven out of 10” and “10 out of 10” was not accurate enough.

[289] Dr. Durand thought this was “pretty good” because overall, there was 83% agreement on Mr. Itty’s ratings. Dr. Durand opined that there would be a problem with inter-rater reliability if the percentage agreement was below 70%.

[290] Both experts agreed that standardization (Standardization) is important in the Assessment Centre process. Dr. Durand explained that Standardization was important because the more standardized an Assessment Centre was in its processes, the more it meant that each candidate had the same experience as the other candidates. Standardization helps minimize the chance that what Dr. Durand referred to as "irrelevant factors" such as race, colour or ethnicity would skew the assessment of a candidate's performance. He opined that he found POERT's level of Standardization to be very good. He used as examples the fact that each recruit in a class is assessed on each Simulation by the same Assessor and that all recruits are assessed in the Simulations on the same day.

[291] He also opined that the amount of information POERT provided to the recruits about how they would be tested on the Competencies and on the Simulations and on other aspects of the POERT program meant that recruits knew what to expect.

[292] Notwithstanding the limited reliance on Dr. Durand's written Report, in considering all the evidence, I did take into account the opinions offered in pages 1 to 21 of his Report. (specifically regarding what is called "Fidelity", "Standardization", Assessment Centre marking systems, etc.)

[293] I found pages 1 to 21 of Dr. Durand's Report, the inclusion of the 2015 Guidelines as an Appendix, and his testimony informative, and more objective and nuanced than Dr. Willis'. Dr. Willis clearly had more "hands-on experience" with Assessment Centres, but as I have stated above, I find that her assumptions about significant aspects of POERT lead to unsupported opinions. I found Dr. Willis very knowledgeable and articulate on notetaking, and her testimony on that, which included examples of the differences between observational notes and conclusory notes, was clear and helpful. Overall, I preferred the opinions and testimony of Dr. Durand, for the foregoing reasons. Dr. Ducharme had testified that the parts of the POERT program on which Hay Group assisted in developing, such as the Simulations, used the 2000 Guidelines as a starting point, and described the psychologists who devised those Guidelines as "expert psychometricians". Dr. Durand's knowledge base and Ph. D. subject emphasized psychometrics, and this was a useful link

to the Guidelines, and to explaining how he assessed the validity of the POERT Simulations – that is, whether they measured what they were supposed to measure.

Credibility – Dr. Durand

[294] I found Dr. Durand to be an honest and forthright witness. His testimony about the Guidelines, the concepts of Fidelity, Standardization, Assessment Centre marking systems, and aspects of Assessor notetaking was very helpful. He was not defensive or evasive when his testimony and opinions were challenged in cross-examination. He acknowledged that he was not an experienced expert witness and I suspect that some of the deficiencies in his Report may have stemmed from a lack of understanding of the Tribunal process.

Conclusion on Assessment

[295] Upon having heard the testimony of Mr. Itty, Dr. Ducharme, the three Assessors, and that of the experts', and upon reviewing the documentary record, including the Willis and Durand Reports and Dr. Willis' Rebuttal Report, I conclude that the evidence failed to establish a link between how Mr. Itty's D-II Assessors evaluated him as being an overall "Not Met" in the D-II Simulations and his protected characteristics of race, colour or national or ethnic origin.

[296] Likewise, having heard Mr. Itty's testimony, Dr. Ducharme's testimony, the Assessors' testimony, the experts' evidence, and upon reviewing the documentary record I also conclude that the evidence failed to establish on the balance of probabilities that the CBSA held Mr. Itty to a higher standard than his classmates who did not have his protected characteristics.

Complainant's Final Feedback Session

[297] The final situation where Mr. Itty alleges that he experienced discrimination at POERT was the session where candidates find out whether they passed the program. The evidence established that typically, three business days after the end of the D-II Simulations and written exams, candidates find out for the first time whether they passed D-II and receive

feedback from their Assessors in what is called their “Final Feedback Session” (Final Feedback). An administrator leads the Final Feedback and all the candidate’s D-II Assessors are all present and available for feedback.

[298] The Assessors provide oral feedback and the candidate is given their D-II Recruit Assessment Simulation Report that the candidates take with them. No recruit is given a copy of the Assessors’ marking booklets. The testing Administrator gives them the results of their written exams. Whether or not a candidate is successful in D-II, they each receive a private Final Feedback. Its other purpose is to give the recruits feedback on performance areas they need to improve.

[299] The successful recruits are told to take their D-II Recruit Assessment Simulation Report and the feedback to their future Supervisors, who continue coaching them. The Respondent’s witness Patrick Gadoury, then the administrator for the POERT written test portion, testified that at the end of the Final Feedback for an unsuccessful recruit, he would advise them that they could appeal to the Public Service Commission and that they could talk to someone at Rigaud from the Employee Assistance Program. Then two trainers would accompany the unsuccessful recruit to their room to get their personal belongings, escort them to the front desk and out of the facility. Mr. Gadoury testified that the CBSA escorts all unsuccessful candidates out in the same manner and does this to ensure both their security and that they leave.

[300] There was no dispute about who was present at Mr. Itty’s Final Feedback on February 4, 2009: Messrs. Gadoury, Phillips, Zbitnoff, Slee, Borgia, Ms. Fowler and himself. All those present testified except for Mr. Slee.

[301] Mr. Itty testified that Mr. Phillips, the Lead Assessor, began by starting to read a couple of paragraphs of the report he had in front of him, which said Mr. Itty had failed. When Mr. Itty asked Mr. Phillips to clarify why he failed, Mr. Phillips *passed* that question to Ms. Fowler, who told Mr. Itty about the Simulation she observed. However, Mr. Gadoury’s testimony was that he, as administrator, was there to deliver the overall Met/Not Met results to the candidates and both he and Mr. Phillips recalled that this is how Mr. Itty’s session began.

[302] Ms. Fowler told Mr. Itty that he should have asked more clarifying questions in Simulation 4. Mr. Itty related that he then asked Ms. Fowler “Did I not ask all these questions?”, and that Ms. Fowler “just sat there and didn’t say anything”. Mr. Itty was taking notes up to this point.

[303] Mr. Gadoury recalled that when Mr. Phillips began his feedback, Mr. Itty did not agree with the results or with Mr. Phillips’ reasons and said the results were not fair. When Ms. Fowler gave her feedback, Mr. Itty was very argumentative and confrontational with her about his results in her Simulation, said he was not treated fairly, the results were not fair and he was not evaluated fairly and that he would sue the CBSA.

[304] Mr. Gadoury described Mr. Itty’s tone of voice as loud and remembered Mr. Itty saying that the Agency’s integrity was not good.

[305] At some point, Mr. Gadoury intervened in the proceedings, and warned Mr. Itty that if he was not civil and respectful, the Final Feedback would end. His testimony was that Mr. Itty and Ms. Fowler were talking at the same time and that he felt he had to “keep the feedback session going in a calm and respectful manner.” He testified that he did not raise his voice or tell Mr. Itty to be quiet. Mr. Gadoury described Mr. Itty’s Final Feedback as “different than any other” of the more than 10 Final Feedbacks he had been involved in. Mr. Gadoury explained that the Final Feedback is not a venue for the recruit to agree, disagree or negotiate test scores – there are other venues for that. Later that day, Mr. Gadoury made a notation concerning Mr. Itty’s Final Feedback in Mr. Itty’s G-Drive file. The notation was entered as an exhibit at the hearing and I find that it aligns with Mr. Gadoury’s testimony, and that of Assessors Fowler, Phillips, and Zbitnoff.

[306] Mr. Itty’s recollection was that Mr. Gadoury “shouted me down,” saying he was not supposed to be asking these questions and if he continued, Mr. Gadoury would end the Final Feedback.

[307] Both Mr. Itty and Ms. Fowler testified that Kevin Phillips also intervened and told Mr. Itty to just put down his pencil, not take notes, and listen to what Ms. Fowler was telling him. Mr. Itty testified that he listened to Mr. Phillips’ “order”. Mr. Phillips did not recall saying this.

[308] The feeling Mr. Itty testified he got was that for no apparent reason CBSA just failed him. Further, Patrick Gadoury, in a senior position in the public service, "just shouted [Mr. Itty] down". No one in the public service had ever spoken to him in what Mr. Itty characterized as "that kind of cruel and demeaning manner". He believed that CBSA did not show him mutual respect. He felt they would not do that to any Caucasian – he described himself as "an easy pick". He testified that he was so disoriented after his Final Feedback that he lost his way going home.

[309] Fernando Borgia testified that he knew who failed before the Final Feedback Session began. Sometimes he would be informed the morning of the Final Feedback. If he had been an Assessor for a Simulation, he would have found out in the Integration Meeting. Mr. Borgia did not recall what information he had when going into Mr. Itty's Final Feedback.

[310] Mr. Borgia testified that he has had different reactions from candidates at Final Feedback Sessions when telling them that they were not successful - sometimes the situation is tense, and sometimes it is "the opposite".

[311] He recalled that Mr. Itty's Final Feedback began with a difference of opinion between Mr. Itty and the Assessors, so his Final Feedback did not go smoothly. Mr. Itty was given the opportunity to listen to his feedback. Mr. Borgia described Mr. Itty as seeming upset, frustrated, a bit loud, but "that's about it". Mr. Borgia remembered that Mr. Itty disagreed with the feedback from Ms. Fowler and described him as being bothered or upset by it. Mr. Borgia remembered that Mr. Gadoury intervened, but didn't remember specifically what he said or whether Mr. Gadoury raised his voice to get Mr. Itty's attention.

[312] Ms. Fowler characterized Mr. Itty's reaction to the information that he had obtained an overall Not Met as being upset. She testified that Mr. Gadoury had to ask Mr. Itty to calm down or the Final Feedback would have to stop. In Ms. Fowler's view, Mr. Itty's Final Feedback was not productive because Mr. Itty was not open to feedback and took great exception to Ms. Fowler especially.

[313] Ms. Fowler testified that Mr. Itty was told not to take notes because it was not "normal" to have candidates take notes at the Final Feedback. It was designed to only deliver

an overview of where the candidate went wrong or needed improvement, and not as a formal "sit-down" to go over every detail; time did not permit note taking.

[314] Mr. Zbitnoff confirmed he was present at Mr. Itty's Final Feedback. He remembered that himself, Ms. Fowler, Mr. Phillips and Patrick Gadoury were in the room with Mr. Itty, and that Mr. Phillips as the Lead delivered the results of the Simulations to Mr. Itty. He remembered Mr. Itty being very angry, upset, animated and boisterous. Mr. Zbitnoff continued his testimony. He testified that Mr. Phillips and Ms. Fowler tried to deliver feedback to the Complainant on their Assessments. Mr. Zbitnoff described Mr. Itty as unwilling to listen and that he was taking control of the dialogue. Mr. Zbitnoff remembered Mr. Gadoury trying to regain composure in the room and afford Mr. Itty feedback and that it was largely unsuccessful. Mr. Zbitnoff described the behaviour of Ms. Fowler and Mr. Phillips as "calm, professional, respectful."

[315] Mr. Gadoury "did not believe" he told Mr. Itty not to ask questions – he wanted Mr. Itty to get the answers to his questions. Mr. Gadoury testified that Mr. Itty asked for his Assessors' Notes and thought they were not given to him - he got the Summary, like all the other candidates.

[316] I accept Ms. Fowler's and Mr. Gadoury's testimony that Mr. Itty made the accusation of CBSA bias and unfairness, asked for badge numbers and said he would sue the CBSA. Mr. Gadoury testified that Mr. Itty said this twice.

[317] In his Final Submissions, the Complainant does not dispute that he was upset on learning he had not passed POERT, and states that the D-II Feedback Session "…became tense and heated".

[318] Mr. Itty submits that the Assessors did not give him sufficient answers, and Ms. Fowler in particular gave him no answers. The evidence does not support this submission. The witnesses' testimony was that the Assessors, including Ms. Fowler, answered Mr. Itty's questions but he did not accept those answers and argued about them and about the results. I find that Mr. Itty got answers, but he did not like or accept them.

[319] The majority of those who testified about the Final Feedback noted that while he was arguing, Mr. Itty raised his voice and was visibly angry. I accept this evidence. Mr. Gadoury testified that his own objections to Mr. Itty's behaviour were not because he was asking questions, but because of the manner in which he was doing so and his questioning of the Agency's integrity.

[320] I take into account that almost every witness who testified about the D-II Feedback Session, including Mr. Itty himself, used the word "upset" to partially describe his reaction to learning that he had not passed POERT, the feedback he received and his demeanour. I find it understandable he would be upset when he found out he had not passed D-II.

[321] I do not accept Mr. Gadoury's testimony that he did not raise his voice in response when Mr. Itty raised his voice and initially did not co-operate with Mr. Gadoury's attempts to bring the Final Feedback back to what Mr. Gadoury described as civility and respect. I accept Mr. Zbitnoff's description of Mr. Itty's demeanour as "boisterous", "very angry" and "taking control of the room". Mr. Zbitnoff testified that Mr. Gadoury tried to get control of the dialogue, without initial success. Mr. Gadoury testified he tried to get Mr. Itty's attention, but could not at first because Mr. Itty was talking to Ms. Fowler. Mr. Gadoury also testified that he himself was upset, not because Mr. Itty was asking questions, but because of how he was asking them and his casting aspersions on the CBSA's integrity. It does not make sense that in the situation described by these witnesses, Mr. Gadoury would not have raised his voice at least at the end of the time he had been trying to get Mr. Itty's attention.

[322] The Complainant submits that as set out in the *Ontario Human Rights Commission's Policy and Guidelines on Racism and Racial Discrimination (OHRC Guidelines*), persons who believe they are subjected to racial discrimination should not be expected to sit meekly by, and may react in an angry, verbally aggressive or accusatory manner, and that experiences in workplace racism "can inspire anger and hostility" and may impact an employee's temperament generally. The Complainant cites *Campbell v. Vancouver Police Board (No. 4),* 2019 BCHRT 75 (*Campbell*), at para 135, which cites *Briggs v. Durham Regional Police Services,* 2015 HRTO 1712, at para 235, as standing for the concept that such strong reactions to deeply painful experiences require reasonable tolerance "…and must not form the basis for further differential treatment."

[323] I find that Mr. Itty's reaction, while understandable in the context of someone who believes they have experienced discrimination, is distinguishable from *Campbell*, as he did not experience further differential treatment as a result of it. The Final Feedback was completed and he was escorted out of Rigaud like every other recruit who was unsuccessful at the D-II stage.

[324] I do not accept as reliable Mr. Itty's testimony that Ms. Fowler did not give him any answers. His own testimony was that Ms. Fowler told him that he asked leading questions and failed to ask certain questions. Ms. Fowler's and Mr. Borgia's testimony established that there was a 'difference of opinion" between Ms. Fowler and Mr. Itty. Ms. Fowler also testified that Mr. Itty took "particular exception" to what she told him. I prefer the evidence of Ms. Fowler and Mr. Borgia to that of Mr. Itty on this point, and therefore find that the evidence established that Ms. Fowler did try to tell Mr. Itty why he had not passed Simulation 4, but Mr. Itty argued with and interrupted her. In other words, he got answers from Ms. Fowler, but did not like or agree with them.

[325] I conclude that the evidence established that in his Final Feedback, the Assessors tried to answer Mr. Itty's questions about why he failed the Simulations, but he simply did not agree with their answers and argued with them. Mr. Gadoury told Mr. Itty to calm down or he would stop the Final Feedback; the Feedback continued after Mr. Itty regained his composure.

[326] After reviewing and weighing all the evidence on Mr. Itty's Final Feedback, including testimony on its purpose and the testimony of everyone there, except Mr. Slee, I conclude that Mr. Gadoury raised his voice to Mr. Itty not because of Mr. Itty's race or colour or national or ethnic origin, but because of Mr. Itty's angry reaction to his D-II Behavioural Simulation results and because he was trying to get Mr. Itty's attention to get back to the purpose of the Final Feedback. Mr. Itty's reaction included being loudly argumentative with the Assessors who failed him; accusing the CBSA and the Assessors of bias against him; and saying he would sue CBSA. Mr. Gadoury testified that what upset him was not so much that Mr. Itty was asking questions, but the way he did so, and his aspersions on CBSA's integrity. All the foregoing evidence on the Final Feedback establishes that CBSA did not

discriminate against Mr. Itty in his Final Feedback because of his national or ethnic origin, his race or colour.

[327] Dr. Willis opined that POERT did not use a recognized Assessment Centre rating system because it used the “Met/Not Met” form of grading in assessing the Simulations. Dr. Durand, however, testified that one rating system was not better than the other – they were just different – and each had pros and cons. For example, POERT’s “Met/NotMet” system was easier for Assessors to remember in a situation where they could be doing 16 assessments per day. In fact, 16 was the number of D-II Simulation Assessments that each Assessor did for Mr. Itty’s class.

[328] Notably, both experts agreed that Assessor bias can never be fully eliminated, but that Assessor training is very important in helping reduce or minimize bias as much as possible.

VIII. CONCLUSION

[329] The evidence established on the balance of probabilities that the POERT program did not give rise to an underrepresentation of people sharing Mr. Itty’s protected characteristics. Extensive expert and lay evidence established that the Assessors are properly trained, including in addressing their minds to the potential of bias in their Assessments, the program is carried out in a conscientious way. I do not accept that any of the classroom or testing situations Mr. Itty described were linked to his race, colour or ethnic or national origin. Not every element of the POERT program, or everyone involved in carrying it out is perfect, but that is not what I must decide. I conclude that the evidence established, on a balance of probabilities, that flaws in the POERT program or biases on the part of Mr. Itty’s Assessors were not factors in Mr. Itty failing the program.

[330] For the above reasons, I conclude that the Complainant has not established a *prima facie* case of discrimination pursuant to section 7(a) of the Act. The evidence also failed to establish that the CBSA’s Port of Entry Recruit Training program engaged in discriminatory practices or had discriminatory policies on the prohibited grounds of race, national or ethnic origin, contrary to section 10 of the *Act.*

IX. THE EVIDENTIARY ISSUE OF SPOLIATION

[331] Having now addressed the main issues of this case, I will explain my findings on an evidentiary issue the Complainant raised. He alleged that CBSA's destruction of the Assessor's handwritten evaluation notes of the successful classmates' performances in their D-II Simulations (Assessment Forms) constituted spoliation of evidence. Accordingly, Mr. Itty claimed that the Tribunal ought to draw an adverse inference regarding the content of that destroyed evidence. Specifically, he submits that the Tribunal should infer that the destroyed Assessment Forms would have been supported his position that the CBSA discriminated against him by holding him to a higher standard than it did his classmates in class A-236.

[332] CBSA does not deny destroying the files of Mr. Itty's successful and unsuccessful classmates. These files included the Assessment Forms containing their Assessors' hand-written Observations on their Simulations, the Assessors' hand-written End of Simulation Scripts and Simulation Marking Sheets for all the D-I and D-II Behavioural and Organizational Simulations. CBSA says that it did so in accordance with its document retention and disposition policy and for no other reason. CBSA argues that this destruction in no way occurred with the intent to affect the litigation at hand.

[333] The doctrine of spoliation is defined in Black's Law Dictionary as being "the intentional destruction, mutilation, alteration or concealment of evidence…. If proved, spoliation may be used to establish that the evidence was unfavourable to the party responsible" (Bryan A. Gamer, ed, Black's Law Dictionary, 11th ed (Thomson Reuters, 2019) sub verbo "spoliation"). Currently, the leading Canadian case on spoliation is McDougall v. Black & Decker Canada Inc., 2008 ABCA 353 (CanLII) [McDougall]. Although in McDougall spoliation was pleaded as its own separate tort, the concepts discussed apply in administrative proceedings when pleaded as an evidentiary matter, such as in this Complaint (see Peters v. United Parcel Service Canada Ltd., et al, 2022 CHRT 25 at para 116). In McDougall, the Court wrote:

> Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances

> where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

[335] As defined in *McDougall,* for Mr. Itty to successfully prove that spoliation occurred in this case and that the Assessor's evaluation notes would have been unfavourable to CBSA, he would need to establish on the balance of probabilities that:

a) the evidence that was destroyed was relevant;

b) The evidence was destroyed intentionally;

c) That litigation was contemplated or ongoing at the time of the destruction of the evidence; and that

d) It is reasonable to infer that the evidence was destroyed to affect the outcome of the litigation

a) Was the destroyed evidence relevant?

[336] The evidence established that Mr. Itty was the only recruit in class A-236 who failed his D-II Behavioural Simulations. One of his allegations is that his D-II Assessors held him to a higher standard when they assessed him as an overall "Not Met" compared to the standard they used in assessing his classmates who did not share his race, colour or national or ethnic origin.

[337] I find that the destroyed D-II Assessment Forms of Mr. Itty's classmates were relevant to the allegation of higher standard because inherent in establishing the allegation is the requirement to compare how the Assessors assessed Mr. Itty to how they assessed his classmates. I find it is more likely than not that the D-II Assessment Forms could have added relevant detail to the comparisons and were therefore relevant evidence.

b) Was the evidence destroyed intentionally?

[338] The Respondent's position is that it destroyed the files of Mr. Itty's classmates in accordance with the applicable document retention and destruction policies and denies intentionally destroying them to affect the litigation of the Complaint.

[339] The Respondent's witness Annie Roy took the lead in CBSA's response to the 2019 Disclosure Order. She consulted with the Nathalie Lavoie, Supervisor of the Administrative Support Team; Sylvie Mainville, one of the clerks supporting archives; other clerks supporting CBSA archives; the librarian at Library and Archives Canada (Archives Canada) and CBSA Labour Relations. I accept Ms. Roy's testimony that cumulatively, she and CBSA staff who helped her locate information on the destroyed documents each spent approximately seven to ten days on the search, and that their efforts were "intensive".

[340] Ms. Roy testified on CBSA's document retention and destruction policies generally and as they related to POERT files, including those of Mr. Itty's and his classmates. Ms. Roy has been with CBSA since 2001. In 2008-2009, when Mr. Itty was at POERT, she was Supervisor of POERT's Defensive Tactics group. She did not recall having any interactions with Mr. Itty at POERT.

[341] I found Ms. Roy to be a credible, forthright and honest witness. I formed the impression that she did not have any underlying agenda to put the Respondent's destruction of the documents in the best light.

[342] I also find that she took her assignment as lead in the CBSA's search for documents pursuant to the 2019 Disclosure Order seriously, and tried to conduct a thorough and conscientious search. She familiarized herself with certain documents to ensure she understood them and consulted with various CBSA personnel to find out about specific document disclosure, and the application of retention and destruction policies. Those consultations included in-person discussions and review of documents with Nathalie Lavoie and Sylvie Mainville, who created two relevant documents attached to the CBSA files at issue when they were shipped to Archives Canada. She also had discussions with Labour Relations. She herself searched and had others search CBSA's electronic records. When there were what she called "missing links", she looked further for documents or individuals

to explain them. She did not always find the answers or the documents, but the evidence established that she diligently searched for them and directed staff to search for them.

[343] I have taken into account that parts of Ms. Roy's testimony were hearsay. Subsection 50(3)(c) of the Act permits the Tribunal to admit evidence which a Court would not necessarily permit; the caselaw confirms this includes hearsay. The Complainant's arguments on hearsay in Ms. Roy's evidence are relevant to the weight to give it, not to its admissibility. I have dealt with the hearsay in Ms. Roy's evidence by assessing if there is documentary evidence supporting it, and then deciding on the weight to give it.

[344] Ms. Roy testified that there were two policies directing CBSA on document retention and destruction. The first is "National Archives of Canada, Multi-Institutional Disposition Authority No. 98/005" (First Records Disposition Authority), a lot of which consists of a chart. It authorizes CBSA to dispose of Human Resource records when the prescribed retention periods (Retention Period(s)) in its chart expire.

[345] Ms. Roy explained that a "Routine" staffing action proceeded in the ordinary course; "Routine" applied to the files of POERT's successful candidates. A "Policy" staffing action is one where something out of the ordinary course occurred: a recruit withdrew, failed or was otherwise removed from the staffing action. The Retention Period for Routine documents (of successful candidates) is two years from the date the candidate signed CBSA's letter of offer; for "Policy" documents (of unsuccessful candidates), it is five years from the graduation date of the unsuccessful candidate's class, unless there is an appeal or legal proceeding or other issue with the file, in which case, the file is retained until five years after the resolution of the legal proceeding or other issue.

[346] Further, Ms. Roy testified that once CBSA learns that a legal proceeding has started on a file, it retains all documents relating to the complainant in the file for five years after the legal proceeding has resolved. They would learn that a legal proceeding had been commenced by starting with Labour Relations for documents. Ms. Roy was aware of other cases where unsuccessful candidates had challenged their outcomes at the Tribunal.

[347] Mr. Itty's class A-236 graduated on February 5, 2009. Applying the Retention Periods in the First Records Disposition Authority, February 5, 2011 was the earliest disposal date

of the records of class A-236's successful candidates. The earliest disposal date of the records of class A-236's unsuccessful candidates was February 5, 2014. Ms. Roy testified that in 2013, CBSA's Vice-President, Human Resources, updated the First Records Disposition Authority; its title is "Multi-Institutional Disposal Authority" ("Updated Records Disposition Authority"). Ms. Roy was familiar with it and explained that it would have applied to the unsuccessful candidates in Mr. Itty's class and did not change the five-year Retention Period for their records.

[348] CBSA kept the paper files of POERT's successful candidates at Rigaud in storage boxes for a period to ensure the files were complete. When CBSA was satisfied that it had the complete files and sufficient Boxes, it shipped them to Archives Canada, which was responsible for the destruction of the files of successful candidates.

[349] Exhibit A5-18 is a CBSA chart which Ms. Roy identified as an "Evergreen Log" document, which CBSA could update as actions occurred on the files, up to and including file destruction. The Evergreen Log refers to the records of the successful candidates in the POERT classes which took place between September 15, 2008 and February 5, 2009, and which were all in Intake 68, including class A-236. It is an internal document, created by and for Administrative Support. Examining the log, Ms. Roy was able to determine that there were two Boxes for class A-236: 6823 and 6824.

[350] The Destruction Date noted for them is March 1, 2011, which Ms. Roy described as the suggested earliest destruction date, in accord with the First Records Disposition Authority. Under "Shipped to Archives or destruction date", Ms. Roy explained that the French "Envoye pour destruction March 31st, 2011" meant both Boxes for class A-236 were sent internally within Archives Canada for destruction on March 31, 2011. She testified this meant that Archives Canada would have asked CBSA if it could destroy the documents in those Boxes, and CBSA would have confirmed its consent. Archives Canada would later confirm the March 31, 2011 destruction, and CBSA would put that information into the Evergreen Log.

[351] CBSA attached an Accession Forecast Report (Accession Report) to the pallet of Boxes it shipped to Archives Canada, which contained a chart telling Archives Canada when it could destroy the files in the Box numbers named.

[352] Page 2 of the Accession Report stated that: (i) the Box numbers were from 6801 to 6828; (ii) their contents were "POERT graduate files of Intakes 67 and 68"; (ii) their Retention Periods; and (iv) their Disposition Date - the date Archives Canada could destroy the Boxes' contents. Ms. Roy testified that boxes 6801 to 6828 included Boxes 6823 and 6824 containing the records of Mr. Itty's successful classmates. The Disposition Date, "03 2011", meant Archives Canada could destroy the documents as of March, 2011, ensuring that destruction would be at least two years from the February 5, 2009 graduation date of class A-236.

[353] Ms. Roy testified that it was a matter of practise at CBSA that there was no consultation with Labour Relations about the destruction of the successful candidates' files.

[354] Ms. Mainville created Exhibit A5-19, another chart with the same headings as the Evergreen Log. I will call it the "Shipping Log". Ms. Mainville also attached it to the Box shipment. The Destruction Date here is July 1, 2011. Ms. Roy testified it was created on May 28, 2009, at the same time as the Accession Report, and was last modified June 29, 2009. It gave Archives Canada a detailed list of everything in the shipped Boxes. It has the Box numbers, Intakes, successful candidates in the Intakes, and was modified as actions occurred. Boxes 6823 and 6824 are in the Shipping Log. Ms. Roy asked Ms. Mainville why she changed its Destruction Date to July 1, 2011. Ms. Mainville told her it was "a moot point" – the Shipping Log was just to provide a list of the names of candidates whose files were in the boxes in case CBSA had to go back to Archives Canada if there was a reason to retrieve a file. July 1, 2009 was the date she actually shipped the boxes to Archives Canada, as shown, so Ms. Mainville put a Destruction Date which was two years after the shipping date: July 1, 2011.

[355] Based on her review, Ms. Roy found that close to the Disposition Date, former Archives Canada employee R. Sawyer would send a fax or email to CBSA, for CBSA to again sign-off that Archives Canada could destroy the records. Ms. Roy had asked Archives

Canada for Mr. Sawyer's emails or faxes – they had not located any when she testified. There were no faxes or emails of CBSA's responses to Sawyer in evidence.

[356] I have reviewed the Evergreen Log and carefully compared it to the Shipping Log. They both refer to the same box numbers, including Boxes part numbers, course and class numbers, class dates and include Intake 68.

[357] I note that the Evergreen Log states the files of Mr. Itty's successful classmates were destroyed on March 31, 2011.

[358] Ms. Roy was asked if she knew whether at any time before 2011, Rigaud was informed of the Complaint, Ms. Roy responded that "[W]e knew there were previous movements on the file, starting with a 2009 ATIP request", so Rigaud would have kept Mr. Itty's file for a longer period anyway. She testified that the Complaint would have come down the "pipeline" to Rigaud, which would have had the Commission's March 24, 2010 letter to CBSA, but did not testify about when Rigaud received it.

[359] Regarding the Commission's advice in its letter that the parties were "required to preserve any material related to the allegations in the complaint, including information in electronic formats, until the final disposition of the matter", Ms. Roy testified that Administrative Support would have kept any information pertaining to Mr. Itty for a longer time until the litigation was resolved. But Administrative Support would not have reviewed the Complaint's allegations or determined which documents needed to be preserved because that was not their mandate. That determination needed to come from Labour Relations or the people dealing with the litigation.

The Commission Investigator's May 2011 Letter and CBSA's response

[360] It is not the Tribunal's usual procedure at a hearing to admit much, if any evidence about a complaint's process while at the Canadian Human Rights Commission (the Commission). One of the reasons for this is because a Tribunal hearing of a complaint is treated as a trial de novo – a fresh start, without taking into account Commission's reports or other Commission evidence. As well, that evidence is not given under oath. However, the Complainant has raised the evidentiary issue of spoliation, so it is necessary that the

Tribunal assess evidence about some of the Commission's and CBSA's interaction on documents.

[361] On May 19, 2011, the Commission Investigator wrote to CBSA's Labour Relations' Rachel Stanford requesting information and documents about the Complaint. Most notable are the following two requests:

> "[T]he competition file, concerning all of the applicants who participated in the DP II process"; and
> "…all notes pertaining to the complainant as well as the other applicants, identifying those who passed this level…"

[364] On May 24, 2011, Ms. Stanford emailed Helene Helde, Acting National Training Administrator at Rigaud, requesting her assistance in answering the Commission Investigator's letter. On May 25, 2011, Ms. Helde wrote questions and some answers in red directly onto the Commission Investigator's Letter and Ms. Stanford responded in black to the questions she could answer (Marked-up Commission Investigator's Letter).

[365] Ms. Helde's questions included querying the scope of the Commission's request, such as whether it wanted "all feedback sheets from practice, all exams and all simulation testing?", to which Ms. Stanford responded "Yes but only from his group." Ms. Helde asked whether the Commission wanted the same documents or just the result reports for the "other applicants", and Ms. Stanton responded "All the same". Ms. Helde's May 24, 2011 cover email also stated that she asked her questions "to be able to answer correctly to the request" and because "[E]specially in regards to the files, this means much work and paper".

[366] In a letter Ruling dated February 11, 2020, I admitted the Marked-up Commission Investigator's Letter into evidence. Notwithstanding that it was originally a Commission letter, the Tribunal took into account that spoliation was an issue and the investigator's letter was relevant to that issue: it included a request for the Complainant's classmates Assessment Results. Those documents were relevant to the claim of spoliation. Further, I found that once Ms. Helde and Ms. Stanford made written comments on the Commission investigator's letter, it became more than a Commission document: it was a Respondent's document as well.

[367] Ms. Roy testified on November 25, 2019 that she had seen it, but did not have it with her and had not spoken to Ms. Helde about it. The ruling permitted the Respondent to recall Ms. Roy or another witness to speak to the marked-up Commission investigator's letter, thereby curing any potential prejudice which may have enured to the Respondent because Ms. Roy had not had an opportunity to testify about the letter.

[368] On June 13, 2011, Guy Cormier, then Manager of the Rigaud Testing Unit, sent two memorandums to Rachel Stanford. I refer to Exhibit A5-23 as the "First June 2011 Cormier Memo" and to Exhibit A5-24 as the "Second June 2011 Cormier Memo", for ease of reference - their order is not relevant.

[369] The "Subject" in the First June 2011 Cormier Memo was "ITTY, Johnson". The enclosures were: "POERT Handbook; POERT Test Objective; D2 Feedback Sheet; D2 written and simulation Assessment Report"; brief outline pre-POERT; Testing process; 2 years time restriction; and POERT overview".

[370] During her search in the summer of 2019, Ms. Roy found the Second June 2011 Cormier Memo in Mr. Itty's file. It came from the Testing Unit which keeps track of any movement on the file. This memo, without enclosures, is still on Mr. Itty's file.

[371] The Second June 2011 Cormier Memo lists its enclosures as "Assessment Records for written & simulation of classroom's recruits…". When asked if that would indicate the Assessment Forms for each candidate still existed in June, 2011, Ms. Roy responded that the "Assessment Records" Mr. Cormier referred to were the electronic versions CBSA still has, and not the original Observation notes. Ms. Roy had not spoken to Mr. Cormier about this, but she knew what the reference to "Assessment Records" was because she had received the versions with the names blacked-out from the CBSA's lawyers, who had received them from Labour Relations. Ms. Roy cross-referenced the name-redacted versions attached to the Second June 2011 Cormier Memo with the un-redacted electronic versions for the remaining candidates in Mr. Itty's class and realized those attached to the Memo were the same, except for the names being redacted.

[372] The Rigaud file contained only the Second June 2011 Cormier Memo, not the enclosures.

[373] Ms. Roy identified what each enclosure in the Second June 2011 Cormier Memo was. Relevant to the destruction of the Assessment Forms, which Mr. Cormier described as "Assessment Records for written & simulation of classroom's recruits (Please black-out names to allow release of info)", Ms. Roy testified that these were the unredacted electronic versions of the typed D-II Recruit Simulations Assessment Reports of the Complainant's classmates. She also testified that the Second June 2011 Cormier Memo was given to the lawyers in 2012, with the unredacted electronic typed D-II Simulations Assessment Reports; she didn't know the specific date the lawyers received it.

[374] Ms. Roy's understanding of what was enclosed with the Second June 2011 Cormier Memo was based partly on the documents the lawyers gave her, and also on her August, 2019 discussion with Nathalie Lavoie. Ms. Roy had asked Ms. Lavoie to go through the items with her, although Ms. Roy herself understood the nomenclature or "appellation" of the documents.

[375] Ms. Lavoie also explained to Ms. Roy CBSA's policy on responding to a request for documents, including Privacy Act requests: if the subject name was, for example, "Johnson Itty", CBSA provided all documents pertaining to Johnson Itty; if the request did not specifically name an additional individual, CBSA only provided documents for the named individual – here, Mr. Itty.

[376] Ms. Roy testified that Mr. Cormier asked Ms. Stanton to black-out the names in the last enclosures in the Second June 2011 Cormier Memo because those names were personal information of other candidates in a selection process and did not pertain to Mr. Itty.

[377] In Exhibit R1-4, there are two groups of attached enclosures, but the recruits' names are redacted: the first group are "Determination Point II Written Knowledge Test Results of Mr. Itty's 15 classmates, including the Test Results of two candidates who failed the tests; the second group are the typed D-II Recruit Simulation Assessment Reports for Mr. Itty's 15 classmates, all of whom passed the D-II Behavioural Simulations.

[378] I therefore find that Ms. Roy's testimony on what Mr. Cormier meant by "Assessment Records for written & simulation of classroom's recruits" in the Second June 2011 Cormier Memo was correct. Further, I find that Mr. Cormier's request to black-out the names

established that the D-II Recruit Simulation Assessment Reports he attached were the unredacted electronic versions.

[379] There was no dispute that the documents attached to the Second June 2011 Cormier Memo existed in June, 2011.

[380] The evidence established that CBSA directed Archives Canada to destroy the D-II Assessment Forms for Simulations 2, 3 and 4 of the successful candidates in the Complainant's class A-236 on March 31, 2011.

[381] On April 24, 2012, the Commission referred the Complaint to the Tribunal. The Complainant filed his Statement of Particulars (SOP) on January 31, 2013. On May 17, 2013, the Respondent made a motion for a confidentiality order on certain documents, which resulted in the First Confidentiality Order (Itty v. Canada Border Services Agency, 2013 CHRT 34 (CanLII).

[382] On June 13, 2013, C. McLaughlin of Labour Relations emailed Ms. Roy asking her to distribute to appropriate people Mr. Itty's representative's latest request for documents. Ms. McLaughlin's email said that CBSA had already told the representative it had destroyed Mr. Itty's "integration records" in 2011 "…pursuant to government policy".

[383] Her email also said she had one of the June 2011 Cormier Memos in her file. Ms. Roy testified that Ms. McLaughlin's email lists all the documents which were attached to the Cormier Memo. Ms. McLaughlin's description of the enclosure list in the Cormier Memo she had and Ms. Roy's testimony together establish that Ms. McLaughlin was referring to the Second June 2011 Cormier Memo. "It would appear that it was not destroyed in March, 2011 we received full copies… etc. and they were redacted here – asking for full copies". Ms. McLaughlin wrote that "…we have to provide them as part of disclosure. We have to be absolutely sure they do not exist."

[384] In response to Ms. McLaughlin's email, then Testing Unit Administrator Pascale Trachy emailed Ms. McLaughlin on June 2013, stating: "I can indeed confirm, etc. Assessors' personal notes have been destroyed. Intake 68 was destroyed March 31, 2011, however all files pertaining to unsuccessful recruits have yet to be destroyed". Ms. Roy

testified that Ms. Trachy would have obtained that information from Administrative Support, who would have referred to the Evergreen Log.

[385] In the same email, Ms. Trachy also answered Mr. Itty's representative's request for information about another recruit who failed POERT. She advised that this recruit had been in Intake 69, failed his D-II Simulations on March 31, 2009, and that the files for successful recruits from Intake 69 were destroyed on July 5, 2011, but the files of the unsuccessful recruits remained.

[386] I find that this documentary evidence supports Ms. Roy's testimony and together they establish, on the balance of probabilities, that the destruction date of the files of Mr. Itty's successful classmates was March 31, 2011, almost two months prior to the CBSA receiving the Commission request for the files of all recruits, not just Mr. Itty.

[387] The Parties cite a June 1, 2011 email from Nathalie Lavoie to Ms. Stanford. It says "…I must inform you that after verification, all of the files for that Intake were destroyed in March of 2011. When recruits are successful, the files are kept for 2 years and then destroyed by National Archives." The Respondent says this e-mail shows that Ms. Lavoie mistakenly assumed that the Commission's request was only for the records of the successful candidates in the Complainant's class, even though the unsuccessful candidates' records were still available at that time. The Respondent calls it an "honest mistake" that rippled forward - when the request was made to Labour Relations in February of 2014 about destroying the records of unsuccessful candidates, the Respondent argues, Labour Relations said they could be destroyed, being under the mistaken assumption that all relevant documents had already been produced.

[388] I find that this was another reflection of the failure to grasp the nuance of Mr. Itty's Complaint. His original 2010 Complaint included language like "subjected to a much higher standard when compared with" the other recruits. I think it is reasonable to assume that someone somewhere should have understood at that time that all the other records would be relevant. I can nevertheless understand why it happened. They were focussed on who had passed POERT as a whole, not who had failed POERT but still passed the Simulations. I accept that the above was an honest, unfortunate mistake.

[389] The fact that when Mr. Itty made his 2009 *Privacy Act* request for documents, CBSA kept Mr. Itty's entire file, including the Assessors' D-II Assessment Forms, and continued to do so, but kept none of the paper files of his successful classmates, is consistent with what Ms. Roy testified Ms. Lavoie told her: CBSA kept only the file of persons specifically named in any request for documents for longer than the Retention Periods in the Records Disposition Authority and Updated Records Disposition Authority.

[390] On July 4, 2011, Patti Bordeleau, then Director General of CBSA's Labour Relations and Compensation Directorate, provided CBSA's response to the Commission Investigator's Letter. Regarding the documents requested, Ms. Bordeleau wrote she was informed that National Archives had destroyed "all the files pertaining to this staffing process as files are only kept for 2 years." She enclosed "final reports…by the assessors for all other applicants who passed this level…" plus the Assessors' written notes on Mr. Itty. Given the previous evidence, it is reasonable to find that the "final reports" Ms. Bordeleau referred to were the typed-up D-II Recruit Simulation Assessment Reports for the Complainant's classmates.

[391] In her 2019 search, Ms. Roy tried to locate the "black books" in which Ms. Helde would have usually made the notes which the Assessors testified she took when they called her into Mr. Itty's D-II Integration Meeting. But Ms. Helde was on leave, could not be contacted and POERT did not locate the "black books".

[392] On February 28, 2012, CBSA's Marc Thibodeau, then Director General of the Labour Relations and Compensation Directorate, wrote a letter to the Commission's Manager of Investigations in response to the Manager's February 22, 2012 letter, which sought CBSA's response to submissions the Complainant had made to the Commission. The Thibodeau Letter stated that the destroyed documents "…dealt only with the initial staffing process. All other documents dealing with the Port of Entry Recruit Training Program (POERT) were provided to the investigator. These documents included assessments and notes from the three assessors, pertaining to all recruits in the complainants [sic] group" (Emphasis added).

[393] No one testified about either of the two Director Generals' letters, notwithstanding that the Tribunal granted the Respondent the opportunity to call a witness to do so.

[394] The February 2012 Thibodeau Letter contradicts not only the 2011 Bordeleau Letter, it also contradicts Ms. Roy's testimony and the documentary evidence on the CBSA's destruction of the records of Mr. Itty's successful and unsuccessful classmates. I have accepted the evidence on the Retention Periods in the First Records Disposition Authority; the documentary evidence about the March 31, 2011 destruction of the records of Mr. Itty's successful classmates, and Ms. Roy's testimony and the documentary evidence about the CBSA's June 2014 destruction of the files of Mr. Itty's unsuccessful classmates. I conclude that the Thibodeau Letter is incorrect on these points and I give it no weight.

[395] Do these two seemingly contradictory letters from the Directors General demonstrate the intent to affect the outcome of the Complaint? Although on their face, they demonstrate a lack of knowledge or understanding of certain aspects of the Retention Period for the files of failed POERT candidates, they, together with the rest of the evidence, fail to establish, on the balance of probabilities, the intent of CBSA personnel to affect the outcome of the Complaint.

[396] I think the Two Letters and other communications such as Ms. Trachy's 2013 email to Ms. McLaughlin also demonstrate on their face that names CBSA assigned to these documents were too similar to each other, and therefore confusing, and lent themselves to careless and inadvertently incorrect use. For example, "Assessment Record" to Manager Cormier meant a particular set of documents, as described above; "Assessment Forms" in this Complaint is the title the CBSA gave to the eight-page booklet containing the Assessors' real-time hand-written Assessment Forms which included their Observations, Marking Sheets, and the recruit's End of Simulation answers. "D-II Recruit Simulation Exercise Assessment Report" means the D-II type-written summary Report the Assessors based on their Assessment Forms.

[397] The Respondent says it only caused the paper files of the Complainant's classmates to be destroyed, including the D-II Assessment Forms of the Complainant's classmates who passed and who failed POERT pursuant to the First and Updated Records Disposition Authorities which govern CBSA and without any intent to affect the outcome of the Complaint.

[398] I find that Administrator Helde's May 25, 2011 questions and comments in the Marked-up Commission Investigator's letter also demonstrated the desire to narrow the number of documents CBSA needed to provide to the Commission by asking Ms. Stanford to request specifics about which recruits' files were wanted, because there was "much work and paper" involved. Ms. Helde also felt she needed the specifics "…to be able to answer correctly to the request." I conclude that she wanted to lessen the work, but also wanted to "answer correctly to the request".

[399] I conclude that none of Ms. Helde's questions in her May 25, 2011 email, or those she wrote on the Commission Investigator's Letter, or Ms. Lavoie's 2019 explanation to Ms. Roy indicate an intention to affect the outcome of the Complaint.

[400] Further, even though in the Complaint, Mr. Itty named three classmates as examples of CBSA assessing him at a higher standard, CBSA seems to have failed to grasp that the D-II Assessment Forms for Mr. Itty's classmates could be relevant to this allegation.

[401] The Respondent did not dispute that it intentionally destroyed the paper files of all the Complainant's classmates, including their three Assessors' hand-written D-II Assessment Forms. That intent is not enough to establish spoliation (McDougall, supra, at para 18). The intent required to constitute spoliation is that the destroyer of the evidence intends to affect the contemplated or ongoing litigation (ibid).

[402] Even if, as the Complainant submits, the Respondent's officials were "grossly incompetent" (I make no finding on this) in how they dealt with the records of the Complainant's classmates, incompetence, like negligence, does not rise to the necessary level of intent, as set out in McDougall, ibid. There is no evidence to support the Complainant's suggestion that anyone at CBSA thought it would be advantageous to destroy the paper files under the cover of "routine" destruction.

[403] The fact that CBSA waited the prescribed two years to March 1, 2011 to direct Archives Canada to destroy the files of the successful candidates in class A-236 is another factor I take into account in finding that CBSA simply destroyed those files in accordance with the First Records Disposition Authority. This wait is markedly different than Forsey v. Burin Peninsula Marine Service Centre, 2014 FC 974, where the defendant destroyed the

relevant evidence within 48 hours of the accident, so that the plaintiff's marine surveyor, who the defendant knew was going to inspect the accident site, would not be able to examine it.

[404] I also take into account that the Evergreen Log states on its last page that at the same time CBSA shipped the files of the successful candidates in class A-236 to Archives Canada, it also shipped the files of the successful candidates in classes A-255 and A-260, who took the POERT course at the same time as class A-236, from November 24, 2008 to February 5, 2009. This further supports that CBSA's intent was not to specifically destroy the files of class A-236's successful candidates to affect the litigation of the Complaint – rather, it supports that CBSA's intention was to follow the two-year Retention period for successful candidates in the First Records Disposition Authority.

[405] The files of the unsuccessful candidates in the Complainant's class

[406] Ms. Roy testified that from February 2009 to February 2014, CBSA stored the unsuccessful candidates' files where they could be accessed, because the likelihood of movement on their files was higher than on the successful candidates' files. "Movement" means, for example, appeals, Privacy Act and ATIP requests, or a complaint to the Public Service Commission, in which cases, CBSA retained the file in accordance with the First and Updated Records Disposition Authorities.

[407] Ms. Roy testified on the undated chart prepared by and for Administrative Support, titled "Echecs & departs volontaires des sessions 64 a 79" (Echecs & Departs Log). To familiarize herself with it, Ms. Roy spoke to Ms. Lavoie. CBSA started this log when the POERT program began, to follow all candidates who failed or left the program for other reasons. It has the Complainant's name, and the names of three other candidates in class A-236 who failed. "File storage area" states in French "destroyed 2014 03 01". Ms. Roy explained this meant that on March 1, 2014, CBSA began taking the files from storage to prepare them for destruction. For another failed candidate in A-236, Ms. Roy verified with Labour Relations that the "2013-11-14" Destruction Date was an error.

[408] Ms. Roy explained that before unsuccessful candidates' files were destroyed, Rigaud would send an email to Labour Relations requesting confirmation that the file could be destroyed. It did so in January 2014, and, on February 1, 2014, received Labour Relations'

answer, which was to proceed with the destruction. This was the same destruction date as the other unsuccessful candidates in class A-236, except there is no destruction date for Mr. Itty's file due to his Privacy Act request for information and the Complaint; the note "2017 11 21" on Mr. Itty's file was the forecasted or suggested destruction date, but CBSA has not destroyed his file.

[409] On February 11, 2014, after checking with the Regions to see if they needed the files, Stephanie Pieri, then CBSA's Acting Manager of Labour Relations, emailed Hugo Martel, an Administrative Support clerk, to proceed with the destruction of the unsuccessful candidates' files. From the timeline and the invoice and email from CBSA's procurement department, I conclude that they were destroyed in June, 2014.

[410] Ms. Roy testified that CBSA contracted with a private company (Shred-It) to destroy the files of the unsuccessful candidates in Mr. Itty's class. On September 4, 2019, the procurement office emailed a CBSA "call-up" document, akin to an invoice, to Ms. Longpre. The call-up document set out that Shred-It came to Rigaud to destroy documents on June 9, 2014, as shown in the French section under "description". Ms. Roy testified that based on the timeline and the procurement office's email stating that no documents were shredded in 2015, the documents destroyed on June 9, 2014 were the documents of Mr. Itty's unsuccessful classmates.

[411] I find that the combined evidence that June 9, 2014 was more than five years after the February 5, 2009 graduation date of Mr. Itty's class A-236; that the call-up document set out that Shred-It destroyed documents on June 9, 2014, and Ms. Roy's testimony established that CBSA directed Shred-It to destroy the records of the unsuccessful candidates in class A-236 on June 9, 2014 and that Shred-It did so.

[412] The evidence established that CBSA had two forms of POERT records: paper and electronic. The combined evidence of Ms. Roy's testimony and the 2011 emails between Labour Relations' Ms. Stanford and Administrator Helde established that there were only paper versions of the Assessors' D-I and D-II Assessment Forms. The same evidence plus the testimony of Mr. Gadoury, Mr. Itty's D-II Assessors, and Ms. Suprenant established that the lead Assessor typed the summary D-II Recruit Simulation Assessment Reports into a

computer, and each recruit received a copy of their own D-II Recruit Simulation Assessment Report during their own Final Feedback.

[413] CBSA retained the electronic versions of the D-II Recruit Simulation Assessment Reports, and therefore could produce copies of them for all of Mr. Itty's classmates. Ms. Roy testified that CBSA had provided all the electronic documents it could find for the candidates in Mr. Itty's class.

[414] I conclude that the destruction of the files of the unsuccessful candidates in Mr. Itty's class on June 9, 2014 was done pursuant to and with the intention of complying with the Updated Records Disposal Authority.

c) Was litigation contemplated or ongoing at the time the evidence was destroyed?

[415] On March 24, 2010, the Commission notified the Respondent of Mr. Itty's Complaint, enclosing a copy. I have concluded that CBSA directed Archives Canada's March 31, 2011 destruction of the files of Mr. Itty's successful classmates, which files included their D-II Simulation Assessment Forms. The Complaint was at that time in the Commission's process. Therefore, litigation was contemplated on March 31, 2011. The Complaint has been at the Tribunal since April 24, 2012 with its litigation ongoing. I have also concluded that in June, 2014, CBSA directed the destruction of the files of Mr. Itty's classmates who failed, which files also included their D-II Simulation Assessment Forms.

[416] Therefore, the evidence established that litigation was contemplated and ongoing when CBSA destroyed the files of the Complainant's classmates.

d) Is it reasonable to infer that the evidence was destroyed to affect the outcome of the litigation?

[417] For the reasons in subparagraph b) above, I conclude that the evidence failed to establish that it is reasonable to infer that the CBSA destroyed the documents with the intention to affect the outcome of the Complaint. Rather, it destroyed them in accordance with the Records Disposition Authority and the Updated Records Disposition Authority.

Applying the criteria in McDougall, supra, I therefore conclude that the evidence failed to establish on the balance of probabilities that the CBSA's destruction of the files of the Complainant's classmates, including their Assessors' hand-written D-II Assessment Forms, constituted spoliation.

[418] The evidence presented does not meet the pre-conditions for the doctrine of spoliation to apply. Mr. Itty may not therefore benefit from a presumption that the destroyed documents would have been unfavourable to CBSA.

[419] Although there was testimony that the CBSA had already taken steps to remedy these record retention and disposition gaps, the Agency really needs to take a more holistic and contextual approach to document retention. The left hand of Labour Relations ought to know what the right hand of Administration is doing, and there ought to be much more communication and education about which documents are arguably relevant in a human rights complaint.

[420] Finally, in his final written submissions, the Complainant asked for an opportunity to make submissions on a remedy relating to the destruction of the Assessment Forms (regardless of whether I found spoliation to have occurred), arguing that the destruction was so reckless as to qualify as abuse of process, and that pursuant to the Tribunal's inherent jurisdiction to control its own process, these abuses ought to be remedied.

[421] In *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (*representing the Minister of Indigenous and Northern Affairs Canada*), 2019 CHRT 1 (CanLII), the Tribunal wrote:

> Pursuant to subsection 48.9(1) of the CHRA, proceedings before the Tribunal are to be conducted as expeditiously as possible. If a party abuses the Tribunal's process and inhibits the Tribunal from fulfilling its mandate under subsection 48.9(1) of the CHRA, then the Tribunal may take action to protect its process from abuse.

[422] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), the Supreme Court of Canada considered abuse of process, stating:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process

> should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux-Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive. (Emphasis added.)

[423] Relying on the evidence reviewed under the test for spoliation, I do not find that the Respondent's conduct surrounding the destruction of the documents in question meets the test for abuse of process: it was at worst a sloppy and unthinking error but certainly not one that rises to the "extremely rare" type of conduct contemplated by the Supreme Court.

X. ORDER

[424] The Complaint is not substantiated and therefore the Tribunal dismisses it.

Signed by

Olga Luftig
Tribunal Member

Toronto, Ontario
March 31, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1817/4712

Style of Cause: Geevarughese Johnson Itty v. Canada Border Services Agency

Decision of the Tribunal Dated: March 31, 2023

Hearing Dates: August 14-18, 2017;
August 21 and 22, 2017;
November 18 and 19, 2019;
November 25 to 27, 2019;
March 9 and 10, 2020;
March 12, 2020.

Written Final Arguments Submitted on: March 26, 2021

Appearances:

For Geevarughese Johnson Itty:

On hearing dates in the period August 14, 2017 to August 21, 2017
Public Service Alliance of Canada
Jean-Rodrigue Yoboua, Representation Officer

On the hearing date of August 22, 2017, Self-represented

On hearing dates in the period November 18, 2019 to March 12, 2020
Champ & Associates
Paul Champ and Bijon Roy

David Aaron and Alexandra Pullano, for the Respondent