CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

PUBLIC SERVICE ALLIANCE OF CANADA

AND CATHY MURPHY

Complainants

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADA REVENUE AGENCY

Respondent

DECISION

MEMBER: Athanasios D. Hadjis

20010 CHRT 9
2010/04/23

[1] The complainant Cathy Murphy was a federal public servant from 1981 to 1994. The other complainant, the Public Service Alliance of Canada (PSAC), was her union. In 2000, Ms. Murphy, along with many other federal public servants who were employed in predominantly female occupational groups, received payments from the Treasury Board of Canada in settlement of two wage discrimination complaints that the PSAC had filed pursuant to s. 11 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*).

[2] The payments (commonly referred to as pay equity payments) included retroactive compensation regarding the employees' wages from 1985 onwards. These lump-sum payments were deemed for income tax purposes to be employment income in the year 2000 even though they related to employment that had occurred years earlier. Ms. Murphy was taxed at a higher marginal rate in 2000 than in previous years, so she claims that she effectively received less money than she would have received had the payments actually been made in each of those years.

[3] The *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (*ITA*) contains a series of provisions offering some tax relief to individuals receiving lump sum payments relating to income earned in previous years. The Respondent, the Canada Revenue Agency (CRA), administers Canada's tax laws, including this relief mechanism. The Complainants allege that the manner in which the CRA has interpreted, applied, and administered this system has, in the "vast majority of cases", prevented recipients of retroactive income payments relating to pay equity, like Ms. Murphy, from benefitting from the tax relief.

[4] The Complainants contend that the CRA thereby breached s. 5 of the *CHRA* by discriminating against Ms. Murphy and the other pay equity recipients on the basis of sex, in the provision of services customarily available to the general public. The Complainants claim that the CRA also adversely differentiated on the basis of sex, in relation to Ms. Murphy and other pay equity recipients, in the course of employment, which would constitute a violation of s 7(*b*) of the *CHRA*. For the reasons given in the following decision, I find that the complaint has not been substantiated.

I. THE CRA'S ORGANIZATIONAL HISTORY

[5] The responsibility for the administration of Canada's tax system has changed over the years. The Department of National Revenue (Revenue Canada) was created in 1927 and was given the responsibility to administer Canada's laws regarding taxation as well as customs and excise.

[6] On November 1, 1999, the *Canada Customs and Revenue Agency Act*, S.C. 1999, c. 17, came into force (SI/99-111), transforming the department's status to that of an independent agency responsible for national revenue, called the Canada Customs and Revenue Agency (CCRA). In December 2005, the CCRA's name was changed to the Canada Revenue Agency and the newly-created Canada Border Services Agency assumed responsibility for Canada's customs operations. Throughout this decision, I will usually be referring to the Respondent as the CRA, even when discussing events arising prior to the more recent name change.

II. THE PAY EQUITY CASES

[7] During most of her career with the federal public service, Ms. Murphy was employed at Revenue Canada. She occupied positions that were principally classified in the CR (clerical and regulatory) occupational group. The PSAC was the union for the CR group of employees. In 1984 and 1990, the PSAC, acting on behalf of federal public service employees in six occupational groups, filed complaints under s. 11 of the *CHRA* against the Treasury Board of Canada (the Section 11 Complaints). The complaints alleged that the employees of these six occupational groups were predominantly female and that they earned lower wages than those earned by public servants employed in predominantly male occupational groups who performed work of equal value.

[8] The Canadian Human Rights Commission (Commission) referred the Section 11 Complaints to the Canadian Human Rights Tribunal (Tribunal) in October 1990 and hearings commenced one year later. By July 1998, the parties to the Section 11 Complaints were aware that the Tribunal was about to release its decision. PSAC members had begun expressing concerns to the union regarding the tax implications of the Tribunal's decision. One of these concerns was in relation to whether a lump-sum compensation payment would put recipients into a higher tax bracket in the year that it was paid. In anticipation of this possibility, representatives of the PSAC, including PSAC Classification and Equal Pay Officer Margaret Jaekl, met with Revenue Canada representatives to ask a number of questions, including what the tax treatment of pay equity adjustments would be.

[9] Revenue Canada advised the PSAC that under s. 5(1) of the *ITA*, any lump-sum wage payment must be fully included in the income for the year in which it is received. No legislation existed that would enable a retroactive employment income payment to be taxed for the years to which it relates or to be taxed at a special rate.

[10] On July 29, 1998, the Tribunal found the Section 11 Complaints to be substantiated and established a methodology for calculating the wage gap between the female and male dominated occupational groups that was the source of the discrimination (*Public Service Alliance of Canada v. Canada (Treasury Board)* (1998), 32 C.H.R.R. D/349). The Tribunal ordered the Treasury Board to make retroactive wage adjustment payments to the affected federal public service employees from 1985 to the date of the decision. The Tribunal also ordered the Treasury Board to pay simple interest calculated semi-annually at the Canada Savings Bond rate on the wage adjustments.

[11] The Attorney General of Canada filed an application for judicial review of the Tribunal Decision in the Federal Court, but the Court upheld the Tribunal's decision on October 19, 1999 (*Canada (Attorney General) v. Public Service Alliance of Canada* [2000] 1 F.C. 146 (T.D.)).

[12] Within a matter of days following the Court judgment, representatives of the PSAC and the Treasury Board Secretariat commenced talks in the hope of coming to an agreement on all outstanding issues, including the determination of the actual wage adjustment amounts. The Tribunal had not directly addressed this matter in its 1998 decision, having deferred it to a subsequent hearing phase known as Phase III. According to Ms. Jaekl, who sat in on most of these discussions, the Treasury Board Secretary attended the first day's meeting and "laid out [the Treasury Board]'s terms" of how the negotiations would operate. The PSAC representatives were told that if these terms were not agreed to, the Treasury Board would end talks and proceed with an appeal of the Federal Court decision. These terms included a requirement that any agreement would have to be reached by noon of the third day (a

Wednesday). In addition, the parties' lawyers were not to participate in the settlement discussions.

[13] Ms. Jaekl testified that although she was not present during every discussion between officials, to her knowledge, the PSAC did not raise "tax implications" during the meetings. She explained that the union was focussed on trying to reach an agreement on the implementation of the Tribunal's decision, which alone raised so many issues, that there was insufficient time to consider matters that did not comprise part of the decision.

[14] The negotiations were successful and a memorandum of agreement was drafted and signed on October 29, 1999. Article 13 of the document was entitled "Settlement" and stated that the parties "agree that the terms of this agreement settle all Phase II and Phase III issues relating to the complaints". As I explained earlier, Phase III relates to the determination of the wage adjustment.

[15] On November 16, 1999, counsel for the PSAC, the Commission and the Treasury Board presented the settlement agreement to the Tribunal. The Tribunal members asked questions and sought clarification of certain parts of the agreement, following which the Tribunal approved the agreement and issued a consent order (Consent Order).

[16] In 2000, those federal government departments responsible for the current and former public service employees subject to the Consent Order made the requisite adjustment and interest payments. Cheques were issued in three or four instalments between April and November 2000.

III. WHEN AND HOW WERE THE INCOME TAX PROVISIONS AT ISSUE IN THIS CASE ADOPTED?

[17] On February 16, 1999, the federal Minister of Finance announced that as part of the next federal budget, the *ITA* would be amended to introduce a new approach to computing tax on certain retroactive lump sum payments. This budgetary proposal was described in the Budget Plan, a document prepared by the Finance Department that the Minister tabled in Parliament. Under Canada's progressive income tax system, tax rates increase as taxable income increases. The Budget Plan observed that due to this progressivity, an individual's tax liability on retroactive lump-sum payments was usually higher than it would have been if payments had been made, and taxed, year by year as the income arose. This higher tax liability represented increased revenue for the government.

[18] As a means of ensuring that the government would not unduly benefit from the progressivity of the personal tax system, the budget proposed the implementation of the Qualifying Retroactive Lump-Sum Payment (QRLSP) mechanism. A qualifying retroactive lump-sum payment would be considered to be the principal (i.e., non-interest) portion of a payment received in a given year, but which related to a preceding year. The mechanism would only apply with respect to lump-sum payments of $3,000 or more, derived from a number of specified sources including income from employment or income received due to a termination of employment, received under the terms of a court judgment, arbitration award or in settlement of a lawsuit. The lump-sum payments received by Ms. Murphy pursuant to the settlement of the Section 11 Complaints and subsequent Consent Order related to her employment and exceeded $3,000. They were thus qualified, for the purposes of the QRLSP mechanism.

[19] Donald Wilson was a policy advisor with the Department of Finance during the period when the QRLSP measure was developed. He testified that the general principle set out in

s. 5(1) of the *ITA*, that income is taxable in the year in which it is received, had always been a source of concern for many taxpayers, particularly those who had "uneven" income streams, such as artists. These individuals were frequently petitioning for relief in their tax treatment.

[20] However, in the period leading up to the QRLSP measure's announcement in the budget, the Finance Department had been in receipt of numerous requests for relief from members of two specific employee groups. The first was comprised of 25,000 Ontario teachers who were receiving retirement benefits that should have been paid to them in prior years. The second group consisted of longshoremen based in Quebec who had been awarded retroactive salary payments by a court order. Mr. Wilson acknowledged that the Finance Department was also aware at the time that the pay equity settlement and that the lump sum payments pursuant thereto were "in the works". He emphasized, however, that the QRLSP was not "tailored" to benefit any particular group but was merely designed after having looked at the specifics of the different cases that had been brought to the department's attention.

IV. HOW WAS THE QRLSP MECHANISM TO FUNCTION?

[21] As proposed in the budget, the mechanism provided for a special "notional tax" calculation to be made by allocating the qualifying lump-sums retroactively to the years to which they relate and calculating the notional additional tax for those years. However, the notional tax was not just comprised of the tax that would have been payable in those years. It was also to include an interest amount to reflect the delay in payment of tax on the retroactive lump-sum payment. The Budget Plan had noted that governments incurred financing costs when they received tax revenues later than if the payment had been made earlier, when due.

[22] This interest component of the notional tax was to be calculated using the prescribed interest rates for tax refunds, i.e. the interest rate paid by the Minister when refunding tax to a taxpayer. Since October 1, 1989, the prescribed rate for refunds under the *ITA* has been calculated as the 90-day Treasury Bill rate plus two percent (*Income Tax Regulations*, C.R.C., c. 945, s. 4301). Since January 1, 1987, interest has been computed on a daily compounded basis (ss. 164 and 248(11) of the *ITA*).

[23] On September 10, 1999, the draft legislation amending the *ITA* that included the provisions relating to the QRLSP was tabled (Bill C-25). The provisions came into force on June 29, 2000 (ss. 110.2 and 120.31, the full texts of which I have attached to the present decision as Schedule 1). The provisions as enacted had no material differences from the proposals in the 1999 budget. The CRA had identified one obvious drafting error in how the calculation would be performed that was clearly inconsistent with the budget proposal. The CRA brought the error to the attention of the Finance Department, which in turn confirmed that the CRA's observation was correct. The CRA has consequently applied the provisions in the "corrected" fashion, although Parliament has yet to amend the provision to rectify the error.

[24] Ms. Jaekl testified that when the budget was first presented in Parliament in February 1999, she became aware of the proposed QRLSP mechanism, but did not learn about or inquire into any of its details. She knew from experience that merely because a proposal is announced in Parliament does not necessarily mean it will ultimately be passed into law. She understood, however, that if the mechanism was implemented, it had the potential to benefit pay equity recipients. She only acquired a more fulsome understanding of the QRLSP during a conference that she attended in Halifax on March 8, 2000, at which one of the speakers had provided a detailed explanation of how the mechanism would work. This

conference took place over four months after the PSAC and the Treasury Board had negotiated the settlement of the Section 11 Complaints.

[25] No evidence was adduced indicating that Ms. Murphy or any representative of the PSAC had contacted the CRA prior to signing the pay equity settlement to obtain details about the QRLSP mechanism nor that anyone had contacted the Finance Department or other government representatives to request or lobby for any change in regard to how the mechanism would function.

V. HOW HAS THE CRA ADMINISTERED THE QRLSP?

[26] Ever since the QRLSP provisions came into force, taxpayers who have been in receipt of qualifying lump-sums have been able to apply to the CRA to learn if they can benefit from this tax relief. Sheila Barnard is the manager of the legislation section in the Individual Returns and Payments Processing Directorate of the CRA, which is responsible for establishing the processes involved in assessing personal income tax. She pointed out that the QRLSP provision enabled taxpayers to allocate their qualifying lump sums as far back as 1978. The CRA recognized that few people keep their tax records for so many years and that the agency, on the other hand, possessed that data in its computer system.

[27] The CRA was therefore in a position to perform the QRLSP calculation for taxpayers and established a process to achieve that result. It developed a special form (T1198), which taxpayers could attach to their tax returns. The form has usually been completed by their employer. If the taxpayers file electronically, the T1198 figures are keyed in. The name of the lump-sum recipient appears on the T1198 form as well as the year in which the lump-sum was received. The amount is broken down between principal and interest. There are then a series of blank spaces identified by year from 1978 (the earliest year to which the QRLSP mechanism's relief extends) to the current taxation year. The amount of principal relating to each year is entered into the appropriate blank spaces. In the case of the federal public service pay equity payments, the employer issued a Form T1198 to all recipients.

[28] Ms. Barnard testified that upon receipt of an income tax return with a T1198 form or an equivalent electronically filed return, the CRA assessing system automatically performs both the regular tax calculation and the special QRLSP tax calculation, provided the portion of the principal relating to prior years is $3,000 or more.

[29] Ms. Barnard explained that the special QRLSP tax calculation is performed as follows:

1) The amount of the qualifying retroactive lump-sum payment is deducted in computing the taxable income in the year in which the lump-sum was received (the "Current Year").

2) Basic federal tax is computed on the reduced taxable income of the Current Year using the tax rates and non-refundable tax credits applicable in the Current Year.

3) A tax adjustment (which is an addition to the basic federal tax) is calculated as a total of:

a. All amounts each of which would be the increase to the basic federal tax for each preceding year, calculated as if the relevant portion of the lump-sum had been received in the year to which it relates, and

b. Interest computed on the increase to basic federal tax for each preceding year, using the prescribed refund rate, from May 1 of the year following the year to which the portion of the lump-sum relates to the end of the year preceding the year in which the lump-sum is received.

4) The tax adjustment is added to the basic federal tax on the reduced taxable income for the Current Year.

[30] Once the CRA has completed this calculation, it then compares the results of the regular tax calculation (i.e., taxing the lump-sum in full in the Current Year) with the special QRLSP calculation to determine the method that is most advantageous to the taxpayer. If the QRLSP tax calculation is more advantageous, the CRA uses it to assess the return for the Current Year. If the QRLSP is of no benefit, the CRA assesses the return using the regular tax calculation. The CRA then issues a Notice of Assessment or Reassessment with an explanation indicating whether the QRLSP tax calculation was beneficial, followed by a letter to the taxpayer explaining the calculation and comparison in detail.

[31] Simply put, the exercise consists of recalculating the Current Year's federal income tax without the lump-sum, and then adding to that tax the amount of federal income tax that would have been payable had the lump-sum amounts been paid in the years to which they related. If the lump-sum has placed the taxpayer into a higher tax bracket in the Current Year, then logically, assessing the taxpayer at the lower marginal tax rates that he or she was paying in prior years would result in a reduction of tax payable. However, there is one other factor to be taken into account - the interest that also forms part of the calculation. When the compounded interest is added, the likely effect is that any benefit from calculating the income tax payable on retroactive payments at the lower marginal rates is negated to varying extents by the compound interest that is included in the calculation. For this reason, retroactive payments extending back six years or more are not likely to benefit from the QRLSP mechanism.

VI. WHAT WAS THE EFFECT OF THE QRLSP CALCULATION ON MS. MURPHY'S TAX TREATMENT?

[32] After leaving the federal public service in 1994, Ms. Murphy became an employee of the PSAC. By the time she received her pay equity lump-sum payments in 2000, her employment income had increased significantly from the levels she had been earning as a public servant. She was now in a higher tax bracket. She received three cheques pursuant to the Consent Order, two representing the principal of the wage adjustment (a total of $16,282.26), and the other cheque representing the interest to which she was entitled in the amount of $9,266.03. When these sums were combined with her earned income in 2000, her total income came to $93,452.

[33] The CRA issued a 2000 Notice of Assessment to Ms. Murphy on April 18, 2001, advising her that she was eligible for the QRLSP tax calculation. On April 25, 2001, the CRA sent a letter explaining that the calculation did not benefit her. The regular tax calculation was more beneficial even though her marginal tax rate was now higher than when she worked for the public service. The table accompanying the letter, which explained the calculation, showed that when the pay equity lump-sums (wage adjustment and interest) were included in her taxable income for 2000, her basic federal tax was $15,433.23. The QRLSP calculation would have resulted in basic federal tax in the amount of $18,494.65.

[34] Thus, although Ms. Murphy's income was greater now and therefore subject to a higher marginal tax rate, she could not benefit from any tax relief under the QRLSP mechanism. She considered this unfair. Had she actually received the wage adjustments in the years to which

they related, she would have paid tax at a lower marginal rate. She was particularly upset that the QRLSP calculation incorporated an interest component that was set at the refund rate and that it was compounded, particularly since the Consent Order had only provided for the payment of simple interest. She perceived the situation as one where the CRA was assessing interest on arrears relating to income that she had never received.

[35] Ms. Murphy was not alone in her consternation. Numerous pay equity lump-sum payment recipients contacted the PSAC to complain about the QRLSP. On April 2, 2001, the PSAC issued a bulletin to its members indicating that it was considering launching a "challenge to this practice on human rights grounds". On June 21, 2001, the PSAC president wrote to the Minister of National Revenue regarding the issue, alleging that the "practice" was "discriminatory". On July 12, 2001, a senior representative from the Minister's department replied by letter, stating that these calculations are an integral part of the retroactive lump sum payment legislation as enacted by Parliament, and do not always result in reduced taxes for lump sum payment recipients. He indicated that the CRA had made every effort in 1999 and 2000 to ensure that recipients of pay equity payments were aware that the QRLSP calculation would not necessarily provide a beneficial result. CRA publications had noted that generally the further back the retroactive entitlement, the smaller the tax savings, if any. He also pointed out that components of the tax calculation for retroactive lump sum payments were a matter of tax policy that is the responsibility of the Finance Department. The CRA was merely responsible for administering the legislation.

[36] Ms. Murphy had been in contact with Ms. Jaekl and expressed a willingness to put forward her situation as a basis for a "test case". Consequently, on March 11, 2002, the PSAC and Ms. Murphy filed the present human rights complaint with the Commission. The complaint alleged that the CRA maintains the following discriminatory practice:

...charging compound interest at high rates on notional tax arrears which result from attributing income received due to the order of the Canadian Human Rights Tribunal dated November 16, 1999. This practice is discriminatory on the ground of sex (female) in that it prevents affected persons from receiving equal pay for work of equal value, as required by Section 11 of the *Canadian Human Rights Act*, by reducing the actual value of the payments ordered, contrary to sections 5 and 7(b) of the *Canadian Human Rights Act*. These practices have, therefore, had the effect of reducing the payments made pursuant to Section 11 of the *Act* to affected persons in a manner inconsistent with Section 11 of the *Act*.

[37] Despite the reference in the complaint to s. 11, the Complainants did not allege before the Tribunal that the CRA was in breach of that provision.

VII. ANALYSIS

[38] In the adjudication of human rights complaints, complainants must ordinarily first establish a *prima facie* case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")). A *prima facie* case, in this context, is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. If the complainant establishes a *prima facie* case of discrimination, then the onus shifts to the respondent to disprove the allegations or prove that there is a reasonable explanation justifying what may appear to be a discriminatory practice. If such an explanation is given, it then falls upon the complainant to demonstrate that the explanation is merely a pretext for the otherwise discriminatory behaviour.

[39] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the impugned decision or action (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.)).

A. Does the alleged discriminatory practice regarding the QRLSP mechanism arise from the "provision of services" within the meaning of s. 5?

[40] The Complainants and the Commission allege that the CRA has engaged in a discriminatory practice in the provision of services customarily available to the general public, pursuant to s. 5 of the *CHRA*, which provides as follows:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	**5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public : *a*) d'en priver un individu; *b*) de le défavoriser à l'occasion de leur fourniture.

[41] The Complainants did not advance any submissions or evidence to the effect that a service was "denied" to Ms. Murphy or the other recipients of pay equity payments. I conclude from this that the allegation of discrimination is grounded in s. 5(*b*) - adverse differentiation in relation to an individual in the provision of services customarily available to the general public.

[42] What is a "service customarily available to the general public", particularly with regard to activities of public bodies like the CRA? Are all practices of government officials in the performance of their statutory duties "services" within the meaning of s. 5, as the Tribunal had suggested in *Bailey v. Minister of National Revenue* (1980), 1 C.H.R.R. D/193, at D/214? The Federal Court of Appeal, in the case of *Canada (Attorney General) v. Watkin*, 2008 FCA 170, explicitly disavowed this opinion. The Court stated, at paras. 31-2, that all government actions in the performance of a statutory function do not constitute "services" merely because they are undertaken by the public service for the public good. Services, within the meaning of s. 5, contemplate "something of benefit being `held out' as services and `offered' to the public".

[43] The Complainants submit that the determination by the CRA of whether a particular taxpayer would benefit from the application of QRLSP provisions, especially when viewed in light of Parliament's aim of increasing fairness and reducing the tax burden of Canadians through the 1999 budget amendments, is intended to provide a benefit to the public. Accordingly, the Complainants submit that the CRA provided a service to pay equity recipients like Ms. Murphy.

[44] The Complainants claim that the CRA's dealings regarding the QRLSP provisions are "couched in terms of actions" for the benefit of taxpayers. The CRA developed software to make the calculations required by these provisions. The Complainants pointed out that in at least one of the documents instructing the software developers on how the QRLSP mechanism functions, taxpayers are referred to as "clients". The CRA ran tests to verify the accuracy of the software once it was developed. It trained staff who handled inquires from the public to advise taxpayers on how the QRLSP mechanism functions. The CRA has also issued information bulletins intended for the public, explaining the mechanism.

[45] Once the CRA receives the T1198 form from the taxpayer, its staff keys the data into its information system. The CRA identifies and screens out applicants who have not received lump-sum payments that are qualified for the tax relief (e.g., under $3,000). The CRA's information system performs the calculations provided in the legislation and produces the results that are then reflected in the tables and letters sent to the taxpayers, in which they are advised whether using the QRLSP mechanism is more beneficial to them than the ordinary tax treatment of their lump-sum payments.

[46] The Complainants submit the above sorts of actions on the part of the CRA come within the meaning of "services customarily available to the public" articulated in s. 5. They point out that although *Watkin* disavowed the opinion expressed in *Bailey* suggesting that all government activity is a service, the Federal Court of Appeal did not disavow the specific finding in *Bailey* that the discretion exercised by the Minister of Revenue in disallowing several tax deductions constitutes a service.

[47] Moreover, the Complainants directed me to another passage in *Watkin*, at para. 28, in which the Court provided some examples of government actions that could constitute a service for the purposes of s. 5:

Public authorities can and do engage in the provision of services in fulfilling their statutory functions. For example, the Canada Revenue Agency provides a service when it issues advance income tax rulings; Environment Canada provides a service when it publicizes weather and road conditions; Health Canada provides a service when it encourages Canadians to take an active role in their health by increasing their level of physical activity and eating well; Immigration Canada provides a service when it advises immigrants about how to become a Canadian resident. That said, not all government actions are services. Before relief can be provided for discrimination in the provision of "services", the particular actions complained of must be shown to be "services" [...].

(*emphasis added*)

[48] Not surprisingly, the Complainants see no real distinction between advance income tax rulings and QRLSP assessments. In either case, a taxpayer requests a calculation from the CRA. Ms. Barnard testified that advance income tax rulings are provided to taxpayers for a fee, to assist them in deciding whether to undertake a particular course of action in light of the tax consequences that will ensue. An information circular published by the CRA states

that advance income tax rulings are provided as an "administrative service" but there is no legal requirement to issue them. However, the CRA argued that, in contrast, the assessment of taxes actually owing by taxpayers under the *ITA* is not an optional prospective tool; rather it is the ultimate application of the *ITA* in furtherance of tax collection. The CRA submits that there is therefore a distinction to be drawn between the QRLSP calculation provided by the CRA and advance income tax rulings.

[49] The Commission for its part concurs that the assessment of income tax is a service. The Commission noted that a taxpayer has a duty to comply with the *ITA* and pay any taxes he or she may owe. The benefit that the CRA provides to taxpayers like Ms. Murphy in making the QRLSP calculation and providing the results to her is that she is thereby enabled to fulfill her obligations pursuant to the *ITA* and pay the appropriate amount of federal income tax. Assisting taxpayers to fulfill their duties to pay taxes is the service being provided and made available to the public by the CRA.

[50] In my view, however, whether or not the calculation pursuant to the QRLSP provisions or even assessment of income tax constitutes a service is immaterial to the real question with respect to s. 5. Even if these activities do constitute a service, they are not what is at issue in this case. Rather, it is the terms of the *ITA* and its regulations that are at issue.

[51] In this sense, the circumstances of the present case are not unlike those in *Forward v. Citizenship and Immigration Canada*, 2008 CHRT 5. The complainants in that case were two brothers who are American. Their mother is a Canadian citizen and they had sought to obtain Canadian citizenship through their mother's citizenship. Their application was denied by Citizenship and Immigration Canada because at the time of their birth, neither of their parents held Canadian citizenship. They did not qualify for citizenship under the parental lineage provisions of the *Citizenship Act*, R.S.C, 1985, c. C-29.

[52] The complainants in *Forward* alleged that the rejection of their citizenship applications amounted to adverse differentiation in the provision of services customarily available to the general public (s. 5(*b*)). They argued that was at issue was not citizenship *per se* but rather the right of someone claiming citizenship to have his or her application reviewed and administered in a non-discriminatory manner. The reviewing of applications for citizenship was accordingly a service.

[53] The Tribunal, at paras. 37-8, rejected this characterization, noting that the evidence and argument in the case was not directed at the conduct of ministerial officials, the exercise of discretion, or at the implementation of departmental policies and practices. The sole source of the alleged discrimination was the legislative language of the *Citizenship Act*. The Tribunal pointed out that in reviewing the application for citizenship, the officials did nothing more than apply categorical statutory criteria to undisputed facts. Any issue taken with the application review process was really an issue taken with the *Citizenship Act*.

[54] In my opinion, these findings are equally applicable to the present case. Even if the tasks undertaken by the CRA in processing QRLSP claims constitute a service, they are not the basis for the adverse differentiation alleged in the complaint. The source of the alleged discriminatory practice is found solely within the legislative language of ss. 110.2 and 120.31 of the *ITA*. None of the evidence before me establishes that the alleged discrimination arises from the conduct of CRA officials or the discretionary implementation of policies or practices by the CRA. The CRA applies the formula as set out in the *ITA* using each applicant taxpayer's tax data. Presumably, taxpayers armed with their own prior tax data could perform the mathematical exercise for themselves, without the CRA's involvement.

[55] There is no evidence suggesting that the CRA did not perform Ms. Murphy's QRLSP calculation in accordance with s. 110.2 and 120.31 of the *ITA*. Since the CRA already possesses taxpayers' prior tax filing information as well as the technological resources to efficiently perform the QRLSP calculation, it has undertaken this task. It could perhaps be argued that the CRA does exercise some discretion in the screening process of the QRLSP provision by determining if a particular lump-sum is qualified under the provision. That is not at issue in the present case, however. The CRA had accepted that Ms. Murphy's and the other recipients' lump-sum payments were qualified provided, of course, that the sums exceeded $3,000.

[56] The Complainants suggested that the CRA could have, in its discretion, waived the interest portion of the QRLSP calculation. According to the QRLSP provisions of the *ITA*, however, the interest portion is deemed to be tax. Ms. Barnard testified that under the applicable fairness provisions, the CRA can only waive interest, not tax (s. 220(3.1) of the *ITA*). It was not open to the CRA to exercise any discretion in this regard.

[57] In sum, the source of the alleged discriminatory practice is not, in whole or in part, the CRA's activities, be they a service customarily available to the public or not, but rather exclusively the tax legislation itself. In *Wignall v. Canada (Department of National Revenue (Taxation)*, 2003 FC 1280, at para. 30, the Federal Court noted that the conduct of Revenue Canada cannot be held to be discriminatory under the *CHRA* when what is really being impugned is a provision of the *ITA*.

[58] Accordingly, where the alleged discrimination, as in the present case, arises solely from the legislative language of the *ITA* and not the activities of the CRA, it is not as a result of the provision of services by the CRA, within the meaning of s. 5 of the *CHRA*. Consequently, a *prima facie* case pursuant to that section cannot be substantiated.

[59] If I am wrong, however, and the alleged discriminatory practice does constitute a service within the meaning of s. 5, I still find that the Complainants have not established a case of adverse differentiation on a prohibited ground in the provision of that service, for the reasons that I provide later in this decision.

B. Can the CRA's administration of the QRLSP mechanism be considered to have been made "in the course of employment" within the meaning of s. 7(*b*)?

[60] Section 7(*b*) of the *CHRA* provides that it is a discriminatory practice to directly or indirectly differentiate adversely in relation to an employee, in the course of employment:

7. It is a discriminatory practice, directly or indirectly, (...) (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	**7.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : (...) *b*) de le défavoriser en cours d'emploi.

[61] The Complainants contend that in its application of the QRLSP provisions, the CRA has affected the pay equity payments of Ms. Murphy and the other recipients by making their net income less than what it would have been had the Treasury Board complied with s. 11 of the *CHRA* in the first place and paid them their fair wages. In other words, the CRA's actions have had the effect of reducing the portions of their wages (the pay equity payments) that were otherwise intended to make them whole. The Complainants contend that this constitutes an indirect form of adverse differentiation in the course of Ms. Murphy's and the other recipients' employment, in breach of s.7(*b*).

[62] Although Ms. Murphy happened to have worked at Revenue Canada during her career in the public service, her complaint against the CRA today does not arise on account of that relationship but rather due to the CRA's assessment of her lump-sum payments pursuant to its role as the administrator of the *ITA*.

[63] In this capacity as administrator of the income tax system, can the CRA be found to have differentiated adversely in relation to Ms. Murphy "in the course of employment"? The Complainants argue that s. 7(*b*) does not require the respondent to be the direct employer of the complainant. They contend that the scope of the provision should be interpreted broadly, relying on the Federal Court of Appeal decision in *Canadian Pacific Limited v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571, which held that in the context of s. 7, employment should be given a "broader meaning [...] than that afforded by the technical master/servant relationship".

[64] However, in this and the other decisions raised by the Complainants in their final submissions (*Yukon (Human Rights Commission) v. Yukon (Human Rights Board of Adjudication)*, 2009 YKSC 44; *Tulk v. Newfoundland (Ministry of Health and Community Services)*, [2002] N.J. No. 65 (Nfld.S.C.T.D.)(QL)), while the respondents were not formally the employers of the persons who had filed the complaints, they were found to have "utilized" their services. In *Canadian Pacific* and *Yukon*, the complainants were employed by contractors who had entered into agreements with the respondents for the provision of services. In *Tulk*, the respondent government department had provided funds to an individual for the purpose of hiring the complainant, but the department retained a measure of control over the relationship including the right to withhold funds for the remuneration of the service provider, which would have effectively resulted in her termination.

[65] The common element in all of these cases is that the respondents "utilized" the complainants' services, albeit indirectly. As taxpayers, however, Ms. Murphy and the other pay equity payment recipients did not have a similar relationship with the CRA. In applying the QRLSP provisions to Ms. Murphy and the other recipients, the CRA did not utilize their services.

[66] The Complainants' submissions regarding s. 7 also fail to take into account the findings of the Federal Court of Appeal decision in a case that I find to be far more relevant and persuasive, *Canada (Attorney General) v. Bouvier*, 1998 CanLII 7409 (F.C.A.). The complainants in that case were individuals who had been refused employment as brakemen/yardmen or trainmen by railway companies because they did not meet the visual acuity standards established by federal transportation regulations. They brought human rights complaints against the Department of Transport alleging, among other things, that the Department had indirectly refused to employ them, as prohibited by s. 7 of the *CHRA*. They argued that the notion of a "utilizer" of an employee's services should be extended to encompass the Transport Department. Among the grounds cited in support of their argument

was the Transport Department's role in the adoption and implementation of the regulations that were the source of the discrimination, as well as the quasi-constitutional status that has been accorded to human rights legislation.

[67] The Court held, at para. 4, that however compelling these arguments may appear, it is not open for courts and tribunals to redraft the *CHRA*. Section 7 could not withstand an interpretation that would stretch its meaning to encompass the Transport Department, which is not ultimately responsible for the existence of the regulations and is not entitled to determine their legal effect. The Court went on to state that "a Government department cannot be held accountable to the [Canadian Human Rights] Commission for a questionable provision of a Regulation simply because it has been given by Parliament the responsibility of administering the Act on the authority of which the Regulation was validly enacted by the Governor in Council". I note, in passing, that this last statement by the Court accords with the reasoning in *Forward* and *Wignall*, discussed earlier.

[68] The CRA is no more a "utilizer" of Ms. Murphy's and the other pay equity payment recipients' services than the Transport Department was of the complainants in *Bouvier*. Section 7's meaning can similarly not be stretched to encompass the CRA's actions in applying the *ITA* to the employment income received by the pay equity recipients. The CRA's role is, just like the Transport Department, to administer an Act of Parliament (i.e., the *ITA*) and its validly adopted regulations. Consistent with the Court's finding in *Bouvier*, I do not see how s. 7 can find any application in the present case.

[69] The Complainants referred me to a British Columbia decision that found that a refusal by a licensing authority to grant licences to the complainants in that case could engage its liability under the employment-related provision of B.C.'s human rights legislation (*Mans v. British Columbia Council of Licensed Practical Nurses* [1990] B.C.C.H.R.D. No. 38 (B.C.C.H.R.)(QL), aff'd on other grounds [1993] B.C.J. No. 371 (B.C.C.A.)(QL)). The decision was cited with approval by the British Columbia Human Rights Tribunal in *Bitonti v. College of Physicians & Surgeons of British Columbia*, [1999] B.C.H.R.T.D. No. 60 (B.C.H.R.T.)(QL)), although that tribunal ultimately held, at para. 84, that the interpretation of the provision being proposed by the complainant in that case would "stretch" it beyond what the legislature can have reasonably intended. Just as the Federal Court of Appeal had indicated in *Bouvier*, the tribunal stated that although human rights legislation is to be interpreted in a broad and purposive manner, this does not permit a "re-writing of legislation".

[70] *Mans* is a tribunal-level decision that relates to a different legislative provision than the section of the *CHRA* at issue here, not to mention that it pre-dates the findings in *Bouvier*, which in my view are far more on point. More importantly, *Bouvier* is a decision of the Federal Court of Appeal and therefore binding on the Tribunal. I do not consider *Mans* to be a persuasive authority in this instance.

[71] For these reasons, I find that the Complainants' allegations in this case, even if believed, cannot engage the liability of the CRA under s. 7(*b*) of the *CHRA*, as a matter of statutory interpretation. A *prima facie* case on the basis of this aspect of the complaint has therefore not been established.

C. Does the evidence demonstrate that the CRA differentiated adversely in relation to Ms. Murphy and the other recipients of pay equity lump-sum payments on the basis of sex?

[72] As I explained earlier, once the QRLSP calculation was performed on Ms. Murphy's tax return, it was shown that the QRLSP provisions of the *ITA* offered her no tax relief. It was more beneficial for her to use the regular 2000 tax calculation despite the fact that she would be paying income tax at a higher marginal rate than when she was employed in the public service.

[73] She was not alone among the pay equity lump-sum payment recipients to have found this to be the case. Ms. Barnard testified that the QRLSP calculation was more advantageous to only 7% of all QRLSP claimants in the 2000 tax year, the great majority of whom were pay equity recipients. This data is consistent with the evidence that it is unlikely the QRLSP tax calculation would be beneficial to any recipient of a lump-sum payment (arising from pay equity or any other matter) that relates back beyond six years. The Consent Order provided compensation for lost wages that, depending on how long the claimant had been employed in the affected job, could extend well beyond this period.

[74] The Complainants argued that Ms. Murphy and the other recipients were effectively compelled to pay tax on the pay equity lump-sum payment using the regular tax calculation in 2000, at higher marginal rates. As a result, they ended up paying a greater portion of their earned income as tax than public service employees performing male dominated work during the years in question.

[75] In order to demonstrate this adverse differentiation that Ms. Murphy and the other recipients of pay equity lump-sum payments experienced, the Complainants adduced the expert evidence of Gary S. Katz, a chartered accountant with a practice that concentrates on income tax matters. He conducted an analysis of Ms. Murphy's financial and tax information and presented scenarios of what would have happened had Ms. Murphy received the additional wages in the years to which they relate, comparing these results with her actual scenario of receiving the lump-sum payment in 2000.

[76] Basically, Mr. Katz sought to determine how much better or worse off Ms. Murphy would have been had she received the payments over the years without interest rather than in one lump-sum payment with interest in 2000, which is what the Complainants contend the CRA compelled her to do by rendering the QRLSP provision of no benefit to her.

[77] Mr. Katz prepared an initial report that he subsequently amended in an addendum to take into account certain comments made by the expert in the area of income taxation whom the CRA called to testify, chartered accountant Martha Skeggs. Mr. Katz considered five possible scenarios:

1. Where Ms. Murphy would have spent 100% of the additional funds in the years in which she received them;

2. Where Ms. Murphy would have immediately invested 100% of the additional funds in 6 month government Treasury Bills (TBills), which Mr. Katz believed would reflect what he perceived as Ms. Murphy's "conservative risk profile";

3. Where Ms. Murphy would have invested only 15% of the additional funds in 6 month TBills. The remaining 85% was considered to have been spent immediately.

4. Where Ms. Murphy would have immediately invested 100% of the additional funds in a registered retirement savings plan (RRSP), taking into account the maximum amounts she was permitted to invest over the years (i.e., her "RRSP room"). The assumed investment vehicle was again 6 month TBills.

5. Where Ms. Murphy would have invested only 15% of the additional funds in 6 month TBills within an RRSP. The remaining 85% was considered to have been spent immediately.

[78] The first three scenarios were compared with Ms. Murphy's actual situation, i.e., where the lump-sum principal and interest payments are taxed in the 2000 return using the regular taxation calculation. The fourth scenario was compared to a hypothetical situation, where Ms. Murphy was assumed to have invested the entire lump-sum principal and interest payments into an RRSP. The evidence in fact is that Ms. Murphy did not deposit any of her lump-sum payments into an RRSP when she received them in 2000. The fifth scenario similarly was compared to the hypothetical situation where 15% of the lump-sum payment in 2000 was invested in an RRSP while the balance was spent.

[79] Under Scenario #1, where Ms. Murphy is assumed to have spent 100% of the additional funds, Mr. Katz concluded that Ms. Murphy was in fact advantaged by about 10% ($1,507) in receiving the lump-sum payments (including the interest) and being taxed on them in 2000, as opposed to having received the additional funds over the years.

[80] Under Scenario #2, where Ms. Murphy saves 100% of the additional funds as she earns them over the years, Mr. Katz found that she was disadvantaged by 4% ($533) by receiving the lump-sum payments instead.

[81] Under Scenario #3, where she saves only 15% of her additional funds, Mr. Katz determined that she was advantaged by 8% ($1,201) in receiving the payments as a lump-sum instead.

[82] Under Scenario #4, where Ms. Murphy is assumed to have invested all of the additional funds in her RRSP to maximum allowable amounts over the years, Mr. Katz found that she was disadvantaged by 77% ($12,043) in receiving the lump-sum payments in 2000 and hypothetically investing the maximum allowable amount in an RRSP in 2000.

[83] Finally, under Scenario #5, where only 15% of the additional funds are assumed to have been invested in RRSPs over the years, Mr. Katz concluded that Ms. Murphy would have been financially "at par", there being no advantage or disadvantage to her having received the lump-sum payments in 2000.

[84] Thus, it is only under Scenarios #2 and #4 that Mr. Katz found that Ms. Murphy was disadvantaged in being taxed in 2000 on her lump-sum payments, for which the Complainants hold the CRA responsible for not having enabled her to benefit under the QRLSP provisions.

[85] This is far from convincing evidence that the QRLSP had an adverse impact on the finances of Ms. Murphy or, for that matter, the other recipients of pay equity lump-sum payments, let alone establish that these consequences constituted adverse differential treatment on the basis of the prohibited ground of sex.

[86] Nevertheless, even if I were to accept that the evidence establishes *prima facie* that Ms. Murphy and the other pay equity recipients were adversely impacted financially by the application of the QRLSP mechanism, albeit in only two of the five scenarios, I find that the CRA has satisfactorily refuted this evidence.

D. What is the CRA's evidence in response to the Complainant's expert evidence?

[87] The CRA contends that both of the scenarios (#2 and #4) where Mr. Katz found a disadvantage are "suspect". Ms. Skeggs testified that after analyzing Mr. Katz's report, she

concluded that both scenarios should be assigned very little weight having found neither of them to be realistic.

[88] Both scenarios assumed that Ms. Murphy would have saved 100% of the additional funds (inside or outside an RRSP). Ms. Skeggs and the CRA noted the following problems with this assumption:

1. Canadians are saving less and less. Ms. Skeggs produced information derived from Statistics Canada indicating that savings rates have declined over the period affected by the pay equity settlement (1985-1999). During the early 1980's personal savings as a percentage of personal disposable income were in the 15% range, but by the early 1990's personal savings were around 9% and dropped to about 5% by 2001. She concluded therefore that a 100% savings rate is likely unrealistic. It was on account of her evidence in this regard that Mr. Katz adjusted his initial report and included scenarios that considered a 15% savings rate (Scenarios #3 and #5). He found that Ms. Murphy was not disadvantaged by the lump-sum payments in these scenarios.

2. Ms. Murphy's actual history does not indicate a significant level of saving while employed in the federal public service. Ms. Murphy reported investment or interest income in only one of the relevant years ($111 in 1990);

3. Prior to 1991, Ms. Murphy did not make any RRSP contribution while employed with the federal public service. As a public servant, she was contributing 5-6% of her earnings to the government's registered pension plan. According to Statistics Canada data referred to by Ms. Skeggs, this pattern of contribution was consistent with the average contributions into pension plans and RRSPs for women in the same earnings quintile as Ms. Murphy over this period. It would therefore be reasonable to assume that no further RRSP contributions would have been made by her. It was only once she changed employer and began earning a significantly higher income that Ms. Murphy began investing more extensively in her RRSPs, at close to the maximum available amounts. It would be unreasonable to assume that she would have contributed 100% of the incremental additional earnings to an RRSP, which would have been inconsistent with her pattern of contributions prior to 1991. It is noteworthy that she did not contribute any of the lump-sum payment to her RRSP in 2000.

4. The additional pay equity sums when distributed out over the ten years to which they relate are all relatively small, some as low as $39 and $74 per annum. Five are between $1,107 and $1,786 ($21 to $34 per week), and the highest is $3,247 (for the year 1989). Thus, even the largest annual amount would have resulted in a little over $62 more per week. With sums in these amounts, it is unlikely that a person would save 100% of the additional increments with every pay cheque. Ms. Murphy testified that she "might have been able to pay a little bit more" on her mortgage payments at the time, had she been receiving the extra wages, although in the 1980's, saving more money would have been "difficult" because of the expenses associated with raising her teenage children.

5. Mr. Katz's analysis did not take into account the tax effect of the RRSP contributions. At some point, typically upon retirement, RRSP amounts are withdrawn at which time they are taxed as income. Mr. Katz conceded that this tax effect was not factored into his calculations. The disadvantage given in his report with respect to Scenario #4 would thus be reduced significantly, depending on what Ms. Murphy's marginal tax rate would be when she collapses the RRSP. Ms. Skeggs calculated the effect if Ms. Murphy cashed out her RRSP in 2000, at the highest marginal rate applicable in her province (46%). The results showed that Ms. Murphy would have been appreciably advantaged (by 22%) in receiving the pay equity

payments as lump-sums in 2000. While few people typically collapse their RRSPs when earning income that is taxed at the highest marginal rate, this result suggests that even if factoring in a tax effect on the RRSPs at a lower marginal rate, the lump-sum payments would yield a considerably lower disadvantage, if not actually an advantage, than as presented by Mr. Katz in his evidence.

[89] I find these arguments persuasive. It is highly improbable that Ms. Murphy or any Canadian in her circumstances at the relevant time would have saved 100% of the additional incremental sums. The failure to factor in the tax effect with respect to the 100% RRSP scenario significantly calls into question any findings related thereto as well. Neither of the two allegedly adverse scenarios (#2 and #4) is realistic.

[90] The Complainants assert that the case is not only based on Ms. Murphy's financial information. Mr. Katz's report analyzed the situation of another public servant who received a pay equity lump-sum payment. However, that person did not testify with regard to the data upon which the report was based. Moreover, Mr. Katz's testimony barely touched upon that person's scenarios. In addition, while Mr. Katz filed an addendum to his original report in order to make several corrections to his methodology and calculations, those adjustments were made only with respect to Ms. Murphy. He did not apply any of the changes to the other person. Consequently, the oversights and flaws in the original report that were corrected in the addendum remain untouched with respect to the other individual. Those conclusions are therefore unreliable.

[91] Besides, Mr. Katz testified that had he adjusted the calculations with respect to the other person as he had done regarding Ms. Murphy, the "numbers" would have "gone down" but he was confident that his conclusions would still be the same regarding advantageousness of the lump-sum payment, not unlike that which had occurred with respect to Ms. Murphy's figures. I have determined, however, that those findings regarding Ms. Murphy's two disadvantageous scenarios are not persuasive and I am therefore not convinced, particularly with the limited evidence before me, that the results with respect to the other individual would be any more persuasive.

[92] Thus, it has not been established on a balance of probabilities that Ms. Murphy or any other pay equity recipient experienced adverse treatment as a result of receiving their payments in the form of a lump-sum, let alone that they had been differentiated in this alleged treatment on the basis of the prohibited ground of sex.

[93] One likely reason for this outcome was explained by Ms. Skeggs in her testimony. She pointed out that pursuant to the Consent Order, all of the recipients were entitled to interest on the sums owing to them. The interest rates agreed to by the PSAC and the Treasury Board (effectively 90% of the rates that had been originally set in the Tribunal decision - ranging from 3.5% (1998) to as high as 11.25% (1985)) far exceeded the rate of inflation over the same period (between 1.65% and 2.8%).

[94] Thus, for instance in Scenario #1 (the 100% spend scenario), if one were only to look at the principal without the interest, Ms. Murphy would obviously have been better off receiving her additional funds in increments over the years, when her total income was less and was therefore paying income tax at lower marginal rates, than in 2000 when her income was much higher. The disadvantage would have been $3,510 in 2000 dollars (i.e., after factoring in for inflation). However, the interest lump-sum payment that Ms. Murphy received in 2000, net of income tax, was over $5,000. The interest ensured that she would be

better off receiving her compensation as a lump-sum payment in 2000, rather than having received it incrementally over the years.

[95] The Commission and the Complainants argued that the award of interest is irrelevant to the issues of this case. It is a distinct and separate remedy that cannot be considered in determining if a tax assessment is discriminatory.

[96] I do not agree. The issue at this stage of the analysis consists of ascertaining, with the assistance of expert evidence, whether Ms. Murphy would have been better off receiving her wages incrementally over the years or, on the other hand, as a lump-sum compensation package in 2000. In order to properly conduct this analysis, one cannot disregard the fact that interest was added to her wages when she received them as a lump-sum in 2000.

[97] The interest that formed part of the settlement agreement between the PSAC and the Treasury Board was calculated as a proportion of the Canada Savings Bond rates ordered by the Tribunal in its 1998 decision. The Tribunal, at para. 477, referred to an excerpt from *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (F.C.A.), in which the Court stated that interest is meant to "cover the loss". If the exercise we are engaged in consists of assessing whether the complainant has been disadvantaged by having been compensated in the form of lump-sum payments, we cannot simply ignore the interest portion of that compensation that Ms. Murphy actually received, which was after all intended to "cover the loss" occasioned by the wage discrimination. If her loss has been more than entirely covered by the interest (in Ms. Murphy's case, by an excess of over $1,500), how can she assert that she has been disadvantaged? It just does not make any sense.

[98] Besides, this issue raises an area of the Complainants' case that I have some measure of difficulty accepting. It relates to the fact that the lump-sum payments, including the interest, were awarded to Ms. Murphy and the other recipients as a result of a negotiated settlement of the Section 11 Complaints proceedings.

E. Is this complaint an effort to avoid the normal and anticipated consequences of the settlement?

[99] The CRA argued vigorously that this complaint was an attempt by the Complainants to, in effect, avoid the normal and anticipated consequences of the settlement agreement and Consent Order in an attempt to retroactively address the tax treatment of the pay equity settlement lump-sum payments. While I am not convinced, as the CRA contends, that this constitutes an abuse of process, I share the CRA's overall perception of the complaint. Given my earlier findings that the complaint has not been substantiated, my comments in this respect need only take the form of an observation.

[100] In October 29, 1999, the PSAC and the Treasury Board negotiated and signed a Memorandum of Agreement "for the purpose of implementing the decision of the Human Rights Tribunal dated July 29, 1998". The settlement was presented to the Tribunal on November 16, 1999. The Tribunal granted the parties the consent order they were seeking, in which it was noted that the parties had advised the Tribunal that matters relating to the various phases of the proceedings had been resolved as a result of the agreement.

[101] As the CRA points out, at all material times including when the settlement was negotiated and signed, the *ITA* provided that lump-sum amounts like the ones being paid under the settlement would be taxed in the year in which they would be received (s. 5(1) of the *ITA*). According to Ms. Jaekl, the PSAC is one of Canada's largest unions with offices nationwide and staff lawyers. The union has been involved in numerous lawsuits and

settlements related to employment, pay equity and human rights. It had sought and obtained verification of this tax information from Revenue Canada over a year earlier, before the Tribunal decision had even been issued. This is the tax rule that was ultimately applied to Ms. Murphy's lump-sum payments. This tax consequence was thus neither unforeseen nor unforeseeable.

[102] Ms. Jaekl indicated in her evidence that the Treasury Board had placed a lot of pressure on the PSAC to settle in that week of November 1999, following the release of the Federal Court's judgment. I am not certain if she intended to imply that the PSAC had been coerced into signing the settlement agreement and that it should therefore not be bound by all the consequential effects of the agreement. Given the above-described sophistication of the PSAC and the fact that these negotiations were occurring following a Federal Court judgment in its favour, I would find such an argument to be very questionable to say the least. In any event, the appropriate place to have raised this type of submission would have been before the Tribunal that heard the parties to the agreement and issued the Consent Order, rather than the Tribunal hearing the present complaint against the CRA.

[103] As the CRA also indicated in its submissions, the PSAC should similarly not have been surprised by the fact that the QRLSP mechanism was of limited benefit to its members. At the time of the settlement, the QRLSP provision had already been announced in the February 1999 Budget Plan and had been included in a bill before Parliament. The provision as ultimately enacted was identical in all material respects to what had been proposed in the 1999 Budget Plan, including the fact that the notional tax calculated under the provision includes an interest component calculated at the prescribed refund interest rate. Since 1989, the *ITA* has provided that the method for calculating interest is compounding.

[104] The CRA correctly points out that it is normal practice for parties to seek to mitigate the tax impact of awards when making submissions on remedy before the Tribunal. For example, the Tribunal may order that the tax impact on complainants be addressed by a "gross up" of the award (*Green v. Canada (Public Service Commission)*, 2003 CHRT 34 at para. 7; *Cashin v Canadian Broadcasting Corporation*, 1990 CanLII 650 (C.H.R.T.)). Parties regularly discuss tax implications during mediation and other forms of settlement talks and often a resolution regarding these implications is incorporated in the terms of the settlement.

[105] The settlement that the PSAC reached with the Treasury Board expressly referred to the tax impact on the settlement monies. Clause 12 stipulated that the parties jointly undertook to provide timely information to employees with respect to the tax implications related to the lump-sum payments.

[106] Thus, the CRA submits that given the wording of the settlement, the fact that the PSAC had specifically sought and received answers from Revenue Canada about the tax implications of lump-sum payments, and in light of its sophistication as a litigant, the PSAC must be taken as having accepted the tax treatment of the lump-sum payments it negotiated. Either the issue was raised and addressed during negotiation, or the PSAC should have raised the issue.

[107] I agree. The settlement agreement between the PSAC and the Treasury Board was in full and final satisfaction of the recipients' pay equity claim. As a settlement, it must have involved negotiation and compromise. Ms. Jaekl testified that although the PSAC had won at both the Tribunal and Federal Court levels, it had an interest in resolving the issue promptly for the benefit of its members, particularly since the Treasury Board had indicated its intention to appeal if no agreement was reached. Nonetheless, if the PSAC believed that the

tax treatment of the lump-sum payments would negatively impact the pay equity recipients, it could have refused those terms or negotiated another form of settlement with different tax consequences.

[108] The Tax Court of Canada reached a similar conclusion in the case of *Burrows v. The Queen*, 2005 TCC 761. In that case, the complainant appealed the assessment of income tax on the interest portion of her lump-sum pay equity payments. She argued that the imposition of tax on the pre-judgment interest was discriminatory under the *Canadian Charter of Rights and Freedoms*. The Court dismissed her claim for want of jurisdiction but went on to add, at para. 47, that since both parties to the settlement agreement knew that pre-judgment interest is taxable under the *Act*, it was open to them to negotiate another form of settlement, such as damages. Having agreed to a settlement including pre-judgment interest, the PSAC must be taken to have accepted the fact that such interest was taxable under the *ITA*.

[109] Similarly, the PSAC must be taken to have accepted the fact that the lump-sum pay equity payments would be taxed in the year in which they would be received and that if the QRLSP mechanism was to eventually be incorporated into the *ITA*, the scope of its benefit would be limited.

F. The basic premise for the complaint

[110] Finally, I wish to address what I surmise to be the basic premise of the present complaint. The Complainants argued that conceptions of equality must be built into all contexts of society, and not limited to specific areas of activity, like employment. They claim that because the QRLSP mechanism resulted in pay equity recipients paying a higher overall percentage of their income as tax, these individuals suffered a discriminatory impact. The CRA was obliged, the Complainants contend, to take action and modify the QRLSP provision's effect by waiving or lowering the compound interest rate or taking some other measure to eliminate this impact.

[111] I have already found that the alleged adverse financial impact of the QRLSP has not been established. However, even if it had been established that Ms. Murphy and the other recipients had been disadvantaged, the Complainants' argument cannot be supported. It is essentially the same argument that was presented and dismissed in *Sveinson v. Canada (Attorney General)*, 2003 FCA 259 at paras. 15-7. The Complainant in that case was also a pay equity payment recipient. She claimed that the pay equity payment should have been allocated for employment insurance purposes to her earnings in the years in respect of which the payment was paid rather than in the year in which the lump sum payment was paid. The parallels to the present case are obvious.

[112] The complainant in that case argued that the provision of the *Employment Insurance Regulation*, SOR/96-332, in question should have been interpreted in a manner that varied from its clear statutory language because a failure to do so "undermined the purpose of the *CHRA*, namely, to put those who had been unlawfully underpaid in the same financial position in which they would have been if the Government had not breached s. 11 of the *CHRA*". The Federal Court of Appeal found that this argument amounted, in effect, to a claim that legislation that does not rectify all the indirect consequences of unlawful discrimination by an employer would itself be inconsistent with the CHRA. In rejecting the argument, the Court stated that "this is not the kind of inconsistency that requires otherwise valid legislation to be rendered inoperative".

[113] In a similar fashion, the Complainants are alleging that the *ITA*'s QRLSP provision does not rectify the indirect consequence of Ms. Murphy being taxed at higher marginal rates

because she received her wages in the form of lump-sum pay equity payments. In keeping with the Court's reasoning in *Sveinson*, however, I would also find that the QRLSP mechanism's failure to rectify this alleged discrimination does not constitute the "kind of inconsistency" that would require the CRA to take measures to have that the interest portion of the QRLSP calculation be "rendered inoperative".

VIII. CONCLUSION

[114] For all these reasons, I find that the complaint has not been substantiated.

Signed by
Athanasios D. Hadjis

OTTAWA, Ontario
April 23, 2010

Schedule 1

Lump-sum Payments

Definition

110.2 (1) The definitions in this subsection apply in this section and section 120.31.

“eligible taxation year”

« année d’imposition admissible »

“eligible taxation year”, in respect of a qualifying amount received by an individual, means a taxation year

(a) that ended after 1977 and before the year in which the individual received the qualifying amount;

(b) throughout which the individual was resident in Canada;

(c) that did not end in a calendar year in which the individual became a bankrupt; and

(d) that was not included in an averaging period, within the meaning assigned by section 119 (as it read in its application to the 1987 taxation year), pursuant to an election that was made and not revoked by the individual under that section.

“qualifying amount”

« montant admissible »

“qualifying amount” received by an individual in a taxation year means an amount (other than the portion of the amount that can reasonably be considered to be received as, on account of, in lieu of payment of or in satisfaction of, interest) that is included in computing the individual’s income for the year and is

(a) an amount

(i) that is received pursuant to an order or judgment of a competent tribunal, an arbitration award or a contract by which the payor and the individual terminate a legal proceeding, and

(ii) that is

(A) included in computing the individual's income from an office or employment, or

(B) received as, on account of, in lieu of payment of or in satisfaction of, damages in respect of the individual's loss of an office or employment,

(b) a superannuation or pension benefit (other than a benefit referred to in clause 56(1)(a)(i)(B)) received on account of, in lieu of payment of or in satisfaction of, a series of periodic payments (other than payments that would have otherwise been made in the year or in a subsequent taxation year),

(c) an amount described in paragraph 6(1)(f), subparagraph 56(1)(a)(iv) or paragraph 56(1)(b), or

(d) a prescribed amount or benefit, except to the extent that the individual may deduct for the year an amount under paragraph 8(1)(b), (n) or (n.1), 60(n) or (o.1) or 110(1)(f) in respect of the amount so included.

"specified portion"

« partie déterminée »

"specified portion", in relation to an eligible taxation year, of a qualifying amount received by an individual means the portion of the qualifying amount that relates to the year, to the extent that the individual's eligibility to receive the portion existed in the year.

Deduction for lump-sum payments

(2) There may be deducted in computing the taxable income of an individual (other than a trust) for a particular taxation year the total of all amounts each of which is a specified portion of a qualifying amount received by the individual in the particular year, if that total is $3,000 or more.

Definitions

120.31 (1) The definitions in subsection 110.2(1) apply in this section.

Addition to tax payable

(2) There shall be added in computing an individual's tax payable under this Part for a particular taxation year the total of all amounts each of which is the amount, if any, by which

(a) the individual's notional tax payable for an eligible taxation year to which a specified portion of a qualifying amount received by the individual relates and in respect of which an

amount is deducted under section 110.2 in computing the individual's taxable income for the particular year

exceeds

(b) the individual's tax payable under this Part for the eligible taxation year.

Notional tax payable

(3) For the purpose of subsection (2), an individual's notional tax payable for an eligible taxation year, calculated for the purpose of computing the individual's tax payable under this Part for a taxation year (in this subsection referred to as "the year of receipt") in which the individual received a qualifying amount, is the total of

(a) the amount, if any, by which

(i) the amount that would be the individual's tax payable under this Part for the eligible taxation year if the total of all amounts, each of which is the specified portion, in relation to the eligible taxation year, of a qualifying amount received by the individual before the end of the year of receipt, were added in computing the individual's taxable income for the eligible taxation year

exceeds

(ii) the total of all amounts each of which is an amount, in respect of a qualifying amount received by the individual before the year of receipt, that was included because of this paragraph in computing the individual's notional tax payable under this Part for the eligible taxation year, and

(b) where the eligible taxation year ended before the taxation year preceding the year of receipt, an amount equal to the amount that would be calculated as interest payable on the amount determined under paragraph (a) if it were so calculated

(i) for the period that began on May 1 of the year following the eligible taxation year and that ended immediately before the year of receipt, and

(ii) at the prescribed rate that is applicable for the purpose of subsection 164(3) with respect to the period.

Paiements forfaitaires

Définitions

110.2 (1) Les définitions qui suivent s'appliquent au présent article et à l'article 120.31.

« année d'imposition admissible »

"eligible taxation year"

« année d'imposition admissible » Quant à un montant admissible reçu par un particulier, l'année d'imposition qui remplit les conditions suivantes :

a) elle s'est terminée après 1977 et avant l'année au cours de laquelle le particulier a reçu le montant admissible;

b) il s'agit d'une année tout au long de laquelle le particulier a résidé au Canada;

c) elle ne s'est pas terminée dans une année civile au cours de laquelle le particulier a fait faillite;

d) elle ne fait pas partie d'une période d'établissement de la moyenne, au sens de l'article 119 en son état applicable à l'année d'imposition 1987, conformément à un choix fait

« montant admissible »

"qualifying amount"

« montant admissible » Montant reçu par un particulier au cours d'une année d'imposition (sauf la partie du montant qu'il est raisonnable de considérer comme étant reçue à titre ou en paiement intégral ou partiel d'intérêts) qui est inclus dans le calcul de son revenu pour l'année et qui représente l'un des montants suivants, sauf dans la mesure où le particulier peut déduire pour l'année, en application des alinéas 8(1)b), n) ou n.1), 60n) ou o.1) ou 110(1)f), un montant relatif au montant ainsi inclus :

a) un montant qui, à la fois :

(i) est reçu en exécution d'une ordonnance ou d'un jugement d'un tribunal compétent, d'une sentence arbitrale ou d'un contrat par lequel le payeur et le particulier mettent fin à une procédure judiciaire,

(ii) est :

(A) soit inclus dans le calcul du revenue du particulier tiré d'une charge ou d'un emploi,

(B) soit reçu à titre ou en règlement total ou partiel de dommages-intérêts pour la perte d'une charge ou d'un emploi du particulier;

b) une prestation de retraite ou de pension (sauf une prestation visée à la division 56(1)a)(i)(B)) reçue au titre ou en paiement intégral ou partiel d'une série de paiements périodiques (à l'exclusion de paiements qui auraient autrement été effectués au cours de l'année ou d'une année d'imposition postérieure);

c) un montant visé à l'alinéa 6(1)f), au sousalinéa 56(1)a)(iv) ou à l'alinéa 56(1)b);

d) un montant ou une prestation visés par règlement.

« partie déterminée »

"specified portion"

« partie déterminée » Quant à une année d'imposition admissible, la partie d'un montant admissible reçu par un particulier qui se rapporte à l'année, dans la mesure où le particulier était en droit, au cours de l'année, de la recevoir.

Déduction pour paiements forfaitaires

(2) Peut être déduit dans le calcul du revenue imposable d'un particulier (sauf une fiducie) pour une année d'imposition le total des montants représentant chacun la partie déterminée d'un montant admissible qu'il a reçu au cours de l'année, si ce total s'établit à 3 000 $ ou plus.

Définitions

120.31 (1) Les définitions figurant au paragraphe 110.2(1) s'appliquent au présent article.

Montant ajouté à l'impôt payable

(2) Est ajouté dans le calcul de l'impôt payable en vertu de la présente partie par un particulier pour une année d'imposition donnée le total des montants représentant chacun l'excédent éventuel du montant visé à l'alinéa a) sur le montant visé à l'alinéa b):

a) l'impôt hypothétique payable par le particulier pour une année d'imposition admissible à laquelle se rapporte une partie déterminée d'un montant admissible qu'il a reçu et à l'égard de laquelle un montant est déduit en application de l'article 110.2 dans le calcul de son revenu imposable pour l'année donnée;

b) l'impôt payable en vertu de la présente partie par le particulier pour l'année d'imposition admissible.

Impôt hypothétique payable

(3) Pour l'application du paragraphe (2), l'impôt hypothétique payable par un particulier pour une année d'imposition admissible, determine aux fins du calcul de son impôt payable en vertu de la présente partie pour une année d'imposition (appelée « année de réception » au présent paragraphe) au cours de laquelle il a reçu un montant admissible, correspond à la somme des montants suivants :

a) l'excédent éventuel du montant visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) le montant qui correspondrait à l'impôt payable en vertu de la présente partie par le particulier pour l'année d'imposition admissible si le total des montants, représentant chacun la partie déterminée relative à cette année d'un montant admissible reçu par le particulier avant la fin de l'année de réception, était pris en compte dans le calcul de son revenu imposable pour l'année d'imposition admissible,

(ii) le total des montants représentant chacun un montant, relatif à un montant admissible reçu par le particulier avant l'année de réception, qui a été inclus par l'effet du présent alinéa dans le calcul de l'impôt hypothétique payable en vertu de la présente partie par le particulier pour l'année d'imposition admissible;

b) si l'année d'imposition admissible s'est terminée avant l'année d'imposition precedent l'année de réception, un montant égal au montant qui serait calculé à titre d'intérêts payables sur le montant déterminé selon l'alinéa a) s'il était ainsi calculé, à la fois :

(i) pour la période ayant commencé le 1er mai de l'année suivant l'année d'imposition admissible et s'étant terminée immédiatement avant l'année de réception,

(ii) au taux prescrit qui est applicable dans le cadre du paragraphe 164(3) pour la période.

PARTIES OF RECORD

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