

**A PAY EQUITY SAGA: THE PUBLIC SERVICE
ALLIANCE OF CANADA VS. THE TREASURY
BOARD OF CANADA SECRETARIAT**

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ABSTRACT

This article deals with a nearly fifteen-year pay equity dispute between the Public Service Alliance of Canada (the largest union of Federal government employees) and the Treasury Board of Canada Secretariat (the employer of Federal government employees). The positions of the parties were articulated and litigated in numerous official arenas during that period finally culminating on October 29, 1999 in a settlement likely to affect 230,000 current and former federal employees and involving a retroactive payout with interest, of approximately 3.6 billion dollars. As such, it was the longest lasting pay equity complaint and largest pay equity payment in history and its telling raises fundamental questions about labor relations, administrative, judicial, and political processes.

This article is concerned with a nearly fifteen-year dispute between the Public Service Alliance of Canada (the largest union of federal government employees) and the Treasury Board of Canada Secretariat (the employer of most federal government employees) with regard to the implementation of section 11 of the Canadian Human Rights Act. Section 11 deals with the matter of "Equal Wages," making it a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value. The dispute became the longest-lasting and most significant pay equity complaint in North America.

Section 11 has historical roots that date to a convention passed by the International Labor Organization on June 29, 1951, entitled an “Equal Remuneration Convention.” Article 11 of the convention stated:

- 1: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: . . . (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work [1, ¶ 198].

The *Report of the Royal Commission on the Status of Women in Canada* published on September 28, 1970 also contributed to the appearance of section 11 of the Canadian Human Rights Act. The report identified occupational segregation as one of the reasons for women’s lower earnings and found further that predominantly female professions tended to be paid less than those predominantly male [1, ¶ 199]. As we fast-forward to 1976, we find that the “Speech from the Throne” on October 12, 1976 previewed the intention of the government to introduce a human rights bill. An extract from the speech proclaimed, “In particular, the Bill will establish the principle of equal compensation for work of equal value performed by persons of either sex . . .” [1, ¶ 200]. Bill C-25, the Canadian Human Rights Act, was passed by Parliament on July 14, 1977 and proclaimed in force on March 1, 1978. The purpose of the act, as stated in section 2, is extensive:

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

The act in its statement of intent incorporates both a proactive and a prohibitive dimension. As a result, it has been a source for considerable argument and litigation before the Canadian Human Rights Commission and the Canadian Human Rights Tribunal (both created by the act), and in the federal courts of Canada. The relevant parts of the act, which are considered in this article, are set forth below.

Equal wages

- 11.(1) It is discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value [2].

Assessment of value of work

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

Different wages based on prescribed reasonable factors

- (4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.
- (5) For greater certainty, sex does not constitute a reasonable factor justifying a difference in wages [2].

Definition of “wages”

- (7) For the purpose of this section, “wages” means any form of remuneration payable for work performed by an individual and includes:
- (a) salaries, commissions, vacation pay, dismissal wages and bonuses;
 - (b) reasonable value for board, rent, housing and lodging;
 - (c) payments in kind;
 - (d) employer contributions to pension funds or plans, long-term disability plans and all forms of health insurance plans; and
 - (e) any other advantage received directly or indirectly from the individual’s employer [2, §1].

Following initial experiences in administering the act, particularly matters dealing with group complaints alleging discrimination under section 11, and pursuant to authority granted in subsection 27.2 of the act, the Canadian Human Rights Commission issued Equal Wages Guidelines relative to the administration of section 11 on November 18, 1986 [3]. These guidelines contain nineteen sections that prescribe 1) the manner in which section 11 of the act is to be applied and 2) the factors considered reasonable to justify a difference in wages between men and women performing work of equal value in the same establishment. The Equal Wages Guidelines, 1986 are still in effect. Sections 12 through 15 of the guidelines, which are reproduced here, along with sections 2 and 11 of the act, have comprised the basic regulatory context for the dispute that has engaged the alliance, the commission, and the Treasury Board since 1984.

CANADIAN HUMAN RIGHTS ACT
Equal Wages Guidelines, 1986
Ottawa, November 18, 1986
GUIDELINES RESPECTING THE APPLICATION OF
SECTION 11 OF THE CANADIAN HUMAN RIGHTS ACT
AND PRESCRIBING FACTORS JUSTIFYING DIFFERENT
WAGES FOR WORK OF EQUAL VALUE
Complaints by Groups

12. Where a complaint alleging different wages is filed by or on behalf of an identifiable occupational group, the group must be predominantly of one sex and the group to which the comparison is made must be predominantly of the other sex.
13. For the purpose of section 12, an occupational group is composed predominantly of one sex where the number of members of that sex constituted, for the year immediately preceding the day on which the complaint is filed, at least
 - (a) 70 percent of the occupational group, if the group has less than 100 members;
 - (b) 60 percent of the occupational group, if the group has from 100 to 500 members; and
 - (c) 55 percent of the occupational group, if the group has more than 500 members.
14. Where a comparison is made between the occupational group that filed a complaint alleging a difference in wages and other occupational groups, those other groups are deemed to be one group.
15. (1) Where a complaint alleging a difference in wages between an occupational group and any other occupational group is filed and a direct comparison of the value of the work performed and the wages received by employees of the occupational groups cannot be made, for the purpose of section 11 of the Act, the work performed and the wages received by the employees of each occupation group may be compared indirectly.
 - (2) For the purposes of comparing wages received by employees of the occupational groups referred to in subsection (1), the wage curve of the other occupational group referred to in that subsection shall be used to establish the difference in wages, if any, between the employees of the occupational group on behalf of which the complaint is made and the other occupational group [3; 4, p. 4796].

As the foregoing discussion indicates, section 11 of the act expanded the concept of discrimination into the area of pay equity (commonly referred to in the United States as “comparable worth” pay equity). The federal government of Canada in 1978 approached the problem of systemic, gender-based discrimination in the monetary value associated with federal government jobs by using a complaint-based process (sections 41-53 of the Canadian Human Rights Act [2]). This entails a case-by-case examination of allegations of prohibited discrimination. Since 1978 most of the provinces, however, have passed pay equity legislation requiring public sector employers to implement pay equity plans within their establishments and have created specific pay-equity tribunals to deal with complaints [1, ¶ 241]. A member of the tribunal used a comparative analogy of a “Ford to a Cadillac” in describing the relative approaches of the federal government (a Ford) and most of the provinces (a Cadillac) [5].

THE 1984 CLERICAL AND REGULATORY OCCUPATIONAL GROUP COMPLAINT

The recently resolved controversy, which is the subject of this study, had its origins in a complaint filed by the alliance with the Canadian Human Rights Commission on December 19, 1984, on behalf of the clerical and regulatory (CR) occupational group of the Federal Public Service. The complaint alleged that members of the predominantly female CR group had been performing work of equal value to members of the predominantly male program administration (PM) occupational group and were being paid lower wages for that work, in contravention of section 11 of the Canadian Human Rights Act. About three months later, on March 8, 1985, the federal government announced a new initiative of proactive measures with regard to the identification and elimination of sex-biased pay in the Federal Public Service, stating that the “. . . government intends to ensure that the principle of equal pay for work of equal value is applied in the Federal Public Service. . . .” [1, ¶ 2].

The Federal Public Service unions were invited to participate in the initiative and they accepted the offer. The initiative, entitled the Joint Union-Management Initiative (JUMI), conducted a study to determine the degree of sex discrimination in pay in the Federal Public Service. The Human Rights Commission was asked to join in the JUMI study in the role of an observer and provide guidance to the JUMI committee on request. Consequently, the commission agreed to hold the 1984 complaint in abeyance pending the outcome of the study, to postpone all section 11 complaints against the Treasury Board, and to await the results of the study before investigating any outstanding complaints. The JUMI created fifteen job evaluation committees to evaluate 1,700 jobs from nine female-dominated occupational groups and 1,407 jobs from fifty-three male dominated occupational groups. The system of evaluation used by the evaluation committees was the Willis Plan, a point-factor scheme, which has a rating scale constituted for the four factors (skill, effort, responsibility, and working conditions) listed in section 11(2) of the act [2]. The parties, however, could not agree on the points assigned to the jobs by the evaluation committees which were composed, at least in part, by people who actually performed the jobs and not strictly by classification specialists. Treasury Board representatives thought that sex bias had possibly entered into the judgments. Further, it also became apparent that the unions and the Treasury Board had quite diverse perspectives on the proper methodology to be employed in determining the nature of the existing wage gap for jobs considered to be of equal value using wage rates recorded in the relevant collective agreements for the fiscal year 1987/88 [1, ¶¶ 3, 5, 27, 75-77].

The unions withdrew from the JUMI initiative in December of 1989. On January 26, 1990, the government announced it would unilaterally issue equalization payments to the clerical and regulatory group, the education support (EU)

group, and the secretarial, stenographic, and typing (ST) group, basing its calculations for the payments on the data developed in the JUMI study.

On February 16, 1990, the alliance filed a separate complaint with the Canadian Human Rights Commission on behalf of six-female-dominated occupational groups that had been surveyed in the JUMI study: the CR, ST, EU groups and the data processing (DA), library science (LS), and hospital services (HS) groups [1, ¶¶ 5-6]. The alliance alleged in the complaint that “the results obtained through the process of the Joint Union-Management Initiative on Equal Pay For Work of Equal Value have demonstrated the existence of wage rates which are in contravention of section 11 of the Canadian Human Rights Act” [1, ¶ 6]. The complaint cited specifically the rates for the six female-dominated groups compared to the wages for the employees of the fifty-three male-dominated occupational groups in the study who performed work of equal value. The alliance alleged further that the wage difference was gender-based and the equalization payments issued by the Treasury Board in February of 1990 were “not sufficient to correct this contravention of section 11 [1, ¶ 6]. The alliance contended that the Treasury Board “arbitrarily raised the scores of male jobs and reduced the scores of women’s jobs” in calculating the 1990 payments, and did not follow the results of the JUMI study [6, p.1]. The commission began its investigation of the 1984 and the 1990 complaints from the alliance in March, 1990. During the investigation stage the commission retained Alan Sunter, a former director of Statistics Canada, to assist it in its work. His assignments included an analysis of the claims of gender bias in the job-evaluation results of the JUMI study and a wage-gap analysis of the Treasury Board’s methodology for the wage adjustment used in the government’s equalization payments of February, 1990. Sunter’s analysis was disclosed to the parties in the *Commission’s Investigation Report* of September 28, 1990, which contained a formal critique of the Treasury Board’s wage-gap methodology and set forth Sunter’s preferred wage-gap methodology (level-to-segment), which had been adopted by the commission [1, ¶¶ 23, 24, 28].

The commission on October 16, 1990, decided to refer the issue of direct wages from the alliance’s 1984 and 1990 complaints to a human rights tribunal. They also referred several similar section 11 complaints from the professional institute of the Public Service of Canada, the second largest federal government union, which had also been a participant with the alliance in the JUMI study. A three-member tribunal was appointed on January 23, 1991, to conduct hearings into the two complaints filed by the alliance and also those filed by the institute. The scope of jurisdiction of the tribunal was extended on May 10, 1991, to include indirect compensation as well as direct wage compensation. The tribunal began its formal hearings on September 9, 1991. The institute’s complaints were resolved by a negotiated settlement between the parties (the Treasury Board of Canada Secretariat and the Professional Institute of the Public Service of Canada), which was embodied in a Tribunal Consent Order issued on March 31, 1995, that

gave effect to the settlement [1, ¶¶ 29, 30]. The alliance complaints remained unresolved until October 29, 1999.

HEARINGS BEFORE THE HUMAN RIGHT TRIBUNAL

The following chronology (Table 1) derived from alliance and Treasury Board bulletins, highlights the interactions of the Canadian Human Rights Commission, the Public Service Alliance of Canada, and the Treasury Board of Canada Secretariat (TB) before the Human Rights Tribunal [7, 8].

The Phase I hearings lasted from September 9, 1991, until the decision rendered by the tribunal on February 15, 1996. The hearings concerned the validity of the data generated by the JUMI study as a reliable factual base to show whether pay equity was present or absent in the wage practices of the Canadian Public Service.

Table 1. Chronology of Hearings Before the Human Rights Tribunal: Phase I

September 9, 1991 to October 26, 1991	Formal hearings begin with the presentation of the CHRC case (Phase I).
January 28, 1992 to February 28, 1992	Formal hearings are suspended to hear a “voir dire” (a minitrial) to obtain a ruling on the admissibility of certain evidence.
March 9, 1992	Formal hearings resume.
August 21, 1992	The tribunal rules that the information generated by the Joint Union-Management Initiative was properly admissible before the tribunal.
January 19, 1994 to June 6, 1994	PSAC starts presenting its evidence.
June 7, 1994 to June 30, 1994	The Treasury Board responds.
June 30, 1994 to November 2, 1994	CHRC replies to evidence.
January 10, 1995 to February 23, 1995	Presentation of submissions by all parties on reliability of data.
February 15, 1996	Phase I ruling: The tribunal holds that the results from the JUMI study were sufficiently reliable to be used as data for the Phase II hearings.

Throughout this period, the representatives of the Treasury Board Secretariat challenged the validity of the results of the data-gathering process associated with the JUMI study. As the chronology reveals, all parties had opportunities to present their considered positions on the matter as well as to engage in rebuttal. This lengthy adjudication was closed on February 15, 1996, when the tribunal ruled the results of the JUMI study were sufficiently reliable to serve as the database for Phase II of the hearings. These were to deal with wage-adjustment methodologies, regional rates, the equal wages guidelines, and proposed remedies. A chronology summarizing aspects of the Phase II hearings is shown in Table 2.

THE POSITION OF THE PARTIES: PHASE II TRIBUNAL HEARINGS

In Phase I the tribunal identified four conditions that must be met for the commission and the alliance to establish a prima facie case of discrimination under

Table 2. Chronology of Hearings Before the
Human Rights Tribunal: Phase II

April 16, 1996	Presentation of submissions on methodology and regional rates (Phase II).
September 12, 1996 to November 8, 1996	Presentation of submissions on Section 14 of the <i>Equal Wages Guidelines</i> , 1986.
January 21-24, 1997	Presentation of submissions on fold-in, retroactivity, interest costs, cost of litigation and hurt feelings.
March 17, 1998	Mr. Justice Muldoon of the Federal Court, Trial Division renders a decision on the Bell Canada pay-equity case.
April 13, 1998	The tribunal hearing the PSAC vs. TB case requests the parties to make submissions on whether, and/or to what degree, Justice Muldoon's decision has any bearing on the issues in dispute.
May 8, 1998	After requesting submissions from the parties on the extent to which Justice Muldoon's decision affects the tribunal's case, the tribunal decides to render its ruling without hearing those submissions.
July 29, 1998	The Human Rights Tribunal renders its decision on the Public Service Alliance complaints.

section 11 of the Canadian Human Rights Act. They were: 1) the complainant groups are female-dominated within the meaning of the *Equal Wages Guidelines* [3]; 2) the comparator groups are male-dominated within the meaning of the *Equal Wages Guidelines* [3]; 3) the value of work assessed is reliable; and 4) a comparison of the wages paid for work of equal value produces a wage gap [1, ¶ 205]. The tribunal reported there were no outstanding issues with respect to conditions 1 and 2 before it in Phase I, as the parties had agreed that the groups included in the JUMI study were female-dominated and male-dominated occupational groups within the requirements of section 13 of the guidelines. Condition 3 was addressed by the tribunal in Phase I, when the tribunal found the job evaluations developed in the JUMI study were reliable for the purposes of calculating a wage gap. Thus, Phase II was focused on condition 4, whether a comparison of the wages paid for work of equal value produces a wage gap. If that wage gap was found to exist, a prima facie case of discrimination would be established and, if proven, the burden of proof would shift to the respondent (the Treasury Board of Canada Secretariat) to establish justification for the discriminatory treatment. All the parties agreed that in determining the extent of a wage gap under section 11 of the act it would be necessary to employ a wage-adjustment methodology [1, ¶¶ 40, 206-208].

THE POSITION OF THE TREASURY BOARD OF CANADA SECRETARIAT

The Treasury Board argued before the tribunal that the wage gap in section 11 of the act must be caused by gender-based discrimination. It also argued it is incumbent on the alliance and the commission to prove that any pay differences between male and female employees must be caused by gender-based discrimination and not for any other reason. To meet this obligation, expressed or implied in section 11, the Treasury Board contended 1) it is necessary to compare the wages of female employees only with the wages of male employees performing work of equal value and 2) the word “employees” must be given the same meaning for both males and females, so that comparisons are made on a basis of either individuals to individuals or groups to groups. Since the complaints involved female-dominated occupational groups, the Treasury Board asserted the comparison must be with male-dominated occupational groups performing work of equal value. They asserted further that to eliminate gender-based discrimination under section 11 of the act, the female complainant occupational group can be compared only to the lowest-paid, male-dominated occupational group of equal value. Any other comparison, they claimed, would bring into consideration differences based on factors other than gender-based discrimination.

Thus, in accordance with the principles found in section 11 of the act, the Treasury Board submitted its wage-adjustment methodology, based on the

concept of “central tendency” as the proper approach in determining whether two occupational groups of different genders are performing work of equal value.

The Treasury Board argued that the commission’s methodology of “level-to-segment” did not comply with the requirement in section 11 that differences in wages be caused by gender discrimination because it selects individual male comparators from a combination of male-dominated occupational groups (the “deemed group” under section 14 of the *guidelines*), while section 11 of the act and section 15 of the *guidelines* requires whole male-dominated occupational group comparators, not combined male-dominated occupational groups. The Treasury Board also argued that the alliance’s methodology (the “weighted quadratic male-composite-line”) suffers from basically the same flaws as the commission’s methodology. The focus of the Treasury Board’s submission to the tribunal was on the plain meaning of the language of section 11 of the act. The board provided no expert testimony in support of its position [1, ¶¶ 40-47].

THE POSITION OF THE CANADIAN HUMAN RIGHTS COMMISSION

The commission asserted that the purpose and goal of the act, as expressed in section 2, is “equality” and section 11 must be read within that context. Within that framework, it argued that section 11 has as its purpose the achievement of equality of remuneration in employment regardless of gender and the resolution of systemic discrimination in the pay practices of the Federal Public Service. The commission stated that in its application of the act, it relies on the liberal approach adopted by the Supreme Court of Canada in interpreting the provisions of the act to give effect and meaning to the rights enshrined in the legislation. The commission noted that Chief Justice C. J. Dickson, in *Canadian National Railway Co. v. Canada (Human Rights Commission)* [9], affirmed the Court’s rejection of the need to prove intent in cases dealing with systemic discrimination in the context of pay equity. Thus, the commission contended the concept of “equality” in the act embodies a standard of reasonableness that must not be restricted by a technical or narrow interpretation of the act or the guidelines. The commission stated that section 11 should be interpreted as requiring “reasonable” or “fair” treatment and thus, the commission asserted, section 11 seeks “on-average-fairness” in resolving issues of pay equity. The commission argued that to obtain results attaining “on-average-fairness” it is necessary to test for patterns of treatment of male work and that the identification of patterns is best demonstrated by its methodology of level-to-segment regression analysis.

The commission rejected the Treasury Board’s argument that whole occupational groups must be the basis for comparing work of equal value. It contended this approach moves away from the central point of section 11, which is the identification of “work” of equal value, not “groups” performing work of equal

value. Work defines the group, the commission pointed out, but the group does not define the work. The overly restrictive approach to the interpretation of section 11 held by the Treasury Board could lead, the commission claimed, to absurd results, since many employers covered by section 11 do not have a classification system of occupational groups similar to that of the federal government. An insistence on the board's interpretation of section 11 would make it inoperative in many situations, the commission pointed out, and would be inconsistent with the goals and purpose of the act. The commission asserted the intent of section 11 must be to provide for a comparison of "work" performed by male and female employees regardless of the occupational group designation of either the complainant or the comparator. The commission contended that the "level-to-segment" methodology uses the most relevant data for comparisons. This methodology looks for patterns of male wages and selects male data from the "deemed" group that is "on average" to the point values of the female complainant level, achieving on-average-fairness in pay, in line with the intention of Section 11 of the act.

The commission, in contrast to the board, sought a purposive approach to an interpretation of section 11 of the act [1, ¶¶ 49-60].

THE POSITION OF PUBLIC SERVICE ALLIANCE OF CANADA

The alliance generally endorsed the position of the commission with regard to the intent of section 11 of the act and the legitimacy of section 14 of the *guidelines* in addressing group complaints dealing with pay equity. The alliance argued that section 11 is not aimed at the general wage gap between males and females but rather is directed at a systemic problem rooted in history and in attitudes about female work that tended to undervalue work traditionally performed by females. The alliance contended the Treasury Board's whole-occupational-group, wage-adjustment methodology necessarily must assume similarity of work within each of the occupational groups in the employer's classification system. They pointed out that this certainly was not the case within the CR occupational group, which consisted of more than 50,000 employees. The alliance noted further that no evidence was presented by the board to establish a commonality within the occupational groups to support reliance upon the whole group methodology that used the employer's classification system. The alliance suggested the segregation of work in the employer's classification system had contributed to the systemic discrimination addressed in the section 11 complaints and argued that arbitrarily established groupings which had contributed to the problem should not now form the basis for comparison under section 11 of the act and sections 14 and 15 of the *guidelines*.

The alliance advocated the "weighted quadratic mail-composite-line" as the most appropriate methodology to ascertain the wage gap and implement pay equity. According to the alliance, equal value is obtained by this method through

the mechanism of equating equal points between female-dominated occupational group scores (by subgroup or level) with the same point value on the “weighted quadratic male-composite-line” [1, ¶¶ 62-73].

DEALINGS OUTSIDE THE TRIBUNAL FORUM

On April 21, 1997, following a national convention of the Public Service Alliance of Canada in Toronto and a week before the calling of a general election by Prime Minister Chretien, the Treasury Board Secretariat made an \$850 million offer to the alliance to settle the pay-equity complaint [10]. The offer also came nearly three months after the parties had completed their submittals to the tribunal. The alliance and the Treasury Board jockeyed for position through the months of June and July, producing memoranda and news items setting forth their respective assessments of the pace of negotiations and the involved issues. The alliance, knowing its case had benefitted from the Phase I decision of the tribunal, was prepared to play the string out and await a Tribunal Phase II decision thought to be forthcoming in the fall of 1997. The alliance members also were cognizant of the fact that collective bargaining was scheduled to begin in August after a suspension of contract negotiations for nearly six years. Both parties had a stake in making collective bargaining work after such a long hiatus and the pay-equity dispute was recognized by both as a roadblock to an agreement. From its point of view, the Treasury Board argued \$850 million was a significant payout and stressed that the affected employees had waited a long time, with the outcome still uncertain. The alliance did not accept the offer, asserting it was only about 50 percent of what the members estimated they were entitled to, based on the JUMI study. If the offer was considered to be a down payment on the ultimate bill, however, they had no objection to the Treasury Board issuing the monies [10, 11].

The parties deadlocked in late June on the pay-equity front and did not return to discussing matters until the Treasury Board’s negotiator on pay equity, Mary Eberts, tendered an offer of \$1.3 billion on August 11, 1997, to settle the dispute. The alliance responded in October with a counterproposal based on its submissions to the tribunal. The Treasury Board negotiators responded to the counterproposal on December 8, 1997. They estimated the proposal would involve a payout of \$5.3 billion and concluded it was unreasonable, being more than twice the amount the alliance had stated previously was owed to it. The Treasury Board concluded that while its offer of \$1.3 billion was still on the table, the alliance really had no interest in negotiating a settlement and was willing to await the decision of the tribunal. The board also announced that an independent auditing firm had confirmed its costing of the counterproposal. The alliance responded that its proposal amounted to a payment totaling \$3.1 billion. The parties at this time broke off discussions on pay equity as well as contract negotiations [12, 13].

Meanwhile, the tribunal was studying and evaluating the testimony and evidence and no doubt hoping that a negotiated settlement might be reached

between the Treasury Board and the alliance. Settlements on section 11 complaints had been reached between the alliance and the Treasury Board several times in the 1980s and, of course, the most recent settlement of a complaint was just two-and-a-half years before, involving the Professional Institute of the Public Service of Canada and the Treasury Board of Canada Secretariat.

On March 17, 1998, Justice Muldoon of the Federal Court of Canada issued a decision that called into question the authority of a Human Rights Tribunal to rule on pay-equity matters and ordered that proceeding be halted in a complaint between Bell Canada and the Communications, Energy and Paper Workers Union. No evidence was presented in this case challenging the *Equal Wages Guidelines* or the effect of section 11 on wage-gap methodologies. Muldoon, however, included a comment gratuitously in his decision that a direct job-to-job comparison was the only methodology consistent with section 11 of the act. On April 13, 1998, the tribunal hearing the 1984 and 1990 cases involving the Public Service Alliance of Canada and the Treasury Board of Canada Secretariat requested the parties to make submissions on whether, and/or to what degree, Justice Muldoon's decision had any bearing on the issues in dispute.

The CEP union, in the meantime, appealed Muldoon's decision to the Federal Court of Appeals of Canada. On May 8, 1998, the tribunal decided not to hear the submissions regarding the Muldoon decision. The tribunal members stated they saw no benefit in receiving submissions on a decision under appeal.¹ They also announced their decision would be ready for publication in July unless there was unanimous agreement by the parties to hold the decision pending the outcome of the appeal. Unanimous agreement did not occur, and the tribunal's decision was published on July 29, 1998 [16].

THE HUMAN RIGHTS TRIBUNAL'S DECISION

The lengthy 203-page decision reviewed all the key issues presented during 262 days of hearings. The tribunal, after an extensive discussion of the proposed remedies on matters of retroactivity; method and calculation of payment; interest on payments; recognition of hurt feeling and special compensation; and costs of litigation; issued fifteen orders [1, ¶¶ 417-507]. The tribunal found a breach of section 11 of the act and ordered the following key actions. First, that the wage gap for direct wages shall be calculated by the commission's methodology of "level-to-segment." Second, that the effective date for calculation of the retroactive wage adjustment is March 8, 1985. Third, that for each year of the

¹The Federal Court of Appeal overturned the decision of Muldoon (November 16, 1998) ruling that human rights tribunals were the properly constituted bodies to hear and render decisions on pay equity cases. Bell Canada appealed this decision to the Supreme Court of Canada. On July 9, 1999, the Supreme Court refused to hear the appeal filed by Bell Canada and by so doing let the appeals court's decision stand [14, 15].

retroactive period (March 8, 1985-July 29, 1998) equalization payments shall be calculated using the 1987-88 job-evaluation data from the JUMI study and contemporary wage rates for the applicable fiscal year. Fourth, that pay equity adjustments for wages after the date of the decision shall be folded in and become an integral part of wages. Fifth, that the Treasury Board and the alliance shall have one year from the date of this decision to agree on the distribution of the aggregate sums of the payout and that if they cannot agree, the issue will revert to the Tribunal for a decision. Sixth, that simple interest based on the Canada Savings Bond rate in effect on March 1 will be calculated semiannually and paid on the net amount of direct wages calculated as owing for each year of the retroactive period and for post judgment years until the ultimate payment of the pay-equity adjustment. Seventh, that the claim for hurt feelings set forth by the alliance and the commission pursuant to section 53(3)(b) of the act as well as the alliance's claims for cost is dismissed. Finally, that the question of indirect wages (i.e., benefits) relative to pay equity shall be determined in Phase III of the proceedings [1, XI Orders].

Estimates were that nearly 54,000 clerks, secretaries, librarians, data processors, hospital workers, and education support staff currently working in the public service were affected by the decision. Further, approximately 140,000 former employees who worked for the federal government for part of the retroactive time period were also affected. Additionally, workers who had retired or taken buyouts since March 8, 1985 would also get adjustments to their pensions or buyout packages. Lastly, the estates of public servants who died during the retroactive time frame would be eligible for adjustments to their estates. Guesses about the total net cost of the decision for the federal government varied from three to five billion dollars, with the alliance estimating privately that it might amount to four billion dollars [17, p. A1].

POSTTRIBUNAL JUDGMENT CHRONOLOGY

The interaction between the parties did not conclude with the decision of the tribunal, as shown in Table 3.

On August 27, 1998, after thirty days of review and analysis of the tribunal's decision, Treasury Board Secretariat President Marcel Massé and Minister of Justice Anne McLellan announced at a press conference the government would appeal the tribunal's decision to the federal court (trial division). The government would also undertake a review, with full consultations, of section 11 of the Canadian Human Rights Act. Further, it would continue to seek a negotiated settlement and that the government's offer of \$1.3 billion for a settlement remains on the negotiating table. Finally, the government would move immediately to resume contract negotiations with the alliance and would offer to implement pay equity in the new collective bargaining agreements. Massé commented, ". . . we want to move quickly to implement pay equity on a fair and equitable basis in the

Table 3. Chronology of Events:
August, 1998 Through October, 1999

August 27, 1998	<ol style="list-style-type: none"> 1. Treasury Board announces it would appeal the tribunal's ruling to the Federal Court of Canada. 2. Undertake a review, with full consultations, of the law on pay equity. 3. Continue to seek a negotiated settlement for back pay. The \$1.3 billion offer remains on the negotiating table.
September 15, 1998	Treasury Board and the alliance resume negotiations at Table 1; included in the board's proposal is an offer to adjust ongoing salaries for the six occupational groups affected by the tribunal ruling.
September 23, 1998	The alliance rejects the Treasury Board's offer and requests that a Conciliation Board be established.
October 29, 1998	The alliance announces its intention to ask its members to vote to authorize a strike.
November 13, 1998	Both the alliance and the Treasury Board reach a tentative agreement on a contract package presented to them by Conciliator Norman Bernstein.
December 13, 1998	The tentative agreement at Table 1 between the alliance and the Treasury Board is ratified.
January and February, 1999	Tentative agreements are reached at Tables 2 and 5 between the alliance and the treasury board.
January 29, 1999	The Treasury Board files its written arguments on the tribunal's decision with the federal court.
May 31-June 10, 1999	Hearings on the appeal by the Treasury Board of the Tribunal Phase II decision are held before Justice John M. Evans of the federal court (trial division) from May 31-June 10, 1999. Justice Evans indicates a decision will not be forthcoming until the fall of 1999.
July 13, 1999	The alliance requests the tribunal to reconvene to decide the issue of implementation of the payment as the parties are unable to reach agreement during the one-year time frame established by the tribunal in their orders of the July 29, 1998 decision.
October 19, 1999	Justice John M. Evans issues a decision that dismisses the application for judicial review and awards court costs to the Public Service Alliance of Canada.
October 29, 1999	After a week of closed-door negotiations the Treasury Board and the alliance reached a settlement on all outstanding issues in the complaint. The settlement was estimated to amount to 3.5 billion dollars affecting 230,000 active and former employees.

public service of Canada. A fair system, however, must also be fair to Canadian taxpayers. Our approach balances these two responsibilities [18, p. 1]. Minister McLellan stated, “We are of the view that the Tribunal chose a methodology that does not meet the requirements of the Canadian Human Rights Act and *Equal Wages Guidelines*” [18, p. 1].

Talks were resumed between the Treasury Board and the alliance on September 15, 1998, and progress on contract negotiations were made in the next several days. On September 20, the board tabled its pay-equity proposal which included a payment of \$98 million to partially address the tribunal’s decision. The proposal included groups that were not at Table 1 (the LS and HS group were at Table 5 and Table 2), and the adjustment was not rolled into the proposed 2 percent and 2 percent pay raise offered by the employer. The alliance found the proposal unacceptable, and on September 23, 1998, requested that a conciliation board be established to review the impasse. On October 29, 1998, the alliance announced it would ask its members to authorize a strike vote. The strike was approved by a large majority of members on November 12, 1998.

In the meantime, the Treasury Board requested the resumption of talks on October 30, 1998. They began on November 9, 1998, and were assisted by Conciliator Norman Bernstein of the Public Service Staff Relations Board. On November 13, the alliance and the Treasury Board reached a tentative agreement on a package of twenty-eight item recommendations from Bernstein to settle the dispute. The agreement with respect to pay equity took the form of a 112-million dollar special pay adjustment to the four occupational groups (CR, EU, ST, and DA(con)) at Table 1 affected by pay equity. The adjustment by group and level was to be folded into the employee’s salary before the 2.5 percent across-the-board pay raise of the second year of the contract went into effect [19]. The tentative agreement at Table 1 was ratified by the affected members on December 13, 1998. Analogous special pay adjustments having appropriately reduced aggregate amounts were included for the LS occupational group in the agreement reached at Table 5 in January 1999, and for the HS group in the agreement reached at Table 2 in February, 1999.

THE APPEAL TO THE FEDERAL COURT (TRIAL DIVISION) OF CANADA

On January 29, 1999, the Treasury Board submitted its appeal to the Federal Court of Canada. The submissions on behalf of the applicant, the Attorney General of Canada, named as respondents the Public Service Alliance of Canada and the Canadian Human Rights Commission. Entitled *Applicant’s Memorandum of Fact and Law*, it consisted of sixty-four pages of text and two appendices, one containing illustrations of key concepts and the other an outline of problems with the process of the JUMI study [20]. The order requested of the court by the attorney general was that “the decision of the Tribunal be quashed, and the

matter be remitted back to the Tribunal for determination in accordance with the requirements of the Act and those guidelines which this Court determines to be valid” [20, p. 65].

Subsequent to the submissions, the court scheduled hearings on the matter before Justice John Evans for May 31, 1999, through June 11, 1999. It should be noted that the federal court cannot consider the issues afresh or substitute its own opinion for that of the tribunal. Its role in the appeal is to determine solely whether the tribunal in its ruling erred in fact or law and, if so finding, remit the matter back to the tribunal for reconsideration of the complaints.

The hearings opened on May 31, and the first three days were concerned with the presentation of counsel for the Attorney General of Canada. The Public Service Alliance of Canada made its presentation and rebuttal of the government’s appeal on days four and five and the morning of day six. The Canadian Human Rights Commission began its presentation in the afternoon of day six and completed its rebuttal on day eight. Finally, the Treasury Board spent the afternoon of day eight and the morning of day nine on its rebuttal of the presentation of the alliance and the commission. The hearings closed a day-and-a-half ahead of schedule [21, 22].

In general, the testimony at the hearing by the parties repeated the arguments and positions previously articulated before the tribunal. At the opening of the hearing, however, both respondents’ counsels took issue with aspects of the government’s submission, claiming they were never entered as evidence before the tribunal and could not now be raised with the court. The lawyers pointed out that evidence which had been before the tribunal was obviously acceptable and also that material used to illustrate and not intended to summarize actual data was not a problem. It was not, however, appropriate to enter into the record “any material which, for example, summarizes actual data that was never presented to the tribunal. It is also not appropriate to provide calculations which could not be done without specialized assistance [21, Bulletin No. 9, June 10, 1999, p. 2]. The government argued the material was just an expansion and an illustration of information filed earlier. Justice Evans indicated he would take the matter under advisement [21, Bulletin No. 2, June 1, 1999, p. 1].

One new area of argument that had not occupied the tribunal’s attention was the government’s critique of the use of expert testimony on behalf of the complainants and also those experts requested by the tribunal. In its *Memorandum of Fact and Law*, the government asserted: “Instead of applying the requirements of Section 11, the Tribunal erred in law and exceeded its statutory jurisdiction by abdicating its role to determine and apply the legal requirements of Section 11 to experts who were neither charged with the responsibility nor qualified to determine the legal criteria [20, ¶ 99, p. 35]. Further, they observed, “. . . the Tribunal approached the matter as though the expertise of the pay equity experts, and their methods of achieving pay equity and their policy objectives in circumstances different from these established by the Section 11 wage discrimination provisions of the federal Act should govern. This is an error of law [20, ¶ 119, p. 41]. Sheila Block, one of

the government counsels, observed that the statistical experts who provided evidence to the tribunal were not experts in the law and this ultimately could have led the tribunal to reach a decision that did not conform with the legal requirements of the Canadian Human Rights Act [2] and the *Equal Wages Guidelines*, 1986 [3]. Instead of listening to the experts, she contended, the tribunal should have asked the right legal questions and found a methodology in keeping with the legal requirements [22, June 2, 1999, p. 1].

Both the commission and the alliance counsels took the same approach in their response to the government's claim that the tribunal had followed the advice of experts rather than the dictates of the law. They pointed out that two appellate court rulings and one federal court ruling had consistently endorsed the tribunal as the proper arena for deciding federal government pay-equity disputes and that relying on expert opinion and testimony is permissible when needed to provide information likely to be outside the experience of tribunal members. The tribunal, they commented, used the experts to provide them with information on approaches that could be taken to achieve the principle of section 11, to assist them in sorting out the mass of data available from the JUMI study, and to provide advice on reliable statistical techniques and methods. In short, they asserted it was perfectly proper and reasonable for the tribunal members to ask for the assistance of persons with special knowledge to aid them in the effort to arrive at a correct judgment. The alliance noted that Justice Joyal of the federal court in April, 1991, in a case involving this tribunal and this complaint, observed in pay-equity complaints that there was a need for a thorough inquiry and that expert evidence is a prerequisite for that thoroughness to occur. Both the alliance and the commission also said the government had never challenged the qualifications of these experts or raised objections to their appearance before the tribunal during the hearings [21, Bulletin No. 8, June 9, 1999, p. 2; 23, pp. 3-4].

At the conclusion of the hearings, Justice Evans said it had been an educational experience, he understood the importance of the case and its impact, and he intended to do it justice. He also noted, however, that his workload continued over the summer and the parties were not to expect a decision before late autumn [22, June 11, 1999, p. 2].

THE ALLIANCE REQUESTS THE TRIBUNAL TO RECONVENE

The decision of the tribunal on July 29, 1998, contained four orders that potentially and actually committed the tribunal to further engagement with the complaint. These orders are reproduced below:

ORDER 3

That the actual wage adjustment for a particular level or sub-group within each complainant occupational group shall be determined by mutual agreement between the Alliance and the Respondent so as not to exceed the total payout calculated for each complainant group.

ORDER 8

That the Respondent and the Alliance shall have one year from the date of this decision to agree upon the distribution of the aggregate sums of the payout

ORDER 9

That the Tribunal remain seized of the issue of wage adjustment should the Alliance and Respondent are [sic.] unable to agree upon the distribution of the aggregate sums of the payout for each female-dominated complainant group.

ORDER 13

That the issue of whether adjustments of direct wages for the retroactive period is to be considered wages for all purposes, or wages for purposes of superannuation but not for other pay purposes shall be determined in Phase III of these proceedings [DECISION OF THE HUMAN RIGHTS TRIBUNAL—PHASE II, July 29, 1998, XI ORDERS].

On July 13, 1999, counsel for the Public Service Alliance of Canada wrote the registrar of the Canadian Human Rights Tribunal asking that the tribunal be reconvened and that blocks of dates for hearings be set aside in the event the parties had not reached agreement by the end of July, 1999. Nycole Turmel, national executive vice president, stated “It has been almost a year since the Tribunal issued its decision. According to the Tribunal order, the parties had one year to come to an agreement on the actual implementation of the decision” [24, p. 1]. Turmel went on to relate, “Treasury Board representatives have done what they must in order to appear to be discussing the matter as the Tribunal directed. However, all indications are that the government will wait for the Federal Court’s decision on their appeal to be issued before discussing the matter seriously” [24, p. 1].

Orders 3, 8, and 9 provided that the actual wage adjustment for the levels and subgroups within each occupational group was to be determined by mutual agreement between the alliance and the government as long as it did not exceed the total amount of money calculated for each occupational group. Further, the parties would have one year from the date of the decision to agree upon the distribution of the payout and, if the parties could not agree, the tribunal would remain seized of the issue of wage adjustment.

The parties met on the matter of implementation of the tribunal decision on September 22, 1998. In early October, the alliance asked the Treasury Board to present its position on implementation. In late October, the Treasury Board responded by stating its position was limited to discussing and coming to an agreement on the total amount of money but not on the distribution of the total by level. In other words, it would not discuss implementation. It is important to remember that at this same period of time, matters had really turned sour with regard to collective bargaining negotiations between the parties. For the next five months, periodic communications took place between Daryl Bean, president of the alliance, and Alain Jolicoeur, chief human relations officer of the Treasury Board, on nuts-and-bolts technical matters relating to the orders. The parties agreed to

meet again during May. In May, several meetings occurred dealing with issues such as interest, the calculation of the number of current and past employees affected by the decision, and the status of the HS occupational group relative to the decision. At these meetings, the alliance requested the board to provide a position on all outstanding issues by the end of June. The parties met again on June 25, 1999, and the Treasury Board indicated it would provide more information on its assumptions and calculations, but not until later in July.

The climate for agreement over the entire year, of course, was clouded by the government's appeal of the tribunal decision. It would be illogical for the government in good faith, to fully implement the tribunal decision at the same time it was trying to radically change the substance of the decision through the judicial process. It seemed the outstanding issues connected to the administration of the decision (which related to almost the entire content of the orders) might necessarily be placed on the agenda of the tribunal once more [25, pp. 1-2].

The alliance also asked the tribunal to initiate Phase III hearings (Order 13) at the same time it reconvened to conduct hearings on the implementation of the Phase II decision. The alliance contended that adjustments of direct wages for the retroactive period should be considered wages for all purposes and that meant the hearings on Phase II implementation and Phase III issues (e.g., overtime, acting pay, maternity leave, etc.) were unavoidably linked. The alliance, thus, planned to ask the tribunal to make a final decision when it reconvened on all the outstanding issues to move the process along. The concern of the alliance with expediting the resolution of the dispute is understandable. Fourteen-and-one-half years had passed since the initiation of the original CR occupational group complaint. Time certainly seemed to be on the side of the government. Any of the parties has the right to appeal to the federal court any decision from the tribunal that results from the Phase II implementation decision or the projected Phase III hearings. Given the history of this dispute, which had taken on the characteristics of a saga, many observers in July thought it was not unrealistic to speculate that the matter would continue to be unresolved for years to come [25, p. 2].

**THE DECISION OF JUSTICE JOHN M. EVANS OF THE
FEDERAL COURT OF CANADA, TRIAL DIVISION,
OCTOBER 19, 1999**

Justice Evans denied the application by the attorney general of Canada to quash the July 29, 1998, decision of the human rights tribunal and remit the complaint back to the tribunal for reconsideration. His reasoning led him to reject all of the major points of the government's application. His discourse on the matter before him was both elegant and comprehensive. Key elements of the text of his commentary are presented in an edited version here to illustrate the tenor of his judgments.

First, with regard to the standard of review, Justice Evans pointed out that it was within his purview to interpret for himself the provisions of the act that are in dispute and, if his interpretation differed from that of the tribunal, then the Tribunal had erred in law and its decision was liable to be set aside [26, ¶¶ 72-74]. He noted that only subsection 11(1) of the Canadian Human Rights Act was directly relevant to the issues in dispute:

While this subsection is undoubtedly elegant in its brevity, the absence of the more detailed elaboration typically found in pay equity legislation in the provinces, and in those American states that have adopted it, inevitably leaves considerable scope to the Commission and the Tribunal, with the assistance of pay equity and compensation experts, and statisticians, to decide how the principle is to be operationalized in any given employment context [26, ¶ 75].

This passage shows the beginning of the rejection of the government's contention that the tribunal was blinded by the testimony of expert witnesses and diverted from basing its decision on the plain meaning of the law. This perspective is reinforced by paragraphs 78, 79, and 83:

In short, the correct interpretation of section 11 in my opinion is that Parliament intended to confer on the agencies created to administer the Act a margin of appreciation in determining on a case-by-case basis, and with the assistance of the technical expertise available, how the statutorily endorsed principle of equal pay for work of equal value is to be given effect in any given employment setting [26, ¶ 78].

In my view, decisions of the Supreme Court of Canada establishing correctness as the standard of review applicable to the Tribunal's interpretation of its enabling legislation are not determinative of the issues raised in this case. Section 11 is a statutory provision that was enacted at the level of a principle, and requires for its implementation mastery of a range of technical knowledge of considerable sophistication, and a thorough understanding of the given workplace [26, ¶ 79].

The fact that the implementation of a statutory provision calls for a range of technical expertise much broader than that possessed by courts of law is a clear indication that more than general questions of law, legal reasoning or *quasi*-constitutional values are involved [26, ¶ 83].

The final coup-de gr ace was administered in paragraph 88 of his opinion:

While I may give no deference to the Tribunal's views on the interpretation of the legislation this does not mean that I should be unwilling to be educated by their reasons for decision. Nor, in light of the Tribunal's lengthy immersion in the issues raised by this dispute and the open-ended nature of the relevant statutory standard, should I be alert to brand as a question of law that which is only doubtfully so, . . . [26, ¶ 88].

He concluded his discourse on this topic by stating with regard to the interpretation of the legislation that in his opinion, “it was not an error of law for the Tribunal to rely on the evidence of expert witnesses who drew on their experience with specialized pay equity legislation [26, ¶ 104].

He also rejected the argument by council that the tribunal erred in law when it accepted the “level-to-segment” methodology for basically the same reasons elucidated above.

Despite the attractiveness of counsel’s computer-assisted presentations, I am not satisfied that she established that the Tribunal erred in law by misinterpreting section 11 when it adopted the segmented line methodology for determining wage differentials. I do not accept that section 11 prescribes as precisely as counsel contended the characteristics that a methodology must possess for determining the existence of a prohibited wage gap. Nor can it be said that, to the extent that the Tribunal’s selection of a methodology involved the exercise of discretion, it exercised its discretion unreasonably, or without regard to the evidence before it [26, ¶ 109].

Section 11 provides only a broad legal framework within which problems of wage discrimination between men and women are to be tackled in light of the facts of the particular employment situation, the evidence of expert witnesses, and the underlying purposes of the statute. In my view it would be inconsistent with both the underlying purpose of section 11, and the legislative record, to interpret the section as impliedly prescribing with the particularity suggested by counsel for the Attorney General the characteristics of the permitted comparative methodologies. Much must inevitably be left to be decided by the Commission and the Tribunal case-by-case, with the assistance of experts [26, ¶¶ 109, 115].

Justice Evans concluded, “I can find nothing in the text of the Act, or in its underlying policy, [that] leads me to the conclusion that the Tribunal’s chosen methodology was inconsistent with the statute [26, ¶ 128].

The decision additionally dealt with the issue of causation raised by the government, i.e., that only wage differences caused by sex discrimination could be measured under the statute and the tribunal’s methodology was, with respect to this criterion, fatally flawed. Evans deduced that “subsection 11(1) can thus be seen to have tackled the problem of proof by enacting a presumption that, when men and women are paid different wages for work of equal value that difference is based on sex, unless it can be attributed to a factor identified by the Commission in a guideline as constituting a reasonable justification for it [26, ¶ 151]. He also emphasized that “in order to establish unlawful discrimination on a ground prohibited by human rights legislation it is sufficient that the conduct in question was based *in part* on the prohibited ground. it does not have to be the *only* reason for the conduct” [26, ¶ 154]. Evans concluded that “section 14 of the guidelines is authorized by subsection 27(2) of the Act and permits the Tribunal to do what it did here: that is, to treat the predominantly male occupational groups as one

group for the purpose of measuring any wage differences between male and female employees performing work of equal value” [26, ¶ 158].

On the matter of the government’s contention that wage comparisons could be made only between whole occupational groups, Evans indicated that the tribunal’s reasoning was cloudy on this point and not easy to understand. He turned for guidance to the submissions made by the counsel for the commission on human rights, since it had been delegated the responsibility by Parliament to issue the guidelines—a responsibility entrusted to it, Evans stated, “by virtue of its front-line experience with issues of discrimination” [26, ¶¶ 169, 173]. Recognizing that the pattern of evidence is somewhat “murky” in this area of consideration, he nevertheless concluded that section 15 of the guidelines does not mandate that comparisons be based on “employees in predominantly male occupational groups, sampled by group” [26, ¶ 187]. Evans backed up the tentativeness of the data underlying his judgment here in an interesting and important way:

In the event that I am wrong on this point, and the Tribunal did commit an error of law because section 15 of the Guidelines requires the Tribunal to base its conclusion on the wage curve of the predominantly male occupational groups, the error would not warrant the quashing of the Tribunal’s decision. I discuss this issue later under the heading, “G. REMEDIAL DISCRETION” [26, ¶ 187].

At the REMEDIAL DISCRETION position of his decision, Justice Evans related:

If, contrary to the view that I expressed earlier, the Tribunal did err in law by failing to compare the wages paid and the value of the work performed by employees in the complainant occupational group with those of predominantly male occupational groups in the manner directed by the Guidelines, it does not necessarily follow that the Tribunal’s decision must be set aside [26, ¶ 219].

On an application for judicial review it is within the Court’s discretion to grant or to refuse the relief sought by an applicant, even when a reviewable error has been committed by the administrative decision-maker. There are a number of grounds on which a remedy may be withheld in the exercise of the Court’s discretion, some of which are potentially relevant here [26, ¶ 220].

He observed that counsel for the alliance had asserted that misconduct by the applicant (the government) justified the refusal of relief. Evans, however was not supportive of the misconduct charge. He set forth the pros and cons of his reasoning in stating he would not quash the tribunal’s decision even if it had made an error in law concerning its interpretation of section 15 of the *guidelines* in the following passages:

The most powerful reason for withholding relief is that, to set aside the Tribunal's decision on the ground that it did not comply with section 15 of the Guidelines, would likely frustrate the purposes underlying section 11 of the *Canadian Human Rights Act*, and inflict a substantial injustice on the thousands of employees in the federal public service, many of whom are now retired, who would be deprived of the payment of back-wages, future wages and pension increases to which they are entitled [26, ¶ 227].

To be weighed against these considerations, of course, is the principle that administrative tribunals are obliged to exercise their statutory decision-making powers in accordance with their enabling legislation, and that public money should not be disbursed pursuant to decisions that are inconsistent with the legally binding instructions of the legislature [26, ¶ 228].

In this context it is important to remember that an application for judicial review is a *public law* proceeding and that in the final analysis relief is granted by the court in order to further the public interest. Thus, relief should be refused when it would not serve the public interest to set aside a decision, even if vitiated by legal error. This is the basic principle that informs the various grounds on which the discretionary remedies available on an application for judicial review may be withheld [26, ¶ 229].

He asserted it would not be in the public interest for the comparator population to be resampled by occupational group because, for all practical purposes, it would be impossible and, even if theoretically possible, would involve considerable expense and entail further delay in the resolution of the dispute. Evans then dramatically opined from the bench, "This is a matter that has also dragged on for far too long and at far too great a cost for all concerned. I would be reluctant to grant a remedy that would have the effect of imposing further delay, with the consequent injustice that this would inflict on many. Justice unduly delayed in this context is indeed likely to be justice denied" [26, ¶ 232]. He further observed that the relevant context is one where, if an error occurred, it was an error of a "merely technical nature that did not thwart the essential purposes of Section 11 or their implementation [26, ¶ 234].

The conclusion to his decision was a thorough dismissal of the government's position. Its cumulative effect no doubt had a devastating impact on the government's willingness to engage in a further judicial hearing on this complaint. The conclusion is reproduced in its entirety:

In my opinion the position taken by the Attorney General in these proceedings contains two structural flaws. First, its approach to the interpretation of the *Canadian Human Rights Act* and the *Equal Wages Guidelines* is too abstract: it is insufficiently grounded in the factual realities of the employment context under consideration, the testimony of the array of expert witnesses who assisted the Commission and Tribunal, or analogous legislation in other jurisdictions [26, ¶ 236].

The Attorney General has sought to convert into questions of general law and statutory interpretation aspects of the implementation of Parliament's enactment of the principle of equal pay for work of equal value that are better regarded as factual, technical or discretionary issues, or questions of mixed fact and law, entrusted to the specialist agencies responsible for administering the legislation [26, ¶ 237].

Second, the Attorney General's argument was based on the narrowest possible interpretation of the *Canadian Human Rights Act*, including the definition of the problem at which Section 11 was aimed and the measures that the Tribunal could lawfully take to tackle it. It paid only lip service to the regular admonitions from the Supreme Court of Canada that, as quasi-constitutional legislation, human rights statutes are to be interpreted in a broad and liberal manner [26, ¶ 238].

The Attorney General too often seemed to regard the relevant provisions of the Act as a straitjacket confining the Tribunal, instead of as an instrument for facilitating specialist agencies' solution of long standing problems of systemic wage differentials arising from occupational segregation by gender and the under-valuation of women's work [26, ¶ 239].

Three consequences follow from the Attorney General's interpretation of the *Canadian Human Rights Act* and the Guidelines. First, the Tribunal is prohibited from using a methodology for identifying and measuring a wage differential that would take into account the fact that women are under-represented among employees who are performing more highly valued work, for which the remuneration increases more rapidly than the value of the work. Instead of a methodology approved by all the expert witnesses from whom the Tribunal heard, it should have adopted one for which there was no support at all from any witness [26, ¶ 240].

Second, the Tribunal is prohibited from identifying and measuring a wage differential by comparing the wages paid to employees in predominantly female occupational groups with the average wage paid to employees in predominantly male groups who are performing work of equal value. Instead, the Tribunal must confine its comparison to the wages of employees in the lowest paid male group [26, ¶ 241].

Third, the Tribunal is required to base its comparison on occupational groups, despite their limited utility as a basis for setting salaries in general and for pay equity exercises in particular [26, ¶ 242].

In my opinion Parliament cannot be taken to have required any of these consequences when it enacted the principle of equal pay for work of equal value in section 11 of the *Canadian Human Rights Act* in an attempt to eradicate systemic wage discrimination resulting from the gendered segregation of work and the under-valuation of the work typically performed by women [26, ¶ 243].

For the reasons that I have given, the application for judicial review is dismissed [26, ¶ 244].

Largely on the basis of the success of the Alliance in this proceeding I award it its costs, despite the importance of the issues raised by the applicant. However, I do not accept the Alliance's submissions that costs on the highest scale are warranted [26, ¶ 245].

REACTION TO THE DECISION

Generally, the press agreed it was a forceful dismissal of the government's case for quashing the decision of the tribunal. The *Ottawa Citizen* stated "Judge Evans strongly rejected the government's appeal . . ." [27, p. A-1]. The *Ottawa Sun* referred to Judge Evans decision as "chastising the government," and that "Evans shot down every argument put forward by the Attorney General of Canada . . ." [28, p. 2]. The *Globe and Mail* reported, "The Court rejected every government argument in a stinging rebuke . . ." [29, p. A-1].

A variety of commentators also expressed doubts, given the content of the decision, that the government would launch a further appeal. The *Globe and Mail* reported that experts said, "The decision sends a clear message to employers: stop using narrow legal arguments to avoid catch-up raises to women staff. It says you have got to live with pay equity, you have got to move on and implement the legislation" [29, p. A-1]. Scott Streiner of the Canadian Human Rights Commission, referring to the Bell Canada decision at the appellate court level and that of Judge Evans, commented that in both cases the court awarded legal costs to the unions "which is a bit of a signal by the court" [29, p. A-1]. Michelle Falardeay-Ramsey, chief commissioner of the CHRC, was quoted in the *National Post* to the effect that "this clears the air and it establishes what is the law as far as pay equity is concerned. The government would be spending money for nothing. The chances [of victory] are slim" [30, p. A-12]. Again on this score, Giles Gherson, political editor of the *National Post*, wrote:

If there's one stern message from the court in recent years, it is that whether the topic is low paid female workers or native fishermen, if Ottawa cannot stand the financial cost of loosely worded, politically correct statutes, it should revise them, not count on jurists to do their dirty work for them. (Sheldon Alberts, "Wage Dispute Could Cost Ottawa \$5B", *The National Post*, October 20, 1999, p. A-1; Giles Gherson, "A simple pay equity lesson: jurists won't do dirty work" [30, p. A-12]).

Finally, Kathleen Harris in the *Ottawa Sun* thought there might be a small cause for alliance optimism that an appeal might not be forthcoming in the fact that "there's a new Treasury Board President—a woman. Lucienne Robillard will fiercely defend the government's position publicly, but surely she's at least a shade more sensitive to this issue than her predecessor, Marcel Masse" [31, p. 3].

Within hours of the decision, the Public Service Alliance of Canada wrote to Lucienne Robillard requesting a meeting on how to implement the settlement and pay workers, in a sense reinstating its attempts to get the Treasury Board of Canada secretariat to comply with orders 3 and 8 of the tribunal's decision. Elizabeth Millar, the pay-equity specialist for the alliance, said the union would not negotiate with the government over the court's decision relative to the formula to eliminate the pay gap. She indicated, however, that the government's estimate of cost may have been exaggerated in an effort to sway public opinion, "We have never been able to reproduce numbers to reflect the government's estimate. We're convinced they added in things to scare people that the government can't afford this and should appeal further [32, p. A-3]. The alliance estimated the bill at about \$3.2 billion, \$2.1 billion in back pay and \$1.1 billion in interest, similar to the Canadian Human Rights Commission's estimate. Millar related that the alliance was open, however, to negotiation with Ottawa over how to administer and interpret the court decision when deciding the size of cash awards for individuals. She observed, "the further you go back in time, the less precise you need to be. But you need to give people some average sum that compensates them" [33, p. A-7]. Millar also noted there was scope for negotiations on salary-related benefits, such as back pay for overtime, maternity leave, promotions, and severance pay: the indirect costs that were scheduled for Phase III hearings by the tribunal [32, p. A-3].

The initial response by Treasury Board President Lucienne Robillard was to keep open all the government's options, including an appeal to the appellate court. She said the government remained committed to the principle of pay equity but needed several days to study the issue and consult with its caucus. Robillard recalled the government had appealed the tribunal's decision because it wanted a clear interpretation of the Human Rights Act. She stated further, "As long as that clarification is in the ruling, we will be able to go further with our partners [29, p. A-1]. The following day, Prime Minister Chretien hinted in the House of Commons that Ottawa does not plan to appeal the ruling. He stated, "Of course sometimes we have to make some expenditures that were not forecast, but we always have money to do that—balance the books and have the programs and have tax cuts" [33, p. A-7]. He added that once the government studies the decision, "we will be in a position to appreciate what are the real obligations of the government and how to implement the judgement, if we decide not to appeal the judgement" [33, p. A-7]. Various sources reported in the *National Post* and the *Ottawa Citizen* issues of October 21, 1999, that senior officials said the cabinet was advised it was unlikely the government could win an appeal and the preferred solution was to reopen negotiations with the alliance in search of a settlement. It was also noted that sources stated at the Liberal caucus meeting on October 20, 1999, the MPs were virtually unanimous in their opinion that the government should not appeal [32, 33]. Kathryn May reported also that senior bureaucrats were said to be more open to the idea of settling. She claimed

that “after a decade of shattered labour relations. Treasury Board is trying to patch up relations with its unions—especially the PSAC—and an appeal would be a major setback in that drive” [27, p. A-1]. It should be noted further that key Treasury Board labor relations officials during the intense period of Phase II hearings and the appeal process left the board over the summer to assume other assignments.

The only opposition party to support an appeal of Judge Evans’ decision was the Reform Party. The Reform Party’s financial critic, Monte Solberg, demanded to know whether the government would use its three-billion-dollar contingency fund to pay for the decision or whether the expected eleven-billion-dollar-budget surplus was at risk. He speculated, “Taxpayers are going to see their tax refund devoted to paying off this government fiasco. It looks like they are going to be able to kiss their tax cut goodbye” [34, p. A-1].

The government decided on Friday, October 22, 1999, that it would, while keeping open the option to appeal Judge Evans’ decision, resume discussions with the alliance on whether an agreement could be reached to resolve the dispute. After five closed-door sessions that were described as intense, the parties reached a settlement on all issues in dispute, including the area of indirect costs, which was scheduled to be part of the Phase III hearings. The total award was estimated at \$3.6 billion and likely would affect 230,000 present and former federal public service employees. As the alliance’s chief counsel throughout the dispute, Andrew Raven, stated, “It is impossible to overstate the impact and importance of this—it’s the biggest human rights award in the world” [35, p. A-1]. The settlement must be approved by the Canadian Human Rights Commission and the Human Rights Tribunal but their approval is a foregone conclusion, since the agreement embodies their positions on the matter. Kathryn May reported the impact is already being felt on a number of outstanding pay equity cases [35]. For example, Bell Canada and the CEP union in September, 1999, following the Supreme Court’s refusal to hear an appeal from the appellate court in July, reached a tentative pay equity settlement of fifty-nine million dollars. On October 29, 1999, the same day the alliance complaint was resolved, however, the affected Bell Canada employees voted to reject the settlement and return to a hearing before the Human Rights Tribunal [35]. May also surmised that the alliance resolution could well be used as a precedent for pay equity disputes at Canada Post, Canadian Airlines, Air Canada, and the government of the Northwest Territories [35].

For current employees the payout will come in three installments in the calendar year 2000. The first payment will cover the retroactive period from 1989 to the present, and the second payment from 1985 to 1989. This will be followed by an interest payment on the amounts awarded in the first two payments. Payment for former employees will follow as the process for tracking them will be prolonged and somewhat difficult. The retroactive payments are thought to be in the range of 2.1 billion dollars; interest payments would cost approximately 1 billion dollars;

and lump sum payments incorporating indirect costs might reach 500 million dollars [36, 37].

Daryl Bean, president of Public Service Alliance of Canada, who signed the original complaint in December 19, 1984, as its recently elected president, proclaimed, "Today [October 29, 1999] is finally the time to celebrate; today we made history. Pay equity is now a reality for many workers in the federal public service . . . justice has been done, the law will be obeyed" [38, p. A-4]. He also praised Robillard for resolving the matter so fast and noted the federal government would probably get 60 percent of the payout back in terms of taxes and various forms of economic stimulation [38, p. A-4].

Lucienne Robillard, president of the Treasury Board, commented, "This agreement brings a final resolution to the long-standing pay equity issue and signals a new era of partnership we are building with the public service unions" [38]. Kathryn May reinforced Robillard's interpretation of the agreement by observing that the settlement is regarded as a "critical first step in the government's latest effort to repair shattered labour relations and build its image as 'the employer of choice'" [35, p. A-1]. She also noted that it gives the government a "clean slate for its plans to introduce a new 'gender neutral' universal job classification system . . ." [35, p. A-1].

The Reform Party continued its criticism of the government's handling of pay equity. Indicating the bill for settlement was a result of fifteen years of mismanagement, Reform Party leader Preston Manning endorsed pay equity as equal pay for equal work but not equal pay for work of equal value. He went on to state, "We simply want Canadians to know that if they don't get tax relief this year, it's because of this kind of bungling on behalf of the Liberals" [38, p. A-4]. Robillard revealed, though, that since 1989 the government had set aside an undisclosed amount every year to cover the cost of a settlement and thus the pay equity payment would not affect the government's financial bottom line, its promised tax cuts, and new program spending [35, p. A-1].

CONCLUSION

The story of the long-lasting, pay-equity dispute between the Public Service Alliance of Canada and the Treasury Board of Canada Secretariat raises interesting questions about the governmental process and relationships between the government as employer and its unionized employees in the Public Service of Canada.

It is an often-noted occurrence in the study of the collective action of legislators that in articulating broad principles and purposes in law, they seldom take into account the administrative consequences of their decisions, frequently delegating that responsibility to another governmental entity. In the matter before us, for example, in 1977 when the Standing Committee on Justice and Legal Affairs of the House of Commons was considering Bill C-25 (the Canadian

Human Rights Act [2]), then-Minister of Justice and Attorney General of Canada, the Honorable S. R. Basford, stated to the committee, “We should legislate the principle and through the Commission and through its efforts at setting out guidelines, solve those problems, presumably of definition and application” [1, ¶ 201].

How ironic that both before the tribunal and in the Federal Court of Canada, the same governing party challenged that very delegation of authority given to the Human Rights Commission under the legislation and disputed the commission’s definition and application of pay equity with regard to the *Equal Wages Guidelines, 1986* [3]. The government, as the advocate for human rights, is obviously distinct from the government as employer of unionized public servants who are bringing complaints against it with regard to one dimension of human rights (pay equity) incorporated in the legislation. The irony is extended even further when one acknowledges that the government is also the paymaster and makes appointments to the Canadian Human Rights Commission and the Canadian Human Rights Tribunal.

Again, perhaps on a lesser scale but still in the same vein, the government, then led by Brian Mulroney’s Progressive Conservative Party, stated on March 8, 1985, in launching the Joint Union Management Initiative, “This government intends to ensure that the principle of equal pay for work of equal value is applied in the Federal Public Service . . .” [1, ¶ 2]. There are risks involved, obviously, in entering a somewhat open-ended joint study, and the documentation in the Phase II hearings indicates that the government backed away from following where the facts led (although there were difficulties on both sides), contributing in part to the dissolution of the Joint Union Management Initiative.

A further illustration involves Prime Minister Jean Chretien. When he was the opposition leader in 1993 he made a pledge in writing to the Public Service Alliance of Canada that a liberal government would abide by whatever the tribunal found. After the government’s decision to appeal the tribunal’s ruling to the Federal Court of Canada, when questioned by the leadership of the alliance and reporters regarding his pledge of five years earlier, Chretien replied he had made that promise on the assumption that the tribunal’s findings would cost the government less than one billion dollars [39, p. 14]. Chretien’s implied concern with costs held, notwithstanding the fact that the principal counsel for the Treasury Board, Duff Friesen, stated before the tribunal in the Phase II hearings in response to a question from tribunal member Norman Fetterly:

You will recall that my friend Mr. Raven criticized the employer for not bringing evidence on how much the employer’s methodology would cost. The reason the employer didn’t bring that kind of evidence is that it is our submission that the cost is not relevant to deciding the principles in this case. The interpretation must be decided based on the principle alone, not on how much it would cost [1, ¶ 381].

The final irony, of course, is that the October 29, 1999, negotiated settlement, including Phase III matters, of 3.6 billion dollars is remarkably close to the December 19, 1997 estimate by the alliance of 3.1 billion dollars. The honorable S. R. Bosford, interviewed by Maclean's Bruce Wallace, stated, "I still can't understand how the process bogged down. Good God, if Parliament says something should happen, surely it shouldn't take 20 years to implement" [40, p. 28]. Perhaps Bosford would not have been as incredulous if he had kept one of the maxims of public administration in mind: that where one stands on a public issue depends on where one sits institutionally. The stance of government not surprisingly is different when it is the object of regulation than when it is the agent of regulation.

The government announced as early as August 27, 1998, that it would review with full consultations section 11 of the Human Rights Act. As cited earlier, section 11 relies on a complaint-based process to implement pay equity, and findings are made on a case-by-case basis on the part of the Canadian Human Rights Commission or, if needed, by the Human Rights Tribunal. The process permits appeals to the federal courts as well. This has resulted in extensive adversarial hearings and litigation for the alliance complaint. The respective parties have been interacting in a variety of forums for nearly fifteen years. In a real sense this may be a case where, as Justice Evans suggested [26], justice delayed probably became, for some, justice denied.

Nearly everyone recognized that the machinery of government has ground along too slowly in this matter and the system needs an overhaul. Michelle Falardeau-Ramsey, chief commissioner of the Canadian Human Rights Commission stated at the end of July, 1998, "The case had gone on long enough. It's now time for these workers to receive their payments and get on with their lives" [17, p. A-1]. She also observed at the time, "The case shows that the pay-equity provisions of the Canadian Human Rights Act must be overhauled . . ." [17, p. A-1]. Under the existing act, as was noted, employers have no obligation to address wage inequities unless workers complain. She related that the commission would like to see changes that would compel employers to address wage inequities similar to some of the legislation that exists in the provinces [17, p. A-1]. Speaking after the settlement on October 30, 1999, she stated, "We agree that after twenty years of experience section 11 of the act should be examined as long as the objective is to improve, not dilute the law" [41, p. 4].

Norman Fetterly, a member of the Human Rights Tribunal, also thought section 11 needs some revisions. He indicated pay equity should be separated from human rights legislation. The act, he said, is not an appropriate instrument for establishing pay-equity claims: ". . . it is not as sophisticated or forward looking as it should be and grievances could be better handled by special pay equity tribunals similar to those in Alberta, Ontario, and Manitoba" [42, p. 2]. Now that the complaint is finally resolved with the public "hand slapping" of the government by the federal court, we should anticipate that legislation might

be forthcoming to put the handling of pay-equity matters in an institutional format more like the ones in relevant provincial settings. Clearly all sides became weary of the contest, and certainly the government must be somewhat wary that it may have, at least in the short run, undermined the legitimate role of administrative tribunals by regularly appealing decisions to federal court. Following the announcement of the settlement, Treasury Board President Lucienne Robillard affirmed the government would review the pay-equity law. She was quoted by stating, "Surely we can do better than this. We all share the frustration with the current process, so the government intends to review the act to ensure clarity in how it is implemented" [35, p. A-1].

Finally, this dispute entered the public realm to a degree that is unusual in personnel or labor relations matters. Both the Public Service Alliance of Canada and the Treasury Board of Canada Secretariat used the medium of the press in dramatic fashion as an outlet for advocacy. On April 20, 1997, the alliance took out full-page ads in *The Ottawa Citizen* and *The Ottawa Sun* with this eye-catching phrase in large letters: "PRINT THE CHEQUES NOW!" It also included a cutout coupon to be sent to Marcel Massé, president of the Treasury Board. The Treasury Board of Canada Secretariat took its case to the members of the alliance on June 17, 1997. Massé stated in a news release he regretted that "after two months, members of the Public Service Alliance of Canada have not been provided details of the government's proposal for resolving the pay equity dispute by their union representatives. . . . Due to the resulting uncertainty and confusion among our employees, I have decided to make our offer public today" [11, p. 1]. This was followed by full-page ads in *The Ottawa Saturday Sun* and *The Ottawa Citizen*, in which the Treasury Board addressed alliance members and Canadian taxpayers with the headlines: "*Equity* begins with the right to full and fair information." The board followed up a week later in the same newspapers with full-page ads which asked: "*Why* refuse to negotiate?"

The alliance considered filing an unfair labor practice allegation, but decided instead to save its legal fire power for negotiations and to respond instead with its own press releases. Thus, a battle of press releases was launched through the summer and into the autumn of 1997. Since negotiating a settlement was overtaken by other events (cited above) and consequently moved to the back burner of the parties' dealings, the press-release battle was gradually reduced to an occasional skirmish.

There is no doubt that the publicity generated by both parties hardened positions on the pay equity matter and by going public made it improbable that a negotiated settlement would be reached. It certainly had a negative impact as well on the collective bargaining negotiations and contributed to walkouts and delays on that front. Still, negotiations were completed on the collective bargaining agreement and the final package contained a significant pay-equity component. The parties have been opposing each other for so long on this issue that perhaps they were able to compartmentalize this specific conflict and work together

on other concerns of mutual interests. The alliance and the Treasury Board opened negotiations on a new collective bargaining agreement in August. Early indications seem to imply they are progressing smoothly. Even though both parties have requested conciliation on certain issues at Tables 1, 2, 3, and 5, there seems to be no residue from the ongoing litigation of the earlier complaints and settlement that has spilled over and negatively affected the negotiations [43].

The ongoing ramifications of the settlement on other parties and in the legislative arena, of course, will be followed with continued interest by personnel and labor relations practitioners and scholars throughout North America.

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