Docket: 2002-33(IT)G

BETWEEN:

SANDRA BURROWS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 18 and 19, 2005, at Ottawa, Ontario.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Andrew Raven and Lise Leduc
Counsel for the Respondent:	Richard Gobeil and Jade Boucher

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2000 taxation year is dismissed with costs.

Signed at Ottawa, Canada, this 15th day of December 2005.

"Lucie Lamarre"

Lamarre, J.

Citation: 2005TCC761
Date: 20051215
Docket: 2002-33(IT)G

BETWEEN:

SANDRA BURROWS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre, J.

[1] This is an appeal of an assessment made by the Minister of National Revenue ("Minister") under the *Income Tax Act* ("*Act*"), which included pre-judgment interest from a pay equity award in computing the income of the appellant for the 2000 taxation year.

Agreed Statement of Facts

[2] The facts which gave rise to the present appeal are summarized in the Agreed Statement of Facts filed jointly by the parties as Exhibit A-7. It is reproduced in part below:

> 1. In 1984 and 1990, the Public Service Alliance of Canada (the "PSAC") presented human rights complaints on behalf of certain employees represented by it in female-dominated occupational groups: The complaints maintained that Treasury Board as employer had acted, and was acting, contrary to section 11 of the *Canadian Human Rights Act* (the "CHRA") by failing to provide equal pay for work of equal value (pay equity).
>
> . . .

2. On July 29, 1998, the Canadian Human Rights Tribunal (the "Tribunal") upheld the complaints, and concluded that the Treasury Board had acted in violation of section 11 of the CHRA. It ordered the Treasury Board of Canada to pay the Appellant and other civil servants a pay equity wage adjustment retroactively to March 8, 1985. The Tribunal's Order also contemplated the payment of interest on the net amount of direct wages, calculated as owing for each year of the retroactive period, as well as post-judgment interest.

. . .

3. On October 19, 1999, the Federal Court, Trial Division, rejected the Attorney General's application to set aside the Tribunal order of July 29, 1998.

. . .

4. On October 29, 1999 the PSAC and the Treasury Board entered into a Memorandum of Agreement (the "Agreement") to resolve remaining issues arising from the Tribunal's order. On November 16, 1999, the Tribunal issued a final Consent Order implementing the terms of the Agreement.

. . .

5. Pursuant to that Order and the Agreement, various payments (retroactive wage, pre-judgment interest and post-judgement [*sic*] interest) were made to affected employees in order to achieve compliance with the Tribunal's Order.

. . .

6. These payments included an amount on account of pre-judgment interest as was specified by the Tribunal order.

. . .

7. The Agreement provided the details with respect to the calculation of the interest to be paid to the Appellant. Clause 3.1 of the Agreement specifically provided that:

> 3.1 The parties agree that the following interest rates will be the applicable rate for each six-month period:

85	11.25%
86	10.00%
87	7.75%
88	9.00%
89	10.50%
90	10.50%
91	10.75%
92	7.50%
93	6.00%
94	4.25%
95	7.50%
96	5.25%
97	5.25%
98	3.50%
99	4.00%

. . .

8. The Appellant, Sandra Burrows ("Ms. Burrows") is an employee of the federal government. She has been working for Library and Archives Canada (formerly the National Library of Canada) since 1977.

9. In the course of her employment, Ms. Burrows was member of a female-dominated occupational group represented by the PSAC. As such, Ms. Burrows was one of the beneficiaries of the Tribunal's Order.

10. Pursuant to the Tribunal's Order and the ensuing Agreement, Ms. Burrows received an amount of $113,301.67 from the Treasury Board of Canada in the 2000 taxation year. The amount referred to above included a pay equity wage adjustment of $79,272.34 and interest in the amount of $34,029.33.

. . .

11. When filing her income tax return for the 2000 taxation year, the Appellant filed a T5 information slip issued by Public Works and Government Services of Canada showing interest from Canadian sources in the amount of $34,029.33. The amount is comprised of both pre-judgment and post-judgment interest, the judgment date being November 16, 1999. The amount of pre-judgment interest is $32,637.50 and the amount of post-judgment interest is $1,391.88.

. . .

12. On May 25, 2001, Ms. Burrows received a Notice of Assessment for the taxation year 2000 which confirmed the inclusion and taxation of the pre-judgment interest in her total income.

. . .

13. On July 4, 2001, Ms. Burrows filed an objection with Canada Customs and Revenue Agency (hereinafter "CCRA" or "Revenue Canada"), objecting to its assessment of the pre-judgment interest in the amount of $34,029.33 as taxable income.

. . .

14. On July 30, 2001, Ms. Burrows received a letter from Linda Matteau, Team Leader, Appeals Division, CCRA confirming that it had received her objection. Ms. Matteau also indicated in her letter that:

> As you might be aware, this issue involves many clients who have received Notices of assessment or reassessment which are similar to yours.
>
> The treatment of all the files is presently under examination and when a decision is reached, we will inform you of the said decision. In the meantime, your file will be put in abeyance until a final decision is taken in these files.
>
> . . .

15. On March 29, 2001, Headquarters, Appeals Branch issued an internal memorandum to all Tax Services Offices and Tax Centres advising of the procedures to follow in processing (i.e. coding and tracking) the objections filed by members of the PSAC with pay equity entitlements.

. . .

16. On August 27, 2001, Income Tax Appeals Directorate issued an internal memo reiterating its procedures to follow upon receipt of an objection on the issue of taxability of the interest received by members of PSAC on pay equity payments. The memo also indicates that:

> "This matter is currently under review. As a result, we remind you to hold all these objections in abeyance until the CCRA has determined its position on this issue."

. . .

17. CCRA also issued other memos dealing with pay equity.

. . .

18. On September 18, 2001, Income Tax Appeals Directorate issued an internal memo advising that the "issue of the taxability of interest received on pay equity payment is currently under review".

. . .

19. In his notes dated October 12, 2001, CCRA Manager Michel Carbonneau wrote: "Impact – Harris – re: traitement favorable à un groupe particulier".

. . .

20. On October 18, 2001, representatives of CCRA met to discuss CCRA's policy on pre-judgment interest.

. . .

21. On November 8, 2001, the Policy and Legislation Technical Subcommittee met and discussed its policy on pre-judgment and pre-settlement interest on damages for personal injury, death, wrongful dismissal and workers' compensation awards in light of the position being taken by the PSAC on the issue of the taxation of the pre-judgment interest paid on the pay equity payments.

. . .

22. On November 16, 2001, counsel for Ms. Burrows provided written submissions to CCRA respecting the taxability of pre-judgment interest payments made as a result of the Tribunal order on pay equity.

. . .

23. On December 7, 2001, CCRA confirmed its assessment and advised Ms. Burrows that the sum of $34,029.33 was interest under paragraph 12(1)(c) of the *Income Tax Act* (the "*Act*") and was included in computing her income in accordance with section 3 and paragraph 12(1)(c) of the *Act*.

. . .

24. On December 21, 2001, Ms. Burrows filed a Notice of Appeal objecting to the inclusion as income and taxation of the pre-settlement interest paid to her pursuant to the Tribunal Order. Ms. Burrows alleged at paragraphs e)ii) and f)iii) of her Notice of Appeal that the taxation of pre-settlement interest as described above is contrary to section 15 of the *Canadian Charter of Rights and Freedoms*.

. . .

25. Ms. Burrows provided further particulars to the Respondent by way of letter dated February 28, 2002 wherein she confirmed through her counsel:

> With respect to your letter dated February 28, 2002, we can confirm that we intend to rely upon sections 2, 5, 7 and 11 of the *Canadian Human Rights Act*. As you are aware from the Notice of Appeal in each of the above-noted matters, the essential thrust of the Appellants' position is that the tax treatment of the payments in issue is discriminatory. It is our position that the treatment of these payments is directly contrary to sections 5 and 7 of the *Canadian Human Rights Act* and is inconsistent with the language and purpose of sections 2 and 11 of the *Canadian Human Rights Act.*

. . .

26. By letter dated December 7, 2001, Burrows was advised that her objection had been dismissed and that she would, accordingly, be required to pay income tax on the pre-judgment interest portion of her pay equity compensation. On January 10, 2002, CCRA completed its Report on Objection wherein it stated:

> -The amount received is described, defined and calculated as interest in the decision of the Tribunal of July 29, 1998 and its implementation was made according to the agreement between the Public Service Alliance of Canada and the Treasury Board on October 29, 1999;
>
> -The amount received was compensation for the delayed receipt by the complainants of the total compensation to which the client was entitled under the Tribunal's ruling and agreement of the Public Service Alliance of Canada.
>
> . . .

27. In a memo dated February 3, 2000, CCRA took the position that the interest on the pay equity payments constitutes "ordinary interest, payable as compensation for the use of money during the delay in settlement, is taxable

> as interest". "As the pay equity payments are not damages for personal injury or wrongful dismissal, the interest on pay equity payments is taxable as interest income pursuant to paragraph 12(1)(c) of the *Income Tax Act* for the year payment is received".
>
> . . .

[3] The balance of the Agreed Statement of Facts (paragraphs 28 to 68) gives the historical background of the Canada Customs and Revenue Agency's ("CCRA") policy of not taxing pre-judgment interest on awards for personal injury or death, on retroactive workers' compensation and, until January 1, 2004, on wrongful dismissal awards.

Appellant's Argument

[4] Before this Court, the appellant limited herself to challenging the tax treatment of the pre-judgment interest as being discriminatory under the *Canadian Charter of Rights and Freedoms* ("*Charter*"). At trial, counsel for the appellant advised the Court that he was no longer disputing the fact that the pre-judgment interest constituted interest for the purpose of paragraph 12(1)(*c*) of the *Act*. He stated that the constitutional challenge was not directed at paragraph 12(1)(*c*) of the *Act* per se, but rather at the CCRA's decision to tax pre-judgment interest in the appellant's case when other pre-judgment amounts were exempted from taxation by the CCRA. Indeed, over the years the CCRA has taken the position that it will exempt from tax all pre-judgment interest payable in respect of awards of damages for personal injury or death, or workers' compensation awards. The same tax exemption policy was also applied, until January 1, 2004, to pre-judgment interest in respect of awards of damages for wrongful dismissal.

[5] It appears that that tax policy was based on the principle that pre-judgment interest payable in respect of an award of damages should be treated, for income tax purposes, in the same manner as the award itself. Thus, the taxation of pre-judgment interest would follow the tax treatment of the award with which it was associated. Where the award was not taxable, the CCRA considered the pre-judgment interest payable in respect of that award to be not taxable either. This policy was adopted regardless of the fact that pre-judgment interest on any type of award should be included in income as interest under paragraph 12(1)(*c*) of the *Act*.

[6] Furthermore, with respect to the termination of an office or employment occurring after November 12, 1981, damages for wrongful dismissal are included in the definition of "retiring allowance" in subsection 248(1) of the *Act* and are taxable pursuant to subparagraph 56(1)(*a*)(ii) of the *Act*. Nevertheless, the CCRA's policy not to tax pre-judgment interest received in respect of an award of damages for wrongful dismissal was maintained until January 1, 2004, at which time the CCRA changed its policy so as to exclude pre-judgment interest on wrongful dismissal awards from the administrative exception, and to therefore tax it as interest income. Essentially, as of January 1, 2004, the CCRA's new position is that all pre-judgment interest which is explicitly identified as interest in a court order or settlement agreement will be taxed as interest income, except for pre-judgment interest on awards for personal injury or death, or interest on retroactive workers' compensation. This new administrative position continues to recognize that pre-judgment interest on non-taxable awards related to personal injury or death, or interest on retroactive workers' compensation payments will not be subject to tax (see copy of the policy change announcement made at the September 2003 Canadian Tax Foundation conference in Montreal, Exhibit A-3, Tab 6).

[7] In the appellant's view, nothing in the *Act* supports the CCRA's policy of not taxing interest on awards where the capital portion is not taxed. This exemption from taxation of pre-judgment interest, which is otherwise taxable under section 12 of the *Act*, is an administrative position. The appellant submits that the protection which the *Charter* gives to individuals like her extends to the manner in which the statute is applied and interpreted, including any administrative positions taken by the taxing authority in exercising its discretion to exclude some groups from tax liability but not others. The appellant submits that the discrimination suffered by victims of prohibited discrimination is compounded by the differential treatment of those victims and their disentitlement to the same exemption from taxation as that given to persons in employment who have suffered violations of tort, workers' compensation or contract rights. Accordingly the taxation of pre-judgment interest in the present case should be found to offend the *Charter*.

[8] In the appellant's view, where the CCRA has decided that victims of human rights violations under the *Canadian Human Rights Act* are entitled to less protection and benefit of the law than employees who have had their contract of employment breached because they did not receive adequate notice of termination, or employees who are experiencing delays in receiving workers' compensation benefits, or persons who received interest in respect of personal injury awards, there is a *Charter* violation. In her view, there is no rational basis for the distinction. Indeed, the CCRA's explanation for the distinction is that the taxation

of interest should follow the taxation of the principal (although there is no legal basis for that in the *Act*). But if this is the governing principle, how can the CCRA justify the non-taxation of pre-judgment interest on wrongful dismissal awards up to January 1, 2004, when these awards had been taxable since 1981? There is clearly differential treatment here, without any evidence of a rational objective or purpose. This is discriminatory.

[9] The appellant also emphasized the fact that the payments ordered by the Canadian Human Rights Tribunal ("Tribunal") were designed to remedy discrimination practised by the Treasury Board on the basis of sex. The pre-settlement interest ordered by the Tribunal was designed, in part, to compensate the victims of that discrimination for the fact that they had been unlawfully deprived, for a substantial period of time, of the income represented by the payments.

[10] The appellant suggests that the decision to tax the payment of pre-settlement interest therefore directly undermines the remedy provided by the Tribunal — a remedy which was designed to make the victims whole and compensate them for the discrimination they had experienced. By eroding the value of that remedy, the CCRA has deprived these victims of the monies which the Tribunal deemed necessary to compensate them. The CCRA's actions have therefore had an unlawful discriminatory effect on these persons. This effect is contrary to the *Charter*.

[11] The appellant submits that the interest component is designed to compensate the victims of the discrimination for the delay in paying non-discriminatory wage rates. The tax which has been collected by the CCRA's actions will ultimately flow back to the federal government. The appellant argues that to a large extent, therefore, the government here is simply recouping the payments it was ordered to make by the Tribunal. In her view, any actions which dilute the value of the payments made to compensate the victims of discrimination have the effect of exacerbating the original discriminatory practices against these persons.

[12] The appellant submits that the application of any law that is inconsistent with the *Charter* is of no force or effect. The *Charter* may be infringed not just by the legislation itself (here the appellant is not seeking a declaration that paragraph 12(1)(*c*) of the *Act* is unconstitutional), but also by the actions of a delegated decision-maker in applying the legislation (see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at 644). In such cases, the

legislation remains valid, but there are equality violations in the application of the legislation. According to the appellant, discriminatory application of the law gives rise to the application of subsection 52(1) of the *Constitution Act, 1982*, which states that any law that is inconsistent with the *Charter* is of no force or effect. A remedy for that unconstitutional action may be sought pursuant to subsection 24(1) of the *Charter*. The remedy sought by the appellant is a ruling that the pre-judgment interest is not to be included in income. She is asking for a declaration that she should be treated the same way as victims of wrongful dismissal, work-related injuries, personal injury, and wrongful death.

[13] The appellant relies on the decisions of this Court in *Campbell v. Canada*, [2004] T.C.J. No. 514 (QL), rev'd 2005 FCA 420, and *O'Neill Motors Limited v. The Queen*, [1995] T.C.J. No. 1435 (QL), (aff'd [1998] 4 F.C. 180; [1998] F.C.J. No. 835 (QL) (FCA)), to argue that this Court has jurisdiction to provide an appropriate remedy where there is a violation of the *Charter*. In the present case, she submits, this Court has the authority to declare the taxation of pre-judgment interest inappropriate on the basis that the administrative decision of the CCRA to, in effect, tax the victims of human rights violations is discriminatory and unconstitutional.

Respondent's Argument

[14] Counsel for the respondent notes that the appellant does not dispute the fact that the pre-judgment interest in this case is interest within the meaning of paragraph 12(1)(*c*) of the *Act*. He also notes that the appellant has limited her argument to the unconstitutionality of the CCRA's policy of taxing pre-judgment interest in some cases and not in others. It is counsel's understanding that the appellant limits her argument to the question of discrimination under section 15 of the *Charter* in the application of the CCRA's policy and that she seeks a remedy pursuant to subsection 52(1) of the *Constitution Act, 1982* and subsection 24(1) of the *Charter*.

[15] Subsection 52(1) of the *Constitution Act, 1982* reads as follows:

PART VII

GENERAL

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[16] Counsel for the respondent submits that subsection 52(1) declares unconstitutional or inoperative a section of a particular law to the extent that that section is inconsistent with the provisions of the Constitution (which includes the *Charter*). The respondent submits that subsection 52(1) does not apply to administrative actions of the government.

[17] In *Eldridge*, *supra*, La Forest J. stated the following at page 644:

> . . . First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

[18] Here, paragraph 12(1)(*c*) of the *Act* is not being challenged. What is being challenged is a CCRA policy, that is, the CCRA's administration of that paragraph. As stated by La Forest J., in such cases the legislation remains valid and a remedy for the unconstitutional action may be sought pursuant to subsection 24(1) of the *Charter*. Thus an administrative policy cannot be declared invalid pursuant to subsection 52(1) of the *Constitution Act, 1982*.

[19] Subsection 24(1) of the *Charter* reads as follows:

> *Enforcement*
>
> Enforcement of guaranteed rights and freedoms
>
> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[20] In the respondent's view, this Court does not have the jurisdiction to vacate an assessment on the basis of subsection 24(1) of the *Charter*, in the circumstances of this case. The appellant argues that she is being discriminated against because she does not have the benefit of the exemption from taxation that others have pursuant to a CCRA policy. She accordingly seeks to have her assessment vacated

on the ground that it was improperly arrived at by the CCRA, not on account of its being inconsistent with the provisions of the *Act*, but rather on the basis of its unfairness. The respondent submits that the Federal Court of Appeal has found it to be plain and obvious that this Court does not have jurisdiction to set aside a valid assessment of tax on the basis of a challenge to the process by which it was established, or how other taxpayers are treated. Counsel referred to the cases of *Main Rehabilitation Co. v. Canada*, [2004] F.C.J. No. 2030 (QL), 2004 FCA 403, leave to appeal to the Supreme Court of Canada dismissed [2005] S.C.C.A. No. 37 (QL), and *Sinclair v. The Queen*, 2003 DTC 5624 (FCA), [2003] F.C.J. No. 1381 (QL).

[21] Counsel refers more particularly to the *Sinclair* case, in which the Federal Court of Appeal found that it is not open to this Court to vary an otherwise valid assessment of tax on the ground that the taxpayer was not granted the favourable tax treatment afforded to others. *Sinclair* was cited with approval in *Main Rehabilitation Co.*, *supra*, a decision in which the Federal Court of Appeal stated at paragraph 8:

> ¶ 8 This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance the Queen v. the Consumers' Gas Company Ltd. 87 D.T.C. 5008 (F.C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (Ludco Enterprises Ltd. v. R. [1996] 3 C.T.C. 74 (F.C.A.) at p. 84).

[22] The respondent submits that the appellant is proposing to extend the jurisdiction of this Court by seeking an order varying her assessment of tax notwithstanding the fact that the assessment is correct in fact and in law. The right of appeal is a substantive right which must not be extended beyond the purpose for which it was conferred. Parliament has given this Court specific jurisdiction to deal with the correctness of a tax assessment and its remedial powers are set out in subsection 171(1) of the *Act*.

[23] Counsel for the respondent argues that this Court is not a court of competent jurisdiction empowered under subsection 24(1) of the *Charter* to grant the remedy sought by the appellant. He relies on the decision of the Supreme Court of Canada in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at 890, where Lamer J. identified "a court of competent jurisdiction" under subsection 24(1) as being a court that has (a) jurisdiction over the person, (b) jurisdiction over the subject matter and (c) jurisdiction to grant the remedy.

[24] Here, this Court is lacking jurisdiction over the subject matter, as it does not have the jurisdiction to look at the assessment process to determine whether an assessment is valid or not. This Court's jurisdiction is limited to a determination of whether the tax assessment is well founded in fact and law pursuant to the provisions of the *Act.* It cannot take into consideration how other taxpayers have been treated.

[25] Counsel for the respondent submits that the appellant's request that this Court consider the actions of CCRA officers as grounds for vacating the assessment is, in fact, a request for judicial review of the administrative actions of the federal Crown. It is argued that this Court does not have statutory jurisdiction for such a review. As suggested by the Federal Court of Appeal in *Sinclair*, *supra*, at paragraph 8, the appellant might seek a remedy before the Federal Court, but no such remedy is available before this Court.

[26] The respondent further submits that if this Court finds that it has the jurisdiction to vacate the assessment on the basis that others have received differential treatment, then this treatment does not constitute discrimination within the meaning of section 15 of the *Charter*.

[27] Section 15 of the *Charter* is not intended to protect individuals from all types of differential treatment. The application of section 15 is predicated on a finding of differential treatment based either on either one or more enumerated personal characteristic or on analogous grounds of discrimination recognized under section 15. Here, the appellant compares her tax treatment to that of recipients of awards for personal injury or death, retroactive workers' compensation, or awards for wrongful dismissal, none of whom are taxed on pre-judgment interest. She claims that the CCRA's failure to accord her the same tax exemption on her pre-judgment interest amounts to differential treatment based on her gender. In the respondent's view, this is an inappropriate comparison, as the appellant and the comparator groups do not share the characteristics relevant to the benefit being sought. Pre-judgment interest arising from personal injury or death awards or from retroactive workers' compensation payments is not considered taxable, irrespective of the recipient's gender. It is not considered taxable because the principal amount from which such interest arises is not taxable. The treatment of pre-judgment interest under the *Act* is therefore based on source of income. The appellant's source of income from which the pre-judgment interest arises is employment income. By contrast, personal injury or death awards, workers' compensation awards and wrongful dismissal awards are considered different sources of income.

The respondent suggests that the appellant's proposed comparison fails because its basis, the source of income, is not a personal characteristic recognized as a ground of discrimination under section 15. A distinction among taxpayers drawn on the basis of source of income is not drawn on any basis of discrimination proscribed by section 15 of the *Charter* (see *Kasvand v. Canada*, [1994] F.C.J. No. 510 (QL) (FCA), at paragraph 3).

[28] Additionally, in the respondent's view there is no evidence that the application of paragraph 12(1)(*c*) of the *Act* has an adverse differential impact on the appellant on the basis of her gender. In this regard, counsel argues, it is not enough to show that more women may be adversely affected by the application of this provision than men; it must also be demonstrated that this provision has a qualitatively different impact on the appellant than on the comparator groups because of her gender (see Respondent's Written Submissions at paragraph 63, where reference is made to the case of *Thibaudeau v. M.N.R. (C.A.)*, [1994] 2 F.C. 189 (FCA)).

[29] Counsel for the respondent concludes that paragraph 12(1)(*c*) of the *Act* and the CCRA's policies regarding the application of this provision, are gender neutral and that the appellant has not shown that paragraph 12(1)(*c*) is being differentially applied by the CCRA on the basis of any personal characteristic, including gender.

[30] Furthermore, the respondent submits that should this Court find there has been a violation of section 15 of the *Charter*, such violation is justified under section 1 of the *Charter*.

[31] Finally, counsel for the respondent submits that the issue is no longer about the appellant's employer maintaining wage gaps between female and male employees. The CCRA is not the appellant's employer. The CCRA is charged with administering the *Act* and in so doing it applied the provisions thereof to the pre-judgment interest received by the appellant as a result of the order issued by the Tribunal. The appellant alleges that to tax the interest portion of a remedy ordered by the Tribunal is itself to compound and continue the discrimination that was found to exist by the Tribunal. In *Sveinson v. Canada (Attorney General) (C.A.)*, [2003] 4 F.C. 927 (FCA), at paragraph 17, Evans J.A. found that such an argument "amounts, in effect, to a claim that legislation that does not rectify all the indirect consequences of unlawful discrimination by an employer is itself inconsistent with the [*Canadian Human Rights Act*]. In [his] opinion, this is not the kind of inconsistency that requires otherwise valid legislation to be rendered inoperative".

Analysis

[32] The appellant is not asking the Court to vacate or vary the assessment on the grounds of its invalidity in light of the *Act*, nor is it asking the Court to strike down paragraph 12(1)(*c*) of the *Act* as unconstitutional. The appellant is asking this Court to vacate the assessment on the grounds that the Minister, by reason of an administrative policy, does not enforce paragraph 12(1)(*c*) in the case of pre-judgment interest on awards with respect to workers' compensation, wrongful dismissal, personal injury or death, yet chooses to enforce it with respect to pre-judgment interest granted to a group whose members have been found to be the victims of a human rights violation. The appellant argues that under subsection 24(1) of the *Charter* this Court has the power to grant that remedy.

[33] This Court has the power to grant a remedy under subsection 24(1) of the *Charter* when it has jurisdiction over the person, jurisdiction over the subject matter and jurisdiction to grant the remedy (see *Mills*, *supra*, referred to by counsel for the respondent).

[34] It was admitted that this Court has jurisdiction over the appellant but it was disputed that this Court has either jurisdiction over the subject matter or jurisdiction to grant the remedy requested.

[35] This Court's jurisdiction is limited by the *Act* and the *Tax Court of Canada Act* ("*TCC Act*"). Section 12 of the *TCC Act* grants this Court exclusive original jurisdiction over references and appeals arising under the *Act*. The main right of appeal is set out in section 169 of the *Act*, where what is in issue is the validity of the assessment and not the process by which it is established. Indeed, I agree with the respondent that the case law establishes that the right to appeal to this Court is limited to appealing the tax due, and does not extend to the manner in which that amount was determined. If the tax due is correctly calculated, in light of validly enacted provisions of the *Act*, then the assessment must be upheld and the appeal dismissed (see *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60 (FCA); *Webster v. Canada*, [2003] F.C.J. No. 1569 (QL); *Lassonde c. La Reine*, 2005 CAF 323).

[36] Under subsection 171(1) of the *Act*, the jurisdiction of this Court is therefore limited to a determination of the correctness of an assessment. That subsection reads as follows:

SECTION 171: Disposal of Appeal.

> **(1)** The Tax Court of Canada may dispose of an appeal by
>
> (*a*) dismissing it; or
>
> (*b*) allowing it and
> (i) vacating the assessment,
> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[37] Here, the appellant has specifically limited her argument to a challenge of the process used by the Minister to determine that the pre-judgment interest the appellant earned was taxable.

[38] In *Sinclair v. Canada*, [2002] T.C.J. No. 388 (QL), aff'd [2003] F.C.J. No. 1381 (QL), [2003] FCA 348, where a similar *Charter* challenge was made and the complaint concerned the CCRA's treatment of the taxpayer, not the validity of the assessment under the *Act*, Judge Bowie of this Court stated:

> ¶6 The decision of the Federal Court of Appeal in Ludmer v. Canada [See Note 1 below] makes it clear that on an appeal from an assessment to income tax, evidence is not admissible to show that other taxpayers have been assessed more favourably in identical circumstances. The Court there quoted with approval the following passages from the judgment of Rothstein J., as he then was, in Hokhold v. Canada: [See Note 2 below]
>
> ---
>
> Note 1: [1995] 2 F.C. 3.
> Note 2: [1993] 2 C.T.C. 99.
>
> ---
>
> > The plaintiff's concern seems to be that other taxpayers were treated differently than was he by Revenue Canada. Whatever the reasons for Revenue Canada's action in respect of other taxpayers, they are not relevant to the plaintiff's situation. ...
> >
> > ...
> >
> > ... While it is understandable that the plaintiff considers it unfair that Revenue Canada appears to have treated taxpayers in similar circumstances differently, that cannot be the basis for

> the plaintiff's appeal. The plaintiff is either entitled on a reasonable interpretation of the words of ... the Act, to the social assistance deduction or he is not. [See Note 3 below]
>
> ---
>
> Note 3: ibid. at p. 106.
>
> ---

The Court of Appeal dismissed the appeal from the decision of the Trial Division, struck out the offending part of the notice of appeal, and noted in doing so the invidious consequences that would flow from letting an issue proceed to trial that would inevitably become an inquiry into the tax treatment of persons who were not parties to the appeals before the Court.

[39] On appeal, Evans J.A. noted in paragraphs 7 and 8 of his reasons:

> ¶ 7 In our view, it is not open to the Tax Court to set aside a tax reassessment on the ground that the taxpayer ought to have been given the same favourable treatment as others who are similarly situated. The issue before the Tax Court in this case is whether Ms. Sinclair is entitled to an exemption under section 87. This must be decided on the basis of the interpretation of the section and its application to her situation: that others are given the benefit of the exemption is simply not relevant to Ms. Sinclair's appeal. See Hokhold v. Canada, [1993] 2 C.T.C. 99 (F.C.T.D.); Ludmer v. Canada, [1995] 2 F.C. 3 (C.A.); Hawkes v. The Queen, [1997] 2 C.T.C. 5060 (F.C.A.). Apart from the allegation that some similarly situated taxpayers receive more favourable treatment, Ms. Sinclair does not suggest that section 87 is unconstitutional, either as interpreted or as applied to her case.
>
> ¶ 8 If Ms. Sinclair wishes to challenge the validity of the Guidelines issued by the Minister with respect to the interpretation and application of section 87 on the ground that they are contrary to section 15 by virtue of their under inclusiveness, she might seek a declaration of invalidity in the Federal Court.

[40] In *Main Rehabilitation Co., supra*, a unanimous bench reiterated at paragraphs 7 and 8:

> ¶ 7 . . . Courts have consistently held that the actions of the CCRA cannot be taken into account in an appeal against assessments.
>
> ¶ 8 This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance the Queen v. the Consumers' Gas Company Ltd. 87 D.T.C. 5008 (F.C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown

> to be properly owing under the Act (Ludco Enterprises Ltd. v. R. [1996] 3 C.T.C. 74 (F.C.A.) at p. 84).

[41] Furthermore, the Federal Court of Appeal in that case considered the argument that the decision in *O'Neill Motors*, *supra* (referred to by the appellant in the present case) "supports the proposition that an assessment can be vacated by the Tax Court in an appeal pursuant to section 169 where it can be shown that the process leading to the issuance of the assessment is tainted by the breach of a Charter right" (see paragraph 11 of the judgment). The Federal Court of Appeal in *Main Rehabilitation Co.*, *supra*, did not accept that argument and pointed out that the decision in *O'Neill Motors Ltd.* stood for the proposition that an assessment may be vacated because of a lack of evidence to support the Minister's assumptions, not on the basis of the actions of the CCRA. The Federal Court of Appeal said at paragraph 13:

> ¶ 13 . . . O'Neil [*sic*] merely stands for the proposition that an assessment may be vacated in an appeal pursuant to section 169 if it is not supported by reason of the exclusion of the evidence which led to its issuance.

[42] As stated in *Main Rehabilitation Co.*, *supra*, at paragraph 15, there is a well-established line of cases confirming the limited jurisdiction of this Court. *O'Neill Motors Ltd.*, *supra*, must therefore be seen as authority only for the principle that this Court can use section 24 of the *Charter* when it is a court of competent jurisdiction (i.e., where it has jurisdiction over the person, jurisdiction over the subject matter and jurisdiction to grant the remedy), but not for the principle that it has jurisdiction over the actions of the CCRA. As a matter of fact, in *O'Neill Motors Ltd.*, both Judge Bowman of this Court (as he then was) and Linden J.A. of the Federal Court of Appeal cautioned that careful consideration is required before granting a section 24 remedy.

[43] Furthermore, the appellant also relied on *Campbell*, *supra*, where Hershfield J. of this Court, in turn relying on *O'Neill Motors*, *supra*, stated that the Federal Court of Appeal had acknowledged the general authority given to this Court by subsection 24(1) of the *Charter* to grant such remedies as it considers appropriate and just. Hershfield J. concluded, at paragraph 27, that it was "clear that this Court has jurisdiction to hear Charter questions respecting impugned provisions of the ITA or Regulations or the manner in which an impugned provision has been applied . . . and the remedy available is that governed by the Charter". Although the Federal Court of Appeal recently reversed Judge Hershfield's decision in *Campbell*, *supra*, Evans J.A. in writing for a unanimous panel stated at paragraph 23 that:

> On the other hand, it is clear in light of *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, that, pursuant to subsection 52(1) of the Charter, the Tax Court has jurisdiction to decide Charter challenges to the validity of a provision of the *ITA* or its application to particular facts, or of administrative action purportedly taken pursuant to it, when necessary to dispose of an appeal otherwise within its jurisdiction.

It is my opinion that when Evans J.A. refers to this Court's jurisdiction to decide Charter challenges to the validity of "administration action purportedly taken pursuant to [a provision of the *Act*]", this does not include the process by which the assessment was established or whether or not CCRA officials properly exercised their powers. This is what Evans J.A. himself inferred in *Sinclair, supra*, and what the Federal Court of Appeal held in *Main Rehabilitation Co., supra*, where it explained the position it took in *O'Neill Motors Ltd., supra*. Since leave to appeal to the Supreme Court of Canada in *Main Rehabilitation Co., supra*, was dismissed, it therefore states the law as it is now, on this specific point.

[44] The present appeal is aimed at the Minister's policy of exempting certain pre-judgment interest from taxation, while not offering a similar exemption for the pre-judgment interest on a pay equity award. This is an attack on the process behind an otherwise valid assessment. No provisions of the *Act* were challenged and the only subject matter of this appeal is the conduct and policies of the Minister. These matters are not within the jurisdiction of this Court, which does not have jurisdiction over the subject matter of the appeal. Accordingly, this Court cannot grant a subsection 24(1) remedy in this case for a violation of section 15 of the *Charter* committed by the Minister in his administrative capacity as tax collector.

[45] This conclusion spares me the necessity of saying anything more in order to dispose of this appeal. However, I will add a few comments with respect to the *Charter* argument. The appellant's complaint regarding the taxation of her pre-judgment interest pursuant to paragraph 12(1)(*c*) of the *Act* was that other taxpayers were not being taxed under this provision. The *Act* clearly does not exempt pre-judgment interest from tax. In *Ludco Enterprises Ltd. v. R.*, [1996] 3 C.T.C. 74 (FCA), in writing about the duty of fairness, the Minister's duty to follow his own policies and the question of treating taxpayers in similar situations in a uniform manner, the Federal Court of Appeal stated at page 84:

> . . . Neither the Minister of National Revenue or [*sic*] his employees have any discretion whatever in the way in which they must apply the *Income Tax Act*. They are required to follow it absolutely, just as taxpayers are also required to obey it as it stands. The institution of Commissioners equipped with broad powers and an extensive discretion to deal with particular cases does not exist here. Accordingly, it is not possible to judge their actions by varying and flexible criteria such as those required by the rules of natural justice. In determining whether their decisions are valid the question is not whether they exercised their powers properly or wrongfully, but whether they acted as the law governing them required them to act.

[46] In the appellant's case, the Minister did act as required by the *Act*. Any differential treatment that occurs between taxpayers does not result from a formal distinction in the *Act*, but stems rather from the Minister's enforcement of the *Act*. The appellant says that she should be afforded the benefit of the same tax exemption on her pre-judgment interest as that given to those who receive other kinds of awards. If there is discrimination here, the proper remedy would be to force the Minister to enforce the *Act* according to its literal meaning. It is certainly not a proper remedy to exempt the pre-judgment interest received by the appellant, as that would be contrary to the provisions of the *Act*.

[47] Finally, it was argued by the appellant that, as a woman who had received a pay equity award as a victim of prohibited discrimination, she was already a disadvantaged member of Canadian society. She suggested that the decision to tax the pre-judgment interest in her case directly undermined the remedy provided by the Tribunal. I agree with the respondent that the discrimination and violation of the appellant's rights was remedied by the Tribunal pursuant to section 11 of the *Charter*. The case before me however, deals with the tax treatment under the *Act* of pre-judgment interest received on a pay equity award. As stated by Evans J.A. in *Sveinson*, *supra*, at paragraph 17, "this is not the kind of inconsistency that requires otherwise valid legislation to be rendered inoperative". I would also add that the final consent order issued by the Tribunal on November 16, 1999, implemented the terms of the agreement between the Public Service Alliance of Canada ("PSAC") and Treasury Board. As both parties to that consent order knew that pre-judgment interest is taxable under the *Act*, it was open to them to negotiate another form of settlement, such as damages. Having agreed to a settlement including pre-judgment interest, the PSAC must be taken to have accepted the fact that such interest was taxable under the *Act*.

[48] I therefore conclude that the appellant cannot succeed in her request to have the assessment varied by the application of subsection 24(1) of the *Charter* on the grounds that the taxation of pre-judgment interest offended against the *Charter*.

[49] As the inclusion in income of the pre-judgment interest was done in accordance with paragraph 12(1)(*c*) of the *Act*, the assessment is therefore valid.

[50] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 15th day of December 2005.

"Lucie Lamarre"

Lamarre, J.

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COURT FILE NO.:	2002-33(IT)G
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PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 18 and 19, 2005
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
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