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Dockets: T-1750-05 / T-1989-05

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Ottawa, Ontario, February 21, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

T-1750-05

CANADA POST CORPORATION

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

AND BETWEEN:

T-1989-05

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

CANADA POST CORPORATION
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This case involves two applications for judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal) upholding a 1983 complaint of wage discrimination brought by certain female employees at Canada Post. The Tribunal concluded that Canada Post violated section 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA) by paying its employees in the male-dominated Postal Operations (PO) Group more than its employees in the female-dominated Clerical and Regulatory (CR) Group for work of equal value. The Public Service Alliance of Canada (PSAC), the union representing the female employees, approximates that, with interest, the amount of compensation required from Canada Post to rectify the pay discrimination is $300 million.

[2] The first application, Docket T-1750-05, is by Canada Post for judicial review of the decision upholding the complaint of pay discrimination against Canada Post. The second application, Docket T-1989-05, is by PSAC for judicial review of the decision to discount by 50 percent the award of damages to employees in the female-dominated CR Group.

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I. FACTS

A) The complaint

[3] The proceedings involved in this case are both lengthy and complex. On August 24, 1983, PSAC filed a complaint with the Canadian Human Rights Commission (the Commission), alleging that Canada Post had violated section 11 of the CHRA by paying employees in the male-dominated PO Group more than employees in the female-dominated CR Group. The complaint alleged that:

> … Canada Post Corporation as Employer, has violated Section 11 of the Canadian Human Rights Act by paying employees in the male-dominated Postal Operations Group more than employees in the female-dominated Clerical and Regulatory Group for work of equal value. The wage rates of the male-dominated Postal Operations Group exceed those of the female-dominated Clerical and Regulatory Group by as much as 58.9 per cent for work of equal value. It is alleged that sex composition of the two groups has resulted in wage discrimination against the Clerical and Regulatory Group, contrary to Section 11.

[4] As remedy for this alleged discrimination, PSAC requested that all employees within the CR Group receive wages equal to those of PO Group employees, with interest, and that that remedy be made retroactive to October 16, 1981; the date that Canada Post was established as a Crown corporation. At the hearing, the parties agreed that the relevant dates for determining compensation spanned from August 24, 1982, one year prior to the complaint, until June 2, 2002.

B) Overview of the proceedings

[5] The following is an overview of the lengthy history surrounding these proceedings:

1) August 24, 1983 – PSAC files its complaint with the Commission;

2) 1984-1991 – The Commission investigates PSAC's complaint by gathering relevant job information and performing job evaluations;

3) January 24, 1992 – The Commission releases its "Final Investigation Report" and recommends that the complaint be referred to the Tribunal for hearing;

4) November 25, 1992 to August 27, 2003 – The Tribunal hears the complaint over the course of 415 hearing days; and

5) October 7, 2005 – The Tribunal releases its 273-page decision.

C) Investigation of the complaint by the Commission

Introduction

[6] The Commission's investigation into PSAC's complaint lasted eight years, between 1984 and 1992. As the Tribunal states at paragraph 5 of its decision, complaints brought under section 11 of the CHRA give the Commission the authority to gather "pertinent job fact data":

> ¶ 5 In the case of a complaint brought under section 11 of the [CHRA], the Commission's authority to conduct its investigation includes authority to gather pertinent job fact data. The Commission may request information from the respondent, such as lists of employees, job descriptions, and related job data including input from supervisory and management personnel and employee interviews. Even on-job-site observations may be requested.

[7] In relation to PSAC's 1983 complaint, the Commission hoped to make use of a job evaluation system being jointly developed by PSAC and Canada Post. The evaluation system, known as System One, was "intended for use by employees represented by [PSAC] bargaining units throughout Canada Post": Tribunal Decision at paragraph 367. The Commission's plan to

utilize System One was discontinued, however, after development was delayed by differences of opinion between the parties. PSAC later withdrew from the development of the system, and both parties eventually concluded that System One was an inappropriate evaluation system because it could not be used to evaluate the comparator PO Group, which was represented by other bargaining units.

[8] As a result, in October 1985 the Commission began developing a "Job Fact Sheet" questionnaire, which it intended to use in gathering current job data for both the complainant and comparator positions. That compiled data would then form the basis of the Commission's subsequent evaluations.

Commission's collection of CR Group job information in 1986

[9] The principal sources of job information intended for use by the Commission in evaluating the CR Group positions consisted of successive lists of employee print-outs furnished by Canada Post and the Commission's "Job Fact Sheet," which was to be completed by employees sampled from the employee lists.

[10] The Commission opted for a random sampling of CR Group employees because it believed that a "full census of the total CR population of about 2,300 would be unmanageable in terms of time and money": Tribunal Decision at paragraph 369. The Commission's original proposed sample consisted of 355 CR Group positions. During the summer of 1986, the Commission

received 194 completed and usable "Job Fact Sheets" from CR Group employees, and those completed questionnaires were to become the basis for the Commission's CR Group evaluation.

[11] At the same time, the Commission also developed an "Interview Guide," which was intended to "guide the Commission's investigator during follow-up interviews which were to be conducted with the incumbents, to clarify answers given on the Job Fact Sheet": Tribunal Decision at paragraph 370. The Commission conducted and completed all interviews by December 1986.

[12] From April to September 1987, Commission staff evaluated the sample of 194 CR Group positions using the data collected in 1986. However, as the Tribunal explained at paragraph 17 of its decision, these evaluations were later set aside and not used in the final investigation process.

Commission's collection of PO Group job information in 1991

[13] The Commission had originally intended to use the same "Job Fact Sheet" and "Interview Guide" used with respect to the CR Group in its collection and analysis of job information relating to the comparator PO Group. However, acquiring job information for the PO Group positions proved exceedingly difficult for a number of reasons. As the Tribunal explained at paragraph 18:

> ¶ 18 Protracted correspondence, meetings and discussions ensued from late 1987 through to mid-1991 between the Commission and Canada Post concerning the sampling of, and job data collecting from, the PO comparator group. The Commission was unsuccessful in seeking the co-operation of the relevant comparator group unions to collect this information. Moreover, Canada Post questioned the size of the proposed sample of the PO comparator positions, and declined to have the Job Fact Sheet completed by PO employees on company time.

[14] Because of its inability to reach an agreement with Canada Post on sample sizes and data collection instruments for the comparator PO Group, the Commission decided in 1991 to base its evaluation of the PO Group on ten "generic" PO jobs, which did not include any actual positions, but "represented the ten mostly homogeneous jobs done by PO incumbents": Tribunal Decision at paragraph 375. Much of the information used to create the ten "generic" PO jobs was drawn from "job specifications," which had been provided to the Commission by Canada Post.

[15] In creating the ten "generic" PO jobs, the Commission dropped the PO supervisors because of a belief that it would be difficult to reconcile many of the supervisory titles into job specifications "without a sampling of incumbents and use of a Job Fact Sheet": Tribunal Decision at paragraph 376. The result of this decision created an inconsistency between the ten "generic" PO jobs and the CR Group sample, which had included supervisors at the CR-5 Level.

Commission's 1991 evaluations of the collected job information

[16] In September 1991, the officer in charge of the Commission's investigation was asked to reduce the original sample of 194 CR Group positions to a more manageable number in order to expedite the evaluation process. After studying the situation, the number of CR Group positions was revised to 93, and this became the new sample number that the Commission used in its 1991 evaluations.

[17] The Commission evaluated the job information for the 93 CR Group positions and the ten "generic" PO jobs using an "off-the-shelf Hay XYZ Evaluation Plan" (the Hay Plan). The Hay Plan

is recognized as an authoritative basis for evaluating and comparing jobs for the purpose of a pay equity analysis such as the one undertaken by the Commission. For its evaluation of the 93 CR Group positions, the Commission relied on the "Job Fact Sheet" information collected in 1986, as well as the interview results, job descriptions, and organization charts. With respect to the ten "generic" PO jobs, the Commission relied on job specifications compiled from information provided by Canada Post in 1990 and 1991, as well as job descriptions and job profiles.

[18] The Commission completed its job evaluations in November 1991. On December 16, 1991, the Commission issued a draft "Investigation Report," and asked the parties to submit any comments on the draft by January 6, 1992. Comments were submitted by both parties by late January 1992, but none of these were included in the Commission's "Final Investigation Report," dated January 24, 1992.

Commission's conclusion and referral to the Tribunal in 1992

[19] In its "Final Investigation Report," the Commission concluded that there was a "demonstrable wage difference when comparing wages and job values in the male and female-dominated groups named in the Complaint," and recommended the complaint be referred to the Tribunal for further inquiry. After considering this recommendation, and having regard to all the circumstances of the complaint, the Commissioners, on March 16, 1992, referred the complaint to the Tribunal, which would assign the matter to a specific panel for a hearing. On May 1, 1992 a panel was established and, on November 25, 1992, the panel commenced hearings that would last more than a decade, until August 27, 2003.

D) The Tribunal Hearing – 1992-2003

[20] After the Tribunal began hearing evidence in late 1992, PSAC engaged a team of professional job evaluators (the Professional Team) to "provide an expert review of the Commission's 1991 evaluations … and to undertake independent evaluations": Tribunal Decision at paragraph 382. The Professional Team was comprised of three individuals: Dr. Bernard Ingster; Ms. Judith Davidson-Palmer; and Dr. Martin G. Wolf, who was the group's spokesperson and was qualified by the Tribunal as an expert in Hay-based job evaluation and Hay-based compensation. PSAC's mandate for the Professional Team was to "apply the Hay Method to the job content in accordance with the 'best practices' of senior level Hay consultants considered to be expert in the use of the process": Tribunal Decision at paragraph 384.

[21] Ultimately, when it became apparent that the Commission's 1991 job information and evaluations were seriously deficient or, in the words of Dr. Wolf, "abominable," it was the Professional Team's evaluations that became the foundation upon which PSAC relied in attempting to substantiate the complaint.

[22] The Professional Team's analysis was conducted in two phases. First, in May and June 1993, the Professional Team re-evaluated the 93 CR Group positions and ten "generic" PO jobs that formed the basis of the Commission's "Final Investigation Report." Second, in November and December 1994, the Professional Team evaluated a further 101 CR Group positions, which "represented the remaining balance from the Commission's original 1987 sample of 194": Tribunal Decision at paragraph 385.

[23] During Phase 1 of its investigation, the Professional Team conducted telephone interviews with a number of the employees in the Commission's 1986 CR Group sample. The major purpose of these interviews was to seek additional information about the work environment of each interviewee's position, since it was the Professional Team's opinion that "the working conditions factor was the least well-documented aspect of the 1986 Job Fact Sheet and other materials the Team had at hand": Tribunal Decision at paragraph 390. The interview results and other CR and PO job information were then evaluated by the Professional Team in May and June 1993.

[24] During Phase 2 of its investigation, the Professional Team again conducted telephone interviews in an attempt to gain additional information respecting the remaining CR Group positions from the Commission's original 1986 sample. Evaluations of these remaining CR Group positions were conducted in November and December 1994.

[25] In its final report, the Professional Team concluded that there existed a significant wage gap between employees in the female-dominated CR Group and employees in the male-dominated PO Group, for work of equal value. Dr. Wolf testified before the Tribunal that while there were numerous shortcomings in the available job information, he believed that the information was "adequate," and was confident in both the process utilized by the Professional Team, and in the validity of their evaluations.

E) Decision under review

[26] On October 7, 2005, approximately 27 months after the close of the hearing, the Tribunal released its 273-page decision. During the course of the hearing, which spanned almost 11 years and involved 415 hearing days, the Tribunal heard testimony from both expert and lay witnesses, and was presented with over 1000 exhibits, including expert reports, videos, training manuals, and physical objects. The transcript of the hearing exceeds 46,000 pages. It should also be noted that the decision was rendered by only two panel members, as the Tribunal Chair, Benjamin Schecter, resigned in June 2004, after the hearing was completed.

[27] In its decision, the Tribunal made five determinations relevant to these applications.

1st Determination: Retroactive application of the wage guidelines

[28] The Tribunal found that the appropriate wage guidelines to apply to PSAC's complaint were the *Equal Wages Guidelines, 1986,* S.O.R./86-1082 (1986 Guidelines), despite the fact that the original complaint was made in 1983, three years prior to the implementation of the 1986 Guidelines. While all parties agreed that the 1986 Guidelines could not be applied retroactively, the Tribunal concluded that their application was dependent on the nature of the fact situation before the Tribunal. In this instance, and relying on the work of Professor Ruth Sullivan in *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), the Tribunal held that because the facts before it were of a "continuing" nature, the 1986 Guidelines applied to the complaint, and their application was not retroactive.

2nd Determination: Standard of proof for the reliability of PSAC and Commission evidence

[29] The Tribunal held that one of the elements to be proven in establishing a case of systemic wage discrimination is whether the complainant and comparator occupational groups are performing work of equal value. The Tribunal stated that this will only be the case if the work has been "assessed reliably on the basis of the composite of the skill, effort, and responsibility required in the performance of the work, and the conditions under which the work is performed": Tribunal Decision at paragraph 257. Further, the Tribunal held at paragraph 69 that the work value evidence must meet the civil standard of proof, the balance of probabilities.

[30] In reaching its decision, the Tribunal assessed the reliability of the job evaluation system employed, the process followed, and the job information and sources upon which the evaluations were premised. Despite finding numerous problems with the reliability of each of the aforementioned "material facts," the Tribunal reached the following conclusions:

1) that, on the balance of probabilities, the Hay Plan, utilized by the Professional Team in its evaluations, was a "suitable" scheme that would "address the issues of this 'pay equity' Complaint in a reasonably reliable manner": Tribunal Decision at paragraph 571;
2) that it was "more likely than not" the evaluation process used by the Professional Team was "reasonably reliable": Tribunal Decision at paragraph 593; and

3) that the job information used by the Professional Team in its job evaluations was "reasonably reliable, albeit at the 'lower-reasonably reliable' sub-band level": Tribunal Decision at paragraph 700.

[31] Canada Post submits that the Tribunal's conclusions distort the civil standard of proof by "inventing and applying a novel standard of 'sub-bands of reasonable reliability' of evidence." Canada Post also argues that the Tribunal developed this standard in order to find liability in the face of evidence that it acknowledged was deficient, and rather than conclude that the case for discrimination could not be established, the Tribunal sought to account for these deficiencies by discounting the award of damages by 50 percent; an issue that is the subject of PSAC's application for judicial review in Docket T-1989-05.

3rd Determination: Appropriateness of the comparator occupational group

[32] Relying on the definition of sex predominance in the 1986 Guidelines, the Tribunal concluded that the CR Group was female dominant, that the PO Group was male dominant, and accepted PSAC's choice of comparator groups.

4th Determination: Legal presumption of sex discrimination

[33] The Tribunal found that section 11 of the CHRA creates a presumption that a wage gap established under the legislation is caused by systemic gender-based discrimination, and that that presumption can only be rebutted by the "close-ended" list of factors found in section 16 of the 1986 Guidelines. Canada Post argues that even if such a presumption exists, the rebuttable factors

available to the employer should be "open-ended," and not limited to those contained in the 1986 Guidelines.

5th Determination: Tribunal's reduction of damages

[34] Finally, despite finding that the evidence proffered by PSAC and the Commission was sufficient to establish the claim for discrimination, the Tribunal found that the award of damages should be reduced by 50 percent to account for various "uncertainties" in both the job information utilized by the Commission and the Professional Team, as well as in the non-wage forms of compensation. As the Tribunal stated at paragraph 944:

> ¶ 944 Recognizing these elements of uncertainty in the state of the job information and non-wage benefits documentation, the Tribunal finds that it cannot accept the full extent of the wage gap as claimed by [PSAC] and endorsed by the Commission.

[35] Accordingly, the Tribunal concluded at paragraph 949 that:

> ¶ 949 … the finally determined award of lost wages for each eligible CR employee … should be discounted by 50% in line with the lower reasonable reliability status of the relevant job information and non-wage forms of compensation.

II. ISSUES

[36] As outlined above, there are five issues to be considered in these applications:

1) Whether the Tribunal erred in retroactively applying the Commission's 1986 Guidelines to a complaint filed in 1983, rather than the guidelines that were in force at the time of the complaint;

2) Whether the Tribunal erred in applying an incorrect standard of proof allegedly invented by the Tribunal;

3) Whether the Tribunal erred in finding that the PO Group was an appropriate comparator group for this complaint;

4) Whether the Tribunal erred in holding that once a wage disparity for work of equal value is established, section 11 of the CHRA enacts a legal presumption of gender-based discrimination that can only be rebutted by the reasonable factors identified in section 16 of the 1986 Guidelines; and

5) Whether the Tribunal erred in finding that the damages could be discounted by 50 percent to account for uncertainties in the job information and non-wage forms of compensation.

III. RELEVANT LEGISLATION

[37] The legislation relevant to these applications is the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA); the *Equal Wages Guidelines, 1978*, S.I./78-155 (1978 Guidelines); and the *Equal Wages Guidelines, 1986*, S.O.R./86-1082 (1986 Guidelines). The relevant provisions have been attached to the end of this judgment as Appendix "A."

IV. STANDARD OF REVIEW

[38] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court affirmed the primacy of the pragmatic and functional approach

when determining the appropriate standard of review. The Court held that the appropriate standard is determined by engaging in an analysis of four factors, which include:

1) the presence or absence of a privative clause or statutory right of appeal;

2) the expertise of the Tribunal relative to that of the reviewing court on the issue in question;

3) the purpose of the legislation and the provision in particular; and

4) the nature of the question – *i.e.*, law, fact, or mixed fact and law.

[39] In relation to the first factor, the CHRA does not contain a privative clause or a statutory right of appeal. This factor is therefore treated as neutral, requiring neither greater nor less deference be accorded to the Tribunal.

[40] With respect to the second factor (the Tribunal's expertise), Mr. Justice La Forest of the Supreme Court, writing concurring reasons in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, made the following statement at page 585:

> … The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. …

[41] In *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.) (*PSAC*), Mr. Justice Evans also recognized the "significant expertise" of the Tribunal in relation to its findings of fact, stating at paragraph 86:

> ¶ 86 These observations are, of course, applicable to the Tribunal members whose decision is under review here. I would note, however, that the Tribunal held over 250 days of hearings, many of which apparently resembled educational seminars conducted by the expert witnesses for the benefit of the parties and the Tribunal, studied volumes of documentary evidence and lived with this case for seven years. It is reasonable to infer from this that the members of the Tribunal were likely to have a better grasp of the problems of operationalizing the principle of pay equity in the federal public service than a judge would probably be able to acquire in the course of even an 8 1/2 day hearing of an application for judicial review.

Accordingly, considerable deference will be accorded to the Tribunal's factual findings.

[42] The third factor, the nature of the legislation and the provisions in question, also suggests the Tribunal's decision should be accorded some deference. Mr. Justice Evans made clear in *PSAC*, above, at paragraph 53, that the CHRA is a quasi-constitutional statute whose provisions are to be given a "broad and liberal interpretation so as to further its underlying purposes." Further, the construction of section 11 of the CHRA, in particular, which legislates the principle of pay equity without addressing its implementation, leaves "considerable scope to the Commission and the Tribunal" in deciding how the principal is to be "operationalized" in an employment context: *PSAC* at paragraph 76. As Mr. Justice Evans stated at paragraphs 83-84 of *PSAC*:

> ¶ 83 Reverting to section 11, I cannot attribute to Parliament an intention that, by enacting the principle of equal pay for work of equal value, it thereby provided a definitional blueprint of such specificity that its implementation in any given context inevitably involves the Tribunal in questions of statutory interpretation, and hence of law, that are reviewable on a standard of correctness in an application for judicial review.
>
> ¶84 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.

[43] The fourth factor to be considered is the nature of the question or questions before the Court. The Federal Court of Appeal has concluded that, in relation to the different questions decided by a tribunal under the CHRA, questions of law should be accorded no deference, questions of fact should be accorded great deference, and questions of mixed fact and law should be accorded some deference: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, 322 N.R. 50; *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154, 334 N.R. 316.

[44] In the case at bar, the first issue is one of mixed fact and law, as the Tribunal must characterize the particular fact situation and then apply the appropriate guidelines to that situation. The second issue is also a question of mixed fact and law, as the Court must determine on the facts whether the Tribunal applied the appropriate standard of proof to the material evidence in determining whether a *prima facie* case of pay discrimination has been proven. The third issue is a question of mixed fact and law since the Tribunal must consider the evidence presented before it while applying the principles relating to the choice of a comparator group that are found within the applicable guidelines. The fourth issue is a question of statutory interpretation, and is a clear question of law. The fifth and final issue is a question of mixed fact and law, since the CHRA grants broad discretionary power to the Tribunal in relation to damages, and since such an award is largely dependent on the facts of the case. However, there is a legal element to the Tribunal's decision, as it must interpret and apply the legal standard of proof on liability before assessing damages.

[45] Having been guided by the pragmatic and functional approach mandated by the Supreme Court in *Dr. Q*, above, I conclude that:

1) the issue of whether the Tribunal erred in retroactively applying the Commission's 1986 Guidelines to a complaint filed in 1983 will be reviewed on a standard of reasonableness *simpliciter*;
2) the issue of whether the Tribunal erred in applying an incorrect standard of proof will be reviewed on a standard of reasonableness *simpliciter*. However, challenges to the Tribunal's factual findings regarding this issue will only be set aside if found to be patently unreasonable;
3) the issue of whether the Tribunal erred in finding the PO Group to be an appropriate comparator will be reviewed on a standard of reasonableness *simpliciter*;
4) the issue of whether the Tribunal erred in holding that once a wage disparity is established, section 11 of the CHRA enacts a legal presumption of gender-based discrimination that can only be rebutted by the reasonable factors in section 16 of the 1986 Guidelines will be reviewed on a standard of correctness; and
5) the issue of whether the Tribunal erred in discounting the damage award by 50 percent to account for uncertainties in the evidence will be reviewed on a standard of reasonableness *simpliciter*.

[46] In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, the Supreme Court interpreted the standards of reasonableness *simpliciter* and patent unreasonableness. Mr.

Justice Iacobucci, writing for the Court at paragraphs 48-49, stated that under a standard of reasonableness *simpliciter*, a reviewing court must uphold an administrative decision if the reasons adequately support the ultimate conclusion:

> ¶ 48 Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable (see *Southam*, [[1997] 1 S.C.R. 748], at para. 61). In *Southam*, at para. 56, the Court described the standard of reasonableness *simpliciter*:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. …
>
> ¶ 49 This signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission, to those reasons….
>
> [Emphasis in original.]

[47] The standard of patent unreasonableness, however, requires that even more deference be granted by a reviewing court. As Mr. Justice Iacobucci held at paragraph 52 of *Ryan*:

> ¶ 52 The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been

> described as "clearly irrational" or "evidently not in accordance with reason" … A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

V. ANALYSIS

Issue No. 1: Did the Tribunal err in retroactively applying the Commission's 1986 Guidelines to a complaint filed in 1983, rather than the guidelines that were still in force at the time of the complaint?

Index for Issue No. 1

The Guidelines

[48] The CHRA was proclaimed in force on March 1, 1978. Section 11 of the CHRA outlines the general principles regarding the discriminatory practice of paying different wages to male and female employees who are performing work of equal value. Subsection 27(2) empowers the Commission to prescribe guidelines for the purpose of enforcing the CHRA.

[49] The 1978 Guidelines were the initial set of guidelines prescribed by the Commission under authority of the CHRA. The 1978 Guidelines define the meaning of the four criteria in subsection 11(2) of the CHRA for valuing work (skill, effort, responsibility, and working conditions), and the "reasonable" factors justifying the payment of different wages to male and female employees.

[50] On November 18, 1986, the 1986 Guidelines were prescribed by the Commission. Their purpose, as outlined in the Explanatory Note accompanying their release, was to:

> … prescribe (a) the manner in which section 11 of the [CHRA] is to be applied; and (b) the factors that are considered reasonable to justify a difference in wages between men and women performing work of equal value in the same establishment.

[51] The 1986 Guidelines are more robust than those issued in 1978. Among the additions, the 1986 Guidelines:

1) expand the number of reasonable factors that justify the payment of different wages to men and women under subsection 11(3) of the CHRA (contained in section 16 of the 1986 Guidelines);
2) define when employees are working in the same establishment for the purposes of section 11 (section 10);
3) explicitly provide for the use of indirect comparator groups for comparing job value when no direct comparator groups are available (section 15);
4) set out when an employer's job evaluation plan is to be used (section 9); and
5) set out criteria for determining when a comparator group is considered male or female based on a sliding scale of sex predominance (sections 13-14).

[52] The complaint in the case at bar was laid by PSAC on August 24, 1983. The Tribunal held that the appropriate guidelines were the 1986 Guidelines. At paragraph 167 of its decision, the Tribunal stated:

> ¶ 167 Accordingly, the Tribunal concludes that the *1986 Guidelines* are applicable to the issues to be addressed in the current Complaint. The question of the retroactivity of these *Guidelines* is not applicable to this Complaint, brought under section 11 of the [CHRA]. The facts involved are ongoing, or continuing, and, as such, do not give rise to a concern about retroactivity. Additionally, the Tribunal finds that there is no infringement of Canada Post's vested rights because of the applicability of the *1986 Guidelines*.

The parties agree there can be no retroactive application of the Guidelines

[53] The legal principles respecting the presumption against retroactivity are not in dispute. The Tribunal and all parties agree that the 1986 Guidelines are akin to regulations: see the Supreme Court of Canada's decision in *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36, [2003] 1 S.C.R. 884. In that case, it was found that there is a presumption against the retroactive application of the 1986 Guidelines, as well as other guidelines issued by the Commission. As stated by the Court at paragraph 47:

> ¶ 47 … the Commission's guidelines, like all subordinate legislation, are subject to the presumption against retroactivity. Since the Act does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively. This is a significant bar to attempting to influence a case that is currently being prosecuted before the Tribunal by promulgating a new guideline. …

Accordingly, if this Court finds the Tribunal applied the 1986 Guidelines retroactively, then the Tribunal erred.

[54] The definition of retroactivity is stated by the Supreme Court of Canada in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at paragraph 39:

> ¶ 39 The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

The Tribunal's decision to apply the 1986 Guidelines

(i) Continuing Facts

[55] The Tribunal held that the 1986 Guidelines, and not the 1978 Guidelines, were the appropriate guidelines to be applied to PSAC's 1983 complaint. According to the Tribunal, application of the 1986 Guidelines was not retroactive since the facts contained within the complaint were of a "continuing" nature. In reaching this conclusion, the Tribunal relied on the text of Professor Ruth Sullivan in *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994). In quoting pages 514-515 of Professor Sullivan's text, the Tribunal states at paragraph 140 of its decision:

> ¶ 140 Situating the facts in time involves, in Professor Sullivan's model, determining whether the fact-situation is ephemeral, continuing or successive. She defines these choices as follows:

> Ephemeral fact situations consist of facts that begin and end within a short period of time, such as actions or events. The facts are complete and become part of the past as soon as the action or event ends; the legal consequences attaching to the fact-situation are fixed as of that moment.
> (…)
> Continuing fact situations consist of one or more facts that endure over a period of time. … A continuing fact can be any state of affairs or status or relationship that is capable of persisting over time. … Where no limit in time is stipulated, a continuing fact situation continues and does not become part of the past until the fact-situation itself – the state of affairs or relationship – comes to an end.
> (…)
> Successive fact situations consist of facts, whether ephemeral or continuing, that occur at separate times. … A fact pattern, defined in terms of successive facts, is not complete and does not become part of the past until the final fact in the series, whether ephemeral or continuing, comes to an end.
>
> [Emphasis omitted.]

[56] Using these definitions, the Tribunal found that the allegation at issue was one of "on-going systemic wage discrimination" which, by its very nature, continued over a long period of time. Accordingly, the Tribunal held that application of the 1986 Guidelines was not retroactive since they were being applied to alleged facts of a "continuing" or "on-going" nature. The Tribunal held at paragraphs 142-145 of its decision:

> ¶ 142 The application of legislation, whether statutory or subordinate, to on-going facts or facts-in-progress, is not, according to Professor Sullivan, retroactive because "…to use the language of Dickson, J. in the *Gustavson Drilling* case, there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date".

> ¶ 143 Professor Sullivan continues:
>
> > Legislation that applies to on-going facts is said to have 'immdediate effect'. Its application is both immediate and general: 'immediate' in the sense that the new rule operates from the moment of commencement, displacing whatever rule was formerly applicable to the relevant facts, and 'general' in the sense that the new rule applies to all relevant facts, on-going as well as new.
>
> ¶ 144 Although Canada Post submitted that to use the *1986 Guidelines* to interpret section 11 of the [CHRA] for a complaint that originated in 1983 would amount to applying those guidelines retroactively, the Tribunal finds that one is not dealing with the retroactivity of the *1986 Guidelines* in this case. One is dealing with what Professor Sullivan has called a continuing "state of affairs" fact-situation. When the *1986 Guidelines* came into effect they applied immediately and generally to all the on-going facts that started in the past and continued to the then-present and to the future. This included all facts involved in the alleged systemic wage discrimination.
>
> ¶ 145 Therefore, the Tribunal concludes that the *1986 Guidelines* are not being applied retroactively in this case, but are addressing an on-going, and continuing, fact-situation without being unfair or prejudicial to Canada Post.

(ii) <u>Vested rights</u>

[57] The Tribunal also considered whether applying the 1986 Guidelines would interfere with Canada Post's "vested right to rely on defences available to it as of the date the Complaint was filed in 1983": Tribunal Decision at paragraph 151. In reaching its decision, the Tribunal first noted that there is no concrete definition of a vested right, as it is a fact-intensive analysis dependent on the circumstances of a particular case. At paragraph 155 of its decision, the Tribunal referred to the text of Professor Sullivan, who states at page 537:

> The key to weighing the presumption against interference with vested rights is the degree of unfairness the interference would create in particular cases. Where the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. Where the interference is less troubling, the presumption is easily rebutted.

[58] In considering the degree of unfairness posed to Canada Post should the 1986 Guidelines be applied to PSAC's complaint, the Tribunal began by addressing the complaint's progression between 1983 and 1986. As the Tribunal stated at paragraphs 158-159:

> ¶ 158 By 1986, although little had been accomplished amongst the parties in the investigation of the Complaint, all parties had kept one another apprised of work being done affecting the Complaint. For example, work continued by Canada Post and [PSAC] in developing System One as a tool for evaluating the positions held by clerical staff at Canada Post. The Commission was informed of this work.
>
> ¶ 159 Furthermore, Canada Post and [PSAC] were actively involved during this period in the Commission's attempts to retrieve data for its job evaluation process. In fact, interviews of sample CR incumbents had commenced just prior to the *1986 Guidelines* becoming effective in November of that year.

[59] The Tribunal went on to conclude that no unfairness would result to Canada Post if the 1986 Guidelines were applied to the complaint. As the Tribunal held at paragraphs 161 and 163:

> ¶ 161 The *1986 Guidelines* had come into effect on November 18, 1986, long before the Commission referred this Complaint, on March 16, 1992, to the [Tribunal] for a hearing. The Commission had played a role in the discussions amongst the parties as the Complaint moved through the Investigation Stage. Many of the matters discussed by the parties before 1986 involved issues which later became part of the *1986 Guidelines*, such as occupational

> groups and methods of job evaluation, including assessment of value.
>
> […]
>
> ¶ 163 Real unfairness or prejudice would arise, as the Supreme Court indicated, if guidelines which were pertinent to a complaint already sent to be heard by a tribunal were promulgated after its referral to that tribunal. Even in complaints under section 11 of the [CHRA], the Commission could, by promulgation of guidelines during the life of a tribunal, influence its outcome. That is not what happened in this case.

Codification of past practices

[60] The Tribunal also held at paragraph 162 that the 1986 Guidelines were essentially a codification of practices already in place at the Commission when the complaint was filed in 1983:

> ¶ 162 There was, therefore, an understanding, by all concerned, of the Complaint as originally drafted. Although the *1986 Guidelines* represent a significant change from the *1978 Guidelines*, their introduction did little more than codify some of the Commission's procedures with which all parties had been dealing from the date of the Complaint. The wording of the Complaint, itself, exemplifies the historical nature of these procedures, as it speaks of female and male-dominated occupational groups, and the wages paid to employees within these groups. These procedures are not a part of the [CHRA], nor were they a part of the *1978 Guidelines*. They are, however, a part of the *1986 Guidelines*.

[61] Finally, the Tribunal stated that if application of the 1986 Guidelines was in any way unfair to Canada Post, then this unfairness was balanced by the "greater good" that promulgation of the 1986 Guidelines served. As the Tribunal held at paragraph 165, the 1986 Guidelines were an

"attempt to bring much needed clarification to the interpretation of section 11 of the [CHRA], without injustice to any party."

[62] Accordingly, the Tribunal concluded at paragraph 166:

> ¶ 166 Therefore, the Tribunal fails to understand how the introduction of the *1986 Guidelines* after the presentation of the Complaint to the [Commission] has been unfair or prejudicial to Canada Post, and infringement on its vested rights, or an improper influence upon the outcome of the Complaint before this Tribunal.

Canada Post's position with respect to the Tribunal's decision to apply the 1986 Guidelines

[63] At the hearing, Canada Post raised many arguments challenging the Tribunal's decision to apply the 1986 Guidelines. First, Canada Post submits that the appropriate guidelines to apply to PSAC's complaint were those in force at the time the complaint was filed in 1983; namely the 1978 Guidelines as amended in 1982. Canada Post submits that the 1983 filing of the complaint "crystallized" the rights of the parties such that application of the 1986 Guidelines amounted to a retroactive application that, according to the Supreme Court in *Bell Canada*, above, violated the presumption against retroactivity.

[64] In support of its position, Canada Post relies on section 43 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which addresses the effects of a legal enactment's repeal. Specifically, Canada Post points to subsections 43(c) and (e), which state:

43. Where an enactment is repealed in whole or in part, the repeal does not	**43.** L'abrogation, en tout ou en partie, n'a pas pour conséquence :

[…]	[…]
(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,	*c*) de porter atteinte aux droits ou avantages acquis, aux obligations contractées ou aux responsabilités encourues sous le régime du texte abrogé;
[…]	[…]
(*e*) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (*c*) or in respect of any punishment, penalty or forfeiture referred to in paragraph (*d*),	*e*) d'influer sur les enquêtes, procédures judiciaires ou recours relatifs aux droits, obligations, avantages, responsabilités ou sanctions mentionnés aux alinéas *c*) et *d*).
and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.	Les enquêtes, procédures ou recours visés à l'alinéa *e*) peuvent être engagés et se poursuivre, et les sanctions infligées, comme si le texte n'avait pas été abrogé.

[65] Canada Post argues that use of the word "accruing" in subsection 43(c) is of "vital importance" in the case at bar, since it reflects the view that any proceeding in progress at the time of the enactment's repeal must continue according to the old or repealed enactment; in this case, the Commission's 1978 Guidelines.

[66] Accordingly, Canada Post argues that the Tribunal's reliance on Professor Sullivan's characterization and definition of a "continuing fact situation" is improper, since characterizing the issue as one involving continuing facts is neither applicable nor relevant once a complaint has been filed. Canada Post submits that had PSAC wanted the 1986 Guidelines to govern its complaint, it should have filed a new complaint in 1986 after those Guidelines had been promulgated.

[67] Canada Post provides further support for this argument by citing P. St. J. Langan in *Maxwell on the Interpretation of Statutes*, 12th ed. (Bombay: N.M. Tripathi Private Ltd., 1976), where it is stated at pages 220-21:

> In general, when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.

Canada Post also cites the words of Professor Sullivan, herself, where she states at pages 553-554 of the 4th edition of her text (*Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002)):

> It is obvious that reaching into the past and declaring the law to be different from what it was is a serous violation of rule of law. As Raz points out, the fundamental principle on which rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary.

[68] Second, Canada Post takes issue with the Tribunal's conclusion that the 1986 Guidelines applied to the complaint since their application was for the "greater good" and neither party would be prejudiced. Canada Post contends that there are many differences between the 1978 Guidelines and the 1986 Guidelines, and that those differences have prejudiced Canada Post's defence of the complaint. In support, Canada Post highlights the following differences between the two sets of guidelines:

1978 Guidelines	**1986 Guidelines**
1) Provides no reference to "occupational groups."	S. 11(1) states that where an individual files a complaint, the sex composition of the "occupational group" is considered to determine if the difference in wages is discriminatory on the ground of sex.
2) Provides no reference to "sex predominance" in group complaints and, accordingly, provides no definition of "sex predominance."	S. 12 states that in group complaints, the complainant and comparator groups must be "predominantly" of opposite sexes. S. 13 then provides a sliding scale of sex predominance depending on the size of the "occupational group."
3) Provides no provision for deeming different occupational groups to be one.	S. 14 states that if a complaint lists "other occupational groups," then the different groups are "deemed to be one group."
4) Contains nothing permitting complaints based on comparisons of work of unequal value.	S. 15(1) permits "indirect" comparisons where no direct comparisons are available. S. 15(2) states that the "wage curve" of the comparator group is used for wage adjustment comparisons under s. 15(1).

[69] Based on these differences, Canada Post argues that it was prejudiced by the Tribunal's decision to apply the 1986 Guidelines. Specifically, Canada Post pointed to four defences that it believed would have been available had the Tribunal properly applied the 1978 Guidelines to PSAC's complaint. Those defences included:

1) that the 1978 Guidelines would not have permitted a comparison between "arbitrarily-defined" occupational groups "predominantly" of the opposite sex, but rather, would have required comparisons of "actual men and actual women," regardless of what occupational group the individual employees were in;

2) that the 1978 Guidelines did not permit the use of indirect comparisons – *i.e.*, the degree of separation between jobs – where no direct comparisons existed;

3) that the 1978 Guidelines did not include any presumption that a wage gap between male and female employees was presumed to be caused by gender-based discrimination; and

4) that the language of the 1978 Guidelines regarding treatment of the "responsibility required in performance of the work" had been materially altered in the 1986 Guidelines.

[70] At the hearing, Canada Post focused its argument primarily on the first alleged defence listed above. According to Canada Post, had the Tribunal applied the 1978 Guidelines to PSAC's 1983 complaint, those Guidelines would have required a comparison of actual men and actual women, rather than a comparison of male-dominated and female-dominated occupational groups. Canada Post's argument is premised on the view that since the 1978 Guidelines were silent with regard to the use of occupational groups as the basis for comparison, then the complaint should have been investigated in accordance with subsection 11(1) of the CHRA, which states that it is discriminatory for an employer to maintain wage differences between *male* and *female* employees employed in the same establishment for work of equal value.

[71] Canada Post further submits that by relying on the use of male and female-dominant occupational groups under the 1986 Guidelines, PSAC and the Commission were able to "mask," and thereby exclude from comparison, one of the largest groups of female employees at Canada

Post, the PO-4 Level. Canada Post argued that a comparison between the CR Group and the PO-4 Level was important for a number of reasons:

1) the PO-4 Level was the largest group of female employees at Canada Post, ranging from approximately 8100 to 9800 individuals between the years of 1983 and 1992;

2) the work of the PO-4 Level was traditionally seen as "female work" according to the Commission's expert witness on pay equity;

3) the PO-4 Level wage rate was the benchmark for the entire PO Group; once it was negotiated, all other PO Group wages were set relative to the PO-4 Level;

4) wages of the largely male letter carriers were lower than those of the PO-4 Level from the time PSAC filed its complaint; and

5) the PO-4 Level was very well paid and some were doing work similar to that performed by the CR Group.

[72] Accordingly, Canada Post argued that if comparisons were made in accordance with the 1978 Guidelines, then any sample of female employees would not have been representative had it not included female employees at the PO-4 Level. Further, Canada Post submits that a comparison involving female employees at the PO-4 Level would have undermined the complaint, as the high wage rate of female PO-4 Level employees would have established that no "on-going systemic wage discrimination" was occurring at Canada Post when PSAC filed its 1983 complaint.

[73] The third argument raised by Canada Post at the hearing was that the Tribunal's characterization of the "continuing fact" of an on-going wage gap from 1982 to 2002 was premised on incorrect information. According to Canada Post, the wages given to PSAC's expert witness, Dr. Wolf, were assumed to be correct by the Tribunal when, in fact, they were wrong. As Canada Post argued, the wages given to Dr. Wolf were inflated such that, had they been correct, the Tribunal

would not have been able to establish the existence of systemic wage discrimination. In support of its argument that the wages were not independently verified by the Professional Team, Canada Post points to paragraph 705 of the Tribunal's decision:

> ¶ 705 In comparing its CR and PO job evaluation values with CR and PO hourly compensation rates, the Professional Team stated in its Report … that it did so for each of three years: 1983, representing the year the Complaint was filed; 1989, the year the Commission used for its wage analysis, and 1995, the year of the Professional Team's Report. The hourly wage rates were supplied by [PSAC] and were assumed to be correct. The top rate was used in all cases.
>
> [Emphasis added.]

[74] Finally, Canada Post challenged the Tribunal's finding that application of the 1986 Guidelines was appropriate because their promulgation "did little more than codify" some of the Commission's practices and procedures that were already in place in 1983 when the complaint was filed. To prove that this was, in fact, not the case, Canada Post relied on a 1984 decision of the Commission dismissing a complaint against Bell Canada. In that case (*Klym v. Bell Canada (Ontario & Quebec)*, File #T-09869), the Commission held the following:

> In assessing the validity of any complaint laid under S.11, it is essential that it be demonstrated that any differential in wages is due to discrimination based on sex. If the disparity in size between the complainant and comparison groups causes a problem, a more serious one arises when the size of the comparison group is compared to that of the total population of male-dominated occupations. Section 11 requires an employer to pay equal wages to male and female employees who are performing work of equal value. The complainant asks the Commission to examine the differences between some female employees and some male employees. Given that there are probably other employees performing work of a value equal to that of the two groups named in this complaint. … To deal with the complaint, it must be assumed that the groups named in it are either the only ones performing work

> of equal value, or that they are a representative sample of male and female employees of Bell Canada. Although it might be argued that, by sheer weight of numbers, Operators are representative of female employees, MM III cannot be considered to be representative of male-dominated groups. …

According to Canada Post, this statement is proof that: 1) prior to the implementation of the 1986 Guidelines, the Commission focused on actual male and female employees as opposed to occupational groups; and 2) under the 1978 Guidelines the Commission did not maintain the existence of a presumption in favour of sex discrimination – both elements that became part of the 1986 Guidelines. In the words of counsel for Canada Post, the *Klym* case dispels the "myth" that the 1986 Guidelines were a codification of "practices and procedures" being applied in 1983.

PSAC's position with respect to the Tribunal's decision to apply the 1986 Guidelines

[75] PSAC, on the other hand, argued before the Court that there was significant evidence upon which the Tribunal could base its finding that the 1986 Guidelines did little more than codify many practices and procedures already in use by the Commission when PSAC filed its 1983 complaint. Included among this evidence was the language of the complaint itself, which referenced "male-dominated" and "female-dominated" occupational groups as opposed to actual male and female employees. According to PSAC, the fact that the Commission accepted the language of the complaint is strong evidence that the Commission allowed for comparisons based on occupational groups prior to the passage of the 1986 Guidelines. Further support for this contention arises from the fact that Canada Post's counsel at the time also did not raise any objections to the wording of PSAC's complaint when it was filed in 1983. This fact is significant since that individual had also been counsel for the Commission from 1978 until 1987 and could, accordingly, be considered

experienced in the practices and procedures of the Commission prior to the passage of the 1986 Guidelines.

[76] PSAC also points to the evidence of Mr. Paul Durber, Director of the Commission's Pay Equity Directorate, who testified before the Tribunal at page 2775 of the transcript that a number of the elements incorporated in the 1986 Guidelines had been previously adopted by the Commission as policies:

> Q. Mr. Durber, you have talked to us about a number of new provisions or changes or amendments. I am wondering if you are able to tell us how significant these changes were in light of Commission policy and/or practice at the time.
>
> A. Certainly, a number of these practices had been followed previously either in specific cases or in promotional/educational efforts of the Commission. I think the more significant of those are the practices it followed in cases.

[77] More specifically, in response to a question regarding the Commission's pre-1986 practice of comparing "male-dominated" and "female-dominated" occupational groups as opposed to actual men and women, Mr. Durber made the following observation at pages 2762-63:

> As I recall it, the hospital technicians case was one which was turned down on the basis of sex predominance. Another one which I have just forgotten at the moment – I think it was in the telephone industry – where the Commission looked at the issue of substantial predominance. We will be coming to that. It was in excess of 50 per cent plus one. <u>This particular guideline codifies some of that preceding practice of going substantially above 50 per cent plus one and makes it more precise</u>.
>
> [Emphasis added.]

[78] In further support of their codification argument, PSAC and the Commission pointed to a document entitled “Background notes on proposed guidelines – equal pay for work of equal value,” issued by the Commission in March 1985. According to PSAC, the document, which outlines many of the principles later incorporated in the 1986 Guidelines, provides cogent evidence that some of the proposed guidelines were already in use by the Commission, albeit at a policy level. For example, PSAC points to the practice of making indirect comparisons where no direct comparisons are available; a practice Canada Post argued was not permitted under the 1978 Guidelines. As the document states at page 7:

> Subsection 1 of the proposed guideline states the requirement for sex predominance and emphasizes that the sexual composition of the group to which an individual belongs must be considered in determining whether sexual discrimination exists.
> Subsections 2 and 3 set out the concept of indirect comparison of employees who are members of groups.
>
> Indirect comparison is already Commission practice, and it represents a move in the direction of comparable worth/pay equity as the terms are understood in the United States.
>
> [Emphasis added.]

[79] The testimony of Mr. Durber also supports the view that indirect comparisons formed a part of Commission practice prior to being formally incorporated under section 15 of the 1986 Guidelines. In response to a question about the content and background of section 15, Mr. Durber testified at page 2764 of the transcript that:

> Section 15 comes back to what we spoke of earlier in connection with the background paper, and that is the use of indirect comparisons and of wage lines. I am sure we will go into that in somewhat more detail. One of the implications, as I read it, of Guideline 15 is that where possible we ought to make direct

> comparisons. In a sense we try not to stray too far into indirectness except where we must. But nonetheless, what this guideline does is allow for greater flexibility in somewhat more complex situations. It does, I might add, also reflect the existing practices of the Commission as we will see though cases, particularly the library sciences case in the federal public service.
>
> Q. That was the practice in existence prior to these guidelines?
>
> A. Yes, 1980 in fact. …

[80] PSAC also defends the application of the 1986 Guidelines on the ground that such application was relied upon by Canada Post during the investigation stage of the complaint. In a letter dated May 28, 1985 from K. Cox (National Director, Compensation and Benefits, Canada Post) to Ted Ulch (Equal Pay for Work of Equal Value Section of the Commission), Canada Post seemed to rely on the Commission's proposed guidelines as justification for a request that System One be used to evaluate the complaint. As the letter states at page 4:

> Based on the Human Rights Commission (HRC's) guidelines (policy) of resolving equal pay complaints within the employer's existing systems if they are objective and free of bias, CPC would expect the HRC to use System I as it is demonstrably objective and free of bias, as may be evidenced by a review of the draft system …

[81] Accordingly, based on this evidence, PSAC argues that it was reasonable for the Tribunal to conclude that the 1986 Guidelines were little more than a codification of practices and procedures already in use by the Commission at the time PSAC filed its 1983 complaint.

[82] PSAC also challenged Canada Post's use of the *Klym* case, above, as proof that prior to the implementation of the 1986 Guidelines the Commission focused on actual male and female

employees as opposed to comparisons based on male-dominant and female-dominant occupational groups. In challenging Canada Post's argument, PSAC points to the actual wording of the complaints encompassed in *Klym*, which, according to PSAC, were very similar to the wording used in PSAC's 1983 complaint. For example, PSAC argues that the second complaint filed in the *Klym* case clearly references male-dominated and female-dominated occupational groups and not actual male and female employees as Canada Post suggests. States PSAC, such evidence lends further support to the argument that the 1986 Guidelines were nothing more than a codification of previously-employed Commission practices and procedures.

[83] In regard to Canada Post's argument that application of the 1986 Guidelines interfered with its rights that had vested under the 1978 Guidelines, PSAC argued before the Court that Canada Post failed to establish the existence of any rights under the 1978 Guidelines that were interfered with by the application of the 1986 Guidelines. As noted, Canada Post pointed to numerous differences between the 1978 Guidelines and the 1986 Guidelines, and the Tribunal concluded at paragraph 162 of its decision that the 1986 Guidelines represented a "significant change" from the 1978 Guidelines. However, PSAC argued that those changes do not prove that Canada Post had any vested rights under the 1978 Guidelines, since those Guidelines were silent on many of the issues raised, and did not explicitly mandate for the application of an alternate procedure or policy.

[84] Further, PSAC argued that even though the 1978 Guidelines were silent with respect to the use of occupational groups, it is not within the spirit or purpose of section 11 to apply a specific or direct interpretation of the language contained within the legislation, as Canada Post proposes.

PSAC suggests that such an interpretation goes against the intent of Parliament, which enacted section 11 to address the "principle" of pay equity, while leaving its application open to the interpretation of the Commission and Tribunal. Accordingly, PSAC argues that it was reasonable for the Tribunal to reach the following conclusion at paragraph 166 of its decision:

> ¶ 166 Therefore, the Tribunal fails to understand how the introduction of the *1986 Guidelines* after the presentation of the Complaint to the [Commission] has been unfair or prejudicial to Canada Post, an infringement on its vested rights, or an improper influence upon the outcome of the Complaint before this Tribunal.

The Commission's position respecting the Tribunal's decision to apply the 1986 Guidelines

[85] In its presentation before the Court, the Commission also challenged a number of the arguments raised by Canada Post. Particularly, the Commission took issue with Canada Post's argument that the filing of PSAC's complaint in 1983 "crystallized" the rights of the parties under the 1978 Guidelines. As noted, Canada Post argued that use of the word "accruing" in subsection 43(c) of the *Interpretation Act* reflects an intention that any proceeding in progress at the time of an enactment's repeal must continue according to the old or repealed enactment. The Commission argues, however, that application of the 1986 Guidelines in the case at bar requires a two-part analysis. At the first stage, on "pure retroactivity," the Commission outlined that the only question to be addressed is whether continuing facts are in issue. If it is determined that there exists continuing, or on-going facts, as the Commission and PSAC allege there are, then it is possible for the 1986 Guidelines to apply to the complaint immediately and generally upon coming into force. However, application of the 1986 Guidelines may still be prevented if such application interferes with any rights of Canada Post that had previously vested under the 1978 Guidelines.

[86] Accordingly, based on the above characterization, the Commission argued that the filing of a complaint will only "crystallize" the applicable law if there are vested rights in place when the complaint was filed. In the case at bar, the Commission argues that since Canada Post failed to demonstrate the existence of any vested rights under the 1978 Guidelines, then the Tribunal's decision to apply the 1986 Guidelines was a reasonable one. Further, the Commission argues that the Tribunal's characterization of a "continuing fact situation" is relevant to the case at bar since it determines, subject to any vested rights of Canada Post, whether the 1986 Guidelines can be applied immediately and generally to the complaint upon their 1986 promulgation.

[87] The Commission argued that Canada Post's interpretation of the effect of section 43 is incorrect, and that the section merely acts as a statutory codification of the vested rights argument. In support of this position, the Commission pointed to the work of Professor Sullivan who, in the third edition of her text, outlined the interrelationship between section 43 and the concept of vested rights. As Professor Sullivan stated at page 528:

> There is an obvious relationship between the circumstances in which survival is permitted under the Interpretation Act and the common law presumption against interference with vested rights. In the federal Act, s. 43(c) provides that repeal does not affect rights or privileges "acquired, accrued or accruing" under the repealed legislation. Under the common law presumption, vested rights are protected from interference by new legislation. These protections are mirror images of each other and should be interpreted together.
>
> However, in attempting to determine what is a vested right or, more generally, what interests should be protected from the immediate application of new law, the courts derive little assistance from the archaic language of the Interpretation Acts. What is needed, whether the analysis takes place in the context of the Act or the common law, is an appreciation of the reasons why

> it is sometimes appropriate to delay the application of new legislation or to continue the application of repealed law.

[88] The Commission stated that further support is derived from the language of the Supreme Court of Canada in *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at page 283, where Justice Dickson (as he then was) stated, in reference to the predecessor of section 43:

> This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the section does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Accordingly, the Commission argued that based on the Supreme Court's interpretation in *Gustavson Drilling*, PSAC's 1983 complaint would only "crystallize" the rights of the parties under the 1978 Guidelines if Canada Post could show that it possessed vested rights at the time the complaint was filed. It is this question to which I now turn.

Court's conclusion regarding application of the 1986 Guidelines

(i) Continuing Facts

[89] Although the law regarding retroactivity is clear, as a practical matter, it is not always as clear when the application of a law is retroactive. When a fact situation consists of an event, or a series of events, that all took place before a law was promulgated, then it is clear that to apply a new law to that situation would be retroactive.

[90] However, the Supreme Court of Canada has made it clear that in cases where the events in question are not clearly in the past, then the analysis is more complex, and the answer may not be easy to reach. Therefore, according to the Court in *Benner*, above, at paragraph 46, a case-by-case analysis of the situation is necessary. While *Benner* dealt with the application of the *Canadian Charter of Rights and Freedoms*, the Supreme Court's analysis addressed the temporal application of statutes and when a fact situation is over; therefore making it pertinent to the discussion currently before this Court. In *Benner*, the Supreme Court endorsed the type of analysis employed by Professor Sullivan regarding the nature of a fact situation, holding at paragraph 42:

> ¶ 42 In considering the application of the *Charter* in relation to facts which took place before it came into force, it is important to look at whether the facts in question constitute a discrete event or establish an ongoing status or characteristic. As Driedger has written in *Construction of Statutes* (2nd ed. 1983), at p. 192:
>
> > These past facts may describe a status or characteristic, or they may describe an event. It is submitted that where the fact-situation is a status or characteristic (the being something), the enactment is not given retrospective effect when it is applied to persons or things that acquired that status or characteristic before the enactment, if they have it when the enactment comes into force; but where the fact-situation is an event (the happening of or the becoming something), then the enactment would be given retrospective effect if it is applied so as to attach a new duty, penalty or disability to an event that took place before the enactment.

[91] In the present case, the fact situation that PSAC and the Commission allege is "continuing" is one of alleged systemic discrimination which, by its very nature, extends over time. Canada Post, however, contends that systemic discrimination is not in itself a continuing fact. It submits that the

alleged wage gap existing between 1982 and 2002 was created by a series of different collective agreements, that adoption of these different agreements were independent events, and that there was, accordingly, no continuing fact situation at play.

[92] The Court does not accept such an interpretation. In my view, just because the collective agreements have changed over time does not mean that they cannot be seen as "continuing" facts. Further, the concept of systemic discrimination, in general, which is addressed below, has been recognized by the Federal Court of Appeal as being one that is continuing in nature. In *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.), Mr. Justice Hugessen stated at paragraph 16:

> ¶ 16 ... Systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time.
>
> [Emphasis added.]

[93] Such an interpretation was recognized by the Tribunal in the case at bar when, after examining the definition of systemic discrimination as stated by Chief Justice Dickson in *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, the Tribunal concluded at paragraph 135: "The discrimination being alleged in the Complaint is, therefore, ongoing, by definition."

[94] The Tribunal then continued its analysis of whether the issue before it was that of an "ongoing fact situation," addressing directly the work of Professor Sullivan. At paragraphs 144-145 the Tribunal concluded:

> ¶ 144 Although Canada Post submitted that to use the *1986 Guidelines* to interpret section 11 of the [CHRA] for a complaint that originated in 1983 would amount to applying those guidelines retroactively, the Tribunal finds that one is not dealing with the retroactivity of the *1986 Guidelines* in this case. One is dealing with what Professor Sullivan has called a continuing "state of affairs" fact-situation. When the *1986 Guidelines* came into effect they applied immediately and generally to all the on-going facts that started in the past and continued to the then-present and to the future. This included all facts involved in the alleged systemic wage discrimination.
>
> ¶ 145 Therefore, the Tribunal concludes that the *1986 Guidelines* are not being applied retroactively in this case, but are addressing an on-going, and continuing, fact-situation without being unfair or prejudicial to Canada Post.
>
> [Emphasis added.]

[95] In my view, the Tribunal's conclusion in this regard is reasonable.

[96] At the hearing, Canada Post argued that the Court should take note of the fact that the Commission's submissions relied upon the third edition of Professor Sullivan's text, published in 1994, as opposed to the fourth edition, which was published in 2002. Canada Post argued that these two editions are materially different from one another, and that many of the passages relied upon by the Commission have either been removed or re-written entirely within the fourth edition. The Court is of the opinion that while the fourth edition may provide greater clarity to the language surrounding the temporal application of legislation, it is not materially different from the third

edition, which was used by the Tribunal and relied upon by the Commission in its submissions. The primary argument raised by the Commission – namely that section 43 of the *Interpretation Act* codifies the common law principle of vested rights – is still found within the fourth edition of Professor Sullivan's text (at page 568), and has not been substantially altered from its previous form. Moreover, the passage continues to be found within a discussion on the survival of repealed law, just prior to a more in-depth discussion of vested rights.

(ii) Vested rights

[97] Having found that the Tribunal was reasonable in concluding that the alleged systemic discrimination amounted to an ongoing fact situation as defined by Professor Sullivan, the question then becomes whether Canada Post possessed any vested rights under the 1978 Guidelines that would prevent the 1986 Guidelines from being applied to the complaint immediately and generally upon coming into force.

[98] In my view, Canada Post possessed no such rights, thereby allowing for the immediate and general application of the 1986 Guidelines upon their promulgation. The Court agrees with the Tribunal's finding that no vested rights existed and that, accordingly, none were interfered with by the application of the 1986 Guidelines. The alleged defences raised by Canada Post are merely arguments that could have been open to them based on their interpretation of the CHRA; they are not legal defences against PSAC's complaint.

(iii) Codification of past practices

[99] However, if I am wrong, and the 1983 filing of PSAC's complaint did "crystallize" the rights of the parties under the 1978 Guidelines, I must nevertheless conclude that the Tribunal's error in applying the 1986 Guidelines does not act to vitiate its decision in this regard. In reaching such a conclusion, I draw upon the Tribunal's finding at paragraph 161 that promulgation of the 1986 Guidelines did little more than codify some of the Commission's "practices and procedures" that had been in place from the date the complaint was filed in 1983.

[100] The only evidence offered by Canada Post that the Commission was not applying these practices and procedures in 1983 was reference to the 1984 *Klym* case, above, which Canada Post alleges compared the wages paid to actual men and actual women, as opposed to those paid to male and female-dominated occupational groups.

[101] The Court finds as a matter of law that the 1978 Guidelines were not a comprehensive or mutually exclusive code of practices that the Commission must follow in considering a pay equity complaint. In fact, it is obvious that the 1978 Guidelines are not purporting to be a complete code of practices and procedures for the Commission. On their face, the 1978 Guidelines are very short. Further, there is no law that the Commission cannot adopt practices and procedures in addition to those contained in the 1978 Guidelines, nor is there any law stating that such practices and procedures are illegal. While they may not have the force of law as "guidelines," they are also not illegal practices and procedures.

[102] As mentioned, the only evidence cited by Canada Post that these practices and procedures were not being followed in 1983 was the 1984 *Klym* case. The fact that one case in 1984 did not follow the practice and procedure of using occupational groups does not mean that in 1983, when this pay equity complaint was filed, the use of occupational groups was not a practice and procedure also being utilized by the Commission to give practical effect to the meaning of section 11 of the CHRA. Moreover, PSAC and the Commission have provided the Court with clear evidence that the Commission was following these practices and procedures in 1983. This evidence consisted of:

1) the language of the complaint, which referenced "male-dominated" and "female-dominated" occupational groups as opposed to actual male and female employees;
2) the testimony of Mr. Paul Durber, Director of the Commission's Pay Equity Directorate, who outlined specific examples where the 1986 Guidelines merely codified practices already in use by the Commission in 1983; and
3) the Commission's "Background notes on proposed guidelines," which clearly stated that indirect comparisons were being used by the Commission, albeit at a policy level, prior to promulgation of the 1986 Guidelines.

Accordingly, based on this evidence, the Court concludes that the Tribunal's finding in this regard was reasonably open to it on the evidence.

[103] Further, Canada Post's submission that the 1978 Guidelines and section 11 of the CHRA require a comparison of actual men and actual women is not compatible with the intention of Parliament that section 11 and the CHRA be given broad and liberal interpretations that further,

rather than frustrate, their objectives. Such a narrow interpretation was found to be inappropriate by Mr. Justice Evans in *PSAC*, above, where he stated at paragraphs 237-240:

> ¶ 237 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 [CHRA] and the [1986 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.
>
> ¶ 238 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.
>
> ¶ 239 Second, the Attorney General's argument was based on the narrowest possible interpretation of the [CHRA], 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.
>
> ¶ 240 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 undervaluation of women's work.
>
> [Emphasis added.]

[104] In light of these findings, even if the Tribunal erred in applying the 1986 Guidelines to a 1983 complaint, this error has no practical effect because the practices and procedures in place at

the Commission in 1983 do apply to the complaint, and these practices and procedures, which were later codified in the 1986 Guidelines, were not illegal in 1983.

[105] Accordingly, the Court concludes that the Tribunal was reasonable in finding:

1) that, upon coming into force, the 1986 Guidelines applied immediately and generally to PSAC's 1983 complaint;

2) that application of the 1986 Guidelines had no impact on any vested rights of Canada Post, since Canada Post possessed no such rights under the 1978 Guidelines; and

3) that, even if application of the 1986 Guidelines is viewed upon subsequent review as being a retroactive application, it is nevertheless reasonable to conclude that that application has no practical effect since the Tribunal was merely applying practices and procedures in use by the Commission when the complaint was filed in 1983.

Issue No. 2: **Did the Tribunal err in applying an incorrect standard of proof allegedly invented by the Tribunal?**

Index for Issue No. 2

Purposive interpretation of the CHRA with respect to pay discrimination

[106] As human rights legislation, the CHRA is a quasi-constitutional statute. Accordingly, it must be given a "large, purposive, and liberal interpretation" that achieves its application and essential purpose; the elimination of discrimination. Further, within the context of a pay equity case, the purpose of the CHRA is to redress the deep-rooted problems associated with systemic gender-based discrimination. As the Supreme Court of Canada stated in *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, 2006 SCC 1, [2006] 1 S.C.R. 3 at paragraph 15, quoting its previous decision in *Bell Canada*, above, at paragraph 26:

> ¶ 15 Narrow interpretations may sterilize human rights laws and defeat their very purpose. Our Court cautioned against this risk in *Bell Canada* in the course of reviewing aspects of the function of a Human Rights Tribunal, *per* McLachlin C.J. and Bastarache J.:
>
> > In answering this question, we must attend not only to the adjudicative function of the Tribunal, but also to the larger context within which the Tribunal operates. The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a

> manner that furthers, rather than frustrates, the Act's objectives. [para. 26]
>
> [Emphasis added.]

[107] The Supreme Court described the object of section 11 of the CHRA at paragraph 17:

> ¶ 17 The object of s. 11 of the Act is to identify and ameliorate wage discrimination. This purpose guides its interpretation. As Evans J. stated in [*PSAC*, above] at para. 199:
>
> > [N]o interpretation of section 11 can ignore the fact that the mischief at which it is principally aimed is the existence of a wage gap that disadvantages women, as a result of gendered segregation in employment and the systemic undervaluation of the work typically performed by women.

[108] This view was supplemented by Mr. Justice Hugessen when, as a member of the Federal Court of Appeal, he stated in *Department of National Defence*, above, at paragraph 16:

> ¶ 16 ... Systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time. That is what happened in this case. The job classification plan referred to by the employer's counsel which lay at the root of the pay inequity has existed since at least 1986.

A purposive interpretation does not minimize the standard of proof for pay discrimination

[109] The nature of the legislation and the larger purpose behind the Tribunal adjudication is to ensure that governmental policy on discrimination is implemented. However, this does not mean that the legal standard or burden of proof can be ignored or minimized for the sake of finding discrimination. Such a finding would breach the protection in subsection 2(e) of the *Canadian Bill*

of Rights, S.C. 1960, c. 44 that the parties be given a fair hearing in accordance with the principles of fundamental justice.

[110] In cases of discrimination, the complainant must satisfy the burden of proof by showing the existence of a *prima facie* case of discrimination. As the Supreme Court of Canada stated in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at page 558:

> Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[111] In the case at bar, the Tribunal continuously states that in order for the discrimination claim to be substantiated, the evidence relied upon by PSAC and the Commission must be "reasonably reliable." For instance, the Tribunal, in referencing the job information collected by the Commission and evaluated by the Professional Team, states at paragraph 596:

> ¶ 596 As noted earlier in paragraph [413], the generally accepted standard of the job evaluation industry, of which all expert witnesses were aware, is to seek, to the extent possible, accuracy, consistency and completeness of job information being used for job evaluation purposes. Given the Tribunal's decision in this case to apply a reliability standard of 'reasonableness' … this calls for reasonable accuracy, reasonable consistency and reasonable completeness.
>
> [Emphasis added.]

[112] Accordingly, the question to be addressed is how such a "reasonableness" standard can be reconciled with the legal standard of proof that all parties agree is the appropriate standard to be used in a pay equity case such at this; namely the civil standard of proof, a likelihood on the balance of probabilities.

[113] I find that the starting point for such an analysis comes from *PSAC*, above. In that case, Mr. Justice Evans, then a member of the Trial Division of the Federal Court, recognized the importance of giving section 11 of the CHRA a broad and purposive interpretation, stating at paragraph 79:

> ¶ 79 In short, the correct interpretation of section 11 in my opinion is that Parliament intended to confer on 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 statutory endorsed principle of equal pay for work of equal value is to be given effect in any given employment setting.

[114] Mr. Justice Evans makes clear that matters before the Tribunal should be considered on a "case-by-case basis" in accordance with the "technical expertise" and evidence available with respect to the given situation. Effectively, the Tribunal should have the freedom to use the tools and evidence present before it in determining whether the discrimination has been proven. However, this "flexible approach" does not mean that the burden or standard of proof can be minimized in order to establish discrimination. While the Tribunal is encouraged to be flexible in receiving evidence, the Tribunal must still be satisfied on the balance of probabilities that that evidence is reliable. There should be no confusion between the "flexibility" for the receipt of evidence and the obligation for the complainant to show that that evidence is more likely reliable than not. Allowing "flexible" evidence does not entitle the Tribunal to allow a flexible civil standard of proof.

[115] The issue of the appropriate standard of proof to be applied is directly addressed by the Federal Court of Appeal in *Department of National Defence*, above, where Mr. Justice Hugessen stated at paragraph 33:

> ¶ 33 The burden which a complainant before a Human Rights Tribunal must carry cannot, in my opinion, be placed any higher than the ordinary civil burden of the balance of probabilities. That is a long way from certainty and simply means that the complainant must show that his position is more likely than not. It is no valid defence for the opposite party to say that things *might* have been otherwise, for that will almost always be the case where the civil burden is in play. If a thing probably happened in a certain way, then by definition it might possibly have happened in a completely different way. …
>
> [Emphasis added.]

[116] Mr. Justice Hugessen explained the existence of a two-step process for establishing a complaint before the Tribunal. In the first step, the claimant must establish, on the balance of probabilities, pay discrimination under section 11 of the CHRA. Once this has occurred, and it is known that the complainant group has suffered damage, then the second step is to ascertain the damages to be accorded for lost wages. In relation to the second step, Mr. Justice Hugessen held at paragraph 44 that "it is well settled law that once it is known that a plaintiff has suffered damage, a court cannot refuse to make an award simply because the proof of the precise amount thereof is difficult or impossible."

[117] In *Department of National Defence*, the issue of liability was admitted by the employer, thereby making the Tribunal's role, in the estimation of Mr. Justice Hugessen, "a straightforward claim for damages for lost wages." In the case at bar, the issue before both the Tribunal and this

Court is liability; *i.e.*, whether PSAC met the standard of proof for proving pay discrimination, which is the balance of probabilities.

Tribunal analysis on the standard of proof

[118] The Tribunal began its analysis of whether the evidence presented by PSAC and the Commission had satisfied the standard of proof by outlining the elements that must be established in order to meet such a case. The Tribunal stated that when addressing section 11 of the CHRA in the context of a pay equity complaint, four "essential elements" must be proven by the complainant on the balance of probabilities. Those elements, identified by the Tribunal at paragraph 257 of its decision, are:

1) that the complainant occupational group is predominantly of one sex and the comparator occupational group is predominantly of the other sex;
2) that the two occupational groups being compared are composed of employees employed at the same establishment;
3) that the value of the work being compared has been assessed reliably on the basis of the composite of the skill, effort, and responsibility required in the performance of the work, and the conditions under which the work is performed; and
4) that the comparison of the wages being paid demonstrates the existence of a "wage gap" between the female-dominated group and the male-dominated group.

[119] At the hearing, the parties agreed that the issue of whether the Tribunal applied the proper standard of proof involved the third element outlined above. In relation to the third element – *i.e.*, whether the value of the work being compared has been assessed reliably on the basis of the composite of the skill, effort, and responsibility required in its performance, and the conditions under which it was performed – the Tribunal stated that all parties recognized the importance of having job evaluations that were based on reliable job information.

[120] After reviewing the job information collected and the methodology used by the Commission in 1987 and 1991, and used by the Professional Team in its 1993/1994 job evaluations and its two additional reviews in 1997 and 2000, the Tribunal began its analysis of the evidence at paragraph 407. What is confusing about the Tribunal's analysis is that despite concluding earlier (at paragraph 355) that the "evaluation process as a whole must be reliable, on a balance of probabilities," the Tribunal begins at paragraph 408 by asking the following question:

> ¶ 408 What standard of reliability should the Tribunal use? While all three parties in this Complaint have agreed that they are not seeking perfection, *per se*, it is necessary to determine what is an acceptable reliability standard in the context of this particular "pay equity" situation.

[121] After canvassing the findings of Mr. Justice Evans in *PSAC*, above, and Mr. Justice Hugessen in *Department of National Defence*, above, the Tribunal concludes at paragraph 412:

> ¶ 412 These rulings support a call for a <u>standard of reasonableness</u>, there being no such thing as absolute reliability. The application of such a standard will depend very much on the context of the situation under examination. <u>This issue is, then, given all the circumstances of the case before this Tribunal, is it more likely than not that the job information, from its various sources, the evaluation</u>

> system and the process employed, and the resulting evaluations are, despite any weaknesses, sufficiently adequate to enable a fair and reasonable conclusion to be reached, as to whether or not, under section 11 of the [CHRA], there were differences in wages for work of equal value, between the complainant and comparator employees concerned?
>
> [Emphasis added.]

This standard of proof is not clear. "More likely than not" refers to the balance of probabilities, but use of the phrase "sufficiently adequate to enable a fair and reasonable conclusion" is confusing.

Three material facts

[122] At the hearing, the parties identified three material facts for the evaluation of the work being compared:

1) the reliability of the job information from the occupational groups being compared, including the sources from which the job information was collected;
2) the reliability of the evaluation methodology utilized to undertake the evaluations; and
3) the reliability of the actual evaluation process undertaken.

After carefully considering the submissions of the parties with respect to these three material facts, the Court will concentrate its standard of proof analysis on the first material fact.

First material fact: Tribunal's analysis of the job information

[123] The Tribunal states that all parties were in agreement on the "vital importance" of using reliable information and data in a job evaluation exercise such as the one undertaken by the Professional Team. The Tribunal held at paragraph 597 of its decision:

> ¶ 597 Accordingly, reasonably reliable job information and data is an essential ingredient of job evaluation as a concept, given its inherent dependence on subjective human judgement. Decisions of evaluators who are using reasonably accurate, consistent and complete job information should, understandably, and indeed, logically, produce more realistic and acceptable results than using job information that may be questionable or flawed.

[124] The Tribunal's analysis of the job information evidence was divided into two stages:

1) FACTS I, which consisted of the factual job information sources and the job information and data that resulted from those sources that existed prior to the date when the Professional Team began its work for PSAC; and

2) FACTS II, which consisted of the additional relevant data and evidence to which the Professional Team had access once it began its work.

[125] The job information comprising FACTS I included: the "Job Fact Sheet" developed by the Commission without professional assistance; the "Interview Guide" designed by Commission staff; the job descriptions and organization charts provided by Canada Post; and the PO job specifications developed by the Commission. As well, the Tribunal found four additional facts relating to this job information, which it believed impacted upon the reliability of the evidence. These facts were: 1) the uncertainty surrounding the "various unprofessional calculations of the CR sampling size"; 2) the fact that both the "Job Fact Sheet" and the "Interview Guide" were developed around the uncompleted System One evaluation system; 3) the fact that the job data was gathered at different times; and 4) the "apparent incompatibility" between the job information collected for the CR

Group positions and the job "specifications" compiled by the Commission for the ten "generic" PO jobs.

[126] The job information comprising FACTS II included: Hay documentation from the Hay organization; the Commission's "Rationale Statements," which recorded the reasoning behind its 1991 job evaluations; a Commission-prepared document that included descriptions of the knowledge and skill, problem solving, responsibility, and working conditions characteristics of the ten "generic" PO jobs; newly-found CR Group documentation, including several missing job descriptions; and the "considerable amount of evidence" submitted to the Tribunal between 1995 and 2000.

[127] Having outlined both the information included within FACTS I and FACTS II, as well as the position of each party respecting the quality of the job information, the Tribunal compared the job information utilized by the Professional Team with that which one would normally expect within the job evaluation industry. The Tribunal found at paragraph 662 that the evidence was deficient, out of date, and incomplete:

> ¶ 662 The deficiencies already well documented above in the job descriptions which the Professional Team came to regard as their primary source documents for the CR positions are, perhaps, one of the best illustrations of a general lack of accuracy, consistency and completeness. Dr. Wolf, himself, acknowledged the many deficiencies including out-of-date, incomplete, unofficial and even missing CR job descriptions.

[128] The Tribunal then outlined numerous other questions of "inconsistency and incompleteness" surrounding the job information, as well as deficiencies arising from the "appreciable difference" in the dates during which the information was collected. The Tribunal stated at paragraphs 664-666:

> ¶ 664 Even the Commission cautioned about the use of job descriptions in its booklet on implementing "pay equity", as follows:
>
> > … job descriptions should not be used on their own or treated as the primary source of data, since they often replicate prevailing stereotypes and are not always an up-to-date, accurate reflection of work done, (paragraph [358]).
>
> ¶ 665 An inconsistency also occurred in the use of the Interview Guide with CR incumbents. Certain changes in its original design, proposed by a representative of [PSAC], were accepted by the Commission after interviews had already begun, resulting in two versions of the Interview Guide having been in the system.
>
> ¶ 666 Questions of inconsistency and incompleteness also arose in evidence about the CR sample which included supervisors at the CR-5 level, while the PO supervisor's sub-group had been dropped by the Commission from the PO 'generic' jobs. Similarly, lack of consistency was expressed over the appreciable difference in the dates of information collection – 1986 for the CR's and 1990/1991 for the PO 'generic' jobs. Mr. Willis, for example, indicated that all data involved in job evaluation should, ideally, be collected during the same time period and as near as practicable, to the date of performance of the job evaluations. He considered this to be important because of the tendency of jobs to change over time.

[129] The Tribunal's analysis and conclusion regarding the reliability of the job information used in this case is set out between pages 190 and 197 of the Tribunal's decision.

[130] At paragraph 672 of its decision, the Tribunal candidly admitted that its assessment in weighing the evidence on this issue was "a daunting task."

[131] At paragraph 673, the Tribunal held that there is little doubt the job information used in conducting the evaluations "did not meet the standard that one would normally expect from a joint employer-employee 'pay equity' study." Having said that, the Tribunal continued, asking:

> ¶ 673 … was the job information "good enough", on a balance of probabilities, to generate reasonably reliable job/position values that, in turn, could be used to demonstrate whether or not there was a wage gap?

[132] At this point, the Court notes that the Tribunal appears to be about to apply the balance of probabilities as the standard of proof required to establish the essential element of work of equal value.

[133] Then, the Tribunal, in consideration of the problems with the CR Group sample, refers to a principle in the law of damages with respect to whether or not the job information was "reasonably reliable." Specifically, the Tribunal states that the difficulty in determining the amount of damages can never excuse the wrongdoer from paying damages. This principle is outlined in the work of Professor S.M. Waddams in *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2006), where he explains at pages 13-1 and 13-2:

> <u>The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed.</u> …
>
> […]

> In Anglo-Canadian law, on the other hand, perhaps because of the decline in the use of the jury, the courts have consistently held that if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff. …
>
> [Emphasis added.]

The Court notes that this principle, along with the forgoing passage, was cited by the Federal Court of Appeal in *Department of National Defence*, above, where Mr. Justice Hugessen stated at paragraph 44:

> ¶ 44 In my view, it is well settled law that once it is known that a plaintiff has suffered damage, a Court cannot refuse to make an award simply because the proof of the precise amount thereof is difficult or impossible. The judge must do the best he can with what he has. …

[134] In referencing the work of Professor Waddams, the Tribunal acknowledges that while the passage does not relate directly to the issue before it, it may be helpful in answering the "question of whether or not the job information was reasonably reliable": Tribunal Decision at paragraph 679. The Tribunal continues at paragraph 680:

> ¶ 680 While the aforementioned excerpt relates to the law of damages, the Tribunal finds that it addresses an approach that may be analogous to what the Tribunal considers to be the spectrum of reasonable reliability. …

[135] In accepting the view that a decision maker must "do its best on the material available," the Tribunal adopts a spectrum analysis, which it believes "is relevant to [its] decision concerning the

reasonable reliability of the documentation used to conduct the evaluations in this Complaint": Tribunal Decision at paragraph 682. Operating within this "spectrum of reasonableness," the Tribunal asks the following question at paragraph 683:

> ¶ 683 … While the job information may not meet the degree of reliability that should normally be sought for a "pay equity" situation, is it "adequate" … for this specific situation? Alternatively, should the job information … be dismissed as being entirely worthless, and as absolutely without merit … ?

[136] The Tribunal then compounds the ambiguity surrounding its application of the standard of proof at paragraph 689, stating:

> ¶ 689 The Tribunal must confess that navigating the job information through the straits of "reasonable reliability" has not been a relaxing passage. …

[137] Having said that, the Tribunal concluded:

> ¶ 689 … the Tribunal finds that the job information, in the hands of the Professional Team, was more likely than not, "reasonably reliable", or "adequate" as the Team described it, despite certain imperfections.

[138] At paragraph 690, the Tribunal states that the most challenging aspect of this case was analyzing and testing the "reasonable reliability" of the job information. The Tribunal heard the expert evidence of Dr. Wolf, a member of the Professional Team, who testified before the Tribunal for 49 days; seven days of direct examination and 42 days of cross-examination. Dr. Wolf described the Professional Team's understanding of the jobs they evaluated as "adequate but not necessarily ideal." After consulting dictionaries, the Tribunal decided that "adequate" meant "sufficient," but

"sufficient" was in turn defined as "adequate." The Tribunal then asked itself how "adequate" compares with the meaning of "reasonably reliable." After further dictionary consultation, the Tribunal held at paragraph 693:

> ¶ 693 "Reasonably reliable" job information can therefore, be interpreted as being job information that is consistently, moderately dependable or in which moderate confidence can be put. …

[139] The Tribunal concluded that "adequate" is equivalent to "reasonably reliable." It is at this point that the Tribunal invents an obtuse "range or band of acceptability" with respect to the meaning of "reasonable" or "adequate" reliability. The Tribunal found it "useful" to think in terms of three possible "sub-bands of reasonable reliability." The Tribunal called these "sub-bands," respectively, "upper reasonable reliability, mid-reasonable reliability, and lower reasonable reliability." At paragraph 696, the Tribunal found:

1) the first sub-band represents the "upper-percentiles" of the band;

2) the second sub-band represents the "mid-percentiles"; and

3) the third sub-band represents the "lower percentiles."

[140] The Tribunal stated at paragraph 696 that the ultimate fairness to all the parties in a pay equity case would probably be achieved when the quality of the job information fell comfortably into the upper-reasonable reliability sub-band. The Tribunal further confuses the matter by stating at paragraph 698:

> ¶ 698 Thus, while all three sub-bands meet the test of "reasonable reliability", the upper sub-band meets the test more abundantly and should, in the Tribunal's view, be the preferred choice for a "pay equity" situation.

[141] After leaving the impression that this evidence did not properly establish, on the balance of probabilities, that the work being compared was for that of equal value, the Tribunal concluded at paragraph 700:

> ¶ 700 Hence, the Tribunal found, as stated in paragraph [689], that it was more likely than not that the job information utilized by the Professional Team in conducting its job evaluations of the CR and PO positions/jobs pertinent to this case, was reasonably reliable, albeit at the "lower-reasonably reliable" sub-band level.

Position of Canada Post

[142] At the hearing before this Court, Canada Post raised a number of arguments challenging the Tribunal's application of the standard of proof. First, Canada Post argued that in concluding that the claim for discrimination had been substantiated, the Tribunal erred in replacing the civil standard of proof, the balance of probabilities, with a lower standard entirely of its own creation. Canada Post pointed to the places in the decision where the Tribunal used the following language to justify its ultimate conclusion: "sufficiently adequate to enable a fair and reasonable conclusion to be reached" (at paragraph 412); "more likely than not ... reasonably reliable" (at paragraph 593); and "reasonably reliable, albeit at the lower-reasonably reliable sub-band level" (at paragraph 700).

[143] Canada Post argued that further evidence of the Tribunal's error regarding the standard of proof can be found in its treatment of the principle raised by Professor Waddams that a trier of fact must do its best to ascertain the appropriate level of damages, and that difficulty in doing so is not an excuse to refuse to award damages. Canada Post argued that the Tribunal's analysis wrongly confuses the issue of liability with the issue of damages. It is only once liability is established on the

balance of probabilities that the nature and extent of the damages can be considered. Further, it is only within this consideration of damages that the trier of fact must "do one's best on the material available." Such considerations cannot be used as justification for lowering the standard of proof below that which the law requires; in this case the civil standard of the balance of probabilities.

[144] Canada Post argued that an excellent example of how completely the Tribunal transformed the test for discrimination can be seen in paragraph 683 of its decision. In that paragraph, the Tribunal states:

> ¶ 683 In view of the circumstances of this particular case and the remedial nature of human rights legislation calling for a purposive, broad and liberal interpretation, the Tribunal finds that a similarly broad and liberal approach, using the analogy of a spectrum, is appropriate to a decision concerning the reasonable reliability of the job information. While the job information may not meet the degree of reliability that should normally be sought for a "pay equity" situation, is it "adequate", as Dr. Wolf indicated it was, for this specific situation? Alternatively, should the job information used by the Professional Team, with its various deficiencies, be dismissed as being entirely worthless, and as absolutely without merit, along the lines of Mr. Willis' opinion?

Canada Post argues that this is an excellent example of the Tribunal's errors for two reasons. First, Canada Post contends that just because the CHRA and Guidelines require a "purposive, broad and liberal" interpretation of their meaning and purpose does not mean that such an interpretation can be applied to the Tribunal's weighing of the evidence, or be used to justify lowering the standard of proof. Second, Canada Post argues that the alternative to the job information being adequate is not that it is entirely worthless, but merely that it is not sufficient to establish that the work being compared is that of equal value. This is an example, according to Canada Post, that the Tribunal has

not just used the wrong language, but that it has “entirely” and “fundamentally” transformed the test to be applied.

[145] Accordingly, Canada Post maintains that while the Tribunal does identify (at paragraphs 69 and 257) the correct standard of proof to be applied to a pay discrimination case such as this, at no time in its decision does the Tribunal properly apply that test. Instead, Canada Post argues that the Tribunal continuously uses different language and different standards in its analysis; standards that do nothing more than continually erode the test that it first identified should be applied.

Position of PSAC

[146] PSAC addressed Canada Post’s submissions within the framework of a two-fold argument that the Tribunal’s decision was a reasonable one. First, PSAC argued that the Tribunal did, in fact, identify and apply the correct standard of proof to the question before it. According to PSAC, the Tribunal’s analysis is clear in that it correctly identified the appropriate standard to be applied at paragraph 69, stated (at paragraph 257) the four elements that must satisfy that standard, and then provided a comprehensive review and consideration of the evidence before it; a consideration that demonstrated a “greater transparency in decision making” than one would normally expect from an inferior tribunal.

[147] In response to the Canada Post argument that the Tribunal never properly answered one of the key questions before it – *i.e.*, whether the work being compared what for that of equal value – PSAC pointed to the following findings of the Tribunal at paragraphs 798 and 801:

> ¶ 798 The Tribunal has already concluded that it is more likely than not that the reasonably reliable Hay Plan, process and job information, in the hands of the competent Professional Team, would result in reasonably reliable job evaluation values being attributed to the work performed by CR and PO employees (paragraph [703]). In determining the value of the work performed by those employees, the Professional Team applied the composite of the skill, effort and responsibility required in the performance of the work, and the conditions under which the work was performed, all in line with the requirements of subsection 11(2) of the [CHRA].
>
> […]
>
> ¶ 801 The Tribunal accepts that the evidence of the Professional Team, both through the *viva voce* evidence of Dr. Wolf and also through the presentation of the Team's Reports to the Tribunal, is sufficient, on a balance of probabilities, to demonstrate a wage gap when the work of the predominantly female CR's was compared with the work of equal value being performed by the predominantly male PO's at Canada Post. …
>
> [Emphasis added.]

[148] PSAC argued that the Tribunal was operating within its mandate by scrutinizing the evidence in the way that it did, since it is possible for the various "material facts" to have varying degrees of reliability as long as that evidence, taken as a whole, satisfies the standard of proof. In PSAC's view, the Tribunal's decision was thorough in assessing the various "material facts" and then using that assessment in reaching its ultimate conclusion at paragraph 801.

[149] The second aspect of PSAC's argument centred on the reliability of the job information as collected by the Commission and the Professional Team. PSAC submitted that many of the Tribunal's findings with respect to the job information and its sources were essentially findings of

fact that are entitled to significant deference when being reviewed by this Court. Central to its argument were five key factual findings made by the Tribunal:

1) that only the Professional Team had read all of the material used for the 1993 job evaluations and 2000 evidentiary review;

2) that only the Professional Team worked with the job information to rate the jobs;

3) that the Tribunal found Dr. Wolf to be a more credible and informed witness than any of the Canada Post experts;

4) that the job information, in Dr. Wolf's opinion, was at least adequate and, later, better than that in relation to the PO Group jobs; and

5) that the Tribunal itself concluded that the job information was reasonably reliable, albeit at the lower reasonably reliable sub-band level.

[150] At the hearing, PSAC presented the following ten "benchmarks," relevant to this case:

1) a wage gap exists between women and men because of systemic discrimination;

2) a large part of the wage gap is caused by a) occupational segregation and b) the undervaluing of women's work;

3) section 11 of the CHRA addresses that portion of the gender wage gap that is discriminatory. The proper interpretation of section 11 takes into account the realities of occupational segregation and the undervaluing of women's work;

4) the federal government admitted there was section 11 discrimination and made voluntary payments to three female-dominated occupational groups in the public sector;

5) the federal government was found to have discriminated under section 11 even after its unilateral payments;

6) the complaint in this case, filed in 1983, would have been part of the Treasury Board complaint – addressed in *PSAC*, above – had Canada Post not become a Crown corporation in October 1981;

7) until 1981, Canada Post was part of the federal government. The occupational groups were identical throughout the public service, with the exception of the postal operations group, which was specific to the Post Office Department. These occupational groups remained in place until 1988;

8) in 1994, two years after the start of hearings and four years after unilateral payments by the federal government, Canada Post increased CR Group wages by roughly 15 percent while general increases were limited to 2.5 percent;

9) in 2002, a new job evaluation plan was introduced at Canada Post, increasing wages of CR Group employees and putting an end to their claim for section 11 damages going forward; and

10) the Tribunal decision deals only with the issue of the section 11 wage gap from 1982 until 2002 for some 2000 individuals.

[151] The position of the Commission supported PSAC.

The Court's conclusion with respect to the standard of proof

[152] These "benchmarks" provide background facts, which suggest that the approximately 2000 CR Group employees at Canada Post, the complainants in this pay equity case, were part of the CR occupational group employed by the Federal Government before Canada Post became a Crown corporation in 1981. These benchmarks, taken as a whole, show that the approximately 2000 CR Group employees at Canada Post would have been found to have been discriminated against by the Federal Government had Canada Post not become a Crown corporation. Moreover, the fact that these CR Group employees received a large pay increase in 1994, two years after the start of the Tribunal hearing, and another increase in their wages in 2002 – which resulted in an agreement between Canada Post and PSAC that the claim for on-going pay discrimination would end thereafter – suggest that the CR Group employees at Canada Post were not receiving fair wages.

While these benchmarks suggest that there was a section 11 wage gap from 1982 to 2002 for approximately 2000 CR Group employees at Canada Post, this was not the basis for the Tribunal's decision. It is that decision that the Court is judicially reviewing. These benchmarks are circumstantial evidence that the Tribunal did not weigh or refer to in its decision. The Court does not consider these benchmarks relevant to the standard of proof issue.

[153] With respect to the matter actually before the Court, namely whether the Tribunal erred in applying a standard of proof below that required by law, the Court must focus on the evidence presented and the actions of the Tribunal in reaching its ultimate conclusion.

[154] In regard to the appropriate standard of proof to be applied to a pay equity complaint, Mr. Justice Hugessen, as a member of the Federal Court of Appeal, made clear that a complainant must show that his position is more likely than not. The complainant has the ordinary civil burden of the balance of probabilities. This burden applies to liability, not to damages. The Tribunal, in applying the standard of proof that it correctly recognized as the balance of probabilities at paragraphs 69 and 257, then misapplied that standard by taking into consideration a principle that applies to the quantum of damages. Such a principle has no application in relation to the issue of liability.

[155] The job information used in conducting the job evaluations of the CR and PO Group positions pertinent to this case must be found to be reliable. The Court recognizes that evidence for pay equity cases is difficult and requires a flexible case-by-case approach in addressing the issues that arise under the CHRA. However, these considerations do not relieve the complainant from

proving, on the balance of probabilities, that there were differences in wages for work of equal value between the complainant and the comparator groups under section 11 of the CHRA.

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

[157] The Court's conclusion that the Tribunal did not find that the job information was reliable on the balance of probabilities is indirectly confirmed by the Tribunal's decision to discount the damages by 50 percent. The Tribunal decided to reduce the damages by 50 percent because the "job information" used to determine the wage gap and the non-wage compensation only met the "lower reasonable reliability" standard on the spectrum of reliability. The Tribunal held at paragraphs 948-949:

> ¶ 948 Following the spectrum analysis already completed for the two elements of uncertainty, the Tribunal concludes that a wage gap determination based upon "upper reasonable reliability" evidence should, logically, give rise to a 100% award of lost wages, a determination based upon "mid reasonable reliability" to a 75% award, and a determination based upon "lower reasonable reliability" to an award of 50% or less.
>
> ¶ 949 Accordingly, the Tribunal concludes that the finally determined award of lost wages for each eligible CR employee, by whatever methodology, should be discounted by 50% in line with the lower reasonable reliability status of the relevant job information and non-wage forms of compensation.

[158] This finding demonstrates that the Tribunal was so unsure about the reliability of the job information evidence that it only awarded the complainant 50 percent of its damages. In law, the Tribunal cannot decide to award the complainant only 50 percent of its damages where it is unconvinced that the evidence regarding liability was probably reliable. A party cannot be half liable – half liable means that the evidence is less than probable. By reducing the damage award by 50 percent, the Tribunal indirectly confirms that it does not think that the evidence was reliable on the balance of probabilities. At the end of the hearing, if the evidence on liability is evenly balanced, the balance of probabilities has not been tilted in favour of the complainant, and the complaint must be dismissed.

[159] In their presentations before the Court, both PSAC and the Commission outlined that the Tribunal reached an ultimate conclusion at paragraph 801 in regards to whether the job values produced were reliable on the balance of probabilities. While Tribunal's language may have stated such a conclusion, the Court cannot ignore the Tribunal's treatment of the standard of proof throughout its analysis.

[160] For instance, at paragraph 703, the Tribunal identifies the issue before it – *i.e.*, that the material facts are "reasonably reliable":

> ¶ 703 Accordingly, the Tribunal concludes that it is more likely than not that the aforementioned reasonably reliable Hay Plan, process and job information, in the hands of competent evaluators, as were the Professional Team, would result in reasonably reliable job evaluation values being attributed to the work performed by CR and PO employees.

In concluding that the material facts must create “reasonably reliable” job values, the Tribunal applies a standard of proof less than reliable on the balance of probabilities.

[161] In *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.), the Federal Court of Appeal addressed “a reasonable basis in the evidence” in relation to the standard of proof required for the Commission to refer a complaint to the Tribunal. As Mr. Justice Décary stated at paragraph 35:

> ¶ 35 It is settled law that when deciding whether a complaint should be referred to a tribunal for inquiry under sections 44 and 49 of the Canadian Human Rights Act, the Commission acts “as an administrative and screening body” ... and does not decide a complaint on its merits. ... It is sufficient for the Commission to be “satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted” (subsections 44(3) and 49(1)). <u>This is a low threshold and the circumstances of this case are such that the Commission could have validly formed an opinion, rightly or wrongly, that there was “a reasonable basis in the evidence for proceeding to the next stage</u>.” ...
>
> [Emphasis added.]

In making such a finding, the Federal Court of Appeal held that a “reasonable basis in the evidence” is a “low threshold,” and is lower that the threshold of the balance of probabilities. In paragraph 36, the Federal Court of Appeal states that the meaning of a “reasonable basis” is nothing more than “sufficient to suggest the possibility that some discrimination contrary to section 11 had occurred.” As Justice Décary stated:

> ¶ 36 The conclusions of the Joint Study combined with the Commission’s own findings were sufficient to suggest the possibility that some discrimination contrary to section 11 had occurred. Nothing more is asked at the preliminary stage. ...

[162] In concluding that the job values must be "reasonably reliable," the Tribunal applies a standard more in line with that required to merely refer a case to the Tribunal – namely, a "reasonable basis" – which Mr. Justice Décary concluded is a low threshold, and one lower than the balance of probabilities, which is the standard required by a Tribunal judging a case on its merits.

[163] The Tribunal's zeal to find pay discrimination is evident in its adopting a lower standard of proof, which even the Tribunal candidly acknowledged was unsatisfactory and unacceptable for most pay equity cases. To compensate for weaknesses in the reliability of the evidence, the Tribunal offset its dissatisfaction with the liability evidence by cutting the quantum of damages by 50 percent.

[164] Accordingly, the Court concludes the Tribunal unreasonably and incorrectly applied the wrong standard of proof to vitally important material facts. The evidence about the CR Group positions and the PO Group jobs was not reliable on the balance of probabilities to prove pay discrimination between the complainant and the comparator groups.

[165] In the event the Court is wrong on this issue, the Court will decide the remaining issues.

Issue No. 3: Did the Tribunal err in finding that the PO Group was an appropriate comparator group for this complaint?

Index for Issue No. 3

Tribunal's decision to accept PSAC's choice of comparator groups

[166] Subsection 11(1) of the CHRA states that an employer discriminates by maintaining different wages between male and female employees who are employed in the same establishment and who perform work of equal value. The Tribunal relied on section 11 in concluding that a *prima facie* case of discrimination only exists if the complainant group proves the existence of four essential elements. Those elements were identified by the Tribunal at paragraph 257 of its decision, and included both that the complainant and comparator occupational groups be predominantly of the opposite sex and be employed within the same establishment.

[167] In deciding whether the PO Group, chosen by PSAC as the comparator group, was appropriate for the purposes of a pay equity analysis, the Tribunal focused on the first essential element; namely, whether the CR Group and the PO Group were predominantly of the opposite sex. After providing a brief history of each occupational group in question, the Tribunal stated at paragraphs 265-266:

> ¶ 265 The complainant group had indicated to the Commission, and expressed the belief in the wording of the Complaint itself, that it was a female-dominated group. The group chosen as a comparator

> was presented by the complainant as a male-dominated group. In 1983, over 80% of the CR group was comprised of female employees and just over 75% of the PO group was comprised of male employees. At the time of referral of the Complaint to the Tribunal in 1992, the CR group remained predominantly female, with a percentage factor of over 83% female, and the PO group ... remained predominantly male, with a percentage factor of just above 71% male.
>
> ¶ 266 [PSAC] and the Commission argue that these percentages are sufficient to classify the complainant group as being comprised of employees predominantly of the female sex, and the comparator group as being comprised of employees predominantly of the male sex.

[168] Before the Tribunal, Canada Post argued that the overall male-dominance of the PO Group was illusory, as it "masked" the fact that the largest single element of the PO Group, the PO-4 Level, "has never been anything but essentially neutral in its gender make-up and should be more properly regarded as representative of the entire PO group": Tribunal Decision at paragraph 269. Canada Post argued that taking the PO Group as a whole ignores the fact that the PO-4 Level has become the most critical and representative category of PO Group workers. After considering Canada Post's argument, the Tribunal concluded at paragraphs 271-272:

> ¶ 271 The Tribunal does not accept this argument. The federal government job classification scheme is predicated upon the concept of groups of employees, bound together by occupational job categories. ... That a union at Canada Post, representing many or all of the [PO] group may have decided to attempt to create a situation where the classification levels are essentially unrelated to wage differentials cannot change the historical concept that is the basis for the groups and levels themselves. ...
>
> ¶ 272 Therefore, the Tribunal accepts that the complainant occupational group, the CR's, and the comparator group, the PO's, are representative, respectively, of a female-dominated group and a male-dominated group because each is over 500 in number, and

> because each contains at least 55% of female employees (the complainant CR's) and male employees (the comparator PO's). This conclusion is based upon the *1986 Guidelines* which indicate the importance of the size of each group, and the necessary percentage of either males or females in each occupational group of a specified size which will deem the group to be either male-dominant or female-dominant.

[169] After concluding that the PO Group was male-dominant, the Tribunal addressed whether PSAC's selection of the PO Group was an act of "cherry picking." The Tribunal's definition of "cherry picking" was premised upon the evidence of Mr. Norman Willis, one of Canada Post's expert witnesses, who was qualified by the Tribunal as an expert in pay equity and in job evaluation. The Tribunal stated at paragraph 276:

> ¶ 276 … "Cherry picking" in "pay equity" situations envisions a scenario where the complainant group chooses a comparator group which, while often small in members, represents the most highly paid of a number of available comparator groups. Although wages, understandably, is one natural aspect of the choice … choosing a group based solely on its characteristic of having high wages compared with the complainant group is not acceptable as a starting point for a legitimate "pay equity" comparison. It would skew the results of evaluation and comparison, in favour of the complainant. Allowing a "cherry picked" comparator would create upheaval within an establishment, as subsequent comparisons would be inevitable between the original complainant and other workers.
>
> [Emphasis in original.]

[170] After reviewing the evidence regarding whether PSAC's choice of the PO Group was an act of "cherry picking," the Tribunal made the following conclusions at paragraphs 281-283:

> ¶ 281 The Tribunal accepts that the largest occupational group within the organization, a group representing about 80% of the total Canada Post employee population, was an appropriate group to

> choose as a comparator. It appeared to be a predominantly male occupational group according to the *Guidelines*. The additional knowledge that certain members of the PO group were performing work which, in some instances at least, was similar to the work being performed by the complainant group added to the appropriateness of the choice.
>
> ¶ 282 Additionally, the evidence indicates that there were few other comparators which could have been chosen. At the time of the issuance of the Complaint, the General Labour and Trades, and the General Services occupational groups – both apparently male-dominated, according to the *Guidelines* – represented a small percentage of Canada Post employees. Moreover, there is no evidence that the work being performed by members of these groups was observed to be similar to that of any members of the CR complainant group.
>
> ¶ 283 Accordingly, the Tribunal finds that the complainant, a predominantly female occupational group, and the comparator, a predominantly male occupational group, are appropriately designated under section 11 of the [CHRA] and the *1986 Guidelines* as representative groups for comparison of work generally performed by women and work generally performed by men. Therefore, the first element necessary to the establishment of a *prima facie* case under section 11 of the [CHRA] has been met.
>
> [Emphasis added.]

[171] Further, the Tribunal accepted that the ten "generic" PO jobs formed a satisfactory basis for the job information in the comparator PO Group. At paragraph 475, the Tribunal explained that the Professional Team had "very considerable evidence and supporting material … about the functions and activities of PO workers," even if only in the form of "generic" jobs. The actual job information could not be assembled because Canada Post would not allow the PO Group employees to complete the "Job Fact Sheet" on Canada Post time, and the union for the PO Group employees, the Canadian Union of Postal Workers, would not allow the employees to complete the "Job Fact

Sheet" after hours unless paid to do so. For these reasons, the Tribunal accepted the job information about the ten "generic" PO jobs for the purposes of conducting the pay equity evaluations.

Position of Canada Post

[172] Canada Post argues the Tribunal made two "serious mistakes" in concluding that the PO Group was an appropriate comparator for PSAC's complaint. First, Canada Post submits that the Tribunal's acceptance of the PO Group was an error because PSAC's decision to compare the wages and work values of the CR Group and the PO Group was a manipulative selection that was fundamentally inconsistent with the requirements for proving a systemic complaint.

[173] In support of its position, Canada Post relies on the Supreme Court of Canada decision in *Canadian Airlines International*, above, which, according to Canada Post, establishes a preferred approach to claims of systemic discrimination under the CHRA. In *Canadian Airlines International*, the Supreme Court was asked to interpret the meaning of "establishment" in section 10 of the 1986 Guidelines, and held that "establishment" should not be limited by aspects of geography, region, or differing collective agreements. As Justices LeBel and Abella stated at paragraphs 35-36:

> ¶ 35 This, therefore, is the key refinement polished by s. 10 of the Guidelines: regardless of regional or geographical differences, or of differences in collective agreements, employees may nonetheless be found to be in the same establishment pursuant to s. 11 of the Act if they are subject to a common wage and personnel policy. ...
>
> ¶ 36 Given this interpretation of "establishment", the issue is whether an employer has actually put in place a common policy. The search for the "common personnel and wage policy" is a

> factual inquiry as to whether there is a common set of principles or a general approach taken by an employer to its employee/employer relationships, including collective bargaining.
>
> [Emphasis added.]

[174] Based on this analysis, Canada Post argues that a systemic complaint, such as the one currently before the Court, requires the examination of the system as a whole rather than of a limited, "cherry-picked" portion of the allegedly discriminatory system. The Tribunal explicitly held that this complaint was one of systemic discrimination (at paragraph 133), and found, in its conclusion, that Canada Post had been practicing systemic discrimination (at paragraph 991).

[175] Canada Post submits that its position is further supported by the facts in *PSAC*, above, where a professionally-supported representative sample of all male jobs in the establishment had been taken before any job evaluations were performed. In response to suggestions by the employer that the number of male comparators be reduced, Mr. Justice Evans stated at paragraphs 117-118:

> ¶ 117 ... The kind of discrimination at issue here is systemic in nature: that is, it is the result of the application over time of wage policies and practices that have tended either to ignore, or to undervalue work typically performed by women.
>
> ¶ 118 In order to understand the extent of such discrimination in a particular employment context it is important to be able to view as comprehensively as possible the pay practices and policies of the employer as they affect the wages of men and women. ...
>
> [Emphasis added.]

Accordingly, Canada Post argues that the only way to prove a case of systemic discrimination is to look at the pattern of discrimination within the establishment as a whole, and that the Tribunal

erred in accepting PSAC's choice of comparator since the PO Group, despite representing 80 percent of all Canada Post employees, was a hand-picked, highly paid, subset of the entire system. In this way, "PSAC picked just the best fruit."

[176] Canada Post also submitted that the approximately 2500 employees in the General Labour and Trades (GL&T) and General Services (GS) Groups should have been compared to the CR Group because their respective job values overlapped, and because the GL&T and GS Groups were predominately male under the 1986 Guidelines. Accordingly, Canada Post says that PSAC "cherry-picked" the comparator group to suit the purpose of its case. Conversely, had the GL&T and GS Groups been compared with the CR Group, it would be seen that the male jobs with overlapping job values were actually paid at a lower rate of pay than the jobs in the CR Group.

[177] Canada Post also submitted that the largest group of female employees within the organization worked as "mail sorters" at the PO-4 Level of the PO Group, and it was "irrational" to compare the wages of the 10,000 female "mail sorters" in the PO Group with those paid to the 1700 female employees in the CR Group, and to then use that comparison as a basis for finding systemic wage discrimination against female employees at Canada Post. Moreover, by "sweeping" these 10,000 women into the PO Group, and using the PO Group as a male-dominated comparator, PSAC and the Commission would have the Tribunal and the Court "pretend" that these 10,000 women are men for the purposes of PSAC's complaint.

[178] The PO-4 Level was comprised of 10,000 women and 10,000 men who, together, worked as "mail sorters" at Canada Post. These employees were the best paid unionized employees at Canada Post – they were better paid than the "letter carriers." In 1983, the CR Group had 1700 women, compared with the 10,000 women working as "mail sorters" at the PO-4 Level. For simplicity, the PO Group consisted of 20,000 employees working inside Canada Post as "mail sorters," and 20,000 employees working outside Canada Post as "letter carriers."

[179] Canada Post refers to the Federal Court judgment in *PSAC*, above, where Mr. Justice Evans held that the Commission and the Tribunal must take into account the existence of the under-representation of women in higher-paying positions when addressing a section 11 complaint of wage discrimination against female employees. Mr. Justice Evans held at paragraph 97:

> ¶ 97 In my opinion it is squarely within the mandate of the Commission and the Tribunal when dealing with a complaint under section 11 to take into account the existence of the underrepresentation of women in higher-paying positions. …

[180] Canada Post submits that in accounting for the under-representation of women in higher-paying positions, the Commission and the Tribunal should have taken into account the proper representation of women in the higher-paying positions at Canada Post, such as the 10,000 women working as "mail sorters" at the PO-4 Level of the PO Group.

[181] Mr. Justice Evans also held that the Tribunal's approach to the interpretation of the CHRA cannot be abstract, but rather, must be grounded in the factual realities of the employment context under consideration. At paragraph 237 Mr. Justice Evans stated:

> ¶ 237 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 [CHRA] and the [1986 Guidelines] is too abstract: it is insufficiently grounded in the factual realities of the employment context under consideration …

[182] The factual reality at Canada Post is that the 10,000 women working as "mail sorters" in the PO Group are, together with the 10,000 male "mail sorters," the best paid unionized employees at Canada Post; better paid than the letter carriers, and better paid than the 1700 women working as CRs.

[183] Canada Post submits that it is illogical and factually unrealistic to conclude that there is systemic wage discrimination against women at Canada Post when the largest group of women are actually the best paid employees. Canada Post submits that ignoring this fact leads to an illogical conclusion contrary to the intent of section 11 of the CHRA. Subsection 11(1) of the CHRA is intended to correct systemic wage discrimination against women by comparing the actual wages paid to male and female employees in the same establishment who are performing work of equal value. By accepting the PO Group as the male-dominated comparator group, the Tribunal is treating the 10,000 women as if they were men, and using their wages to find pay discrimination against female employees in the CR Group.

[184] According to Canada Post, the Tribunal's second "serious mistake" in selecting the PO Group as an appropriate comparator was that evaluation of the PO Group was based on ten

"generic" PO jobs that no employee at Canada Post ever held. Canada Post submits that the decision to accept the Commission's ten "generic" PO jobs was an error of law for two reasons:

1) the decision violated subsection 11(1) of the CHRA, which requires a comparison and evaluation of "actual work" performed by "actual Canada Post employees"; and

2) the use of "notional jobs" such as the ten "generic" PO jobs creates an inconsistency contrary to job evaluation standards.

[185] With regard to the first argument, Canada Post submits that section 11 is "clear and unambiguous" in requiring that "work" performed by the female complainant group be compared with "work" performed by the male comparator in order to determine whether the work is of equal value. Canada Post submits that such language refers to the work of actual employees, and cannot be interpreted as referring to the "valuation of generalized job descriptions or groups of different types of work." Canada Post argues that further support for its position is found in subsection 11(7) of the CHRA, which states that for the purposes of section 11, "wages means any form of remuneration payable for work *performed by an individual*"; a reference suggesting that remuneration is payable to actual employees, not fictitious employees employed in notional jobs.

[186] Canada Post also submits that it is neither sound nor appropriate to value generalized jobs encompassing different tasks and responsibilities. Rather, experts state that a job must describe a single kind of work performed by all employees within a specific job, and that job data must reflect actual work being done, not theoretical duties. Accordingly, Canada Post argues that the Tribunal's reliance on the Commission's ten "generic" PO jobs was an error because it prevented the accurate

identification of jobs, and made it impossible to accurately, completely, and consistently assess the work performed by Canada Post employees.

[187] Accordingly, Canada Post submitted that the PO Group was not an appropriate comparator group for the reasons outlined above.

Position of PSAC

[188] PSAC's first submission is that the Tribunal's finding regarding the appropriate comparator group is a finding of fact subject to the standard of review of patent unreasonableness. It is a factual determination based on the evidence of several witnesses, including expert witnesses Durber, Armstrong, and Willis, and PSAC's lay witness Jones. The Tribunal had to consider this evidence in deciding whether the PO Group was an appropriate comparator group. In *Canadian Airlines International*, above, the Supreme Court of Canada held at paragraph 42:

> ¶ 42 … Finding and evaluating the proper comparators belongs to the core functions of the Commission and the Tribunal.

For example, does the inclusion of the women at the PO-4 Level make the choice of the PO Group inappropriate?

[189] The Tribunal's rationale that the PO Group was an appropriate male-dominated comparator group is set out above under the heading "Tribunal's decision to accept PSAC's choice of comparator groups." The Tribunal rationalized:

1) in 1983, 75 percent of the PO Group was comprised of male employees, in 1992 it was comprised of 71 percent male employees, and these percentages are

sufficient to classify the comparator group as being predominantly male (Tribunal Decision at paragraphs 255-256);

2) the PO Group is a group of employees bound together by an occupational job category set by the Canada Post job classification scheme (Tribunal Decision at paragraph 271);

3) certain members of the PO Group were performing work which, in some instances at least, was similar to the work being performed by the CR Group (Tribunal Decision at paragraph 281);

4) the evidence indicates there were few other comparators that could have been chosen. The GL&T and GS Groups, both male-dominated, represented only a small percentage of Canada Post employees, and there was no evidence that the work being performed by these two groups was similar to that of any members of the CR Group (Tribunal Decision at paragraph 282); and

5) there were 43,099 PO Group positions in 1992, consisting of 20,510 PO internal positions, 18,020 of which were "mail sorters" at the PO-4 Level, and 19,820 PO external positions, which included 17,549 "letter carriers." The remainder of the PO Group was comprised of PO supervisors, which totalled 2768 and were excluded from the comparison to the agreement of the parties.

[190] PSAC submits that after considering all of the evidence, including:

1) the evidence of Mr. Norman Willis, an expert witness in pay equity and job evaluation for Canada Post, that the choice of the PO Group was "cherry-picking" because it was an occupational group with relatively high wages compared with the CR Group;

2) the evidence of Mr. Paul Durber, Director of Pay Equity at the Commission, and an expert in pay equity, that the PO Group was an appropriate comparator because of its general homogeneous nature and its large size; and

3) the evidence of Mr. Chris Jones, the PSAC representative, that the PO Group was chosen because of similarities in the duties and responsibilities of certain CR and PO jobs, such as the "customer service clerk" in the CR Group and the "wicket clerk" in the PO Group,

the Tribunal found that the PO Group was the appropriate comparator group because:

1) it was the largest occupational group within Canada Post;

2) it represented about 80 percent of the total Canada Post employee population;

3) it was predominantly male;

4) certain members of the PO Group were performing work that was similar to the work being performed by the CR Group;

5) other possible comparator groups such as the GL&T and GS Groups, which were male-dominant, only represented a small percentage of Canada Post employees; and

6) there was no evidence that the jobs performed by employees in the GL&T and GS Groups were similar to those performed by the complainant CR Group.

Accordingly, the Tribunal found that the PO Group was an appropriate comparator under section 11 of the CHRA and the 1986 Guidelines, since it was a representative group for the comparison of work generally performed by men in relation to the work generally performed by the complainant CR Group: Tribunal Decision at paragraph 283.

[191] In its submissions, PSAC challenged Canada Post's arguments that the Tribunal must analyze the whole establishment where a systemic complaint is involved. PSAC stated that such an argument is a misapplication of the Supreme Court's analysis in *Canadian Airlines International*, above, since that case only addressed the appropriate definition of "establishment" as found in section 11 of the CHRA and section 10 of the 1986 Guidelines. Nowhere in the Court's analysis does it state that the Commission or the Tribunal must utilize a comparator group composed of all jobs of the opposite sex within a given establishment.

[192] Further, in *Canadian Airlines International*, the Supreme Court held at paragraph 14 that the proper comparator should be found within the establishment and, at paragraph 42, that the core function of the Tribunal is to find and evaluate the proper comparators within the establishment.

[193] As well, PSAC submits that Canada Post's argument in this regard undermines the intent of Parliament, which never envisioned a comparison of every single male-dominated job within an establishment. Support for this position is found in the wording of the CHRA, which is silent with respect to the requirement of an establishment-wide study. Further, PSAC states that sections 12-15 of the 1986 Guidelines specifically contemplate "group-to-group" complaints within the establishment of an employer's pay practices. This fact, according to PSAC, directly contradicts Canada Post's argument that an establishment-wide study is required for complaints of systemic discrimination under section 11 of the CHRA. With respect to whether the GL&T and GS Groups were appropriate comparators, the Tribunal stated that these two groups represent only a small percentage of the total employees at Canada Post (2 percent) compared with the PO Group, which

represents 80 percent. Moreover, the work of the GL&T and GS Groups was not similar to the work of the CR Group.

[194] In relation to Canada Post's submission that it was an error to rely on the use of notional PO Group jobs, PSAC argues that there is no legal basis for such an attack since general pay equity considerations and the evidence tendered justify the Tribunal's reliance on the Commission's ten "generic" PO jobs. PSAC submits that the ultimate goal of a pay equity analysis is to determine how an employer compensates the work performed by men as opposed to that performed by women. Accordingly, PSAC submits that so long as the work is assessed in accordance with the criteria set out in subsection 11(2) of the CHRA – namely according to the skill, effort, responsibility, and work conditions – then there is no reason why male and female work cannot be evaluated using composite job data as opposed to actual job data.

[195] Further, PSAC argues that in the case at bar, it was Canada Post's refusal to cooperate throughout the investigation stage that made it necessary for the Commission to resort to the creation and use of the ten "generic" PO jobs. PSAC submits that while it was the Commission's intention to collect job information for the PO Group in a manner similar to its collection of CR Group information, Canada Post's failure to cooperate in the process made such efforts impossible.

Position of the Commission

[196] The Commission also challenged a number of the arguments proffered by Canada Post. In relation to Canada Post's submission that PSAC's choice of comparator groups was a "cherry-

picked" attempt to manipulate the resulting work values, the Commission argues that there are two reasons why PSAC's selection was not an act of "cherry picking." First, the Commission argues that while "cherry picking" often results in the selection of a small, highly paid comparator group, the PO Group was by no means small, representing approximately 80 percent of all Canada Post employees. Second, the Commission submits that the evidence established that PSAC's selection was in no way manipulative, as both the CR Group and the PO Group were long-established job classifications in the federal public service, dating back to before Canada Post became a Crown corporation.

[197] The Commission also echoed PSAC's submission that neither the CHRA nor the 1986 Guidelines require a "whole establishment" examination in cases of systemic discrimination. The Commission cites the Supreme Court's decision in *Canadian Airlines International*, above, as support for the position that the goal in a systemic complaint is to find "appropriate comparators," not to conduct an establishment-wide analysis. As the Court stated at paragraph 14:

> ¶ 14 … More particularly, the issue is the interpretation of the word "establishment" found in both s. 11 of the [CHRA] and s. 10 of the Guidelines. The correct interpretation of "establishment" will allow the identification of appropriate comparators. Given the nature of its principles and objectives, pay equity cannot be achieved without proper comparators. …
>
> [Emphasis added.]

Accordingly, the Commission submits that because of the complaint-driven nature of the CHRA and the potential for a lack of cooperation on the part of any employer, a requirement to conduct a pay equity exercise across an entire establishment would defeat the purpose of section 11.

Court's conclusions regarding the appropriateness of the comparator group

[198] While a joint union-management study accounting for all male and female-dominated jobs at Canada Post would have been the preferred approach to PSAC's complaint of systemic discrimination, such a requirement does not follow from a plain reading of the CHRA, the 1986 Guidelines, and the applicable jurisprudence.

[199] Section 11 of the CHRA states that in order for systemic discrimination to be established, there must be a difference in the wages paid to male and female employees employed in the same establishment and performing work of equal value. I have already found, concurring with the analysis of Mr. Justice Evans in *PSAC*, above, that section 11 merely legislates the principle of pay equity, while leaving considerable scope to the Commission and the Tribunal in deciding how that principle is to be "operationalized" within the framework of a given case.

[200] Complaints of systemic discrimination should be assessed on a case-by-case basis, and courts and tribunals alike should be flexible in assessing what type of evidence or process is sufficient to satisfy such a complaint. While I have already held that a case-by-case approach does not alleviate the requirement that a complaint be proven on the civil standard of proof, it does mean that the Tribunal could reasonably utilize the evidence before it in determining whether a case of systemic discrimination has been proven including, where necessary, evidence comprised of "generic" job information.

[201] The adherence to a flexible approach was supported by the Supreme Court's decision in *Canadian Airlines International*, above, where the Court stated at paragraph 14 that the correct interpretation of "establishment" allows for the proper identification of "appropriate comparators." I agree with the Commission and PSAC that it is not required for the comparator group to be based on a system-wide analysis of all male-dominated jobs within an establishment such as Canada Post.

[202] The requirement of flexibility in approaching systemic complaints is underscored by the facts of this case. In *PSAC*, above, the parties worked together in establishing a joint union-management initiative, which thereby allowed for an assessment of the entire establishment's pay practices before the Tribunal was faced with deciding whether systemic discrimination was present.

[203] It is clear from the facts that this case was devoid of a similar cooperative effort on the part of both PSAC and Canada Post. As noted above, in the case at bar, the parties were unable to reach an agreement on a joint evaluation system, as witnessed by the break-down of negotiations with respect to the development of System One. As well, the actions of Canada Post also compromised cooperative efforts, as it refused to allow employees to complete the Commission's "Job Fact Sheet" during work hours. The Commission's efforts were further stymied by the union representing the PO Group employees, which refused to allow its membership to participate in "after-hours unpaid work" to complete the "Job Fact Sheets." Such limitations made it all but impossible for the Commission to adhere to its original intention of collecting job information for PO Group employees in a manner similar to its collection of job information respecting the CR Group.

[204] However, as the Tribunal found at paragraph 1002:

> ¶ 1002 … it can also be alleged that the Commission was not entirely responsibility-free – that it, too, may have contributed to that tortuosity, by the way it managed the Investigation Stage of the Complaint.

The Court agrees with this comment and notes that Canada Post was very willing to cooperate at the outset of the investigation, but that the Commission wanted to investigate the complaint without Canada Post's participation. The Tribunal further held at paragraph 1002 that PSAC:

> ¶ 1002 … made its own contribution to that tortuosity by not ensuring, during the formative stage of the Complaint, that the non-wage elements of compensation … were included in the wage calculations.

Accordingly, the Tribunal did not lay blame against Canada Post, and the Court accepts its finding of fact in this regard.

[205] In *PSAC*, above, Mr. Justice Evans held that the meaning of "occupational group" is one of statutory interpretation to be determined on a standard of correctness. Mr. Justice Evans held at paragraph 174:

> ¶ 174 Since the meaning of "occupational group" in the Guidelines is one of statutory interpretation I must determine on a standard of correctness whether the Tribunal erred in the conclusion that it reached. …

[206] The Court agrees with Mr. Justice Evans, sitting as a Trial Judge in *PSAC*, that the meaning of "occupational group" is a question of law and the standard of review is correctness. However, the Court finds that the choice of the appropriate comparator group is a question of mixed fact and law, and is properly reviewed on a standard of reasonableness *simpliciter*.

[207] While the Tribunal analyzed the evidence about the appropriateness of the PO Group as a comparator group, the Court finds the Tribunal unreasonably ignored the factual reality that the largest group of women at Canada Post were the 10,000 women working as "mail sorters" within the PO Group, and that these 10,000 women were the best paid unionized employees at Canada Post. The Court finds it unreasonable to choose a comparator group that masked the 10,000 women, and in fact, considered them men for the purposes of section 11. This is contrary to the intent of section 11 and is illogical. Moreover, it is evident that there was no systemic wage discrimination against female employees at Canada Post since the largest group of women within Canada Post were the highest paid of all unionized employees.

[208] The Court remembers the caution from the Supreme Court of Canada in *Canadian Airlines International*, above, that a narrow interpretation of the CHRA may sterilize human rights laws and defeat their very purpose. The larger purpose behind the Tribunal adjudication is to ensure that the government policy on pay discrimination is implemented, and that any ambiguities in the CHRA be interpreted in a manner that furthers, rather than frustrates, the legislation's objectives. In *Canadian Airlines International*, the Court stated at paragraph 17:

> ¶ 17 The object of section 11 of the [CHRA] is to identify and ameliorate wage discrimination. This purpose guides its interpretation. …

The Supreme Court then quoted from Mr. Justice Evans in *PSAC*, above, where he stated at paragraph 199:

> ¶ 199 … no interpretation of section 11 can ignore the fact that the mischief at which it is principally aimed is the existence of a wage gap that disadvantages women, as a result of gendered segregation in

> employment and the systemic undervaluation of the work typically performed by women.

[209] In the case at bar, I am satisfied that the Tribunal, in interpreting "comparator group" to include the largest group of women working at Canada Post and to effectively treat them as men for comparison purposes, ignores the fact that, at Canada Post, there did not exist:

1) a wage gap that disadvantaged 10,000 female employees as a result of gender segregation in employment; or
2) a systemic undervaluation of the work typically performed by women.

The Court cannot ignore that one of the largest groups of employees at Canada Post is this group of 10,000 women working as "mail sorters," and that they have historically been the best paid employees at Canada Post. This demonstrates that there was no systemic wage discrimination against female employees at Canada Post.

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

[211] If the Court is wrong on this issue, the Court will decide the remaining issues.

Issue No. 4: **Did the Tribunal err in holding that once a wage disparity for work of equal value is established, section 11 of the CHRA enacts a legal presumption of gender-based discrimination that can only be rebutted by the reasonable factors identified in section 16 of the 1986 Guidelines?**

Index for Issue No. 4

The CHRA and Guidelines

[212] Subsection 27(2) of the CHRA empowers the Commission to issue guidelines. Subsection 11(4) states that the Commission may prescribe guidelines enacting "reasonable factors" justifying the payment of different wages to male and female employees performing work of equal value. These "reasonable factors" act as defences available to an employer faced with a pay equity complaint.

[213] "Reasonable factors" were first incorporated within subsection 4(1) of the 1978 Guidelines. A similar, albeit expanded, list of ten reasonable factors has been included in section 16 of the 1986 Guidelines.

[214] In *PSAC*, above, Mr. Justice Evans addressed the intended operation of section 11 of the CHRA and section 16 of the 1986 Guidelines, stating at paragraph 150:

> ¶ 150 … Accordingly, once a complainant has established a difference in the wages paid to male and female employees

> performing work of equal value, a breach of section 11 is thereby established, subject only to the employer's demonstrating that the difference is attributable to one of the "reasonable factors" prescribed in section 16 of the Guidelines.
>
> [Emphasis added.]

[215] Mr. Justice Evans continued at paragraph 152, stating that the combined effect of the two provisions created a legal presumption of gender-based discrimination that is only rebutted by "reasonable factors" justifying such treatment:

> ¶ 152 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. …

The Tribunal's decision regarding the existence of a legal presumption

[216] The Tribunal applied the analysis of Mr. Justice Evans in *PSAC*, above, and concluded that section 11 of the CHRA creates a rebuttable presumption that differences in wages paid to male and female employees performing work of equal value is the result of gender-based discrimination. Based on this conclusion, the Tribunal stated that the "real question" before it must be whether section 16 of the 1986 Guidelines is exhaustive, meaning that the presumption can only be rebutted by those "reasonable factors" included in section 16, or whether other reasonable factors not included in the Guidelines could justifiably rebut the presumption.

[217] After outlining the respective positions of PSAC, Canada Post, and the Commission, the Tribunal stated at paragraph 248:

> ¶ 248 The Tribunal accepts that section 11 of the [CHRA] is addressing, primarily, a particular discriminatory practice commonly known as systemic discrimination. This type of discrimination has often arisen, historically, from recruiting and hiring policies and practices that have inherently, but not necessarily intentionally, resulted in female employees being paid less than male employees for work of comparable value. The concept of "equal pay for work of equal value" is, therefore, an attempt to address systemic discrimination by measuring the value of work performed by men and women.

[218] After further referencing Mr. Justice Evans in *PSAC*, above, the Tribunal concluded at paragraphs 252-253:

> ¶ 252 The Tribunal notes that the aforementioned Supreme Court of Canada decision [in *Bell Canada*, above] supports the view that the legislative intent was to add precision to the [CHRA] in terms of the guideline-making power which, in the Tribunal's opinion, is compatible with taking a "close-ended" approach to the establishment of "reasonable factors". Moreover, a close-ended list of "reasonable factors" would, in the Tribunal's view, also be compatible with the principle of narrowly construing defences in human rights cases.
>
> ¶ 253 Accordingly, the Tribunal concludes that the presumption enacted by subsection 11(1) of the [CHRA], while being a rebuttable presumption, is one that can be rebutted only by "reasonable factors" identified, from time to time, by the Commission, pursuant to subsections 11(4) and 27(2) of the [CHRA].

Canada Post's position

[219] Canada Post submits that the Tribunal ignored significant evidence that there did not exist a gender-based wage gap between male and female employees at Canada Post. The evidence Canada

Post relies on is that the largest group of female employees at Canada Post, those within the PO-4 Level, were more highly paid than the largest group of male employees, the PO-EXT 1 Level (the "letter carriers"), despite being involved in what has historically been defined as "classic female work."

[220] Canada Post states that in order for systemic discrimination to exist, the wages paid to employees in female-dominated occupational groups, or employees doing work seen as "women's work," must inevitably be lower than the wages paid to employees in male-dominated occupational groups or employees doing work seen as "men's work." However, Canada Post submits that a comparison between the PO-4 Level and the "letter carriers" establishes that no such wage gap existed and that, in fact, the employees doing "classic female work" were better paid than those employees doing "men's work."

[221] Accordingly, Canada Post argues the Tribunal attempted to rationalize its finding of discrimination by ignoring the women employed at the PO-4 Level, and allowing PSAC to "submerge" those employees artificially through its manipulative choice of comparator groups. To the extent the Tribunal attempted to justify its decision by ignoring the PO-4 Level and only looking at the PO Group as a whole, Canada Post submits that it acted in error. (This argument is the same as for Issue No. 3.)

[222] Canada Post argues that while the reasonable factors contained in section 16 of the 1986 Guidelines – and established by the Commission under subsection 11(4) of the CHRA – provide a

complete defence to a section 11 complaint, they only apply where subsection 11(1) of the CHRA would otherwise have been breached. Accordingly, Canada Post submits that it should have been able to defend PSAC's complaint by arguing that there was no breach of subsection 11(1), even though that defence was not listed as a "reasonable factor."

PSAC's position

[223] PSAC argues Canada Post's submission must fail since it cannot be reconciled with the proper interpretive approach to human rights legislation. PSAC submits that given the overall intent of human rights legislation, which is to confer protection against discrimination, the defences to such allegations must be "clearly defined and narrowly construed." PSAC submits that the "open-ended" approach taken by Canada Post is in direct conflict with Parliament's intent, and submits that a "close-ended," or exhaustive approach to the list of "reasonable factors" is more consistent with the principal that human rights defences be narrowly construed.

[224] On this basis, PSAC submits that the Tribunal properly interpreted the reasoning of Mr. Justice Evans in *PSAC*, above, that unless justified by one of the "reasonable factors" contained within section 16 of the 1986 Guidelines, then a wage difference between male and female employees performing work of equal value will be attributed to gender-based discrimination.

[225] Further, PSAC argues that Canada Post's reliance on the PO-4 Level in attempting to establish that no gender-based discrimination existed during the time of this complaint, amounted to a misinterpretation of section 11 of the CHRA, and was premised on a mistaken view regarding the

issue of causation in pay equity complaints. PSAC submits that the Tribunal was correct to reject Canada Post's evidence concerning the PO-4 Level.

The Commission's position

[226] The Commission submits that Canada Post's argument is in error, and that the existence of a presumption is clear on the language of subsection 11(1) of the CHRA. The Commission states the Tribunal was correct in applying the reasoning of Mr. Justice Evans in *PSAC*, above, since that case settles the law with respect to the existence of a presumption.

Court's conclusion regarding whether section 11 enacts a rebuttable presumption

[227] It is clear from the CHRA and the relevant jurisprudence that once the complainant establishes the existence of *prima facie* discrimination under section 11 – *i.e.*, the complainant establishes, on the balance of probabilities, the existence of a wage gap between male and female employees, that those employees are employed in the same establishment, and that they are performing work of equal value – operation of the section creates a rebuttable presumption of gender-based discrimination.

[228] Accordingly, on this basis, I accept the reasoning of Mr. Justice Evans (who was a Trial Judge at the time), in *PSAC*, above, and conclude that upon establishing a case of systemic discrimination under section 11 of the CHRA, there arises a rebuttable presumption that such discrimination is based on gender. Having reached such a conclusion, the next matter to be

addressed is whether that presumption is rebuttable only by those "reasonable factors" authorized by subsection 11(4) of the CHRA and contained within section 16 of the 1986 Guidelines.

[229] PSAC argues that a proper interpretive approach to human rights legislation requires that defences to allegations under such legislation be narrowly construed. In support, PSAC cites the Supreme Court of Canada decision in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, where Mr. Justice Sopinka stated at page 339:

> In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a "special nature, not quite constitutional but certainly more than the ordinary ..." … One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed ….

Accordingly, PSAC argues that in order to adhere to such principles, a narrow, exhaustive approach to the application of section 16 of the 1986 Guidelines is required, and that the Tribunal was correct in reaching such a conclusion.

[230] While Canada Post argues that it should be able to show that the resulting discrimination has been created by some other factor beyond those listed in section 16, the evidence proffered by Canada Post actually addresses the issue of whether a *prima facie* case has been proven, and not whether there exists a reasonable justification for such treatment.

[231] The evidence concerning the PO-4 Level and the omission of lower-paid male-dominated jobs within other PSAC bargaining units concerns the issue of the appropriate comparator group. The Court has already found with respect to Issue No. 3 that the Tribunal's choice of comparator groups was unreasonable, and for that reasoning, together with the standard of proof issue, no *prima facie* discrimination was established. Accordingly, the issue of a "legal presumption" of gender-based discrimination does not arise.

THE PSAC APPLICATION

Introduction

[232] The final issue to be determined arises in the application for judicial review filed by PSAC in Docket T-1989-05, and addresses the Tribunal's decision to reduce its damage award by 50 percent.

Issue No. 5: Did the Tribunal err in finding that the damages could be discounted by 50 percent to account for uncertainties in the job information and non-wage forms of compensation?

Index for Issue No. 5

The CHRA and the Tribunal's power to award damages

[233] Subsection 53(2) of the CHRA provides the Tribunal with broad remedial powers to remedy the effects of discrimination found to exist under section 11. Paragraph 53(2)(c) states that the Tribunal has the power to order an employer to compensate the victims of discrimination for "any or all of the wages" that those individuals were deprived of, and for any expenses incurred "as a result of the discriminatory practice."

[234] In *Department of National Defence*, above, Mr. Justice Hugessen addressed the meaning of this provision, stating at paragraph 20:

> ¶ 20 As I read this provision, it is a simple and straightforward authority to order the payment to a victim of lost wages resulting from a discriminatory practice. Such an order will always be backward looking and will result from the answer to the question "what wages was this victim deprived of as a result of the discriminatory practice?" …

[235] In *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (F.C.A.), Mr. Justice Marceau held at page 414 that the purpose of an award of damages in a pay equity complaint, or in human rights law in general, is similar to the purpose of an award of damages in the law of torts:

> … In both fields, the goal is exactly the same: make the victim whole for the damage caused by the act [*sic*] source of liability. Any other goal would simply lead to an unjust enrichment and a parallel unjust impoverishment. …

Tribunal's decision to reduce the award of damages

[236] The Tribunal considered the statements of both Mr. Justice Hugessen and Mr. Justice Marceau in reaching its decision. Specifically, the Tribunal relied on Mr. Justice Hugessen's decision in *Department of National Defence*, above, for the proposition that a decision-maker cannot refuse to award damages simply because proof of the precise amount proves difficult to establish. Rather, as Mr. Justice Hugessen stated at paragraph 44, that individual "must do the best he can with what he has."

[237] Relying on this proposition, the Tribunal stated at paragraph 940 of its decision:

> ¶ 940 While the presence of uncertainty in determining the extent of damages should not, indeed must not, inhibit the Tribunal from awarding damages, that uncertainty can, nevertheless, result in a reduction, under some circumstances very appreciable, in the assessed value of the damages.

[238] In the case at bar, the Tribunal found uncertainties to exist in both the job information used by the Professional Team in evaluating the CR Group positions and the PO Group jobs, as well as

in the non-wage forms of compensation. The Tribunal assessed the nature of this uncertainty at paragraphs 941-944:

> ¶ 941 Given the classification, by the Tribunal, of the job information used in evaluating the CR positions and PO jobs, as "lower reasonably reliable," … the Tribunal finds there is present a significant degree of uncertainty. This uncertainty arises from the lowest rating on the "band of acceptance" which pre-empts an assessment of the wage loss damages to the amount that could be expected had the job information been rated at the "upper reasonably reliable" level – the most desirable level for a "pay equity" case.
>
> ¶ 942 A similar further element of uncertainty arises from the classification, by the Tribunal, of the non-wage forms of compensation as also being "lower reasonably reliable" (paragraph [927]).
>
> ¶ 943 Taking into account these elements of uncertainty which affect the very crucial aspect of determining the extent of the wage gap, it is, in the Tribunal's view, more likely than not that if the job information and the non-wage benefits had been "upper reasonably reliable," the resulting wage gap would have more accurately reflected reality. …
>
> ¶ 944 Recognizing these elements of uncertainty in the state of the job information and non-wage benefits documentation, the Tribunal finds that it cannot accept the full extent of the wage gap as claimed by [PSAC] and endorsed by the Commission.

[239] Having concluded that uncertainties in the job information and non-wage forms of compensation prevented a full award of damages, the Tribunal next assessed what it believed would be an appropriate award given the circumstances of this case. The Tribunal referred back to its "spectrum analysis" and held at paragraphs 948-949 that the damages should be discounted by 50 percent because the job information only meets the "lower reasonable reliability" standard of proof:

> ¶ 948 Following the spectrum analysis completed for the two elements of uncertainty, the Tribunal concludes that a wage gap

> determination based upon "upper reasonable reliability" evidence should, logically, give rise to a 100% award of lost wages, a determination based upon "mid reasonable reliability" to a 75% award, and a determination based upon "lower reasonable reliability" to an award of 50% or less.
>
> ¶ 949 Accordingly, the Tribunal concludes that the finally determined award of lost wages for each eligible CR employee, by whatever methodology, should be discounted by 50% in line with the lower reasonable reliability status of the relevant job information and non-wage forms of compensation.

PSAC's position regarding the reduction of damages

[240] PSAC argues the Tribunal erred in reducing the damage award by 50 percent to account for "inconsistencies" in the job information and non-wage forms of compensation. Having concluded the evidence was sufficient to establish the complaint on the balance of probabilities, the Tribunal was not entitled to correspondingly reduce the award of damages because it believed the information used to establish the wage gap was not more than reasonably reliable. Such a conclusion has the effect of requiring certainty in evidence, something PSAC argues is virtually impossible in cases of systemic discrimination, and something that has been expressly rejected by the Federal Court of Appeal in *Department of National Defence*, above.

[241] PSAC submits that in *Department of National Defence*, Mr. Justice Hugessen stated that proof of a systemic complaint does not require certainty, but must merely be established on the civil standard of the balance of probabilities. Accordingly, PSAC argues that having concluded that the complaint had been established in accordance with the civil standard of proof, the Tribunal had no basis in law for reducing the award by 50 percent.

[242] PSAC submits that the Tribunal raised the standard of proof when it required that the job information and non-wage forms of compensation meet the "upper reasonable reliability" standard in order to give rise to a 100 percent award of damages, the "mid-reasonable reliability" standard to give rise to a 75 percent award, and that since the evidence only met the "lower reasonable reliability" standard, the complainant was only entitled to an award of 50 percent damages or less.

[243] PSAC submits that the standard of review for the Court with respect to this issue is correctness, since it is a question of law that if a party proves pay discrimination on the balance of probabilities, then that party is entitled to 100 percent of its lost wages. PSAC submits that the "lower reasonable reliability" standard is equivalent to the balance of probabilities.

Canada Post's position

[244] Canada Post's primary submission on this issue is that the Tribunal's decision to reduce the award of damages is moot, since its finding of liability was premised on the use of a standard of proof – sub-bands of reasonable reliability – that was lower than the standard required by law – the civil standard of proof, a likelihood on the balance of probabilities. Accordingly, Canada Post submits that the Tribunal's finding of liability should be quashed, thereby making the Tribunal's damage finding a moot issue.

[245] Alternatively, Canada Post submits that the Tribunal's damage finding should be upheld on its merits, as the CHRA gives the Tribunal wide discretion to fashion remedies, and imposes no rigid formula for how that discretion shall be exercised. Accordingly, Canada Post argues that the

Tribunal properly applied the Federal Court of Appeal's analysis in *Morgan*, above, and that the Tribunal's ultimate conclusion was a reasonable one on the evidence before it.

The Commission's position

[246] The Commission also argues that the Tribunal was justified in reducing the award of damages by 50 percent, and that this Court should not interfere with such a finding. The Commission relies on the Federal Court of Appeal decision in *Morgan*, above, where Mr. Justice Marceau stated at pages 412-413 that damages can be reduced to reflect their uncertainty:

> I have great difficulty with the proposition adopted by the Review Tribunal and accepted by my colleague that it was sufficient to look at the probable result of the recruiting process to be able to draw the conclusion that the loss was that of a job rather than a mere opportunity. We are not dealing with the establishment of a past fact which in a civil court need only be proved on a balance of probabilities. Nor are we concerned with the relation between a particular result and its alleged cause. It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality. But, to establish the extent of that damage and evaluate the monetary compensation to which it could give rise, I do not see how it would be possible to simply disregard evidence that the job could have been denied in any event. The presence of such uncertainty would prevent an assessment of the damages to the same amount as if no such uncertainty existed. The amount would have had to be reduced to the extent of such uncertainty.
>
> [Emphasis in original.]

[247] According to the Commission, this statement justifies the Tribunal's decision to reduce the award of damages, as it establishes that the nature, extent, and value of a loss can be considered in an assessment of the appropriate level of damages. The Commission states that the Tribunal's decision followed this jurisprudence and is, accordingly, not unreasonable.

[248] Further, the Commission argued that because of the Tribunal's wide discretion regarding damages under paragraph 53(2)(c) of the CHRA, its exercise of this discretion should only be overturned if found to be patently unreasonable. However, the Commission agrees that a proper finding of liability is a precondition to the award of damages. Accordingly, if this Court finds the Tribunal erred in concluding that a *prima facie* case of discrimination had been established, the Tribunal's decision regarding damages is moot.

Court's conclusions regarding the reduction of damages

[249] In deciding the standard of proof issue in this case (see Issue No. 2, above) the Court held at paragraph 155 that:

> ¶ 155 … The Tribunal finding that the job information evidence was "reasonably reliable" at the "lower-reasonably reliable sub-band" level is less than a finding that the job information was reliable on the balance of probabilities.

The Court further held at paragraph 161 that the conclusion that the job values were "reasonably reliable," is a standard more in line with that required to refer a case from the Commission to the Tribunal – namely, a "reasonable basis," which the Federal Court of Appeal held was a low threshold, and one lower than the balance of probabilities.

[250] The Court's sense that the Tribunal applied the wrong standard is reinforced by the Tribunal's finding in paragraph 697:

> ¶ 697 … that ultimate fairness to all parties in a "pay equity" case would probably be achieved when the quality of the job information fell comfortably into the "upper reasonable reliability" sub-band. …

This evidence is more accurate. At paragraph 698 the Tribunal held:

> ¶ 698 Thus, while all three sub-bands meet the test of "reasonable reliability", the upper sub-band meets the test more abundantly and should, in the Tribunal's view, be the preferred choice for a "pay equity" situation.

[251] The Court can only take this statement to mean that the "upper reasonable reliability" standard equates to the balance of probabilities because the Tribunal acknowledged that the balance of probabilities is the proper legal standard to prove pay discrimination under section 11 of the CHRA. Therefore, the Court cannot accept PSAC's submission that the Tribunal did find that the job information was reliable on the balance of probabilities. Instead, the Tribunal found something less. A finding that the evidence is "reasonably reliable" on the balance of probabilities is less than a finding that the evidence is "reliable" on the balance of probabilities. "Reasonably reliable" is something less than reliable.

[252] If the job information is not reliable, then the resulting job values are not reliable. Without reliable job values, the Tribunal cannot properly compare the job values of the two occupational groups on the balance of probabilities.

[253] Further, I do not agree with the Commission's position concerning the Tribunal's reduction of the award of damages. In *Morgan*, above, Mr. Justice Marceau clearly held that uncertainties may be accounted for "to establish the extent of damage" suffered by the discriminated individual or group. This reasoning differs significantly from the case at bar, where the Tribunal's decision to reduce the damages by 50 percent was not made because of uncertainties in establishing the *extent of damage* suffered. Rather, the Tribunal's rationale for discounting damages was that the job information used to establish "equal pay for work of equal value" only met the "lower reasonably reliable" standard, which is less than the standard ordinarily required for liability.

[254] As noted above, the distinction between proof of liability and proof of damage was addressed by Mr. Justice Hugessen in *Department of National Defence*, above, where he outlined the existence of a two-step process for establishing a complaint before the Tribunal. In the first step, the claimant must prove the existence of discrimination on the regular civil standard of proof. Only after the claim has been proven, and it is known that the complainant group has suffered damage, can an assessment be made with respect to the extent of damages that are to be accorded for lost wages. In the case at bar, the Tribunal conflates these two processes, and fails to recognize that different assessments are required for each stage of the analysis.

[255] I find that the Tribunal's decision to award damages is incorrect and unreasonable since the Tribunal did not properly find that the pay discrimination complaint had been established on the balance of probabilities. The premise for PSAC's argument that the Tribunal erred is based on its

submission that the complaint had been established in accordance with the civil standard of proof. Accordingly, the PSAC application must be dismissed.

LENGTH OF HEARING

[256] The Court would be remiss if it did not comment on the length of the Tribunal hearing in this case.

[257] It strikes the Court as wrong and unreasonable that:

1) a pay equity complaint of this nature could last nearly 25 years from the time the complaint was filed until it was heard on a judicial review before the Federal Court;
2) the Tribunal hearing would span 10 years and 11 months; and
3) the Tribunal would reserve its decision for 2 years and 3 months.

The long hearing before the Tribunal is reminiscent of the trial in Charles Dickens' *Bleak House* over the Jarndyce Estate. *Jarndyce v. Jarndyce* concerned the fate of a large inheritance, which dragged on for many generations. The trial finally came to an end after legal costs had devoured the entire estate. Dickens wrote in Chapter 1:

> … Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. … The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. …

[258] The Federal Court judicially reviews hearings conducted by federal tribunals. The almost 11-year hearing before the Tribunal in this case offends the public conscience of what is reasonable and responsible. Many of the original female complainants working as CR Group employees at Canada Post in 1983 may be dead, or at least no longer requiring equal pay so that they can pay for their needs in the 1980's. The hearing lacked the discipline required of a court of law. The Tribunal must control the number of witnesses and the length of cross-examinations.

[259] PSAC explained the reasons for such lengthy proceedings. In addition to the large number of expert and lay witnesses called to present evidence before the Tribunal, PSAC outlined "systemic" factors that contributed to the length of the hearing. These factors included:

1) the Tribunal process is not governed by the same evidentiary and time constraints as civil trials;

2) Canada Post was required to change counsel midway through the Tribunal hearing after its former counsel was appointed to the Ontario Superior Court of Justice;

3) The Tribunal Chair was unavailable for hearings for three months every year on account of personal reasons;

4) The parties were not operating within the context of a joint pay equity study, meaning that many of the issues normally discussed before an evaluation committee were being submitted and argued before the Tribunal itself; and

5) Canada Post cross-examined PSAC and Commission witnesses for 121 days, and did not cooperate in providing the information required from the employer regarding the jobs being compared.

[260] Canada Post submitted that the Tribunal hearing took so long because the hearing lacked any discipline. Canada Post characterized the hearing as "a never-ending circus" without any shape,

rule of law, or time constraints. Canada Post stated that the Tribunal sat for 416 hearing days over 11.25 years [*sic*], averaging about 37 hearing days per year and 3.5 hours per sitting.

[261] The Commission explained the length of hearing as follows:

> - The Tribunal scheduled hearing dates for one or two weeks per month, with three months off in the winter and two months off in the summer.
>
> - Moreover there was a break in the schedule to permit new counsel for [Canada Post] to familiarize itself with the file.
>
> - All of these factors serve to explain 414 days of hearing … spread out over 10 years.

[262] Within the first year of the hearing before the Tribunal, the evidence upon which the PSAC complaint was referred by the Commission to the Tribunal, was found deficient and of no value. At that point, all the parties and the Tribunal recognized that the evidence did not substantiate the complaint. The Tribunal has the legal duty, if it finds that the complaint to which the inquiry relates has not been substantiated, to dismiss the complaint under subsection 53(1) of the CHRA. Subsection 53(1) provides:

53. (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.	**53. (1)** À l'issue de l'instruction, le membre instructeur rejette la plainte qu'il juge non fondée.

[263] However, in this case the Tribunal allowed PSAC to retain new experts to marshal new evidence in an attempt to substantiate the complaint. Marshalling of the evidence took place over

the next several years, and each time the evidence was found to be deficient, the hearing was extended to repair or buttress the deficient evidence.

[264] In my view, the Tribunal breached its duty under section 53 of the CHRA, and breached the duty to provide the parties with a fair hearing. A fair hearing is not a continuing process. A fair hearing is one where a party knows the case against it and has an opportunity of addressing that case within a reasonable time. At that point, the Tribunal has a duty to adjudicate upon the case.

[265] A legal hearing without discipline and timelines both delays and denies justice. Justice delayed is justice denied. Such an assessment of the Tribunal process was also made by PSAC's chief witness, Dr. Martin Wolf of the Professional Team, who testified before the Tribunal at page 41,459 of the transcript:

> . . . Look at this case. It has been going on for almost nine years now and it is still in process, and you will never come to a resolution that everybody can agree is totally fair because it is impossible.

[266] None of the parties raised the length of hearing as a ground for review. Accordingly, the Court need not make any further comment on this matter.

VI. CONCLUSION

[267] This case involves two applications for judicial review of a decision of the Canadian Human Rights Tribunal upholding a 1983 complaint of wage discrimination brought by certain female employees at Canada Post. The Tribunal concluded that Canada Post violated section 11 of the

Canadian Human Rights Act (CHRA) by paying its employees in the male-dominated Postal Operations (PO) Group more than its employees in the female-dominated Clerical and Regulatory (CR) Group for work of equal value. PSAC, the union representing the female employees, approximates that, with interest, the amount of compensation required from Canada Post to rectify the pay discrimination is $300 million.

[268] The case raises five issues upon which the Court has decided as follows:

Issue No. 1: Did the Tribunal err in retroactively applying the Commission's 1986 Guidelines to a complaint filed in 1983, rather than the guidelines that were still in force at the time of the complaint?

[269] The Tribunal reasonably applied the Commission's 1986 Equal Wages Guidelines to the complaint filed in 1983. The application of the 1986 Guidelines was not retroactive since they were being applied to facts of a "continuing" or "on-going" nature. Moreover, the Court agreed with the Tribunal's finding that the application of the 1986 Guidelines had no impact on any vested rights of Canada Post. In any event, the Court found that the promulgation of the 1986 Guidelines did little more than codify some of the Commission's "practices and procedures" that had been in place from the date that the complaint was filed in 1983.

Issue No. 2: Did the Tribunal err in applying an incorrect standard of proof allegedly invented by the Tribunal?

[270] This pay equity complainant has the ordinary civil burden of proof with respect to liability, namely the balance of probabilities. The Tribunal misapplied that standard by taking into consideration a principle that applies to the quantum of damages. The Tribunal finding that the job

information evidence was "reasonably reliable" at the "lower-reasonably reliable sub-band" level is less than a finding that the job information was reliable on the balance of probabilities. This is indirectly confirmed by the Tribunal's decision to discount the damages by 50 percent because the "job information" used to determine the wage gap only met the "lower-reasonable reliability" standard on the "spectrum of reliability." The Tribunal applied a standard required to merely refer a case from the Commission to the Tribunal – namely a "reasonable basis" – which the Federal Court of Appeal has concluded is a low threshold, and one lower than the balance of probabilities.

Issue No. 3: Did the Tribunal err in finding that the PO Group was an appropriate comparator group for this complaint?

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

Issue No. 4: Did the Tribunal err in holding that once a wage disparity for work of equal value is established, section 11 of the CHRA enacts a legal presumption of gender-based discrimination that can only be rebutted by the reasonable factors identified in section 16 of the 1986 Guidelines?

[272] Once a complainant establishes the existence of *prima facie* discrimination under section 11 of CHRA – *i.e.*, the complaint establishes, on the balance of probabilities, the existence of a wage gap between male and female employees, that those employees are employed in the same establishment, and that they are performing work of equal value – the operation of section 11

creates a rebuttable presumption of gender based discrimination. That presumption is rebuttable only by those "reasonable factors" prescribed by subsection 11(4) of CHRA and contained within section 16 of the 1986 Guidelines. However, in the case at bar, since the Tribunal's choice of comparator group was unreasonable and since the Tribunal applied the wrong standard of proof, no *prima facie* discrimination was established so that the issue of a "legal presumption" of gender-based discrimination did not arise.

Issue No. 5: Did the Tribunal err in finding that the damages could be discounted by 50 percent to account for uncertainties in the job information and non-wage forms of compensation?

[273] The Court held that the Tribunal's decision to award damages was incorrect and unreasonable since the Tribunal did not properly find that the pay discrimination complaint had been established on the balance of probabilities. The PSAC argument that the Tribunal erred in discounting the damages by 50 percent is based on a false premise and must be dismissed.

Length of hearing

[274] The length of the Tribunal hearing (11years) was wrong and unreasonable. It offends the public conscience. The Tribunal has a legal duty if it finds that the complaint to which the inquiry relates has not been substantiated, to dismiss the complaint under subsection 53(1) of the CHRA, and not allow the complainant unlimited time to marshal new evidence. A legal hearing without discipline and timelines both delays and denies justice. Since none of the parties raised the length of the hearing as a ground for review, the Court made no legal finding with respect to the length of the hearing.

[275] For these reasons, the Court allowed the application for judicial review by Canada Post and referred the pay discrimination complaint back to the Tribunal with the direction that the complaint be dismissed as not substantiated according to the legal standard of proof.

VII. COSTS

[276] Legal costs do not always follow the event. In *Gee v. M.N.R.*, 2002 FCA 4, 284 N.R. 321, no costs were awarded against an unsuccessful respondent who had been put to the cost of the litigation in part because of the lack of clarity in the decision of the Human Rights Commission. In the case at bar, the parties were put to the cost of this litigation, in large part, because of the lack of clarity in the decision of the Tribunal with respect to the legal standard of proof. The Court does not consider it appropriate to award legal costs against PSAC and the Commission in these applications.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review by Canada Post in Docket T-1750-05 is allowed, the decision of the Tribunal dated October 7, 2005 is set aside, and the complaint is referred back to the Tribunal with the direction that the complaint be dismissed as not substantiated according to the legal standard of proof;
2. The application for judicial review by PSAC in Docket T-1989-05 is dismissed; and
3. There is no order as to costs in either application.

"Michael A. Kelen"
Judge

APPENDIX "A"

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

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

(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.

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

(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.

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

(7) For the purposes of this section, "wages" means any form of remuneration payable for

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

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

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

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

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

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

(7) Pour l'application du présent article, «salaire» s'entend de toute forme de

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.

rémunération payable à un individu en contrepartie de son travail et, notamment:

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

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

c) des rétributions en nature;

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

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

27. […]

27. […]

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

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

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

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

[…]

[…]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Outre les pouvoirs que lui confère le paragraphe (2), le membre instructeur peut ordonner à l'auteur d'un acte discriminatoire de payer à la victime une indemnité maximale

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

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

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

[…]

de 20 000 $, s'il en vient à la conclusion que l'acte a été délibéré ou inconsidéré.

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

[…]

***Equal Wage Guidelines, 1978*, S.I./78-155**

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

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

3. Subsections 11(1) and (2) of the Act apply in any case in such a manner that in assessing the value of work performed by employees employed in the same establishment to determine if they are performing work of equal value,

(a) the skill required in the performance of the work of an employee shall be considered to include any type of intellectual or physical skill required in the performance of that work

1. *Ordonnances sur l'égalité de rémunération.*

2. «Loi», la *Loi canadienne sur les droits de la personne.*

3. Les paragraphes 11(1) et 11(2) de la Loi s'appliquent dans tous les cas où le travail exécuté par les employés d'un même établissement est évalué en vue de déterminer si ces employés replissent des fonctions équivalentes,

a) les qualifications requises pour l'exécution du travail d'un employé comprennent les aptitudes physiques ou intellectuelles nécessaires à l'exécution de ce

that has been acquired by the employee through experience, training, education or natural ability, and the nature and extent of such skills of employees employed in the same establishment shall be compared without taking into consideration the means by which such skills were acquired by the employees;

(b) the effort required in the performance of the work of an employee shall be considered to include any intellectual or physical effort normally required in the performance of that work, and in comparing such efforts exerted by employees employed in the same establishment,

(i) such efforts may be found to be of equal value whether such efforts were exerted by the same or different means, and

(ii) the assessment of the effort required in the performance of the work of an employee shall not normally be affected by the occasional or sporadic performance by that employee of a task that requires additional effort;

(c) the responsibility required in the performance of the work of an employee shall be assessed by determining the extent to which the employer relies on the employee to perform the work having regard to the importance of the duties of the employee and the accountability of the employee to the employer for machines, finances and any other resources and for the work of other employees; and

(d) the conditions under which the work of an employee is performed shall be considered to include noise, heat, cold, isolation, physical danger, conditions hazardous to health, mental stress and any other conditions

travail et acquises par l'expérience, la formation, les études ou attribuables à l'habilité naturelle; la nature et l'importance de ces qualifications chez les employés qui travaillent dans le même établissement doivent être évaluées sans tenir compte de la manière dont elles ont été acquises;

b) l'effort requis pour l'exécution du travail d'un employé comprend tout effort physique ou intellectuel normalement nécessaire à ce travail; lorsqu'on compare les fonctions des employés d'un même établissement à cet égard,

(i) l'effort déployé par un employé peut être équivalent à celui déployé par un autre employé, que ces efforts soient exercés de la même façon ou non et

(ii) l'effort nécessaire à l'exécution du travail d'un employé ne doit pas normalement être considéré comme différent sous prétexte que l'employé accomplit de temps à autre une tâche exigeant un effort supplémentaire;

c) les responsabilités liées à l'exécution du travail d'un employé doivent être évaluées en déterminant dans quelle mesure l'employeur compte sur l'employé pour accomplir son travail, compte tenu de l'importance des exigences du poste et de toutes les ressources techniques, financières et humaines dont l'employé a la responsabilité;

d) les conditions dans lesquelles l'employé exécute ses fonctions comprennent le bruit, la chaleur, le froid, l'isolement, le danger physique, les risques pour la santé, le stress et toutes les autres conditions liées à l'environnement physique et au climat psychologique; elles ne comprennent pas cependant l'obligation de faire des heures

produced by the physical or psychological work environment, but shall not be considered to include a requirement to work overtime or on shifts where a premium is paid to the employee for such overtime or shift work.

4. (1) Subject to subsection (2), for the purposes of subsection 11(3) of the Act, the factors prescribed to be reasonable factors justifying differences in the wages paid to male and female employees employed in the same establishment who are performing work of equal value are the following, namely,

(a) different performance ratings, where these are given to the employees by means of a formal system of performance appraisal that has been brought to the attention of the employees;

(b) seniority, where a wage and salary administration scheme applies to the employees and provides that they receive periodic pay increases based on their length of service with the employer;

(c) red circling, where the position of an employee is re-evaluated and as a result is down-graded, and the wages of that employee are temporarily fixed, or the increases in the wages of that employee are curtailed, until the wages appropriate to the down-graded position are equivalent to or better than the wages of that employee;

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

(e) a demotion pay procedure, where the employer re-assigns an employee to a

supplémentaires ou de travailler par postes lorsque l'employé reçoit une prime à cet égard.

4. (1) Aux fins du paragraphe 11(3) de la Loi, les facteurs reconnus raisonnables pour justifier une disparité salariale entre les hommes et les femmes qui travaillent dans le même établissement et remplissent des fonctions équivalentes sont,

a) la rémunération fondée sur le rendement, lorsque les employés sont assujettis à un tel régime et font l'objet d'une évaluation dans ce sens après que cette condition ait été portée à leur connaissance;

b) l'ancienneté, lorsqu'un régime salarial stipule que les employés ont droit à des augmentations statuaires fondées sur leurs états de service;

c) la surévaluation des postes, lorsque le poste d'un employé a été réévalué et déclassé et que l'employé reçoit un traitement intérimaire ou que ses augmentations ont été bloquées jusqu'à ce que le traitement du poste ainsi déclassé devienne équivalent ou supérieur au traitement de l'employé en question;

d) l'affectation comportant des tâches allégées, lorsqu'un employeur verse temporairement à un employé un traitement supérieur à la valeur du travail exécuté pendant que l'employé se remet d'une blessure ou d'une maladie;

e) le mode de rémunération en cas de rétrogradation, lorsqu'un employeur attribue à un employé des fonctions moins importantes à cause

(i) d'un rendement insuffisant

position at a lower level because of

(i) the unsatisfactory work performance of the employee caused by

(A) the deterioration in the ability of the employee to perform the work,

(B) the increasing complexity of the job, or

(C) the impaired health or partial disability of the employee or other cause beyond the control of the employee, or

(ii) an internal labour force surplus that necessitates the re-assignment of the employee to a position at a lower level,

and the employer continues to pay to the employee the same wages that he would have paid if he had not re-assigned the employee to a position at a lower level;

(f) a procedure of phased-in wage reductions, where the wages of an employee are gradually reduced for any of the reasons set out in subparagraph *(e)*(i); and

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

(2) The factors set out in subsection (1) are prescribed to be reasonable factors justifying differences in wages if they are applied consistently and equitably in calculating and paying the wages of all male and female

attribuable à une diminution de l'aptitude à exécuter le travail, une complexité de plus en plus grande du travail, ou des problèmes de santé une incapacité partielle ou toute autre cause indépendante de la volonté de l'employé, ou

(ii) un surplus de main-d'œuvre nécessitant la réaffectation de l'employé à un poste d'un niveau inférieur,

et que l'employeur continue de verser à l'employé le même salaire que s'il ne l'avait pas réaffecté à un poste moins important;

f) la méthode de réduction graduelle du salaire, lorsque le salaire d'un employé fait l'objet d'une réduction graduelle à cause de l'un des motifs mentionnés au sous-alinéa *e*)(i);
et

g) l'affectation temporaire à des fins de formation, lorsque, dans le cadre d'un programme de perfectionnement, un employé est temporairement affecté à un poste et reçoit un traitement différent de celui des titulaires permanents; ces programmes de perfectionnement doivent être accessibles tant aux femmes qu'aux hommes et leur fournir d'égales possibilités d'avancement.

(2) Les facteurs mentionnés au paragraphe (1) sont considérés comme raisonnables et justifient une disparité salariale, s'ils sont appliqués rigoureusement et d'une manière équitable dans le calcul et le paiement des salaires des hommes et des femmes qui travaillent dans le même établissement et exécutent des fonctions équivalentes.

employees employed in the same establishment who are performing work of equal value.

***Equal Wage Guidelines, 1986*, S.O.R./86-1082**

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

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

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

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

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

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

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

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

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

2. La définition qui suit s'applique à la présente ordonnance.

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

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

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

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

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

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

is performed.

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

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

(a) operates without any sexual bias;

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

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

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

11. (1) Where a complaint alleging a difference in wages is filed by or on behalf of an individual who is a member of an identifiable occupational group, the composition of the group according to sex is a factor in determining whether the practice complained of is discriminatory on the ground of sex.

pour la santé et le stress.

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

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

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

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

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

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

11. (1) Lorsqu'une plainte dénonçant une situation de disparité salariale est déposée par un individu qui fait partie d'un groupe professionnel identifiable, ou est déposée au nom de cet individu, la composition du groupe selon le sexe est prise en considération avant qu'il soit déterminé si la situation constitue un acte discriminatoire fondé sur le sexe.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. (1) Pour l'application de l'article 11 de la Loi, lorsque la plainte déposée dénonce une situation de disparité salariale entre un groupe professionnel et un autre groupe professionnel et qu'une comparaison directe de ces deux

Act, the work performed and the wages received by the employees of each occupational group may be compared indirectly.

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

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

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

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

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

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

groupes ne peut être faite quant à l'équivalence des fonctions et aux salaires des employés, une comparaison indirecte de ces éléments peut être faite.

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

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

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

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

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

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

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

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

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

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

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

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

17. For the purpose of justifying a difference in wages on the basis of a factor set out in section 16, an employer is required to establish that the factor is applied consistently

maladie;

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

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

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

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

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

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

17. L'employeur qui entend justifier une disparité salariale en invoquant l'un des facteurs énumérés à l'article 16 doit prouver

and equitably in calculating and paying the wages of all male and female employees employed in an establishment who are performing work of equal value.

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

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

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

(b) there is a difference between the incumbents receiving wages on the scale established for the former classification and another group of employees, predominantly of the same sex as the first group, who are performing work of equal value.

que ce facteur est appliqué de façon uniforme et équitable dans le calcul et le versement des salaires des hommes et des femmes qui exécutent, dans le même établissement, des fonctions équivalentes.

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

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

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

b) une disparité salariale existe entre les employés recevant un salaire selon les taux de l’ancienne classification et un autre groupe d’employés qui exécute des fonctions équivalentes et est composé majoritairement d’employés du même sexe que le groupe mentionné en premier lieu.

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